IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. M. 68 OF 1982

IN THE MATTER of an Application by BANCROFT SMIKLE for Leave to Apply for an Order of Certiorari

A N D

IN THE MATTER of an Award made by the Industrial Disputes Tribunal on the 3rd day of August, 1982

A N D

IN THE MATTER of the Labour Relations and Industrial Disputes Act.

Muirhead Q.C. (with him Adolph Edwards) for Applicant.

Leo Rhynie Q.C. (with him Baugh) for Respondent.

Heard: October 31, November 2, and 3, 1983

Coram: Vanderpump, Bingham, Wolfe J.J.

Delivered: March 15, 1984

Vanderpump J.

Pursuant to leave having beem granted to the Applicant herein on the 25th of August 1982 learned counsel on his behalf on the 31st October last year moved this court for an Order of Certiorari to quash an award of the Industrial Disputes Tribunal finding that he was justifiably dismissed.

The Terms of Reference to this Tribunal read:

> "To determine and settle the dispute between the Jamaica Public Service Company Limited on the one hand and the workers employed by the Company and represented by the Jamaica Public Service Managers Association on the other hand over the dismissal of Mr. Bancroft Smikle".

These Terms of Reference were subsequently amended by the substitutions for the word 'dismissal' near the end thereof the words 'termination of employment'.

The Applicant's main grounds were:

5(a) "That the said order was wrong in law.

(b) That the Tribunal erred as a matter of law when it held that on the evidence given and the submissions made that Mr. Bancroft Smikle was justifiably dismissed as there was no evidence or credible evidence upon which the tribunal could base its finding of dismissal.

(c) That the Tribunal erred as a matter of law in finding that Bancroft Smikle had been justifiably dismissed as the case for the employers Jamaica Public Service Co. Ltd., was that Mr. Smikle had abandoned his job being absent from work without just cause or exouse and was accordingly liable to dismissal in circumstances where there was no intention on the part of Bancroft Smikle to abandon his job or to be absent from work without just cause.

(d) That the Tribunal erred in a point of law as on the facts as established, no reasonable Tribunal properly addressing its mind to the evidence could have made the finding that Bancroft Smikle was justifiably dismissed.

.....

(g) That the Tribunal did not direct itself properly and fairly on the facts and has gone wrong in law.

(h) That the Tribunal erred in law in holding that Bancroft Smikle was justifiably dismissed in that the employer has failed to discharge the burden of proof to establish justifiable dismissal." (not argued)

The Applicant was the personnel manager employed to Respondent. He went to New York on 11th September 1981 on his employer's business. He overstayed his time there. Instead of resuming his duties on 18th September 1981 he did so on the 9th November 1981. His case is that he stayed in America until the end of September on a busman's holiday: it being his understanding and belief that he could proceed on leave after a three day course that he had attended there. On 1st October 1981 he returned to the Island sick (as he had left it), was admitted to hospital and continued sick until his resumption. Respondent's case is that no leave was granted him. In its brief Respondent contended that he was absent without permission or reasonable excuse for these days 18th September - 2nd October 1981 (sic) in breach of the Company's policy this absence being construed as an <u>abandonment</u>

of the job. In the alternative that his employment was determined by the Company for good and justifiable reasons. This alternative was new.

Before the Tribunal a document loosely described as a Policy Manual (Policy Statement No. 5.2) was tendered in evidence as Exhibit 5. It was made up of several pages - the first page of which I would describe as a preamble, the pages following comprised a Disciplinary Schedule setting out the different types of offences and their penalties (presumably on breach). The first two read.

1. Absence without permission.

2. Absence for five consecutive working days.

The penalties for these two are for the latter, dismissal for the ... first offence and for the former also dismissal, but only for the fourth offence. Nos. 3, 4 and 5 deal with leaving the premises without permission. This phrase 'without permission', this requirement to render it an offence in the other four offences does not form part of the second offence, it would seem. The underlining is mine.

