IN THE HIGH COURT OF FIJI AT LABASA

NORTHERN DIVISION

CIVIL JURISDICTION

HBC: 28 of 2021

BETWEEN:

CHRIS O'KEEFE

FIRST PLAINTIFF

AND: **AMY JENSEN**

SECOND PLAINTIFF

AND: **TAYLOR SHELLFISH (FIJI) LIMITED**

DEFENDANT

Date of Trial :	**12 June 2023**
For the Plaintiff:	**Mr. Samuel Ram**
For the Defendant:	**Mr. Tomasi Tuitoga**
Date of Judgment:	**4 December 2023**
Before:	**Levaci SLTTW, Acting Puisne Judge**

J U D G M E N T

Background and jurisdiction of the Court

1. The First Plaintiff had entered into an employment contract with the Defendant to feed, stock and move animals on 25th of November 2010 payable based on production processes with 50% as wages.

2. The plaintiffs alleged that the Defendant made representations that the farms would expand to about 1 million implants per annum resulting in the first plaintiff earning in excess of AUD $200,000 per annum.

3. His wife, the second Plaintiff, left her employment to accompany the First Plaintiff on the basis of this representation.

4. The First Plaintiff was later terminated by a letter dated 14 July 2015 in lieu of notice with a compensation of $20,000.At this time, the Plaintiff had started to work for Vunibaka (Fiji) Limited.

5. The First Plaintiff now argues that his contract was breached when it was -

   (i) terminated unlawfully, unfairly and without reason;
   (ii) the Plaintiff was not paid in his salary the production based income as per agreement;
   (iii) the Plaintiff was not paid housing, vehicle and other expenses were offered.

6. The Plaintiff seeks:

   (i) Damages for breach of contract;
   (ii) Damages for humiliation, loss of dignity and injury to feelings
   (iii) Judgment in the sum of $1,213,600.00 for First Plaintiff;
   (iv) Judgment in the sum of $420,000 to the Second Plaintiff.

7. The Defendant denied that he approached the Plaintiff nor made representations to the Second Plaintiff. He argued that the First Plaintiff contacted the Defendant company seeking to return to live in Fiji. The Defendants offered the First plaintiff to consider employment at $20 per hour on the condition that the bonus system would be solely based on the measurable increase in pearl production.

8. The Defendant also denied making representation that the Plaintiff would earn $200,000 per annum.

9. The Defendant argued that he had paid for the Plaintiffs rent with a motor vehicle allowance.

10. The Plaintiff has accepted that pursuant to section 220 (1) (h) of the Employment Relations Act empowers this Court to determine an action founded on an employment Contract.

11. This has not be contradicted nor argued by the Defendant in their Statement of Defence nor in their submissions into court.

12. The Court will therefore accept its powers to determine the employment contract in accordance with section 220 (1) (h) of the Employment Relations Act.

Evidences of Plaintiff

13. Given that the Plaintiff was employed in a very specialized area, I have referred to current evidences recorded from the court records and summarized.

14. The Plaintiff had experiences in breeding fish, claims, mud-crabs and fresh water prawns both in development and in hatchery more particularly for barramundi, prawns and cabs. He was in Australia in 2010 managing a large multi species hatching oyster giant clams and cod. He only bred the animals and did not implant the pearls. The technician was responsible for that.

15. In his evidence the Plaintiff knew the director, Justin Hunter before. He had previously worked in the Hatchery in Savusavu for different species before going to Australia in 2007. He admitted he made physical animals by selective breeding depending on the colour of pearls and the type. A baby oyster required 2-3 years from being implanted for pearl making. The Defendant bred oysters to make pearls. The temperature, when altered affected the spawning of the oysters. The Defendant would previously leave it in the sun in a bucket causing it to die. The Plaintiff moved them to a cooler temperature that fluctuated in degrees similar to rock oysters. Tendered was the email as **Exh 1** regarding the purchase of equipment from Morgan Pearls in Western Australia to sterilize the machine in Fiji. The equipment would assist in the farming of the oysters affixed on a metal frame with netting holding 6 to 10 oysters together.

