

Scan & file

SG.
[Signature]
20/12/12

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

- **Plaintiff**

AND : TANIELA KIVALU

- **Defendant**

L.M. Niu for the Plaintiff

O. Pouono for the Defendant

DECISION

[1] On 21 March 2011 the Defendant accepted a written offer of temporary employment with the Plaintiff, commencing on 4 April 2011. One of the terms of the contract (Exhibit A to the affidavit of Inoke Kupu dated 25 September 2012) was that the "offer of temporary employment may be terminated at the will of the Seminaries and Institutes by providing you 30 days written notification."

[2] On the following day, a rental agreement (Exhibit B to the same affidavit) was entered into between LDS Church Schools Tonga and the Defendant in respect of House No 10 which he moved into on the same day. Section 5 (a) of the rental agreement states:

rec'd 20/12/12
[Signature]

"It is expected that SAI employees will vacate SAI housing upon termination of employment with SAI."

- [3] On 11 October 2011 the Plaintiff and the Defendant entered into an "Employment Agreement". Paragraph 5.1 of the agreement is as follows:

"This Employment Agreement recognizes the employee's employment starting on 14 September 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 the Employer is at-will. Neither this Agreement, nor any oral or written representation or Employee policy may be considered a contract of employment for any specific period of time."

- [4] Paragraph 5.2 of the Agreement is as follows:

"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] Paragraph 13.8 of the Agreement is as follows:

"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] On 16 February 2012 the Manager of the Tonga Service Center of the Plaintiff wrote to the Defendant (Exhibit E). Invoking paragraph 5.1 of the Agreement he advised the Defendant that:

"The Employer hereby terminates this Agreement and consequently your employment as teacher thereunder forthwith as from today."

[7] On 22 February 2012 the Manager wrote to the Defendant (Exhibit G) giving him 30 days notice to vacate House No. 10.

[8] On 9 October 2012 the Plaintiff commenced proceedings in this Court. The Statement of Claim, dated 25 September, sought:

a) an order evicting the Defendant and his family from House No. 10;

b) mesne profits for the period of 23 March 2012 to date of delivery; and

c) damages for "electricity used."

[9] On 3 October 2012 an inter parte application for the eviction of the Defendant from house no. 10 by 30 November 2011 was filed.

[10] On 8 November 2012 a statement of defense and counterclaim were filed. Put briefly, the Defendant states that he incurred substantial removal expenses when taking up his employment with the Plaintiff in the expectation that he would continue in that employment until reaching the age of 60, that his dismissal was wrongful and/or unfair, that he and his family have no other home to move to and that in any event house no. 10 is not immediately required by the Plaintiff which is in possession of other vacant premises.

- [11] On 27 November 2012 the Defendant sought directions for the proper pursual of his claim for breach of contract against the Plaintiff.
- [12] On 30 November 2012 the Plaintiff filed a reply and defence to the counterclaim. The Plaintiff pleaded that the Defendant's termination was according to contract and that accordingly his right to remain in house no. 10 had also been terminated. The claim for reimbursement of the removal expenses was rejected as was the suggestion that the Defendant and his family were not able to remove from house no. 10.
- [13] On 5 December both counsel agreed that the fundamental question, which was the lawfulness of the termination of the contract of employment, was within the jurisdiction of and could most conveniently be dealt with by this Court. Neither counsel nor the Court saw any advantage in staying the Land Court proceedings while the Supreme Court (in all probability presided over by the same judge) considered the validity of the termination.
- [14] Mr. Niu then sought a ruling on the eviction application. After citing the various documents already referred to, he pointed out that it is now over 9 months since the Defendant's employment was terminated. He suggested that there was nothing to show that the Defendant had sought alternative accommodation while more than enough time had been given to him by the Plaintiff to make alternative arrangements. His instructions were that the Plaintiff needed house No. 10 to provide accommodation for visiting teachers. Mr. Niu referred to *The Church of Jesus Christ of Latter Day Saints in Tonga Trust Board v Toki* (2007) To. L.R To in which the Court

decided that this was "one of those rare cases where the Court is justified in making a mandatory injunction at this interim stage."


[15] In opposition, Mr. Pouono again emphasized the Defendant's expectation that he would continue in employment, the hardship that his removal would entail and the doubts about the legitimacy of his termination. Those, he suggested, needed first to be resolved before the decision to evict was taken.

[16] The general principles governing the grant of interlocutory injunctive relief are well known and conveniently set out in the commentary to Order 29 in the 1988 Edition of the White Book. As pointed out in *Toki* mandatory injunctions are rather rarely granted at the interlocutory stage. However, as will be seen from the former Order 113 of the English Supreme Court Rules and from the present CGR Order 24 of the 1998 English Rules (both of which are referred to in our rules by O2 R3) the principles are somewhat different when, as in this case, possession is sought from a licensee whose license to occupy has *prima facie* been determined.

[17] In my opinion the Defendant will have very considerable difficulty in establishing wrongful dismissal while in Tonga there is no law of unfair dismissal. It may well be that the Defendant will be able to establish that he has been treated rather ungenerously but such conduct alone will not result in the relief that he is seeking. His chances of obtaining an order for reinstatement seem to me to be very slim.

[18] In all circumstances I am satisfied that there must be an order for possession of house no. 10 in favor of the Plaintiff to take effect 28 days from the date of delivery of this decision.

DATED: 7 December 2012.



CHIEF JUSTICE

E. Takataka

7/12/2012