

IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

APPELLATE JURISDICTION

CIVIL APPEAL NO. ABU0043 OF 2007

BETWEEN : ESALA DELANA KAMA *Appellant*
AND : NATIVE LAND TRUST BOARD *Respondent*

Quorum : Byrne, J. A.
Pathik, J. A.
Mataitoga, J. A.

Counsel : Appellant - In Person
S. Banuve for the Respondent

Date of Hearing: 1st of April 2008
Date of Judgment: 4th June 2008

JUDGMENT OF THE COURT

[1] In Johnson -v- Unisys Limited [2001] 2 All E.R. 801 at p.815 Lord Hoffmann said:

“Over the last 30 years or so, the nature of the contract of employment has been transformed. It has been recognised that a person’s employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem.

The law has changed to recognise this social reality”.

[2] We have no doubt that when the Appellant began as an employee of the Respondent in February 1980 as an accountant cadet he had high hopes for his future. Until he was appointed Deputy General Manager Administration of the Respondent in July 1992 he had no reason to doubt that his future was not bright. He had progressed in the employment of the Respondent to Senior Accountant in 1983 and then in 1989 was given an opportunity to pursue further studies towards his Masters in Business Administration Degree in the United Kingdom and returned at the end of 1990. He then became Manager Finance and Corporate Planning on his return. In July 1992 he was appointed Deputy General Manager Administration and in a letter dated the 8th of July 1992, the then Acting General Manager, M. Bulanauca wrote to the Appellant, congratulating him on his appointment and setting out his duties and responsibilities in the position to which he had been appointed. He was told that he was expected to be a person who planned, led, organised and controlled the policy and functional areas of the Board's Head Office to foster and support achievement of its missions and objectives.

[3] **Production of Annual Accounts**

One of the Appellant's main tasks was to produce the Board's Annual Accounts, especially the accounts of 1990, 1991, 1992, 1993, 1994 and 1995 which were long overdue.

- [4] Unfortunately the Appellant did not live up to the expectations which the Respondent had of him. The accounts and reports for the years concerned were not ready on the time which the Appellant had indicated they would be. Concern was beginning to be expressed by the Board's management on these outstanding matters. The Board's employees were also expressing their concern with the failure of the Appellant to do the work for which he had been promoted.
- [5] The situation deteriorated further when on 19th February, 1997 one of the Appellant's main aides in the preparation of the accounts, Isikeli Vosailagi, manager of the Trust Section, in a memorandum to the Appellant stated that he was ceasing all efforts to assist in the completion of the Annual Reports. Mr Vosailagi cited irreconcilable differences between himself and the auditors on one hand and the Appellant on the other on the best approach to follow to hasten the production of the annual accounts. Despite the Appellant's request that he reconsider his decision, Mr Vosailagi remained adamant and stated that he was willing to be transferred, demoted or resign if something was not done about the Plaintiff's failure to carry out his tasks.
- [6] Finally the General Manager decided to act and on 21st February 1997 he suspended the Appellant from his employment with the Board citing non-performance and specifically his inability to produce the 1991 to 1995 annual accounts, amongst other shortcomings, as the reasons.

[7] Appellant's Suspension and Court Action No. CA336 of 1997

The Appellant's suspension took immediate effect from 21st February 1997.

[8] One week later, the General Manager appointed an Investigation Committee to investigate the allegations against the Appellant. The Appellant appeared before this Committee and, as Fatiaki J. later found in his Judgment in Civil Action No. 336 of 1997 the Appellant was given a fair hearing and that the Investigation Committee had not been biased against him. These proceedings had been instituted by the Appellant in an attempt to have the findings of the Investigation Committee set aside. They are relevant to this appeal because of the remarks which Fatiaki J. made at pages 22 and 23 of his Judgment and to which we shall refer shortly.

[9] The Appellant did not appeal the Judgment of Fatiaki J. but instead on the 27th of August 1999, the day the Judgment was delivered, issued an Originating Summons seeking declarations that the Respondent's action in suspending him from his employment was null and void and, in any event contrary to his terms and conditions of employment. The Appellant claimed unpaid salary and benefits and special and general damages and the case was tried by Jitoko J. in the High Court. Evidence was given that on the 19th of August 1997 the Board suspended the Appellant without salary and other benefits for an indefinite period "*pending the outcome of the Court Action you have now instituted against the Board*".