Provision 5 on the first page of the preamble (as I call it) reads:

> "In cases where dismissal is contemplated, the employee shall first be placed on suspension and the circumstances of the case further reviewed with the Head of Department and the Personnel and Industrial Relations with a minimum of delay.....
> ....."

The emphasis is mine.

Mr. Muirhead has submitted with some force that this provision for suspension is mandatory and the reason for its inclusion is to ensure that the employer's actions are not such that can be interpreted as constituting evidence, estoppel evidence affirmative of the contract.

Mr. Smikle was not suspended at any time. Indeed so far from not suspending him Smikle was met on his return on the 1st October by a car sent by Respondent (albeit at his request). Thereafter (on production of medical certificates) he was granted sick leave for varying periods, 14, 15, 7 days. On the expiration of which he actually resumed his

duties. Just like any other employee would have done.

Respondent had written him under date 28th September 1981 Exhibit 1. After reciting that he had stayed away from work without permission from 18th September to even date Christie states:

> "In the absence of any communication or any justifiable explanation to the contrary from you, the Company contends and has taken the position that you have abandoned your employment".

which would be terminated forthwith should he not think it fit to resign, the latter goes on to say. (Mr. Smikle did not resign so was formally dismissed by letter dated 11th November 1981) Mr. Leo Rhynie has submitted that the word abandoned here should be taken in a popular sense rather than in a strict legal one. Incidentally abandonment of employment is not an offence known to the Policy Manual nor to the Act! And nowhere has it been raised as being known to the common law or to any other Act.

Abandonment is clearly a matter of intention to be gathered or inferred from the conduct of the person intending to abandon his job, here Mr. Smikle. And that during the period 18th September to 1st October 1981 only i.e. ten working days (17th September not included although abroad then).

Apart from job analyses and writing job description he was concerned with a pre-retirement (counsel) programme for the Company. To that latter end he attended the A.M.A's library and made extensive notes (8 pages) which were made available as Exhibit 14. This on 22nd September and 25th September. Then on 29th September 1981 he bought some pamphlets viz. Getting ready to retire by Close. A full life after 65 by Stern and two others as also a book entitled Retirement by Keizal all part of Exhibit 14. On 28th September he had telephoned Respondent's Transport Division (Mr. Wilson) to have a car meet the plane on 1st October. (on 18th September an appointment with Con. Ed. had fallen through because of illness.) All this was clearly on Respondent's business, certainly not the conduct of a man

in the process of abandoning his job!

THE EVIDENCE

Mr. Leroy Rowe the Respondent's training manager arranged this course for Mr. Smikle with American Management Association to run from 14th September - 16th September 1981 i.e. Monday to Wednesday. (And he was to travel back on Thursday and resume Friday Exhibit 1).

Mr. Muirhead: Q. "Do you know sir, whether Mr. Smikle was going to be on leave abroad after the course?

A. He did indicate to me that he was taking a couple of weeks.

Q. Now sir, am I correct in saying that provided there is no additional cost to the Company, employees are able to spend shall I say, leave abroad and return on the ticket?

A. Yes.

.....

Q. ..... the practice is that persons may nevertheless using the same ticket spend vacation leave abroad provided no further cost to the company?

A. Yes .....

.....

Q. Mr. Rowe did you regard Mr. Smikle's absence from work during the week after the course as being absence on leave?

A. Yes sir....."

Underlining mine.

Mr. Linton Andrews the purchasing officer made arrangements for Applicant's ticket. There was a variation dealing with a return

via Miami instead of direct from New York and his understanding was a return via Miami instead of direct from New York and his understanding was that Mr. Smikle had asked and that the duration of his stay was approved to be beyond the date mentioned on the original Request for Purchase. He had gotten permission to stay on for a few more days i.e. after the course.

During Smikle's evidence under examination by Mr. Muirhead.

