PHILIP THOMAS v FIJI ELECTRICITY AUTHORITY (HBC243 of 1996L)

HIGH COURT — CIVIL JURISDICTION

GATES J

29 June, 24 August, 4 October 2000, 21 November 2001, 27 August 2004

Employment — termination of employment — summary dismissal — assault — whether breach of employment contract — whether Plaintiff improperly investigated — Employment Act (Cap 92) ss 28, 28(a) — Penal Code — Trade Disputes Act (Cap 97).

The Plaintiff was employed as a linesman at the Fiji Electric Authority (the Defendant). An incident happened when one of his colleagues as a matter of horseplay slapped one Subash Chandra on his head in which the Plaintiff and his brother Alfred thought that Joape was the one who was responsible. Subash turned around and swore at another colleague. As a consequence, an exchange of swearing occurred. Also, Subash thought that the Plaintiff was responsible for the rude comments about his mother and his wife. The Plaintiff said that Subash came up to him and threatened him and told him "to watch out". The Plaintiff went outside the main gate and waited for Subash. He held a hockey stick in his hand at the time. The Plaintiff shook Subash by the front collar of his overall with one hand and with the other hand, pushed him back forcibly and hit Subash with the hockey stick. Subash sustained injuries to the ear, inside the cheek and lower mandible.

The next day, the section head asked the Plaintiff to explain what had transpired during the alleged assault to which the Plaintiff replied in a letter. Subsequently, he received a memorandum from the personnel manager asking him to provide a written explanation. The Plaintiff responded a second time but later received a suspension letter.

The Plaintiff claimed that the Defendant breached his employment contract, that there was no proper investigation on the incident, and that he was denied a chance to appropriately participate in the procedure.

On the other hand, the Defendant submitted that the Plaintiff was correctly dealt with and had been properly dismissed. The Defendant further argued that the Plaintiff should have gone to the permanent arbitrator under the procedure of the Trade Disputes Act (Cap 97).

Held — (1) The incident took place close to the truck at the depot entrance, proceeded inside with an exchange of words and ended near the fence outside the gates. Thus, the incident happened properly within the Defendant's concern. The car park was an extension of, or part of, the Defendant's depot. Though the Plaintiff and Subash clocked off and left the main gates, they were still on the Defendant's premises and still at their work place.

(2) The Plaintiff argued that he did not break any company rule when he struck Subash. He maintained that the assault should have been subject of a complaint reported to the police so that the same could have been properly investigated and prosecuted by the court. While it was correct that such a complaint could have been made to the police, an employer still had the option to proceed in several ways or not to make any report at all to the police. Also, it was not necessary that there be a specific rule that an employee must not assault another. The Plaintiff likewise complained that he was not properly investigated. There was evidence that the personnel manager of the Defendant dealt with the complaint by asking the Plaintiff to explain following receipt of the written complaint of Subash as well as the medical report. He received a reply from the Plaintiff and considered all the circumstances of the case. It was clear that the personnel manager weighed carefully the alleged assault in giving his reasons and conclusions. Moreover, an employer is not expected to be a trained investigator or detective. Accordingly, the Defendant made sufficient inquiry as to the surrounding circumstances of the incident.

(3) A statutory protection against summary dismissal for oral contracts is provided in s 28 of the Employment Act (Cap 92). In the Plaintiff and Respondent's case, the contract was partly written and partly oral, however, some terms will have to be implied as being clearly intended by the parties. Clearly, summary dismissal is open to an employer for gross misconduct under s 28(a) of the Employment Act. Thus, an assault could amount to gross misconduct since it is criminal in nature. It was not an employment tribunal or appeal tribunal. The Plaintiff's case should have been taken under the Trade Disputes Act procedure to the permanent arbitrator. The court can only act on whether there was breach by the employer of the contract of employment with the Plaintiff.

Determination made.

Cases referred to

State v Arbitration Tribunal; Ex parte Air Pacific Ltd [2001] 2 FLR 111; *X v Y* [2004] ICR 1634; [2004] IRLR 625; [2004] EWCA Civ 662; *Ridge v Baldwin* [1964] AC 40; [1963] 2 All ER 66, cited.

Post Office v Foley [2001] 1 All ER 550; [2000] ICR 1283; [2000] IRLR 827, considered.

