

## Masiwawa v Tupouniua

Supreme Court, Nuku'alofa  
Webster J.  
Civil case No. 182/1989  
15, 16, 17 and 25 January 1990

*Contract – breach of terms*

*Contract – employment – no power to suspend without pay*

*Employment – no power of private employer to suspend without pay*

*Contract – fundamental breach*

The plaintiffs were employed by the defendant to work in a restaurant owned by the defendant for a period of 2 years from November 1987. In January 1989 the defendant told the plaintiffs that he was suspending them without pay and closing the restaurant until his return from overseas. In February 1989 the defendant made an agreement with the plaintiffs to terminate their services, pay them back pay, and pay their air passages back to their home country. It was also arranged that the defendant would pick them up and take them to the airport where the balance of the money due would be paid and the tickets handed over. There was confusion as to where the plaintiffs would be picked up and in fact they were not picked up or taken to the airport, nor were they given the balance of back pay or their tickets. The plaintiffs then sued the defendant for breach of contract.

### HELD:

- (1) The defendant as a private employer had no right to suspend the plaintiffs without pay;
- (2) It was not a fundamental term or condition of the contract made in February 1989 that the plaintiffs would be at a particular place to be picked up or taken to the airport;
- (3) The defendant was therefore obliged to observe the terms of the agreement made in February 1989.

Counsel for the plaintiffs : Mr S. Hola  
Counsel for the defendants : Mrs P. Taufaeau

### Judgment

The Plaintiffs Viliame and Temo Masiwawa are Fijians and are husband and wife. They were employed by the Defendant Sione Tupouniua in the Arcade Restaurant, Nuku'alofa under 2 year contracts dated respectively 20th and 25th November 1987. Viliame was the Chef and Temo his assistant.

The Statement of Claim alleges that the Defendant terminated these contracts contrary to their terms and claims for -

- (a) back pay for days worked and not paid
- 50 (b) return air passages for themselves and one child to Fiji
- (c) return of the passports of Temo and their child (already carried out) and compensation for the loss of passports lost while in the custody and care of the Defendant
- (d) 2 weeks holiday pay each (withdrawn at the trial)
- (e) pay and compensation in respect of the remainder of the periods of their respective contracts.

Apart from (a), the Defendant denied any legal obligations to the Plaintiffs in respect of the items claimed.

80 Both Plaintiffs gave evidence themselves and also led evidence from Taufua Moala 'Eua, who at the time was helping in the Arcade Restaurant, about attempting to pick up the Plaintiffs in Sopa on 10th February, 1989. The Defendant also gave evidence himself but led no other witnesses.

On the evidence I find the following facts established -

1. The Arcade Restaurant was opened by the Defendant in December 1986 but has never at any time made a profit. On an average it had only 10 customers each day. The Defendant closed it on 17th January 1989 and it has not re-opened since, except to serve drinks on 2 days.
- 70 2. The First Plaintiff Viliame Masiwawa was asked by the Defendant to come from Fiji as specialist Chef of the Restaurant and was so employed under a contract of employment dated 20th November, 1987 and registered with the Magistrates' Court the same day (Reg. No 4449/87) (Exhibit 1). According to the contract and the evidence of the Defendant his duties were primarily cooking and assisting with the efficient operation of the restaurant, not managing it. Day to day management was done by the Defendant's wife, who was unfortunately overseas at the time of the trial and not available to give evidence.
3. The Second Plaintiff Temo Masiwawa was also employed at the Restaurant under a similar contract of employment dated 25th November, 1987 and registered with the Magistrates' Court on 27th November, 1987 (Reg. No. 4589/87) (Exhibit 4). Her job was to be an assistant to the Chef and to help perform his duties.
- 80 4. The Plaintiffs performed their duties at least satisfactorily until the incident that provoked this case occurred on 14th January, 1989. The First Plaintiff Viliame said there were no problems, though while the Defendant agreed that Viliame had done his fair share of work during his time at the restaurant, he would not agree that Viliame had done a good job. However, if actions speak louder than words, after 1 year's service the Defendant thought well enough of Viliame to give him 4 weeks holiday on full pay in October or November 1988 with his return fare
- 90 to Fiji.

