IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 31

WCC No. 9806-7993

JERRY A. GUNDER

Appellant

vs.

CIGNA

Respondent.

ORDER ON APPEAL

Summary: Claimant appealed from the decision of Department of Labor holding that failure of the insurer to deny an occupational disease claim within 30 days does not preclude the insurer from contesting the claim. Claimant asked the WCC to find the "retroactive" application of section 39-71-606(5), MCA (1997) unconstitutional. That section, which specifies that failure to deny within 30 days does not constitute acceptance, was expressly made applicable by the Montana Legislature to matters pending prior to its enactment.

Held: Application of section 39-71-606(5), MCA (1997) to claims existing prior to the effective date of the statute does not violate the contract clause of either the Montana or United States Constitutions. Given the statement in section 39-72-103, MCA (1995) that rights to compensation for occupational diseases did not vest and could be changed by the legislature, an occupational disease claimant had no contractual right to benefits as described in a particular year's legislation. Given this and in light of applicable precedent, the retroactive application of the 1997 amendment to section 39-71-606(5), MCA was constitutional. (Note: the appeal to the Montana Supreme Court, *Gunder v. CIGNA*, No. 99-337, was ordered dismissed on May 18, 2000, based upon notice from the parties that the matter had settled.)

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-606(5), MCA (1997). Claimant appealed from the decision of Department of Labor holding that failure of the insurer to deny an occupational disease claim within 30 days does not preclude the insurer from contesting the claim. Claimant asked the WCC to find the "retroactive" application of section 39-71-606(5), MCA (1997) unconstitutional. That section, which specifies that failure to deny within 30 days does not constitute acceptance, was expressly made applicable by the

Montana Legislature to matters pending prior to its enactment. The WCC held that application of section 39-71-606(5), MCA (1997) to claims existing prior to the effective date of the statute does not violate the contract clause of either the Montana or United States Constitutions. Given the statement in section 39-72-103, MCA (1995) that rights to compensation for occupational diseases did not vest and could be changed by the legislature, an occupational disease claimant had no contractual right to benefits as described in a particular year's legislation. Given this and in light of applicable precedent, the retroactive application of the 1997 amendment to section 39-71-606(5), MCA was constitutional. (Note: the appeal to the Montana Supreme Court, *Gunder v. CIGNA*, No. 99-337, was ordered dismissed on May 18, 2000, based upon notice from the parties that the matter had settled.)

Claims: Acceptance. Claimant appealed from the decision of Department of Labor holding that failure of the insurer to deny an occupational disease claim within 30 days does not preclude the insurer from contesting the claim. Claimant asked the WCC to find the "retroactive" application of section 39-71-606(5), MCA (1997) unconstitutional. That section, which specifies that failure to deny within 30 days does not constitute acceptance, was expressly made applicable by the Montana Legislature to matters pending prior to its enactment. The WCC held that application of section 39-71-606(5), MCA (1997) to claims existing prior to the effective date of the statute does not violate the contract clause of either the Montana or United States Constitutions. Given the statement in section 39-72-103, MCA (1995) that rights to compensation for occupational diseases did not vest and could be changed by the legislature, an occupational disease claimant had no contractual right to benefits as described in a particular year's legislation. Given this and in light of applicable precedent, the retroactive application of the 1997 amendment to section 39-71-606(5), MCA was constitutional. (Note: the appeal to the Montana Supreme Court, *Gunder v. CIGNA*, No. 99-337, was ordered dismissed on May 18, 2000, based upon notice from the parties that the matter had settled.)

Constitutional Law: Contract Clause. Claimant appealed from the decision of Department of Labor holding that failure of the insurer to deny an occupational disease claim within 30 days does not preclude the insurer from contesting the claim. Claimant asked the WCC to find the "retroactive" application of section 39-71-606(5), MCA (1997) unconstitutional. That section, which specifies that failure to deny within 30 days does not constitute acceptance, was expressly made applicable by the Montana Legislature to matters pending prior to its enactment. The WCC held that application of section 39-71-606(5), MCA (1997) to claims existing prior to the effective date of the statute does not violate the contract clause of either the Montana or United States Constitutions. Given the statement in section 39-72-103, MCA (1995) that rights to compensation for occupational diseases did not vest and could be changed by the legislature, an occupational disease claimant had no contractual right to benefits as described in a particular year's legislation. Given this and in light of applicable precedent, the retroactive application of the 1997 amendment to section 39-71-606(5), MCA was constitutional. (Note: the appeal to the Montana Supreme Court, *Gunder v.*

CIGNA, No. 99-337, was ordered dismissed on May 18, 2000, based upon notice from the parties that the matter had settled.)

