

LOTAWA BOGIVITU v FIJI DEVELOPMENT BANK (HBC066 of 2001)

HIGH COURT — CIVIL JURISDICTION

5 SINGH J

22 August, 25 September 2007

10 **Employment — termination of employment — summary dismissal — action for unlawful dismissal — participation in politics prohibited in terms and conditions of employment — whether Defendant had sufficient and reasonable cause to dismiss Plaintiff — whether process of hearing prior to dismissal fair — Plaintiff given opportunity to clarify and provide evidence — Plaintiff participated in volatile politics and acted contrary to Defendant’s interest — nature of inquiry conducted was adequate — Employer had sufficient and reasonable cause to summarily dismiss Plaintiff.**

20 The Plaintiff worked as a senior loan officer for the Defendant bank. In May 2000, a civilian coup took place. The Plaintiff was alleged to be sympathetic to the rebel soldiers. The Defendant summarily dismissed the Plaintiff from his employment for allegedly supporting the takeover of the Sukanaivalu Barracks by the rebel soldiers. The Plaintiff contented that the dismissal was illegal for two reasons. First, the Defendant had no sufficient and reasonable cause to dismiss the Plaintiff. Second, the process of hearing prior to dismissal was not fair.

25 The Defendant claimed that it had warned the Plaintiff that his participation in politics was prohibited under cl 5.3.1 of the Master Agreement and General Instructions (master agreement) which formed the terms and conditions of his employment. The Defendant showed evidence of prior notices indicating due process; the first one warned him that the bank was conducting further investigations. The Plaintiff responded to the letter but gave little information to counter the allegations. The second notice was the letter of dismissal.

30 **Held** — (1) There was evidence that the Plaintiff participated in volatile politics and acted contrary to the Defendant’s interest. The Defendant was justified in taking the view that the mutual trust and confidence between the parties no longer existed. The Plaintiff’s involvement with the takeover of the Defendant’s vehicle and the use of the Defendant’s resources for political purposes was seen by the Defendant as a breach of cl 5.3.1 and, accordingly, justified the Plaintiff’s summary dismissal.

35 (2) The Plaintiff was provided with an opportunity to clarify matters and submit material evidence. He responded in writing and gave his explanations but only briefly. The master agreement provided that the appeal should be heard by the managing director. But no complaint or objection was made at the appeal stage to the fact that Kaloumaira, who was part of the initial decision to dismiss the Plaintiff, was sitting on appeal. If the Plaintiff was not satisfied with the appeal, the matter could be referred for arbitration. The Plaintiff did not invoke referral for arbitration.

(3) The court found that the nature of the inquiry conducted was adequate and the Defendant had sufficient and reasonable cause to summarily dismiss the Plaintiff.

Application dismissed.

45 **Cases referred to**

Awadh Narayan Singh v Fiji Posts & Telecommunications Ltd HBC 210/1994; [1998] FJHC 200; *Jone Bebe v Telecom Fiji Ltd* HBC 494/2002; [2007] FJHC 22; *Sinclair v Neighbour* [1967] 2 QB 279; [1966] 3 All ER 988; [1967] 2 WLR 1, cited.

50 *Bulu v Housing Authority* ABU 57/2003; [2004] FJCA 41; *Cyril Leonard Co v Sima Securities Trust Ltd* [1971] 3 All ER 1313; [1972] 1 WLR 80; *Laws v London*

Chronicle Ltd [1959] 2 All ER 285; [1959] 1 WLR 698; *North Island Wholesale Groceries Ltd v Hewin* [1982] 2 NZLR 176, considered.

H. Robinson for the Plaintiff

5 *N. Lajendra* for the Defendant

[1] **Singh J.** Lotawa Bogivitu joined the Fiji Development Bank in 1988. In the year 2000 he was a senior loans officer with the bank at Labasa. One Ilisoni Taoba was then the regional manager northern so he was in charge of the Labasa Branch.

10 [2] In May 2000 the civilian coup led by George Speight took place. Some rebel soldiers joined George Speight in executing the coup. The disturbances also spread to the northern division particularly the Sukanaivalu Army Barracks where the soldiers were divided into two groups namely the rebels who were sympathetic to and supported George Speight and the loyalists who remained behind and rallied with the commander. Some members of the civilian community were also divided in their loyalties. On 24 August 2000 the Plaintiff was summarily dismissed by the bank for his alleged involvement in supporting the takeover of the Sukanaivalu Barracks by the rebel soldiers. That summary dismissal has resulted in this action by the Plaintiff for unlawful dismissal. He alleges that prior to his dismissal he was not provided the process of being heard in accordance with the master agreement and General Instructions which formed the terms and his conditions of employment.

