High Court Set I

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M 563/78

BETWEEN R E LORD and SUSAN GOULDER

Appellants

A N D AUSTRALIA & NEW ZEALAND BANKING GROUP LIMITED

Respondent

Hearing: 23 July 1981

Counsel: J J Cleary for the appellant
W M Wilson and P R Castle for the respondent

Judgement: 13 November 1981

RESERVED JUDGMENT OF WHITE J

This is an appeal from a decision of the Magistrate's Court. The appellants had claimed that the respondent (hereinafter referred to as "the Bank") was not entitled to make certain deductions from their respective bank accounts. The learned Magistrate held that the deductions were properly made.

The two appellants were employed by the Bank, Mr Lord as from 5 January 1972 and Miss Goulder as from 13 January 1977. Both appellants were minors at the time of commencing employment with the Bank. Each appellant was shown a copy of a service agreement at the time of employment, which each appellant read and signed. The relevant provisions of clause 11 of the service agreement signed by Miss Goulder (clause 12 in the agreement signed by Mr Lord) read as follows:

> "The employment of the Officer shall be terminated by any of the following events:
>
> ...
>
> (c) (i) The expiration of one calendar month's notice of termination of service given in writing on either side or such lesser period as is mutually agreed or provided for in any industrial award or agreement for the time being in force and applicable

to the employment of the Officer by the Bank.

(ii) The Bank's immediate termination of service and payment to the Officer of one month's salary in lieu of one calendar month's notice in writing.

(iii) Termination of service by the Officer without giving one calendar month's notice in writing as required under sub-clause (i) hereof in which event the Officer shall forfeit an amount equivalent to one month's salary and without prejudice to any other mode of recovery to which the Bank may have recourse it shall be lawful for the Bank if it elects so to do to have such amount deducted at its discretion either from salary due to or credited to any account of such Officer with the Bank and/or from any other moneys belonging to such Officer and in the possession or control of the Bank and/or payable to such Officer from the Fund of the Pension or Superannuation Scheme or Fund of which he is a member and production of this Agreement shall be sufficient authority and a good discharge to the Bank and/or the Trustees of the Pension or Superannuation Scheme or Fund for any deduction made or paid pursuant to the powers herein conferred."

The case has become complicated and I think it is necessary to refer to the pleadings in order to ascertain the real issues of fact and law with which the Court is concerned. Mr Cleary's first submission was that it was necessary to examine the deductions and their purpose to discover whether the deductions could be properly made.

In Mr Lord's case there is no dispute that he gave 14 days' notice on 14 October 1977, and that on 3 November

his current account was credited with salary including 14 days' overpayment amounting to $69.16. Mr Lord alleged that the Bank debited his current account with the overpayment without right or authorization and Mr Lord claimed he was entitled to the return of $69.16. There is no dispute that on 7 November the Bank deducted from Mr Lord's account $231, being the amount of his salary payment up to the date of his resignation. It was also alleged that on that date the Bank reclaimed from its PAYE tax account up to the date of his resignation. It was claimed that the amounts in each case were debited without Mr Lord's authority. It was claimed that the Bank had no right to claim any such moneys and Mr Lord claimed a taking of accounts between the parties and payment of all salary and holiday pay found due to him.

Miss Goulder gave two weeks' notice on 14 October 1977. In her statement of claim she admits that in terms of the award in force she should have given one month's notice. She alleged that soon after giving the notice she was required to write a letter to the Manager. It was alleged that the Bank had claimed from Miss Goulder several days' pay and all accrued holiday pay. It was alleged that the deductions were "in the nature of a penalty". She claimed that an account be taken between the parties and that she be paid the salary and holiday pay due without deduction.

These matters were dealt with in much more detail in evidence.

Both appellants elected to resign from the Bank late in 1977. It is not disputed that each appellant gave fourteen days' notice of his resignation, and accordingly the last day each appellant spent at work with the Bank was 28 October 1977. Mr Lord tendered no notice in writing. Miss Goulder tendered her resignation in writing. In each case the notice fell short of the period of one month stipulated in the service agreement by two weeks. It was accepted that the relevant industrial award, in so far as it concerned termination of employment, has no direct

bearing on this case but it did provide for one month's notice of termination of employment.

