**IN THE EMPLOYMENT RELATIONS COURT AT SUVA**
**EMPLOYMENT JURISDICTION**

**ERCC No. 22 of 2017**

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| **BETWEEN** | : | **SIKELI WAQATAIREWA** of Lot 21, Covuli St, Simla, Lautoka |
| | | ***PLAINTIFF*** |
| **AND** | : | **SUGAR INDUSTRY TRIBUNAL** a Government Statutory body established under the Sugar Industry Act, 1984 having its place of business at Sugar House, Walu Street, Marine Drive, Lautoka. |
| | | ***DEFENDANT*** |
| **BEFORE** | : | M. Javed Mansoor, J |
| **COUNSEL** | : | Mr D. Nair for the Plaintiff |
| | : | Mr D. Sharma for the Defendant |
| **Date of Hearing** | : | 13.05.2019 |
| **Written Submissions** | : | 03.06.2019 |
| **Date of Judgment** | : | **24.10.2019** |

# JUDGMENT

**EMPLOYMENT LAW:** termination of employment – redundancy – breach of contract of employment – wrongful termination – unfair dismissal – period of notice – extension of notice – conduct of employee – validity of letter of termination signed by the Registrar of the Tribunal – whether the internal appeal process should have been exhausted prior to filing action

References:

A Legislation:

I. Employment Relations Promulgation 2007, Sections 4, 77(1)(c), 30 (6), 106, 107 (1), 108 (1) & 230

B Cases:

I Carpenters Fiji Ltd v Latianara [2011] FJHC 822; ERCA 07.2011 (8 September 2011)

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1. Sikeli Waqatairewa, the Plaintiff, was appointed by the Sugar Industry Tribunal as its Cane Quality Manager on a contract of employment effective from 1 May 2016 for a term of three (3) years until 30 April 2019. His basic wage was $30,000.00. In addition, he received a housing allowance of $6,000.00 per annum, and was entitled to medical insurance. He was in employment until the Defendant terminated his services after giving him notice of four (4) weeks by letter dated 9 August 2017. These facts are admitted, as is the termination of the Plaintiff.

2. The Plaintiff pleaded that termination of the Plaintiff's employment was due to financial constraints faced by the Defendant, that, therefore, it constituted redundancy, that the Defendant failed to comply with Section 107(1) of the Employment Relations Promulgation which required the Defendant to inform the Plaintiff or his Union and the Permanent Secretary for Labour at least 30 days prior to the redundancy taking effect to minimize and/ or avert the redundancy, and that the Defendant contravened the statutory requirement provided under Section 20(1) of the Constitution by terminating the employment contract of the Plaintiff through compulsion which was contrary to the principles of fair labour practices. By such termination of employment, the Plaintiff suffered loss of

livelihood, depression, mental anguish and loss of dignity, trauma and a feeling of despair and lack of self-worth. That is the substance of the Plaintiff's case.

3. The Plaintiff is seeking to recover from the Defendant, his base salary from 9 August, 2017 to 30 April 2019 together with outstanding leave pay in the sum of $61,841.09.

4. The main issues raised by the Plaintiff are:
    a. Whether the Plaintiff's position had become redundant due to lack of financial support from the Government to the cane Quality Based Cane Payment Project?

    b. Whether the Defendant had breached Section 20 (1) of the 2013 Constitution?

    c. Whether the Defendant had breached Section 77 (1) (c) of the Employment Relations Promulgation 2007?

    d. Whether the Defendant had breached Section 107 (1) of the Employment Relations Promulgation 2007?

    e. Whether the Plaintiff is entitled to compensation under Section 230 of the Employment Relations Promulgation 2007?

5. The Plaintiff gave evidence on his behalf. The Defendant, however, did not summon witnesses but marked several documents through the Plaintiff in cross examination.

<u>Was the Plaintiff made redundant?</u>

6. On 9 August 2017 (D2), the Defendant wrote to the Plaintiff and gave four (4) weeks' *notice of termination* of his services as Cane Quality Manager. He was informed, that in view of the financial situation, the Sugar Industry Tribunal could no longer give budget support to the cane quality based Cane Payment Project.

7. This was followed by the Defendant's letter dated 25 September 2017 (D7) titled "Re: Redundancy Package". By this letter, the Defendant advised the Plaintiff that he was entitled to four (4) weeks redundancy pay and makes reference to the redundancy payment of $530.77 on 20 September 2017, and the balance due of $1,776.91 amounting to three weeks wages. The Plaintiff signed and accepted the letter but there is no evidence that he responded to this letter or that he questioned the Defendant's decision to hand him a redundancy package.

