[BELCHER, C.J., SERTSIOS AND FUAD, JJ.]

1928.
March 16, 27.

ALEXANDRE BOUZOUROU

v.

THE OTTOMAN BANK

BOUZOUROU
v.
OTTOMAN
BANK.

Contract—Master and servant—Action for wrongful dismissal—Disobedience to order of transfer—Lawfulness of order.

Plaintiff was an employee of the defendant Bank at Constantinople. He was ordered to go, on transfer, to Mersina: refused, and was dismissed.

Held, by the majority of the Court, Sertsios, J., dissenting, that transfer to another branch being an implied incident of banking employment the order was not unreasonable and consequently that dismissal for disobedience to it was justified.

The Privy Council dismissed plaintiff's subsequent appeal from the judgment of the Court.

Appeal by defendant from the judgment of the District Court of Nicoisa (No. 187/27).

The facts appear in the judgments.

Artemis (with him *Stavrinakis*) for appellant.

N. G. Chryssafinis (with him *Clerides*) for respondent.

JUDGMENT:—

BELCHER, C.J.: This was an action for wrongful dismissal by a Bank officer. He was dismissed because he refused to go from Constantinople to Mersina, to which place he had been ordered to proceed as manager. The learned Judge in the Court below found that that was not a reasonable order and that, therefore, the respondent was justified in disobeying it and that the dismissal founded on that disobedience was wrongful. Whether or not the dismissal was wrongful was a question of fact for the Court, in its aspect as a jury, and what this Court has to decide on the hearing of this appeal is, whether there was evidence before the Court below on which it could reasonably find as it did. All the circumstances must be looked at, since the ambit of orders which may be given is, naturally enough, not defined in the written contract. The service the respondent entered was the service of a Bank with over eighty branches, in which in fact transfers to take place at the rate of some hundreds a year, from one office to another.

The reasons the respondent gave for refusing to go to Mersina were that he did not know enough Turkish to conduct the Mersina branch, that he would be there engaged in managerial work instead of on the administrative work to which he was accustomed, that he was unpopular with the Turkish Government who would not hesitate to order

1930.
March 16, 27.

BOUZOUROU
v.
OTTOMAN
BANK.

his dismissal if they got the opportunity, which his ignorance of Turkish would at Mersina readily afford them, and that he would have to keep up two houses as his family was at Constantinople where his children were at school. The learned Judge found that these reasons were good, and the wording of his judgment implies as well that he considered the real reason for the Bank ordering respondent to go to Mersina was that they knew his ignorance of Turkish would lead to a position in which they would be justified in dismissing him for incompetence, this being the end they desired to achieve. In my view the qualifications of the respondent for the post were matters for the Bank to decide, and respondent was not entitled to anticipate dismissal in the future, as a necessary consequence of his being placed in a post for which they regarded him as fitted; nor can the inconvenience of having to have his children in another place from that in which he himself lived, be said to convert an otherwise reasonable order of transfer into an unfair one. There was no question in this case of the respondent risking his life. Transfer is shewn to be one of the ordinary incidents of Bank employment; the proved fact that the Bank studied their officials' convenience where they could, and usually, if not always, offered them increases on transfer, is not evidence that to order transfer at all was unreasonable or that both parties had impliedly agreed that there should be no transfer without the officer's consent. I see no ground whatever in the evidence for the finding that the Bank's real object was to arrive at a stage where they could dismiss the plaintiff.

There was, in my opinion, no evidence on which the Court below could find the order of transfer unreasonable or the dismissal wrongful and the appeal must be allowed.

FUAD, J.: I concur with the judgment of the Chief Justice.

SERTSIOS, J.: I dissent.

The issue in this case is whether the Bank had power under the "Caisse de Pensions et de Retraites" to transfer plaintiff to Mersina without his consent. Counsel for the Bank admitted at the trial that there was no special provision, and plaintiff deposed to cases of refusal to accept transfer which were not visited with dismissal. Mr. Reid himself admitted that he had never known of an officer with twenty years' service in Constantinople being moved to the provinces, and that a number who had fled from Smyrna to Athens were not dismissed for refusing to go to Constantinople: nor was any evidence given of the exercise, even in the case of a junior employee, of the alleged right

to transfer without consent. It was, says plaintiff, on account of these refusals that the two new forms of engagement were drawn up in August, 1926, acknowledging an obligation to accept transfer anywhere and a right in the Bank to dismiss for refusal.

Plaintiff joined the Bank in Constantinople in April, 1905; in September, 1910, he went for three months to Panderma, which is only four hours by boat from Constantinople; served there again from May, 1911, to January, 1913; and since then was stationed in Constantinople. There is nothing to show that his wishes were not consulted each time he went to Panderma. What led to his dismissal was his refusal to go as manager to Mersina.

