

IN THE EMPLOYMENT RELATIONS COURT AT SUVA
CENTRAL JURISDICTION
CIVIL JURISDICTION

ERCA: 07/21

BETWEEN:

AKTHAR ALI

PLAINTIFF

AND:

SPECIAL ADMINISTRATORS NASINU
TOWN COUNCIL AND NAUSORI TOWN
COUNCIL

FIRST DEFENDANTS

AND:

PERMANENT SECRETARY FOR MINISTRY
OF LOCAL GOVERNMENT

SECOND DEFENDANTS

AND:

ATTORNEY GENERAL

THIRD DEFENDANT

Date of Hearing : 7 June 2023
For the Appellant: Mr. Inia
For the First Respondent: Mr. Nair
For the Second and Third Respondent: Ms. Raman
Date of Decision: 18 August 2023
Before: Levaci SITTW, J

J U D G M E N T
(ORIGINATING SUMMONS)

Application

1. By way of an Originating Summons, the Plaintiff had filed and sought the following reliefs:
 - (i) Whether the Defendants had wrongfully and unfairly terminated the employment of the Plaintiff under section 220 (1) (h) (b) & (i) of Part 20 Division 3 of ERA (referred hereto as 'the ERA');
 - (ii) Whether the plaintiff's employment was founded on the employment contract and if so, whether the contract was breached by the Employer when they prematurely terminated his employment;
 - (iii) Whether the Employer had breached the termination clauses provided in the ERA;
 - (iv) If the Defendants breached the contract, determine the loss of salaries and allowances and mortgage payments of 11 months including special Damages for loss of dignity through unfair and wrongful termination totaling \$99,802.22;

Background

2. The Plaintiff was contracted as the Chief Executive Officer of Nasinu Town Council by the Permanent Secretary of Local Government, Housing and Environment (referred to as second Defendant) on 31 December 2014 for 3 years. The terms and conditions of the contract was the same as ERA.
3. He was then transferred to Nausori Town Council as the Chief Executive Officer by virtue of a transfer letter dated 28 March 2017 effective from 10 April 2017.
4. The Plaintiff was later terminated by the Second Defendant on 30 January 2020 by with immediate effect.
5. He lodged an employment grievance with Mediation Services on 4 February 2020 for wrongful and unfair dismissal which was later transferred to the Employment Relations Tribunal on 13 December 2020 where it was adjudged that the claim fell outside of the jurisdiction of the Tribunal.

Affidavits

6. The Plaintiff relies upon their Affidavit as follows -

- (3) **THAT** the Plaintiff was contracted as Chief Executive Officer of Nasinu Town Council by the Permanent Secretary for Local Government (Defendant 2) Housing and Environment effective from 31 December 2014 and the term was to run for 3 years. Copy of contract is annexed as annexure 'A-1'.
- (4) **THAT** the Plaintiff was transferred from CEO Nasinu Town Council to CEO Nausori Town Council by the Defendant 2 through a 'Transfer letter' dated 28 March 2017 contracting him as Chief Executive Officer, Nausori Town Council effective from 10/4/17 with a salary of \$51, 096.76 per annum and the said letter was authored by the Permanent Secretary for Local Government, Housing and Environment. Copy of the Transfer letter is annexed as Annexure 'A'.
- (5) **THAT** the preamble of my employment contract says that this contract is made between the Ministry of Local Government on behalf of the Nasinu Town and me hence the Nasinu Town Council and any town council around Fiji (referred to in paragraph 16 of my employment contract) hence DEFENDANT 1 is a party to this matter.
- (6) **THAT** pursuant to section 96 of the Fiji Constitution 2013, DEFENDANT 3 is the Chief Law Officer of the State and has responsibility of supervising and advising statutory public bodies like municipalities on legal matters and since they have failed to intervene to cure this irregularity committed by Defendant 2, demonstrates that Defendant 3 is a party to this matter as well.
- (7) **THAT** paragraph 16 of my employment contract stipulates that the Chief Executive Office of Nasinu Town Council will be posted to any city/town council around the Fiji at the discretion of the ministry of Local Government.
- (8) **THAT** the Plaintiff's employment contract was terminated by the Second Defendant on 30/01/20 through the latter's letter of the same date and the letter titled "End of Contract". Copy of the Termination of Employment contract letter is annexed as annexure 'A-3'.