- [10] Not unnaturally Jitoko J. was very critical of this action by the Board and stated in his Judgment of the 23rd of March 2007, which is now the subject of this appeal, that the Board's decision bordered on contempt of Court. The Court's concern was met when the Board paid the Appellant the sum of \$29,460.67 on the 17th of June 1999. This represented his full salary entitlement from 19th of August 1997 to July 1998.
- [11] As Jitoko J. said in his Judgment on page 25 of the Court record, the position after the Appellant's Originating Summons was dismissed by Fatiaki J. was that the Appellant remained an employee of the Board on demotion in the position of Manager Special Duties. The Appellant after the decision of Fatiaki J. did not return to work although he wrote no less than on four occasions to the Board as to whether and when he should resume his duties. He did not receive any reply and, as Jitoko J. said, stayed at home as he was still suspended. The Board did not attempt to respond to the Appellant's enquiries and Jitoko J. felt that it did not go out of its way to seek a meeting with him. He quoted the evidence of Mr Mosese Volavola who had said "*I, as General Manager of the Defendant did not want the Plaintiff to return to work for the Defendant because, as I felt at that time (and now), there was a fundamental breakdown in the relationship between him and the Defendant*".
- [12] Jitoko J. found that in May 1998, following a report by Coopers and Lybrand on the Board's structure and recommendations, the Board began re-organising itself. It resulted in the removal of all senior office holders and advertising anew their posts. For example the

position of General Manager and Deputy General Manager were advertised in the Daily Press on the 2nd of May 1998.

- [13] The Judge found that to support the re-structure, a redundancy scheme was put in place. The Appellant applied for the position of General Manager but was unsuccessful.
- [14] As far as the Court in CA 336/1997 was concerned, the Appellant remained on full salary from the 19th of August 1997, the date of his suspension, to July 1998. Fatiaki J. did not hand down his Judgment until 27th August 1999. The question which Jitoko J. had to decide, and which is now the subject of this appeal, is whether he remains suspended and if so to when, and in any event was the suspension unlawful?
- [15] Jitoko J. found that the Board's action to suspend the Appellant from employment on the 19th of August 1997 was unlawful and contrary to the terms and conditions of his employment. He then considered whether the Appellant's employment was terminated by the re-organisation of the Board in May 1998. He said there was general agreement that the Board was re-organised in May 1998 resulting in redundancy packages offered to some employees. In some cases it re-employed those under contract such as Senior Managers. The posts of Deputy General Manager and General Manager were advertised in the newspapers from April to May 1998. The Appellant said he was made aware of the re-organisation and the vacancies created thereby only from reading the newspapers. At no time was he informed by the Board of the re-organisation nor that he had been made redundant as a result.

He had assumed all along that he remained an employee of the Board.

[16] Jitoko J. found that the Appellant must have been very much aware that the re-organisation of the Board had resulted in the Senior Management positions being declared vacant. This had led to redundancy packages being offered. He also found that the Plaintiff must have known of the re-organisation because he had applied for one of the posts, the General Manager's, and the Judge found that this supported the Respondent's argument that he no longer was employed by the Respondent. The Judge therefore came "to the inevitable conclusion" that the Appellant's employment was effectively terminated by the re-organisation of the Board in July 1998. He found that there was enough evidence to impute knowledge to the Appellant of his redundancy from the organisation although no formal notice was personally given to him.

[17] This Court is of the same opinion. In our view it would be unreal to draw any other conclusion. In his Judgment in Civil Action 336 of 1997 Fatiaki J. said at page 22:

"In this latter regard it hardly needs to be said that a manager who blames the equipment, his support staff and all others except himself, is plainly unsuited to a senior management role where academic qualifications are necessarily secondary to planning and people skills.

Whatsmore a manager who refuses to accept responsibility for the shortcomings and inability of his department to meet a primary production target, in this case the defendant board's Annual Accounts, lacks a fundamental trait or quality of leadership".

[18] At page 23 Fatiaki J. accepted what he called the blunt submission of counsel for the Board:

"In any language it was plain that (the plaintiff) had not been doing his job. Whatever disputes of fact exist between the parties as might be apparent from their competing affidavits, nothing changed the incontrovertible fact that by the end of calendar year 1996, the plaintiff had failed to produce, despite his personal assurances, the annual accounts of the defendant Board for the years 1991, 1992, 1993, 1994, 1995 and 1996".

