IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 319 of 2007

BETWEEN : **OLOTA ROKOVUNISEI** of 761 Damu Circle, Pacific Harbour, Deuba, Fiji, Businessman

PLAINTIFF

AND : **FIJI NATIONAL PROVIDENT FUND BOARD** a statutory body established under the Fiji National Provident Fund Act Cap 219.

DEFENDANT

BEFORE : **Justice Deepthi Amaratunga**
COUNSEL : **Ms. Vaniqi S** for the Plaintiff
Mr. Sharma D for the Defendant
Date of Hearing : **28th and 29th October, 2014**
Date of Decision : **27th November, 2014**

JUDGMENT

INTRODUCTION

1. The Plaintiff, who was the CEO of the Defendant, was terminated of his services on 19th April, 2007. Before the said termination he was handed over letter containing 11 charges relating to misconduct and was requested for response within 14 days and was informed that if an explanation was given within the said time period a Tribunal would be appointed for the hearing of the charges. The plaintiff replied to the 11 charges within the time allocated and a Tribunal was established, but there was no agreement between the parties as regards to the terms of the said Tribunal and the Defendant terminated the Tribunal and immediately terminated the employment of the Plaintiff. The Plaintiff is claiming damages for unlawful termination of employment.

FACTS

2. The Plaintiff gave evidence and closed their case, and for the Defence the present CEO and Principal Internal Auditor gave evidence.

3. The bulk of the facts in this case are agreed between the parties. There is an agreed bundle of documents containing 5 documents and they were marked P1-P5. Even irrelevant facts were admitted in the Pre-trial Conference and, these are not repeated for obvious reasons.

4. The following facts are agreed between the parties at the Pre-trial conference (some of the irrelevant facts agreed are omitted)

   a. The Defendant is a body corporate and Trustee of the Fiji National Provident Fund (hereinafter FNPF) established under the FNPF Act (Cap219) as a provident fund for all employees.

   b. The Plaintiff joined the Defendant in 1976 as a System Engineer rising through its ranks to EDP Manager, Assistant General Manager, Deputy General Manager to General Manager and Chief Executive Officer with effect from 2001.

   c. The Plaintiff had been in employment with the Defendant for a period of approximately 30 years.

   d. On 1 June 2001, the Plaintiff entered into a written contract of employment with the Defendant for a period of three (3) years as its General Manager and Chief Executive Officer.

   e. Upon expiry of the contract referred to in paragraph 5 herein, the Plaintiff entered into a subsequent and new written contract of employment with the Defendant on 1 July 2004, for a period of five (5) years as its General Manager & Chief Executive Officer.

   f. On 25 January,2007, the Plaintiff was suspended from his position by the Acting Chairman of Defendant, Mr. Aisake Taito, and sent on annual leave (with pay and employee benefits remaining in place) pending investment in various projects.

   g. On 27 February 2007, the Acting Chairman of the Defendant issued to the Plaintiff a letter detailing ten (10) allegations of personal misconduct against the Plaintiff and suspended him without pay and advised him that it was entitled to terminate the Plaintiff's employment under clause 36(c) of the Plaintiff's contract of employment if the allegations were substantiated.(note: there were in fact 11 charges in the said letter and this may be due to a mistake in the agreed facts).

h. The Plaintiff was given fourteen (14) days in which to respond to the allegations and the Defendant further informed him it would appoint a Tribunal to enquire into the allegations of misconduct upon receipt of the Plaintiff's response as well as provide the Plaintiff with an opportunity to be heard pursuant to clause 36(d)(ii) of his Contract of Employment.

i. On 15 March 2007, the Plaintiff was directed, in writing by a letter from the Acting Chairman of the Defendant, to return all of the Defendant's property.

j. In accordance with the Deadline stated in (h) above, the Plaintiff wrote to the Defendant by letter dated 12th day of March, 2007. He also sought a copy of the Audit Report and the staff Loans Policies and Procedures Manual (upon with the allegations were reportedly based).

k. The Plaintiff's solicitors were advised by the Defendant, in writing by letter dated 21 March, 2007 that the first call of the Tribunal established by the Defendant to inquire into the allegations against the Plaintiff pursuant to the Plaintiff's contract of employment was to take place on 26 March 2007at 10 am at level 5, Civic House, Suva.

