IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0116 OF 2019
[Suva Civil Action: HBC 107 of 2017]

BETWEEN : **NIRANJANS AUTOPORT LIMITED**

Appellant

AND : **AVINESH KUMAR**

Respondent

Coram : **Basnayake, JA**
Lecamwasam, JA
Jameel, JA

Counsel : **Mr. D. Sharma for the Appellant**
: **Mr. A. Pal for Respondent**

Date of Hearing : **14 February, 2023**

Date of Judgment : **24 February, 2023**

JUDGMENT

Basnayake, JA

[1] I agree with the reasons and conclusions arrived at by Jameel, JA.

Lecamwasam, JA

[2] I agree with the reasons given and the conclusions arrived at by Jameel, JA.

Jameel, JA

Introduction

[3] This is an appeal from the judgment of the High Court dated 22nd November 2019, whereby His Lordship the Acting Chief Justice (as he then was), awarded the Respondent (original Plaintiff) damages, salary for the period of suspension from work, ordered that the Appellant pay the Respondent the FNPF contribution, interest on a sum of $15,000, and costs in a sum of $ 4000.00.

[4] The Appellant (original defendant) has appealed on four grounds, and at the hearing before this court, Mr. Sharma, learned Counsel for the Appellant, informed this court that the appeal was being prosecuted as a matter of principle and, conceded that the Respondent ought to have been paid his salary during the period of suspension, but was pursuing the appeal in respect of costs awarded against his client. The Respondent has also filed a Respondent's Notice, challenging the judgment of the High Court, on nine grounds.

[5] By Amended Statement of Claim filed on 21 March 2018, the Respondent pleaded breach of his employment contract and defamation and sought *inter alia*, damages. The Respondent pleaded that his original Contract of Employment had been varied by letter dated 28 January 2017, and that the terms of the original Contract of Employment remained unaffected. The Appellant denied the entire claim and pleaded that the letter of variation relied on by the Respondent had been issued without authority, and that the Respondent had been terminated for gross misconduct.

Factual Background

[6] The Appellant company is a family business. Narayan Singh Niranjan (known as **Niranjan)** and his wife Prabodini Niranjan had two sons, Nitish Singh Niranjan ("***Bob***") and Nirmal Niranjan ("***Michael***"). Both were directors of the company, together with their parents and one Kuar Singh. Narayan Singh Niranjan was the Chairman of the company. The holding company was Narayan Singh Niranjan Holdings Limited (a family Trust Company) and its subsidiaries and, or related companies were Jans Rental Cars Fiji, trading as Budget Rent-a-Car, Niranjan's Motor Corporation Limited trading as Euro Cars, Niranjan's Hire Plant Limited trading as Niranjan's Hire Plant. The Respondent was employed in the Appellant company from 23 June 2017.

[7] Around 1996, Michael left the Appellant Company to start his own business Ken Motors and Ken's Rental. He later left Fiji and returned in 2015. On his return, he was employed in the Appellant company as Regional Manager (West) and was appointed Managing Director of the Appellant.

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[8] In mid 2016, a conflict arose within the family business, as a result of which Bob was removed from the post of Managing Director (***"MD")*** in the Appellant company. On 12 August 2016, Bob instituted Civil Action No.206 of 2016 in the High Court of Suva, challenging his removal from the post of MD. The Defendants in that case were his father Narayan Singh Niranjan (1stDefendant), his mother Prabodini Niranjan (2nd Defendant), and his brother Michael (3rd Defendant). He sought an interim order reinstating him in the post of MD of the Appellant Company, an interim injunction restraining the 1st and 2nd Defendants from making any further decisions pertaining to the company, Niranjan Holdings Limited, or in any other subsidiary of the holding company without his written consent, an interim injunction against the 1st and 2nd Defendants preventing them from making any decisions pertaining to the Niranjan Family Trust, or making any variations or new appointments without his written consent, and an interim injunction restraining the 3rd defendant (Michael) from acting as a Director of the company and interfering with

the Plaintiff's (Bob's) operations and management of the company, and all other related companies owned by N.S. Niranjan Holdings Ltd.

[9] In that case, the High Court found that the Plaintiff had not sought a permanent injunction reinstating him as the MD of the company and restraining the defendants from removing him as a director, or an employee of the company. The court found that the Plaintiff had only alleged that the company was having *inter alia,* financial expenditure of an exorbitant and unauthorized nature at the hands of the defendants. The court was not satisfied that the Plaintiff had made out a case for the relief sought, and by judgment dated 28 September 2016, the High Court declined to grant relief. The Plaintiff did not appeal the judgement. The family later resolved matters, and Bob Niranjan was eventually restored to the post of MD of the Appellant Company.

The Respondent's employment in the Appellant Company and subsequent events

[10] By letter dated 23 June 2016, the Respondent was offered, and he accepted employment in the Appellant company as a Business Development Manager. At that time, Bob Niranjan was MD of the Appellant company. According to the terms of the Contract of Employment he was required to report to the National Sales and Logistics Manager, the National After- Sales Manager, and to the Managing Director. It was a full-time job, with the salary of $20,000 per annum. Under the Heading "*Overtime*" it stated "*Fixed Salary Per Annum*". Salary was to be paid bi- weekly. The Respondent was entitled to a company vehicle with allowance of 30 liters of fuel per week, and a post -paid mobile phone for company related work. He was also entitled to a Sales Bonus of $ 500 per month on the sales of New Vehicles, and the bonus of $ 500 a month on the sales of Used Vehicles.

[11] On or around 14 September 2016, Bob Niranjan was removed from the post of MD, and Michael Niranjan was appointed MD of the Company, and the staff were informed of this by Internal Memos. This change in the management resulted in the Respondent having to report to Michael Niranjan. The evidence reveals that almost immediately after Bob Niranjan returned to the Appellant company as MD, he suspended the Respondent, and eventually terminated his contract.

Pleadings in the High Court

(a) The Amended Statement of Claim

[12] Initially in the court below, the Appellant was the 1st Defendant, the 2nd Defendant was Narayan Singh Niranjan, the 3rd Defendant was Nitish Singh Niranjan (known as "***Bob"***), and the 4th Defendant was Nirmal Niranjan (known as "***Michael***").

[13] When the case first came up on 2 November 2017, the Respondent was granted permission to withdraw the action against the 2nd, 3rd and 4th Respondent s, and court made order for the Respondent to file Amended Statement of Claim by 16 November 2017.

[14] When the case was taken up on 16 March 2018, the Appellant company submitted that paragraphs 14 and 19 of the Statement of Claim contained no particulars of the allegations made, and Court ordered the Respondent to serve Further Amended Statement of Claim providing particulars in respect thereof, by 22 March 2018. Further Amended Statement of Claim was filed on 21 March 2018.

[15] In the Amended Statement of Claim filed on 21 March 2018, the causes of action pleaded were breach of contract and defamation. The Respondent pleaded the contents of his Contract of Employment, and that on 28th January 2017, upon completion of his probationary period, the Defendant entered into another Agreement with the Respondent, that the fundamental terms of the new Agreement were that the term of the contract was three years full-time from 28 January 2018, salary was FJ$ 25,000.00 per annum, and the Appellant would honour in full the remaining terms of the contract if it decided to terminate the contract. The other terms of the original Contract of Employment remained as per the original contract dated 23 June 2016.

[16] By letter dated 3rd February 2017 the Respondent was suspended without pay, and on 6 April 2017 the Appellant terminated the Respondent's employment.

[17] The cause of action for defamation was based on the contents of the Letter of Termination. The Respondent pleaded that the termination of his employment by the Appellant had caused loss of earnings, loss of future earnings, injuries to his feelings, humiliation, and loss of credibility and had stigmatized him. He pleaded that the Appellant had denied him work although he had been ready, able and willing to work, and that the Appellant had acted in bad faith when it dealt with the accusations against the Respondent, and that the termination was based on unfounded accusations, and without evidence, was arbitrary, and it prevented the Respondent from performing his work although he was ready, able and willing to do so.

