

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No: HBC 127 of 2019

BETWEEN : **SEPETI TAGILALA** of 6 Karishma Street, Tamavua, Suva currently unemployed, formerly Group CEO

PLAINTIFF

AND : **CORPORATE MANAGEMENT SERVICES LTD** a duly incorporated company registered and existing under the laws of Fiji, with its head office located at 29 Wailada Industrial Subdivision, Lami t/a HOT BREAD KITCHEN

DEFENDANT

Counsel: Plaintiff: Ms. Sharma. A
Defendant: Mr. Toganivalu. D
Date of Hearing: 15th, 16th March, 2023
Date of Judgment: 26th April, 2023

JUDGMENT

INTRODUCTION

1. Plaintiff was CEO of the Defendant and he was summarily dismissed for misconduct after completion of internal investigations and mediation. Plaintiff instituted this action seeking special damages for payments for unpaid annual leave and unpaid bonus for wrongful termination of the employment contract. Defendant admitted summary dismissal of Plaintiff for misconduct. The main allegation is conflict of interest in violation of Clause F of the Employment Contract. Plaintiff was not terminated wrongfully in violation of his Employment Contract. As pleaded his special damages were for wrongful termination and cannot be granted as the termination was not wrongful. Plaintiff had also pleaded for statutory breaches.

FACTS AND ANALYSIS

2. Pretrial Conference minutes filed admitted following facts.

- a. Plaintiff was an employee of Defendant as its CEO in terms of Employment Contract executed on 24.3.2017.(Employment Contract)
 - b. Plaintiff was summarily terminated from the employment on 17.10.2018.
 - c. Defendant is a limited liability company engaged in making and selling bakery products.
 - d. Plaintiff approved Capital Expenditure (CAPEX) items and overseas training trip for senior executive as they were approved by annual budget by the board of Defendant. These were supposed to taken again for endorsement by the board of Defendant. The relevant expenditure was paid by cheques signed by director and board secretary.
 - e. Plaintiff referred the matter to mediation unit of Ministry of Labour.
 - f. Plaintiff was charged for criminal action for assault in Magistrate's Court and that matter is pending determination.
3. Plaintiff gave evidence and for Defendant only one witness gave evidence. There were no dispute as to documents submitted and both parties agreed on them they were marked from Defendant's bundle of documents marked P1-P7 and P8, P9, and P10 were from Defendant's documents.
 4. Both parties were granted time to file written submissions but neither party filed, till the date of judgment.
 5. Employment Contract is marked P1 and. Clause 4 of Employment Contract deals with termination and states

'The Companies shall be entitled to terminate the employee's employment by giving ninety days (90) in writing, or by payment of 90 days' pay ie. Salary in lieu of the notice if the performance of the Employee or the Companies is found by the Board to be consistently, or dangerously, below the expected level.

This Agreement may be terminated forthwith by the Companies without prior notice if the Employee at any time:

- (a) Commits any serious or persistent breach of any of the provisions of this Agreement; or
- (b) Becomes bankrupt or makes any arrangement or compromise with his creditors;
- (c) Becomes of unsound mind; or
- (d) Is convicted of any criminal offence; or
- (e) Is found and demonstrated to have grossly misled the Board in any matter of his employment or service conduct or in respect of any matter of his pre-employment

(e.g. qualifications, previous employment history, previous court convictions).”(emphasis added)

6. The previous convictions for criminal charges was not a reason for summary dismissal and accordingly that is not an issue for this court, though some evidence was led in this aspect without any objection from Plaintiff.
7. Summary dismissal of CEO of Defendant, was not confined to above (a) to (e) in clause 4 of the Employment Contract. So the grounds for summary dismissal, were not exclusive for the stated five instances and this is also logical considering unlimited ingenious methods that can be resorted by a senior management personnel such as CEO of any entity. So depending on the seriousness of allegation summary dismissal can be made by Defendant. It may be due to breach of contract or misconduct including ‘conflict of interest’.
8. The use of words “may be terminated forthwith” in clause 4 of Employment Contract indicate that summary dismissal was not confined to said five grounds.
9. Halsbury’ Laws of England at p750. Employer's right of summary dismissal¹, states,