[19] With respect to the Appellant this Court considers that the remarks of Fatiaki J., hurtful though they might have been to the Appellant, are nevertheless true, given the evidence before Fatiaki J. and now before this Court.

[20] After hearing the evidence Jitoko J. found:

- i) That the Appellant's suspension without salary on 19th August 1997 was unlawful;

- ii) That the Appellant remained an employee of the Respondent on demotion as Manager, Special Duties until the re-organisation of the Board in July 1998;
- iii) That the Appellant's employment with the Board ceased in July 1998 following its re-organisation.

Pursuant to these findings the Court awarded damages to the Plaintiff totaling \$111,233.64.

[21] The Appeal

Despite the High Court's findings, the Appellant now asks this Court to partly set aside these findings in particular (ii) and (iii) above. The grounds for the appeal are contained in the Appellant's first Notice of Appeal dated 12th June 2007 and his later Amended Notice of Appeal dated 23rd August 2007. They may be summarized as follows:

- i) The High Court erred in law and in fact in concluding that the Appellant's employment terminated in July 1998 following the re-organisation of the Respondent;*
- ii) The High Court erred in law and in fact in assuming that the Appellant was aware of the re-organisation of the Board and as a consequence that the Plaintiff was no longer employed by the Respondent;*

- iii) *The High Court wrongly imputed that the Appellant must have known that he was no longer an employee of the Defendant as a result of the vacancies in the daily papers and the fact that Plaintiff had applied to one of the General positions with the Respondent;*
- iv) *The High Court erred in law and in fact in holding that the Plaintiff's employment was effectively terminated in July 1998 when it ought to have held that it continues to date.*

The remedy sought by the Appellant is to be paid full salary and benefits during the period from July 1998 to the date of judgment or to such date as this Court determines. The amount now sought by the Appellant as damages is \$550,194.00.

[22] The Appellant argues that the main issue in this appeal is whether he was aware that his post was effectively made redundant and whether his employment with the Respondent ceased in July 1998. He submits that he was not aware that his post was planned or publicised for redundancy, or that he had been made redundant. Secondly, he argues that the conduct of the Respondent showed that it and its counsel regarded the Appellant as still being an employee of the Respondent. Thirdly, he submits that in the absence of any notice of redundancy, the Appellant's employment could not possibly have ceased from a date earlier than the date of redundancy payment or payment in lieu of notice, is actually made by the Respondent. Fourthly, that a master-servant relationship

continues to exist between the Appellant as employee, and the Respondent as his employer. Finally, that the Appellant has not repudiated his contract of employment with the Respondent nor has he accepted the repudiation of his employment contract by the Respondent. He then submits that the relief which he seeks is based on the grounds that, if it is held that he is still employed by the Respondent, then his suspension without investigation since 19th August 1997, which the High Court has held to be unlawful, continues to date, and therefore, the Appellant is entitled to receive all salaries and benefits earned and owed to him from the date he was suspended to the date the Judgment was delivered on 23rd March 2007.

[23] In our opinion there is an air of unreality about these submissions. In our judgment, he invites the Court to make an unrealistic interpretation of the right of an employer to dismiss an employee.

[24] This was considered by the Supreme Court of Fiji in Central Manufacturing Company Ltd. -v- Kant [2003] FJSC5 where the Court quoted with approval the remarks of Iacobucci J. in the Supreme Court of Canada in Wallace -v- United Grain Growers Ltd. [1998] 152 D.L.R. [4]:

“In the absence of just cause, an employer remains free to dismiss an employee at any time provided that reasonable notice of the termination is given. In providing the employee with reasonable notice, the employer has two options:

Either to require the employee to continue working for the duration of that period or to give the employee pay in lieu of notice ...

In the event that an employee is wrongfully dismissed, the measure of damages for wrongful dismissal is the salary that the employee would have earned had the employee worked during the period of notice to which he or she was entitled ...

The fact that this sum is awarded as damages at trial in no way alters the fundamental character of the money”.

[25] Here the facts are unique, their most salient feature being that the Appellant has not been actively employed with the Respondent for the past ten years, yet maintains nevertheless that he remains an employee. In our Judgment there was enough evidence before the High Court to impute knowledge to the Appellant of his redundancy from the Board although no formal notice was given to him. This must be taken in no way as condoning the actions of the Respondent in suspending him.

