

IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

CV 299 of 2007

JM  
21/1/08  
Judgment  
file

**BETWEEN : TAVITA TOMINIKO F.V. LEMOTO : Plaintiff**

**AND : 1. SUE GARDINER  
2. PACIFIC FORUM LINE LIMITED: Defendants**

**BEFORE THE HON. JUSTICE ANDREW**

**Counsel : Mr. Vaipulu for the plaintiff, Mrs. Vaihu for 1<sup>st</sup> defendant/Applicant and Mr. Kefu for 3<sup>rd</sup> defendant**

**Date of judgment : 31<sup>st</sup> August 2007**

## **J U D G M E N T**

The Plaintiff seeks leave to file an amended statement of claim.

The Plaintiffs claim in for damages for wrongful dismissal. I don't think it is putting it too bluntly to say that the main issue of dispute between the parties is whether or not the plaintiff was given leave without pay for 6 months and whether the first defendant issued a leave request form. The Plaintiff is claiming that his leave was so approved. The amendment sought is to the effect that if such leave had not been approved then the defendant's owed the plaintiff a duty of care to inform him that if leave had not been granted then he was at risk of losing his employment.

Recd: 14/01/08

The defendants object to such an amendment on the basis that this is a new claim and that it contradicts the Plaintiffs case that permission for leave had always been granted.

I think the issue in this application is largely whether or not the defendants would be prejudiced by the amended statement of claim raising the issue of the duty of care involved in the granting of leave and advising the plaintiff accordingly. There appears to be an issue of whether or not a signature was placed on a leave form. I do not think the claim that if no signature of approval was in fact given that there still remained a duty of care is such a radical departure from the original claim that the Plaintiffs would be so disadvantaged that they would be prejudiced in their defence. I think the proposed amendment has a sufficient nexus with the original claim that it should be allowed. This amendment was foreshadowed some time ago and I do not think that it catches the plaintiffs by surprise or that it is prejudicial. The matter is set for hearing in some six weeks time.

In the circumstances I propose to grant leave to the Plaintiffs to file their amended statement of claim.

#### ORDER THAT

- 1) The Plaintiff is granted leave to amend his amended statement of claim and serve the same upon the Defendants within 7 days.
- 2) The Defendants may file and serve an amended statement of defence within 14 days of receipt of service of the 2<sup>nd</sup> amended statement of claim.

Costs of the application to be costs in the cause.

NUKU'ALOFA: 31 August 2007

