IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

CASE NUMBER: **ERCC 8 of 2012**

BETWEEN: **VIMAL KRISHNA**

PLAINTIFF

AND: **FIJI REVENUE AND CUSTOMS AUTHORITY**

DEFENDANT

Appearances: *Mr. Devanesh Sharma and Ms. Choo for the Plaintiff.*

Ms. Rayawa for the Defendant.

Date/Place of Judgment: *Friday 27 February 2015 at Suva.*

Coram: *Hon. Madam justice A. Wati.*

JUDGMENT

Catchwords:

Employment Law – Employee interdicted upon being charged for abuse of office- subsequently exonerated – entitlements under the contract – position of the law governing the contract- entitlement of pre judgment and post judgment interest against state- indemnity costs- summary assessment of costs.

Legislation:

1. ***Fiji Islands Revenue and Customs Authority (Conduct and Discipline) Regulations 2002 ("FIRCA Regulations"): Regulations 11 and 23.***

2. ***Law Reform (Miscellaneous Provisions) (Death and Interest) (Amendment) Decree 2011: s. 2(3).***

The Background

1. The plaintiff was employed by the defendant as the General Manager Taxation from 20 March 2009. His contract of employment was for a period of 3 years until 19 March 2012.

2. Before being appointed to this current position, the plaintiff had worked with the defendant since 1969, starting his career as a clerical officer and thereafter had risen to different ranks.

3. On 23 September 2009, the plaintiff was charged by Fiji Independent Commission against Corruption ***("FICAC")*** for 2 counts of abuse of office.

4. The charges were laid pursuant to s. 111 of the Penal Code of Fiji Cap. 17. The particulars of the first count stated that the plaintiff *"between 9 July 2009 and 24 August 2009 at Suva in the Central Division whilst being employed in the public service as the General Manager taxation of FIRCA, in abuse of the authority of that office, did an arbitrary act by directing his subordinate officers, namely Krishna Chand and Josefa Vakalala that the application for refund of vat on acquisition of new dwelling house for Ashwin Kumar Jogia be processed, after being informed by the said officers that the supporting documents were false thereby causing prejudice to the rights of FIRCA".*

5. The particulars of the second count stated that the plaintiff on *"10 July 2009 at Suva in the Central Division whilst being employed in the public service as the General Manager Taxation of FIRCA, in abuse of the authority of that office, did an arbitrary act by personally entering the application for refund of Vat on acquisition of new dwelling house for Ashwin Kumar Jogia into the FIRCA's integrated Tax System, disregarding the proper procedures that should be followed in registering such applications thereby causing prejudice to the rights of FIRCA".*

6. Immediately upon being charged, FIRCA interdicted the plaintiff on 50% salary and ordered the plaintiff not to enter the work premises. He was also asked to return his office keys and the car that had been allocated to him as part of his benefits under the employment contract. All other benefits such as his mobile phone allowance were also suspended.

7. The suspension was effected under Regulations 11 (1) (d) and 23 (1) (e) of FIRCA Regulations. The sections read:

" 11 (1) Where an employee has been charged with –

(a) a disciplinary offence; or

(b) a criminal offence;

and where the Chief Executive Office is of the opinion that the public interest, or the interests or repute of the Authority requires it, the Chief Executive Officer may -

(c) transfer or re-deploy the employee to other duties; or

(d) Interdict the employee.

(2) The Chief Executive Officer may not interdict an employee unless a fair investigation has been carried out into the misconduct alleged against the employee.

(3) An employee who is interdicted must immediately cease to perform his or duties.

(4) The effective date of interdiction is –

(a) where the employee has not been suspended under regulation 7 – the date of receipt by the employee of the notification of interdiction; and

(b) where the employee has been suspended under regulation 7 – a date directed by the Chief Executive Officer.

(5) An employee who is interdicted must not have access to any official premises of the Authority, and must not remove, destroy or add to, or cause to be removed destroyed or added to any official document, or instrument.

(6) An employee who is interdicted is entitled to fifty per cent of his or her salary during the period of interdiction.

(7) If the disciplinary proceedings against any interdicted employee result in his or her exoneration, the employee is entitled to the full amount of the salary and benefits which the employee would have received if not interdicted, but if the proceedings result in disciplinary action other than dismissal the employee is to be allowed the amount of salary and benefits (if any) determined by Authority".

