Hougland v Tonga Family Planning Association

Supreme Court
Civil Case No.25/1989

10 1 December 1989

Administration law - principles of natural justice - not applicable to private employment
Natural justice - principles not applicable to private employment
Contract - employment - conduct justifying summary dismissal
Employment - conduct justifying summary dismissal
Contract - illegality - contract of employment not illegal because employee does not have wor permit
20 *Employment - probation period*

The plaintiff was employed by the first defendant as a programme officer for a probation period of 3 months from 1 February 1989. Later in February 1989 she was summarily dismissed on the ground of misconduct and bad relations with staff. She brought proceedings claiming a breach of natural justice and of the terms of her contract of employment, and the defendant raised the defence that the contract of employment was unenforceable for illegality since the plaintiff did not have a work permit, also that the plaintiff was on probation and could be dismissed at any time.

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HELD:

Upholding the plaintiff's claim.

(i) the principles of natural justice did not apply to the plaintiff's dismissal since her employment was solely a relationship between private persons;

(ii) the contract was not unenforceable for illegality because it is not a criminal offence under the Control of Immigration Act 1969 to work without a work permit;

(iii) a contract of employment on probation is no different from any other contract of employment and may be terminated without notice only in circumstances 40 which justify summary dismissal so she was entitled to reasonable notice of termination, which was 2 weeks, or wages in lieu thereof.

Cases considered
Ridge v Baldwin [1963] All ER 66
Addis v Gramphone Co [1908-10] All E Rep 1
Cassell v Broome [1972] 1 All ER 801

Martin CJ

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Judgment

Deborah Hougland was employed by Tonga Family Planning Association ("the Association") and was dismissed without notice. She claims damages in contract for wrongful dismissal by the Association. She says

1. that her dismissal was in breach of the rules of natural justice and decided for improper motives;
2. that it was in breach of her constitution alright of freedom of worship, claiming that one reason for her dismissal was her Bahai faith.
3. that her dismissal was premature termination of a fixed term contract for 3 months.

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She orginally claimed damages in tort for interference with her constitutional right of freedom of worship.

She originally claimed damages for defamation by the second defendant Mrs Foliaki, but that is not now pursued. The defence says that her contract of employment was illegal and unenforceable because she had no work permit; alternatively that she was employed on probation and that she could be dismissed at any tiem without notice.

The Facts

The Association is a charitable body affiliated to an international organisation and governed by an executive committee. Mrs Foliaki is its President.

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The employment of Mrs Hougland

The Association decided to appoint a programme officer. Mrs Hougland applied for the job. Towards the end of January 1989 she was interviewed by a sub-committee.

Both before and during the interview Mrs Hougland was asked if she had a work permit. Tevita Ti'o recalled that she said she had, but it was at home. Mrs Foliaki thought she said she had one and "... I have no problem". Mrs Hougland said that she simply said "I've never had any trouble with my visa". In fact she did not then have a work permit, and she must have known that. She had applied for a permit some time before, but had received no reply. She herself said in evidence "I knew the visa situation was not settled". Her reply was misleading and evasive. But the members interviewing her assumed that she had the required permit.

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In this belief the subcommittee agreed that she should be appointed on 3 months probation. It had no power to make the appointment itself, without confirmation by the full executive committee. But on the invitation of the Association's Executive Officer, Sione Kengike, Mrs Hougland began work on 1 February 1989, and was paid. Although the proper procedure was not followed, she became an employee.

She was never given a letter of appointment. One was prepared but never sent to her. She was given a job specification. Apart from that the only terms clearly agreed were her salary ($6,500 p.a.) and that she was employed on 3 months probation. Different terms were used by different witnesses, but there is no effective difference between "... a trial period of 3 months ..." and " ... 3 months probation ...".

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The dismissal of Mrs Hougland

Difficulties were soon experienced in the office. Some of the existing staff did not get on with Mrs Hougland. Mr Kengike called 2 staff meetings to try to resolve the problem, apparently without success.

The executive committee met on 20 February 1989. Until then most members did not realise that Mrs Hougland had started work. There was some discussion about

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whether she should have done so, but that is not relevant for the purpose of this case. Mr Kengike presented a report on her. The committee's decision was based on that report. There are conflicting views on what he said.

I found the evidence of Mr Kengike difficult to accept. It became evident during the course fo the trial that he ahs said one thing to one person and something different to another. It is impossible to know which version is correct. The only safe course is to ignore his evidence altogether and to ascertain what happened at the meeting from other sources. I do not find the minutes particularly helpful as they have been shown to have a number of inaccuracies (despite being confirmed at a subsequent meeting), and there is no reason to suppose taht one part is more accurate than another. That leaves the evidence of others who attended the meeting, Viliami Salakielu, Tevita Tio and Masima Sefesi. They gave their evidence fairly and convincingly.

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I find as a fact that Sione Kengike made a series of complaints about Mrs Hougland:

1. that she was frequently late for work;
2. that she had used the Association's vehicle for her own purposes;
3. that she had entered his office and taken documents without his consent;
4. that she did not get on well with staff.

