MOHAMMED SAHIM RAZAK v FIJI SUGAR CORPORATION LTD (ABU0031 of 2010)

COURT OF APPEAL — CIVIL APPELLATE JURISDICTION

CALANCHINI AP, CHITRASIRI, HETTIARACHCHI JJA

29 February, 7, 21 March 2012

Dismissal from employment — wrongful and/or unlawful termination of employment — compensation for loss of future salary and emoluments — retirement age — whether appellant entitled to claim damages — whether award of costs against successful party in error — High Court Rules O 62 r 3(3).

The appellant claimed damages for wrongful and/or unlawful termination of his employment by the respondent, relying upon a term of the contract of employment which stated: "Upon reaching their 55th birthday, officers shall retire from the corporation". The High Court, whilst refusing to grant the appellant compensation for termination of his employment, directed the respondent to pay costs to the appellant.

Held –

(1) The appellant's services were terminated under the contract of employment. No evidence was adduced to prove that the services of the appellant were terminated wrongly or unlawfully.

(2) The contract of employment does not permit the appellant to claim damages by relying on a clause relating to the age of retirement. The retiring age in the agreement does not mean that it is a contractual retiring age, but it is the age at which employees of that description in the relevant group can reasonably expect to no longer be in employment. An employer can terminate an employee's employment before they reach the retiring age.

Fiji Electricity Authority v Naiyaga [1998] FJHC 77; HBA 4A/96S, applied.

(3) The order to pay costs should be made in accordance with the decision. When the High Court judge decided that there was no merit in the action filed by the appellant, an order imposing costs on the Respondent became a wrong order.

Appeal by appellant dismissed. Order to pay costs vacated. Appeal by respondent allowed.

Cases referred to

Age Concern Scotland v Hines (1983) IRLR 477; *Ritter v Godfrey* [1920] 2 KB 47, not followed.

Radhika S Naidu for the Appellant

Feizal Haniff for the Respondent

[1] Calanchini AP. I agree that the appeal by the Appellant should be dismissed and the appeal by the Respondent be allowed.

[2] Chitrasiri JA. The Appellant, namely Mohammed Sahim Razak being the Plaintiff in the case filed in the High Court at Lautoka claimed damages from the Respondent Fiji Sugar Corporation alleging that his services were terminated in a wrongful and/or unlawful manner by the Respondent. Learned High Court Judge having heard the case, made order dismissing the action of the Plaintiff. In that decision, he also made order directing the Defendant to pay costs of $5,000 to the plaintiff though the action of the Plaintiff was dismissed. Being aggrieved by the said decisions of the learned Judge, both the Appellant and the Respondent have appealed to this Court.

[3] I may now refer to the history of this case. The Appellant was an employee holding a position of a Building Engineer of the Respondent Company since the year 1990 until his services were terminated by letter dated 22nd June 1994. Appellant in his statement of claim had stated that his services were terminated consequent upon a conspiracy amongst the employees and/or officers and of the others of the Respondent Corporation in order to protect the senior members of its staff. The Appellant therefore had stated that the termination of his employment by the Respondent is wrongful and/or unlawful. Accordingly, he has claimed damages in the sum equalling to his wages plus other emoluments that he could have received had he been in the employment until he reaches the age of 55 which period counts 19 years.

[4] In the statement of defence, the Respondent whilst denying the allegation of wrongful and/or unlawful dismissal of employment has taken up the position that the entirety of the issue including the payment of compensation for the loss of future salary and emoluments had finally been decided by the Sugar Industry Tribunal by its decision made on the 6th may 1997. However, the said defence of "*res judicata*" had been looked into by the Court below in two different occasions by two different Judges. In that, both the Judges had held that the High Court has the jurisdiction to entertain this action filed by the Appellant despite the decision made by the Sugar Industry Tribunal. However, the two Judges seems to have taken two different views on this point in coming to their conclusions. Learned Judge who heard the striking out application at the early stage of the case, had decided that the issue before the Tribunal was entirely a different issue to the issue that arose in this case and had kept it open for the Judge who takes up the trial to decide. Thereafter, the trial Judge having considered the same issue subsequently was of the view that the decision of the Tribunal was only on a very narrow point of lack of authorisation of duties by the appellant and not on the issue of conspiracy as alleged in the statement of claim filed in this case. (vide page 19 of the judgment/page 24 in the record)

