

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. C244 of 1977

BETWEEN	VINCENT CADIEN	PLAINTIFF
A N D	KAISER BAUXITE COMPANY	1ST DEFENDANT
A N D	I. K. PENGELLEY	2ND DEFENDANT

Crafton Miller and Monica Brown of Miller, Mitchell & Company for the Plaintiff.

Dr. Lloyd Barnett and Janet Morgan instructed by Milholland, Ashenheim & Stone for the Defendants.

Heard on: 17th, 18th, 19th, 20th, 21st March 1980
the 30th January - 17th July, 1981

JUDGMENT

15th July, 1981

Morgan J.

This is an action for wrongful dismissal. The plaintiff was the employee of the first defendant whose business is the mining of bauxite for the production of aluminium products, and the second defendant the Plant Operation Superintendent of the first defendant's Company. On the 22nd September, 1964 the plaintiff, Vincent Cadien commenced working with the first defendant, Kaiser Bauxite Company as a Clerk in its Dredging Department. He was then 38 years old. Over the years he gained several promotions in the Company and on the 8th April, 1977 was working as a Shipping Foreman. On that day an incident occurred as a result of which he was forthwith suspended, and subsequently dismissed on the 25th April, 1977 with the effective date being the 19th April, 1977.

The plaintiff claims that he was dismissed without just cause, that he has since been unable to procure alternative employment and has suffered loss.

The defendants say that he was in breach of his duties and obligations, was guilty of misconduct, that the dismissal was justified and listed seven specific complaints in support.

The System

A part of the defendants Company's operation involves the shipping of bauxite from their own port and they maintain a shipping department which is responsible for loading the ships. Mr. Ian Pengelley was the Superintendent in charge of this department, Mr. Winter the Supervisor, the plaintiff, Mr. Cadien one of the foremen and Mr. Leo Cover one of the Gantry Operators.

The last two sets of workers worked on a shift system and supporting technical staff was available. When a ship is to be loaded the bauxite would be channelled to the shipping department from the drying department, then go through a tunnelling to the transfer house, then the inner transfer - house and then to the gantry. In this loading operation there was an enclosed area into which the bauxite got deposited and then would feed out underneath and on to a belt - a shuttle belt on which the bauxite would finally be delivered into the chute and on into the ship. This part of the operation was done by a hopper which was operated by the Gantry operator and a part of the duties of the shipping foreman was to inspect the system before the loading operation commenced to see that all was in order.

There is no dispute between the parties as to these facts.

The Incident

The plaintiff says he was on duty on the swing shift, that is, 4 p.m. to 12 midnight on the 8th April, 1977 which was a public holiday being Good Friday. Mr. Cover a Gantry operator was on the same shift duty. There was a ship, The Clear Lake, in port to be loaded and another, The Good Carrier, in mid stream. He reported for work at 4.00 p.m. relieving Mr. Winter who gave him an urgent message from his wife that he should telephone her. He also invited Mr. Cover and himself to visit him at his home, after he plaintiff had checked and found everything O.K. as there was not enough bauxite to commence loading operations and loading would not commence till 8.00 p.m. He then started working and checked the system from the tunnelling down to the Gantry as also the belts. At 8.00 p.m. he instructed the Gantry operator to start loading but after half an hour of loading Mr. Cover reported to him that the hopper had got blocked and the shuttle belt overloaded. He inspected the blockage and put two men with shovels to commence to clear the blockage, as he had no more labour available except these two men. He contacted the electrician for assistance, who considered that his assistance was not advisable on account of the nature of the blockage. He then left to contact Mr. Winter his Supervisor at his home to report the breakdown and to get some help. Mr. Winter was indisposed and he was unable to see him. It was now 9.30 p.m. so he went out on the street in search of casual workers to be employed to assist in expediting the work of shovelling but misfortune was still with him, he could get no worker up to 11.00 p.m. so he returned first to the Gantry where he saw the men still shovelling and finally to his office where he engaged himself in writing up the books. He had a bandaged cut

toe he says and it started bleeding, so, to ease it, he elevated this foot on the desk for about ten minutes. It was in this position that Mr. Evon Clarke, the Drying Supervisor saw him at 11.40 p.m. He says he asked Mr. Clarke to get in touch with Mr. Pengelley for him and inform him of the situation of the delay in loading. About 12 midnight when Mr. Sinclair his relief came along he saw Mr. Pengelley. He briefed Mr. Sinclair orally of the situation and left the premises at 12.05 a.m. Next day he was due to return to work at 4.00 p.m. but at 3.45 p.m. Mr. Winter came to his lodging house and asked him what had happened. He told him what occurred and then Mr. Winter handed him a letter of suspension telling him that he Mr. Winter did not want to suspend him but he was advised by Mr. Pengelley to do so. As a result he did not go to work and returned to Kingston. A few days after, as a result of a telegram from the Personnel department he went to the office of the department where he saw Mr. Pengelley, the Superintendent, with paper and pen in hand. Mr. Pengelley asked him to give him, Mr. Pengelley, a statement in respect of the incident. He asked Mr. Pengelley if the enquires into the incident were complete. He got no reply to that question and Mr. Pengelley repeated his request for a statement. He replied by telling him that he had already given Mr. Winter a statement, oral, and that when the investigations were complete he would be prepared then to defend the issues but would not now give a written statement. Mr. Pengelley threw his hands up in the air and left. On 25th April, 1977 while in Kingston he received a telegram and as a result he went to the Kingston office where a letter of dismissal signed by Mr. Pengelley, was handed to him.

