

IN THE EMPLOYMENT RELATIONS COURT

AT LAUTOKA

ORIGINAL JURISDICTION

CASE NUMBER: ERCC No. 195 of 2010

BETWEEN: **ELIZABETH ANNE POWELL**

PLAINTIFF

AND: **GLOBAL BEDBANK LIMITED**

RESPONDENT

Appearances: ***Mr. Kumar for the Plaintiff.***

Mr. Lowing for the Defendant.

Date and Place of Judgment: ***Friday 12 June 2015 at Suva.***

Judgment of: ***The Hon. Madam Justice Anjala Wati.***

RULING

Catchwords:

EMPLOYMENT LAW – claim for unlawful and unfair dismissal – claim for further and better particulars and striking out of the claim on the grounds that it is embarrassing.

The Cause

1. The Plaintiff claims to have been unlawfully and unfairly dismissed from employment for which she seeks the following remedies:
 - a. *loss of salary for the balance term of the employment contract;*
 - b. *shortfall in quarterly bonus payments;*
 - c. *unpaid yearly bonus entitlements for shares in the defendant company or compensation in lieu thereof;*
 - d. *FNPF contributions;*
 - e. *damages for emotional and mental trauma;*
 - f. *punitive damages;*
 - g. *Interest; and*
 - h. *Cost on indemnity basis.*
2. On 21 June 2012 the defendant filed a statement of defence and on 6 July 2012 it filed a summons seeking:
 - a. *further and better particulars details of which will be apparent in this judgment later; and*
 - b. *for paragraphs 10(c) and 12 of the statement of claim to be struck out as being embarrassing.*
3. The defendant says that its solicitors wrote to the plaintiff's solicitors on 21 June 2012 and sought further and better particulars and for rephrasing of certain offensive phrases in the claim.
4. The plaintiff's solicitor wrote on 27 June 2012 by which they refused to provide the particulars sought in the request. No response was received as to the defendant's objection to the use of offensive language in the claim.

5. On 4 July 2012, the defendant's solicitors wrote and specified why the initial request was made. No response was received on this request and therefore an application was necessary.

The Statement of Claim ("SOC")

6. I usually do not but due to the nature of the application I feel that it is necessary to exactly state what the statement of claim says:
 1. *At all material times the plaintiff was in the employment of the Defendant.*
 2. *The Defendant is in the business of facilitating at a commission the selling of hotel rooms in the Pacific Island Countries.*
 3. *On or about the 8th day of April 2009 the Plaintiff entered into an employment contract with the Defendant.*
 4. *Prior to entering into the said contract the Defendant had enticed the Plaintiff into leaving a lucrative job she held with KPMG and join the Defendant at a lesser salary based on a promise of far greater bonus payments with the Defendant.*
 5. *The Plaintiff commenced work with the Defendant on or about the 11th of May 2009.*
 6. *The Plaintiff's performance at all times would have entitled her to substantial bonus payments.*
 7. *On or about the 7th of April 2010 the Defendant without valid reasons asked the Plaintiff to resign.*
 8. *On or about the 16th of April 2010 the Defendant further tried to force a position of resignation by back dating a letter of dismissal to 7th of April 2010 and emailing to the Plaintiff.*

9. *The Defendant's actions were motivated by and designed to avoid paying contractual bonuses to the Plaintiff as she was rightfully entitled to. The Defendant's actions were in breach of the employment contract.*
10. *Due to the Defendant's breach the Plaintiff has suffered emotional and mental trauma.*

Particulars

- a) *Being treated by the Defendant in a humiliating manner in front of other staff employees.*
- b) *Being taken to Suva Private Hospital on 8th of April 2010 and treated for shock and mental trauma.*
- c) *Being intimidated by Defendant's goons who scaled the Plaintiff's electronic gate on the 17th of April 2010 to deliver a back dated letter of dismissal dated the 7th of April 2010. In the process the Defendant's goons yelled out to the Plaintiff, waving an envelope and making intimidating remarks.*
11. *The Plaintiff has also suffered financial losses in lost salary, unpaid quarterly monetary bonuses, yearly bonuses as share entitlements and FNPf contributions.*
12. *The Defendant's actions constituted a high handed disregard to the Plaintiff's right as an employee for being enticed into leaving her job to join the Defendant on a false promise only for the Defendant to renege on the promise to avoid payments of bonuses and shares by trying to force the Plaintiff to forcibly resign and suffer mental and emotional trauma. The Plaintiff will claim punitive damages.*

