

IN THE TRADE DISPUTES PANEL)

OF SOLOMON ISLANDS)

Case No: UDF 37 of 2008

IN THE MATTER of the Unfair
Dismissal Act 1982

AND IN THE MATTER of a
complaint of Unfair Dismissal

BETWEEN: HENRY NINIVAI

Complainant

AND: SOLOMON MOTORS LIMITED

Respondent

Hearing: 30th June, 2009, Honiara.

Decision: 4th September 2009.

Panel: Wickly Faga Deputy Chairman
Mary Ida Susurua Employee Member
John Vollrath Employer Member

Appearances: Ms. Maelyn Bird, Counsel for the Complainant
Mr. Dwayne Tigulu, Counsel for the Respondent

FINDING

The complainant filed his complaint of unfair dismissal with the Panel Secretary on the 8th September 2008. He was employed as mechanic with the respondent from 1985 until his resignation on the 27th June 2008. He claim constructive dismissal on the ground that he was forced by the respondent to resign when he was offered scholarship to study overseas.

In response to the complaint, the respondent, through its counsel, filed its notice of appearance (TDP2) on the 13th October 2008, indicating its intention to resist the complainant's claim. The respondent sought to resist the claim on the following grounds;

"(a) The complainant insisted in personally pursuing overseas training by APTC in Papua New Guinea for 6 months not officially sanctioned;

~~(b) The complainant was forewarned and properly advised of the consequences of taking up the overseas training on a very short notice;~~

(c) The complainant chose to resign by letter dated 27th June 2008 from his employment before pursuing the overseas training the next day which unfortunately lasted 5 weeks;

~~(d) The complainant was paid his long service benefits and other dues including company accommodation for his family pending repatriation;~~

(e) The complainant's resignation was accepted without any guarantee of direct re-employment."

The respondent also stated in its notice of appearance that it "...denies forcing the respondent [complainant] to resign in that:

(a) The complainant chose to take up the overseas training in Papua New Guinea on 3 days verbal and unofficial notice to his supervisor;

(b) The complainant was properly advised of his options affecting his continued employment with the respondent with regards to the overseas training he was taking up, and

(c) The complainant elected to resign from employment in order to take up training in Papua New Guinea."

The respondent stated in clause 4(a) and (b) of its TDP2 that the complainant was not dismissed, but resigned. The onus then was on the complainant to show constructive dismissal; and if he did, then he had to show that the dismissal was unfair.

The complainant gave evidence that he began employment with the respondent in February 1985 as a mechanic until 27th June 2008. He told the Panel that in or around April 2008, he accepted an

Australian Pacific Technical College (APTC) Scholarship offer to study mechanic in Port Moresby, Papua New Guinea. After accepting the offer, he talked to one, Mr. Sam Iro who was Director of the respondent company. He explained to Mr. Iro that the Scholarship was fully funded by APTC. Mr. Iro then assured him that if he went on training, he can come back and work. The said Sam told the complainant to continue working until he was ready to go, when he was to come and get his pocket money. All these were not put in writing. The complainant further said in evidence that three days before he was to leave for Papua New Guinea on the 28th June 2008, he went and discussed his acceptance of the APTC scholarship with the General Manager, Maclean Sarukiki. He asked for a one month unpaid leave, but Mr. Sarukiki advised that in the country, if anyone accepts such a scholarship, he must resign. The complainant then expressed his disappointment to Mr. Sarukiki why he had to tell him that in the last minute. After talking to Mr. Sarukiki, he made his resignation letter [EX HN1]. He said under oath that he talked to one, Donna, who was Senior Administration Officer of the company, that he would resign, and she drafted, and typed out his letter of resignation. The complainant admitted signing the resignation letter after reading it. In cross-examination, the complainant conceded that he did not know how to type so his resignation letter was typed for him. He however insisted that he was forced to sign, but accepted generally that he would not have signed if he had not agreed to its contents.

The complainant further told the Panel that he left on the 28th June 2008 for study in Port Moresby. He returned to the country after five weeks. He made an application letter dated 6/07/08 [EX HN4] for re-employment with the respondent company. In his letter of response dated 7/08/08 [EX HN2], Mr. Iro informed the complainant of the company's regret that it can only accept one applicant of two applications. Of those two, the other applicant was considered for recruitment.

In closing Ms Bird submitted that during her client's 23 years and 4 months employment, there was no evidence of any misconduct by the complainant. It was submitted that based on evidence before the Panel, her client was forced to resign because he was going overseas to further his skills in mechanics. She further stated that the complainant's resignation letter [EX HN1] shows that the respondent has no policy on overseas scholarships, and that he has no choice but to resign. The option for unpaid leave

was not considered by the respondent. That in effect was an act of suppression of the complainant's interest to further his skills, and to realize his rights as a worker. It was further stated that the respondent failed to consider the complainant's intention to return and work for the company. Thus, on the balance of probabilities, her client was unfairly dismissed and is entitled to damages.