[5] At this stage it is pertinent to refer briefly to the aforesaid inquiry held before the Sugar Industry Tribunal as well. Sugar Milling Staff Officers Association, of which the appellant was a member, made an application to the Sugar Industry Tribunal alleging that the dismissal of the Appellant was unreasonable and/or unfair, and had sought that he be reinstated in the office he held. Having considered the merits of the case, the Tribunal found that the dismissal of the Appellant was unfair and unreasonable. However, the Tribunal did not order reinstatement of the Appellant but decided that the appellant be paid the salary that the appellant would have received for the period commencing from the date of the termination up to the date of its award. (06.05.1997). Subsequently, another application was also made by the Appellant to the same Tribunal seeking a clarification of the award. Tribunal then made a further finding on 17th October 1997 setting out the manner in which the amount due on the award should be calculated. (vide page 124 of the record)

[6] The Appellant then filed this case on 1st July 1998 by way of writ, more than one year after the award of the Tribunal. In the statement of claim filed with the writ, the Appellant had averred that an agreement was entered into between the Respondent Company and the Sugar Milling Staff Officers Association as to the terms and conditions of employment of the Salaried Staff Officers of the Defendant Company (Respondent). In that statement of claim it is further stated that this agreement had been registered with the Ministry of Labour and Industrial Relations under the provisions of the Trade Disputes Act.

[7] In the circumstances, it is important to note that the claim of the Appellant in this case for damages entirely depends on the terms and conditions of the contract of employment referred to above though the termination of his services alleged to have been made pursuant to a conspiracy of the employees of the respondent as alleged by the Appellant.

[8] The Learned High Court Judge who took up the trial has addressed his mind mainly to the issue of conspiracy that led to the termination of services. He has extensively dealt with this issue of conspiracy complained of by the Appellant referring to the alleged misconduct and neglect of his duties with regard to the reconstruction work conducted pursuant to Cyclone Kina which hit in the month of January 1994

[9] Learned High Court Judge having considered the conspiracy claim had decided that he was not satisfied that there was a conspiracy by FSC and its officers and the employees to make Mr Razak a scapegoat. He therefore seems not to have been persuaded to grant the Appellant compensation for terminating his employment.

[10] Being aggrieved by the said judgment of the learned High Court Judge this appeal was lodged by the Appellant. The Respondent too had filed a counter appeal challenging the award of costs made on the Respondent, Fiji Sugar Corporation.

Grounds of Appeal

[11] Plaintiff's appeal is on seven grounds. Basically the grounds of appeal can be summarised in the following manner

- not properly considering the evidence;
- not taking relevant matters into consideration and taking irrelevant matters into consideration;
- placing much emphasis on the findings of the Inquiry Committee wrongly applying the principles of mitigation of losses;
- not considering the evidence as to the attempts made by the Appellant to find another employment; and
- holding that damages would have been claimed in the proceedings before the Tribunal; by the learned High Court Judge.

The first two grounds of appeal relates to the manner in which the learned Judge considered the evidence whilst the others are directed mostly towards the assessing of damages. Determination of the latter will depend on the success of the former.

Preparation of the Appeal Record

[12] Before looking at the merits of the grounds of appeal advanced by the appellant, it is pertinent to refer to the way in which this action was instituted and proceeded with. It became necessary, due to the difficulties in understanding the contents of the record as many documents including the very same contract of employment upon which the appellant had relied upon, was not found in the appeal record. This Court had to reassemble to have these matters clarified. Only thereafter, a supplementary record consisting of the documents, P1 to P5 and D25 to D27 that was marked in evidence, was tendered to Court.

