MOTOI (SILIVIA) AND VAOMUA (TUTONU) v WESTERN SAMOA NATIONAL PROVIDENT FUND BOARD

Supreme Court Apia
Ryan CJ
13 June 1990

EMPLOYMENT LAW - "unfair dismissal" - not excluded by S 40 Labour and Employment Act 1972 - assessment of general damages.

HELD: Each of the Plaintiffs were "unfairly dismissed" and were entitled to an award for loss of income and general damages.

CASES CITED:

- Keil v Polynesian Airlines (1987)

LEGISLATION:

- Labour and Employment Act 1972 - Ss 21, 40

R Drake for Plaintiffs
S To'ailoa for Defendant Board

The overwhelming amount of evidence in this case is not really in dispute. The Plaintiffs appear quite independently to have come to work for the Defendant Board as a result of their separately responding to advertisements calling for audit inspectors in August 1988 and they were the two successful applicants from the nine applications received. They started work for the Defendant on different dates, the first named Plaintiff Mrs Motoi commenced on 22nd August and the second named Plaintiff Mr Vaomua on 9th September 1988. Thereafter their employment records with the Defendant followed a parallel course.

The first remarkable fact which emerges was that each was only employed as an audit inspector for some three days after their initial commencement date and they were then moved to another part of the National Provident Fund and carried out what appear to have been duties of a lower kind until the beginning of 1989. One of the problems which had arisen as a result of the alteration to the work status of each Plaintiff was that they were placed in a grade of work where they were receiving a higher salary than were their counterparts. It appears that the

Defendant sought to put that right by its failure to pass on to the Plaintiffs a 7.5% general wage order which all other employees of the National Provident Fund had received and decided to pass on only 2.5% of that order to the Plaintiffs. The net result was of course a feeling of disgruntlement on the part of the Plaintiffs clearly for two reasons. The first one was that they were not being employed on the basis on which they were taken on namely as audit inspectors and the second reason being that the net result of their failure to be employed as audit inspectors was that they were to incur a loss of income.

It must be said that about this time the Defendant was in the process of an unfortunate situation involving members of its staff and that it was clear from the evidence here today that within the Defendant organization the left hand did not know what the right hand was doing as far as the advertisement for audit inspector was concerned but having said that the Management still continued with the interview and subsequently appointed the 2 Plaintiffs as audit inspectors although it would appear that Management did not feel any great need for audit inspectors, Management that is other than the chief auditor. Once the Defendants had failed to pass on the 7.5% in favour of the Plaintiffs, the Plaintiffs took the matter up with the Management; they did not receive a satisfactory response to their entreaty and decided to take the matter further by writing to the Chairman of the board. It is clear that the Management took exception to this action the net result being that on the 23rd February the Plaintiffs were required to send a letter of apology to the Chairman and to withdraw what was contained in the letter. There was a dispute today as to precisely whether or not they were to be dismissed from their positions once they had written such a letter or that if they did not send a letter of apology then it was better for them to resign. There does seem to me to be a clear indication from the terms of the letter that if there was no such letter then there would be no job.

On 24 February there being no letter forthcoming from the Plaintiffs, the Plaintiffs said they were humiliated in public in front of the other employees by being dismissed on the job. They returned to work on the following Monday and again were given a letter of dismissal.

The Plaintiffs claim personal damages for alleged wrongful termination by the Defendant. They claim damages of $50,000 and general damages of $5,000 as far as the first named Plaintiff is concerned and $18,000 under the first heading and $5,000 under the second heading for the second named Plaintiff.

The Defendant basically says that it has done what it was entitled to do and any law with regard to breaches of contract of employment between the employer and the employee is foreign to the law of this land.

A number of decisions were quoted by Mr To'ailoa for the Defendant in his submissions which were most carefully prepared and in particular the decision of Keil v Polynesian Airlines. The decision of Bathgate J in 1987 was put forward to give strength to the Defendant's position that there was no obligation on an employer to spell out the reason for termination and generally that employers were entitled to dismiss employees for whatever reason they liked.

A number of cases were also referred to the Court ranging as far back as 1909 but virtually all of those decisions stem from what I consider to be a fundamental policy in place before legislation of a more enlightened nature was passed overseas in virtually every jurisdiction to protect individual employees against the arbitrary termination by employers by emphasising the important words "unfair dismissal". The only legislation in force in Western Samoa touching on this matter is to be found in the Labour and Employment Act 1972 and Mr To'ailoa referred me to provisions of section 21 which relate to what is to happen when a contract is terminated. Section 21 however does not exclude the provisions of section 40 and that particular section says:

> "nothing in the Act shall operate to prevent any employer or worker from enforcing their respective civil rights and remedies for any breach or non-performance of a contract of service by way of civil proceedings".

An employer has been recognised in other proceedings as normally in the position of power contrary to what applies to the position of the employee. Here the forces of the Management of the National Provident Fund Board were really ranged up against two Plaintiffs who had dared to go over the heads of Management to the Chairman of the Board and it seems to me that that was the gravest sin which they are alleged to have committed and really had they not done so then these proceedings would not have been necessary. Of course what else could they do. The Management was apparently intractable on 2.5% - 7.5% gap and the Plaintiffs saw that this had been to their disadvantage as a result and also as a result of the employer's failure to abide by the contract with them to employ them as audit inspectors.

The common law of course never stands still. In my view this is a classic case where the Court should look at the equity of the situation. There are no binding decisions on this Court which would prevent it from taking the course which I propose to take. It seems to me that in this day and age employees should have the rights which are set out in legislation in most other jurisdictions and which are [not] excluded by section 40, to security of tenure without being subjected to dismissal for dubious or inconsequential reasons. That being the case I am satisfied that the Plaintiffs are entitled to relief because this is a situation where they were unfairly dismissed basically as I

have said on the grounds that they had departed from the norm by by-passing the Management and going direct to the Chairman of the Board rather than accepting meekly the decision of the Management. There is no evidence here before me as counsel for the Defendant says of any loss of promotional prospects; I disregard that entirely. The Plaintiffs are in my view entitled to damages for the loss of income and for general damages for unfair dismissal. They have mitigated their loss to a significant degree but as I have already indicated the amount claimed in the prayer for relief is totally disproportionate to the loss suffered.

Dealing first of all with Mrs Motoi. She was unable to find employment for some 5 months until the end of July. She was paid two weeks salary in lieu of notice and that amount must be deducted from money claimed for loss of income. By my calculation her final income plus the 7.5% initially was $205. There were 10 fortnights which equals $2050 under the heading of the loss of income. As far as Mr Vaomua is concerned he was also given two weeks pay in lieu of notice. He was out of work for one month and his figure for loss of income amounted to $455.50. He is entitled to that figure for loss of income. His final income including the 7.5% for one fortnight was $199.50 together with a figure of $15 per fortnight for a period down to the end of the year which amounted to $225; the total of $455.50 under the heading of loss of income.

So far as general damages are concerned the Plaintiffs are clearly entitled to same for their unfair dismissal. They claim $5,000.00. They were unfairly dismissed but I do not think the damage done to them was $5,000.00. Each is awarded $1,000 for unfair dismissal. Costs and disbursements are to be fixed by the Registrar.