IN THE EMPLOYMENT RELATIONS COURT
AT SUVA
ORIGINAL JURISDICTION

ERCC No. 01 of 2018

BETWEEN : **ANGIE KAINAMOLI**

PLAINTIFF

AND : **FIJI REVENUE AND CUSTOMS SERVICE**

DEFENDANT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. D. Nair for the Plaintiff
: Mr. O. Verebalavu for the Defendant

Date of Hearing : 11 August 2019

Date of Judgment : 30 September 2021

JUDGMENT

EMPLOYMENT LAW: WRIT OF SUMMONS Redundancy – Replacement of existing position with new role filled by a recruit – Whether redundancy procedures followed – Sufficiency of notice to redundant employee – Breach of contract – Variation of contractual terms – Measure of damages – Fairness of dismissal - Jurisdiction of the Employment Relations Court – Sections 107, 108, 211 & 220 Employment Relations Promulgation 2007

The following cases are referred to in this judgment:

a. *Central Manufacturing Company Limited v Yashni Kant [2003] FJSC 5; CBV0010.2002 (24 October 2003)*

b. *Eastwood v Magnox & McCabe v Cornwall County Council [2004] 3 WLR 322*

c. *Johnson v Unisys [2001] 2 All ER 801*

d. *Transport Workers Union v Mobil Oil Fiji [2011] FJHC 28; ERCC 01.2011 (31 January 2011)*

e. *Aoraki Corporation Ltd v McGavin [1998] NZCA 88; [1998] 3 NZLR 276 (15 May 1988)*

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1. The plaintiff filed a writ of summons alleging that the defendant, by making her services redundant, acted in breach of her contract of employment and contrary to the provisions of the Employment Relations Promulgation 2007 (Promulgation). She sought a declaration that the redundancy was unjust and unlawful and for orders to recover loss of earnings as well as loss of future earnings, general damages, and interest and costs.

2. The plaintiff, after several years of employment with the Fiji Revenue & Customs Authority, was appointed by the defendant, as a senior properties & assets management officer on a three year contract of employment commencing 2 June 2015 until 1 June 2018. Before the expiry of that contract, the plaintiff was issued another contract from 1 January 2017 to 31 July 2018. However, she was made redundant by letter dated 15 November 2017, which gave her 44 days notice prior to dismissal on 29 December 2017.

3. The plaintiff treated the act of making her redundant as a breach of her employment contract, declaring *inter alia* that there was no reasonable cause or

justification to terminate her employment on that basis and that her employment contract was arbitrarily terminated when her position and key responsibilities remained an integral part of the establishment. She pleaded that part 12 of the Promulgation was contravened as her position continued to exist under a different designation, and the process followed in making her redundant was unfair, discriminatory and unlawful. The plaintiff stated that the defendant failed to give reasons for not considering her for rotational postings or for deployment in terms of her contract. The plaintiff claimed that the defendant discriminated in that she was the only worker to have been made redundant at the material time, and attributed bad faith on the part of the defendant. As a result of losing her employment, the plaintiff claimed to have suffered from depression and much anguish, and claimed compensation for such suffering.

4. By statement of defence, filed on 13 March 2018, the defendant denied the positions taken by the plaintiff, without setting out a substantive defence to those claims, relied on the terms of the contract of employment and called upon the court to dismiss the claims. On 26 March 2018, the plaintiff filed a brief reply to defence.

5. The issues raised by the parties are reproduced verbatim:

a. "Whether the decision to make the plaintiff redundant from 15 November, 2017 was lawful, justified and fair?
b. Whether the plaintiff is entitled to compensation under section 230 of the Employment Relations Act 2007
c. Whether the plaintiff is entitled to damages
d. Whether the plaintiff is entitled to costs on an indemnity basis?
e. That on 29 September 2017, a show cause letter to the plaintiff pursuant to which an interview was conducted on the alleged poor performance of the plaintiff".

The last issue being incomplete, the court changes it marginally to read, "whether on 29 September 2017, a show cause letter was issued to the plaintiff pursuant to which an interview was conducted on the alleged poor performance of the plaintiff?"

6. The plaintiff gave evidence on her behalf. Mr. Akshay Kumar, who was in charge of the defendant's recruitment, disciplinary matters and human resources, gave

evidence on behalf of the defendant. Though, at the conclusion of the trial, both parties undertook to file written submissions, only the plaintiff did so.

