RIVERS v. COXON AND CO LTD AND von REICHE

SUPREME COURT. 1962. 18, May; 5, 6, 20 July; 24, August. MOLINEAUX C.J.

Claim for wrongful dismissal - Managing Director of company - failure to manage in sound and efficient manner - mutual promises - breach of contract.

The plaintiff was employed as Managing Director of E.A. Coxon and Co Ltd from April 1960; the terms of employment being first discussed between the plaintiff and the second defendant, von Reiche, and later confirmed by letter of 1 February 1960 written on behalf of the first defendant, E.A. Coxon and Co Ltd. The letter contained mutual promises of a concurrent nature; the company promising to pay the plaintiff as Managing Director a salary plus bonus and to grant him certain other privileges incidental to the position; the plaintiff promising simultaneously to conduct the management of the company in a sound and efficient manner and to undertake his responsibilities to the very best of his ability.

Subsequent events revealed that the plaintiff's conduct was otherwise than in accordance with sound and efficient management of the company's affairs and there was general dissatisfaction expressed against the plaintiff by most of the staff members and against his management from the company's point of view.

Upon some of these grievances being brought to the attention of the second defendant (who throughout appears to have acted with full authority and approval of the company as its agent) there ensued a heated exchange between the plaintiff and the second defendant ending with the latter terminating the employment of the plaintiff with the company, and by his saying to the plaintiff he had better take a month's pay in lieu of notice, or words to that effect.

In an action by the plaintiff claiming a monetary sum for wrongful dismissal -

HELD: (1) On the evidence, there was a breach of contract on the part of the plaintiff through his failure to perform a condition precedent that was expressly undertaken by him in the agreement with the company, in that he did not conduct the management of the business of the company in a sound and efficient manner; and where there are dependant promises, as in this case, that go to the root of the contract, it is well established that failure on the part of one party to perform what he has promised will relieve the other party from liability, and he is free to treat the contract as at an end.

(2) While there were a number of isolated acts of the plaintiff insufficient in themselves to warrant dismissal without notice, such acts were, when considered in the aggregate and in relation to the conduct of the plaintiff as a whole, sufficient to justify his dismissal without notice.

Boston Deep Sea Fishing and Ice Co v. Ansell (1888) 39 Ch.D. 339; Burnett v. Distributing Agency Ltd /1923/ N.Z.L.R. 169; and Clouston and Co Ltd v. Corry (1905) N.Z.P.C.C. 336 referred to.

Judgment for first defendant

CLAIM of monetary sum for wrongful dismissal.

Phillips, for plaintiff.
Metcalfe, for defendants.

MOLINEAUX C.J.: The plaintiff, Mr C.R. Rivers, commenced employment as Managing Director of E.A. Coxon and Co Ltd, the first defendant, in April 1960, following discussions with the then Managing Director, Mr K. von Reiche, the second defendant. The terms of agreement were set out in a letter dated the 1st February, 1960 and signed by Mr von Reiche as Managing Director for E.A. Coxon and Co Ltd. The letter was typed by the plaintiff although not signed by him, the terms being dictated by the second defendant, and subsequently confirmed in evidence by both parties as representing the agreement between them. The text of this letter was as follows:-

"Mr C.R. Rivers, 1st February 1960
Apia, Western Samoa.

Dear Sir,

Following our recent discussion concerning your appointment as Managing Director of E.A. Coxon & Company Limited, I confirm the following arrangements.

SALARY: You will commence at a salary of £( ) per annum rising to £( ) per annum in 5 years or sooner as decided by the Directors. Any further increments will be at the discretion of the Directors.

BONUS: In addition to salary, you will be paid a yearly bonus of 2½% on the nett profits of the Company.

LIVING QUARTERS: The Company will provide you and your family with living quarters, reasonably furnished, free of rent.

OVERSEAS FURLOUGH: You will be granted 3 months overseas furlough every three years (the period of leave being assessed at one month for every year of service) on full pay with return fares paid for yourself and family to New Zealand or to another overseas country as approved by the Directors.

SHARES IN COMPANY: You will have the right to become shareholder in the Company and to buy up to 5,000 shares or more as approved by the Directors, at one pound per share (at par).

