IN THE COURT OF APPEAL OF TONGA

LAND JURISDICTION AC 24 of 2015

NUKU'ALOFA REGISTRY [LA 15 of 2012]

BETWEEN : TANIELA KIVALU

- Appellant

AND : THE CHURCH OF JESUS CHRIST OF THE LATTER DAY SAINTS IN TONGA TRUST BOARD

- Respondent

Coram : Moore J
Blanchard J
Hansen J
Tupou J

Counsel : Mr. 'O. Pouono for the Appellant
Mr. L. M. Niu SC for the Respondent

Date of Hearing : 7 September 2016

Date of Judgment: 14 September 2016

JUDGMENT OF THE COURT

[1] This is an appeal by Taniela Kivalu (the appellant) against a judgment of Scott J of 7 August 2015 in the Land Court dismissing the appellant's counter-claim against The Church of Jesus Christ of Latter Day Saints in Tonga Trust Board (the Church). The counter-claim was brought in proceedings the Church had initiated to obtain possession of a property then occupied by the appellant. Until his dismissal on or about 18 February 2012, the appellant had been a teacher employed by the Church and the premises he occupied were quarters made available to staff.

[2] It is unnecessary to recount in any great detail findings of fact made by Scott J or, as will become apparent, facts alleged by the appellant to be relevant to his counter-claim insofar as it relates to his relocation costs. In outline, the relevant background is this. Until the appellant commenced teaching at a school operated by the Church in Tonga, he had been living in the United States of America. The appellant is Tongan. While he had visited the school on several occasions between the years 2000 and 2010, it was not until early 2011 that he entered into an agreement with the Church to teach at the

school and commenced teaching. Obviously enough, he had to relocate from the United States of America to Tonga. He commenced teaching at the school in, it appears, March 2011 and in September 2011 the school board approved his appointment as a permanent teacher effective 14 September 2011. On a date that is not clear from the document, nor was any specific finding made by Scott J about it, the appellant signed a document entitled "Employment Agreement". The document itself recites that it was entered into on 1 October 2011. In any event Scott J found that this document (the October agreement) constituted a contract of employment operative in early 2012 when the Church purported to dismiss the appellant from his employment as a teacher. As a matter of combined fact and law, this finding is correct.

[3] On 5 January 2012, the appellant spoke to the school's headmaster informing him that he was going overseas (to the United States) but would be returning on 19 January 2012. The appellant was told he had to be back for pre-school training commencing in late January. In fact, the appellant was detained by the American authorities when he entered the United States. He was not released from custody until 7

February 2012. He did not return to Tonga until 19 February 2012. On 16 February 2012 a letter was signed on behalf of the Church addressed to the appellant terminating his employment. The letter set out the terms of clause 5.1 of the October agreement and concluded by saying:

> "The Employer hereby terminates this Agreement [a reference to the October agreement] and consequently your employment as teacher thereunder forthwith as from today."

In an email dated 18 February 2012, the appellant acknowledged having received an email informing him that his employment had been terminated. In addition, Scott J made a finding, which is not contested, that the appellant's wife gave him a copy of the letter dated 16 February 2012 on 22 February 2012. Thus the position appears to be that by no later than 22 February 2012, the appellant had been notified that his employment as a teacher by the Church had been terminated.

[4] It is convenient to set out, at this point, some of the provisions in the October agreement. Clause 5 of that agreement provides:

5.1 *This Employment Agreement recognises the employee's employment starting on 14 Sep 2011. Either Employer or Employee may terminate this Agreement at any time upon written notice to the other, with or without cause. Thus, Employee's employment with Employer is at-will. Neither this Agreement, nor any oral or written representation or Employer policy may be considered a contract of employment for any specific period of time.*

5.2 *Unless otherwise agreed in writing between the Employer and the Employee, the Employee's employment with Employer will cease on 31 December of the year in which the Employee attains age 60.*

[5] Two further provisions should be noted. One is clause 12.1 which provides that the October agreement is to be governed by the laws of Tonga. The second is clause 13.8 which provides:

> *This Agreement, including any Exhibits, constitutes the only and entire agreement between the Parties on the subject matter of the Agreement. It replaces and cancels all other verbal or written agreements, express or implied, which may have existed in the past between the Parties and which deal with the subject matter of the Agreement.*

[6] It is necessary to summarise briefly the way the appellant framed, in the pleadings, his counter-claim and also some

elements of his defence. Paragraph 10 of the defence responded to paragraph 11 of the Church's statement of claim. That latter paragraph pleaded, in substance, that the Church was able to terminate the appellant's employment without notice and without cause in accordance with clause 5.1 after the appellant failed to attend pre-school training and the commencement of the academic year at the school on 31 January 2012. Paragraph 10 of the defence pleaded that the termination came as a surprise to the appellant and he had no opportunity to show cause as to the actual reason for his employment being terminated. The substance of this claim is repeated in paragraph 25 of the counter-claim. The relief sought was the quashing of the notice of termination and consequential relief (including the payment of wages since the purported termination and, it appears, a declaration that the employment continued) or, in the alternative, a declaration that the contract had been terminated and damages equal to the amount the appellant had spent relocating to Tonga, a little over US $59,000. In the appellant's submissions to Scott J, counsel alluded to the proposition that the appellant "[had] been wrongfully terminated".

