

Palu v. Commodities Board & Others

Supreme Court, Nuku'alofa
 Webster J.
 Civil case No 55 / 1988

16 & 17 November 1988; 2, 3, 8 & 15 March 1989; 29 January 1990

¹⁰ *Administrative law – principles of natural justice – not applicable to dismissal of store attendant by statutory body*

Natural justice – principles not applicable to dismissal of store attendant by statutory body

Employment – dismissal on notice justified

Contract – employment dismissal on notice justified

²⁰ The plaintiff claimed damages of \$50,000 for wrongful lay-off from his employment as a store attendant by the Board, which was a statutory body. The plaintiff did not claim that his dismissal was subject to public law principles, but claimed that his dismissal was wrongful as it was based on his refusal to continue as a member of a toutu'u or collective yam plantation.

HELD:

- (1) There were no statutory restrictions or underpinning of his employment to render public law principles applicable;
- ³⁰ (2) The layoff was equivalent to dismissal, but it was based on his unsatisfactory performance as an employee rather than his giving up membership of the toutu'u, and so was not wrongful;
- (3) The plaintiff's unsatisfactory work performance was not sufficient to justify summary dismissal, so he was entitled to one month's notice or wages in lieu thereof, plus accrued holiday pay.

Cases considered :

Va'inga Teu v Commodities Board PC 7/1988

'Uta'atu v Commodities Board C40/1989

⁴⁰ *Malloch v Aberdeen Corporation* [1971] 2 All E.R. 1278

R v East Berkshire Health Authority, ex parte Walsh [1984] 3 All E.R. 425

R v Civil Service Appeal Board, ex parte Bruce [1988] 3 All E.R. 686

Marlborough Harbour Board v Goulden [1985] 2 N.Z.L.R. 378

Counsel for the plaintiff : Mr K. 'Afuha'amango

Counsel for the defendants : Mrs 'A. Taumoepeau

Judgment

In this action the Plaintiff Leone Palu claims damages of \$50,000 for wrongful lay-off from his employment as a staff employee (Store Attendant II) with the Construction Division of the Commodities Board at Vava'u. He claims against the Chairman of the Board, the General Manager of the Board at Vava'u, and his departmental head the Manager of the Board's store at Vava'u.

The Plaintiff was laid off in October 1986 at a time when around 200 other employees of the Board were laid off to effect financial savings, but the Plaintiff claims that although the official reason for his lay-off was stated to be excessive and unproductive manpower, the real reason why he was dismissed was for selling his share in a toutu'u or collective yam plantation run by the employees of the Board at Vava'u in out-of-work hours. The Plaintiff submitted that this was not a proper factor for consideration in selecting him for lay-off.

The Plaintiff also claimed that he had not been given any opportunity of re-employment by the Board even although other former employees had been taken on. In addition to damages of \$50,000 he claimed \$5,000 for arrears of pay from his date of lay-off up till the present.

The Defendants denied the claim on the grounds that the decision to lay-off Leone Palu was based on the reasons given officially (i.e. excessive and unproductive manpower) and not on any other grounds. They denied that any matters related to the toutu'u were factors in selecting Leone for lay-off.

The Plaintiff gave evidence himself and led evidence from 'Ili Feleti Pongi, a Copra Sales Inspector with the Board, that the Second Defendant had said at an employees' meeting when the toutu'u was started that any employee not joining the toutu'u would be laid-off, and that in the week when the Plaintiff left work the Third Defendant had said at an employees' meeting that one person had sold his share of the toutu'u and as soon as possible he would try to have him laid-off. Similar evidence about the second incident was given by 'Ilahopo Likiliki, the Cashier of the Board at Vava'u, who had challenged the Third Defendant about raising questions about the plantation in the context of the Board's work. The Plaintiff called Sione 'Alatini, General Manager of the Construction Division of the Board, and Tevita Tapavalu, Secretary of the Board, to give evidence about the lay-offs and the Plaintiff's efforts to obtain further information from the Board about the reasons for his lay-off. Finally he led evidence from Dr Laumeesi Malolo, who had treated him for influenza when he obtained sick leave on 14th to 16th October, 1986, an important time in relation to this claim. The Defendants did not lead any other evidence.