15 [3] There are two issues to this action namely whether there was sufficient and reasonable cause for Plaintiff's dismissal and second if there was cause, whether the process followed in dismissal was fair.

25 **Issue 1 — Whether the bank had sufficient and reasonable cause to dismiss the Plaintiff?**

30 [4] According to Ilisoni Taoba the bank was first alerted to the Plaintiff's involvement with the rebels after the Fiji Broadcasting Commission and the newspaper Fiji Sun sought clarification from him if the bank supported the rebels. He put these concerns to the Plaintiff who told him that the commissioner northern at a meeting of heads of government departments had advised them to go to the barracks. He sought a written explanation from the Plaintiff about the reports. The Plaintiff's response was he accompanied Tui Labasa to the barracks as he was the financial adviser to the Tui Labasa.

35 [5] Ilisoni Taoba wrote to the Plaintiff to refrain from participation in the dispute regarding the take over of the barracks. This warning was given pursuant to cl 5.3.1 of service instructions which forbids active participation in politics. The key words in the clause are "officers are prohibited from active participation in politics". The Plaintiff himself admitted that he went to the army barracks twice. One was during working hours. He admits giving a speech on behalf of the rebel soldiers. He saw nothing irregular in his conduct. He said that he did not visit the camp after being warned.

40 [6] Once Ilisoni Taoba became aware of Plaintiff's presence at the camp he warned him by phone and later by a letter. These warnings are not to be interpreted as if the bank had forgiven and forgotten about the matter provided he did not repeat his conduct. It is more a means of damage control so that no further damage to bank's image was done by such continued activity. The Plaintiff's motives in going to the camp that he went to diffuse the situation is strictly

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irrelevant. No one was forcing him to go to the camp. He became spokesperson for the rebels. He was involved with activity of the people who in one way or another were determined to change the government of the day by force. The second highlight of Plaintiff's involvement was accompanying two rebel soldiers to the manager of the bank and obtaining a release by force of bank's vehicle registration no DE 446. This vehicle was later used to loot villagers and to kidnap two pilots from Savusavu airport to be held as hostages in a rebel village.

[7] The Plaintiff says he was forced by the soldiers to accompany them to the manager to get the vehicle. I disbelieve him on this. When one looks at Plaintiff's handwritten reply being document 2 — supplementary bundle, it says he had "close relationship with the said two army officers". These two officers were the ones who took control of the camp. He could have simply directed the soldiers to go to a certain place where the manager was. Given the Plaintiff's earlier visits to the camp and the admission of close relationship, I conclude that he was a willing party in directing the soldiers to where the vehicle was.

[8] Ilisoni Taoba also stated that the Plaintiff had directed the bank staff to type out press releases "Davui ni Kudru au Taukei ni Qele" meaning the voice of the landowners. The bank's equipment and paper and time of the employees paid for by the bank were used for non-bank related activity. This information was provided to Ilisoni Taoba by the employees of the bank and I accept it.

[9] There were allegations that the Plaintiff allowed bank rented premises for visits by rebel soldiers. Mr Taoba said that as a result of meetings being held at the premises, neighbours were putting up fences. I am not satisfied on the balance of probability that the bank premises were used for holding political meetings. Generally in times of political upheaval with tensions and heightened sense of insecurity fences begin to be put up by worried citizens. There is also no reasonable source who identified that persons, if they were present, were in fact rebel soldiers.

[10] It is also alleged the staff at the bank felt insecure because of the Plaintiff's activity. It would have been more appropriate if a member of staff were called to testify to the fact rather than leaving it to the court to draw inferences as to the state of mind of the staff.

[11] However the issue remains whether taking the three factors namely the visits to the camp, the Plaintiff's involvement with the takeover of the bank's vehicle and the use of bank resources for political purposes together could be seen by a reasonable employer as a breach of cl 5.3.1 justifying summary dismissal.

40 **When can an employer dismiss summarily?**

[12] An employer is justified in summarily dismissing an employee if "the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service" *Laws v London Chronicle Ltd* [1959] 2 All ER 285 at 287; [1959] 1 WLR 698 at 700 or "the conduct set up by way of defence must, indeed be grave — as for instance conduct as would deeply impair the basic confidence that is essential should exist between the parties": *Cyril Leonard Co v Sima Securities Trust Ltd* [1971] 3 All ER 1313 at 1323; [1972] 1 WLR 80 at 89.

[13] The New Zealand Court of Appeal in *North Island Wholesale Groceries Ltd v Hewin* [1982] 2 NZLR 176 in considering principles relating to summary dismissal stated:

5 Regard must be had to the nature and degree of the alleged misbehaviour and to its significance in relation to the business of the employer and to the position held by the employee. In making the factual assessment the Court must weigh the questioned conduct and, viewing the matter objectively, its effect on the maintenance of the confidential relationship between them as against the severe consequences of immediate dismissal. If it is to warrant that response the misbehaviour must go to the heart or root of the contract between them.