- (9) **THAT** the paragraph 15 of the Plaintiff's employment contract says that other terms and conditions inclusive termination of employment contract shall be the same as specified under the Employment Relations Bill which has been promulgated as the *ERA*.
- (10) **THAT** the Plaintiff reported an employment grievance to the Mediation Services through the *Form 1 Section 200 (1) (a) ERA & Regulation 3 (1)* on 04/02/20 as a wrongful & unfair dismissal.
- (11) **THAT** the matter was later referred to the Employment Relations Tribunal on 10/11/20 and mentioned in the Employment Relations Tribunal on 15/12/20. Copy of Referral is annexed as annexure 'A-4'.
- (12) **THAT** the Non-Legal Tribunal adjudged and ordered in the Tribunal that this matter be withdrawn from the Tribunal as is the intention of the Plaintiff since the claim is more than S40,000.00 and cannot be heard in the Tribunal and an application be made to the Employment Court to determine the said matter. Copy of the Non Legal Tribunal sealed ORDER that the Plaintiff withdraws the Employment Grievance as is his intention and make application to the Employment Court is annexed as annexure 'A-5'.
- (13) **THAT** as a result of the termination, the Plaintiff has suffered in his loss of pay (\$46,838.70) and allowances and related work benefits (\$18,100.00) with loss of dignity (\$10,000.00) and unpaid mortgage (\$24,863.52) that amounts to \$99,802.22. Copy of telephone, housing allowances and mortgage are annexed as annexure 'A-6'.
- (14) **THAT** I am advised by my Solicitor and I say that the notice of Defendant 2 to end my contract effective from 30/01/20 rather than on 31/12/20 as implied in my 31st December 2014 Employment Contract, the said Defendant has practically breached paragraph 1 of this contract.
- (15) **THAT** I am further advised by my Solicitor and I say that Second Defendant by stating in my "End of Contract" letter that "Reference is made to your employment contract dated 31 December 2014 ... I wish to advise that your contract has come to

an end with effect to the date of this letter, "30 January 2020 (our emphasis), the Permanent Secretary for Local Government has breached the said contract as there is no such provision that the said contract to end on 30 January 2020.

- 16) **THAT** I am advised by my Solicitor and I say that the Second Defendant has committed a statutory breach pursuant to section 40 (1) (a) of the *ERA* when they terminated my written Employment Contract when the term of my contract has NOT EXPIRED.
- 17) **THAT** I am advised further by my Solicitor and I say that since this Employment Contract has continued for an INDEFINITE DURATION from 31 December 2014 and continued for more than the stated 3 years in the contract to 2020 I should complete its second 3 year term on the 31 December 2020.
- 18) **THAT** by prematurely ending the contract 11 months before the expiry of the second 3 year term in which the contract was made, the Second Defendant has breached my 31 December 2014 Employment Contract and *section 28 (1) of the ERA*.
- 19) **THAT** I am advised by my Solicitor and I say as from the conduct of Defendant 2 when he failed to give any reason for the termination of my employment contract, he has breached paragraph 15 of my employment contract and the termination clauses under the *ERA*.
- 20) **THAT** I am advised by my Solicitor and I say that Defendant 2, by NOT giving me a notice of his intention to terminate my employment contract, the said Defendant has breached paragraph 15 of my employment contract and the termination clauses under the *ERA* as well.
- 21) **THAT** I am advised by my Solicitor and I further say that as pursuant to section 96 of the Fiji Constitution 2013, DEFENDANT 3 is the Chief Law Officer of the State and has the responsibility of supervising and advising government and statutory public bodies like municipalities on legal matters, and since the SECOND DEFENDANT is a government body regulated by the Local government Act, THIRD DEFENDANT has failed to intervene and cure this breach committed by

SECOND DEFENDANT, demonstrates that THE THIRD DEFENDANT'S conduct is wrongful as well.

