IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. F.100 OF 1984

BETWEEN	GERALD FOSTER	PLAINTIFF
AND	ALUMINA PARTNERS OF JAMAICA	DEFENDANT

P.J. Patterson and Clarke Cousins
instructed by Rattray, Patterson, Rattray for the Plaintiff

R. Williams, Q.C. and Charles Piper
instructed by Clinton Hart & Co. for the Defendant.

January 7, 8, 9, 1985
June 3, 4, 5, 6, 1985
May 2, 1986

WRIGHT, J.

The question for determination in this case is whether the summary dismissal of the plaintiff by the defendant on the ground of his continued intermittent absence from work (albeit most occasions of absence were justified by him on the ground of ill-health and were supported by medical certificates) was or was not justifiable. Contending that the dismissal was wrongful the plaintiff seeks redress in the nature of -

(a) Loss of salary in lieu of notice

(b) Damages for wrongful dismissal

(c) Redundancy payments.

Denying the plaintiff's claim the defendant maintains that the plaintiff was dismissed without notice because of his poor attendance and personnel record. In argument it was made clear that the plaintiff's ability to perform while on the job is not in issue.

The resolution of the problem is not rendered any easier by the appearance of some amount of confusion in the plaintiff's camp. Paragraphs 8 9 and 10 of the Statement of Claim are as follows:

> "8. The Plaintiff maintains that such dismissal was invalid and/or alternatively contrary to the terms of his employment, whether expressed or implied.

9. The Plaintiff further, or in the alternative, claims that his dismissal was contrary to the provisions of The Employment (Termination and Redundancy Payments) Act and/or that the requisite notice was not given.

10. It was an implied term of the contract of employment, that in the event of severance, the Plaintiff would receive payment computed on no less favourable a basis than that which applies to members of the Unionised staff covered by the Labour Agreement between the National Workers Union and the Defendant.

The Plaintiff will in the course of the trial refer to the said agreement for its full terms and effects, and in order to determine the provisions properly applicable to the Plaintiff in the events which have transpired."

In opening the plaintiff's case Mr. Patterson said -

"It is not uncommon for purposes of union representation distinction is made between the supervisory category and other members of staff who are represented by the N.W.U. - all unionised staff.

The supervisory staff not members of any Trade Union but the basic terms governing unionised staff apply insofar as they can to the supervisory staff as the terms for the basic minimum terms of their employment.

No written term of agreement between the employers and the supervisory staff - none in respect of the plaintiff though his emoluments were clearly stipulated."

The plaintiff in his evidence said that although from time to time there were Collective Labour Agreements in respect of the unionised staff such agreements did not include the supervisory staff and there were no such agreements regarding the latter category. In this he was confirmed by a copy of the Collective Labour Agreement (Exhibit 2) which took effect on February 1, 1981 paragraph 5 of which states inter alia -

"This Agreement shall apply only to regular hourly rated employees engaged by the company directly in the Company's operations, etc."

This provision effectively nullifies paragraph 10 of the Statement of Claim and forced Mr. Patterson to announce abandonment of reliance thereon. It was expected that when the trial was resumed after adjournment on the third day that witnesses would be called to fill the lacuna. However, on resumption on June 3, 1985 a Supplemental Agreed Bundle was filed which Mr. Patterson said obviated the necessity to call further evidence and on that note the plaintiff's case was closed without his attention being drawn to any of the contents of this latest bundle.

In this Supplemental Bundle are four documents -

2 letters from the opposing parties (pp. 7 - 8)

1 document dated 2.3.72 - dealing with the subject - EMPLOYMENT TERMINATION - SALARIED EMPLOYEES (pp. 1 - 4).

1 document dated 19.10.79 from N.T. Chaplin, General Manager, dealing with the subject - PROBLEM HANDLING - SALARIED EMPLOYEES and addressed to All Salaried Employees, Alpart - Nain (pp. 5 - 6).

Although the plaintiff gave no evidence regarding these documents (pp. 1 - 6) Mr. Patterson submitted that "they represent the standard practice relating to salaried staff and are the express terms of the employment". Further reference will be made to these documents. The present purpose is to highlight the difficulty in identifying the terms, express or implied, of the plaintiff's employment. In this regard it is apposite to include paragraph 6 of the Defence which in addition to denying paragraph 8 of the Statement of Claim reads -

> "The defendant says that it was an express and/or implied term of the said contract of service between itself and the Defendant that the latter would be entitled to dismiss the Plaintiff without notice or payment in lieu thereof for misconduct or other just cause shown."

Such a pleading envisions the adducing of evidence of express provisions or a system employed by the Company and known to the plaintiff against the background of which he accepted or continued in the employment. More of this anon. The endeavour is rendered even more keen by the Court having been alerted by the parties that the case is not without significance in the field of Industrial Relations by the fact that there is no previous local ajudication on the issue involved.

The plaintiff's employment to the defendant company was terminated by Inter-Office Memo dated 14th September, 1981 with effect from 12th September, 1981. It reads -

> "Effective September 12, 1981, your services with Alpart as Supervisor in Slurry Mix Section are terminated.
>
> This decision is based on the fact that your Personnel Record over the years has not been good.
>
> Recently, you presented a sick certificate for two (2) days adding to your poor attendance record, which has created undue hardship to your peers who in most cases have to work extra hours in filling your vacant position."

He was then Section Shift Supervisor with responsibilities stated by him as follows:

> "I supervised the total running of my section on a rotating basis. I now supervise supervisors -
>
> 2 Area Supervisors
>
> 2 Control Board Technicians
>
> I supervised three (3) work shifts -
>
> 12 mid-night - 8.00 a.m.
>
> 8 a.m. - 4.00 p.m.
>
> 4 p.m. - 12 midnight."

