IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER:	**ERCC 10 of 2013**
BETWEEN:	**WELLSFORD LIMITED T/A FUJI XEROX BUSINESS CENTRE FIJI**
	PLAINTIFF
AND:	**KRISHNEEL A. SHARMA**
	DEFENDANT
Appearances:	*Mr. A. Vulaono for the Plaintiff.*
	Mr. A. Pal for the Defendant.
Date/Place of Judgment:	*Monday 22 November 2021 at Suva.*
Coram:	*Hon. Madam Justice Anjala Wati.*

JUDGMENT

A. Catchwords:

EMPLOYMENT LAW – Whether the employee's resignation was in breach of the contract of employment – whether the contract of employment was for a fixed period - is the employment bond clause in the employment contract for liquidated damages valid and enforceable: the "Dunlop Test" derived from the case law authority to determine validity and enforcement of the employment bond.

B. Cases:

1. ***Dunlop Pneumatic Tyre Company v. New Garage and Motor company (1915) AC 79.***
2. ***Xia Zhengyan v. Geng Changqing [2015] 2 SLR 731.***

C. Legislation:

1. ***The Employment Relations Act 2007 ("ERA"): ss. 28 (2) (a).***

Cause/Background

1. This case arises out of an employment relationship entered between the parties on 20 July 2009. The claim is brought by the employer against the employee for a sum of $25,000 to be paid by the employee for early termination of the contract in breach of clause 1 of the contract of employment.

2. The plaintiff was employed as a service technician and worked for the employer from 20 July 2009 until 8 April 2013 when he gave the employer a written notice of resignation effective the same date.

3. It is important that I outline clause 1 of the contract of employment as the claim emanates from there. The clause reads

"1. Period of Employment

This agreement:

a) The fixed period of employment will be for five years, without renewal (the "term") and if the Employee fails to complete this Term, for whatever reason, the Employee shall pay the liquidated sum of F$25,000 to the Company to reimburse the Company for its expenses related to recruitment and training of the Employee".

4. The plaintiff says that the defendant only worked for approximately 3 years and 8 months and then resigned without notice. The act of not completing 5 years is in breach of the contract of employment for which the defendant is liable for liquidated damages.

5. It is the plaintiff's position that shortly after his resignation, the defendant commenced employment with Computech Electronics Limited, trading as Daltron Fiji, a company that became suppliers of Fuji Xerox products from New Zealand in 2013 and now provides services for the maintenance and management of these Fuji Xerox Products. The plaintiff at

all material times was the supplier of the Fuji Xerox products from Australia and not New Zealand.

6. The plaintiff says that the defendant received trainings provided by the employer due to which he was promoted from a service technician to a fully-fledged Fuji Xerox Technician, Team leader, Senior Support Person and Fuji Technician Trainer.

7. It is claimed by the plaintiff that the training provided to the defendant cost the company more than $25,000 as he was sent for training overseas as well. The employee was trained in Sydney 3 times starting October 2012 to December 2012. The plaintiff says that this is in addition to the training that was provided to him by the employer and in particular by one of the Directors Mr. John Lal. It is averred that Mr. John Lal was a certified technician for Fuji Xerox Products and was in a position to provide that training to the defendant. The plaintiff says that the employer has not received the full benefit of the training provided to the employee for which the liquidated damages should be paid.

8. The defendant admits entering into the contract of employment but denies that the term of 5 years was fixed by the contract. He also says that he also entered into a confidentiality agreement with the employer but that agreement is not valid for want of consideration.

9. The defendant says that he resigned after notice to the employer. He says that initially he orally notified the two directors of the employer of his intention to resign. He then gave a written notice of resignation on the day he resigned. It is the defendant's claim that it has been the practice of the employer to terminate the employment of any employee who gave notice of resignation.

10. The defendant's position is that clause 1 of the employment contract is penal or punitive in nature and as such unenforceable in law. His position is that the sum of $25,000 is in excess of the training costs received by the defendant and as such he is not obliged to pay the same.

Issues

11. In its closing submission, the plaintiff stated that the only issue before the court is whether the defendant is liable to pay the liquidated amount of $25,000 since he had terminated the contract of employment. However, the Pre-Trial Conference Minutes filed by the parties requires me to determine other issues as well and at no point in time have the parties indicated to me that they have abandoned the other issues. It is therefore not justifiable that I only focus on the issue of the payment of the liquidated sum but reflect on what the parties have agreed in writing to be the issues for the court's determination.

12. It may be that the question of payment of damages is the ultimate issue and the kernel one too but before that is answered there are other issues that needs examination as they are linked to the question of liquidated damages.

13. I therefore find it prudent to reflect on some of the issues agreed by the parties to be determined by the Court. It is important to state at this stage that there are some issues, examination of which is neither necessary independently or in conjunction with the main issue.