It appears the Bank followed a cycle of fortnightly salary payments. The cycle for the end of October 1977 began on 21 October. Although the appellants ceased working after 28 October, difficulties with computer programming resulted in Mr Lord being paid a final salary for the period ending 3 November 1977. That date was the end of the fortnightly cycle. The payment for the four days that he did not work was thus an overpayment. What happened is shown by reference to the figures. The final payment lodged in Mr Lord's account on 2 November by direct credit was $162.62. The calculation of that figure included a gross fortnightly salary of $243.47 (including cost of living and location allowances) which, less tax of $55.16, gave a net figure of $188.31, from which deductions for Provident Fund and insurance premium totalling $25.69 were made, leaving the sum of $162.62. The four days' overpayment totalled in gross $96.52. There was no such overpayment error in Miss Goulder's salary calculation. Of the $127.63 final payment credited to her account on 2 November, $69.26 was her net salary after tax of $26.96 was taken from a gross fortnightly salary of $96.26 (which included cost of living and location allowances). To that was added holiday leave adjustment of $64.71 and a deduction of $6.34 for insurance was also made, leaving the sum of $127.63.

To summarize, on 2 November 1977 the Bank credited the sum of $162.62 to Mr Lord's account and the sum of $127.63 to Miss Goulder's account. In the figure credited to Mr Lord was the overpayment of $96.52 for four days that he had not worked.

The fact that each appellant had given only two weeks' notice was dealt with as follows. Purporting to act in accordance with the service agreement, an amount equal to the pay that the appellants would receive for two weeks' work was calculated. Those amounts were $243.47 in the case of Mr Lord and $160.35 in the case

of Miss Goulder. It should be noted that upon a strict construction of the service agreement the Bank was entitled to deduct a full month's salary. Thus, in its discretion, the Bank claimed less than the amount to which it was entitled in terms of the agreement. In addition, the Bank claimed and deducted the amount of money by which Mr Lord had been overpaid.

As already mentioned, the position of Miss Goulder differed in one respect, in that she had written a letter which reads as follows:

> "The Manager
> Australia and New Zealand Banking Group Ltd
> 90 The Terrace
> Wellington
>
> Dear Mr MacMillan,
>
> In consideration of the Bank consenting to my early release from the service on 28th October 1977, as requested in my letter of resignation dated 13th October 1977, I hereby authorise the Bank to make such adjustment to my final pay as necessary or, in the absence of any further salary entitlement, to debit my account with such sum as is determined in accordance with the provisions of the Industrial Award.
>
> I understand that any adjustment will be calculated on the basis of the difference between leave to which I was entitled at the date of leaving the service, less leave taken, and the number of days short notice given.
>
> Yours faithfully
> S. Goulder"

The method followed to recover the money was somewhat complicated. On 2 November $127.63 was directly credited to Miss Goulder's account. It has already been shown how that figure was arrived at. The Bank then recalculated Miss Goulder's final pay taking into account the sum of $160.35 as the amount claimed to arise through not giving sufficient notice. That recalculation left a

net balance that required Miss Goulder to pay the Bank $5.76. On the following day, 3 November, the Bank debited Miss Goulder's account with $133.38. That debit was made up of $5.76 plus $127.63, being the amount of the final pay she was initially given which had to be deducted to correct the effect of the first final payment the Bank made. There appears to have been a minimal mistake in the Bank's addition of the two figures ($5.76 plus $127.63 = $133.39). The effect of steps taken by the Bank on 3 November was to leave Miss Goulder's account with a debit balance of $5.09. The recalculation of Miss Goulder's final pay simply involved subtracting from the first assessment of her final payment $160.35, being the amount claimed for insufficient notice, and omitting to subtract PAYE tax from her salary for the days from 21 to 28 November. With the tax ($26.96) added back to the amount credited to her account on 2 November, the balance was $154.59. Her account was then debited with $160.35, which left a debit balance of $5.76.