¶1 This is an appeal from a decision of the Department of Labor and Industry (Department) holding that the failure of an insurer to deny an occupational disease claim within 30 days does not preclude the insurer from contesting the claim. The decision was based on 1997 legislation amending section 39-71-606, MCA. The amending legislation provided that an insurer's failure to accept a claim within 30 days does not constitute an acceptance of the claim. The amendment was expressly retroactive and legislatively reversed the Montana Supreme Court's decision in *Haag v. Montana School Groups Authority,* 274 Mont. 109, 906 P.2d 693 (1995), which held that the failure of an insurer to deny a claim within 30 days constitutes an acceptance of the claim.

¶2 Not considered below, and reserved for appeal, was appellant's (claimant's) challenge to the constitutionality of the amendment.

The Proceeding Below

¶3 The claimant alleges that he suffers from occupational diseases involving his wrists, arms, shoulders, and low back. CIGNA, which insured claimant's employer, denied the claims but did so after the 30 day period prescribed by section 39-71-606, MCA (1995). Claimant pursued his claims before the Department. He sought a contested case hearing on the merits of his claims and alleged that by failing to accept his claims within 30 days of submission CIGNA was precluded from contesting liability for his medical conditions.

¶4 The parties agreed to bifurcate the merits of claimant's occupational disease claims from the timeliness issue. The case proceeded with regard to the latter issue, the parties stipulating to the following facts:

> 1. On February 18, 1997, petitioner presented respondent with three claim forms alleging occupational disease. On February 21, 1997, respondent received petitioner's attorney's cover letter which included those claim forms and a variety of medical records.
>
> 2. Respondent did not accept or deny any of the three claims until April 29, 1997, when it denied all three claims with three separate letters.

Based on those facts, the hearing officer held, as a matter of law, that CIGNA's failure to timely deny the claims within the 30 days provided by section 39-71-606 did not constitute an automatic acceptance of them, hence CIGNA is entitled to litigate the claims.

Discussion

I. Statute at Issue

¶5 At the time the claims at issue were submitted, CIGNA was required to either accept or deny them within 30 days. Section 39-71-606(1), MCA (1995),[(1)] provided in relevant part:

> **39-71-606. Insurer to accept or deny claim within thirty days of receipt -- notice of benefits and entitlements to claimants -- notice of denial -- notice of reopening -- notice to employer.** (1) Every insurer under any plan for the payment of workers' compensation benefits shall, within 30 days of receipt of a claim for compensation, either accept or deny the claim, and if denied shall inform the claimant and the department in writing of such denial.[(2)]

¶6 Section 39-71-606, MCA (1995), requires the insurer to accept or deny a cliam within 30 days, however, it does not expressly spell out the consequence of the insurer's failure to act within the 30 days. In *Solheim v. Tom Davis Ranch,* 208 Mont. 265, 677 P.2d 1034 (1984), the Supreme Court held that the failure of the insurer to respond within 30 days did not amount to an automatic acceptance, thus an insurer could still litigate the claim. Eleven years later, in *Haag v. Montana Schools Group Ins. Authority,* 274 Mont. 109, 906 P.2d 693 (1995), the Court overruled *Solheim* and held that an insurer's failure to deny a claim within 30 days constitutes an acceptance of the claim. As of the date *Haag* was decided, an insurer's failure to deny a claim within 30 days of receipt precluded the insurer from contesting the claim short of fraud or other legal basis for rescinding the acceptance.

¶7 In *Klimek v. State Compensation Ins. Fund,* WCC No. 9602-7492, Order and Partial Summary Judgment (October 11, 1996), this Court exhaustively examined cases concerning the retroactive application of judicial decisions and concluded that those precedents required that the *Haag* decision be retroactively applied. Thus, claims submitted prior to the *Haag* decision which were not denied within 30 days were deemed accepted. *Klimek* was not appealed and no subsequent litigant has pressed a request that this Court revisit the issue.

