

STOCKDALE v THE WOODPECKER INN LIMITED AND SPOONER (1967) ZR 128 (HC)

HIGH COURT
MALLON AGJ
23rd AUGUST 1967

Flynote and Headnote

[1] **Contract - Termination unilaterally - Employment contract - Misconduct of employee.**

If a servant is guilty of misconduct, he may be dismissed without notice before the expiration of the period for which he is hired, and he is not entitled to any wages for the broken period of service preceding the discharge if they had not then accrued due.

[2] **Contract - Termination unilaterally - Employment contract - Unfaithful discharge of duties by employee.**

An employer can terminate an employee's contract for unfaithful discharge of duty to employer, even if this occurs in an area outside the scope of service and even if employer has suffered no actual harm as a result of employee's conduct.

[3] **Contract - Termination unilaterally - Employment contract - Lack of necessary skill on part of employee.**

An employee may be terminated for failing to exercise that degree of skill which, expressly or impliedly, he holds himself out to possess.

[4] **Contract - Termination unilaterally - Employment contract - Immorality of employee.**

Immorality of an employee will serve as a cause for unilateral termination of the employment contract only if it is so gross as to show that the employee cannot reasonably be trusted or if it is inconsistent with the discharge of his duties.

[5] **Contract - Termination unilaterally - Employment contract - General considerations.**

An employee can be dismissed unilaterally for the following reasons, *inter alia*: (1) dishonesty, (2) fraud, (3) negligence calculated to injure the employer's business, (4) refusal or neglect to render agreed service, and (5) breach of a condition precedent to the employment contract.

Cases cited:

- (1) *Clouston and Co. v Corry* [1906] AC 122.
- (2) *Pearce v Foster* 1886 17 QB D. 536.
- (3) *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285.
- (4) *Boston Deep Sea Fishing and Ice Co. v Ansell* 1888 39 Ch. D. 339.
- (5) *Sinclair v Neighbour* [1966] 3 All ER 988.

Pimm, for the plaintiff

H R E Mitchley, Q C, for the defendants

Judgment

Mallon AG J: In this action the plaintiff, Robert Stockdale, claims damages for breach of contract against the Woodpecker Inn Limited, first defendant, and Peter Spooner, second defendant, who is managing director of the first defendant.

Evidence was given by the plaintiff and by a Miss Victoria Paraskevi Skamanga on his behalf. Mr Spooner gave evidence for the defendants as also did Mr David Chikanaika, Mr Dickson Lungu, Mr Alphonse Kumwenda and Mr Charles Ngoma, who were all employees of the first defendant at the material time.

The case arises out of a contract of employment entered into between the plaintiff and the first defendant which is undated, but which was signed by the second defendant on behalf of the first defendant and initialled by the plaintiff. This contract appears as document 3 of the agreed bundle. When it was sent to the plaintiff by the second defendant, it was enclosed with a letter from the second defendant dated 30th June, 1966, which is documental in the agreed bundle.

By his writ of summons as originally filed the plaintiff claimed damages for breach of contract and for defamation, but at the outset of the hearing counsel for the plaintiff abandoned his claim for damages for defamation and during the hearing of the case he applied to amend his statement of claim to include a claim for general damages and this was allowed by consent, re-service being dispensed with.

It is common ground between the parties that the plaintiff arrived in Zambia to take up his appointment as manager of the Woodpecker Inn, Lusaka, on or about 23rd July, 1966, and that he was summarily dismissed from that employment by the second defendant on or about 29th November, 1966. This dismissal was effected verbally by the second defendant and was followed up by a letter addressed to the plaintiff by the defendant's solicitors, Messrs Russell, Cook & Co., dated 30th November, 1966, which appears as document 13 of the agreed bundle.

Counsel for the defendants readily accepted that, in law, the *onus* of proof in this case lay upon the defendants to establish on a balance of probabilities that the defendants were justified in law in summarily dismissing the plaintiff.