- (22) **THAT** which such conduct of THIRD DEFENDANT, the said office has clearly demonstrated that it has adopted a "Termination Procedure" that is wrongful and unjustified.
- (23) **THAT** the FIRST DEFENDANT is a fully funded (100%) statutory government public body which had been regulated by government laws.
- (24) **THAT** the 1st AND SECOND DEFENDANT in this matter have failed to comply with the statutory provisions of Regulation 22(2) & (3) of the Public Service Regulations, 1999, a public servant law which warranted obligatory compliance of natural justice and procedural fairness.

7. The Respondent deposed his Affidavit of response as follows

- (2) I depose to the facts in this affidavit in response to the Affidavit in Support of Akhtar Ali (Plaintiff) that was sworn on 12 July 2021 and filed on 16 July 2021 (Affidavit) as within my own knowledge and that acquired by me in the course of my role as the Acting Permanent Secretary for Local Government (Permanent Secretary) save and except where stated to be on information and belief, and where so stated, I verify believe the same to be true.

BACKGROUND

- (3) The Plaintiff was appointed to the position of the Chief Executive Officer (CEO) of the Nasinu Town Council for a period of 3 years with an annual salary of \$42,000. A copy of the Plaintiff's employment contract dated 31 December 2014 is annexed hereto and marked 'SA1'.
- (4) With effect from 10 April 2017, the Plaintiff was transferred from Nasinu Town Council to Nausori Town Council as the Chief Executive Officer under the terms and conditions of the employment contract at CEO approved rate for Nausori Town Council with a salary rate of \$51,096.76 per annum. A copy of the appointment letter dated 28 March 2017 is annexed and marked 'SA2'.

- (5) The Plaintiff's employment contract expired on 31 December 2017.
- (6) On 16 March 2018, the Plaintiff was informed by the Director Local Government, Mr. Azam Khan that all employment contracts for Chief Executive Officers that had expired on 31 December 2017 has been extended until the end of May 2018. A copy of the e-mail dated 16 March 2018 is annexed and marked 'SA3'.
- (7) On 30 May 2018, the Plaintiff was informed by the Director Local Government, Mr. Azam Khan that all employment contracts for Chief Executive Officers expiring on 31 May 2018 have been extended until the positions are subsequently filled. A copy of the e-mail dated 16 March 2018 is annexed and marked 'SA4'.
- (8) On 11 October 2018, the Plaintiff was issued a letter by the then Permanent Secretary for Local Government whereby the Plaintiff was instructed to step aside from his role on full paid leave until further notice for investigation to be carried out for the allegations laid against him. There were allegations received by the Ministry of Local Government regarding the conduct of the Plaintiff whilst being employed as the CEO at the Nasimu Town Council. The allegations included:
- a) several tender irregularities under his supervision;
 - b) certain decisions at the council level being made without obtaining approval from the Ministry as required;
 - c) that he employed an individual at Nausori Town Council who was previously terminated by Nasimu Town Council on grounds of abuse of office;
 - d) that he made a policy that all customers requesting to meet him, require one day prior booking with the office receptionist; and
 - e) that he carried out his personal business activities during the working hours; (hereinafter referred to as the "Allegations"). A copy of the letter dated 11 October 2018 is annexed and marked "SA5".
- (9) Thereafter, I verily believe that the ministry conducted investigations into the Allegations and established findings pertaining to the same.
- (10) Through the 11 October 2018 letter, the Plaintiff was informed that he was to hand over all council assets and office keys to Mr. Deo Narayan, Senior Health Inspector

who in his absence was appointed to act as the Acting CEO. Nausori Town Council until Ms. Lydia Eliana Lazel-Racule was appointed to act in the CEO position for Nausori Town Council effective from 18 November 2019. A copy of her appointment letter dated 10 December 2020 is annexed and marked as "SA6".