Particulars Sought / Opposition/ Law and Analysis

7. I will deal with a paragraph at a time in respect of which the application applies.

Paragraph 1

8. The defendant wants the plaintiff to state the date of employment and the date of termination of employment. The defendant says that in paragraph 3 the plaintiff asserts that she entered into a contract on 8 April 2009 and by paragraph 5 she asserts to have started work on 11 May 2009. When did the contract take effect? This is confusing for the defendant and needs to be clarified.
9. The defendant further argued that by paragraph 7, the plaintiff stated that she was asked to resign on 7 April 2010 but paragraph 8 seems to imply that she was still in employment until 16 April 2010. What is the correct date of termination of the employment? The claim does not say when the plaintiff was terminated.
10. The defendant says that since the period of employment is not clear from the claim, it is embarrassing in that regard. The particulars sought are facts which need to be known by the defendant so that it can defend itself properly.
11. The plaintiff submitted that the defendant has attached to its statement of defence a contract of employment that provides for the date of employment. Paragraph 3 of the SOC further provides for the date of employment and paragraph 8 provides for the date of termination.
12. The defendant was the employer. In that capacity, it ought to know the particulars sought like the date the contract was entered into, the date the plaintiff commenced work and the date she was dismissed. There is no need for these particulars to be provided in any further detail than as outlined in paragraphs 3, 5, 7 and 8 of the SOC. If one reads the entire claim, one can gather that the claim is for unlawful and unfair dismissal. I wonder why the defendant is finding it difficult to comprehend.

Paragraph 4

13. The defendant seeks from the plaintiff to clarify:
 - a. *Whether the alleged enticement was oral or in writing. If it was oral, the date, time and place of the conversation, between whom it took place and the words*

alleged to constitute the enticement. If the enticement was in writing to identify the document, its date and the parties to it.

b. the details of lucrative emoluments .

c. the details of bonus payments the plaintiff presumably received at KPMG.

14. The defendant argued that paragraph 4 of the SOC does not clearly state that the enticement was oral. The defendant's knowledge of the particulars sought does not preclude the defendant from its entitlement to the particulars. The bonus payments need to be particularised so that the defendant is aware of the extent to which the plaintiff claims special damages. When the claim is read in its entirety, the defendant is confused by the plaintiff's assertions at paragraph 4 of the SOC. In light of the matters pleaded in paragraph 9 of the SOC and use of the phrase "*false promise*" and "*renege on the promise to avoid payment*", the defendant suspects that there is an allegation of contractual misrepresentation. If the plaintiff is pleading misrepresentation then particulars ought to be given under order 18 Rule 11 (1) (a) of the HCR. The defendant therefore says that paragraph 4 is embarrassing.
15. The plaintiff says that the enticement was oral and paragraph 4 clearly states it was based on a promise of far greater bonus payment.
16. The plaintiff also says that she was employed as a Director at KPMG. The defendant is well aware of this and the salary that she was getting at KPMG. This is stated by the defendant at paragraph 5(b) of its statement of defence.
17. The plaintiff also argued that the promise of far greater bonus was not from KPMG but was from the defendant and that paragraph 4 of the statement of claim is very clear. How the bonus was to be computed is evident from clause 7.3 of the employment contract.
18. The plaintiff has already stated in its affidavit at paragraph 6 (a) that the enticement was oral and the nature of enticement was a promise for greater bonus. The employment contract states the basis of the bonus payment. I will order that

paragraph 6 (a) of the affidavit of the plaintiff in opposition to the interlocutory summons forming the basis of the current application to stand as pleadings.

19. What the plaintiff needs to state in the pleading is the person and the rank from whom the enticement came and the approximate period when the said enticement was made. This is necessary as there are so many people working with the defendant, some of who may not even have the capacity to negotiate a contract and there may be more than a few who have that capacity. The defendant cannot properly ascertain as to who made this enticement until the person is named and it would be easier for the defendant to prepare its defence in absence of which the defendant has to ask everyone in capacity to negotiate an employment contract to be prepared to give evidence. This would more or less be like an ambush trial.
20. On the question of lucrative job, this is a matter that refers to the position and salary of the plaintiff at KPMG. The defendant is well aware of the salary that the plaintiff obtained from KPMG and that has not been refuted so there is no need to provide any further information of what the plaintiff meant by the lucrative job.
21. Then the issue of “*far greater bonus payments*” comes in. What the plaintiff clearly means is that she was to receive greater bonus payments from the defendant. The plaintiff does not say that she received greater bonus payments at KPMG. How the bonus is to be calculated is a matter for the contract and is clearly provided for by clause 7.3.
22. I also do not find that the plaintiff has made any claim for misrepresentation for the particulars to be provided.

