Noor Mohamed bin Mumtaz Shah v Apollo Enterprises Ltd (trading as Apollo Hotel Singapore) [2000] SGHC 58

Case Number : DA 34/1999

Decision Date : 11 April 2000

Tribunal/Court : High Court

Coram : Lee Seiu Kin JC

Counsel Name(s) : Andrew J Hanam (Edmond Pereira & Partners) for the appellant; Kee Lay Lian and Allen Choong (Rajah & Tann) for the respondents

Parties : Noor Mohamed bin Mumtaz Shah — Apollo Enterprises Ltd (trading as Apollo Hotel Singapore)

Employment Law – Termination – Whether termination with notice or termination with cause – Whether right of termination with notice removed by Retirement Age Act (Cap 274A) -ss 10, 11 & 14 Employment Act (Cap 91) – s 4 Retirement Age Act (Cap 274A)

Employment Law – Contract of service – Termination with notice – Whether termination solely or mainly because of redundancy – When presumption that dismissal on ground of redundancy arose – Burden of proof

: The defendants, who are the respondents in this appeal, operate Apollo Hotel Singapore at Havelock Road. The plaintiff-appellant was employed by the defendants as a lift attendant on 13 September 1973. He remained in their employment in various capacities, as a bell-hop and finally as a driver for almost 25 years. By way of a letter dated 31 August 1998 (`the letter of termination`) signed by the defendants` personnel manager, the plaintiff`s employment was terminated. The plaintiff was dissatisfied with his termination and referred the matter to his union whose officials made representations to the defendants on his behalf. When this did not work, the union made a formal application to the Ministry of Manpower pursuant to the Employment Act (Cap 91) (`the Act`). This recourse was not proceeded with when the plaintiff commenced this action in the District Court in DC Suit 7558/98.

The plaintiff alleged that the defendants terminated his employment because of redundancy and claimed for retrenchment benefits provided under the Collective Agreement (`the CA`). In the alternative, he claimed that his dismissal was in breach of s 14 of the Act and claimed damages. He also claimed certain amounts in respect of meals not provided by the defendants and telephone expenses. In their defence, the defendants pleaded that the plaintiff`s employment was ` ***terminated due to his bad working attitude and difficult behaviour according to the employment contract*** `. The defendants averred that the termination was not a dismissal under s 14 of the Employment Act and submitted that as a matter of law, they were entitled to terminate the plaintiff`s employment with one month`s pay in lieu of notice as provided in ss 10 and 11.

In the court below, the district judge dismissed all the plaintiff`s claims. He found on a preliminary determination that ss 10 and 11 of the Act gave the defendants the right to immediately terminate the plaintiff`s employment with payment of one month`s pay in lieu of notice. In view of this finding, the district judge said that the question of wrongful dismissal did not arise and did not examine this issue. The trial proceeded on the question of whether it was a disguised redundancy retrenchment and on the plaintiff`s claims in respect of meals and telephone calls. Before me the plaintiff appealed against the decision of the court below. After hearing the submissions from counsel, I allowed the appeal in relation to the main claim for redundancy payment, but dismissed the appeal in respect of the claim for reimbursement for meals and telephone calls. The defendants have filed notice of appeal against the order relating to wrongful termination and I now give my grounds of decision. [The appeal was withdrawn - Ed.]

Whether plaintiff was dismissed

In para 5 of their defence, the defendants averred that the plaintiff`s employment was ` ***terminated due to his bad working attitude and difficult behaviour according to the employment contract*** `. It is not clear whether this means that he was dismissed. Before examining this, I first set out the definitions of two terms that I will use in this judgment. Section 10 of the Act provides that either party to a contract of service may give notice of his intention to terminate such contract. The length of such notice shall be that provided in contract or, in the absence of such provision, shall range from one day to four weeks depending on the period of employment. Section 11 provides that either party may dispense with such notice period by payment to the other party the salary that the employee would have earned during that period. I will use the term `termination with notice` to describe termination (or purported termination) pursuant to s 10 or 11, ie whether it is with notice or payment of salary in lieu of notice. In a termination with notice there is no requirement for either party to have or give reasons for the termination. Hence when the defendants plead that the plaintiff was terminated on grounds that appear to suggest misconduct, there is uncertainty as to whether it is a termination with notice.