(b) Statement of Defence

[18] In the Amended Statement of Defence filed on 22 March 2018, the Appellant pleaded that the extension of the Respondent's contract was not authorized by a Board Resolution, and that the Respondent had been suspended on the grounds of "*gross misconduct*".

[19] The Appellant pleaded that it genuinely and honestly believed that the Respondent's conduct was reflected in the contents of the Letter of Termination, and that the Respondent was not a fit and proper person to be employed by the Appellant. It denied that the Respondent had suffered loss as a result of the Appellant 's, actions and pleaded that the termination was not publicized but was made known only to the staff within the Sales Team (with whom the Respondent worked) and to the Payroll Section. The Appellant stated that the Letter of Termination was copied to its lawyers.

The Trial

Evidence for the Appellant

[20] Nitish Niranjan Singh ("***Bob***") testified on behalf of the Appellant. His evidence was that he was appointed as Managing Director ("*MD*") of the Niranjan Group of Companies in 1995. The subsidiaries of NS Niranjan Holdings Limited were Niranjan's Autoports Limited (the Appellant Company), NMCL trading as Euro Cars and Niranjan's Hire Plant Limited trading as NHP. He testified that he had never been removed as Director of any of the companies, had been a Director of the defendant company since 1984, his

brother MN ("***Michael*")** was part of the NAL group, his brother started a competing business, from 1985 Michael had nothing to do with the Niranjan Group of companies. He also testified that Michael manipulated their parents and worked his way back into the business.

[21] According to Bob Niranjan, from 1983, the majority of the shares of Niranjan's Autoports Limited, the Appellant Company, was NS Niranjan Holdings Ltd, the directors of which were Narayan Singh Niranjan, Prabodini Niranjan and himself. It was a Trust, and he was the sole beneficiary from 2004, although the Trust Manager suggested that the Trust be vested in him entirely, and the Trustees retire, out of respect for his parents, he persuaded them to remain as Trustees. His parents became Directors in the Appellant Company by virtue of being trustees in the holding company, which was the major shareholder of the Appellant Company. He emphasized that they were on the Board of Directors at his pleasure. He stated that his father appointed Michael as a director of the Appellant Company, but it never succeeded.

[22] According to Bob Niranjan, from June 2016 to January 2017, the Appellant company was taken over by "*other people*" and Michael Niranjan was making decisions on behalf of the company.

[23] He testified that his parents 'reconciled' with him and decided to vest the Trust in him.

The evidence was as follows:

"Q: Is it correct that your parents reconciled with you and decided to vest the Trust in you?
A: 95% of my staff kept in touch. Yes.

Q: Exhibit D3. This is what the trustees met and decided.
A: *Yes they appointed me to reconcile and resolve.*

Q: From 23/1/17 you individually held shares in in NSNHL?
A: Yes.

Q: From 23/1/17 you vested? What were you doing from 23/1/17 to 30/1/17?
A: Priority to finalize legal aspects as to vesting of Trust until that time.

Q: Is it correct finalization of these matters happened on 30/1/17?
A; Yes.

Q: You fully back in control of company after that date?
A: Yes.

Q: That was with your parents blessings?
A: Yes.

Q: Is it true NSN remained (sic) chairmanship but gave MD to you?
A: Yes.

[24] Bob Niranjan admitted that he signed the Respondent's Letter of Suspension, and he carried out an investigation after the suspension. In this regard the evidence was as follows:

"Q: After suspension did you carry out investigation?
A: We provided proper process of investigation to ensure that employee is not accused. Fair process is maintained by Accounts Department and Audit Department to carry out investigation on allegation to ensure it is verified and in so doing staff is suspended so that there is not (sic) *interference with investigating personnel and team".*

[25] Bob Niranjan maintained that the Respondent had held himself out as Sales Manager when he was not, and that he was not consulted when a Landrover vehicle was sold. The evidence was:

Q: When Land Rover was sold-value that $29,000 and sold $1500 were you consulted as MD of euro cars?
A: None whatsoever

Q: did your finance team also receive payment voucher from Zara logistics one of your clients?
A: Yes.

Q: is this what was brought to your Audit Department?
A: yes, could not accept to be true. Let Audit Department to investigate and report staff signed no monies were received for services provided by company to customer.

Q: Confidential in document provided by Zar Logistics.
A: Yes.

Q: Was investigated?
A: Allow investigation and for them to sign off.

Q: Who was the person who prepared this report?
A: Staff off zoologists who dealt with this matter told him Avinesh received the money.

[26] It is important to note that there was no evidence that the said Landrover was sold during the period that Bob Niranajan was MD, and that the Respondent had breached internal procedures by selling the vehicle without his written approval. Therefore, there was no reason to get the authorization of Bob Niranjan. On the contrary, the allegation was that the said Landrover was sold when Michael Niranjan was MD, and he had approved the sale as MD. Therefore, the allegation that the vehicle was sold in breach of the company's internal procedures was ill-founded, and could not have been acted upon by the court to conclude that this amounted to connivance and gross misconduct and that, the termination on this ground, was lawful.

[27] In respect of the employment of the Respondent, Bob Niranjan testified that he was recruited after being interviewed by Devend (PW1), and Ratnesh Singh he was not consulted about the extension of the Respondent's contract, and the matter of extension would arise only at the end of the contract. He testified that the Letter of Termination was signed by him, and was collected by the Respondent from his Personal Assistant, the Respondent did not ask for a Service Certificate but had commenced legal action, he had not sanctioned the Letter of Termination to be given to anybody else but had copied it to his lawyers. There was no reason given for why the said letter was copied to his lawyers, when it was a matter that would ordinarily only concern the employee and its Human Resources Department.

[28] In cross examination he admitted that his father Narayan Singh Niranjan had appointed his brother Michael as Director of the NAL group, from June 2016 to January 2017, the investigation team got in touch with Zar Logistics staff who brought the document to the Appellant Company showing that it had paid $300.00 to the Respondent. In response to the question whether he was removed as MD in July 2016 he replied in the negative, but

conceded that his challenge of same was unsuccessful. He said that the vehicle sales transactions were hidden from him. When questioned whether he could say that the Respondent was a thief and is dishonest, he responded that he had '*no comment'*. The witness led in evidence as Exhibit D4, a photocopy of the Zar Logistics payment voucher dated 2 August 2016. However, the allegation sought to be established with this document was not proved.

[29] The reasonable conclusion from this evidence, and the totality of the evidence given by Bob Niranjan, is that Bob Niranjan himself admitted that during the period June 2016 to January 2017, he did not act in the capacity of MD. The dispute within the family came to a head, resulting in his father appointing his brother Michael to the post of MD, and him walking out of a Board Meeting in protest. In fact, Bob Niranjan's challenge of the appointment of his brother as MD was unsuccessful, and it was only by way of family agreement, and in his own words on the basis of 'reconciliation' with his parents, that he was brought back into the fold, and was restored to the post of MD with effect from 31 January 2017. Therefore, the decisions taken by the Board of Directors, as well as the Directors in their individual capacity as Directors during the period when he stood removed as MD, cannot in law, be impugned by Bob Niranjan upon his restoration to the post. Nor could he, by collateral means seek to invalidate acts of the Board or individual Directors, after his restoration.