5. Just after Christmas 1988 the Defendant and his wife went on holiday to Australia. Viliame was left in charge of the restaurant during this time. They arrived back in Tonga at midday on Saturday 14th January 1989. Mr Tupouniua had intended to have dinner with his family at the restaurant that evening to celebrate the New Year. He said that he had telephoned from Australia to fix this up but in evidence at first he could not remember which member of staff he had told, later he was certain that it was his secretary, but as she did not give evidence it was not established that the message had been passed to Viliame. Again although the Defendant denied  
100 looking forward to Viliame's cooking, the Defendant is unlikely to have arranged a family gathering at the restaurant unless Viliame's cooking was satisfactory.

6. In the event Viliame did not turn up at the restaurant that evening. He claimed that he had been sick since p.m. Friday 13th with a leg or back pain and could not walk to go to a doctor or the hospital and so did not have any sick note. While Temo confirmed this, there was in effect no independent evidence that Viliame was sick (but this is not material to the result of the case). Viliame did not go to work on Monday 16th either, again because he said he was sick.

7. The result was that the Defendant could not have his meal at the restaurant and was very upset and disappointed. Temo said that she had been at work on Saturday 14th and had said Viliame was sick, the Defendant admitted having been told that later that night. The Defendant said that meantime he went round about 8 p.m. to see Viliame at the house where he was living at Sunia'akaveka Road, Kolomou'a/Sopu; there were no lights on in the house and he sounded the car horn twice but there was no answer - from that he assumed that Viliame was not there. In contradiction to this, Viliame's evidence was that at this time he was at home lying down because he was sick. Temo also said that she was at home at that time (although it was not clear from the evidence whether this was possible if she was working) and did not see the Defendant  
110 or any car coming. The Defendant did admit in evidence that it was physically possible that Viliame had been in the house when he called but said that he thought it unlikely for Viliame to go to bed as early as that because he enjoyed kava drinking. There is therefore conflicting evidence although it is not necessary for the decision in this case for the Court to decide where the truth lies. But it was not disputed that Viliame did not work on Saturday 14th January and did not produce any sick note to the Defendant.

8. The Defendant said that he also called at the Plaintiff's home on the evening of Sunday 15th and again there were no lights on in the house: he knocked but there was nobody there. Again Viliame said that he was at home that evening but nobody came around, while Temo said that on Sunday evening she went to church. Again the conflict of evidence is not material.

9. Once more on the evening of Monday 16th the Defendant said he went round to the Plaintiff's home but nobody was there. He said that Temo had been at work that day but Viliame had not. Again Viliame said he had been at home that evening but nobody had come round.

10. The Defendant did not leave a note asking Viliame to see him on any of these occasions.

11. This all so upset the Defendant that on Tuesday 17th January, before he left  
140 again for overseas on Wednesday 18th, he wrote a letter to Viliame telling him

that he was closing the restaurant until his return and putting Viliame on leave without pay until then. The reason he gave was Viliame's unsatisfactory behaviour since the Defendant's return, problems with staff (impliedly other staff) and lack of customers, resulting in the takings not even covering Viliame's pay. The Defendant believed that the shortage of customers was due to the poor quality of the food, though this was not established in evidence. Even the presence of a well known Fijian singer Sakiusa had not helped. The other staff were employed (and paid) at the takeaway.

150 12. Under cross-examination the Defendant said that he did not really mean the last paragraph of the letter and that he never at any time intended not to pay Viliame during this period but wanted to reprimand him and make him think that because the business was not doing well Viliame also should take some of the consequences. However I find this difficult to accept and believe this is a view with hindsight rather than the Defendant's intention at the time. Indeed the Defendant admitted in evidence that he saw things differently on his return when he had "cooled down", implying that his action had been taken in the heat of the moment. In any case at the time there was no indication to Viliame that his suspension without pay was  
160 not intended.

