JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 49/81

BEFORE: The Hon. Mr. Justice Rowe, J.A.
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Campbell, J.A. (Ag.)

BETWEEN:	KAISER BAUXITE COMPANY	DEFENDANT/APPELLANT
A N D:	VINCENT CADIEN	PLAINTIFF/RESPONDENT

Dr. L.G. Barnett instructed by Mrs. Janet Morgan of Milholland Ashenheim & Stone for the Appellant

Mr. Horace Edwards, Q.C. instructed by Mr. Crafton Miller for the Respondent.

October 4, 5, 6 and July 29, 1983

ROWE J.A.

Morgan J. had the opportunity to observe the demeanour of the plaintiff/respondent and the five witnesses as to fact called on behalf of the appellant company. After much reflection and a complete re-reading of the Record I am persuaded that the learned trial judge's assessment of the primary facts and the inferences which she drew from them were so much against the weight of the evidence, that the judgment rendered on behalf of the plaintiff/respondent is unsound and cannot stand. I have read the judgments of Carey J.A. and Campbell J.A. (Ag.) and as I find myself in complete agreement with the reasons which they have advanced, I concur that the appeal should be allowed and that the judgment of the court below be set aside and that judgment be entered for the appellant with costs, both here and below, to be agreed or taxed.

CAREY, J.A.:

This is an appeal from the judgment of Morgan, J., whereby she entered judgment in favour of the respondent in the sum of $12,869.00 against the appellants in an action for wrongful dismissal. The burden of the complaint against the judgment was that the judge had misdirected herself as to the facts.

In my view, her findings of fact are unreasonable and against the weight of evidence. In arriving at this conclusion, I am very mindful of the caveat against this court interfering with findings of fact of a judge sitting without a jury. The principles on which an appellate court should act where it is minded to disturb findings of fact are succintly and correctly stated in the headnote of Watt or Thomas v. Thomas [1947] A.C. 484 as follows:

"When a question of fact has been tried by a judge without a "jury and it is not suggested that he has misdirected himself in law, an "appellate court in reviewing the record of the evidence should attach "the greatest weight to his opinion because he saw and heard the "witnesses, and should not disturb his judgment unless it is plainly "unsound. The appellate court is however free to reverse his conclusions "if the grounds given by him therefor are unsatisfactory by reason of "material inconsistencies or inaccuracies or if it appears unmistakably "from the evidence that in reaching them he has not taken proper advantage of "having seen and heard the witnesses or has failed to appreciate the "weight and bearing of circumstances admitted or proved."

The evidence of the respondent should first be looked at. He had, by dint of hard work, risen to the position of shipping foreman in the appellant's mining company and he had been in that position for somewhat in excess of a year at the time of the incident, which, in the result, culminated in his dismissal from the company's employment. His account of his actions on that day are important. On Good Friday, April 8, 1977, the respondent's period of duty was between 4:00 p.m. and midnight; it is called the "swing-shift". He dutifully reported at 4:00 p.m. and relieved Mr. Winter, the shipping supervisor, who apprised him of the fact that bauxite loading operations were scheduled to start at 8:00 p.m. Between 4:00 p.m. and 8:00 p.m. he occupied himself in inspecting the loading

system and found it in working order. He also telephoned his wife and attended at one Winter's house where he saw Cover, the gantry operator, and a witness for the appellant. After that, at 7:00 to 7:15 p.m., he left to check the level of the water before loading operations begun. He ordered loading to begin at 8:00 p.m. but this was halted when the hopper became blocked and the shuttle belt over loaded. He explained that it was the gantry operator (Mr. Cover) who reported that the system had broken down. He visited the site of the blockage and set two men to work to have it cleared. He next spoke to the electrician whom he requested to check the electrical system and went to advise Mr. Winter of the situation. His next step was to search in the areas of Discovery Bay, Farm Town and Thicketts for men whom he knew as casual workers in the pool maintained by the appellants. He had seen persons in the square during his search but did not recognise any as casual workers. By the time he had completed his unsuccessful search for workers, it was almost 11:00 p.m. On his return, an injury to his toe began acting up, and as a result, he sat down with his feet on the desk. Prior to his return to the office, he had been to the gantry where he had seen the men still engaged in clearing the blockage. At 12:00 midnight, his shift ended; he left at 12:05 a.m. Before he left, he completed some records but made no note in the log-book regarding the fact of the blockage. He had seen Mr. Clarke to whom he mentioned the breakdown and requested him to advise Mr. Pengelley of the situation. He did see Mr. Pengelley at midnight but said nothing to him nor did Pengelley say anything to him.

On the following day he was suspended from duty. He informed Winter of the circumstances of the breakdown. Some days after this, at the personnel office, he was asked to give a statement but he demurred on the ground that he would defer providing one until there was a hearing. On April 25, he received a letter from the company terminating his services.

He acknowledged that it was the correct procedure to prepare a written report of the events of the night to be left for the person relieving him on the shift when this was practical. It was not impractical to have prepared it in the circumstances. He also conceded that two men could not clear the blockage by midnight. I think it is as well to note

that although the respondent said he had ordered loading to begin, he also said that he was on the way from inspecting the water levels at 8:00 p.m., which was somewhere in the shipping area.

The appellant's version of the respondent's conduct is based not on direct evidence but on inferences to be drawn from the evidence adduced on its behalf. Ian Pengelley, the person with overall responsibility for shipping, among other duties, called and spoke to the respondent at 5:00 p.m. requiring to be informed if the system was ready for loading to re-commence and whether the pilotage authority was advised of the expected time of departure of the vessel. His response was that everything was satisfactory but that he learnt his wife was trying to locate him, that he had himself tried to get through to her but was unsuccessful and enquired whether if further attempts failed, it would be possible to use his (Pengelley's) telephone. Permission was granted. In the event, Cadien never came to his house to use the phone. As to this conversation, Cadien emphatically denied that it ever took place.

Leopold Cover was the gantry operator. He was on duty during the swing shift and arrived at work at 4:00 p.m. He did not see Cadien until 4:25 p.m. At 8:00 p.m., he was in the gantry tower from where he telephoned the shipping-foreman's office and got no reply. He tried the guard-gate but did not raise Cadien. He started loading operations on his own.

After 15 minutes operation, the conveyor belt tripped out for the reason, as he discovered, the shuttle belt was skidding and overloaded. He tried once more to find Cadien by phoning his office but failed to do so. On his way to Winter's house, he did meet Cadien, and made a report to him. They returned to the gantry, Cadien enquiring repeatedly what had occurred. Cadien left and returned with a flashlight. They both examined the belt and the hopper. By this time the electrician whom Cadien said he would have sent for, arrived. It was suggested to the electrician that he bridge the overloaded relays but that the electrician declined to do. Cadien left two men to shovel the bauxite from the belt. It was now 8:40 p.m. Cover did not see Cadien for the rest of the shift which ended at midnight.

Cover explained that upon his arrival, he had reported at

the shipping foreman's office but had not seen him. It was Winter who advised him that there would be no loading until 8:00 p.m. Cover denied that he had been invited on that evening to Winter's home nor had he visited there. It was in the course of going there, however, to look for Cadien, that he met him. This piece of evidence conflicts with Cadien's on this point. Cadien had said that Winter had invited both himself and Cover to his, Winter's home, and both had done so. Each man travelled separately. Cover arrived first, but both left together. For completion, I might add, that Cover explained that when he saw Cadien at 4:25 p.m., Cadien was driving in from the pier gate to his workplace. At that time Cover was at his post up in the gantry.

Peter Winter, at the material time, was shipping supervisor and the person to whom Cadien was directly answerable. On the day in question, he was on duty between 8:00 a.m. and 4:00 p.m. He expected to be relieved at 4:00 p.m. by Cadien. At about that time Cadien's wife called, but when he looked in at Cadien's office, did not see him. At 4:25 p.m. Cadien arrived and got out of his car. He was told of his wife's call and directed to check everything to ensure that the system was ready for loading at 8:00 p.m. He next saw Cadien at his home at 6:00 p.m. He remained some 20 - 30 minutes. The purpose of the visit was to report on the status of the system. Cover never visited him that evening. So far as the breakdown went, he knew nothing of it until the following morning.

