

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 0065 OF 2007
(High Court Civil Action HBC 494 of 2002S)
(High Court Civil Action HBC 34 of 2002S)

BETWEEN : JONE BEBE

Appellant

AND: TELECOM FIJI LIMITED

Respondent

Coram: Byrne, JA
Powell, JA
Hickie, JA

Hearing: Monday, 7 July 2008, Suva

Counsel: R. Matabalavu for the Appellant
A. Neelta for the Respondent

Date of Judgment: Wednesday, 9 July 2008

J U D G M E N T

THE NOTICE OF APPEAL

[1] This is an Appeal by JONE BEBE in relation to a judgment in the High Court at Suva on 17 August 2007 whereby the Court dismissed his claim for wrongful dismissal following an investigation of deliberate sabotage and damage to its international circuit on 19 May 2000, the day of the 2000 coup. The Court also dismissed the Defendant's counterclaim for damages in the loss of

business in the sum of \$125,000 arising out of disruption to its international outbound and inbound services for seven hours on the same date.

- [2] The Plaintiff has appealed raising seven grounds of appeal. The Defendant has not cross-appealed.
- [3] Of the seven grounds of appeal, they can be divided into three categories:
 - (a) Five of them (Grounds 1, 2, 3, 4, 5) concern the hearing before the Trial Judge;
 - (b) One (Ground 6) deals with the earlier internal inquiry and;
 - (c) The other (Ground 7) questions whether the person who dismissed the Appellant had the power to do so.

THE POWER TO TERMINATE

- [4] Only Ground 7 deals with the issue of the power to terminate and then without citing any legal propositions and/or case law in support. The thrust of the Appellant's argument on this Ground was:
 - (a) That the General Manager Network Engineering who actually dismissed the Appellant did not have the authority to do so; and
 - (b) That the General Manager Network Engineering was also a witness in the inquiry against the Appellant.
- [5] The Respondent, by contrast, has correctly set out the law in dealing with the termination of employment namely:
 - (a) That there is a requirement that an employer deals fairly with the employee (***Central Manufacturing Company Ltd v Yashni Kant*** [2203] FJSC 5 (PacIIi: <http://www.pacIIi.org/fj/cases/FJSC/2003/5.html>); (Civil Appeal No. CBV0010 of 2002, 24 October 2003, Fatiaki CJ, Blachard and Weinberg JJ);
 - (b) That there is, however, no requirement to hear the employee before dismissing them so long as the dismissal is valid, that is, in breach of a contract (***Malloch v Aberdeen Corporation*** (1971) 1 WLR 1528 at 1581) and ***Central Manufacturing v Kant*** (supra) at page 21);

(c) That there is a requirement for the employer to act reasonably in coming to a decision –

“ ... The question ^{is} as not whether or not the industrial tribunal was satisfied that the employee was guilty, [but] whether they were satisfied that the employer has reasonable grounds to believing that the employee has committed the offence, and had acted reasonably in dismissing for that offence.”

(*Awadh Narayan Singh v Fiji Posts and Telecommunications Limited*, Civil Action No.210 of 1994, Pathik J citing N. Selwyn, *Law of Employment*);

(d) That there is an implied term that an employer can make payment in lieu of notice and the measure of damages is the salary an employee would have earned during the period of notice to which they were entitled (*Central Manufacturing v Kant* (supra) citing at page 12 the Supreme Court of Canada in *Wallace v United Grain Growers Ltd* [1997] 3 SCR 701 at pars 65-66).

THE ISSUES

[6] The issues for determination before the Trial Judge (relevant to this Appeal) were:

(a) Whether the termination was lawful or not, predicated upon Clause 51 of the Recognition Agreement dated 22 December 1994, which outlined the circumstances when an employee could be summarily dismissed, that is,

(i) Had the Appellant committed an act of gross misconduct, and;

(ii) Upon investigation had it ^{be} found that the Appellant had committed that act such that he could be summarily dismissed;

(b) Whether the General Manager Network Engineering had authority to dismiss the Appellant; and

(c) Whether the Defendant was liable to the Plaintiff in damages.

THE TRIAL JUDGE'S FINDINGS

[7] In relation to whether the Appellant had committed an act of gross misconduct, the Trial Judge made a number of findings.