- (11) On 21 December 2018, the preliminary investigation was concluded and the Preliminary Investigation Report was forwarded to the then Permanent Secretary for Local Government recommending that the CEO of the Nausori Town Council be subject to disciplinary action.
- (12) The Plaintiff was on leave with full pay including allowances (housing and telephone) and had access to official laptop and mobile phone from 11 October 2018 to 30 January 2020 when the Plaintiff was informed that his employment contract has come to an end. A copy of the letter dated 30 January 2020 to the Plaintiff is annexed and marked "SA7".

EMPLOYMENT GRIEVANCE

- (13) On 4 February 2020, the Plaintiff filed an employment grievance based on a claim of unfair dismissal seeking for re-instatement/compensation with the Mediation Services which was referred to the Employment Relations Tribunal (ERT) as ERT Grievance 276 of 2020 for determination (Grievance). A copy of the Applicant's Form ER 1 - Referral of an Employment Grievance to Mediation and Form 3 - Certificate of Mediation are annexed and marked 'SA-8A' and 'SA-8B' respectively.
- (14) That ERT Grievance 276 of 2020 was withdrawn by the Plaintiff and a fresh action is being filed in the Employment relations Court for determination.

RESPONSE TO AFFIDAVIT

- (15) I do not take issue with paragraphs 1 and 2 of the Affidavit.
- (16) I admit paragraph 3 of the Affidavit and further state that the Plaintiff was contracted as the CEO of the Nasinu Town Council by the Ministry of Local Government, Housing and Environment on behalf of the Nasinu Town Council.
- (17) I admit paragraph 4 of the Affidavit and reiterate paragraph 4 hereinabove.
- (18) I do not take issue with paragraph 5 and paragraph 6 of the Affidavit is admitted only to the extent that the 3rd Defendant is the Chief Law Office of the State.
- (19) I admit paragraphs 7 and 8 of the Affidavit and reiterate paragraph 12 hereinabove.
- (20) I admit paragraph 9 of the Affidavit.

- (21) I admit paragraphs 10 and 11 of the Affidavit and reiterate paragraphs 13 and 14 hereinabove.
- (22) I do not take issue with paragraph 12 of the Affidavit.
- (23) I deny paragraph 13 of the Affidavit and repeat paragraphs 3 and 12 hereinabove.
- (24) I deny paragraph 14 of the Affidavit whereby the Plaintiff says that his employment contract is implied to have come to an end on 31 December 2020 and further state that the Plaintiff's employment contract ended on 30 January 2020 upon being informed by the Ministry of the same. The initial term of contract as per paragraph 1 of the contract refers to 31 December 2017.
- (25) I deny paragraphs 15 of the Affidavit and state as follows:
- (a) An investigation panel to investigate the allegations against the Plaintiff was appointed;
 - (b) The investigation panel carried out its investigation into the allegations against the Plaintiff;
 - (c) The investigation panel provided its Preliminary Investigation Report dated 21 December 2018 to the Permanent Secretary with a finding of a case to answer in terms of the allegations against the Plaintiff and provided recommendations that the Plaintiff be subjected to disciplinary action;
 - (d) The Plaintiff was on leave with full pay including allowances (housing and telephone) and had access to official laptop and mobile phone from 11 October 2018 to 30 January 2020.
 - (e) In the Plaintiff's absence, Mr. Deo Narayan was Acting CEO Nausori Town Council from 11 October 2018 until Ms Lydia Eliana Lazel-Racule was appointed to act in the CEO position for Nausori Town Council effective from 18 November 2019; and
 - (f) Taking into consideration all the relevant factors, the Permanent Secretary exercised the authority to end his contract with the Ministry.
- (26) I deny paragraph 16 of the Affidavit and further say that the Plaintiff was on leave with full pay from 11 October 2018 to 30 January 2020 and reiterate paragraph 10 hereinabove. I further say that upon issuing the 30 January 2020 letter to the Plaintiff, the Permanent Secretary exercised his discretion to end his employment with the Ministry.

