

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No.: HBC 238 of 2015**

**BETWEEN** : **EDWIN THOMAS** of 27 Nasevou Street, Lami, Suva in the Republic of  
Fiji

**PLAINTIFF**

**AND** : **EVERGREEN INTERNATIONAL FIJI, LLC** (the Company) a limited  
Liability company having its registered office at Lot 19, Wailada, Lami, Fiji  
and trading as **EVERGREEN FIRE and SECURITY AND GUARD**  
**FORCE FIJI**

**DEFENDANT**

**Appearance** : **Mrs. Kunatuba S. for Plaintiff**  
**Ms. Low P with Mr. Skiba K. for the Defendant**  
**Date of Hearing** : **5<sup>th</sup> December, 2017, 30<sup>th</sup> and 31<sup>st</sup> January, 2018**  
**Date of Judgment** : **28<sup>th</sup> February, 2018**

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiff who held a senior management position of the Defendant, had instituted this action against, for unfair and wrongful dismissal in terms of his employment contract. The Plaintiff was summarily dismissed. It is admitted fact that Plaintiff was given several warning letters and also a Final Warning letter by the Defendant for his aggressive and unprofessional conduct towards the clients, subordinate employees as well as other employees including senior management personnel. The Plaintiff's contention is that his behaviour did not constitute a serious misconduct that justified a summary dismissal. The contract of employment provides termination of it by either party with one month notice or in lieu of notice, one month salary can be provided by either party. The letter of termination inter alia offered the Plaintiff one month salary.

## FACTS

2. It is an agreed fact that the Plaintiff was dismissed on 2<sup>nd</sup> June, 2014, whilst in the employment of the Defendant company. (See agreed facts in the pretrial conference minutes).
3. The Plaintiff held a senior management post in the Defendant and had worked for the Defendant as well as its former entity since 2000. His employment contract with the Defendant's one of the predecessor, was signed along with confidentiality agreement in year 2002.
4. During the said time period, the employer of the Plaintiff change hands several times due to its global entity changing hands several times and the name of the employer changed accordingly. These are evidenced from 'P4' and 'P5' and at the time of termination the employer was the Defendant.
5. The Plaintiff holds a MBA from the University of South Pacific and he had worked with the Defendant for more than 14 years and was its Operational Manager in Suva division.
6. He had received long service award for working with the employer for over 10 years in 2010.
7. The first incident regarding Plaintiff's unprofessional behaviour was in 2006 regarding threatening the Financial Controller of a client of his employer, to deport him by reporting him to immigration authorizes. The Financial Controller had expressed his displeasure of the services of Defendant in front of Plaintiff at a meeting, and this threat was made.
8. This fact is admitted by his own letter of 29<sup>th</sup> September, 2006 and in the cross examination he admitted making such a threat, but stated that he would not go to such a length of complaining and he could not assure that a person could be deported solely on his complaint.

9. The employer had apologized to the client on 2<sup>nd</sup> October, 2006 on the behaviour of the Plaintiff on the complaint received from the client on 27<sup>th</sup> September, 2006.
10. On or around 12<sup>th</sup> February, 2007 the Plaintiff had dismissed a security personnel who was undergoing training at that time without any inquiry for allegedly calling him 'Gavin'. There was no evidence that this utterance was done by the said security officer except the suspicion by the Plaintiff. Without any form of warning or a formal investigation the Plaintiff had entered the training room and the said Security Officer was manhandled in front of other trainees and was also dismissed summarily thereafter.
11. On this incident, explanation was called from the Plaintiff and evidence of the others at the training room, were recorded including the trainer, and finally the Plaintiff was given a final warning that if he acts in unprofessional and aggressive manner that he could be terminated. The receipt of the said warning was admitted. The contents were not denied by Plaintiff.
12. This evidenced from admission of the Plaintiff when he was shown the document dated 5.03.2007. The Plaintiff had also acted unprofessionally towards the trainer Rupeni in front of security officers. The said letter also stated if such behaviour is repeated he could be terminated from service. Since there were already 3 similar unprofessional conducts, including a swearing at an employee when he went to see him in his office, this warning was given. This letter of warning was admitted by Plaintiff.
13. The Plaintiff's behaviour did not stop there.
14. Again in a management meeting held in Novotel 13<sup>th</sup> August, 2010 the Plaintiff behaved in 'unprofessional, disrespectful, and aggressive' manner. Instead of terminating him on that occasion again he was reminded of all previous occasions where he had behaved in aggressive and unprofessional manner by letter of 16<sup>th</sup> August, 2010. The letter contained a subject, as Final Warning, and reiterated that it would be his final opportunity to improve.