7. It is more or less common ground that the plaintiff was dismissed for redundancy and not for misconduct. This needs a little clarity in view of Mr. Nair's suggestion during his cross examination of the defendant's witness that the plaintiff was punished for misconduct following an incident that happened in the defendant's Lautoka office, and will be dealt with in later paragraphs (13 - 15).

Appointment, employment and termination

8. The plaintiff said that she started employment with the defendant in 2005 in the training department. Thereafter, she moved up the ranks within the human resources division. She was then seconded to the properties section at the finance department after which she applied for and was appointed to the position of "senior properties and assets management officer". The plaintiff was interviewed for this position on 13 May 2015, and, on 28 May 2015, she was informed that her application was successful. The contract period was 2 June 2015 to 1 June 2018. The letter of appointment states that the chief executive officer had identified the plaintiff as requiring further coaching and capacity building, in addition to her current skills and coaching. As a result, her salary of $30,904.00 was at a lower band. Whether the plaintiff was provided with suitable training and development, as identified by the management, did not emerge in evidence. The contract for that position provided for the worker's employment to be terminated by written notice of not less than three months in the ordinary course or payment of three months salary as compensation in lieu of notice. The same period applied in respect of retirement at the age of 60, while the period was one month when the employee was proved medically unfit. Though not related to the issues raised by the parties, the notice clause in this contract is of much relevance.

9. The period thereafter appears to have been materially uneventful until the plaintiff received the defendant's letter dated 23 May 2017 titled, "Re: Structure Reform Notice". The letter stated that the position "senior accountant asset and property management", was disestablished; the stated designation, however, was erroneous as the plaintiff's position was senior properties and asset management

officer. Little turns on the error as the plaintiff seems to have been the intended recipient of the letter, which was sent by the director, corporate services on behalf of the chief executive. The structure for corporate services, the letter stated, was implemented from 5 May 2017. The new position of "projects and assets administrator", the letter advised the plaintiff, would be "taking over your roles with other additional duties". The letter stated that the plaintiff was welcome to apply once the position was advertised. This appears to be the first time that the plaintiff was informed that her position was being considered for change, and there seems to have been no discussion on the matter preceding this letter.

10. Around the same time, a document titled, Position Description - May 2017, which was a revised job description, was also issued. This described the plaintiff's position as "projects and assets administrator", reporting to the principal projects and assets officer. The position also carried the description "rotational". Although the Position Description did not explain what was meant by rotational, the updated contract stated that "FRCA positions are rotational. Therefore, in consultation with you a rotation to a different FRCA position at this level may be effected within the term of this contract"[1].

11. The plaintiff applied for the advertised position of "projects and assets administrator", and was interviewed. She did not succeed. At the interview, the plaintiff recalled having been asked some questions on the position related to technical, administrative, behavioural and safety matters. The evidence shows that the interview panel comprised, in addition to the defendant's witness, Mr. Kumar, the defendant's former director of human resources, Ms. Ruth Williams, the finance manager, Mr. Kapil Raj and a former legal officer, Mr. Sunia Ravono. The person who scored the highest at the interview, an external candidate, one Mr. Sharma, was appointed to the new position.

12. After the plaintiff was advised by letter dated 23 May 2017 that a new position would take over her role, she was issued with an updated contract which came attached to a letter dated 16 June 2017 sent by the chief executive officer. There is no explanation why this was done. The covering letter drew attention to the

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[1] FRCA refers to the Fiji Revenue & Customs Authority. Later correspondence and the pleadings refer to the defendant as Fiji Revenue & Customs Service (FRCS)

plaintiff's revised salary, which was set out in the schedule to the revised contract. The plaintiff accepted the terms of the new contract. The contract, which was to initially end on 1 June 2018, was extended by a further two months to 31 July 2018. Her employment was to end on that date unless renewed. The schedule to the contract of employment showed an increase in her base salary to $39,248.00. The plaintiff's remuneration was backdated to 1 January 2017. The employer could terminate the plaintiff's employment giving not less than one month's advance notice or payment of one month base salary in lieu of the notice period. For the purpose of retirement, the notice period was revised to two months. The notice to be given by the employee was also reduced from three months to a month. The attached letter made no reference to the variation of the notice period.