The respondent's case however was that, the complainant had voluntarily resigned. Mr. Sarukiki, who is the General Manger of the respondent company said under oath that he only knew about the complainant's application for an APTC scholarship three days before the complainant was due to leave for Port Moresby for his study on the 28th June 2008. That was when the complainant personally walked into his office and discussed with him about his scholarship. At that point in time, it was hard for him to make any decision on short notice. Mr. Sarukiki told the Panel that had the complainant come earlier, he would have considered other options, and a formal arrangement could have been made that binds the parties. Considering the time limitation, he could only put to the complainant three options, they are; 1. If he insists to go and the company refuses, then he could be considered as having terminated himself; 2. The possibility of deferring his course, and 3. To resign and take up full time study. The complainant considered the third option. He then tendered his resignation letter on the 27th June 2008. His pay and Long Service Benefits were then calculated and paid to him on the same day he resigned [Ex HM3]. Mr. Sarukiki did admit that he told the complainant to reapply when he returns from study.

Mr. Tigulu stated in his closing submission that the complainant, had apart from discussing with Mr. Iro, did nothing to talk to the management about his intentions of taking up studies overseas. As an employee of 23 years, he should have approached the Management in time. He only did so a few days before he was to leave; and he has to face tough decisions against him. Mr. Tigulu also stated that the respondent denies forcing the complainant to resign. He submits that the complainant voluntarily resigned from employment, and when he was being presented with payments, he accepted. Also, his family was assisted, when they were allowed to reside in the company house, whilst he was away on study overseas. In Mr. Sarukiki's evidence, the only unfortunate situation was that the

complainant applied late to be accepted back. It was therefore submitted that the dismissal was fair and the claim for compensation must be denied.

The first question that the Panel had to consider was whether the complainant was forced to resign. The Panel heard evidence that the complainant applied and was accepted for an APTC scholarship to study mechanics in PNG. On 26th June 2008, he approached the General Manager about his scholarship. The General Manager advised him that the company does not have training scheme for its employees, and due to short notice, the only options he could put to the complainant were; 1. If the complainant insists to go and the company refuses, then he could be considered as self terminated, 2. To defer his training, and 3. To resign. He chose the third option. On the 27th June 2008, he tendered his resignation letter. This letter became the point of contention after the complainant alleged that the letter was typed for him, and he was forced to sign it. The respondent however denied that it forced the complainant to sign his resignation letter. In cross examination, the complainant admitted that he could not type so another person did it for him. Also he appeared to accept that he would not have signed if he had not agreed to its contents. The Panel also noted that the complainant identified his signature on his resignation letter of 27th June 2008, and that he accepted his payments for long service benefits and one week pay. In view of those facts, the Panel is not convinced that the complainant was forced to resign.

Having established that the complainant voluntarily resigned, the important question to consider was whether his resignation was one of constructive dismissal, and if it was, whether it was unfair. In constructive dismissal claims, the employee must prove that his or her resignation was in response to the employer's action, one that amounts to a fundamental breach of the contract of employment. The Panel must direct it's mind to the facts of the present case. The Panel must be satisfied that the complainant's resignation was a result of any situation arising from action of the employer that rendered his continuous employment unbearable. That is to say, that as a result of the respondent's action, the complainant had no other option but to quit his job. We are not satisfied on evidence before the Panel that the respondent's action had resulted in a situation that the employment relationship between the complainant and the

respondent had been seriously affected. It is incomprehensible why the complainant would want to reapply to work for the respondent after just five weeks resignation, if his resignation was a result of a situation introduced by the respondent that renders his continuous employment intolerable. In the Panel's assessment of available evidence, the complainant's resignation was to facilitate his own interest to study overseas in the absence of an overseas training policy by the respondent company.

In further evidence by the complainant, he claimed that there was a difference between the management and employees. He appears to think that those like him who have been working for a long time were targeted for removal from the company. In the absence of any further evidence to corroborate such claim, the Panel dismisses the contention that his resignation was due to a difference between management and employees.

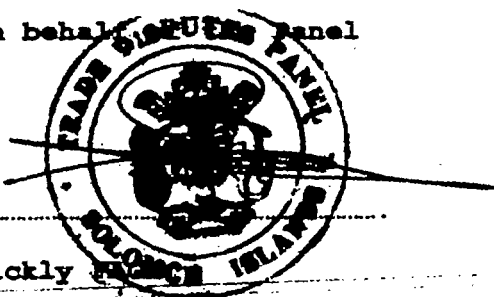
Having had time to consider the evidence, the Panel finds that the complainant had not made his case of constructive dismissal, and accordingly dismiss the complaint.

We make no order as to Panel expenses.

There is a right of appeal against this finding on points of law only within 14 days from the date of this finding.

Dated the 4th of September 2009

On behalf of TRADE DISPUTES PANEL



Wickly

Deputy Chairman/Trade Disputes Panel