14. The issues agreed by the parties for determination are:

    1. *Was the contract of employment fixed for a term of 5 years from 20 July 2009?*

    2. *Is the confidentiality agreement entered between the parties a valid agreement?*

    3. *Whether clause 1 (a) of the contract of employment a punitive clause and unenforceable?*

    4. *Whether the defendant is liable to pay to the employer a sum of $25,000 as agreed by the parties in the contract of employment.*

    5. *Whether the defendant had notified the plaintiff (via 2 of its Directors) of his intention to resign and whether this notification is valid?*

6. *Whether the Plaintiff terminated the employment of employees who handed in their notice of resignation and whether such action rendered the notice period requirement non-obligatory or too unreasonable.*

7. *Whether the defendant has agreed only to reimburse a percentage of the training costs and not $25,000 as alleged by the plaintiff?*

8. *Whether the sum of $25,000 alleged to be recruitment and training costs by the plaintiff an overestimate of the actual costs of recruitment and training.*

9. *Whether the defendant has received institutionalized training from a certified and qualified trainer.*

10. *Whether the plaintiff can substantiate $25,000 worth of recruitment and training costs it is claiming by providing the training modules, materials, programs and list of the days the defendant was provided training.*

11. *Whether the defendant is a formally qualified and certified Fuji Xerox Product Trainer.*

12. *Whether the defendant is entitled to the cost of the action despite the email dated 12 June 2013.*

13. *Whether the defendant received formal qualification and certification for Fuji Xerox products as a technician and trainer in the amount of $25,000?*

Evidence and Findings

15. The main issues will be answered under a separate heading. There are however some issues which can be answered collectively and classed under the main head.

A. Contract of Employment: Was it Fixed or Not/Was it properly terminated?

16. The first issue that the parties require me to answer is whether the contract of employment between the parties was fixed for a period of 5 years. I do not think that the issue can exist on its own. It is my view that together with this issue, it is very important to decide whether if the contract was a fixed one, the employee could terminate the same before it expired. It then follows that I have to examine whether the employee did determine the same properly? This is necessary because it is linked to the main issue of the liquidated damages and whether clause 1 kicks in. I find that it is necessary to determine whether clause 1 kicks in before deciding whether the same is punitive in nature and thus unenforceable.

17. What is a fixed contract? The answer can only be deduced from s. 28 (2) (a) of the ERA. It says that a contract for one fixed period which is expressed to be not renewable is a fixed contract. To answer this question, I need not only examine the contract of employment but the evidence of the parties as well.

18. The contract of employment ***(Exhibit 1)***, by clause 1 says that the contract is for a fixed period of 5 years without renewal. On the face of the contract of employment it appears that the contract is a fixed one as it meets the requirement of a fixed contract but I cannot make a finding on clause 1 alone. I need to have regard to the evidence in whole to make the finding.

19. The first piece of evidence that I find necessary to refer to is the offer of appointment dated 20 July 2009. The evidence was tendered in as ***Exhibit 7***. The offer of appointment was signed on 18 August 2009 and the contract of employment was signed on 20 July 2009. Normally an offer of appointment is signed before the contract of employment because the offer forms the basis for the preparation of the contract of employment. For whatever reason it may be, the contract of employment predates the offer of appointment. I do not regard the dates as fatal affecting the validity of any document. None of the parties have not raised any issue regarding its validity. I therefore rely on the offer of appointment and find that it forms part of the contract of employment.

20. Clause 9 of the offer of employment reads as follows:

"You will retire on attaining the age of 55 years. Extensions may, however, be given at the discretion of the management".

21. The above clause is not in line with clause 1 of the contract of employment. Whilst the contract of employment states that the contract is for a period of 5 years and not renewable, the offer of appointment indicates that it is an indefinite contract and can be renewed beyond the retirement age. Clause 9 of Exhibit 7 does not meet the definition of what a fixed contract is.

22. Given the disparity in the two documents, I see a great need to concentrate on the evidence of the parties and see if the issue can be determined concretely in reference to the evidence. The evidence in this case, I must say, throws a very different light on the nature of the contract.

23. I first refer to the oral evidence of Mr. John Lal. He testified on behalf of the plaintiff employer. Mr. John Lal is the Managing Director of the plaintiff company. In his cross-examination evidence, Mr. John Lal very explicitly said that clause 1 is a standard clause in all his employees' contract. He said that the clause exists even in the contract of employment of a receptionist. He further said that when an employee completes 4 ½ years out of the 5 years and if the employees want to renew their contract, the parties enter into a renewal discussion and a fresh contract is given.

24. Mr. John Lal's evidence explicitly indicates that although the written contract has this clause 1, which says that it is a fixed term of employment for 5 years and not renewable, I find that the provision existed by reason of that being a standard provision in all contracts and not by any intention of the parties. This standard provision was put in everyone's contract including the contract of a receptionist.