13. Sometime after the new contract was issued, the plaintiff was given a letter dated 21 September 2017 summoning her for a meeting with the management. In her evidence, she termed it a letter inviting her to show cause, and said it was to do with a lock breaking incident that occurred in the defendant's Lautoka office. When questioned regarding the incident in cross examination, the plaintiff explained that she was based at the Fiji Revenue & Customs Service office in Suva, and that the incident in Lautoka was not immediately brought to her notice. Upon being informed, the plaintiff said that she put in place a temporary lock until a biometric system could be installed by the IT division. This matter, the plaintiff said, was reported to her two days before she received the letter dated 21 September 2017, inviting her to attend a meeting with the management.

14. The defendant's witness did not concede that the letter dated 21 September 2017 was a show cause letter. Signed by the manager, business services, the letter is titled "Re: Invitation". She was invited to the meeting to "discuss the following poor performance allegations ……. inability to follow instructions as given by your manager, unable to perform duties as required for the position, carelessness and negligence and being irresponsible". The Lautoka incident was not specifically mentioned in the letter. Referring to the incident, Mr. Kumar said that the lock was in a broken state for nearly a month until it was seen by an officer during an inspection, and that this exposed the institution to risk as the CCTV was not working. The evidence is not

clear as to when the incident occurred in the Lautoka office, but the matter itself is not of materiality to the main issues.

15. The plaintiff was not required to reply to the letter, and the defendant did not pursue the matter. The outcome of the interview was also not communicated to the plaintiff. Regardless of the steps the employer may have proposed to take prior to the meeting, no such intention appears to have shown itself afterwards. The termination letter made no reference to any deficient conduct on the plaintiff's part. The pleadings of the parties also did not refer to the incident, though the plaintiff's statement of claim made reference to a show cause letter without giving details. Mr. Nair, during cross examination of the defendant's witness suggested that the plaintiff's employment was terminated due to the lock breaking incident in the Lautoka office. However, the plaintiff testified that her services were brought to an end due to redundancy. Mr. Kumar said the same in his testimony. On these, it is safe to conclude that termination of employment did not result from misconduct.

16. On 13 November 2017, the plaintiff said she was informed that the role of "project and assets administrator" would be taken up by an external candidate. This was admitted by the defendant. The plaintiff said she was told verbally that a suitable position for her would be explored. This was admitted by the defendant. However, by letter dated 15 November 2017, the plaintiff was informed that she has been made redundant for structural reasons. She was told that an appointment was made on 22 September 2017 to the new role after disestablishment of her position. The plaintiff insisted that her role was not made redundant, and that the position continued to exist within the organisation. According to her, the position continued with a new appointment, the same reporting line and subordinates, and had similar requirements and "person specifications".

17. In this backdrop, it is necessary to examine how the redundancy was carried out.

The redundancy

18. The reason for redundancy must be external to the worker's performance or conduct[2]. The term "Redundancy" is defined in the Promulgation to mean, "no longer being needed at work for reasons external to a worker's performance or conduct pursuant to the reasons and processes set out in Part 12"[3]. The object of part 12 of the Promulgation is to provide workers facing redundancy with some degree of certainty about the problems faced by the employer and the assurance of compensation. Section 107 of the Promulgation states:

> "If an employer contemplates termination of the employment by redundancy of workers for reasons of an economic, technological, structural or similar nature, the employer must—
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> (a) 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; and
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> (b) give the 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"

19. The provision requires the employer to provide the worker, the worker's representatives and the permanent secretary with relevant information 30 days prior to termination of the worker's employment, when an employer contemplates such termination by redundancy of the worker for economic, technological, structural or similar reasons. Relevant information includes the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out. The plaintiff claimed that the permanent secretary was not informed about her redundancy.

20. The plaintiff's claim that information concerning her redundancy was not provided to the Ministry of Employment, was disputed by Mr. Kumar. He said that notice of the redundancy was given to the permanent secretary, and an

[2] Section 4 *ibid*

[3] Section 4 *ibid*

acknowledgement was received. Mr. Kumar's evidence is supported by the email tendered on behalf of the defendant which shows that the redundancy notice was sent to the permanent secretary on the same day as it was acknowledged i.e: 17 November 2017. For present purposes, it suffices to say without further inquiry into the matter, that the defendant informed the permanent secretary of the plaintiff being made redundant within the stipulated time. It is apt to mention that section 107 does not require the permanent secretary's involvement in the redundancy process or decision.