- [8] To begin, the Trial Judge found that Clause 51 of the Recognition Agreement dated 22 December 1994, did apply to this matter which outlined the circumstances when an employee could be summarily dismissed and, in this case, it was whether through the company's internal investigation it was found that the Appellant had committed an act of gross misconduct (pages 3-4 of judgment).
- [9] As to the actual damage, the Trial Judge found (page 5 of judgment) –
- (a) It was “admitted by both parties that circuits were damaged”;
 - (b) “No one is alleging some mechanical failure”;
 - (c) The internal investigation “found that lines had been swapped and it could only be done by someone who had the expertise about such system”;
 - (d) “In short disruption was due to human intervention”;
 - (e) “Given that the plaintiff was not raising technical defect as to cause of failure, the only significant issue was who was in the Transmission room at 11.03 a.m. and who [the] swapped lines”.
- [10] As to the investigation, the Trial Judge found (pages 4-6 of judgment) –
- (a) That although “a more open enquiry was perhaps warranted ... the matter has to be looked at in its entirety”;
 - (b) That the employer, however, decided upon an internal investigation whereby once it was established what damage had occurred and from what location, then the employer wrote to the Appellant on 24 May 2000 seeking “an explanation of his actions, activities and movements on 19th May”;
 - (c) That a written explanation was submitted by the Appellant on 25 May 2000 which the Trial Judge found “that except for one final short paragraph, the rest of the letter is irrelevant”. The Appellant's explanation was that he had left the workplace at about 10.00am and did not return as he was locked out;
 - (d) That as the employer was not satisfied with this explanation, four disciplinary charges were laid against the Appellant on 6 July 2000 alleging that the Appellant “was the only person in the Transmission room at the time of the disruption”;

- (e) That the Appellant responded providing “a written explanation to the four charges ... [which] was a significantly longer explanation than the previous one”;
- (f) That there was no oral hearing before the Appellant was summarily dismissed finding that he was the person in the Transmission room at 11.03 am and who had swapped the lines;
- (g) That “the only effective defence” raised by the Appellant “was an alibi” which would have involved “the Union Secretary with whom he says he took a ride” upon leaving the workplace building with him, getting into his car and travelling with him to Knolly Street. Putting the internal inquiry to one aside, as the Trial Judge observed, the Appellant did not produce the Union Secretary as an alibi witness “even in these proceedings” before the High Court;
- (h) That the Appellant “was given at least two opportunities to explain his conduct”;
- (i) That “there is no entitlement as of right by an employee to have an adversarial form of enquiry normally conducted in courts” as “the manual does not mandate an adversarial hearing”;
- (j) That “all the employer needed to do was to conduct an enquiry sufficient to satisfy itself as to whether or not its preliminary suspicions were well founded or not” citing Pathik J in *Singh v Fiji Posts and Telecommunications* (supra);
- (k) That in light of the above, the Trial Judge found “that the nature of the enquiry conducted was sufficient and adequate due process of investigation ... provided to the plaintiff”.

[11] As to whether the Appellant sabotaged the international circuits, the Trial Judge:

- (a) Found that it was “for the defendant to show on the balance of probability that the plaintiff damaged the circuits” and “mere suspicion is not enough”;
- (b) Accepted the evidence of the General Manager at Telecom and found that “judging by the time the alarm system went on ... the act of sabotage occurred at 11.03 am ... there were three employees in the transmission room” and that

the other "two had left the transmission room before the fault occurred" leaving only the Appellant "in the transmission room after they left";

(c) Found that the Appellant "denied being in the transmission room at the material time" taking a break "probably after 10.30 am" and "that when he returned ... he was locked out";

(d) Found that the evidence of the General Manager was that "the company had not given any instructions to the security to restrict entry of persons" into its premises;

(e) Found that witness "DW4" gave evidence that on 19 May 2000 he was working at Navua station and that his last communication with the Appellant in Suva "was at 10.45am" and that when he returned from a break some "ten minutes later" there was no response from the workstation where the Appellant had been;

(f) Found that on the same day, 19 May 2000, witness "DW4" came to Suva and assisted with other technicians in locating the problem which was "swapping of optic fibre cables" which "he said could only be done by human intervention";

(g) Accepted the evidence of DW4 "that the international communications broke down on 19th May 2000 due to optic fibre cables being swapped" and "that the disruption commenced at 11.03 a.m. and lasted till 6.00 p.m."

