

IN THE TRADE DISPUTES PANEL )

OF SOLOMON ISLANDS )

Case No: UDF 80 of 2010

IN THE MATTER of the Unfair  
Dismissal Act 1982

AND IN THE MATTER of a  
complaint of Unfair Dismissal

BETWEEN: STEPHEN KIDO DALIPANDA

Complainant

AND: MINISTRY OF DEVELOPMENT PLANNING AND AID COORDINATION

Respondent

Submission: 20<sup>th</sup> September, 2012, Honiara.

Decision: 20<sup>th</sup> August 2013.

Panel: Wickly Faga Deputy Chairman  
Walter Tesuatai Employee Member  
Sika Manuopangai Employer Member

Appearances: Linda S. Folaumoetui & Eddie Ki'i on behalf of  
the Complainant.

Augustine Rose, representing the Respondent.

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FINDING

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The complainant lodged his complaint of unfair dismissal pursuant to section 6(1) of the Unfair Dismissal Act 1982 (cap77). In his TDP 1 Form, the Complainant raised two grounds in support of his Complaint; "1. Termination letter [was] not proper without giving any reasons - Refer section 82 of Manual and Labour Laws," and "2. Payment of 2010 COLA as per s.23 of the Manual." This second ground was ruled irrelevant for the purpose of this case. The Panel will only make a determination

on the question; whether the Complainant was fairly or unfairly dismissed by the Respondent, based on the grounds of this application.

The Respondent's case is that the Complainant was on probation and during his 6 months probation; which was further extended for another three months, he was not able to prove to the Respondent that he could satisfactorily carry out the job that he was recruited for.

The Complainant's case however was that he was unfairly dismissed on the basis that, 1. he was not involved in the second performance assessment, 2. Second assessment could not be an accurate assessment of his performance during his probationary period; 3. the Respondent did not comply with the relevant provisions of the Pay and Conditions of Service Manual, for example, section 16 and 17, and 4. that the warnings as alleged by the Respondent were made in the dying hours of his probationary period.

The Respondent's evidence was by way of cross examination of sworn statements and evidence in court. Jane Waetara and Rose Tungale gave evidence in support of the Respondent's case. Ms. Waetara, who now works as a freelance consultant, identified her sworn statement made on the 17<sup>th</sup> April 2012, and was admitted as her evidence. Rose Tungale who was head of National Authorizing Office identified her sworn statements made on the 5<sup>th</sup> April 2012 and another made on the 17<sup>th</sup> April 2012, which were admitted as her evidence in court. The Complainant was the only witness in support of his case.

The common facts are that; the Complainant signed an employment contract with the Deputy National Authorizing Officer (DNAO) of the Ministry of Development Planning and Aid Coordination which administers and oversees European Union Development Funded ("EU funds"), development projects in Solomon Islands. The Minister of Planning is the National Authorizing Officer for EU funds. That function was however delegated to the Permanent Secretary who is also known as the Deputy National Authorizing Officer ("DNAO"). It was recognized that the Pay and Conditions of Service Manual of the Respondent would accompany the employment contract. The Complainant signed an employment contract with the DNAO on the 15<sup>th</sup> June 2009. Due to delay in the program estimates being approved, the employment contract did not commence until

21<sup>st</sup> September 2009. The Complainant was under a period of six months probation from 21<sup>st</sup> September 2009 to 21<sup>st</sup> March 2010.

On or about the 16<sup>th</sup> March 2010, a performance review was carried out in relation to the Complainant's performance. The Respondent was not satisfied with the Complainant's performance so it extended his probationary period for a further 3 months. During the period between May to July 2010, the DNAO issued letters to the Complainant. The letters were about the Complainant's lack of administrative control over office property. On the 5<sup>th</sup> July 2010, the Respondent again assessed the Complainant's performance and was still not satisfied with his performance.

On the 19<sup>th</sup> August 2010, the DNAO wrote to the Complainant informing him of his unsatisfactory second review and the decision to terminate his contract. By a letter dated 30<sup>th</sup> August 2010, DNAO on behalf of the Respondent terminated the Complainant's contract under clause 22.2 of the employment contract and the Complainant was paid \$28,000.00. On the 31<sup>st</sup> August 2010, the Complainant wrote to the Respondent expressing his disappointment but he further requested for 33 days annual leave entitlement. He was paid a further \$12,631.80 for his annual leave entitlement. On or about September 2010, the Complainant filed his Complaint with the Panel Secretary alleging unfair dismissal.

The only points of contention which now appears to form part of the Complainant's ground of this application are, the manner in which the second performance assessment was carried out and the alleged noncompliance with section 16 and 17 of the Pay and Conditions of Service Manual.

With unfair dismissal complaints, the onus of proving fair dismissal rests with the respondent in instances where the Respondent admits that it dismissed the Complainant. The evidence by Rose Tungale and Jane Waetara showed that the Complainant was fired under clause 22 bullet point number 2 of the Contract of Employment because he failed to demonstrate during his 9 months probationary period that he was capable of managing RAMP project. According to evidence of Rose Tungale and Jane Waetara, the Complainant had not performed to the expectation required of the job which he had been recruited for during his probationary period, so the Respondent made the decision to terminate him.