To all appearances a very responsible post. And indeed this is so as Mr. Piper took care to emphasize in outlining the case for the defence. Said he -

> "Each shift in each Section is manned by a crew of approximately 5 - 6 men - hourly paid workers. There are different Sections in each department and in particular the production department.
>
> Each crew has a Supervisor who is responsible for the management of production in the Section during his shift. The role of the Supervisor is a very important one to the Company and the Supervisor in that capacity is responsible for ensuring continuity in production ensuring that the system under which the company as a whole, as well as each member of his crew operates is safe and that they follow all safety procedures set down by the Company.
>
> The Supervisor is also responsible at the commencement of the shift to take over from the previous Supervisor and at the end of his shift to hand over operation to the new Supervisor taking over.
>
> The defendant therefore places a great deal of responsibility on Supervisors and relies upon them both for managing the operation during each shift and for attending to do so."

Such then was the position of prominence occupied by the plaintiff. Having joined the Company on 17th March, 1969 as an Alumina Plant worker-trainee he was trained and promoted through the ranks. Confirmed as a Plant worker after three (3) months he occupied that position for two (2) years and then left the unionised group when he was promoted to Plant Technician. He reached his final position via the positions of Shift Supervisor (1973) and Area Shift Supervisor. As Section Shift Supervisor he was responsible for the Slurry Mix.

By means of Performance Reviews - some quarterly, some annually - the Company kept a check on the progress of employees including the plaintiff and although his on-the-job performance is not in issue, Mr. Patterson submitted that in considering whether the plaintiff had been fairly dealt with the complaint of absenteeism should be viewed against the background of such performance. But, retorted the defendant, what is the value to the company of even a capable employee who is not there to perform at the time he is required to perform? And who could doubt the validity of this aspect of the matter? Several of the plaintiff's Performance Reviews are included in the Agreed Bundle of Documents which disclose for the most part that he was a capable employee performing commendably when in accustomed areas. His standard was observed to fall usually while he was in a new area and before he had mastered it. His suitability for promotion was generally recommended, but even on such occasions complaint would be made about the level of absenteeism which he was advised to improve. It is observed that where appropriate there was provision for counselling with the employee in an endeavour to overcome any observed deficits.

However, the full extent of his absenteeism is disclosed not by the Performance Reviews but by the Medical Certificates which were faithfully submitted to account for his absences. Apart from an out-Patient Record which shows 65 visits for the period 21.10.71 - 11.9.81 there are 50 medical certificates covering the period 21.5.70 - 11.9.81. However, Mr. Williams thinks there should be a cut-off period going back no earlier than 1977 - quite a concession. On that basis the medical certificates would account for absences as follows:-

1978 -	28 days	-	11% rate
1979 -	50 days	-	21% "
1980 -	11 days	-	5% "
Up to 11.9.1981 -	38 days	-	24% "

This represents an average rate of absenteeism of 15% over the period January 1978 - 11th September, 1981. In cross-examination on this aspect of the case the plaintiff agreed that for a Supervisor anything above a

rate of 6% was poor and above 10% was very poor. In addition to the absences accounted for by the medical certificates the plaintiff testified of an absence of 12 days during 1979 occasioned by an operation performed by Dr. G. Allen, a company doctor, in the Hargreaves Hospital because of a ganglion on his wrist.

Having regard to the frequency of the plaintiff's absence from work and the variety of illnesses certified the company was presented with two options. The first option was to challenge the genuiness of the certificates and if these proved successful charge the plaintiff with malingering. To do so, however, would give rise to another problem because such a course would involve impeaching the credit of the company's own doctors who had issued some of those certificates. So understandably it did not adopt that course. The second option, and the one adopted was to accept the certificates as genuine and then seek to justify the dismissal of the plaintiff on the strength of his own case. But in addition to that care was taken to demonstrate that not only in his health but in his attitude as well the plaintiff was unhealthy. As if incapable in assessing the implications of his answers or else afraid to admit the truth, the plaintiff testifying under cross-examination insisted that no problem was created by the failure of hourly paid workers turning up for work on their shift because the workers on the previous shift would work for another shift - 16 hours at a stretch. And this in an industry where safety was accorded a very high priority. But, then he had to admit that the management would be concerned. To him it was also no problem if a Supervisor failed to report when he should. The out-going Supervisor would carry on for another 8 hours. Of course the management did not share his views, which, if the embarrassment that accompanied his answers is anything to go by, were palpably dishonest. The company was solicitous of his health. He admits that both orally and by inter-office memos the Company's concern was expressed. The following memos demonstrate the company's attitude quite clearly dating from as far back as 4th January, 1977:

"Subject: Absence from Work

"Your record of absence from work has become a major concern for us. Since August 1976, you have been absent for a total of nineteen (19) days (see attachment).

I am concerned about your state of health and am recommending that whenever you are sick again, you report to the Alpart Clinic for medical examination.

GF/fm
Attachments (3) Medical Certificates".

"August 20, 1979

Subject : Performance

"Although I have spoken to you on several occasions about your performance, I have noticed that it has got from bad to worse.

On Monday August 13 I came to your office and inquired about the steam line up to the 'C' Digestion injection heater. Your reply was nothing short of being obnoxious. Among some of the things you said was that someone must have isolated it, and you want to know why every time you were having your lunch someone had to bother you about the work.

On Tuesday 14th August I asked what you were doing about the high L-P temperatures. Your reply was that the Clarification personnel were not co-operating re: the flow adjustment. I asked if you informed anyone of the problem and your reply was; "it would not make any difference."

Since February 1979 you have been absent from the job two days without permission and twenty days due to illness. It is obvious that you have a very serious medical problem. I will be too willing to arrange a thorough medical examination at the Company's Clinic to try and determine the extent of your illness and what corrective measures can be taken, as the Company would like to see you restored to a fit medical condition so that your services can be relied on.

I hope to see some change in your attitude and attendance as the above performance will not be tolerated much longer."

"June 23, 1981

Subject: Absence Without Permission

You had to work over on the 4 - 12 shift on Friday June 19 when Lawford Henry did not report for duty.

Because of this you absented yourself from work on your regular 8-4 shift on Saturday June 20.

Behaviour of this nature cannot be tolerated as it subjects your colleagues and the organisation to much inconvenience.