21. The employer must also give the worker an early opportunity for consultation on measures to be taken to avert or to minimise the terminations and on measures to mitigate the adverse effects. Measures to attempt to find alternate employment or retraining are suggested by the provision. There is an obligation on the employer to comply with the provisions in part 12 of the Promulgation in order to lawfully dismiss an employee for redundancy[4].

22. Wati J in *Transport Workers Union v Mobil Oil Fiji*[5] held that the employer was not in breach of section 107 (b) of the Promulgation by holding a meeting, providing a written notice and by looking for alternative employment. The court observed that a meeting was held one month before termination in addition to giving notice of termination; by conducting the meeting the employer provided the workers an opportunity to consult on measures outlined in section 107 (b); the employees had all the opportunity at the meeting to discuss on measures to mitigate or minimise the redundancy and also to find alternative employment.

23. According to the plaintiff's testimony there had not been any joint discussions concerning the redundancy of her position, and her employer did not take any measures to mitigate the effects of redundancy by posting her to an alternative position. She complained that though the defendant was obliged to provide her with consultation opportunities on suitable measures to be taken this was not done. This, the plaintiff told court, was treatment meted out in bad faith as she could have been easily deployed to another position.

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[4] Section 106 *ibid*

[5] [2011] FJHC 28; ERCC 01.2011 (31 January 2011)

24. The redundancy policy statement dated 13 November 2017, was signed and issued by the defendant's chief executive officer, Mr. Visvanath Das. The plaintiff said she was verbally informed of her redundancy on the same day the policy statement was issued. This was two days before the plaintiff received the letter dated 15 November 2017 giving notice of termination of employment. This evidence was not challenged by the defendant. The letter dated 15 November 2017 was titled "RE: Redundancy arising out of Structural Changes in the FRCS Corporate Services Division". The termination letter made reference to the defendant's redundancy policy. The plaintiff was informed that the interview process was finalised and a new candidate appointed to the role on 22 September 2017, due to the new role being *very different* to "your current role in terms of the financial skill sets required". In contrast, Mr. Kumar, described the new position as being only *slightly different* from the plaintiff's role. On the face of the defendant's letter, the plaintiff's position appears to have been filled much before the redundancy policy was released.

25. The policy was ostensibly intended to support the defendant's transformative strategy, of which no evidence was placed before court. In fact, the defendant's witness expressed uncertainty whether a structural review was undertaken within the defendant institution prior to the decision on redundancy. The policy statement set forth that where there is a need for workforce reduction, the defendant will ensure employees are provided with some degree of certainty for the reasons of redundancy and the assurance of compensation. The policy requires the defendant to make every reasonable effort to reduce the number of redundancies and mitigate the effects of the redundancies through its redundancy policy. These salutary policy measures are in step with the spirit of the law.

26. Moreover, the policy states, where redundancy is being considered, "the organisation will ensure a fair process", and "for any possible job loss, FRCS will ensure a thorough and extensive consultation process is conducted prior to identifying the redundant jobs". Under the heading, "Procedures for Redundancies", the policy states, "PCC will also convene a meeting between the employee(s), the line manager and the employee representative within the first 7 consecutive days where applicable to discuss the proposed

grounds of redundancy". The defendant did not lead evidence to show that these measures in its policy were followed in this instance.

27. The plaintiff said that she was handed over the redundancy notice when she was asked to attend a meeting with the management on 15 November 2017. There is no evidence that a meeting or consultation was held prior to 13 November 2017 concerning the plaintiff's redundancy. The plaintiff was given notice of 44 days of the redundancy, which was to take effect on 29 December 2017. However, uncertainty over the position could be traced to May 2017. The letter giving notice of termination for redundancy stated that the employer was open to consultations during the notice period in relation to any measures to mitigate the adverse effects of the termination of her employment and if there are alternative roles or retraining opportunities. The notice of redundancy suggests that the plaintiff had an opportunity for consultation prior to termination. Neither party, however, appears to have initiated consultations on the matter, and the defendant has not followed its own policy. There is no evidence of correspondence between the parties after notice of redundancy on 15 November or upon termination taking effect on 29 December.

