RYAN, J. dissented in *Toussaint.*

TOUSSAINT v BLUE CROSS-BLUE SHIELD

RYAN, J. This is a suit for breach of an employment contract. The plaintiff was awarded a judgment in the amount of $72,835.52 upon the verdict of a jury. The Court of Appeals reversed. 79 Mich App 429; 262 NW2d 848 (1977).

I

Charles Toussaint sought the assistance of an employment agency to obtain suitable employment and in early 1967 the agency referred him to defendant, Blue Cross and Blue Shield of Michigan (hereinafter, Blue Cross). After several interviews, Mr. Toussaint was hired by Blue Cross on May 1, 1967 as an assistant to the company treasurer. His duties consisted primarily in analyzing and preparing certain financial reports.

In early 1971, plaintiff was assigned the duty of administering the company car program. According to some Blue Cross employees who testified at the trial, plaintiff was having difficulty in satisfactorily administering the program and upper-level management had begun to receive some complaints. One such complaint involved the claim that someone had "set back" the odometers on several company cars while the vehicles were under plaintiff's control. Mr. William Flaherty, Blue Cross Executive Vice President, requested various reports and documents concerning the matter and ultimately called a meeting in an attempt to resolve the problems. Plaintiff and his supervisor, Leonard Visosky, attended the meeting and were asked to explain why they had been unable to administer the company car program without recurring complaints from those involved in the use of company cars. Apparently dissatisfied with the answers received, shortly after the meeting defendant's management decided to request Mr. Toussaint's resignation and that of his supervisor, Mr. Visosky.

On May 7, 1972, Allen R. Schaedel, defendant's treasurer, notified the plaintiff of the decision to terminate his employment and immediately requested his resignation in return for a severance pay arrangement whereby plaintiff would continue to receive his salary for six months or until he found other employment. At plaintiff's request, the decision to request his resignation was reviewed by defendant's Personnel Department, the company president, and by the chairman of the Board of Trustees. Upon review, Blue Cross held firmly to its determination that it would be in the best interests of all the parties to terminate the employment relationship with plaintiff.

On November 20, 1972, plaintiff filed a complaint against Blue Cross in the Third Judicial Circuit Court alleging wrongful termination of his employment contract.

II

Plaintiff's claim is that he has an employment contract with defendant which is partly oral and partly written. It is claimed that the oral portion was made in the course of several pre-employment interviews with Blue Cross representatives. The written portion is claimed to consist of a document entitled, "Supervisory Manual—Personnel Practices and Procedures, Michigan Blue Cross", and a pamphlet entitled, "Guidelines for Michigan Blue Cross Employees".

It is understandable that both the trial court and the Court of Appeals had difficulty in determining precisely what Mr. Toussaint claimed was the agreement concerning the duration of his employment.

The complaint, while alleging the terms of the agreement concerning the plaintiffs duties, the amount of compensation to be paid him and other details, does not allege a specific term of employment. It does, however, allege in paragraph 5 that "[t]he contract of plaintiff's employment is, in part, set forth in

defendant's policy manual entitled, `Supervisory Manual—Personnel Practices and Procedures' ". Paragraph 6 of the complaint then incorporates by reference Section VII of the Supervisory Manual entitled *Terminations* wherein is found paragraph III which states:

"*Policy:* It is the policy of the company to treat employees leaving Blue Cross in a fair and consistent manner and to release employees *for just cause only."* (Emphasis added.)

Thus it appears to be the plaintiffs claim that he has a contract with Blue Cross for permanent employment terminable not at will but "for just cause only".

We are fortified in drawing that conclusion by the plaintiff's allegations that Blue Cross violated the alleged employment agreement by terminating Mr. Toussaint's service "without just cause" and without according him the requisite warnings, notice, hearing and other termination procedures as provided in the Blue Cross Supervisory Manual.[44]

We are satisfied that there is not before this Court, as there was not before the trial court or the Court of Appeals, any claim of employment for a specific term of years or for employment terminable when plaintiff reached age 65, and thus no justiciable issue concerning the application of the statute of frauds.[45]

In proof of the oral portion of the employment agreement, Mr. Toussaint testified that he was hired by Blue Cross following a number of meetings with company representatives, including a session of psychological testing and an interview with Mr. Schaedel. When asked upon direct examination if he knew the purpose of the meeting with Mr. Schaedel, Mr. Toussaint testified:

"A. Yes, because he was the party I was going to be working for and he wanted to meet all qualified applicants for the position; get his feel, whether he felt we would have worked out on the job, that was the purpose of the interview; meet us and see if we were compatible, if we had the proper background, to fill the position.