This letter, a copy of which is being placed on your personnel file, serves as a warning to you that any future breach of this nature will be severely dealt with."

The memo dated 14th September, 1981 terminating his employment was a predictable climax.

Of course, the plaintiff maintains that he challenged the adverse comments in the memos prior to the one dismissing him, but not in writing. The cross-examination was unsparing, in the endeavour to show that on the plaintiff's record the defendant had just cause to terminate his employment. Many incidents were explored but the position is so well crystallized in the admission forced from the plaintiff that it is not necessary to examine them all. This is what he had to say:-

> "Yes, I am saying my attendance record was very poor but it was due to illness. This was not so regarding my whole career but only when I got ill. Yes, generally my attendance was very poor but it was due to illness.
>
> No not my contention that the company was obliged to put up with this sort of attendance indefinitely. No, don't agree in September, 1981 the Company was entitled to say we can't put up with this sort of attendance any longer even though supported by medical certificate because I don't have any control over my health. I would think that instead of dismissal they would make me medically redundant."

Detectable here is the feeling that the company would be coming soon to the end of its endurance at which stage the plaintiff would be made medically redundant with certain benefits to him. He certainly did not think of a dismissal but he has pointed to nothing in the terms of his employment which would justify his expectations. But the company did not rely on the plethora of medical certificates produced by the plaintiff to inform itself of the state of the plaintiff's health. There were periodic medical examinations. The results of five such records in the agreed Bundle are set out hereunder:

"12.6.73	Apparently healthy adult male with no significant abnormal findings. Fit to continue working.
6.1.75	Fit for service
19.1.77	Apparently healthy man with Tinea Versicolor.
27.3.77	Fit.
28.1.81	Apparently healthy male adult with Tinea pedis."

The final report which was the result of a Special Examination requested by the company and done on 10th September, 1981 reads -

> "Fit.
> Mild hypertension on treatment
> by Dr. Bennett (Black River)
> Appearance: healthy."

It is a matter of record that although the company maintained a Health Clinic at Spur Tree, the plaintiff frequently went to doctors in Black River, Malvern, Junction and Mandeville. In relation to the question of absenteeism, the plaintiff testified that when a Supervisor was absent someone else had to perform his duties but the absentee was still paid. It would not, therefore, require any stretch of the imagination to understand that absenteeism was to the company's detriment in more ways than one.

It is the defendant's contention that the high frequency of absences by the plaintiff was by far the worst among Supervisors in the defendant's employ -- certainly the worst in the Production Department and much greater than the average acceptable within the plant as well as in the industry as a whole. Also, the fact that the Supervisors who were being adversely affected by the plaintiff's absences were unhappy about the situation had been brought to the plaintiff's attention but to no avail.

A company Superintendent, Claude B. Stewart testified that the Alpart Plant with respect to design capacity was the third largest such plant in the world. The plaintiff had been a Day Supervisor which was a higher paid job than the Shift Supervisor and it was noticed that after he changed from Day to Shift Supervisor in 1974 his attendance rate became very poor. In a plant of that size and at a time when emphasis was on improving the cost efficiency of the plant, the plaintiff's level of absence was an aggravating factor. What seemed to have attracted the attention of the defendant was the fact that the medical certificates to cover the plaintiff's days off were not issued by the company's doctors but by other doctors in the area. According to Mr. Stewart the Special Medical Report was requested because having regard to the Annual Reports

and these other certificates there was no pattern and no consistency in his treatment for any particular ailment.

The dismissal was precipitated by the fact that on Saturday 12th September, 1981 he arrived for work 1½ hours late. Mr. Stewart summoned him to his office and had a discussion with him pointing out to him that because he was late others had to cover for him. He was accordingly placed on suspension and directed to report to Mr. Stewart's office on the following Monday for a decision and when he did he received his letter of dismissal effective 12th September, 1981. But prior to that he had been requested to attend at the Company's Clinic for the Special Medical Examination on 10th September, 1981. This was done when after three (3) days absence he had re-appeared with a medical certificate from Dr. Bennett (Black River) granting him three days leave from 6th September, 1981 on the ground of his suffering from gastro-enteritis. According to Mr. Stewart he discussed the plaintiff's records with the witness' senior officer and the Human Resources Department after which the decision was made "to terminate his employment based on his overall performance as it relates to his problem of absenteeism". In the view of this witness, also having regard to the plaintiff's annual medical reports as well as the Special Report dated 11th September, 1981 -- all of which showed him to be fit and able to carry out his duties -- there would be no justification for considering him for medical redundancy.

Evidence of a gathering storm would have been evident to an alert worker who was not hoping to be made medically redundant! Further evidence of the company's concern over the plaintiff's absences was given by Mr. Osmond W. Nation, Production Superintendent and Mr. Wesley Vernon, Maintenance Co-ordinator, both of whom had on occasions spoken to the plaintiff - But what could they hope to achieve when the plaintiff's attitude was -

> "I considered all expressions of concern - oral or written - from 1977 to time of dismissal as being without merit."

Having regard to the ground for dismissal which is already adequately ventilated it will not be necessary to review all the incidents related by the witness. It will be sufficient to mention just a few. Wesley Vernon testified that on Christmas Eve 1979 the plaintiff requested two hours to do shopping. The witness volunteered to work for the plaintiff and gave him instead 4 hours telling him to return to work at 8.00 p.m. The plaintiff did not return and as a consequence the witness had to work the whole shift. He said that when he next saw the plaintiff and questioned him about his behaviour he said he had had trouble with two of his car tyres. The explanation was not believed and he verbally reprimanded the plaintiff. When the plaintiff was cross-examined as to this he could recall no such incident.

Again in April 1981, about 12.00 noon one day, while Vernon acted temporarily as Superintendent the plaintiff requested permission to be absent because of domestic problems. Vernon told him he could not leave until several problems which they had at the time were resolved. However, at about 2.10 p.m. when matters were worse the plaintiff was seen by Vernon leaving his work area and all efforts to make contact with him proved futile. The matter was reported to Mr. Hay, Superintendent in the Slurry Mix Department who in Vernon's presence upbraded the plaintiff for his irresponsible behaviour and cautioned better conduct for the future. The plaintiff again could not recall such an incident and specially denied leaving work as testified by Vernon.

