Privy Council Appeal No. 6 of 1925.

Thomas Caven - - - - - - - *Appellant*

v.

The Canadian Pacific Railway Company - - - - *Respondents*

FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 6TH JULY, 1925.

Present at the Hearing:
LORD BUCKMASTER.
LORD ATKINSON.
LORD SHAW.
LORD PARMOOR.

[*Delivered by* LORD SHAW.]

The appellant, at the time of the incidents about to be referred to, culminating in his dismissal in October, 1923, had been for a good many years in the service of the respondents, the Canadian Pacific Railway Company, as a passenger conductor.

In November, 1920, an agreement, called the Union Agreement, was entered into between the railway company and its conductors and various other servants, the agreement to "remain in force subject to 30 days' notice from either party." It is matter of admission that the contract of service between the respondents and the appellant was regulated by this agreement. The appellant explains quite properly in his evidence that he read Exhibit I, and from that time, namely, in 1920, when he received it, and up to the time of his discharge, he worked under it.

It may be mentioned that agreements similar to this in form had been in force between the company and its employees since about the year 1891, variations being introduced from time to time according to, presumably, the results of the deliberations between the representatives, on the one hand, of the employees, and, on the other, of the employers.

The one question of importance in this case has reference to the construction of Article 10 of the agreement, dealing with the subject of discipline and dismissal. That article is in the following terms :—

"Discipline and Dismissal.

"No trainman shall be disciplined or dismissed until his case has been investigated and he has been proven guilty of the offence against him, and decision rendered. He, however, may be held off for such investigation for a period not exceeding three days, and when so held off he will be notified in writing that he is being held off for that purpose and advised of the charges against him. He may, if he desires, enjoy the privilege of the assistance of a fellow employee in stating his case at the investigation, and will be given a copy of statement made by him at the investigation. All material and necessary witnesses must be notified in writing to appear. If they appear, their evidence shall be taken in the presence of the accused. If they do not appear the accused shall be furnished with a copy of their written statements and their names. If accused is not satisfied with the decision, he will be given an opportunity of reviewing the evidence and may appeal through his representatives to the higher officials. Should the charge not be proven, the trainman will be reinstated at once and paid for all time lost at schedule rates and reasonable actual expenses.

"Should the charge be proven, the trainman will be paid his reasonable actual expenses for the time he may be held away from his home terminal in excess of three days, but nothing for the time lost, nor for expenses if not held longer than said three days.

"Note :—It is understood that men will not be held off unnecessarily and caused to lose time under above rule.

"When a trainman is discharged or resigns he will, within five days, be paid and given a certificate, stating the term of service and in what capacity he was employed."

Before dealing with the construction of this article, it may be advisable to give the following brief narrative of the facts and procedure :—

On the 17th October, 1923, certain information having reached the respondents as to irregularities in the discharge of his duties, the appellant was notified that he was being held off duty for the purpose of attending an investigation. The letter is in the following terms :—

"*17th October*, 1923.

"Dear Sir,

"You are being held off duty for the purpose of attending investigation in my office at 16.00K, Thursday, October 18th, in connection with it being charged that, while in charge of Train 67 Macleod to Kootenay Ldg. on September 8th, 1923, you accepted one dollar and fifty cents from male passenger for transportation Macleod to Blairmore and that you collected cash fare from male passenger on same train, Lundbreck to Blairmore, and failed to account for it to the Auditor Passenger Receipts. Also that on August 30th while in charge of same train you collected numerous cash fares from passengers and failed to account for same to auditor passenger receipts.

"Yours truly,
"T. R. FLETT,
"Superintendent."

On the 18th October, 1923, the appellant appeared before Mr. Flett and denied the charges, and he was informed that an investigation would be held. It was held on the 25th October, 1923. The appellant was present and he was assisted by Mr. W. A. Wilson, a conductor in the respondents' employment and a member of the Grievance Committee of the Order of Railway Conductors. This was in accordance with section 10, which provided that the employee "may, if he desires, enjoy the privilege of the assistance of a fellow employee in stating his case at the investigation." Various persons were examined. It is undesirable to enter upon the details in this judgment further than to say that, after evidence led, the investigation concluded adversely to the appellant and he was accordingly notified of his dismissal.

Up to that point the appellant had attended the investigation and taken part therein, and had the assistance of his fellow employee, as stated, and the parties on both sides proceeded in accordance with Article 10. Under that article, however, "if accused is not satisfied with the decision he will be given an opportunity of reviewing the evidence and may appeal through his representatives to the higher officials." In the appellant's evidence he states who those higher officials were. "I could take it," he says, "to the higher positions of the Canadian Pacific Railway Company or the Order of Conductors." It is unnecessary to pursue this matter, for the appellant did not avail himself of the appeal provided by the agreement, but had recourse to a Court of law and brought this action on the 27th November, 1923.