"Q. As a result of all this, were you hired?

"A. Yes, I was.

"Q. That was May 1?

"A. May 1st, of `67.

"Q. Do you recall your starting terms of employment?

"A. Yes.

"Q. What was that?

"A. Well, the salary; which I don't recall the exact dollar amount, I started for, that to do my job, that I would be there until I would reach the age of 65,[46] which then I would have to retire, `cause they had a mandatory retirement program of which you had to leave on the last day of the month of which you became 65. Mr. Schaedel had indicated to me that as long as I did my job, that I would be with the company for that period of time; showed me a number of documents—I had asked the question about how secure a job it was and he said that if I came to Blue Cross, I wouldn't have to look for another job because he knew of no one ever being discharged."[47] (Footnotes added.)

In support of his claim that the employment contract was partly written, Mr. Toussaint testified upon cross-examination as follows:

"Q. Did you have an employment contract?

"A. I certainly felt I did.

"Q. Is it your testimony that the three sections of the `Supervisory Manual' which I have given you were your contract?

"A. No, not all of my contract, but part of it.

"Q. Did you sign a document that was entitled or had some title similar to employment contract?

"A. Not that I recall.

"Q. Did you ever receive a signed document from the corporation entitled such an employment contract?

"A. Now that you're phrasing it, I don't believe so."

The "three sections" of the Supervisory Manual to which Mr. Toussaint made reference as constitut-

ing a part of his employment contract were portions of Sections VII, XII-A and XII-B of the manual entitled, "Terminations", "Employee Complaint Procedures" and "Disciplinary Procedures", respectively.

Thus it is clear that at trial the success of the plaintiff's claim that he had a contract for employment terminable only for "just cause" and then only if certain specific termination procedures were honored depended upon his success in sustaining the burden of proving that the Supervisory Manual, and particularly the foregoing "three sections" were a part of his employment contract, since the termination for just cause language, and termination procedures alleged to have been violated, are to be found in those sections.

We turn then to examine the record, including the documents in question, to determine whether the plaintiff has sustained that burden.[48]

The manual is a large three-ring looseleaf note-book entitled: "Supervisory Manual—Personnel Practices and Procedures". It contained, at the time of trial, 250 pages of material divided among 11 separate tabbed headings labeled:

I. Hiring & Induction
II. Supervisory, Adm., Tec., Pay Administration
III. Clerical Pay, Administration
IV. Vacations
V. Leave of Absence
VI. Bank Time
VII. Terminations
VIII. Hours of Work and Overtime
IX. General Policy
X. Emergency Procedure
"XII. Complaint and Disciplinary Procedures"[49]

Within each part are found statements, labeled as policy, touching the whole spectrum of typical personnel policy concerns on virtually every aspect of employee-employer relations likely to be encountered by supervisory personnel and their subordinates in a large business enterprise. Also included are sample printed forms for intra-company job transfer requests, personnel evaluation reports, attendance records, payroll change records, funeral reimbursement requests, flower fund solicitation forms, maternity leave request forms and others.

The Guidelines is a 32-page three-colored illustrated pamphlet which the plaintiff accurately described as "somewhat of a summary of what is contained in [the] manual", with caricature-like drawings on nearly every page as an aid to understanding the text.

The only direct evidence in the record bearing on the plaintiff's claim that the Supervisory Manual and the Guidelines constituted the written portion of his employment contract is Mr. Toussaint's testimony that the documents were handed to him on the day he was hired, and his testimony that he "felt" he had an employment contract and that three portions of the manual described in his complaint were "part of it".

Nowhere, either in the manual or the Guidelines pamphlet, is there to be found any reference to Mr. Toussaint, by name or otherwise, to his specific duties, job description or the compensation to be paid him. The documents contain no reference to a contract of employment of any kind. Neither document is signed by the plaintiff or any representative of the defendant, nor is a place provided for such signatures.

Repeatedly throughout the manual notebook there appears the declaration that the document is a statement of company policy on the subjects addressed. Pages of the manual are regularly added and deleted by company officials unilaterally, under the supervision of the Blue Cross Personnel Department, without notice to any employee.

The record bears no evidence that during Mr. Toussaint's several pre-employment interviews any reference was made either to the manual or Guidelines, or even to the subject of a written employment contract. Mr. Toussaint did not learn of the existence of the manual and Guidelines until they were handed to him *after* he was hired on May 1, 1967. That is in keeping with the testimony of defendant's witnesses that the manual is given to supervisory level employees as an aid in supervising persons in their charge and not as declarative of the contract terms of an employee's hire.