The second term is `dismissal with cause` which I will use to refer to dismissal pursuant to s 14 of the Act. That section provides as follows:

> *(1) An employer may after due inquiry dismiss without notice an employee employed by him on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service except that instead of dismissing an employee an employer may -*
>
> *(a) instantly down-grade the employee; or*
>
> *(b) instantly suspend him from work without payment of salary for a period not exceeding one week.*
>
> *(2) Notwithstanding subsection (1), where an employee considers that he has been dismissed without just cause or excuse by his employer, he may, within one month of the dismissal, make representations in writing to the Minister to be reinstated in his former employment.*
>
> *(3) The Minister may, before making a decision on any such representations, by writing under his hand request the Commissioner to inquire into the dismissal and report whether in his opinion the dismissal is without just cause or excuse.*
>
> *(4) If, after considering the report made by the Commissioner under subsection (3), the Minister is satisfied that the employee has been dismissed without just cause or excuse, he may, notwithstanding any rule of law or agreement to the contrary -*
>
> *(a) direct the employer to reinstate the employee in his former employment and to pay the employee an amount that is equivalent to the wages that the employee would have earned had he not been dismissed by the employer; or*
>
> *(b) direct the employer to pay such amount of wages as compensation as may*

be determined by the Minister, and the employer shall comply with the direction of the Minister.

(5) The decision of the Minister on any representation made under this section shall be final and conclusive and shall not be challenged in any court.

(6) Any direction of the Minister under subsection (4) shall operate as a bar to any action for damages by the employee in any court in respect of the wrongful dismissal.

(7) An employer who fails to comply with the direction of the Minister under subsection (4) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 12 months or to both.

(7A) Where any amount to be paid by an employer under subsection (4) is not paid in accordance with the direction of the Minister and the employer has been convicted of an offence under subsection (7), the amount or so much thereof as remains unpaid shall be recoverable by the court as if it were a fine and the amount so recoverable shall be paid to the employee entitled to payment under the direction of the Minister.

(8) For the purpose of an inquiry under subsection (1), the employer may suspend the employee from work for a period not exceeding one week but shall pay him not less than half his salary for such period.

(9) If the inquiry does not disclose any misconduct on the part of the employee, the employer shall forthwith restore to the employee the full amount of the salary so withheld.

Section 14(1) provides for two remedies to the employer in the case of employee misconduct, viz dismissal or punishment (by down-grading or suspension from work without salary of up to one week). We are concerned here only with dismissal. Under this provision, the employer has the right to dismiss an employee without notice if, after due inquiry, he finds that the employee has engaged in misconduct inconsistent with the fulfilment of the express and implied conditions of his service. There are safeguards in s 14 against a wrongful dismissal. The employee may make written representations to the Minister within one month and the Minister may cause an inquiry to be made as to whether the dismissal was without just cause or excuse. If the Minister is satisfied that the employee was dismissed wrongfully, he may direct reinstatement of the employee or monetary compensation to be made.

It can thus be seen that if an employer makes a termination with notice, he is obliged to give the employee a certain period of notice during which the latter continues to be paid his salary, or to give the employee salary in lieu of notice. On the other hand, if termination is by way of dismissal with cause, no notice period is required to be given although there is nothing to prevent the employer from giving notice. However the employer must make due inquiry as to the alleged misconduct. Also the employee has recourse to the Minister if he feels that the dismissal is wrongful.

