

IN THE SUPREME COURT OF FIJI
AT SUVA

[APPELLATE JURISDICTION]

Civil Appeal No. CBV 0004 of 2012

(On Appeal Civil From Fiji Court of
Appeal No. ABU 0007 of 2011 and High
Court Civil Action No. HBC 65 of 2009)

BETWEEN: **JIUTA VATEITEI**

PETITIONER

AND: **FIJI PORTS CORPORATION LIMITED**

1st RESPONDENT

AND: **FIJI NATIONAL PROVIDENT FUND**

2nd RESPONDENT

CORAM: Hon. Chief Justice Anthony Gates, President of the Supreme Court
Hon. Mr. Justice Sathya Hettige, Justice of the Supreme Court
Hon. Mr. Justice Suresh Chandra, Justice of the Supreme Court

COUNSEL: Mr. I. Fa for the Petitioner
Mr. S. Lateef for the 1st Respondent
Ms. S. Saro for the 2nd Respondent

DATE OF HEARING: 14th August, 2013

DATE OF JUDGMENT: 27th August, 2013

JUDGMENT OF THE COURT

SATHYAA HETTIGE J A.

[1] The petitioner is seeking Special Leave to Appeal against the judgment of the Court of Appeal dated 8th of June 2012 by which the Court of Appeal allowed the appeal of the 1st respondent setting aside the judgment of the High Court which was given in favor of the petitioner. The petitioner's Special Leave to Appeal application is filed in terms of section 8 (2) (b) of the Administration of Justice Decree 2009

Grounds of Appeal

[2] The petitioner's appeal is based on the following grounds of appeal.

- (a) The Court of Appeal erred in finding that Fiji National Provident Fund contributions (hereinafter referred to as FNPF contributions) were not payable by the 1st respondent on the Voluntary Employment Severance Scheme to its employee (the petitioner) under Voluntary Employment Severance Scheme offered to them by the 1st respondent.
- (b) The Court of Appeal erred in failing to note that the calculation of payments to its employees qualified for its Voluntary Employment Severance Scheme was based on the salaries of its employees which therefore attracted an FNPF contribution as it fell under the definition of wages under the FNPF Act.
- (c) The Court of Appeal erred in relying on the dicta of the House of Lords in **Mairs v Haughey** (1993) 3 WLR 393 without taking into account the different factual situation and the different legislation in **Mairs** case and the present case.

(d) The Court of Appeal failed to take into account the Voluntary Employment Severance Scheme that it offered to its employees arose directly out of their employment with the petitioner and was made to bring their employment to an end and was made after their employment had ended as in **Mairs** case.

(e) The Court of Appeal had failed to note that the 1st respondent's employees who qualified for the Voluntary Employment Scheme had paid PAYE taxes on the severance pay that they had received from the 1st respondent therefore such payments arose out of their employment, which meant that FNPF was payable on these payments.

[3] On a reading of the above grounds of appeal it can be seen that the appeal as alleged by the petitioner, raises two questions to be determined, whether the redundancy payment made by the 1st Respondent to the petitioner can be considered to include the wages (emoluments) under the 1st respondent's VSE Scheme and secondly as to whether the 1st respondent is liable to pay FNPF contributions to the Fund on the said redundancy payment under the FNPF Act.

[4] The Court of Appeal in its judgment dated 8th June 2012 came to the conclusion and held that the redundancy payment made by the 1st respondent to the petitioner was not "wages" and therefore the 1st respondent was not liable to pay FNPF contributions to the Fund under the FNPF Act.

[5] It is common ground that the petitioner **unconditionally** accepted the Voluntary Employment Severance Scheme package as set out in the Human Resources Circular No. 08/05 dated 18th April 2005 (annexure "B" at pages 49 & 50 of the SC brief) by the letter of the petitioner dated 26th April 2005 (emphasis added). It is also undisputed that no mention of any payment of FNPF contributions has been made in

the Voluntary Employment Severance Scheme package offered to all the employees including the petitioner who accepted the package.

- [6] It was contended by the 1st respondent that the absence of any payment of FNPF contributions in the Voluntary Redundancy Package demonstrates that the FNPF contributions were excluded from the “financial content and contributions.”

Reliefs sought in the High Court

- [7] The petitioner sought the following Orders from the respondents by way of Originating Summons:

- (i) A declaration that payments made under Voluntary Redundancy Package offered to employees of the 1st respondent constitute a payment of wages for the purposes of Fiji National Provident Fund Act (Cap 219) hereinafter referred to as “the Act” for which the defendant is liable to contribute to the Fund established pursuant to Section 7 of the Act and administered by the 2nd defendant.
- (ii) A declaration that each of the employees of the 1st respondent who accepted the redundancy packages to the Port Industry Reform Voluntary Severance of Employment Scheme in June 2005 are entitled to have their FNPF contributions totaling F\$ 271, 530.98 paid by the 1st respondent into the said Fund.
- (iii) Such Further or Other Order as the court in the circumstances considers appropriate.
- (iv) An Order as to costs.