He claimed various declarations, as follows :—

"(*a*) A declaration that the defendant has not complied with the conditions precedent to its right to dismiss the plaintiff and that its alleged dismissal of the plaintiff and its notice of dismissal to the plaintiff are null and void and of no effect.

"(*b*) A declaration that the plaintiff has not in law been proven guilty of the charges laid against him.

"(*c*) A declaration that the plaintiff is in law entitled to have the charges against him heard before a board of arbitration or other impartial tribunal.

"(*d*) A declaration that the plaintiff is entitled to be reinstated in the service of the defendant company in his capacity as a passenger conductor and to be paid for all time lost since the 17th of October, 1923, at schedule rates.

"(*e*) An injunction restraining the defendant from keeping the plaintiff out of service as a passenger conductor on the defendant's railway.

"(*f*) In the alternative a declaration that the plaintiff was improperly dismissed from the defendant's service and judgment in the sum of twenty-five thousand dollars ($25,000.00) for damages for wrongful dismissal."

He further claimed an injunction "restraining the defendants from keeping the plaintiff out of service as a passenger conductor on the defendants' railway." It is plain that all this part of the case is based upon the footing that the railway company has violated, by inaccuracy and impropriety of procedure, Article 10 of the agreement. The provisions of that article are dealt with as

conditions precedent to its right to dismiss the appellant. This is naturally followed with the demand that the company should by law be held by the agreement and, having failed to fulfil it, then the Court should declare that he was in terms of it entitled to reinstatement, and the Company should be restrained from keeping him out of its service.

In the case for the appellant the reasons were stated for attacking the procedure. They are of a somewhat unusual character, and are as follows :—

First, " That the passengers on the train from whom, it was alleged, the appellant received fares without accounting therefor, were material and necessary witnesses " and had not been called. At the Bar it was maintained that it was the duty of the railway company to produce all the witnesses in the carriage where the defalcation took place. In their Lordships' opinion such a demand is quite unreasonable. It is true that Article 10 provides for calling all material and necessary witnesses, but when, in the conduct of an investigation, enough has been provided to satisfy a tribunal, or a Court, or an investigator, more than enough are quite immaterial and quite unnecessary. Such an agreement ought to be interpreted on this plain and sensible footing.

The *second* ground of attack on the procedure was that there was no evidence. This is unintelligible. In argument it was maintained that the investigators did not put the persons coming before them on oath. There is no stipulation of this kind in the agreement, and in their Lordships' view the investigators could quite well discharge their duties of enquiry and determination without putting witnesses on oath. It is possible that a point on this head might possibly arise if any protest against examination of witnesses without their being sworn had been put forward: but no such protest was made. The objection accordingly fails. it being long settled, even in much more formal proceedings of arbitration than an investigation such as that under consideration, " it is no ground for setting aside an award that the arbitrator (a layman) has examined witnesses, not upon oath or affirmation, if that mode of proceeding was not objected to at the time of examination " (*Briggs* v. *Hansell*, 1855, 16 C.B., Reports 562).

The 3rd objection is that the investigation was initiated and carried on contrary to the principles of natural justice because the tribunal " was biased and the appellant was not given a fair opportunity to defend himself." The latter portion of the charge is out of the question and the former portion is without any proof. It is sufficient to close this part of the case with the expression of their Lordships' concurrence with the judgment appealed from to the effect that none of the grounds assailing the justice or propriety of the investigation under Article 10 have been made out.

It must be noted again, however, that all of these pleas and arguments are founded upon an affirmation of the agreement, and of the plea that it bound both parties. The first reason given by the appellant, is in the following terms :—

he should appeal to the higher officials already mentioned. He did not take that course, and his plea is that, having acted in these proceedings as now described, he is nevertheless entitled by law to bring an action for wrongful dismissal.

In the opinion of the Board the law cannot support such a demand. It is a mistake to think that such a demand if admissible could only proceed from one side. Under arguments identical with those of the appellant, the railway company could plead as follows :—

"We, the company, entered into an agreement with the representatives of our men regulating the subject of discipline and dismissal. We challenge the conduct of one of our employees. We were parties to an investigation under the agreement and we examined witnesses in the course of that examination, and it closed with a determination by the investigators entirely in the workman's favour; nevertheless, we shall not act upon that report. The agreement binds us to reinstate him. We shall not do so. The agreement binds us to pay him back wages. We shall not do that either. He stands dismissed, and, if necessary, we shall appeal to the Courts of law to determine the whole matter *in foro publico.*"

This would be the exact parallel of the case now before the Court stated not from the side of the workmen but from the side of the employers. It is needless to say that from whichever side the argument comes the law must address itself so as to distribute justice equally between both parties to this contract. It is from that point of view that the agreement, namely, as one binding not one party but both parties, must be examined.