The first reason plaintiff gave for refusing was his ignorance of Turkish. The Court below found that the Mersina post required a good knowledge of Turkish. When plaintiff told the General Manager that his ignorance of Turkish made him unfit for that post the latter said, "If you are unable to go to Mersina, we shall dismiss you for incapacity"; and on being asked what he meant by "incapacity" he explained "the incapacity of not knowing Turkish which makes you incompetent to serve at Mersina." The answers given by his chiefs to the Management's questionnaire establish plaintiff's inability to carry on a conversation in Turkish.

Plaintiff's second ground for refusing was that, for the reasons set out on pp. 18–19 of the lower Court's judgment, as the Turkish authorities thought him, although wrongly, hostile to Turks, this reputation would soon reach Mersina. Ungar's letter of 25th August, 1925, and Boggetti's reply justify plaintiff's view, and Mr. Reid said the Management had seen the former when considering plaintiff's transfer.

The Management, knowing of plaintiff's ignorance of Turkish, ordered him to take up a post where such ignorance was an incapacity which, according to the General Manager, would lead to his dismissal. I cannot help agreeing with the Court below that this order was given with a view to providing a means of getting rid of him.

Assuming, however, that the Bank had power to transfer without consent, does it possess a right under the Caisse to dismiss for refusal? The right to dismiss is given by Article 5:—

> "La Direction Générale a le droit de revoquer les employés pour faute grave ou abus commis dans leurs fonctions, ou pour violation du secret qu'ils doivent garder sur les affaires de la Banque."

Did plaintiff's refusal to go to Mersina constitute a "faute grave" or "abus dans ses fonctions"? The Bank had never terminated any clerk's service, much less

1930.
March 16, 27.

BOUZOUROU
v.
OTTOMAN
BANK

dismissed any one, for refusal to go on transfer, and the forms of engagement introduced in August, 1926, show that it did not think it had the right. According to A. Williamson's Dictionary of French legal words and phrases, "faute" means "a fault or error giving rise to damages": ("abus" means something done against the law—an unlawful use of power—and does not arise here). It would have been a "faute grave" in this case if plaintiff, having accepted the transfer, wilfully delayed to take up his new post and thereby caused damage to the Bank. But plaintiff refused it for reasons which in the view of the lower Court, with which I agree, justified him, and the Bank has not shown that it sustained any damage by his refusal. Consequently plaintiff committed no "faute grave" under the article and his dismissal was, therefore, wrongful. The case of *Cusson* v. *Skinner* (1) is decisive on the point that the disobedience must have occasioned loss. *Anderson* v. *Moon* (2) shows that "a master cannot remove the servant to any other place inconvenient to the servant. The place where the master has his work at the time of the engagement would be held to be the place where (in the absence of express stipulation) it is implied that the servant was to work .... and he cannot be removed to any other place which may occasion trouble or expense .... But the inconvenience must be real."

The Court below found, in my view rightly, that the transfer caused plaintiff real inconvenience and that he was justified in refusing it. It is according to *Clouston* v. *Corry* (3) for the jury to decide what degree of misconduct would justify dismissal, and the Court below sitting as a jury has found that the dismissal was unjustified and wrongful, and I see no reason why its judgment should be disturbed.

Appeal allowed with costs.

The judgment of the Privy Council (Lords Blanesburgh, Warrington of Clyffe, and Thankerton) was delivered by Lord Thankerton on 21st January, 1930, and is as follows:—

LORD THANKERTON: In the present case the appellant who appeals by special leave *in forma pauperis*, sues the respondent Bank for damages for wrongful dismissal and for a declaration that he was entitled to be paid a monthly pension of £39 4*s*. 0*d*. by the respondents. He appeals from a decision of the Supreme Court of Cyprus dated the 27th March, 1928, reversing the decision of the Trial Judge.

The appellant, who is a Christian Ottoman subject, entered the service of the Bank in April, 1905, and remained in its service until the 7th March, 1927, when he was dismissed without notice and without pension, because of his

(1) 12 L J, Ex. 347.
(2) Macdonnell's Master and Servant, 2nd ed., p. 190.
(3) (1906) A.C. 122.

refusal to conform to an order by the respondents in January, 1927, for his transfer from the branch at Stamboul, where he was then employed, to the branch at Mersina, a town in the Asiatic provinces of Turkey on the south-east coast of Asia Minor.

The appellant maintains (1) that under the terms of his contract of service, the sphere of his employment did not include the provinces of Turkey, but only the Head Office and branches in Constantinople and its suburbs, which include Stamboul, and (2) *esto* that the provinces of Turkey were included, the particular order was unreasonable in view of his ignorance of Turkish and the hostile attitude of the Turkish civil authorities, and was one which he was not bound to obey.

