

**IN THE EMPLOYMENT RELATIONS COURT AT SUVA**

**CENTRAL JURISDICTION**

**CIVIL JURISDICTION**

**ERCA: 11 OF 2020**

**BETWEEN:**

**VULISERE TUKANA**

**PLAINTIFF**

**AND:**

**FREE SOUL REAL ESTATE  
DEVELOPMENT PTE LTD**

**DEFENDANT**

**Date of Hearing : 18 July 2023**  
**For the Plaintiff : Mr. Singh V. and Ms. Sahin S.**  
**For the Defendant : Mr. Nandan A.**  
**Date of Decision: 3 November 2023**  
**Before: Levaci SLTTW, AJ**

**J U D G M E N T**

**(Claim for unlawful and unfair termination of Contract on basis of Redundancy)**

## **Cause and Background**

1. The Plaintiff was employed with the Defendant for a term of 5 years from 20 September 2018 as a project manager.
2. On 18<sup>th</sup> March 2020 The Defendants directors issued a letter of termination to the Plaintiff on the basis of redundancy.
3. By a Writ of Summons, the Plaintiff claims for unfair or/and unlawful termination and thereafter damages for the sum of \$512,500 as loss of salaries from the date of termination until the completion of the contract, damages on merit payment annually amounting to \$51,250, damages for loss of FNPF amounting to \$92,250, damages for loss of a vehicle as a benefit and damages for loss of medical insurance from date of termination until the date of completion of the contract.

## **Evidences**

4. The Plaintiff gave his evidence that he attended high school and later Fiji Institute of Technology graduating with a Diploma in Civil Engineering in 1993. He worked for a few companies from 1994 to 2002 when he started work as a Building Inspector at Suva City Council until 2006. He was offered a scholarship and thereafter completed his studies at QUT with a Bachelor Degree in Civil Engineering. He was employed with SCC on return to Fiji from 2010 until 2018 having been promoted to Senior Engineer. In September 2018 he was contracted and employed with the Defendant until April 2020.
5. Whilst a Director Engineer at SCC, he developed the Suva City and ensured compliance with building code standards. He managed projects like the Albert Park refurbishment and the My Suva Park re-development. He directly reported to CEO and Special Administrator. During his employment his base salary was \$73,000 plus a vehicle, housing allowance and a mobile phone.
6. He was approached by the Director of the Defendant three times to persuade him to be employed as a project manager development on the condition that they would double his salary \$150,000 which he refused three times until the final offer came in September 2018. He was engaged by the defendant and signed an employment contract. He started in October 2018. He was not aware of environmental issues nor was he informed. He was informed his post was that of project manager and team leader to finalize the recruitment of consultants as well as lodgment of development permits for hotel construction. He confirmed his contract entitled him to a salary of \$150,000 per annum payable on a monthly basis, a 4 wheel drive vehicle, medical insurance and merit payments which was not awarded to him despite his engagement. Tendered as **Exh 1** was the contract. He was located at the Suva office at Victoria Parade with 5 local expatriate staff and would visit construction sites twice a week and report to the Director of the Company, Dick. His work was to prepare the Scope of Works of engagement of Consultants, recruitments and development of projects. He confirmed there

were consultants and sub-consultants. There was an environment consultant looking after environmental issues including structural engineers and architects. The value of the Malolo project was estimated at \$500 million dollars containing 300 to 500 room hotel.