10 [14] In Fiji it is established that the conduct complained of need not have caused or resulted in any financial loss to the employer in order to justify dismissal: *Bulu v Housing Authority* ABU 57/2003; [2004] FJCA 41 (*Bulu*) where the Court of Appeal stated:

Even if ultimately there was no loss to the Authority, we agree with the Judge that the appellant's conduct amounted to grave and serious misconduct justifying summary dismissal in accordance with the cases.

15 In *Bulu* a manager had manipulated records of account contrary to the rules of practice of the employer but without any financial loss to it.

20 [15] The above view is more forcefully expressed in *Sinclair v Neighbour* [1967] 2 QB 279; [1966] 3 All ER 988; [1967] 2 WLR 1. In that case the manager of a betting shop borrowed £15 from his employer's money. He told two other employees and intended to pay the money back the next day. He did pay the money back the next day. When the employer discovered what the manager had done, it dismissed him. The manager brought an action for damages. The employer in its defence pleaded that it dismissed the employee for misconduct amounting to dishonesty. The primary court gave judgment in favour of the employee on the basis that the employer could not have concluded beyond reasonable doubt that the employee had acted dishonestly. The English Court of Appeal disagreed with the primary court.

25 [16] Each of the three appellate judges ruled that even if the employee had pleaded dishonesty and could not prove it, this was irrelevant. The dismissal was found to be justified because the real question, regardless of the actual name the employer put to its justification and regardless of whether any dishonesty was involved, was whether the employee's actual misconduct was of such a grave and weighty character as to undermine the relationship of trust and confidence which is central to the master servant relationship. Sellers LJ at QB 287; All ER 989 stated:

40 This case turns on the attitude that the employer could properly take to that conduct ... In my view, whether such taking of the money would have resulted in a conviction for larceny or for dishonest misappropriation of the money does not arise. On these facts a jury might have taken the view that they would not convict. But whether it is to be described as dishonest misconduct or not, I do not think matters. Views might differ. It was sufficient for the employer if he could, in all the circumstances, regard what the manager did as being something which was seriously inconsistent — incompatible — with his duty as the manager in the business in which he was engaged.

45 [17] Sachs LJ at QB 289; All ER 990 stated:

It is well-established law that a servant can be instantly dismissed when his conduct is such that it not only amounts to a wrongful act inconsistent with his duty towards his master but is also inconsistent with the continuance of confidence between them.

50 The cases above show that the justification must be based on identifying an essential condition which the employee has breached and if so whether the breach justifies the employer taking the view that it cannot any longer have trust

and confidence in the employee carrying out his duties in the future. Given that the Plaintiff had participated in volatile politics and acted contrary to bank's interest by assisting in depriving its manager of a vehicle and using the bank's resources for publishing pamphlets, the bank would be justified in taking the
5 view that the mutual trust and confidence no longer existed.

Issue 2 — Was the process of hearing prior to dismissal fair?

[18] The master agreement executed on 17 December 1992 and the General Instruction 1994 formed part of Plaintiff's employment with the bank. These two
10 documents define the rights of the employer to dismiss, the circumstances in which it will dismiss and the procedure in relation to dismissal.

[19] Clause 4(a) of the master agreement and cl 5.2 are in identical terms. They both give the employer right to dismiss summarily for misconduct and for wilful disobedience of lawful orders given by the bank. The other circumstances are not
15 relevant to these proceedings. Misconduct is the usual ground for summary dismissal. Misconduct connotes positive and intentional wrongdoing.

The course of investigation

[20] Having received reports of Plaintiff's involvement at the barracks, the regional manager northern rang the Plaintiff on 7 August and cautioned him. He
20 sought an oral explanation and he was told by the Plaintiff that the Plaintiff went to the barracks on the directive of the commissioner northern. Subsequent inquiry from the commissioner's office proved this to be untrue. A written explanation was also sought and provided by the Plaintiff by a handwritten faxed note.

[21] The bank wrote to him two letters seeking clarification from the Plaintiff. One of the letters warned him that the bank was conducting further investigations. Nevertheless with information in hand it viewed Plaintiff's
25 conduct as "grossly irregular" which had severe implications on his future as employee of the bank. The Plaintiff responded on 14 August 2000 saying that the allegations were incorrect and gave little information to counter the allegations.
30 The next step was the letter of dismissal dated 24 August 2000.