13. Not surprisingly the suspension without pay came as a great shock to Viliame and Temo. Temo stopped work voluntarily on Tuesday 17th January and without Viliame's pay they could not afford to pay their domestic expenses, school fees etc.

14. When the Defendant returned to Tonga the Plaintiffs went to see him almost immediately on Tuesday 7th February and asked to leave their jobs and return to Fiji. The defendant said that while overseas he had been thinking of plans to alter things at the restaurant by providing a buffet instead of a la carte service and was  
170 therefore taken by surprise. However he knew from experience that once a cook had made up his mind to go it was not worth keeping him and so agreed and said that he was happy to pay the Plaintiffs' air fares even although he had no legal obligation to do so.

15. The Defendant also said that he would give the Plaintiffs \$600 to assist them with their travel back, partly to cover what he owed them as back pay and partly he said because he was trying to be fair to the Plaintiffs, \$400 was for Viliame and \$200 for Temo. Viliame said they asked for their money but in the witness box certainly was not clear why the \$600 was to be given, though Temo said it  
180 was because the Defendant asked them not to take him to court, but this was not otherwise corroborated. The Defendant denied that from a business point of view he would have been happy to see the Plaintiffs return to Fiji and so cut his losses, but I did not find this denial very convincing. I cannot think that a businessman would pay out almost \$1,000 without some good business reasons for doing so. 16. The Plaintiffs asked for cash immediately to do some shopping and got \$100 from the till at the takeaway. They arranged with the Defendant that they would get the remaining \$500 at the Arcade Restaurant at 12 noon that day but waited till 12.30 p.m. and the Defendant did not turn up. The Defendant in his evidence  
190 first claimed that he made it clear that the \$500 would be paid by bank draft but

later admitted that he thought he did say that and did not keep to it because it was "one of 25 matters he was attending to".

17. The next event was that the Defendant set out the arrangements in a letter to the Plaintiffs dated 8th February, 1989 (Exhibit 4). The contracts were to be terminated and the Plaintiffs were booked on a flight to Fiji at 2200 on Friday 10th February. The "balance of your money \$500 will be made to a Bank Draft in your name in Fijian currency and will be given to you on Friday evening by our driver who will drive you to the Airport". In the letter the Defendant also thanked the Plaintiffs for their services and wished them and their family all the very best in the future. At the bottom of the letter it is stated "I hereby agree to the above" and signed by Viliame.

18. It was not clear from the evidence why the \$500 was to be paid by a bank draft in Fijian currency and only given to the Plaintiffs at the airport on the 10th. The Defendant said that it was his policy not to make payments of over \$100 in cash as there would be no documentation, but it would have been easy to hand over cash in exchange for a signed receipt. Even so there was no real obstacle to paying the Plaintiffs by cheque or bank draft in Tongan pa'anga before the Friday, but the Defendant said it would be beneficial to the Plaintiffs taking the money into Fiji as they would get a better rate for the bank draft. However it was clear that the Plaintiffs were not given the chance to say how they would like the money to be paid.

19. Viliame said that at the meeting on 7th February they asked for the return of Temo's passport, which had been held by the Defendant since he applied for a work permit for her. Viliame's had been given to him for his trip to Fiji in 1988. There was no dispute in evidence that at the time on 7th - 8th February the Defendant could not find Temo's passport and was unable to do so before the Plaintiffs intended departure on 10th February because it was mislaid in his office and the Defendant's secretary was not at work on at least one of those days.

20. The Defendant said that he checked with the Immigration Department that the Plaintiffs could return to Fiji without passports provided the airline would allow them to fly. He said he checked with the airline (Air Pacific) and they would allow it if Temo could prove she was a Fiji citizen, but the only way the Defendant could suggest of providing this proof was that Temo "looked like a Fijian and was known to the airline people as a Fijian". I was not convinced that the Defendant had in fact checked with the airline. Viliame's evidence was that he got some kind of piece of paper from the Immigration Department but was told by an Immigration Officer that Temo could not leave without a passport: nevertheless he decided still to go to the airport to find out what the true position was.