16. Not all oysters survived and some died, eaten by fish or let go as they are small in size. The hatchery consists of oysters between 6 months. At 6-12 months 50% will survive and at 18 months 10% will survive. The bonus was calculated against the production equivalent to 50% of income and company bonus. To produce 1 million, he was to make $40,000 to $60,000 1 to 4 times per year. The hatchery lasts every 6 weeks and then it is redone. **Exh 2** is the emails and **Exh 3** is the email to the

Director Immigration. Juvenile oysters (after 6 months) would be selected and controlled and sold for food if too small for pearl production.

17. The employment contract was signed in November 2010 and worked for 7 days for 60 to 70 hours per day. His wages started at $20 per hour. He was responsible for 400,000 oysters. He commenced work in March or April of 2011. They oysters would reach the 12 month count on April 2012. The Plaintiff alleges that the Defendant had agreed to a bonus package payable at 3 cents per oyster when they were 6 months and for oysters reaching 10 months, 10 cents per oyster and at 18 months as well. As part of his work, he was responsible for oysters hatching.

18. A minimum of 750,000 is required to obtain a few hundred thousand oysters. As the numbers decrease over age. 400,000 oysters would get approx. $57,000 as bonus. There was potential to earn double what he earned in Australia where he had a package of $73,000 with a car and house with return fares, internet and television. He believed he could make the same amount or better.

19. The Plaintiff resided a few kilometers away from the hatchery which was paid for by the Defendant company and he paid the fringe benefit tax.

20. He was receiving 50% of the wages although this was not the amount agreed upon nor included in the final contract. There was no grievance procedure discussed between the parties and provided in the contract. There was no monthly counts of the oysters because of the risk of mortality. Tendered as **Exh 7** email on monthly counts by Mr Hunter's email.

21. He was in Tonga on a research with an Australian Scientist on how to produce materials for hatchery. They had produced more than enough oysters that the farm could handle. This was between July to December and he had obtained time off to spend that time in Tonga. He was paid by the Government of Tonga for a month for $7000 AUD. In Fiji he had trained a staff to do the production and run it themselves. Tendered as **Exh 9** was the email from Hunter. They were to bring the oysters from the edge and place in tanks on ropes. His wife Amy was doing the book keeping and also looking after algae whilst the technician was away during the 8 weeks. Justice Hunter remunerated his wife as well by depositing into his bank account because Amy had no work permit. He was using 3000 collectors in 20,000 panels with 50 oysters in one collector. There would be 240,000 oysters with 30,000 carton packs. Justin then killed or removed 30,000 oysters. 1/3 would be kept for another 3-6 months and 2/3 were at a size that they could be moved and drilled with a 2 inch mark. Tendered as **Exh10 and 11** is the emails. In tab 12 Justice requires Amy to check the 2012 records for harvested pearls which were implanted 2 years ago. Tendered as **Exh 12.**

22. In an email (tendered as **Exh 13**) the plaintiff referred to hatchery implants SSV where the Defendant then referred to the payment of bonuses at 25 cents per implant. Plaintiff alleges he was now changing the bonus system to add plant size as well. There were 3964 oysters implanted by the technicians. There was a separate research from an Australian Bivalve Scientist on specific species and gender of oysters. Plaintiff had done the production costing $12,000. He had done the run and after 3 months, without consultation, Justin removed all of them. He was not paid for the research as the total research required 2-3 rounds for a total of $12,000. The University from Australia was paying. He was not sure if payment was made. He emailed to say that he would work out a payment to plaintiff account but that did not eventuate. Tendered as **Exh 15**. He then briefed Justin on chemicals used in the Tongan research. Tendered as **Exh 18 and 19** is the administrative and book keeping correspondences between Amy and Justin. **Exh 20** is an email from Market Development Facility about hatchery expert for Crab Company which was different from what he was doing. Another email from Amy in April of 2014 about 70 lost implanted oysters and Justice admitting that was too high. They either died from poor animal husbandry or from incorrect implant or from a disease tendered as **Exh 21**. Justin emailed to request to slow down the pre-harvest tallies given by Amy and he did not want to do the record keeping. He did not want to do it anymore tendered as **Exh 22.**