[13] The appellant instituted this case claiming damages for wrongful and/or unlawful termination of his employment relying upon the terms and conditions of the said contract of employment after a lapse of four years from the date of termination of his employment. Therefore, the said document dated 12.08.1977 marked as P1 at the commencement of the trial, namely the Agreement between

the Fiji Sugar Corporation Limited and Sugar Milling Staff Officers' Association on Terms and Conditions of Employment for Salaried Staff officers which contains the terms and conditions of the contract of employment becomes the vital document in determining the issue in this case.

[14] Unfortunately, this document was not part of the appeal record when the case was taken up for argument in this Court. Apparently, the document that is filed of record as the contract of employment is a different agreement dated 06.01.1978 [page 262 of the record] which contains a few amendments to the terms and conditions of the said contract of employment marked P1. In the statement of claim too, no reference had been made even as to the date of settlement of the agreement, making it more difficult to identify the particular document relied upon by the appellant. It became worse, since specific references had been made in the statement of claim as to the conditions pertaining to travel and transport and provident fund benefits which are similar to the conditions found in the subsequent agreement filed in the appeal record. It must be noted that this subsequently made document found in the record, does not refer to any clause relating to termination of services.

[15] Statement of defence also had been filed without any reference to the agreement that contained the terms and conditions of employment. It may probably due to the fact that the entire defence was on the basis of *res judicata*. No specific reference such as the date of the agreement is found, even in the agreed bundle of documents at least to differentiate the two. When perusing the appeal record against such a background, one would possibly think that the document marked P1 has come to the picture only when the trial proper was commenced.

Consideration of merits in the High Court

[16] Having said the way in which the case had proceeded with until the trial was commenced, I will now look into the manner that the learned High Court Judge has considered the issue of wrongful and/or unlawful termination of employment of the appellant.

[17] Learned Judge in his judgment has stated:

> *"He claims his entitlements under clauses G6(a), (b) and L2(a) of the Agreement."*
>
> The clauses found in said schedule G relates to Travel and Transfers of the employees. It does not speak as to the conditions of the contract of employment or as to the way in which the employment of the appellant could be terminated. Therefore, it seems to me that the learned High Court Judge has considered irrelevant matters such as travel and transfers and the like in his judgment whereas the claim of the appellant is for wrongful and/or unlawful termination of his employment.

[18] Also, it is necessary to mention that the learned High Court Judge, in his judgment has extensively dealt with the "conspiracy" issue that was alleged to have been committed amongst the senior officials of the Respondent Corporation. Learned Counsel for the Respondent also has elaborated on this aspect in his submissions to this Court probably due to the fact that much consideration had been placed on the issue of conspiracy by the learned trial Judge. The alleged conspiracy, supposed to have been the cause for the dismissal of the Appellant from his employment. Whatever the cause for the dismissal may be, the duty of the trial Judge in this instance should have been to consider carefully, the way that the terms of the contract of employment should be interpreted in order to ascertain whether the dismissal is wrongful or unlawful. Therefore, it is seen that

the learned High Court Judge was heavily influenced by the alleged "conspiracy" rather than the terms and conditions of the contract of employment when he decided to dismiss the action and awarding costs on the respondent.

[19] At this stage, I need to stress upon the manner in which the learned High Court Judge has looked at the application made to the Sugar Industry Tribunal and to its two awards as well. He seems to have disagreed with its findings as to the conspiracy issue. However, it must be noted that the application to the tribunal was on the basis that the termination of employment was unfair and/or unreasonable whereas this application to the High Court was to ascertain whether the termination was wrongful and/or unlawful. Obviously, these are two different causes of action. Hence, the learned High court judge should have identified this position and stated so before considering the merits of that application to the Sugar Industry Tribunal. Therefore, it is my opinion that the learned High Court Judge seems to have not properly identified his task as opposed to the role of the Tribunal.

[20] In the light of the above discussion, it is clear that the learned High Court Judge had addressed his mind more towards irrelevant matters and had concentrated much on the issues secondary to the main issue. At the same time, it is seen that he has not given adequate thoughts to the main issue namely the interpretation of the contract of employment of the Appellant. I am therefore of the view that the first two grounds of appeal has merits in it. Accordingly, the appeal has to be allowed even without considering the other grounds of appeal urged by the Appellant.