7. In Christmas of 2019 the Defendant obtain a Development Permit for the Malolo project issued under the conditions that they would comply with environmental issues and an environmental report to be submitted and approved by Director Environment. They then went for Christmas break for 2 weeks and returned to see some development already taking place despite his directives. The Director of Environment then issued an injunction for stop works. He had advised the Director of the Defendant company, Dick to comply with the environmental requirements for the Director of Environment's approval before they construct. Director of the Defendant company did not accept the advice and whilst on break, the channel was dug up deeper to allow barges to come in bringing construction work machines. Director of Environment was made aware and he issued a Stop Work notice served in January of 2020. From January 2020 he continued work with the Nausori Highland project and engaged a consultant to work with the Environment Consultant to get the EIA approved for the Malolo Project. In March 2020 a letter of redundancy was issued to him Tendered as **Exh 2**. Prior to this, he was not consulted or contacted to discuss the issues on his employment nor a contact from the Ministry of Labour regarding the redundancy and no discussion about the notice. The Nausori Highland project was not affected and could continue as the only the Malolo Island project required the Department of Environment approval. A letter was sent by his lawyers to the Defendant tendered **Exh 3**. From 2019 both projects were ongoing until Christmas when in January 2020 the stop order was issued. There was no major project in April 2020 for a year. A reply to the letter was sent from Counsel for Defendant regarding a requirement in clause 18 of the Employment Contract for a meeting within 7 days thereafter tendered as **Exh 4**. Since Termination he was doing free-lance work on a project basis with Hemal Construction since 2020. He earns \$3000 per month and there is no superannuation. He now seeks his monthly salary owing, merit payment, FNPF, loss of motor vehicle and medical insurance.
8. In cross-examination he was unaware of the environmental issues at Malolo Project until he signed the employment contact. He admitted he had gone to China in 2018 (date and month cannot confirm) whilst working for SCC with a Government Delegation where he met Dick, by then he had signed the contract in 2018. He denied offering to work for Defendant and admitted Defendant approached him. He assisted in getting the permit and did not indicate his intentions before signing the contract. He was not paid the merit payment as there was no work for the 1<sup>st</sup> year from October 2018 to October 2020 and there were pending works not concluded including the approvals from Director Environment. He was the only project manager on the site and had 20 plus workers there. He had visited the site 1-2 weeks prior to signing his employment contract to consider the project. The channel was dug in 2018 and later deepened in 2019. There were no pre-existing buildings. He had advised by the Defendant, who were developers from China. They did not listen and pretended not to know about the progress. He did not give his advice in writing and was not aware of the construction during the 2 weeks break. When they resumed work, there was activation of the notice already

served. There were 1-2 stop work orders already issued when he joined. The stop work was issued in June 2018 but he only knew after this and managed to get approvals in order for permit to be issued. However after 2020 when redundancy letter was issued, no other consultation was done. He was aware Malolo Project was on hold due to non-compliance. He had started the Nausori High land project for a development lease, engaged a surveyor and prepared a concept plan which was still for discussion and to engage a local consultant. He visited the Nausori Highland project site with Wood and Jepsen and did the survey works and lodged with the ministry. He was aware of the pandemic but was unaware of Defendant being impacted. He had not attended any meeting for the purposes of discussing redundancy. He admitted working with other directors on other projects in Nadi between 2019 to 2020 and on residential projects when he would go down and the Defendant tried to absorb him before redundancy. Plaintiff received letter on 18/3/20 and was given 1 months' notice. He agreed the reasons for Covid was not included in the termination letter and only for financial issues as per the letter. He admitted no tendering of evidences of Free Soul's financial. He admitted a development lease was issued but not a full title. The commissioning of the survey at Lands Department was pending. The project at Malolo was cancelled as the Department of Environment's requirements needed to be complied with. He denied that any meeting was organized to discuss his redundancy. He admitted applying for a permanent secretary position and that he was engaged as a contractor from 2021.