On the 25th January, 1905, an advertisement (Ex. A. 1 (1)) appeared in the newspaper *Stamboul* in Constantinople, which stated "The Imperial Ottoman Bank offers under competitive examination five posts in its offices in Constantinople or in the provinces"; among the subjects of examination set out in the advertisement was included "Languages spoken or written by the candidates and especially Turkish." The appellant, who was then in other employment in Constantinople, but did not know Turkish, applied and was among the successful candidates. In a minute of meeting of the respondents' Management Committee on the 6th April, 1905 (Ex. A. 1 (2)) it is recorded:—"STAFF: After inspection of the examination papers of the last competitive examination held, the General Management have decided to engage the following:—Ap. Michaelides, Joachim Levy, Josue Sinai, Jean Ouannou, Alex. Bouzourou, on the permanent staff at a salary of Ltq. 8 per month." On the 17th April, 1905, the following decision (Ex. A. 1 (3)) is found in the respondents books:—"Decision No. 3186:—By decision of the Director-General dated 6th April, 1905, Mr. Alex. Bouzourou is engaged in the Bank's service (Head Office) as from the 17th April, 1905, with salary Ltq. 8 per month,—The Director-General (Sgd.) J. Deffes." On the 20th April, the appellant subscribed the printed form of declaration of adherence to the Regulations governing the "Pensions and Superannuation Fund," the provisions of which are therein stated to form an intergral part of "my engagement in the Imperial Ottoman Bank." (Ex. A.B. (1).) While the terms of these Regulations (Ex. A.B. 2 (1)) throw no direct light on the contractual sphere of the appellant's employment, it is to be noted that every employee of the Bank, on entering its service, is required to subscribe to them, the whole staff—whether employed in Constantinople or the provinces or abroad—being treated as a unit for the purposes of the Pension and Superannuation Fund. These are the only

1930. March 16, 27.

BOUZOUROU v. OTTOMAN BANK.

contemporaneous documents which are relevant to the consideration of the terms of the appellant's engagement, and they are all produced and founded on by the appellant in his evidence.

The appellant, who was the only witness on this point, states :—" I saw a notice calling for candidates for employment in the defendant Bank. (Witness referred to Ex. A. 1 (1).) This looks like the notice. There was a competitive examination. I said I knew no Turkish. I was successful in that examination. I was appointed at the Head Office in Constantinople at a salary of £T.8 a month ; in the defendant's Department of General Correspondence (*vide* A. 1 (2) and (3)). At the time of entering service of defendant Bank, Mr. Maltass asked me ' will you have a post with £8 in Constantinople or £12 in the provinces.' I accepted the post for Constantinople. I signed this declaration. (Put in and marked Ex. A.B. 1). These are the Regulations referred to in this declaration. (Put in and marked Ex. A.B. 2.) "

In the Courts below the respondents maintained that the contractual sphere of employment of the appellant was unlimited and that they would have been entitled to transfer him to one of their foreign branches, but in the appeal they maintained mainly that the ambit of employment was Constantinople and the provinces, though they still retained their former view as an alternative.

In their Lordships' opinion the history of the various appointments of the appellant during his 22 years' service does not afford any definite explicatory evidence as to the terms of the original contract. In their Lordships' opinion the evidence shows that transfer is one of the ordinary incidents of the Bank's employment, being usually concurrent with an increase of salary and responsibility, and suggests no more than that the Bank considered their officials' convenience where possible. It is significant that, throughout the correspondence protesting against his dismissal, the appellant did not suggest that the transfer to Mersina was a breach of his contract, and that it was not suggested in his evidence until the cross-examination, when he stated : " When I joined the Bank I did not know that I was liable to be sent into the provinces," and, again, " Employees are not bound to serve the Bank outside the place where the contract was made except with their consent."

The appellant sought to found on a new form of declaration imposed by the respondents on new employees engaged after August, 1926, and a revised form of declaration imposed on those engaged after February, 1927, devised

to put beyond doubt the Bank's right to transfer its employees to any branch. In their Lordships' opinion these can have no bearing on the terms of the appellant's engagement in 1905.

It is not unimportant to consider the nature of the service which the appellant entered. The appellant was a young man of 23; as provided in Article 1 of the Regulations, he was engaged without limit to the duration of his engagement, and it is admitted that the Bank was entitled to decide from time to time what particular department of the Bank's service he was to serve in and to move him, for instance, from the Correspondence Department to the Accountancy Department. He may be assumed to have hoped for promotion and thereby to rise high in the service. From the point of view of proper organisation of their staff, it is difficult to assume that the Bank would willingly agree that their employees should not be bound to serve outside the place where the contract was made except with their consent, and, in their Lordships' opinion, such condition of the contract would require to be clearly established. The nature of the service in this case is different to that of the yearly engagement as a spinner of the defender in the Scottish case of *Anderson* v. *Moon* (1) where it was held that the contract was applicable to one mill only.