¶8 However, in 1997 the Legislature amended section 39-71-606, MCA, adding a new subsection (5). The new subsection expressly provides that an insurer's failure to deny a claim within 30 days does **not** constitute an acceptance of the claim:

> *(*5) Failure of an insurer to comply with the time limitations required in this section does not constitute an acceptance of a claim as a matter of law. However, an insurer who fails to comply with 39-71-608 or this section may be assessed a penalty under 39-71-2907 if a claim is determined to be compensable by the workers' compensation court.

1997 Mont. Laws, Ch. 276, Sec. 11.

¶9 The new subsection was enacted after the claims at issue herein were submitted to CIGNA. However, the legislature expressly made the new subsection retroactive. *Id*. at Sec. 33(2). It is clear that the new subsection was intended to nullify and overrule *Haag,* thus restoring the legal rule announced in *Solheim.*

¶10 Claimant does not contend that the Department erred in following the 1997 amendment. Rather, he contends that the amendment, as applied to his claims, is unconstitutional.

II. Merits of Constitutional Challenge

¶11 In pursuing his constitutional challenge, claimant bears a heavy burden. To prevail, he must prove beyond a reasonable doubt that the challenged statute is unconstitutional. *Heisler v. Hines Motor Co.,* 282 Mont. 270, 279, 937 P.2d 45, 50 (1997).

¶12 Claimant argues that the retroactive application of the 1997 amendment is contrary to decisions in *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 730 P.2d 380 (1986) and *Carmichael v. Workers' Compensation Court,* 234 Mont. 410, 763 P.2d 1122 (1988). Both cases were based on the Contract Clauses of the United States and Montana constitutions.[(3)] The Court therefore considers whether application of the 1997 amendment violates claimant's Contract Clause rights.

¶13 In both *Buckman* and *Carmichael* the Supreme Court held that workers' compensation is contractual. In *Buckman* the Court observed, "The basis for Workers' Compensation is a contract of hire either express or implied." 224 Mont. at 325, 730 P.2d at 384. It went on to hold that liability for benefits "arises out of the contract between" the employer and employee and that workers' compensation statutes in effect on the date of an injury "are a part of that contract." *Id*. at 326, 730 P.2d at 385.

¶14 While the *Buckman* Court limited its decision to the Contract Clause of the Montana Constitution, 224 Mont. at 325, 730 P.2d at 384, it acknowledged that historically the Montana and United States Contract Clauses have been interpreted "as interchangeable guarantees."[(4)] *Id.* The Court proceeded to apply Federal Contract Clause analysis in deciding the case, embracing the three-tiered analysis set out in *Energy Reserves Group, Inc. v. Kansas Power and Light Co.,* 459 U.S. 400 (1983):

> The question becomes whether the statute at issue in this case constitutes an impairment of the obligation of contract. We first turn to the three-tiered analysis set down by the United States Supreme Court in Energy Reserves Group, Inc. v. Kansas Power and Light Co. (1983), 459 U.S. 400, 103 S.Ct. 697, 74 L.Ed.2d 569, and followed by this Court in Neel, 675 P.2d at 96, 41 St.Rep. at 18. The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." Neel, 675 P.2d at 104, 41 St.Rep. at 27. Next, we must look to whether the state in justification, has a significant and legitimate public purpose for the regulations. Finally, we must inquire whether the adjustment of the rights and responsibilities of the contracting parties are based on reasonable conditions and of a character appropriate to the public purpose justifying adoption of the legislation. Energy Reserves, 459 U.S. at 411-13, 103 S.Ct. at 704-5, 74 L.Ed.2d at 580-81. Neel, 675 P.2d at 104-5, 41 St.Rep. at 27-8.

Buckman, 224 Mont. at 326, 730 P.2d at 385.