The same process was followed in respect of Mr Lord's final pay. No bank statement covering Mr Lord's position was produced. The Magistrate's decision sets out these facts. On 2 November $162.62 was directly credited to Mr Lord's account, being the calculation of his final pay. The amount included the four days' payment for which he had not worked. The Bank then recalculated Mr Lord's final pay, which calculation did not include payment for the four days from 31 October to 3 November. This calculation took into account the $243.47 the Bank claimed Mr Lord owed for giving insufficient notice. That recalculation left a net balance which meant that Mr Lord was required to pay the Bank $69.16. On 7 November the Bank debited Mr Lord's account with $231.78. That debit was made up of the amount Mr Lord owed the Bank, $69.16, added to $162.62 being the amount of the final pay he was initially given by direct credit on 2 November. This amount had to be deducted to correct the effect of the first final payment the Bank made. The recalculation of Mr Lord's account was as

follows. His salary for the days 21 to 28 November, plus cost of living and location allowances, totalled $146.95. To that was added holiday leave adjustment of $47.93, totalling $194.88. From that amount was deducted $243.47 for the short notice and $20.57 for Provident Fund and insurance premium payments, making total deductions of $264.04. It will be noted that in the second calculation no deduction was made for PAYE tax, whereas in the first calculation $55.16 was deducted for tax. The deductions exceeded the credit by $69.16, which amount the Bank entered as a debit balance in Mr Lord's account.

The Magistrate found as a fact that Mr Lord was "well aware of the situation as far as his service agreement was concerned." The inference he drew from the evidence was that Mr Lord decided "he would leave with fourteen days' notice and take the consequences." The Magistrate also found that Miss Goulder was aware of what was in the agreement and was warned by the manager and the accountant as to notice. And the letter she signed was, of course, noted.

Having regard to the provisions of s 5 of the Minors' Contracts Act 1969 and Lord Dunedin's judgment in Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd (1915) AC 79, 86 to 88, the Magistrate decided, first, that the agreement was not "so inadequate" as to be "unconscionable" or "harsh and oppressive". The agreement, he pointed out, prevented the Bank from summarily dismissing its officers, except for misconduct, without a month's notice on either side. "These mutual requirements", he held, amounted to adequate consideration and he observed that the rules were "by no means unusual" and that the award was couched in "somewhat similar terms". On that basis, he found that the service agreement was clear, that "a month's notice" "means what it says" and "if an employee leaves early then he is liable to forfeit a month's salary." He rejected the submission that the amount involved was a penalty, accepting the Bank's case that it would be impossible to estimate loss which might accrue and that a period of notice should be regarded as "a

genuine attempt to pre-estimate a future loss". He also rejected the submission that the agreement was "in terrorem", pointing out again that the clause was mutual and fair in its application. Determining the matter on the basis of contract, the Magistrate concluded that any reference to a banker's lien was irrelevant and that a claim for set-off could not be relied on successfully. He held that, in any event, the actual overpayment to Mr Lord was recoverable by counterclaim and that the amount repayable should be fixed accordingly.

It is now necessary, in considering the issues which were debated, to set out the submissions of counsel in some detail.

Mr Cleary's first submission in this Court was that the service agreement signed by each appellant was subject to the Court's power to review a contract under s 5 of the Minors" Contracts Act 1969. Miss Goulder was 16 years old when she signed the contract on 13 January 1977. She was still a minor when she left the Bank's employment. Mr Lord was a minor when he signed the service agreement on 5 January 1972. His age on resigning does not appear in the evidence but he was no longer a minor. Mr Cleary submitted that the clause in the contract was "so inadequate as to be unconscionable" and was "harsh or oppressive" within the meaning of s 5. That submission was based on the proposition that a failure by one day to give proper notice, or a failure to give the notice in writing, gave rise to the Bank's claim to the equivalent of one month's salary.

Mr Cleary's next submission concerned the overpayment to Mr Lord for the four days that he did not work. The Magistrate had found that the Bank was unable to point to any specific authority, including the service agreement, to justify deducting that amount from Mr Lord's account and simply held the Bank was entitled to recoup the money owed arising from the short notice. Mr Cleary's submission was that the Bank had no authority to debit its customer's account in respect of the overpayment, but Mr Cleary did not dispute that the Bank was entitled to recover the over-

payment by a counterclaim.

