TRINIDAD AND TOBAGO
TRADE DISPUTE NO.140 OF 1997

IN THE INDUSTRIAL COURT

Between

BANK AND GENERAL WORKERS' UNION - Party No.1

And

HOME MORTGAGE BANK - Party No.2

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CORAM:

His Honour Mr. Addison M. Khan - Vice-President
His Honour Mr. George Ramsubeik - Member

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Appearances:

Mr. Don Devenish,)
Second Vice- President) for Party No.1

Mr. Andre De Vignes,)
Attorney at Law) for Party No.2

DATED: March 3, 1998

JUDGMENT

We completed the hearing of this trade dispute on Monday, February 2, 1998 and reserved our decision for delivery today.

The issue giving rise to the trade dispute is the termination by the Home Mortgage Bank ("the Employer") of the contract of employment of Balliram Mahadeo ("the worker"). The Bank and General Workers' Union ("the Union") reported the dispute to the Honourable Minister of Labour and Co-operatives as a trade dispute in accordance with section 51(c) of the Industrial Relations Act, Chap.88:01 ("the Act").

In obedience to the directions given by the Court, the parties presented written evidence and arguments and they both elected not to call any oral evidence. They relied on their respective written evidence and arguments and oral submissions.

The facts are not in dispute. The Employer engaged the services of the worker as a driver/chauffeur with effect from May 28, 1996 pursuant to a written contract of employment ("the contract") dated May 18, 1996. The agreed period of the contract was six months from May 28, 1996 in the first instance, but it was subject to renewal at the option of the Employer. The contract contained two provisions for termination. The first provision was contained in clause 10("clause 10") which stated that the Employer was entitled to terminate the services of the worker without notice or pay in lieu of notice if he was in serious breach of, or did not observe the conditions of the contract, or was guilty of neglect, failure or refusal to

perform the duties assigned, persistent unpunctuality or breach of any rules or regulations of the Employer. Clause 11(" clause 11") provided for termination at any time by either party by the giving of two weeks' notice in writing. If the contract had endured for its full term, it would have come to an end on November 28, 1996.

Some three months and twenty days before November 28, 1996, the Employer gave the worker a letter dated August 8, 1996 in which it informed him of the termination of the contract ("the letter of termination"). The letter of termination stated:

> " We are exercising our option under clause 11 of your contract, to terminate your employment, by giving two (2) weeks notice in writing as of today, Thursday, August 08, 1996.
>
> Enclosed is a cheque for one thousand six hundred and twenty four dollars and sixty one cents ($1,624.61) which covers your contractual remuneration to date, including the required two weeks notice."

According to the evidence, the Company terminated the worker's services with effect from August 8, 1996, that is to say, on the same day on which the letter of termination was given to the worker. We find that the Employer did not give the

worker the contractual two weeks' notice in writing which was stipulated by Clause 11 but rather tendered to the worker two weeks' pay in lieu of such notice. The Employer, therefore, terminated the worker's employment without prior notice and at least three months and twenty days before the contract was due to expire by the effluxion of time.

It is important to note that the Employer:

> (a) did not terminate the contract for any of the reasons stipulated in Clause 10; and
>
> (b) gave no reason or reasons in the letter of termination for prematurely determining the contract or for requiring the worker to leave its employment on the same day on which it gave him the notice of termination.

We infer from the Employer's use of clause 11 that none of the reasons in Clause 10 could have been utilised in the case of the worker, that is to say, that he did not commit any serious breach or failure to observe the conditions of the contract nor could it be said that he was guilty of neglect, failure or refusal to perform his

assigned duties or of persistent unpunctuality or of breach of any of the Employer's rules or regulations.

The main submissions of the Union and the Company may be summarised as follows:

The Union's submissions:

(a) The worker was employed for a fixed term of six months which commenced on May 28, 1996 and the Employer was not entitled to terminate the contract before November 28, 1996.

(b) Clause 11 was null and void.

(c) The Employer violated the provisions of Convention No. 158 of the International Labour Organisation and violated the principles of good industrial relations practice in terminating the worker's contract.

The Employer's submissions:

(a)The contract was not a fixed term contract but was one terminable by notice.

(b)The contract, including clause 11, was valid and binding on the Company, the Union and the worker.

(c)By terminating the worker's employment in accordance with the terms of the contract, the Company acted in accordance with the principles of good industrial relations practice.

(d)If parties freely enter into a binding contract, it cannot be subsequently argued that it is improper industrial relations practice for the employer to invoke the provisions of the contract.

(e) The Employer invoked clause 11 of the contract and tendered a cheque to the worker and the worker cashed the cheque which was in respect of his salary up to August 8, 1996 and two weeks pay. The implication of his having cashed the cheque was an acceptance of the payment and was in full discharge of the Bank's contractual obligations to the worker.

(f) Termination clauses in contracts are well-recognised contractual provisions and a party is entitled to rely on such a clause in a contract.

(g) The Termination of Employment Convention, 1982 (I.L.O.Convention No.158) has not been ratified by Trinidad and Tobago and is not binding on Trinidad and Tobago but is of persuasive authority.