¶15 At the time of Ms. Buckman's industrial injury, discounting was not permitted. *Willis v. Long Const. Co.,* 213 Mont. 203, 690 P.2d 434 (1984). The Court held that retroactive application of the discounting provision therefore impaired Buckman's rights.[(5)] (Factor 1.) Turning to the second factor, the Court noted that the stated purpose in enacting the discounting provision was "to head off threatened premium increases, hold down employers' cost of doing business, and promote the Montana economy," a purpose which the Court found legitimate. 224 Mont. at 327, 630 P.2d at 386. (Factor 2.) Applying the third factor, it acknowledged that the discount provision "will undoubtedly result in the type of savings desired by the legislature" with regard to injuries occurring **after** the effective date of the provision." *Id*. But the Court then observed:

> [O]ur concerns must be directed to those who were injured **prior** to April, 1985, such as Rose Buckman. The record does not contain any significant evidence bearing on the cost to the state which may result if the discount provisions are not applied to workers injured prior to April, 1985. Under those circumstances, we conclude that the state has failed to prove a significant public interest which requires the application of the discount to workers such as Buckman. The general statement of the reason in itself is not sufficient to justify the severity of the impairment of contract as in this case. We therefore hold that the retroactive application of Section 39-71-741, MCA, violates the contract clause of the 1972 Montana Constitution. [Emphasis added.]

Id. While the logic of the distinction is perplexing to this judge,[(6)] the Supreme Court did not view the impact of a retroactive application of the discounting provision sufficient to justify the impairment of the existing contractual relationship. It struck down the retroactive application.

¶16 In *Carmichael* the Court considered the retroactive application of a newly enacted requirement that the parties mediate their dispute before filing any petition with the WCC. The Court again applied a three-factor analysis. It summarized the inquiry as follows:

> (1) Is the state law a substantial impairment to the contractual relationship? (2) Does the state have a significant and legitimate purpose for the law? (3) Does the law impose reasonable conditions which are reasonably related to achieving the legitimate and public purpose?

234 Mont. at 414, 763 P.2d at 1125.

¶17 Applying the three factors, the Court initially found that there was a substantial impairment of the existing contract because mediation delayed access to the the Workers' Compensation Court by as much as 100 days. (Factor 1.) On the other hand, the Court found that the statute had a legitimate public purpose of encouraging settlement and reducing the workload of the WCC. (Factor 2.) But, proceeding to the third inquiry, it found that the law was not reasonably related to that public purpose because there was insufficient evidence to demonstrate that mediation would in fact result in a more manageable caseload in the WCC. It characterized the "statistical evidence" presented in support of mediation as "vague."

¶18 CIGNA urges that *Buckman* and *Carmichael* were wrongly decided and should be overruled. It cites *General Motors Corp. V. Romein,* 501 U.S. 181 (1992) (hereinafter "*Romein*") in support of its arguments.

¶19 The facts in *Romein* are somewhat complex, but what occurred in the legal arena in the case is somewhat similar to what occurred in this case. In 1981 the Michigan legislature enacted a law providing that employers paying non-workers' compensation benefits from employer-funded sources could offset those benefits against worker's compensation benefits paid to the employee. The legislation was effective on March 31, 1982. Employers argued that the offset applied with respect to benefits paid after that date irrespective of whether the injury occurred prior to March 31, 1982. In a 1985 decision, the Michigan Supreme Court adopted the employers' position. *Chambers v. General Motors Corp.,* 422 Mich. 636, 375 N.W.2d 715 (1985).

¶20 Following the *Chambers'* decision, in 1987 the Michigan legislature adopted a law which nullified *Chambers*. The law, enacted in 1987, prohibited retroactive application of the 1981 law and required employers who had applied the offset to pre-March 31, 1982 injuries to refund the offsets to injured workers. The total refund required was "nearly $25 million." 503 U.S. at 186. General Motors and Ford challenged the statute on Contract Clause grounds. The Michigan Supreme Court rejected the challenge and the United States Supreme Court affirmed in *Romein.*

¶21 The decision in *Romein* is short and unanimous. Applying tripartite Commerce Clause analysis, the Court found that the first query dispositive:

> This [Commerce Clause] inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial. Normally, the first two are unproblematic, and we need address only the third. **In this case, however, we need not reach the questions of impairment, as we hold that there was no contractual agreement regarding the specific workers' compensation terms allegedly at issue.**

503 U.S. at 186-87 (emphasis added). The Court specifically rejected the contention that the offset adopted by the 1981 Michigan legislature was part of the employment contract between Ford or General Motors and their injured employees. The Court noted that the Ford and General Motors collective bargaining agreements, which were executed prior to 1981, made no mention of workers' compensation benefits and did not provide for any offset. The Court characterized the offset provision enacted in 1981 as "unanticipated." 503 U.S. at 188.