Any repeat of such unprofessional behaviour could result in termination of the Plaintiff. Unfortunately, the Plaintiff did not change his behaviour even after this. This is evidenced from Defendant's witnesses specially Yoshiko, and Wah.

15. The credibility of none of the witnesses called by the Defendant is challenged in the cross-examination. Their position were more elaborated in the cross-examination.
16. On 27<sup>th</sup> May, 2014 at a meeting with General Manager, Mr. Fenton Barrack, Wah, Yosh the Plaintiff acted in 'unprofessional, disrespectful and aggressive manner' and his services were terminated by summary dismissal by the Defendant.

### ANALYSIS

17. The Plaintiff is claiming special damages for his salary for two years on the basis of restrictive covenant where he is prevented from working on a rival business. (Clause 20 of Employment Contract).
18. The Plaintiff is also claiming general damages for breach of contract, for unfair dismissal.
19. This action is instituted under common law for breach of contract. The plaintiff's employment contract is marked as D1 and clause 19.1 states as follow
  - 19.1 *Termination of employment shall be by one month's notice by either party in writing to the other except in case of serious misconduct in which case summary termination may apply*
  - 19.1.1 *In the case of serious misconduct the Employer reserves the right to suspend an employe pending investigation.*
  - 19.2 *In lieu of proper notice one month's salary may be paid or forfeited.*
20. So either party could terminate the employment contract with one month notice or in lieu of that by providing one month's salary.

21. In this instance the Plaintiff was offered one month salary and dismissed summarily. So, there is no breach of contract under common law and termination is done in terms of the employment contract.
22. In Court of Appeal *Shell Fiji Ltd v Johnson* [2010] FJCA 54, ABU0012/2009 (23 September 2010), his Lordship Byrne and Callanchini J held.

*'It is apparent that the Respondent was not given notice nor did he receive any payment in lieu of notice'*
23. In contrast to that, the Plaintiff was offered one month salary in the said termination letter, though the termination was a summary termination the clause 19.1 of the employment contract, which I have quoted. This clause was also referred in the said letter of termination.
24. The said Court of Appeal case dealt with **implied contract**, whereas the Plaintiff and Defendant had entered into a written contract of employment where either party could terminate in terms of clause 19.1 of the contract. Court of Appeal in *Shell* (supra) dealt with common law right to terminate, in the absence of a written contract. Both parties are given freedom to terminate on equal terms, and Plaintiff was offered one month salary.
25. The said clause 19.1 contained in the contract of employment, dealt with summary termination for serious misconduct as well as for termination of the contract by either party, generally.
26. The obligation on both parties to give one month notice or in lieu of that to provide one month salary. Since one month salary was offered to the Plaintiff, no damages can be granted for breach of contract.
27. Even if I am wrong on above, the Plaintiff was dismissed summarily and statutory provision governing summary dismissal are stated in Section 33 of Employment Relations Act, 2007 which states as follow:

*Summary dismissal*

*33.- (1) No employer may dismiss a worker without notice except in the following circumstances-*

(a) where a worker is guilty of gross misconduct,  
(b) for wilful disobedience to lawful orders given by the employer;  
(c) for lack of skill or qualification which the worker expressly or by implication warrants to possess;  
(d) for habitual or substantial neglect of the worker's duties, or  
(e) for continual or habitual absence from work without the permission of the employer and without other reasonable excuse.

(2) The employer must, provide the worker with reasons, in writing, for the summary dismissal at the time he or she is dismissed.

