

**IN CONFIDENCE**

This is a judgment to which the Practice Note of the Master of the Rolls dated 19 December 2001 applies. This is a draft of the judgment to be handed down on Friday 19<sup>th</sup> December 2003 at 10am in Court No 66. It is confidential to Counsel and Solicitors, but the substance may be communicated to clients not more than one hour before the giving of judgment. The official version of the judgment will be available from the shorthand writers once it has been approved by the judge.

The court is likely to wish to hand down its judgment in an approved final form. Counsel should therefore submit any list of typing corrections and other obvious errors in writing (Nil returns are required) to the clerk to Lord Justice Brooke, by fax to GRO or by E-mail to <chris.day@GRO>, by 12 noon on Thursday 18<sup>th</sup> December, so that changes can be incorporated, if the judge accepts them, in the handed down judgment.

Neutral Citation Number: Double-click to add NC number

Case No: A2/2003/0623

**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**Judge Mackay**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 19th December 2003

**Before :**

**LORD JUSTICE BROOKE**  
**(Vice-President of the Court of Appeal, Civil Division)**

and

**LORD JUSTICE SEDLEY**

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**Between :**

**MOEZE LALJI**

**Claimant/**  
**Appellant**

**- and -**

**POST OFFICE LIMITED**

**Defendant/**  
**Respondent**

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**Adrian Davies** (instructed by **Sykes Anderson Solicitors**) for the **Appellant**  
**David Griffith-Jones QC & Shaen Catherwood** (instructed by **Legal Department of the Royal Mail**) for the **Respondent**

Hearing date : 4<sup>th</sup> December 2003

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**DRAFT JUDGMENT**

**Lord Justice Brooke :**

1. This is an appeal by the claimant Moeze Lalji against an order of Judge Mackay, sitting as a High Court judge, whereby he struck out paragraphs 11-14 of the particulars of claim in this action and directed that summary judgment be entered for the defendants, Post Office Ltd (formerly known as Post Office Counters Ltd) on Mr Lalji's claim for remuneration during his suspension and on his claim for losses arising from the closure of his business.
2. Mr Lalji was appointed sub-postmaster at the GRO Post Office in Epsom by an agreement made between the parties in January 1993. In July 1997 events occurred which gave rise to an investigation by the defendants into certain financial and accountancy aspects of his sub-postmaster's business. On 24<sup>th</sup> July he was suspended from office. On 9<sup>th</sup> September 1997 the defendants told him that although no criminal charges were to be brought, there were matters outstanding which required further investigation. They invited him to an interview, but he never went.
3. On 23<sup>rd</sup> September 1997 he was warned that it was possible that his contract might be terminated summarily not only because of the accounting problems, but also because Post Office books had been pledged against loans and disbursements of money contrary to the express terms of his contract. He was again invited to attend an interview. Again he did not attend. On 30<sup>th</sup> October 1997 his contract was terminated summarily.
4. Mr Lalji commenced the present action on 17<sup>th</sup> April 2002. By his particulars of claim he claimed (i) remuneration of £5,445.28 for the period between his

suspension and the eventual termination of his contract; (ii) £4,083.96, being three months' salary in lieu of notice as damages for wrongful dismissal; (iii) damages for loss sustained by the rest of his **GRO** business arising out of the defendants' wrongful behaviour; (iv) damages because the defendants' conduct caused or materially aggravated his **GRO**. In this context complaint was made that they had dismissed him in a harsh and humiliating way which imputed dishonesty on his part and made it all but impossible for him to find another position.

5. In their defence the defendants relied on a number of the terms of their agreement with Mr Lalji:

“1(10) ... The agreement may be determined by Post Office Counters Ltd at any time in case of Breach of Condition by [the Sub-postmaster], or non-performance of his obligation or non-provision of Post Office Services, but otherwise may be determined by Post Office Counters Ltd on not less than three months notice.

17(15) A Sub-postmaster must not borrow from or lend money to any Post Office employee. Nor should he become security for any Post Office employee in raising a loan. The loaning of money to persons drawing pensions or allowances on the security of their order books is also strictly forbidden.

19(4) A Sub-postmaster may be suspended from office at any time if that course is considered desirable in the interest of Post Office Counters Ltd in consequence of his (a) being arrested, (b) having civil or criminal proceedings brought or made against him, (c) where irregularities or misconduct at the office(s) where he holds appointment(s) have been established to the satisfaction of Post Office Counters Ltd, or are admitted, or are suspected and being investigated.

19(5) Where a Sub-postmaster is suspended his remuneration in respect of any period of suspension will be withheld so long as such suspension continues.

19(6) On the termination of the period of suspension whether by termination of contract or reinstatement, the Sub-postmaster's remuneration in respect of the period may, after consideration of the whole of the circumstances of the case, be forfeited wholly or in part. If remuneration is paid any rent or other expenses which may have been paid to him in respect of the continued use of his premises for Post Office purposes during the period of suspension will be deducted."