¶22 The United States Supreme Court also rejected the notion that every state regulation in effect at the time a contract is made is part of the contract:

> Contrary to petitioners' suggestion, we have not held that all state regulations are implied terms of every contract entered into while they are effective, especially when the regulations themselves cannot be fairly interpreted to require such incorporation. **For the most part, state laws are implied into private contracts**

> **regardless of the assent of the parties only when those laws affect the validity, construction, and enforcement of contracts.**

503 U.S. at 189 (emphasis added).

¶23 While *Romein* raises significant questions regarding the holdings of *Buckman* and *Carmichael,* CIGNA's arguments should be addressed to the Supreme Court on appeal. It is possible that the Montana Supreme Court might distinguish its decisions on the basis of state law. In *Romein* the United States Supreme Court deferred to Michigan's interpretation of its laws concerning incorporation of existing laws into contracts:

> The Michigan Supreme Court held that the term suggested by petitioners was not an implied term of the employment contracts between petitioners and respondents. We "accord respectful consideration and great weight to the views of the State's highest court," though ultimately we are "bound to decide for ourselves whether a contract was made." Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100, 82 L. Ed. 685, 58 S. Ct. 443 (1938). The question whether a contract was made is a federal question for purposes of Contract Clause analysis, see Irving Trust Co. v. Day, 314 U.S. 556, 561, 86 L. Ed. 452, 62 S. Ct. 398 (1942), and "whether it turns on issues of general or purely local law, we can not surrender the duty to exercise our own judgment." Appleby v. City of New York, 271 U.S. 364, 380, 70 L. Ed. 992, 46 S. Ct. 569 (1926). In this case, however, we see no reason to disagree with the Michigan Supreme Court's conclusion.

503 U.S. at 187. This analysis leaves open the possibility that a state may take a broader view of the doctrine concerning incorporation of existing laws into contracts. The Montana Supreme Court has unequivocally and repeatedly indicated that the workers' compensation laws in effect at the time of an injury are a part of the employment contract. That pronouncement may be sufficient to make it so; in any event *Romein* did not consider what affect such a prior pronouncement might have. Moreover, *Romein* may be inapposite since the contract at issue in that case was a written collective bargaining agreement, not an employment-at-will.[(7)]

¶24 This is not a case in which subsequent Montana Supreme Court decisions implicitly overrule prior decisions. *Compare Klimek, supra.* This is also not a case where the United States Supreme Court case is on all fours with the prior Montana Supreme Court cases which CIGNA asks this Court to overrule. CIGNA's arguments certainly raise significant questions as to the correctness of the prior decisions, but they also plow new ground and are appropriately addressed to the Montana Supreme Court.

¶25 Claimant must still show that retroactive application of the 1997 amendment is contrary to *Buckman* and *Carmichael.* Initially, he must show that the 30 day requirement found in section 39-71-606(1), MCA, applies at all. The requirement is part of the Workers' Compensation Act (WCA), whereas this case arises under the Occupational Disease Act (ODA). If the requirement is inapplicable to ODA claims, then claimant's constitutional challenge is irrelevant and the hearing officer's decision must be affirmed.

¶26 The ODA, which is found in a separate chapter (Title 39, ch. 72), does not contain any corresponding 30-day requirement. Indeed it is silent on the subject. However, it does contain a provision which incorporates portions of the WCA by reference. Section 39-72-402, MCA, provides:

> **39-72-402. Practice and procedure -- applicability of Workers' Compensation Act.** (1) Except as otherwise provided in this chapter, the practice and procedure prescribed in the Workers' Compensation Act applies to all proceedings under this chapter.
>
> (2) Sections 39-71-304, 39-71-403, 39-71-406, 39-71-409, 39-71-411 through 39-71-413, 39-71-742, and Title 39, chapter 71, part 9, which are contained in the Workers' Compensation Act, specifically apply to and are incorporated as part of this chapter.