25. Clause 1 of the contract says that the term is *"not renewable"* but the intention and understanding was that it can be renewed. I cannot disregard this evidence of the plaintiff. It is a very important piece of evidence which indicates that the practice was to renew the contract. On this evidence, I find that the written contract was not a fixed contract as it was

renewable and I reiterate that the provision is only because it was left there as a standard contract.

26. That is not the only evidence based on which I come to that conclusion that the contract was not a fixed one. I refer to the evidence of the employee. He testified in his evidence in chief that when he saw clause 1 in the employment contract, he questioned Mr. John Lal on that and Mr. John Lal's response was that it is nothing and if the employee wanted to leave, he could go. The defendant also testified that he was made to understand that the clause will not be activated and that he signed the contract as he needed work.

27. The employee's evidence clearly suggests that clause 1 on the aspect of whether the contract was a fixed one was standard in nature and that the term of the contract was not meant to be fixed for a period. I have no reason to disregard the evidence of the employee and I accept the same. I believe that Mr. John Lal gave the employee an assurance that the contract was not for a fixed term and that it could be determined early by the defendant. He could leave when he wanted. I accept that Mr. John Lal made these representations to the employee and if he insists on clause 1 now then he made the employee enter into the contract on misrepresentation. This misrepresentation is not a defence raised in the statement of defence but the evidence is indicative that there was misrepresentation. I cannot disregard the evidence in determining the issue.

28. I then come to the question of whether the defendant could terminate the contract. I have made a finding that since the contract is not a fixed one, the employee could determine the same. The employee was made to believe that he could terminate the contract. I have said before that I accept the employee's evidence which means that once the employee was assured that he could terminate the contract anytime, he should not be deprived of that right. Otherwise it would amount to lack of good faith between the parties given the misrepresentation on the part of the employer for which the employee is not liable.

29. Even if the contract was a fixed one, I find that the employee could still terminate the same. Employees should always have the right to resign, even during the agreed time period for performance of work. An employment contract is not supposed to "enslave" the employee or

stop the employee from leaving. It only allows the employer to claim for genuine pre-estimate of loss if the employee leaves during the bond period. I will discuss this in detail later under a different heading when I arrive at the question of whether the liquidated damages clause is valid and enforceable.

30. In this particular case, the contract of employment is one sided. Where it contains provisions for the employer to be able to terminate the contract, it does not contain any provision for the employee to terminate the same. This is because the employer was and is still of the view that the employee has to, no matter what, serve the 5 year period as it is a fixed period of employment.

31. In an employment relationship, it cannot be expected that a person can be kept at work beyond his wishes. It will not be a productive work relationship for any party. In this case, the evidence indicates a need for the employee to leave the employment as he was mentally affected by the conduct of the employer. Whether or not the conduct of the employer was reasonable, the fact remains that the employee no longer wished to remain in the employment relationship.

32. Let me very briefly touch on what happened that caused the employee to resign from employment. In cross-examination, it was put to Mr. John Lal that the conduct of the employer caused the employee to resign. It was indicated that some months before the resignation, there was a staff retreat at Naviti Resort. The retreat was provided by the employer. The employee took his girlfriend there and at the retreat, another Director Irene Shankar had made comments about the girlfriend being present at the retreat. Mr. John Lal's response was that they do not get involved in personal matters.

33. It was also put to Mr. John Lal that 2 or 3 weeks before the resignation, the employee's mother was sick and he had to take her to the hospital. When he was late to work, the Director Irene Shankar commented that work was more important then his mother. Mr. John Lal replied that they do not practice that policy.

34. When Mr. Pal summed up in cross examination that the two incidents formed the basis for the employee's resignation, Mr. John Lal responded that the employee had come up with various excuses and that he cannot recall the order of events.

35. The employee's evidence was that he was emotionally affected by the conduct of the employer whilst in the employment and so he had to resign. He was said things about his girlfriend and his mother. He therefore had to resign as he was so affected that his health took a toll on him. He became very skinny. He said that he could not give notice of resignation because from his past experience he knew that employees cannot tell the employer why they are resigning so he wrote the email and just said that he is resigning for personal reasons.

36. I find that the employee was indeed mentally affected that he made up his mind to leave work. In summary, I find that the contract could be terminated by the employee. What then follows is whether the employee had terminated the contract properly? When the question of proper termination comes in, the issue that needs to be examined is whether the employee followed the proper procedure in terminating the contract. The procedure in this case would be whether proper notice was given by the employee.

37. There is no provision about the notice period required by the employee. Naturally so because the contract does not contain any provision for the employee to be able to terminate the contract. The employer is of the view that the employee could not terminate the contract and given that view, it is expected that it did not include in the contract the provision on the notice period required on the part of the employee.