(g) The recommendations to Article 2 of I.L.O. Convention No.158 states that a member state may exclude from all or some of its provisions workers who are engaged under a contract of employment -

> "for a specified period of time or a specified task" (emphasis ours)

(h) the Court's judgment in Trade Dispute No.68 of 1980 between Communication, Transport and General Workers' Trade Union and Trinidad and Tobago Television Company Limited ("the TTT case") was correctly decided on its own facts but the facts of this trade dispute are different from the facts of the TTT case in that:

> (i) in this trade dispute, there is no collective agreement between the Company and the Union.

(ii) the worker is not a member of a recognised majority union.

(iii) the worker was engaged on a short-term contract.

In their oral addresses, both Mr. Devenish and Mr. de Vignes amplified their respective submissions.

On the evidence, we find that:

(a) the contract was not a fixed term contract;

(b) the whole of the contract, including clause 11, was valid and binding on the parties thereto;

(c) The Employer was entitled to terminate the contract in accordance with the provisions of clause 11 provided that it also observed the principles of good industrial relations practice.

(d) In terminating the contract under clause 11, the Employer did not inform the worker of the reason or reasons why it decided to bring his employment to an end.

Mr. de Vignes' s submissions overlook the main thrust of the provisions of the Act concerning the dismissal of a worker. Section 10(3) of the Act contains an unambiguous command to the Court to apply the principles stated therein in matters before it. Section 10 (3) stipulates:

> "(3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall -
>
> > (a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;
> >
> > (b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations."

In the case of trade disputes concerning the dismissal of a worker, the Court may make one or more of the orders stated in section 10 (4) where, in its opinion, a worker has been dismissed-

> " in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice... "

The principles of good industrial relations practice dictate that no worker 's employment may be terminated except for a valid reason connected with his capacity to perform the work for which he was employed or which is founded on the operational requirements of an employer's business. These principles are enshrined in writing in Convention No.158 of the International Labour Organisation ("I.L.O.Convention No.158"). ILO Convention No.158 has put in written form long standing principles of good industrial relations practice and it is of no consequence that the Convention has not been ratified by Trinidad and Tobago. It is not applicable as part of the domestic law of Trinidad and Tobago but as evidence of principles of good industrial relations practice which have been accepted at an international level.

b/ At common law, an employer is not bound to give any reason for dismissing a worker. The principles of good industrial relations practice, on the other hand, require an employer, not only to inform a worker of the reason or reasons for a proposed dismissal but also to give a worker, save in exceptional circumstances, a fair opportunity to be heard before proceeding with a decision to dismiss for such reason or reasons. The two requirements are inseparable one from the other, since without being informed of the proposed reason or reasons the worker will not have a fair opportunity to present to the employer material which may cause the

employer to change his mind from his proposed course of action. It is, therefore, necessary to read all workers' contracts of employment subject to the requirements of the Act. What might constitute a good termination in accordance with the common law might not satisfy the requirements of the Act.

We believe that the correct approach of an employer in the case of a proposed dismissal was spelt out in Trade Dispute No.130 of 1994 between Association of Technical, Administrative and Supervisory Staff and Caroni (1975) Limited ("the Caroni case"). At pages 36 - 37 of that judgment, the Court stated:

> " The essence of a fair opportunity to be heard involves the provision of relevant information by the employer to the employee to enable the latter to appreciate and understand the substance of the allegations made against him and an opportunity given to the employee to reply to such allegations and to put forward any reasons in mitigation of any penalty or penalties which may be possible having regard to the nature of the allegations made against him. It is a requirement of basic fairness and justice as well as of the principles of good industrial relations practice. It is to enable the employee to bring to the notice of the employer relevant facts and circumstances and to enable the employer to hear and understand the employee's side of the story before he makes up his mind finally. The opportunity must be given before the decision to dismiss is made."

We appreciate that the facts in the Caroni case were vastly different from the facts in this trade dispute but the principle remains valid that, save in exceptional cases, of which this is not one, an employer must give to a worker the reason or reasons

why he proposes to dismiss him and also give the worker a fair opportunity to be heard before the employer puts his intention to dismiss into effect. It is possible that, in this trade dispute, the Employer may have had a good reason for dismissing the worker which reason was not in any way related to any of the reasons stated in Clause 10 but, if it had, the letter of termination did not contain that reason, and the worker was provided with no material to make any representations to the Employer to change its mind about dismissing him.