Q. "Arising out of the discussion with Mr. Christie what was your understanding?

A. He did not approve the subsistence for the two days but he had no objection for (sic) my using any other form of resource that I had. He also said that on my way back to Jamaica I had planned to stop in Miami to go to Florida Light and Power Company to look at the same two matters (sic)..... writing job description, job analyses and pre-retirement programme. (Return via Miami denied by Christie)

Q. .....did you ever understand at any time that Mr. Christie had objected to your spending some additional time after the completion of the 3 day course to carry out those things that you have described?

A. None whatsoever

Q. What was your understanding?

A. That I would not get subsistence for the two days i.e. Thursday and Friday (17th and 18th September)

Q. ..... you indicated to Mr. Christie that you would be taking some leave at the end of the course?

A. Yes sir ..... (denied by Christie) I am in the management level.....

Q. I think Mr. Christie has complained that he doesn't recall that and that you didn't mention any special days. He said you should have.....

..... <u>In the management level how do people deal with one another at that level?</u>

A. <u>Less than in the formal rigid manner</u> that is expected of a clerk or hourly paid worker.

Q. If you were of the opinion that Mr. Christie was objecting to your taking some leave at the end of the course what would you have done?

A. I would have put it in writing to him spelling out the period etc.

Q. And if he still objected?

A. I would have returned to work..... on the Friday (i.e. 18th September 1981).

Q. .....did you inform any member of your section that after the course you would be away on some leave at the end?

A. Yes sir my immediate assistant Mr. Chung..... he assumes responsibility in my absence". Underlining mine.

Mr. Smikle also informed his secretary, Mrs. Robinson. He told Mr. Baugh that initially he planned to take one week from the Monday after the end of the course, that week. But he continued ".....after I discussed the matter with Mr. Christie I went out and asked Mr. Andrews to update the ticket to 21 days and

I could only have done that based on the discussion I had with Mr. Christie". It must be borne in mind that Smikle then had 30 working days leave to his credit.

Dr. Paul Wright was Applicant's doctor. On 8th September 1981 Smikle indicated to him that he was going on a course in the United States for 3 weeks. This was against his medical advice.

Mr. Christie gave evidence. He said no request had been made prior to Mr. Smikle's departure for New York for any leave and none had been approved for him. Indeed no mention of leave at all by Smikle! Mr, Muirhead has submitted that Christie was a biased witness being both witness and judge in a case in which he was intimately involved. The very nature of his interest gave rise to bias. He was seeking to perpetuate his decision before the tribunal. That however should have been convassed before the tribunal by Mr. Muirhead but apparently was not. It was for them to have observed him in the box and come to a conclusion whether he was actuated by any improper motive, whether he was biased against Smikle and treat his evidence accordingly.

CONCLUSION ON FIRST CONTENTION

Except for Christie the evidence is to the effect that Smikle was to go on leave after the course. That evidence came from more than one witness and it is important to establish his state of mind when considering whether he had abandoned his employment whilst abroad. If it was clearly and firmly fixed in his mind that Christie not having objected when he told him he would be taking some leave at the end of the course had thereby impliedly granted him leave (for which he was eligible) and that therefore he was entitled to remain over there for those 9 working days (he was travelling on the 1st October) it cannot be said that he had thereby abandoned his employment. And it is only if he had abandoned his employment that his dismissal would be justified. Assuming such an offence existed (rule 2 apart) The fact that Christie said that he had not granted that leave is neither here nor there as far as abandonment is concerned. It is Smikle's state of mind that is

relevant. There is abundant evidence that Smikle believed he had, so much so that he had the ticket varied. The point is that he intended to stay abroad for a certain period of time after the course largely on Company business and indeed most of it was, it transpired, supra, not abandon his job. The evidence as to his state of mind is all one way. There is therefore no evidence on which the tribunal could reasonably have arrived at the conclusion that he intended to bandon and did abandon his job. (grounds 5(b) and (c)) so it is wholly unsupported by the evidence. De Smith Judicial Review of Administrative Action 4th Ed. P. 133. Allinson vs. General Council..... 1894 1 Q.B. 750, 763. Smith vs. General Motor Cab..... 1911 A/C 188, 190. A question of law.