28. The burden of proof then, in terms of Section 33 of Employment Relations Act, 2007 had shifted to the Defendant that summary dismissal is justified. (See Court of Appeal decision Shell Fiji Ltd v Johnson [2010] FJCA 54, ABU0012/2009 (23 September 2010), his Lordship Byrne J and Callanchini AP.
29. So the issue is whether the Defendant on balance of probability established any one or more grounds stated in Section 33 of Employment Act. For this the Defendant had called 9 witnesses. Of that two witnesses relate to an incident outside the office of the Defendant, relating to a complaint of a client.
30. Statutorily the employer is obliged to give reasons for summary dismissal. In my judgment that is to confine the reasons for summary dismissal for those grounds stated in the summary termination letter.
31. The termination letter is marked as D8 and states as follow

**EVERGREEN INTERNATIONAL FIJI, LLC  
MEMORANDUM**

**TO** : EDWIN THOMAS  
**FROM** : FENTON BARRACK, GENERAL MANAGER FIJI  
**SUBJECT** : DISMISSAL  
**DATE** : 02/06/2014

*In August 2010 you were issued a final warning in a memorandum dated 16/08/2010 for unprofessional, disrespectful and aggressive behavior at a Managers meeting. In issuing the final warning it had been noted that there had been three previous incidents of a similar nature involving your behavior.*

*On Tuesday the 27<sup>th</sup> of May 2014, during a meeting with you, Wah, Yosh and I, you again acted in an unprofessional, disrespectful and aggressive manner while we were reviewing and trying to discuss ways to improve your division. Your behavior towards your peers and me were totally unacceptable and you took exception to us raising any questions about your division and responded with argumentative, aggressive, rude and disrespectful behavior throughout the meeting. Your actions constituted serious misconduct.*

*In addition, your division being Guardforce Siva is failing behind its targets for 2012 and despite bringing this to your attention earlier in the year, you have made no serious efforts to explain or improve this situation and the results are only worsening.*

*With reference to your Individual Employment Contract, clause "19.1 Termination of employment shall be by one month's notice by either party in writing to the other except in the case of serious misconduct in which case summary termination may apply", you are hereby summarily dismissed with immediate effect.*

*As per clause 19.4 of your Individual Employment Contract you are to vacate your office immediately and hand over all company property supplied to you or which you possess. On receipt of these you will be paid 1 month's salary and any other entitlements owing to you less any monies owed by you to Evergreen.*

*Fenton Barrack  
GENERAL MANAGER"*

32. From the said letter the Plaintiff was summarily dismissed after giving him a final warning on 16.08.2010. This letter which is having a Subject: Final Warning is marked as D7.
33. The Plaintiff had not replied or denied the facts stated in 'D7' when he got it in 2010 or thereafter.
34. By reading that letter 'D7' as well as 'D8' indicate a series of events, where the Plaintiff had acted unprofessionally and aggressive manner.
35. It should also be noted that Plaintiff had always accepted these letters and had not denied contents. In the cross examination the Plaintiff also accepted the receipt of the said warnings and if the contents or the facts stated therein were not correct he could have denied them. These incidents were proved by the witnesses called by the Defendant.

36. The letter marked 'D7' was also mentioned in the letter of termination (D8). The said letter stated that it was the **forth** such occasion where the Plaintiff had lost temper, and acted in aggressive and unprofessional manner, and he was given warning for three previous occasions.
37. These three previous warnings were also admitted Plaintiff and those three occasions were also stated in the said letter 'D7'.
38. It also stated a swearing at an employee when he went to see him in his room at office. This along with other behaviour of the Plaintiff is, below the expectation of a senior managerial person.
39. It is very difficult or nearly impossible to lay down every acceptable or unacceptable behaviour of a senior managerial personnel similar to Operational Manager. They are given a certain freedom, and that does not indicate that they can behave badly. Respect for seniors as well as peers are essential in any organization, and this may be more considering that Plaintiff was solely involved in Defendant's security service division, where a considerable input of human capital was required. This included security officers as well as supporting staff. The interactions with persons are unavoidable and PR is an essential trait of the trade and certain level of dignity is essential. Such can be achieved only through discipline at all levels of the organization.
40. From the evidence called by the Defendant it is proved on balance of probability that Plaintiff had acted unprofessional manner and such behaviour cannot be condoned by the Defendant. The Plaintiff had been given sufficient notice to improve his behaviour, but he had not heeded even to Final Warning.
41. When he got the Final Warning the Plaintiff knew that he could be sacked at any time if he repeat his behaviour that was amply explained in the said letter 'D7'. Said letter in no uncertain manner had warned that such behaviour from Plaintiff would not be tolerated by the General Manager in future.