Article 10 has been already quoted. Under the first half of it, it is provided that "no trainman shall be disciplined or dismissed until his case has been investigated and he has been proven guilty of the offences against him and the decision rendered." He is to be advised of the parties against him, to have the privilege of the assistance of a fellow employee in the investigation, and to get a copy of the statements made, and all material and necessary witnesses are to be notified to appear. The evidence of the witnesses is to be taken in the presence of the accused, and, if they do not appear, the accused is to have a copy of their written statements and the names.

As already determined, this investigation took place according to the contract. The legal proceedings deal, then, with the situation of the parties after the decision by the investigators. In their Lordships' view this part of Article 10 makes it clear what course is to be adopted and is obligatory and exhaustive :—

1. If the accused is not satisfied, he may appeal to the higher officials. This right on the part of the accused had its correlative in a duty on the part of the employers. They could not object if such an appeal was taken, and it was their duty to follow it and to continue, if they so desired, to maintain their position on appeal.

(1) Because the schedule constitutes a binding agreement between the respondents and the appellant.

The second reason is :—

(2) Because the appellant could not be dismissed by the respondents until Article 10 of the schedule had been complied with.

In the opinion of their Lordships the first reason is sound. They think, however, that the second reason entirely fails upon the facts which were clearly established.

The case would therefore naturally seem to come to its end.

But in the course of a long plaint, namely in Article 23 thereof, " the plaintiff further says that the defendant wrongfully terminated the plaintiff's employment with it, and has wrongfully refused to reinstate him as a passenger conductor," and, among numerous claims made in the plaint, one, namely, F., occurs in this form :—

> " In the alternative a declaration that the plaintiff was improperly dismissed from the defendant's service and judgment for the sum of $25,000 for damages for wrongful dismissal."

It cannot be said accordingly that counsel for the appellant went beyond their rights in claiming to plead that, assuming the case against their client of irregularities or improprieties in the arbitration in which he took a part has failed, he is nevertheless—when the enquiry has resulted adversely to him—entitled to throw over the arbitration proceedings, altogether to declare the whole of these to have been worthless, and to maintain that he has a case for wrongful dismissal, which, notwithstanding the investigation contracted for having been held, Courts of law should again proceed to try. The argument is that it was contrary to law to exclude a contract of service from the jurisdiction of the ordinary tribunals. Such a question presented in the abstract might no doubt, in conceivable circumstances, raise a wide and important issue. It is clear that the interests of both parties, and their past labours in collective bargaining might be seriously affected and rendered futile even under such an abstract challenge, and that, no doubt, would, along with serious legal issues, be one of the points for consideration in such a case.

But this case does not present any such abstract question and must be decided upon the view taken of the contract, the reference, and the acting of parties thereunder.

These have been already indicated. The investigation provided for under Article 10 was held. The appellant and his friend appeared on the one side, the railway representative appeared on the other. The appellant took a full share along with Mr. Wilson, his friend, in the investigation, the witnesses were examined, and the investigation resulted, unhappily for the appellant, in the charges being in the estimation of the investigators held proved. The course open to the appellant under the agreement was plain, namely that if he was dissatisfied

2. Should the charge not be proven, the trainman will be reinstated at once and paid for all time lost at schedule rates and reasonable actual expenses. This appears clearly to state as matter of contract that the trainman has the right to be reinstated and paid for lost time and the correlative to that is the obligation of the railway company to reinstate and to make that payment. It would not, in their Lordships' opinion, have been open to the company to throw over the investigation, to decline reinstatement or payment, and to dismiss. And Courts of law could have been properly appealed to to prevent such action.

The other event is also matter of contract under Article 10 and applies to the case of the charge being found proven by the investigators. In that case the trainman will be paid his reasonable actual expenses away from his home terminal in excess of three days, but nothing for the time lost, nor for expenses if not held longer than three days, and he will within five days be paid and be given a certificate stating the term of service, and in what capacity he was employed. These conditions bind the railway company, which is willing to comply with them.

But the appellant refuses to accept that termination per contract as a satisfaction of his rights. He argues that he has a right to recover damages at common law as for wrongful dismissal, irrespective of and ignoring Article 10 and all that has been proved and done under it.

The situation is that the Courts of law, having been appealed to, in a suit for wrongful dismissal, the defendant tables the agreement and the proceedings thereunder, and states the defence that the contracted-for investigation has been held and resulted as described, and maintains that it is thus conclusively established that the dismissal was not without just cause and was not wrongful. On the contrary, it is established that just cause existed for the appellant's dismissal. Once the allegations made against the regularity or propriety of the investigation were seen to be unfounded, then this defence was, so to speak, instantly verified.