I will first of all consider the principles of law which apply to a case of this kind. The contract between the parties was one of master and servant, under which the plaintiff was to serve the defendant as manager of the Woodpecker Inn, Lusaka. No period of time for the duration of the contract appears therein, but it is common ground that the parties had agreed verbally that it would be for a period of two years.

The general principles are set out in *Chitty on Contract*, 22nd ed., in paragraph 1112 and the succeeding paragraphs. [1] It is clear that if a servant is guilty of misconduct he may be dismissed without notice before the expiration of the period for which he was hired, and he is not entitled to any wages for the broken period of service preceding his discharge if they had not then accrued due. There is no fixed rule of law defining the degree of misconduct which will justify dismissal (*see Clouston and Co. v Corry* [1]). The general rule is that if the servant does anything which is incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him, even though the incompatible thing is done outside the service (*see Pearce v Foster* [2]). In his judgment at page 539, Lord Esther, H.R, states, "The relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully and if, by his own act, he prevents himself from doing so, the master may dismiss him." In his judgment at page 542, Lord Lindley lays down the principle that it is not necessary for employers to prove that they have in fact suffered by reason of a servant's conduct and that it would be sufficient if the employers might suffer seriously if they kept the servant in their employ. Lord Justice Lopes, also at page 542, points out that, "If a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service it is misconduct which justifies immediate dismissal. That misconduct, according to my view, need not be misconduct in the carrying on of the service of the business. It is sufficient if it is conduct which is prejudicial or is likely to be prejudicial to the interests or to the reputation of the master and the master will be justified, not only if he discovers it at the time, but also if he discovers it afterwards, in dismissing that servant."

In *Clousden & Co. v Corry* [1], referred to above, which was a decision of the Privy Council, Lord James of Hereford at page 129 states: "Of course there may be misconduct in a servant which will not justify the termination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal." This dictum of Lord James of Hereford was applied by the Court of Appeal in England in *Laws v London Chronicle (Indicator Newspapers) Limited* [3], in which it was held that a single act of disobedience could justify dismissal only if it was such as to show that the servant

was repudiating the contract of service or one of its essential conditions as would an act of wilful disobedience.

[3] It is clearly established that a servant may also be dismissed summarily for failing to exercise the skill which, expressly or by implication, he holds himself out to possess. [4] Immorality on the part of the servant will not in all cases justify dismissal, but the servant may be dismissed if his immorality is so gross that he cannot reasonably be trusted or if it is inconsistent with the due discharge of his duties, or if his position and the nature of his conduct are such that his continuance in the service may reasonably be expected to bring loss or scandal upon the master, or to be injurious to the other servants or to the master's family.

[5] A servant may also be dismissed for dishonesty or fraud in the service of the master for taking a secret commission. He may also be dismissed for negligence, but every act of negligence will not justify dismissal - the negligence must be such as to be calculated seriously to injure the master's business. It is a good ground of dismissal that the servant refused or neglected to render the service for which he had been hired or absented himself from the service.

Another general principle of law applicable to a case of this kind is that a master is entitled to determine a contract of service summarily in case of any breach by the servant of a condition precedent expressed or implied in the contract. A substantial failure to fulfil any of the duties implied from the relationship of master and servant is a breach of an implied condition precedent.

In the absence of an express right to terminate the service, without notice, there must be shown a failure by the other party to perform a condition precedent (see *Diamond on The Law of Master and Servant*, 2nd ed., pages 185 and 186).

One of the leading authorities on this branch of the Law is *Boston Deep Sea Fishing and Ice Co. v Ansell* [4], in which the managing director of a company had accepted a secret commission. He was dismissed by the company for other reasons, the company not being aware at the time that he had received the commission. It was held that receipt of the commission was good ground for dismissal although it was not discovered until after the dismissal had taken place. In his judgment at page 363, Bowen, LJ, refers to a servant doing a wrongful act inconsistent with his duty towards his master and a continuance of confidence between them.