l. Mr. Barrie Sweetman was appointed by the Defendant under the Plaintiff's contract of employment to inquire into the allegations of misconduct made against the Plaintiff, to hear the evidence and to make findings in respect of the said allegations and forward the same to the Defendant for decision.

m. The Plaintiff's counsel appeared before the Tribunal on 26 March 2008 together with Mr. Hemendra Nagin of Messrs. Sherani and Company for the Defendant.

n. On 27 March 2007, the Defendant's counsel forward draft Deed of Agreement setting out the terms of the inquiry to the Plaintiff's counsel for consideration.

o. On the same day (27 March 2007) the Plaintiff's counsel responded, proposing that the draft Deed be amended to allow the Plaintiff to be given a copy of the Tribunal's findings and that the FNPF could not widen the scope of the allegations beyond the letter from FNPF to the Plaintiff dated 27 February 2007.

p. On 19th April 2007, the Defendant's counsel advised the Plaintiff's solicitors in view of the failure to reach agreement on the draft of the Deed of Agreement by the deadline mentioned in paragraph 24 herein, that the Defendant had resolved to revoke the appointment of Mr. Barrie

Sweetman as Tribunal and it would proceed to determine the case against the Plaintiff on the evidence and response by the Plaintiff.

q. On the same day (19 April 2007) the Plaintiff's solicitors wrote to FNPF's solicitors alleging a breach of faith on the part of the Defendant in refusing to accept the amendment to the draft Deed proposed by the Plaintiff's solicitors.

r. Also on 19 April 2007, the Chairman of the Defendant wrote to the Plaintiff advising that the reason it was revoking the appointment of the Tribunal was the apparent failure of the parties to agree on the Deed of Agreement.

s. In the same letter above, the Chairman also stated that having considered the charges, the Plaintiff's response and the evidence, the Defendant was terminating the Plaintiff's employment with immediate effect.

ANALYSIS

5. From the above agreed facts reproduced in verbatim, it is proved that the Plaintiff had replied to the 11 charges contained in the letter marked P3 (in the agreed bundle of document). The said letter stated that **'if your response is received then the Board will appoint a Tribunal to inquire into the allegations of misconduct and provide you with an opportunity to be heard in line with Clause 36(d)(ii) of your contract'.**

6. The clause 36(d)(i) of the employment contract P1 states that if the termination was due to performance of the duties, first the board needed to advise in writing of the nature of the Board's dissatisfaction and after the said advise, a reasonable opportunity to perform as required by the Board should be given **or**, **if the issues were regarding the misconduct, a reasonable opportunity to be heard by the Board (36)(d)(ii).** Only the latter applies to the Plaintiff as his alleged dismissal was not due to performance, but due to alleged misconduct. So he should be given 'a reasonable opportunity to be heard by the Board'.

7. The issue is whether the Plaintiff was granted a reasonable opportunity to be heard by the Board. It should be noted a 'reasonable opportunity to be heard' as contained in the employment contract (P1) is a lawful prerequisite for dismissal for misconduct.

8. In the written submission of the Defendant at paragraph 7 the Defendant tries to deviate from the main issue in this case. It is not the reason why the Plaintiff was terminated, as contended in the submissions of the Defendant, but the manner in which he was terminated that will determine the issue whether the Plaintiff's termination of employment was lawful. If the manner in which he was terminated was contrary to the employment contract it is unlawful, he will be entitled to damages for the breach of contract. So even if the reasons for termination can be justified, if it was done contrary to the employment contract it would be an unlawful termination.

9. By the letter dated 27th February, 2007 the Defendant, informed to the Plaintiff that 'during an Internal Audit carried out by FNPF serious allegations of misconduct have surfaced' against him. The details of the charges were described and 11 specific charges that were contained in the said letter. This letter is P3 (in the agreed bundle of documents).

10. P3 further stated that the Board was entitled to terminate the employment under clause 36(c) of the contract if the said charges were found to be justified and sought written response from the Plaintiff within 14 days.

11. P3 stated, that if a response was given within 14 days the Board would appoint Tribunal to inquire into the allegations of misconduct and provide him an opportunity to be heard in line with clause 36(d)(ii) of the employment contract(P1). So in this letter the Defendant was reinforcing what was already stated in clause 36(d)(ii) of the employment contact. The appointment of the said Tribunal was to allow 'reasonably opportunity to be heard by the board' as stipulated in the said clause 36(d)(ii) of the employment contract.