28. Mr. Kumar agreed in his testimony that the defendant did not take any measures to retrain the plaintiff to fit into the required role. This, he said, was because the role required civil engineering skills – which the plaintiff lacked – and training her would have taken about a year. His evidence was that the new position was slightly different from that held by the plaintiff, but with added responsibilities. Mr. Kumar said that the expectation from the plaintiff's occupational role was to look after the defendant's properties inclusive of all its assets, vehicles and buildings, and that the new role was created with added responsibilities such as attending to tenders. He said that knowledge in civil engineering was needed for building maintenance, but that the plaintiff did not possess the necessary engineering knowledge. The interview panel, he said, recommended the highest scorer, an external candidate. Mr. Kumar reasoned in his evidence that the plaintiff was given an equal opportunity to be part of the interview process. Alternative roles, he said, were not available to match the plaintiff's competencies and skills in any other division after the new position was created.

29. The key accountabilities set out in the "Position Description" issued in May 2017 did not seem to show a significant requirement in civil engineering, although the document places some emphasis on a qualification with a civil engineering content, and refers to a "position purpose" which is said to be for the "development and maintenance of appropriate systems for the monitoring of assets and ensuring properties section projects are successfully completed in a timely manner". The evidence led on behalf of the defendant, in my view, does not show there were differences of substance between the two positions.

30. Structural redundancy was the reason given by the defendant in the plaintiff's notice of redundancy. According to the policy, "structural redundancy may also apply where a role is disestablished and a new role is created in a manner that the incumbent of the disestablished role is not sufficiently qualified, skilled or capable to continue performing the task or multitask", and "also refers to a compulsory situation where the FRCS management identifies jobs that will no longer be needed and/ or redesigned due to economic, structural and technological reasons and the employee(s) is made redundant in this instance". The term "structural" is defined by the Promulgation to mean in relation to a company, corporation, business enterprise or workplace the manner in which such an entity is organized, managed or administered[6].

31. 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 other entitlements[7]. The defendant complied with this, and the plaintiff did not decline or protest payment. In her evidence, she confirmed receipt of compensation, but was uncertain whether the compensation was $5,000 or $6,000. The plaintiff explained that she accepted the compensation as she needed the money.

32. By and large, therefore, it appears that the statutory provisions have been complied with even though this single redundancy from a work force numbering several hundred could have been carried out with prudent planning and necessary sensitivity. The defendant's contention that the plaintiff was made

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[6] Section 107 (2) *ibid*

[7] Section 108 *ibid*

redundant for structural reasons, was not wholly convincing. It is possible though that the defendant, in its managerial wisdom, had reason to make the plaintiff redundant. An employer must have some latitude in selecting employees for redundancy provided it adheres to the law and acts reasonably. However, non-compliance of the statutory provisions, breach of contractual provisions and an employer's unfair conduct would entitle an employee to pursue an employment grievance in terms of the Promulgation.

33. Having concluded that the defendant was generally compliant with the statutory provisions, the court must consider whether the terms of the plaintiff's contract of employment have been followed. Where a mechanism is provided for redundancy in the contract of employment that must be followed; in this instance, however, the contract did not make express provision concerning redundancy.

Is the plaintiff entitled to succeed?

34. The pleadings in the plaintiff's statement of claim aver breach of the employment contract, denial of natural justice and non-compliance with the law. The pleadings further alleged violation of the Fiji Constitution by inflicting forced labour on the plaintiff. The issues raised on behalf of the parties relate to a damages claim as well as to the statute based employment grievance regime. The decision that falls to be made by this court, however, is whether or not the defendant acted in breach of the plaintiff's contract of employment by dismissing her, and whether, as a consequence, the plaintiff is entitled to damages.

35. Section 107 of the Promulgation states that an employer contemplating terminating the employment of workers for redundancy must provide the workers with relevant information not less than 30 days before carrying out the termination. This provision has no impact upon the contractual notice period in the plaintiff's contract.

36. The updated contract of employment, which was issued to the plaintiff on 16 June 2017, reduced the notice period to one month from the previous three month period given in the original contract. The defendant gave the plaintiff

notice of 44 days. The plaintiff did not raise issue on this matter. In the court's view, this, however, is a matter that needs consideration.