38. Although there is no provision on notice period in the contract, I find that parties are duty bound to give each other reasonable notice. What would be a reasonable notice period in this case? In absence of any provision, I find that reasonable notice period would be 14 days under the contract because the contract requires that the employer gives the employee that period of notice if it is terminating the contract. It is therefore axiomatic that the same standard would apply to the other party.

39. I then turn to the question of whether the employee should have given oral notice or notice in writing and whether the employee was in breach in not giving the required notice to the employer. The nature of the evidence and the issues in the Pre-Trial Conference also requires me to examine whether the employee's ability to give adequate notice was impacted by the conduct of the employer.

40. From the contract is clear that any form of notices has to be in writing. Clause 17 of the contract of employment reads as follows:

> ***"a) All notices hereunder by one party may be sent either by personal delivery or by prepaid mail to the last known address of the others. Notices sent by mail are deemed to be received when delivered in the ordinary course of the post".***

41. Clause 17 anticipates that all notices shall be in writing. The clause should apply to notice of termination too. There is no reason why notice of termination should be excluded.

42. The defendant's position is that he gave notice both orally and in writing. His evidence is that the oral notice was given to one of the Directors Ms. Irene Shankar who informed the other Director Mr. John Lal who then called the employee to ask him to change his mind. The written notice, indisputably was given via an email on 8 April 20313. The email was tendered in as Exhibit 2. It reads:

> *"Dear Sir*
>
> *I am writing this email to inform you that I am resigning from Fuji Xerox Business Centre as of today. The reason for my resignation is of personal problem.*
>
> *Thank you for the opportunities for professional and personal development that you have provided me during the last four years. I have enjoyed working for Fuji Xerox Business Centre and appreciate the support provided to me during my tenure with the company.*
>
> *Yours sincerely*
>
> *Krishneel Sharma".*

43. Let me first of all come to the issue of oral notice. Was any oral notice given and whether the requisite time period was followed? Whether the employer is to be blamed for the actions of the employee when he gave oral notice instead of written notice for the requisite time period?

44. Mr. Lal denied that any oral was given. In his testimony in chief, Mr. Lal stated that prior to the above email of resignation, there was no other correspondence from the employee about his resignation. There was no written communication and since he resigned suddenly, the consequences were dramatic.

45. In cross-examination, it was put to Mr. John Lal that the employee had also given verbal resignation to another Director Ms. Irene Shankar on 3 April 2013 and that on the same day he called to discuss the resignation with the employee. Mr. John Lal's response was that resignation in a civilized country is not acceptable and he considers that as a discussion. He stated further that he had pleaded with the employee to retract from his action but that was all considered to be a discussion and not an oral resignation. In the same breath he said that he is not aware and cannot remember that the employee gave any oral resignation to the employer.

46. Mr. Lal was also questioned in cross-examination that it is a practice of the employer not to accept resignation notices to which he denied. It was also put to him that whenever he gets a resignation from an employee, he issues a termination notice. He disagreed that that was the practice of the employer.

47. Mr. Lal agreed in cross-examination that when the employee resigned, he along with Irene Shankar and Inoke Jale went to the employee's house and spoke to him and his parents. He however disagreed that the purpose of going there was to threaten the employee with a legal action but to plead to him to reconsider his decision. He agreed that he issued a demand notice a day later that is 9 April 2013.

48. The employee stated in his examination in chief that when he resigned, Mr. John Lal, Ms. Irene Shankar and Mr. Inoke Jale came to his home and asked him to go back to work or else they will take him to Court. According to the employee, Mr. Lal also stated that if he loses

the proceedings he can pay but that the employee needed to think about what he will do if he lost the case.

49. Mr. Sumeet Chand, a former Service Technician of the employer gave evidence on behalf of the employee. He said that he had also resigned from the Company. His resignation was instant as well because the employer's will not accept the resignation. He said that the notice period was two weeks.

50. I find from the evidence that before the employee gave written notice on 8 April 2013, he had verbally informed one of the directors that he was resigning. That was done on 3 April 2013. When that happened, Mr. John Lal talked to the employee. In his own evidence Mr. John Lal said that he entered into a discussion with the employee to ask him to retract from his position and that was only a discussion and not an oral notice of resignation. If there was no oral notice of resignation, why was there a need for a discussion and the request for the employee to change his decision? What decision is it that the employer wanted the employee to change? It definitely is the decision to resign which was conveyed to Mr. John Lal. I find that the employee did give oral notice on 3 April 2013 and this was because a written notice would not be accepted. This was very clear from the evidence of the employee which is substantiated by the conduct of the employer's directors visiting the employee and asking him to change his mind when he had given the written notice of resignation.

51. Mr. John Lal admitted in his evidence that he went to the employees house to try and change his mind. This conduct shows that the employer did not accept resignations. The employee did say that the employer had come to his place to threaten him with a legal action if he did not change his mind. Whoever is reflecting the correct version of what happened when the employer went to see the employee after the written resignation, it is clear that the employer did not accept resignations and that is why the employee had to give oral evidence to avoid any counter-reactions of the employer.