12. The Plaintiff responded in his detailed letter dated 12th March, 2007 (P4 in agreed bundle of document) and a Tribunal was appointed but the Tribunal could not proceed with the hearing as the parties were not in agreement relating to two main issues and they were

a. That the amending of the charges during the inquiry.
b. The access to the final report of the tribunal to the Plaintiff.

13. The Plaintiff requested that the charges should not be amended beyond the nature of the allegations already contained in the 11 charges and if there was an amendment an opportunity was requested for amending the response, to the Plaintiff. These evidence were unchallenged and contained in the P8 and P9 emails and annexed draft terms for the tribunal agreement. The Defendant did not agree to release the final report of the Tribunal to the Plaintiff or to the request relating to the issue of amendments.

14. In the evidence the Defendant's present CEO was unable to explain why they refused consent to release a copy of the report of the tribunal to the Plaintiff. The Plaintiff had given an assurance not to reveal the content of final report if their request was granted, but the Defendant refused to accede to it.

15. The present CEO in his evidence said at that, when the Tribunal was appointed, the investigations regarding the Plaintiff were not concluded and that was the reason not to consent to the request of the Plaintiff regarding the amendment of charges, but he was unable to explain why the Defendant could not release the findings of the tribunal to the Plaintiff. This indicates the said refusal was unreasonable.

16. It is also noted that the Defendant was not flexible, for a reasonable request like a copy of finding of the Tribunal. The issue of amendments and the position taken by the Defendant and the conduct of the Defendant at that time cannot be justified fully. The letter containing 11 charges specifically stated that the charges were based on the internal audit report which was completed before the 11 charges were made against the Plaintiff.

17. If the investigations were going on at time the Defendant could have stated that fact at that time. If added charges were brought before the Tribunal they should be adequately replied by the Plaintiff. So the conduct of the Defendant not to accede to reasonable request of the Plaintiff cannot be justified in their evidence.

18. The Defendant's witness, the chief internal auditor stated that the final recommendation of the specific investigation relating to the activities of the Plaintiff, was to conduct further hearing of the findings of the said internal audit report. While giving evidence both the present CEO and the Chief Internal Auditor confirmed that the recommendations contained in the conclusions of the internal audit report (marked as D11) were accepted by the Board without any reservation. So the conclusions of the specific internal investigation of the Plaintiff were, to have a proper disciplinary process which would establish whether the Plaintiff was guilty of serious misconduct or minor misconduct. It also recommended that disciplinary process should ensure a fair hearing to the Plaintiff in order to safeguard the Board from possible future litigation. From the evidence presented before the court it is clear that the said conclusion of the audit report (D11) was based on the employment contract (P1) and more specifically clause 36 of the employment contract.

19. Considering the Defendant had refused to provide final report of the Tribunal to the Plaintiff or to allow any amendments to the response if the charges were amended, would indicate that those requests were reasonable concern for the Plaintiff and they were met with refusal without showing flexibility to requests, on the part of the Defendant. So, now the Defendant cannot blame the Plaintiff for the failure to proceed with the Tribunal.

20. By letter dated 19th April, 2007, the Plaintiff's employment was terminated and explained the circumstances that led to the revocation of the appointment of the Tribunal and stated that '**Board has fully considered the evidence and the charge laid against**' him. The Plaintiff was accordingly terminated with immediate effect.

21. The Defendant was unable to accede to reasonable requests of the Plaintiff regarding the terms of the Tribunal Agreement as evidenced from P8 and P9. The Defendant was unable to explain any reason for their refusal to request for releasing the report of the Tribunal to the Plaintiff. At the same time the request to amend the response if new charges were added or existing charges were amended while proceeding with the tribunal cannot be considered an unreasonable, too. Without resolving these issues one cannot consider that the hearing of the Tribunal can be considered as 'reasonable opportunity to be heard' was offered to the Plaintiff. In terms of the clause 36(d)(ii) of the employment contract a 'reasonable opportunity to be heard' should be offered to the Plaintiff when the allegations are relating to misconduct. From the evidence adduced, on the balance of probability the clause 36(d)(ii) of P1 was not complied with, when the Defendant terminated Plaintiff's employment.

22. The revocation of the appointment of the Tribunal was mainly due to unreasonable conduct when the Defendant refused the requests of the Plaintiff contained in P8 and P9 emails and the annexed drafts with the suggested amendments to the Tribunal Agreement.