ALTERNATIVE CONTENTION

The absence for 5 consecutive working days (as such) seems to be an afterthought. It is not mentioned in any correspondence and only seems to have come to light through the industry of counsel. It appears to be the basis of the alternative in Respondent's brief. (undated).

Some months afterwards, on the 11th March 1982 Mr. Baugh opens his case to the tribunal. He tells them that Mr. Smikle failed to report for work and in effect terminated his own employment with the company. As an alternative his failure so to do for a "period of 5 days or more" was a breach of the company's policy as set out in the Policy Manual. And that "employees who are absent from work without reasonable excuse for a period in excess of five days would no longer be considered to be employed to the company". He seems to have been referring to Exhibit 5, second offence but somewhat inaccurately! In closing at the very end of his submissions he urges them to find that he was justifiably dismissed because he breached the rule of the company applicable to all employees including himself.

Mr. Leo Rhynie spent some time on this offence. He said

that it "was an accepted fact here that there was a rule to the effect that absence without permission for five consecutive days would result in dismissal". He did not however mention the important provision, the prerequisite of suspension which was not invoked by the Respondent and not invoked for the simple reason, I believe, that the offence was not within the contemplation of Christie the writer of Exhibit 1 who after all had only a few months experience with the company when he wrote it. (In any case he was completely wedded to abandonment of employment)

CONCLUSION

After writing Exhibit 1 and prior to writing the letter formally dismissing Smikle it was mandatory I hold, for Christie to have suspended Smikle - i.e. during the period 28th September - 11th November 1981. His not having done so is fatal. If the tribunal believed Christie, Smikle was absent without leave and so was caught by the provisions of this offence as his absence ran for 5 consecutive days and was without permission (if those words are to be read into it). But Smikle is saved by Christie's non-compliance with the mandatory prerequisite of suspension, I would hold. In so doing I am interpreting this provision as to its legal effect which is a matter of law. Phipson on Evidence 12th Ed. paragraphs 25, 1962. If they considered it at all the Tribunal must have failed to regard it as mandatory and so would be guilty of misinterpretation.

Both counsel addressed us on Affirmation, Waiver, Estoppel (grounds (e) and (f)). These submissions proceeded on the footing that there had been an abandonment of employment or breach of rule 2 on the part of Smikle and there was neither.

I would order Certiorari to go.

J.

And so Certiorari is to go to quash this Award of the Tribunal, Costs to Applicant to be taxed, if not agreed.

J.

Bingham J:

Having seen and read the Judgment prepared in this matter by my brother Vanderpump I wish to state that I am in complete agreement with the reasons he has expressed in his opinion for coming to the conclusion that he has that Certiorari should go to quash the decision of the Industrial Disputes Tribunal.

Because of the importance of the matter, however, I am minded to make one or two observations.

On a full examination of the history of this matter there can be no doubt that the company sought through Mr. Fritz Christie, the Human Resource and Industrial Relations Director, to take steps to terminate the applicant's services the moment there was the realisation that he had overstayed his "allotted time" abroad. That the letter of the 28th September, 1981, was allowed to be written to a worker abroad on the company's business was neither something befitting a Human Resource Director nor does it speak well for the Industrial Relations of the company. Be that as it may, that letter sought "for better or for worse" to terminate the "bond" which had existed between the applicant and the company for thirteen years by demanding the applicant's resignation, and failing this, threatening to take steps to terminate his employment. The ground upon which such extreme action was based being that the applicant by overstaying his time in the United States of America for a period of what amounted to seven working days, the company had "taken the position that he had abandoned his employment." It was on that basis that despite the applicant's written explanation accounting for his absence that the company sought to

terminate his employment with the company by the letter of 11th November, 1981.