Vuataki and *Qoro* for the Plaintiff

Anu Patel for the Defendant

Gates J. Employment Act (Cap 92); summary dismissal for misconduct s 28(1); whether Plaintiff assaulted fellow employee; whether assault sufficiently proximate to and related to workplace; contract of employment and collective agreement; statutory protection; whether proper investigation and procedure followed; whether rules breached; whether proper notice of charge; whether dismissal constituted breach of employment contract; Permanent Arbitrator and Trade Disputes Act procedure not pursued; narrow focus for High Court on contract only.

[1] The Plaintiff claims his employer breached his employment contract. He says no company rule had been breached as a result of his assault on a fellow employee, that the incident was inadequately investigated, and that he was denied an opportunity to participate properly in the procedure. He also says the incident took place outside the workplace, after hours, and that the incident was of no proper concern of his employer. He argues he should not have been dismissed.

[2] The Defendant says the Plaintiff was correctly dealt with and had been properly dismissed. If the Plaintiff felt he had been unfairly dismissed he should have gone to the permanent arbitrator under the procedure of the Trade Disputes Act (Cap 97). The trial was heard over 3 days, each side calling three witnesses.

Was there an assault?

[3] The Plaintiff joined FEA in 1991 as a trainee linesman. He completed probationary service and thereafter worked as a linesman stationed at the Defendant's Navutu depot, near Lautoka.

[4] On 27 July 1995 the Plaintiff and 10 workmen returned from a day's work in Tavua. They reached the depot at about 4.20 pm. One Subash Chandra sat in front in the truck and the Plaintiff with others in the back. When the truck stopped, Subash got out.

[5] As Subash picked up his lunch box from the tray at the back so as to place it in his car, one of his colleagues as a matter of horseplay, slapped him on his head. The Plaintiff, as well as his brother Alfred who testified, thought the person responsible for this was Joape. Subash turned around, said the Plaintiff, and

swore at another colleague. There was an exchange of swearing which gave offence. Subash thought the rude comments about his mother and his wife had been made by the Plaintiff. The Plaintiff denied this, and was supported to some extent by his brother. The brother Alfred however failed to identify who, as an alternative, was the person doing the offensive swearing, which had by then become personal.

[6] The Plaintiff said Subash came up to him and threatened him, and told him "to watch out". The Plaintiff said he left Subash and went to punch his card. But when he went outside the main gate, he waited for Subash. Later he said "I deliberately waited outside for him".

[7] In his letter of explanation of 18 August 1995 addressed to the personnel manager, the Plaintiff wrote that "after he (Subash) had threatened me, I lost my temper. So after punching my card, I waited for him outside the main gate …".

[8] When Subash complained orally to his foreman about the horseplay near the truck and the offensive swearing in relation to his mother and his wife, the foreman told him to take the matter up with Philip first. "I told Philip" said Subash, "Philip swore again and said he would see me at the Gatehouse". When Subash went out Philip was waiting there for him.

[9] On the issue of his brother's anger, Alfred commented in his evidence: "It is very hard to get him angry, but once angry, hard to stop him".

[10] The Plaintiff himself concedes he was angry and said he deliberately waited for Subash outside the gates. But he had already had his discussion with Subash inside. In his first letter of explanation of 3 August 1995 to the Operations Manager Engineering the Plaintiff concluded by saying:

> I had no intent to punched (sic) him or hurt him. I just wanted to shake him and probably get some sense into him.

Undoubtedly the Plaintiff was the aggressor at this stage, a conclusion reached also and validly, by the personnel officer of the Defendant company.

[11] When Subash came out, the Plaintiff was waiting for him. Subash said "He (Philip) held my collar and pushed me to the fence and hit me with a hockey stick. I was hurt on my inside cheek, a cut, and my ear". The supervisor told Subash to go to the hospital. He obtained a short medical certificate and was prescribed amoxyl, and diazapan, a low grade sleeping tablet and muscle relaxant.

[12] Dr Naidu Munsamy of the Accident and Emergency Department of the Lautoka Hospital, gave evidence of his examination of Subash and of his findings. He had an X-ray carried out which revealed that there was no fracture of the mandible (lower jaw). Subash had complained of being punched on the left side of the face. He was found to be bleeding from the left eardrum. He had a laceration inside the left cheek. He complained also of pain on opening and closing his mouth. There was tenderness to the left angle of the lower jaw.