23. Document 23 is the petty cash voucher of 16 April 2014 paying $5000 USD as commission for the oyster. The payment was made almost 3 years into the contract and this was the next bonus after he received $FJD 1400 at the beginning. The payment in USD was a part payment and he was looking at $10,000 for 50,000 oysters at 6 months and should be 100,000. The figure of 40,000 oyster was incorrect. He admitted receiving the $5000 USD. Tendered is **Exh 23.** Document 25 refers to his accounts about 100 days after implants tendered as **Exh 25**. There was a bonus of $10,000 as cash payment received from J Hunter Pearls Fiji Ltd tendered as **Exh 26**. On 23 September 2014 his work permit had expired and emails were sent by Amy regarding the citizenship application as well as Amy exemption tendered as **Exh 27**, 28 and 29. He was unable to get citizenship as his tenure was 6 months short of the 5 year requirement. In **Exh 28** was his wage slip which contained a PAYE deduction as well as the rent. No FNPF was paid although 1-2 payments were made in 2015. He was not paid any extra monies. Tendered as **Exh 30.** He paid $165.23 to seek for visa renewal tendered as **Exh 31.**

24. **Exh 32** is the emails regarding bonuses. He informed Justin about bonuses owed. Justin asked him how much was owed as he was not sure if any was owed at all and informed Plaintiff $10,000 US had been paid. He only paid for $5000 USD for the first payment. No other payment was made. The email of 10 June 2015 suggested 80,000 implanted 0ysters at 25 cents each totaling $20,000 as bonus for the whole thing. He was counting the oysters implanted instead of the oysters that

could be use. Which is not the correct amount implanted. The implantation was done 15 times at 10,000 per implant.

25. He was pressured to extend the aging of the oyster to 18 months prior to selection and implantation but he did not agree to payment on implantation at an age longer than 18 months. He had no control over which oyster was implanted.

26. Justin later emailed asking him to come over for them to look at the numbers for 2012 and 2013. But he did not go. Justin felt that less oysters could be recovered from the 2011 batch hence he lamented very high expenses as more staff and more work. There was 53,000 spats with few collectors and not much harvested. Again the year prior was 53,000 spats with too many small sizes. The spat numbers he thinks was in existence was 600,000 in 2013. Justin counted the bigger spats and not the smaller ones. He offered $20,000 as the final bonus. The Plaintiff felt pressured and so accepted it. He understood that the payments were new arrangements altogether on different terms. Tendered as **Exh 33.**

27. **Exh 35** refers to the termination letter. He was employed by Vunibaka Bay Resort for coral restoration. He started work there in March April of 2015 for a few months. He left to go there as the hatchery needed to be shut down and dried out for decontamination purposes. Everything is sterilized and dried up and then operations begin again. The owner is a friend of Justin. A $20,000 was offered after tax deduction which was signed as accepted by him as full and final payment. However taxes were not paid. Tendered **is Exh 34 and 35.** Payment of $20,000 J Hunters Pearl on 15 July 2015 tendered as **Exh 36.** Exh 39 is the notice by the Plaintiff and his wife regarding an approach for Blood Lip Pearl Oysters Spat. The representation was that the farms would be expended to 1 an implant per annum earning $200,000 per annum AUD. He added onto that the claim for moving to Fiji at $20,000 which was the cost of a container containing their household items. He claimed for $20,000 as he return air fares to Australia. He was using his vehicle for the company and was usually stuck trying to get to town because the hatchery was far away up the coast. He was compensated with fuel being paid. He had lived in an accommodation with no fridge and stove and had to pay electricity, internet and other expenses.

28. He was paid $95,000 at Vunibaka and it was for a year renewable. They arranged for him to be terminated from Vunibaka Resort. He was claiming for loss of 6 years salary if he remained in Australia. Tendered as **Exh 38 and 39 and 40** denying the allegation s and a complaint lodged with the Australian Information Commissioner. Justin had approached Centre for International Agriculture Research (ACIR) to have Cletus from Solomon to be the consultancy for giant clams. AS a result the plaintiff did not participate in the ground research. It was under the grant signed on 2 June 2015, 7 days after termination. It was $100,000 grant.