"23 (1) Where –

(a) it is confirmed that proceedings are contemplated against an employee; or

(b) criminal proceedings have been instituted in any court against an employee, the Chief Executive Officer may under these Regulations –

(c) transfer;

(d) suspend;

(e) interdict;

(f) charge the employee with having committed a disciplinary offence; and

(g) carry out an investigation into alleged misconduct by an employee,

but must not take further proceedings against the employee upon any grounds arising out of the criminal charge until the court has determined the matter and the time allowed for the appeal from the decision of the court has expired.

(2) Where an employee on conviction has appealed, the Chief Executive Officer may commence or continue proceedings after the withdrawal or determination of the appeal".

8. The plaintiff was not subjected to any form of internal investigations by FIRCA or charged with any disciplinary offences. This may be because of the directions in Regulation 23 (1) not to take any further proceedings against the employee.

9. On 18 January 2012, FICAC entered a nolle prosequi in Court and withdrew the criminal charges against the plaintiff. The plaintiff was exonerated. The plaintiff then expected an immediate reinstatement but the CEO of FIRCA sent him on leave from 19 January 2012 until 29 February 2012.

10. Whilst the plaintiff was on leave, his position was advertised twice in the local dailies. The first advertisement was on 28 January 2012 and the second was on 4 February 2012.

11. When the first advertisement was published, the plaintiff did not meet the Minimum Qualification Requirement ***("MQR")***. The plaintiff raised this issue with the CEO. The Manager Human Resources ***("HRM")*** then reworded the MQR and the plaintiff then met the MQR and could apply for the position.

12. On 10 February 2012, the CEO wrote to the plaintiff and informed him that since the criminal charges were withdrawn against him, FIRCA would pay him full amount of his salary and benefits that were withheld from him during the period of interdiction pursuant to Reg. 11 (7) of FIRCA Regulations.

13. The plaintiff initially received the balance half of his salary which was retained by FIRCA since 23 September 2009. He did not receive his benefits as advised by the CEO by a letter dated 10 February 2012.

14. His solicitors then wrote to FIRCA on 20 January 2012 asking for the restoration and payment of all the benefits. Those payments were not made.

15. After expiration of his leave, the plaintiff, as he should have, reported to duty on 1 March 2012. When he reported to work, he was taken to the Board Room by Ms. Arieta Dimuri who was the Acting CEO and Ms. Lily Wong, the HRM. There he was handed a letter whereby the defendant purported to terminate his employment by paying him one month's wages in lieu of 3 months' notice together with his 33 days accrued annual leave. The letter was dated 29 February 2012.

16. FIRCA then made a second payment to the plaintiff comprising of one month's wages and 33 days accrued annual leave.

17. FIRCA also issued the plaintiff with a Certificate of Service in which it was stated that the reason for him leaving work was that his contract had expired. The Certificate of Service is dated 1 March 2012.

18. The plaintiff's claim for motor vehicle allowance and performance payment was, according to the plaintiff, due and payable and when FIRCA did not pay these benefits, the plaintiff amongst several other claims filed a writ claiming these payments. All other claims of the plaintiff were abandoned by the plaintiff by paragraph 17 of his closing submissions.

The Claim

19. Specifically the plaintiff's claim is now as follows:

(a) car allowance from 23 September 2009 to 19 March 2012 in the sum of $37,334.84 at the rate of $15,000 per annum.

(b) performance payment from 20 March 2009 to 19 March 2012 in the sum of $40,122.18 at the rate of 15% of the base salary.

(c) Interest on bonus and car allowance from 19 March 2012 until 11 March 2014 being the date of trial at the rate of 13.5 % per annum amounting to $11,052.29.

(d) Post Judgment Interest at 4% per annum until payment is made in full.

(e) Legal costs of this action in the sum of $14,789.50

The Defence

20. The defendant is refuting the claim on the basis that the plaintiff had never opted for a motor vehicle allowance but a motor vehicle and so he is not entitled to the allowance now. FIRCA also contends that the performance payment should not be made because the plaintiff did not work for that period.

21. On the question of interest, FIRCA states that it a government agency for the benefit of the state and it should not be made to pay the interest because the state will be affected. It also contended that the rate of interest sought against it is exorbitant. It is not a bank or commercial entity to pay interest at that rate.