The next significant point in time, is at approximately 11:30 p.m., when Clarke, the shift supervisor, received a report from the electrician which caused him to put a call through to Pengelley. Clarke and the electrician both went to the pier. Cadien was not seen but a truck provided for his use, was observed, parked at the ship-loading office. He went to the gantry where he saw Cover. The shuttle belt was over-loaded with bauxite but some of it had been shovelled off. Neither of the two men who apparently had been assigned for that purpose, was at that time actively engaged. He went to the ship-loading office, where, on looking through a window, he observed Cadien reclining in a chair with his two bare feet on a desk, and his back against a wall: he appeared to be asleep. He requested two employees to accompany him to have a look

but both declined to become involved. Returning to the office, he spoke with Cadien, telling him that he had been asked by Pengelley to check on the present situation. Cadien's reply was to use a deal of abusive and indecent language. Clarke then told him that he had his permission to go out and find other casual workers. Cadien said he had already tried but had not succeeded. Clarke attempted to contact Pengelley but could not. He carried out some other duties, returned to the Plant and handed over to his relief. On his return to the pier, he saw Pengelley to whom he spoke and he departed. After Clarke had spoken to Pengelley at 11:30 p.m., the latter telephoned the shipping office, heard ringing tones but no one answered. He called and spoke to Cover, the gantry operator. He also spoke to the guard at the pier gate. None of these calls produced any result as far as Cadien was concerned. In the event, he got dressed, called on Winter but was unable to speak with him, drove along the road, collected three casual workers whom he turned over to the relieving foreman, a Mr. Sinclair. He saw Cadien by the pier seated in his car, in front of the shipping office. Cover confirmed that Pengelley had telephoned him at 11:30 p.m. and he had given him some information. When he was leaving, he saw Pengelley.

As to the evidence regarding the plaintiff's dismissal, Pengelley said that on 18th April, 1977, he made a request for Cadien to be at the Personnel Office on that day. He required a statement regarding the events that took place during his shift, as investigations into the delay were in progress. Cadien refused to give any statement then, but said that he was prepared to answer charges when they were made. Prior to this, on the day following the breakdown, Winter called on Cadien to give an explanation. Cadien told him what he had done, viz., that he had asked the electrician to bridge out an overloaded switch but the electrician did not accede to his suggestion. He put two men to work and had gone out to find extra help but had found no one. Winter then asked for a written statement but this he declined to do. At this point he was suspended from his duties.

The evidence of the plaintiff thus stood alone; the witnesses for the defence supported each other. There were conflicts between the versions which the learned judge was called upon to consider and resolve.

To take the earliest example, viz., his time of arrival. Cadien's evidence was, he arrived at 4:00 p.m. and relieved Winter. But he was not seen to arrive until 4:25 p.m. by Cover or Winter. It is as well to see how the learned judge resolved the matter. She said this:

"Late-Coming

"Mr. Cadien insists that he arrived on duty at 4:00 p.m. "and not at 4:25 p.m. One would have expected that he would proceed "immediately to relieve the man on duty. Mr. Winter says it was 4:25 "he saw him but he would not be able to say if he had come in before that "time. The probabilities are that Mr. Cadien was on time but late in "reaching the office. Human beings do not operate with the precision "of machines.

"Mr. Cover the gantry operator said that when he came at "4:00 p.m. he did not see him but if he had come earlier and was on the "plant he would not be able to say. It was a holiday and an unusual shift "for him, the chances are that that fact was supportive of his being on "the compound and of encouraging dalliance in reaching the office. "I am supported in this finding from the fact that nothing was adduced "to satisfy the Court or even infer that he was habitual in this late "coming, or even that it had occurred once before."

On the basis of this rationalization which, with respect, I found jejune, the learned judge found that there "is no abuse by "Mr. Cadien of late coming to the office and this singular breach cannot "be regarded either as lack of concern or indifference." The judge also recorded in her judgment that "Mr. Winter remained in his office till "he came, the system was not left unmanned and no detriment was suffered "by the Company."

The appellant averred in its pleadings that the respondent was "guilty of misconduct in and about his said employment" in that (inter alia) he reported late for work. In these circumstances, the judge was required to determine as a matter of fact whether or not the plaintiff reported late for work. What she did was to find on his behalf an excuse for his lateness by saying "since it was a holiday he might "have arrived earlier at the compound but reported at his office late." Was he a truthful witness when he said he arrived at 4:00 p.m. to relieve

Mr. Winter? He did not say he came late because it was a holiday: he said he came at 4:00 p.m. This was plainly in conflict with the evidence of Cover who saw him driving into the compound in his car at 4:25 p.m. and also Winter to the like effect. Since she found in the end that on this occasion Cadien was late, it must be presumed that she accepted the evidence of the two witnesses. Logically therefore, Cadien could not be believed. It would be necessary in those circumstances to scrutinize his other evidence with care.

The credit of the several witnesses was plainly of importance in this case. In this illustration, it is not the case of an unreasonable finding but, I am inclined to think, of "a failure to appreciate the weight and bearing of circumstances admitted or proved." I have read the judgment with particular care and have searched to see if at any point, she found any particular witness to be untruthful or unreliable. She approached the question of credit in this way:

"One appreciates that each man is interested in the self-preservation "of his job, a factor which I find runs through the evidence of some of "the witnesses, a self-preservation that is moreso understandable when "it is demonstrated that in the organisation of which they form a part "it requires the influence and signature of one person to dismiss them. "To ensure that this does not happen it is easy to see how evidence is "twisted and bent, sometimes gently, sometimes sharply not in an attempt "to thwart Mr. Cadien's cause but to extricate themselves from admitting "having done what they thenselves know as being against the rules."

I understood that observation to mean that a concern to preserve job status, induced witnesses to be untruthful, although none were minded to lie deliberately and so prejudice Cadien's cause. She illustrated the validity of this formulation by holding that Cadien and Cover being on social terms with Winter, were on that evening invited by him for drinks, the effect of these being to render Winter incapable of providing any assistance that night. Both Cover and Winter denied receiving any such invitation. The latter, it was suggested, "bent and twisted "the evidence, sharply" because he did not wish it to be known that he had withdrawn two men from their functions, and Cover because he was constrained to corroborate Winter's evidence and maintain his stance

that he was never absent from his post. Now, there is absolutely not a scintilla of evidence that Winter was unavailable because he had imbibed well and not wisely. The learned judge may well have entertained strong suspicions in this regard but it was never even suggested to Winter that drinks had been served: Cadien contented himself by saying that both he and Cover were invited but he himself left at between 7:00 p.m. to 7:15 p.m. The judge found that Cadien was absent from 6:00 p.m. to 7:15 p.m. Since she accepted Cadien's evidence as to the visit to Winter, then Cover would have been absent from his post some time before 6:00 p.m. and between then and 7:00 p.m. to 7:15 p.m. Seeing that loading was to begin at 8:00 p.m. and did in fact start at that time, it is difficult, I fear, to appreciate what reason Cover could have to "twist or bend his evidence" to show he was never absent from his post. On the occasions when Cover was required to perform his duties, no one has suggested that he was absent. As to Winter, again, what did he stand to lose by admitting that he invited both men to his house? Indeed, Winter said that Cadien had come to his house at 6:00 p.m. to report on the status of the loading system, and remained some 20 - 30 minutes. The judge was in error when she said that Cover had met Cadien coming from Winter. Cover's evidence was that after the breakdown, he was on his way to Winter, when he met Cadien. In my respectful view, the basis for this view as to lying, out of self-interest is fanciful and misconceived.

Again, I come to the conclusion that the learned judge failed to appreciate the weight and bearing of circumstances admitted or proved.

By reason of that approach, the judge concluded that Cadien was "not available at the time of the blockage but was not absent from "his post." He was engaged, he had said, in checking the water levels. The evidence of Cadien at one point was that he had given the order to start operations at 8:00 p.m., and at another time, he was on his way from checking water levels: it was the gantry operator, Cover, who told him of the breakdown. But Cadien did not vouchsafe where it was, that he was so advised: he was content to say that Cover came and reported it to him. Now this is curious because the evidence of Cover was that he telephoned Cadien. having ascertained the nature and cause of the breakdown but

got no response. He went to advise Winter of the situation and on his way there,met Cadien. The allegation of misconduct was stated to be absence from his post. The effect of Cadien's evidence was that he was not at his office when operations started at 8:00 p.m., nor did he give the order to start. This is consistent with the evidence of Cover that he started up on his own. In a situation where Cadien was the responsible employee on duty, it would be reasonable to expect that he would have given the order to commence operation. He did not, for he was not at a place where he could have done so. When the breakdown occurred, he was again not at his office. He had to be sought out. As I understand it, he was aware that loading had not started earlier because of the lack of dried bauxite. That being so, any further delay would have resulted in increased costs. He occupied a post of responsibility and would appreciate these factors. I am not clear whether the judge in holding that "though Cadien was not immediately available "at the time of the blockage, he was not absent from his post," meant he was on the leave which she found, had impliedly been given to Cadien by Winter in the invitation to drinks. Her preference for the evidence of Cadien that he was not available at the time of the blockage but was not absent from his post was based on her finding the evidence of Cover discredited. But having failed correctly to appreciate Cover's evidence which as I said she mis-stated, a finding that Cadien had not absented himself from his post, must be at least dubious.