Clause 22 of the Contract of Employment states that:-

*"In accordance with the details set out in the Manual on Pay and Conditions of Employment, this agreement may be terminated by...either party giving in lieu of notice aforesaid, three months salary..."*

A probationary period is used by most employers to assess the suitability of new recruits. A probationary period is often stipulated in a contract of employment. Usually a probationer must prove to the satisfaction of his or her employer that he has the capability to do the job. If he or she does not perform to the expected standard, the employer may terminate his or her employment giving notice or pay in lieu of notice.

Section 4(4) (a) of the Unfair Dismissal Act anticipates a probationary period of employment so any employee who is dismissed within 26 weeks (which is 6 months), beginning from the date of his employment, cannot claim for unfair dismissal.

Our present facts have an interesting twist to it. The Complainant was on probation for 6 months. At the end of the 6 months, the Respondent was not satisfied with the performance of the Complainant. But instead of terminating him within the 6 months and avoid any unfair dismissal claim, the Complainant was given a further three months to prove himself. At the end of the further three months, an assessment by the Respondent found that the Complainant's performance was still unsatisfactory, so a decision was made to terminate his employment. He was paid three months in lieu of notice and holiday accrued.

The Panel is therefore of the view that even though the Complainant was on probation at the time of his dismissal, he had already worked more than 6 months, so any issues regarding his performance should comply with the disciplinary procedures under his contract of employment.

In determining whether the Complainant was fairly dismissed or not, the Panel must consider two questions, the first question is whether the Complainant was dismissed for a substantial reason, and the second question is, whether the Respondent acted reasonably in treating that reason as sufficient for dismissing the Complainant. The first question therefore is whether the Complainant was dismissed for a substantial reason of a kind such as to justify his dismissal. The Panel took time to consider all available evidences and submissions, and is satisfied that the reason for dismissal is of a substantial nature. As an employee on probation, the Complainant was

expected to perform to a standard required by his employer, the Respondent. If he had not been performing up to that expectation, the Respondent has all the right to terminate his employment. The Respondent in this matter was not satisfied with the performance of the Complainant so it made the decision to terminate his employment.

Having established that the Complainant was dismissed for a substantial reason, the next question that the Panel must consider is whether the employer acted reasonably in treating the reason as sufficient for dismissing the Complainant. The Respondent's witnesses stated in their sworn statements and during cross-examination that the Complainant was invited to attend a review of his performance on the 16<sup>th</sup> March 2010. The review found that the Complainant's performance was unsatisfactory. He was therefore given a further three months to show improvement in his performance. After the further three months a second performance review was conducted on the 5<sup>th</sup> July 2010. The review concluded that the Complainant had shown no improvement in his performance, therefore a decision was made to terminate his contract of employment. It further submitted that there is no provision under the contract of employment or the Manual that requires the Respondent to provide the Complainant with charges and any right of reply to the charges alleged by the Respondent.

The Complainant however stated that the second assessment report was not an accurate assessment of his performance, because he was not involved in it. A decision to terminate him was based on that report.

The fact that the Complainant was not given an opportunity to respond to the allegation of non-performance is enough to suggest that the decision to terminate him was reached after going through a process that fails to comply with one of the basic rules of natural justice, the right to be heard. Also the absence of any provision in either the contract of employment or Manual of any existence of a separate policy for employees under probation, would in the Panel's view, support the Complainant's argument that, he had not been given time to answer to the charges under the normal disciplinary provisions of the contract of employment and the Manual.

The Panel had after considering all available evidences and submissions is satisfied on the balance of probabilities that

the Complainant had not acted reasonably in treating the reason as sufficient for dismissing the Complainant. In all the circumstances, the Panel finds that the Complainant's dismissal was unfair.

In awarding Compensation, the Panel takes into account that the Complainant had only worked for 9 months with the Respondent, and that he had already been paid three months in lieu of notice, and holiday accrued. In all the circumstances of this case, the Panel makes a fair and reasonable compensation award.

**Award**

1. Compensation award \$20,000.00

The respondent unfairly dismissed the complainant and is to pay \$20,000-00 to **Stephen Kido Dalipanda** being payable immediately and is recoverable as a debt under section 10 of the Unfair Dismissal Act 1982.

**Appeal**

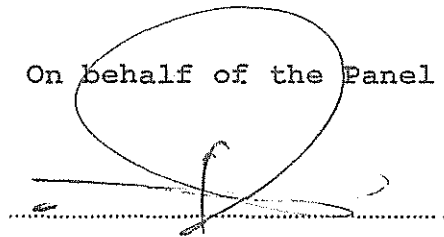
There is a right of appeal to the High Court within 14 days on points of law only, and any party aggrieved by the amount of compensation awarded may within one month of the date of the award appeal to the High Court as provided for under the Unfair Dismissal Act 1982, S. 7 (3).

**Panel Expenses**

The Panel fixes a contribution of \$500-00 to cover Panel expenses, and this amount is to be paid by the respondent within 14 days from the date of this decision.

Dated the 20<sup>th</sup> of August 2013

On behalf of the Panel



Wickly Faga

DEPUTY CHAIRMAN/TDP