[13] What had caused these injuries? Were they caused by a punch, from being shaken, from being pushed against the fence post, or from being pushed on the face by a hand holding a hockey stick?

[14] There were three eyewitnesses. Since this occurred at around 5 pm when employees on the day shift were departing for home, one might have expected others to have witnessed the incident. If so, none came forward.

[15] In this written report to the operations manager, Subash said:

After punching my card at 4.49 pm I went out and he punched me and held my collar and pushed me to fence pole where I got hurt and also with hockey stick which hit my lips so I got cut.

[16] In his evidence Subash's account was:

He was waiting there. He held my collar and pushed me to the fence and hit me with a hockey stick.

In cross-examination he said:

He hit me with a hockey stick. Grabbed my overall at front and hit me with other hand with hockey stick. He pushed me with it. It was not a swing. More a push-punch

[17] Hassan Ali called by the Plaintiff said he remembered "the day there was a fight". He said he saw Philip holding Subash's shirt. He demonstrated holding the buttons of the lower shirt area. Philip said to Subash "Did you hear"? Then Hassan went and separated them. He did not see any hockey stick in Philip's hand, nor any assault of Subash, or any punching or shaking. Later in cross-examination he admitted Philip had shaken Subash with one hand.

[18] A letter addressed to the personnel manager was put to this witness. It had been written at Hassan's dictation by a neighbour for him. Hassan said the neighbour was a totally independent person who did not know the Plaintiff. He had no reason to add things to the letter. It referred to "a commotion" outside the main gate between Philip and Subash, and recorded that Philip had held Subash by the collar and was shaking him. He said he did not see any punching. In his evidence Hassan at first denied the shaking.

[19] Alfred Thomas gave no evidence of the incident itself. He saw Subash when he came back inside the depot and noticed that he looked shocked. He said he did not see any injuries on him, nor to his lips. He said he and his brother played hockey and trained weekdays. Normally the hockey sticks were kept in a hockey stick bag which he kept.

[20] The Plaintiff said he went outside and waited for Subash. He did not have the hockey stick with him at the time. He held Subash by his overall, the top front part with one hand. He said he did not do anything physical to him other than hold his overall. He denied punching him or hitting him with a hockey stick. He said his knuckle did not come into contact with Subash's lower lip.

[21] In cross-examination he eventually admitted he did shake Subash, which is what he had admitted in his first written explanation to the operations manager on 3 August 1995. He later admitted also that he had assaulted Subash, and admitted he was at fault. He maintained that he did not punch Subash, and I accept that. So how did he cause the injuries? Was it while holding the hockey stick in his other hand or was it in the shaking of Subash thus bringing Subash's ear, cheek and jaw against the fence pole?

[22] Subash's evidence was unembroidered. He gave his evidence simply and convincingly. Hassan said there was a fight but then gave no evidence of any assault. He even initially denied the shaking, yet he was the person who saw fit to break up his two colleagues. Right at the end of his cross-examination he admitted Philip had in fact shaken Subash. The Plaintiff also made less of the consequences of his own anger. He admitted having his workbag with him.

[23] I prefer Subash's account of the cause of his facial injuries. Hassan lacked independence and credibility on this issue. He was trying to make less of the incident as far as Philip was concerned. On a balance of probabilities I find that

Philip held a hockey stick in his hand at the time. He was going to play hockey straight after work. Philip shook Subash by the front collar of his overall with one hand. With the other hand he pushed him back, forcibly and in anger, by pushing him on the left side of the face with the hand that clenched the hockey stick. Effectively, as Subash explained, it was a pushpunch. This hand and hockey stick thus caused the injuries to the ear, inside cheek and lower mandible. In doing so, the Plaintiff assaulted a fellow employee.

Did the incident affect the contract of employment?

[24] Put another way, was this an incident sufficiently proximate to the workplace to cause a breach of the employment contract? Was it significant that the Plaintiff had clocked off from work and that the assault had occurred outside the main gate?

[25] The incident was one which began near the truck at the depot entrance, continued inside with an exchange of words, and ended near the fence outside the gates. It was an incident properly of concern to the employer. It bore directly upon the relationship the Plaintiff had with fellow employees at the workplace in the way in which they carried out their duties together. It affected the way in which they carried out their work for their employer. It also occurred at the ingress and egress point of the workplace, the depot.