Another finding was that Cadien had in fact gone out to search for casual workers but was unsuccessful. I would suggest two grounds for holding that this finding is unreasonable. In the first place, Cadien said he was aware that a pool of casual workers existed, but did not know that a list of names of these persons was available. He had gone about looking to find some of those whom he knew. His evidence is interesting: "Men were there but no casual worker I "knew. Could be some I did not know who were there. Never asked those "as I went to ask those I knew. My purpose was to get persons to assist." It seems preposterous that in the situation of emergency which had arisen, a responsible member of staff could be expected to be believed when he gave evidence that he made not a solitary enquiry but merely

looked in different faces as if on an identification parade, or as suggested, during the arguments at the bar, as if on a beauty parade. That evidence as quoted, is capable of two inferences; one, that Cadien was not a responsible or intelligent person; or two, that he was lying when he said he had gone in search of men. As to the first inference, that would be inconsistent with other evidence which the judge accepted, showed that Cadien had risen rapidly in the ranks and was therefore a competent and efficient worker. In that situation, the second was inescapable. No reasonable person could believe he could have done what he said he had done that night. But the judge also based this finding that he had gone in search of casual workers on his candour in telling Mr. Clarke that he had attempted to do so but had failed. She said: "I find that this "statement of Mr. Clarke was made at a time when Mr. Cadien had no "thought or idea that his actions would be the subject of enquiry and "at a time in which to make up a story." In point of fact, Cadien was well aware that he was required as part of his normal duties to record in the log-book the nature of his efforts in clearing the blockage. Self-interest would have begun to operate from then. The question of any thought to future enquiry was, in my view therefore, quite far-fetched. As to time to concoct a story, how long does it require to make up a story? The judge also conjectured that Cadien's difficulty in finding workers was that he may have looked at the wrong places and had no prior experience in recruiting casual workers. With respect, I do not think conjecture is a rational basis for a judgment. In my view, the inescapable inference was he had done nothing to get extra help. Again, I am constrained to hold that the judge failed to appreciate the weight and bearing of circumstances admitted or proved before her.

It was alleged by the defendant as part of the plaintiff's misconduct that he had failed "to report the incident or the circumstances "of the breakdown to the appropriate officer." The members of staff who gave evidence, save for the plaintiff were well aware of the procedure whereby the shipping-foreman, during the back shifts, reported to the drying supervisor, Mr. Clarke. The plaintiff on the night in question sought the help of Mr. Winter because of his ignorance of this procedure. The judge found that "apparently the necessity never arose for

"Mr. Winter to tell him and so Mr. Winter forgot to do so." Now it is perfectly true that Winter could not recall having briefed Cadien as to the line of authority. But as I understood his evidence, although he could not recall having done so, it was possible he had done so. In other words, in the normal course of events, it is more probable than not, that he had. The real question, however, seeing that the judge found that the Drying Supervisor was not a person to whom Cadien needed to have reported since he was not so briefed, was, did Cadien take reasonable and adequate measures to rectify the faults which had developed in the loading system? Cadien knew of the presence of Clarke. It would certainly have been reasonable to seek assistance from any source. Clarke had the experience and in point of fact was the senior staff member on duty at the material time. But Cadien did not attempt to do so nor did he call Pengelley. On the evidence, mutely he went looking in people's faces to see if he knew them, an endeavour which occupied him from after 8:00 p.m. to 11:00 p.m.

One of the factors which induced the learned judge to find in favour of the plaintiff was that when the steps which the plaintiff said he had taken, were put to the defendant's witnesses, they acknowledged that they were reasonable. However, the real question, I suggest, was whether, in fact, he had taken adequate measures. Apart from his own word on the subject, what he had done was to assign two men to clear the bauxite. He well knew at least two or three extra men would have been required to clear the blockage expeditiously. His evidence was that he had failed to obtain extra help. The ship, as was found, was delayed for four hours. It was also found that had he obtained extra help, the blockage would have been cleared earlier. By failing to weigh the evidence correctly, the learned judge fell into error in holding that Cadien did not display incompetence or neglect and that he had taken adequate measures in the circumstances.

Another of the examples of misconduct was the averment that Cadien used indecent language to a superior officer. The learned judge disbelieved Cadien and found that he had in fact used indecent language in a situation, where such conduct could not be said to have interferred with, or prejudiced the safe and proper conduct of the company to justify

dismissal. It was the view of the judge that indecent language was excusable in circumstances where men are pent up and working. She relied on Jupiter General Insurance v. Shroff [1937] 3 All E.R. (Rep.) 67 and the words of Maughan, L.J., at p. 74, where he said:

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

I for one, do not quarrel with that eminently sensible approach but, was it applicable in the circumstances which arose in the present case? Plainly, no one was being reprimanded. There was no evidence that Cadien was "pent up". The judge, be it noted, disbelieved Cadien. Winter's evidence was that after receiving a report from the electrician; he sought out Cadien whom he found apparently asleep. When he told him that Pengelley wished to know what was the situation, the response took the form of expletives. Clarke was himself a senior officer acting in the course of his duties, transmitting a request for information in the emergency which had arisen. The words - "fuck Pengelley, fuck Pengelley "to rass, fuck unoo. A call Pengelley the other night and him curse me "off", was more than mere discourtesy: it was gravely undisciplined conduct, incompatible with the responsible position he held. There was also evidence of Clarke, the significance of which, I do not think was appreciated. He said that when he went to the ship loading office, he saw McKain, the guard, on his way from the office to his post by the pier gate. Pengelley, it must be remembered, had telephoned the guard in his endeavours to find Cadien and had heard nothing from him. Then Clarke, having observed Cadien reclining in his office when everyone else was trying to locate him, thought it adviseable to call on two other workers but they refused to interfere. The weight of this evidence suggests that Cadien far from sitting out the last half an hour or resting[2] his feet, was fast asleep which would explain why he never contacted Pengelley that night. In this situation, I do not think it could fairly

be said that Cadien was letting off steam in the rough and ready milieu of a shipping and mining operation. The conclusion appears to me inescapable that he was quite indifferent to his responsibilities, or in the language of the pleadings, "he placed a low priority on the perform-"ance of his duties."

I think I have said sufficient to demonstrate that this court is entitled to interfere with the findings of fact of the learned judge on the basis that there was a failure on her part to appreciate the weight and bearing of circumstances admitted or proved. I should, however, also deal with Cadien's refusal to give a written statement when requested to do so. The judge found none was requested. The finding, I would hold, is against the weight of evidence. It is not at all clear to me why she disbelieved Winter but accepted Cadien. The basis of self-preservation which would cause Winter to bend the evidence, does not appear appropriate in these circumstances. Whether or not a decision had been taken to suspend him, what interest to protect self could prompt Winter to tell a deliberate falsehood? I have not been able to discover with certainty the basis of this preference from a careful reading of the judgment. It would seem that what was being said was that since the suspension was already decided upon and the management had already heard the oral explanation, then no written explanation could have been asked for. For my part, I am not able to accept this analysis as satisfactory: it is a non sequitur.

In the light of the views I have expressed, it becomes necessary to examine the pleadings to see whether the defence as pleaded was met by the evidence. The defence which is set out hereunder was pleaded cumulatively and in the alternative -

"2. With reference to paragraph 5 of Statement of Claim the "Second Defendant admits that the Plaintiff was assigned to the Swing "Shift on April 8, 1977 but says that he was late in taking up his duties.

"3. ..... In particular the Second Defendant says that the "Plaintiff failed to inspect the ship loading system and to take pre-"cautions against excessive water on the conveyor belts and to ensure "that the belt was correctly tensioned.

"5. ..... In particular the Plaintiff when informed that loading "operations would recommence at 8:00 p.m. stated that communicating with

"his wife has priority over the execution of his duty and the pre-checking "of critical points in the loading system. He absented himself from his "post from approximately 6:00 p.m. to 8:30 p.m. and was absent when the "Hopper and Shuttle Belt became blocked and overloaded. In addition he "remained in his office between approximately 8:45 p.m. and 12:00 mid- "night and took no steps to deal with the problem.

"7. With reference to paragraph 12 of the Statement of Claim, "the Second Defendant says that it was part of the duties and obligations "of the Plaintiff under his contract of employment with the First "Defendant to report on the loading operations, the problems that had "arisen and the measures taken to deal with them during the period of "his shift but the Plaintiff during the investigations by the First "Defendant into these matters expressly refused and/or neglected to make "any report thereby acting in breach of his duties and obligations as "aforesaid.

"9. Further or alternatively, the Second Defendant says that the "Plaintiff in the course of his said employment with the First Defendant "and before the alleged wrongful dismissal, was guilty of misconduct in "and about his said employment.

" PARTICULARS

" (1) Reporting late for work and placing a low priority on the " performance of his duties despite the importance of these " duties to the smooth operations of the unloading system and " heavy expenses which may result from his default.

" (2) Absenting himself from his post, failing to take precaution- " ary measures against injury to the First Defendant.

" (3) Failing to take any or any adequate measures to rectify the " faults which had arisen in the loading system.

" (4) Using indecent language to a superior officer, namely the " Plant Shift Supervisor, Evon Clarke and acting in an insolent " and irresponsible manner.

" (5) Failing to report the incident or the circumstances of the " breakdown to the appropriate officer.

" (6) Refusing to give a report on the circumstances when requested " to.