It is understood of course that you will conduct the management of the Company in a sound and efficient manner and that you will undertake your responsibilities to the very best of your knowledge and ability.

Yours faithfully,
E.A. COXON & COMPANY LIMITED
(Sgd.) K. von Reiche
Managing Director."

After commencing his duties in April 1960, the plaintiff was assisted by the second defendant until the latter left for New Zealand in September of that year, after which the plaintiff continued as Managing Director alone, up till the time of the return of the second defendant from New Zealand on the 9th July, 1961. During the plaintiff's year of management, there was some evidence that gross sales had increased, the renovation of part of the Company's premises had been continued following the declared policy of the Company, and reports concerning the progress

of the Company's affairs submitted by the plaintiff to the second defendant. On his return from New Zealand, the second defendant expressed satisfaction with the way things appeared to him after a preliminary visual examination of the premises. A few days after his return, however, the staff assembled and requested the second defendant to hear certain grievances that they had to make against the plaintiff. This request was granted and a meeting took place at which a letter, in the form of a general resignation by most of the staff, was handed to the second defendant. This letter expressed general dissatisfaction with the way the plaintiff had managed the affairs of the Company during the absence of the second defendant. It was signed by some thirty members of the staff of a total of forty odd, and contained a general statement of dissatisfaction with the plaintiff's management, together with several specific grounds of complaint. It commenced with the words:

> "We, the undersigned, have this day the 5th July 1961, resolved to bear on record the various aspects of our grievances against our present Managing Director, Mr Charles Raymond Rivers."

There then followed the various complaints, of which some are discussed below, and the letter concluded with the following words:

> "In view of the above, we have decided to inform you that unless you take a decisive action in removing the present Manager, we would desire you to take this as our formal resignation from the firm's service."

At this meeting, members of the staff were invited to voice their complaints, and in addition to those set out in the letter, several further complaints were made against the plaintiff by different members. A few days after the meeting on the 18th July, 1961 the plaintiff requested the second defendant to be allowed to deal with the matter as Manager in his own way, suggesting that the ringleaders be fired. On inquiry being made by the second defendant, several senior members of the firm who had signed the letter of resignation, when interviewed by him, reaffirmed their intention to resign if the plaintiff should continue as Managing Director. Discussion as to whether they had in fact so reaffirmed their intention to resign, led to a somewhat heated exchange between the plaintiff and the second defendant, during the course of which the latter said "Well, you had better resign", to which the plaintiff replied "Why should I? I have done nothing wrong." The conversation gathered momentum, and ended by the second defendant terminating the employment of the plaintiff with the Company, and by his saying that the plaintiff had better take a month's pay in lieu of notice, or words to that effect. This the plaintiff did not do, and in fact he was paid up to the end of the month of July.

Following correspondence between the Solicitors for both parties, the present proceedings were commenced, in which the plaintiff claims the sum of £2,390.11. 3 for wrongful dismissal, being one year's salary in lieu of notice, compensation in lieu of furlough, and bonus on nett profit in terms of the agreement. The defendants plead that the second defendant gave the plaintiff the opportunity to resign; that he was offered one month's salary in lieu of notice in addition to his salary for the month of July, 1961; that the plaintiff conducted the management of the Company so negligently, inefficiently and improperly that the defendants were justified in dismissing him without any notice. It is further alleged that the plaintiff did not conduct the management of the Company in a sound and efficient manner, and further that he failed to qualify as a Director of the first defendant, by reason of his not having acquired the minimum number of shares as set out in the Articles of Association, and for that reason was not entitled to notice.

Throughout, it appears that the second defendant acted with the full authority and approval of the first defendant, as its agent, and that the contest lies between the plaintiff on the one hand, and the first

defendant on the other.

The letter dated 1st February, 1960, contains mutual promises of a concurrent nature, each dependent on the other. The first defendant promises to engage the plaintiff as Managing Director and to pay him a salary plus bonus, and to grant him certain other privileges incidental to the position as set out in the letter, and the plaintiff promises simultaneously:

(1) to conduct the management of the Company in a sound and efficient manner; and

(2) to undertake his responsibilities to the very best of his ability.