37. Clause 11 of the original contract dated June 2015 states that the contract may be varied at any time during the period of service, subject to a written notice by either party, prior to variation and must be mutually agreed by both parties in writing. A similar clause is to be found in the updated contract as well. There is no indication that the plaintiff was given advance notice *prior* to variation of the termination clause. Certainly, the employer called upon the plaintiff to obtain advice regarding the terms of the updated contract of employment. The proper and reasonable course would have been to notify the employee of this change, as was done by the letter dated 16 June 2017 attached to the updated contract in regard to the revised salary. It is possible that the plaintiff considered the salary revision to be the only change in the updated contract. In fact, in her testimony, the plaintiff suggested that the new contracts were issued following salary revisions that were backdated. The date of signing is shown to be 14 April 2017; April may have been erroneously stated instead of June. The contract is likely to have been signed and returned on the day it was issued to the plaintiff. In this context, although the plaintiff placed her signature signifying her agreement to the updated contract, whether this amounts to her unqualified consent is a moot point.

38. It is reasonable to conclude, therefore, that the defendant did not comply with the variation clause of the plaintiff's contract of employment by failing to give prior notice of varying the notice clause. This would mean that the termination clause in the original contract has not been validly varied by the parties. By this, the defendant must be taken to have terminated the plaintiff's employment in breach of the notice provisions of the plaintiff's contract of employment. Such a reasoning may be important considering the respective positions of the parties, the overall circumstances and the Promulgation's objective in creating minimum labour standards that are fair to workers and employers alike. It is perhaps pertinent to point out that even where a contractual term is considered valid, the court is competent, in exercising its jurisdiction under section 220(1)(i) of the promulgation when an action is founded on an employment contract, as it is in this case, to make an order cancelling or varying a contractual term though the

court must make such an order only if any other remedy would be inappropriate or inadequate[8]. As the parties have not specifically raised issue on the matter, it may seem that the court has traversed beyond the lines drawn by the litigants. However, breach of the employment contract has been advanced as a cause of action, though particularised in a different way, and the court, in the interests of justice, must take cognizance of the documentary evidence in its record.

39. Where there is a breach of a notice clause in terminating a worker's employment, the remedy of damages is available, and the period of notice is a relevant factor in the assessing of damages. Damages for wrongful dismissal through an employer's wrongful dismissal are governed by ordinary principles of contract law including those that relate to mitigation of damages. At the time of the trial, the plaintiff said she was employed by the Fiji Sports Council. Whether she took up the new employment shortly after she left the defendant's employment is not known. She was not cross examined concerning the mitigation of her losses. If there was evidence that the plaintiff was gainfully employed elsewhere soon after ceasing to be employed with the defendant, those monetary gains would have to be reduced from the damages due to her. In this case such a reduction is not supported by the evidence. I have, therefore, reached the conclusion that the plaintiff is entitled to damages for breach of contract. The plaintiff is entitled to damages on her revised salary together with related FNPF benefits and payment in lieu of balance annual leave.

40. It was submitted on behalf of the plaintiff that an employer is obliged to treat an employee fairly, and with respect and dignity. In her evidence, the plaintiff said she felt "humiliated and useless" as she was the only worker picked for redundancy out of a workforce of about 800 in the defendant's employ. Mr. Akshay Kumar conceded that the plaintiff was the sole employee to be made redundant. Mr. Nair cited the decision of the Fiji Supreme Court in *Central Manufacturing Company Limited v Yashni Kant*[9] in which their Lordships agreed with the Court of Appeal that there is an implied term in the modern contract of employment that requires an employer to deal fairly with an employee, even in the context of dismissal. In that case, following the finding that the dismissal was

[8] Section 220 (2) *supra*

[9] [2003] FJSC 5; CBV0010.2002 (24 October 2003)

carried out in a manner that was unnecessarily humiliating and distressing, the Supreme Court held that there is no reason in principle why a breach of such implied term should not be found to have occurred.