June 1981 was to witness another incident which questions the plaintiff's credit and challenges his work attitude. About the details of this occasion there is great conflict. The plaintiff had been absent from work for two days without permission. He said that he had sent a message on the first day but he did not say how. Vernon said the plaintiff telephoned him from an in-plant telephone on 26th June, 1981 requesting him to inform Mr. Hay that he was having a hearing problem and had been to a doctor at Spur Tree who had said nothing was wrong with him so he would be going to another doctor. On 29th June, 1981, Vernon was

despatched by Mr. Hay to Southfield in search of the plaintiff whom he located at a bar operated by him. There is conflict about what happened there. The plaintiff accounts for his presence at the bar on the ground that his home was being re-furbished and so he was in temporary residence in a room attached to the bar and had just returned from the doctor in Black River along with his wife shortly before Vernon's arrival. It is agreed that he handed Vernon a Medical Certificate from Dr. Bennett. The nature of his illness was not indicated. The doctor allowed the plaintiff four (4) days sick leave.

Further, Vernon said the plaintiff's car was parked in front of the bar with the trunk lid open and that crates of beer and other stuff were being unloaded from the car. The plaintiff recalled the car being there but nothing more about it. Also he denied telephoning Vernon as the latter had testified. Denied also was Vernon's evidence that in answer to his query the plaintiff had said he was suffering from an earache.

Mr. Patterson obviously appreciated the significance of this evidence and in his effort to discredit the witness, suggested that there was no such incident in June and that if there had been any such incident it was in May. But he had to withdraw the suggestion. The witness had no difficulty in maintaining his stand. Quite apart from the fact that the medical certificate bore the date 28th June, 1981 there was the notation beside the witness'signature "Received 29.6.81". If the plaintiff's version that he had just returned from the doctor is correct why is the certificate dated 28th June, 1981 and not 29th June, 1981? I have no difficulty in rejecting the plaintiff's version as untrue and accepting Vernon's version. Vernon further testified that the plaintiff was absent from work on the 2nd and 3rd July, 1981 and that when he did return to work he was reprimanded by Hay in Vernon's presence. This also is denied but I reject that denial.

Implicit in the plaintiff's contention that he should have been made medically redundant must be an admission that there was some chronic or frequently recurring medical condition which reduced the state of his

health to less than the acceptable standard for the plant or the industry. In this regard it is plain that while the medical certificates do seem to run the gamut of ailments they do not disclose any such disabling condition. Then, too, the annual medical examinations which passed him fit for work fail to detect any such condition. Why then did the plaintiff entertain such expectation? Since it was not based on his medical record it would seem to be related to his attitude to his job or some other not-so-obvious factor.

The perspective in which the plaintiff's case was presented is reflected in the following submissions by Mr. Patterson.

> "1. The entitlement of a worker when his services are being terminated because he is found to be medically unfit are vastly superior to those where the services of an employee are being determined summarily for cause on medical grounds.
>
> 2. The services of an employee are not to be summarily determined on medical grounds except that it be shown that the purported reasons advanced by the employee from time to time for his absence from work on medical grounds are found to be spurious and merely a resprt to malingering.
>
> 3. In the instant case if the defendant came to the decided view that having regard to previous absences by the plaintiff on medical grounds he should no longer continue in the employment of the Company they ought to have had reports of prevailing conditions of employment and grievance procedure which would have entailed subjecting the plaintiff to a medical examination and if the report supported their conclusion they could have terminated his services because he was medically unfit; but in such a case he would have been entitled to notice and severance pay."

Mr. Williams objected to any reliance on breach of Grievance Procedure without it being raised in the Pleadings but I held that paragraph 8 (supra) of the Statement of Claim covered the submission. Mr. Patterson drew support for his submissions from East Lindsey District Council vs. Daubney (1977) 1 C.R. 566.

In that case an employee who had been absent from work for long periods because of illness was dismissed on the grounds of permanent ill health. A medical report had been obtained and acting on the doctor's recommendation that he should be retired on the grounds of permanent ill health, he was

served notice and retired. Complaint was made by the employee of unfair dismissal because he had not been afforded an opportunity of influencing the decision. An industrial tribunal found that although his inability to perform his duties was a reason justifying his dismissal within the relevant provisions, nevertheless the manner of the dismissal was unfair in that the employers had failed to obtain a full medical report before dismissing him and that they had dismissed him without giving him the right to discuss the situation with them or to seek an independent medical opinion. Accordingly, the tribunal found the dismissal unfair. It was held, dismissing the employers appeal -

> 1. That, although it was not the function of employers or of industrial tribunals to act as a medical appeals tribunal to review advice received from medical advisers, the decision whether or not to dismiss an employee was not a medical question but had to be taken by employers, in the light of available medical advice which should be requested in such a way, as to enable them to make an informed decision; that a report merely stating that an employee was unfit to carry out his duties and should be retired on the ground of permanent ill health was verging on the inadequate but in the circumstances, the report would have been sufficient to have enabled the employers to act on it after they had discussed the situation with the employee.
>
> 2. That except in exceptional circumstances employers should take such steps as were sensible in the circumstances to consult the employee and inform themselves of the true medical position before dismissing him on the ground of ill health; that since the employee was not consulted the dismissal was unfair.

Quite plainly the facts and the grounds of dismissal in in Daubney's case are different from those in the instant case. Clear points of distinction to be borne in mind are the difference in the grounds for dismissal and the manner in which the decision to dismiss was arrived at. In Daubney's case the dismissal was based on a medical ground and was, largely speaking, the decision of the doctor. Whereas in the instant case the employers sedulously avoided the medical route and took the decision themselves. The submissions seem more appropriate to a dismissal based on ill-health than to any other case. The only relevance, so far as I can see, is support for the suggestion that where there is a grievance

procedure, save for exceptional circumstances, even where there are adequate grounds for dismissal, the employer may be held to have acted unfairly if the grievance procedure is not followed.