It must be observed that the arrangement made in the contract for settlement of the questions of discipline and dismissal are ancillary to, and indeed part of, the contract of service itself. The citation of *Scott* v. *Avery*, 5 House of Lords Cases, p. 843, and cases of that description is not helpful to the appellant. *Scott* v. *Avery*, no doubt, is read as having decided that parties cannot, by contract, oust the Courts of their jurisdiction. But it also decided that any person may covenant that no right of action shall accrue till a third person, contractually appointed and selected, has decided on any difference that may arise between himself and the other contracting party.

It is a mistake to treat *Scott* v. *Avery* as being confined to the question of insurance, or even building contracts, and to the ascertainment by conventional arbitral arrangements of sums due as being a condition precedent to maintaining an action. Said the Lord Chancellor (Lord Cranworth) :—

> "Now this doctrine depends upon the general policy of the law, that parties cannot enter into a contract which gives rise to a right of action for

the breach of it, and then withdraw such a case from the jurisdiction of the ordinary tribunals. But surely there can be no principle or policy of the law which prevents parties from entering into such a contract as that no breach shall occur until after a reference has been made to arbitration. It appears to me that in such cases as that, the policy of the law is left untouched."

And Lord Campbell observed in reference to the insurance contract then under consideration :—

". . . And, upon a deliberate view of the policy, I am of opinion, that it embraced not only the assessment of damage, the contemplation of quantum, but also any dispute that might arise between the underwriters and the insured respecting the liability of the insurers, as well as the amount to be paid. If there had been any question about want of seaworthiness, or deviation, or breach of blockade, I am clearly of opinion that, upon a just construction of this instrument, until those questions had been determined by the arbitrators, no right of action could have accrued to the insured."

And the noble Lord proceeded to state the principle in much greater fullness, thus :—

"What pretence can there be for saying that there is anything contrary to public policy in allowing parties to contract that they shall not be liable to any action until their liability has been ascertained by a domestic and private tribunal, upon which they themselves agree? Can the public be injured by it? It seems to me that it would be a most inexpedient encroachment upon the liberty of the subject if he were not allowed to enter into such a contract. Take the case of an insurance club, of which there are many in the north of England; a noble Lord now present, who is connected with that part of the country, is probably aware of it: there are insurance clubs of this sort in Newcastle and in all the seaports of the north. Is there anything contrary to public policy in saying that the company shall not be harassed by actions, the costs of which might be ruinous, but that any dispute that arises shall be referred to a domestic tribunal, which may speedily and economically determine the dispute? I can see not the slightest ill consequences that can flow from such an agreement, and I see great advantage that may arise from it. Public policy, therefore, seems to me to require that effect should be given to the contract."

Underlying the whole of this doctrine no sanction can be found for the proposition that in such a case as the present the contract can be either ignored or be held to be invalid because it excluded the jurisdiction of the Courts of law. The conventional investigation has been made. The action is in Court. Any parties to actions having complied with what has been conventionally prescribed for the ascertainment of figures, or the determination of facts, are then in a position of founding upon that ascertainment and determination and making these effective (if the other party be still recalcitrant) in a Court of law.

In the opinion of the Board the doctrines thus cited from *Scott* v. *Avery* are not only sound, but they are clearly applicable, not only to the plaintiffs, but to the defendants in a suit. The present case is an apt instance of how the principle applies as it ought to apply to both sides. The appellant, in fact, pleads that the agreement bound both parties, but that the respondents failed to obey its conditions by having a proper enquiry, and, in his own

language, that the condition precedent to the right of dismissal had, therefore, not arisen. This is quite a correct statement of how the position stands, and had the conventional investigation been successfully attacked, then a judicial investigation on the issue of wrongful dismissal might naturally follow. But the attack has entirely failed, and it has been, therefore, necessary to consider broadly the position, not of one party, but of both when such an investigation concludes and a decision is given. Such a decision must be respected and honoured by both parties. It would not, in the judgment of their Lordships, have been open to the railway company to ignore it or treat as worthless. Upon the contrary, if it had been established that just cause for dismissal did not exist then reinstatement would have resulted by contract, and this result would, if legal proceedings had ensued, have been affirmed by law. Equally, from the other point of view, when it has been affirmatively established that a just cause did exist for dismissal, then a Court of law seized of that fact must give effect to it and the defence must be sustained. The principle of law thus stated is seen to be one of equal obligation to both sides in such a dispute, binding upon both employer and employed.

Their Lordships will therefore humbly advise His Majesty that the appeal fails and should be dismissed with costs.

In the Privy Council.

THOMAS CAVEN

v.

THE CANADIAN PACIFIC RAILWAY COMPANY.

DELIVERED BY LORD SHAW.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.

1925.