He called no witnesses. It appeared that all persons who were privy to this incident were persons still in the employ of the defendants.

The defendants' account of the incident differ. It is that the plaintiff should have relieved Mr. Winter at 4.00 p.m. but he did not come in until 4.25 p.m. Mr. Winter then gave him a message from his wife that it was important that he telephone her. He left Mr. Cadien about 4.30 p.m. after inviting him to come up to see him. At about 5 p.m. Mr. Pengelley spoke with plaintiff to check that all was O.K. and Mr. Cadien said the system was O.K. but expressed inability and urgency in getting in touch with his wife by telephone who up to then he was unable to reach. This was expressed in a manner which conveyed to Mr. Pengelley the fact that the call at that ~~time~~ held priority to the job. On Mr. Cadien's request Mr. Pengelley agreed that he could come to his home to make the call if he was unable to get through after he had completed his checking. At 6.00 p.m. he went to Mr. Winter where they had discussions, and left after spending twenty minutes to half an hour there. At 8.00 p.m. when the loading was to commence Mr. Cover was ~~unable~~ to locate plaintiff and so Mr. Cover started to load on his own instructions but after fifteen minutes the shuttle belt tripped and the system started overloading. He tried then unsuccessfully to locate Mr. Cadien at the foreman's office - so he left in his car to make a report to Mr. Winter. On ~~his~~ way there he saw Mr. Cadien and they returned together. Mr. Cadien went to the Gantry then to his office for a flashlight returned and Mr. Cover and himself inspected the hopper. The electrician who was called by Mr. Cadien came and ^{was} asked to bridge the system but he refused to do so telling Mr. Cadien the danger in such an action. Mr. Cadien then put two men to

shovel it and left almost 8.40 p.m. saying he was going to secure men to shovel. Mr. Cadien never returned to the Gantry to see what happened.

When the electrician was called he had to get a gate pass from Mr. Evon Clarke the ~~Shift~~ Supervisor at the Drying Department and at about 11.30 p.m. he returned and made a report to Mr. Clarke who made a report to Mr. Pengelley. As a result the electrician and himself went to the pier. They never saw Mr. Cadien there though the Company's pick up for his use was there. He was not at the Gantry either so Mr. Clarke went to the foreman's office and through a window he saw Mr. Cadien reclining in a chair, his bare feet on the desk, and apparently asleep. It was 11.46 p.m. He then knocked on the door, told Mr. Cadien that Mr. Pengelley had asked him to check whereupon Mr. Cadien replied using indecent language in his reference to Mr. Pengelley and said that he had already tried without success to find casual workers. He was the person to whom Mr. Cadien should have reported and Mr. Cadien had not reported anything to him or asked his assistance.

At about 11.30 p.m. Mr. Pengelley telephoned Mr. Cadien's office but got no reply and so spoke to Mr. Cover and the guard at the gate. Getting no reply he left his home and picked up three casual workers. By then Mr. Sinclair was on duty, so he got equipment and turned over equipment to him. It was now 12.10 p.m. and Mr. Cadien was then sitting in his car by the shipping office.

Mr. Winter on his arrival next morning received some information, he examined the books and found that the records were not completed. He spoke to Mr. Pengelley then later armed with a letter of suspension, he went to Mr. Cadien who told him what had happened. Mr. Winter asked him

for a written statement and on his refusal he gave him the letter of suspension. On the 12th he communicated with Mr. Cadien's wife and getting no response he dispatched a telegram to him. On the 18th April, 1977 Mr. Cadien went to the defendant's office where Mr. Pengelley asked him for a written statement in respect of what took place on the shift and he refused. In spite of the urgings of Mr. Winter he kept his stand stating that the Company should prefer charges and he would be prepared to answer them. The decision was then taken to dismiss him.

To support this the defendants called Mr. Pengelley, Plant Operation Superintendent in charge of Shipping, Mr. Clarke, the Drying Supervisor, Mr. Winter the Shipping Supervisor, Mr. Sinclair, the Shipping Foreman and Mr. Cover, the Gantry operator.

In examining the issues that arise in this matter, the case of Baster and Lincoln, Country Printing Works (1895 - 9) All E.R. Reprint p 437 is a good guide-line. Here an employer dismissed the employee summarily because the employee concluded that he had failed to put a roller called a "top rider" into the forks in which it would revolve, causing the machine to gain when started as a result of which considerable damage was done to it. The employee says he did but it had "jumped out."

The learned judge found that the employee forgot, that it was an important part of his duty, that it amounted to neglect and dismissal without notice was justified.