The next step, therefore, is to ascertain what, if any, grievance procedure was provided for in the terms of employment of the plaintiff. Immediately one is confronted with the difficulty, as the plaintiff testified, that there was no writing setting out the terms of his employment. From Mr. Patterson's opening it was patent that he was relying on the grievance procedure in the Collective Labour Agreement but he was rebuffed by the specific provision in that agreement which excluded non-unionised employees. Was the plaintiff aware of any grievance procedure relating to non-unionised staff? In dealing with the memo dated 20th August, 1979 from Mr. Nation he said that he disputed the allegations therein and secured from Mr. Nation an acceptance of his explanation but nevertheless Mr. Nation insisted that the memo would remain on the plaintiff's file - a course which would, and did in fact, operate to the prejudice of the plaintiff. Asked whether he did write about it he said no becuase there was no one to whom he could make a formal complaint. He explained that steps were being taken to provide such machinery for the benefit of supervisors but at that time it had not yet been formalised. However, said he, a machinery was set up before his dismissal but he could not give the relevant date. And to demonstrate how unprotected the supervisors were at that time he said that had there been far more damaging allegations in the memo, all he could do was to f go to Mr. Nation's boss, Mr. Herschell Ford, the Production Manager. However, the situation must have improved because within two days of being dismissed he addressed a letter to Mr. Eric West, Human Resources Manager as follows:

> "Dear Sir,
>
> This is to inform you that my services with Alpart were terminated on the 12th instant.
>
> In my opinion I was wrongfully dismissed and I am not satisfied, therefore I am grieving the case with you.
>
> Yours truly,
> G. H. Foster."

What is the grievance procedure that he was thus seeking to activate? Did he do all that he an aggrieved person was required to do to obtain redress? For answers one must look to the terms of such grievance procedure, if indeed there was one. The plaintiff did not give evidence of having done anything else to secure redress and apart from the documents introduced in the Supplemental Agreed Bundle the only other evidence relating to any grievance procedure was given by Mr. Wesley Vernon. He said he was not much acquainted with the matter. As far as he recalled a committee had been set up to deal with situations but he did not know how effective that had been. It is unfortunate that this witness was not asked to relate either of the two documents in the Supplemental Agreed Bundle to this committee of which he spoke. As it is, therefore, there is only this passing reference to the committee which cannot assist in the search for an answer. However, because the name Mr. Eric West appears in the second document, though the title differs, it seems more likely that the provisions of this document were being invoked. This can only be stated as a likelihood because the plaintiff made no reference to such provisions nor did he give any indication that he knew of the existence of any such machinery. Addressed to "All Salaried Employees, Alpart, Nain" on the subject "Problem Handling Salaried Employees" it reads:-

> "INTRODUCTION
>
> Over the last few weeks, an experimental procedure has been developed for dealing with problems arising from the workplace. The ideas incorporated in this Procedure were mainly yours .... now you see them as an Alpart Policy. I thank you for your contribution.
>
> POLICY
>
> It is Alpart's purpose to protect the dignity and security of its salaried professional people through a disciplined, controlled access to all levels of management when dealing with inter-personal relationships.
>
> PURPOSE
>
> To ensure all salaried employees prompt, consistent and impartial and unprejudiced resolution of problems and/or complaints.

PROCEDURE

1. It is the employee's responsibility to bring his/her problem to Management's attention promptly, starting with his/her immediate supervisor.

2. If the immediate supervisor fails to satisfy the employee in a reasonable period of time, the employee must carry the problem on "up the line" to the Manager, if necessary.

3. At each step "up the line", notes should be kept of each meeting, including promised dates for resolution of the problem.

4. If the Department Head (Manager) fails to resolve the problem, the employee may request a hearing with a representative from the Personnel Section (currently Mr. Eric West).

4. (A) The Personnel representative is required to contact the employee's supervisor and line organization in order to force communications.

   (B) The Personnel representative is required to keep records/notes of all meetings or related activities.

5. If the Personnel representative fails to resolve the problem, he may convene the "Working Consultative Committee", whose function will be to hear the case and recommend by consensus, a proper solution to the appropriate Department Head.

   (A) This Committee consists of (1) Personnel representative (Mr. West as Chairman); (2) Member of the line selected by the Department Head; (3) A peer of the complainant to be agreed upon by (1) and (2) above, and the employee.

   (B) The Committee must make its recommendation immediately following the hearing.

6. If the Department Head cannot accept the recommendation, or the employee is not satisfied, either can request a second hearing by the "General Consultative Committee", which consists of (1) Personnel representative; (2) Special designate by the General Manager; (3) Human Resources Manager (Chairman); and (4) a Superintendent selected by the employee (The Personnel representative has no vote).

   The findings of this Committee:

   (A) May be delayed up to three (3) days.

   (B) May not be over-ridden except by Plant Manager or Mining & Port Manager.

7. If either the employee, the Plant Manager or the Mining and Port Manager cannot accept the findings of the "General Committee", the matter may be referred to the General Manager for final decision.

8. The General Manager may at his discretion call on any outside assistance in arriving at a prompt decision.

PRECAUTIONS

1. Wherever possible, an appropriate employee action may be "Suspension Pending Investigation", thus allowing this procedure to fully operate.

2. This Procedure is to be used without prejudice.

3. Prompt action at each step is required.

4. Confidentiality is mandatory!

October 19, 1979:"

With reference to this document the submissions of the opposing attorneys are poles apart. Mr. Williams submitted -

(a) It was the duty of the plaintiff to pursue the grievance procedure as set out in the document.

(b) There is no evidence to satisfy the Court that this grievance procedure is legally binding on the parties. It is a letter from the General Manager to All Salaried Employees. No evidence it was ever used. The plaintiff did not apparently know of it because he was doing everything except to pursue the grievance procedure.

