

JOSEPH VALENTINE v SHELL FIJI LTD (HBC0169 of 2002)

HIGH COURT — CIVIL JURISDICTION

5 PATHIK J

4 November 2005

10 **Employment — contract of employment — unlawful termination — Plaintiff received warning letters from Defendant — letter of termination given to Plaintiff — Plaintiff claimed termination unlawful — termination not in breach of contract and not unfair or unreasonable — claim dismissed as termination lawful — 1997 Constitution s 33(3) — Employment Act (Cap 92) ss 32(2), 35.**

15 The Plaintiff was employed by the Defendant as commercial area manager. The contract of employment between the Plaintiff and the Defendant provided for a termination clause giving the parties the option to terminate the contract by giving not less than 1 month's notice in writing and the Defendant has the option to pay 1 month's salary in lieu of notice. The contract of employment between the parties lacked signature and date. In 1999, the Defendant issued a warning letter to the Plaintiff which warned him about exceeding his authority limits under the "Shell Fiji Authorities Policy". In 2000, a final warning letter was issued to the Plaintiff which warned him about his inappropriate conduct as a manager. The Plaintiff was given a letter of termination and paid 1 month's pay in lieu of notice on 26 June 2000. The Plaintiff's termination was immediate.

20 The Plaintiff claimed that the Defendant breached the contract of employment and the Plaintiff was not given an opportunity to defend himself as the termination letter did not provide the reasons for his termination. The Plaintiff sought damages from the Defendant. The Defendant alleged that the termination was fair as the warning letters were given to the Plaintiff and that the contract of employment allowed the payment of one month's pay as notice to terminate the employment.

25 **Held** — (1) The terms and conditions in the contract of employment between the Plaintiff and the Defendant are the terms of employment between the parties notwithstanding the lack of signature and date. Furthermore, the Plaintiff acknowledged the document as the contract of employment in his submission.

30 (2) The Defendant was justified in terminating the Plaintiff's employment after giving a month's pay in lieu of notice in conformity with the provisions of the contract of employment. The termination of the Plaintiff was lawful as he was given two warning letters which clearly admonished him from exceeding his authority as manager. The evidence established that the Defendant was justified in issuing warning letters. The warning letters indicated the possibility of termination and made reference to earlier discussions.

35 (3) Under Fiji jurisprudence an employer may dismiss an employee without cause but the manner of dismissal must be fair, and should not unnecessarily humiliate or distress the employee. The termination was justified. The Plaintiff was given opportunities to be heard as referenced in the warning letters given to him.

40 Application dismissed.

Cases referred to

45 *Stuart v Armourguard Security Ltd* [1996] 1 NZLR 484, cited.

Central Manufacturing Co Ltd v Yashni Kant [2003] FJSC 5; *Diners Club (NZ) Ltd v Prem Narayan* [1997] FJCA 46; *Mallock v Aberdeen Corporation* [1971] 1 WLR 1578; [1971] 2 All ER 1278; *Wallace v United Grain Growers Ltd* [1997] 3 SCR 701, considered.

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L. Vaurasi for the Plaintiff

H. Lateef for the Defendant

Pathik J. This is the Plaintiff's claim for unlawful termination of contract of employment. He was employed by *Shell Fiji Ltd* (the Defendant).

5 **Evidence**

In this action evidence was given by the Plaintiff in support of his claim and by Mr Thomas, marine manager on behalf of the Defendant.

10 The Plaintiff *Joseph Valentine* was offered a contract with the Defendant on 15 April 1997. This offer was accepted. He commenced employment on 5 May 1997 with an applicable probation period from the date of commencement. His confirmation of employment with the company came on 1 September 1998.

Under the contract of employment (*see Ex 1(b)*) between the Plaintiff and the Defendant, the Plaintiff was employed as a *commercial area manager*. Among other things, the contract provided for a *termination clause*, which stated at cl 15:

15 You or we, at any time shall have the right to terminate this Contract by giving to the other not less than one (1) month notice in writing and Shell at its option may give pay in lieu of notice.