(27) I deny paragraphs 17 and 18 of the Affidavit and further state that the Third Defendant was not involved in the affairs of the Ministry at any stages.

(28) I do not take issue with paragraph 19 of the Affidavit.

(29) I have been advised by my Solicitors that the statutory provisions of Regulations 22 (2) and (3) of the Civil Service (General) Regulations 1999 is not applicable as no disciplinary action was instituted against the Plaintiff before the Public Service Disciplinary Tribunal.'

Contractual terms

8. According to the Contract executed by the Applicant and the First Defendants, the Applicant was employed as Chief Executive Officer for Nasinu Town Council for a period of three [3] years commencing from 31 December 2014. The Applicant was transferred to Nausori Town Council on the same terms and conditions and later the contract was extended twice. Firstly from March to May 2018 and later after May 2018 for a further period until the substantive position was filled.

9. The preamble to the Contract states as follows

'This is an Agreement made on this 31st day of December, 2014 between the Ministry of Local Government, Housing and Environment on behalf of the Nasinu Town Council hereinafter referred to as the Council and Mr. Akhtar Ali hereinafter referred to as the Chief Executive Officer. This Agreement is made in relation to the Council appointment of the Chief Executive Officer's contract for a period of [3] three years.'

10. Clause 5 of the Contract stipulates that -

'The Council may terminate the employment of the Chief Executive Officer as provided under the Civil Service Code (PSC Act and Regulations) or in lieu of payment of salary for the balance of the contract.'

11. Section 9A of the Local Government (Amendment) Promulgation 2008 (referred to as Promulgation) states that -

'Special administrators

9A. - (1) The Minister may by order appoint two or more persons to be special administrators of a municipality for such period as the Minister may consider necessary to

perform the functions of a council until the election date is determined by the Electoral Commission.

(2) The persons appointed as special administrators under subsection 1 shall be deemed to be the duly constituted council of a municipality and shall, subject to any general or specific directions issued by the Minister, have the power to perform and discharge of all the rights, privileges, powers, duties and functions vested in or conferred or imposed on the council, the mayor and any officer of the council by the Act or any other written law.'

12. Thus on 31st of December 2014, the Minister of Local Government acted on behalf of Nasinu Town Council to appoint and contract the Applicant as a Chief Executive Officer of the Nasinu Town Council.
13. The Applicant seeks a determination by the Court whether the procedure adopted by the Ministry of Local Government was a breach of a contract.
14. Termination of the employment by an employee may arise out of a number of circumstances as stipulated under the ERA. Termination after a notification period (section 29 of the ERA), summary dismissals (sections 33 (with reasons) or section 114 of the ERA (without reasons) or on expiry of contract (Section 40) or on death of the employee (section 41) or in payment in lieu (section 30 (3) under Part 5 of the ERA.
15. It is clear from the manner of termination that the Applicant was not summarily dismissal.
16. According to the terms of the Contract, the alternative form of termination in Clause 5 of the Contract is termination by payment in lieu of notice.
17. The Respondent argued that the termination letter was based on Section 40 and section 41 of Part 5 of the ERA, which provides as follows -

'Termination of contract by expiry of the term of service or by death

40.—(1) Subject to section 41, a written contract is terminated—

(a) by the expiry of the term for which the contract was made; or

(b) by the death of the worker before the expiry of the term for which the contract was made.'