" (7) By acting as aforesaid the Plaintiff was guilty of -

" (a) insubordination

" (b) gross neglect and/or reckless disregard of his duties, and

" (c) abdication of his responsibilities."

The evidence adduced on behalf of the defendant fell far short of proof of paragraphs 3, 5 and 7 of the defence but it is plain from the eventual conduct of the case that paragraph 9 was the substantive basis of the defenee. All the particulars stated in paragraph 9 have, on the evidence, been amply made out. The result is that the learned judge did misdirect herself on the facts as shown in this judgment. I would accordingly allow the appeal.

Although the question of damages no longer arises for resolution, I nevertheless, propose now to express shortly my views as to the award of damages. I do so out of deference to the arguments of counsel and the dearth of authority within our jurisdiction. The award was in the following form:

"Six weeks in lieu of notice @ $1,206.00	
"per month	$1,809.00
"Ten months loss of prospective earnings	12,060.00
General Damages	$1,000.00 "

Complaint is made in respect of prospective earnings and general damages, viz., that no award should be made.

For convenience, I consider first the award of general damages. It is plain the learned judge took two factors into consideration (i) the denial of the privilege of future advancement in the company; (ii) the very high-handed manner in which he was removed after 13 years of dedicated service. The learned judge cited no authority for these factors as permissible heads for an award of damages in an action for wrongful dismissal. The plaintiff's claim sounded in contract, not in tort, and the general rule as respects damages in breach of contract is the loss flowing from the breach. In the case of wrongful dismissal, that would be the estimated pecuniary loss resulting as a reasonable and probable consequence from the premature determination of the employee's service.

Subject to the plaintiff's obligation to mitigate his loss, he would be entitled to wages due and payable for the agreed period of service. Under the Employment (Termination and Redundancy Payments) Act, this plaintiff would be entitled to six weeks notice (see sec. 3 (1)(c)). It was held by the judge that six weeks was reasonable notice. The defendant has not sought to urge that six weeks is unreasonable; counsel, on its behalf, takes no issue in that regard. But as to the 10 months loss of prospective earnings, it was argued that there is no authority for such a head of damages. Mr. Edwards, for the respondent, relied on Maw v. Jones (1890) 63 L.T. 347 and Yetton v. Eastwoods Froy Ltd. [1966] 3 All E.R. 353 to urge that the award was sustainable. I did not find the latter case helpful for the question at issue there, was whether steps taken by the plaintiff to mitigate his loss were reasonable. Maw v. Jones (supra) related to the wrongful dismissal of an apprentice. In that case on the issue of damages, Lord Coleridge, C.J., and Matthew, J., approved a direction of Manisty, J., to a jury that in assessing damages to which the plaintiff was entitled, although they might take into consideration the fact that the defendant would have been justified in dismissing the plaintiff with a week's notice they were not bound to limit the damages to the value of the week's notice which he had lost. This case does appear, at first blush, to support Mr. Edwards' contention. But for two reasons, there is no merit in the point. In the first place, apprenticeship agreements are treated differently from other contracts of service. See Dunk v. George Walter & Son Ltd. [1970] 2 All E.R. 630, where Lord Denning, M.R., stated that "an apprenticeship agreement is of a special character" for the reason that, "the very object of an apprenticeship agreement is "to enable the apprentice to fit himself to get better employment. If "his apprenticeship is wrongly determined, so that he does not get the "benefit of the training for which he stipulated, then it is a head of "damage for which he may recover."

Secondly, Maw v. Jones (supra) was overruled in Addis v. Gramophone Co. Ltd. [1909] A.C. 488. The additional damages to which Lord Coleridge, C.J., thought the plaintiff in Maw v. Jones (supra) was entitled, related to the fact that his dismissal without notice implied a slur on his character, which would render it more difficult for him to

obtain future employment elsewhere. All the Law Lords in Addis v. Gramophone Co. Ltd. (supra) were at one in holding that damages for wrongful dismissal cannot include compensation for the manner of the dismissal for his injured feelings or for the loss he may sustain from the fact that dismissal of itself makes it more difficult for him to obtain fresh employment.

It is, I think, settled law that where it is an express term of the contract that a servant who is dismissed without notice is to be paid his wages for a certain period in lieu of notice, the measure of damages is the amount of such wages which is to be regarded as liquidated damages. See 16 Halsbury (4th edition) para. 653, where the law is correctly stated. There was in this case no express term of the contract of employment requiring the giving of notice of any stipulated length. As I said before, the learned judge held that six weeks was reasonable: that, as well, is the minimum period prescribed by the Act for a case such as this.

Another reference to 16 Halsbury (4th edition) para. 653 is useful: "In any other case (i.e. where there is no express term or usage) "the damages are to be measured by the amount of wages which the servant "has been prevented from earning by reason of his wrongful dismissal, this "is subject to taking into consideration the probabilities of his obtain-"ing employment elsewhere."

The examples given, however, relate to damages for loss of opportunity to make profits on company shares. See Inchbald v. Western Neilgherry Coffee, Tea and Cinchona Plantation Co. Ltd. (1864) 34 L.J. C.P. 15; loss of commission Addis v. Gramophone Co. Ltd. (supra). Although the learned authors of Mayne & McGregor on Damages (12th edition) paragraph 610 suggest that the servant is entitled to recover for prospective loss, no authority is cited. In Edwards v. Society of Graphical & Allied Trades [1970] 1 W.L.R. 379 where it was suggested that the principles applicable to cases of personal injuries should be applied as respects the period in relation to which the damages ought to be calculated, that was not a case of wrongful dismissal but an action for wrongful procurement of dismissal.

In the result, the authorities establish that in an action such as the present, the measure of damages must be related to the period of notice in the absence of agreement, held to be reasonable. In the present case that period was six weeks. The plaintiff had he been wrongfully dismissed would have been entitled to nothing further than the award of $1,809.00. The learned judge, in my view, fell into error when she awarded damages for loss of prospective earnings and general damages.

CAMPBELL J.A. (Ag.)

This is an appeal by Kaiser Bauxite Company the appellant against the judgment of Morgan, J. delivered on the 17th day of July, 1981 declaring that the respondent Vincent Cadien had been wrongfully dismissed by it and awarding special damages of $11,869.00 for loss of earnings actual and prospective and $1,000.00 general damages.

The respondent who at the date of the incident had been in the service of the appellant for nearly thirteen years and had served in varying junior and intermediary capacities until attaining the responsible office of Shipping Foreman, was on swing shift duty from 4:00 p.m. to 12:00 midnight on 8th April, 1977. He was responsible for the loading of bauxite on to a ship at the appellant's Port Rhodes Pier in the parish of St. Ann. Loading was scheduled to commence at 8:00 p.m. and did in fact commence then, but within fifteen minutes of the commencement there was a blockage of the hopper with resultant overloading of the shuttle belt. The conduct of the respondent in dealing with the situation together with certain related incidents in the view of the appellant merited summary dismissal. The respondent sued for wrongful dismissal. The facts adduced in evidence are fully set out in the judgment of Carey J.A.

In order to appreciate the grounds on which the appellant attacked the judgment of the learned trial judge it is necessary to state succinctly the main contention of the respective parties in their pleadings.

The respondent averred in his statement of claim that:

> (a) Prior to the commencement of the loading operations he took all necessary care to ensure that the loading system was in proper working order and did so find the same.

(b) During the loading operations there was a blockage of the hopper and over-loading of the shuttle belt. He immediately took the necessary steps to clear the blocked hopper and over-loaded shuttle by:

(i) getting the men on the shift to use shovels to clear the blockage;

(ii) alerting his immediate supervisor and by trying to obtain temporary employees from the nearby areas but without success;

(iii) continuing to work and doing everything possible to restore the loading operation despite an injured toe to the point where the toe having begun to bleed, he had necessarily to seek temporary relief for about ten minutes by elevating his foot on a desk in his office.

(c) Despite the steps taken to restore the loading operation he was on the 9th April, 1977, given a notice suspending him from duty pending investigation.

(d) During the investigation he was given no opportunity to defend himself against possible charges that could likely be preferred against him.

(e) On the 25th April, 1977, he was by letter wrongfully and unjustifiably dismissed from his employment by the appellant.

The appellant by its defence, pleaded misconduct of the respondent as justifying his dismissal. It pleaded that the respondent on the night in question and subsequent thereto was guilty of misconduct in and about his employment in that inter alia:

(1) He absented himself from his post from approximately 6:00 p.m. to 8:30 p.m. and so was absent when the hopper and shuttle belt became blocked and over-loaded - he thus failed to take precautionary measures against injury to the appellant.

(2) He failed to take any or any adequate measures to rectify the faults which had arisen in the loading system and failed to report the incident or the circumstances of the break-down to the appropriate officer.

(3) He used indecent language to a superior officer, namely, the Plant Shift Supervisor Evon Clarke, and acted in an insolent and irresponsible manner.

(4) He subsequently refused to give a written report on the circumstances of the break-down when requested to do so.

