

1966

## Vincent Chiodo v. Bear River Telephone Company : Respondent's Brief

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# IN THE SUPREME COURT OF THE STATE OF UTAH

VINCENT CHIDO,

*Plaintiff and Respondent,*

vs.

BEAR RIVER TELEPHONE  
COMPANY,

*Defendant and Appellant.*

Case No.  
10478

## BRIEF OF RESPONDENT

Appeal from the District Court of Box Elder County  
State of Utah  
Lewis Jones, District Judge

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FILED

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Clerk, Supreme Court, Utah

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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VINCENT CHIDO,

*Plaintiff and Respondent,*

vs.

BEAR RIVER TELEPHONE  
COMPANY,

*Defendant and Appellant.*

Case No.  
10473

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## BRIEF OF RESPONDENT

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### STATEMENT OF KIND OF CASE

The plaintiff, Vincent Chiodo, sought recovery from defendant, Bear River Telephone Company, for breach of an employment agreement executed between plaintiff and defendant. This contract was part of a larger transaction wherein General Waterworks Corporation acquired the controlling interest in the Bear River Telephone Company from the plaintiff and certain members of his family. Plaintiff contended that this contract of employment was a condition to the sale

of the majority stock of Bear River and that it provided him a guaranteed employment for 10 years with no right in Bear River to terminate his employment or, at least, the payments required thereunder. Defendant, Bear River Telephone Company, admitted it had entered into a 10-year contract of employment with plaintiff but claimed such contract was terminable for cause and that plaintiff's termination was justifiable and a result of his insubordination. Plaintiff replied that even if such contract could be interpreted to give the defendant the right to terminate him for cause, that defendant did not have such cause in this case and that the termination was done willfully, maliciously and without justification.

## DISPOSITION IN LOWER COURT

The case was tried to the court without a jury and the court entered Findings of Fact, Conclusions of Law and Judgment in favor of the plaintiff finding that plaintiff had carried out his employment duties as general manager of defendant faithfully and efficiently, that defendant terminated the contract of employment without just cause and excuse, and in violation of its terms and that such termination was unwarranted. The Court concluded that defendant must pay plaintiff the total of the salary contracted less a discount for payment in advance, together with an amount agreed upon by the parties owing on a retirement policy, which was part of the employment agreement and entered Judgment for the plaintiff against the defendant in the sum of \$81,264.99.



## RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the Judgment and Judgment in its favor as a matter of law, or that failing, a new trial.

## STATEMENT OF FACTS

Because this is a case requiring a full understanding of the facts and circumstances and because Appellant's "STATEMENT OF FACTS" consists mainly of argument and a recital of defendant's contentions, plaintiff deems it necessary to submit the following statement of facts:

### (A) PRELIMINARY EVIDENCE

Plaintiff, Vincent Chiodo, devoted his life work to the telephone industry. Leaving college in 1925, he worked for the Bell Telephone Company accumulating experience and some capital until 1943, when he acquired controlling interest in the Bear River Telephone Company. Plaintiff managed and controlled the destinies of this company from 1943, when it was then just serving the town of Tremonton and had approximately 700 stations, until the end of 1960, when it had grown to approximately 5,000 stations. During this period plaintiff and members of his family acquired additional outstanding shares of Bear River Telephone Company so that by 1960 they owned approximately two-thirds of all outstanding stock. All members of plaintiff's family worked in the telephone operation with his wife and

daughter working intermittently in the office, and his two sons working at various jobs as they grew up, finally becoming key employees in the operation.

Late in 1959, plaintiff concluded that it would be advisable to sell control of the company to an organization with sufficient capital to supply the facilities needed to satisfy the constantly increasing demand for services. While the company was financially sound and making good earnings, plaintiff felt it did not have adequate capital available to keep pace with the rapid growth of the area. He decided to sell control to an organization sufficiently large to furnish the required financing for expansion, provided such organization was not purchasing the company in order to resell it and provided, further, that he would be given a management contract until he reached the age of 65 years, which would give him a continuing free rein in the management and operation of the company for 10 years.

After preliminary discussions with certain prospective purchasers, plaintiff began negotiations with General Waterworks Corporation. Numerous discussions were held over a considerable period of time as to the terms of the sale and as to the terms of plaintiff's employment contract. The sale of the outstanding stock to General Waterworks was consummated at the end of the year 1960 and plaintiff began his employment under his management contract, which was then signed, with Bear River at the beginning of the year 1961.

## **(B) CONTRACT OF EMPLOYMENT**

Because of plaintiff's firm intention to retain the management and control of operations of Bear River Telephone Company with a substantial salary and the attendant prestige of the position until his retirement, he had extensive conversations with representatives of General Waterworks Corporation regarding this requirement and the contract of employment that would afford him these rights. It was recognized by all of the parties that while the contract of employment would be between Bear River Telephone Company and the plaintiff, the understanding and agreement concerning the terms of the contract had to be negotiated and resolved by the officers of General Waterworks Corporation whose acts and representations would then be ratified and adopted by Bear River after the stock sale was made. (Exhibit 1)

Mr. Helmer Hansen, an attorney in Chicago, Illinois, was hired by General Waterworks to represent it in the acquisition of Bear River Telephone Company and to work out the provisions of the stock exchange and the plaintiff's employment contract so that it would constitute a tax-free exchange. (R. 144, 142.) Mr. Hansen acknowledged that one of the required conditions in the stock sale was a ten-year employment contract insisted upon by the plaintiff (R. 142). Mr. Hansen also acknowledged that the plaintiff with his managerial employment contract, wanted to retain the autonomy and freedom that he had been used to in the past in his

operation of the company (R. 146, 156).

Mr. A. W. Sanders, Vice-President of General Waterworks and the manager of all of the telephone utilities owned by General Waterworks, was the company officer who, together with Mr. Helmar Hansen, negotiated the stock purchase agreement and employment agreement on behalf of General Waterworks. He was present at the two initial meetings in Chicago with plaintiff, which were also attended by Helmer Hansen. Following these meetings Mr. Sanders came out to Tremonton where he conducted further negotiations with the plaintiff (R. 27). Part of these negotiations consisted of a discussion held at Logan, Utah, on August 3, 1960, between Mr. Sanders and plaintiff, which was stenographically reported by Mr. George Parker, Court Reporter for the First District. The stenographic transcript of this meeting signed by both Mr. Sanders and Mr. Chiodo is in evidence as Exhibit 1.

In this discussion Mr. Sanders and the plaintiff explored very thoroughly the scope of the powers and duties which plaintiff would have as manager of Bear River Telephone Company when the stock ownership in the company passed to General Waterworks as well as his manner of compensation. Mr. Sanders' assurances to plaintiff's conditions and demands were broad and extensive, and a literal reading of these assurances seemingly guarantees to plaintiff the agreed wage of \$12,000 per year, plus certain insurance benefits for a full period of ten years, regardless of whether plaintiff carried out

his duties of manager or not. The following excerpt from this discussion begins on Page 27 of Exhibit 1, at line 18:

MR. CHIODO: I don't want to have this thing come up here with me. I want it tied down so that there's no question about it, and you decide to fire me, that you're going to pay my \$500.00 every two weeks for ten years.

MR. SANDERS: My opinion of this is that we can't fire you for ten years. That's what Hansen tell me. Now—

MR. CHIODO: Well, then your opinion is that this contract is ironbound, that the General Waterworks is bound to keep me employed.

MR. SANDERS: The Bear River Telephone Company.

MR. CHIODO: To keep me employed. I don't care about the telephone company once you own it. You can let her go to seed, but I want the paycheck every month.

MR. SANDERS: You're going to be just as interested in Bear River after this is over with as you are now.

MR. CHIODO: Well, assuming I lose my interest for a price, which I question, but you never know what will happen.

MR. SANDERS: Well, the only thing I hesitate on that is getting back to the legal end of it. I think this stock trade could be affected by saying we're paying you so much, see, Vince. I think that's the only reason. I would see no objections to it.

MR. CHIODO: You have no objections to tying it down so that we don't have to go to court to keep this in force?

MR. SANDERS: I don't see why we have to. You got the contract here.

MR. CHIODO: Yeah, but I can't write myself a check for \$500.00 payday if you refuse to sign the check; then what? I'm fired; right?

MR. SANDERS: No. I'm no attorney, of course, but the attorneys tell me this is all your way. We can't do anything .

MR. CHIODO: Well, you see, I'm talking out of school now, because the attorney hasn't given me an opinion, but I do read this in the paper.

MR. SANDERS: Of course, you don't know what all the facts of that thing were.

MR. CHIODO: No, I don't, but that same thing could be applicable to any employment contract, because this probably will set the pattern in Utah. this decision.

