

IN THE HIGH COURT OF KIRIBATI 2011

CIVIL CASE NO. 191 OF 2010

BETWEEN [MANETA TEKAUTU PLAINTIFF
[
[AND
[
[TARAWA FISHERMEN'S COOPERATIVE
[SOCIETY DEFENDANT

Before: Hon Chief Justice Sir John Muria

10 November 2011

Ms Kiata Kabure for Plaintiff
Mr Mantaia Kaongotao for Respondent

JUDGMENT

Muria CJ: By a writ issued on 3 December 2010, the plaintiff claims loss and damages for breach of his contract of employment. The particulars of the loss and damages claimed are:

(a) Wages for 30 fortnights (\$336.93 x 30)	\$10,107.90
(b) Leave grant \$200.00 p.a. for 2 years	400.00
(c) Wages payable to him in lieu of notice	673.86
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	\$11,181.76
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At the hearing, Mr Kaongotao of Counsel for the defendant, accepted that as the plaintiff was terminated under Clause 9(a) of his contract of

employment, he was entitled to one month's notice before termination or payment in lieu of notice. Counsel then went on to add that if the plaintiff had not yet collected his cheque for the notice pay, he should do so.

With the concession stipulated by Mr Kaongotao of Counsel for the defendant in his submission to the Court, the Court had indicated that the claim for payment of wages of \$673.86, in lieu of notice succeeds. The defendant does not agree with the other claims in paragraphs (a) and (b) of the plaintiff's claim.

Brief Background

The brief background circumstances of this case are that the plaintiff was employed by the defendant as a MYOB Consultant, Finance Manager and Acting General Manager since January 2010. The plaintiff's employment was for two years, subject to further extension as might be approved by the Committee. There appeared to be some disagreement on certain operational matters in the company between the plaintiff and the defendant's Committee/Board.

The Committee held a meeting on 14 November 2010. As the Committee had to deal with issues regarding the plaintiff, the chairman of the Committee asked the plaintiff to leave the meeting. The plaintiff was never called to answer for any allegation made about him nor was there any suggestion of any allegation of misconduct made against him. The next day, 15 November 2010, the plaintiff received a termination letter from the Chairman of the defendant with immediate effect. As it transpired, no notice was given to the plaintiff before terminating his contract nor was there any explanation as to the reasons for terminating his contract.

Issues

Ms Kabure of Counsel for the plaintiff helpfully noted the two issues for the Court's determination in this case. The first is whether the plaintiff's contract was unlawfully terminated or not, and secondly, if he was unlawfully terminated, what damages are the plaintiff entitled to. The second issue, in effect, asks whether the plaintiff is entitled to the loss and damages set out in paragraphs (a) to (c) referred to above.

With the somewhat tacit concession by the defendant, the first issue present little problem. The defendant terminated the plaintiff in breach of clause 9(a) of the contract. The termination was therefore unlawful. The second issue is very much a live one that has to be determined.

The Law

The general rule in employment law is that an employer is entitled to terminate an employee's employment, either by giving notice before termination or payment in lieu of notice, or summarily for misconduct, disobedience to lawful orders, neglect of duties or breaches of contract of employment. The law, thus, recognizes that employers have a right to terminate workers, subject to express terms of the contract of employment.

With the general rule in mind, we turn to the case now before us. The starting point is the 'Contract Employment Agreement' ("the Contract") entered into between the parties in this on 13 January 2010. Among other things, the Contract provides, in Clause 9, for termination of employment of the plaintiff. It provides:

"9. Termination

- (a) Employment may be terminated by other party to this agreement giving one month notice to the other party. Notice maybe waived by the payment of a monthly salary in lieu by either party. Medical grounds may terminate the employee in the opinion of a doctor expressly is no longer fit to carry out full duties.
- (b) Employee may be summarily dismissed if he or she is guilty of gross misconduct or breach of discipline including drinking intoxicating liquor being under the influence of liquor at his workplace during normal working hours".

The said provisions repeat the general rule as I mentioned earlier. They also reflect the two ways in which termination of employment can be done.

