

FIJI PORTS CORP LTD v JIUTA VATEITEI AND FIJI NATIONAL PROVIDENT FUND (ABU0007 of 2011)

COURT OF APPEAL — CIVIL JURISDICTION

5 CALANCHINI AP, CHITRASIRI and BASNAYAKE JJA

16 May, 8 June 2012

10 **Employment — employer’s liability — voluntary severance scheme — whether redundancy payments are emoluments — whether payments qualify for Fiji National Provident Fund contribution — National Provident Fund Act ss 2, 13**

15 The first respondent accepted a severance package, as part of which employees were paid a lump sum equivalent to one and a half years’ salary plus four weeks’ pay for every additional year of service. The first respondent subsequently complained to the Fiji National Provident Fund (FNPF) that the employer had failed to pay contributions to the FNPF from the redundancy package. The High Court held that the sum payable under the redundancy package falls within the definition of emoluments, and therefore wages, and thereby qualifies for the FNPF contribution.

20 **Held –**

Redundancy payments cannot be considered as emoluments, and therefore the High Court erred in its decision.

Mairs v Haughey [1994] 1 AC 303, followed.

25 Appeal allowed. Judgment of High Court set aside.

Cases referred to

Hamblett v Godfrey (Inspector of Taxes) [1986] 1 WLR 839, cited.

S Lateef for the Appellant.

30 *I Fa* for the first Respondent.

Soros for the second Respondent.

35 **Calanchini AP.** I agree with the reasons and conclusion expressed by Basnayake JA

Chitrasiri JA. I too agree with the reasons and conclusion expressed by Basnayake JA

40 [1] **Basnayake JA.** This is an appeal by the 1st defendant - appellant (1st defendant) from a judgment dated 3.2.2011 of the learned High Court Judge at Suva.

45 [2] The plaintiff 1st respondent (plaintiff) is representing employees of the Ports Terminal Ltd and Marine & Ports Authority of Fiji. The 1st defendant was formed after merging the Ports Terminal Co and Marine & Ports Authority Ltd. The merging of the two companies in to one company was due to port reforms and due to which a voluntary severance of employment scheme was introduced.

50 [3] The reforms allowed employees of the two companies to choose between making the transition to the new company called Fiji Ports Corp Ltd (1st defendant) or to take a voluntary redundancy package. In total 44 employees including the Plaintiff of Ports Terminal Ltd and Marine & Ports Authority limited had opted to take the voluntary severance package.

[4] The method of payment in relation to the scheme was clearly stipulated by way of a circular (Circular 08/05). This scheme was accepted by the plaintiff. As part of the severance package the employees were paid a lump sum equivalent to 1½ years of salary plus 4 weeks pay for every additional year of service. The circular stipulates as follows:

Voluntary Severance Employment

- (i) 1½ years basic salary plus 4 weeks pay for every completed year of continuous service with Ports Authority of Fiji; plus 3 months basic salary plus.
- (ii) 5 weeks for every completed year of continuous service with PTL.
- (iii) Those who are re-employed by the 1st defendant are not eligible for voluntary severance of employment packages.

[5] The plaintiff in the letter of acceptance dated 26.4.2005 states as follows; “After much consideration in reading, I therefore have decided to accept the offered severance package stated in your circular. With my decision I believe that it will be an opportunity for our young enthusiastic generations to prove their worth in the new company”.

[6] Having agreed upon the voluntary severance scheme, the plaintiff complained to the Fiji National Provident Fund (2nd defendant) on 24.12.2005 that the 1st defendant as their employer has failed to pay contributions to the Fund from the redundancy package in terms of the Fiji National Provident Fund Act. The 1st defendant took up the position that as the voluntary severance package was a lump sum payment and not wages due under a contract, the 1st defendant was not obliged to make such contributions.

[7] The plaintiff on 23.2.2009 originated summons seeking *inter alia* the following reliefs, namely:-

- (i) A declaration that payments made under voluntary redundancy packages offered to employees of the 1st defendant constitute a payment of wages for the purpose of the Fiji National Provident Fund Act (FNPF) for which the 1st defendant is liable to contribute to the Fund...
- (ii) A declaration that each of the employees of the 1st defendant who accepted redundancy packages pursuant to the Port Industry Severance of Employment Scheme in June, 2005 are entitled to have their FNPF contributions totalling \$ 271,530.98 paid by the 1st defendant in to the said Fund.

[8] The obligation of the employer with regard to the contributions to the FNPF is laid down in s 13 of the FNPF Act which is as follows:-

- (i) 13-(1) Every employer shall pay to the Fund in respect of each of his employees, in every month during which such employee is employed by him and in the month following the termination of such employment, a contribution calculated upon the amount of wages payable to such employee by such employer for the preceding month at the appropriate rates set out in the second schedule (emphasis added).
- (ii) The proviso and sub sections (2) to (5) not reproduced.

[9] The liability of the employer thus is to pay to the Fund in every month such employee is employed and in the month following the termination. The amount payable is calculated according to the wages payable by such employer to such employee for the preceding month. Wages means (section 2) all emoluments including allowances and commission which would be due in money to an employee under his contract of service or for services or as an agent....