29. In cross-examination he admitted he initially signed a contract for pay of $20 per hour. Because they were long hours he was paid a salary of $42,000. He admitted his accommodation was paid for and also his fuel monies for using the vehicle. His wife did not sign any contract of employment. He denied approaching Mr Hunter for a job. He denied being paid based on the implanted oysters. He started at Vunibaka from 2015 in March. He agreed he accepted the $20,000 and USD $5000 as bonus. The bonus agreement was not in the employment contract but in the written letter which he did not sign off. There was nothing in the employment contract of payment of costs for moving to Fiji, nor office supplies or electricity bills. He was claiming for $73,000 in expenses including holiday and superannuation and transfers and air flights.

30. Second witness was his wife, Amy. Whilst at Taylor Shellfish Ltd she grew the algae Lab and fed it to the animals. She kept track of the spat produced and documented it for record keeping. She previously worked in Australia in growing algae from labs. She was not offered a job by Taylor but Justin knew that they worked together as a team. She kept the book work for Taylor Shellfish although not paid personally. She did 80 hrs work but Chris was paid. She claimed for loss of salary from Australia for $47,000. No representation was made to her to come over. She accompanied her husband.

Was the termination of the employment contract a breach?

31. The Plaintiff has claimed that the termination of the contract was a breach as it was done unlawfully, unfairly and without proper reason.

32. At the time of termination, he had not been properly paid his salary, bonuses and other promised benefits to him.

33. In his evidence, the Defendant was being closed down for sanitization and clearing before it could be reused for growing algae as well as implanting the oysters during the period in which he worked for Vunibaka Bay Resort.

34. Hence in his evidence, he was terminated in breach of contract and thereby unlawfully and unfairly dismissed.

35. The letter of termination is as follows :

> *'The purpose of this letter is to confirm the outcome of a recent review by Taylor Shellfish (Fiji) Ltd (the employer) and Christopher John O'Keefe (the employee) of its operational requirements.*

You have been employed by a different company therefore the company terminates all your contracts and compensates you for the outstanding dues.

As agreed the company will compensate you Twenty Thousand Fijian Dollars ($20,000.00) after all taxes.

We thank you for valuable contribution during the employment with us. Please contact me if you wish to obtain are reference in the future."

Is this a written or oral contract?

36. It is not disputed that the parties had entered into an Employment Contract initially.

37. The contract only contains provisions for Holiday Entitlements with remuneration on a 50% of wages production based and still processing.

38. The contract also described the work the Plaintiff would do and it entailed on the Savusavu and Kioa farms in the area of nursery, brood stock and general husbandry.

39. The Plaintiff argued that the Defendant had offered, which he had accepted, that they would pay him bonuses based on the number of animals bred prior to implantation according to the breeding season. The payment on a bonus basis was as follows: from 0-6 months at 1 cents per animal, 6-12 months at 3 cents per animal and 12 months to 18 months at 5 cents per animal.

40. These bonus arrangements were not in the Employment Contract but was agreed in an email recommended by him. This same bonus arrangement was reflected in the Defendants letter to the bank to confirm his full time employment, his remuneration and bonus system to be paid to the Plaintiff.

41. The Plaintiff also argued that the Defendant offered to pay for their accommodation, for his vehicle usage and for his utility bills in emails between the parties.

42. This again was not provided for in the Employment Contract.

43. In Section 4 Employment Relations Act 2007 defines the following words as –

"**Contract of service** means a written or oral contract , whether expressed or implied, to employ or to serve as a worker whether for a fixed or indefinite period, and includes a task, piece work or contract for service determined by the tribunal as a contract of service;

"**Oral Contract** means a contract of service which is not required to be made in writing, but which may be subsequently evidenced in writing;

Written contract means a contract of service which, under this Act, is required to be made in writing."

44. Section 37 of the Employment Relations Act requires that for a contract made between an Employer within Fiji and a foreign worker to be performed within Fiji, the contract must be in writing.