The evidence on behalf of the Respondent

[30] Diven Ram, National Sales Manager of the Appellant company testified on behalf of the Respondent. He said that the Respondent had been interviewed by him, Ratnesh Singh, and Bob Niranjan who was MD at the time. The post had been advertised and there had been two rounds of interviews, and the Respondent was absorbed in the position of Business Development Manager. The Board was not involved in the recruitment process because the authority for recruitment had been given to the MD. The witness had prepared the Contract of Employment, and it was signed by Bob Niranjan as MD. The witness was the Line Manager of the Respondent. He stated that the sales procedure was that initially the company considered a prospective offer from the customer, the price is then agreed

upon, a Sales Information booklet is prepared and signed by the Line Manager or the MD. Once it is approved, a sales contract is prepared, the customer signs and gives a LPO or a cheque. After the customer signs, the Sales Manager and the Line Manager sign the contract. The Sales transaction is accepted only if signed by a Director of the company. After the signed paperwork is complete, it goes on for registration of the vehicle with the LTA. The Delivery Docket is prepared and signed for release of the vehicle. The final release is signed by him as the Line Manager, and if he were to refuse to sign, the MD has to approve the final release. If the MD does not sign the contract, it does not proceed, nothing further is done, and the vehicle would not even be allowed to be taken out of the Bond. The four signatories for Euro Cars were the Chairman Narayan Singh Niranjan, Michael Niranjan, Nitesh Niranjan and Kuar Singh.

[31] In cross examination he was asked as to how the valuation of a vehicle is done. He said that valuation is arrived at, after adding taxes and duties. The final decision in regard to the sale price is of the MD and he allows the Line Manager some discretion in regard to the percentage of discount that can be given. If the discounted price is within his discretion, he would give the discount. However, if it was a matter of gaining or losing a deal, the MD would decide, it being a business decision.

[32] He was not consulted before the extension in the contract was given to the Respondent. The Respondent had sold four cars for the company Euro Cars during the period July 2016 to July 2017. During this period, the Respondent would come to him with regard to preparation of sales documents. The Landrover vehicle was 10 years old when bought by the Appellant (it buys and sells used vehicles, as well), its mileage was 133,482. In regard to the sale of the Land Rover, in cross examination, he said he refused to sign for a sale price of $1500, and that the Respondent must have signed in the capacity of Sales Manager because he did not agree to sign. The evidence was as follows:

> *"From what I view: customer came to AK. He must have shown value to customer. He must have got it authorized by other two signatories. He signed as sales manager because I did not agree"* [emphasis added].

[33] The Market Value of the said Landrover vehicle would be around $30,000, the sale was approved by the MD Bob Niranjan, it was sold for $1600, the vehicle was 10 years old, the Market Value would have to be deducted from the Book Value, the sales document had been printed by Accounts and Administration, he did not know who had done it. However, he concluded by saying that *"Can't point finger at AK"*. This was clear evidence that even the immediate superior of the Respondent admitted that the Respondent could not be blamed for the alleged undervalued sale. The effect of his evidence was that, he did not doubt the honesty of the Respondent, because he categorically said that the Respondent must have got the required signatures in keeping with the internal procedures.

[34] Michael Niranjan (PW3) testified on behalf of the Respondent that the contract for the purchase of pre-owned vehicle FP885 was signed by him, the Chairman and he signed as Directors and that the forms were then sent to the LTA. He denied that he colluded with the Respondent to sign the letter extending the contract of the Respondent, he said that the variation to the contract would have to be done by the HR Department, and that there was no request from the Respondent to vary his contract.

[35] Sheik Firoz Deen (PW4) the Accountant in the Appellant company testified on behalf of the Respondent. When he was asked whether he was aware that the Respondent had collected $300.00 from Zar Logistics, he stated that he did not deal with it because cash was collected by the cashier, but stated that any money received should be paid into the Accounts Department. Witness Deen resigned a month after the Respondent was terminated.

The Evidence of the Respondent Avinesh Kumar

[36] The Respondent testified that on 3rd February 2017 the Appellant served on him, the Letter of Suspension when he was in the office. Around 10:30 a.m. the Auditors came into his room and asked him to move away from his table, he then stepped out of his office and wanted to use the washroom when he realized that the access code to it had been denied to him. He felt anxious, weak and ashamed and wanted a drink of water. He saw two persons, one in security uniform, and the other in plain clothes, who came to him

and said that had instructions from the boss that he should hand over all keys, including his car key, and his phone. One of the security guards then pulled him by his wrist and escorted him out of the door and left him outside, and told him not to come back in. He insisted that the security let him collect his lunch from his car, but he was told that he could not go back into the premises. He then walked to the bus stop which was about 20 meters away from the company premises and realized that he had no cash with him. He was entitled to a company car, the keys of which had been taken away from him. When he wanted to call his wife, he realized he did not have his phone with him, as that too had been taken away from him. He then managed to hail a taxi and get home but there was nobody at home to pay for the taxi and he delayed dispatching the taxi, eventually his wife got home and she paid the taxi fare. He had been a Commissioner of Oaths for the past 15 years and could never forget how he had been treated on that day.

The post-suspension period

[37] After he was suspended, he had emailed Bob Niranjan seeking a response and clarification on his predicament. The Respondent testified that the changes in the Management from August 2016 had been circulated by the Chairman in writing to the staff as well as the stakeholders such as the banks, informing them that Michael Niranjan was now the MD. It is relevant to note that the Respondent's Contract of Employment required him to report to the MD, and therefore, irrespective of who the MD was it was his duty to report to the MD in place. Accordingly, all transactions that he had entered into under the supervision of Michael Niranjan as MD, cannot be imputed to him alone and used as a tool to establish "*gross misconduct*" on his part.

The Respondent's attempts to gain alternate employment

[38] The Respondent testified that after his dismissal he had tried to gain employment and he had been unable to do so because of the refusal of the Appellant to give him a Service Letter. He had even applied to the Judicial Department, but had been unable to give his reasons for leaving his last employment. As a result of the termination, he had got into debt could not pay his rent or credit card bill, his landlord had given him notice of ejectment, his termination was being discussed on public forums such as Facebook and

had complained to the Police, he suffered humiliation stigma, loss of income and the inability to secure a job. In addition, he feared that he would be victimized for taking his employer to court. In his words:

> "*Was just doing my job on the instructions of people who were in power at that point in time. Decision employer made against me was very harsh. I was given my right and opportunity to reply neither before terminating me what evidence was in their hand?"*

[39] In the judgment, the learned Judge summarized the issues for determination as follows:

> *(i) Whether Plaintiff's Contract of Employment with defendant was lawfully terminated?*
> *(ii) Whether Plaintiff suffered any form of loss in the manner in which his contract was terminated or the manner in which the Plaintiff was allegedly notified of his termination?*
> *(iii) Whether Plaintiff is entitled to be paid salary for the remaining term of Contract of Employment from date of termination?*

The findings of the High Court

[40] The findings of the learned Judge may be summarized out as follows:

(a) Michael and Bob Niranjan were directors of the Appellant company, together with their parents, and Kuar Singh. Narayan Singh the father, was the Chairman of the Appellant company, which had four related companies. The company Euro Cars was incorporated by Bob Niranjan, and he had the major shares in that company, and the only two directors were he, and his father Narayan Singh.

(b) In 1996, Michael left the Appellant company, started his own business, and he later left for Australia and returned in 2015.

(c) On 23 June 2016, the Respondent was employed by the Appellant as a Business Development Manager BDM), when Bob Niranjan was MD. The contract was for a period of one year and, the probationary period was 6 months.

(d) On 14 September 2016, Narayan Singh removed Bob Niranjan as MD, and purportedly appointed Michael Niranjan as MD, and he informed all the staff, Michael acted as MD even when Narayan Singh Niranjan was present in Suva.

(e) During the period 14 September 2016 to 31 January 2017, the Respondent worked under Michael Niranjan. The Respondent signed Sales Contracts as National Sales Manager although he was not employed in that capacity, as seen in P18, P21 and P22.

(f) In collusion with Michael Niranjan, the Respondent sold vehicle bearing Registration number DX 025 at a grossly undervalued price.

