KEIL (HANS JOACHIM) v POLYNESIAN AIRLINES LIMITED AND OTHERS

Court of Appeal - Apia
Ryan CJ, Dillon, Martin J
1 November 1990, 8 January 1991

EMPLOYMENT LAW - Breach of contract - no implied term giving right to invoke grievance procedure - no implied term for Airline to act fairly and reasonably and in conformity with the principles of natural justice - express provisions prevailed.

HELD: The contract is clear and unequivocal. A disciplinary matter had not arisen and even if it had the employer still had the option of invoking the non-disciplinary procedure. A term will not be implied in a contract if the contract is effective without it.

Lister v Romford Ice & Cold Storage Co Ltd
[1957] A.C. 558

HELD: Application of public law and principles of natural justice do not apply to a pure master and servant relationship. The employer was not a public corporation or quasi government body. Subsequently Marlborough Harbour Board v Goulden [1985] 2 NZLR 379 did not apply.

CASES CITED:

- Lister v Romford Ice & Cold Storage Co. Ltd (1957) AC 558
- Marlborough Harbour Board v Coulden (1985) 2 NZLR 379

Dr Barton QC and Nelson for Appellant
Enari for First Respondent
Retzlaff & Philipp for Second Respondent

Cur adv vult

This is an appeal against a decision of Bathgate ACJ delivered on 28 May 1987 wherein he held that the appellant failed in his action against the Second Respondent for specific performance, damages, and an order for reinstatement in relation to the termination of his employment by the Second Respondent in August 1983.

An agreed statement of facts, some of which it eventuates, was incorrect was put before the Judge in the lower Court. It is common ground now that the Appellant commenced employment with the Second Respondent or at least its predecessor the First Respondent, as a pilot in April 1972. There was a contract of employment between the parties contained in a written agreement ("the contract") being the Polynesian Airlines Limited Pilots Agreement 1980/82 of 6 October 1980 between the Company and the Pilots Association.

Some employment differences existed between the parties by at least 20 August 1983 and on 22 August 1983 the Second Respondent wrote to the Appellant giving him notice of termination in the following terms:

> "You are hereby advised that effective on receipt of this letter, your services are no longer required by Polynesian Airlines Operations Ltd.
>
> Salary will be paid up to 22nd October 1983 plus leave entitlements for accrued leave as of the 22nd August 1983.
>
> Notice is given under the terms of the Pilots Agreement Part A para. 4.2(c) and para. 4.9."

Paragraphs 4.2(c) and 4.9 of the Contract read as follows:

> "4.2 The services of a pilot shall be terminable by either the Company or the pilot;
>
> (c) By the payment to the pilot of 28 days salary or 1 months salary in lieu of the notice required in sub paragraphs (a) and (b) hereof;
>
> 4.9 On termination of service, a pilot shall be deemed to be employed, and shall receive all benefits as such of employment granted by the Company, and other carriers subject to conditions of interline agreement until the expiry of the required notice period plus the expiry of accumulated leave."

Some 2 days later the Second Respondent tendered a cheque to the Appellant for $11,879.22 being salary from 21/8/83 until 28/10/83, leave entitlement, and 2 months salary in lieu of notice. The Appellant has refused, down to the present time, to accept payment of the aforesaid sum.

It can be seen that, notwithstanding the so-called agreed statement of facts which reads in part "The notice was given by the Second Defendant pursuant to clause 4.2(c) of the contract; the Plaintiff was paid his salary for a period of 2 months in lieu of 2 months notice in writing, as would be required under clause 4.2(b) of the contract", the Appellant was tendered a cheque greatly in excess of payment required under clause 4.2(c) which provided for payment only of 1 months salary in lieu of the 2 months notice in writing required under 4.2(b). Effectively, the tendered cheque was for 4 months salary, viz salary to 28/10/83, plus 2 months salary in lieu of notice. The payment far exceeded the Second Respondent's liability under 4.2(c).

The basis of the learned Judge's decision in the Supreme Court is that "the contract expressly provided for termination of the principal subject matter of the contract whether or not there were any differences between the parties...." He held that there was no room to imply a term into the contract that having been given notice, he had a right to invoke the grievance procedures under paragraphs 13.3. and 13.6 of the Contract which read as follows:

> "13.3 Representation
>
> A pilot has the right to be represented by himself, the Association, another pilot or other persons of his choice at all stages of an investigation or disciplinary enquiry conducted by the Company and subsequent appeals, and at all stages of procedure in cases of grievance. Subject to the witnesses' concurrence, a pilot shall be entitled to call such witnesses as may assist his case.
>
> 13.6 Appeals
>
> A pilot has the right to appeal to the General Manager against disciplinary action, or in the case of grievance. Any subsequent appeals may be to the Commissioner of Labour."