23. The Defendant submitted the Fiji Court of Appeal, decision of ***Kant v Central Manufacturing Company Ltd*** [2002] FJCA 39; ABU0001U.2001S (30 August 2002) with its written submission. The High Court decision relating to this appeal was also submitted to court. In the Fiji Court of Appeal decision it was held,

> '*There is authority for the view that employment contracts contain an implied term that procedure leading to termination must be consistent with fairness.* ***Stuart v. Armourguard Security Ltd****. [1996] 1 NZLR 484.*

Further concluded

> *'For all those reasons we are of the opinion that in Fiji Addis v. The Gramophone Company Ltd. no longer stands in the way of the recovery of damages arising from the breach of an implied term of a contract of employment even although the breach arises from the manner of dismissal'*

24. The decision of Fiji Court of Appeal recognized a claim for damages ***Kant (***supra) for the manner in which the termination of employment by the employer and also recognized implied condition to act fairly. The Defendant was obliged under the law to act fairly in offering an opportunity to the Plaintiff to be heard in a reasonable manner.

25. The Defendant not only revoked the Tribunal by its letter dated 19th April, 2007, but also terminated the employment of the Plaintiff without offering a reasonable opportunity for hearing to the Plaintiff which was recommended by their own internal audit report (D11).

26. The Plaintiff at the commencement of the trial objected to the marking of internal audit report. The objection was based on the relevancy and not on the basis that the counsel was taken by surprise. The audit report is a fact relevant to the fact in issue. The termination of the Plaintiff was mainly based on the internal audit report and this was specifically stated in the letter where the 11 charges were made. So the said report is relevant to the issue of termination. The said audit report D11 supported the arguments of the Plaintiff and the evidence of the chief internal auditor also substantiated the requirement of a fair hearing of the findings contained in the said internal audit report.

27. I cannot agree with the contention of paragraph 24 of the written submission of the Defendant, where it stated 'it is difficult to reconcile the wordings of clause 36(c) and 36(d)(ii). The clause 36(d) starts with '**the board shall not terminate this Contract under paragraph(c)-**…….'. So the clauses 36(d)(i) and 36(d)(ii) are paramount considerations in relation to termination under clause 36(c) of the employment contract, as expressly stated at the commencement of 36(d). So, there is no ambiguity as suggested by the Defendant's counsel. So I reject the said contention. The termination of the Plaintiff's employment was contrary to Section 36(d)(ii) of the employment contract (P1) and it is unlawful.

DAMAGES

28. Next issue is the calculation damages. The Plaintiff is seeking all the dues in terms of the employment contract for the remaining period. This cannot be the basis for the

assessment of damages. The Plaintiff was the CEO of the Defendant. In his evidence he did not state that why he could not find suitable employment during the remaining period of time. The Plaintiff did not produce any evidence that he made efforts to find a suitable employment either in Fiji or elsewhere. In the circumstances he cannot claim for the remaining period under the employment contract.

29. In the submission for the Plaintiff there are facts regarding newspaper publication which were not presented as evidence in this trial and I disregard the same.

30. The employment contract (P1) provided either party to terminate the contract on payment of money or with notice as stipulated in the said contract. The employer could terminate the contract 'with or without cause' by giving 6 months notice or by paying 6 months' basic salary in lieu of the notice. There is provision for the employee to terminate the contract but that is irrelevant to the issue before the court.

31. So, in terms of clause 36(a)(ii) of the employment contract (P1) the Defendant could terminate the employment contract with the Plaintiff immediately without notice and also without cause on payment of 6 months basis salary.

32. In this case the Plaintiff was served with 11 charges of misconduct and a Tribunal for the investigation of the said charges were also appointed, but it could not proceed because of the failure to agree on certain terms that ultimately resulted Defendant revoking the appointment of the Tribunal and also termination of the employment of the Plaintiff. In the circumstances I would assess the damages as 6 months basic salary of the Plaintiff in terms of the employment contract.

33. In ***Fiji Electricity Authority v Naiyaga*** [1998] FJHC 77; Hba0004aj.96s (29 May 1998) (unreported) Fiji High Court, Justice Pathik discussed the law relating to award of damages in unlawful termination of employment as follows;

> '*In the text book TRADE UNIONS, EMPLOYERS AND THE LAW by G.S.MORRIS & T J ARCHER 2nd Ed para. 3.20 at p.70 it is stated:*

"The length of notice required for termination is usually specified in the contract. If there is no express agreement between the parties, the courts will imply a term by examining whether there is a customary term as to notice and, if none, what constitutes reasonable notice in all the circumstances."