The Issues

22. The issues for the determination of the Court are:

    1. ***Is the plaintiff entitled to car allowance and the performance payment for the period claimed?***

    2. ***Is the plaintiff entitled to any interest on the claims and the rate of interest that should be allowed?***

    3. ***Is the plaintiff entitled to post judgment interest at 4% until the monies are paid?***

    4. ***Who is entitled to the costs of this legal action and in what sum?***

The Law and Analysis

23. I will first deal with the issue of the performance payment. The clause in the employment contract regarding performance payment is clause 4.2. It reads:

"PERFORMANCE PAY

4.2.1 ***The Employee may be eligible to receive a performance payment as outlined in 4.2.4.***

4.2.2 ***The Employee and the Employer will prepare a draft performance plan within three months of the commencement of the contract period and annually thereafter, which will then be submitted to the Board for approval. The measures therein form the basis for the assessment of the performance of the Employee.***

4.2.3 ***The performance assessment will be conducted by the Employer.***

4.2.4 ***Performance pay may consist of the following and will not form part of the base salary or fixed remuneration:***

1] ***Short Term – potential of up to 15% of the base salary applicable at the time of the assessment and paid annually.***

4.2.5 The performance pay is an at-risk component of the remuneration package.

4.2.6 If this Contract:

- ***is terminated for the purpose of enabling the Employee to enter into a new contract of employment with the Authority; or***
- ***Is terminated or otherwise comes to an end by reason of ill health (refer 10.1.2), retirement or death of the Employee; or***
- ***Is terminated by the Authority due to the abolition of the position;***

A performance review shall be conducted for the final period of the contract and the Employee shall be entitled to receive a short term performance payment pro-rated (if any) as a result of that assessment.

4.2.7 If this contract is terminated prior to its expiration for any reason other than the reasons specified in Clause 4.2.6, no performance payment shall be made in relation to the final period of the contract".

24. It was agreed in evidence of the defendant that the final period of contract in the above clause means the last working year.

25. When the plaintiff reported to work on 1 March 2012, he was given a letter purporting to terminate his contract and a Certificate of Service. In that letter it was said that FIRCA was implementing clause 10.1.1 (ii) of the employment contract. Clause 10.1.1 (ii) of the employment contract gives the employer the right to terminate the contract without cause by paying the officer one month's salary in lieu of 3 month's written notice.

26. If I hold that the plaintiff's contract was terminated than the plaintiff will not be entitled to the performance payment for the final period of the contract which would be 20 March 2011 to 19 March 2012. It must be noted that the issue of termination of contract does not affect the

plaintiff's right for performance payment for the first two years of the contract. Before I decide whether the plaintiff's contract was terminated or not, I must first decide whether the plaintiff is entitled to the performance payment at all.

27. The plaintiff was not employed as per his contract because of the charges laid down by FIRCA. The plaintiff was, I reiterate, exonerated. Regulation 11 (7) of the FIRCA Regulations very clearly states that if the disciplinary proceedings against any interdicted employee result in his or her exoneration, the employee is entitled to the ***full amount of the salary and benefits*** which the employee would have received if not interdicted.

28. The plaintiff was exonerated from an independent prosecuting body in Fiji. On that basis Regulation 11(7) applies equally in the plaintiff's case in that he is entitled to the full amount of salary and benefits as if he had performed his duties.

29. FIRCA's argument that the plaintiff did not work and so is not entitled to performance payment is not sustainable in light of Reg. 11(7) of the FIRCA Regulations. The plaintiff was interdicted under Regs. 11 (1) (d) and 23 (1) (e) of the FIRCA Regulations. Since the latter Regulation does not provide for payment of salaries and benefits, the only applicable Regulation to arrive at the answer to the issue is Reg. 11 (7).

30. The performance pay and rate was conditional upon a performance assessment conducted by the employer. The assessment was to be conducted on the performance plan arrived at by the parties within three months of the commencement of the contract. The evidence that was tendered by the employer was that if the employee was assessed as at 85% then the percentage rate that would apply to him would be 85% of the 15 %. The witness of the employer also stated that 15% is the highest that could be paid and if the employee had worked he would have been given 15%.

31. The employer did not carry out any performance assessment even though the employee had worked for the first 6 months of his contract. The time for conducting a performance assessment is not prescribed either by the contract or the legislation. However there is no evidence from the employer that the plaintiff did not perform as per the performance plan or performed at a level

that would require FIRCA to reduce the assessment from 15%. There is also no evidence of any performance plan being drafted by the employer.

32. In fact the defendant conceded to pay the plaintiff at the rate 15% but only for the 5 months of his employment contract. The 5 months was arrived at by calculating the actual period of work by the plaintiff. The plaintiff refused to accept that amount on the basis that he should be paid for the period of his contract as he was prevented from working by FIRCA and that he did not stop work on his own.