Consideration of the Issues

[21] At this stage, it must be noted that the decision to allow the appeal does not mean that the claim of the Appellant is decided in his favour. As mentioned earlier in this judgment, the learned Judge has come to his conclusions upon considering irrelevant matters and more importantly without looking at the most important issue, namely the terms and conditions of the contract of employment of the Appellant. Therefore, the fact remains that the issue in this case has not been looked into in a judicious manner. Therefore, in order to arrive at the correct decision of the case, it is my opinion that this matter has to be either referred to the original Court for rehearing or this Court will have to consider the material available in the record and make a decision accordingly.

[22] As I have already discussed hereinbefore, the issue of wrongful and/or unlawful termination of employment would basically depend on the terms of employment contained in the Contract of Employment marked P1 in evidence. More particularly, Clause B.6 in that agreement deals with Termination of Employment. Having looked at the record it is seen that the parties have presented their respective cases depending mostly on the documentary evidence. In fact, only the Appellant has given evidence in this instance. Major part of his evidence also is in relation to the documents that were marked in evidence. Accordingly, it is seen that even if this matter is sent for rehearing the prospective decision would probably depend on the documentary evidence. Therefore, I believe no prejudice is caused to the parties' concern even if this Court coming to a finding by considering the available evidence without the case being sent back for rehearing. Hence, I decide to consider the available evidence and to make a decision thereof.

Contract of Employment

[23] Basically, the issue is whether the termination of employment of the Appellant by the respondent corporation is wrongful and/or unlawful. This depends on the terms and conditions of the contract of employment between the appellant and the Respondent. Admittedly, those terms are contained in the document marked P1 at the trial. The way in which the employment could be terminated is set out in clause B6 of the said agreement. It reads thus:

B6 TERMINATION OF EMPLOYMENT

B6(a) The Corporation may terminate an officer's appointment by giving one month's notice or one month's salary in lieu of notice.

B6(b) If in the view of the Corporation the work or conduct or an officer is unsatisfactory, the Corporation may terminate such officer's employment by one month's notice or one month's salary in lieu of notice provided it has first counselled or warned him in writing of his shortcomings and he has failed to improve his work or conduct to the satisfaction of the Corporation within three months or such longer time as the Corporation may stipulate at the time of such counselling or warning. At any such counselling an executive member of the Association may be present provided the officer notifies the Corporation in writing of his wish to have an Association representative present.

B6(c) Nothing therein contained shall restrict the Corporation's right of summary dismissal under Clause B6 (e) hereof.

B6(d) Notice of termination of an officer's employment under this clause shall be given by means of a letter signed by the Chief Executive or his nominee.

B6(e) The employment of an officer may be terminated summarily without notice or payment in lieu of notice in any of the following circumstances:-

(a) where an employee is guilty of misconduct inconsistent with the fulfilment of the exp or implied conditions of his contract of Service;

(b) for wilful disobedience to lawful orders given by the employer;

(c) for lack of the skill which the employee expressly or by implication warrants himself to possess;

(d) for habitual or substantial neglect of his duties;

(e) for continual absence from work without the permission of the employer and without other reasonable excuse.

B6(f) In any of the above circumstances the Corporation may in its discretion give the officer the option to resign from his employment.

B6(g) B6(g) All monies owing to the officer whose services are terminated or who exercises his option to resign in lieu of termination will be paid in cash and the Corporation shall be entitled to deduct all monies owing to it from such payment.

B6(h) B6(h) Upon termination of employment the officer shall be immediately entitled to those monies which are due to him by the Corporation.

B6(i) B6(i) In the event that an officer is aggrieved by the termination of his employment by the Corporation the Association shall be entitled to raise the matter with the Chief Executive or his nominee provided that it does so within 21 days of the date of termination of employment and upon the written authority of the officer concerned

[24] The above terms of the Contract, empowers the respondent Corporation to terminate its employees for unsatisfactory work or conduct, by giving one months notice or in lieu of such a notice by making a payment of one month's salary. [B6(b)] Furthermore, services of an employee could be terminated in the similar manner, if he or she is found guilty for misconduct, for wilful disobedience to lawful orders, for lack of required skill for the job he is

employed, for habitual or substantial neglect of duties and for continual absence from work without permission or excuse.

