

CAY ACB

IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 102/86

SET 2

BETWEEN

JOSEPH ROBERT JOHN
HORSBURGH

Appellant



AND

N.Z. MEAT PROCESSORS,
PACKERS, PRESERVERS,
FREEZING WORKS AND RELATED
TRADES INDUSTRIAL UNION OF
WORKERS

Respondent

Coram: Cooke P.
Somers J.
Hardie Boys J.

Hearing: 30 May 1988

Counsel: D.I. Jones and P.A. Joseph for Appellant
B. McClelland Q.C. and S.L. Kaminski for
Respondent

Judgment: 21 June 1988

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

The plaintiff in a High Court action appeals from a judgment of Cook J. awarding him \$23,531.99 damages against the defendant union for wrongful expulsion. He seeks a higher award. The union cross-appeals, contending that the Judge should have deducted notional income tax from the damages.

The plaintiff, a member of a sub-branch of the union employed as a cleaner at the Fairton Freezing Works, Ashburton, was expelled by resolution of the executive of the Canterbury branch on 10 December 1982 for his refusal to pay a levy of \$10 per week to assist members of the union

employed at Islington who were on strike or locked-out. It was held by the Judge and is not in dispute in this Court that the expulsion was unlawful for two reasons. First it was in breach of regulation 5 of the Economic Stabilisation (Membership Fees, Subscriptions and Levies) Regulations 1982, which prohibited an increase in levies during the material period. Secondly, it was in breach of s.182 of the Industrial Relations Act 1973 in that there had been no secret ballot. It has also been common ground that the plaintiff's cause of action is breach of contract by the union. In any event there appears to have been a violation of his statutory right to be a member of the union (s.104 of the Industrial Relations Act 1973, the current equivalent of which is s.60 of the Labour Relations Act 1987). The issues argued in this Court are confined to matters concerning damages. There are four issues.

Years of Lost Wages

The plaintiff had held the cleaning position and had been a compulsory member of the union for some 15 months. He was 55 years of age at the time of expulsion. He lost the position immediately on expulsion and has only obtained very limited employment since. His claim has been put forward on the basis that in the normal course he would have kept the position until retirement at the age of 65. In substance a lump sum representing lost wages until then is claimed. The Judge's finding was as follows:

It is not at all an easy one to answer, but I think the question must be viewed broadly, weighing up competing factors. Taking these into account I think a proper award would be a figure representing some three years earning at Fairton in the position which he held at the time of his expulsion; as it happens, approximately his lost earnings to date.

The restriction to three years is attacked. It is clear that Cook J., having referred to the judgments in the English Court of Appeal in Edwards v. SOGAT [1971] Ch. 354, selected that period after a broad assessment of various contingencies, including such prospects as there were of the plaintiff's finding future employment; he took into account also that the plaintiff had made some unsuccessful attempts to find other employment; he made no express finding as to whether the plaintiff had done all that was reasonable in that regard. The other contingencies specifically mentioned by this Judge were these:

... there appear to be possibilities that a general retiring age for an industry of 65 may give way in favour of a lower age, but more important than that there can be no certainty that the plaintiff would still be with the company when he attained whatever the retiring age might prove to be. The industry situation may change, redundancies may occur, ill health might intervene and there is the possibility, arising from the fact that the plaintiff, prior to the resolution ever being put to the meeting, had aroused a degree of animosity amongst the other members, that his resignation or dismissal might have come at a much earlier time.

During the argument in this Court Mr Jones for the appellant was asked several times, in varying words, whether he argued that the Judge had approached the assessment on a wrong principle or that, while the approach had been

correct, a wholly erroneous assessment had been reached. Counsel replied consistently to the effect that it was the second contention.