Mr Cleary's third submission concerned the claims by the Bank for damages for breach of contract arising from short notice. He submitted that what was claimed in each case amounted to a penalty and not liquidated damages: see Chitty (24th ed) para 1602, and McGregor (14th ed) para 335, and the Dunlop Pneumatic case (supra). Mr Cleary submitted that the requirement to pay one month's salary for giving inadequate notice as provided in the service agreement was a threat to ensure the employee did not break the contract; a fixed sum representing 'damages' for breach, damages which were determined having no regard either to the employee's value within the context of the Bank's profitability, or to the damage actually suffered by the Bank as a result of the inadequate notice, but were merely equated with the employee's salary for one month. There was, Mr Cleary submitted, no evidence to show that the inadequate notice given by either appellant caused any damage to the Bank. He submitted that, in the context of the actual provision in the service agreement, it made no difference that the Bank claimed a lesser sum equivalent to the salary for the period by which the notice fell short of that required. It should be added that Mr Cleary in his final submissions submitted that if the contract had provided that the damages claimed for short notice was to be salary for the time by which the notice was short, then his submission that it was a penalty would fail.

Mr Cleary's fourth submission was that, by claiming the money for short notice as an employer, the Bank was in breach of s 7 of the Wages Protection Act 1964. This submission depended upon the claim for the short notice amounts being penalties. If they were penalties, he submitted, they were not deducted for a "lawful purpose".

Mr Cleary's final submission concerned the letter written to the Bank and signed by Miss Goulder, set out earlier. He submitted that the letter did not constitute a separate contract because there was no consideration in

return for Miss Goulder's resignation. Alternatively, he submitted that the Court should exercise its jurisdiction under the Minors' Contracts Act 1969, for the reasons already referred to.

Mr Wilson submitted that the letter signed by Miss Goulder constituted an agreement, the consideration being the Bank's agreement to forego the full amount of a month's salary and accept the equivalent of two weeks' salary.

Mr Wilson then repeated submissions previously made in the Court below by Mr Greig (as he then was). He submitted there were two questions: first, whether the Bank had any claim against the appellants in respect of the termination of their service and, secondly, whether the Bank was entitled to recover the amounts by way of deduction from the appellants' bank accounts. Both questions, he submitted, should be answered in the Bank's favour in accordance with the service agreement entered into by each appellant.

As to the question of "penalty", Mr Wilson pointed out that the amount claimed was less than the amount prescribed in the agreement and that the case is not one where various breaches, trivial and otherwise, led to one amount being payable. He submitted that, although there are a number of ways in which the breach of contract can occur, there is only one breach for which one amount is payable, namely, failure to give proper notice for which the money equivalent to one month's salary is payable.

Mr Wilson submitted that the provision in the contract to pay the amount was not in terrorem to ensure compliance with the contract. He pointed out that the appellants knowingly broke the contract regarding notice which was the notice accepted also in the award. Finally, he pointed to the impossibility of assessing the damages likely to be suffered by breach of the notice provision, at the time the contract was entered into, any more accurately than the method adopted. The onus to show that the agreement provided for a penalty, it was submitted,

was on the appellants.

Mr Wilson also submitted that the provision in the agreement was a genuine pre-estimate of damage, not a sum fixed in terrorem. He submitted that the problem of assessing damages where an employee has given short notice is very difficult and expensive which is the reason for adopting a pre-estimate. The loss would become more difficult to assess the longer the period of employment.

In the alternative, Mr Wilson submitted that, if it should be held that the provision in the service agreement was a penalty, the Court had sufficient evidence before it to assess the damages for the breach of contract and he submitted that the amount of those damages should be the actual amounts claimed by the Bank, namely the equivalent of two weeks' salary for each appellant.

Mr Wilson also relied on the letter written by Miss Goulder. He also submitted that the Bank had a right of set off arising out of the employer-employee relationship pursuant to which the appellants had sued the Bank.

Regarding the Minors' Contracts Act 1969, Mr Wilson argued that the clause was a standard clause in all the Bank's service agreements and that it was expressed in terms similar to the award. He submitted that the term was not unconscionable, harsh or oppressive and that the Magistrate had so found.