On 7 December 1999 the Defendant issued a *warning letter* to the Plaintiff (*see Ex 1(h)*). This was the first letter of this kind to be issued to the Plaintiff since he began employment with the Defendant. In this letter he was warned about exceeding authority limits under a "Shell Fiji Authorities Policy". It can be deduced from the said letter that there was a conversation between the Plaintiff and his superior a Mr Peter Walker, concerning the basis for the warning. The particulars of this meeting is unclear and so is the question of whether the Plaintiff was given time to explain the allegation of *exceeding authority* as stated in the warning letter.

Another *warning letter* was issued to the Plaintiff on 28 March 2000 (*see Ex 1(j)*). In this letter from Mr Peter Walker the Plaintiff was warned about *inappropriate conduct as a Manager*. It stated that there had been a discussion between the Plaintiff, Mr Walker and the Plaintiff's superior concerning the basis for this warning. This discussion supposedly took place on 14 February 2000. The letter further stated that this would be the final warning letter that the Plaintiff would be issued with and that a third letter would warrant dismissal.

35 Throughout the Plaintiff's term with the Defendant company he was awarded yearly salary increments based on his performance. The following lists out these increments through the years 1998–2000:

Date former new increment comments.

40 07/05/98: \$18,455–\$20,600: \$2165 increment rating based at three which reflects a performance rating of "fully effective"

27/05/99: \$20,600–\$21,600: \$1000 increment rating at four which reflects a performance rating of "Adequate Performance"

Note: Performance ratings range from 1–5 (See: *Ex 1(d)* for this key performance ratings)

45 On 13 June 2000 the Plaintiff was selected by the company to attend formal training at the Fiji National Training Council to improve his work performance, which was to have taken place between the 21–25 August 2000.

On the 26 June the Plaintiff was issued with a *letter of termination*, which terminated him instantly from the Defendant company. The letter stated:

50 We advise the termination of your employment from Shell Fiji Ltd which is effective 26 June 2000. You will be paid one (1) months pay in lieu of notice. Please contact the

Executive Assistant to make necessary final arrangements for your pay and payment of your outstanding annual leave up to 26 June of eighteen (18) days. You are to complete and sign the attached Personnel Departure Action Procedure with your Supervisor. You are reminded of your obligations of confidentiality in respect of Shells business affairs and records and that Shell documents and/or computer information in your possession must be returned upon your departure from the company.

According to the Plaintiff's submissions he was told to remain in his office and not to leave the premises upon his arrival at work on 27 June 2000. He was called to a meeting where he was told that he was being terminated and then handed the termination letter without any reasons as to why he was terminated. This made him break into tears. He was told to hand over all of the property of the Defendant company which he had in his possession and later escorted outside the premises to a waiting taxi with instructions to the driver to take him home.

In the letter (*Ex I(q)*) is set out the *reasons* for the Plaintiff's termination. This letter was a reply to an enquiry that the Plaintiff's former solicitor had made with the Defendant company. During the Plaintiff's employment he had two bankruptcy notices issued against him. One was a notice of a receiving order, and the second was for an order for adjudication (*see Exs I(r) and I(s)*).

Issues

The *issues* that were agreed to be determined by the court at the pre-trial conference were:

1. What are the terms and conditions of the Plaintiff's employment with the Defendant and did it include the contract of employment dated 21st April 1997?
2. Were the issuance of the warning letters by the Defendant dated 7th December, 1999 and 28th March 2000 justifiable, warranted and did the Defendant take into account all relevant circumstances prior to the issuing of the same?
3. Was the termination of the Plaintiff by the Defendant on the 26th June lawful and in compliance with the Plaintiff's Terms and Conditions of Employment and the Principles of Natural Justice?
4. If not, is the Defendant liable to pay damages to the Plaintiff, if so, how much?
5. Did the Plaintiff suffer any losses? If so, to what extent?
6. Has the Plaintiff mitigated his losses?
7. Is the Defendant liable to pay interests and costs, if so, how much?