In this regard it is important to refer to the evidence of the Production Manager, Mr. Claude D. Stewart. Referring to the document under consideration he said -

"At time of plaintiff's dismissal Alpart had a grievance procedure. Not sure whether plaintiff followed procedure set out. It is the employee's responsibility to follow procedure."

In cross-examination he further testified -

"Grievance Procedure is as in the memo. He should have brought his complaints to Committee comprised of the Human Resources Manager, someone from his Department (Manager) and other persons named there. Yes the Grievance Procedure is invigilated by the Manager of the Human Resources Department.

(Referring to plaintiff's letter dated 16.9.81 to Mr. Eric West he said).

"Yes that letter is sufficient to trigger the Grievance Procedure. Not in a position to say why following upon this letter the Grievance Procedure was not followed."

His evidence seems to run counter to Mr. Williams' submission that the company was not shown to have felt itself bound by these provisions.

But it is apparent that Mr. Stewart was not well acquainted with the provisions of the document because his evidence contradicts its express provisions as to how the procedure is activated and works. This would tend to suggest that it was not a much used procedure. Hence the plaintiff's apparent ignorance on the matter. Despite Mr. Stewart's testimony it is obvious that the plaintiff did not do as he was required to get the benefit of the Grievance Procedure.

Despite the plaintiff's apparent ignorance of these two documents referred to in the supplemental Agreed Bundle Mr. Patterson welcomed them with open arms and submitted -

> "That they represent the standard practice relating to salaried staff and are the express terms of the employment. A Collective Labour Agreement has the force of Law (see J.B.C. v. N.W.U.)
>
> Company now estopped from contending that these documents are not the operative terms and no case could be advanced to controvert. The right to suspend does not exist at Common Law and if exercised, as it was in this case, then it is clear the company could only have done so within the framework which was the subject of agreement between the company and the employees. This should justify the Court in concluding that these documents were in existence and honoured as governing their relationship.
>
> Alternatively, these documents set out the procedure and guidelines which the Company undertook to follow in cases such as the instant one. Failure so to do relevant to the question of the dismissal being justified. (See Daubney's Case - supra)."

The defendant was not presented as having no social conscience, an accusation it certainly could not escape, if large and prestigious as it is, it operated contrary to the modern trend in social legislation and efforts towards industrial peace in that it had no provisions for dealing with grievances. But acceptance of Mr. Williams' submissions on this document would lead to the denial of its purpose, that is, the provision of a machinery for the handling of problems among a very important section of the Alpart work force. What is more, it is made plain in the introduction that the machinery is the result of a consensus between Alpart and the relevant workers with whom the ideas mostly originated. Reason, therefore, favours its acceptance as constituting terms of employment of the Salaried Staff.

The other document dealing with "Employment Termination - Salaried Employees" is not consensual by nature. Stamped "Policy/ Procedure" it is signed as to the Policy Section by the General Manager and as to the Procedure Section by the Industrial Engineering Manager, The Manager, Administrative Systems, the Industrial Relations Manager and the Operations Manager - a wholly company document backed by much authority. The Policy Section so far as is relevant is set out hereunder:-

"1. The services of Salaried Employees may be terminated either voluntarily or involuntarily.

A. Voluntary Termination is termination of employment by employee action.

1. employees who voluntarily resign shall be expected to give one month's notice in advance of the resignation date.

B. Involuntary Termination is termination of employment by Company action. Involuntary termination may be occasioned by:

1. poor job performance;
2. misconduct;
3. serious cause or other reasons prejudicial to the Company;
4. age or disability;
5. reduction in the Company's work force; or
6. end of a temporary employment.

2. On Termination of employment, salaried employees will be paid regular salary to the date of the termination.

3. SEVERANCE PAY will be allowed salaried employees whose employment is permanently terminated due to "Company Convenience". Employment may be permanently terminated at "Company Convenience" because of:

(a) cut back in operation;
(b) discontinuance of certain business activities;
(c) age or disability where the employee is not eligible for retirement or disability benefits under company programmes; or
(d) elimination of a job with no comparable position available in the Company or affiliated Companies at their various locations.

4. . . . . .

5. Severance Pay will not be allowed employees who:

(a) . . . . .
(b) was discharged for serious cause or other reasons prejudicial to the Company;
(c) . . . . .
(d) . . . . .

6. The Industrial Relations Department will be responsible for co-ordinating all employee actions or Company action which "line" management may find necessary to initiate.

7. GUIDELINES

i. Superintendents/Supervisors will council their staff at intervals of not less than three (3) months. However, in instances where there are infringments of Company Policies, misconduct, serious cause or other reasons prejudicial to the Company an immediate enquiry must be held and the department head informed in writing.

ii. Written summaries of counselling and/or enquiries must be submitted to Industrial Relations Department for placing on the employees' file within ten (10) days of the counselling session or enquiry.

iii. If an adverse report about the employee is written, the employee must be given the opportunity of seeing it before it is placed on his file. If he wishes to reply, his reply must be in writing and placed on the file. The reply must be submitted within seven (7) days of the employee seeing the report.

iv. Disciplinary action must be administered as a corrective measure rather than as a punitive measure.

v. It is the Policy of the Company to provide a career pattern for all its employees and to encourage their development and growth within the Company. If disciplinary action is contemplated, depending on the nature of the offence and the quality of the employee's service, the employee, wherever possible may be given the opportunity to serve in another section or department, provided there is a vacancy in that section or department.

vi. In cases where dismissal is contemplated the Superintendent/Supervisor should first review the circumstances with his department head and the Industrial Relations department before final action to terminate is taken.

vii. Disciplinary action should be taken at the end of the working day for the employee who is being disciplined."

The relevant clause in the Section on Procedure reads:

"Superintendent/ Supervisor	Meets with Department Head and Industrial Relations Department and reviews circumstances regarding disciplinary action."

Nothing in this document is subject to negotiation and, unlike the other document, there is no indication it was circulated. However, no issue was made of this. And indeed, rather than repudiating it Mr. Patterson embraces it as disclosing terms of employment. Nor does Mr. Williams repudiate it. Indeed on the evidence of Mr. Stewart it would appear that the decision to dismiss was taken in accordance with the provision under Procedure (supra).

