

PARTIES: Dennis Arthur Norman v
North Australian Aboriginal
Legal Aid Commission Inc.

TITLE OF COURT: In the Supreme Court of the
Northern Territory of Australia

JURISDICTION: Interlocutory Application

FILE NO.: 280 of 1989

DELIVERED: 16 June 1995

REASONS OF: Master Coulehan

CATCHWORDS:

CONTRACTS - construction and interpretation - whether
intention to be bound pending execution of formal
contract - inferences from conduct

MASTER & SERVANT - notice - whether plaintiff a public
servant and liable to be dismissed without notice
- effect of parties' discussions

Cases followed:

Brogden v Metropolitan Railway Co. (1877)
2 App. Cas. 666
Edward Keller (Australia) Pty Ltd v Hennelly
(1990) 35 I.R. 464
Empirnall Holdings Pty Ltd v Machson Paul
Partners Pty Ltd (1982) 14 NSWLR 523

Cases referred to:

Masters v Cameron (1954) 91 CLR 353
Scott v Commonwealth of Australia 41 ALR 498

Representation:

Counsel:

Plaintiff Mr D. Norman in person
Defendant Mr D. Francis

Solicitors:

Plaintiff Dennis Norman & Associates
Defendant David Francis & Associates

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

At Darwin

280 of 1989

BETWEEN:

DENNIS ARTHUR NORMAN

Plaintiff

and

NORTH AUSTRALIAN ABORIGINAL

LEGAL AID SERVICE INC.

Defendant

MASTER COULEHAN: REASONS FOR DECISION

(Delivered 16 June 1995)

In this proceeding the plaintiff claims damages for wrongful dismissal. On 26 May 1994 Kearney J ordered as follows:

- "1. The undermentioned question in the proceeding be tried before the trial of the proceeding, namely:-
 - "(a) Whether as at the date of the dismissal by the Defendant of the Plaintiff of the employment of the Defendant, there was any agreement as to the matter of notice of the termination of the employment of the Plaintiff with the Defendant;
 - "(b) If there was such an agreement, the terms of such agreement;
 - "(c) If there was no such agreement, the question as to what was the proper notice required to be given by the Defendant to the Plaintiff for the termination of the Plaintiff's employment with the Defendant.
- "2. The above questions be tried before the Master of the Supreme Court.
- "3. Evidence to be given at the trial of such questions be given by way of affidavit subject to such further directions as the Master may make in regard to the conduct of the trial of such questions.

"4. The question of costs is reserved."

In accordance with the order a trial has now been conducted on evidence by affidavit.

The plaintiff commenced employment with the defendant in July 1983 as a senior solicitor. There was no written agreement.

On 18 November 1985 the defendant offered the plaintiff employment as solicitor in charge. The offer was contained in a letter signed by the defendant's administrative officer, P.L. Wilson, which, omitting formal parts, reads as follows:-

"I write to offer you employment as Solicitor-in-Charge of N.A.A.L.A.S.

"Yours (sic) salary will be that of a Principal Solciitor (sic) in the Commonwealth Public Service at the maximum of the range plus \$500.00 per year. You will also receive District Allowance at Commonwealth Public Service rates and your general conditions of service will be as detailed in the Industrial Agreement between (sic) N.A.A.L.A.S. and the A.C.O.A.

"I am recommending to the N.A.A.L.A.S. Council that they provide you with a three year contract in the terms of the sample contract attached. It is expected that the resumed Annual General Meeting of N.A.A.L.A.S. will approve constitutional amendments to permit the setting up of a firm of retained solicitors for N.A.A.L.A.S. In that case the contract will provide for you to be offered the opportunity to set up that firm as its principal.

"A copy of your duty statement is attached.

"If you agree to accept the position of Solicitor in Charge under the conditions outlined above please sign one copy of this letter as indicated below and return it to me before 4.00pm on Thursday 21st November.

"Wishing you every success in your new position."