Due to the time of 2 to 3 years which has passed since the events in this case took place, much of the details of the evidence was obviously not clear in the minds of witnesses and cannot be relied on as being completely accurate for any witness. In addition, for the two persons principally involved in this dispute, the Plaintiff Leone Palu and the Third Defendant Koli Saafi, as regards parts of the evidence of each of them they were clearly very much emotionally involved in the events taking place, so that their recollections of them are not entirely correct and are coloured by their viewpoints. On the other hand, I accept in general terms the evidence of the Second Defendant Viliami Hala'ufia, who did not seem to have been involved in the argument between the other two.

I find as follows:-

1. While there was not complete agreement among the witnesses about the days on which various events happened, I believe that the timetable was as follows:-

Thursday 9 October - Commodities Board approved in principle large numbers of lay-offs.

100 *Friday 10 October* - Leone offered Koli his share in the toutu'u for \$120 and Koli gave him \$15, either as a loan or down-payment. Not being satisfied with this, Leone sold his share to 'Euate Sesau for \$120 cash.

Monday 13 October - At the morning meeting of Board workers Koli as Acting Manager said that he would completely turn his back on any person who sold his share of the toutu'u, with the implication in the atmosphere of impending lay-offs that the person would be laid-off. Later Koli pressurised Leone to give \$120 from him to 'Euate so that Koli could himself buy Leone's share. Leone was told he was to be moved to another job.

110 *Tuesday 14 October* - Leone worked in the morning, went to the doctor at lunchtime and then went home sick for the rest of the day. Viliami returned from Tongatapu. Leone claimed that he heard that evening that he had been laid off, but there was no other evidence of this.

Wednesday 15 October - Heated discussion between Viliami, Koli and 'Ilahopo about Leone and the toutu'u. Leone says he came in and saw Viliami, but Viliami says that was the following day.

Thursday 16 October - Viliami says he saw Leone and told him to move his job from the timber and cement yard to the store itself, but did not tell him then that he was laid-off.

Friday 17 October - Leone says he saw Viliami, who told him to return to work on Monday.

Monday 20 October - Leone says that he returned to work but was then told by Viliami that he was laid off.

Wednesday 22 October - Viliami says that as Leone had not by then returned to work he rang Board Head Office and was told to include him in those laid-off.

130 *Thursday 30 October* - Leone came to the Board to collect his pay and was told by Viliami that he was laid-off.

2. Although they may not ultimately have been the reasons for his lay-off, there were good reasons for moving or laying-off Leone in that he was often late at the store, with no other employee to back him up, and was also misusing his position and embarrassing the Board's customers by asking them for loans. Neither can have helped the business of the Board.

3. The change of Leone to another job by the management was therefore justified as it was not satisfactory to have a bad time-keeper as sole store-keeper and there was a good man Sa'a Po'oi to take over at the store.

140 4. Whether or not the moving of Leone was justified, it was not sufficient reason for him to stay off work, in a huff as it were. He should have continued working and complained about the move to management, especially given the rumours of lay-offs at the time. He would not have suffered financially from the move.

5. It is not unrealistic to say that the Store Manager Koli Saafi appears to have been obsessed with the toutu'u, even when he gave evidence 3 years later in 1989. The inference is that he did allow it to influence his decisions at work even though it was a separate matter: this occurred both generally as evidenced by his argument with 'Ilahopo Likiliki, and in relation to Leone in particular. While this was unfortunate and bad management, as explained in the following paragraph it does not really help the Plaintiff's case.

6. I accept that great pressure was put on employees to join or continue in the toutu'u, including threats of lay-off or sacking for those who did not co-operate: this also included naming Leone at a meeting of workers. This was both wrong because it was unfair to bring in matters which were not within the scope of Leone's employment; and unwise of Koli because it has clouded the issue in a case where there were other genuine grounds for lay-off.

7. Regardless of Koli's prejudices, the Vava'u Manager Viliami Hala'ufia took the final decision on Leone's work, thus emphasising the view that he was an unreliable employee.