Paragraph 6

23. In respect of paragraph 6 the defendant says that on the use of the words “*the plaintiff’s performance*” the plaintiff must state the nature of the plaintiff’s performance, particularise how the plaintiff’s performance would have entitled her to “*substantial bonus payment*”. The plaintiff must state whether she relies on her employment contract and if so identify the terms of the employment contract. The

plaintiff says that it is not sufficient for the plaintiff to plead the entire contract and leave the defendant guessing as to which terms of the employment contract she alleges the defendant has breached.

24. The plaintiff argued that the information on how the bonus payments were to be made is clearly stated in clause 7.3 of the employment contract and its computation is a matter of proof.
25. I agree with the plaintiff that clause 7.3 of the employment contract clearly talks about bonus payment. The defendant will clearly know the figures on management accounts and audited accounts for the purposes of calculations of the bonus. It is clear from the affidavit of the plaintiff by paragraph 7 that the clause breached is 7.3 of the employment contract. The Company will have the knowledge of how the computation is to be made. I order that paragraph 7 of the plaintiff's affidavit to stand in as pleading. If there are other clauses that the plaintiff wants to rely on than that should be mentioned in the claim too.

Paragraph 7

26. The defendant says that for the term "*without valid reasons*", the plaintiff must particularise the reasons given by the defendant for requesting the plaintiff's resignation of which the plaintiff considers not to be valid. The defendant says that it is asking for reasonable particulars.
27. The defendant argued that the plaintiff failed to identify the provisions of the contract whether express or implied, on which she relies. The defendant cannot make out what constitutes, in the plaintiff's opinion "*valid reasons*" for termination of employment. This must be pleaded to prevent surprise at the trial.
28. The plaintiff argued that she was asked to resign by the defendant without giving valid reasons for asking for her resignation. The contract of employment provides the grounds upon which parties can terminate the contract. These were not followed by the defendant. She was told that she would be summarily dismissed if

she did not resign. She was not given reasons as to why she would be summarily dismissed. She did not resign. She will give oral evidence of this.

29. It is for the employee to establish dismissal and for the employer to establish the lawfulness and fairness of the same. The case is solely based on the employment contract which sets out the mode and manner in which it could be brought to an end. The plaintiff has said enough in the pleading of how the dismissal occurred. In fact, if the defendant is disputing this version then it ought to have its own version in the statement of defence which needs to be established at the trial. There is no need for the plaintiff to provide more particulars.

30. What I understand from the claim is that on 7 April 2010 the plaintiff was forced to resign. No reasons were given to her to do that. Until 16 April 2010 she was at employment. The defendant tried to force a position of resignation once again by backdating a letter of dismissal. She refused to sign and then it was being delivered to her on 17 April 2010. The other particulars that the defendant seeks are matters of evidence and should not be stated in the pleadings.

Paragraph 9

31. The defendant takes issue with the words “*the defendant’s action*” in the first and second sentence and the words “*rightfully entitled to*”. The defendant says that in the first sentence the plaintiff must particularise the defendant’s alleged actions that were motivated by and designed to avoid paying contractual bonuses and state whether the actions were oral or in writing and if oral to state the date and time and place of the conversation, between whom it took place and the words alleged to constitute the actions and if in writing to identify the document, its date and the parties to it. In the second sentence the defendant says that the plaintiff must identify the terms of the employment contract on which the plaintiff relies and the defendant’s alleged actions that were in breach of the identified terms of the employment contract.

32. In respect of the words “*rightfully entitled to*” the plaintiff must state the basis upon which the plaintiff relies on the employment contract which entitles him to contractual bonus.
33. The defendant says that the allegation that the contract was terminated to avoid paying contractual bonus is a serious one. This allegation is regarding the defendant’s intention or state of mind. Since the plaintiff says that the defendant was dishonest or malicious she needs to provide the particulars sought in order to prepare the case. The plaintiff has stated in its affidavit that clause 14 of the employment contract was not adhered to in terminating her but that it was not pleaded. The defendant needs to know how it allegedly breached the terms of employment contract. The defendant is entitled to tie the plaintiff down to a definite story as the plaintiff’s allegation may be something very different from the true facts of the case.
34. The plaintiff states that she was terminated from her position and she has given sufficient particulars to show the same. The defendant is well aware of her claim that the defendant terminated her employment to avoid paying contractual bonuses. This is a dispute fact that the court needs to decide on. Clause 7.3 and 14 clearly stated the entitlement for bonus and the manner of termination. These terms were not adhered to by the defendant.
35. The words “*defendants’ action*” in the first sentence refers to it forcing a resignation on the plaintiff on two occasions of 7 April 2010 and 16 April 2010 and then giving a letter of dismissal on 17 April 2010. It makes a reference to the fact of dismissal. I do not find a need for any more particulars in that regard.
36. In respect of the second sentence, I find that it is for the employer to prove the lawfulness and fairness of the dismissal so the employer needs to know what clauses justify the termination or what of its actions justified the resignation or how the contract came to an end. There are dates given and time and place is not necessary to file a defence. This is not a medical negligence case. In respect of bonus I have