Their Lordships are of opinion that the reference to five vacant posts in the advertisement and the choice of post given to the appellant by Mr. Maltass related merely to the initial step in an unlimited employment in the service of the Bank, which followed on engagement on the permanent staff of the Bank, and that the appellant has failed to establish that the appointment to an initial post at Constantinople involved that no subsequent appointment to another post could be made except to another post in Constantinople. While their Lordships incline to the view that the terms of the advertisement might be held to limit the service to Constantinople or the provinces, it is unnecessary to come to a definite conclusion on that point.

The appellant further maintains that, even if Mersina was within the contractual ambit of his employment, he was not bound to obey the order of transfer to that place on the ground that the order was so unreasonable as to be unlawful, and his disobedience could not be held by the respondents to constitute *faute grave* within the meaning of Article 5 of the Regulations.

The only case referred to on this point was *Turner* v. *Mason* (2) where a domestic servant sued in respect of alleged wrongful dismissal. The plaintiff had requested her master's leave to absent herself for the

(1) (1837) 15 Shaw 412.
(2) (1845) 14 M. & W. 112.

1930.
March 16, 27.

BOUZOUROU
v.
OTTOMAN
BANK.

night, her mother having fallen ill and being in peril of her life; it was not clearly alleged that the plaintiff had communicated this reason to her master. The latter refused leave, and the plaintiff nevertheless absented herself, whereupon she was dismissed. It was held that a plea of demurrer was good, as showing a dismissal for disobedience to a lawful order of the master, and that the replication was bad, as showing no sufficient excuse for such disobedience. Pollock C.B. said :—

"It is very questionable whether any service to be rendered to any other person than the master would suffice; she might go but it would be at the peril of being told that she could not return."

Parke B. says :—

"Even if the replication showed that he had notice of the cause of her request to absent herself, I do not think it would be sufficient to justify her in her disobedience to his order; there is not any imperative obligation on a daughter to visit her mother under such circumstances, although it may be unkind and uncharitable not to permit her."

Alderson B. says :—

"There may undoubtedly be cases justifying a wilful disobedience of such an order, as where the servant apprehends danger to her life, or violence to her person, from the master, or where, from an infectious disorder raging in the house, she must go out for the preservation of her life."

Rolfe B. says :—

"In truth the cases suggested by my brother Alderson are cases in which there is not legally any disobedience, because they are cases not of lawful orders. It is an unlawful order to direct a servant to continue where she is in danger of violence to her person, or of infectious disease."

Their Lordships agree with the view that there must be an immediately threatening danger by violence or disease to the person of the servant before an order to remain in the zone of danger can be held to be unlawful.

None of the reasons put forward by the appellant in excuse of his refusal to go to Mersina comes within the above category; the two main reasons given by the appellant were his ignorance of Turkish and the unfavourable attitude of the Turkish authorities; he did not suggest that the latter involved any peronal danger to him. The only other reason, which was not stated prior to the dismissal, was that he would have been obliged to leave his family in Constantinople. Accordingly their Lordships are of opinion that,

in ordering the appellant to go to Mersina, the respondents were giving a lawful order, which the appellant was bound to obey, that his disobedience was justifiably treated by the respondents as *faute grave* under Article 5 of the Regulations, and that his dismissal was justified.

For these reasons their Lordships are of opinion that the appeal should be dismissed, and they will humbly advise His Majesty accordingly.

[BELCHER, C.J., CREAN AND FUAD, JJ.]

THE MUNICIPAL COUNCIL OF KARAVAS BY ITS MEMBERS, VIZ., CHRISTODOULO KYRIACO AND OTHERS.

v.

KYRIACO CHR. TSIOMOUNI.

Form of proceedings under section 76 of the Municipal Councils Law, 1885—Action—Application.

Defendant having exceeded the limit laid down in the permit given him for extension of his building and having thereby encroached upon the road, plaintiffs brought an action to restrain him, which was dismissed on the ground that the remedy provided by Section 76 must be sought by way of application and not by action. From this decision plaintiffs appealed.

Held, that the Municipal Councils Law, 1885, created new rights and duties and, therefore, the particular remedies specified in that Law for their enforcement must be followed.

Appeal by plaintiffs from judgment of District Court of Kyrenia dismissing action (No. 109/27).

Christis (with him *Phylactou*) for appellants.

Plaintiffs sued as private individuals as well as members of the Council. In any case the statutory remedy does not exclude the common law remedy of action for injunction. The Court could have treated the action as an application, there being no special form of application provided in the Law.

Triantafyllides (with him *Mitsides*) for respondent.

Application is a distinct form of remedy and the only one provided by the Law in proceedings under Section 76. Plaintiffs sued in their corporate name and there is nothing in the writ to indicate that they sued as individuals. *Alecco Zenon* v. *Hafiz Haji Ali* is authoritative on the point.

The judgment of the Court was delivered by Crean, J.