Contracts -- Employment -- Remedies for Wrongful Breach

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by the trial judge. Thus a technical explanation may well fulfill the court's duty to a well-educated defendant; while to an uneducated defendant a simple, clear explanation in easily understandable terms would seem desirable. The accused should have a broad understanding of the matter. This could require advising an accused that an attorney might be able to present a defense for him. Arguably, though, the judge himself should not advise of any defenses as this would pre-empt the function of the lawyer to whom the defendant has a right. As a minimum in all cases, three of the criteria stated in Von Moltke would appear necessary to assure a voluntary waiver of counsel: apprehension of (1) the nature of the charges, (2) the statutory offenses included within the charges, and (3) the range of allowable punishments for these offenses.

Regardless of any possible clarification that may be forthcoming with regard to the doctrine of intelligent waiver, it appears that the dissenting opinion in Butler, by applying the circumstances of the case to the standards set out in both Johnson and Von Moltke, reaches the correct conclusion.

George Carson II

Contracts—Employment—Remedies For Wrongful Breach

In 1966 the North Carolina Supreme Court re-examined its prior decisions concerning the remedies available to an employee who has been wrongfully discharged during the term of his contract. In so doing it took a significant step toward realigning itself

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27 Two circuits have reached this conclusion since the requirement of advice concerning defenses was first set out in Von Moltke. In United States v. McGee, 242 F.2d 520 (7th Cir. 1957), vacated, 355 U.S. 17 (1957), the court reasoned: "The innumerable factual situations that might possibly afford an accused a defense to the crime charged reveals the absurdity of the assertion that to be valid the waiver of counsel . . . may be accepted only after the trial judge had made known to the accused every conceivable defense that may be available . . . ." Id. at 524. In Michener v. United States, 181 F.2d 911 (8th Cir. 1950) the court declares: "Nor is it the duty of the trial court judge to explain and set out for an accused the possible defenses he might adduce to the charges against him . . . . [T]he is not the duty or the responsibility of the trial judge to give legal advice to an accused, or to any party . . . ." Id. at 918.
28 Webster, New Collegiate Dictionary (1960), defines range as: "The limits of a series of actual or possible variations; as, a range of choice.
29 332 U.S. at 724.
with the great weight of authority on this question. In *Freeman v. Hardee's Food Systems, Inc.*,\(^1\) the plaintiff entered into a contract to become treasurer of the defendant corporation for a two year term. He worked in that capacity for approximately five months, when he allegedly was wrongfully discharged. He immediately commenced this action to recover his salary for the remainder of the two year term. The conclusion of law reached by the trial court judge was that the plaintiff was entitled to recover only the amount due him at the time of the institution of the action.\(^2\) On appeal the North Carolina Supreme Court reversed, expressly overruling prior case law,\(^3\) stating that Freeman, if entitled to recover, would not be limited to this amount. The court refused, however, to set forth the position it would adopt in future cases, as to the amount an employee in such a situation would be entitled to recover, until the question was "directly presented and fully argued."\(^4\)

A majority of jurisdictions support the rule that an employee who has been wrongfully discharged during the term of his contract may recover damages for the entire term of the contract, even though he brings suit before expiration of the term.\(^5\) North Caro-

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2. He was therefore entitled to nothing since he had already been paid $560.00 more than this amount. Record, p. 15.
4. The case involved other issues and the plaintiff's attorney in his brief, probably because of the long-standing rule to the contrary, only in form objected to the trial judge's conclusion of law. No argument was made for the adoption of a new rule in this situation. This apparently is what the court alluded to when it said the question was not "directly presented or fully argued." Brief for Appellant, p. 4.
lina, however, has until now refused to follow the majority rule. The leading decision on the North Carolina position is Smith v. Lumber Co.\(^6\) In Smith the plaintiff was employed by defendant in February, 1904, for four months. He received his salary for February and was then discharged. He brought suit for his March salary before a magistrate and recovered a judgment. The summons in that suit, however, was dated May 4, 1904, and was delivered to the sheriff on May 5. The plaintiff then brought suit to recover his salary for the last two months. He recovered in the trial court but on appeal the supreme court held that, since the first suit was instituted on the date the sheriff received the summons and on that date two months pay was due, the plaintiff was now barred from collecting for the second month in this suit. The court then stated:

> [W]hen the contract is entire and the services are to be paid for by installments at stated intervals, the servant or employee who is wrongfully discharged has the election of four remedies: 1. He may treat the contract as rescinded by the breach, and sue immediately on a quantum meruit for the services performed; but in this case he can recover only for the time he actually served. 2. He may sue at once for the breach, in which case he can recover only his damages to the time of bringing suit. 3. He may treat the contract as existing and sue at each period of payment for the salary then due . . . . 4. He may wait until the end of the contract period, and then sue for the breach, and the measure of damages will be prima facie the salary for the portion of the term unexpired when he was discharged, to be diminished by such sum as he has actually earned or might have earned by a reasonable effort to obtain other employment.\(^7\)

The plaintiff had elected the third remedy and was, therefore, entitled to recover only his salary for the fourth month in his second suit.


\(^7\) 142 N.C. 26, 54 S.E. 788 (1906). The court in Smith, however, believed it was adopting the majority rule at that time.