It is evident that the manual, standing alone, is not an employment contract at all, but instead is what it purports to be: a manual reciting Blue Cross's personnel policies, practices and procedures provided to supervisory level personnel for their use in dealing with employees under their supervision, concerning the entire panoply of subjects germane to corporate personnel relations. While we would be justified to conclude as much as a matter of law from an examination of the document itself, it is unnecessary to do so in light of the uncontradicted testimony of defendant's Executive Vice President, Mr. Flaherty, who testified as follows:

"Q. Blue Cross has a `Supervisory Manual' is that right?
"A. Yes, it has.
"Q. The `Supervisory Manuals' were prepared for some person?
"A. Initially it's a guide for new supervisors and others of their kind.
"Q. Employee relations?
"A. That's correct and other matters.
"Q. The term supervisor manual encompasses the type of work Mr. Toussaint had?
"A. They principally went to the clerical position, rather than the positions that were so close to management; top management or experienced management."

We have no doubt that circumstances could exist in which an employer's written policies, including those of the defendant, might be incorporated by reference, expressly or impliedly, into an otherwise oral employment contract and thus become a declaration of the employment agreement. This, however, is not such a case. Here the record is wholly devoid of evidence, direct or circumstantial, to justify the conclusion that the parties agreed that the manual or the Guidelines, or either of them, would become the plaintiff's contract of employment.

Defendant's 250-page manual of personnel policies cannot become its employment contract with some or all of its employees by reason of the company's inadvertence and inattention, or by accident. Neither can defendant be chargeable with incorporating by reference some or all of the terms of its manual into an oral employment agreement with plaintiff simply because a copy of the manual was handed to the plaintiff after he was hired or because the policy manual speaks in general terms to many of the same subjects with which a contract of employment would be concerned, such as sick benefits, vacation time, hours of work and similar provisions.

While it is elemental that the question whether a contract has been made, and if so its terms, is for jury determination,[50] it is equally elemental that the question cannot be put to the jury unless there is some evidence produced from which a reasonable juror would be warranted in finding a contract.[51]

We have examined the record evidence in the light most favorable to the plaintiff and we are unable to conclude that there was produced any evidence whatever from which a jury was free to conclude that the parties agreed, either expressly or by implication, that the defendant's manual or guidelines, or any part of either, would constitute the plaintiff's contract of employment.

There is an abundance of evidence in the record concerning the policies and procedures to be followed when an employee's services are thought to be unsatisfactory and his discharge is contemplated. Extensive testimony was taken upon both direct and cross-examination to show the extent to which plaintiff was accorded the benefit of such procedures. That evidence went to the particulars of plaintiff's claim of wrongful termination as alleged in paragraph 8 of the complaint.[52] It is clear that plaintiff was given the benefit of some of those procedures and denied others. What is wholly missing from the record, however, is any evidence from which a jury was entitled to conclude that the plaintiff's contract of employment included the Supervisory Manual and particularly that part of it which includes the disciplinary, complaint and termination procedures, as the plaintiff claimed.

Employment contracts, like other binding agreements, are the product of informed understanding and mutual assent as to the subject matter. As stated by Justice COOLEY in the early case of *McDonald v*

Boeing, 43 Mich 394, 396; 5 NW 439 (1880):

"[T]he contract of employment must always be a voluntary act on the part of the employer and of the employed, coinciding in a common understanding."

As plaintiff so appropriately points out in his brief on appeal:

"The principles [governing formation of an employment contract] are described in 53 Am Jur 2d, [Master and Servant], § 15 [p 93], in the following manner:
" `The formation of the relationship of * * * employer and employee is in general determined by the principles governing the formation of other contracts. The relationship is a product of mutual assent, that is, of a meeting of minds expressed by some offer on the part of one to employ or to work for the other and an acceptance on the part of such other.' "

Nothing in the evidence on the record before us establishes a factual issue, either directly or circumstantially, from which the trier of fact was entitled to conclude that the requisite mutual assent or meeting of minds occurred on the proposition that the defendant's manual or Guidelines, or any part of either, would constitute the plaintiff's employment contract as claimed.

III

Plaintiff invites our attention to a line of cases which are cited for the proposition that an employee's "legitimate expectations" which "were grounded upon the employer's written policy statements" "ought to be enforceable by contract". The cases are: *Cain v Allen Electric & Equipment Co,* 346 Mich 568; 78 NW2d 296 (1956); *Psutka v Michigan Alkali Co,* 274 Mich 318; 264 NW 385 (1936); *Gaydos v White Motor Corp,* 54 Mich App 143; 220 NW2d 697 (1974); *Clarke v Brunswick Corp,* 48 Mich App 667; 211 NW2d 101 (1973); and *Couch v Administrative Committee of the Difco Laboratories, Inc, Salaried Employees Profit Sharing Trust,* 44 Mich App 44; 205 NW2d 24 (1972).