45. The Plaintiff was not a Fiji Citizen at the time he was contracted to work in Fiji. He was working in Fiji under a work permit, which did not allow his spouse, the second Defendant to also work in Fiji.

46. Hence his contract of employment was required to be in writing for the purposes of the ERA.

47. Therefore his employment contract was in writing.

48. The Court accepts and it is not disputed, that the agreement between the parties on the payment of bonus was made via email exchanges. These agreements became, which the court accepts, as amendments to the employment contract.

49. Lastly it is also not disputed in evidences, which the Court accepts, that the parties orally agreed that the Employer would pay or provide accommodation and transportation which was later reduced in writing by emails exchanged between the parties. This is evidenced by the 2013 and 2014 pay slips tendered into Court as well as the Plaintiffs evidence, which the Court accepts.

50. The Defendant also does not dispute in his evidence that fuel was paid to the Plaintiff for transportation purposes. This was orally agreed upon by the parties and not provided for in the employment contract nor reduced into writing.

51. Hence the Court accepts that the Employment Contract between the parties was in writing as well as by an oral agreement, later reduced into writing.

Did the Employer breached the Contract of Employment by terminating the contract without paying the 50% production based on hatchery and was the termination lawful?

52. According to the evidence of the Plaintiff, he was required to nurture and grow algae (oyster food) and assist in the growth of spat until they were of juvenile age. Once they were 18 months, as per his timeline which they both agreed upon to work with, the surviving spats were then implanted for the creation of pearls. From the evidences in Court, there is no dispute as to the type of work that the Plaintiff was required to do.

53. There was also no disputed evidence and it was agreed by parties that a separate technician was employed to implant the spats which was then created and grew pearls.

54. The Employer had finally terminated the Contract of Employment in 2015 on the basis that :

> ‘’*You have been employed by a different company therefore the company terminates all your contracts and compensates you for the outstanding dues.”*

55. In the Defendants evidence, which the Plaintiff did not dispute, was that he was contracted to grow clams at Vunibaka Resort for a salary of $93, 000 for 1 year.

56. It was on the basis of this new employment as a result of no production in the hatchery for a period of time, that the Defendant terminated the employment of the Plaintiff.

57. The Plaintiff evidence is that there was no work being conducted on the labs and hatchery as the equipment required to be sanitized and the hatchery cleaned prior to re-starting the cultivation of algae in the labs and nurturing of animals. Hence the failure of the Defendant to properly pay him from the bonus system rendered the termination unlawful.

58. In one of their emails, the Plaintiff has suggested the appropriate chemicals researched off during his attachment to the Scientist in Tonga, that would assist in the cleaning and sanitization of the hatchery and the labs. The Defendant had failed to purchase this.

59. However from the emails in October 2014, it was clear that Amy was involved in the supervision of the cleaning of the hatchery including the spats which the Defendant found was slow. There is clear evidence that cleaning was being

conducted. Whether cleaning was completed or the level of cleaning required is not clear, however it is clear that the Plaintiffs spouse was involved in the cleaning in October 2014. Hence it is obvious that the Plaintiff was aware of the cleaning that was happening.

60. The Plaintiff opted to find employment elsewhere to continue his mode of remuneration. The reasons by the Plaintiff is not sufficient to establish a good ground for which he was absent from the hatchery. He was employed to provide work for the hatchery and also to grow food. He failed to do this when he started employment with Vunibaka Bay Resort.

61. The Defendants argued that the plaintiff, when accepting the $20,000, had mutually terminated the Agreement.

62. Whether the new employer knew or did not know the Defendant is beside the point. The failure of the Plaintiff, as an employee to make good the working arrangements by informing the Defendant and assisting him in the sanitization of the labs and the hatchery left the Employer with no other option but to terminate the contract.

63. Furthermore, the parties did not have a termination clause in the Written Contract. However via email, the parties had orally agreed, which was later sent by notification, to a full and final payout. This evidence the Court accepts and weighs as proving that there was an agreement to terminate despite there being no such clause in the Employment Contract.

64. The Defendant paid the Plaintiff $20,000 as payout for termination of the contract. In addition to the $5000 USD and $10,000 FJD he had paid the Plaintiff previously as bonus.