\(^8\) Id. at 32, 54 S.E. at 790.
The *Smith* decision was cited as controlling in *Robinson v. McAlhaney*. In *Robinson* the plaintiff alleged a contract with a craft shop for a five year period. Suit was brought before expiration of the term and the case in part involved whether or not plaintiff was limited to a recovery of the agreed upon salary up to that date. In answering this in the affirmative the court set out the four remedies announced in *Smith*, and held that the plaintiff had elected to pursue the second remedy and was, therefore, limited in recovery of damages to the date of institution of the action.

The ruling in *Smith v. Lumber Co.* and *Robinson v. McAlhaney* limiting an employee's recovery to the salary payments due when the action was commenced were succinctly declared in *Freeman* no longer to be considered authoritative. This is a welcome step in eliminating an anachronism in our case law.

The soundness of the remedies set forth in the *Smith* decision are highly dubious. To require an employee to wait until the end of the term before he brings the suit might deprive him of all redress for his injury in many cases, especially in the event of a long-term contract. More important, this rule is too dilatory and would result in great injustice and hardship in many cases where an employee was financially unable to wait this long.

In North Carolina, if an employee cannot afford to wait until the end of the term, he was forced into the option under *Smith* of bringing suit for each installment when it becomes due or else be limited in recovery to the amount due when the action is commenced. Only a few jurisdictions allow an employee to bring suit when each installment is due and this remedy is open to the obvious objection that it results in needless litigation and expense to both parties as well as burdening the courts.

Similarly, to hold that no damages are recoverable except for the period which has already elapsed when the action is brought is equally objectionable. As Labatt commented: "[T]he preponder-
ance of authority is so decidedly against this doctrine that it may safely be treated as erroneous, except in the jurisdictions in which it has been explicitly adopted. Numerous decisions indicate that the action is not one in which the plaintiff seeks to recover wages, but is for damages for the violation of the terms of the agreement by which he was employed to perform services for the defendant for a stipulated term. When the breach is committed the wrong is complete, and whatever damages flow from the wrong should be recoverable in one action. The reason given by the court in Smith for limiting damages to the time of institution of the suit was that an employer was entitled to diminish the damages by the amount the employee may or could have received from other employment and until the full period was at an end this sum would be “speculative.” Williston calls this conclusion “wholly indefensible logically.”

The United States Supreme Court, as well as many other courts, have recognized that the difficulty and uncertainty of estimating damages is no greater in this action than if the plaintiff had sued the defendant in tort to recover damages for personal injuries sustained in his service.

The jurisdictions that follow the majority rule have the jury consider in estimating damages the wages the plaintiff would have earned under the contract, the probability that he will live to the end of the contract period, or that his ability to work will continue, and any other uncertainties growing out of the terms of the contract as well as the likelihood that he would be able to earn money in other comparable work during the time. In most cases by the time the trial takes place the plaintiff will have found other employment and it should be even less difficult to estimate his future earnings. Furthermore, that damages are speculative “seems to be properly considered rather as one of the elements to be taken into account in assessing the prospective damages . . . than as a specific reason for

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12 I Labatt § 363(d), at 1145.
13 See, e.g., Seymour v. Oelrichs, 156 Cal. 782, 106 Pac. 88 (1909); Carter v. Gillette, 163 Mass. 95, 39 N.E. 1010 (1895).
15 5 Williston, Contracts § 1362 (rev. ed. 1936).
18 Ibid.
refusing altogether to assess such damages." Moreover, if the defendant wrongfully discharges the plaintiff, he should be taken to have understood that if he did not wish to be subjected to such damages, he should have kept his agreement.

It is submitted that the court in Freeman was correct in recognizing the inadequacies of the Smith and Robinson decisions. The court has now set the stage so that in the next case raising the issue counsel should present the reasons supporting the majority rule which allows damages for the entire contract period. When this occurs the court will probably adopt the sounder majority rule.

JAMES ALFRED MANNINO

Corporations—Specific Enforcement of Shareholder Agreements

Shareholder voting agreements to achieve control of a corporation are generally recognized as lawful. Difficulty arises, however, when a shareholder breaches a voting agreement, and the court is faced with the dilemma of awarding the inadequate relief of money damages, or specifically enforcing the agreement, thereby substituting the court’s direction for the will of the majority.

10 LABATT § 363(e), at 1145.
20 E.g., Granow v. Adler, 24 Ariz. 53, 206 Pac. 590 (1922); Seymour v. Oelrichs, 156 Cal. 782, 106 Pac. 88 (1909); Carter v. Gillette, 163 Mass. 95, 39 N.E. 1010 (1895).

Voting agreements should be distinguished from voting trusts. Voting trusts are created by the transfer of shares to trustees, who vote these shares as dictated by the agreement. Statutes now usually control both the formation and duration of these agreements. If a voting trust is inconsistent with the statute it is generally held void. Voting agreements are contracts among shareholders to vote stock in a specified manner. Typically, statutory control is not present. Henn, CORPORATIONS §§ 199-200 (1961).


Courts often recognize the legality of shareholder agreements in a negative manner, by stating that the “contract is not per se invalid.” For a collection of such cases see Annot., 45 A.L.R.2d 799, 802-04 (1956). See Generally 5 FLETCHER, CYCLOPEDIA CORPORATIONS § 2064 (perm. ed. rev. repl. 1952).

2 Compare E.K. Buck Retail Stores v. Harkert, 157 Neb. 867, 62 N.W.2d