Upon careful examination of each of the cited cases, we are convinced they are all inapposite to the issues before us. Each of the cases deals not with a complaint for wrongful termination of a contract of employment, but with an employee's entitlement to benefits under bonus or pension plans as deferred compensation for services rendered. The cases are concerned with claims for termination pay *(Cain);* death benefits *(Psutka);* severance pay *(Gaydos* and *Clarke);* and profit-sharing benefits *(Couch).* They stand for the familiar proposition that an employee may enforce ancillary contractual obligations of the employer to pay bonus and pension benefits upon performance by the employee of services required as a condition for eligibility, and that entitlement to such benefits cannot be defeated by termination of the claimant's employment.

In each of the cases cited, policy statements by the employer announced the existence of bonus, profit-sharing or pension benefits and the employer or the claimant-employee satisfied the burden of proof that work already performed was in consideration of the announced benefit and that what was sought was merely deferred compensation. In none of the cases was the employer's right to discharge the claimant questioned. The benefits involved in each case were properly regarded by the courts as inducements extended to employees to become employed or remain employed by the defendant employers.

The cases are therefore wholly distinguishable from the controversy before us not only upon their facts, but also because the specific policy statements involved concerning employee deferred compensation were of the kind that the employers should reasonably have expected would induce reliance by the employee in joining or remaining in the employer's service.

The legal theory upon which the employer in such cases is held bound is known as promissory estoppel. It has been defined as follows:

"A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires." Restatement Contracts, 2d (Tentative Draft No. 2, 1965), § 90, p 165.

A comment to § 90 adds:

"The promisor is affected only by reliance which he does or should foresee, and enforcement must be necessary to avoid injustice. Satisfaction of the latter requirement may depend on the reasonableness of the promisee's reliance, on its definite and substantial character in a relation to the remedy sought, on the formality with which the promise is made, on the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting or otherwise, and on the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant." *Id.,* § 90, Comment b, p 166.

While the plaintiff in this case has not pleaded a claim of promissory estoppel concerning his wrongful termination claim, even if one be assumed, the record before us is without any evidence whatever that Mr. Toussaint relied upon any policy statements contained in the Supervisory Manual or the Guidelines concerning the duration of his employment, notice of termination or entitlement to written or oral warnings prior to termination either as an inducement to become employed by or to remain in the employment of the defendant.

IV

In view of the plaintiff's failure to present a jury-submissible case on the claim that the Supervisory Manual or the Guidelines, or portions of them, constituted all or part of his employment contract, and the withdrawal by plaintiff's counsel of any claim that the duration of employment was until age 65, the record before us is one of an oral employment contract for permanent service for an unspecified duration. It is well settled that in the absence of distinguishing features or provisions, or special consideration, such contracts are generally regarded as indefinite hirings terminable at the will of either party. *Lynas v Maxwell Farms,* 279 Mich 684; 273 NW 315 (1937); *Ebling v Masco Corp, ante,* p 625 (RYAN, J.).

In *Prussing v General Motors Corp,* 403 Mich 366; 269 NW2d 181 (1978), we recognized the existence of a line of authorities holding that even in an employment contract terminable at will, discharge of an employee for reasons motivated by bad faith, malice, or based on retaliation or for refusing "to do that which public policy forbids or condemns" is actionable. *Monge v Beebe Rubber* Co, 114 NH 130; 316 A2d 549 (1974). Plaintiff does not claim this is such a case nor is there any evidence in the record to suggest it is. Consequently this is not the proper occasion to consider whether we wish to jurisprudentially align this state with those authorities; neither is this a case in the *Prussing* mode in which an employee of 29 years service relied upon his "substantial longevity of employment" in urging us to adopt the even broader rule that "an employer cannot terminate a long-term employment contract without cause".

Here the employment relationship lasted for a period of five years and the plaintiff relied not upon equitable principles derived from "the evolution of the modern employer-employee relationship", but upon a claim of an express contract, partly oral and partly written, specifically providing for discharge only for just cause, a claim we hold he has not proved.

We agree with the Court of Appeals that the trial court erred in failing to grant the defendant's motion for directed verdict, but for the different reason that the plaintiff failed to present a prima facie case in support of his claim that the contract of employment was partly written as alleged.

The decision of the Court of Appeals is affirmed. Costs to appellee.

COLEMAN, C.J., and FITZGERALD, J., concurred with RYAN, J.