He balanced this by saying she was well qualified and good at her job.

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In evidence Mr Kengike said that he told the committee that he had given permission for her to be late, and to use th vehicle; and that he did not mind her going into his office. None of the other members recalled this.

Viliami Salakielu said: "... if Kengike had said that he gave permission to be late, or to use the vehicle, or had permission to take documents, I don't believe the committee would have dismissed her". He was particularly concerned about quarrels in the office.

Tevita Tio said: "... if he had said these things we would not have made the decision".

And Masima Sefesi flatly denied that Mr Kengike said anything about giving permission to use the vehicle or to be late.

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The other members knew nothing about Mrs Hougland and relied on information from Mr Kengike. On the basis of his report, they were led to believe that Mrs Hougland was unsatisfactory. If he had qualified his comments as he said there would have been little cause of concern. I do not believe Mr Kengike's evidence on this point.

The matter was considered at length and a decision taken to dismiss Mrs Hougland (subject to obtaining legal advice). During the deliberations there was some reference to her Bahai faith. I have considered the evidence on this point very carefully, because it is a very important matter. I have concluded that her faith was mentioned in passing but that it formed no part of the reason for her dismissal.

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The reasons for her dismissal were her alleged misconduct and bad relations with other members of staff. These are not sufficiently serious to justify summary dismissal in a normal contract of employment.

Soon after the meeting Mrs Foliaki saw Mrs Hougland in Mr Kengike's office. Mr Kengike was also present. She told Mrs Hougland of the complaints made by Mr Kengike. Mrs Hougland was surprised, and asked him if he had really made these complaints. He confirmed that he had. She became upset and left the office. Mr Kengike mentioned that she had no work permit, and Mrs Foliaki went out to ask her specifically is she had one. Mrs Hougland said that she would ask her husband. She denies that Mrs Foliaki told her not to come back unless she brought her work permit, but I accept Mrs Foliaki's evidence

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that she did. I think that Mrs Hougland was so upset at this stage that her memory for detail is unclear.

Mrs Hougland came in to work on the next two days. On 22 February after a discussion with Mr Kengike she left the office and went to consult her lawyer, Mr Niu. It was Mr Niu who was informed that she had been dismissed.

The work permit

Mrs Hougland had been granted a work permit some years ago when she worked as a teacher at Tonga High School. She ceased work to have a family. The original permits for herself and her husband having expired, they both applied some time ago for a permit to reside. It seems that their applications were lost. Nothing happened. Just as all this disagreement was occurring they were called to the immigration office. It was not at their request. Although it was denied, it is impossible to resist the conclusion that it was as result of an approach from the Association. They explained their position, and on 28 February each completed a further application for a residence permit. Mrs Hougland gave as her reason for applying: "to accompany husband". Permits were issued on 15 March 1989, back dated to 5 May 1987. The officer dealing with the application noted that this was done because they were waiting for a reply to an earlier application.

The copy of Mrs Hougland's permit on the Immigration Officer's file (Ex 15) shows that she and her children were allowed to enter and reside "... as dependants (of her husband)". The copy which she produced (Ex 3) has the address, and the words "as dependants" and her husband's name whited out; there is handwriting over these to show her address as "Family Planning - Nuku'alofa" and that she was authorised 'to take up employment with Family Planning Association". The Immigration Officer, Commander Kolokihakaufisi, was quite clear about their practice. If a mistake were made in a permit issued, an alteration may be authorised by only him or the Principal Immigration Officer (or the person acting in either capacity in their absence). If authorised, the old permit would not be changed but a new one issued.

Unauthorised alterations have been made to the permit produced by Mrs Hougland. It did not authorise her to take up employment at the relevant time.

The Law

The right to a fair hearing

This is a concept of public law. Public law is applied to make public bodies behave properly. A public body has responsibilities to the general public, which has a strong interest in ensuring that persons who serve it are treated properly and fairly. For that reason the Court may intervene in such matters. But the situation is different with contracts between private citizens. The Court will not interfere with terms agreed between freely contracting parties, and will seldom impose terms not clearly agreed between them.

At common law, there is no right to a fair hearing in a pure master and servant relationship. Lord Reid explained this in Ridge v Baldwin [1963] 2 All ER 66 (at p.71):

> "The law regarding master and servant is not in doubt ... the master can terminate the contract with his servant at any time, and for any reason or none ... the question in a pure master and servant case does not depend on whether the master has heard the servant in his own defence; it depends on whether the facts emerging at the trial prove breach of contract ..."

In order words, the sole question is: has the employer broken any term of the

contract? That includes express and implied terms.

Can the right to a fair hearing be implied, by statute or otherwise? There is no statutory protection for employees in Tonga. There is legislation in England which creates a statutory code of conduct, but this is designed to meet English circumstances. It is not a statute of general application and cannot be introduced into Tongan law under the Civil Law Act. Apart from statute, a term may only be implied into a contract if it is obvious that both parties intended it, or the contract does not make sense without it. Neither applies in this case. In this contract no terms as to a fair hearing can be implied.