Proceeding to the circumstances of this case, the defendants` letter of termination dated 31 August

1998 is entitled `Letter of Termination` and states as follows:

> *I am to inform that the Hotel has decided that your services are no longer required and your employment with the Hotel will be terminated with effect from 1 September 1998. In accordance with your contract of employment, the Hotel hereby gives you one (1) month salary in-lieu of notice for the termination of your Contract. ... your last day of service with the Hotel shall be today, 31 August 1998. ...*

This letter states that the ground for termination is that the plaintiff`s services `are no longer required`. It also states that, in accordance with the `Contract of Employment`, the plaintiff is given one month`s salary in lieu of notice. The parties agree that the employment contract, insofar as it is written, is contained in (i) a document entitled `Employment Agreement` dated 13 September 1973; (ii) the CA; and (iii) any provision of any written law. The first two documents do not mention any right on the part of the defendants to terminate the plaintiff`s employment with payment of one month`s pay in lieu of notice although the plaintiff is obliged to give one month`s notice of resignation. Section 10(2) of the Employment Act provides that the length of notice shall be the same for both parties and it would follow that the defendants would also be obliged to give one month`s notice. In any event, s 10 of the Employment Act supplies the default notice period, which in the plaintiff`s case amounts to four weeks.

There is no express provision in the employment contract, apart from s 14 of the Employment Act, for `termination` for misconduct generally or on any of the grounds stipulated in para 5 of the defence. It would appear that if the defendants had bona fide grounds for terminating the plaintiff`s employment for misconduct, for some reason they had decided not to seek recourse under s 14 of the Employment Act. As I have pointed out above, that would have entailed making `due inquiry` and the possibility of an inquiry and intervention by the Minister.

Finally, there is no mention in the letter of termination of any misconduct on the part of the plaintiff nor of any `due inquiry` being made. And in para 10 of the defence, the defendants aver as follows:

> *... The plaintiff`s service was terminated according to the employment contract as stated in para 5 herein. The plaintiff was not dismissed for misconduct and s 14 of the Employment Act is inapplicable in the circumstances.*

Therefore, the only conclusion is that it pertains to termination with notice and not dismissal with cause.

Whether termination was due to redundancy

Notwithstanding that the defendants take a somewhat confused position in their defence, on the face of the letter of termination they had purported to make a termination with notice pursuant to ss 10 and 11 of the Act. The plaintiff claims that he was in fact retrenched and that the defendants had merely disguised this as a termination with notice in order to avoid paying him redundancy benefits under the CA in which cl 20 provides as follows:

> *20 Retrenchment*

(1) Subject to the provisions of the Employment Act, an employee who has served for not less than three continuous years with the Hotel shall be paid a retrenchment benefit on the termination of his service on the ground of redundancy or by reason of any reorganisation or liquidation or voluntary winding up at the rate of one month`s basic salary last drawn for each year of continuous service and a proportionate part thereof for any incomplete year of service.

(2) In the event of retrenchment, the Hotel shall give an employee two months` notice of termination or two months` pay in lieu of notice.

Factual background

The defendants decided in late 1997 to merge Apollo Hotel with Furama Hotel. Their Group General Manager, Mr Cliff Leong (PW2) said that the merger was for the survival of the hotel because they were undergoing a difficult period and 1998 was worse. He said that four departments would be merged, viz. (i) sales and marketing, (ii) purchasing, (iii) public relations and (iv) training. There was no merger of the Front Office Department, which the plaintiff was in. But both the plaintiff and the Furama Hotel driver were required to transport passengers of both Hotels, a move designed to achieve greater efficiency in the use of resources. The Furama Hotel driver resigned sometime in July 1998, leaving the plaintiff as the sole driver for both hotels. On 31 August 1998 the plaintiff was handed the letter of termination, with that day to be his last day of service. Then on 2 September 1998, the defendants wrote to Jamilah Ahmad, the Office Assistant in the Front Office Department, to inform her that they would re-designate her position to include performing the duties of a driver. The letter states as follows:

Please refer to our discussion on 2 September 1998 ... in respect of the integration and operational merging of both Apollo Hotel Singapore and Furama Hotel Singapore. As you are aware, the current economic situation continues to worsen for all business sectors. Companies regardless of its size are making concerted effort to maintain their competitive edge in order to ride the regional economic turmoil.