MR. SANDERS: Yeah, it could. Well, we'd better let him see that and talk to him when we get back to Tremonton.

MR. CHIODO: Well, I think I'd want some mention made of how valid, to what extent I can go to keep this contract in force. Okeh. Now I've read the vacation schedules and all the other terms affecting employment. To what extent will I be governed by hard and fast employment rules in order to qualify for the pay? In other words, I'm making reference to working an additional Saturday, if not all Saturdays. And then

deciding I'm going to take two or three months off when the occasion arises. If you decide that I'm not going to take this time off or I'm not going to take this vacation, you decide against me, you say, "Hell, this thing says \$12,000 a year at the rate of \$500.00 semi-monthly installments, you're going to be gone two months—we'll just dock you \$2,000 bucks."

MR. SANDERS: No. As you and I discussed before, we're going to let you run the property as you see fit.

MR. CHIODO: Yeah, but do I have to stay right here and run it every minute, or do I have a chance to take a couple of months off if I so desire?

MR. SANDERS: You can do that.

MR. CHIODO: You're being awfully easy to get along with.

MR. SANDERS: Well, I think we have an understanding in advance. You're not going to take very many couple of months off.

MR. CHIODO: Well, I don't know.

MR. SANDERS: I'm quite sure of that.

MR. CHIODO: Well, I'm not going to make any commitments now, if you're looking at my face and guessing that, I'm going to let you go ahead and guess. Will you buy it that way?

MR. SANDERS: Yes.

A reading of all of Exhibit 1 reveals that plaintiff in this recorded discussion with Mr. Sanders, was extremely frank and candid. He clearly expressed his

desire for independence in his management and control of the Bear River operation and received assurances that this would continue in the future after the stock sale, much as it had in the past. Plaintiff, on several occasions, indicated that he wanted to avoid someone getting peeved with him because of his personality or manner of doing business and that he wanted autonomy so that the operations would not be affected by temperament. See for example page 19 of Exhibit 1, where plaintiff states he wants his authorization clear so that they can avoid any "clash of personalities." At page 29, Mr. Sanders states "as you and I discussed before, we are going to let you run the property as you see fit" and after acknowledging at page 32, that this was the plaintiff's life work, stated on page 37 that plaintiff would be sure to run Bear River for ten years.

The intent of the parties is clear throughout this transcript that plaintiff was to perform the duties as manager and be given broad powers of management so long as he operated the company efficiently and profitably. Furthermore, that in all events he was to receive the \$120,000 over a period of ten years by semimonthly payments of \$500.00. At the conclusion of the transcribed discussion it was expressly agreed that the transcript would be the governing factor in any future disputes and that if any questions might arise in the future they should be settled on the basis of the discussion that day. (See page 45 of Exhibit 1.)

To insure that he could rely on the transcribed



discussion, plaintiff insisted before he would agree to sign the stock sales agreement that he be given assurance by General Waterworks that this transcript understanding, Exhibit 1, was authorized, understood and approved by General Waterworks and would be honored by Bear River Telephone Company after control had passed (R. 30 and 36). The assurance demanded by plaintiff was given him by the telegram of November 8, 1960, from James Jennings, Secretary and General Counsel for General Waterworks (Exhibit 2). This telegram followed the letter of November 4, 1960, to plaintiff (Exhibit 5) wherein General Waterworks, through Vice-President V. F. Rigling, said:

"This letter is written to confirm our understanding with you that in the event that such exchange transaction is consummated, and our nominees are then elected to the Board of Directors of Bear River Telephone Company, we will then cause Bear River Telephone Company to enter into an employment agreement with you, for a period of ten years, such agreement to be in the form attached hereto with such changes therein as may be agreed to."

The telegram demanded by plaintiff following this letter was intended by the parties to reflect an agreed change in the form agreement by incorporating by reference therein the transcript. As this was the same form of agreement approved by Bear River, the same incorporation would be effected and understood.

Helmer Hansen, defendant's attorney and representative in the negotiations with the plaintiff, acknowl-

edged that plaintiff insisted on an affirmation of this Logan Transcript before he would sign the final draft of the employment agreement (R. 151, 152). Mr. Hansen admitted that the sending of the telegram affirming the Logan Transcript was a condition to the plaintiff's accepting the whole deal (R. 152). Mr. Hansen further acknowledged that he knew the sending of the telegram was to affect the incorporation by reference of the understanding recited in the Logan Transcript into the terms of the employment contract and that this was done for the purpose of satisfying plaintiff as to the final draft of the employment contract (R. 153, 154).

Following the final agreement by General Waterworks of plaintiff's conditions relating to the employment agreement, the plaintiff, on December 21, 1960, finally signed the stock purchase sales agreement (Exhibit 3), which had been prepared under date of September 23, 1960 (R. 35). The stock sale was then implemented and a new Bear River Board of Directors was voted in, vesting control of Bear River into General Waterworks. This was accomplished at a Bear River Board of Directors meeting held on January 3, 1961. (Exhibit 7), pursuant to the agreements and understandings that had been reached between plaintiff and the officers of General Waterworks, who, thereupon became the officers of Bear River (R. 87, 88). The Board, at this same meeting, authorized the ten-year employment agreement that had been promised plaintiff. Following this, the simple two-page letter document

reflecting such agreement and which expressly incorporated all prior understandings regarding it, was signed for Bear River by A. M. Sanders, Executive Vice-President; the same A. W. Sanders who had negotiated the employment agreement on behalf of General Waterworks (Exhibit 6).

The letter contract of employment provided that plaintiff would be hired as manager of Bear River Telephone Company for a period of ten years at a salary of \$12,000 per year, together with a payment on a life insurance contract. The contract was in the same form and language theretofore submitted to Plaintiff by General Waterworks and stated that it was "written to confirm our understanding with you concerning your continuing employment by Bear River and the nature of your duties." This contract, confirming a prior understanding reflects the intent of the parties that it incorporates by that language the express prior understanding theretofore had with respect to plaintiff's employment, namely the detailed management agreement reflected in the approved transcript. Throughout these prior negotiations and discussions it was, of course, contemplated that General Waterworks as the controlling stockholder would direct the affairs of Bear River Telephone Company and that Bear River Telephone Company, immediately after passing under the control of General Waterworks, would by this letter contract, confirm and ratify the previous discussions and agreements.

### **(C) DEFENDANT'S WILFULL BREACH**

The evidence presented in the trial showed that almost immediately after the acquisition of Bear River by General Waterworks, the officers of General Waterworks, and Bear River began violating the terms and spirit of plaintiff's employment contract in that they did not allow plaintiff the latitude of action and responsibility of management that he had insisted on as a condition of the sale and which had been assured him in the negotiations. This led to the type of misunderstandings predicted by the plaintiff in the transcript between himself, as Manager, and certain staff men situated in the New London, Iowa, offices of General Waterworks.

Despite these restrictions, annoyances and frustrations, plaintiff continued to manage Bear River Telephone Company in a highly efficient and profitable manner. The record shows that this company was the most prosperous of all the General Waterworks properties and had the highest net income per station, highest return on investment and the highest return on the net plant (R. 126, 127). Defendant's officers acknowledged at the trial that plaintiff throughout his management did a good job servicing Bear River customers (R. 192) and that he rendered good and adequate service to the largest and most demanding customer, Thiokol (R. 198).

The true intentions of the new ownership with respect to their commitment to the plaintiff were indicated in April of 1961 when the Articles of Incorpora-

tion were amended to provide for a procedure to remove officers for cause. The following July plaintiff was summoned to Denver by the new Bear River Executive Vice-President, Mr. Sanders, and there advised that a trade was being negotiated by General Waterworks whereby Mountain States Telephone & Telegraph Company would acquire Bear River and that plaintiff would be terminated (R. 141).

The evidence in the trial introduced by the defendant in an attempt to support its contentions that the plaintiff had not been a dutiful, loyal employee, rather than proving such fact, merely showed how plaintiff was continuously hampered and interfered with in his management of the operations of Bear River Telephone Company, contrary to the assurances that he had been given prior to his sale of his controlling interest, which commitments defendant's officers knew were required in order to acquire the company. Rather than being able to continue the "one-man operation" that Helmer Hansen admitted plaintiff insisted upon as a condition of the sale (R. 156), plaintiff found himself subject to direction from not just Mr. Sanders, but all of the Bear River officers located in General Waterwork's New London office (R. 192). Donald Bell, the successor to A. W. Sanders as Executive Vice-President of Bear River Telephone Company, acknowledged to the plaintiff in October of 1963 that "obviously you have a lot of reason for complaint and that one reason I am out here, frankly, is to see what we can do, what I can do, or what I can for our general office procedures.