This concession is realistic and we would not be justified in reading into the judgment under appeal any error of principle. It is true that in the period up to the trial the plaintiff's health had remained apparently good and that the janitor's position had remained in existence, though filled by someone else. It would have been right to take those facts into account instead of speculating as at the time of dismissal three years earlier; but there is no indication that the Judge did confine himself to such speculation. The question of animosity between the plaintiff and other members of the union, and the associated possibility of a loss of the position even within the three years as a result of resignation or some form of dismissal, had been canvassed in the evidence. That did call for some degree of speculation or, more accurately, discretionary assessment by the trial Judge. As to the argument that the Judge's assessment was far too low, on the notes of evidence we might be tempted to make an assessment more favourable to the plaintiff, but we could not do so with the confidence necessary before one should interfere on appeal with a discretionary assessment. Undeniably there had been some friction between the plaintiff and fellow-workers. That must have a significant effect in assessing his job security

as at the end of 1982. There is insufficient ground for disturbing the Judge's assessment of this and other factors.

The passages cited by Cook J. from Edwards included Lord Denning's statement that damages in such a case are so difficult to assess that he would take the Donovan Royal Commission's suggestion, namely the loss of earnings which the plaintiff might reasonably be expected to have suffered over two years from his expulsion; and then work upwards or downwards from that figure, according to the circumstances of the case. In a case where much must turn on the plaintiff's prospects of retaining his employment, we consider that this admittedly somewhat arbitrary approach is open. If Cook J. was influenced by it, as probably he was, he was not wrong in that respect. The basic award should accordingly stand.

Damages for Loss of Status

The original claim having mentioned only \$1500, the plaintiff's ultimate claim under this head was for \$75,000, pleaded as 'general damages for loss of amenity, mental distress, anxiety, inconvenience, humiliation, loss of dignity, injury to feelings, loss of a compensatable interest in the plaintiff's employment and expectation of future income and loss of reputation'. In the argument on appeal the references to compensatable interest in the plaintiff's employment and expectation of future income were withdrawn, these items being reflected in the basic economic

award. The Judge gave nothing under any of the remaining heads. His reasoning suggests that he was mainly influenced towards that conclusion by Addis v. Gramophone Co. Ltd [1909] A.C. 488. He relied specifically, while recognising that the present is not a wrongful dismissal case, on Prichard J.'s judgment in a wrongful dismissal case, Vivian v. Coca Cola Export Corporation [1984] 2 N.Z.L.R. 289. That judgment contains a valuable collection of modern authorities on damages in contract for injured feelings, to which it is enough for us to refer now without repetition. Cook J. also referred to McGregor on Damages, 14th ed. paragraphs 65 to 75. The distinction which Mr Harvey McGregor draws - see now the 15th ed. para.96 - is that:

The reason for the general rule is that contracts normally concern commercial matters and that mental suffering on breach is not in the contemplation of the parties as part of the business risk of the transaction. If however the contract is not primarily a commercial one, in the sense that it affects not the plaintiff's business interests but his personal, social and family interests, the door should not be closed to awarding damages for mental suffering if the court thinks that in the particular circumstances the parties to the contract had such damage in their contemplation.

Cook J. thought, however, that 'in the absence of more compelling authority than I see in McGregor' the plaintiff could not succeed under this head.

For the respondent union in this Court Mr McClelland accepted that Addis does not bar in principle damages for mental distress in a case of wrongful expulsion from a

union; his argument as we understood it was that on the evidence and the Judge's findings here no such damages had been suffered. It will be necessary to turn to that question shortly. First let it be said that we agree with counsel that Addis is not in point. It is generally understood that the House of Lords decision in that case established a rule that damages for wrongful dismissal were limited to the dismissed employee's loss of wages and other pecuniary loss during the period of notice to which he was contractually entitled. Should this Court have to consider whether that rule applies in New Zealand at the present day, it would be essential to give full consideration to such judgments pointing to the contrary as that of Linden J. in Brown v. Waterloo Regional Board of Commissioners of Police (1982) 136 D.L.R. (3d) 49; but this is not the occasion for that exercise.