Mr. Justice Daley in his judgment says:-

" To forget to do something trivial or a not very important thing in the business is not enough to justify dismissal. But to forget to do a thing which if it be not done may cause serious damage or injury may be a serious neglect of duty and forgetfulness of that kind may be more serious and may justify dismissal."

He went on to say that it need not be habitual it depends on the circumstances of the case, depends on the act of forgetfulness and the character of the work which the workman has to do. It is largely a fact of degree.

The main issue as I see it is not one of forgetting, but it is whether Mr. Cadien neglected or fail to do, or showed gross incompetence in what he was required to do and whether or not it was a matter of great importance which caused serious damage or injury to the defendant's Company, taking into account the particular circumstances of this case and the character of the work he was required to do.

Late-Coming

Mr. Cadien insists that he arrived on duty at 4 p.m. and not at 4.25. One would have expected that he would proceed immediately to relieve the man on duty. Mr. Winter says it was 4.25 he saw him but he would not be able to say if he had come in before that time. The probabilities are that Mr. Cadien was on time but late in reaching the office. Human beings do not operate with the precision of machines. Mr. Cover the Gantry operator said that when he came at 4 p.m. he did not see him but if he had come earlier and was on the plant he would not be able to say. It was a holiday and an unusual shift for him, the chances are that that fact was supportive of his being on the compound and of encouraging dalliance in reaching the office. I am supported in this finding from the fact that nothing was adduced to satisfy the Court or even infer that he was habitual in this late-coming or even that it had occurred once before. Mr. Cover spoke of seeing him at times at work earlier than 4.00 p.m. and on his own uncontradicted evidence he had never been late in his thirteen years with the defendant's Company.

Mr. Winter remained in his office till he came, the system was not left unmanned and no detriment was suffered by the Company. I find there is no abuse by Mr. Cadien of late coming to the office and this singular breach cannot be regarded either as lack of concern or indifference.

Telephone Communication with his wife

The plaintiff's evidence is supported that when he came on duty he got a message from Mr. Winter that he should telephone his wife. The nature of the telephone call was never investigated but Mr. Winter and Mr. Pengelley said it sounded as if it was urgent. Mr. Pengelley said he spoke with him at 5.30 p.m. and he indicated he was having some difficulty in getting in touch with his wife and on Mr. Cadien's request he agreed that he could come to his home to make the call. He never came but under cross-examination Mr. Cadien said he telephoned her at 5.30 p.m. Nothing more was said on this but it may well be that the first attempt at 4.00 p.m. was not successful hence his request of Mr. Pengelley and a second attempt at 5.30 p.m.

Mr. Cadien has denied any conversation with Mr. Pengelley at 5.30 p.m. In spite of their differences to which I shall later refer it does not appear to me that Mr. Pengelley's imagination could have run this far I can only say that in the night's anxiety and turmoil he had forgotten this portion of the evening's incident. On a view of all the circumstances it seems to me that what Mr. Cadien was saying was that he had done all that the job demanded of him so far - warning pilotage, checking system etc. and the next matter of urgency was to try to contact his wife. I can see no error in a family man given these circumstances, trying, while on the job, to get in touch with his family at any available

time, provided he had done such work on the job which had to be done up to that moment of time. Mr. Pengelley in cross-examination was supportive of this view. Mr. Pengelley says that Mr. Cadien told him pilotage was advised and that everything was O.K. with the system. This was 5.00 p.m., he was aware that loading would not commence until 8.00 p.m., the telephones on the premises were not working. I regard it as inhumane to think that a family man could properly address his mind for the rest of the shift to what he had to do without getting in touch with his home. I consider it perfectly natural and within the bonds of any working conditions and a reasonable thing to expect him to do this having already done what was necessary for the job. His communication with Mr. Pengelley I do not interpret as having meant to convey that he was placing a priority in communicating with his wife over and above the execution of his duties and I so find. Of this Mr. Pengelley said that when he spoke to him "it sounded so" and later concluded that it was not unreasonable to infer that what he said was that now/^{he}had finished (checking) the next thing he wanted to do was to get in touch with his wife. This supports my finding.

Inspection of Loading System

The defendants say that he did not make an inspection of the loading system. The plaintiff denied this. He strenuously asserted that he inspected and checked it that he walked from tunnel to transfer house then lower transfer house and other areas leading to the gantry and found everything in order. As he was not a technical man he was not expected to check the mechanical system. He had inspected also the shuttle belt to see if idlers on which they run were missing or if they were ~~more~~

on one side than the other. No evidence was led to indicate that this did not cover the extent of his inspection and no evidence was led that he did not inspect it, whether by inference or direct.