(h) Accepted further DW4's evidence "that while he was trying to restore communications ... he received a call" from the Appellant telling him not to restore the system, and to put out the links to the West";

(i) Accepted that the Appellant "was superior" to DW4 in employment and "may have thought that ... in the normal course of employment [that DW4] would obey his orders"; also, that DW4 was "familiar with" the Appellant's "voice on the phone having worked together for so long";

(j) Dismissed the suggestion put to DW4 that he should have recorded the conversation noting that apart from not having a tape recorder with him "nor could he have known in advance that this unusual request would be made so he could keep a tape recorder at hand";

(k) Found that DW4 "had the moral fibre not to listen to his superior and instead went ... and relayed the story" to his General Manager;

(l) Found that the General Manager also confirmed in his evidence what DW4 had told him "and sent two staff ... just to reassure DW4";

(m) Found "that this telephone conversation did take place" and, significantly:

*"If as the plaintiff said in his evidence that he was not aware of the disruption till forty-eight days later, how was he able on this day to tell ... [DW4] not to restore the links. **This suggestion could only be made by someone who knew that the links were down and who wanted the links to remain unrestored** and wanting the keys to the transmission room to be brought to him in the Union Office so others who may be minded to fix the problems would not gain access to the transmission room ... **The fact that the police have not charged him is neither here nor there.** Police might have considered that there was no evidence beyond reasonable doubt. I am of the view that it was Bebe [the Appellant] who after swapping cables left Canilau House did not return of his own volition that day. Other workers including ... [DW4] were able to gain access ... [The General Manager] also said there were no instructions given to the security to deny access to staff."*

(n) Found that the Appellant was inside the building at the time when the system went down and accepted the damning evidence of the General Manager Network Engineering who after trying "to make an international call and could not get through on 19th May", undertook his own investigations as the Trial Judge noted:

"He stated he met Jone Bebe [the Appellant] at the national centre and told him to go to the Transmission room to the third floor to restore the service. Therefore he placed Jone Bebe right inside the Canilau House after the failure. I accept ... evidence on this aspect ..."

(o) That in light of the above, found:

"A staff [member] who tries to interfere with the system, in the way the plaintiff allegedly did clearly undermines the business ... Accordingly the defendant was reasonable in taking the view that such conduct justified summary dismissal. Bebe's conduct was inconsistent with fulfillment of his duties as a technician."

(p) Found that the test of whether the actions justified summary dismissal was "whether the employee's actual misconduct was of such a grave and weighty character as to undermine the relationship of trust and confidence which is

central to the employer-employee relationship”? The Trial Judge answered citing Sachs LJ in *Sinclair v Neighbour* [1967] 2 QB 279 at 289, as follows:

*“It is well established that a servant can be instantly dismissed when his conduct is such that it not only amounts to a wrongful act inconsistent with his duty towards the master **but also is inconsistent with the continuance of confidence between them.**” (Our emphasis)*

[12] In relation to **whether the General Manager Network Engineering had authority to dismiss the Appellant**, the Trial Judge made a number of findings.

(a) That the Appellant “has acted upon it and treated it as having brought his employment at and end”;

(b) That the company’s manual defines “Managing Director ... as the Managing Director of the Company or any employee properly authorized [sic] to act for him”;

(c) That as there was provision to appeal to the Chief Executive Officer from dismissal it was preferable for the CEO to have delegated such powers of dismissal to another person, as occurred in this instance, so that the CEO could hear any appeal afresh (not having been involved in the dismissal) and thus such delegation “of powers to dismiss make good sense”.

[13] That the Trial Judge was not only entitled to note that the Union Secretary was not called, he was entitled assume that any evidence that the Union Secretary could have given would not have assisted the Appellant: *Jones v Dunkel* (1959) 101 CLR 298. The Court of Appeal was informed that the Union Secretary had passed away but no evidence of that fact was adduced at trial.

[14] That the Trial Judge has made comprehensive findings of fact and the Court of Appeal will not normally interfere with such findings. Indeed, the Court strongly endorses, *Benmax v Austin Motor Co. Ltd* [1955] 1 All ER 326 where it was said that:

“An appellate court, on an appeal from a case tried before a judge alone, should not lightly differ from a finding of the trial judge on a question of fact ...”

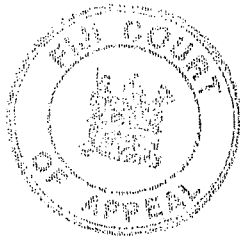
[15] The Appellant has failed to demonstrate that the findings of fact that the Trial Judge made were unreasonable or plainly wrong.

[16] Finally, as a finding of fact, the Trial Judge held that the General Manager Network Engineering had the delegated powers for dismissal. Again, for the reasons expressed above, this Court will not interfere with such a finding unless it is plainly wrong: Ashmore v Corp of Lloyd's [1992] 2 All ER 486 at 493.

ORDERS

[17] Accordingly, the Court makes the following Orders:

1. That the Application for Leave to Appeal is refused.
2. That the Appellant is to pay the Respondent's costs of the Appeal as agreed or taxed within 28 days.



John D. Byrne
Byrne, JA

Russell Powell

Powell, JA

[Signature]
Hickie, JA

Solicitors:

Esesimarm & Co, Nadi, for the Appellant

Sherani & Co, Suva, for the Respondent