Plaintiff's submission

Counsel for the Plaintiff submitted that an implied term of the contract was that the Defendant company had to deal fairly with the Plaintiff in its dismissal process and in the manner he was dismissed, for he says that the 1997 Constitution in s 33(3) provides that "*every person has the right to fair labour practices, including humane treatment and proper conditions*".

Counsel submits that the warning letters followed by the termination letter were given without giving him an opportunity to really defend himself. The termination letter did not provide any reasons for his termination. It was only when the Plaintiff's former solicitor questioned the termination that the "reasons" were supplied.

It is submitted that the Defendant breached the implied term of the employment contract to treat the Plaintiff fairly and with appropriate respect and dignity in carrying out dismissal for which the Defendant company would be

liable in damages. He submitted that it was most certainly a breach of trust and confidence to terminate his employment in such a manner.

Defendant's submission

5 The learned counsel for the Defendant submitted that the Plaintiff was fairly dismissed after warning letters were given. The said cl 15 of the agreement allows for the giving of a month's notice to terminate employment. He was taken home in a taxi.

10 Consideration of the issues

(a) *The terms and conditions of employment of the Plaintiff*

The contract of employment is the primary reference point for the employer-employee relationship. In the present case, there are two documents
15 that provide the primary reference points for the relationship. The first can be found under *Ex 1(a)* and the second under *Ex 1(b)*. The former is an offer of employment dated 15 April 1997, extended to the Plaintiff from the Defendant company. The offer deals with, among other things:

20 *Salary*

- including commencement salary.
- an annual salary review commencing April 1998
- assessed on standard performance and with cost of living adjustment determined by the management.

25 *Provision of a company vehicle*

Condition of acceptance of the company's policies at the time.

Exhibit 1(b) is titled "*Shell Fiji Limited — Terms and Conditions of Employment for Joseph Valentine*". Clause 2 of the document states:

30 Your employment should commence on Monday 5th May 1997, subject to the terms and conditions outlined in this Contract of Employment between yourself and Shell Fiji Limited.

This latter document is not signed or attested in any way and save only the reference to Joseph Valentine there does not seem to be any express indication
35 from the face of the document itself that this was actually the agreement that was made between the Plaintiff and the Defendant company. Furthermore, the document does not have a specific date to it.

Under the Employment Act of Fiji (Cap 92) there is a requirement that every written contract needs to be signed under s 32(2) and attested under s 35.
40 However, despite this lack of clarity on the face of the document, the Plaintiff's submission acknowledges this document (being *Ex 1(b)*) as the contract of employment.

On the evidence, I find that the "Terms and Conditions" of the agreement are the terms of employment of the Plaintiff with the Defendant company.

45 (b) *The warning letters: Justified and warranted? Were the circumstances accounted for before issue of warning letters?*

The first letter was given to the Plaintiff on 7 December 1999 under which he was admonished for exceeding authority as set out in the "Shell Fiji Authorities
50 Policy". One can assume from this letter that there was a discussion about the basis of the warning earlier on the same day of the issuing of the letter.

Just over 3 months (on 28/03/00) following this he was given letter quoting “inappropriate conduct as manager”. Again in this letter there is reference to a discussion that took place on the 14/02/00 which is over a month prior to the constructive notice to the Plaintiff about the issue in question on that particular date.

In the Supreme Court Case of *Central Manufacturing Co Ltd v Yashni Kant* [2003] FJSC 5 (on appeal from Fiji Court of Appeal Action No ABU 0001 of 2001) the court held in principle that *fair and reasonable treatment* is generally expected today of any employer that the law has come to recognise; it is an ordinary obligation in a contract of service.