At Apollo and Furama Hotels, we too are striving for better results to remain competitive. As both hotels embrace new challenges, its employee`s contribution play an important role in its development. In its effort, employees were prepared to perform additional duties as in job enlargement. Since you possess a valid Class 3 driving licence, the hotel will assign you to perform additional duties of a driver and re-designate your appointment from Office Assistant to Office Assistant cum Driver with effect from 1 September 1998 ...

This letter also informed her that the new appointment would entail an increase in her basic salary by $250, from $837 to $1087 per month. In comparison, the plaintiff`s last drawn basic salary was $1,369.

The defendants say that the plaintiff was a difficult and uncooperative employee who had caused problems and disruptions at work. This was what the district judge said at para 9 of his judgment:

> *The appellant performed his new duties but raised a query with the Union on the propriety of the new arrangement. The appellant also subsequently on various occasions wrote to the Ministry of Manpower and raised issues pertaining to alleged extra working hours, reimbursement of telephone charges and payment of food allowance. As a result of his complaints, the respondent and the Union had various meetings to resolve the matters raised by the appellant.*

For these reasons they decided to terminate his employment. The defendants do not dispute that they did not employ another person to replace the plaintiff in his position as a driver and that they enlarged the position of the Office Assistant to include performing the task of a driver. In so doing, the defendants stood to save each month the plaintiff`s salary of $1,369 (less the $250 increment granted to the Office Assistant cum Driver) as well as various allowances. By characterising it as a termination with notice, they also stood to save retrenchment benefits under the Collective Agreement of a sum equivalent to almost 25 months of his basic salary, amounting to about $33,000 (less one month`s salary given in lieu of notice).

The defendants say that they had the right to do so under s 10 of the Act and the letter of termination was a bona fide termination with notice. I do not dispute that there is a general right to effect a termination with notice. The only question is whether the ground for termination was wholly or mainly because of redundancy.

The law

In **Malton v Crystal of Scarborough Ltd** [1971] ITR 106, a dismissed employee claimed redundancy payment on the ground that his dismissal was due to a redundancy. He was employed as one of two panel beaters and after he was dismissed he was not replaced. The employer tried unsuccessfully to get another apprentice to train up to that position, but no desperate effort was made and such panel beating as they could not do was put out to contract. The employer contested the claim on the grounds that their reasons for dismissing him were that his work record was unsatisfactory and his poor quality of work. The industrial tribunal decided that although he may have been redundant, he had been dismissed for the reasons given by the employer and not because of redundancy. On the question of whether there was a redundancy, Lord Parker CJ said (at p 107):

> *There was as it seems to me a possible redundancy situation here. After dismissal he was not replaced by another panel beater, and as the tribunal say, though some effort was made to get another apprentice to train up to that position, no desperate efforts were made by the respondents to replace him. Such panel beating as they could not do was put out to contract. That being the position, one has to look very closely at the reasons given by the respondents for dismissing him, bearing in mind that in a redundancy situation such reasons may be put forward as an excuse.*

The Lord Chief Justice, with whom the other two judges of the Queen`s Bench Division agreed, said that in such a situation the onus was on the employer to prove that the dismissal was not due to the redundancy. At p 106, he said:

> *... the only question in this case is as to whether the respondents, the employers, had negatived the presumption that the dismissal which did take place was not mainly or wholly due to redundancy.*

After considering the facts, the court was satisfied that the tribunal were justified in finding that the presumption was rebutted.

In **Stride v Moore (Metal Spinners) Ltd** [1967] ITR 117, an earlier case with similar facts, Lord Parker CJ said that the onus was on the employer to prove that the dismissal was not solely or mainly due to redundancy. Again the court found that there was sufficient evidence to justify the tribunal`s finding that the dismissal was not wholly or mainly due to redundancy.