Section 39-71-606, MCA, is not among the subsections specifically incorporated through subsection (2). However, the processing of a claim for compensation is a matter of procedure, thus it is incorporated through subsection (1). I therefore conclude that section 39-71-606(1), MCA, is applicable to occupational disease claims.

¶27 The only remaining task is to apply *Buckman* and *Carmichael.* That task is not as simple as it may first appear. Both parties have overlooked a significant difference between the statutes involved in *Buckman* and *Carmichael* and those involved in this case. That difference is the fact that the ODA contains a specific provision not found in the WCA. The provision goes to the very core of any contract.

¶28 The statute in question is section 39-72-103, MCA, which provides:

> **39-72-103. No vested right to compensation.** The right to the compensation provided for herein shall not nor shall the rate or amount thereof be or become vested or continuing rights in persons awarded compensation under this chapter or any amendment hereof, but the state reserves the right, by act of the legislature, to reduce the rate or amount of compensation thereafter to be received by any person theretofore or thereafter receiving compensation under this chapter or any amendment hereof or to wholly discontinue to all persons all compensation provided for by this chapter or any amendment hereof.

This section provides clear notice that the legislature reserved the right to reduce benefits with respect to past claims, or discontinue those benefits altogether. The provision was in effect at the time the claimant filed his occupational disease claims, indeed it was enacted in 1959. 1959 Mont. Laws, ch. 155, sec. 67. It is as much a part of any contract between claimant and his employer as the 30-day notice provision. It put claimant and his employer on notice that entitlement to occupational disease benefits could be changed or withdrawn at any time. It therefore qualified the 30-day notice provision and made it subject to modification and repeal.

¶29 Under this set of circumstances, *Romein* is persuasive and dispositive in applying *Buckman and Carmichael.* As in *Romein*, there is no binding contractual agreement regarding the specific provision of law upon which the claimant relies. While the 30-day

rule governing denial of a claim may have been part of the contract, so was section 39-72-103, MCA. Thus, as in *Romein*, the retroactive application of the 1997 amendment did not substantially impair any contractual relationship between claimant and his employer.

¶30 Since the first question of the tripartite analysis is answered in the negative, it is unnecessary to consider the remaining two questions.

ORDER

¶31 1. The application of section 39-71-606(5), MCA (1997), to occupational disease claims submitted by claimant in 1995 does not violate the claimant's Contract Clause rights under either the Montana or United States constitutions. The decision of the Department of Labor and Industry is **affirmed**.

¶32 2. This Judgment certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶33 3. Any party to this dispute may have 20 days in which to request an amendment or reconsideration of this Order on Appeal.

DATED in Helena, Montana, this 3rd day of May, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Rex Palmer
Mr. Peter J. Stokstad
Date Submitted: March 10, 1999

1. The claims were submitted in 1996. At that time, the 1995 version of the Workers' Compensation Act applied.

2. The remaining subsections (2 through 4) concern other requirements.

3. Article I, Sec. 10, ¶ 1 of the United States Constitution provides, in relevant part, "No state shall . . . pass any . . . law impairing the obligation of contracts. . . ." Article II, Sec. 31 of the Montana Constitution provides, in relevant part: "No . . . law impairing the obligation of contracts . . . shall be passed by the legislature."

4. In subsequent cases the Court has reaffirmed the notion that the two Contract Clauses are generally interchangeable. *E.g., City of Billings v. County Water District of Billings Heights,* 281 Mont. 219, 227, 935 P.2d 246, 251 (1997).

5. Simply put, retroactive application of the discount provision meant that Buckman got less money.

6. If the discount provision would save insurers money and head off premium increases with respect to cases arising after the adoption of the provision, then surely it would save insurers money with respect to cases arising **prior** to the enactment of the provision, and thereby dampen premium increases and contribute to the financial health of insurers and employers. Indeed, the State Compensation Insurance Fund subsequently went bankrupt in part because its reserves were insufficient to pay prior claims.

7. While the claimant in this case may have commenced his employment long before the 1997 amendment, there is no evidence before the Court indicating that his employment was governed by a written contract.