In the footnote 1. to above passage the authors say that "factors such as length of service, the type of employment, seniority, and the rate and frequency of payment are among those relevant in assessing reasonableness". Subject to what I say hereafter, similar considerations would apply in this case.

On the concept and implications of dismissal the authors at para 3.21 state that:

".....If the employer does not terminate the contract in accordance with its terms (whether express or implied), the employee can sue the employer for breach of contract. The remedy will usually lie in damages" (underlining mine for emphasis)

Elaborating on the above statement in footnote I, they say "the employee is entitled to recover the loss which arises naturally in the ordinary course of things from the breach and also for any loss which it was reasonably foreseeable by the parties as being likely to arise from the breach. See McGregor, 1988".

In ***HILL v C.A. PARSONS & CO. LTD*** *(1971) 3 All ER 1345 at 1350 DENNING MR stated what the employee is entitled to after dismissal:*

"The servant cannot claim wages after the relationship had determined. He is left to his remedy in damages against the master for breach of contract to continue the relationship for the contractual period. He gets damages for the time he would have served if he had been given proper notice, less of course, anything he has earned or might have earned in the alternative employment".

(emphasis added)

*The fact that the retiring age in the agreement is 55 years does not mean that it is a contractual retiring age. It is the age at which employees of that description in the relevant group can reasonably expect to be compelled to retire [**AGE CONCERN SCOTLAND v HINES** (1983) IRLR 477] [quoting from SELWYN'S LAW OF EMPLOYMENT 7th Ed].*

For damages for unlawful dismissal, as in this case, I also refer to a text book PRACTICAL APPROACH TO EMPLOYMENT LAW (1982) by JOHN BOWERS at pages 129 - 130.

At p129 the author states:

"Damages are the normal remedy for breach of contract and the usual measure is the wages the employee would have earned if due notice had been given. For that is the only period when he is entitled by contract to continue in employment. If his contract can be determined by three weeks' notice he cannot claim his loss over the next three years even though he is unemployed for that length of time; for within that period at any time he might have been dismissed with three weeks' notice." (emphasis added)

He goes on to say:

"Very large measures of damages are available only where the contract is for a fixed term and cannot be terminated by notice. This is most usually the case in high status occupations like company directors, football club managers and accountants. The measure of damages is then similarly the amount which would have been earned in the unexpired part of the fixed term, but here there might be four or five years to run.

From the amount of damages so made up must be deducted sums to take account of: mitigation; taxation; and benefits received."

34. The clause 36(a)(ii) of the employment contract of the Plaintiff specifically state that the employer could terminate the Plaintiff with or without cause by payment of 6 months' basic salary in lieu of the notice of 6 months as required by preceding provision.

35. The basic salary for the Plaintiff in terms of the employment contract (P1) was 150,000 P.A and accordingly the damages will be FJ $75,000. The cost of this action is summarily assessed at $3,000.

CONCLUSION

36. The Defendant had unlawfully terminated the Plaintiff. When the 11 charges were made against the Plaintiff, Defendant stated that they would appoint a Tribunal for the hearing of the allegations if a written response for the charges were made. A written response to

all the 11 charges were made within the stipulated time and a Tribunal was appointed. The Tribunal could not proceed as the reasonable request relating to the changes to the Tribunal Agreement of the Plaintiff were rejected by the Defendant. The Defendant revoked the Tribunal and terminated the employment of the Plaintiff in violation of the clause 36(d)(ii). The termination of the employment of the Plaintiff was unlawful. The clause 36(a)(ii) of the employment contract sanctioned the Defendant to terminate the employment of the Plaintiff without notice and also for without any cause upon the payment of 6 months basic salary. The Plaintiff is granted 75,000 as damages and cost of $3,000 summarily assessed.

FINAL ORDERS

a. The Plaintiff is granted a damage of FJ$75,000 for unlawful termination of his employment.

b. The cost is summarily assessed at $3,000.

Dated at **Suva** this **27th** day of **November 2014**.

HIGH COURT OF FIJI
SUVA

.....
Justice Deepthi Amaratunga
High Court, Suva