The promises of the plaintiff go to the root of the contract, and provide the essence of the consideration for which the first defendant engaged him. All the privileges and emoluments incidental to the position of Managing Director were to flow "on the understanding of course that" or provided that he conducted the management of the Company in a sound and efficient manner, and undertook his responsibilities to the very best of his ability. They go beyond warranty. The plaintiff stated that he had agreed to the inclusion of these provisions. By such agreement he had expressly undertaken to manage the business in a sound and efficient manner, and it was on that understanding or basis that the defendants had engaged him. Where there are dependant promises, as here, that go to the root of the contract, it is well established that failure on the part of one party to perform what he has promised will relieve the other party from liability, and he is free to treat the contract as at an end. This aspect of the law of contract is clearly summarized in 8 Halsbury 3rd Edn. 198 paras. 334/335. The plaintiff had expressly undertaken to conduct the management of the Company in a certain manner, and if he did not do so, then the first defendants were entitled to treat the contract as discharged. Whether the plaintiff did conduct the management of the Company in a sound and efficient manner is a question of fact, and on the evidence placed before me, I am of the opinion that he failed to do so.

After a first meeting at the house of Mr R. Berking, at which several senior members of the staff announced their intention of resigning there and then because of the plaintiff's conduct, the staff agreed to carry on until Mr von Reiche's return from New Zealand. On his return, they presented him with an ultimatum to the effect that they would resign unless the plaintiff was removed. It is difficult to conceive how such a decision, confirmed as it was later by the Secretary of the Company and departmental heads when interviewed by Mr von Reiche, could have been reached had the plaintiff been handling the staff efficiently. The state of affairs that confronted Mr von Reiche on his return from New Zealand was, in my view, quite incompatible with the concept of sound and efficient management over the preceding period, and this is so quite apart from the intrinsic merit or demerit of the particular complaints alleged. The fact of refusal to continue to work under the plaintiff reflects, to my mind, the antithesis of sound and efficient management, at any rate as far as the control of the staff was concerned. Admittedly the control of the staff did not comprise the only duties for which the plaintiff was engaged, but it is common knowledge that the ability to control staff satisfactorily is one of the most important, if not the most important aspect of management in a large commercial concern such as E.A. Coxon & Co Ltd. There were, however, other complaints relating to the plaintiff's management that were not effectively met, and which are regarded as established. The decision of the plaintiff that the Company should pay the amount of a small fine for a traffic offence committed by him, but that an employee of the Company who found himself in a similar position should pay his own fine, could only foster discontent among the staff. Small in itself, this decision reflects little credit on the plaintiff as Managing Director. It appeared that on some occasions the plaintiff used Company transport for private purposes, without ensuring that the proper hire charges for the use thereof were put through, and this was known to

some of the staff. There was a complaint that the plaintiff was in the habit of taking goods after hours and having them charged to his account the following day or perhaps later. Evidence was given that some shirts, a pair of shoes and 6½ yards of Tapa cloth went missing on different occasions. Although not proved to my satisfaction that the plaintiff was responsible for these shortages, I feel nevertheless that he should not have exposed himself to the risk of criticism by the staff, by adopting a practice that was capable of resulting in the losses complained of, and which was to say the least somewhat unusual. The subjects of these three complaints in themselves resulted in expressions of discontent by different members of the staff; they all resulted in a loss of revenue to the Company, and in my view, were not consistent with sound and efficient management. Such conduct could only engender a feeling of disrespect for the plaintiff which in itself was injurious to the interests of the Company. Of more consequence, perhaps, was the policy adopted by the plaintiff in regard to the issue of advances to traders upon security. No valuation by a competent valuer appears to have been made in respect of any one of the properties referred to in the list of mortgages tendered in evidence. Some of the securities are noted as being very old and decayed. All the accounts are outstanding to some extent, and the measure of the security in relation to the amount advanced is dearly insufficient, being well below what is regarded as normal commercial practice. Five of the advances issued by the plaintiff amount in the aggregate to the sum of £2,430, whereas the total value of the securities upon which these amounts were advanced is only £1,050, or something like 43% of the amount advanced. The value of the remaining seven securities was not stated. The need for security indicates that in the opinion of the Manager, the personal security of the trader concerned is insufficient, and that it was necessary in the interests of the Company to secure the amount of the advance in the event of the trader not being able to meet his commitments. It is evident when such a step is taken that the value of the security is material, and that a proper valuation should be made with a view to assessing the amount that would be safe to advance upon such security. In my view, the practice adopted by the plaintiff in regard to the advances to traders was inadequate. Having regard to this evidence, as I have said, I have reached the conclusion that the plaintiff did not in fact conduct the management of the Company in a sound and efficient manner.