33. The defendant's evidence that the employee would have been entitled to 15 % if he worked and that they offered him performance pay at that rate albeit for 5 months indicates that plaintiff had worked exactly as expected by FIRCA and so his percentage assessment was not reduced or taken away. I find that he had given his best to the department and that his maximum eligibility should not be reduced.

34. Further, the plaintiff had worked for FIRCA for more than 40 years and having risen to the ranks without any adverse records on the aspect of his competency I find that that he would not have performed below standard for him not to qualify for the performance pay at the rate of 15%. The employer has not even raised that there was ever any issue with the plaintiff's performance.

35. FIRCA says that the performance pay and the rate were discretionary. However evidence was given to the effect that FIRCA would have given the performance pay if the plaintiff had worked. Even my reading of the terms of contract indicates that FIRCA was bound to give performance payment once there was an assessment conducted. The percentage rate would have depended on the percentage assessment.

36. Even in its letter of 10 February 2012, FIRCA had agreed as follows:

" …, as per Regulation 11(7), you are entitled to fill amount of your salary and benefits that were withheld from you during your period of interdiction".

I therefore find no basis why FIRCA should renege from its agreement and depart from the FIRCA regulations which it also understood to mean what I have found, that is, that the plaintiff is entitled to full pay and benefits upon him being exonerated.

37. The question that now remains is the period for which the plaintiff is entitled to be paid the performance pay. The specific issue is whether the plaintiff is entitled to performance pay for the final year under clause 4.2.7 of the employment contract.

38. The letter which was handed to the plaintiff indicated that he was terminated. If he was terminated then for him not to qualify for the performance pay I must hold the termination to be procedurally fair. However the employer had given the plaintiff a certificate which stated that the plaintiff's contract had come to an end. The employer's witness Ms. Lily Wong, also testified that the plaintiff's contract had come to an end and not terminated because he was paid his salary for the full term of his contract. In the employer's closing submission it is accepted by paragraph 24 that the plaintiff's contract had come to an end. The employer thus cannot rely on the argument that the plaintiff's contract was terminated therefore he is not entitled to the performance payment.

39. Based on the Certificate of Service and Lily Wong's evidence I find that the plaintiff was not offered further work because his contract had come to an end. Even if it did not come to an end there was only 19 days for the plaintiff to work and he would have been entitled to claim performance payment. FIRCA, if I hold that, has terminated the plaintiff's contract cannot escape liability on clause 4.2.7 as it is bad faith on the part of an employer to terminate a person's contract when there is 19 days left to expire for the sole purpose of avoiding payment of the performance pay. In any contract of employment there is an implied term of good faith and that must be observed by both parties to the contract.

40. If that term is breached by a party, there is breach of employment contract. I therefore find that if there was termination, it was done solely to avoid the payment of the performance bonus and that was breach of good faith to treat an employee in that manner who has given his service to the department for all his working life.

41. Further, the contract was said to come to an end under clause 10.1.1 (ii) of the employment contract. Clause 10.1.1 says that an employer can terminate the employment by giving not less than three months' notice of the date of termination or a month's salary in lieu. The plaintiff only had 19 days to complete his contract. Clause 10.1.1 was therefore not available to the defendant. It would have been prudent for the defendant to allow the plaintiff to complete his contract.

42. What is the quantum of the bonus precisely is the next issue. I will calculate the performance pay from 20 March 2009 to 19 March 2012 on the base salary of $89, 178:

20/3/09 – 19/03/10	- 15 % of $89, 178	=	$13, 376. 70
20/03/10 – 19/03/11	- 15% of $89, 178	=	$13, 376. 70
20/03/11 – 19/03/12	- 15% of $89, 178	=	$13,376. 70

43. The total performance payment that is therefore due and owing is $ ***40, 130. 10***. I find that the plaintiff ought to be paid this amount by FIRCA.

44. I now turn to the issue of motor vehicle allowance. The provision in the contract that provided for motor vehicle allowance is Clause 4.3. It reads as follows:

" MOTOR VEHICLE

4.3.1 ***The Employer will offer to the Employee the options of either:***

4.3.1.1 ***Accepting from the Employer an appropriate motor vehicle, for use by the Employee for the purpose of assisting the Officer in performing his duties and for his personal purposes out of normal business hours of the Authority, in which case, only the employee shall drive the motor vehicle; or,***

4.3.1.2 ***Accepting from the Employer car allowance of $15,000 per annum…"***

45. The plaintiff exercised his option under clause 4.3.1.1.He accepted from the employer a motor vehicle for official and personal use instead of accepting the car allowance. The defendant says that because the car allowance was not accepted, there cannot be any claim by the plaintiff. I find this argument of the employer absurd if not anything else. If this is the position that the employer upheld then it should have clarified under Reg. 11 (7) that motor vehicle allowances and benefits will not be paid to those who chose option 4.3.1.1. In that way if the plaintiff chose that option then he would have done so at his peril. However there was no such provision in the Regulation to exclude the plaintiff from claiming such a benefit upon his exoneration.