19. When the Contract expired on 31st December 2017, the Respondent had thereafter extended the terms of the Contract until the 30th of May 2018 and a further extension was made until the positions were substantially filled. The Respondent had not ceased the contract on its

expiration and both the parties had accepted the manner of extension to the contract on the same terms and conditions.

Was the termination of the Contract wrongful?

20. The Applicant argues that his contract termination was wrong as his contract expired at the end of December 2020 and that in accordance with section 30 (3) of the ERA and in accordance with clause 5 of the Contract, he was entitled to his salary and benefits up until December 2020.
21. To prove wrongful termination, the Applicant must prove that the termination was without any proper cause or following procedures (Prudence v- Wyndham Vacation Resorts (Fiji) Ltd [2021] FJHC 308; ERCC 02 of 2017 (22 October 2021)). The Court considered the contractual terms in light of the provisions of section 30 (3) of the ERA.
22. The terms of the contract required that the Council terminate the employment under the Civil Service Code (PSC Act and Regulations) or in lieu of payment for the salary for the balance of the contract. The third and last form of termination implied into the contract is the expiry of the Contract. Therefore with no renewal.
23. The Applicant was not terminated under the Civil Service Code (PSC Act and Regulations) for disciplinary measures under Section 22 of the PSC Act 1999 as there was no such disciplinary proceedings imposed although investigations were conducted against the Applicant's performance.
24. If it had so happened that disciplinary measures were implemented against the Applicant, then the Court would have considered whether the termination was done in accordance with section 33 or section 114 of the ERA as summary dismissal. In describing summary dismissal in Bogivitu v- Fiji Development Bank [2007] FJHC 31; HBC 066,2021 (25 September 2007) Singh J (see also Singh J decision in Behe v- Telecom Fiji Limited [2007] FJHC 22; HBC 492,2002 (17 august 2007), explained summary dismissal to mean

"The cases above show that the justification must be based on identifying an essential condition which the employee has breached and if so whether the breach justifies the employer taking the view that it cannot any longer have trust and confidence in the

employee carrying out his duties in the future. Given that the plaintiff had participated in volatile politics and acted contrary to Bank's interest by assisting in depriving its manager of a vehicle and using the Bank's resources for publishing pamphlets, the Bank would be justified in taking the view that the mutual trust and confidence no longer existed.'

25. Hence in this instance, there was never any conclusive evidences to establish an act of the Applicant that was in breach of the terms of the Contract.
26. Thus the other form of termination was a payment of salary in lieu of notice by paying the balance of the contract as stated in Clause 5 of the Contract and provided for in section 30 (3) of the ERA.
27. Section 30 (1) (2) and (3) of the ERA stipulates the procedures for payments upon termination of employment in lieu of notice.

Further provisions as to termination of contracts

30. — (1) Upon the termination of a contract of service, the employer must pay to the worker all wages and benefits then due to the worker by end of the following working day.

(2) The wages and benefits due to a worker under subsection (1) must, in the case of a worker who is entitled to receive notice from the employer in accordance with this Promulgation or the worker's contract (the terms of which relating to notice are not less beneficial than this Promulgation), include wages and benefits payable in respect of services rendered during the period of notice or payable in lieu of the notice.

(3) If payment is made in lieu of notice the payment must include the wages and benefits that would have been payable to the worker if the worker had worked during the period of notice.'

28. Clause 5 of the Employment Contract is worded slightly different. The clause allows the Employer termination of the contract in lieu of notice by payment of the balance of the contract.
29. The Court accepts as evidence and it is not contested by the parties that on 10th April 2017 the Applicant was transferred to Nausori Town Council and the Applicant signed to acknowledge the transfer and at the same time amendment to the Contract entitling the Applicant to an increased salary with same terms and conditions.