[25] These matters referred to in the two preceding paragraphs had been considered by a Committee comprising of an Assistant personnel Officer, an Accountant and an Engineer of the corporation appointed by the respondent itself. It was also looked into by the Sugar Industry Tribunal after having gone through the evidence of many witnesses. Report of the said Committee had been marked in evidence by the respondents as D25 whilst the two awards [Vide pages 42 to 50 of the record] of the said Tribunal also had been considered carefully by the learned trial Judge.

[26] The aforesaid Committee appointed by the respondent Corporation, in its report dated 03.06.1994, had recommended that the services of the Appellant Razak be summarily terminated under clause B6(e) of the Contract of Employment. Accordingly their decision was that the Appellant's performances subsequent the cyclone Kina fell within the matters referred to in clause B6(e) above.

[27] However, the decision of the Sugar industry Tribunal was that Mr. Razak's dismissal was unfair and unreasonable and in that the tribunal had found that the appellant had the appropriate authority to give directions in respect of cyclone Kina related rehabilitation work.

[28] Even though, the Tribunal had concluded that the dismissal of the appellant was unfair and unreasonable, His Lordship having referred to the said decision and the evidence recorded therein did not wish to follow the thinking of the Tribunal. Having taken such a view, the learned Judge dismissed the action of the appellant basically relying on the terms relating to the retiring age of the employees of the Respondent Corporation contained in the Contract of Employment.

[29] Apparently, this decision of the learned High Court Judge was made on the basis that the Contract of Employment of the Appellant does not assure him to be in the office till he reaches the age of 55. He was on this point since the Appellant had claimed that he should be compensated taking into consideration of the balance period of service that he could have served till he reaches the age of 55.

[30] This claim of the appellant had been made on the strength of clause B5(a) of the Contract of Employment. The said term reads as follows:

> *B5 retirement*
> *B5(a) Upon reaching their 55th birthday, officers shall retire from the corporation.*

[31] Having considered the said clause and the law connected thereto, the learned Judge has concluded that the Appellant cannot be heard to say that clause B5(a) in the Agreement, assure him employment until he reaches the age of 55.

[32] In coming to this conclusion the learned Judge has relied upon the decision by Pathik J in *Fiji electricity Authority v Naiyaga.* [1998 FJHC 77 dated 29.05.1998] In his judgment the following passage from the said decision has been quoted by the learned High Court Judge.

> *"The fact that the retiring age in the agreement is 55 years does not mean that it is a contractual retiring age. It is the age at which employees of that description in the relevant group can reasonably expect to be compelled to retire"*
>
> In coming to this conclusion Pathik J had relied on the case of *AGE CONCERN SCOTLAND v HINES* (1983) IRLR 477] [quoting from SELWYN'S LAW OF EMPLOYMENT 7th Ed].

[33] I will now examine whether the appellant is entitled to claim damages in terms of clause 5B(a) of the Contract of Employment despite his services were terminated even for a valid reason or otherwise. The said clause 5B(a) referred to above requires an employee to retire at the age of 55. The obvious interpretation to this clause is that the employees are not entitled to be in employment after he or she reaches the age of 55. This does not mean that the employer cannot terminate an employee before reaching the age of 55. In fact, clauses found in Schedule B to the Agreement, specify the instances where such terminations could take place.

[34] In the instant case, the Committee appointed to look into the issue had recommended that the services of the appellant be terminated under clause B(6) of the Agreement. However, the Sugar Industry Tribunal had come to the conclusion that termination is unreasonable or unfair but had not said it is unlawful or unfair. Whatever the reason it had been for the dismissal, fact remains that the termination was made in terms of the Agreement. Therefore, the said clause 5B(a) will not give rise to claim damages for the balance period of service till he reaches the age of 55.