I would like to have them changed so we will give you the kind of help and cooperation that you should have and that you want" . . . (sic) (R. 95).

On December 12, 1963, plaintiff received Exhibit 17, a letter purporting to discharge him as manager of the Bear River Telephone Company. Since that date, Bear River Telephone Company failed and refused to pay him any salary or other compensation and failed to pay the premium on the life insurance policy which was part of his employment agreement. Plaintiff was unable to find any steady employment following the termination by Bear River and despite continuous efforts to obtain other employment was only able to find work for a few days prior to the trial (R. 45, 46).

The Notice of Termination of December 12th (Exhibit 17), came from the home office in New London, Iowa and advised the plaintiff that the specific charge against him on which he was being removed as an officer and employee was

"I. That you failed to comply in any manner with five specific instructions issued to you by the Vice-President and General Manager in his letter of November 19, 1963."

In the defense presented by the defendant corporation, little, if any, evidence was presented with respect to this specific charge or how plaintiff failed to comply with such instructions. Prior to the formal letter of termination dated December 12, Mr. Chiodo received a letter dated December 3, advising him he was being relieved

of his responsibilities as manager as of that date and that a special meeting of directors was being called for December 10th, 1963, to remove him as an officer of the company (Exhibit 49). These actions were also based upon the so-called specific charge of failure to respond to the "five specific instructions" of then Vice-President and General Manager of Bear River, Donald Bell, in his letter of November 19, 1963. This series of events is chronicled and the charges contained in the letter of November 19th replied to by Mr. Calvin L. Rampton, counsel for plaintiff, in his letter directed to Mr. Donald Bell, dated December 6, 1963 (Exhibit 48).

The letter of December 3rd to the plaintiff from Mr. Bell notifying him he was relieved of all duties and responsibilities as of the close of business December 6, 1963, concluded by offering plaintiff the right to resign prior to the Board Meeting and indicated that if he would agree to resign, the Board would be asked to consider a termination payment (Exhibit 49).

Mr. A. W. Sanders, Executive Vice-President of Bear River Telephone Company and the man who had negotiated the acquisition of Bear River for General Waterworks and the employment contract with the plaintiff, died and was replaced by Mr. Donald Bell in April of 1963. Bell claimed that shortly after he assumed his position that he was told that he could fire plaintiff at any time he wanted to and that he finally fired him "because he was impossible to live with" (R. 176). Bell acknowledged that plaintiff wasn't fired because of the

rate of return General Waterworks was obtaining on its net investment in Bear River, which was some 34<sup>9</sup>/<sub>16</sub>% in 1963, the best rate of any company owned by General Waterworks (R. 176).

Defendant's attempted proof of justification in terminating plaintiff consisted in the main of certain correspondence indicating some friction and clashes of personality similar to that which plaintiff had anticipated and hoped to avoid in his transcribed discussion with Mr. Sanders in Logan prior to the sale. These difficulties arose from the new owner's failure to give plaintiff the independence promised him in the company.

The other evidence offered by plaintiff which consumed much of the trial was in regard to certain contracts that were let by Bear River to one Max Fannesbeck, a general contractor. Defendant attempted to establish or at least imply that the plaintiff permitted his two sons, who were key employees of Bear River, to improperly moonlight on these Fannesbeck contracts. The evidence, however, established that these Fannesbeck contracts were let and Bear River employees used thereon at the suggestion and with the full knowledge of A. W. Sanders and, further, that most employees of Bear River were required to be employed at various times in order to complete the work to be performed under these contracts (R. 225, 226). The testimony of Mr. Fannesbeck and Grant Allred, a subcontractor, merely confirmed that the plaintiff and his two sons were excellent telephone men and honest and loyal em-



ployees of Bear River Telephone Company. The evidence disclosed that such work as was done during the Bear River working hours had actually been Bear River work, and not contract work as defendant attempted to show.

Defendant's intention to attempt by any means possible to justify the termination of plaintiff's employment contract was announced by the defendant's counsel, James L. Morrison, in his letter of December 9, 1963, (Exhibit 39), wherein he advised plaintiff's counsel, Mr. Calvin L. Rampton, that Bear River's defense would "have to constitute an attempt to destroy Mr. Chiodo." The malice and bad faith which motivated defendant in its actions toward plaintiff are reflected, not only by this letter and the history of the transaction as shown in the evidence, but also by the actions taken against the plaintiff's two sons, Don and Gene Chiodo. These men who had grown up in this company were summarily dismissed on March 13, 1964. Prior to this dismissal there had never been any complaints about the performance of work by these two men (R. 120, 123) and the evidence indicates they had been performing their work in a satisfactory manner. They were, however, given termination slips stating their work was unsatisfactory. Defendant admitted that the termination slips were erroneous and that Gene and Don Chiodo were not terminated because of their work, but rather because they were "fomenting trouble" (R. 174). Defendants did not attempt to produce any evidence to substantiate this charge.

The reason that General Waterworks was willing to make any promises necessary to acquire the valuable Bear River property became clear through the sale General Waterworks finally succeeded in making of this property several months prior to the trial when they sold the Bear River stock ownership for some sixteen times what they had paid for it (R. 93). Howard Butler, a former employee of General Waterworks in its New London offices, testified that he had overheard a conversation between officers of the defendant that plaintiff had been given his contract with broad management powers because that was the only way they could buy the Bear River Company (R. 128).

## ARGUMENT

### I. THE TRIAL COURT FOUND DEFENDANT DID NOT HAVE CAUSE FOR PLAINTIFF'S TERMINATION.

Defendant's first argument implies that the trial court found that the employment contract in issue could not be terminated, even for cause, without liability. This is not the fact, for the trial court bottomed its judgment for the plaintiff on the conclusion that the defendant's termination of the plaintiff's ten-year employment contract "was without just and sufficient cause and was in violation of the terms and provisions of the employment agreement between the parties." This language is found in paragraph 4 of the Court's Conclusions of Law, and paragraphs 5, 6 and 7 of the Court's Findings of Fact

support and amplify this conclusion.

It appears to be the defendant's contention that the two-page letter agreement was intended by the parties to integrate fully the understanding and agreement regarding plaintiff's employment, and that the parties, and particularly the plaintiff, thereby revoked and nullified all of the previous negotiations and understandings that had been reached regarding plaintiff's employment. Such a contention is totally without support in the record of this trial.

Certainly this was no ordinary employment agreement, as defendants apparently want the court to believe, for Vincent Chiodo was in a strong bargaining position when he negotiated the terms and conditions of his employment. He had a valuable telephone company that General Waterworks wanted to acquire. He laid down some stringent conditions to such acquisition, which General Waterworks accepted and which it had Bear River ratify and affirm after General Waterworks acquired the ownership of Bear River. These conditions included the right to continue to manage Bear River much as he had in the past, and the promise that he would not be fired unless Bear River continued to be obligated to pay his salary. Plaintiff wanted the continuing financial security of employment from the company that he had built from modest beginnings into a substantial utility company, and also the continuing prestige, challenge and responsibility of management, and he wanted these things without strings. (See the transcript discussion, Exhibit 1, and particularly the

language on page 27, line 18, and continuing to the end of page 29.)

It is therefore true that one of the plaintiff's contentions was that the employment contract guaranteed that plaintiff would not be terminated from his job in such a way that he would lose the salary payments provided for. Defendant's response to this contention was not a denial that such a promise was made, but rather that it was made by General Waterworks in its acquisition of Bear River, and not by Bear River. The obvious answer to this confession and avoidance was that although the contract was negotiated and agreed upon by officers of General Waterworks as a condition of acquiring Bear River, that the promises and agreements then made were later ratified and adopted by Bear River through the very same officers, who then spoke for Bear River as well as General Waterworks.

Whether or not this employment contract could or could not be terminated by defendant without liability for cause is, however, moot in light of the court's findings and conclusions that defendant did not in any event have justifiable cause for plaintiff's discharge, and thus the defendant's general statements of law under its Point I while interesting, are in no way controlling.

**II. THE ACTIONS OF VINCENT CHIDO DURING THE COURSE OF HIS EMPLOYMENT WITH BEAR RIVER TELEPHONE COMPANY WERE NOT INCONSIS-**

TENT WITH THE RELATIONSHIP OF  
PRINCIPAL AND AGENT AND BEAR  
RIVER TELEPHONE DID NOT HAVE  
GOOD CAUSE FOR HIS DISCHARGE.