[26] In Wallace’s case, McLachlin J. said at p39:

“Far from making a dismissal wrong the law entitles both employer and employee to terminate the employment relationship without cause. A wrong arises only if the employer breaches the contract by failing to give the dismissed employee reasonable

notice of termination. The remedy for this breach of contract is an award of damages based on the period of notice which should have been given”.

[27] The Respondent has accepted that its action in dismissing the Appellant without due process was wrong for which the Appellant is entitled to damages. In this Court's view the Appellant's position that he is still employed by the Respondent after all this time as a consequence of his wrongful dismissal is not only contrary to established authority but is not supported by the facts of this case.

[28] In our view it stretches credulity for the Appellant to maintain otherwise, given the preponderance of evidence to the contrary, that he would not have been aware that he had been made redundant simply because the redundancy process was not activated in dealing with his case. As to his submission that the High Court mistakenly assumed that his substantive position was that of Deputy General Manager Administration when applying for the vacant positions with the Respondent on re-organisation, we consider that this could not be considered confirmatory of dismissal. We say this for two reasons:

First, re-organisation of the management posts whether it be General Manager, Deputy General Manager or Manager-Special Duties by the Respondent meant that security of tenure was abandoned and posts, including that previously held by the Appellant were advertised and new incumbents were appointed on merit. All subsisting managerial positions were terminated to be replaced by contractual tenure. As

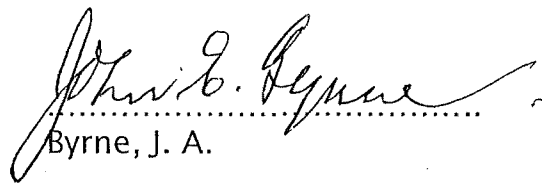
the Appellant was not re-appointed after this process, despite his application, any employment relations he had left with the Respondent effectively ended then, and the High Court was therefore correct in imputing knowledge of termination to the Appellant at that time.

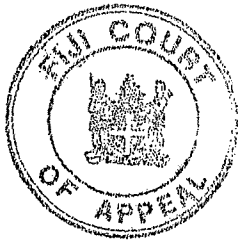
Secondly the High Court held correctly that subsequent to the dismissal of the initial proceedings the Appellant remained as Manager Special Duties. However the reference to the position of Deputy General Manager Administration *as being the substantive one* is an obiter reflection by the Court on its perception of what the Appellant's real grievance was about. It has been stated in numerous cases, one example being Hill -v- CA Parsons & Co. Ltd. [1972] 1 Ch. 305, a case where the employer and the employee still had complete confidence in each other, that no employer is normally bound to continue to employ an employee.

- [29] In relation to the submission that the Appellant through his counsel had as late as 2000 been maintaining that the Appellant was still technically an employee of the Respondent, we consider that this was strictly true at the time because Civil Action No. 408 of 1999 (the case under appeal) had not been decided.
- [30] With the delivery of the Judgment in 2007 and the Court's finding that employment relations were terminated in 1998, this ground of appeal is no longer tenable.

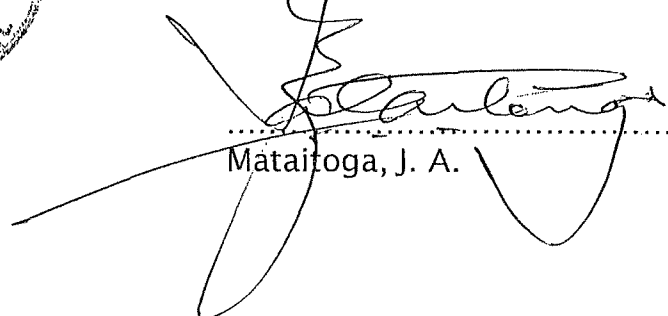
[31] Damages

The Respondent maintains that in general the High Court's award of a total of \$156,837.48 damages was reasonable with the exception of the amount awarded for loss of the home (\$67,287.00). In our Judgment, whilst the High Court may have been a little generous to the Appellant for example in its award of exemplary damages of \$20,000.00, overall we consider that there is no demonstrable error in the Judgment of the High Court and therefore the appeal must be dismissed. There will be no order for costs.


Byrne, J. A.




Pathik, J. A.


Maitoga, J. A.

At Suva

4th June 2008