41. Neither counsel made full submissions on this matter other than the reference made by Mr. Nair to the Supreme Court decision in *Central Manufacturing Company Limited v Yashni Kant*, which was decided prior to the enactment of the Employment Relations Promulgation in 2007. Their Lordships, in that decision, referred to the decision of the House of Lords in *Johnson v Unisys*[10]. In that case an employee brought a claim for unfair dismissal and the Industrial Tribunal held with him and awarded the then statutory maximum of £11,000. Later, he brought a County Court action against the employer for breach of contract and negligence, and sought damages for loss of earnings resulting from the fact and manner of his dismissal, which he claimed caused him a nervous breakdown. The employee claimed that the employer had breached the implied term of trust and confidence between employer and employee by failing to give him a fair hearing and by breaching its disciplinary procedure.

42. By majority judgment, the House of Lords held that an employee had no right of action at common law to recover financial losses arising from the unfair manner of his dismissal, as that would be inconsistent with the statutory scheme for unfair dismissal established by Parliament. Having traced the development of the statutory system for dealing with unfair dismissals, Lord Hoffman, expressed the view that "for the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be to go contrary to the evident intention of Parliament that there should be such a remedy but that it should be limited in application and extent"[11].

43. In *Eastwood v Magnox & McCabe v Cornwall County Council*[12], the House of Lords stated, "This development of the common law, however desirable it may be, faces one overriding difficulty. Further development of the common law along these lines cannot co-exist satisfactorily with the statutory code regarding unfair dismissal. A common law obligation having the effect that an employer will not dismiss an employee in an unfair way

[10] [2001] 2 All ER 801
[11] At 821 *ibid*
[12] [2004] 3 WLR 322 at 327

would be much more than a major development of the common law of this country. Crucially, it would cover the same ground as the statutory right not to be dismissed unfairly, and it would do so in a manner inconsistent with the statutory provisions. In the statutory code Parliament has addressed the highly sensitive and controversial issue of what compensation should be paid to employees who are dismissed unfairly. This code is now an established and central part of this country's employment law. The code has limited the amount payable as compensation. In 1971 the limit was £4,160. Reflecting inflation, this limit was raised periodically up to £12,000 in 1998. In the following year (Employment Relations Act 1999, section 34 (4)) the statutory maximum was raised in one bound to £50,000. From there it has risen to the present figure of £55,000.

In fixing these limits on the amount of compensatory awards Parliament has expressed its view on how the interests of employers and employees, and the social and economic interests of the country as a whole, are best balanced in cases of unfair dismissal………...A common law action for breach of an implied term not to be dismissed unfairly would be inconsistent with the purpose Parliament sought to achieve by imposing limits on the amount of compensatory awards payable in respect of unfair dismissal. It would also be inconsistent with the statutory exclusion of the statutory right where an employee had not been employed for a qualifying period or had reached normal retiring age or the age of 65 and, further, with the parliamentary intention that questions of unfair dismissal should be dealt with by specialised tribunals and not the ordinary courts of law".

44. Their Lordships' views are apt in this context, considering the special employment grievance procedure established by the legislature in 2007 to deal with complaints concerning employer unfair conduct.

45. Mr. Nair further contended that this court has jurisdiction in terms of section 230 of the Promulgation to grant relief to the plaintiff if the court determines that the plaintiff has an employment grievance.

46. Section 230 (1) of the Promulgation provides:

"(1) If the Tribunal or the Court determines that a worker has an employment grievance, it may, in settling the grievance, order one or more of the following remedies—

(a) reinstatement of the worker in the worker's former position or a position no less advantageous to the worker;

(b) the reimbursement to the worker of a sum equal to the whole or any part of the wages or other money lost by the worker as a result of the grievance;

(c) the payment to the worker of compensation by the worker's employer, including compensation for-

(i) humiliation, loss of dignity, and injury to the feelings of the worker;

(ii) loss of any benefit, whether or not of a monetary kind, which the worker might reasonably expect to obtain if the employment grievance had not occurred; or

(iii) loss of any personal property"

47. Parliament has laid down a statutory process by which a worker may file or lodge an employment grievance. Part 13 of the Promulgation makes provision for workers to pursue employment grievance procedures either personally or through the assistance of a representative. The statute provides that an employment contract must contain procedures for settling an employment grievance, including confidentiality and natural justice[13]. A worker who believes that he or she has an employment grievance may pursue the grievance procedure in person, and may be assisted by a representative[14]. Schedule 4 provides that where an employment grievance relates to dismissal, the aggrieved workman may refer the grievance directly to mediation. All employment grievances must first be referred for mediation[15]. Where an employment contract includes an internal appeal system, however, that system must first be exhausted before any grievance is referred for mediation[16]. If an employment grievance or employment dispute is not resolved by mediation, the mediator must refer the grievance or dispute to the Employment Relations Tribunal[17].