At least Addis is not an authority to be extended. No solid reason appears to exist for extending it to wrongful expulsion from a trade union. Whether or not a particular employer's liability to an unlawfully dismissed employee should be confined to provable loss of money, a union's objects are not normally to ensure for members particular employment. A status carrying with it opportunities of employment on terms negotiated by the union is what the union offers. In this case the worker apparently had the statutory right to be a member of the union by virtue of s.104 of the Industrial Relations Act

1973; it was not suggested in argument that this section did not apply. In effect that right has been denied. Moreover the trial Judge found that the union executive must have known that they were acting unlawfully and at a time of high unemployment in Ashburton. No reason suggests itself why the union should not have to pay the damages, not only foreseeable but highly probable, arising from the deliberate refusal to accord the plaintiff the status to which he was entitled. In such a case mental distress must be in the forefront of likely consequences. In our opinion, however, mental distress is not a fully adequate term to comprehend all the unquantifiable consequences of deprivation of union membership. It seems preferable to say that the damages are to compensate for loss of status or standing and interference with the right to work. These are heads of loss that cannot be measured merely by lost income. They include but are not confined to mental distress.

The researches of counsel have brought to our notice only one authority directly in point, the judgment of Anderson J. in the British Columbia Supreme Court in Tippett v. International Typographical Union Local (1976) 71 D.L.R. (3d) 146, where plaintiffs wrongly expelled from a union were awarded damages for the 'discomfort, distress and annoyance which must necessarily have followed from the humiliating features of their daily lives'. We find that judgment persuasive in principle. It should be mentioned

that in Byrne v. Auckland Irish Society Inc. [1979] 1 N.Z.L.R. 351, Vautier J. gave a small amount of damages for loss of enjoyment of club facilities, but no similar deprivation of amenities appears to have occurred in the present case.

As already mentioned, the argument for the union as we understand it is not that damages for mental distress and the like are irrecoverable in principle, but that on the facts here the plaintiff did not suffer such distress. It is clear that the plaintiff was no ardent unionist. Mr McClelland described him as fiercely antagonistic to the union and having derived no enjoyment from being a member. The fact remains, though, that the Judge has found that there was humiliation and anxiety. He said:

As to humiliation, this appears to come from having to collect the unemployment benefit and generally, no doubt, from being unemployed - something shared with many but I do not think attracting separate compensation. The mental anxiety arises from thinking about the problems that have arisen and embarrassment in not being able to live as full a life socially as before.

The curtailment of social life referred to was no doubt primarily for economic reasons, and to that extent is covered in theory by the basic award, but it is implicit in the Judge's statement that there was significant non-economic damage. It seems obvious that the plaintiff would have suffered much vexation from being kept out of his position at the freezing works by the action of a union to which he was antagonistic. The humiliation of unemployment

is no light thing. Even if the plaintiff could arguably have done rather more to find other work - the Judge made no finding on that question - it was the union's unlawful conduct that put him in that situation.

The Court should recognise that the right to work is valuable in itself. A reasonably substantial award should be made for knowingly unlawful deprivation of status and interference with the right to work. We accept, however, that this plaintiff's loss was less than could well have been suffered by a more committed or active unionist. Taking all the circumstances into account, we award him \$7500 under these heads.

It may be as well to say expressly that we are not suggesting that damages for distress can be awarded in, for instance, an action for breach of an ordinary commercial contract. Nor are we essaying any general propositions about when damages for distress can be recovered under various causes of action. We are simply holding that, if the facts warrant it, distress is a kind of damage to be taken into account in assessing damages for loss of status and interference with the right to work in a case of the present kind.

Unemployment Benefit

In his main judgment Cook J. held that unemployment benefit received by the plaintiff under the Social Security Act 1964, s.58, should be deducted from the amount for which

damages would otherwise be awarded for loss of earnings. Subsequently there was placed before the Judge a letter from the Department of Social Welfare apparently suggesting that the plaintiff should be awarded his full loss of wages, about \$45,000, and that he should refund to the Department some \$22,758 unemployment benefit. The Judge was informed by counsel that this ruling by the Department was being appealed against; accordingly he made an interim order for a payment to the plaintiff. In the event the Department, faced with an appeal to the Social Security Appeal Authority, changed its view. Accordingly judgment was ultimately entered for the plaintiff for the sum arrived at by deducting the benefit. On appeal it is argued for him nevertheless that this deduction should not be made.