The plaintiff has no argument with the general statements of law cited by the defendant-appellant that if the court finds that plaintiff had no guarantee of continuing payment as part of his contract that defendant could have discharged the plaintiff without liability if it had had substantial reasonable cause for such discharge. Defendant's brief asserts a number of acts which it contends plaintiff engaged in during the course of his employment that were inconsistent with the employer-employee relationship and therefore constituted good cause for plaintiff's discharge. It is interesting to note that none of these acts were asserted or occurred at the time of plaintiff's discharge, and that they were all subsequently dredged up by defendant in the defense of this suit. Defendant's alleged reason for terminating plaintiff in December of 1963 was because of plaintiff's supposed failure in complying with certain instructions from President Donald Bell in November of that year (Exhibit 17). Defendant essentially abandoned this reason as a defense because it affirmatively appeared that plaintiff had in fact substantially complied with the letter requirements of President Bell and to the fullest extent possible (Exhibit 48).

Defendant sets forth five specific breaches upon which it finally relied to justify plaintiff's discharge.

They were the following: Payroll padding; insubordination; disclosure of confidential information; failure to render proper accounts; and failure to communicate information. Defendant attempts to substantiate these serious sounding charges by reciting under each heading only those facts defendant attempted to establish without setting forth the facts presented by the plaintiff on which the Court made its Findings.

It is, of course, fundamental in a case such as this that the plaintiff, having prevailed, is entitled to the benefit of the evidence viewed in the light most favorable to him, together with every inference and intentment fairly or reasonably arising therefrom. *McCollum v. Clothier*, 121 U. 311, 241 P.2d 468. Because of this it is imperative that all pertinent facts are recited, and particularly those upon which the plaintiff relied. Plaintiff will therefore answer each of defendant's following charges with a recital of the facts regarding each alleged breach.

#### (A) PAYROLL PADDING

Defendant relies upon the case of *Dixie Glass Company v. Pollak*, 341 S.W. 2d, 530, 91 A.L.R. 2d 662 (Tex. Cir. App. 1960) and particularly the language of this case indicating that "aggravated cases of refusal to obey reasonable orders of the employer that amounted to insubordination, or cases of purely dishonest acts toward an employer on the part of the employee in the attempted performance of employee's work, or acts such as an unprovoked fight by an employee with an officer

of the employer in the presence of other employees constitute good cause for discharge." Plaintiff has no complaint with this case or the rule pronounced thereby, but submits that defendant presented no evidence establishing that the plaintiff was guilty of clearly dishonest acts, or aggravated cases of refusal to obey.

Defendant asserts that plaintiff falsified payroll records of his son, Don Chiodo, and directed other employees of Bear River Telephone Company to falsify Don Chiodo's payroll records, all of which resulted in payroll padding and illegal and improper payments to Don Chiodo. The evidence presented by defendant attempting to justify each charge was simply that Don Chiodo worked for some 9 days in Montana with a contractor by the name of Max Fannesbeck in November of 1962, and that during all of this time he remained on the Bear River payroll. These facts were undisputed by the plaintiff, as was the answering testimony that Don Chiodo had this time coming to him because of work that he had been required to do for Bear River during his vacation period and some extensive night work which he had performed for Bear River without charge (R. 546, 547, 548). That there was nothing wrongful or hidden with respect to Don Chiodo's taking nine days off was further borne out by the fact that the employee who entered the additional time on Don's record admitted that plaintiff had told him that if he ever had any trouble with the New London officers, and if they tried to fire him, he wanted all employees to tell the truth, indicating plaintiff's clear conscience

and freedom from guilt (R. 465).

While all of defendant's claims of justification in discharging plaintiff appear contrived and inadequate, the most feeble attempt to discredit plaintiff comes in the accusation that plaintiff knowingly permitted Don and Gene Chiodo to improperly profit from contracts let to Max Fonnesbeck to the prejudice of the defendant.

Defendant initially attempted to make it appear that the Fonnesbeck contracts themselves were suspect and improper, but had to abandon this contention when the evidence established that these contracts were directed by Mr. A. W. Sanders, defendant's chief executive officer. Mr. Sanders was the one who requested that Max Fonnesbeck terminate his employment with the defendant and take these special construction jobs as an independent contractor, with a full realization that Fonnesbeck would have to rely on Bear River personnel to do the technical work required, because of the lack of other qualified men in the area. Another reason defendant beat a hasty retreat from the position that the contracts were improper was the evidence that developed showing that Bear River did not itself pay for these contracts, and that Thiokol financed the work and was very satisfied with the results thereof (T. 482).

Defendant's evidence under this charge consisted of the testimony of several employees that they had participated in certain work at the Thiokol plant and on the central office equipment in the Tremonton office.



This evidence was supposed to establish that these Bear River employees performed work included in the Fonnesbeck contracts while on the payroll of the defendant, thus profiting the independent contractor to the expense of the defendant. All of these employees who testified for the defendant admitted on cross-examination that they did not personally know what the contract work consisted of and this fact alone negated defendant's efforts under this charge (R. 339, 360, 371, 378). Additional proof conclusively established the baselessness of this accusation and the propriety of the conduct of both Don and Gene Chiodo, as well as Max Fonnesbeck and Grant Allred, the independent contractors who were, in effect, accused of fraud and wrongdoing.

Defendant relied on the testimony of one Steve Anderson, who testified he assisted Don Chiodo over a period of time in doing cable splicing on a Thiokol project, which defendant's brief now contends was identified by Fonnesbeck as being part of his contract. This statement, unsupported by any evidence, is false, for the testimony established that the cable splicing was not part of the Fonnesbeck contract at all, and had been actually let to another contracting firm known as Henkels-McCoy, which firm had been unable to finish the work because of labor difficulty, thereby requiring the Bear River employees to complete the cable splicing work (T. 544, 545). Max Fonnesbeck not only did not identify this as part of his contract, but expressly denied that this cable splicing was included in his work on the Thiokol project (T. 500). All of this testimony was

therefore meaningless, because Don Chiodo did this cable splicing as part of his employment with Bear River. That Don Chiodo normally did the cable splicing for the defendant was acknowledged by Maurice Staples, the plant accountant (T. 459).

Defendant's other main witness on this charge was one Jerry Jones, who testified that he adjusted some switches and wipers and worked on certain other equipment in the central office of the defendant. A full development of this evidence, here again revealed that the work Jones had done was not contract work at all, but merely regular maintenance work which goes on continuously in the defendant's telephone operation and which its employees are constantly being required to do (R. 518, 555). Both Grant Allred and Gene Chiodo flatly denied that any of the contract work involving the central office was done by Bear River employees on Bear River time (R. 520, 552).

There was, of course, never any issue that both Don and Gene Chiodo performed valuable services on their own time in order that the Fonnesbeck-Allred projects could be completed for Bear River and that they were paid for such effort. The evidence showed other Bear River employees also performed such work and these contracts were let at the direction of A. W. Sanders (R. 255, 256). The evidence further established these contracts were paid for by Thiokol with Bear River being merely a conduit for the money (R. 559) (Exhibit 114). Max Fonnesbeck and Grant Allred, both of

whom are responsible, reputable businessmen, testified that Don and Gene Chiodo performed their work in a competent manner and that they were not, in their opinion, overpaid for their services (T. 257, 289).

Defendant's final charge of fraud against plaintiff was based upon a payment to plaintiff's fourteen-year-old granddaughter for some \$354.00 for the delivery of the Bear River Telephone Company directories. To establish this claimed fraud, defendant relies on the testimony of defendant's employee Sam Warner. Mr. Warner claimed to have seen Don Chiodo helping his daughter deliver telephone directories one day while he was in town on a coffee break. Mr. Warner acknowledged that he had on prior occasions also delivered the telephone books for additional compensation, as had other employees of the company. The defendant each year had paid for the delivery of the books the amount of postal charges that the company would have had to pay if the directories had been mailed (R. 470). The testimony of plaintiff refuted this charge and established that there was nothing improper with such arrangement (R. 470).

This accusation indicates the desperation of the defendant in attempting by any means to justify the plaintiff's discharge. A similar example was the accusation made at the trial by defendant, again through testimony of Mr. Sam Warner, that plaintiff had given his daughter, Mary Anne, salary payments when she was not working (R. 449-450). This charge was aban-

done by defendant when the evidence established Mary Anne did office work and maintained certain records for the company at her home (R. 534-538).

#### **(B) INSUBORDINATION**

Defendant charges that plaintiff was disobedient, disrespectful and unfaithful, and communicated such insolence and disrespect to employees of Bear River Telephone Company. A review of the testimony in the record discloses that such charges were groundless, or that the acts complained of were provoked, and apparently intentionally provoked. In support of this charge, defendant mentions an insurance contract that Bear River had with an insurance agent in Brigham City by the name of Brough. Plaintiff was directed to cancel this policy in April of 1961, a few months after he had been employed as manager of the company by the new owner. Plaintiff refused to terminate this policy, which he had negotiated for a five-year term prior to the acquisition of Bear River by General Waterworks (R. 570).