already made a finding. I need not repeat that. It is clear that the only agreement referred to is the employment contract and the parties to it and the date of it. It is sufficient if I order that paragraph 9 (b) and (c) of the plaintiff's affidavit be ordered to stand in as pleadings.

Paragraph 10 (a)

37. In respect of the words "*humiliating manner in front of other staff employees*" the defendant says that the plaintiff ought to identify the defendant's actions that were humiliating, whether the actions were oral or in writing; if oral to state the date, time and place of the conversation, between whom it took place and the words alleged to constitute the humiliating actions. If in writing, identify the documents, its dates and the parties to it.
38. The defendant also states that in respect of the words "*other staff employees*" the plaintiff must particularise the difference between "*staff*" and "*employees*".
39. The defendant argued that the plaintiff can lead unlimited evidence because paragraph 10 (a) is so broad and open ended. The defendant is entitled to tie the plaintiff down to a definite story as the plaintiff's allegation may be something very different from the true facts of the case. A claim for exemplary damages must be specifically pleaded together with the facts on which the party pleading relies.
40. The plaintiff says that she was humiliated in front of other employees and she will give evidence as to how she was humiliated. She further states that she need not particularise the difference between staff and employees as this request is absurd and a matter of evidence for the Court to deliberate.
41. The fairness of the dismissal depends on the manner of treatment at the time of dismissal. If the employee feels that she was humiliated she needs to particularise the actions and/or words of the employer which were humiliating. I order that particulars of this paragraph be provided to the defendant.

42. There is no need to distinguish between staff and employees. The plaintiff has stated that when the humiliating actions and/or words took place there were other people in the vicinity. That is sufficient and the names and particulars of these people are not essential.

Paragraph 10 (c)

43. In respect of paragraph 10(c) in reference to the use of the words “goons” and “intimidating remarks” the plaintiff must identify the context in which the word goon is used and the basis upon which such an allegation is made . Is this a reference to the British radio comedy the “Goon Show”. The defendant also says that the plaintiff must identify the action or words that constituted intimidating remarks that the defendant allegedly “yelled out to the plaintiff”.

44. The defendant says that the use of the word “goon” is embarrassing, unintelligible, offensive, scandalous and vexatious and therefore should be struck out.

45. The plaintiff states that she is characterising the actions taken by the defendant’s servants and/or agents. The defendant is well aware of the actions taken by its servants or agents and is well aware of how the word “goons” fits their actions. The defendant’s servants and/or agents climbed her electronic gate to deliver to her the dismissal letter. While they were delivering the letter they were yelling out to her and making intimidating remarks. She will give oral evidence as to what the remarks were.

46. The word goon is a slang or an informal word. It should be avoided in a legal document. It must be removed and replaced with the words “servants and/ or agents”.

47. The plaintiff must give particulars of the words spoken off which humiliated, embarrassed, frightened or caused injury to her feelings. These all go towards establishing the fairness of the treatment provided to the plaintiff.

Paragraph 11

48. In respect of paragraph 11 and in reference to the words “*lost salary, unpaid quarterly monetary bonuses, yearly bonuses as share entitlements and FNPF contributions*” the details and particulars must be given, says the defendant. The defendant is entitled to know the extent of the plaintiff’s alleged losses. She ought to plead other employments she obtained after her dismissal and if so, when, with whom, date of commencement, salary and terms of payments, the nature of employments and whether it is still continuing. Such particulars are necessary for the establishment of the plaintiff’s losses. The defendant is entitled to tie the plaintiff down to a definite story as the plaintiff’s allegation may be something very different from the true facts of the case.

49. The Plaintiff says that the employment contract clearly specifies how the salary, quarterly monetary bonuses, yearly bonus as share entitlements and FNPF contributions are to be calculated. She says that she will give oral evidence of the specific terms of the employment contract that she relies on.