In the recent case of *Sinclair v Neighbour* [5], the manager of a betting shop, openly, but without his employer's knowledge, took £15 out of the till, put in an IOU for the money and used the money to place a bet of his own elsewhere. On the next day he repaid the £15. The manager knew that if he had asked his employer for permission to borrow the money from the till for this purpose, it would have been refused. Later on the same day the employer discovered what had happened and dismissed the manager forthwith without notice. In an action by the manager for damages for wrongful dismissal, it was held by the Court of Appeal that the manager's conduct, even if it was not dishonest, was inconsistent with his duty towards his employer, and with the continuance of the confidential relationship of master and servant between them; accordingly, the employer had been entitled to dismiss the manager summarily.

In his judgment at page 990, Sachs, LJ, said, "It is well established law 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 his master' but is also inconsistent with 'the continuance of confidence between them'." That was said by Bowen, LJ, in his classical judgment in *Boston Deep Sea Fishing and Ice Co. v Ansell* [4].

Here we have a case where the manager of a betting shop, responsible for the conduct of the shop and for the other employees there, quite deliberately takes out of the till money for his own personal purposes, in circumstances which he knew quite well his employer if asked would not so permit.

His Lordship continued on page 991 just below letter B: "For my part, I go a little further, as regards my description of the conduct of a manager which I have just described. As between the employer and the employee (and that seems to me to be the cardinal matter), where the former deliberately takes money illicitly behind the back of his employer and appropriates it, even temporarily, for his own use, knowing that the employer would

disapprove, that is sufficient, to my mind, to establish that as between the employer and the employee that conduct is dishonest."

I will now turn to the facts of this case as they appear from the pleadings and the evidence. The plaintiff's duties under the contract of service are set out in paragraphs 1, 2 and 3 thereof, which provide that he shall give his whole time and attention to the defendant's business and shall use his best endeavours to improve and extend the same and shall at all times, faithfully and honestly, discharge the duties of his situation and in all respects observe and comply with the orders and instructions of the defendants in relation to such business. The plaintiff was also required regularly to cause entries to be made in proper books of account of all moneys received and paid, and all goods received in or delivered out, and of the stocks of liquors and all matters relative to the business necessary to show the dealings in relation to the said business, and to give all necessary information and explanations in connection therewith. The plaintiff was under a duty to account for all moneys received by him in the course of the conduct of the said business and to pay over the same to the defendants.

In their defence at paragraph 7 the defendants set out what they allege to be breaches by the plaintiff of his contract of service and the grounds upon which he was dismissed. As almost every one of the allegations contained in paragraph 7 result in a direct conflict of evidence between the plaintiff and the second defendant and the defence witnesses, the issue of credibility is crucial to the decision of this case. I will now, therefore, set out my views on the credibility of the parties and their witnesses.

The plaintiff is twenty - six years of age and gave evidence on oath. He was obviously a very immature person who did not impress me at all favourably in the witness box. I took the greatest care to observe closely his demeanour while giving evidence and formed the definite opinion that he was evasive in his answers, particularly in cross - examination. He frequently resorted to a blanket denial in reply to questions put to him, and I have come to the positive conclusion that he is not a witness of truth upon whose evidence any reliance can be placed, in the absence of independent corroboration.

Miss Victoria Skamanga attained the age of eighteen years on 19th December, 1966, and struck me as a remarkably self - possessed young lady for her age. In contrast to the plaintiff she impressed me as being a comparatively mature person whose loyalty to the plaintiff was obvious to such an extent that I cannot accept her as a wholly impartial and reliable witness.