There was no denial of such refusal, but the refusal was not unreasonable, for it appeared that plaintiff responded to the direction to terminate and informed the New London officers that he felt a moral, as well as a legal commitment to abide by the terms of the insurance agreement which had been entered into by plaintiff for Bear River on the basis of bids, because of the fact that Mr. Brough had fully performed his end of the agreement (R. 561, 562).

This incident was one of the first following acquisition wherein defendant, rather than plaintiff, breached the employment agreement and the understanding that it had made with plaintiff to permit him to continue to manage the defendant corporation following its acquisition by General Waterworks, as he had in the past.

35 Am. Jur., *Master and Servant*, paragraph 34, page 478, states:

“In order to constitute disobedience, the employee’s conduct must have been wilful or intentional, wilfulness being characterized by a wrongful and perverse mental attitude rendering the employee’s act inconsistent with proper subordination. An employer will doubtless be precluded from asserting violation of a rule or order as a justifiable ground for the discharge of an employee when it appears that he has waived compliance with the rule or that the rule has been abrogated by habitual violations of which the employer has notice.”

The facts of this incident, occurring as it did some 20 months prior to the plaintiff’s dismissal, showed that the defendant waived compliance with this request and that the obvious reason for such waiver was the fact that plaintiff’s refusal was entirely justified under the circumstances, and did not indicate a wrongful or perverse mental attitude.

See also 35 Am. Jur., *Master and Servant*, paragraph 50 at page 488, where a discussion of waiver or condonation of an employee’s conduct states:

“The retention of an employee, however, after the actual discovery of an act of misconduct on his part will, in some circumstances, warrant the inference that the act has been condoned, so as to be no longer available as a ground of dismissal.” (Citing cases)

This incident occurring in April of 1961 with full knowledge of the defendant, even if it could be called misconduct, was waived or condoned.

Defendant next recites certain communications from plaintiff to A. W. Sanders and Donald Bell, Saunders' successor in the New London offices, with respect to a Mr. Hanson, one of the General Waterworks employees in New London, who became vice-president of defendant, and Mr. Cornwell, another staff officer of General Waterworks and Bear River in the New London office. It is clear from the record that Mr. Cornwell was a thorn in plaintiff's side almost immediately after the acquisition of the Bear River by General Waterworks. At the time of the first meeting of the Bear River Board of Directors at Tremonton, Mr. Cornwell went out of his way to embarrass plaintiff by informing defendant's banker that checks signed by plaintiff should no longer be honored (R. 560). He also was the one that made a point in advising plaintiff that all defendant's existing insurance policies would be cancelled, which prompted plaintiff's protest against the arbitrary chopping-off of the Casualty Fire Insurance Company policy with Mr. Brough (R. 562). The correspondence introduced indicating a dispute between Mr. Cornwell

and plaintiff regarding a Bliss Crandall, the defendant's billing agent in Provo, Utah, reflects that it was caused because of the interference in local management functions by Mr. Cornwell, contrary to the understanding on which plaintiff sold his controlling stock in Bear River (Exhibit 24).

This constant and continuing interference by the New London office with plaintiff's management of Bear River also explained, in part, the difficulty that developed with regard to Mr. Hansen. In this case, however, there was no personal misunderstanding between the two men (R. 569). Plaintiff became distressed because of certain engineering mistakes admittedly made by Mr. Hansen which affected the service and operations of Bear River (R. 144). It is submitted that nothing was said or done by plaintiff toward Mr. Hansen or any other employee or officer of Bear River or General Waterworks that could be classified as insolence. Plaintiff did become exercised on several occasions because of the irritations that developed as a result of New London's interference and failure to permit him to manage the company as had been agreed. Under all of the circumstances it appeared that plaintiff exercised a remarkable amount of restraint.

35 Am. Jur., Master and Servant, paragraph 48, page 480, states:

“Unprovoked insolence or disrespect on the part of the employee toward the employer, or the latter's representative may afford ground for

the discharge or dismissal of the employee prior to the conclusion of the term of employment."

Even if it could be contended that such conduct amounted to insolence or disrespect, it certainly could not be classified as unprovoked. Any statements made by plaintiff regarding the competency of Mr. Hansen were justified in light of the errors committed by him and the serious and costly effect of such errors on the Bear River operation.

Defendant complains that plaintiff directed Bear River employees to keep officers of the company in New London in the dark and told them not to send New London anything which was not specifically asked for. It was apparent why plaintiff did not wish his subordinates to send information that had not been requested back to New London because of the continuing interference by New London in the Bear River operations. He did, however, expressly order all employees to send New London the information that had been requested. This is proper administrative control and procedure (R. 327, 461).

Defendant asserts that plaintiff advised certain Bear River employees that there was going to be a court battle over his contract as early as six months after the sale, and said that "New London was trying everything they could to get him to resign as manager, and that he would not resign regardless of what they did" (R. 489). It is difficult to understand why defendant would attempt to rely upon this conduct by plaintiff for, again,



it merely substantiates the obvious fact that New London was constantly interfering with the Bear River operation and provoking plaintiff by refusing to give him the autonomy, authority and respect that had been promised to him. See plaintiff's complaints about defendant's failure to live up to the contract as testified to by defendant's witnesses (R. 324). See, also, page 19 of Exhibit 1, where plaintiff attempted to avoid such problems.

It is understandable why plaintiff soon after the sale had occasion to feel that there might be a court battle over his contract. He had done everything he thought to be necessary to insure his right to retain the operational control and management of Bear River, even to the extent of having the understanding reported, transcribed and then affirmed. The almost immediate disregard of these commitments would certainly make any reasonable person believe that there might ultimately be legal proceedings required to enforce his rights. As to Mr. Warner's contentions that plaintiff said that he would do everything he could legally to get himself discharged, the obvious answer is that if plaintiff merely desired to be discharged, the quickest and best way to obtain this result would have been to run the company into the ground, rather than operate as he did, an efficient telephone company, providing good service and developing extremely high profits. It must be noted that Mr. Sam Warner was hardly an unbiased witness, and that a review of his cross-examination reveals that his credibility was thoroughly discredited.

Defendant cites a number of exhibits, claiming their pertinence in establishing plaintiff's disobedience, insolence and disrespect. These exhibits, while impressive in number when actually examined and understood do not bear out defendant's contention. When considered individually in their proper context, they are found to be not nearly as damaging as contended, and fail to establish any unprovoked disobedience, insolence, or disrespect, merely reflecting the arbitrary interference of New London with plaintiff and the Bear River operations, contrary to defendant's initial commitments to the plaintiff.

#### **(C) DISCLOSURE OF CONFIDENTIAL INFORMATION**

Defendant asserts that plaintiff's action in informing the Public Service Commission of Utah and the R.E.A. in August of 1961 of pending negotiations between Mountain States Telephone and Telegraph Company and General Waterworks for the exchange of Bear River Telephone Company properties, was in direct and flagrant violation of its orders to keep such negotiations secret. The evidence is not clear that Mr. Chiodo was ever explicitly instructed not to mention this matter to anyone, but it is reasonable to assume that General Waterworks did not want any broad public disclosure of this fact, particularly because of its prior assurances to the Public Service Commission as well as the Plaintiff but a few months before, that it was not buying with any intention of resale.

Mr. Chiodo was justified in making the limited dis-

closure of this transaction that he made, because of the fact that he had cooperated with General Waterworks in making a personal assurance to the State Public Service Commission that General Waterworks intended to operate Bear River and had no intention of speculation and resale, and because of the fact that he had been told that General Waterworks was going to terminate his employment if the transfer of the Bear River properties was concluded. It is submitted that there is nothing unreasonable in Mr. Chiodo's conduct when all of the facts and circumstances are considered. He had insisted as part of his sale that the purchaser must intend to buy the property to operate and not turn around and resell. Here again, his conduct was justified by the flagrant violation of General Waterworks and Bear River of their prior commitments, and did not, therefore, constitute a breach by plaintiff. Furthermore such claimed disobedience was condoned and was clearly not willful or perverse (R. 563, 564).

Defendant concludes this charge by contending that immediately after the meeting in Denver, Vincent Chiodo declared war on Bear River Telephone Company and did everything in his power to cause trouble and problems for the company. No specific facts were cited for this accusation, nor does any evidence support it. The best answer to this completely false charge is, of course, the undisputed fact that under plaintiff's continuing management Bear River continued to provide its customers good service and made its owner, General Waterworks Corporation, more money than any of its

other telephone properties (R. 126, 127, 192).