“An employer has a common law right to dismiss an employee without notice on the grounds of the employee's **gross misconduct**, and such a dismissal is not wrongful.” (emphasis added)
10. Accordingly, an employer, in common law summarily dismiss an employee and it is not wrongful if the contractual or procedural compliance was adhered.
11. Whether such summary dismissal amounts to ‘unfair dismissal’ is not a Common Law remedy and this is through statutory provisions in exercising jurisdiction under statutory provisions.
12. Section 33 of Employment Relations Act 2007(ERA), deals with summary dismissal and it states that at the time of summary dismissal reasons for that should be given. Gross Misconduct is one reason for such summary dismissal and this is neither interpreted in the ERA nor in the Employment Contract.
13. Section 33 of ERA requires the grounds for summary dismissal given to the employee and accordingly the grounds for summary dismissal were given by letter dated 17.10.2018.

¹ Halsbury's Laws of England ; Employment (Volume 39 (2021),

These are statutory requirements and for breaches can be dealt under jurisdiction created under ERA.

14. Section 110(3) of ERA makes it mandatory to refer all 'Employment Grievances' to be referred to mediation. In terms of ERA termination is included in 'Employment Grievances'.
15. Dismissal for a cause such as 'gross misconduct' is an 'employment grievance' in terms of Section 4 of ERA so it needs to be referred for mediation and the mediator can refer the matter to Employment Tribunal in terms of Section 194(5) of ERA.
16. Section 211(1)(a) of ERA allows Employment Relations Tribunal to adjudicate Employment Grievances.
17. Plaintiff had made a complaint in terms of P8 alleging 'Employment Grievance' dated 6.2.2019, but according to P9 he had voluntarily withdrawn his 'Employment Grievance' against Defendant and the reason given in the said P9 is that he would 'like to pursue the matter in **Employment Relations Court**'.
18. Plaintiff had failed to invoke jurisdiction in Employment Relations Court.
19. Instead of invoking jurisdiction in Employment Relation Court, this action was filed invoking common law jurisdiction.
20. Plaintiff was not precluded from institution an action for breach of contract under Employment Contract, invoking statutory jurisdiction as Employment Grievance, in Employment Relation Court (ERC). Section 220(1)(h) of ERA grants jurisdiction inter alia to ERC '(h) **to hear and determine an action founded on an employment contract**'.
21. So, there is concurrent jurisdiction for ERC to 'determine an action founded on employment contract'. An action founded on 'employment contract' can be determined by ERC or by High Court under common law.
22. It is also noteworthy, that ERC is granted jurisdiction 'to hear and determine a question connected with an employment contract which arises in the course of proceedings properly brought before it'(i.e Section 220(1)(g) of ERA). So it is clear that invoking jurisdiction of ERC allows an 'employment grievance' to be dealt comprehensively including violations of any statutory provisions under ERA and or contractual breaches.

23. It is to be noted that same jurisdiction, cannot be exercised by this court in this action based on common law for wrongful termination, which is obviously a narrower jurisdiction compared to ERC regarding termination of employment.
24. Statement of claim paragraph 32 contained alleged breaches of contract including and not limiting to statutory breaches (see paragraph 32(iii)), and this exclude the jurisdiction of this court to determine all the claims, under common law. This action which included a statutory breach can be struck off in *limine* for want of jurisdiction.
25. Without prejudice to above, I considered the issue of wrongful termination.
26. Plaintiff in his evidence admitted that he was served letter headed “Allegations of Gross Breach of Employment Contract” on 14.9.2018. It contained eleven allegations of misconduct. This was marked as P2.
27. Plaintiff had replied to that by 21.9.2018 by letter marked as P3. He had given detailed answers to said allegations.
28. By a letter of Defendant dated 27.9.2018, marked as P4, ‘found guilty of persistently breaching “Service” under ‘Employment Contract. It also stated that he was requested to appear for Mitigation before the Board of Defendant on 5.10.2018. Plaintiff was suspended as CEO and given 50% of his salary.
29. Plaintiff had written a detailed letter on 5.10.2018 covering many aspects including CAPEX limit and also conflict of interest raised by Defendant, and this letter is marked as P5.
30. P6 letter is dated 11.10.2018 and it stated inter alia,
 - “Re Mitigation Hearing & Recommendations to the Joint Board Meeting
 1. The Board Sub Committee, following your Mitigation Hearing held on Friday, 5 October 2018 at the Novotel Hotel considered your guilty plea, that you were remorseful and that you realized the existence of real conflict of interest in your involvement with Hotel Equipment under Tier3 Global and that you considered returning to the Company if given another chance by Joint Board for SEL & CMSL.
 2. Accordingly, the Board Sub Committee proposes to make the following recommendations without prejudice to the Joint Board for SEL & CMSI....”