Notice of termination

Clause 9(a) above provides that the plaintiff's employment could be terminated by giving one month's notice or one month's pay in lieu of notice. Happily, in the present case, the defendant does not dispute that it did not give the one month notice required. As such, it has agreed to pay the plaintiff his one month's salary. It is for that reason that, at the end of the hearing, the Court indicated that the claim for one month pay in lieu of notice had been made out. The plaintiff is entitled to his one month pay in lieu of notice in the sum of \$673.86.

Wages for 30 fortnights

The plaintiff's claim under this head is that because of the termination, the plaintiff has suffered loss of income for 14 months or 30 fortnights, amounting to \$10,107.90. The first question is whether the plaintiff is entitled to claim wages for 14 months or 30 fortnights, that is, to the end of his contract with the defendant.

The onus is on the plaintiff to show by evidence that he is entitled to the 14 months or 30 fortnights pay remaining under his contract.

There is evidence in this case from the plaintiff that his contract was for two years commencing on 13 January 2010. The evidence also shows that on 14 November 2010 the defendant's Committee met to discuss matters concerning the plaintiff's employment. The evidence further confirms that on 15 November 2010 the plaintiff's contract of employment was terminated by a letter dated 15 November 2010 which cut short his contract by about 14 months. In the normal run of events, the plaintiff's contract would have ended on 13 January 2012 had he continued in employment with the defendant.

Apart from the question of pecuniary punitive damages, the case law authorities have clearly established that an employee who is terminated from his employment without cause is entitled to compensation for lost pay and other employment benefits and other advantages, including notice pay. The law also shows that aggravated damages are claimable in such cases. See *D'Souza -v- London Borough of Lamberth* [1997] UKEAT 1206/95/0910; *Harvey -v- The Institute of Motor Industry* [1995] 1 RLR 416; *Attorney General of Trinidad and Tobago -v- Siewchand Ramanoop* (23/3/2005) Privy Council App. No. 13/2004; *Tillicum Haus Society -v- British*

Columbia Nurses Union & Others, BCLRB No. B 728/2000 and other cases on this aspect of the employment law. I am unable to agree with Mr Kaongotao that the plaintiff is only entitled to notice pay.

The defendant states in its defence that it terminated the plaintiff's employment because his services were no longer required. Hence the termination under clause 9(a) of the contract. The defendant was entitled to terminate the plaintiff's employment under clause 9(a) but it must pay to the plaintiff the loss of wages he suffered for the remaining term of his contract. The sum of \$10,107.90 should also be paid to the plaintiff in this case.

Leave

Under his contract, the plaintiff is entitled to leave and an allowance of \$200.00. Clause 6 of the contract states:

"You are entitled for leave and an allowance of \$200.00".

I have already stated earlier that the plaintiff, in a case such as this, is entitled to compensation for lost pay and other employment benefits and advantages. Leave entitlement is one such benefit. In this case, the contract provides for it and as such the plaintiff is entitled and should be paid to him his leave benefit of \$400.00, leave grant, as claimed.

Particularised Loss

The total of the particularized loss suffered by the plaintiff in this case under the three heads mentioned above is therefore \$11,181.76 which comprises \$10,107.90 for wages for 30 fortnights, \$400.00 leave grant for

two (2) years and \$673.86 for notice pay. There is evidence to support these three claims. Judgment must, therefore, be given for the plaintiff in the sum of \$11,181.76.

General Damages

Ms Kabure of Counsel for the plaintiff also submits that the plaintiff is also entitled to general damages for loss of reputation, embarrassment, shame, distress, humiliation and defamation arising out of his unlawful termination. No authority is cited by Counsel in support of this submission. Nevertheless, I feel that it is well established in this area of the employment law that a dismissed or terminated employee can claim compensation for distress, injury to feeling and other inconvenience suffered. See **Johnson v- Unisys** [2003] 1 AC 518; see also **D'Souza -v- London Borough of Lambeth** (above).