#### **(D) DISLOYALTY**

It soon appeared, following the acquisition by General Waterworks of Bear River that the many promises made to the plaintiff to induce him to sell his stock including those that General Waterworks purchased the property to operate, not resell, and the broad management powers to be given to the plaintiff had been false and misleading. These broken promises by defendant explain and excuse plaintiff's contacting a representative of J. A. Hogle Company in an attempt to repurchase the Bear River stock from General Waterworks. This action took place approximately a month after plaintiff had been advised of General Waterworks' intentions to resell Bear River to Mountain States. Plaintiff's conduct was not disloyal because he had been advised shortly before of General Waterworks' desire to sell the Bear River properties and its intentions to terminate plaintiff's services if such sale was accomplished.

In light of these facts can it be said that plaintiff's attempt to purchase control of Bear River back from General Waterworks was either improper or unfaithful and, if so improper and unfaithful, to whom? Certainly not improper and unfaithful to Bear River. The attempted purchase of stock from General Waterworks was not a breach of any responsibility that plaintiff might owe as manager of Bear River Telephone Company. Such attempt on his part stemmed from an

understandable desire to not only protect himself, but also to preserve the company that he had built in a lifetime of effort, namely, Bear River Telephone Company, and insure that it would be owned and operated by a responsible organization. There was, therefore, nothing unfaithful to the defendant, Bear River Telephone Company's interests in the plaintiff's action in attempting to repurchase the stock.

### **(E) FAILURE TO RENDER PROPER ACCOUNTS**

Defendant urges that plaintiff failed to collect proper charges from customers to the prejudice of the defendant. Defendant again relies on the testimony of Mr. Sam Warner in support of this accusation, which concerned charges to Thiokol for the watts bands and certain advertising accounts. This charge demonstrates the tremendous diligence and ingenuity defendant exercised in reviewing and reconstructing every transaction that took place during the three years plaintiff managed the Bear River Telephone Company in a desperate effort to find anything that might be questionable or embarrassing. Many hours were obviously spent interrogating employees and reviewing records endeavoring to develop anything possibly prejudicial.

The substance of this charge was that an adjustment was required of the watts bands charges to Thiokol for a period of some six months and that a credit was allowed Thiokol against the required additional charge, because of a fire which occurred during the period causing an outage on the watts bands (R. 441, 442). Mr.

Warner did not testify that there was anything improper about the charge or the method of handling the matter, but contended that plaintiff stated that it was not up to the local office to determine if the charge produced a profit or a loss and that because New London had all the figures involved, it was up to them to make this determination (R. 444). Mr. David Jensen, Thiokol Supervisor of Communication, affirmed the fire interruption of the watts bands service and that a credit was given as a result thereof (R. 484). Sam Warner acknowledged that New London did have, in fact, all of the information that Tremonton had, with respect to the watts bands service and billings (R. 494).

There was a similar accusation regarding certain advertising billings which Mr. Warner contended resulted in a small loss to the defendant corporation and that when he pointed this out to the plaintiff, plaintiff responded that it was up to New London to make any changes in charges because they had the same information that Tremonton had. Mr. Warner again acknowledged this to be the fact and thereby admitted that plaintiff had done nothing that was not done with the full knowledge of the New London office, or that was improper or prejudicial to the defendant's interests. How defendant can now claim that because it might have lost several hundred dollars on certain advertising billings, it can use this to justify the termination of the plaintiff, when the record shows that plaintiff produced greater net profits in the Bear River operation than any other property owned by General Waterworks, is diffi-

cult to understand.

#### **(F) FAILURE TO COMMUNICATE INFORMATION**

Defendant's final effort to justify its termination of plaintiff's employment is based on the charge that plaintiff permitted two employees, Sam Warner and Maurice Staples, to do some extra work as janitor and automotive repairman respectively on a straight time basis, rather than on overtime, without communicating this information to the New London office. It is obvious that plaintiff was here trying to save money for the defendant and the he personally received no benefit whatever from these arrangements. Whether, in fact, there was an actual violation of the Federal Wage and Hour Law under such arrangements is very questionable because both of these men held office jobs and, in effect, contracted to perform additional and totally unrelated duties on their own time under separate contracts. Defendant was not sufficiently concerned about this conduct to terminate the services of either Warner or Staples, despite the fact that Warner, the office manager, admitted that he had requested the additional work and could see nothing wrong with the way the arrangement was handled (R. 493). (Exhibit 35).

It is submitted that plaintiff's actions were not incompatible with the faithful performance of his duties, nor did they render him in any way unfit for his job. Such an accusation implying that plaintiff hired these men to perform these menial tasks for the purpose of getting defendant in trouble with the Wage and Hour

Law is patently absurd. This charge further shows defendant's desperate effort to develop anything that might justify its discharge of the plaintiff.

It is a fundamental rule of law that in any action by an employee against his employer for wrongful discharge, the burden of providing justification for the discharge falls on the employer. For a recital of this recognized rule by the Supreme Court of Utah, see *Russell vs. Ogden Union Railway and Depot Co.*, 247 P.2d 257. It is respectfully submitted that defendant failed to present any substantial, preponderating evidence establishing that the plaintiff committed a material breach of his employment contract by an unexcused failure to substantially perform the work he contracted to do or by a serious violation of the duty of loyalty or obedience. (Restatement of Agency Section 409.) It, therefore, failed to sustain its burden in this case of justifying plaintiff's discharge.

### III. THE ORAL OPINION OF THE TRIAL COURT IS NOT INCONSISTENT WITH THE COURT'S FINDINGS AND JUDGMENT AND IN ANY EVENT MAY NOT BE USED TO IMPEACH SUCH FINDINGS AND JUDGMENT.

The trial court made the following Findings of Fact with respect to the plaintiff's performance of his employment agreement and the grounds urged by the defendant in attempting to justify his discharge:



5. Pursuant to the said contract of employment, plaintiff, Vincent Chiodo, immediately upon the assumption of control of Bear River Telephone Company by General Waterworks Corporation, entered into his duties as General Manager of Bear River Telephone Company and carried on such duties as general manager of Bear River Telephone Company faithfully and efficiently up to and including the 6th day of December, 1963.

6. On or about the 6th day of December, 1963, Bear River Telephone Company without just cause and excuse, and in violation of the terms of its agreement with Vincent Chiodo, did discharge the said Vincent Chiodo as manager of Bear River Telephone Company and as a result and by virtue of such discharge the defendant, Bear River Telephone Company, has refused and declined to pay to the said Vincent Chiodo a salary as manager of Bear River Telephone Company beyond the 10th day of December, 1963, to the damage of the said Vincent Chiodo in the sum of \$84,676.93.

7. That plaintiff, Vincent Chiodo, did not breach the terms and provisions of the employment contract in any manner as to warrant the termination of his employment or the refusal of the defendant, Bear River Telephone Company, to make the payments required to be made thereunder, nor to entitle said defendant to any set-off or counterclaim against the amounts to be paid thereunder.

From the foregoing Findings of Fact, the Court made the following Conclusions of Law:

4. The Bear River Telephone Company, on the 6th day of December, 1963, terminated the employment of the plaintiff, Vincent Chiodo, effective December 10, 1963, which termination was without just and sufficient cause and was in violation of the terms and provisions of the employment agreement between the parties.

It is a fundamental rule that oral or written opinions of the trial court cannot be looked to to ascertain what the Court has found or decided and that the Court's Findings of Fact, Conclusions of Law, and Judgment must alone be looked to for that purpose, and further that such Findings and Conclusions cannot be qualified or limited by any prior oral or written opinion by the Court. See *Wasatch Oil Refining Co. vs. Wade*, 92 Utah 50, 63 P.2d 1070, 1075.

This rule is set forth in the California District Court of Appeals case *Shaha vs. Frey*, 277 P.2d 428, where the Court said at page 430:

"It is the rule that no resort may be had to the language of the court in discussing the evidence at the conclusion of the trial where the finding is unambiguous and the record supports it. The written finding is the ascertainment of the fact by the Judge. It is the court's decision upon the facts. The reasoning of the Judge in announcing his decision is not such part of the record as may be used for the purpose of establishing a fact in a case where the findings are filed."

In the case of *Lieberman vs. Atlantic Mutual Insurance Company*, 385 P.2d 53, the appellants attempted to impeach the finalized findings of the Court by fre-

quent references to the trial judge's original oral opinion, much as appellants are attempting to do in this case. The Supreme Court in Washington held on page 54 that:

"Remarks contained in an oral opinion of the trial judge will not be considered by this Court insofar as they conflict with the final formal findings and judgment as made and entered by the trial judge."