8. These letters and the Defendant's payments of four (4) weeks wages to the Plaintiff are not in dispute. In these circumstances, the question arises – as articulated on behalf of the Plaintiff – whether the Plaintiff's employment was terminated due to redundancy? If so, whether there has been compliance with the law by the Defendant?

9. The object of Section 106 of the Employment Relations Promulgation 2007 is to provide workers facing redundancy with some degree of certainty about the problems faced by the employers and the assurance of compensation. In a redundancy situation, the employer is required to show good faith, and act fairly and reasonably. Redundancy is a commercial decision which has nothing to do with the performance of a worker.

10. Section 108 (1) of the Employment Relations Promulgation 2007 states that if an employer terminates a worker's employment for reasons of an economic, technological, structural or similar nature, the employer must pay to the worker not less than one week's wages as redundancy pay for each complete year of service in addition to the worker's other entitlements. Section 108 (2) provides that a worker is not entitled to the payment specified in Section 108 (1) unless the worker has completed a year of service with the employer. An employer is also not prevented from giving to a worker a redundancy payment in excess of that required to be given by the Promulgation.

11. If Section 108 is considered to be applicable to the facts before Court, the Plaintiff would be entitled to a week's redundancy payment on the basis of having

completed a year's service[1] under the terminated contract of employment. He was paid a further three (3) weeks, being the redundancy payment for his employment with the Fiji Sugar Corporation from 2013. In Cross Examination, the Plaintiff admitted accepting a week's wages on 20 September 2017 and a further three (3) weeks wages totaling $ 1,776.91.

12. Section 107 (1) (a) of the Employment Relations Promulgation obliges an employer contemplating termination of employment by redundancy of workers for reasons of an economic, technological, structural or similar nature to provide the workers, their representatives and the Permanent Secretary not less than 30 days before carrying out the terminations, with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out. Section 107 (1) (b) requires such employer to give workers or their representatives, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and on measures to mitigate the adverse effects of any terminations on the workers concerned, such as action to attempt to find alternative employment or retraining.

13. The Defendant by its letter dated 9 August 2017, spells out the reason for terminating the Plaintiff's contract of employment; the reason being the financial situation facing the sugar industry and the inability of the sugar industry stakeholders to give budget support for the Cane Quality Based Cane Payment Project. This letter is under the heading "Re: Closure of Cane Quality Based Cane Payment Project", from the Registrar of the Tribunal. The letter stated that the sugar industry stakeholders had advised the Registrar that they could no longer give budget support for the Cane Quality Based Cane Payment Project in view of the financial situation facing the sugar industry. He was given four (4) weeks' notice from the date of the letter for termination of his contract. The Registrar thanked him for the great work done for the sugar industry.

14. The Defendant marked several documents through the Plaintiff to show the efforts it had taken to secure funding. Letter dated 29 August 2017 (D3) under the

[1] Section 108 (2) of the Employment Relations Promulgation 2007

heading "Re: Cane Quality Based Payment Project", was written by T. Brown, the Industrial Commissioner/ Registrar of the Tribunal to the Permanent Secretary for the Sugar Ministry, letter dated 22 September 2017 (D6) sent to the Industrial Commissioner/ Registrar of the Tribunal on behalf of the Permanent Secretary for Employment, Productivity and Industrial Relations clarifies the payment of redundancy to workers in response to an email query (D5) relating to the interpretation of Section 108 (1) of the Employment Relations Promulgation and letter dated 29 September 2017 (D4) from the Permanent Secretary of the Ministry of Sugar Industry to Mr. Timothy Brown, the Industrial Commissioner/ Registrar of the Tribunal – which was in reply to D3 – make it clear that notwithstanding the efforts of the Defendant, state sponsorship for the Project was not going to continue. Letter dated 29 September 2017 (D4) from the Permanent Secretary of the Ministry of Sugar Industry states, "*Without the demonstration of any positive impact of the CQB Project to the growers, I am informing you that the Government does not support the continuation of this Project through any budgetary allocations*".

15. In Cross Examination, the Plaintiff admitted that the funding for the Cane Payment Project had ended. He was aware of attempts by the Defendant to secure funding from the Government. He knew that those attempts did not succeed. He conceded that his employment was terminated as a result of the cessation of funding. His evidence on the matter supported the Defendant's position that new sources of funds were not available for the Cane Payment Project, and, therefore, the Project could not be continued. However, the Plaintiff's point that these efforts had been made *after* his services were terminated seem to be supported by letters dated 29 August 2017(D3), 29 September 2017 (D4), 22 September 2017 (D6) and the email query relating to the interpretation of Section 108 of the Employment Relations Promulgation (D5).