Mr. Cover the only other employee at the section said he would not be able to say he was not there neither would he be able to say if he was at any point on the compound. The absence of precise information is understandable as one gleans from the evidence that the area which covers around the loading operation - from the gantry and over to the foreman's office is quite large. It is Mr. Cover's estimate that it takes approximately ten minutes to walk from the foreman's office to the gantry. Mr. Cadien's estimate is half an hour. It is accepted that each man walks at a different pace but sufficient to draw an inference that the area is wide. This can well explain Mr. Cover's inability to say and the lack of any evidence from the defendant to explain where Mr. Cadien was or what he did. It cannot be said either that the very fact of the blockage indicated that he had not checked it and there is absolutely no evidence that what had indeed occurred "the hopper tripping out" could have been ascertained on his examination of the system. The Court is left to infer that it is one of these things that happen unannounced and as both Mr. Winter and Mr. Sinclair evidenced, this hopper/shuttle breakdown was not a thing of regular occurrence. I would hold however, that what is correct is that the blockage happens unfrequently and unforeseen. Mr. Clarke said that loading had electrical and mechanical devices and something could have gone wrong with either. The defendants evidence is speculative. Mr. Cadien speaks positively of having checked it and I find that the allegation that he failed to inspect the loading system to take precautions against excessive water in the conveyor belts

and ensure that the belts were properly tensioned has not been proved.

Plaintiff's absence at time of blockage

The visit to Mr. Winter's house is of some importance at this point. The allegation, as I understand it, being that he left his job to visit Mr. Winter and was so out of reach between 6 - 8.30 p.m. at a time when the breakdown occurred. The plaintiff said that on Mr. Winter's, his supervisor leaving, he requested both Mr. Cover and himself to come up to his house after they had finished checking the system. So after telephoning his wife and doing his checks he proceeded to Mr. Winter. Mr. Cover had gone before him and returned to the plant before him. He left Mr. Winter's home between 7 to 7.15 p.m. Mr. Cover denied having been invited or having gone and asserted that he would go there only on duty, that is, for help if there are problems on the job. Mr. Winter admitted that Mr. Cadien came on his invitation about 6.00 p.m. and remained twenty minutes to half an hour - that they had "certain discussions", but that Mr. Cover never came. He however, belies Mr. Cover by saying that Mr. Cover would visit him occasionally and on social occasions when he Mr. Cover is off duty, and also when on duty, if he is sent by the foreman. Some significant facts emerge. Both Mr. Winter and Mr. Cover said that they saw Mr. Cadien at the same hour; 4.25 p.m. - Mr. Cover said that when he needed Mr. Cadien later he left the plant intending to go to Mr. Winter's "to look for Mr. Cadien" - he gave the impression that he goes to Mr. Winter only for business whereas Mr. Winter's evidence indicated that they meet socially at his house.

I come to the conclusion that all three men met at the beginning of the shift, that Mr. Cover knew where Mr. Cadien was because he had also

been invited to Mr. Winter, had gone there and had left Mr. Cadien there. That Mr. Cadien was away from his job from 6 p.m. and that Mr. Cover returned ahead of him. One appreciates that each man is interested in the self-preservation of his job, a factor which I find runs through the evidence of some of the witnesses, a self-preservation that is moreso understandable when it is demonstrated that in the organisation of which they form a part ~~it~~ requires the influence and signature of one person to dismiss them. To ensure that this does not happen it is easy to see how evidence is twisted and bent, sometimes gently, sometimes sharply not in an attempt to thwart Mr. Cadien's cause but to extricate themselves from admitting having done what they themselves know as being against the rules. A case in point is this one where all three men on social terms are invited to the home of Mr. Winter, and though an Englishman an invitation, I infer, not to tea but it seems for other repast more endemic to a Jamaican Society, one which put Mr. Winter very soundly to sleep - beyond Mr. Cadien's reach when help was needed. But both Mr. Winter and Mr. Cover make a denial the former because as a Supervisor he cannot admit that he took two men off duty for some purpose not pertaining to the job and Mr. Cover must perforce support Mr. Winter in his purpose and at the same time support himself that he Mr. Cover was never absent from his post.

An issue that arises from this is what hour did he return from Mr. Winter? He says he returned at 7.15 p.m. and went to an area to check the level of the water. Mr. Winter says he left him home at 6.20 - 6.30 p.m. and it is five minutes drive. Mr. Cover says that at 8.15 p.m. after getting no reply from the telephone in the foreman's office he went off in

his car and met Mr. Cadien coming from Mr. Winter. His time factor does not tie in with either Mr. Cadien's or Mr. Winter's timing which is nearer to each other. In view of Mr. Cover's evidence on the issue of the visit which is discredited I find that on a balance of probabilities Mr. Cadien's evidence is correct that he returned at 7.15 p.m. and was on his duty checking the water level. He was absent from 6 p.m. to 7.15 p.m. Absence under such circumstances amounts basically to leave granted by his superior officer to be absent from his post, and in that case I find it cannot be regarded as a ground for dismissal. It means then that though he was not immediately available at the time of the blockage he was not absent from his post.