48. An employment grievance can be adjudicated by the Employment Relations Tribunal[18]. The circumstances in which the Employment Relations Court will have jurisdiction in regard to an employment grievance is also expressly stated in the Promulgation[19]. The jurisdiction of the tribunal and the court are explicitly set out under Part 20 of the Promulgation. Where the court is conferred jurisdiction

[13] Section 110 (1) (a) *supra*
[14] Section 111(1) *supra*
[15] Section 110 (3) *supra*
[16] Section 110 (4) *supra*
[17] Section 194 (5) *supra*
[18] Section 211 (a) *supra*
[19] Section 218 (2) & (3) *supra*

to hear an employment grievance, it has authority to grant the remedies provided in section 230 of the Promulgation. The court does not consider this to be an instance in which it can exercise such jurisdiction.

49. The redundancy policy document makes provision to appeal a redundancy decision. This, given under the section redundancy procedures, states that "FRCS shall provide an opportunity for the employee(s) and or employee representative to respond and appeal the decision within seven (7) consecutive days". The document continued, "Any employee(s) grievance arising from a proposed redundancy shall be treated under the Grievance Policy & Procedures…..The CEO shall endorse the final decision for any redundancy appeal …...Employee may refer the matter under mediation or through the union if still unsatisfied with the decision".

50. The plaintiff received written notice of redundancy on 15 November 2017, and the termination of her employment took effect 44 days later. No appeal was lodged against the decision. There is no reason to distinguish redundancy dismissals made unjustly from other dismissals made unjustly, and had the plaintiff so desired, she could have pursued the matter by lodging an employment grievance if her appeal to the defendant did not succeed. The plaintiff chose not to appeal internally or take the statutory grievance route.

51. Had an employment grievance been filed, the emphasis of the inquiry would have been different to the matters considered in this action. An insight is provided by the judgment of the Court of Appeal of New Zealand in Aoraki Corporation Ltd v McGavin[20]

> "No checklist can be provided for use in deciding, upon a dismissal in a true redundancy situation, whether there has been unjustifiable action. All of the circumstances of the particular employment relationship potentially are relevant. The nature of the employment contract generally will be the starting point - its express terms, when it was negotiated, the relative bargaining strengths, the type of work and its remuneration all will be relevant as background. So will the circumstances giving rise to the redundancy and the dismissal. Against these matters will be examined the conduct of the employer and employee in their respective positions to determine whether the employer's action is justifiable by reasonable standards of procedural fairness".

[20] [1998] NZCA 88; [1998] 3 NZLR 276 (15 May 1988)

52. Having given consideration to the preceding matters, I have reached the following conclusion. The plaintiff is entitled to relief for breach of contract. The employer was in breach of the variation of contract clause and, consequently, the termination clause. The question of unfairness, as alleged by the plaintiff, on the basis of the defendant infringing the implied contractual term of fair conduct does not arise in this proceeding. The relief for a declaration that the termination was unlawful and unjust is declined. Consequently, there will be no award of compensation in terms of the Promulgation. Likewise, the question of future earnings will not arise in the circumstances of this case; the employer, in this case, was contractually entitled to terminate the plaintiff's employment with due notice. An issue was raised as to whether indemnity costs are payable to the plaintiff. This was not pursued on behalf of the plaintiff, and no order is made in this regard. A further complaint in the plaintiff's statement of claim, though not raised as an issue, is that natural justice was denied to her. This was not pressed by the plaintiff in her testimony or in submissions on her behalf. Nor does the evidence support such a finding. Similarly, the claim of forced labour lacks merit.

ORDER

A. The plaintiff is awarded damages equivalent to the aggregate of three months of the plaintiff's last drawn wages together with accrued FNPF benefits less the sum paid to her as redundancy. Payment shall be made to the plaintiff by the defendant within 21 days of this judgment;

B. The defendant is directed to pay the plaintiff costs summarily assessed by court in a sum of $2,000.00 within 21 days of this judgment.

Delivered at **Suva** this **30th** day of **September, 2021.**

M. Javed Mansoor
Judge