(5) He was thus guilty of insubordination, gross neglect and or reckless disregard of his duties and abdication of his responsibilities.

At the trial it became clear from the cross-examination of the respondent that what were really in serious contention were the following inter-related issues:

(a) Was the respondent absent from his post at the time of the Blockage? If so was it justified?

(b) Did the respondent take any or any adequate steps to obtain temporary casual workers to clear the blockage on the loading system?

(c) Did he alert his immediate supervisor and/ or any other superior officer known and available to him to assist him, if necessary, to resolve the problem including the rounding up of temporary casual workers?

(d) Did he show the necessary responsibility in discharging his duties in the critical situation caused by the blockage?

(e) Did he instead of complying with a reasonable request, behave insolently by using indecent language of/and concerning superior officers, namely, Mr. Pengelley and Mr. Evon Clarke when the latter communicated to him the request of Mr. Pengelley, for an immediate report of the circumstances of the blockage and how he the respondent was coping with the problem?

(f) Did the respondent at a subsequent date refuse to give a written report, during the course of the investigation of the circumstances of the blockage of the loading system?

In regard to the first issue that is to say the respondent's absence from his post the learned trial judge found as primary facts or inferences therefrom the following:

(1) The appellant was asserting as the cause of the respondent's absence from his post the fact that on the invitation of Mr. Winter both the respondent and Mr. Cover had left the job to visit Mr. Winter.

(2) The purpose of the visit was not duty but for drinks and Mr. Winter imbibed so much that he became comatose and beyond the reach of the respondent when the latter needed help in the urgent situation created subsequently by the blockage of the hopper and over-loading of the shuttle belt.

(3) Because Mr. Winter as a supervisor could not properly admit that he had taken the respondent and Mr. Cover off their jobs for drinks, he had to 'twist and bend' his evidence to effect the exclusion of this. Mr. Cover also had to 'twist and bend' his evidence to exclude this drinking diversion so to support his stance that he was never absent from his post.

(4) The evidence of Mr. Winter and Mr. Cover was discredited because of this 'twisting and bending' for the purpose of obriating the need to admit having done what they each knew was against the rules.

(5) The respondent was away from his job from 6:00 p.m. and returned at 7:15 p.m. at which time he was checking the water level. Mr. Cover had returned from Mr. Winter ahead of the respondent and when the latter was needed, Mr. Cover proceeded en route to Mr. Winter's home to summon him because he had left him there.

(6) Mr. Cover is additionally discredited because he told a deliberate untruth when in his evidence he stated that he would go to Mr. Winter's home only on duty that is to say for help, if there was a problem on the job, whereas Mr. Winter says in evidence that Mr. Cover visited him on social occasions in addition to visits while on duty.

(7) Absence by the respondent from his post in the circumstances described above amounted basically to leave granted by the respondents superior officer and as such cannot be regarded as a ground for dismissal.

The appellant appeals against these findings on the ground that they are against the weight of the evidence and are the result of the learned trial judge misdirecting herself on the facts.

In my view there is much merit in this ground of appeal because the reasoning and conclusion of the learned trial judge are plainly unsatisfactory. They are predicated on an incorrect view of the facts given in evidence and on the discrediting of Mr. Winter and Mr. Cover on a premise resting partly in speculation and partly on the aforesaid incorrect view of the evidence particularly as given by Mr. Cover.

Firstly, the learned trial judge drew the inference that Mr. Cover was a discredited witness because Mr. Winter said that Mr. Cover would visit him on social occasions, whereas Mr. Cover had said that he would go there only on duty for help if there was a problem on the job. This is an unjustified and unsatisfactory basis for discrediting Mr. Cover because in his evidence he never used the word "only". His evidence is that "I would go at times to Mr. Winter about my duty". The record does not disclose that he was ever asked whether he had ever gone on social occasions muchless that he had answered in the negative. It is thus unfortunate that he should be discredited on an incorrect view of his evidence suggesting that he had told an untruth.

Secondly, the learned trial judge drew adverse inferences to the discredit of Mr. Winter and Mr. Cover, namely, that in order to protect their respective positions they were "twisting and bending" the facts in order not to reveal that Mr. Cover and the respondent had been invited at about 6:00 p.m. by Mr. Winter to his home "not to tea but it seems for other repast more endemic to a Jamaican Society, one which puts Mr. Winter very soundly to sleep - beyond Mr. Cadien's reach when help was needed." The respondent did not give evidence of the purpose for which he visited Mr. Winter, he did not give evidence of the time he went and for how long

he stayed or what actually took place at Mr. Winter's home. All he said was that he left Mr. Winter's home at about 7:00 - 7:15 p.m. Mr. Winter's evidence is that the respondent came to his house at about 6:00 p.m. as a result of a request by him that the respondent after checking the system should let him know if everything was alright. There is thus no evidence whatsoever primary or inferential to justify the discrediting of these witnesses on the basis that both Mr. Winter and Mr. Cover sought to suppress the fact of a drinking session with the respondent. This is speculation and no witness ought to be discredited on speculation.

Thirdly, Mr. Cover is again discredited because he said that when he wanted the respondent, he proceeded en route to Mr. Winter to look for him. This the learned trial judge said was explicable on the basis that he knew that the respondent was at Mr. Winter because he Mr. Cover had been there with the respondent and had actually left him there. There is however no evidence that Mr. Cover had left the respondent at Mr. Winter. The respondent's evidence which was the only evidence on the matter was that Mr. Cover preceded him to Mr. Winter's home but that both returned at the same time from Mr. Winter's home even though they drove separate vehicles. This reason for discrediting Mr. Cover not being based on any evidence is again wholly unjustified and unsatisfactory.

Fourthly, the learned trial judge found as the reason for the respondent's absence from duty at the critical time of the blockage a fact which was neither in the pleading of either party nor given in evidence by the appellant. The appellant never admitted that the reason for the respondent's absence from duty between 6:00 p.m. - 8:30 p.m. was that he had left his job to visit Mr. Winter. It was the respondent who in his evidence stated that he was not absent from work during the aforesaid period except for a period, which he did not state, when he visited the home of Mr. Winter on the latter's invitation. His case was

that despite this visit to Mr. Winter he was back at his work place well before the critical time when the appellant says he should be on spot. By postulating a view of the facts different to that on which the appellant's complaint rested, the learned trial judge disabled herself and so failed to give due weight to the real complaint, namely, whether at 8:00 p.m. the respondent ought to have been at the gantry or in his office to supervise the starting up operation.

Fifthly, the learned trial judge's finding that the respondent's absence from duty between 6:00 p.m. and 7:15 p.m. amounted in the circumstance to leave granted by his superior officer is totally inconsistent with her finding, albeit erroneous, that the respondent was absent for purposes of regaling himself with Mr. Winter an Englishman in a repast more endemic to a Jamaican Society than tea. The respondent could never consistently with his own admitted awareness of his responsibility, honestly believe that he would be entitled to absent himself from duty at a critical time even on the direction of another employee albeit a superior officer where such absence was not for the benefit of nor in pursuance of his duties to their common employer. The respondent thus never pleaded any grant of leave of absence and the learned trial judge fell into the additional error in finding for the respondent relative to this issue on a basis not pleaded by him. This error is particularly pronounced when viewed in the light of the respondent's evidence that at the critical time, namley, about 8:00 p.m. he was at his work place even though he was not up in the gantry nor in his office to supervise the starting-up operation.

The next complaint of the appellant is that the learned trial judge in dealing with the second issue namely whether the respondent took any or any adequate steps to locate casual workers misdirected herself on the facts in holding that the respondent's failure to locate workers resulted from his looking for them in the wrong place viz. the square rather than on the pier.

The learned trial judge in findings as a fact that the respondent did go in search of casual workers but was unsuccessful based her finding on grounds which were untenable and totally unsatisfactory having regard to the respondent's own evidence and the unchallenged evidence of the appellant. She said at pages 115-116:

> "Mr. Sinclair said that a list of twenty to twenty-four of these workers from which they can select was assigned to this department. He had had three years employing casual labour and he admits to having a great working knowledge of the men. But these men can be found laying around in the pier area. Mr. Cadien said that he drove by the pier and to the square where men were but not casual workers. The evidence as a whole is silent as to where the pier area is vis a vis the square, and other areas where Mr. Cadien evidenced he visited in search of casual workers. But it may be that Mr. Cadien's difficulty in finding workers sprung from the fact that he was looking for them at the wrong places, that is, at the square etc. rather than remaining at pier, till they turned up. He said that it was always Mr. Winter's responsibility to get casual workers and he always did, that he would have to get permission also but being unable to speak with him he undertook the responsibility and went out on his own. If on Mr. Winter's return to office he was satisfied he Mr. Winter would make out a requisition for them to be paid. His lack of knowledge in recruiting could well be another reason why he had gone to the wrong places. On the other hand Mr. Pengelley with his vast experience would certainly know where they could be found."