42. All the witnesses that gave evidence for the Defendant confirmed that the Plaintiff was a very aggressive and disrespectful to his subordinates, to his peers as well as to senior management including the General Manager in those respective instances alleged in documents 'D7' and 'D8'. His disrespectful behaviour had amply demonstrated in close door management meetings as well as in other senior management discussions, as well as in the office environment.
43. It is noteworthy that even as late as 2010 the General Manager in his Final Warning (D7) in the opening paragraph stated as follows
- 'The behaviour you displayed in our Managers meeting on Friday 13<sup>th</sup> August, at the Novotel, Lami boardroom was unprofessional, disrespectful and aggressive and I will not tolerate this from any of our staff.'*
44. The witnesses who were at the said meeting while giving evidence confirmed that the behaviour of the Plaintiff was very unprofessional, to say the least. This is certainly not what one could expect from the senior managerial personnel, and if ignored can deteriorate the organizational behaviour. If the discipline of the senior management of the Defendant, is affected it is detrimental to the Defendant.
45. The last witness called by the Defendant had left the employment of the Defendant and now employed in another organization. He is a disinterested party as he is no longer employed with Defendant. He confirmed that he consider Plaintiff as a friend and both of them reside in same area and meet on the road or other places, the behaviour of Plaintiff in the said instances were far below expectation of senior management person of the Defendant. He also said such management meetings became even 'unpleasant' solely because of the behaviour of the Plaintiff. He confirmed that Plaintiff acted in very disrespectful manner on 27.05.2014. This proves a serious misconduct.
46. He was at the General Manager's office when the termination of the Plaintiff was communicated to him and he explained how difficult was even for the General Manager to terminate the Plaintiff. This indicate that the General Manager had taken the decision to terminate Plaintiff with much reluctance. General Manager of an organization needs to take

unpleasant decisions for the sake of the organization and there is no proof of any bad faith on the part of the Defendant, and or General Manager of Defendant.

47. The termination was done in close doors, and the Defendant had taken all necessary steps not to humiliate the Plaintiff but again the Plaintiff had raised his voice to the General Manager, that he would take the matter to the courts. The subsequent behaviour also corroborate unacceptable conduct of Plaintiff
48. Considering the circumstances the behaviour of the Plaintiff is below the expectation of a senior management personnel. Though he was given several warnings and also a final warning from the evidence of Mr Wah, Yoshiko Wakaniyasi, the Defendant on the balance of probability proved that Plaintiff had behaved in unprofessional, disrespectful and aggressive manner and this conduct along with his previous conduct amounts to gross misconduct.
49. The Plaintiff is also claiming under restrictive clause contained in the employment contract. The clause 20 deals with that and states as follows  
*'Confidentiality Fidelity  
20.1 The employee shall not engage in any employment or other activity for pecuniary gain, or have any financial interest in any other company what is a competitor of the employer, without prior written approval of the employer. For the purposes of this clause the employer shall have the sole right to determine who is a competitor.'*
50. There is no evidence that the Plaintiff had made a written request to the Defendant regarding any type of engagement with any organization that the Plaintiff thought he was restrained. In the absence of that his claim on that ground fails. He could not name even a single organization that refused employment due to restrictive clause.

## **CONCLUSION**

51. The Plaintiff was terminated by the Defendant in terms of employment contract by offering one month salary. There is no unlawful termination. Without prejudice to that, the termination of the Plaintiff was done after giving Final Warning for the aggressive and

unprofessional behaviour, that is suitable for an Operational Manager of the Defendant. Senior managerial personnel are required to conduct themselves in professional and exemplary manner within the organization. Management meetings and other type of managerial reviews are essential for evaluation for organic development of an organization. So contribution from the senior management is very much integral part of such management gatherings for the survival, growth, and also development of an organization such as Defendant. They need to be conducted in much dignified manner so that new ideas are freely emerge in and, parties could freely express their views on the organization's strengths, weaknesses, threats in the industry and their new opportunities that can quickly identified and acted upon promptly. If these meetings are disturbed in the manner that was described by the witnesses, they will not serve any purpose and all employees will be at a disadvantage. This will be detrimental for growth of Defendant. So the termination of the Plaintiff was not done in bad faith or unreasonably or unlawfully. The conduct of Plaintiff described on 'D8' is a serious misconduct. The Defendant had proved these facts through evidence on balance of probability. Considering the facts of the case I do not wish to grant any costs.

#### **FINAL ORDERS**

- a. The Plaintiff's action is struck off.
- b. Considering the circumstances of the case I do not award any costs.

**Dated at Suva this 28<sup>th</sup> day of February, 2018**



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**Justice Deepthi Amaratunga**  
**High Court, Suva**