9. The Defendant admitted he firstly met the Plaintiff in China in December 2017 on a government and private sector meeting. The plaintiff did some part time work whilst working with SCC and later he was contracted in August of 2018. He understood that the Plaintiff was employed to manage all the projects including the necessary approvals. There was another staff, Leweni who contacted the public and arrange travel. They hired the two as the two were familiar with the laws in Fiji. In the Nausori Highland project he did some scheme plan and was awaiting a survey report. The TLTB lease had been received. They had done a channel when stop works were issued by Department of Environment on 1 June 2018 when they had dug the channel to make the walkway tendered as D Exh 1 and D Exh 2. They did not carry out any work. There was an order on 13 September 2018 for injunction against the company tendered as D Exh 3. On 4<sup>th</sup> April 2019 the Malolo Project was cancelled tendered as D Exh 4. Another order was issued on 9 April 2019 tendered as Exh D 5. At this time between 2019 and 2020 the Plaintiff was working at Nausori Highlands and part-time for Dickson's house. He made a scheme plan for the Nausori Highland. He was also doing works at his house. The Nausori Highland Project did not proceed as no survey report was received by him. They later found the company that was hired but he was unaware of the report nor was it lodged with council. He sent the Plaintiff home as there was a virus and there were no jobs available at that time. They offered the Plaintiff alternative work and fully paid him every month. A letter was sent to Permanent Secretary tendered as Exh 6 as well as a notice of termination to the Plaintiff both 30 days prior. No response was received from the Plaintiff and he received all his redundancy payments. The payment was received and dated and tendered as D Ex 7. There were correspondences with the Counsel for Plaintiff. He could not arrange for a meeting because of covid as he had suffered from covid. He admitted there was a letter for dispute resolution which he received but that there was no meeting. Email

exchange was tendered as D Exh 8. Judgement delivered in Court against the Defendant tendered as Exh 9.

10. In cross-examination he admitted Plaintiff worked part time with them whilst at SCC. The contract did not contain an explanation about the environmental issues nor any correspondences to the Plaintiff about it. There was an environmental consultant with them who dealt with environmental issues and reporting to Vuli as well as him hired for 6 months from 2018. The Development lease for Malolo was obtained in 2019 just before the Christmas break. He denied the development leased was cancelled although the letter from Department of Environment was read to him. The project at Malolo was worth \$100 million and Nausori highland was \$15 million USD. He had done scheming plans but they had to wait until the survey report was issued. The company therefore stopped the project at Nausori Highland. Although Free Soul was engaged in construction and not tourism. They were not involved in tourism and was not affected by Covid.

### **Law on Redundancies**

11. Section 4 (1) of the Employment Relations Act defines redundancy as –  
*“No longer being needed at work for reasons external to the worker’s performance or conduct pursuant to the reasons and processes set out in Part 12’*
12. According to the provision of section 107 (b) of the Employment Relations Act, the Employer must give the worker an opportunity for consultations on measures to avert or minimize terminations or to mitigate adverse effects of terminations.
13. In the case of Kanamoli -v- Fiji Revenue and Customs Authority [2021] FJHC 270; ERCC 01.2018 (30 September 2018) Mansoor J held that the structural change in the position for which she was notified 44 days prior and a redundancy policy made known to her 2 days prior to the letter of termination being issue. The Court found that the Employer was in compliant with the provisions in law regarding redundancy. The variation to the Employee’s employment contract to reduce the termination notice period from 3 months to 1 month was determined by the Court as a breach of contract but was not unlawful or unfair.
14. In State -v- Public Service Commission ex parte Saverio Baleinakanacea [2019] FJHC 120; HBJ11.2014 (20 February 2019) I concur with Wati J decision when she stated –  
*’23. Having said that, I must say that it is a fundamental principle of law that a party must be given an opportunity to be heard in respect of a decision that is likely to affect his livelihood. In this case also, there is no evidence that the applicant was heard or given any opportunity to consult the employer when such a drastic decision was made to make him redundant.*

24. *The employee was entitled every right to question and be heard on why he was transferred to a position when there was no vacancy. He had been in service with the State for almost 26 years, being half of his life, when he was terminated. He was entitled to be consulted and heard on his views and provided explanation and ways to minimize the effect of the **redundancy**. The employer had in my view breached a very fundamental principle of law and therefore making the process procedurally unfair'*

