

**IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY**

Solicitor-General
Sum & File
LA 15 OF 2012
2/08/15

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

- **Plaintiff**

AND: TANIELA KIVALU

- **Defendant**

Hearing : 13, 14 July 2015.

Counsel : L.M. Niu SC for the Plaintiff
O. Pouono for the Defendant

Before Mr Justice M. Scott and Madam Assessor Koloamatangi

[1] The Plaintiff has a school known as the Liahona High School. The Principal of the school from 2009 to December 2012 was Inoke Kupu. Kupu had attended the school as a pupil and one of his class-mates was the Defendant.

[2] The Defendant told the Court that the Plaintiff Church had sponsored him to travel to the United States for further education after which he hoped to return to Tonga as a teacher.

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- [3] It appears that the Defendant in due course gained the necessary qualifications and began making enquiries about returning to Tonga. He came to Tonga in 2000, 2007, 2009 and 2010, each time visiting the school.
- [4] Towards the end of 2010 or in early 2011 the Defendant arrived at the Principal's office where he and Kupu discussed the matter again and it was agreed that the school would employ the Defendant. Pending approval by the Church Board (the CES) for a permanent appointment he was offered and accepted "an interim offer of temporary employment as a substitute teacher" at the school beginning in early April 2011. He signed a contract dated 28 January 2011 setting out the terms and conditions of his employment (Document P39-40 which was followed by a second contract with slightly different terms - P1-4).
- [5] The Defendant explained to Kupu that he wished to relocate his wife and children and all their possessions from the USA to Tonga and that he therefore wanted one of the vacant staff quarters at the school to be allocated to him. Kupu was agreeable to this request and the Defendant then returned to the USA.
- [6] On 14 March the Defendant arrived back in Tonga. He and his family went straight from Fu'amotu to the school. On 22 March the Defendant entered into a Housing Rental Agreement (P3-4) and a Housing Deductions Agreement (P-5). The Defendant assumed his duties as a

substitute teacher on 4 April and after some delays he and his family and their personal effects moved into the staff quarters.

[7] In September 2011, the Church Board approved the Defendant's appointment as a permanent teacher. No copy of the Board's decision or notification to the Defendant was produced but it is accepted that the appointment was with effect from 14 September 2011.

[8] According to Fatafehi Fifita, the present Principal of the school, the Plaintiff had for some time been working to standardise employees' contracts and to remove the requirement that these contracts be renewed each year. At the end of September the new contracts were introduced and explained: "We did a training for all employees, teachers and non-teachers". Ms Fifita who was the very experienced Human Resources Manager at the time told the Court that all the employees of the school were given contracts and that a copy of the contract as given to all employees, including the Defendant, was document P8-14. This particular document names the Defendant on page 1 and is signed by him on page 7.

[9] Paragraph 5 of the contract is entitled "Term of Employment". It reads as follows:

"5.1. This Employment Agreement recognizes the Employee's Employment starting on 14 September 2011. Either Employee or Employer 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."

[10] On 5 January 2012 the Defendant went to see Kupu at his office. He sought and obtained approval to fly to the USA on 10 January and to return on the 19th. Kupu reminded the Defendant that teacher training was beginning on 23 January and that his attendance was mandatory. According to the Defendant he wished to visit the USA for "personal, medical and other reasons."

[11] The Defendant told the Court that upon his arrival in Los Angeles on 10 January he was arrested and taken into custody. In due course he was taken to Utah where he appeared in Court on 30 January. He was eventually released on 7 February and was finally able to return to Tonga on the 19th.

[12] On the morning of 22 February the Defendant's wife handed him a letter, P-18, entitled "Notice of termination of Employment". The letter informed the Defendant that, in reliance upon clause 5.1 of the

contract of 1 October 2011 his employment as a teacher at the school had been terminated forthwith.

[13] It appears that on or about 18 February the Defendant had also received an email from the school advising him of his termination. No copy of this email was produced although the Defendant told the Court that he might have a copy at home. On 18 February the Defendant emailed the school (Document P-19) requesting a review of the decision to terminate him. He suggested that he was entitled to avail himself of the Employee's Grievance Procedure. He explained that the "major reason" for his non return by the 19th January was "a Court Order of arrest"; these legal matters had now been settled. He advised that confirmation that his termination was final would lead to legal proceedings being taken.

[14] On 22 February the Defendant received a second hand-delivered letter, P-21, giving him 30 days notice to quit the staff quarters. The second paragraph of the letter also replied to his email of 18 February, P-19, and advised him that the notice of termination was final.

[15] On 25 September 2012, the Defendant not having vacated the staff quarters, the writ was issued. It sought an order for vacant possession of the quarters, mesne profits and damages for unauthorised use of electricity.

[16] On 8 November 2012 a Defence and Counterclaim were filed. The Defendant alleged that he was given no opportunity "to show cause as

to the actual reason for his Employment being terminated”, that the notice of termination was “unfounded”, that he was wrongfully dismissed and that consequently there were no valid grounds for his eviction from the staff quarters.

[17] The Counterclaim alleged that the Defendant had “Spent about \$USD59,285.00 in preparation for his coming here and his establishment in Liahona to take up his post as a teacher”. The Defendant sought dismissal of the eviction application, reinstatement as a teacher at the school, alternatively damages and costs.