In this trade dispute, the Employer merely relied upon its contractual right to terminate the contract by the giving of notice of termination to the worker. It is clear that if the worker had breached the provisions of clause 10, the Employer was entitled to terminate his employment in accordance with the provisions of that clause. However, it did not do so, but acted under clause 11 of the contract. In such an event the Employer was nevertheless required to give a reason or reasons for the termination and the worker was entitled to have such reason or reasons before the termination to enable him to make any representations which he wished to make to the Employer concerning the proposed termination. We find that the Employer's failure to give such reason or reasons was in breach of the principles of good industrial relations practice. It does not matter that the contract was a short-

term contract. The Act's protection applies to all persons who work under contracts of employment, regardless of the duration of the contract. In our opinion, it is just as possible for an employer to dismiss a worker under a short-term contract of employment harshly and oppressively or contrary to the principles of good industrial relations practice as he can in the case of a worker under an indefinite contract of employment. The length of the employment under the contract is of no significance. Every contract of employment, whether short-term or of indefinite duration, may be terminated by notice. If an employer dismisses a worker under a short - term contract of employment harshly or oppressively or contrary to the principles of good industrial relations practice, the Court will take the duration of the contract into account for the purpose of assessing the quantum of damages to be paid by the employer but its short-term character is no defence in such a situation.

The stand of the Employer in this trade dispute is reminiscent of the argument of the Company in Trade Dispute No 68 of 1980 between Communication, Transport and General Workers' Union and Trinidad and Tobago Television Company Limited, which was delivered on 14th November, 1980. In that dispute, the Company terminated the services of four monthly paid workers by giving them letters which were couched in the following way:

> " In accordance with Article 6 of the subsisting collective agreement, I have to inform you that your services with the Company are no longer required with immediate effect."

The Company enclosed with each letter a cheque which represented each worker 's salary for the month in which they were dismissed and one month's salary in each case in lieu of thirty days' notice of termination in accordance with Article 6 of the applicable collective agreement. The Company gave no reasons in the letters of termination for bringing the workers' employment to an end. The Company also gave no reason to the Union when the Union raised the dismissals of the workers with it. Similarly, the Company gave no such reason to the Minister of Labour when the Union reported a trade dispute to the Minister about the workers' dismissals. Before the Court, the Company also gave no reason for dispensing with the workers' services and argued that it was entitled to terminate the workers' services by reason of the contents of Articles 3 and 6 of the registered collective agreement between the Employer and the Union. The Union submitted that the workers were dismissed for no just or reasonable cause (compare "valid reason" in I.L.O Convention No.158), that the Company's action was contrary to the proper interpretation of the collective agreement and that, in any event, the Company's action was harsh and oppressive and contrary to the principles of good industrial relations practice.

The Company argued strenuously before the Court that the right of an employer vis-a-vis his employees was founded on the common law and that those rights could only be circumscribed by statute or a collective agreement, that the relevant collective agreement stated quite clearly that the Employer was entitled to terminate the services of a monthly paid worker by giving to him thirty days' pay in lieu of notice and that it would be an unjustifiable intervention in the collective bargaining process if the Court overruled this provision of the collective agreement.

So far as material , Article 6 of the relevant collective agreement provided

" TERMINATION OF SERVICE

"The services of any employee falling within the scope of this Agreement may be terminated by the Company giving two (2) weeks' notice in writing for weekly paid employees and thirty (30) days for monthly paid employees or pay in lieu thereof."

In rejecting the Company's arguments, the Court stated inter alia

"We are unable to agree with this simplistic approach to the matter. It

> overlooks and by-passes a number of serious and highly relevant considerations. As the Court has pointed out in many previous judgments, it is an under-statement to say that the common law rights of an employer have been circumscribed. For all practical purposes they have been almost completely eroded out of existence. This has come about through the rise of collective bargaining and the principles of industrial relations practice developed under it. The ..... principles and practices developed under the voluntary system were not ..... swept away. The Court is ..... enjoined by the I.R.A. in making its determinations to apply the principles of good industrial relations..... "

The Court held that the Company's submissions were erroneous and found that the workers' dismissals were harsh and oppressive and contrary to the principles of good industrial relations practice.

In Trade Dispute No. 306/85 (1987) of 1985 between Seamen and Waterfront Workers' Trade Union and Port Authority of Trinidad and Tobago, the Court rejected a similar argument by the employer.

In Civil Appeal No. 2 of 1968 between Fernandes Distillers Limited and Transport and Industrial Workers' Union, Wooding, C.J. expressly recognised, in the context of the former Industrial Stabilisation Act, 1965, that if a contract of employment is determined terminated according to its tenor, nothing can make it wrongful. However, it can nonetheless be harsh or oppressive and unreasonable and unjust.

At common law, it may be sufficient for an employer to rely on the strict terms of the contract and, unless there has been a breach of contract or a wrongful dismissal, no damages are recoverable.

In the event of a trade dispute concerning the dismissal of a worker, however, the Court is not restricted to the strict application of the terms of the individual contract or collective agreement. It is required to consider whether a worker has been dismissed by an employer in circumstances that are harsh and oppressive or contrary to the principles of good industrial relations practice .

In this trade dispute, the Employer has given no reason for terminating the worker's contract of employment. It also gave no reason to the worker for the termination. The worker was, therefore, deprived of the opportunity to make representations to the Employer on whether or not there was justification for such termination since the maximum term of his contract was not due for expiry for at least another three months and twenty days. The Employer thus violated the principles of good industrial relations practice. It does not matter that the worker was not represented by a recognised majority union or that he was not covered by a collective agreement or that he cashed the Employer's cheque which was tendered to him.