The Washington Court cited cases stating that if the trial judge's oral decision is at variance with the findings, such decision cannot be used to impeach the findings or judgment, but when such decision is consistent therewith, the findings and judgment may be read in its light.

See also *Hixson vs. Cook*, 379 P.2d 677, where the Supreme Court of Oklahoma held that a judge's oral remarks made at the conclusion of the evidence which were not incorporated into the decree appealed from could not be used to reverse such decree.

A reading of the full statement made by the trial court (R. 589 to R. 593; R. 596 to R. 597) reveals that the court's comments are not inconsistent with the Findings and Conclusions subsequently made by the court. The Court's statement that the plaintiff's conduct had not been "lily white" and that New England honesty might not uphold the somewhat minor acts of the plaintiff do not establish, as defendant contends, that the Court was convinced that the activities charged against plaintiff by the defendant did all in fact occur.

Nor are the statements by the Court regarding a lowering of the community standards and prevalence of unorthodox employment practices in the community in conflict with the formal Findings and Conclusions, wherein the Court expressly found that plaintiff did not breach his employment contract in any manner warranting the termination by defendant of such employment.

Defendant urges that the Court's determination in effect condoned the actions of plaintiff which reflected that he considered the stockholders of Bear River and the users of its services as "fair game". This charge is entirely without justification or support in the evidence, which on the contrary established that the Bear River Company under plaintiff's management provided its owner, General Waterworks, with the best return and profit of any of its numerous telephone subsidiaries and further that the service rendered to its customers was good (R. 126, 127, 192).

Throughout defendant's brief it assumes that all charges made by it were clearly established and that the Court was convinced of the truth of such charges. There is no support for this assumption, for plaintiff presented substantial, competent, believable evidence refuting such charges, which evidence was obviously accepted and believed by the trial court, as reflected in its Findings, Conclusions and Judgment.

Defendant attempts to torture the language of the Court's oral statement in an attempt to convince

this Court that the trial court found that while plaintiff did the things defendant claim, defendant could not rightfully discharge him because they had condoned his actions. It is submitted that a fair reading of the Court's language thus relied upon by defendant indicates that such was not the Court's meaning nor intention. This language cited in the defendant's brief on page 46 and found in the record at pages 590 and 591 indicates that the Court believed the conduct of the parties during plaintiff's three year employment supported plaintiff's contention with respect to the breadth and scope of his management powers and helped establish the admissibility and materiality of plaintiff's Exhibit 1. In other words, this is a completely specious issue, for the Court was not discussing condonation at all, but was merely indicating that the parties' actions over the three year employment period substantiated plaintiff's contention that he was to be given unusually broad management powers under his employment contract as had been negotiated for by him and agreed to by A. W. Sanders in the recorded discussion transcribed in Exhibit I.

#### **IV. THE PAROL EVIDENCE RULE WAS NOT VIOLATED NOR WAS THE EMPLOYMENT AGREEMENT VARIED.**

Defendant under its Point IV asserts that although it has assumed, for the sake of argument, in its prior Points I, II, and III that the employment contract

in question could be varied by the parol evidence introduced by the plaintiff relative to the negotiations leading up to the written contract that such evidence was actually not admissible. Defendant contends that all evidence of the prior negotiations leading up to the written contract of employment, including the verbatim report of the discussion between A. W. Sanders and plaintiff (Exhibit I) should not have been considered by the Court for the purpose of varying or interpreting the written agreement, and cites in support of this contention, *Corbin on Contracts*, Section 573, to the effect that antecedent understandings and negotiations are not admissible "for the purpose of varying or contradicting the writing".

Plaintiff has no argument with the citation from *Corbin* for it is the recognized "parol evidence rule", but plaintiff submits this does not bar Exhibit "I" or evidence regarding the circumstances under which the employment contract was negotiated, for such evidence does not vary or contradict the writing. In *Corbin's One Volume Work on Contracts*, at page 575, the author says, "prior agreements or understandings, oral or written, are not affected by a subsequent contract if they are not inconsistent in their meaning or operation. This is true even though they deal with the same subject matter". As Corbin pointed out in Section 573, cited in defendant's brief, the key issue is whether the parties assent to the particular writing as the complete and accurate "integration" of that contract.

Defendant, in support of its position that nothing can be considered to show the intent of the parties outside the bare details of the simple two-page document, cites an article written by Ronan E. Degrin on "Parol Evidence—the Utah Version" found in 5 Utah Law Review, Fall Edition of 1956, wherein the writer indicates a latter agreement supersedes all former agreements not because the former agreements are untrustworthy, but because they are legally immaterial. The paragraph cited from Professor Degrin's article by defendant is not clear unless the following paragraph, which is the significant portion, is also read. In this paragraph at the top of page 163 the writer states:

"The key or shorthand expression to all of this is 'integration' . . . if the prior dealings of the parties have been integrated or embodied in a written or oral agreement, the latter and that alone controls the legal relationship between them. Whether or not the prior dealings have been integrated is a question of intent of the parties. Primarily this intent is to be sought in the writing itself, by comparing it with the terms offered to be proved by parol. Are the latter such that reasonable men would deem them abandoned when the writing was adopted, or could they exist consistently with the terms of the writing?"

Plaintiff submits that the evidence was clear and uncontroverted that the detailed commitments made to him with respect to his employment were not abandoned but on the contrary were confirmed and that there was nothing inconsistent about them with the terms of the written contract.

In the *Restatement of Contracts*, Paragraph 228, which deals with "integration", the authors state, "An agreement is integrated where the parties thereto adopt a writing or writings as a final and complete expression of the agreement. An integration is the writing or writings so adopted." In commenting on this paragraph at page 308, the authors say, "It is an essential of an integration that the parties shall have manifested assent, not merely to the provisions of their agreement, but to the writing or writings in question as a final statement of their intentions as to the matters contained therein". Plaintiff challenges the defendant to point out to the court any evidence which would indicate an assent by him that the two-page document contained a final and complete statement of the intentions of the parties as to the plaintiff's employment agreement.

Corbin in his work on Contracts, in Paragraph 543, states "court's attempt to give to the words of a contract the meaning expressed by the parties or if giving the meaning of only one of the parties, basing such decision on the fact that the other party knew or had reason to know of the meaning attached to such words of the first party". There was no evidence presented to the effect that the plaintiff knew or had reason to believe that the prior understandings that had been reached with respect to his employment contract and, particularly, as reflected in the verbatim report of his detailed conversation with Mr. A. W. Sanders, had been rejected or abandoned and, on the



contrary, all of the evidence supports the proposition that he clearly understood and was led to believe by General Waterworks and then Bear River that such agreements and understanding were still in full force and effect and were incorporated in the short, two-page employment contract that was executed in January, upon the acquisition of Bear River by General Waterworks.

The language of the agreement saying that it was "to confirm our understanding and agreement which we have arrived at" certainly led plaintiff to believe this when nothing had been said or done indicating to the contrary. At the very least, such language creates some uncertainty and ambiguity in the agreement and under the fundamental principal of construction any uncertainty or ambiguities in an agreement are construed against the party preparing such agreement.

One of the key words in this contract is the word "confirm". *Black's Law Dictionary*, 3rd Edition, defines this word to mean "to complete or establish that which was incomplete or uncertain—to ratify what has been done without authority or insufficiently." This, not only is a technical legal definition, but is what a layman such as plaintiff would naturally assume this to mean.

In *Read vs. Forced Underfiring Corporation*, 26 P. 2d 325 (Utah, 1933) at Page 327, the Supreme Court of this State said:

"Where language is mixed and susceptible of

more than one construction, the court should attempt to place itself as nearly as possible in the situation of the parties to the contract at the time the contract was entered into, so that it may view the circumstances as viewed by the parties themselves to be enabled to understand the language used in the sense, with which the parties used it. In order to accomplish this purpose it is generally proper for the court to take notice of the surroundings and attendant circumstances and consider the language used in the line of such circumstances."

This *Read* case also concerned an employment contract in the form of a letter prepared by the defendant corporation and in construing this letter, the court recognized the established rule of construction mentioned hereinabove with the following statement also on page 327:

"It is a familiar rule of construction that the language used must be construed most strongly against the person using it. In this case, the contract is in the form of a letter written by the defendant corporation to the plaintiff in which they set out the details of the employment."

In order to fulfill this requirement as set out by our Supreme Court, it was necessary for the trial court to view all of the surrounding circumstances of the employment contract and consider the language of the contract in light of such circumstances. This would of necessity require the court to consider the preliminary discussions and agreements reached with respect to this employment agreement.