Attached to the letter were the following documents:-

1. A duty statement.
2. A sample contract.
3. A letter addressed to the Administrator of the defendant.
4. A staff circular.
5. A copy of an agreement between the defendant and the A.C.O.A.

Clause 8(2) of the sample contract provided for termination by either party giving three months notice in writing.

On the same day Mr Norman indicated his acceptance by writing on the letter the words **"I am pleased to accept this position"** and adding his signature.

It appears from the wording of the letter that the parties contemplated the execution of a written document in the terms of the sample contract. No such document was executed and the firm of retained solicitors did not eventuate.

There is no doubt that the plaintiff accepted the terms set out in the sample contract.

In paragraph (d) of the particulars provided by letter dated 27 June 1989 the plaintiff states:-

"Wilson informed the Plaintiff that as Solicitor in Charge the Plaintiff would be retained by the Defendant on the terms set out in the draft Contract which was attached to the letter to the Plaintiff offering the Plaintiff the position of Solicitor in Charge. The Plaintiff accepted these terms and signed the letter of acceptance as requested by the Defendant."

Further, in paragraph 8 of his affidavit sworn on 15 March 1994 he deposes that:-

"At the time of commencement of my employment with the Defendant I was provided with the said 'Sample Contract' and thereafter it was always understood

by the said P.L. Wilson and myself that the Contract would become otiose upon my setting up of the retained solicitors system. In any event, if the terms of the said Sample Contract were ever in force, the Contract ran out on the 18th of November 1988. At no time did I or the Defendant sign the said 'Sample Contract'."

The plaintiff carried out his duties as solicitor-in-charge until his employment was terminated on 3 March 1989. He was paid 2 months salary in lieu of notice.

The agreement with the A.C.O.A. and the sample contract provided for conditions applicable to the Commonwealth Public Service and it is pleaded in paragraph 6 of the statement of claim that:

"It was an express term of the said contract that the conditions of recreational leave, sick leave, leave loading and air-fares would be in accordance with those applicable to the Commonwealth Public Service awards then in existence."

The defendant argues that the plaintiff was therefore a Commonwealth public servant and was liable for dismissal without notice, relying on Scott v Commonwealth of Australia 41 ALR 498, in which case it was held that a Crown servant may be dismissed at pleasure, notwithstanding any terms of contract.

The logic of this argument assumes that a person who is employed on conditions generally applicable to public servants are employees of the Crown. This does not necessarily follow and in the absence of evidence that the plaintiff was an employee of the Crown the argument fails.

On the question as to whether the parties intended to be bound pending the execution of a formal contract the leading case is Masters v Cameron (1954) 91 CLR 353.

At p.360 the High Court said:-

"Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract."

The facts would appear to fall into the first class of cases mentioned but for the statement by the writer of the letter that he was recommending that the NAALAS Council provide a three year contract in the terms of the sample contract. This suggests that the Council may not have agreed to the terms of the sample contract.

However, in the absence of express agreement, agreement may be inferred from the conduct of the parties (see Brogden v Metropolitan Railway Co. (1877) 2 App.Cas. 666 and Empirnall Holdings Pty Ltd v Machson Paull Partners Pty Ltd (1988) 14 NSWLR 523).

It may be inferred from the employment of the plaintiff as solicitor in charge after his acceptance of the defendant's terms that there was an agreement in those terms.

The sample contract provided for a 3 year period of employment, however, there was no commencing date agreed. This was to be stipulated in the executed contract.

I conclude that there was agreement between the parties that, pending execution of the contract, the plaintiff would be employed on the terms provided in the sample contract which included the provisions of clause 8(2).

If this was not the case, the parties do not appear to have canvassed any period of notice other than the period of three months. In these circumstances it would be inappropriate to impose a period exceeding 3 months. (See Edward Keller (Australia) Pty Ltd v Hennelly (1990) 35 IR 464, 467).

The answers to the preliminary questions are as follows:-

- (a) Yes.
- (b) Three months notice in writing.
- (c) Does not arise.