Brief outline of facts

- [8] The Petitioner instituted the legal proceedings in the High Court seeking the above reliefs in his personal capacity and on behalf of his fellow employees with the 1st respondent who were made redundant from the employment in June 2005. The petitioner and his fellow employees represented by him took part in a Voluntary Severance of Employment Scheme offered by the 1st respondent. The details of the Voluntary Severance of Employment Scheme were set out in the annexure marked “B” of the respondent’s affidavit filed in the High Court. The petitioner and his fellow employees represented by him accepted the redundancy package. The amount did not include the FNPF contributions. The issue of non-compliance of FNPF contributions in the redundancy payment was raised and subsequently were informed by the 2nd respondent that the FNPF contributions were not payable at law. The 1st respondent filed an affidavit in reply in the High Court stating that since the petitioner had accepted the VSE package and there was no reference made therein with regard to payment of FNPF contributions, the petitioner was bound by the acceptance of the offer under the VSE Scheme. The 2nd respondent also submitted that FNPF contributions were not payable on the redundancy payment since there is no express provision requiring the employer to pay contributions on the redundancy payment.
- [9] The Court of Appeal set aside the Order of the learned High Court Judge on an appeal filed by the 1st respondent on the basis that the redundancy payment cannot be considered as emolument having relied on the judgment in **Mairs v Haughey** (1993) 3 WLR 393 wherein it was held that redundancy payment is made after the termination of employment and to compensate the employee for loss of the employment.

[10] It is undisputed that the Voluntary Employment of Severance Scheme was introduced with the endorsement of the Government of Fiji. The 1st Paragraph of the Voluntary Severance of Employment Scheme marked “B” above referred to reads as follows:

“The Voluntary Severance of Employment Scheme which had been negotiated and agreed to between the Staff Association and the Charter Administration Committee (CAC) for the port reforms, to facilitate the industry reforms under the Public Enterprises Act, 1996, has now been agreed to by Government and the Board of Ports Terminal Limited” (emphasis added).

[11] It is also pertinent to consider the last paragraph of the said document wherein it refers to Financial Contents and Conditions of the approved scheme which reads as follows.

Voluntary Severance of Employment

- (i) 1.5 years basic salary plus 04 weeks pay for every completed year of continuous service with PTL.
- (ii) Three (3) months basic salary plus five weeks for every completed year of continuous service with PTL.
- (iii) Employees within the Maritime Division and those who are reemployed by Fiji Ports Corporation Limited (FPCL) or Ports Terminal Limited are not eligible for Voluntary Severance of Employment package.....”

[12] Now it is useful to consider the provisions in section 13 (1) of the FNPF Act which sets out the obligations of the employer with regard to the contributions to the FNPF which reads as follows:

“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).*

[13] It can be seen on a careful reading of the above provisions that the amount of FNPF contributions are calculated on the amount of “wages” payable to such an employee in every month and in the month following the termination of the employment. The Court of Appeal has discussed the issue on “wages” in detail in paragraphs 10 and 11 of the Judgment and held that the redundancy payments were not “wages” within the meaning of FNPF Act and therefore the employer was not obliged to pay any contributions.

[14] It is pertinent to consider the meaning given to “wages” in the definition contained in section 2 of the FNPF Act which reads as follows:

*“All emoluments which would be due **in money to an employee under his contract** if no deductions were made therefrom , whether in pursuance of any law requiring or permitting the making of any deduction or otherwise and whether such emoluments have been agreed to be paid monthly, weekly, daily or otherwise: (emphasis added).*

[15] It is clear from the above definition for the wages to be included in all “Emoluments” received from the employment, the payment has to be made under the contract of service and only in respect of the wages received during the course of the employee’s employment.

[16] Learned counsel for the 1st respondent contended that the redundancy payment was paid to the petitioner not as a direct payment arising out his employment but as compensation for the loss of the employment.

- [17] We now proceed to examine the contents in the Human Resources Circular (at page 50 of the Supreme Court Brief) which is relevant to understand the purpose for which the VSE Scheme was introduced and the formulae of payment scheme.

Paragraph 1 of the VSE Scheme states as follows:

“The Voluntary Severance of Employment (VSE) Scheme , which had been negotiated and agreed to between the Staffs Association and the Charter Administration Committee (CAC) for the Port Reforms, to facilitate the industry reforms under Public Enterprises Act , 1996 has now been agreed to by Government and the Board of Ports Terminal Limited.”