52. I find that oral resignation was given and that the reason why there was not enough notice give (14 days) for resigning, it was to avoid the employer from acting heavy handedly and troubling the employee. If the employee gave the 14 days' notice, the fear was the conduct of

the employer causing the employee misery at work and the unnecessary torture that the employee would have to go through. The evidence of the former employee Mr. Sumeet Chand is crucial in finding that it was not the practice of the employer to accept resignations.

53. In the situation I find that although the employee did not comply with the notice period, it was only because of the employer's known conduct that precluded the employee from fulfilling his obligation under the contract of employment. Even when instant notice of resignation was given, the employer visited the employee at his place and was, according to the employee, threatened by the employer of the legal action. It makes one wonder the difficulty the employee would have gone through if he was to work the notice period.

54. When the relationship of an employer and employee ends, it must end in a dignified manner, irrespective of who ends the same. From the evidence, I do not find that the employer acted in a dignified manner as I accept the evidence of the employee that he was asked to return to work or else face the threatened legal action. This is of utmost concern to me. The employee had a right to determine the contract in a peaceful manner and he did that on his part but the employer conducted itself in an improper manner. The conduct of the employer indicates that clause 1 was designed to stop the employee from leaving employment early. Not only that, it was not arrived at with the understanding that it will be made effective if the employee left early.

55. I am also asked to determine whether the Plaintiff terminated the employment of employees who handed in their notice of resignation and whether such action rendered the notice period requirement non-obligatory or too unreasonable.

56. There is no evidence that the employer used to terminate the employment of employees who handed in their notice of resignation. There is however evidence that the employer did not accept notice of resignations. Even in the case of Sumeet Chand, when he resigned, he was not terminated. He was sued. Sumeet Chand's evidence was that the practice of the employer is not to accept resignations.

57. Why would the employer terminate the employment and take the responsibility? It really makes no sense for the employer to undertake that line of action. I however find from the evidence that the employer would not accept the notice of resignation and go ahead to act in an improper manner to ask the employees to retract from their decision. In this case, the employee was even threatened of a legal action. Legal action is the right of a party to an employment contract but to go to an employee's residence and threaten him is an act of heavy handedness. I find that this is the reason which precluded the employee from complying with the notice period.

58. I therefore find that the contract was properly terminated by the employee. I now turn to the question of the liquidated damages of $25,000 sought by the employer.

B. The Employment Bond – Liquidated Damages

59. I now turn to the issue of whether the employee is liable to pay to the employer the sum of $25,000 as agreed in the employment contract. That sum in employment law is known as employment bond.

60. Before I go to the issue of whether the employment bond is penal in nature as raised by the defendant in his defence, I must link my first finding to the issue of liquidated damages. Since I have decided that the contract of employment was not for a fixed period, I find that the employee did not have to stay at work for the 5 years and that 5 years was not the bond period. Given that finding, I consequently arrive at the finding that he is not liable to pay the sum of $25,000 as liquidated damages as he was assured by the employer that he could leave early. He was made to understand that there was no bond period. Irrespective of this conclusion, I will make an independent finding whether the employment bond clause is valid and enforceable or whether it is penal in nature and thus not enforceable.

61. An employment bond is an agreement between the employer and the employee stating that the employee shall remain with the company for a certain minimum time after joining the company or after being sent for training. The parties further agree that should the employee leave before the agreed-upon time, the employee will have to pay the employer a certain

amount, called liquidated damages, as compensation. The employee, for example, agrees to remain with the company in return for training received.

62. The reasoning behind such a clause is to protect the employer and provide compensation for losses suffered as a result of costs incurred in recruiting training, and possible losses that can incur until a replacement is hired and trained. The bond amount will also serve as a deterrent to stop the employee from terminating the employment contract before the agreed-upon time – that is, to make the employee think twice before leaving their job.

63. On the face of it, it sounds fair and reasonable – the employer should have the right to claim compensation and recovery for the money spent on expensive training, upgrading and up-skilling. They should be protected against an employee who quits after the training, upgrading, and upskilling to find better employment after the employer's investment in the employee.

64. If used fairly and reasonably, employment bonds can be handy employer – friendly tool. Unfortunately, in some cases, these employment bond restrictions are unethical, unfair, and to the detriment of the employee. Often these clauses state that the employee must pay excessive sums of money if they leave the company during the bond period. Some of the bonds are also imposed although there has been no training, upgrading, or upskilling. This is certainly unfair for employees who are penalized.

65. Although the Courts adopt a freedom of contract approach, it will protect employees against being exploited. The Courts will not hesitate to hold an employment bond unenforceable if it seems excessive or it is deemed to be a penalty clause.

66. The question that I need to determine in this case is whether the employment bond is enforceable. It is the employee's position that the employment bond is not enforceable because it is punitive in nature.