[18] On 12 December 2012 I granted the Plaintiff an order for possession of the quarters. My Decision of even date sets out my reasons. I understand that the Defendant and his family vacated the quarters shortly after the Decision was delivered.

[19] The central issue in this case is whether the Defendant was wrongfully dismissed. If he was, then he will be entitled to damages. If his dismissal was lawful then the Plaintiff will prima facie be entitled to recover damages as sought resulting from the failure to comply with the notice to quit.

[20] The Plaintiff’s witnesses were Kupu and Ms Fifita. The principal defence witnesses were the Defendant and his wife Tuanekinoa Kivalu.

[21] The Defendant’s evidence was that following his arrest he was able to contact his brother in Utah. He asked him to tell his wife and Kupu

what had happened. According to Tuanekinoa she first heard from the Defendant on 21st and when she learned what had happened she went to see Kupu. She may have been to see Kupu before. She again went to see Kupu on the 23rd and told him that it seemed likely that the Defendant would not return for 30 days. Kupu told her that he would have to find a substitute teacher. She was worried about the Defendant's salary and the rental deductions on the quarters. Kupu reassured her that all these matters would be attended to on his return.

[22] Kupu told the Court that several meetings were held to consider the situation following the Defendant's non-return. On 16 February it was decided that his contract would be terminated. The principal reason for this decision was his failure to return to Tonga on 19th as promised.

[23] The Defendant advanced three grounds upon which contended that the dismissed was unlawful:-

- (a) The contract had been varied when Kupu assured Tuanekinoa that a substitute teacher could be found to stand in for the Defendant and everything would be resolved on his return;
- (b) He was unaware of Clause 5.1 of the contract and was therefore not bound by it; and
- (c) Clause 5.1 did not relieve the Plaintiffs of the requirement that his dismissal was reasonable in all the circumstances and was carried out in a procedurally fair manner.

[24] As to the first, I do not accept that there was any variation of the Defendant's contract as a result of Kupu's reassurances. In my view Kupu was doing no more than comfort Tuanekinoa who was very distressed about what had occurred and worried about her husband's job and their accommodation. In any event, the contract was between the Plaintiff and the Defendant, any variation would have to be agreed between those parties, not between the Principal of the school and the Defendant's wife.

[25] I did not believe the Defendant's claim not to have seen or been aware of clause 5.1 of the contract. No such claim is pleaded or had been advanced before the hearing. I accept Ms Fifita's evidence that the Defendant was given the whole of the contract document which he then signed. I reject the Defendant's claim that he was told to access pages 1 – 13 of his contract on the computer but was unable to do so in the more than three months that elapsed between 1st October and his departure for the USA in the following year. Clause 5.1 was in similar terms to the corresponding paragraphs in the contracts he signed in January and March 2011. I am satisfied that the Defendant knew perfectly well that he was being employed on an at-will basis and that he was liable to be terminated at the will of the church with or without adequate reason.

[26] The third ground apart from being briefly adumbrated was not advanced in any detail. I have not overlooked *Fu'ikava 'Ilangana v Westpac Bank of Tonga* (AC 17 of 2014) in which the Court of Appeal

suggested that a case of alleged wrongful dismissal might have been decided differently if an implied term of mutual trust and confidence had been relied upon (see *Malik v Bank of Credit* [1998] AC 20; [1997] 3 All ER 1). In the present case not only was this line of argument not pursued but I am also satisfied that it could not succeed. Unlike *Ilangana* the Defendant had only been employed for a few months, as opposed to many years, before he was dismissed. Secondly, as pointed out in *Malik* implied terms of contracts operate as default rules which the parties are free to exclude or modify. In my opinion clause 5.1 plainly excludes any requirement that any quasi-unfair dismissal procedures be implemented before the contract could be terminated. The Preamble to The Faculty Handbook dated 28 November 2011 (unnumbered document in the Plaintiffs bundle, not referred to at all by either Counsel) which includes a section dealing with disciplinary action against teachers, specifically states: "If any conflict should exist between the handbook and a written Employee Agreement contract the Employee Agreement and local in-Country policies shall prevail."

- [27] As pointed out by Mr Niu in his closing submissions the Defendant's disclosures raised considerable doubts about the Defendant's honesty and the truthfulness of his very skimpy account of why exactly he was arrested and detained in the USA. It seems clear, to give but one example, that his detention did not, or at least chiefly not, arise from non payment of a gas bill as suggested in his letter of 22 January (P 16-17). The Defendant admitted that he had never given the school a full, detailed and document – supported explanation for his arrest.

Given the view I have taken of the effect of clause 5.1 these matters, never fully explored at the trial, are not decisive in arriving my conclusion. They do not, however, suggest that any enquiry into the reasons for the Defendant's non-return would improve his position.

[28] I am satisfied that the Defendant's dismissal was not wrongful. From a Human Resources standpoint it might have been better to have given the Defendant a proper opportunity to explain himself before a final decision was taken but I am satisfied that there was no legal requirement to do so.

[29] It follows that the Defence and Counterclaim must be dismissed. In his helpful final submissions Mr Pouono accepted that the rent and electricity issues were not in dispute if judgment were given to the Plaintiff on the central issue. There will be judgment for the Plaintiff in respect of paragraphs (c) and (b) of the prayer of the Statement of Claim. Plaintiff's costs to be taxed if not agreed.

NUKU'ALOFA: 7 August 2015.



JUDGE

M. Taufu

20/7/2015