30. The Court accepts from the facts and evidence that the Contractual amendments on the letter of transfer were specifically for his salary only and that the terms and conditions of the Chief Executive Officer from Nasinu Town Council remained the same.
31. Therefore according to Clause 5 of the Contract, the Applicant was entitled to his benefits and salary for the 'balance of the contract' in lieu of notice in order to terminate the Contract.
32. The Court therefore finds that the termination of the Contract of Employment on the basis that it had come to an end was wrong and that the Respondent should have implemented Clause 5 of the Contract and not section 40 of the Contract.
32. The Court therefore holds that the Termination to the Employment Contract of the Applicant was wrongful.
33. In order to be able to fulfil the terms of Clause 5 of the Contract, the Respondent was required to pay the Applicant the balance of the contract.
34. In the correspondences sent to the Applicant which is not contested to by the parties and accepted by the Court, the Applicant's contract was extended until the substantive post was filled.
35. In this instance, because the Applicant was suspended and was not reinstated thereafter, the substantive post was therefore vacant with individuals were acting in that position from 18 November 2019.
36. Be as it may, whether the substantive post was filled or not, the requirement for termination in lieu of notice by paying the balance of the contract as stipulated in Clause 5 still applied.
37. Hence from the facts and evidences before this Court, the contract did not contain specific provisions to extend or renew the contract. The extension of the contract was based on mutual terms agreed by both parties. There is no evidence from the Plaintiff objecting to the extensions granted by the Respondent.
38. Hence in having terminated the extended contract, the termination required payment of salaries and benefits in lieu of the termination notice in sub-section (1) and (2) or section 30 (3) of the ERA.

Was the termination unfair?

39. However, the court must consider whether the manner in which the termination of the extended contract was unfair.
40. In Central Manufacturing Company Limited v- Kant [2003] FJSC 5; CBV 0010.2002 (24 October 2003) Fatiaki CJ and P of SC, Blanchard J of SC and Weinberg J of SC held that

'In our view, the Court of Appeal correctly held that there is an implied term in the modern contract of employment that requires an employer to deal fairly with an employee, even in the context of dismissal. The content of that duty plainly does not extend to a requirement that reasons be given, or that a hearing be afforded at least where the employer has the right to dismiss without cause, and to make a payment in lieu of notice. It does extend, however, to treating the employee fairly, and with appropriate respect and dignity, in carrying out the dismissal. Each case must, of course, depend upon its own particular facts. However, where, as in the present case, the dismissal is carried out in a manner that is unnecessarily humiliating and distressing, there is no reason in principle why a breach of this implied term should not be found to have occurred.'
41. In order to determine if the termination was unfair, the Court must consider whether the Employer's procedures to terminate the contract was fair and done in good faith. The onus is therefore on the Applicant to prove the allegations causing him humiliation, loss of dignity and injury to feelings.
42. The Employer had conducted investigations into the conduct of the Employee and thereafter sent the Employee on leave with pay from 11th October 2018 until he received his letter of termination in January 2020.
43. From when the Employee was sent on leave the Employer continued to pay the Applicant's full salary together with his allowances, benefits and allowed him exclusive use of the Employers phone and laptop whilst he was on leave and at the same time employed current officers to Act against his post.
44. The Respondent had issued a termination letter on 30 January 2020 with effect from the date of the letter after having filled an individual to act on his post backdated to 2019.
45. Having perused the Applicant's Affidavit in Evidence, the Court found there was no evidence to establish that the Applicant suffered embarrassment and loss of dignity although he pleaded this in his Affidavit.
46. His only argument was the inability to find a job. This however did not prejudice him as the Respondent continued to pay him his salary and benefits up until the letter of termination.

47. There is no evidence from the Affidavit of the Applicant on the current employment status of the Applicant to indicate to this Court his ability to find and retain employment at the same level. Hence there is no evidence to show that his entitlement to a salary level similar to the pay made.
48. The Court therefore finds that the Applicant was unable to prove to the Court that the termination was unfair.

Is the Applicant entitled to damages for wrongful termination?