31. By letter P7, Defendant summarily dismissed Plaintiff and the reasons were given in the said summary dismissal.
32. Halsbury's Laws of England - 'Termination of employment; in general'.² States,
 "Employment may in general be terminated at common law either by dismissal or by resignation. If it is terminated by dismissal, that dismissal may at common law be either lawful or wrongful; and a dismissal, whether lawful or wrongful, **may be challenged as being unfair by statute.**"(footnotes deleted)(emphasis added)
33. The claims of Plaintiff were also made under common law for 'wrongful dismissal' of Plaintiff's employment summarily. An action founded on 'unfair' dismissal, can be made under ERA, for breach of contract including statutory breaches as pleaded in the statement of claim.
34. Halsbury's Law of England, under Meaning of 'wrongful dismissal'.³ States,
 "A wrongful dismissal is a dismissal in **breach of the relevant provision in the contract of employment relating to the expiration of the term for which the employee is engaged.** To entitle the employee to sue for damages, two conditions must normally be fulfilled, namely:
 (1) the employee must have been engaged for a fixed period, or for a period terminable by notice, and dismissed either before the expiration of that fixed period or without the requisite notice, as the case may be; and
 (2) his dismissal must have been without sufficient cause to permit his employer to dismiss him summarily."(footnotes deleted)(emphasis added)
35. The Employment Contract was entered on 24.3.2017 for a period of three years, and dismissal was before expiration of term.
36. Defendant admits that Plaintiff was summarily dismissed on 17.10.2018. The letter of 'Confirmation of Summary Dismissal', marked as P7. Plaintiff was served with allegations of 'Gross Breach of Employment Contract "by letter marked P2 and this was replied by Plaintiff by P3.

² Halsbury's Laws of England ; Employment (Volume 39 (2021), paras 1-346; Volume 40 (2021), paras 347-728; Volume 41 (2021), paras 729-1086; Volume 41A (2021), paras 1087-1509) ; 5. Termination of Employment > (1) In general

³ Halsbury's Laws of England ; > Employment (Volume 39 (2021), paras 1-346; Volume 40 (2021), paras 347-728; Volume 41 (2021), paras 729-1086; Volume 41A (2021), paras 1087-1509) ; 6. Unfair Dismissal and Wrongful Dismissal > (4) Wrongful Dismissal ; (i) In general

37. Having considered Plaintiff's reply Defendant had found him 'guilty of breaching' the Employment Contract and Plaintiff was granted an opportunity for 'Mitigation before the Board Sub Committee'.
38. According to P6 which reads as 'Mitigation Hearing & Recommendations to the Joint Board Meeting', Plaintiff had pleaded guilty for the allegations for existence of conflict of interest.
39. Plaintiff in his evidence stated that he pleaded guilty on the request of chairperson of Defendant.
40. There was no duress or undue influence to plead guilty for the conflict of interest, he had done it on his own admission on the request of Chairperson of Defendant.
41. Plaintiff was summarily terminated on 17.10.2018 for said allegations of 'gross misconduct'.(P7) and it states

"Re: Confirmation of Summary Dismissal

Following the Mitigation Hearing held on Friday 5 October 2018, the SEL & CMSL Joint Board Meeting met on Tuesday 16 October 2018 to deliberate on the Board Sub Committee's recommendations. However, in view of the seriousness of the breach of your Employment Contract, the Joint Board decided to terminate your employment with SEL & CMSL by reasons of your gross misconduct.