The second defendant gave evidence in a straightforward and perfectly frank manner. I observed his demeanour with the same care which I devoted to that of the plaintiff and came to the definite conclusion that Mr Spooner was doing his best to be quite fair to the plaintiff. He made several admissions which were contrary to his interests, and I have no hesitation in accepting him as a substantial witness of truth. The other defence witnesses were members of the staff of first defendants and I saw nothing in their demeanour while giving evidence which would justify me in coming to the conclusion that they were all liars determined to conspire together to concoct a series of false allegations against the plaintiff. Therefore, wherever there is a conflict and the second defendant and the other defence witnesses, I have no hesitation in preferring the evidence of the second defendant and his witnesses, and in the light of these remarks, I now make the following findings of fact:

- (1) The plaintiff and the first defendants entered into the contract of service which appears as document 3 in the bundle, which was to continue for a period of two years, under which the plaintiff was to receive a salary of £150 per month, plus the sum of £20 per month by way of entertainment allowance to be used for entertaining clients or customers.
- (2) the second defendant left Zambia on leave on 5th August, 1966, leaving the plaintiff as manager in sole charge of the Woodpecker Inn.
- (3) The plaintiff was specifically instructed by the second defendant, personally to check the bar stocks each week during his absence, and that he failed to do so after 19th September, 1960.
- (4) That approximately one week after the second defendant's departure on leave the plaintiff asked the head waiter, Alphonse Kamwenda, D.W.3, to arrange for an African woman

called Margaret to visit him in his flat above the Woodpecker Inn and that this woman did visit the plaintiff at the flat and spent the night there, having been served with a meal which she shared with the plaintiff. The plaintiff warned Alphonse that this arrangement should be a secret between the two of them.

- (5) The staff of the Woodpecker Inn became aware of the above facts and this adversely affected their relationship with the plaintiff resulting in a loss of respect for him on the part of the staff, with a consequent diminution in his authority over them.
- (6) The refrigeration units in the bars of the Woodpecker Inn were allowed to fall into disrepair due to the negligence of the plaintiff.
- (7) The plaintiff incurred a bar account in the sum of £180 7s. without having the authority of the defendants to do so. He also incurred a restaurant account in the sum of £83 12s. 6d., similarly without authority.
- (8) Plaintiff received an advance of salary of £170 from first defendant which was to have been repaid before the second defendant's return from leave. This was not done. This sum was recovered from the plaintiff by the defendants by retaining his November salary.
- (9) On or about 21st October, 1966, the plaintiff instructed David Chikanaika, D.W.1, the head barman, to sell on his behalf, through the restaurant, seven bottles of wine belonging to the plaintiff. Acting on the plaintiff's instructions, D.W.1 took the sum of £12 from his float and gave it to the plaintiff, who instructed him to reimburse the float as and when he sold the wine. By so doing the plaintiff deprived the defendants of the opportunity to make a profit upon the sale of seven bottles of wine. The plaintiff warned the head barman not to let other members of the staff know about this arrangement. Document 12 in the agreed bundle is a record of this transaction. On one other occasion a similar transaction involving six bottles of wine was carried out by the plaintiff, involving a sum of £11 10s.
- (10) The transactions referred to in (9) above became known to the staff of the Woodpecker Inn and resulted in a further deterioration in their respect for the plaintiff.
- (11) The plaintiff carried a revolver on the premises which he showed to the staff.
- (12) When the second defendant returned from leave on or about 10th November, 1966, he found the premises generally in an untidy and dirty condition; and that the plaintiff had failed to make adequate preparations for an important function to be held at the Woodpecker Inn on Sunday, 12th November, 1966, which it was his duty to do.
- (13) The sum of £11 2s. was paid by the defendants to the Income Tax Department by way of PAYE in respect of the plaintiff's salary for November, 1966.
- (14) The sum of £11 2s. was paid by the defendants in respect of personal trunk calls made by the plaintiff to Athens, while in the employment of the defendant, and is owed by the plaintiff to the defendant.
- (15) The plaintiff rarely started to perform his duties as manager before 9 a.m. each morning, and failed adequately to supervise the staff of the Woodpecker Inn.