50. In any employment case it is necessary for the plaintiff claiming damages for unlawful dismissal that he or she mitigated the loss. To do that one must state what the plaintiff did to secure another employment. Did she get any, the term of the contract and the pay and if she did not secure the employment what is the reason she could not. I believe that the defendant should know the exposure of its liability and as such particulars ought to be provided to ascertain lost salary.

Paragraph 12

51. The defendant says that the plaintiff must specify what the phrase “*high handed disregard*” means and in respect of the use of the words “*false promise*” to identify the actions that constituted the false promises, whether such actions were oral or in writing; if oral, state the date, time and place of the conversation, between whom it took place and the words alleged to constitute the “*false promise*” and if in writing to identify the document, its dates and the parties to it.

52. The defendant says that paragraph 12 is embarrassing.
53. The plaintiff argues that paragraph 12 of the SOC should be read in its entirety and the phrase “*high handed disregard*” simply refers to the defendant’s high disregard of her rights as an employee. The SOC clearly states that there was a promise of far greater bonus payment by the defendant and the bonuses to be paid to the plaintiff is clearly identified by clause 7.3 of the employment contract.
54. I read paragraph 12 to mean what the plaintiff has explained. I do not find that it in any way says something that the defendant cannot make out what is alleged against him.

Prayers for Relief

55. In respect of the prayer the defendant says that the claims in (a) to (d) must specify precisely how the claims are calculated. The defendant says that the plaintiff must specify whether she has obtained other employment or employments after her alleged dismissal and if so, when, with who, date of commencement, salary and terms of payment, the nature of the employment(s) and whether it is still continuing. The plaintiff has failed to specify an amount it claims to be recoverable from the defendant. In the circumstance, the claim is defective.
56. I have already ordered particulars to be provided for mitigation of loss. Once that is provided it is the discretion of the court to award damages under s.230 of the ERP. Whether total salary loss or partial would be given, what is the bonus entitlement and what would be given and the damages for unfair dismissal is not to be pleaded in its exact amount. It is a matter for the court to calculate and award. The parties will have to make appropriate legal submissions for the damages. There is no need for such particulars.
57. I further note that this issue was not addressed in the affidavit of the defendant and the plaintiff was deprived of responding to this request.

Final Orders

58. In the final analysis, I make orders in respect of the following paragraphs of the SOC:

Paragraph 4

- a. (i). **Paragraph 6 (a) of the affidavit of the plaintiff in opposition to the interlocutory summons forming the basis of the current application to stand as pleadings.**
- (ii). **The plaintiff must amend the pleadings to include the person and his rank in the defendant company who enticed him into leaving the job at KPMG and join the defendant company at a lesser salary based on a promise of far greater bonus payments.**

Paragraph 6

- b. **I order that paragraph 7 of the plaintiff's affidavit to stand in as pleading. If there are other clauses that the plaintiff wants to rely on than that should be mentioned in the claim too by an amendment.**

Paragraph 9

- c. **I order that paragraph 9 (b) and (c) of the plaintiff's affidavit stand in as pleadings.**

Paragraph 10 (a)

- d. **By an amendment of the claim, the plaintiff must particularise the actions and/or words of the employer which were humiliating.**

Paragraph 10 (c)

- e. (i). **The word goon must be removed and replaced with the words "servants and/or agents".**

(ii). *The plaintiff must give particulars of the words spoken off which humiliated, embarrassed, frightened or caused injury to her feelings.*

The orders in above can be complied with by raising an amended claim.

Paragraph 11

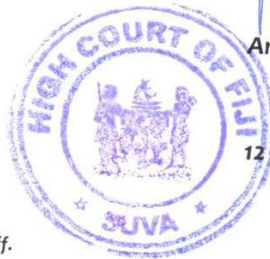
f. The plaintiff to provide particulars of whether and how she mitigated her loss by stating whether she did secure any other employment, the periods she was employed, the terms of that contract and the pay she received. She must also provide particulars of why she was not able to get any other employment if she did not secure any employment after termination and the periods in which she was unemployed.

59. The plaintiff must amend her claim to incorporate the orders and to provide particulars where suggested either by an affidavit or including the same in the amended claim within 14 days of the date of the order. Any document filed in compliance with this order must be served within the same 14 days.

60. Any defence must be filed within 14 days thereafter and reply to be filed within 14 days thereafter.

61. The plaintiff must then file a summons for directions within 14 days thereafter for orders to be granted to enable the matter to be ready for trial.

62. Each party must bear their own costs of this action.



Anjala Wati

Judge

12 June 2015

To:

1. Mr. Kumar for the Plaintiff.
2. Mr. Lowing for the Defendant.
3. File: ERCC No. 195 of 2010.