[22] The disciplinary procedure as set out in the master agreement requires that if an interview is conducted, the purpose of interview must be stated and if
35 following such an interview the employer wishes to take disciplinary action, the employee should be informed of it. The relevant clause on Disciplinary Procedure being cl 51(b) provides:

- (i) When an employee is being interviewed in connection with an alleged
40 irregularity which may lead to disciplinary action against the employee he shall be informed in writing by the Manager or his nominee of:
 - (1) the purpose of the interview;
 - (2) the fact that disciplinary action may result;
 - (3) that the employee will be informed of his/her right if he/she wishes to be accompanied and represented by the Association representative;
- (ii) If following such interview the employer proposes to take disciplinary action,
45 the employee shall be informed of the proposed disciplinary action. Such advice may be given in writing and a copy given to the Union if requested by the employee.
- (iii) An employee upon whom an employer has imposed disciplinary action shall
50 have the right to appeal against such disciplinary action. The employee shall advise the Manager, and if he so wishes, the National secretary of the Union in writing within seven days of the disciplinary action being imposed, of his desire to appeal.

(iv) The Manager and the employee or if the employee has so elected the Union shall arrange for an appeal to be convened and heard as soon as possible. Any appeal under this Article shall be heard by the Managing Director of the Bank or the person relieving in his position.

5 (v) If the employee is not satisfied with the outcome of the appeal he may process the matter under the provisions of paragraph (c)(iv) of the Grievance Procedure.

10 (vi) If it shall be proved after following the Grievance Procedure, that an employee has been unjustly suspended or dismissed he shall be reinstated and paid all salaries he/she would have earned without loss of benefits which would normally have accrued to him/her during the period of suspension or dismissal.

[23] The Plaintiff was questioned by the regional manager northern on telephone about his activity. An interview in the context of this agreement does not mean an interview in the nature of written caution interview as conducted by police. Even verbal enquiries would suffice. The regional manager northern was not in Labasa. The matter was urgent. A telephone interview was quite appropriate. The interview was followed by more formal letters seeking clarifications and warning of severe implications. At this stage no one had thought of dismissal. A final decision would depend on what the Plaintiff had to say in his reply. That decision was only made after the Plaintiff replied on 14 August 2000.

25 [24] Opportunity was provided to the Plaintiff to clarify matters. There was nothing stopping him to even provide a statement from Tui Labasa or commissioner northern to say he directed the Plaintiff to proceed to the army barracks.

30 [25] The Plaintiff was questioned on telephone. His explanation was sought. He was asked to put his explanations in writing which he did. He was given one more opportunity to which he also responded but only briefly. It was up to the Plaintiff to provide all material evidence he had at hand.

Formal adversarial inquiry not necessary

35 [26] The master agreement does not mandate a formal oral adversarial inquiry with the parties having right to cross examine every witness. All the employer had to do is to conduct an inquiry sufficient to satisfy itself whether or not its preliminary suspicions or allegations were well founded or not. It is for the employer to decide the form and extent of inquiry it is going to conduct given the circumstances of the case: *Awadh Narayan Singh v Fiji Posts & Telecommunications Ltd* HBC 210/1994; [1998] FJHC 200; *Jone Bebe v Telecom Fiji Ltd* HBC 494/2002; [2007] FJHC 22.

45 [27] There is provision for appeal and the Plaintiff exercised his right of appeal. The record of appeal is document 35 in the agreed bundle. The Plaintiff during the course of trial tried to attack a few parts of the appeal records as not being accurate. One must note that these documents form part of the agreed bundle of documents. They were agreed to form part of records by consent both as to content and admissibility. It is a detailed thirteen pages record. It shows that the appeal was by way of rehearing on each point. The Plaintiff and the union representative accompanying him were each provided separate opportunities to present their case which in itself was a benevolent indulgence. They did address the tribunal at length.

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[28] One of the arguments presented at the trial was that Isoa Kaloumaira heard the appeal. He is the managing director. The master agreement provides that the appeal should be heard by the managing director. However, Isoa Kaloumaira also sat as one of the members of the staff board which made the initial decision to
5 dismiss the Plaintiff. Therefore there was not the necessary degree of impartiality on appeal.

[29] As a general rule, this is a justified complaint. However, there was no complaint or objection made at the appeal stage to Kaloumaira sitting on appeal. Having presented their arguments without objections, it is a bit late to object
10 about that now. Further there is another step provided after appeal. If an employee is dissatisfied with the appeal, he could have referred the matter for arbitration. The Plaintiff did not invoke that provision.

Conclusion

15 [30] I am of the view that in the circumstances of this case, the nature of the inquiry conducted was adequate and the employer had sufficient and reasonable cause to summarily dismiss the Plaintiff. Accordingly the Plaintiff's claim is dismissed with costs in the sum of \$2000 to be paid in 14 days.

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Application dismissed.

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