The Judgment of the learned High Court Judge

- [10] The learned High Court Judge considered the issue to be decided as to whether the amount calculated under the voluntary severance employment scheme falls under the definition of “wages” defined in the FNPF Act. Considering Section 13 of the FNPF Act the learned Judge held that FNPF contribution is calculated upon the amount of wages payable to an employee. *He further held that wages includes all emoluments which would be due in money to an employee under his contract. Any emolument which is paid periodically or otherwise has to be treated as wages.*
- [11] The learned judge held that the term wages should be broadly defined and includes not only periodic monetary earnings but all compensation for services rendered without regard to the manner in which such compensation is computed. The learned judge relied on *Hamblett v Godfrey (Inspector of Taxes)* (Ch D), [1986] 1 WLR 839 where Knox J held that “the expanded definition in s 183 (1) of the word “*emoluments*”, “*all salaries, fees, wages, perquisites and profits whatsoever*” seems to me to indicate something wider than remuneration. Salaries, fees and wages are all remuneration, but “*perquisites and profits whatsoever*” seems to me to go much wider” (at 846 (H)).
- [12] The learned High Court Judge further held that the plaintiff is entitled to the redundancy package by virtue of their employment with the defendant. In other words, it is a monetary advantage arising from the plaintiff’s occupation of an office...The plaintiff received the payment in recognition of the loss of earning rights which are directly connected with his employment and the source of the payment was the employment. *The fact that a payment is made in recognition of, or as compensation for loss of rights that are directly connected with the employment means that the source of the payment remains employment. Accordingly, it attracts the characteristics of an emolument.*
- [13] It was further held that if a payment is not made for being an employee, or does not arise from the existence of the employer-employee relationship, it is not an emolument from the employment...*The redundancy payment offered to the plaintiff by the defendant did arise from the existence of the employer-employee relationship. Therefore it clearly falls within the definition of the emolument, it becomes wages within the definition given in the FNPF Act, and thus qualifies for FNPF contribution....A payment whether offered during the course of the employment or at the time of termination of the employment can be considered as an emolument, if it attracts the characteristics of emoluments.*
- [14] *The learned Judge further held that all these considerations lead inevitably to the conclusion that the sum payable upon the redundancy package falls within the definition of emoluments and thereby qualifies for the FNPF contribution.* Even if there is no provision relating to the FNPF contribution, contained in the VSE scheme, the amount payable to the FNPF fund shall be calculated upon the amount of emoluments received by the employee as a result of the redundancy package. On this basis the learned Judge concluded that the payments under voluntary redundancy package constitute a payment of wages and the 1st defendant is liable to contribute to the fund.

Submissions on behalf of the plaintiff

- [15] The learned counsel submitted that the redundancy payments offered to the plaintiff are emoluments. The redundancy payments offered to the plaintiff did arise from the existence of the employer-employee relationship. Therefore it

clearly falls within the definition of emoluments. If it falls within the definition of emoluments, it becomes wages within the definition given in the FNPF Act, and thus qualified for FNPF contribution.

5 **Submissions on behalf of the 2nd defendant (FNPF)**

[16] The 2nd defendant is the Fiji National Provident Fund which is a statutory body. *It was submitted on behalf of the 2nd defendant that clear provision has been made by the FNPF Act with regard to the obligations of employers to the fund. It was submitted that the employer is obliged to pay requisite contribution*
10 *on a monthly basis during which the employee is employed or a month following the termination (Section 13 (1) of the Act). The amount to be calculated considering the wages an employee has received during the preceding month. Wages has been defined (S. 2).*

[17] The learned counsel submitted that whether or not the contributions are
15 payable depends on whether the emolument is contained in the contract of employment. The learned counsel relied on the case of *Mairs v Haughey* [1994] 1 AC 303 where an employee was paid a lump sum in return for giving up rights he was entitled to under a redundancy scheme. It was held that the lump sum payment was not assessable to tax because it was made in consideration for the
20 employee giving up his rights to an enhanced redundancy payment. The House of Lords considered the redundancy payments not forming part of the “*emoluments from employment*”.

[18] In the above case (*Mairs*) it was submitted on behalf of the Inland Revenue
25 that in law a payment made to an employee under the enhanced redundancy scheme would have been taxable as an emolument from his employment. ***Lord Woolf with Lord Griffiths, Lord Ackner, Lord Brown-Welkinson and Lord Mustill agreeing held that a redundancy payment would not be an emolument from the employment and a lump sum paid in lieu of the right to receive redundancy payment is also not chargeable as an emolument under schedule***
30 ***E*** (at 323 B)

[19] Lord Woolf (at 319 H) held that redundancy involves an employee finding
himself without a job through circumstances over which he has no control. Lord Woolf further stated that (pg 320 D) instead of being an emolument from
35 employment it is a payment to compensate the employee for not being able to receive emoluments from his employment.

[20] A characteristic of a redundancy payment is that it is to compensate or
relieve an employee for what can be the unfortunate consequences of becoming
unemployed (at 321 G). The other significant characteristic of a redundancy
40 payment is that it is payable after the employment has come to an end. Prima facie a payment made after the termination of employment is not an emolument from that employment (Lord Woolf at 321 G & H).

[21] Thus the House of Lords in *Mairs v Haughey* (supra) decided that the
redundancy payments cannot be considered as emoluments. The learned High
45 Court Judge regarded redundancy payments as forming part of wages. That is by considering them as emoluments. The FNPF Act by s 13 has clearly laid down the procedure with regard to FNPF payments. I am of the view that the learned Judge has erred by considering the redundancy payments as emoluments. By so doing the learned Judge had gone beyond the limits of the Act.

50 [22] Therefore I am of the view that the judgment of the learned Judge should be set aside and the appeal allowed.

[23] Under the circumstances of this case I make no order with regard to costs.

The Orders of the Court are:

- (1) Appeal allowed.
- 5 (2) Judgement dated 3.2.2011 set aside.
- (3) No costs.

Appeal allowed.

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