21. On the evening of Friday 10th, Viliame and Temo packed their bags and were ready to be collected at the appointed time. It was not clear whether this was 6 p.m. (according to Taufu) or 7 p.m. (Viliame) or 8 p.m. (Temo) but I think the uncertainty is due to the passage of time rather than confusion about the time. Throughout their evidence I found both Plaintiffs, and especially Temo, very vague about details and dates. The Defendant did not establish precisely when the pick-up time was to be, and I do not consider that time was the reason why the collection did not take place.

22. Viliame and Temo both said that they waited "at home" for the Defendant's driver to collect them on the evening of Friday 10th, and he never turned up, but they also gave evidence that when Viliame was suspended without pay they went and stayed with Temo's sister Kituy Fong. Temo said the house was at Halaleva but I think she may have been flustered and mistakenly given the wrong name of the place. It was not put to them directly in evidence that they were somewhere other than Sopus. Taufu, on the other hand, came in the Defendant's car to the house in Sopus provided by the Defendant for the Plaintiffs with the airline tickets and the bank draft (Exhibits 5 and 6) but nobody was there and the doors were locked. She believed that the Plaintiffs, had moved to the house of another Fijian in Longolongo but the driver had said that they should go straight to the airport and meet the Plaintiffs there, but the Plaintiffs did not turn up at the airport. The Plaintiffs did not get to the airport that evening and did not catch the flight on which they were booked.

23. Taufu also said in evidence that she knew on the Friday afternoon that the Plaintiffs had moved to another house when the key to their house in Sopus was returned. The Defendants wife 'Ana had been told of this but said that Taufu was to stick to the arrangement to pick up the Plaintiffs from the house in Sopus. As 'Ana did not give evidence this could not be put to her, but her action may not have been as malicious as it might appear. It may have been sensible to keep to the original arrangement, though at the same time it may have been possible with a little effort to find the Plaintiffs and get them to the airport. The Defendant apparently did not know of all this till later that evening.

24. The Plaintiffs did not immediately approach the Defendant but on 22nd February filed the Summons and Statement of Claim in this action. Later the Defendant's Secretary told Temo that her passport had been found in the Defendant's office at Sia and on 3rd March 1989 the 2 Plaintiffs went with their lawyer Mr Hola to collect the passport from the Defendant. This arrangement was confirmed in writing in the Defendant's letter to the Plaintiffs of 3rd March (Exhibit 7) on which Temo acknowledged receipt of her passport. This letter did not suggest that the Defendant would pay the Plaintiffs the \$500 and air passages agreed to; and rather suprisingly it did not contain any apology about mislaying the passport, but instead an allegation of un-Christian behaviour by the Plaintiffs.

25. The Defendant apparently returned the air tickets to the airline on 28th February and returned the bank draft to the bank around the same time. The air fares were TS\$163 for each Plaintiff and TS\$82 for their son, a total of TS\$408.

26. Subsequently the Plaintiffs returned to Fiji later in March at their own expense and after 2 weeks returned to Tonga to take up new jobs with John's Place Takeaway in Nuku'alofa where they now work and live. Viliame said that he had obtained this job before he left Tonga in March 1989, even before 8th February, though this was one of the dates he may have remembered in-accurately.

I have set out my findings in fact in detail for the sake of the record but the facts on which the case can be decided in law are simple and largely agreed. The legal position is --