(g) There is doubt whether the Respondent obtained cash from Zar Logistics (D4) and he failed to account for it to the Appellant.

(h) The letter dated 28 January 2018, under the hand of Michael Niranjan was not written by him but had been signed by him in collusion with the Respondent after they became aware that Bob Niranjan was due back as MD, and that therefore the Respondent was not entitled to rely on this letter.

(i) There was clear evidence that when Michael Niranjan signed the letter dated 28 January 2017 relied on by the Respondent, Narayan Singh Niranjan was in Fiji, which disentitles him from signing the said letter.

(j) Upon the Company becoming aware of the '*suspicious contract'* and the sale of a vehicle at a grossly undervalued sum, the Respondent was suspended on 3 February 2017, to enable the company to carry out investigations.

(k) The Appellant should have carried out the investigation expeditiously and informed the Respondent of its decision to terminate the Respondent, rather that respond to his email.

(l) The Respondent was not cross examined in regard to the manner in which the suspension was carried out, and the court accepted his evidence and the court found that the *"manner of suspension was totally inappropriate"*.

(m) The Letter of Termination had been served on the Respondent in the Appellant's office premises by Bob Niranjan's Personal Assistant, and not in the manner described by the Respondent, and that the Respondent tried to create a basis on which to claim damages for the manner in which the letter was delivered to him.

[41] Having arrived at these findings, the court found that the suspension and termination of the Respondent were both not unlawful, but that he was not entitled to be paid for the remaining term of the contract provided for in letter dated 28 January 2017, but he was entitled to salary with interest, for the entire period (including the period of suspension) up to the date of termination, *i.e.* 6 April 2017.

The Appellant ’s Grounds of Appeal

[42] Aggrieved by the judgment of the High Court, the Appellant has appealed on the following grounds:

1. *That the Learned Judge erred in fact and in law in holding that the manner of suspension of the Respondent was totally inappropriate.*

2. *That the Learned Judge erred in fact and in law in awarding the Respondent damages in the sum of $15,000.00.*

3. *The Learned Judge erred in fact and in law in not limiting the Award to salary to be paid during the period of suspension.*

4. *The Learned Judge erred in fact and in law in awarding the costs in the sum of $4,000.00.*

Discussion of the Appellant's Grounds of Appeal

Suspension

[43] In Ground 1 the Appellant contends that the learned Judge erred in holding that the *manne*r of suspension was inappropriate. The Appellant essentially maintains that there was nothing irregular in the manner in which the Respondent was suspended. However, the learned Judge accepted the Respondent's evidence on this matter, and in a single line concludes that "*the manner of the suspension was inappropriate"*

[44] Since the reasons for holding that the suspension was valid, have not been clarified, this court will consider the facts relating to the suspension, and the law in relation to suspension.

[45] The letter of suspension was dated 3rd February 2017, addressed to the Respondent stated as follows:

"***<u>RE : SUSPENSION LETTER</u>***

You are hereby notified of your suspension forthwith.

A number of transactions have come to light that shows discrepancies and inventory/assets of the company have been sold well below cost and without normal company procedures and trading terms.

This conduct denies the company of its rightful income and the government of appropriate taxes.

A valuation will be carried out of the assets sold.

A thorough investigation and audit will be carried out and you will be advised of any liability incurred as a result of your actions.

It has been disappointing to note that you have not been following the company procedures which were told to you from the first day of your employment.

Hence this letter is to be served as your suspension without pay for the following reasons.

- *Decisions and transactions that you have conducted does not comply with the rules and regulations of the company.*
- *Not following the company's procedures.*

Consequently, you to hand over all company assets and property to the Auditors immediately and this notice is to be served as your Suspension Letter.

Bob Niranjan
Managing Director
Please sign in return this for file records."

[46] The duration of the suspension was not specified and he was informed that the suspension was without pay. Unless the Contract of Employment provided for it, denial of salary whilst the Contract of Employment was in operation, render the suspension unlawful.

[47] After the letter of Suspension was issued to the Respondent, he had telephoned Bob Niranjan in regard to the suspension. It appears that Bob Niranjan had directed the

Respondent to speak to Ratnesh Singh, whom the Respondent had telephoned on 14 of February 2017. Ratnesh Singh had told the Respondent that he would let him know by 17 February 2017. In the absence of a response, the Respondent wrote an email dated 17 February 2017 to Bob Niranjan, requesting him to respond by the end of the day, as he had been waiting keenly for two weeks. This sequence of events is established by the email dated 20 February 2017 written by the Respondent to Bob Niranjan. The Respondent then sent email dated 22 February 2017 to Bob Niranjan, requesting a response within 7 days, and seeking reinstatement and an apology from the management. There was yet no response.

[48] On 21 February 2017, the Respondent addressed another email to his superiors and colleagues in the Sales Team, as well as the Appellant 's lawyers the essence of which was that he had done nothing wrong in respect of the prices of the vehicles sold, the prices had been agreed upon by the Chairman or Michael Niranjan as MD, the Chairman had made Bob Niranjan step down, he was unable to understand how the allegation of him selling assets below cost could be sustained, and that Michael Niranjan was abusing his powers by singling out the Respondent and unnecessarily victimizing him. He reiterated that he awaited the outcome of investigations in regard to his suspension.

The effect of Suspension

[49] Suspension takes away the employee's right to work, and therefore to earn. It effectively puts the contract into sub-employment mode. There is no implied right to suspend unless it is authorized by contract itself, statute, industrial instrument, or the consent of the employee. Suspension outside these grounds, will amount to a breach of the contract. In this case, the Contract of Employment did not provide for suspension pending inquiry, and for reasons that will be set out below, the suspension was unlawful.

[50] Suspension must not be used as a disciplinary tool, or as the first choice. The right to suspend is usually to enable the employer to determine as far as possible, and within a reasonable time, whether there exists a well- founded reason for the employee's conduct to be investigated in the interest of the employer, and whether there has been a breach of

the conditions of employment by the employee. It can be used if there is good reason to believe that the employee is likely to interfere with the investigations, or would affect the security of the employer, the workplace or other employees. The seriousness of the allegations must be established; the information available at that stage may have been minimal, but it ought to be pointed clearly at the suspect. In this case, Bob Niranjan returned as MD on 31 January 2017, and within three days, on 3 February 2017, he issued a letter suspending the Respondent .

[51] The Respondent ought to have been at least initially confronted and informed that there was concern about matters relating to his work. None of the concerns of the Appellant were even discussed with the Respondent prior to the issue of the Letter of Suspension. In this case, the manner in which it was done was not only inappropriate as the High Court correctly found. In my view, it was done in bad faith and a manner that is unacceptable by any civil standard and was clearly unfair, degrading and humiliating. In addition, the contents of the Letter of Suspension reflected conclusions of guilt, rather than suspicion of conduct amounting to a breach of the terms of employment, or criminal liability. In other words, the Respondent had been basically suspected and convicted with no chance of defending himself. The right to suspend an employee is not an unqualified right, and it is an implied term of a contract of full-time employment that the employer has no unqualified right to suspend on unreasonable grounds, or without just or proper cause. Further, the Letter of Suspension itself must communicate specifically that the suspension does not affect the employee's remuneration, and other cash and non-cash allowances and benefits, and must as far as possible, specify the duration of suspension. There can in law be no compromise on these fundamental obligations of the employer, reflecting in fact the existing Contract of Employment which continues to subsist throughout the period of suspension.

[52] Suspension should be resorted to only if there are *prima facie* grounds and well- founded suspicion on acceptable evidence to believe that an employee is guilty of serious misconduct, and there is an objective and justifiable reason to exclude the employee from the workplace.