8. It was therefore entirely natural and justified that Viliami should decide that, as every effort was being made by the Board to economise on workers, Leone should be laid off on grounds of his voluntary and apparently unjustified absence, which fell within the standard criteria of excessive or unproductive manpower.

9. Leone was told definitely that he was laid off by Viliami when he came to collect his pay on 30th October, 1986, as confirmed by 'Ili. This is therefore the effective date of his lay-off.

10. While the defence accepted that Leone was the only staff member laid off at Vava'u, other staff, including higher paid staff, were laid off from other places, so there was no discrimination against Leone in this way.

11. While no length of notice for termination of employment in non-disciplinary cases is stipulated in Leone's terms and conditions of appointment as a staff employee dated 23rd March, 1984 and no relevant rules or regulations have been made by the Board (eg. under section 11(1) of the Commodities Board Act 1973), an appropriate period suggested by the Board witnesses was one month. For an employee in Leone's job this seems an appropriate period and both counsel appeared to accept this as reasonable. It fits in with what is said in *Va'inga Teu*.

12. Before his lay-off, Leone was paid \$58.78 a fortnight.

13. There was no evidence that before Leone was told to move he had ever been warned that his conduct was unsatisfactory, but while again this may be poor management it is not strictly relevant to this case, because I have found that Leone was laid-off for another reason.

Turning to the law, I am satisfied that indefinite lay-off is equivalent to dismissal and Mrs Taumoepeau for the Defendants conceded this, referring to *Powell-Duffryn v House* (1974) ICR 123 as authority. Although that case turned on UK statutes not applicable in Tonga, the indefinite lay-off which occurred here certainly amounted to dismissal.

I find therefore that Leone Palu was dismissed by the Commodities Board, the effective date of his dismissal being 30th October, 1986. However the consequent legal position is not clear as there are two recent Tongan decisions which conflict.

The first is the Privy Council case of *Va'inga Teu v Commodities Board PC 7/1988* where it was stated -

200 "There are two ways in which the Board could have dispensed with the Appellant's services and the first was "termination by notice" and that does not simply mean informing the employee that at the end of a specified period his employment will cease; or he may be given payment immediately for the specified period "in lieu of notice". Either party to an employment relationship may terminate the relationship by giving proper notice, which means a reasonable period of notice depending on the circumstances, including the importance of the employee's position, his length of service and seniority. It is unnecessary for any question of misconduct to arise before there can be termination by notice.

210 The second form of termination is by summary dismissal, which is what occurred in the present case. The dismissal is immediate with no intervening period before it would take effect. A summary dismissal must be justified by the employer if it is challenged. That simply means that it must be shown to be in accordance with justice and fairness having regard for all the circumstances ... the question is whether the Appellant's summary dismissal was justified ...

Having regard for the nature of the offending, with no loss to the Board and no gain to [the] Appellant; the Appellant's long service and being on the eve of retirement, we conclude that summary dismissal was not justified.

At worst the Appellant should have been dismissed on notice... We therefore resolve the matter on that basis."

220 The second case is *'Uta'atu v Commodities Board 40/1989* where Martin CJ held that administrative law applies to the Board so that in dismissing an employee the principles of natural justice apply and the Board is under a duty to act fairly. It does not appear that the Privy Council decision in *Va'inga Teu* was argued before Martin CJ in *'Uta'atu* but I believe that this Court is bound by *Va'inga Teu* and must follow the principles set out in that judgment.

230 The Plaintiff did not claim that the principles of natural justice should have been applied and in any event there are factual differences between this case and *'Uta'atu* which I believe mean that the two situations ought to be distinguished. I think it is very probable that the learned Chief Justice would not have intended to mean that the principles of natural justice should be applied in a case such as this. Looking at the cases cited in *'Uta'atu*, in *Malloch v Aberdeen Corporation [1971] 2 All E.R. 1278 (HL)*, Lord Reid states at p. 1282 -

"An elected public body is in a very different position from a private employer. Many of its servants in the lower grades are in the same position as servants of a private employer. But many in higher grades or 'offices' are given special statutory status or protection."

Then Lord Wilberforce says at p 1294 -

240 "[relationships in which observance of the rules of natural justice are excluded] must be confined to what have been called 'pure master and servant cases', which I take to mean cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or status which is capable of protection."