The law in England is therefore as follows. If an employee is dismissed in circumstances where a redundancy results and that employee is entitled to redundancy payments were he retrenched on account of redundancy, there is a presumption that the dismissal is on that ground. The onus then shifts to the employer to show that it was not solely or mainly due to redundancy. I see no reason why the same position should not obtain in Singapore. It is after all a matter of balancing the unequal positions of the parties. It would otherwise be all too easy for employers to escape their legal obligation to pay the redundancy benefits to which the employee is entitled. The CA, which contains the redundancy payment provision, is an agreement between the parties that must be upheld not just in letter but, for the sake of industrial harmony, also in spirit. I would therefore hold that the law in Singapore is the same as in England.

Unfortunately the judge below was of the view that the burden of proof rests on the plaintiff. He said at [para] 34 of his judgment:

> *To prove his case, the [plaintiff] would have to show that the [defendant] intended to reorganise the front office operations and merge the job of Office Assistant and driver before terminating the [plaintiff] on 31 August 1998. He had to prove on a balance of probabilities that the [defendant] had really intended to retrench the [plaintiff] and had contractually terminated the [plaintiff] in order to avoid paying retrenchment benefits under cl 20 of the Collective Agreement. Neither the [plaintiff] nor his witnesses gave direct evidence to discharge this burden. ...*

The finding below was therefore made on a misapprehension of the law in respect of the burden of proof. As all the evidence had been taken and were before me, it was not necessary to remit the case to the judge below.

Analysis of the evidence

I now turn to consider whether the defendants have adduced evidence to prove that the termination of the plaintiff`s employment was not due wholly or mainly to the redundancy. The defendants` witnesses say that the conduct and attitude of the plaintiff was such that they felt that he did not fit into the organisation and their intention was purely to terminate his employment with no intention, at the time of termination, of making the position redundant. This is of course evidence of a subjective intent which only the person concerned is able to give positive evidence of. However the court is entitled to look at extrinsic evidence, particularly in relation to the actions of that person, to see whether it is consistent with the stated intention.

There are features in the evidence adduced by the defendants that are wholly unsatisfactory and I

find on the whole that they have not rebutted the presumption that the termination was due wholly or mainly to redundancy. I set these out below.

The defendants plead in para 6 of their defence that the plaintiff was ` ***a difficult and uncooperative worker who has caused several problems and disruptions in his work*** ` and listed nine matters as particulars. These can be summarised as follows:

(a) he refused to co-operate with the integration of the driver`s job for the two hotels;

(b) he complained of shorter lunch hours when he in fact took longer periods for lunch;

(c) his complaints were taken up by the Union and he agreed to the integration of the driver`s job and to send a letter of apology to the defendants;

(d) but instead of sending an apology, he repeated his unfounded complaints on 24 April 1998;

(e) while refusing to perform duties pursuant to the job integration, he demanded a phone card as the driver of Furama Hotel was given one. The defendants agreed to given him one from 1 June 1998;

(f) he complained directly to the Ministry of Manpower instead of complying with the Grievance Procedure in the CA;

(g) on 23 July 1998 he lodged another complaint concerning his claims for telephone calls and meal allowances;

(h) the defendants reminded him to follow the Grievance Procedure; and

(i) he deliberately or negligently recorded the Transport Log Book wrongly several times, and additional mileage recorded was unjustifiable.

On 7 September 1998, the defendants` Personnel Manager met the Union`s representatives to explain the reasons for the termination. The minutes of that meeting was recorded by the Assistant Personnel Manager and the material part of it states as follows:

> *Management revealed the facts, reasons and explained that its decision was based on grounds of the ex-employee`s low integrity, adverse attitude, unethical work behaviour and poor performance. Management detailed on a point to point basis 14 facts and pointers that eventually lead to Management`s decision to contractually terminate Noor Mohd as follows: ...*

There follows 14 subparagraphs listing, not various examples of the adverse behaviour and attitude attributed to the plaintiff, but instances relating to:

(a) inaccuracies in the Driver`s Log Book, ie particular (i) of para 6 of the defence; and

(b) the lunch break, ie particular (b) of para 6 of the defence.

