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THE HIGH COURT 2120

1977 No. 3650P

10 OCT 1984

BETWEEN/

MICHAEL FARRELL

PLAINTIFF

AND

THE MINISTER FOR DEFENCE

DEFENDANT

Judgment of Mr. Justice Murphy delivered this 10th day of July 1984.

This is a claim by the plaintiff on the grounds that his purported dismissal from his employment with the defendant on the 14th day of September 1976 was unlawful and wrongful.

Counsel on behalf of the defendant contended - with considerable justification - that there was some ambiguity as to the precise nature of the case being made on behalf of the plaintiff. The case was opened on behalf of the plaintiff on the footing that the plaintiff was a mere employee and not an office holder with the consequence that the need to hold an inquiry to which the rules of natural or constitutional justice would apply as a condition precedent to the dismissal had no application to this case. Certainly as I understood it, the case being made on behalf of the plaintiff was that there had been an effective but wrongful termination of his employment in circumstances which gave him an entitlement to damages not

merely for his loss of employment but entitled him also to a sum - perhaps a considerable sum - for what is frequently described as "mental distress". In fact the case on behalf of the plaintiff was closed on a rather different basis. It was then urged that the rules with regard to natural justice might or might not apply to a person who is in employment otherwise than as an office holder. Effectively what was argued was that where, as in the case of Glover .v. B.L.N. Limited 1973 I.R.388, an agreement between an employer and an employee provided that the employment should only be terminated for serious misconduct which was of a kind which in the unanimous opinion of the Board of Directors of the particular company affected the reputation, business or property of the company, it was necessary that the inquiry by the Board of Directors into the alleged misconduct and its effect should be conducted and determined in accordance with the rules of constitutional justice. In the present case it was not suggested that there was any express or implied term in the original contract of employment under which the employer was bound to conduct any such investigation less still in accordance with any particular standard. Instead the rather ingenious argument was advanced that the Minister through his agents having suspended the plaintiff from employment without pay and having called upon the plaintiff for an explanation of the particular incident which gave rise to the dispute had "mapped out a programme" which necessarily entailed the holding of an inquiry or

investigation and the proper determination of the allegations in accordance with the rules of natural justice.

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Apart from any procedural difficulties in making that case in the manner and circumstances in which it was done I believe that the basic argument is not entitled to prevail.

The facts of the matter insofar as they emerged in the hearing which, it must be recognised, took place nearly eight years after the events giving rise to the proceedings, were as follows.

The plaintiff was employed by the defendant as a civilian labourer and maintenance man in Collins Barracks in the city of Dublin from the 4th of June, 1965 until the 28th of June, 1976. It is not suggested that the conduct of the plaintiff during that period of employment apart from the incident in question was unsatisfactory in any way. On the 25th of June, 1976 the plaintiff having collected his weekly remuneration and "signed off" from his work about 5 p.m. left for his home in a motor car driven by a friend and neighbour Mr. Anthony Kileen who was also a civilian employee in Collins Barracks. The plaintiff and Mr. Kileen left the Barracks sometime about 5 o'clock and returned to their respective homes in the Ballyfermot area. After a short while Mr. Kileen called back to the plaintiff's house by arrangement and both men returned to Collins Barracks for the purpose of having a few drinks in the Sergeant mess there. There is some disagreement as to the precise time of their arrival at

and departure from the Barracks, but the general impact of the evidence is that the two men remained in the Barracks for about a half an hour after their return and finally departed sometime between 6.30 p.m. and 6.45 p.m. It was Mr. Farrell's evidence that they had two or three pints of stout and that he was in the company of Mr. Kileen at all times except when one or other of them went into the toilet.

Mr. Kileen's car was stopped at the gate on leaving the Barracks by Mr. O'Reilly who was at the time a member of the military police. Mr. O'Reilly's evidence was clear in all material respects. He had seen Mr. Kileen's car return to the Barracks and had noticed that the rear springs were normal at that stage. When leaving the Barracks some half hour later the boot was hitting the ground as the car went out. Of this Mr. O'Reilly was "absolutely positive". The sequence of events thereafter, which was not seriously challenged, seems to confirm the evidence of the military policeman. He closed the gate and requested Mr. Kileen to open the boot of the car. Mr. Kileen explained that he was either unable or unwilling to do so as he did not have the appropriate key, it being, or so he said, his brother's car. The matter was investigated further. Additional military policemen arrived and it was they who managed to open the boot of the car. There they found some 271 slates which it subsequently appeared were the property of the Minister and had their origin in Collins Barracks. The car was impounded and detained in the Barracks over

night with the result that Mr. Farrell and his companion had to walk, or make alternative arrangements, for getting home. Mr. Farrell's evidence was that he had been in the Sergeant's mess all of the time. He never saw the slates in the boot of the car. He did not get out of the car while they were being inspected. He took no part in the debate. Indeed he summarised his position by saying "I just was not interested".

On Monday, the 28th of June 1976 the plaintiff was handed a letter bearing that date informing him that as a result of the incident he was being suspended from his employment with effect from the 28th of June, 1976 and inviting the plaintiff to make any representation he wished. Indeed the letter concluded with the sentence:- "A written explanation is required immediately from you".

The plaintiff offered no explanation in writing or otherwise.