46. The motor vehicle was not to be used for official purposes only but for personal purposes too. If the plaintiff was not interdicted he would have had the enjoyment of the vehicle for his personal use too which he was deprived of because of being interdicted. Whilst he was interdicted he would definitely have had to find another mode for transporting himself. He would have definitely spent his own money for such an expense. I therefore find that he is entitled to the motor vehicle allowance from the date of interdiction until the date of expiry of his contract.

47. The calculation that I arrive at is as follows:

23/09/09 - 23/09/10	-	$ 15,000		
24/09/ 10 - 24/09/11	-	$15,000		
25/09/11 – 25/02/ 12 (5 months)	-	$1,250 x 5 months	=	$6,250.
26/02/12 – 19/13/12 (23 days)	-	$40. 98 (per day) x 23 days	=	$942.54

48. The total of the motor vehicle allowance that needs to paid to the plaintiff is $ ***37, 192.54***.

49. Now comes the interest part. The counsel for the plaintiff has asked for interest at the rate of 13.5% per annum from 19 March 2012 until the date of trial. The trial was conducted on 11 March 2014. Counsel for plaintiff has not provided any evidence on what interest rate the various financial institutions would have provided him if he invested the money or the rates of interest that were paid in the year 2012 when he ought to have received the money.

50. I am of the view that on deposits the highest interest rate that would have been paid would have been between 3 to 6 % and it is only correct that in absence of any other evidence a sum be fixed between 3 to 6 %.

51. I will award interest at the rate of 4 % for a period of 2 years. I am of the view that the monies as I have found were due and owing should have been paid to the plaintiff in March 2012 when his contract came to an end. Interest for a period of 2 years is therefore justified in my view.

52. The total sum for the performance payment and motor vehicle comes to $77, 322.64. The annual interest at the rate of 4% on that sum would come to $3, 092.91 per annum. Interest for 2 years would amount to $6,185. 82. I award interest in the sum of $6, 185.82.

53. On the question of post judgment interest I will rely on s. 2 (3) of the ***Law Reform (Miscellaneous Provisions) (Death and Interest) (Amendment) Decree 2011*** which states that ***"Notwithstanding anything contained in this section, the State Proceedings Act or any other written law, no interest shall be payable on any Judgment Debt in any proceedings against the State, or the Attorney-General".*** On the basis of this provision no post judgment interest against the state can be levied.

54. I am now left to deal with the issue of legal costs for this proceeding. Mr. Sharma has asked for costs in the sum of $14,789.50. The costs that he has asked for is Indemnity Costs. Whilst I am of the view that this matter should not have seen the day in Court but settled as per the legislation and the employment contract, I do not think that the conduct of FIRCA in the proceedings warrants indemnity costs.

55. Indeed the plaintiff is entitled to costs for filing the action, preparing the matter for trial, preparing for trial, conducting the trial and making appropriate submissions to Court. It is appropriate that costs in this matter be summarily assessed and I find that a sum of $5,000 is justified.

Final Orders

56. In the final analysis, I allow the plaintiffs claim to the following extent:

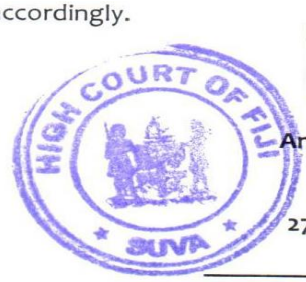
a. ***There shall be judgment against the defendant for a sum $77,322.64 being the amount of the benefits that the plaintiff ought to have received from the defendant for motor vehicle allowance and performance pay.***

b. ***The defendant must pay interest in the sum $6,185.82 on the above sum of $77,322.64.***

c. ***There shall be an order for costs against the defendant for the sum of $5,000, summarily assessed.***

d. ***The total sum that the defendant ought to pay the plaintiff including interest and costs is $88,508.46.***

57. I make the orders accordingly.



Anjala Wati
Judge
27.02.2015

To:

1. *R. Patel Lawyers for the Plaintiff.*
2. *FIRCA Legal Section for the Defendant.*
3. *File: Suva ERCC 8 of 2012.*