The Blockage

When Mr. Cadien received a report of the blockage he inspected it and put two men to work with shovels and mask. He had never been on a night shift when such a problem had arisen and had never had to go seeking casual labour. The evidence indicated he became anxious and frightened. Mr. Cover's account is:-

" On my way to gantry I met Mr. Cadien he repeatedly asked me what had happened and I told him that the shuttle belt skidded and overload. He said he was going to the office for a flashlight and to call the electrician. He left. Some minutes after he came on the gantry with a flashlight in his hand. We both inspected the belt and the hopper and found that the hopper was full with Bauxite. The electrician arrived - Mr. Clifton Miller, Mr. Cadien asked him to bridge the overload relays. Mr. Miller said he could not as it would burn out the motor. Mr. Cadien left two men to shovel the Bauxite from the belt - Lynch and Morrison. Mr. Cadien left. It was about 8.40."

And he later said:-

" Yes once he ^{came he} was doing everything to get things moving. When it was not practicable to bridge the motor he got the two men on the spot to start shovelling off the bauxite. Mr. Miller came on scene about 8.35 p.m.

immediately Mr. Cadien came he got Mr. Miller.
He set men to work within ten minutes about 8.40."

Mr. Cadien catalogue his step at clearing blockage as:-

1. Putting two casual workers to manually shovel the bauxite off the belt.
2. Calling the electrician, Mr. Miller to check the system.
3. Driving to Mr. Winter's home to report the situation.
4. Driving in environs of Discovery Bay, Farm Town; Thickets, searching for casual workers to assist up to 11.00 p.m.

As to (1) he admits he knew that the two men could not expeditiously shovel off the Bauxite. It is admitted that two men were seen shovelling.

As to (2) the electrician came but nothing electrical could assist.

This is accepted.

As to (3) Mr. Winter was asleep and not available which he admits.

Casual Workers

As to (4) he said ^{he} / did not find any casual workers. The allegations are that he did not go out to look for casual workers, for if he did he ~~would~~ have found some in like manner as Mr. Pengelley found and brought in four men at 12.10 a.m.

The Company has a list of casual workers two hundred in all but before Mr. Cadien ^{could} / employ, permission had to be sought from the Superintendent in charge, that is, Mr. Winter. Mr. Sinclair said that a list of twenty to twenty-four of these workers from which they can select was assigned to this department. He had had three years employing casual labour and he admits to having a great working knowledge of the men. But these men can be found laying around in the pier area. Mr. Cadien said that he drove by the pier and to the square where men were but not casual workers. The evidence as a whole is silent as to

where the pier area is vis a vis the square, and other areas where Mr. Cadien evidenced he visited in search of casual workers. But it may be that Mr. Cadien's difficulty in finding workers sprung from the fact that he was looking for them at the wrong places, that is, at the square etc. rather than remaining at pier, till they turned up. He said that it was always Mr. Winter's responsibility to get casual workers and he always did, that he would have to get permission also but being unable to speak with him he undertook the responsibility and went out on his own. If on Mr. Winter's return to office he was satisfied he Mr. Winter would make out a requisition for them to be paid. His lack of knowledge in recruiting could well be another reason why he had gone to the wrong places. On the other hand Mr. Pengelley with his vast experience would certainly know where they could be found.

Mr. Winter said that the next morning he was aware that Mr. Cadien had come to his home when he was asleep. Mr. Clarke also said that at 11.35 p.m. he told Mr. Cadien that he had permission to go and find casual workers and Mr. Cadien told him that he had already tried and could not find anyone. I find that this statement to Mr. Clarke was made at a time when Mr. Cadien had no thought or idea that his actions would be the subject of enquiry and at a time when he had no time in which to make up a story and I find as a fact that he did go out in search of casual workers but was not successful.

Rectifying Blockage

The defendants said that he failed to report the blockage to Mr. Clarke the Drying Supervisor or seek his assistance in rectifying it.

Mr. Cadien said that he did not know that Mr. Clarke was the

person over-all on that shift. He had always regarded the departments as separate and so sought the help of his own department head, Mr. Winter, instead. Mr. Cover with thirteen years in the shipping department was however aware of this arrangement so was Mr. Sinclair of nine years but Mr. Cadien of less than one and a half years experience in this department stuck to his written instructions of the inter-office memo of 29th January, 1976 which said that Mr. Winter was the person to whom he should answer and this because he had got no other instructions oral or written. Mr. Winter said that those instructions were given verbally and he was unable to say whether he had given them to him. Apparently the necessity never arose for Mr. Winter to tell him and so Mr. Winter forgot to do so. Mr. Cadien then could not have failed to do something which he never knew he should do.

The question is, did he neglect to act or did he show gross incompetence in what he was required to do in a matter which was of urgency and importance?

Mr. Clarke in his assessment says:-

" I know there was no loading on his shift. If he used the electrician to check the system I would say he took some steps to get it moving, also if he went to seek casual labourers or if he used what labour he had and put them on duty. If he had been to the head of his department, Mr. Winter, I would say he has taken positive steps."

And finally gave an opinion:-

" If he had done as enumerated I would say he had done a great deal to get the thing moving."