[26] No plan of the extent of the site owned by the Defendant was exhibited. Alfred Thomas said the car park (where the assault incident occurred) belonged to the Defendant. He said it was within the depot complex. There was a distance of about 20–30 m from the car park to the access road. Hassan also agreed that the car park was within the Defendant's area. The car park had been built by contractors for FEA. FEA cleaned and maintained the car park. No-one else did that. FEA's staff and employees used the car park, as well as visitors who had business at the depot.

[27] I find that the car park was an extension of, or part of, the Defendant's depot. Though the Plaintiff and Subash had clocked off and left the main gates they were still on the Defendant's premises and still at their workplace. Even if the car park were not part of the Defendant's premises, I would have found the incident was sufficiently proximate to the ingress and egress point of their workplace for it to have been intended by the parties to have been a place where the conduct of the parties was yet to be subject to the contract of employment. The process of becoming "off duty" was not complete, nor was the Plaintiff away from his workplace.

How did the contract govern this incident?

[28] The Plaintiff exhibited his letter of appointment in which he was to start work as a trainee linesman on 12 June 1992. It referred to terms and conditions of service. The Plaintiff signed the letter showing his acceptance of the contract. The letter also stated:

> All other terms and conditions of your employment will be as contained in an agreement between the Authority and/or the FEA Hourly Paid Employees Union.

[29] It seems immaterial of which union the Plaintiff was a member at the material time or even if he were a member of none, in view of this part of the contract. The parties were agreeing to be bound by the agreement between the authority and the FEA Hourly Paid Employees Union, and were incorporating it into the contract of employment between the Plaintiff and the Defendant.

[30] The latest collective agreement was exhibited. It was dated 1 March 1994, which was also its commencement date. Chapter IV dealt with discipline, suspension, termination and dismissal.

[31] There is statutory protection against summary dismissal for oral contracts provided in s 28 of the Employment Act (Cap 92), which states:

> 28. An employer shall not dismiss an employee summarily except in the following circumstances:
>
> a) where an employee is guilty of misconduct inconsistent with the fulfilment of the express or implied conditions of his contract of service;
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> b) for wilful disobedience to lawful orders given by the employer;
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> c) for lack of the skill which the employee expressly or by implication warrants himself to possess;
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> d) for habitual or substantial neglect of his duties;
>
> e) for continual absence from work without the permission of the employer and without other reasonable excuse.

[32] If summary dismissal is not appropriate, notice of termination may be given by either party the length of notice depending on the contract period and the frequency of payment of wages: s 24(1). Hours of work are expressed in the letter of appointment to be 44 per week, and salary as 2.6604 (dollars) per hour. There was no specific evidence as to the frequency of pay; presumably it was either weekly or fortnightly.

[33] The contract was thus partly written and partly oral, in the sense that in a case such as this where there is no fully written contract, some terms will have to be implied as being clearly intended by the parties.

[34] In *State v Arbitration Tribunal; Ex parte Air Pacific Ltd* [2001] 2 FLR 111, Scott J aptly described Fiji's Employment Act as obsolete. It lacks the combined protective measures of England's Human Rights Act 1998 or the Employment Rights Act 1996. No doubt this position will change for Fiji before long.

Was there compliance with the contract in the procedural handling of the complaint?

[35] The Plaintiff complains of having been dismissed when he had not, by his assault on Subash, broken any company rule. He says the assault should have been the matter of a complaint to the police. They would then have investigated and if need be prosecuted for an offence under the Penal Code.

[36] It is correct that such a complaint could have been made to the police. But an employer may proceed in several ways, and may choose, if need be, not to make a police report: *Ridge v Baldwin* [1964] AC 40; [1963] 2 All ER 66. Anyway this was a matter chiefly for the victim, who no doubt decided against bringing a criminal charge.

[37] It is not necessary for there to be a specific rule that an employee must not assault another. It will be implied into an employment contract that a disruptive criminal act committed on a fellow employee will render the aggressor liable to summary dismissal.

[38] As for notice of the charge, the Plaintiff said in his evidence that when he went to work on the next day he knew of the complaint which had been made to his section head, the maintenance engineer. The engineer asked him to write a letter to him explaining what had happened. The Plaintiff had time to consider his position and tendered his letter dated 3 August 1995. He received a memorandum

after that from the personnel manager headed "Subject: assault — Subhas Chandra" dated 14 August 1995. The memorandum set out the date, time, place, victim, circumstances, details of assault, and injuries suffered for the allegation. He was asked to provide a written explanation by 4.30 pm on 21 August 1995.