6. They also referred to clauses 18(1) and (2) which give a sub-postmaster an express right to give a written explanation if allegations are made against him and/or to meet the Retail Network Manager, accompanied by a friend, to discuss the allegations.
7. It is unnecessary for the purposes of this judgment to refer to the defence in any great detail. It is sufficient to say that the defendants asserted that the audit conducted on 24<sup>th</sup> July 1997 gave them reasonable grounds to believe and/or suspect that Mr Lalji was holding Pension and Allowance books against the price of goods in his other business, and that there were deficiencies in his accounts. This constituted, they said, grounds for his suspension pursuant to clause 19(4). Following further investigations, and Mr Lalji's non-attendance at the interview he was offered, coupled with his failure to provide any explanation, the defendants decided to terminate his contract summarily "by reason of the said accounting irregularities and the holding of Pension and Allowance books against debts". In a counterclaim the defendants claim deficiencies of £2,730,36 against which they set off a sum of £959.82 which was still due to Mr Lalji. So far as the claim for damages for GRO was concerned, this was resisted on a number of grounds, including limitation.

8. After a reply was served on Mr Lalji's behalf, the action was listed for trial on 7<sup>th</sup> April 2003. On 28<sup>th</sup> February the defendants issued an application for summary judgment and/or an order striking out certain aspects of the claim. This application, supported by a witness statement by the defendant's solicitor, was listed for hearing on 7<sup>th</sup> March. No explanation was given of the reason why the application was made so late. On the other hand no point was taken on Mr Lalji's behalf that he had insufficient time to respond to the application.
9. In recent years both the House of Lords and this court have drawn attention to the unwisdom in many cases of seeking to bring an action to a summary conclusion before any disputes on the facts have been resolved at the trial. The present case seems to me to provide a good example of what may go wrong if short cuts are taken in an effort to eliminate the cost of a contested hearing.
10. It was common ground that one issue had to proceed to trial in any event. This was the claim for damages for wrongful termination of the contract, in so far as it represented a money claim for three months' loss of income.
11. It appears to me that the claimant's claim for financial loss caused to his associated business from the summary termination is also fit to proceed to trial. Although it is not yet pleaded as including the value of the loss of opportunity of selling the combined business as a going concern to a purchaser who might have satisfied the Post Office as being a suitable sub-postmaster, as was suggested in argument, such an amendment might be made, and in any event I do not consider that it could properly be held that there is no real prospect of a claim succeeding under this head.

12. This claim was pleaded as a claim for general damages arising out of the failure of the associated business, being a failure attributed to the closure of the sub-post office. In paragraph 8 of the particulars of claim it was asserted that it was commonplace for sub-postmasters as a class of men and women to carry on an ancillary trade (in this case the trade of newsagents, confectioners and grocers), and to depend on attracting custom for this trade from the people transacting post office business. This rendered the ancillary trade profitable enough to afford sub-postmasters sufficient income on which to live, when taken together with their remuneration as sub-postmaster.
13. The judge said that the parties when making their contract would not have regarded the closure of the associated business as a foreseeable consequence of any failure by the Post Office to give three months' notice. He added that Mr Lalji also had no reasonable prospect of successfully proving that the closure followed from the failure to give notice, rather than the actual period of closure between the 24<sup>th</sup> July 1997 and the 30<sup>th</sup> October 1997 which "the defendants were lawfully entitled to bring about by reason of the very complex contract entered into between the parties".
14. This matter, in my judgment, raises issues of disputed fact which can only be resolved at the trial. One could well see how the business might have limped along during the period of Mr Lalji's suspension but was then dealt a body blow by the summary termination. Similarly, it seems to me that the issue as to what the parties reasonably foresaw might have been the effect of summary termination when they entered into the contract originally is essentially one to

be resolved on evidence by the trial judge, and not one to be resolved on no evidence in a summary manner.

15. The next issue relates to the claim for remuneration for the months of July, August, September and October 1997 which the defendants claimed to be entitled to withhold permanently pursuant to their rights under section 19(5) and (6) of his contract (see paragraph 5 above). No issue arose as to the entitlement to withhold remuneration during the period of suspension. The dispute arose under section 19(6) which purported to give the Post Office at the end of that period an unfettered discretion to forfeit the withheld remuneration wholly or in part “after consideration of the whole of the circumstances of the case” whether the period of suspension ended by termination of the contract or reinstatement.
16. One of the matters on which Mr Lalji relied on by way of reply was to contend that section 3 of the Unfair Contract Terms Act 1977 could be called to his aid to invalidate section 19(6) in the circumstances of his case. In his judgment the judge referred, in effect, only to section 3(2)(a) of that Act, and said that since this sub-section would apply only if there was a breach of contract by the defendants it was inapplicable in the present case since the forfeiting of remuneration was not a breach of contract.
17. On the appeal Mr Davies called in aid section 3(2)(b) of the Act. He said that this was a contract on the Post Office’s written standard terms of business by which the Post Office was claiming to be entitled to render no performance at all in relation to its obligation to remunerate Mr Lalji during each month of his

suspension. In these circumstances it would be for the Post Office to show at trial that the contractual term on which it relied passed the “reasonableness” test in section 11 of the Act, and this would be essentially a matter for the trial judge to determine. I agree.

