

Privy Council Appeal No. 129 of 1928.

The Ottoman Bank	-	-	-	-	-	-	-	<i>Appellants</i>
								<i>v.</i>
Etienne Chakarian	-	-	-	-	-	-	-	<i>Respondent</i>
Etienne Chakarian	-	-	-	-	-	-	-	<i>Appellant</i>
								<i>v.</i>
The Ottoman Bank	-	-	-	-	-	-	-	<i>Respondents</i>

FROM

THE SUPREME COURT OF CYPRUS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 21ST JANUARY, 1930.

Present at the Hearing :

LORD BLANESBURGH.

LORD WARRINGTON OF CLYFFE.

LORD THANKERTON.

[*Delivered by* LORD THANKERTON.]

In this action the plaintiff, who is respondent in the leading appeal, seeks to recover damages for wrongful dismissal from the defendant Bank, who are appellants in the leading appeal.

The Trial Judge found the appellants liable in damages, which he assessed on an alternative basis. The appellants appealed to the Supreme Court of Cyprus, who affirmed the Trial Judge on the question of liability, but directed the re-assessment of damages on a lower basis. From that judgment the leading appeal was taken by the appellants on the question of liability, and the respondent has taken a cross-appeal on the question of damages.

The respondent, who was an Armenian and a Turkish subject, became a temporary employee of the appellant Bank in 1901 at

the branch office at Aidin in Turkish Asia Minor. In 1903 he entered the permanent service of the Bank, and subscribed to a book of regulations, called "Caisse de Pensions et de Retraite," which deals with conditions of service and a contributory pension fund for the staff. He continued in their service until 27th January, 1923, when he was dismissed without notice and without pension under the circumstances referred to later.

The respondent remained at the Aidin Branch until 1913, when he went to the Sokia Branch, from which he was re-transferred to Aidin in June, 1919, immediately before the destruction of Aidin by the Kemalists, by whom he was imprisoned and sentenced to death. The timely arrival of the Greek forces enabled him to avoid the execution of the sentence and to escape to Smyrna. After various changes he came back to Smyrna in July, 1920, and he remained there until 8th September, 1922, when he applied for and obtained leave, but was asked by Mr. Simmons, the branch manager, to take a confidential letter to the Head Office at Constantinople.

The respondent arrived at Constantinople on 10th September, 1922, delivered the letter, and was given temporary employment at the Head Office, which appears to have superseded his leave. Meantime Smyrna was destroyed by the Turkish forces. The respondent's story of his experiences at Constantinople, which substantially remains unchallenged, is as follows:—

"I found Constantinople in a disturbed state. I went to the Bank and saw Mr. Ungar, the sub-manager in the Direction Generale. I gave the confidential letter Mr. Simmons had given me to Mr. Ungar, I also told him what Mr. Simmons had told me confidentially. I explained to him the state of affairs in Smyrna. At this interview I asked him to allow me to leave Constantinople, because it was unsafe for me to remain. I told him I had been condemned to death at Aidin and that therefore I could not remain. Mr. Ungar referred me to Mr. Skanzianni, le chef du Personnel. I saw him. At the office of Mr. Skanzianni, Mr. Bouzourou happened to be present, and Mr. Skanzianni called in the Chef du Bureau, Mr. Goyar. I explained everything to Mr. Skanzianni and asked permission to leave. He laughed at me. Mr. Bouzourou was then Chef du Bureau du Personnel. I was not given leave. I stayed in Constantinople for 20 days, asking him every day to transfer me to any branch outside Turkey. They would not do so. Instead of giving me leave they gave me temporary work. On Thursday evening, on coming out of the office, I came across Tewfik Bey who had been Chief of Police at Aidin at that crucial time. He was in mufti. I could not recognise him. He questioned me. I was much perturbed and immediately changed my hotel for fear that he should betray me at any time. On the Friday (28.9.22) the Bank was closed. On the Saturday I went to relate the incident of meeting Tewfik Bey, to my Chief. The Chiefs came late, 9.30 or 10 a.m., so I saw two Sub-Chiefs, Mr. Berturucchi and Mr. Baache. I related to both of them the incident of meeting Tewfik Bey, explained to them the whole affair; and stated that as my life was in danger I wanted to leave at once. There was a ship leaving on the Saturday morning at 10.30 a.m. for Athens. I had told these two gentlemen that I was going to Athens; and I left by this boat."

The respondent reached Athens on 1st October, 1922, and found there Mr. Simmons and most of the Smyrna staff. On

3rd October Mr. Simmons advanced to the respondent his salary for October, but took it back from him in view of a telegram he had received from the Head Office to the effect that the respondent was dismissed, though the ground of dismissal was not then stated.

In a letter of 2nd October, addressed to Mr. Simmons, and letters of 18th October and 15th November addressed to the Head Office, the respondent recounted the circumstances of personal danger which moved him to leave Constantinople, and again requested transfer to a branch outside Turkey. To the Head Office he protested against the dismissal. On 29th November the appellants wrote to the respondent :—

“ We can hardly take into consideration the reasons put forward by you to explain your precipitate departure and your dereliction of the service. We would besides remind you that you have behaved in an analogous manner in 1920 when you were at Adana, and your relapse fully justifies the measure of revocation (dismissal) that has been applied in your case. However, we are willing to attenuate that penalty and would ask you to tender your resignation—which would enable us, on receipt of your letter, to consider the possibility of granting you pecuniary assistance. It should nevertheless be understood that this is a mere offer resulting out of extreme benevolence on our part, and that, should the same not be accepted by you, and should your acceptance of same not be notified to us within 25 days from to-day, it should be regarded as null and void.”