The Garda Siochana investigated the matter and Mr. Farrell was interviewed by Detective Garda Liam Coen. Mr. Farrell, having had the matter explained to him stated to the Detective Garda that "I have nothing to say". At that stage Mr. Farrell had obtained and was acting on the advice given to him by his lawyer. Subsequently Mr. Farrell and Mr. Kileen were prosecuted in the District Court for stealing the slates or alternatively receiving the same knowing the same to have been stolen. These proceedings were dismissed but there was some controversy as to whether they were dismissed on what was described as technical

grounds or on the merits. It is unfortunate that any such debate should have arisen because counsel who had advised Mr. Farrell was indeed the counsel who had originally signed a statement of claim on his behalf, although not the counsel who appeared for him at the hearing before me. I accept fully the evidence of Detective Garda Coen that in fact the proceedings were dismissed on the grounds that the District Justice accepted that the proceedings should have been brought under a different section of the Larceny Act.

After the conclusion of the District Court prodeedings Mr. Farrell returned to Collins Barracks but his immediate foreman refused to re-employ him without the authority of Commandant Shannahan, the officer commanding the maintenance engineers. Commandant Shannahan did not give authority to re-employ the plaintiff. After that Mr. Farrell remained in the canteen of the Barracks for a period and having failed to leave the Barracks was escorted out by two military policemen. Mr. Farrell complained that this was a matter of very grave embarrassment to him. It seems to me that in the circumstances a civilian employee who had been suspended from his employment - whether rightly or wrongly - and who chose to remain in the Barracks would properly be escorted from the premises and apart from any other consideration I cannot see that the plaintiff has any complaint under that heading. Apparently the next communication in relation to the matter was a letter of the 14th of September, 1976 in which Commandant Shannahan informed the plaintiff that his services

with the unit in question were being "terminated with effect from 14/9/1976".

Whilst no particular explanation was offered in that letter for the summary dismissal of the plaintiff it is clear from the replies to the notice for particulars - which it may be noted were not delivered until some days before the hearing of the action - that the reason for the dismissal was:-

"The plaintiff was involved in attempting to take a quantity of slates from Collins Barracks, which were the property of the Minister for Defence".

On behalf of the plaintiff it was accepted that Mr. Farrell could have been dismissed on reasonable notice. It was common case that in that event no investigation or inquiry of any description was required and accordingly the question of natural or constitutional justice would not arise. As to what constituted reasonable notice, counsel did argue in broad terms that the political and economic theories of the 19th century which lay behind the relationship of master and servant were no longer applicable in this country and that the principles of justice enshrined in our Constitution would guarantee a more just and humane treatment of employees than had been the case in earlier times. Even applying this rather vague argument the furthest that counsel for the plaintiff could go was to suggest that the plaintiff would have been entitled to three months notice of the termination of his employment. As the plaintiff was, at the date of termination of his employment, in receipt

of a wage of some £45.00 per week, it was clear that even on this extremely favourable interpretation of the duty of the employer to the employee that the maximum claim of the employee would be a sum under £600.00

Again it was argued on behalf of the plaintiff - though without any supporting authority - that where an employee who is entitled to, say, three months notice is given only one month's notice that the employee is entitled to damages equivalent to the two months salaries of which he was deprived whereas if an employee who is entitled to, say, one week's notice is given no notice at all that his dismissal is void and that he is entitled to all of the arrears of salary up to the time the proceedings are ultimately heard and indeed thereafter until the employment is validly terminated. I find it difficult to accept that this is a correct statement of the law. In fact it is directly in the teeth of the observation of Lord Reed in Ridge .v. Baldwin 1964 A.C. 40 at page 65 (and which was quoted with approval by Mr. Justice Kenny in Glovers case) at page 427 in the following terms:-

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"The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, the Master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract".

I fully recognise that Mr. Justice Walsh in delivering his judgment in the

Supreme Court in the Glover case expressly reserved his opinion as to the correctness of the statement aforesaid by Lord Reed. However in the absence of any authoritative review of the law I am happy to apply the proposition already cited from the decision in Ridge .v. Baldwin and, as I say, approved by Mr. Justice Kenny. I have no doubt but that by any standard the employment of Mr. Farrell with the Minister was effectively terminated. The only question that I would have to consider is to whether in the circumstances it was necessary to give notice of the termination of the employment and if so the duration of such notice.

Again I do not accept the argument to the effect that the "mapping out" of a course or programme by the employers which indicated or seemed to indicate that an inquiry was being held or would be held conferred upon the employee the right to any such inquiry if not previously incorporated in his terms of employment. It is perfectly true that no evidence was given on behalf of the defendant that he, the Minister, or indeed any other person reviewed the facts of which evidence was given before the Court and concluded that it was an appropriate case in which to dismiss the plaintiff in a summary manner. On the other hand I do not think that the plaintiff was left in any doubt as to what his position was. He and his colleague were found in a motor car which contained property which appeared to have been very recently stolen from the Minister/employer. Though asked to do so the plaintiff declined to offer any

explanation for this embarrassing circumstance. The fact that the plaintiff had the legal right, which he exercised, to remain silent when charged with a criminal offence arising from the same incident must be distinguished from his situation as an employee where he owed to his employer a general obligation to respect and protect as far as practicable the property of the employer. In those circumstances to refuse any explanation either at the time when the incident occurred or subsequently when called upon in writing so to do would in my view justify the employer or any third party in drawing the inference that the plaintiff had been involved in an attempted larceny of his property and accordingly was not trustworthy. However, as I say, it was not a matter in which it was necessary for the employer to hold any form of inquiry nor indeed would the holding of an inquiry necessarily have protected the employer. In a case of summary dismissal the employer must establish not to his own satisfaction but to the satisfaction of the Court that a state of fact existed which justified the employer in taking the action which he did. I am quite satisfied that on the balance of probabilities, that is to say the onus appropriate to a civil case, that the plaintiff was at the time in question involved in an incident, namely, the theft of the slates in question, which would and did justify the employer in dismissing him summarily.

Accordingly in my view the plaintiff's claim herein must fail.

Francis D Murphy