16. In view of the evidence before Court, there seems little doubt that the Plaintiff's termination was actuated by forceful financial considerations. It is to these circumstances that the Plaintiff points in claiming that his termination was due to redundancy, and asserts that regulatory requirements were not followed by the Plaintiff prior to termination of his employment.

17. The earliest reference to redundancy and payments to the Plaintiff in lieu of such cessation of employment is found in letter dated 25 September 2017 (D7). The sums referred to in this letter were paid by the Defendant and accepted by the Plaintiff, it appears, without demur. By the time letter dated 25 September 2017 was sent out by the Defendant, termination of the Plaintiff's employment had taken effect in terms of the (termination of employment) letter dated 9 August 2017, sent by the Defendant, which was not responded to by the Plaintiff. Termination of employment took effect upon the completion of the notice period referred to in the letter of termination of employment (dismissal means *any* termination of employment by an employer including those under Section 33)[2]; the Plaintiff testified that his last working day was 5 September 2017. If such termination was in terms of the contract of employment, and as permitted by law, the provisions relating to redundancy should not arise in respect of the Plaintiff's cessation of employment, notwithstanding the contents of letter dated 25 September 2017.

18. After issuing the notice of termination of employment, it is curious as to why the Defendant sent letter dated 25 September 2017, and made payments to the Plaintiff in respect of redundancy. There is no explanation of this by testimony as evidence was not given on behalf of the Defendant. It is possible that this was an act of circumspection by the employer; in fact, the Defendant's Counsel submitted that this course of action was taken by the Defendant on legal advice. The Defendant's concern in the matter could be gauged by the exchange of correspondence in D3 to D7. For the Plaintiff's part, by accepting the "redundancy" payment, no harm has befallen him. The sum he received was the equivalent of four (4) weeks of wages, even though he had completed only a year of service with the Defendant. This has helped mitigate any possible losses the Defendant may have suffered.

19. In these circumstances, it would seem that the termination of the Plaintiff's employment was carried out substantially in accordance with the contract of employment. The termination of the Plaintiff's employment, therefore, is not wrongful. The further question of whether termination of services was due to redundancy is irrelevant in these circumstances; termination, in terms of the letter

[2] Section 4, Employment Relations Promulgation

dated 9 August 2017, had already taken effect when redundancy was mentioned by the Defendant, and payments made and accepted. There is no evidence of an offer of redundancy having being made by the Defendant at any time during the Plaintiff's employment. For these reasons, the Defendant cannot be held to have acted in violation of Section 107 of the Promulgation.

20. Mr. Nair submitted that the Defendant could not have used a hybrid method for termination and invited the attention of the Court to the decision of the High Court in Carpenters Fiji Ltd v Latianara[3]. The *ratio decidendi* of that case is not applicable to the facts in this action; in that case, the employee was dismissed for misconduct, but the employer subsequently took the stance that termination of employment was in terms of the notice clause of the contract of employment. It was in those circumstances that the Court held that *there could not be a hybrid or combination of termination methods*.

Non-compliance with the notice period and other grounds of complaint

21. It was contended for the Plaintiff that instead of the two weeks' notice stipulated in the contract of employment for termination of services, the Defendant had given the Plaintiff four weeks' notice. Thereby, Mr. Nair contended, the Plaintiff had acted in breach of the terms of the contract of employment. As a consequence, he argued, the Plaintiff was summarily dismissed. The Defendant denied this assertion and countered that termination of employment was in terms of the contract of employment, that it was due to the project running out of funds and that the letter terminating the Plaintiff's services had recognised the Plaintiff's hard work and dedication. I am inclined to agree that this was not an instance of summary dismissal. There is also no evidence to establish – though claimed as such by the Plaintiff – that the Defendant was in breach of Section 77(1)(c) of the Employment Relations Promulgation.

22. The Plaintiff's complaint that 4 weeks' notice, instead of the contractually stipulated two weeks' notice to terminate his services, resulted in a breach of the contract of employment is not acceptable. Though, in the strict sense, the extension of the notice period does not comply with the terms of the contract, there is no

[3] [2011] FJHC 822; ERCA 07.2011 (8 September 2011)

evident prejudice to the Plaintiff by the extension of the notice period. He has been paid in full for the period he has rendered services. Nor did the Plaintiff complain or attempt to assert the contractual term on notice at the time of the extension of the notice period. Clearly, no prejudice to the Plaintiff is evident. On the contrary, he has acquiesced[4] in such extension of time. To that extent, the relevant term of the contract of employment has been varied by the new notice period, and the Plaintiff has accepted the new term on notice by his conduct.