[7] In paragraph 19 of the reasons for judgment of Scott J, his Honour identified the "central issue" as being "whether the [appellant] was wrongfully dismissed". "If he was, then he will be entitled damages". It appears his Honour believed that clause 5.1, properly construed, enabled the Church to terminate the appellant's employment by the giving of written notice without specifying any period of notice. We disagree with this conclusion for reasons we will shortly explain.

[8] Before we do so, it is desirable for this Court to observe that a suggestion in argument at the trial, noted by Scott J, that there may have been an implied term of mutual trust and confidence, derived from the decision of the House of Lords in *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 was not raised, at all, in this appeal. Indeed Scott J noted that it was not a matter pursued before him.

[9] We have mentioned it only because, had such an argument been raised and pursued in the hearing before Scott J and in this appeal, it possibly could have had a bearing on the outcome. It has been held by the Supreme Court that this implied term requires an employer to act reasonably when it

exercises its right to dismiss an employee: *Koloa v Helu* [1999] Tonga LR 227 at 234. While this proposition has not yet been addressed by this Court, *Malik* has been adverted to on at least two occasions, namely in *Leiola Group Ltd v Moengangongo* [2010] Tonga LR 85 at 95 and *'Ilangana v Westpac Bank of Tonga* [2014] TOCA 18 at [17] and [30].

[10] This first issue raised by the appeal, though not with any real clarity on the part of the appellant, is the correctness of the central conclusion of Scott J, that there had not been a wrongful dismissal. The common law of Tonga ordinarily implies a term into a contract of employment that an employer can dismiss an employee by giving the employee reasonable notice: *Leiola Group Ltd v Moengangongo* at 96. Obviously such an implied term yields to the express terms of the contract and would be displaced by an express term to the contrary: *Leiola Group Ltd v Moengangongo* at 94. In the present case to say, as clause 5.1 does, that the employment could be terminated at any time by written notice without cause says nothing about the content or nature of the notice. The clause does not, in our opinion, displace that much of the term implied by common law requiring any notice to be

reasonable notice. It is not at odds with the express intention of the parties to be gleaned from the terms of clause 5.1 to treat the notice referred to in the clause as reasonable notice. We read "at will" in context as affirming the Church's ability to give (reasonable) notice at any time.

[11] In this appeal, counsel for the appellant said reasonable notice in relation to the appellant's position was two months. Counsel for the Church did not contest this proposition. In these circumstances we are content to proceed on the basis that reasonable notice was two months' notice. Accordingly, that notice having not been given, the Church breached its obligation to give reasonable notice for which the appellant is entitled to damages. Those damages are an amount equivalent to the wages or salary for the period of notice: *Leiola Group Ltd v Moengangongo* at 89. We are not aware of the rate of remuneration of the appellant at the time of his dismissal. Accordingly our order will have to be expressed at a level of generality.

[12] A central aspect of the appellant's appeal is a claim that he is entitled to be reimbursed for the costs associated with

relocating to Tonga from the United States. No attempt is made to identify the legal foundation of this claim. The dealings between the appellant and the Church before he relocated, when he first took up employment and later, do not support the implication of a contractual term that the Church would pay for the cost of relocation. Indeed it is not asserted by the appellant that there was a term to that general effect and no claim for such payment was made before the employment was terminated. In any event the October agreement is, in terms, the entire agreement between the appellant and the Church. It does not contain any contractual obligation on the part of the Church to pay the appellant's costs of relocation either generally or upon termination of the contract. This claim must be rejected.

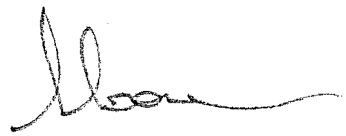
[13] As to the costs of the appeal, both parties have been partially successful and, accordingly, the just and appropriate result is that each party bear their own costs of the appeal.

[14] In the result, the Court orders:

(i) The Order of the Land Court dismissing the appellant's counter-claim is set aside.

(ii) The respondent pay the appellant damages in a sum equivalent to the gross sum the appellant would have earned for the two months immediately following the termination of his employment on 22 February 2012 plus any unpaid salary up to that date.

(iii) The appeal is otherwise dismissed.



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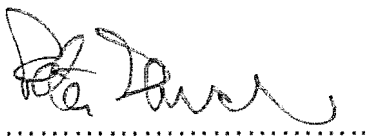
Moore J



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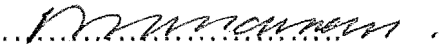
Blanchard J



Hansen J

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Tupou J