Our only proper approach in the circumstances is to assume that the benefit is not repayable. On that footing one would think prima facie that the defendant's conduct did not deprive the plaintiff of income completely but only to the extent of the difference between the income that would have been earned and the benefit to which as an unemployed person he was entitled from the state. Hence his damages should be the net figure. That was indeed the basis of Lord Denning's judgment in Edwards v. SOGAT and has since been held by the House of Lords to be the correct approach. That is to say, in England unemployment benefits are in principle deductible in mitigation of damages: Westwood v. Secretary of State for Employment [1985] A.C. 20; Hussain v. New

Taplow Paper Mills Ltd [1988] 1 All E.R. 541. The same view has prevailed in Australia by four Justices of the High Court to three: Evans v. Muller (1983) 151 C.L.R. 117.

It is axiomatic that a plaintiff's damages are not reduced because of private insurance that he has taken out or benevolence that he has received from friends or even the general public. Parry v. Cleaver [1970] A.C. 1, 14, contains a suggestion by Lord Reid that the same principle applies to 'public benevolence in the form of various uncovenanted benefits from the welfare state', but as just indicated the later English and Australian authorities have not extended this concept to unemployment benefits. The division of Australian judicial opinion is enough to show that there are powerful arguments either way. We do not think that there is adequate reason for declining in New Zealand to adopt the rule settled in England and Australia. Nor should any fine distinctions in the statutes governing unemployment benefits be allowed to make a difference. So we hold that these benefits should be taken into account in assessing damages in New Zealand and affirm the Judge's decision on this point.

Income Tax

The Judge rejected an argument for the defendant that the tax which the plaintiff would have to pay on his wages should be deducted in calculating the damages for loss of wages. He applied the majority ruling in this Court in

North Island Wholesale Grocers Ltd v. Hewin [1982]

2 N.Z.L.R. 176 wherein in a wrongful dismissal action against an employer it was held that taxation should not be taken into account in assessing damages as compensation for loss of office. The union challenges the Judge's decision on this point.

Insofar as the award against the union was for wages which the plaintiff would have earned from his employer but for his expulsion, we agree with the Judge that no sound distinction can be drawn between this case and Hewin. A persual of the judgments in Hewin shows the extraordinary vicissitudes of the modern development of the law in this field in England, Australia and New Zealand. Yet another reversal of course should not be contemplated by this Court. The majority decision in Hewin should be taken as settling for New Zealand that the disposition of income, even by way of compulsory tax payments, is not relevant in assessing damages for the loss of that income. And also that the P.A.Y.E. system makes no difference to that rule.

As with the unemployment benefit issue, there is much to be said for either answer; but on the taxation issue a majority of this Court have decided quite recently to follow the Supreme Court of Canada rather than the House of Lords and the prevailing view in Australia. In the interests of stare decisis it seems to us better now simply to follow and apply that majority decision. There is a difference

between requiring the plaintiff to give credit for a benefit actually received by him as compensation for loss of income and ignoring any tax liability to which income might have been subject; so the different results on the unemployment benefit and taxation issues can stand together. No opinion is called for on whether or not the damages are taxable in the plaintiff's hands.

For these reasons we allow the appeal by increasing the amount of damages awarded to the appellant by \$7500, making a total award of \$31,031.99. The cross-appeal is dismissed. The appellant will have an order for costs of the appeal against the respondent in the sum of \$1500 with disbursements, including the cost of reproducing the case on appeal and the reasonable travelling and, if necessary, accommodation expenses of two counsel, to be settled by the Registrar.

R B Cuth P.

Solicitors:

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Wood Hall & Co., Christchurch, for Respondent