The evidence in chief of the respondent at page 29 is however to the following effect:

> "I left them and saw the electrician a Mr. Miller and asked him to check the system for me while I left to report to Mr. Winter. I went to his home but did not see him but spoke to his wife in relation to the breakdown. I left and went in environs of Discovery Bay, Farm Town, Thickets searching for casual workers to assist the two men I left to shovel it off knowing that the two I left could not alone expeditiously shovel off the bauxite.

> "It was now well past 8.00 p.m. It was about 9.30 p.m. when I left Mr. Winter's house. When I stopped searching for workers it was almost 11.00 p.m. I did not find any casual workers that night. I have had several breakdowns of this nature before. I have never of myself gone out to fetch casual workers but have had breakdowns of this type. Mr. Winter is responsible for this. I realized he was not available after speaking with his wife so I took responsibility of going for it myself."

and under cross-examination at page 35:

> "Not correct that between 10:30 and 12 midnight I never left my desk. Between that hour I was on street looking for men ..... When I went into town I saw persons in the square, Men were there but no casual worker, I knew. Could be some I did not know who were there. Never asked those, as I went to ask those I knew. My purpose was to get persons to assist."

and also at page 36:

> "I have had similar problems and had got casual workers. ..... Responsibility to get casual workers not mine. Always Mr. Winter's responsibility to get casual workers. ..... If Mr. Winter is not available I can go and get them and when he comes if satisfied he can make out the requisition. ..... Sometimes you do it and it is approved and sometimes it back-fires and questioned why did you approve so many men." (Emphasis mine.)

From the above excerpts from the respondent's evidence under cross-examination it seems clear that he has resiled from his position in examination-in-chief namely that he had not previously gone to fetch casual workers. He is saying that he has got casual workers on previous occasions, hence he is not pleading inexperience in securing casual workers. The respondent has equally not attributed his failure to secure casual workers to the fact of his having gone to look for them in the wrong place. In fact he went to the right place namely, the environs of Discovery Bay as revealed by the evidence of Mr. Pengelley, Mr. Winter, Mr. Clarke and Mr. Sinclair.

The evidence of Mr. Ian Pengelley the mines manager is that he experienced no difficulty in locating casual workers. At pages 47-48 he said:

> "About 11.30 Mr. Clarke called and I made telephone calls as a result to Shipping Foreman's office. Phone appeared to ring - heard ringing tone but got no answer. Failing to get it I called gantry operator, Mr. Leo Cover, and spoke to him. I called the guard at the pier gate following on this and gave him instructions. I was at home. I waited for a reply following on these calls from Mr. Cadien, I got none. I got dressed ..... I drove along road and picked up three casual labourers along road and turned them over to the foreman, Mr. Sinclair, at that time. ..... I saw Mr. Cadien at the pier seated in his car in front of the foreman shipping office. .....
>
> I experienced no difficulty in locating the casual workers. ..... There are two hundred in plant area (Discovery Bay). ..... People in plant area are in radius of five miles from the plant. In general pretty easy to find them. Several people looking for work."

and at page 53 he said:

> "Left Winter probably about midnight and drove towards the pier. I picked up three men and went to the pier. I stopped along main road and picked up the men on the street. Mr. Winter is about a mile from pier. It was then a little after midnight."

Mr. Evon Clarke the shift supervisor who was formerly a shipping foreman gave evidence on the location of casual workers similar to Mr. Pengelley, at page 66 he said and I quote:

> "There is a list of persons with badge numbers who can be called out at any time. There is a list in the shipping office and about two hundred persons are listed. They are located on a radius of four to five miles in close proximity to the plant. The shipping department has to utilise casual workers fairly often - every week. The need will arise in any shift. In my experience no extreme difficulty in locating them at nights or on Public Holidays. To get three or four such workers I would go out on the road to look for them or take the list and go to the addresses. As Shipping Foreman I had to do that. On some occasions - not often I have experienced difficulty in getting them to work but I have always been able to find them. Not all would be unwilling to work." (Emphasis supplied)

Mr. Winter who was then the shipping supervisor gave evidence at page 79 to the following effect:

> "Casual workers are engaged, by company, myself or foreman can engage workers in that department. ..... In this department unlike other departments we were permitted, that is, myself or foreman to take on workers any time it was necessary. There is a location near pier where ten to twelve men could be found and about two hundred on a radius of five miles. Area close to pier would not be strange to Mr. Cadien as he boarded in that area at one time. Having regard to Good Friday and time 8.30 - 11:30 p.m., knowing the area I would say there would be men on the street outside and whatever bars there are in the area. If two to three men are required, within half hour or a little more those persons could be located."

Mr. Earl Sinclair a shipping foreman gave evidence at page 89 as follows:

> "I usually work swing shift and graveyard and have had to engage casual workers on those shift. ..... In locating them at nights it would take up to one and a half hours to pick up several guys. We were informed of two hundred on record but from our department we had a group of twenty to twenty-four we could select from. We could utilize persons from this number. They are located in and around the pier area of Discovery Bay. If a break-down occurs on backshift and casual workers needed the foreman would employ these workers and it would be his responsibility."

These extracts from the evidence indicate that the pier area, the plant area and the square all relate to the area or environs in and around Discovery Bay which on the unchallenged evidence of Mr. Winter is well known to the respondent, he having lived there some time previously. There is thus no factual basis for the learned trial judge to have found that the lack of success of the respondent in securing casual workers was due to his having gone to the wrong place and or his lack of knowledge in recruiting. The respondent never said so, his case is that he searched but did not find. The irresistible inference to be drawn from the facts proved in evidence, viewed against the background that the respondent has manifested skill/competence over the years in reaching the responsible post of shipping foreman, is that he did not go in search of casual workers because had he done so he must certainly have found two or three such workers in the environ of Discovery Bay which was well known to him.

The learned trial judge also erroneously based her finding that the respondent did go in search of casual workers on the fact that he had told Mr. Clarke about 11:35 p.m. that he had done so. The learned trial judge's reasoning is that at the time when the respondent made this statement to Mr. Clarke, he "had no thought or idea that his actions would be the subject of enquiry and at a time when he had no time in which to make up a story." This ground for finding in favour of the respondent is neither justified in law nor on the facts. The previous consistent statement of the respondent can have no probative value whatsoever as it was not part of the res gestae but a report made after the incident to which it related namely, the alleged search for casual workers. Whether it was made ante litem motam so to speak, and in circumstances precluding any opportunity to make up a story are entirely irrelevant. Being a previous consistent assertion it is of no probative value and is incapable of confirming the respondent's evidence that he unsuccessfully searched for casual workers. On the facts, the situation revealed to the contrary, a state of affairs where unless the respondent was totally devoid of reason he must have realised that his conduct could be called in question. There was a situation where he knew that the loading system had broken down since about 8:15 p.m. He had placed two workers to shovel off the bauxite from the overloaded shuttle belt but he knew that these two workers were totally inadequate to the task. The appellant his employer in the meantime was incurring expenses in demurrage due to delay in loading the ship. He had not establish contact with either Mr. Pengelley, Mr. Winter or Mr. Clarke to seek assistance. Instead of being at the seat of action giving even moral support to the two overstretched workers he lay stretched out in complete abandon in his office with his bare feet which showed no sign of injury placed on the desk. Had the learned trial judge given due weight to these circumstances revealed by the evidence she would inescapably have concluded that the respondent would have had good and sufficient reason for believing that his conduct would must likely be

the subject of enquiry and that in consequence anything that he said could be self-serving and incapable of confirming his testimony in court.

Next the appellant complains about the learned trial judge's determination of the issue of gross neglect arising from the respondent's failure to alert his immediate supervisor as pleaded by him, or any other superior officer of the blockage. The matter is dealt with by the learned trial judge at pages 116-117 in these words:

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

In dealing with this issue in a somewhat isolated way unrelated to the issue whether the respondent having failed to alert Mr. Winter, had taken any or any adequate steps to secure casual workers to rectify the problem, the learned trial judge manifestly failed to appreciate the weight and bearing of the respondent's failure to seek assistance on the central issue which was, whether, taking all the circumstances together, the respondent was guilty of a serious neglect of duty in not effectively remedying the blockage and securing the resumption of the loading operation. Again the learned trial judge erroneously limited her consideration to the respondent's non-communication

with Mr. Evon Clarke and even here she failed to appreciate that the circumstances notwithstanding the inter-office memo did not justify non-communication. She failed to appreciate that the real thrust of the appellant's complaint was that notwithstanding the written words contained in Exhibit 1 that the respondent's line of communication was to Mr. Winter, he acted in such an unreasonable manner when being unable to locate casual workers he failed and or neglected to contact persons who undoubtedly to his knowledge were senior officers and could assist him in locating the said casual workers in the absence of Mr. Winter so that his failure to contact any of these persons was tantamount to gross dereliction of his duties.