This suggests that these other matters were formulated after 7 September 1998 and before the defence was drafted, and were not in the minds of the defendants` representatives when they decided to terminate the employment on 31 August 1998.

Furthermore, while in most of these instances the defendants` complaint appear reasonable on the face of it, a few of them do not appear to be all that serious. And the first one is so trivial as to invite the suspicion that it was included to boost the number. This is what is recorded in the minutes as the first incident:

> ***On 14 July 1998***
>
> *Management noted Noor Mohd had deliberately indicated in his Driver`s Log Book that his lunch hour was taken from 1pm to 1.45pm although his personal car season card computer print-out recorded his car exit at 12.55pm and re-entry into the Hotel at 1.37 pm. It was noted that he had intentionally recorded his timings inaccurately and had consumed his lunch earlier than recorded and permitted.*

From this record, it would seem that according to the clock in the computer, the plaintiff had passed the barrier at 12.55pm. This the plaintiff recorded in his book as 1pm. He returned from lunch, according to the computer, at 1.37pm. He recorded it as 1.45pm. So he had taken, according to the computer, 42 minutes from exit to return but had recorded it as 45 minutes. His timepiece did not coincide with that in the computer and was 5 minutes late at exit and 8 minutes late on return. I can see no basis, apart from malice, for including this as evidence of misconduct. The defendants appear to be keen to bolster their case for termination (i) at the meeting with the Union on 7 September 1998 by including trivial and unjustified complaints; and (ii) in their defence by adding matters that did not feature at all at the time of termination.

The plaintiff called Jamilah Ahmad to give evidence. She said that she obtained her motorcar driving licence in April 1998 and that shortly afterwards, she had informed Foo, the Front Desk Manager who was her supervisor. She also said that the Personnel Manager, Sim, also knew about this because about a month later, he congratulated her in the lift. Although both Foo and Sim denied such knowledge in cross-examination, I find it puzzling that Jamilah Ahmad, who is still in the defendants` employ, would give this evidence in such an unequivocal manner if it were not the truth.

Although the judge below said that he did not find Sim to be an unreliable witness, I would, with respect, beg to differ. In para 44 of his judgment, the judge said that Sim`s testimony ` ***and demeanour in court were forthright and the version of facts proffered, logical and reasonable*** `. While I did not have the opportunity to observe Sim`s demeanour in court, an examination of the notes of evidence reveals that his testimony was not all that forthright nor was it wholly logical. I have given one instance above, ie his denial of any knowledge that Jamilah Ahmad had a driving licence. The other instances are as follows:

(i) When Sim was first questioned about merging the two jobs, he said that it did not occur to him that there would be cost savings. The following day, he said that this consideration did cross his mind.

(ii) At several points in his cross-examination, Sim was evasive in his answers. There were four instances in which he failed to answer the question asked and counsel had to repeat the question. From the first responses he gave to those questions, one can see that he was trying to avoid a possibly awkward answer.

(iii) When asked why he chose to `dramatically` terminate the plaintiff`s employment on 31 August 1998, his answer was: `It being the end of the month`. In a later answer he explained that it would

be easier for salary computation to await the end of the month, in other words, for administrative convenience. From this it would appear that the matter was not so urgent as would justify any inconvenience to his payroll clerk in having to compute the pro-rated pay. Yet when asked why did he not give the plaintiff one month`s notice instead of paying him a month`s salary in lieu thereof, Sim`s answer was as follows:

> *I have to maintain discipline and I have to maintain productivity. Employee working together as a team - embracing the economic situation, learning new skills. The plaintiff was making serious allegations against the hotel. This causes disruptions to the hotel`s business opportunities, and instead of the hotel concentrating better to deal with the economic situation, we were plagued by allegations. Because of that we decided we didn`t want him around anymore.*

Clearly this ground does not sit well with the ground of administrative convenience.