15. In Transport Workers Union -v- Mobil Oil Fiji [2011] FJHC 28 where it was held that a holding of a meeting and providing notice by looking for alternative employment a month before termination and giving notice to all the parties involved to give employees the opportunity to meet and discuss the measures was generally compliant with the statutory provisions.
16. In Bakani -v- Carpenters Fiji Ltd [2008] FJCA 6; AAU0038.2006 (1 April 2008) where Byrnes JA, Scutt JA and Shameem JA (dispute arose prior to the Employment Relations Act) held that –

*'36. Looking carefully at the terms of **redundancy** or termination offered to and provided to Mr Bakani, we find it impossible to agree with Mr Bakani's contention that these were unfair and unreasonable, or that his termination of employment was unfair and unreasonable. On the contrary, the approach taken by Carpenters appears to be extremely fair and reasonable. In addition to the one month's termination, Mr Bakani was offered the use of his company car for just under six months, with registration, comprehensive insurance and other expenses (apart from petrol and running costs) continuing to be paid by Carpenters; he was offered two directorships at a total of \$6000 per year – a far smaller sum than his annual income of course this is true, but nonetheless in all the circumstances an offer which went beyond anything required by Mr Bakani's contract; he was offered the option of buying at written-down value his company vehicle or one at a lesser cost; he received five months **redundancy** pay; a requirement for immediate clearance and deduction of company accounts (Carpenters Finance, etc) was waived 'on the understanding the [Mr Bakani] would meet these accounts as they fall due': Exhibit D1, A2, Court Record, pp.338-340.'*

## Analysis

### *Was the termination on the grounds of redundancy unlawful?*

17. The evidence submitted into Court is that the Defendant issued a termination letter on 18 March 2020 on the grounds of redundancy on the basis of economic and structural change. There was a 1 month notification period.

18. The plaintiff's evidence was that he was never informed nor met with the company representatives to discuss their intentions to make him redundant prior to the issuance of the notification of termination. He had never shared his views in any meeting. He was also never contacted by the Ministry of Labour regarding his redundancy. The Court accepts his evidence and gives proper weight to it.
19. He also said in evidence that the redundancy on the basis of economic and structural change was incorrect as the Nausori Highland was the second project that did not undergo any stop work orders from Department of Environment and had secured a development lease awaiting the commissioning of survey prior to commencement of construction works. He argued there was still work available.
20. In Natadola Resort Ltd -v- Isireli Tamanitoakula and Ors [2017] FJHC 62; ERCA 13.2012 (3 February 2017) Wati J, when explaining economic change stated –  
  
“Redundancy for economic reasons means that employer is not making profits for the business and is not able to sustain some workers. The inability to make a profit must be external to the worker's performance or conduct.”
21. The notice of redundancy was issued a month prior to the termination being effected. Plaintiff's evidence, when cross-examined, which the Court accepts, was that there were a number of other projects that he was involved in during 2019 to 2020 in an attempt by the Defendant to continue to engage the Plaintiff although it was not part of his employment contract.
22. On 4<sup>th</sup> April 2019 the Department of Environment, by letter, cancelled the development lease on the Malolo Project.
23. The Defendant, in his evidence, which the Court accepts, is that there was no further investment which meant stifling of their income. Which the Court understands result in stifling of any profits. They attempted to provide the Plaintiff with other residential construction works whilst in employment with them.
24. The Court accepts from Defendants evidence is that a letter of notification about the redundancy was issued to the Ministry of Labour on the same date that the notice of termination on the grounds of redundancy was issued to the Plaintiff.
25. In addition, the Plaintiff was paid \$13,183.30 for all his dues.