Having regard to the evidence Mr. Patterson conceded that he is not contending that the defendant company was obliged to put up with the plaintiff's irregular attendance indefinitely. What he is contending is that the summary dismissal of the plaintiff is wrong there being no notice nor any opportunity to present his side of the issue. In the result, he submitted, the plaintiff is entitled to the reliefs claimed. What he is unhappy about is the manner in which the termination of the employment was effected. There should have been consultation followed by medical redundancy which he submitted carries superior benefits for the employee to termination otherwise.

In Spencer vs. Paragon Wallpapers Ltd. (1976) I.C.R. 301 the plaintiff had been summarily dismissed on the ground of incapacity due to ill-health. The plaintiff appealed from the finding of the Industrial Tribunal upholding the dismissal. The Employment Appeal Tribunal dismissed the appeal holding - inter alia:-

> "That in the case of a dismissal on the ground of absence due to ill-health, there should be some form of communication between the employer and the employee before the employee was dismissed for incapacity; that usually the communication should be a discussion between the parties so that the situation could be weighed up bearing in mind the employer's need for the work to be done and the employee's need for time in which to recover his health;"

It was said too that -

> "Every case depends on its own circumstances. The basic question which has to be determined in every case is whether in all the circumstances, the employer can be expected to wait any longer, and if so, how much longer."

A point to note is that this case dealt with a matter of protracted ill-health of the employee who would require another six (6) weeks rest before he could resume work at a time when there was an unexpected increase in demand for the employer's product. Accordingly the employer had to take immediate action.

Although in the instant case the ground for dismissal as stated in the memo was not incapacity due to ill-health but "the fact that your Personnel Record over the years has not been good" the principles stated in the Paragon Case may bear some relevance. And, indeed, the record shows that on numerous occasions during the relevant period there had been consultations, counselling, reprimand and finally the warning contained in the memo dated June 23, 1981 -

> "Behaviour of this nature cannot be tolerated as it subjects your colleagues and the organisation to much inconvenience. This letter, a copy of which is being placed on your personnel file, serves as a warning to you that any future breach of this nature will be severely dealth with."

This was an occasion when the plaintiff did not report for duty when he should. He could be left in no doubt that the company regarded his absences very seriously but his attitude was that he was not responsible for the state of his health and as long as he presented certificates to account for his absences that ought to satisfy the company. And although he did not take part in the final discussions which led to the dismissal he has not in evidence disclosed anything which had it been advanced in consultation could have influenced the decision taken.

It is observed that in the document dealing with employment termination the employee who voluntarily terminates his/her employment is required to give one month's notice. Not so where termination is by the company.

The ground for dismissal is in all probability related to one or more of the first three items listed under Involuntary Termination. Evidence was given that when the plaintiff was on the job his performance was good and he was certified as fit for promotion. The problem was with his failure to perform due to persistent absences. But the level

of absenteeism was not by any evidence equated with poor job performance. Nor was it stated to be misconduct. However, it should not be difficult to relate it to "serious cause or other reasons prejudicial to the Company".

The learned author of Chitty on Contracts 24th Edition at paragraph 3622 sets out the common law position on misconduct thus:-

> "Where the employee is guilty of sufficient misconduct in his capacity as an employee he may be dismissed summarily without notice and before the expiration of a fixed period of employment. (Boston Deep Sea Fishing Co. v. Ansell (1888) 39 ch.D. 339). Although the power of dismissal in these circumstances may be by virtue of an implied term in the contract it is also possible to view it as a power to rescind the contract upon a repudiatory breach of contract committed by the employee. There is no rule of law defining the degree of misconduct which will justify dismissal (Clouston & Co. vs. Corry (1906) A.C. 122). The test to be applied must vary with the nature of the business and the position held by the employee and reported cases are therefore only a general guide. The general rule is that if the employee does anything which is incompatible with the due or faithful discharge of his duty to his employer, he may be dismissed without notice (Sinclair v. Neighbour (1967) 2 Q.B. 279); the employee's conduct need not be dishonest since it is sufficient if it is "conduct of such a grave and weighty character as to amount to a breach of the confidential relationship" between employer and employee."

The evidence demonstrates the critical importance of the plaintiff's time-related job in an enterprise of such magnitude and nature; so that whether his conduct falls under item 2 or 3 (supra) it is liable to be visited with dismissal without notice. Inasmuch, therefore, as the two documents in the Supplemental Agreed Bundle are embraced as supplying terms of the plaintiff's employment he cannot be heard to say he was unaware of the company's policy. But even if at some stage he could plead ignorance, he would have only himself to blame if his ignorance persisted after the several warnings and reprimands. He had sufficient notice that he was toying with the possibility of dismissal.

Mr. Patterson is of the opinion that though his record of absenteeism was very poor yet he ought to have been given notice failing which he is entitled to pay in lieu thereof. But this view ignores the provisions for Involuntary Termination which makes no provision for notice.

Apart from the cases already mentioned other cases were cited dealing with absenteeism and dismissal without notice.

> International Sports Co. Ltd. vs. Thomson (1980) 1 R.L.R. 340 is a case in which the respondent employee was dismissed without notice for persistent absenteeism. For the last 18 months of her employment she was absent on average for about 25% of the time. The agreed acceptable level was 8%. Most absences were covered with medical certificates listing a great variety of ailments.
>
> Persistent absenteeism was an offence under the company's disciplinary procedure. The respondent was warned on several occasions and it was made clear that if there was no improvement dismissal could result.
>
> Before deciding to dismiss the company reviewed her medical history with company doctor and it was observed that there was no link between the various ailments and her illnesses were not of a nature which could be subsequently verified. The doctor advised that in these circumstances no useful purpose would be served by examining her.
>
> The Employment Appeal Tribunal overturned a finding by an Industrial Tribunal of unfair dismissal. It held that -
>
> > "The Industrial Tribunal had erred in holding that the appellant (company) had acted unreasonably in dismissing the respondent employee for persistent sickness absence without carrying out the procedure of investigation and consultation required in cases of incapability due to ill-health.
> >
> > Where an employee has an unacceptable level of absenteeism due to minor ailments what is required firstly, that there should be a fair review by the employer of the attendance record and the reasons for it; and secondly, appropriate warnings after the employee has been given an opportunity to make representations. If there is no improvement in the attendance record, in most cases the employer will be justified in treating the persistent absences as a sufficient reason for dismissing the employee."