65. The Plaintiff claims that the payout of $20,000 was less than the agreed manner of bonus payment, i.e. by way of 50% of the hatchery production as per the employment contract.

66. Section 30 of the Employment Relations Act requires that on termination of a contract of service, the Employer must pay to the worker all wages and benefits then due to the worker by the end of the following working day. Subsection (3) requires that if payment is made in *liue 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.

67. Furthermore in Central Manufacturing Company Ltd -v- Kant [2003] FJSC 5; CBV 0010;2002 (24 October 2003) also held that the is an implied term in common law that an employer can make payment in liue of notice. Reference was made to the

case of Delaney -v- Staples [1992] 1 AC 687 at 692 where the fourth category of termination in liue of notice required the Employer to inform the employee not to continue work until the last date of employment in liue of a payment being issue.

68. Let me reproduce the exchange of emails between the Defendant and the Plaintiff:

> *"July 7 2015*
>
> *Hey Chris – getting back into Savusavu. Hectic couple of weeks and I'm pretty rooted. Bonus – I've asked the boys to get me numbers for 2012 to 2013.*
> *Let's get them in and talk. I have no intention of not honoring this.*
>
> *I really feel horrible about things. We are putting on a rave face but this is hard.*
> *Last harvest saw 5-7% of implanted shells producing a pearl. We have not exported a single pearl in over a year.*
>
> *I consider you a friend – this has not been easy.*
>
> 8 July 2015 at 9.32pm:
>
> *Hi Justin,*
>
> *I appreciate your consideration in this and didn't think you would never honor the bonus but the delays have caused a problem.*
>
> *I have been forced to pay for the house last year with a credit card that was to be paid back with the house loan but without the letter to the bank last year the loan could not be completed and I have been unable to pay this off other than the interest.*
>
> *I consider you a friend as well and the agreement to help you by having the bonuses paid at implant was my investment in you. I has been a hard year for both of us with it costing me my opportunity to build my house and leaving me with debt.*
>
> *If there is any way we can save the relationship I would like to try.*
>
> *Can we somehow reconcile the bonus arrangements so that it not a continuing problem and help relieve the strain it is causing.*
>
> *Chris.*
>
> On July 9 2015 at 11.39am:

Chris getting numbers in from 2012 to 2013.

We still have some on collectors as pulling them off when small is just a nightmare and we lose too many.

Really looking at two years before you want to touch them – then another on CTN till implant.

How about 20,000 fjd – to tidy everything up?

We have implanted 25,000 – started some from 2012 but still a bit on small size (most from 2011 – these did nothing 80% were coming in sick and dead – the ones that did get implanted did not do much). More coming up and should implant a good number this next implanting (20,000 – I hope and need) Again – all stuff that was "small" size going to CTN, has just a high mortality (these around 6-7 cm). Medium size does better.

2013 – So far 63,000 spat with a few collectors to go – no many- We harvested 53,000 last year –again too many into small size. We did close to 10,000 last month and size was better.

I don't think I will get 100,000 implants from these – Prior bonus payment – 2011- we all get screwed.

Justin Hunter

On 9 July 2015 at 6:45pm-

Hi Justin,
I have considered your offer and if this can put an end to the conflict that the bonuses have caused I would accept the offer of $20,000 fjd if it could be done after tax.
The bonus have always been a problem and it can be put behind us I would appreciate the relief of the stress it has caused us

Chris"

July 9 2015 at 7.02pm:

"ok – let me talk to Munesh to sort this out
We might do a cash payment so please don't say anything. Can also run it via purchasing spat.

Back to you. You know – love you sorry. So much of this way just crazy"

69. The Court finds that the Plaintiff accepted the calculation of bonus based on the implanted juvenile oysters rather than the initial argument on the bonus system which led to the amount of $20,000 representing a price of 25 cents per implanted juvenile based on the number of available implanted oysters.

70. In accepting the bonus payment system which was calculated by the Defendant, the Plaintiff had therefore agreed that this was the form of remuneration to be paid based on the 50% hatchery production.