49. Where the Applicant can prove that the termination is wrongful, the Court has granted damages as salary and fringe benefits owing to the Applicant during the period of the notification as was held in Seva v. Sea Ports Terminal Limited [2008]FJHC 50; HBC78.2006 (28 March 2008) by Singh J

[23] The defendant, if it wanted, could have given the plaintiff a 90-day notice under the agreement and terminated the agreement. In Yashni Kant the Supreme Court relied on a passage from the Canadian case of Wallace v. United Grain Growers Ltd. (1997) 3 SLR 70] which stated that ***"In the event that an employee is wrongfully dismissed, the measure of damages from wrongful dismissal is the salary that the employee would have earned had the employee worked during the period of notice to which he or she was entitled"***. The Supreme Court concluded that there is now an implied term at common law that an employer can make payment in lieu of notice. Yashni Kant is the binding authority on Fiji courts and I follow it.

[24] On the basis of this authority the plaintiff would be entitled to 90 days salary. He would also be entitled to all the fringe benefits which were incidental to his employment namely \$60.00 per month for mobile phone, the 8 percent employer's statutory contribution to Fiji National Provident Fund. The fringe benefits are recoverable for the period required to lawfully terminate the employment. It has been held that financial loss resulting from loss of tips that would have been earned: Manubens v. Leon (1919) 1 KB 208; use of car: Kilburn v. Enzed Precision Products (Australia) Pty Ltd. (1988) 4 VLR 31; pension and superannuation entitlements: Bold v. Brough, Nicholson and Hall Ltd. (1964) 1 WLR 201, 211 during the period required to lawfully terminate the contract are recoverable. Accordingly the plaintiff would be entitled to the 90 days salary which is \$6,627.00 (one quarter of his annual salary). He is entitled to 8 percent employer's statutory contribution to Fiji National Provident Fund on this sum that is \$530.32. He was given use of \$60.00 worth of charges per month on mobile phone so that is a total of \$180.00. His fortnightly pay slip (document 17) shows a payment of \$88.52 being paid to Colonial Mutual Life Association. This I believe was for an Insurance policy. This would mean a loss of six such payments over 90-day period or \$511.12. Hence his total loss over the 90-day period is \$7,848.44'

50. According to common law, the payment of damages entitled to the Applicant is the payment of salaries and benefits owing to him if he was to have worked during the period of notice.
51. The period of notice according to Clause 5 of the Contract was the 'balance of the contract.'
52. However in this instance, the contract had been spent after the Applicant had served the contract for 3 years. Thereafter according to the evidences and facts, the Court accepts that the notice of extension did not stipulate a specific period for extension purposes which would have been the 'balance to the contract'.
53. Therefore in this instance in accordance with Seva v- Ports Terminal Limited (Supra), and in consideration of Clause 5 of the Contract, there were no payments owing as there was no 'balance of contract' pending for which was a requisite for termination without notification.
54. Be as it may and if I am wrong, I also refer to the decision of my brother Judge, Justice Singh in the case of Djar v- PSC [2008] FJIC 213; HBC 155.2004 (10 September 2008) where the Court held that the act of termination by re-offering another position contrary to the position he was initially contracted for was a breach of contract. He held that --

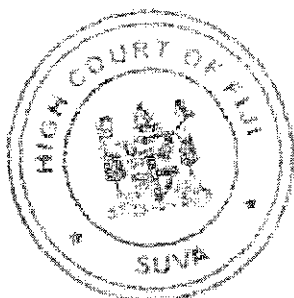
'[33] Considering the principles set out in above cases, the motives or intentions of Doctor Tuqa are immaterial to damages. The plaintiff had been paid his salary even though he was suspended. If the contract had been performed he would have only received his salary..... He suffered no loss.'


Costs

55. The Court will award costs to the Respondent.

Orders

56. The Court will Order
- (i) That the application by way of Originating Summons is dismissed;
 - (ii) Costs of \$800 awarded to each of the Respondents.




S. T. W. Levaci
A/Judge