- [18] It is to be noted that the above paragraph in the Circular and the Financial Contents and the Conditions of the Approved Scheme contained therein make it clear that the employees had been given the option whether to join the 1st Respondent or to accept the Voluntary Redundancy Package in view of the industry reforms, that had been offered by the employer.

- [19] It appears from the letter dated 26th April 2005 addressed to the Stevedoring Department, Ports Terminal Limited by the petitioner in response to the said offer the petitioner accepted the offer unconditionally stating as follows:

“After much consideration in reading , I therefore have decided to accept the offered Severance package” (at page 48 of the Supreme Court Brief) (emphasis added).

It is also common ground that the Ports Industry underwent a reform to merge the Ports Terminal Company and Maritime & Ports Authority Limited and all other

employees totaling a number of 44 including the petitioner have received the redundancy payment having opted to take the Voluntary Severance Package.

[20] Counsel for the 1st respondent strongly contended that the Voluntary Severance Package was a lump sum and such payment does not fall under the definition of “wages” under FNPF Act.

[21] Learned Counsel for the petitioner heavily relied on the definition of the word “wages” in the FNPF Act and submitted that the severance packages received by the petitioners from the 1st respondent under the VSE Scheme were clearly emoluments due to the petitioner under the contract of service with the 1st respondent. The petitioner further submitted that the subject matter of the case raises a far reaching question of law being whether FNPF contributions are payable on the severance payment received.

Jurisdiction

[22] The Supreme Court derives jurisdiction to grant Special Leave to Appeal from a final judgment of the Full Court of Appeal pursuant section 8(2) (b) of the Administration of Justice Decree 2009. In exercise of its appellate jurisdiction, the court has powers to vary, set aside or affirm decisions or Orders of the Court of Appeal and make such orders including an order for new trial or an order for award of costs as are necessary for the administration of justice.

[23] Section 7 (3) of the Supreme Court Act 1998 confers powers on the Supreme Court and exhaustively deals with the circumstances in which special leave could be granted . Section 7 (3) of the Supreme Court Act provides as follows:

“In relation to a Civil matter (including a matter involving constitutional question) the Supreme Court must not grant special leave to appeal unless the case raises –

- (a) A far reaching question of law;
- (b) A matter of great general or public importance ;
- (c) A matter that is otherwise of substantial general interest to the administration of civil justice.”

[24] We now proceed to examine as to whether there is any far reaching question of law involved in this case and whether the grounds of appeal urged by the petitioner would satisfy the threshold criteria contained in section 7 (3) of the Supreme Court Act 1998.

Definition of “wages”

[25] The Court of Appeal came to the conclusion that the redundancy payment paid to the petitioner and other employees represented by the petitioner were not “wages” within the meaning of the FNPF Act therefore, the employer was not obliged to pay any FNPF contributions.

[26] It is important to consider as to whether the Legislature ever intended to include “redundancy pay “ within the meaning of “wages” when it defined the word “wages” for the purpose of FNPF contributions.

“wages” includes under section 2 of the FNPF Act all emoluments including allowances and commission, which would be due in money to an employee **under his contract of service**.....”

It is necessary to understand the nature of wordings used in the statute. It seems that the Legislature has never intended to include **any other payment** made by the employer after the contract of service has come to an end in the FNPF Act.

[27] **Maxwell on the Interpretation of Statutes (12th Edit.) 1969 P.1** says that “ Statute law is the will of the Legislature” (*emphasis added*).

[28] In a line of authorities it has been decided that the function of the court is to find out and declare the intention of the legislature and not to add words to a statute.

In **R. v Wimbledon Justices Ex.P. Derwent** (1953) 1 QB 380 **Lord Goddard CJ** at page 384 observed that

“ A court cannot add words to a statute or read words into it which are not there” (emphasis added).

It was decided in an earlier case in the case of **R.v City of London Court Judge (1892) 1 QB 273 Lopes LJ** at page 310 said “ *I have always understood that if the words of an Act are unambiguous and clear you must obey those words however absurd the result may appear..*”

[29] The question is as to whether this court can depart from the literal meaning given to the FNPF Act by limiting it to the emoluments and other payments referred to therein . It is the view of this court that it is not the function of this court to add the words which are not there . We are obliged to interpret the words as encapsulated in the section. It is not prudent for this court to determine and conclude that the contractual offer of the VSE Scheme set out in the circular must have included the FNPF Act as they were not specifically excluded from the definition of “wages” as submitted by the petitioner.

[30] Now we will proceed to consider what the House of Lords said in the case of **Mairs v Haughey (1994) 1 AC 303** on which the Court of Appeal relied upon when it came to its final decision on the issue whether the redundancy payment was liable under the FNP Act, that the redundancy payments which is a lump sum paid to an employee do not form part of the emoluments from employment.