18. Finally, there is the question whether Mr Lalji should be permitted to pursue to trial his claim for damages for the manner of his dismissal. He contends that the Post Office dismissed him in a harsh and humiliating way which imputed dishonesty to him, thereby stigmatising him and making it all but impossible for him to find another position. The claim under this head includes a claim for aggravated damages and also a claim for damages for the **GRO** **GRO** he suffered as a result. In his reply Mr Lalji averred, among other things, that the Post Office’s retail network manager was so hostile to him that he believed that her decision in his case was a foregone conclusion. He also maintained that this manager had assured his wife that the Post Office would turn a blind eye to Pension and Allowance books being held against customers’ debts, such as had occurred on two occasions, so long as those books were not held on the Post Office side of their premises.
19. Mr Griffith-Jones QC, who appeared for the defendants, observed that it was now common ground between the parties that Mr Lalji was not employed under a contract of employment (see *Commissioners of Inland Revenue v Post Office Ltd* [2003] IRLR 199). In his particulars of claim he did not rely on anything resembling the implied duty of mutual trust and confidence, such as had provided the foundation stone for claims of this kind in the employment sphere. In any event in that sphere the House of Lords has now held in

*Johnston v Unisys Ltd* [2001] UKHL 13; [2003] 1 AC 518 at [46] that this term was always concerned with preserving the continuing relationship which should subsist between employer and employee, and that it was not altogether appropriate for use in connection with the way in which that relationship was terminated. In any event, he said that this part of Mr Lalji's claim presented formidable limitation problems.

20. In reply Mr Davies said that the limitation issue could not be brushed aside in a summary way. Even if Mr Lalji had the requisite knowledge more than three years before the issue of proceedings there was still a claim for the discretion of the court to be exercised in his favour pursuant to section 33 of the Limitation Act 1980, and this issue could not be determined summarily. As to the claim for damages arising out of the manner of the termination, this should not be dismissed summarily on a pleading point. This was a developing area of the law in which the House of Lords had shown itself willing to extend the occasions on which damages of this kind could be claimed for breach of contract. Even if this was not a contract of employment, it was very close to being a contract of employment, and the only reason why the House of Lords had barred a claim of this kind in an employment context was that in its unfair dismissal legislation Parliament had provided an alternative remedy. Mr Lalji had no such alternative remedy. In this context he was entitled to call in aid Lord Hoffmann's dictum in *Johnson* at paragraph 50 to the effect that where there was no relevant legislation in this area he would regard the question whether judges should develop the law by implying a suitable term into the contract of employment as finely balanced.

21. In my judgment there are simply too many difficulties in Mr Lalji's path in respect of this aspect of his claim for us to be able to hold that the judge was wrong to enter summary judgment for the defendants on this part of his claim. Even if one puts the limitation problems on one side, there are problems with the facts, because his claim that he was treated in a humiliating manner, although supported by a statement of truth, appears on paper extremely thin, and his GRO surfaced a considerable time after the events in question in this action. Difficult issues of foreseeability and causation would have to be surmounted successfully. There are also very serious problems with the law, which it is very difficult to see how he could surmount. Although I appreciate that there is high authority to the effect that where the law is in a state of development it is wrong to shut a claim off before the facts are established (see *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 740H-741A), there are just too many difficulties with the facts to warrant the claim going forward to trial. Compare the approach of Lord Steyn in *Johnson v Unisys Ltd* [2001] UKHL 13 at [29]; [2003] 1 AC 518.
22. For these reasons I would allow this appeal to the extent set out in this judgment.

**Lord Justice Sedley:**

23. I agree with the judgment of Lord Justice Brooke.
24. So far as concerns the taking of a decision in Mr Lalji's absence, no legitimate ground of complaint can arise. Mr Lalji was twice offered the opportunity to attend and twice failed to do so. It is too late for counsel to tell us now that he

was too GRO to attend. The least that could be expected of someone who was not wholly incapacitated is that he would have told the Post Office that this was so. At worst he should have made use of his right of appeal.

25. But it does not follow that his silence left the Post Office free either to terminate the contract summarily rather than on the due 3 months' notice, nor arbitrarily to forfeit the remuneration which it had meanwhile withheld.
26. As to the first of these, I see nothing at present in the evidence which justifies the Post Office's resort to the drastic remedy of summary termination. As to the second, it seems to me cogently arguable that clause 19.6 of the contract, which purports to give an unfettered power to forfeit remuneration withheld during a period of suspension, falls foul of s.3(2)(b) of the Unfair Contract Terms Act 1977.
27. The Post Office's concession that the power must not be exercised capriciously (I assume in its favour that it will at least be able to pass this test) will not be enough to meet the requirements of the 1977 Act if s.3 applies. How the section operates - whether by avoidance of the offending provision or by reading down - does not have to be determined at this stage. It may well have to be decided, however, at trial.