[53] In my view, suspension of a full-time employee particularly at managerial level as was the case here, requires greater circumspection on the part of employer, than the suspension of a part-time clerical or minor staff position. It is not to be assumed that breach mutual trust and duties of employees at a managerial level are to be viewed lightly; but rather because the degree of ignominy visited upon a managerial level employee is likely to be more severe, and probably more likely to receive publicity, than the suspension of a minor, part-time employee. The learned Judge too found that in this case, the suspension had been executed in an inappropriate manner. This court finds that the suspension itself was unlawful, was unreasonably long in duration (over two months), whilst ignoring the written requests of the Respondent pleading for a response and justice, and for a Certificate of Service. Without doubt, it was executed in a degrading and humiliating manner, devoid of basic decency and fairness.

[54] For the reasons set out above I hold that the suspension of the Respondent was not lawful, and therefore, the Respondent was entitled to be paid his salary during the entire period under suspension. Therefore, I dismiss ground 1 of the Appellant's grounds of appeal.

[55] Ground 2 of the Appellant's grounds of appeal is that the learned Judge erred in awarding damages of $15,000.00 to the Respondent. Learned Counsel for the Appellant submitted that this was an exorbitant amount, as it amounted to 75% of the annual salary of the Respondent. In reply, Mr. Pal for the Respondent submitted that it was unfair and a misconception to use the annual salary as a point of comparison. There is merit in Mr. Pal's submission. An employee whose salary is much lower may, in certain circumstances be entitled to a sum of $15,000.00 if the evidence establishes a ground for damages. The quantum of damages will depend upon the head of damages under which it is granted. For unlawful termination of a Contract of Employment, the quantum need not always be compared against the annual salary. The issue of termination will be dealt with separately, however, at this point suffice it is to say that, because this court finds, for the reasons that will be set out below, the termination itself was unlawful, the Respondent is entitled to damages for the unexpired term of his contract which commenced on 23 June 2017. It is

difficult to see how the High Court could have awarded damages, when it held that the termination was not unlawful. This will be considered further when the Respondent's Notice is considered below. Suffice to say for now that the Respondent is entitled to damages for the unlawful termination, and therefore ground 2 of the grounds of appeal of the Appellant, is dismissed.

[56] Ground 3 of the Appellant's grounds of appeal is that the learned Judge erred in not limiting the Award to salary to be paid during the period of suspension. This ground of appeal is misconceived because the learned Judge in paragraph 53.(ii) of the Orders limited the payment of salary from 3 February 2017 (the start date of the suspension) and 6 April 2017, which was the ending date of the suspension, because that was the date of termination, and therefore the suspension automatically came to an end. Although this court finds that the Judge erred in limiting salary to the date of termination, there is no merit in the Appellant's third ground of appeal, and it is accordingly dismissed.

[57] Ground 4 of the grounds of appeal is that the learned Judge erred in awarding costs. Due to this court finding that the termination was unlawful, there is no legal basis to allow this ground of appeal, and it is accordingly dismissed.

The Respondent's Notice and Grounds of Appeal filed on 13 January 2020

[58] Aggrieved by the judgment of the High Court the Respondent too, has appealed against the Judgment of the High Court on the following grounds:

1. ***THAT*** *the Learned Trial Judge erred in law and in fact by failing to recognize the collateral employment contract in place between the Respondent and Appellant dated 28 January 2017, on the basis that it was entered into the parties by agreement and with the ostensible authority of the signatory of the Appellant himself a company shareholders and ostensible Managing Director at that time.*

2. ***THAT*** *the Learned Trial Judge erred in law, in declaring that the Respondent could not lawfully assist in the preparation of a collateral contract with the Appellant.*

3. ***THAT*** *the Learned Trial Judge erred in law and in fact by disregarding the Respondent's reliance on that collateral contract.*

4. ***THAT*** *the Learned Trial Judge failed to take into consideration that the Appellant did not communicate to the world at large, the fact that it had entered into a resolution of the family trust on 22 January 2017, until sometime on or after 31 January 2017.*

5. ***THAT*** *the Learned Trial Judge failing to adequately recognize, the lawfulness of the contract entered into between the Appellant and Respondent dated 22 January 2017.*

6. ***THAT*** *the Learned Trial Judge failed to recognize that there was no lawful authority for the Appellant to suspend the Respondent without pay, whether at contract or common law.*

7. ***THAT*** *the Learned Trial Judge committed an error of fact when he determined that the Respondent had sold a motor vehicle on 12 January 2017 for substantially less than the Appellant 's retail price, in circumstances where the vehicle sales were authorized by the Appellant itself.*

8. ***THAT****, given the above, the Learned Trial Judge erred in the determination of liquidated damages arising out of the collateral Contract of Employment dated 22 January 2017, between the Appellant and Respondent.*

9. ***THAT*** *given the above (paragraphs 1 to 6), that the Learned Judge failed to appropriately compensate the Appellant for hurt, humiliation and distress arising out of the unlawful suspension of the Respondent and the manner in which the Appellant brought the Contract of Employment to an end.*

Discussion of the grounds of appeal in the Respondent's Notice

[59] Grounds 1 to 5 of the grounds of appeal are based on the Respondent's claim that the Respondent and all employees had no official intimation of the changes in the management structure, and therefore, he was entitled to rely on the contents of the letter dated 28 January 2017, by which his original Contract of Employment dated 23 June 2016, were varied by the contents of the letter dated 28 January 2017. For reasons that will be set out, this court is unable to accept that submission.

[60] Diven Ram (PW1) in his testimony described the regular process for recruitment and changes to the Contract of Employment, and his role in promotions of employees

reporting to him. When the Respondent was initially employed, he had prepared the offer letter and it was signed by the then MD, Bob Niranjan. Usually, at the end of the period of probation, Human Resources Department would seek review of the employee from the Line Manager, who in the case of the Respondent was Diven Ram. He testified that however in the case of the Respondent, he was not consulted in regard to the extension, nor had the regular process been followed. Further, the changes in management were made known by internal memos.

[61] Nirmal Vijay Singh Niranjan (Michael) (PW 2) who testified on behalf of the Respondent said that the Chairman and he decided to extend the Respondent's contract and he admitted he signed the letter of extension of the period of employment.

[62] For the Respondent to rely on variation as a ground on which his contract was extended, the original Contract of Employment ought to have contained a clear clause permitting variation. Schedule A of the Contract of Employment contains the following clause:

> ***"Changes to Duties and or Compensation***
>
> *If your duties should change during the course of your employment with company, the validity of our agreement will not be affected. In addition, if one or more of the provisions in our agreement are deemed void by law then the remaining provisions will continue in full force and effect"*

[63] This clause reveals that the salary of an employee can be changed midstream, however in view of the evidence led of the regular procedures that were admittedly in place in the Appellant company, this court is inclined to the view that the contents of the letter dated 28 January 2017, taken in conjunction with the evidence of Diven Ram the Line Manager of the Respondent , do not lend credibility to the claim that either the said letter, or the manner in which it appears to have originated, is sufficient to vary the initial Contract of Employment. Consensual variation of a contract is legal, but its effect is to be ascertained from the terms of the second contract and the circumstances under which the second contract was executed. The evidence in this case was that the letter relied upon by the Respondent was not preceded by the necessary procedures that had been usually followed.

Accordingly, grounds of appeal 1, 2, 3, 4, 5 and 8 contained in the Respondent's notice are dismissed.

[64] Ground 6 of the Respondent's grounds of appeal is that the learned Judge erred in failing to recognize that the Appellant had no right to suspend the Respondent without pay either at Common Law, or under the Contract of Employment. This ground of appeal has already been dealt with under the first ground of appeal of the Appellant, and therefore ground 6 of the grounds of appeal in the Respondent's Notice is allowed in favour of the Respondent.