26. In Clause 16 of the Employment Contract entered in between the parties, under the sub-heading of termination and suspension provides as follows:

**“16.0 TERMINATION AND SUSPENSION**

16.1 *The Employer may terminate the Agreement by summarily dismissing the Employee in accordance with Employment Relations Promulgation 2007. Without derogating from the provisions of the Employment Relations Promulgation, as employee may be liable for summary dismissal in the following circumstances:*

16.2 *Where the Employee is guilty of gross misconduct inconsistent with the fulfilment of the express and implied conditions of this contract including:*

- (a) Breach of confidentiality or serious conflict of interest affecting the performance of the duties of employee;*
- (b) Driving under the influence of drinks or drugs, alcohol abuse or improper drug or substance use adversely affecting the performance and behavior of the employee;*
- (c) Wilful disobedience to lawful orders or direction given by the Employee;*
- (d) For lack of skill or qualification which the Employee expressly or by implication warrants himself to possess;*
- (e) For habitual or substantial neglect of her duties;*
- (f) For material breach of any condition of the Agreement, whether expressed in the Agreement or incorporated by reference.”*

27. From the manner of termination for the Plaintiff’s employment contract, these were not the appropriate provisions in the employment contract to terminate the Plaintiff on the basis of redundancy.

28. Hence the appropriate provisions for termination on the basis of redundancy where the Employment Contract does not provide for such, is in section 107 (1) of the Employment Relations Act which states –

*‘(1) If an employer contemplates termination of the employment by redundancy of workers for reasons of an economic, technological, structural or similar nature, the employer must –*

- (a) Provide the workers, their representatives and the Permanent Secretary not less than 30 days before carrying out the terminations, with relevant information including the reasons for the terminations contemplated, the numbers and categories of workers likely to be affected and the period over which terminations are intended to be carried out; and*



(b) *Give the workers or their representatives, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimize the terminations and on measures to mitigate the adverse effects of any terminations on the workers concerned, such as action to attempt to find alternative employment or restraining.*

(2) *In this Part –*

*Economic means maintained at a profit;*

*Structural means in relation to a company, corporation business enterprise or workplace the manner in which the entity is organized, managed or administered; and*

*Technological means a matter concerning, or use of, technology or information technology.’’*

29. The Employment Relations Act requires that the Employer provide relevant information to the Employee and Permanent Secretary and reasons for the termination 30 days prior to termination of contract.
30. Section 107 (1) (b) of the Employment Relations Act also requires the Employer to give a notice, as early as possible, to give an opportunity for consultations for measures to avert or to minimize termination and mitigate adverse effects of termination such as alternative employment or restraining.
31. On 27 of March 2020, 9 days after the termination letter was issued to the Plaintiff, the Plaintiff’s Counsel served a letter seeking for reinstatement or compensation for the remaining terms of the employment contract arguing that the redundancy as unlawful.
32. On 27 April 2020, the date in which the 30 day notification period expired, the Defendant refuse to accept any offer and remained firm on its decision to terminate the Plaintiff on the basis of redundancy for structural and economical change.
33. The Plaintiff and Defendant both admit no consultation was carried out prior to or during the 30 day notification period regarding the termination of the Plaintiff’s employment on the grounds of redundancy.
34. The Defendant did not provide any evidence of the economic or structural change in their Company to substantiate their reasoning for having issued a termination on the grounds of redundancy. The Defendants’ witness only admitted that the stop work orders from the Department of Environment and the stalling of the Nausori Highland project was the reason for issuing the notice to terminate. There were no financial reports nor documents to show to this court that there was no other option but to terminate the Plaintiff. Although he argued

that the development leases were cancelled, no evidence was submitted into court to confirm cancellation of the Nausori Highland development lease.

35. The Court finds that the reasons for termination on the grounds of redundancy was unlawful as the evidences was not sufficient, on the balance of probability, to establish the grounds for which the Defendant relies upon.
36. The Court finds that the reason for termination had nothing to do with the provisions under section 106 and 107 of the Employment Relations Act for redundancy purposes.
37. There was no evidence from the Defendant of the structural changes in his position as project manager to confirm why the company was terminating the Plaintiff. In essence Defendants evidence was contradictory as he admitted there was still work to be done on the Nausori Highland project and was stalled until the commissioning of the survey.
38. Furthermore, despite the Defendant issuing a 30 day notification prior to termination, he failed to consult the Defendant to discuss measures to minimize termination or mitigate the adverse impact of termination.
39. The Employer did not offer to consult and the Employee did not ask to consult within the 30 day period. The Employer had a greater responsibility as he was required to hear and discuss measures to mitigate termination. He failed to do so.
40. Therefore the Court finds the termination unlawful.