Mr. Winter in his appraisal of what was done said:-

" He told me of steps he took to solve the problem. If one occurs and you are non technical it is your duty to call a member of technical staff to assist. I learnt he called Mr. Miller the electrician it would be a proper step. And I would expect him to

await the report of the electrician before he does anything else. If not electrical fault I would expect Mr. Cadien to start shovelling off the bauxite with what labour force he had. I now know the electrician never got system going. And that he got men on duty with him to start shovelling off bauxite. It was the proper thing to do."

And now Mr. Sinclair said:-

" Almost 8 - 10 minutes after the men arrived at clearing site the system got started and loading process would be able to start."

They had completed the work by 12.28 a.m.

It means then that the bauxite was largely removed at the time when the extra hands came on. The ship was delayed for four hours. Had he been able to get extra hands it would have been cleared earlier but I find that though he might not have mastered it with the competence of the Plant Operation Superintendent he certainly did not display incompetence or neglect in this area.

Conduct in Office

Mr. Clarke came and found him in his office with his foot up and appeared to be sleeping though he admitted that it was hard to tell if one is sleeping or not, Mr. Cadien admitted it but said he was not sleeping but that his toe was cut - bleeding and bandaged and it was hurting, so he elevated it but Mr. Clarke though he did not examine the toe did not notice anything wrong with it. Mr. Cadien said he got it just before coming on duty. Whether his toe was hurt or not he was in a state of apparent ease at a time when he should be showing some urgency. He said he visited the men shovelling at the gantry before returning to his office. Mr. Cover said he did not see him. He could have shown some interest in remaining there in his supervisory capacity if only to give

support in as much as they did not seem to lack expertise. Mr. Cover said it is not unusual for them to work on their own and that Mr. Cadien had instructed them what to do before he left and they knew what to do. It could be that for one reason or another he decided to sit out the last half hour to be present when his relief arrived or to rest his foot. In doing so though thoughtless, there was no detriment to the work at hand, it is not an issue I consider to be taken into account in considering dismissal.

Log Book

He did not complete the entry in the log book. No note was made of the delays and it was not signed. He said he intended to make the entries next day and that he told Mr. Sinclair who admitted that he told him - though briefly - of the problem. A look at the book - Ex. 2 indicates it sometimes did not get signed and on the matter of entries though this does not excuse Mr. Cadien the Court looks at it generously as Mr. Clarke said he had seen foremen write up things in the log books at the next shift. He, Mr. Clarke would usually brings them to grips and would not fire a man for that. If indeed it had not been noted and there was no communication with his relief causing injury to the Company then it could be regarded as gross incompetence, but since Mr. Pengelley said that verbal communication on relief is accepted procedure, which he did and his stated intention was to complete the entry next day a procedure which happens at times I do not regard his failure here as neglect of duty from which detriment resulted. However, the necessity must not be overlooked by persons who are deputed to make entries and those supervising them to see that this is done.

Indecent Language

Mr. Clarke said that when he told Mr. Cadien that Mr. Pengelley had asked ~~him~~ to check on the breakdown for him he used a volley of bad words all related to Mr. Pengelley. They were the only two persons present. Mr. Cadien denied this but I believe that he did use them. Mr. Clarke says it is not unusual ^{to} hear expletives in such circumstances where men are pent up and ~~working~~ and the history of the evening makes me find with certainty that he did use them.

In Juptier General Insurance vs SHROFF 1937 (3) All. R. p 67 at p 74 Lord Maughnman said:-

" Their Lordships would be very loath to assent to the view that a single outbreak of bad temper accompanied it may be with regrettable language is sufficient ground for dismissal. Sir John Beaumont C.J. was stating a proposition of mere good sense when he observed that in such cases one must apply the standards of men and not those of angels and remember that men are apt to show temper when reprimanded."

I adopt His Lordship's view and would in this case substitute the word frustrated for reprimanded.

No one can but conclude that Mr. Cadien was very abrasive in his manner and ~~course~~ in his use of words on this occassion, something quite inexcusable, however, it has to be considered in the context of dismissal from office and I find that ~~his~~ foul language was used on a solitary occassion and that they were used in a situation where Mr. Pengelley the Plant Superintendent of whom the words were spoken was ~~not~~ humiliated or lose respect in the eyes of his fellow-workers neither was Mr. Clarke degraded or disgraced in the presence of others and it ~~is~~ therefore not conduct which interferes with or prejudiced the safe and proper conduct of the Company to justify dismissal.

No evidence was led as to the cause of the break-down in spite of highly technical staff being available to the Company. In those circumstances it is impossible to conclude other than the fact that what plaintiff said he did was all that was necessary to be done to inspect the ship loading system to see that all was in good order for the loading. None of the witnesses were able to say he did it or even deny that he did and there is absolutely no evidence from which the Court can infer this.