It was not until the matter came before the Industrial Disputes Tribunal that the Industry of Counsel resulted in the alternative ground being brought forward based upon the "five days absence rule," to seek to justify the dismissal by the company.

On the evidence before the Tribunal although the main thrust of the company's arguments by Mr. Baugh was posited on "abandonment" there was clearly not the least scintilla of evidence upon which Tribunal could have supported such a conclusion. That term is neither a part of the Policy Manual of the Respondent's Company nor is it known to our Statute Books. It is entirely an English conception and surfaced for the first time in the Serve-Wel case. The several authorities referred to do not lend support to the Respondent's cause as by no process of reasoning could it be contended that the dismissal could have been justified on the basis of abandonment as:

(i) The applicant was abroad on the company's business.

(ii) He had overstayed his time by a matter of some seven working days when the company's letter was written.

(iii) There was no evidence pointing to any conduct on the part of the applicant from which abandonment by him could be inferred.

The authorities referred to also do not support such an extreme course as dismaissal based on a "first offence" (the position here) save for the gravest misconduct and the applicant's conduct in overstaying his time for such a short period in circumstances where he had leave to his credit could certainly not be termed as grave misconduct.

To sum up, therefore, my contentions are:-

1. There can be no question of abandonment and the Tribunal must have so concluded.

2. The second limb of company's argument based upon the dismissal being justified on a breach of the "five day rule," a clear afterthought by Christie in the letter of 11th November, 1981. This could not be interpreted as applying to the case where a worker is abroad on the company's business, but applies rather to absence from work without permission.

3. Even if my interpretation as to two above is in error, then this would be caught by the argument by Mr. Muirhead in favour of Estoppel by Conduct arising based upon the company conduct in:-

(i) Paying the applicant after he had returned from United States of America for entire period of six weeks while he was sick.

(ii) Allowing him to resume his position as Personnel Manager.

This showed beyond question that the company uncertain as to the applicant's situation was still treating the applicant as being "on the job" and in that regard it could not thereby contend that he was liable for summary dismissal based on the "five day absence rule." It is trite law that when one is interpreting disciplinary rules a strict interpretation is called for and the contra proferentem rule also applies. The company here could not both approbate and reprobate, or in short it could not claim in one sentence that the applicant

had abandoned his employment (letter of 28th September, 1981) but when that did not suit their position then to say that in any event if "abandonment" was not tenable to invoke the "five day rule" as that rule based on the estoppel principle could only be applicable in event of a fresh breach of the rules and the applicant having been treated by the company as "still on the job" the relation of employer and employee was still in existence when the company sought to terminate by the letter of 11th November, 1981.

Wolfe J.

The Applicant Bancroft Smikle prays the Court by way of the prerogative writ of Certiorari to quash an Award of the Industrial Disputes Tribunal made on the 3rd day of August, 1982.

Bancroft Smikle an employee of the Jamaica Public Service Company Limited for over twelve years was at the time of his alleged dismissal Manager Personnel Services.

In September 1981 the Applicant, through the instrumentality of the Respondent Company, attended a conference at American Management Associations in New York. All arrangements as to travel were made by the Company. The conference was for the duration of three days from the 14th through to the 16th September 1981.

The Company asserted that the Applicant ought to have resumed working on the 18th September 1981. The Applicant returned to Jamaica on the 1st October 1981 and on 2nd October he was admitted into the University Hospital where he remained as a patient for a period of twenty-one (21) days. He was discharged from Hospital on either the 22nd or 23rd of October 1981 and reported back to work on the 9th November 1981 at the expiration of sick leave granted to him.

Prior to the Applicant resuming work, the Company by letter dated the 28th September 1981 communicated to the Applicant its stand relative to his absence from work.