The respondent admitted that as shipping foreman, it was his duty to report to Mr. Pengelley in the absence of his immediate supervisor. He could, he further admitted, communicate with him by telephone without difficulty. Mr. Clarke, also on the respondent's admission had occupied a position higher than his and was a former shipping foreman with considerable experience in the shipping operations. He could also communicate with Mr. Clarke by telephone. Yet he did not, in his own words, find it necessary to communicate with either. The learned trial judge's reasoning and conclusion on this related issue is thus not only against the weight of the evidence but unmistakably arises from a failure to appreciate the case of the appellant as revealed on the evidence which is that the various acts or inactions constituting the gross neglect of duty are inseparable when considered as justification for the dismissal.

The appellant next complains against the conclusion of the learned trial judge on the issue whether the respondent did manifest the necessary responsibility in discharging his duties in the critical situation caused by the blockage. This really is a conclusion from a consideration of the subsidiary issues e.g. absence from duty at the critical time, failure to get casual workers and to seek assistance from his superiors to supplement if necessary his lack of experience and his

remaining relaxed if not asleep in his office while the urgent situation remained. The appellant complains that the learned trial judge misdirected herself on the facts and so made a finding which was unreasonable and against the weight of the evidence in favour of the respondent.

The learned trial judge at page 108 of the record stated the main issue as she saw it namely.

> "Whether Mr. Cadien neglected or failed to do, or showed gross incompetence in what he was required to do and whether or not it was a matter of great importance which caused serious damage or injury to the defendant company taking into account the particular circumstances of this case and the character of the work he was required to do."

She then proceeded to consider and resolve inter alia the undermentioned subsidiary but inter-related issues in isolation namely:

> (a) The plaintiff's absence from his post at the time of blockage.
>
> (b) The blockage.
>
> (c) Effort to secure casual workers.
>
> (d) Steps taken to rectify the blockage.

Having done so she again posed this question at page 117:

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

After considering the opinions of Mr. Clarke and Mr. Winter on the hypothesis that the respondent had gone in search of casual workers she answered this question thus at page 118:

> "They had completed the work by 12.28 a.m.
>
> It means then that the baurite was largely removed at the time when the extra hands came on. The ship was delayed for four hours. Had he been able to get extra hands it would have been cleared earlier but I find that though he might not have mastered it with the competence of the Plant Operation Superintendent he certainly did not display incompetence or neglect in this area."

and at page 125 she said:

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

The pith of the appellant's complaint is that the learned trial judge failed to perceive that the essence of the misconduct which the appellant says amounted to gross neglect of duty by the respondent and abdication of his responsibility consisted primarily in (a) his absence from the pier or from his office at the critical time when as he knew he should be in close proximity to the venue of the starting-up operation, (b) his incomprehensible failure to obtain casual workers compounded with his even more incomprehensible failure to seek the assistance of available experienced persons of whom he had knowledge, and (c) his nonchalant and irresponsible behaviour in reclining uninjured in his office from at least 11:15 p.m., knowing fully well that the blockage still remained unrectified and his employer was in the meantime incurring costs and expenses consequent on the attendant delay in the loading of the ship.

As Dr. Barnett submitted, the respondent, after discharging the obvious common sense duty of putting two workers on the shift to shovel off the bauxite on the over-loaded shuttle belt and contacting the electrician, was thereafter singularly difficult to contact and conspicuously absent from the critical area.

The respondent on his own admission did not return to the gantry after his visit at 11:00 p.m. until his shift ended at 12 midnight to see how the work of shovelling was proceeding even though he knew only too well that the operation could not be expeditiously handled by the

two casual workers alone. The conduct of the respondent in remaining in his office in apparent ease at a time when he should be showing some urgency, was not so complains the appellant, conduct which should be treated as being merely thoughtless and as not being an issue to be taking into account in considering dismissal as stated by the learned trial judge.

I consider that there is considerable merit in the complaint of the appellant that its case was not correctly perceived. The learned trial judge by treating each issue isolation and not as facets of the total conduct which the appellant alleges constituted gross neglect and abdication of responsibility, disabled herself from appreciating the weight and bearing which the cumulative effect of the evidence adduced on each subsidiary issue would have on the appellant's decision whether the conduct of the respondent in its totality constituted misconduct amounting to gross neglect of duty.

Against the background that the bases for the learned trial judge's finding that the witnesses for the appellant, in particular Mr. Cover "twisted and bent" their evidince are groundless and unsubstantiated, the high points in the overall evidence show that the respondent was late for work, he was not available to direct the starting-up operation of the loading system even though he knew he should be present giving direction. He was seen only after the break-down about 8:20 p.m. After going through the elementary exercise of putting two shift workers to clear the overloaded shuttle belt, he was next seen in his office about 11:46 p.m. in apparent ease and likely slumber. On his own admission he did not between 11:00 p.m. and 12:00 midnight go to the gantry to see how work was progressing. He said he had unsuccessfully scouted the environs of Discovery Bay for additional sorely needed casual workers. He in fact saw men in the square yet he did not engage any as he did not know if they were casual workers and did not ask any of them if they were. He did not communicate with either Mr. Pengelley to whom he was in duty bound to communicate in the absence of Mr. Winter nor with Mr. Evon Clarke, both senior officers easily accessible by telephone.

On his own admission Mr. Clarke has wide experience in shipping and was a former shipping foreman. He did not view it reasonably necessary or expedient to seek the assistance of either of these persons on the urgent matter of securing the casual workers. He was content to rest in his office while his employer was being burdened in demurrage due to delay in the loading of the ship resulting from the blockage in the loading system. This evidence in my view depicts a situation in which the respondent exhibited such nonchalance in discharging his duties including the seeking of assistance in a critical and urgent situation that it eloquently bespeaks gross neglect and abdication of responsibility.

With regard to the issue of insolence and the use of indecent language, the complaint of the appellant is that the learned trial judge having found that the respondent did use indecent language and was very "abrasive in his manner and coarse in his foul mouth utterings which were quite inexcusable" erred in finding that the dictum of Lord Maugham in Jupiter General Insurance v. Shroff (1937) 3 All E.R. page 67 at page 74 was apposite to the circumstances before her by the mere substitution of the word "frustrated" for "reprimanded" mentioned in the dictum.

The dictum of Lord Maugham in the above case commence at page 73 and is as follows:

> "Their Lordships recognize that the immediate dismissal of an employee is a strong measure, and they have anxiously considered the evidence with a view to determine the question whether the trial judge was right in his finding that the respondent was guilty of negligence which coupled with his conduct at the interview of Dec. 21, was sufficient to justify his dismissal. On the one hand, it can be in exceptional circumstances only that an employer is acting properly in summarily dismissing an employee on his committing a single act of negligence; on the other, their Lordships would be very loath to assent to the view that a single outbreak of bad temper, accompanied, it may be, with regrettable language, is a sufficient ground for dismissal. Sir John Beaumont, C.J., was

> "stating a proposition of mere good sense when he observed that in such cases one must apply the standards of men, and not those of angels, and remember that men are apt to show temper when reprimanded."

In the above case the facts as found were that Mr. Shroff knowing that a re-insurance on the life of one Keshavji in the sum of Rs. 10,000 had been refused by Mr. Mody the managing governor of the company, endeavoured to secure the acceptance by another senior officer namely the secretary of the company and supervisor of the life department, of a direct life policy on the life of the said Keshavji in the sum of Rs. 50,000. When Mr. Mody by good fortune became aware of this, he declined the proposal and summoned Mr. Shroff to his office on December 21 and demanded to know why he had not revealed to the other senior officer the fact that the re-insurance of the life of Keshavji for a lesser sum had been declined by him whereupon Mr. Shroff became angry and insolent but vouchsafed no intelligible explanation.

Lord Maugham in delivering the judgment of the Privy Council allowing the appeal of the appellant company said thus at pages 74-75:

> ".....If a person in charge of the life assurance department, subject to the supervision of superior officers, shows by his conduct or his negligence that he can no longer command their confidence, and if when an explanation is called for, he refused apology or amendment, it seems to their Lordships that his immediate dismissal is justifiable. Some at least of the above considerations seem not to have been present to the minds of the judges on the appeal to the High Court. In particular, their Lordships cannot agree that the respondent was guilty of a mere error of judgment. ..... They take a serious view as to the interview of Dec. 21, and they draw a different inference from that of the judges as to the true meaning of the respondent's behaviour. Further, ... they are of opinion that it is a mistake to consider the action of the respondent in approving the risk, and his conduct at the interview, as if these two matters could separately be excused or explained. They are in truth inseparable from the point of view of the action of Mr. Mody and Mr. Iyer in giving the notice of dismissal."
>
> (Emphasis mine)

In the present case there is no evidence from which the learned trial judge could have found that the respondent was frustrated, equally he was not being reprimanded. He was being informed of a request, eminently reasonable, that he should get in touch with Mr. Pengelley whom as a matter of duty he should have already contacted but had not done so, to advise on the continuing blockage of the loading system which ordinarily should long before have been cleared. In my view the response of the respondent was not only inexcusable as found by the learned trial judge but manifested insolence without provocation and was such as to seriously undermine if not erode such confidence as Mr. Pengelley and/or Mr. Clarke may have had in him to act responsibly especially having regard to the fact that he holds a supervisory position. To attack with expletives, when the respondent should in all the circumstances have avidly grasped the opportunity, albeit belated, to perform his duty by explaining if he could, his apparently out of character conduct in relation to the continued blockage of the loading system, is in my view, despite being a solitary occasion, sufficient to warrant dismissal being a negation of the necessary sense of responsibility which the post demanded. The question of there being no humiliation of Mr. Pengelley or loss of respect in the eyes of his fellow-workers or of Mr. Clarke not having been disgraced in the presence of others to my mind is not the only consideration as to whether the respondent's abrasive and insolent conduct was capable of interfering with or prejudicing the safe and proper conduct of the business of the company. The erosion of confidence in him by his superior due to his vulgar, abrasive and irresponsible behaviour when equanimity and a sense of duty should be manifested would have a continuing prejudicial effect on the appellant since the respondent's ability to deal with urgent situations in a manner commanding the respect and confidence both of his superior and subordinates was seriously called in question.