Another Utah case which holds that all of the facts surrounding a writing may be viewed in order to understand the intentions and agreements of the parties is *Hawaiian Equipment Company vs. Eimco Corporation*, 207 P. 2d 794 (Utah, 1949), where the court quoted 17 C.J.S. Contracts, Paragraph 327, Page 751, as follows:

“... a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that the contract means one thing while he hopes the court will adopt the construction to mean another thing more to his advantage.”

Here, when the defendant, Bear River, executed the employment agreement with the plaintiff, it knew of his requirements with respect to such employment agreement as expressed to Mr. A. W. Sanders and that such requirements had been agreed to by General Waterworks. Therefore, when Bear River executed the exact form of agreement that had been settled upon between plaintiff and General Waterworks to reflect their understanding, it knew what the language of such agreement meant to the plaintiff, namely, that his conditions and requirements were being met and incorporated in this agreement.

The Supreme Court of Utah, in the more recent case of *Marw vs. Noble*, 10 U. (2d) 444, 354 P. 2d, 121, 123, amplified the strict construction rule against the party who draws an instrument with an even more realistic one, as follows: “The primary and more fun-

damental rule is that the contract must be looked at realistically in the light of the circumstances under which it was entered into, and if the intent of the parties can be ascertained with reasonable certainty, it must be given effect."

Under the facts and circumstances of this case and pursuant to the legal authorities recited hereinabove the commitments and agreements made by the defendant to the plaintiff set forth in Exhibit I, were a part of the plaintiff's contract of employment. See *Laskey vs. Rubell Corporation*, 303 N.Y. 69, 100 N.E. 2d 140, where the court held that while parol evidence cannot be used to modify the terms of a contract of employment that has been reduced to writing, such evidence may be used to supply details that were not reduced to writing. See also *Ross vs. Stricker*, (Okla. 1953) 275 P.2d, 991, where the court held that where a written employment agreement refers to or recognizes the existence of other agreements, that such other agreements may be proved on the basis that there was more to the agreement than appeared in the written letter.

In this case the plaintiff was actually led to believe that the transcript was incorporated in the two page letter contract and the language of such letter contract corroborates this fact. It should be remembered that at the conclusion of this transcript discussion between plaintiff and A. W. Sanders, which was affirmed subsequent to the delivery to the plaintiff of the letter

agreement it was specifically agreed that such transcript would be the governing factor in any future disputes regarding plaintiff's employment and that if any questions might arise regarding such employment they would be settled on the basis of the discussion as transcribed. (See page 45 of Exhibit I.)

What, then, is the legal result of the agreement reached between the defendant and the plaintiff regarding his employment? It would seem clear from the facts and circumstances that plaintiff was promised a ten year employment contract as a required condition of his stock sale and that in connection with such employment, he was to remain the manager of Bear River with the autonomy and freedom he had had in his past operations in the company. These requirements of the plaintiff were acknowledged by Helmer Hansen (T. 142 and 146) and were agreed to by A. W. Sanders, Vice President of General Waterworks and manager of this telephone utility, in the Verbatim Report of their discussion (Exhibit I). We direct the court's attention particularly to page 27 of Exhibit I, beginning at Line 18, and the language which there follows over to the bottom of page 29.

Whether or not the plaintiff was promised that he would receive \$500.00 every two weeks, even if defendant decided to fire him, was specifically discussed in this transcript beginning at the said line 18, page 27 of Exhibit "I". A fair interpretation of the discussion that followed indicates clearly that this commitment

was made to him.

It was not, however, necessary for plaintiff to rely upon this commitment, for the evidence shows that he faithfully discharged the managerial duties contemplated in his employment agreement with Bear River Telephone Company and that Bear River Telephone Company terminated him without just or legal cause.

## V. THE TRIAL COURT APPLIED THE PROPER RULE OF DAMAGES AND DEFENDANT FAILED TO PRESENT ANY EVIDENCE IN MITIGATION OF PLAINTIFF'S DAMAGES.

The Supreme Court of Utah in the case of *Russell vs. Ogden Union Railway and Depot Co.*, 122 Ut. 107, 247 P.2d 257, has held the correct measure of damages for the breach of an employment contract by an employer, to be the amount the employee would have received as wages had the contract been performed, less what the employee has earned since the time of his discharge or what he might by reasonable diligence earn in other appropriate employment during the remaining term of his employment contract. The only evidence presented as to plaintiff's earnings since his discharge was the testimony of the plaintiff that he had earned some \$500.00 prior to the trial, but that he had been required to expend nearly \$800.00 to do so, thereby realizing a net loss (R.-45).

Plaintiff was a man then 60 years of age who had devoted most of his productive years to the development of the Bear River Telephone Company. It was obvious that plaintiff's employment opportunities were extremely limited and that he couldn't hope to find similar appropriate employment at his age, and would thus be limited to infrequent consulting work. In the case of *Dixie Glass Co. vs. Pollak*, 341 S.W. 2d 530, 91 A.L.R. 2d, 662, cited by defendant in its brief, the court held that it was a matter of common knowledge that a person 58 years of age cannot well compete in the labor market.

The burden of proving mitigation of the plaintiff's damages rests on the defendant, including the obligation to present evidence regarding plaintiff's employment opportunities. Defendant had the responsibility of showing that plaintiff's unemployment was his own fault and that he could have, by reasonable diligence, secured other remunerative employment of a like character elsewhere. For cases supporting this generally accepted proposition see *Davis vs. Sherry, et al*, (Calif.) 202 P.2d 101; *Independent School District #65 vs. Stafford* (Okla.) 257 P.2d 1092; and *Krehbill vs. Goering*, (Kan.) 293 P.2d 255. Another Oklahoma case, *Ray vs. Board of Education*, 153 P.2d 233, put this rule another way by holding that proof of mitigation of damages is an affirmative defense so that prima facie measure of damages for breach of employment contracts by an employer is the monthly salary established in the contract.

35 Am. Jur., *Master and Servant*, Paragraph 60, page 494, recites this general rule that in an action for alleged wrongful discharge the plaintiff is not bound to show affirmatively as a part of his case, that other employment was sought and could not be found, but may rest his case upon proof of the contract, its breach, and damages which are determined by the contract price for services. If the employer desires to mitigate damages by showing that the employee had employment or could have obtained employment by reasonable diligence during the whole or any portion of the contract, the burden rests upon the employer to establish this fact.

The defendant in this case failed to present any evidence in mitigation of the plaintiff's damages and, therefore, under the record before the trial court, the judgment awarded was proper and should be affirmed. It should be noted that the trial court followed the rule urged by the defendant and set forth in the *Dirie Glass Co. v. Pollak* case, *supra*, and reduced to present value the unpaid contract payments by discounting them at the rate of 6% per annum.

## CONCLUSION

There is a presumption that the judgment of the trial court was correct, and every reasonable intentment must be indulged in favor of it. The burden of affirmatively showing error is on the party complaining



thereof. *Burton v. Zion's Cooperative Mercantile Institution*, 122 U 360, 249 P 2d. 514.

The defendant wholly failed to sustain its burden in proving any reasonable justification for its termination of the plaintiff's employment as manager. The record fails to establish that the plaintiff did other than devote his full time and best efforts to the management of the Bear River Telephone Company. Defendant's charges of insolence, insubordination and disrespect were not borne out by the evidence, which show that the actions of the plaintiff complained of were provoked and certainly not indicative of a wrongful or perverse mental attitude. Such acts by the plaintiff resulted from the continual harrassment and interference of the plaintiff in his managerial functions contrary to the promises given him regarding his employment.

The other attempts of defendant to justify the firing of the plaintiff also were lacking in proof. These attempts consisted in the main of the charge that plaintiff permitted a fraud to be perpetrated on Bear River in the form of a conspiracy by Max Fonnesbeck, Grant Allred, and Don and Gene Chiodo whereby these men realized improper profits for contract work done for Bear River. Defendant's evidence totally failed to support this charge and the testimony of Mr. Fonnesbeck, Mr. Allred and Don and Gene Chiodo effectively answered and repudiated it.

The trial court's findings, conclusions and judg-

ment, bottomed as they were on sufficient, competent, believable evidence, requires this court to affirm the judgment of the trial court under familiar principles relating to appellate review. *Home Electric Corporation vs. Russell*, ... U. .... 409 P.2d 385. The defendant's request to remand this case to the trial court for a determination of the amount plaintiff might earn over the remaining period of the contract is likewise without merit for the defendant failed to meet its burden at the trial and present any evidence on which the court might base a reduction of the plaintiff's damages.

Respectfully submitted,

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