"Dear Mr. Smikle,

> On September 14, 15 and 16, 1981, you were scheduled to attend an American Institute of Management Course in New York, United States of America, sponsored by the Company.
>
> Allowing one extra day for travelling, the date of your returning to work and resuming your duties was Friday, September 18, 1981.
>
> To date, September 28, 1981, you have not returned to the office nor have you resumed your duties in your department. No permission, written or otherwise, had been granted for your absence in excess of the time specified above, The Company regards quite seriously, conduct of this nature and even more so its senior Officers are the violators.

In the absence of any communication or any justifiable explanation to the contrary from you, the Company contends and has taken the position that you have abandoned your employment.

Accordingly, we request that you let us have your letter of resignation immediately, failing which the necessary steps shall be taken to effectively terminate your employment forthwith.

Yours very truly,
JAMAICA PUBLIC SERVICE COMPANY LTD.

Fitz A. Christie,
DIRECTOR
HUMAN RESOURCE DEVELOPMENT & INDUSTRIAL RELATIONS"

This letter clearly demonstrates that as far as the Company was concerned the matter was a fait accompli. The Company, in my view, was saying you have been absent from work without permission. You have not communicated with us or offered any justifiable explanation as to your absence, we are of the view that you have abandoned your job and that is our position. In the light of that please tender your resignation or we shall take steps to effectively terminate your employment immediately.

There can be absolutely no doubt about the Company's position, it is unequivocal.

Notwithstanding the letter set out above, the Applicant reported back to work on the 9th November 1981 and performed his usual functions as Manager Personnel Services until the 13th November 1981 when he was served with a letter of dismissal dated the 11th day of November 1981, addressed to the Applicant at his place of abode, although it is admitted that on the date the letter was written he had resumed working.

As a matter of completeness it ought to be mentioned that upon receipt of the letter dated the 28th September 1981 the Applicant addressed a note to the Company dated 7th October 1981 along with a medical certificate for 14 days sick leave. The Applicant was at this time hospitalized.

Upon resuming work on the 9th November 1981 the Applicant in response to the letter dated 28th September 1981 submitted a written explanation for his absence. The contents of the written explanation dated [illegible] set out hereunder:

9th November 1981 are set out hereunder:

"To Director, Human Resource Development And Industrial Relations

From: B. E. Smikle

Date: November 9, 1981

Further to my note of October 7, 1981, may I remind you that during a discussion with you regarding the AMA course, I indicated that I would be taking some leave at the end of the course. No objection was raised by you. However, you declined my request for subsistence for a further 2 days, indicating inter alia that AMA would not make such arrangements as contained in my letter to them dated August 19, 1981.

Pursuant to this discussion, I advised members of my section that I would be taking some leave at the end of the course. I took the leave at the end of the course, accordingly.

You may recall that I stated during our discussion that, as requested of the AMA, I proposed to spend a day discussing with my counterpart in an electric utility company, the application and implementation of the contents of the course and on the other day, do some research at AMA's library and collect material on pre-retirement programmes in order to carry out some studies and make recommendations to management in due course. I also mentioned that I had friends in New York who could arrange a visit to CON EDISON for me, when I got to New York. Accordingly, a visit was arranged with an officer of the company but due to illness on my part, I was unable to keep the appointment. However, I was afforded the opportunity of looking through pre-retirment literature at the AMA's library on September 22 and 25, 1981, and made notes which are available. I also visited the offices of the Public Affairs Committee on Park Avenue on September 29, and bought some pamphlets on the subject.

I returned to Jamaica on Thursday, evening, October 1, in great pain, saw a doctor and was admitted to the University Hospital the following day as an in-patient.

Your letter of September 28, came as a shock to me as I was clearly of the view that my stay on conclusion of the course was by way of leave as indicated above. If I had thought otherwise, I would most certainly have communicated with you, especially having regard to my illness.

I have no intention at this time, nor had at that time of abandoning my job and never considered my stay on conclusion of the course was by way of leave as indicated above. If I had thought otherwise, I would most certainly have communicated with you, especially having regard to my illness.

I have no intention at this time, nor had at that time, of abandoning my job and never considered my stay abroad as such. Indeed, what I did, I consider to be in the best

interest of both the Company and its ageing employees.