71. From these evidences, the Court finds that the plaintiff had agreed to the payment of $20,000 as full and final settlement of the bonus payment. He had already accepted the payout of $USD 5000 as well as $FJD 10,000 paid to him earlier based on bonus system from the Defendant without disputing the same.

72. The Court therefore finds that the manner of termination was not unlawful and not in breach of the contract agreed by the parties.

73. The Court arrives at this finding from the evidences before it and the negotiation between the parties to arrive at the payout of $20,000 as the full and final settlement of all dues owing.

74. This settlement was agreed upon by the First Plaintiff. In agreeing to the settled figure, he also agreed to accept all monies owing by the Defendant to have been satisfied on payment of the amount of $20,000.

75. Counsel for the Defendant had helpfully referred to a number of case authorities pertaining to mutual agreement to terminate. In Lee -v- Aon Risk Services (Fiji) Ltd [2004] FJHC 289, HBC0186J.1999s (23 June 2004) Amaratunga J held that:

> "thereafter the next day the plaintiff collected his final pay. It is to be noted that by agreement the defendant paid him over 5 weeks salary more than he would have been entitled to under his contract of employment if the defendant had exercised his right to terminate his contract of employment unilaterally by giving him required notice. The defendant also continued his medical cover for a further 8 months which it was not obliged to extend".

76. In Mishack Kgawedi -v- Bidvest Protea Coin (PTY) Ltd JS 1052/2016 [2018] ZALCJHB 425; [2019] 6 BLLR 562 (LC) (In the Labour Court) Mahosi J held that:

> [38] When evaluating bargaining power between the parties, the Court will take into account the position and status of employee to the contract. In the current matter the threat not to pay the applicant for failure to sign the entitlement agreement cannot amount to a reasonable fear on the part of

the applicant. It is apparent from the facts of this matter that the applicant did not hold a low level position that could be seen to have been exploited by the respondent in to entering into the settlement agreement. The evidence is not only that the applicant had a Grade A Security Certificate, Basic Computer, book keeping and a Certificate in management but he was trained on labour relations."

77. It is apparent from the evidences of the Plaintiff that he was an expert in the area of hatchery and animal food and hence was a knowledgeable man. Hence it was quite obvious that from his acceptance of the $20,000 payout, he completely understood and accepted the basis for which he was going to satisfy all debts and dues owing to him.

78. The Court found that the First Plaintiff was not coerced, under duress or forced into accepting the settlement termination agreement and fully understood thereof.

Did the Employer breach the contract by failing to pay $42,000 base salary and fuel and accommodation when they terminated the contract?

79. The First Plaintiff argued that he was not paid his base salary of $42,000 per annum plus 50% of the income from his work and production.

80. The Defendant also did not provide housing, vehicle and other expenses as per the agreement to either of the clients and mitigated the losses by working for Vunibaka Bay Resort.

(i) Payment of base salary of $42,000

81. The Employment contract between parties agreed upon remuneration reliant upon 50% of the production.

82. The Plaintiff relied upon a letter to Westpac from the Defendant stating that the Plaintiff earned gross wages of $42,000 per annum (at approximately $800 per week) with a bonus package base on hatchery production output.

83. The Court finds that from the interpretation of the contract, no agreement was entered into regarding the salary of the First Plaintiff but for the 50% upon production provided for in the Contract.

84. Despite the terms of the Contract, the parties thereafter agreed that the Plaintiff would be paid a salary.

85. The evidence of the payment was made from the salary slips tendered into court.

86. The Court finds that the amount of $42,000 as a base salary was not agreed by either party nor was it founded on any oral agreement reduced into writing by the parties through email exchanges.

(ii) Accommodation and fuel

87. The Court considered the evidences and is satisfied that the provision of accommodation and fuel was orally agreed by the parties which is reflective in the wage slips tendered as evidence in Court.

88. The plaintiffs did not dispute that their accommodation was paid for and a fuel card issued to them for fuel to be paid by the company for use of the company vehicle.