In my view, the evidence of Sim and Foo shows that they were keen to emphasise that the notion of merging the two jobs did not cross their minds at the time they terminated the employment on 31 August, and that it only surfaced the following day, on 1 September. It must be borne in mind that the plaintiff was the only driver at the time. Surely the question of a replacement must have been foremost in their minds as it concerns the operations of the hotels. The decision to terminate the employment of the plaintiff was not one that came as a bolt out of the blue. The defendants` complaints against him relate to events over several months.

Furthermore, it would appear from the minutes of the meeting with the Union on 7 September, that the defendants had been monitoring the plaintiff`s activities between 14 July and 29 August. Despite such close monitoring, all they could come up with by way of specific evidence of the plaintiff`s misconduct was that he had failed to accurately record his log book.

There is a significant difference between the circumstances in the present appeal and those in the two English cases cited above. In the latter, the employees concerned were dismissed on ground of misconduct. In ***Malton*** `s case, the court said (at p 107):

> *... The reasons which they did put forward were that the quality of his work was unsatisfactory, in other words he was an inefficient workman, and it is accepted that he was far less efficient than the other panel beater ...*
>
> *Secondly, it was said that his work record was unsatisfactory in that he was absent on many occasions and late on many occasions. They said that the final straw, as it were, occurred just before the notice of dismissal was given when, having injured himself playing football on Saturday, he did not turn up for a considerable period, and did not produce a doctor`s certificate until a week following the Monday of his return to work, instead of obeying the written rule of the company that the doctor`s certificate should be handed in at once.*

And in ***Stride*** `s case, the headnote reads:

> *The appellant was employed by the respondents as a metal spinner. In November, 1966, the respondents wrote to him warning him that unless his production rate improved, he would be dismissed the following January. His production did not improve as required and he was dismissed ...*

In each of those two cases the employer had dismissed the employee and the latter then referred the matter to the industrial tribunal which examined whether there were bona fide grounds for the dismissal.

In the present appeal, there was no dismissal with cause under s 14 of the Employment Act, nor indeed any other form of dismissal at all. The defendants simply gave the plaintiff a letter terminating his employment with one month`s pay in lieu of notice. The difference is significant because had there been a dismissal with cause, this would have obliged the defendants to make due inquiry and entitled the plaintiff to make written representations to the Minister who may order an inquiry. The defendants say that termination with notice relieves them of any obligation to justify the termination. But it is exactly for this reason that this court, when considering the defendants` evidence, would bear in mind that it is very easy to use this as an expediency in order to avoid incurring the substantial redundancy payments that the plaintiff would be entitled to.

The plaintiff had worked for the defendants for almost 25 years. During most of this period there was no blot on his record. In 1983 the defendants awarded him a Long Service Medal for his ` ***in recognition and appreciation of the faithful service rendered*** ` . In 1984 he received a similar award. The defendants have not brought up any incidents prior to July 1998 in which the plaintiff was difficult and uncooperative. It would appear that this sudden change on his part took place only after the plaintiff had raised the inquiry with his Union in March 1998. Even then, the defendants` witnesses had not given evidence of specific instances in which the plaintiff was difficult and uncooperative, apart from the fact that he had complained to his Union. There was no allegation that he had refused to do the work assigned to him on any particular occasion and the only specific complaint appears to be his inability to faithfully and accurately maintain the driver`s log book. This could explain why the defendants did not resort to dismissal with cause. Furthermore, the fact that with almost 25 years` service the plaintiff`s redundancy payment is a substantial sum provides the motive for the defendants to resort to this course of action.

The circumstances at the time were as follows. Apollo Hotel and Furama Hotel were merged during a time of severe economic difficulty for the hotel industry and the General Manager himself said that it was ` ***for the survival of the hotel*** `. To keep afloat, the defendants engaged in severe cost cutting measures. One day after the termination, the position of Office Assistant was enlarged to include that of driver. The fact is that after the termination, no additional person was engaged by the defendants.