> I therefore respectfully disagree with the basis for the request for my resignation contained in your letter of September 28, 1981.
>
> B.F. SMIKLE"

In keeping with the letter of the 28th September 1981 the Company maintained a consistent position before the Industrial Disputes Tribunal namely that the worker had abandoned his job.

In his opening address to the Tribunal Mr. Baugh who appeared for the Company said inter alia:

> "The facts which we intend to substantitate are, sir, that Mr. Smikle failed to report for work and that having failed to report for work he had in effect terminated his own employment with the Company".

The Applicant on the other hand contended that he had been dismissed unjustifiably.

ABANDONMENT

On the evidence adduced before the Tribunal it is clear that the Respondent failed to establish that the worker had abandoned his job. The uncontroverted evidence points clearly to the contrary.

However assuming that I am wrong in so holding let me repeat what I said in R v The Industrial Disputes Tribunal and the Hotel Four Seasons Ltd. Exparte the National Workers Union at page 35.

> "To my mind abandonment is conduct which evidences an intention to repudiate".

Repudiation is conduct on the part of an employer or employee which unequivocally demonstrates that the employer or employee no longer regards himself as being bound by the contract of employment. Mere repudiatory conduct is not enough to terminate a contract. There must be acceptance of the repudiation, acting upon the well established principle of law that a contract cannot be unilaterally terminated. As Lord Simon said in Heyman v. Darwins Ltd. (1942) A.C. 356 at 361

> "..... termination by one party standing alone does not terminate the contract. It takes two to end it, by repudiation on the one side, and acceptance of the repudiation, on the other".

In R. v. Industrial Disputes Tribunal and Hotel Four Seasons Ltd. Exparte National Workers Union Smith C.J. said:

> "Whether or not there has been repudiation is, however, a question of fact or of mixed law and fact, so that each case has to be decided on its own special facts".

The Learned Chief Justice went on to cite with approval the words of Lord Coleridge C.J. in Freeth v. Burr (1874) L.R. 9 C.P. 208 at p. 213.

> "In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think the decisions in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, viz that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract".

The rule as stated by Lord Coleridge C.J. was approved by the Earl of Selbourne, L.C. in Mersey Steel and Iron Co. v. Naylor, Benzon & Co. (1884) 9 App. Cas. 434 at 438 and by the Earl of Halsbury and Lord Collins in General Billposting Co. Ltd. v. Atkinson (1909) A.C. 118. In the latter case Lord Collins said, at page 122:

> "I think the true test applicable to the facts of this case is that which was laid down by Lord Coleridge, C.J. in Freeth v. Burr and approved in Mersey Steel Company v. Naylor in the House of Lords, 'that the true question is whether the act and conduct of the party evince an intention no longer to be bound by the contract'".

In the light of the decisions cited supra can it be said that the Applicant by his conduct evinced an intention no longer to be bound by the contract? The evidence before the Tribunal showed that the Applicant was expected to have resumed working on the 18th September 1981, that is, two days after the course ended. Up to the 30th day of September the Applicant was still in the United States of America. It cannot be doubted that absence from work for such a period, without communicating to the employer the reason for such absence is evidence capable of amounting to conduct which is repudiatory

Of the contract. However it must be borne in mind that repudiatory conduct by itself does not terminate a contract. The innocent party must unequivocally accept the repudiation if he intends to treat the contract as having been terminated.

Did the Company accept the repudiation? The answer to this question must be garnered from the letter dated the 28th September 1981.

> "In the absence of any communication or any justifiable explanation to the contrary from you, the Company contends and has taken the position that you have abandoned your employment. Accordingly, we request that you let us have letter of resignation immediately, failing which the necessary steps shall be taken to effectively terminate your employment forthwith".