89. In his evidences he agreed that they were initially accommodated in Nukutoso where the rent was paid out by the Defendant. The salary slips for 2011 and 2012 did not reflect any direct deduction of accommodation, however the Plaintiff did not dispute that his accommodation was paid for by the Defendant. He himself had to pay for fringe benefit tax as a result of the accommodation benefit.

90. Hence the Court finds nothing to dispute that accommodation and fuel was provided for and finds that this claim was not proven.

Did the Defendant act unfairly when terminating the Employment Contract?

91. In Central Manufacturing Company Ltd -v- Kant [2003] FJSC 5; CBV 0010.2002 (24 October 2003) Fatiaki CJ and President SC, Blanchard J.A SC, Weinberg J.A 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 with an employee, even in the context of dismissal.
>
> We accept the petitions argument on this point. The respondent called no evidence to suggest that he had suffered no physical or psychological damage from the manner in which he was dismissed. His evidence regarding the damage done to his reputation was tenuous, at best, and did not provide the basis for a link between the manner in which he was treated on the day of his dismissal, and his inability to find alternative employment."

92. From the evidences it was clear that when the Plaintiff was terminated, he was already working for Vunibaka Bay Resort. However he contends that shortly after

that he was also terminated from Vunibaka Bay Resort. No document was tendered to confirm his termination from Vunibaka, hence the Court has nothing to confirm or deny his current employment in Vunibaka.

93. Hence the Court finds no evidence of physical or psychological damage suffered from the manner of termination and the link towards his reputation because of the way in which he was terminated.

94. The Court therefore finds that in contrary, there were lengthy discussions and negotiations between the parties prior to arriving at termination and payment of compensation.

95. The Court found that the Defendant had acted not only lawfully, but also fairly.

Whether the Defendant made Misrepresentations to the Second Plaintiff causing the contract to be voidable thereby entitling the Second Plaintiff to rescind the contract and be awarded damages

96. In addition to the claim for breach of contract on unlawful and unfair dismissal, the Second Plaintiff claims that the Defendant had misrepresented to her that hatchery and the farms would be expanded to about 1 million implants per annum that would be more than his current salary in Australia causing the Second Plaintiff to leave her work in Australia and accompany the First Plaintiff to Fiji.

97. The Defendant denied that he had made misrepresentations to that the Second Plaintiff. He does not deny that there were discussions on projected results if hatchery was a success.

98. The Court heard the testimony of all the parties. The Second Plaintiff denied there were misrepresentations by the Defendant or anyone to accompany the First Plaintiff in order to help him record the algae and conduct trials on the algae. However in cross-examination she admitted there was some form of promise and encouragement. This was contrary to the earlier evidence she gave in which she admitted she was not misrepresented to come to Fiji.

99. The Court finds her evidence inconsistent. She was aware the reason why she left to come to Fiji and it was to accompany Chris. She was also aware that the contract was only between the First Plaintiff and the Defendant as he was given a work permit to work in Fiji and she was not given such a permit.

100. Although the Second Plaintiff was providing her voluntary services to the Defendant, the gratitude payment was made into the account of the First Plaintiff and not herself given that she had no work permit.

101. Taking into consideration the evidences, the court concludes that there is lack of evidences to establish that there was representations by the Defendant caused the Second Plaintiff to leave her work to come to Fiji.

102. The Court found that there were talks between the Defendant and First Plaintiff for projected profits if the hatchery was maintained and oysters yielded results, this is no way had a direct impact on the decision by the Second Plaintiff to leave her employment to come to Fiji.

103. Her doing so was of her own making. She offered to volunteer to assist the First Plaintiff in the hatchery. However she did this knowing that she had no permit to enter and work in Fiji and that her work was on a volunteer basis, for which she was paid a gratuity for her work.

104. Therefore the Court finds there was no misrepresentation made to the Second Plaintiff at all.

Costs

105. Given that the Trial was for 2 days including witnesses being called and documentations filed, the Court will award the Defendant a sum of $3000.

Orders

106. The Court will:

(i) The claim for breach of contract on unlawful and unfair termination is not made out and is hereby dismissed;

(ii) Costs against the Plaintiffs for the sum of $3000.00 as summarily assessed.