67. The Fiji ERA does not have any provision in relation to employment bonds. The legality of the bond therefore depends on the circumstances of each case. If the parties agreed freely and without any coercion to a pre-determined sum of money as a genuine estimate of damages, it

might be valid and enforceable. If however, it is one-sided or unreasonable, or the amount is disproportionate to what was invested in the employee, it will be held to be unenforceable. Penalty clauses such as clauses that restrict an employee from leaving employment although no training, upskilling, or upgrading cost was expended are also illegal.

68. If an employee chooses not to complete the bond, they might have to pay the amount of liquidated damages provided in the contract. If however, the amount of money is such that it is regarded as a penalty, instead of compensation and a genuine estimate of the loss, the Courts may decide that it is illegal and unenforceable.

69. The terms of the bond clause will determine its enforceability. When is the provision a penalty according to the law? The law governing the enforceability of penalty clauses is stated in the 1915 House of Lords decision in ***Dunlop Pneumatic Tyre Company v. New Garage and Motor company (1915) AC 79.***

70. Even though this decision is more than a century old, it remains good law. This law is also followed in Singapore and was adopted in a recent Singapore case of ***Xia Zhengyan v. Geng Changqing [2015] 2 SLR 731***. The decision stated that when the contract provides for liquidated damages to be paid in the event of a breach, it will be enforceable if the amount of damages is a genuine pre-estimate of the loss flowing from the breach (early termination) of the contract.

71. The Court further stated: If the obligation or damages sought is extravagant and unconscionable in comparison with the loss that could conceivably be proved to have followed from the breach, the provision is a penalty clause and thus unenforceable.

72. Thus, if the amount is excessive or disproportionate to the loss suffered by the employer, it will be regarded as a penalty. It is not a genuine pre-estimate of the loss.

73. I will determine the issue in reference to the Dunlop test. I need to ask two questions. The first is whether the sum of $25,000 is a genuine pre-estimate of the loss flowing from the breach (early termination) of the contract and the second is whether the sum of $25,000

extravagant and unconscionable in comparison with the loss that could conceivably be proved to have followed from the breach.

74. In respect of the first question from the Dunlop test, I do not find that the sum of $25,000 is a genuine pre-estimate of the loss flowing from the breach. The evidence indicates that this amount was put it everyone's contract including that of the receptionist too. It was a standard clause in all employees contract. There was no evidence on how the amount was arrived at in this employee's contract. The evidence suggests that it was in the contract as it was standard in nature. There is no evidence before me to make a finding that the sum is a genuine pre-estimate of the loss that would flow from the breach. The employer did not give any evidence on why that sum was picked and how the employer arrived at that sum.

75. In respect of the second question, which is, whether the sum of $25,000 is extravagant and unconscionable in comparison with the loss that could conceivably be proved to have followed, I have to have regard to what the sum represents.

76. The evidence of the employer is that it represents the costs of recruiting the employee and the overseas training provided to him. Mr. John Lal had stated that he had provided in-house training to the employee but that that is not accounted for.

77. Mr. John Lal testified that the employer spent a lot of money on recruiting this employee. In this case for example, Mr. Lal said that a significant amount of money was spent in putting advertisements for the vacancy. He said that he and his senior manager utilized 20 hours of their time in shortlisting the candidates and finalizing the right person. That is costly.

78. On the costs of advertising for the vacancy, interviewing and selecting the employee for the job, I find that this is a cost that normally all employers have to bear if they wish to find a suitable employee for work. This employee was a local candidate and there was no additional costs involved in recruiting him apart from the normal expected costs of advertising, interviewing and selecting. It is inconceivable that the employer is expecting the employee to meet the recruitment costs. I can understand that some employers spend huge sums of money in bringing an employee to work for example air tickets, initial accommodation and

associated costs. This case did not see any such costs being expended on the employee. I therefore find that to ask the employee for recruitment cost in fact is to penalize him for leaving work before the employer's anticipated period of 5 years. That costs cannot be fairly imposed on the employee.

79. Mr. John Lal did say that he provided local training to the employee but that they do not account for this. There is no schedule of cost or any evidence of what it cost the employer to provide local training to the employee. Further, the employee said that he was not provided any local training. All that he was given was manuals and CD's to learn on his own.

80. I accept the evidence of the employee that he was not provided any local training and that he was asked to learn on his own. If anything, the employer would have provided the employee the information and guidance on the know- how of the position and how to work efficiently. Therefore no cost can be attached to the local training.

81. I further find that the overseas training was given to the employee not because he wished to receive the training but because the employer wanted him to get trained as they were on the verge of re-tendering for the job for the University of the South Pacific. The employee was not able to refuse the training as it would have impacted on his career. The training was not to enhance the skill of the employee but to secure a job that the employer was going to tender for. If the employer wanted to enhance and upskill the employee, he would have been provided the training in the first few years of his employment. It is worth noting that the employer did not provide any training to the employee for almost the first 3 ½ years. There was no need because the work that the employee was doing did not require him to be a certified Fuji Xerox technician. When it became necessary for the employer to secure that work, the training was then considered.