[39] The Plaintiff responded a second time on 18 August 1995. On 21 November 1995 he was given his suspension letter after the Defendant's personnel manager had considered that he had indeed assaulted Subash. The suspension was said to be pending dismissal in terms of cl 7(e)(i) of the collective agreement. This was taken from the collective agreement between the Defendant and the Fiji Electricity and Allied Workers Union of 7 July 1994. The wording of the clause was in identical wording to the equivalent clause in the collective agreement with the FEA Hourly Paid Employees Union governing the Plaintiff's contract with which the Defendant wholly complied. I find the Plaintiff had adequate notice of what was alleged against him. He knew it was an allegation of an assault and he was given fulsome particulars as well.

[40] The Plaintiff says the complaint was not properly investigated. I indicated earlier on that it was surprising that more of the Plaintiff's colleagues had not witnessed the incident. Presumably no others were willing to come forward. It is noteworthy only one person came forward and that was Hassan. If others could have thrown light on the incident they could have been called by either side. They were not. From this I conclude an investigation would not have brought any further elucidating evidence to bear on the matter at the time the employer was investigating the matter.

[41] Mr Josaia Boseiwaqa, the personnel manager of the Defendant gave evidence. He spoke of his dealing with the complaint, and following the receipt of the written complaint of Subash and the medical report, he caused a letter to go to the Plaintiff seeking his explanation. He received a reply from the Plaintiff, then a fuller explanation. He said he "considered all the circumstances of the case. I had to make a submission. Assault is dealt with by dismissal if in workplace". It was clear that Mr Boseiwaqa had weighed the three accounts carefully. He gave his reasons, in his cross-examination, for his conclusions.

[42] Though the investigation might have been more proactive and thorough, it was focused correctly on whether there had been an assault. An employer is not expected to be a trained investigator or detective. I consider that the Defendant had caused to be made into the incident sufficient inquiry as was reasonable in the circumstances: *Post Office v Foley* [2001] 1 All ER 550; [2000] ICR 1283; [2000] IRLR 827.

[43] It was not necessary for there to be a court procedure or anything like it. The person accused of assault was able to write on two occasions with his side of the story and prior to that he knew the details of the allegation. He could have engaged the support of others for his account if necessary, and they could have submitted their statements.

The dismissal

[44] It is clear summary dismissal is open to an employer for gross misconduct under s 28(a) of the Employment Act. An assault on a fellow employee is an act inconsistent with an implied condition of his contract of service not to assault a colleague. An assault could amount to gross misconduct, since it is criminal in nature, irrespective of whether it becomes a police case.

[45] Subash said in his letter of complaint that he hoped that the necessary disciplinary action would be taken. This might have meant some punishment other than the draconian penalty of dismissal. This court, if the employer might have proceeded differently. That is not the point.

[46] In *X v Y* [2004] ICR 1634; [2004] IRLR 625; [2004] EWCA Civ 662 (*X v Y*) the English Court of Appeal said at [9]

> In a claim for unfair dismissal the employment tribunal, the appeal tribunal and this court must all resist the temptation to substitute themselves as the applicant's employer, which they were not. In the case of an appeal to the employment appeal tribunal or to this court, which is limited by statute to questions of law, the appellate bodies must resist the temptation to substitute themselves for the fact-finding employment tribunal, which they are not.

[47] The law on dismissal for conduct is clear. It has been said to be a four-pronged test. The Foley test was cited with approval in *X v Y* at [18]:

> the employer must show that he believed that there had been misconduct by the employee; that there were reasonable grounds for that belief; that he had carried out as much investigation into the matter as was reasonable in all the circumstances; and that the decision to dismiss him for that conduct reason was within the range of reasonable responses of a reasonable employer.

[48] This is not an employment tribunal or appeal tribunal. This matter could have been taken through the Trade Disputes Act procedure to the permanent arbitrator. It was not. The only jurisdiction for this court is to decide whether in dismissing the Plaintiff for the assault the employer broke the contract of employment it had with the Plaintiff. I find the Plaintiff has failed to prove such a breach.

[49] In the result, the Plaintiff's claim is dismissed.

Determination made.