In his evidence the second defendant said that he thought the plaintiff had done his best, after his own fashion, to improve the image of the Woodpecker Inn during his absence, largely by entertaining customers on what appears to have been a lavish scale. In the view of the second defendant, the plaintiff's enthusiasm in this respect was misguided, and detrimental to the efficient performance of his duties as manager, particularly in regard to supervision of the staff as a whole. He also said that his decision to dismiss the plaintiff was based not so much on what he had done or had not done during his absence as on what he had seen of his work since his return. He freely conceded that he was no prude, and had agreed to the plaintiff's fiancée living with him in the flat, although they were not married. No serious attempt has been made by the defendants to prove that they suffered actual financial loss as a result of the plaintiff's conduct.

I have now to decide whether upon the above finding of fact and the evidence as a whole the defendants have discharged the *onus* upon them of proving on a balance of probabilities that their action in summarily dismissing the plaintiff was lawful.

In my view the plaintiff has been guilty of conduct which was, (i) incompatible with the faithful discharge of his duty to the defendants, and (ii) incompatible with the continuance of confidence between them, in the following respects:

- (a) his failure personally to check the bar stocks each week. Although paragraph 2 of the contract only refers to a duty on the part of the manager to "cause" entries to be made in the books of the business relating to the stocks of liquors, this, in my view, did not absolve the plaintiff from strict compliance with the specific verbal instructions given to him by the second defendant in this regard (see paragraph 1 of the contract);
- (b) his use of the defendant's restaurant to sell wine belonging to himself for his own personal profit to the detriment of the defendant's business. This, in my view, was not an honest discharge of his duties in terms of paragraph 1 of the contract, and the most serious aspect of this conduct was the attempt on the part of the plaintiff to bind the members of the staff who knew about it to keep the matter secret. In effect this amounts to an attempt to undermine their loyalty to the defendants;
- (c) bringing a woman into the flat for what amounts to the purposes of prostitution. This conduct was hardly likely to improve the reputation of the Woodpecker Inn, but again the most serious aspect of the matter in my view was the plaintiff's attempt to bind the members of the staff concerned to secrecy and then denying that it ever happened when challenged by the second defendant. I have found as a fact that the incident took place, and in my view the second defendant had every justification for reaching the same conclusion; and
- (d) an inevitable result of the plaintiff's conduct was a loss of respect for and confidence in him on the part of members of the staff, which could only have been detrimental to the running of the defendant's business, and made it almost impossible for the plaintiff to perform efficiently his duties as manager.

In the light of the above, and the other evidence of unsatisfactory performance by the plaintiff of his duties as manager, I find that, in law, the defendants have discharged the *onus* upon them and were justified in summarily dismissing the plaintiff. The claim therefore fails and is dismissed with costs to the defendants.

I allow the defendants counter - claim in respect of the following matters:

- (1) the sum of £180 7s. 6d., in respect of wines and spirits admittedly purchased by the plaintiff from the first defendants and not paid for. It may well be that, in law, the figure of £150 in red in the second defendant's handwriting on document 11 constitutes some kind of compromise on this figure, and this is a matter which the parties may be able to resolve by agreement.
- (2) The sum of £83 12s. 6d., being the price of meals purchased by the plaintiff in the restaurant.
- (3) The sum of £11 2s., in respect of PAYE Income Tax paid by the defendants on the plaintiff's behalf in respect of his salary for November, 1966.
- (4) The sum of £11 2s., admittedly due by the plaintiff in respect of trunk calls.
- (5) The sum of £169, in respect of air fares paid by the first defendant under the provisions of paragraph 4 (c) of the contract.

The defendants also claim the sum of £12, allegedly being the profit on the sale of wines sold by the staff of the Woodpecker Inn on the plaintiff's instructions, but in my view the defendants have not proved that this was the actual amount of the profit lost by them in this connection, and I decline to allow this claim.

Costs of the counter - claim to the defendants.

Plaintiff's claim dismissed.

Judgment for the defendants.