The steps which he said he took to rectify the faults were put to the witnesses, Mr. Pengelley, Mr. Cadien, Mr. Sinclair, each of whom agreed that they were the proper steps. It has not been suggested that he should have done more except that he should have reported it to Mr. Clarke which directions as I have found were never communicated to him. Mr. Clarke on finding out did not offer him the assistance of the two men who he said in evidence he might have been able to assist him with. What he did was to give him permission to go and look for casual workers which step Mr. Cadien had already taken. Mr. Clarke had gone to the gantry and had seen the men shovelling - he could offer no help there. Mr. Cadien might have had a duty to tell Mr. Clarke, but as it turns out that even if he knew and did what help Mr. Clarke did offer when he learnt of it did not go beyond what Mr. Cadien had already done.

Mr. Cadien's error comes with his foul mouth uttering abusive words but it was on this single occasion in circumstances which did not interfere with or prejudice the safe and proper conduct of the Company.

It however irked Mr. Pengelley to the extent that when in the course of considering the manner to deal with Mr. Cadien and he got

information from Mr. Clarke about it it immediately brought him to a conclusion on Mr. Cadien's conduct resulting in his several consultations with Mr. Winter and the latter writing a letter of suspension.

Mr. Pengelley was Mr. Winter's boss and no one who saw Mr. Winter could conclude any way other than he was a "timid soul." It would take very little for a person of strong character as Mr. Pengelley proved both in his deameanour and his handling of the entire affair to overwhelm him.

Mr. Pengelley an urbane young man with a very senior position, Mr. Cadien a much older man very junior in position to Mr. Pengelley, Mr. Cadien rough in manner, Mr. Pengelley uncompromising, unco-operative and rigid in his handling of him. In spite of Mr. Pengelley's assertion that their relationship was good and Mr. Cadien's failure in supporting his own negative averment with any substantial example I came to the view on seeing the men and the circumstances as described that inasmuch as they might not have openly ~~feuded~~ there was a decided clash of temperaments and as such "no love was lost" between them.

It was unfortunate therefore that Mr. Pengelley was the person who had to liaison with Mr. Winter, the amiable but diffident social friend of Mr. Cadien on the appraisal of Mr. Cadien's management of the breakdown on the night of the 8th resulting in the letter of suspension. It was suggested that ~~it~~ was on Mr. Pengelley's urging that Mr. Cadien was suspended and Mr. Pengelley denied this. At 2 p.m. he knew Mr. Winter had in his possession the letter of suspension but by then he had already discussed the matter with Mr. Winter several times before but was not aware of Mr. Winter's definite decision about suspension till then. Mr. Winter purported to support him saying it was his Mr. Winter's own

decision. His decision yes, but clearly on Mr. Pengelley's urgings. So armed with his letter he waited no doubt with great hesitancy and arrived at the home of his friend Mr. Cadien at the last moment fifteen minutes before he was due to return to work, received a verbal report of the blockage, the calling of the electrician, putting the two casual workers to work, going out to find more, his failure to find. This explanation he said did not satisfy him yet in Court in cross-examination he admitted they were the proper things to do! Mr. Cadien said that Mr. Winter said that Mr. Pengelley told him to suspend him. I believe he told Mr. Cadien and that what he told him was the truth. He says he asked Mr. Cadien for a written statement and he refused and he handed him the suspension slip. I do not believe this. I find no written statement was requested of him before the suspension. Mr. Winter went to his home with a letter of suspension in his pocket already signed. Mr. Winter asked for an oral explanation which was given to him. Notwithstanding the oral explanation he gave him the letter. If they had not in fact intended to suspend him one would have expected that the first request would have been for a written statement which Mr. Winter would take to Mr. Pengelley, and discuss before making that decision.

Even if one should say that since it was in Mr. Winter's power to suspend and he took the letter of suspension on the chance that he would need it, there is on the evidence nothing on the oral explanation given him by Mr. Cadien which could have supported the decision for suspension as these things he admitted in cross-examination were the proper things to have done. It clearly shows that they were prepared to suspend him on what they had already heard from others.

Nine days later he did not comply with the request of Mr. Pengelley who came with pencil and paper to collect a written statement from him. He took the view that when they had completed the enquires and investigations and he was aware of what the charges were against him he would be prepared then to defend them.

Suspension is a very old form of punishment where the contract of service remains but the employee does no work and the employer does not pay. A worker can be suspended for a given period after an investigation, but there can be no valid investigation unless there is an enquiry and the worker is heard and a decision taken as to his conduct which decision and punishment is communicated to him.

A worker can be suspended also pending investigation without a given period. An enquiry can be conducted with the person remaining on the job or removed from the job with/a given period pending investigations. or without
As a result of these investigations charges are prepared against him and a hearing or enquiry follows on the strength of which he is commonly either reinstated or suspended if on the job or further suspended if not on the job.

Implicit in a suspension without a given period is an indication that there is a matter which calls for further investigation. If from these, negative results flow then reinstatement is automatic but if this exercise proffers positive allegations, that is, something which requires an explanation then a hearing or interdictment becomes necessary at which the worker is given an opportunity to offer the explanation, that is, to answer those charges. He can then be reinstated, dismissed, further suspended for a named period or otherwise punished.