The respondent declined that offer, and ultimately his name was struck off the list of members of the Bank's staff on 27th January, 1923.

Provision is made for dismissal in Article 5 of the “ Caisse de Pensions et de Retraites ” as follows :—

“ La Direction Générale a le droit de révoquer les employés pour faute grave ou abus commis dans leur fonctions, ou pour violation du secret qu'ils doivent garder sur les affaires de la Banque. La Direction Générale est seule juge d'apprécier le caractère de gravité de la faute. Elle a le droit de revocation pour fautes légères successives et répétées malgré l'avertissement des supérieurs.”

Under Article 18 neither an indemnity nor a pension of any other nature is granted to an employee who has been dismissed. Under Article 19 an employee who resigns has no right to any pension or indemnity, but the Direction Générale have the faculty to grant him an amount not exceeding in capital the amount of the sums retained from his salary. Under Article 2 a discharged employee has right to three months' notice and an indemnity borne by the Pension and Superannuation Fund and to be fixed in terms of Article 21.

It was not disputed by counsel for the appellants that the risk of personal danger which caused the respondent's flight from Constantinople, in disregard of the appellants' repeated refusals to allow him to leave, was real and justified from the point of view of his personal safety, and, in their Lordships' opinion, this is established by the evidence, and, in particular, by that of Roy McLaughlan, an Officer in the Intelligence Department attached

to the High Commissioner's Office in Constantinople. He stated that an Armenian who had been condemned by the Turkish authorities to death would be in "an uncomfortable position" there at the end of September, 1922, and that if he had been in the respondent's shoes he would have left Constantinople at the first possible opportunity.

On the contrary, the appellants submitted three contentions, all of which were based on the view that the respondent incurred a permanent personal disability, which incapacitated him from further ability to perform adequately his part of the contract. These contentions were (1) that, as a condition precedent to recovery of damages, the respondent must be in a position to offer implementation of the contract on his part, and that the respondent, by reason of his permanent personal disability, was not in such a position; (2) that the supervening incapacity of an employee to perform the services contracted for, was a valid ground for dismissal, even though not founded on at the time of dismissal as a justification; and (3) that by reason of the respondent's permanent personal disability the contract became incapable of further performance, and that accordingly both parties were released from its obligations, thus excluding any action based on breach of contract. This contention was based on the principles to which effect was given in *Horlick v. Beale* [1916], 2 A.C. 486, and cases therein referred to.

It was not seriously maintained by the appellants that their order to the respondent to remain in Constantinople was a lawful order which the respondent was bound to obey at the grave risk of his person. In their Lordships' opinion, the risk to the respondent was such that he was not bound to obey the order, which was therefore not a lawful one. *Mason v. Turner* [1845], 14 M. & W. 112, per Alderson B. at p. 117, foot, and Rolfe B. at p. 118.

It follows that the respondent's refusal was not "faute grave" such as is necessary to justify dismissal under Article 5 of the regulations.

Admittedly the respondent undertook by his contract to serve the Bank in Turkey or any of its branches elsewhere, and the contentions of the appellants must all be tested as at the time of dismissal. In their Lordships' opinion, the appellants have failed to establish that at the time of dismissal they were entitled to regard the respondent's disability as a permanent one. In his letter of 2nd October the respondent requested a provisional transfer to one of the agencies outside Turkey "whilst awaiting the end of the present situation." The appellants have not suggested any impossibility of compliance with that request; indeed, they probably never considered it, in the view that they took of the situation.

On the views expressed above that the order to remain in Constantinople was not a lawful order, and that at the time the disability could not be regarded as a permanent one, their Lord-

ships are of opinion that the respondent's offer of service outside Turkey is sufficient to entitle him to pursue the present suit, and that the appellants are equally unable to found on that disability as justification for the dismissal.

The failure of the appellants to establish that the disability had become permanent and that they could not employ him meantime at some place where the disability did not affect him, also disposes of the contention that the contract had become impossible of performance by the time of dismissal.

Accordingly their Lordships are of opinion that the dismissal of the respondent by the appellants was wrongful and that the respondent is entitled to recover damages.

On the question of damages, their Lordships agree with the majority of the learned Judges of the Supreme Court both as to the measure of the damages and the basis on which—for that purpose—the pension to which the respondent would have been entitled is to be calculated. Their Lordships are of opinion that the pension must be calculated, in terms of Article 14, on the basis of the salary which the respondent in fact received on 31st December, 1922, irrespective of how that salary was arrived at. On that basis parties are agreed that the respondent would have been entitled to a pension of £T.56.375, but their Lordships are of opinion that the rate of conversion for the purposes of a decree in sterling should be the rate current at the time of dismissal instead of that current at the date of the decree; parties are agreed that the former rate should be taken as 7.20. In the view that their Lordships take of the measure of damages, parties are agreed that the amount of damages should be arrived at by taking the appropriate proportion of the £2,000 awarded by the Trial Judge; on this basis, the amount of damages will be £1,378 10s. 6d., and the judgment of the Supreme Court will fall to be modified to that extent and the cross appeal to be allowed for that purpose.

Their Lordships will therefore humbly advise His Majesty that the leading appeal should be dismissed with costs and that the cross appeal should be allowed without any order as to costs.

In the Privy Council.

THE OTTOMAN BANK

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ETIENNE CHAKARIAN.

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DELIVERED BY LORD THANKERTON.

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