[65] Ground 7 of the Respondent's grounds of appeal is that the learned judge erred in fact when he held that the Respondent had sold a motor vehicle on 12th January 2017 for substantially less than the Appellant 's Retail Price, when the sale had been authorized by the Appellant itself. There is merit in this ground because an examination of the evidence reveals that a Director of the company did sign the sales document, thereby establishing compliance with the company's internal procedures.

[66] The evidence revealed that as Business Development Manager the Respondent was required to bring in business for the Appellant. Schedule B of the Respondent's Contract of Employment under the heading "*Key Responsibilities*" provided *inter alia*, as follows:

- *Works with Sales Executives to approve part exchanges and purchases of used cars*
- *Sanctions and manages any paint or repair work on part exchanges / used cars or preparation work on new cars, ensuring all vehicles meet the correct standards for sale or display,*
- *Agrees individual gestures and customer discounts."*

[67] It is clear that the Respondent was required to play a proactive, and not a passive role in the solicitation of business for the Appellant. He was given a reasonable amount of discretion in regard to discounts that could be given to customers. It is also relevant to note that despite the allegations of financial fraud and misappropriation alleged by the Appellant, there was no evidence of the Appellant having pursued this allegation in the

form of a Police complaint at any point of time. If indeed the Respondent alone had been responsible for colluding with other members of the staff and engaging in financial fraud there was no evidence forthcoming of any steps that had been taken in that regard. In these circumstances there was no evidence for the court to have concluded as it did in paragraph 50 (xviii) of the Judgment, that the Respondent colluded with Michael Niranjan.

[68] Even according to the company's internal procedures, the final decision on sales price had to be approved and signed off by a Director. At the time the alleged sale took place Michael Niranjan was the Managing Director. Therefore, the mere signature of the Respondent on that sales document would not capture him within the description of a person who had "*colluded*"; he could not collude with a person who had authority to do what he did. Michael Niranjan was entitled to approve the sale at the time he did. According to the company's own procedures the final decision was with a Director. This criterion was fulfilled. Therefore, it cannot be contended that the Respondent colluded with Michael Niranjan. In any event, even Witness Diven Ram testified that the blame for the alleged undervalued sale could not be foisted on the Respondent.

[69] The fact that a subsequent Director impugned the sale approved by another Director, cannot *per se*, invalidate the sale, or unequivocally point to the fault of the Respondent , so as to categorize him as having "*colluded*" with the existing management and authority (the then MD Michael Niranjan), to harm the Appellant's business. In view of the unsuccessful challenge of his removal as MD, all those acts and transactions that had taken place during the hiatus, cannot be set aside in the manner that was sought to be done. The fall-out from Bob Niranjan seeking to question all transactions that had been entered into by Michael Niranjan, was the victimization of an employee who had been complying with the terms of his Contract of Employment by reporting to the MD, and who had not in fact exceeded his authority. Therefore, the learned Judge erred when he held that the Respondent colluded with Michael Niranjan in regard to the sales of vehicles. Consequently, that incident could not have been relied on by the Appellant to found what it called '*gross misconduct*", and therefore termination on that ground was unlawful, and entitled the

Respondent to damages. Ground 7 of the Respondent's grounds of appeal is therefore allowed.

[70] Ground 8 of the Respondent's grounds of appeal combines both suspension and termination of the Contract of Employment. The issue of suspension has been already dealt with, and the issue of termination will now be considered.

The Termination

[71] The Letter of Termination signed by Bob Niranjan stated as follows:

> *6th April 2017*
> *Avinesh Kumar*
> *Business Development manager*
> *Niranjans Autoports Ltd.*
> *Suva*
>
> *RE:TERMINATION LETTER*
>
> *Further to our previous letter notifying you of your suspension on 3 February 2017 Please note that your services have been terminated.*
>
> *Probably investigations have revealed that on a number of occasions, you have not followed company procedures policies and conducted unethical practices.*
> *we detail below:*
>
> 1. *You have been responsible for selling the inventory/assets of the company well below cost and without normal company procedures and trading terms.*
>
> 2. *Upon conducting an investigation we have found out that you were involved fraudulently with our customer Zar Logistics and obtained financial advantage from them.*
>
> 3. *You have made negative impressions by making false promises to our customers which is affecting our company reputation.*
>
> 4. *You have fraudulently amended the delivery documents during delivery of vehicles.*
>
> 5. *You have sold a Land Rover Discovery sport below approved price and cost, without the approval of the managing director of euro cars.*

> *6. You have colluded with staff/ known persons to sell company inventory to staff/nonpersons, below cost and fair price, denying both the company and FIRCA fair profit/taxes.*
>
> *You have shown a complete disregard for Niranjan Group of Companies reputation, its customers and Co-workers, creating an unethical environment. Hence, this is unacceptable conduct.*
>
> *Consequently, you are hereby terminated from employment and this notice is served as your termination letter.*
>
> *Yours Faithfully,*
>
> *Bob Niranjan*
> *Managing Director.*
> *Sign and return this for file records. In the absence of your signature, it will be deemed to be accepted by you when served."*

[72] In holding that the termination was lawful, the court had to be satisfied that there was '*just cause*". In arriving at this conclusion, the court was required to consider the weightage to be given to the evidence of both sides. This was necessary because, the allegations upon which the termination eventually rested, were never put to the Respondent , nor was he ever given a right to be heard, either orally or in writing, prior to issuing either the Letter of Suspension or the Letter of Termination. Therefore, the burden was on the Appellant to establish by cogent and unequivocal evidence that the grounds of termination were justified. In the Judgment, His Lordship set out the evidence of the witnesses on behalf of the Respondent and concluded that the suspension, and termination of the Respondent, were both lawful. The Appellant relied on "*gross misconduct*" (paragraph 5 of its Statement of Defence) as the reason for termination.

[73] The burden was on the Appellant to prove the alleged acts of misconduct. In my view, it did not fulfil its burden, and it was therefore not for the Respondent to prove a negative. Although the Appellant said it was investigating the allegation, no evidence of the findings was produced.

[74] Whilst the contractual freedom of the employer to terminate is not to be interfered with, the employer cannot be said to have an unbridled freedom to escape from the duty to establish the evidence it relies upon for its decision to terminate the relationship of employer and employee, if the employer relies on gross misconduct. In this case, the Appellant admitted the suspension and the termination, but in its defence, pleaded that it was on grounds of gross misconduct. Since the Appellant did not put the allegations to the Respondent prior to the termination, it was incumbent on it to establish it in trial. The only witness for the Appellant was Bob Niranjan, and his evidence did not establish the grounds alleged for termination or provide evidence of justification for the termination. Ground 8 of the Respondent's Notice of Appeal is allowed in favour of the Respondent.

[75] Ground 9 of the grounds of appeal in the Respondent's Notice is that the learned Judge failed to appropriately compensate the Appellant for hurt, humiliation and distress arising out of the unlawful suspension of the Respondent and the manner in which the Appellant terminated the contract.

Termination and the right to damages

[76] The Contract of Employment dated 23 June 2016 was for a period of one year, of which six months was the probationary period. The Termination Clause provided as follows:

> *"Company may terminate your employment at any time for cause.*
>
> *At the end of your probationary period company may terminate your employment without cause at any time by providing you with the minimum notice, or pay in lieu of such notice, and any severance pay required by the employment standards and no more.*
>
> *In the event a temporary layoff* is ever required *it may be implemented in with the requirements of the employment standards"*

[77] On behalf of the Respondent a total of 5 witnesses including himself, testified. Diven Ram, National Sales Manager of the Appellant company testified that he was told about the Respondent's termination by Nitish Niranjan. He had informed the Sales Team,

Branch Managers and customers who inquired after the Respondent, that he was no longer employed. He testified that once a sale is finalized, it is not effected until a Director signs the Delivery Docket. A sales transaction is accepted only if signed by a Director of the Company. Final release is signed by him as the Line Manager. If he refuses, then the MD must approve the final release. If a Director does not sign on the contract, the vehicle cannot even be taken out of the bond. Euro Cars was a separate legal entity, the Respondent was paid the Commission for selling cars belonging to Euro Ears, the signatories for Euro cars are also the four signatories of the Appellant company. The Respondent had the potential to sell one or two-Euro Cars Ltd. and was eligible for a commission. The right to receive a commission on the sale of vehicles, was included in the Contract of Employment.