A further appeal against this decision was unsuccessful.

This case bears very close resemblance to the instant case in the medical history of the employee and the manner in which she was treated by the employer and finally in the ground for dismissal - persistent absenteeism. But indeed in the instant case the employers had done more than was done in the International Sports case in that they had an up-to-date medical assessment of the employee.

Another case in similar vein is -

> "Rolls-Royce Ltd. vs. Walpole (1980) 1 R.L.R. 343. The employee had worked for the company for 7 years before he was dismissed because of poor attendance record. During the last 3 years of his employment his rate of absence was 44%, 45% and 44%. Almost all these absences were certified by a doctor as being due to sickness or injury. He was counselled, seen by the company doctor and warned about his attendance. But he persisted in absenting himself and was dismissed.
>
> By a majority the Appeal Tribunal allowed the employer's appeal against the finding of the Industrial Tribunal that the dismissal was unfair. The Tribunal echoed the rhetorical question posed to it by the appellant's counsel "what else in all the circumstances could the employers do? . . . . . the two of us are quite satisfied that the employers' response in the circumstances of the present case to dismiss the employee was well within the range of responses which reasonable employers could have taken having regard to equity and substantial merits of the case, in treating the employee's poor attendance record after warning as a sufficient reason for dismissing him."

These are remarks which I consider very appropriate to the facts and circumstances of this case.

Earl v. Slater & Wheeler (Airlyne Ltd. (1973) 1 All E.R. 144 is another case on which Mr. Patterson relied in submitting that the failure of the Company to implement the clear provisions of its own policy for terminating employment and the handling of problems which may arise give rise to an obligation on the Court to consider whether in all the circumstances dismissal was fair nor justified or whether or not the plaintiff has not been subjected to manifest injustice. In that case the employee had received several verbal complaints from his employers regarding work. While the employee was absent from work due to sickness, the employers made certain discoveries which showed that the employee was not carrying out his work in a satisfactory manner. On his return to work the employers handed him a letter of immediate dismissal. The letter set out reasons relating to the employee's conduct or capability which the employers considered as justification for dismissing him. No opportunity was afforded the employee either before or at the time of dismissal to state his case and there was no grievance procedure. The employee had no valid answer to the employers' complaints but the employers did not know

that when they dismissed him, nor had they taken any steps to find out. An Industrial Tribunal dismissed the employee's claim for unfair dismissal holding that in keeping with the relevant statutory provision it was not open to them to find that the employee had been unfairly dismissed solely because the procedure adopted by the employer had been unfair, when that procedure had led to no injustice to the employee. Upon the employee appealing it was held.

> "(i) That the Tribunal had erred in holding that an unfair procedure which led to no injustice was incapable of rendering unfair a dismissal which would otherwise be fair; the employers at the moment of dismissal could not and did not know whether the employee could explain the matters which had been discovered during his absence; they had dismissed the employee for a reason which might or might not be sufficient according to whether the employee could or could not offer an adequate explanation. Thus the Tribunal should have found that the employee had been unfairly dismissed.
>
> (ii) The employee was not, however, entitled to compensation. The only matter rendering his dismissal unfair had been his lack of opportunity to explain matters which had been discovered during his absence from work and on the accepted facts he had no valid explanation to offer suspecting those matters. Consequently the employers' failure to give the employee an opportunity to offer an explanation had caused the employee no loss."

Quite apart from the absence of a grievance procedure in the above-mentioned case it is obvious that there is a fundamental difference between that and the instant case. There the employee had been condemned without the benefit of an explanation. Here the ground for dismissal is a ground about which there had been much consultation and communication between the parties over the years during which time the attitude of the employer was made abundantly clear. So he has had ample opportunity not only to explain but to amend what was clearly irksome conduct. From as far back as 20th May, 1969 he had been disciplined for "Excessive Missing of work - 20 days in 14 weeks by loosing 3 days pay. Additionally there were warnings for absenteeism. In those circumstances, if he has an explanation which would render his dismissal wrongful he has managed to keep it a secret.

The plea in paragraph 9 of the Statement of Claim alleging a breach of the Employment (Termination and Redundancy Payments) Act has neither been advanced by evidence nor sustained by argument. The plaintiff has not proved that he has not been paid the entitlements which appear on the company's records.

It is my opinion that, having regard to all that was done by the company to have the plaintiff reduce his absenteeism to an acceptable level, this case provides a fitting example of the exceptional circumstances contemplated by the second limb of the decision in Daubney's Case insofar as it relates to consultation with the employee. Accordingly, any failure to formally comply with a grievance procedure does not invalidate the dismissal without notice. The company was in my judgment justified in saying to the plaintiff "Enough is enough" and so part company with him. It follows that there can be no salary in lieu of notice since the company was entitled to terminate without notice.

Whatever other classification may be applied to the ground for dismissal it certainly qualifies as "serious cause or other reasons prejudicial to the company" for which it is specifically provided (paragraph 5 (b) of provisions for Employment Termination - Salaried Employees) that no Severance Pay shall be allowed. Accordingly, this claim fails.

There will therefore be judgment for the defendant with costs to be taxed if not agreed.

Before parting with the case I would like to commend the attorneys-at-law for the keeness with which the issues were contested and the assistance rendered the Court. The commendable efforts of the plaintiff's attorneys to improve the lot of the employee is no less praiseworthy than the persistence of the defendant's attorneys in expounding and supporting what they believe to be the law of the land. And even if the issues were not easy to resolve the presentations made the case nonetheless an interesting one.