In an earlier case of **Norton Tool Co. Ltd -v- Tewson**, [1973] 1 WLR 45 (**Norton Tool** case), the Court interpreted the word "loss" to mean only financial loss. The House of Lords in **Johnson** stated that **Norton Tool** interpretation of "Loss" was too narrow. Lord Hoffman felt that it should include a sum by way of compensation for distress, damage to family life and similar matters.

Neither Ms Kabure nor Mr Kaongotao was able to inform the Court that in Kiribati there exists a comprehensively statutory regime governing labour or employment relations. If there is, then this Court would be very cautious in applying the common law principles applicable in such cases as this. In the absence, however, of such a comprehensively statutory regime, I can safely presume that the common law principles must apply in Kiribati in labour relations or disputes such as the one before the Court.

In my judgment, claim for damages by way of compensation for injury to feelings, mental distress, damage to family life, and loss of future employment are claimable. See the cases of *Tillicum Haus Society* (above) and *D'Souza* (above). In the present case, the plaintiff is entitled to claim compensation by way of damages for distress, embarrassment, humiliation and loss of reputation arising out of his termination.

The more difficult question is whether the distress, embarrassment, humiliation, loss of reputation and the like have actually been established. That must be done on evidence before the Court. For it is one thing being entitled to damages for distress, it is quite another thing altogether proving that distress has actually occurred.

Counsel for the plaintiff made reference to the case of *Bangga -v- Vanuatu Broadcasting and Television Corporation* [2008] VUSC 1 to support the plaintiff's claim for damages for loss of reputation, distress and humiliation. In that case, there was evidence before the Court to support the claim. The Supreme Court of Vanuatu awarded VT 200,000 damages for loss of reputation, distress and humiliation.

In the present case, apart from the assertion in the submission by Counsel for the plaintiff, there is absolutely no evidence at all to demonstrate that the plaintiff suffered loss of reputation, embarrassment, shame, distress or humiliation. Consequently, there is no evidence to support the claim for the general damages sought by the plaintiff. The claim for general damages is therefore unsustainable and it is rejected.

Right to be heard

Before I conclude this judgment, let me briefly deal with the submission by Ms Kabure on the question of the right to be heard before termination. The suggestion by Counsel is that the defendant failed to give the plaintiff the opportunity to be heard before his contract was terminated. In his evidence in cross-examination, the plaintiff, in response to a question put to him by Mr Kaongotao, stated that he did not know the reasons for his termination and that he only received the letter of termination of his contract.

In the present case, the plaintiff was terminated without cause under Clause 9(a) which only requires one month's notice before termination. There is no obligation on the defendant to give reasons for the termination or to require explanation or opportunity to be heard from the plaintiff. Had the termination been done under Clause 9(b) (for misconduct) then the requirement to be given an opportunity to be heard must be given to the plaintiff. This is what is sometimes called termination for cause or summary dismissal.

The case of ***Metutera -v- Kiribati Shipping Services Ltd*** (30 July 2007) Kiribati Court of Appeal Civil App. 7/2007 referred to by Ms Kabure is relevant to a case of dismissal for cause. In that case the appellant was dismissed from his job because he was alleged to have been responsible for the damage done to the LC vessel 'Betiraoui', he being the captain of the vessel. He was not given the chance to be heard on the allegations against him before he was dismissed. The Court of Appeal decided that the appellant should have been given the opportunity to be heard before his dismissal.

The present case is not a case of dismissal for cause. This is a case of dismissal or termination without cause under Clause 9(a) of the plaintiff's contract, and there is no ground for reading into it or implying into it a right to be heard before dismissal or termination under that clause.

The plaintiff's complaint of not being afforded the opportunity to be heard has no merit in this case.

Conclusion

However, having said all that and in the light of the circumstances of this case, the plaintiff nevertheless succeeds in the main. There will be judgment for the plaintiff, as indicated in this judgment, in the sum of \$11,181.76.

The claim for general damages is, however, dismissed.

Interest is also claimed in this case. In the exercise of the Court's discretion, interest is granted at the rate of 5% per annum from date of issue of writ to the date of judgment.

The plaintiff shall also have his costs of these proceedings.

Order accordingly.

Dated the 18th day of November 2011



SIR JOHN MURIA
Chief Justice