Finally the appellant complains that the learned trial judge erred in law in her conclusion on the respondent's failure to give a written report on the circumstances of the break-down of the loading system especially as he had made no entry in the log book of the aforesaid circumstances.

The learned trial judge said at pages 124 - 125:

> "Implicit in a suspension without a given period is an indication that there is a matter which called for further investigation. If from these, negative results flow then reinstatement is automatic but if this exercise proffers positive allegations, that is, something which requires an explanation then a hearing or interdictment becomes necessary at which the worker is given an opportunity to offer the explanation, this is, to answer those charges. He can then be reinstated, dismissed, further suspended for a named period or otherwise punished. But to request a statement from a person already under suspension, if not voluntary given, would, in those circumstances if demanded be prejudicial, compromising and in breach of natural justice. Mr. Cadien it is admitted, gave an oral report to his supervisor before a suspension letter was handed to him even though the decision to suspend was already taken. At the time of Mr. Pengelley's decision to dismiss, the accusative facts in his possession consisted of six statements. To dismiss Mr. Cadien without giving him an opportunity of answering these accusations is I hold compounding the wrongful dismissal."

The learned trial judge had previously found that the respondent had failed to comply with the request of Mr. Pengelley for a written statement. She said at page 124:

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

The complaint of the appellant is that the learned trial judge erred in law in holding that:

> (a) The plaintiff/respondent was entitled or justified in refusing to give the requested statement on the grounds that charges should first be brought.

(b) In failing to hold that it was the contractual duty of the plaintiff/ respondent to give a full report on such request and that his refusal was unreasonable and in breach of contract, particularly as he had failed to complete the records.

(c) In holding that the request for the statement is contrary to the rules of natural justice the principles of which have no application to the private contractual relationship between the plaintiff/respondent and the defendant/appellant.

Dr. Barnett in his submission contends that the contractual duty of the respondent required him to furnish reports to his superior officers in relation to matters occurring during the shift on which he was in charge of the shipping operations. His refusal to furnish the said reports constituted a repudiation of his contractual duty and since in the contractual relationship between the appellant and the respondent there was no prescribed or stipulated procedure for the formulation of charges following a suspension or inquiry, the respondent could not justifiably refuse to furnish a statement on the shipping operation and the steps taken by him to meet the urgent situation created by the blockage on any pretext that charges against him should first be formulated. Equally, Dr. Barnett submitted, the concept of natural justice which was generally applicable in the sphere of public law had no application to private contractual relationships. I am of the view that Dr. Barnett's submissions are correct and that the learned trial judge clearly erred in law when she invoked the principle of natural justice which was inapplicable in the situation and further applied procedures generally applicable to employment in the public service but alien to the contractual relationship subsisting in the ordinary private master and servant relationship which provided no disciplinary procedures to which reference can be made.

Concluding on the issue of the justification for the dismissal of the respondent, I am, for the reasons given in considering the separate but inter-related issues which called for determination impelled to the conclusion that the judgment of the learned trial judge is unreasonable and against the weight of the evidence and that accordingly the appeal on this issue ought to be allowed.

In the light of my above conclusion it is not really necessary for me to consider the appeal relating to the award of damages. However since reasoned submissions were made thereon and authorities cited I have decided to express an opinion on this aspect of the appeal.

The appellant complains that the learned trial judge erred in law:

> "(a) In awarding damages for wrongful dismissal over and above the amount recoverable for the statutory or contractual notice period or in excess of the amount claimed as such by way of Special Damages.
>
> (b) In holding that the manner of his dismissal was to be taken into account in assessing the damages."

As Dr. Barnett rightly pointed out, it was common ground that though the respondent's contract of service provided for four weeks' notice of termination, the Employment (Termination and Redundancy Payment) Act governed his case and that the respondent by reason of his length of service would therefore be entitled to a minimum of six weeks' notice of termination. The learned trial judge stated the law applicable and made a specific finding as under:

> "A general hiring is terminable on reasonable notice. What is "reasonable notice" depends on a totality of circumstances. Mr. Harrison the Personal Officer, gave evidence of a custom in the company of giving one month's notice to quit. It is my view that persons who are charged with senior positions are entitled by the very nature of their work to longer notices than others. In the particulars of Special Damages, six weeks is claimed. I consider it a reasonable period."

Thus far there is no complaint against the learned trial judge and there could be no complaint. However in addition to ascertaining the emoluments which would have been earned by the respondent for the requisite six weeks period of notice and awarding that sum as the measure of damage as for a wrongful dismissal, the trial judge went on to assess further special damage for ten months as for loss of prospective earnings of the respondent who because of his advanced age would have difficulty in securing alternative employment. She also gave general damage for being deprived of "the privilege of further advancement in the company".

With regard to the award of damages for loss of prospective earnings and general damages the learned trial judge clearly erred in law in conceiving, because the statement of claim was settled as in a claim in tort, that the claim was other than one in contract of a special kind for breach of which the measure of damage is that which ensues by virtue of the fact that the contract has not been terminated in the manner agreed upon by the parties or as prescribed by the law.

In Addis v. Gramophone Co. (1908)-1910) All E.R. reprint page 1 the plaintiff was employed by the defendant as manager of their business at Calcutta at £15 per week as salary and a commission on the trade done. He could be dismissed by six months' notice. In October 1905, the defendants gave him six months' notice but at the same time appointed some one else as his successor and took steps to prevent the plaintiff from acting any longer as manager. The plaintiff sued for breach of contract and claimed inter alia damages for injured feeling consequeni on the humiliating circumstances surrounding the breach of contract. Lord Loreburn L.C. at page 3 lucidly stated the measure of damage thus:

> "To my mind, it signifies nothing in the present case whether the claim is to be treated as for wrongful dismissal or not. In any case there was a breach of contract in not allowing the plaintiff to discharge his duties as manager, and the damages are exactly the same in either view. They are in my opinion, the salary to which the plaintiff was entitled for the six months between October, 1905 and April, 1906, together with the commission which the jury think he would have earned had he been allowed to manage the business himself. I cannot agree that the manner of dismissal affects these damages. Such considerations have never been allowed to influence damages in this kind of case. An expression of Lord Coleridge C.J. (Maw v. Jones (1) 25 Q.B.D. at page 108)) has been quoted as authority to the contrary. I doubt if the learned Lord Chief Justice so intended it. If he did, I cannot agree with him. If there be a dismissal without notice the employers must pay indemnity; but that indemnity cannot include compensation either for the injured feelings of the servant or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment." (Emphasis mine).

In my view even though the real question on appeal was whether damages in a case of wrongful dismissal could be awarded for injured feelings due to the totally unjustified basis for the dismissal or because of attendant words importing a non actionable obloquy. Lord Loreburn took the opportunity to state the correct principle of the measure of damage applicable to cases of wrongful dismissal. Lord Gorell also in laying down the principle said at page 8:

> "But if he were treated as suing for wrongful dismissal, he could recover damages based on the loss of the benefit of the contract for six months, and the factors for determining this loss would be the salary and commission which he would have earned."

Mr. Edwards, contended that in addition to the lost emoluments for the relevant notice period there could be assessed damages for loss of prospective earnings over and above the notice period as well as exemplary damages.

For this proposition he cited a passage in Batt on Master and Servant (5th Edition) 1967 page 263. This passage relies for its validity on the principle assumed to be established in Maw v. Jones (1890) 63 L.T. 347. The Law Lords in Addis v. Gramophone Co. (supra) doubted whether the case established any such principle and went on to state expressly that if any such principle was in fact established by the case such a principle was not approved. Thus Mr. Edwards' submission is not well-founded either on principle or by authority.

Had I concluded that the appeal relative to the issue of wrongful dismissal should have been dismissed, I would none-the-less have allowed the appeal as to the quantum of damages by limiting the damages to the loss of salary for six weeks which was the period which the learned trial judge found to be reasonable for the lawful termination of the contract of service.