Bearing all these factors in mind, I found that the defendants had not discharged the burden of rebutting the presumption that the termination was wholly or mainly due to redundancy. Accordingly I allowed the appeal in respect of this part of the claim.

Retirement Age Act

That is sufficient to dispose of the appeal. However there is one further matter which it is incumbent upon me to clarify. Counsel for the plaintiff had also submitted that the Retirement Age Act (`RAA`) operated to remove the right of termination with notice under s 10 of the Act. At the end of the hearing I accepted his submission and gave that as an alternative ground for allowing the plaintiff`s appeal. However that holding was made without a full consideration of the matter - indeed neither counsel had included the Second Reading speech for the Retirement Age Bill in their bundles of authorities although a copy was produced towards the end of the hearing. I have since had an opportunity to fully consider this point and would hold that the RAA does not have such effect. This

of course does not affect the outcome of the appeal, the grounds for which I have given above. I set out below my reasons for so holding.

The Long Title of the RAA states as follows:

> *An Act to provide for a minimum retirement age for employees and for matters connected therewith*

The operative provisions are ss 4 to 8. There is no express repeal of s 10 of the Act nor anything to state that it shall not apply in any particular situation. The only provision that can possibly affect s 10 is s 4(1). Section 4 provides as follows:

> *(1) Notwithstanding anything in any other written law, contract of service or collective agreement, the retirement age of an employee shall be not less than 60 years or such other age, up to 67 years, as may be prescribed by the Minister.*
>
> *(2) No employer shall dismiss on the ground of age any employee who is below 60 years of age or the prescribed retirement age.*
>
> *(3) Any employer who contravenes subsection (2) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 6 months or to both.*

The effect of the opening words ` ***notwithstanding anything in any other written law*** ` would be to overrule any other statutory provision that contradicts this sub-section. However s 4(1) only provides that the retirement age of an employee shall be not less than 60 years or such other age as may be prescribed by the Minister. The Minister has prescribed the minimum retirement age to be 62 years with effect from 1 January 1999: see the Retirement Age (Prescribed Retirement Age) Regulations 1998 dated 7 December 1998, and I shall refer to that as `the prescribed age`.

In relation to persons within the ambit of the RAA, there is the question of the meaning of `retirement`. If there is a provision for retirement, as in the present appeal, is the employer entitled, pursuant to s 10 of the Employment Act, to terminate the employment of an employee who has not attained the prescribed age? There is no definition of this term in the RAA nor in any other Act. Section 4(2) prohibits an employer from dismissing any employee (who is below the prescribed age) on the ground of age and s 4(3) makes contravention of that provision an offence punishable by fine or imprisonment. In addition, s 7 provides the remedies available to an employee who considers that he has been unlawfully dismissed on the ground of age. Such person may make representations in writing to the Minister to be reinstated or for compensation. But there is no express provision in the RAA relating to the question whether an employer may terminate employment under s 10 of the Employment Act. However I need not deal with this in great detail because any ambiguity as to whether this must be implied is resolved by a consideration of the Minister`s Second Reading speech in moving the Bill in Parliament on 12 April 1993, which the court is entitled to consider pursuant to s 9A of the Interpretation Act. I only need to cite the following passage from that speech (at column 34):

> *Sir, though the Bill will give workers the right to work up to 60 years and*

beyond, I wish to stress that employers` right to terminate employees` service on grounds of poor performance or ill-health, or to dismiss employees on ground of misconduct, would not be abrogated. These are established rights of the employers. It is not the Government`s intention to compel all employers to keep poor performers or ill-disciplined employees. It is important that we continue to maintain a disciplined and productive workforce.

In view of the intention expressed by the Minister in that speech, and the fact that there is no express provision in the RAA relating to s 10 of the Employment Act, I would disagree with counsel for the plaintiff that the defendants do not have the right to terminate the plaintiff`s employment pursuant to s 10.

Outcome:

Appeal allowed.