The Joint Board Meeting considered your various responses and found that your conduct was unsatisfactory in the following respects:

1. **Breach of Clause "F" Restriction on Outside Activities"** that restricted you from any outside activities either directly or indirectly in any capacity in the performance of your duties as Group CEO.
 - i. That your consultancy engagement in any capacity with Hotel Equipment Limited through your family company, Tier3Global on several occasions from the period 7 October 2017 to April 2018 whilst being the Group CEO for SEL & CMSL was without the Board's prior approval;
 - ii. That you used your position of influence as Group CEO by directing HBK Management Team to purchase various equipment to the amount of \$16,580 from Hotel Equipment Limited without the Board's prior approval. This did not comply with the Company's procurement procedures during the period 7 October 2017 to April 2018 but the purchase was done to the benefit of your family company, Tier3Global;

- iii. That in the period October 2017 to April 2018, you diverted confidential company information on the proposed 3 to 5 years expansion plan of the Company for the MH,
 - iv. Lautoka Coffee Shop, Nadi Main and Ba to Hotel Equipment Limited for the benefit of Tier 3 Global by using your position of influence as Group CEO to actively purchase \$32,000 worth of equipment (50 pie warmers) without any Board approval;
 - v. That you proposed to both the SEL and CMSL Board for the purchase of your Pasvali Street property by either Company at the selling price of \$550,000 which was not approved. Your wife in her statement dated 17 September 2018 confirmed that you had intended to loan \$100,000 to assist Hotel Equipment Limited in their financial woes had the sale of your Pasvali Street property proceeded. Again, you actively attempted to use your position in the Board in a compromising situation to the benefit of Tier 3 Global.
 - vi. In the Board Meeting of Wednesday 28 February 2018 and upon your request, the Board had directed that they were not keen with your interest to take Directorship position on the Board of Hotel Equipment Limited, yet you attended a Bank of Baroda meeting scheduled by Hotel & Equipment Limited for their refinancing loan of \$100,000 with your wife and Mrs Beggs on Friday, 9 March 2018 at 11am in Company uniform.
 - vii. That during the said period of Friday, 9 March 2018, as Company CEO you attempted to influence Manager Finance to secure a \$100,000 loan to Hotel Equipment Limited from the Company thus creating a situation of conflict of interest.
 - viii. That Tier3 Global received a benefit from such engagement with Hotel Equipment to the amount \$28,518.
2. Breach of "Service" when you as Group CEO constantly conducted your official duties outside of the Board's directive regulations, resolutions given from time to time when you constantly authorised CapEx beyond your \$5,000 limit, as highlighted in the few instances below:
- ix. That on 31 July 2018, you authorised the purchase of 3 x Sinmag Ovens from China at the cost of about \$USD20k without the prior approval of the CMSL Board and in excess of the \$5,000 approved limit granted to you by the Board;
 - x. That the CMSL Board did not approved the training of 3 staff members including yourself for a few days in the USA at a cost of around \$50,000.00 nor

have you attempted to formalise these unauthorised expenses above your CapEx limit to the Board;

- xi. That the Board had not approved your Board Secretarial Fees nor made any decision to substitute such fees as incremental to your duties as Group CEO.

These conducts are serious enough to merit summary dismissal under your Employment Contract.

Therefore, the arrangements in respect of your summary dismissal are as follows:

- Your summary dismissal is effective from Tuesday, 16 October 2018 (Termination Date);
- You are not entitled to any period of notice nor payment in lieu of notice;
- We will pay you in lieu of any accrued but untaken leave incurred prior to the Termination Date;
- If you are entitled to reimbursement of any genuine expenses incurred prior to the Termination Date, you must submit your claim by Thursday, 18 October 2018;
- You must return in good condition any property which belongs to the Company;
- Your final payment of salary shall be made on Friday, 19 October 2018, and released to you only upon return of all company property currently held by you.”