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To Mr. Pengelley
written on 28/1/58

But to request a statement from a person already under suspension, if not voluntary given, would, in those circumstances if demanded be prejudicial, compromising and in breach of natural justice.

Mr. Cadien it is admitted, gave an oral report to his Supervisor before a suspension letter was handed to him even though the decision to suspend was already taken. At the time of Mr. Pengelley's decision to dismiss the accusitive facts in his possession consisted of six statements. To dismiss Mr. Cadien without giving him the opportunity of answering these accusations is I hold compounding the wrongful dismissal.

It is said that immediate dismissal of an employee is a strong measure and this is well known to Mr. Pengelley for he had never before dismissed an employee of that level and none since. What is argued here, however is gross neglect, reckless disregard of his duties, abdication of his responsibilities. I find none of these proved.

In my view he did nothing which was incompatible with the due or faithful discharge of his duty to his employer, he did not fail to display a reasonable degree of competence in all the circumstances, albeit, Mr. Pengelley proved more efficient and competent in the particular area of finding casual workers and here there was no error of judgment or neglect on Mr. Cadien's part as he was aware that the labour was insufficient and had made efforts to find other labour.

I find that his dismissal was not justified and he was wrongly dismissed.

Damages

The defendant was suspended on the 9th April, 1977 and

summarily dismissed by notice dated 25th April, with an effective date of dismissal as 19th April, 1977. His letter of termination said that "outstanding salary related moneys" was enclosed and that his contributions to the Superannuation Scheme would be sent to him. No evidence was given as to what sum he had received as salary and as contributions or if in fact he received anything. I find therefore that the refunds were made and that salary was paid up to the effective date namely April 19, 1977. When he came into the employment of the defendant on the 22nd September, 1964 he was hired on a general basis. A general hiring is terminable on reasonable notice. What is "reasonable notice" depends on a totality of circumstances. Mr. Harrisson, the Personnel Officer, gave evidence of ^A custom in the Company of giving one-month's notice to quit. It is my view that persons who are charged with senior positions are entitled by the very nature of their work to longer notices than others. In the particulars of Special Damages, six weeks is claimed. I consider it a reasonable period. I find his yearly intake as proved was - salary \$1,136.00, shift premium \$800.00, overseas travel approximately \$240.00, medical plan approximately \$500.00, school allowance \$600.00 a total of \$15,772.00 a figure of approximately \$1,315.00 per month. The particulars of Special Damage claim \$1,206.00 per month and that figure will be used.

He says he has made several applications and has been unable to find a job. He is fifty-one years of age and has spent the major part of his working life growing in the operations of the bauxite industry, where his skill now lies. In the depressed state of the economy in 1977 it is my view that his chances of finding a position comparable or at all

was indeed small. He has grown older and has still failed to find a suitable job and I think he would be extremely lucky to find anything at all. This I infer was conceded by the defendant as no attempt was made to satisfy the onus of proof placed on them to show that he could have obtained alternative employment. In the very organized industrial country of England the law considers that employment in any ordinary branch of industry can be obtained by a competent person as of course, and that with some diligence a person would be fully able to mitigate his damages. The Jamaican situation is contra to this, is well known, and I need not labour it. It is sufficient to say that jobs are difficult to find if at all. The loss of prospective earnings can be safely put at ten months.

His evidence is that he has been assisting his wife in her gas station business. It is difficult to accept that for this "assistance" he receives no remuneration and I am content to find that he is gaining the benefit of or receiving some sum not quantified. I assess it at \$200.00 per month.

He is entitled to benefits from a Pension Scheme but he has not been able to quantify in his evidence what sum he was likely to lose. Mr. Harrison, the Personnel Officer, said it required a very involved method of calculation but went no further than the fact that a calculation of 1.75% of the average of the salary of the past three years was used. Used to do what? Inasmuch as he is entitled to an award under this head. I can make none.

I take into consideration, however, the fact that he has been denied the privilege of further advancement in the Company which he said

was available, a fact supported by defendant's witness and which would have undoubtedly enhanced his salary also the very high-handed manner in which he was removed after thirteen years of dedicated service rewarded by substantial promotions in a very large Company taking him in this period from a salary of \$152.00 per month to \$1,136.00 per month plus fringe benefits, which, I consider, is a tacit demonstration by the defendants of satisfaction in his work.

He will be awarded for Special Damages.

Six weeks in lieu of notice @ \$1,206.00 per month	\$ 1,809.00
Ten months loss of prospective earnings	<u>12,060.00</u>
Total	\$ 13,869.00
Less mitigating damages 10 months @ \$200.00	<u>2,000.00</u>
	\$ 11,869.00
General Damages	<u>1,000.00</u>
	\$ 12,869.00

There will be judgment for plaintiff vs first defendant for \$12,869.00 being as to Special Damages \$11,869 and General Damages \$1,000.00 with costs to be agreed or taxed.

At the close of the plaintiff's case I gave judgment for the 2nd defendant. The 2nd defendant is awarded his costs to be agreed or taxed and to be paid by the 1st defendant.

M. Morgan
Judge