Mr Wilson's submission concerning the Wages Protection Act 1964 was that it does not apply to a situation arising after employment is terminated.

Having reviewed the facts and the submissions of counsel, it is clear the agreement provided for the deduction of a month's salary although a lesser amount was deducted, taking into account the shorter notice given in each case. Having considered the actions of the Bank fully, I am satisfied that the deductions were fairly made pursuant to the agreements entered into between the parties.

The fundamental question then is the effect of the provision as to notice. Considering the application of s 5 (2) of the Minors' Contracts Act to the agreements, I am unable to agree that the Magistrate's findings of fact were wrong. Those findings were related, of course, to the crux of the case whether the agreement provided for liquidated damages or a penalty. In considering that question, I need not restate the reasoning of Lord Dunedin in the Dunlop Pneumatic case (supra). At p 87, tests suggested by the authorities are set out. After referring to criteria which indicate "penalty", Lord Dunedin says:

> "On the other hand:
>
> (d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties."

In my opinion the present case comes within that category and what is said is the answer to Mr Cleary's submission that "not the slightest attempt was made to make the obvious relationship between the time given in the way of notice and the amount of time required." The question has to be considered "at the time when the stipulation is made" and it seems to me that the agreement between the parties should be regarded as "a genuine pre-estimate of damage" as compared with "a payment of money stipulated as in terrorem of the offending party", which was one of the comparisons between liquidated damages and penalty as stated by Lord Dunedin (at p 86). The amount of loss could not at any time, and particularly at the commencement of the service agreement, be reasonably calculated in money. What was arranged in the present case does not, in my view, come within the category which has been described as agreements that are "unconscionable and extravagant...which no Court ought to allow to be enforced" - see Webster v Bosanquet (1912)

AC 394, 398. A duty to give notice is a common requirement to avoid unnecessary loss; for example, to avoid loss due to premises becoming vacant and to avoid loss while a replacement for an employee is found. The facts in the Dunlop Pneumatic case were quite different but a further passage from the judgment of Lord Dunedin, at p 88, seems to me to be apt in describing the situation in the present case:

> "It is just, therefore, one of those cases where it seems quite reasonable for parties to contract that they should estimate that damage at a certain figure, and provided that figure is not extravagant there would seem no reason to suspect that it is not truly a bargain to assess damages, but rather a penalty to be held in terrorem."

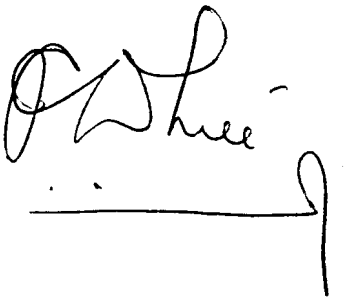
Under s 5 (1) of the Contracts Enforcement Act a contract of service entered into by a minor "shall have effect as if the minor were of full age" subject to subs (2). Applying subs (2), I do not agree, as I have already indicated, that the reasonable inference on the evidence was that the consideration for the promise in each case was "so inadequate as to be unconscionable" or that the agreement imposes an obligation on the minor which was "harsh or oppressive".

Having reached those conclusions it is unnecessary to consider other issues which were argued. In short, after considering the submissions as to the actions of the Bank and the application of the law to the circumstances, I consider that the decision of the learned Magistrate that the Bank acted lawfully in giving effect to the relevant clause of the agreement has not been shown to be wrong.

I have not overlooked the question of the overpayment of salary to Mr Lord which seems to me to have been left unclear in the argument having regard to what was said in the Magistrate's judgment. If necessary, I shall hear counsel further on this point, but it does

appear that in view of the concessions made in argument before me regarding a counterclaim there is no real dispute that the amount overpaid was recoverable and should be dealt with on that basis in entering judgment in these proceedings.

For the reasons given, the appeal is dismissed. As I have indicated, I shall hear counsel, if necessary, as to entering judgment and as to costs.



Solicitors for the appellant: J J Cleary (Wellington)
Solicitors for the respondent: Bell, Gully & Co (Wellington)