However Martin CJ points out that these must be read subject to *R v East Berkshire Health Authority, ex parte Walsh* [1984] 3 All E.R. 425 (CA) at p. 430 -

250 "Employment by a public authority does not per se inject any element of public law. Nor does the fact that the employee is in a higher grade or is an 'officer'. This only makes it more likely that there will be special statutory restrictions on dismissal or other underpinning of his employment ... It will be this underpinning, and not the seniority, which injects the element of public law.' and at p 441 -

"In order that there should be a remedy [in public law] it is clear that there must be something more than a mere private contractual right on which the court's supervisory functions can be focussed."

Finally the test is put concisely in *R v Civil Service Appeal Board, ex parte Bruce* [1988] 3 All ER 686 (CA) at p 687 -

260 "The answer ... turns on whether the applicant is seeking to enforce some public right or the performance or proper performance of a public duty ... or a private right arising by contract or statute or under common law ... If it is the first, then judicial review is available subject to the court's discretion. If the second, then judicial review is not available."

270 While it is clear that the Commodities Board is a public body, I do not consider that for Leone Palu there was any statutory underpinning of his employment or anything beyond a simple private contractual right. Although he was a staff member he was not an office holder and had no real status capable of protection. The terms and conditions of his appointment make no reference to the Commodities Board Act 1973 and although section 11(1) gives power for the appointment (and hence dismissal) of servants, I construe that merely as the enabling power necessary to allow a statutory body to do such things under the law and not as implying special statutory restrictions on dismissal. Nor have the Board provided any underpinning by making regulations on service under section 11(1). Indeed far from there being statutory protection, the Act gives the Director power to take action without reference to the Board on all questions relating to personnel administration, except for the most senior officers (Fourth Sch. para. 1(b)).

280 For these reasons I feel that the case of *Marlborough Harbour Board v Goulden* [1985] 2 NZLR 378 also referred to by Martin CJ in *'Uia'atu* is not relevant here as there is no requirement for fair procedure according to the rules of natural justice.

On the facts of this case it is possible that the summary dismissal of Leone Palu might have been justified because he absented himself from work without any good reason, but his absence, even if it was about a week, was not sufficiently long to merit such drastic action. However it was an important enough factor for his name to be added to the list of those being laid off and so dismissed or notice (or with pay in lieu of notice). I therefore hold that in law this was what occurred, the effective date of dismissal being 30th October, 1986.

290 I have already held that the appropriate notice was one month, so Leone is entitled to one month's pay of \$117.56 in lieu of notice. As it was agreed that he had been paid up to 14th October and he did not do any work for the Board

after that date, Leone is not entitled to any back pay for work prior to his dismissal. But he is entitled in terms of Condition 5 of his appointment to vacation or holiday pay (3 days for each completed month of service) accrued since he last took leave: it was very surprising to find that the Board had made no effort to pay this before or during this case and I hope they will remedy that quickly.

300 In light of this finding there is clearly no basis for the Plaintiff's main claim of \$50,000 for wrongful lay-off succeeding, nor for his claim for \$5,000 for arrears of pay up to the present (except as described in the preceding paragraph), nor for his claim for re-employment.

Further it appears that the above award to the Plaintiff should only be made against the First and Second Defendants in their capacities as officers and representatives of the Board. Accordingly no award is made against the Third Defendant as the final decision to lay off the Plaintiff was not his, but in all the circumstances of the case it would not be just to award costs to the Third Defendant.

310 As the Plaintiff has obtained an award of pay and holiday pay which had not been achieved without this court action, some of his costs must be met by the First and Second Defendants. But the award is very much less than the sum of \$50,000 sued for, or even the sum of \$5,000 originally sued for, so it would not be right for the Plaintiff to receive his whole costs. I shall adjourn a decision on the amount of costs to allow Counsel to make further submissions.

I shall therefore order that the First and Second Defendants shall pay to the Plaintiff -

- 320 (a) one month's pay of \$117.56 in lieu of notice;
- (b) outstanding arrears of accrued holiday pay at the rate of 3 days for each completed month of service;
- (c) costs to be fixed by the Court.