[78] In my view, a survey of the evidence that was led on behalf of the parties, showed that the court did not give due weightage to the evidence of the Respondent which contradicted that of the Appellant in respect of the justification for the grounds of termination. There was inadequate consideration of the totality of the evidence that transpired on behalf of the Respondent, particularly regarding the allegations made against him, and relied upon by the Appellant to justify termination. This is significant because the court held the suspension and termination were both lawful but found that the "*manner of suspension was inappropriate*". I hold that on the entirety of the evidence, the Respondent's employment was unlawfully terminated. He is therefore entitled to his salary and perquisites for the period from the date of suspension, until the date of the contractual terminal date of the contract, that would have been 23 June 2017.

The duty of the Plaintiff or the injured party to mitigate loss.

[79] The injured party has a duty in law to mitigate his loss for breach of contract. For the reasons set out above it is clear that the Respondent had made every attempt to obtain employment after he was terminated by the Appellant, however the failure of the Appellant to issue a Service Letter, as well as the adverse publicity that appears to have been given against the Respondent, had no doubt played a role in his being unable to

obtain employment after termination by the Appellant. In fact, this position was not challenged by the Appellant in the court below, although during the hearing before this court the explanation sought to be proffered was that "*in this day and age*", anyone could create a social media account, and put together information imputing it entirely to someone other than the person who actually created the profile and information. Attractive as it may sound, that is not a legal defence to the complaint and allegation of the Respondent in the court below, and therefore, as a matter of evidence, the Respondent's position on this matter remained unchallenged, leaving this court to draw a reasonable inference from that.

[80] In determining damages for unlawful dismissal, this court is guided by the following authorities:

> *"Basically the amount that the Plaintiff would have earned under the contract is the salary or the wages which the defendant had agreed to pay. In addition, there may be benefits in kind the value of which must also be taken into account, such as a rent free residence, board and lodging, luncheon vouchers and the like, and also benefits under pension schemes. Where the Plaintiff has been entitled to be paid commissioned on work done or sales affected by him, or in relation to the profits made by the defendant in his business, on orders received from customers introduced by him, this must also be taken into account, provided always that the defendants failure to provide the Plaintiff with an opportunity to earn the Commission constitutes a breach of contract. this proviso is important and on the facts of a particular case it is often difficult to ascertain whether there has been a breach especially where the wrongful dismissal is occasioned by the defendant closing down his business… The average amount that the Plaintiff has previously earned by way of Commission may be taken as evidence of what he would have earned subsequently but for the dismissal."* (**Mc Greggor on Damages,** 15th Ed, 1988, Sweet and Maxwell).

[81] The Supreme Court of Fiji in **Central Manufacturing Company Ltd v Kant** [2003] FJSC 5; CBV0010.2002 (24 October 2003), considered damages arising out of humiliation and degrading treatment suffered on unlawful termination, and the manner of dismissal. The court said:

> ***"****The Court of Appeal noted that all three breaches arose out of the manner of dismissal. This raised for consideration the question whether* ***Addis v***

__Gramophone Company Limited__ *[1909] AC 488*, *a case long seen as authority for the proposition that damages arising out of the manner of dismissal cannot be recovered, was still good law. The Court observed that the authority of* *__Addis__* *had been eroded in a number of jurisdictions, including New Zealand, but that it was unnecessary to discuss those authorities since the whole question had recently been analysed in depth in* *__Johnson v Unisys Ltd__* *[2003] 1 AC 518. After analysing that judgment in some detail, the Court concluded that* *__Addis__* *no longer stood in the way of the recovery of damages arising from the breach of an implied term of a Contract of Employment, even though the breach arose from the manner of dismissal.*

[82] The Supreme Court then said:

" it does not follow that there is no implied term requiring an employer to deal fairly with an employee when dismissing that employee.

[83] The Supreme Court said further:

In **Johnson** Lord Hoffmann commenced his analysis of **Addis** by reviewing the development of the law regard to employment contracts. Initially, they were regarded as any other contracts. Parties were free to negotiate their terms, and nothing additional could be implied thereto. His Lordship said at 539:

"But over the last 30 year 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. Most of the changes have been made by Parliament..."

[84] Having considered a series of authorities, citing the Canadian Supreme Court's judgment in the case of **Wallace v United Grain Growers Limited [**1997] 3 SCR 701, the court said:

"In ***Wallace****, the Supreme Court of Canada held that the Contract of Employment has many characteristics that set it apart from an ordinary commercial contract. The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence most in need of protection. Employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal. While a dismissed employee was not entitled to compensation flowing from the fact of dismissal itself, where it could be shown that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation,*

embarrassment, and damage to self-esteem might all be worthy of compensation. Often the intangible injuries caused by unfair dealing on dismissal will lead to difficulties in finding alternative employment. However, the intangible injuries are sufficient to merit compensation in and of themselves. In an appropriate case, damages may be awarded for mental distress.

*In our view, the Court of Appeal correctly determined that **Addis** no longer represents good law. The modern trend of authority, apart from the decision of the House of Lords in **Johnson** (which is explicable on other grounds) is entirely against the somewhat artificial approach taken by Lord Loreburn. Even among the majority Law Lords in **Johnson** there was little enthusiasm for the principle. **Addis** only survived because, in practice, it did not preclude recovery of damages for distress and humiliation arising from the manner of dismissal through the industrial tribunals. ..*

*This Court is required to declare the common law as it applies in Fiji. In our view, **Addis** has no place in a modern system of employment law. It should now be consigned to history.*

*We reject the petitioner's contention that this task should be left to the legislature. **Addis** is a product of the common law. It may have been correct in 1909, when conditions of employment were very different from what they are today. It is no longer, however, an appropriate standard by which to regulate employer/employee relations.*

*We also reject the argument that social and economic conditions in Fiji are so different from those in Canada or New Zealand as to make it inappropriate to follow the most recent statements regarding employment law in those countries. We have regard to s 33(3) of the Constitution 1997 which provides that **"every person has the right to fair labour practices, including humane treatment and proper working conditions"**. The continued existence of **Addis** seems to us to be difficult to reconcile with that right.*

The final matter to be considered is the petitioner's argument that the Court of Appeal acted upon speculation and conjecture, and not evidence, when it assessed damages in the amount of $30,000. It was submitted that there was no evidence to support the conclusion that the Respondent had suffered anything like the harm found to have been caused by the manner of his dismissal. In particular, there was no evidence that his inability to find alternative employment for two years was brought about by the insensitive treatment accorded to him by the petitioner.

We accept the petitioner's argument on this point. The Respondent called no evidence to suggest that he had suffered any physical or psychological damage resulting from the manner in which he was dismissed. His evidence regarding the damage done to his reputation was tenuous, at best, and did not provide the basis for a link between the manner in which he was treated on the day of his dismissal, and his inability to find alternative employment.

In our view, the Respondent was entitled to some compensation for the distress and humiliation that was needlessly inflicted upon him by his employer in the manner in which he was dismissed. However, two of the three bases upon which the Court of Appeal assessed damages have been found to be in error, and the third basis, namely harm to reputation, significantly modified. The Respondent was publicly humiliated by the manner of his dismissal, involving as it did the unnecessary use of security, and the prevention of access to his office. However, the amount awarded as compensation should be significantly less than that assessed by the Court of Appeal.