[31] The House of Lords in the above case held that *“notwithstanding the wide definition of “emoluments” in section 131(1) of the Income and Corporation Taxes Act 1988 a redundancy payment in its nature was not an emolument from employment but compensation to the employee for his no longer receiving emolument from the employment...”*

Lord Woolf with whom **Lord Griffiths, Lord Ackner, Lord Browne-Wilkinson** and **Lord Mustill** agreed, said at page 319 that the redundancy involves an employee finding himself without a job through circumstances over which he has no control.

Furthermore the House of Lords went on to say at page 321 that a characteristic of the redundancy payment is that it is to compensate or relieve an employee for what can be the unfortunate consequences of becoming unemployed (emphasis added).

[32] It appears from judicial statements made by Lord Woolf in the **Mairs** case (supra) that the redundancy payments are paid to an employee to compensate the employee for loss of employment and not as a reward for his services and such payments are made after the contract of employment has come to end.

Employment Act

[33] It is also pertinent to consider the provisions of the Employment Act and the Employment Relations Promulgation 2007 which defines the word “Wages” and which will be useful for this court to determine this matter.

Section 2 of the Employment Act (92) defines “wages” as follows:

“All remuneration which is payable to an employee for work done in respect of his contract of service but does not include

(b) any contribution paid by the employer on his own account to any pension fund or provident fund” (emphasis added).

Employment Relations Promulgation 2007

[34] Section 4 of the Employment Relations Promulgation 2007 defines “wages “as follows:

“All payments made to a worker for work done in respect of the worker’s contract of service but does not include-

(a) The value of a house, accommodation or supply of food, fuel, light water or medical attendance, or amenity or services;

(b) A contribution by the employer on the employer’s own account to a pension fund or provident fund;

(c) A travelling allowance or the value of a travelling concession;

(d) A sum payable to the worker to defray special expenses incurred by the worker by nature of the worker’s employment; or

(e) A gratuity payable on discharge or retirement...” (emphasis added).

[35] On analysis of the above definitions in the Employment Act and the Employment Relations Promulgation 2007 it can be seen that any contribution paid by the employer to the pension fund and the Provident fund and also a gratuity payment made on discharge or retirement have been excluded from the definition of the “wages”.

[36] Section 108 of the Employment Relations Promulgation 2007 provides that “*subject to subsection 2, if an employer terminates a worker’s employment for reasons of economic, technological, structural or similar nature , the employer must pay to the*

worker not less than one week's wages as redundancy pay for each complete year of service in addition to the worker's other entitlements."

The 1st respondent contends that redundancy payment paid on termination of employment does not in any way convert the redundancy pay into 'wages' under the ERP 2007.

[37] Learned counsel for the 1st respondent has referred to the provisions contained in paragraph 74 of **Superannuation Guarantee Ruling 2009/2** in other jurisdictions such as Australia which provides as follows:

"Redundancy payments made on termination of employment are not a reward for services rendered by an employee, even if part of the payment is calculated by reference to the employee's period of service with the employer. They are payments to compensate the employee for the loss of their job; not a reward for their services" (emphasis added).

[38] It can be observed that even in other jurisdictions such as Australia redundancy payments under the Superannuation Guarantee Ruling have been paid only as compensation to the employees for loss of their jobs and not as rewards.

[39] It must be noted that the existing statutory provisions in the definition of "wages" in the FNPF Act are inadequate to include redundancy pay for the purpose of payment of FNPF contributions requiring the employer to obey and it is necessary to bring in the required legislation to include the express provisions of law for the payment of FNPF contributions on the redundancy pay. In the absence of such express provisions in the law we conclude that the 1st respondent is not liable to make any contributions to the Fund on the redundancy pay.

Conclusion

[40] Having considered the totality of the material placed before this court by all parties all the circumstances of the case and the written submissions tendered by the parties we reach the conclusion that the petitioner has failed to satisfy the required threshold criteria encapsulated in Section 7(3) of the Supreme Court Act 1998. All the grounds of appeal lack any merit to fall within the threshold requirements. This court is of the view that there is no illegality or infirmity in the conclusion reached by the Court of Appeal.

[41] For the reasons set out above we are not inclined to grant any relief to the petitioner. Therefore, petitioner's application for special leave to appeal fails.

Accordingly, the petitioner's application for Special Leave to Appeal is dismissed.

We make no order for costs.

Hon. Chief Justice Anthony Gates
President of the Supreme Court

Hon. Mr. Justice Sathya Hettige
Justice of the Supreme Court

Hon. Mr. Justice Suresh Chandra
Justice of the Supreme Court

Solicitors:

Fa & Associates for the Petitioner

Lateef and Lateef Lawyers for 1st Respondent

FNPF Legal Officer for 2nd Respondent