Apart from these matters, there was further evidence, falling short of proof perhaps, that tended to make the defendants dissatisfied with the conduct of the plaintiff during his year of management.

The plaintiff submitted a balance-sheet to the second defendant on his return from New Zealand containing errors of £2,000 and £10,000 respectively, which inflated the nett profits of the Company by these amounts. There was the matter of a refrigerator alleged to have disappeared from the flat occupied by the plaintiff, inconclusive perhaps in itself as against the plaintiff, but from the second defendant's point of view, not adequately accounted for. The reduction of the interest rate on the plaintiff's mortgage to the Company from 6% to 5% after the second defendant went to New Zealand, left a feeling of suspicion in his mind, as he stated that he was not aware that such a reduction had been authorised. No doubt he had cause to be genuinely dissatisfied with the plaintiff's management after the enumeration of the various complaints mentioned at the staff meeting and later. The plaintiff's handling of the securities to traders could only have caused him concern. Cash shortages were reported but not accounted for. On the over-all position, I am satisfied that the defendant's conduct was genuine, and not frivolous or vexatious. Genuine dissatisfaction on the part of an employer, even though no good grounds are established, is sufficient for an employer to determine the services of a servant without notice. <u>Diggle v. Ogston Motor Co (1915) 84 L.J.K.B. 2165</u>: <u>34 Digest 72 para. 491</u>: also <u>Connelly v. Labour Daily Ltd (1925) S.R. N.S.W. 398</u>: <u>34 Digest 72 para. 491 (i)</u>.

It was contended that some of the matters referred to were too trivial in themselves to warrant the dismissal of the plaintiff without notice, but single acts which in themselves may be insufficient to warrant

dismissal without notice on the part of an employer, may in the aggregate justify such action. Bowen L.J. in Boston Deep Sea Fishing & Ice Co v. Ansell (1888) 39 Ch. D. 339 stated such a proposition in the following manner:

> "There may be cases where the breach of confidence and good faith towards the master could not arise from a simple isolated act, but would be founded on the accumulation and repetition of such acts...........cases of isolated acts which, if they occurred singly, would not in themselves amount to a violation of the confidential relation or breach of the faithful service which the servant is bound to render. In that class of cases, it is perfectly proper to consider whether on the whole the conduct of the servant has been such as to amount to a breach of confidence, and if it has not, the master will not be justified in the dismissal."

This view was followed by Adams J. in the case of Burnett v. Distributing Agency Ltd /1923/ N.Z.L.R. 169, p. 170, where some of the isolated acts complained of, which taken in the aggregate were held to justify dismissal without notice, were similar to the type of conduct complained of in this case. In Clouston & Co Ltd v. Corry (1905) N.Z.P.C.C. 336, p. 341. The Privy Council held that -

> "there is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination 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 express or implied conditions of service will justify dismissal......... The question whether the misconduct proved establishes the right to dismiss the servant must depend upon the facts, and is a question of fact."

In the present case, there are a number of isolated acts of the plaintiff which caused dissatisfaction on the part of the first defendant, and which when considered in the aggregate, and in relation to his conduct as a whole, are sufficient, in my view, to warrant the action taken by the second defendant.

In the result, I am of the opinion that there was a breach of contract on the part of the plaintiff, through his failure to perform a condition precedent that was expressly undertaken by him in the agreement, in that he did not conduct the management of the business of the Company in a sound and efficient manner; and also, on a review of the whole situation after his return from New Zealand, the second defendant was genuinely dissatisfied with the plaintiff's conduct in respect of a number of matters, which in the aggregate justified the determination of his services without notice. That being so, it is not necessary to consider the technical defence raised concerning the alleged failure of the plaintiff to take up the requisite number of shares for qualification as a Director.

Judgment will be for the first defendant, with costs and disbursements as fixed by the Registrar.