82. It was put to Mr. John Lal in cross-examination that the employer had made the training mandatory and the employee had no option to refuse it. He referred to the appointment letter which was tendered in as Exhibit 7. Clause 11 of the Exhibit says that *"you will attend to all seminars and training (external or in house) on company and your time as scheduled".* Mr. John Lal stated that the clause said *"will"* but despite that the training was not mandatory.

According to Mr. John Lal, the employee could have refused the training but that would have had an impact on his career. Mr. John Lal also stated that to work for Fuji Xerox you have to get qualified as the work is very unique to other work and one must ensure that justice is done to the position when working for Fuji Xerox.

83. Now what it actually cost the employer to provide the 3 trainings to the employee, I turn to the evidence. Mr. John Lal said that the 3 trips to Sydney would have cost the employer $8,000 to $10,000 per trip. He said in Mescot, they have a training school by Fuji Xerox. The training is specifically on trade secrets, the know-how, the internal mechanisms, and the use of software to diagnose problems. The costs involved upfront is the airfares, accommodation costs, travel allowances, incidentals, and the cost of training. He said that the cost of training is informally billed.

84. He further said that training in Sydney cost $1500 a day. To substantiate the costs, he tendered in evidence 3 sets of documents marked as Exhibit 4, Exhibit 5 and Exhibit 6. According to Mr. John Lal, it is the employee who had prepared the documents and gave it to the Administration Department.

85. Let me start with Exhibit 4. This Exhibit firstly shows that a sum of $4,000 was given to the employee as his expenses for taxi/train fare and food. The Exhibit also has a ticket attached to it which shows the air fare amount to be $2236.00. The fare was for travel from Suva to Nadi, Nadi to Sydney, Sydney to Brisbane and Brisbane to Nadi. It also has the receipts for monies used by the employee for food, fare and internet. The invoices total to $126.80.

86. There are no other invoices tendered as expenses paid for the training and as such I cannot take any other expenses into account. If the employer paid any other costs, the documents should have been made available as it could be obtained easily.

87. The first cost in Exhibit 4 is the sum of $4,000 given to the employee. The employee's evidence is that he gave this money to Mr. John Lal. He said that he shifted the money for him. I find the employee's evidence credible. He has no reason to make up that he was asked to shift money for Mr. John Lal. Mr. John Lal had also said that it is the employee who

prepared the documents and the employee denied that. The employee has said that he gave all the invoices to the employer. The employees' version was substantiated as Exhibit 4 had all the invoices that the employee would have received for his expenses.

88. If the employee was given the sum of $4,000 for his personal use, I am sure that the employer would have asked for documentation on how the money was spent. The employee even gave invoices for expenses worth $6.00 so how would he be spared if he did not provide the expenditure accounts for $4,000?

89. I find that the sum of $4,000 was not used on the employee and that this money was given to the employee to be given to Mr. Lal in Brisbane.

90. Then to the aircraft fares which is not a true reflection of the air fare paid for the training. The employee's evidence, which was accepted by the employer was that he was the best employee of the year and the reward for him was to watch Gold Coast 7's. If that was his reward, why then was the travel from Sydney to Brisbane included in the costs of the training? Mr. John Lal conveniently said that he has no idea why that was done but that the employee prepared the documents. If the employee prepared the documents, why would he include that in the training costs to his detriment? Mr. John Lal's evidence is not reliable.

91. I find that Exhibit 4 does not show a correct reflection of the airfare costs for the training. Even if I take the fare as is shown, the total expense has not been substantiated to be more than $2,500 for the first trip.

92. I now turn to Exhibit 5 which shows that a sum of $3,000 was given to the employee which he denies and says that it was the money that he gave to Mr. John Lal. The Exhibit also shows the policy document of the aircraft. There is no evidence of any fare being paid and the amount that was paid. There are 3 invoices attached to the Exhibit which shows invoices for the train and taxi fare. The invoices calculates to $51.40. For the same reasons I have given earlier, I do not find that the employee was given $3,000 cash in hand for his use. If he was, he would have been asked to provide the invoices on how he spent the money. If I were

to give allowance for the air fare, notwithstanding the lack of evidence in this regard, and the other expenses shown in the invoices, then once again the training cost is not beyond $2,500.