From the perspective of Plaintiff employees, the principal difficulty with the headnote rules is that they engender a narrow view of the employment contract — as a purely commercial exchange of remuneration for services. This narrow view is at odds with the 'social reality' [13] *of employment, which entails a holistic bargain encompassing personal and relational as well as financial dimensions. Broussard J of the Supreme Court of California has remarked that an individual 'usually does not enter into employment solely for the money; a job is status, reputation, a way of defining one's self-worth and worth in the community.'*[14] *In a similar vein, Lord Hoffman has noted 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.'*[15]

[85] The Respondent pleaded and tendered evidence of undue publicity given to his termination, and the shame and humiliation he suffered as a result of it. The matter appeared to have been discussed on social media and printouts of the screenshots on Facebook been tendered in evidence. This evidence had not been challenged in the court below. As to what effect it would have had on a person in the position of the Respondent can be reasonably gauged from considering his previous employment record, and the positions he held in society. He had been a Commissioner of Oaths from 27th of June 2013 for a period of three years, and that had been extended up to 2016. He had worked at BOC (Fiji) Ltd between 2001 and 2010. From 2001 to 2005 he held the post of Cylinder and Debtors Controller, from 2005 to 2008 he held the post of Branch Manager, Labasa, and from 2008 to 2010 he held the post of Branch Manager, Lautoka. He had worked at Vodafone Fiji between 2009 and 2013 as a Debt Recovery Officer. The letter from BOC (Fiji) was dated 21 July 2014, and the letter from Vodaphone was dated 2 July 2014. These letters had been obtained before he commenced employment with the Appellant and they all reflected that he was an honest person of good character, and was held in high esteem in society. He had a steady employment record, he had engaged in social service

at a community level, and was certainly not regarded as a person whose integrity was in doubt.

[86] By a Character Reference dated 9th June 2016, the then Minister of Youth and Sports certified that he had known the Respondent from 2014, as he had joined as an Advisory Councilor for Nasinu in 2010 to 2013 to look after Community Welfare and Development. He had found the Respondent to be:

> "*whole, an exclusive always honest straight upright and fair. He performed his duties exceptionally well with dedication pride and integrity…… He ultimately combined with reliability and truth that displays trust and confidence in his communities and also gains their respect. I see Mr. Avinesh as very diligent firm friendly and with proper training and guidance we'll become a very respectable senior welfare officer. With the above I have no doubt that Mr. Avinesh Kumar is responsible and trustworthy. I am confident that he can perform above expectation if given the opportunity.*

[87] None of these Character References was disputed or challenged in any manner. The Appellant also did not deny that it had failed to give the Respondent the Service Letter that he had requested. It was only in the evidence of Bob Niranjan when asked about the Service Letter, he replied that the Respondent commenced legal action, alluding to the fact that the Respondent was hasty in commencing legal action against the Appellant. However, the failure on the part of the Appellant to release the Respondent honorably, refusal to give him a Service Letter, and the complete indifference shown to his requests to communicate to him the steps that were being taken in regard to the suspension and the investigations, left him in grave distress and uncertainty, and definitely affected his future prospects of employment. He was denied his salary from the day of suspension and was unreasonably and unlawfully terminated without just cause. It requires no convincing to conclude that he was unable to retain a Counsel to appear on his behalf in the court below, because of the dire economic situation that he was thrown into.

[88] Whilst the employer has the freedom to terminate a Contract of Employment for just cause, this does not give him an unfettered power to humiliate, embarrass and treat an

employee with gross unfairness and in bad faith, which appeared to have permeated all the events leading to the termination in this case.

[89] Whilst damages are meant to restore the injured party to the position (not merely the financial position) that he would have been in if the actionable wrong had not taken place, there is no basis on which to exclude all pecuniary losses suffered connected with the wrong. Although courts have been reluctant to award damages for feelings of anguish and hurt as a result of the termination of a Contract of Employment, the manner of dismissal and the preceding events such as bullying, abuse, or unjustified allegations, are not grounds that the court ought to ignore.

[90] The modern view of the employment contract is that;

> " *extends beyond the mere exchange of remuneration for services. In addition to remuneration, the employee gains marketable skills, experience and reputation, personal financial security, and a sense of identity, dignity and involvement in the community"* (Keesing, Grace, *Contractual Rights and Remedies for Dismissed Employees after the 'Employment Revolution'*" [2012] Melb. U LawRw 3; (2012) 36(1) Melbourne University Law Review, 104).

[91] There is no reasons not to adopt the view of the modern Contract of Employment. An observation that must be made; it is telling that not a single employee of the Appellant company testified on its behalf. It was only Bob Niranjan who testified for the Appellant company. On the contrary, two employees and two Directors of the Appellant Company, testified on behalf of the dismissed the Respondent, the dismissed employee, and it is not without significance that the Respondent took it upon himself to single-handedly challenge this unfair dismissal, irrespective of the outcome. The irresistible conclusion is that he was basically targeted and victimized but was confident that the truth would triumph and he would vindicate himself. This, he has now done.

Conclusions

[92] For the reasons set out above, I conclude that the suspension and termination of the Respondent was unlawful. The Appellant failed to prove gross misconduct on the part of the Respondent. The evidence reveals that the Respondent was subjected to gross unfairness. The termination of the Respondent in the absence of reasonable notice, and for just cause was unlawful. The Respondent was entitled to be in service for the entirety of the period covering the Contract of Employment dated 23 June 2016, unless the Appellant established just cause. This was not done. The Respondent is entitled to the entirety of all sums of the unpaid salary up to 23rd June 2017 (3 February to 23 June 2017), together with legal interest thereon.

[93] For the reasons set out above, the Respondent is entitled to damages in a sum of $60,000.00 for unlawful termination together with legal interest thereon. He is also entitled to the value of the vehicle and petrol allowance, in accordance with the Contract of Employment for the entirety of the contractual term. Although no evidence of the value was led, the right to vehicle and the petrol allowance is a matter that is provided for in the Contract of Employment. In view of the finding that the termination was unlawful, the Respondent is entitled to all benefits flowing from the Contract of Employment. Accordingly, this court awards a sum of $3000.00 for the period when he was deprived of the said benefit, *i.e.* 3 February 2017 to 23 June 2017.

[94] This court sees no reason to disturb the order made by the High Court in respect of costs. The Respondent is also entitled to costs in this court.

Orders of the Court:

(i) The Appellant's appeal is dismissed.

(ii) The judgement of the High Court dated 22 November 2019, is set aside, except in respect of the order of costs of $4,000.00 in favour of the Respondent.

(iii) *The Respondent's appeal is allowed in part (grounds 6, 7 and 9).*

(iv) *The Appellant is ordered to pay to the Respondent a sum of $ 60,000.00 as damages together with legal interest from 23 June 2017 up to the date of payment in full.*

(v) *The Appellant is ordered to pay to the Respondent the contracted salary together with legal interest thereon from 3 February 2017, to 23 June 2017.*

(vi) *The Appellant is ordered to pay to the Fiji National Provident Fund to the account of the Respondent, the FNPF contribution payable for the period 3 February 2017 to 23 June 2017, together with legal interest from 3 February 2017 to the date of this judgment.*

(vii) *The Appellant is ordered to pay to the Respondent a sum of $3,000.00 being the value of the vehicle allowance for the period 3 February 2017 to 23 June 2017.*

(viii) *The Appellant is ordered to pay to the Respondent a sum of $5,000.00 as costs in this court, and a sum of $ 4,000.00 in the court below.*

(ix) *All the payments set out above are to be effected and paid by the Appellant within 28 days of this judgment.*

COURT OF APPEAL FIJI

....
Hon. Justice Eric Basnayake
JUSTICE OF APPEAL

....
Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

....
Hon. Justice Farzana Jameel
JUSTICE OF APPEAL

Solicitors:

R.Patel Lawyers for the Appellant

A.P. Legal for the Respondent