Furthermore the persuasive authority of *Stuart v Armourguard Security Ltd* [1996] 1 NZLR 484 holds the principle that the procedure leading to termination must be consistent with *fairness*. This principle was relied on by the court in the *Central Manufacturing Ltd* where in that case the Court of Appeal found that the employee had not been confronted with the allegations upon which the employer had relied upon for termination.

The contract of employment cl 15 herein gives the right to terminate the contract by giving of not less than 1-month notice. Furthermore, the Defendant company may exclusively determine for itself whether to give a payment in lieu of notice. Although a right of summary dismissal is not expressly provided for, the wording of this termination clause where there is discretion to give payment in lieu of notice, may give rise to the assumption that this is intended under the agreement. Otherwise, the right is entrenched as a common law right that it really is naturally implied into the contract unless the contract expressly states otherwise.

The Plaintiff had also accepted to be bound by the policies that govern the company for example under the “Policy and Guidelines for the conduct of Shell Group employees”.

Following from the above principles now established, it makes it mandatory that the procedures leading up to termination are not only seen to be fair but are actually observed to be fair.

It is evident from the second warning letter that the Defendant company observed a policy to terminate on any disciplinary breach immediately after a second warning letter has been issued. This is apparent from the letter, which states:

I confirm that this is your second warning letter and as explained to you, the third notice will result in your termination of employment with Shell Fiji Limited. I trust that you understand the grave nature of this letter and the consequences thereafter. However both Fred and I remain optimistic a change in your performance will be for the better.

I find, on the evidence, that the Defendant was justified in issuing warning letters.

The issuing of a warning letter is indicative of the extent of risk that an employee faces in respect of possibilities of being terminated. Therefore, the Defendant company has adopted a policy in that the issuing of a third notice would result in immediate termination.

(c) The legality of the termination

The relevant section under the contract of employment of the parties (cl 15) contains the termination as stated above.

On “*unfair dismissal*”, in Fiji there is no statutory provision establishing cause of action known as “*unfair dismissal*”. This proposition is supported by Court of Appeal in *Diners Club (NZ) Ltd v Prem Narayan* [1997] FJCA 46 where the court stated:

5 Fiji does not have legislative provisions protecting employees from arbitrary or unjustified dismissal as is the case in England, Australia and New Zealand. Accordingly, the rights and liabilities of the parties in the present case fall to be determined in accordance with the proper construction to be based on the termination clause.

10 However, *Yashni Kant* has thrown a new light on “unfair dismissal” by making this remedy available in the common law courts of Fiji according to my understanding of the case.

In the case of *Central Manufacturing Co Ltd v Yashni Kant* [2003] FJSC 5 — Supreme Court — judgment 24.10.03) the court decided that payment in lieu of
15 notice “*is accepted as a statutory right in relation to oral contracts, and an employer does not commit a breach of contract by exercising that statutory right*”. The court went on to say that “*if that interpretation of s 25 (of Employment Act) be incorrect, we would nonetheless hold that there is now an implied term at common law that an employer can make payment in lieu of*
20 *notice*” (emphasis added).

The Supreme Court said that on this aspect the reasoning of the Supreme Court of Canada in *Wallace v United Grain Growers Ltd* [1997] 3 SCR 701 at [65]–[66] “*seems to us to be persuasive*”. There Iacobucci J said:

25 In the absence of just cause, an employer remains free to dismiss an employee at any time provided that reasonable notice of the termination is given. In providing the employee with reasonable notice, the employer has two options:

Either to require the employee to continue working for the duration of that period or to give the employee pay in lieu of notice ...

30 *In the event that an employee is wrongfully dismissed, the measure of damages for wrongful dismissal is the salary that the employee would have earned had the employee worked during the period of notice to which he or she was entitled ...*

The fact that this sum is awarded as damages at trial in no way alters the fundamental character of the money.