#### **Was the Plaintiff unfairly terminated?**

41. The Plaintiff now claims he was unfairly dismissed by the Employer. As I had reiterated earlier, the Employer had not acted unfairly, although he had not called for a meeting. There is also a duty to the Employee to seek for a meeting with the Employer which he failed to do personally or through his Counsel.
42. In Sheraton Fiji Resort -v- Naqai [2021] FJHC 304; ERCA 03 of 2013 (22 October 2021) Wati J explained unfair termination as being –

“When it comes **unfair termination**, the worker must establish that in dismissing him, the conduct of the employer was such that it caused him humiliation, loss of dignity and injury to the feelings.”

43. In Central Manufacturing Ltd -v- Kant [2003] FJSC 5; CBV 0010.2002 (24 October 2003) Fatiaki PA, Blanchard JA and Weinberg JA 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.

In our view, the respondent was entitled to some compensation for the distress and humiliation that was needlessly inflicted upon him by his employer in the manner in which he was dismissed. However, two of the three bases upon which the Court of Appeal assessed damages have been found to be in error, and the third basis, namely harm to reputation, significantly modified. The respondent was publicly humiliated by the manner of his dismissal, involving as it did the unnecessary use of security, and the prevention of access to his office. However, the amount awarded as compensation should be significantly less than that assessed by the Court of Appeal.”

44. When applying the principles of unfair termination in this instance, the Court finds no evidence of pain, public humiliation or distress caused to the Plaintiff. He manage to find work thereafter as a contractor and continue to be paid.
45. The Court therefore finds that the manner of termination on the grounds of redundancy was not unfair and no gainful benefit would have come from the application.

#### **Remedies for unlawful termination**

46. The Plaintiff has claimed for the balance of his contract, his merit performance payment, FNPF for the balance of his contract and claims for damages for vehicle and medical insurance.
47. The Plaintiff admits at the time of termination, it was Covid 19 and he remained unemployed. He was employed as a contractor from 2021 at a pay of \$3000 per month which the Court accepts as his evidence. He had also applied for the position as a Permanent Secretary and last week was awarded with two government projects to complete works.
48. The Court will therefore award the Plaintiff reimbursement loss of salary, benefits and dues from the date of termination until 31<sup>st</sup> July 2021 when he regained employment.

49. The Court will not grant his benefits for medical insurance as the benefit was awarded on a user-pay basis.
50. The Court will award him for the loss of motor vehicle, a benefit he was entitled to, to a sum of \$20,000.
51. Given that the merit performance payment was awarded only on performance basis, the Court finds no basis to grant payment of this as the Defendant had the discretion to determine whether to award the payment or not. In addition there was no evidence that the Plaintiff was previously entitled and continued to entitle to that said award.
52. The Court will also award costs of \$1000 to the Plaintiff.
53. Finally as part of his benefits, payment of his FNPF from date of termination until 31 July 2021.

### **Orders**

54. The Court orders as follows:
  - (i) That the Plaintiff was unlawfully terminated;
  - (ii) That the Plaintiff be awarded as follows:
    - (i) His salary and benefits and dues from the date of termination including FNPF dues until 31<sup>st</sup> July 2021;
    - (ii) His loss of vehicle \$20,000;
    - (iii) Costs of \$1000.
  - (iii) The Plaintiff was not unfairly terminated and this claim under unfair termination is dismissed.



Mrs Senileba LWTT Levaci

Acting Puisne Judge