23. The finding of this Court is that the Defendant has not acted in breach of the employment contract by extending the notice period beyond the term stipulated in such contract.

Did the Sugar Industry Tribunal sign the letter of termination?

24. A further grievance of the Plaintiff was that the letter of termination of employment, dated 9 August 2017, was not signed by the Sugar Industry Tribunal. Instead, it was signed by Mr. Tim Brown. This contention is not acceptable. The contract of employment and the letter of termination were both signed by Mr. Tim Brown. They were issued on the letter head of the Sugar Industry Tribunal. It was the same with letter dated 25 September 2017, by which payments were granted for redundancy. No concern was expressed by the Plaintiff at the relevant times that the signatures were that of Mr. Tim Brown and not of the Sugar Industry Tribunal, and it seems fair to deduce that the Plaintiff had no such concern both at the time the contract of employment was issued and upon receipt of the letter terminating his employment. It made sense for Mr. Tim Brown - as the Registrar of the Defendant - to have signed as the agent of the Sugar Industry Tribunal.

Failure to issue the Plaintiff a certificate of service

25. Section 30 (6)[5] provides that upon termination of a worker's contract or dismissal of a worker, the employer *must* provide a certificate to the worker stating the nature of employment and the period of service. The Plaintiff's evidence that he was not provided with such a certificate remains unimpeached. There is no evidence from the Defendant – who chose not to testify – on this point. Counsel

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[4] Chitty on Contracts, 29 edition, Volume 1, 1308

[5] Employment Relations Promulgation 2007

for the Defendant did not dispute that a service certificate was not provided to the Plaintiff. Counsel submitted that the letter dated 9 August 2017 giving notice of termination of employment had greatly appreciated the services of the Defendant. This is true. The Defendant's position was that the letter of termination, which praised the work of the Plaintiff, was as good as a certificate of service. That argument, though, holds no water. A letter terminating employment cannot be equated to a certificate of service regardless of complimentary comments about the employee in such letter. That such an interpretation could unnecessarily prejudice an employee, apart from possibly negating the salutary requirement in Section 30 (6), is not lost on this Court. The enactment specifies the bare minimum that must be mentioned in such a certificate: the nature of employment and the period of service.

26. The only reasonable conclusion to reach would be that, in the circumstances of this case, the employer did not act with due fairness, when it failed or neglected to provide the Plaintiff a certificate of service as required by law. This statutory requirement is not at all a difficult one for an employer to comply. No explanation is available as to why the Defendant defaulted in this duty. The context of the Plaintiff's dismissal is also relevant. The Plaintiff ceased to be employed, not due to any fault of his, but due to the Defendant's perilous financial position. In that setting, the Defendant ought to have exercised greater sensitivity and diligence. In view of these circumstances, I hold that the Plaintiff was unfairly dismissed from employment.

27. I do not accept the Defendant's contention that it was necessary to exhaust the internal appeal process (clause 9 of the contract of employment) prior to invoking the Court's jurisdiction. This clause was for the benefit of employees who have been disciplined or have been subject to a decision which is considered unfair. This appeal process is unlikely to have assisted the Plaintiff. Appealing internally is not a contractual condition precedent to invoking the Court's jurisdiction.

Compensation

28. The Plaintiff was out of work for about eight months between the time of his dismissal and his new employment. He is entitled to be compensated for this period. However, he has already accepted the equivalent of four weeks wages as redundancy payments which the Defendant made available through letter dated 25 September 2017, though he was not strictly entitled to such sums on the basis of redundancy; these payments must be taken as mitigating his losses resulting from his dismissal. Therefore, a sum equivalent to the wages of three months would be fair compensation to the Plaintiff.

**Orders:**

A. The Defendant is directed to pay the Plaintiff a sum equivalent to the wages of three months. The Plaintiff's wage at the time of his dismissal shall be used as a base for the purpose of calculation of the compensation. The payment must be settled within two weeks of the date of the judgment.

B. The Defendant is directed to pay the Plaintiff a sum of $ 1,000.00 being costs summarily assessed.

C. The Defendant is directed to issue the Plaintiff a certificate of service in compliance with Section 30 (6) of the Employment Relations Promulgation 2007.

Delivered at Suva this **24th** day of **October, 2019**

Justice M. Javed Mansoor
**Judge of the High Court**