35 In *Central Manufacturing Co Ltd v Yashni Kant* at [21] the Supreme Court recognised the common law duty that lay was upon an employer where it is stated that:

40 The Court of Appeal correctly held 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. The content of that duty plainly does not extend to a requirement that reasons be given, or that a hearing be afforded at least where the employer has the right to dismiss without cause, and to make payment in lieu of notice. It does extend however to treating the employee fairly, and with appropriate respect and dignity in carrying out the dismissal. Each case must of course depend on its own
45 particular facts. However where as in the present case the dismissal is carried out in a manner that is unnecessarily humiliating and distressing there is no reason in principle why a breach of this implied term should not be found to have occurred.

The above statement shows that the employer has the right to dismiss without cause. However, the proposition also states that the manner in which such a
50 dismissal is to be carried out should be fair and not be calculated to unnecessarily humiliate or cause distress to the employee being terminated.

In this case, the Plaintiff's superiors acting on behalf of the Defendant company, have a degree of power to exercise their own discretion in the absence of determinable acts/conducts in breach of policies. That is those policies that the employee had accepted to be bound by.

5 The case should rest on a finding on any credible evidence that was given at the hearing as far as the Plaintiff is concerned. Here the first two warning letters makes reference to earlier discussions held with the Plaintiff as far as the contents of each letter was concerned and there is no credible evidence to suggest otherwise.

10 **(d) The question of damages**

A finding of damages would only be determined if there is a finding of breach of contract. In this case, the Plaintiff's case depends upon the breach of the common law implied term of fairness as established on the authority of *Yashni Kant*.

15 The Plaintiff's submission stated that the Plaintiff had suffered humiliation and stress as a result of the manner in which he was terminated.

In the case of *Yashni Kant* the court stated at [19] that:

20 To characterize the relationship between employer and employee as involving obligations of mutual trust and confidence at the stage of dismissal, when that relationship had effectively broken down, seems to us to involve a somewhat strained use of language. It may well be that the very reason the employee is being dismissed is because there is no longer any trust or confidence in him.

25 The trust and confidence had broken down and I find that the manner of dismissal that was exercised on the Plaintiff was fair and reasonable. There was nothing wrong with the procedure adopted by the Defendant.

Conclusion

30 In the outcome, in summary I find that the Defendant was justified in terminating the Plaintiff's employment after giving a month's pay in lieu of notice in compliance with cl 15 of the agreement between the parties as employer and employee. It was a lawful termination of employment after the Plaintiff was given two warning letters as he was admonished from exceeding his authority as a commercial area manager.

35 To conclude, the Defendant as employer was entitled to do what it did in terminating the Plaintiff's employment for the reasons it gave.

40 Although in *Mallock v Aberdeen Corporation* [1971] 1 WLR 1578 at 1581; [1971] 2 All ER 1278 at 1282 Lord Reid has said that "*an employee who may be dismissed without cause is not entitled to demand reasons from his employer, nor, in the ordinary course, is he entitled to a hearing or any of the normal incidents of natural justice*", the Supreme Court in case of *Central Manufacturing Co Ltd v Yashni Kant* [2003] FJSC 5 — Supreme Court — judgment 24.10.03 said that "*it does not follow that there is no implied term requiring an employer to deal fairly with an employee when dismissing that employee*".

45 Upholding the Court of Appeal on this aspect, the Supreme Court said "*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. Each case must depend upon its own particular facts*" (emphasis added).

50 For the reasons given hereabove and on the authorities, the Plaintiff I find has not proved his case on the civil standard.

The Plaintiff, therefore, does not succeed on any of the reliefs sought.

In all the circumstances of this case, in view of the facts as I have found them and for the reasons stated, the termination was neither in breach of the provisions of the agreement nor was it unfair or unreasonable as alleged by the Plaintiff.

The action is dismissed with costs in the sum of \$500 payable to the solicitors for the Defendant within 28 days.

Application dismissed.

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