This extract from the letter of the 28th September is a clear indication that the Respondent did not accept the breach as having terminated the contract. There was no acceptance on the part of the Respondent which could effectively terminate the contract. The Respondent waivered between requesting the resignation of the Applicant, and a threat that failure to resign would result in steps being taken to terminate the contract. The matter was further compounded when the Applicant was allowed to return to work on the 9th November 1981.

The letter of the 28th September 1981 having clearly set out the Company's position, the failure of the Applicant to tender his resignation as requested in the said letter and his subsequent return work raise the question as to whether or not the dismissal on the 13th November 1981 was justifiable in law. It is worthy of note that notwithstanding the strong line taken by the Company in the letter of September 1981 the Company granted the Applicant sick leave with pay for period 1st October 1981 - 8th November 1981. This in my view is a clear indication that the Company was not treating the alleged breach as having been repudiatory of the contract and the employee was entitled to so regard the conduct of the employer. There was undoubtedly a waiver by the Company of the right to treat the contract of employment as at an end. Having waived that right both by the granting of sick leave and by allowing the applicant to return to work for the period 9th November

1981 - 13th November 1981 there was in my view no justification for the letter of dismissal dated 11th November 1981.

In Røss T. Smyth and Co. Ltd. v. T.D. Bailey, Sons and Co. (1940) 3 A.E.R. 60, Lord Wright said (at p.71) that "repudiation of a contract is a serious matter, not to be lightly found or inferred".

DISMISSAL

Before us Mr. Leo Rhynie conceded that nothing existed on the evidence to ground the alleged abandonment. He contended that the applicant's absence from work for a period of eleven days without permission was in itself conduct which would justify the Applicant's dismissal.

This contention is sound, bearing in mind the Company's policy as set out in its Policy Manual. There are however certain conditions which must be observed before the right to dismiss becomes exercisable.

Provision 5 at page 1 of the Policy Manual states:

> "In cases where dismissal is contemplated, the employee shall first be placed on suspension and the circumstances of the case further reviewed with the Head of Department and the Personnaland Industrial Relations with a minimum of delay".

I take the view that whenever there are provisions governing the dismissal of an employee, because of the serious consequences which flow from such dismissal, the provisions dealing with the steps to be taken prior to dismissal are to be regarded as mandatory.

To avail itself of the Provisions which deal with the absence of a worker for a consecutive period of 5 days the Company must show that it acted strictly in accordance with those Provisions in order to justify the dismissal. In my view the Company failed miserably in this regard. It clearly could not have attempted so to do because at the time the decision was taken to dismiss Mr. Smikle the particular Provision was not in the contemplation of the Company. The question of 5 days consecutive absence from work was a matter which emerged for the first

time at the hearing before the Industrial Disputes Tribunal. It was undoubtedly an after thought. It was a prop to support the dubious contention of abandonment.

As I have already indicated there was no basis upon which the Tribunal could have found that the worker had abandoned his job. Even if such a finding could have been supported by the evidence there was no acceptance by the Company of the act of repudiation hence any finding of justifiable dismissal based on the fact of abandonment would have been unsupportable in law.

It seems therefore that the only other basis for the award of the Tribunal that the worker was justifiably dismissed must be the 5 days consecutive absence from work. The Mandatory Provisions governing dismissal not having been adhered to by the Company the dismissal cannot be said to be justifiable. For the dismissal to be justifiable not only must there be just cause for the dismissal but it must be shown that the Provisions governing dismissal have been strictly observed.

Any finding of justifiable dismissal based upon 5 days consecutive absence from work would in my view be an error in law and ought to be quashed.

En Passe, let me state that it is indeed unfortunate that the Tribunal failed to give reasons for its award. In matters of this nature it is desirable that the Tribunal should set out its reasons for the award. I am not unmindful of section 12(3) of the Labour Relations and Industrial Disputes Act which states:

> "The Tribunal may, in any award made by it, set out the reasons for such award if it thinks necessary or expedient so to do".

For the reasons I have given I too would order certiorari to go to quash the award made by the Tribunal.

J.