[35] If the termination is unfair or unreasonable an employee can seek relief accordingly, but it must be noted that the claim in this case is on the basis of wrongful and/or unlawful termination of services. In fact the Appellant in this case had received compensation amounting to $54070.89 pursuant to the award of the Tribunal for unfair and/or unreasonable termination of his services. In the circumstances, it is my view that the contract of employment does not permit the appellant to claim damages in this instance relying on a clause relating to the age of retirement. Moreover, I do not see any evidence being adduced to prove that the services of the appellant were terminated wrongly or unlawfully.

[36] Therefore, it is clear that the learned High Court Judge has correctly come to his final conclusion when he dismissed the action of the appellant upon considering the clause 5b(a) of the Contract of Employment. I should further state that the learned Judge has correctly applied the law when he relied upon the said decision of Pathik J. I also agree that retiring age in the agreement does not mean that it is a contractual retiring age but it is the age at which employees of that description in the relevant group can reasonably expect to be in employment.

[37] For the aforesaid reasons, I conclude that this Court should not interfere with the final outcome of the judgment delivered by the learned High Court Judge. At this stage, it is pertinent to state that the Courts exercising appellate powers do not reverse the final orders of the original court judges, if those final orders of the original court judges are correct even though part of their reasoning for the decisions is wrong. It may be so in this instance as well. Accordingly, I conclude that this appeal should be dismissed with costs.

[38] Next issue that requires consideration is the awarding of costs on the Respondents. Learned High Court Judge whilst dismissing the action of the appellant, directed the respondent to pay the appellant costs of the action. In that he said:

> *"This case had a long and protracted journey. The Court file is several inches thick and no doubt a substantial effort has been put in by Mr. Razak's solicitor and Counsel. I therefore summarily assess his costs to be paid by the FSC as $ 5000, to be paid within 28 days."*

[39] Payment of costs is governed by Rule 3(3) of the High Court Rules in Order 62 made in the year 1988. It reads thus:

"If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs"

[40] In Vol. 37 of the Halsbury's Laws of England, at para 717, it is stated:

"On the principle that costs follow the event there is such a settled practice that a successful party should receive his costs that it is necessary for the unsuccessful party to show some ground for the court to exercise its discretion to refuse an order which would give them to him, and the question whether the ground is sufficient is entirely for the judge at the trial, and if he has exercised his discretion on facts connected with or leading up to the litigation which have been proved before him or which he has himself observed during the trial the Court of Appeal may not intervene even if it deems his reasons insufficient".

[41] Learned Counsel for the respondent has referred to the decision in the case of *Ritter v Godfrey* [1920] 2 KB 47 at 60] where Atkin LJ said;

"In the case of a wholly successful defendant, in my opinion the judge must give the defendant his costs unless there is evidence that the defendant (1) brought about the litigation, or (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3) had done some wrongful act in the course of the transaction of which the plaintiff complains".

[42] Having looked at the aforesaid authorities and the High Court Rules in Fiji, it is clear that the rule in granting costs is to follow the event. In this instance the event is the dismissal of the action. Hence, the order to pay costs should be made in accordance with the decision made in favour of the respondent. Therefore, an order made otherwise namely to make an order against the respondent becomes a wrong order.

[43] Reasons of the learned High Court Judge, to make an order as to costs seem to be the thickness of the case record and the efforts made by the Solicitor and the Counsel for the Appellant. Obviously, in that event the same grounds should apply to the respondent as well. More importantly, when the Court had found that there was no merit in the action filed by the appellant, it is illogical to grant costs on the innocent party. Accordingly, I conclude that the order to pay costs by the respondent is wrong and should be vacated.

[44] For the aforesaid reasons this Court decides to make the following orders.

[45] **Hettiarachchi JA.** I agree with the judgment and proposed orders of Kankani Chitrasiri JA.

ORDERS OF THE COURT

[46] Orders of the Court are:

I The appeal is dismissed

II The Respondent's appeal by notice is allowed.

III The order in respect of costs made by the Court below is set aside.

IV The Respondent is entitled to cost in the Court below which are fixed summarily in the sum of $1200 and the costs of this appeal which are fixed at $3,000.00

Appeal allowed.