93. The third invoice is Exhibit 6. It contains a document which shows that $6,000 was given to the employee which he denies and says that this was money given to him to be given to Mr. John Lal. The next document is the travel ticket for Mr. John Lal and the defendant for Saturday 3 November 2012. This is the airfare from Sydney to Nadi. The total costs shown is AUD542.00. There are two things that concern me. The first is that this document does not relate to the 3rd training and should not be part of Exhibit 6. It should be part of 2nd training and be part of Exhibit 5. The second is why should the employee be charged for air travel costs for John Lal? This document also substantiates the employee's evidence that Mr. John Lal was with him during the 2nd training. It therefore substantiates his evidence that the money in the sum of $3,000 given as cash at hand was not for the employee but for him to give the same to Mr. John Lal which I find he did.

94. The next document in Exhibit 6 is the air fare for the third training which is in the sum of $1199.83. The third document is the tax invoice for the accommodation costs for the period 3 December to 14 December 2012 in the sum of AUD 179.00 per night. The number of nights that the employee would have stayed would be 11 nights as he is shown to have checked out on 14 December 2012. That is the date he flew back to Fiji. The total costs I calculate for accommodation is AUD 1969.00. The next document is a deposit receipt for AUD 550.00 for 3 days accommodation at the Sebet Surry Hills. The rest of the invoices are for the expenses for the meals and by road travel costs. The invoices amount to less than 100.00.

95. I do not accept that the sum of $6,000 was given to the employee for his expenses. That I accept was money that was shifted for Mr. John Lal. I find that the total expenses shown in Exhibit 6 will be not exceed more than $5,500 FJD.

96. On the evidence presented to me, the total costs for the training would be in the vicinity of $10,000 to $11,000 FJD. This is for the 3 trainings obtained abroad. There was no evidence that the employee would have been sent for any more trainings. Whatever may have happened, the amount of liquidated damages is twice as much as the amount spent on the

employee. Even if I accept that there was at least FJD 5,000 spent on each training, the amount still is far less then the sum claimed. On the evidence I therefore find that amount stated in clause 1 is extravagant. The employment bond clause therefore is penal in nature and not enforceable.

C. Other Issues/Costs

97. I have answered the main issues in the trial. There are other issues that I have not touched upon. The first one is whether the confidentiality agreement allegedly entered between the plaintiff and the defendant is a valid agreement.

98. I cannot fathom why the parties want me to decide that. It has no relevance as the employer is not claiming damages for breach of the confidentiality agreement. Further to that, this same issue was already raised before me when I heard the application for an injunction by the employer and I had answered the issue. Succinctly, what I had said was that the parties had signed the confidentiality agreement on the same day as they signed the contract of employment and for the employee to raise that the confidentiality agreement was invalid for want of consideration was alarming. In the injunction judgment I had stated that the consideration that the employee received was the salary for being employed.

99. If any party was not satisfied with the finding that I made on the issue that is placed before me again, the right course of action was to appeal the decision. As far as I am concerned, I have already made a conclusive finding in reference to the validity of the confidentiality agreement. I need not go any further.

100. The next issue is whether the defendant had agreed to reimburse a percentage of the training costs and not $25,000. It is evident that this matter was not settled. Any settlement discussions are confidential and not binding on the parties.

101. The third issue that the parties wanted me to try was whether the defendant is a formally qualified and certified Fuji Xerox Product Trainer. I do not find that this question is relevant to the main issue of liquidated damages. It is sufficient for me to say that there is enough evidence that the employee received 3 trainings overseas and whether that qualified him as a certified technician was not established in evidence. There was no qualification documents or certificates tendered to that effect.

102. The next issue is that of cost and the specific matter that was brought to my attention in the evidence was an email dated 12 June 2013 which was tendered in evidence as Exhibits 10 and 11. In an email dated 12 June 2013, Mr. Pal clearly asked Mr. Vinit, counsel for the employer that his understanding was that the employer will no longer press the issue of $25,000. The counsel for the employer Mr. Vinit Pal agreed that indeed it was no longer an issue.

103. It is the defendant's position that there was vindictiveness on the part of the employer to proceed to legal action because the employee had joined a company which also became suppliers of Fuji Xerox product in 2013. To take that work away from the new employer, the plaintiff started a legal action against the employee and the new employer.

104. It is the defendant's position that the defendant is entitled to the costs of the action since the plaintiff proceeded despite the assurance that it will not press for the liquidated damages.

105. I must say that since the plaintiff has not been able to establish the claim, the defendant in any event is entitled to the costs of the action. I do not find that initiating legal proceeding despite the assurance that the issue of liquidated damages was no longer going to be pressed for, establishes any misconduct on the employer to make it liable for indemnity costs.

106. I find that the appropriate costs in this claim should be in the sum of $5,500 to be paid by the employer.

Final Orders

107. In the final analysis, I dismiss the plaintiff's claim and order that it pays to the employee costs in the sum of $5,500 within 21 days of the date of the judgment.

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Hon. Madam Justice Anjala Wati

Judge

22. 11. 2021

To:

1. ***Siwatibau and Sloan Lawyers for the Plaintiff.***
2. ***AP Legal for the Defendant.***
3. ***File: ERCC 10 of 2013.***