- A. In the absence of any express or implied term to the contrary (which did not exist here) an employer cannot punish an employee for alleged misconduct by suspending him and stopping his wages (*Halsbury's Laws (4th Ed) Vol. 16 para 584*). There was therefore no legal justification for the Defendant's suspension without pay of Viliame, whatever he had done.
- B. The Defendant therefore owed Viliame back pay for that period of 3 weeks when he was suspended. This would come to \$330. Not unnaturally Viliame was aggrieved at being suspended without pay.
- C. The meeting on 7th February and the Defendant's letter of 8th February amounted in law to variations of the original contracts of employment of the Plaintiffs, by which it was in effect agreed that -
- (i) the Plaintiffs' contracts would be terminated by mutual agreement immediately.
  - (ii) the Defendant would pay Viliame \$400 (including the back pay mentioned above of \$330 and the one other day's outstanding pay) and Temo \$200 (including any back pay due to her for days worked and not paid, and possibly 2 weeks holiday pay)
  - (iii) the Defendant would pay air passages to Fiji for the Plaintiffs and their son.
- D. While the Defendant said that he agreed to this solely out of the goodness of his heart I believe he had sound business reasons which amounted to the consideration for doing so -
- (i) it allowed him to cut his losses on the Arcade Restaurant, which had never made any profit
  - (ii) the contracts of the Plaintiffs still had about 41 weeks to run at \$110 per week for Viliame and \$40 or more per week for Temo, making \$150 a week in all or a total of over \$6,000.
  - (iii) the Defendant knew that he owed Viliame back pay for the time he was laid off of \$330 and that Temo could expect holiday pay
  - (iv) by giving the Plaintiffs flights to Fiji the Defendant would have ensured that Viliame and Temo were not readily available in Tonga to work for his competitors.

The readiness of the Defendant to do these things and the fact that he took the trouble to record it in the letter of 8th February and have it acknowledged by Viliame are all confirmation that the variation was in the Defendant's interest. In any event businessmen seldom agree to pay out sums such as \$900 without some benefit arising to them.

- E. However the Defendant's reasons are largely irrelevant. The agreement of 7th - 8th February was made and its effect in law was to wipe the slate clean on the contracts. The payments by the Defendant were to supersede claims for back pay, holiday pay, compensation etc. No further compensation is due for loss of earnings, especially as the Plaintiffs obtained new jobs immediately.

- 340 F. It was not a fundamental term or condition of the agreement of 7th - 8th February that Viliame and Temo would be at a particular place at a particular time to be picked up and taken to the airport. So whether it was the Plaintiffs or the Defendant who broke this arrangement, the breach did not entitle the Defendant, as he seemed to think, to forget all about what he had agreed. The breach did not result in the whole variation agreement being discharged. It is therefore not necessary to make a finding on who was responsible for the failure in the pick-up arrangements. By that stage good faith between the parties was wearing thin and there were probably faults on both sides. Perhaps the failure was just one big muddle due to lack of communication all round. I cannot see that either the Plaintiffs or the Defendant had anything to gain by deliberately not keeping to the arrangements.
- 350 G. So the Defendant must still keep to the bargain he made in the variation agreement, and pay the Plaintiffs the outstanding \$500 and single air fares to Fiji, or if the Plaintiffs do not wish this, \$408 in lieu. The Plaintiffs had to pay their air fares to Fiji themselves in March 1989. While the point was not argued before the Court, it also appears to be a requirement of clause 3 of the Constitution that anyone bringing persons from other islands to work for him must "promise to take them back to their own land".
- 360 H. The Court takes a very serious view of the Defendant's failure to produce Temo's passport at the time she required it. If an employer sees fit to hold the passports of foreign employees he has a duty to make sure that he keeps a record of those he has, that they are kept safely and that he knows where they are and can produce them immediately. Failure in such a duty resulting in the temporary or permanent loss of a passport may amount to a restriction of the foreign employee's freedom of movement. Although not argued before the Court this may be contrary to clause 14 the Constitution which states "nor shall the life or property or liberty of anyone be taken away except according to law". Such a restriction of freedom of movement may render the employer liable to heavy damages. In this case I was not satisfied that it was proved that Temo could have travelled to Fiji without her passport. Only \$100 is claimed so the Court cannot award more, but I would otherwise have been inclined to award the Second Plaintiff more to show the considerable unhappiness of the Court at what took place.
- 370 I shall therefore award the Plaintiffs
- (i) \$500 in respect of the balance unpaid by the Defendant;
  - (ii) single air passages to Fiji for themselves and their son or, if the Plaintiffs do not wish that, \$408 in lieu;
  - (iii) \$100 to the Second Plaintiff as compensation for the withholding of her passport;
  - (iv) costs.
- 380