The learned Judge held that the notice of 22 August 1983 had effectively terminated the contract of employment between the parties, and given that situation, it was too late to make a claim by way of grievance, since the master/servant relationship no longer existed. He went on to say that "I cannot imply a term into the contract that would preserve such rights as it would be clearly contrary to the expressed provisions of clause 4.2(c). That would be contrary to the express provisions of the contract. Under those circumstances there is no room for an implied condition or provision."

Counsel for the appellant made a number of submissions in support of the appeal:

1. The action of the Airline in purporting to deprive Mr Keil of his right under the contract to invoke the grievance procedure contained in para. 13 was ineffective.

2. A term should be implied into the contract to the effect that in the circumstances either

   (i) the grievance procedure should have been applied: and/or

   (ii) that the Airline was obliged to act fairly and reasonably and in conformity with the principles of natural justice in terminating Mr Keil's employment.

3. The Judgment of the Supreme Court was erroneous in deciding not to imply a relevant term into the contract on the reasoning that Mr Keil's employment was terminated by payment of wages in lieu of notice rather than at the expiration of a period of notice.

It was conceded that the 3rd submission was to some extent a corollary of the 1st submission.

Many authorities were referred to us during the course of argument. The Second Respondent naturally enough, had no criticism to make of the decision of the Supreme Court and took the stance that the procedures under paragraph 4.2 were quite separate and distinct from those under clause 13; that clause 4 provided procedures whereby either party could, without reason, determine the contract provided certain conditions as to notice, or payment in lieu of notice, were met; that clause 13 set out procedures to be followed where disciplinary action was taken which might or might not result in termination of the contract.

As to the Appellant's 1st and 3rd submissions referred to above we find that we are in complete agreement with the decision of the learned Judge in that it is quite inappropriate to imply a term as suggested by the Appellant. The contract we find makes perfectly good sense as it stands and there is no justification for implying other terms. It provides to the employer two alternate methods of termination viz by notice or payment in lieu of notice under paragraph 4.2; or disciplinary dismissal under paragraph 13. There are no fetters placed on the employers discretion to choose between the two methods.

Further it also provides to the employee two alternate methods of termination viz by forfeiture or payment in lieu of notice under the same paragraph 4.2. Likewise there are no fetters placed on the employee. These are rights, privileges, and obligations

which the parties to this master and servant relationship have negotiated; which in our view are clearly set out in the contract; which do not require further terms to be implied; and which the parties have preserved by registration under the provisions of the Labour and Employment Act 1972.

Counsel for the Appellant at the end of his comprehensive submissions to us, urged that a term should be implied into the contract to the effect that the appeal provisions in paragraph 13 should have been available to the Appellant. He claimed this was an obligation on the Second Respondent to act fairly and reasonably and in conformity with the principles of natural justice. But a term that has not been expressed, should not be implied, simply because such a term might be regarded as reasonable; nor should a term be implied which might adversely affect those rights available to either or both, the Appellant and the Second Respondent, in accordance with the provisions of paragraph 4.2.

The contract is clear and unequivocal. A disciplinary matter had not arisen and even if it had the employer still had the option of invoking the non-disciplinary procedure under 4.2. A term will not be implied in a contract if the contract is effective without it: Lister v Romford Ice & Cold Storage Co. Ltd [1957] AC 558. As to the application of public law and principles of natural justice we find that here all that existed was a pure master and servant relationship. The employer was not a public corporation or quasi-government body and the principle adverted to in cases such as Marlborough Harbour Board v Goulden [1985] 2 NZLR 379 simply have no application. The Second Respondent was entitled to rely on the strict terms of the contract and once it had done so, as we find it did with the letter of 22 August and the tendering of the cheque 2 days later, it had fulfilled all its contractual obligations.

Accordingly the appeal must fail with costs to the Second Respondent which we fix at $2,000. Not having heard further from Counsel as to costs between the First and Second Respondents we take it that that matter has been resolved. However in case it has not leave is reserved to the First Respondent, which was not strictly speaking involved in the appeal, to apply for an order for costs in both the Supreme Court and this Court.