42. Accordingly Plaintiff was dismissed for a ‘cause’ and this was done summarily for the violation of Clause F of Employment Contract which States

“Restriction on Outside Activities

The Employee shall not during the continuance of this Agreement be engaged or interested either directly or indirectly, in any capacity, in any trade, business or occupation whatsoever other than the business of the Companies. In the clause, “occupation” includes membership of local authorities, Parliament or its equivalent, or any other public or private work which in the opinion of the Companies may hinder or otherwise interfere with the performance of the Employee’s duties under this Agreement.’

43. Conflict of interest is a serious allegation specially to senior management personnel such as Plaintiff who also attended the Board meetings of Defendant company as CEO. He had access to all the deliberations of the Board meetings and as CEO was in possession of strategic plans, financials of Defendant.

44. Plaintiff's wife was a consultant in Hotel Equipment Limited (HEL) and this was through a consulting company named Tear3 Global owned by her. There was no evidence of Plaintiff disclosing his or his wife's connection to HEL through Tier 3 Global. Plaintiff in his evidence stated that he had disclosed his wife's professional engagements with HEL verbally to the board of Defendant. According to Plaintiff these were not recorded by the secretary to the Board of Defendants. HEL was supplier of numerous CAPEX items for the Defendant, before and after Plaintiff assumed duties as CEO.
45. Plaintiff also admitted he personally desired even to grant a loan for HEL and he had also sought the same loan from Chairperson of Defendant and also from Defendant through Accountant. This shows Plaintiff was personally involved in the affairs of HEL and he had also purchased capital expenditure items from HEL while he was CEO of Defendant.
46. Plaintiff had used CAPEX of Defendant to buy items from HEL indicating conflict of interest.
47. Witness for Defendant said about excessive number of 'warmers' bought from HEL they were idling in the storage for some time. It is alleged that Plaintiff did not obtain necessary Board approval for large CAPEX, including purchases from HEL.
48. Plaintiff in his evidence admitted that he attended a meeting with a commercial Bank for HEL to obtain a loan during his lunch interval. There were allegations of revelation of Defendant's expansion plans to HEL and when considering totality of evidence this allegation cannot be excluded as frivolous. Plaintiff was CEO of Defendant and had attended a meeting of supplier (HEL) of Defendant to obtain a loan to HEL.
49. Hence there is prima facie case for violation of Clause F of Employment Contract, and accordingly Plaintiff was summarily dismissed. The jurisdiction under common law is restricted to find out whether there was a 'wrongful termination', in terms of the Employment Contract.
50. So there was no wrongful dismissal as alleged in the statement of claim as he was dismissed for a 'cause' and it was in terms of the Employment Contract.
51. Plaintiff's claim for special damages was confined to for wrongful termination and this is dismissed as there was no wrongful termination.

CONCLUSION

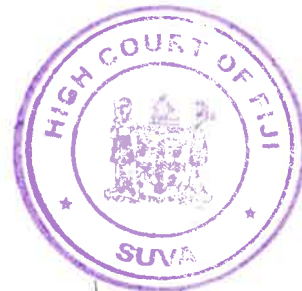
52. Plaintiff instituted this action for breach of contract and also breach of statutory provisions. Statutory breaches and 'unfair dismissal' cannot be dealt under common law hence the

action can be dismissed in *limine*. Without prejudice to that I have considered whether there was a wrongful termination of employment, in violation of Employment Contract. Plaintiff was summarily dismissed for the misconduct of conflict. Plaintiff was terminated for violation of a term of contract. I cannot consider its fairness, which is clearly jurisdiction of ERC. There was no wrongful termination of employment of Plaintiff as CEO by Defendant. This action is struck off for reasons given. Considering circumstances no cost awarded.

FINAL ORDERS

- a. Plaintiff's action is struck off.
- b. Considering circumstances no costs granted.

DATED this 26th day April, 2023.



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Justice Deepthi Amaratunga
Judge High Court, Suva