210 On the present state of the law of Tonga, there is no right to a fair hearing between employer and employee unless there is an element of public service which will enable the Court to apply public law principles. If a change is required, it is for Parliament and not for the Court to make it.

This is a case concerning only private rights. There is no element of public law. The Association is a private organisation. It owes no special duty to the public and it is not answerable to the public for its actions. The principles of natural justice do not apply.

Even if that were not the case, it seems to me that the formality of a fair hearing would have made no difference to the decision of the Association. It is a small organisation with a few people working together in close proximity. In order to operate with any degree of
220 effectiveness the employes must work together. Whether or not Mrs Hougland was at fault, her introduction resulted in discontent and acrimony. The obvious remedy was to remove the cause of it. The remedies for breach of natural justice are discretionary and it would make no sense to award compensation for a procedural error which would not have affected the decision made.

Illegality

Part IV of the Control of Immigration Act 1969 regulates the entry of foreigners into Tonga. Under section 10 a visitor's permit may be granted to a temporary visitor who intends to leave within 6 months. Mrs Hougland has been here far longer than 6 months.
230 She needs a "permit to enter and reside" granted under section 9. Such a permit may be granted subject to conditions, ineluding as to employment. One of the conditions of her (retrospective) permit is:

> "that no other form of employment is to be undertaken while in the Kingdom except with the permission of the Principal Immigration Officer."

No employment at all is authorised.

The Act does not make it a criminal offence to work without a permit. The sanction appears to be the possibility that the residence permit may be revoked, or not renewed. This is a matter for the Prinicpal Immigration Officer. But that does not necessarily make
240 the contract unenforceable. A contract entered into in breach of some statute remains enforceable unless the policy of the statute falls within one of the recognised heads of public policy such as injury to good government, justice, morality, etc. The control of Immigration Act falls within none of the recognised categories.

I hold that the contract of employment is not unenforceable by reason of illegality.

The effect of employment "on probation".

There is nothing special about a contract of employment on 3 months probation. It is not a contract which cannot be determined before the end of 3 months. Nor is it a contract which may be terminated without notice at any time, unless there are circumstances
250 which justify summary dismissal. It is a simple contract of employment during which the

normal rules apply. The only special characteristic is that the contract will expire authomatically at the end of the probationary period unless the probationer is entitled to the same rights and is subject to the same obligations as any other employee. In particular, he amy be dismissed summarily for sufficient cause, or at any time on proper notice. In the circumstances of this case proper notice would be 2 weeks - the interval at which Mrs Hougland was paid.

Summary of Conclusions

1. Mrs Hougland was not dismissed because of her faith. Her claims based on this ground fail.
2. She was not gien an opportunity to reply to the complaints against her, but the Association was not obliged to afford her that opportunity. Alternatively, even if a fair procedure had been adopted it would not have made any difference to the decision to dismiss. Her claim on this ground fails on this point.
3. She did not have a valid work permit at the time when she was employed, but this does not render her contract of employment unenforceable. The defence fails on this point.
4. Her conduct was not such as to justify dismissal without notice. Her dismissal without notice was therefore a breach of contract and to that extent her claim succeeds.

Damages

1. **Compensatory damages**

Mrs Hougland could have been dismissed at any time on 2 weeks notice. Her damages under this head are the equivalent of 2 weeks pay = $271.00.

2. **General damages**

These are intended to compensate for loss which is incapable of precise calculation. They are seldom awarded for breach of contract. Damages cannot be awarded for distress occasioned by wrongful dismissal (Addis v Gramophone Co [1908-10] All E Rep 1). There is no entitlement to general damages in this case.

3. Aggravated damages

These are awarded to give a plaintiff additional compensation for the conduct and motive of the defendant. They cannot be awarded for wrongful dismissal (Addis v Gramophone Co), but even if that were possible I find nothing in the conduct or motives of the Association to justify such an award.

4. **Exemplary damages**

These can only be awarded in a very limited number of cases, to punish the defendant for its behaviour and to deter repetition. See, for example, Cassel & Co Ltd v Broome [1972] 1 All ER 801. There is nothing whatever in the behaviour of the Association to justify such an award.

Judgment will be entered against the Association for $271.00. The claim against Mrs Foliaki for defamation having been dropped, there is no other valid claim against her and the claim against her is dismissed.

As to costs, the plaintiff has recovered only a very small proportion of the sum claimed. She has abandoned her claim in defamation and has failed to establish any breach of her constitutional rights. On the other hand I believe that she was misled by the Association's executive officer Mr Kengike, to believe that the facts were other than they

were, and to that extent the Association has brought this action upon itself. I therefore make no order as to the costs of the first defendant. Mrs Hougland must pay the costs of the second defendant to be taxed if not agreed.