

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. 169 of 2018

BETWEEN

SERA BERNADETTE FILIPO NICHOLLS of 34 Deovji Street,
Suva, Business woman.

PLAINTIFF

AND

SUVA CITY COUNCIL a local government duly incorporated under the
Local Government Act and having its principle place of business at
Victoria Parade, Suva, Fiji.

DEFENDANT

Counsel : Mr O'Driscoll G. for the Plaintiff
Mr Lajendra N. for the Defendant

Date of Hearing : 28th July 2020

Date of Judgment : 07th August 2020

JUDGMENT

- [1] The plaintiff instituted these proceedings by writ of summons seeking the following reliefs:
- (i) Judgment in the sum of \$154,807.25 for the plaintiff's unpaid and/or loss of salary earnings;
 - (ii) Judgment in the sum of \$13,932.25 for unpaid FNF contributions;
 - (iii) Judgment in the sum of \$16,586.45 for unpaid housing allowance;
 - (iv) Judgment in the sum of \$1,106.30 for unpaid entertainment allowance;
 - (v) Interest;
 - (vi) Costs; and
 - (vii) Such further and other reliefs as this Honourable Court deems just in the circumstances.
- [2] The plaintiff entered into a contract with the defendant pursuant to which she was appointed as the Chief Executive Officer of the defendant and the contract was for 3 years from 31st May 2010. The plaintiff alleges on 16th March 2011 the defendant terminated the contract and the particulars of breach of the contract are, according to the plaintiff, as follows;
- (i) Failing to honour its contractual obligations in March 2011 under the plaintiff's contract.
 - (ii) Failing to use correct procedures for performance assessment of the plaintiff.
 - (iii) Failing to give proper notice of the complaints to the plaintiff.
 - (iv) Failing to allow the plaintiff a reasonable opportunity to make explanations regarding the complaints and warnings raised against her.
 - (v) Failing to follow the proper dispute resolution procedures set out in agreement between the plaintiff and the defendant.
- [3] The position of the defendant is that the termination of the employment of the plaintiff was based on serious misconduct of insubordination and poor work performance of the plaintiff. The defendant also avers in the statement of defence the plaintiff's

contractual benefits are subject to the defendant's right to summarily dismiss the plaintiff for these acts misconduct.

[4] At the pre-trial conference the parties admitted the following facts:

- (i) The plaintiff was the Chief Executive Officer of the defendant from 19th May 2010 until 15th March 2011.
- (ii) On 15th March 2011 the plaintiff's employment with the defendant was terminated with immediate effect.
- (iii) The contract was for a period of 3 years commencing from 31st May 2010 with provisions in relation to termination of contract including summary dismissal.
- (iv) The plaintiff was paid a gross salary in the sum of \$42,692.31 fortnightly which equivalent to \$1,346.15 weekly.
- (v) In addition to her salary the plaintiff under the contract was entitled to 9% of the annual salary to FNPF contributions, a housing allowance of \$7,500 per annum and an entertainment allowance \$500.00 per annum.

[5] The plaintiff testified that all her decisions were always questioned by the Special Administrator and the implement of her decisions were delayed. She said she received couple of memorandums from the Special Administrator. The memorandum (P4) sent to the plaintiff on 28th October 2010 is in relation to certain decisions taken by the plaintiff as the Chief Executive Officer. As admitted by the plaintiff in her evidence the plaintiff has sent the officers who complained about overpayment of VAT directly to the Ministry by passing the Special Administrator. It is a fact admitted by the parties that the Special Administrator is the Council. The plaintiff was holding the second highest position of the defendant council and she was required to follow instruction of the Special Administrator.

[6] Paragraph 3 of the memorandum states;

The case on the over payment of VAT by the Council is still under investigation and the two officers who are implicated in the this investigation had erred by ignoring procedures of Council and bypassing the offices of the Chief Executive Officer and by going straight to the Minister's Office. They have been warned in writing on such malicious intentions. Further severe disciplinary

action on this case will await the conclusion of the internal investigation report on the issue of the overpayment of VAT by the council.

The memorandum states further;

...The Special Administrator is the duly appointed officer of the and is in charge of the overall operations of the Council at all times in relation to any Council matters and bypassing this High Office will result in severe disciplinary action. Failure to adhere to the above warning will result in further disciplinary action against you.

[7] The plaintiff said she replied to the memorandum verbally but the court does not have the contents of her reply.

[8] On 25th January 2011 the Special Administrator sent another memorandum to the plaintiff which is titled "WARNING – POOR PERFORMANCE, MISCONDUCT AND SERIOUS IMPLICATIONS OF INSUBORDINATION".

[9] Paragraph 7 of the memorandum reads:

Given below are very important issues that are still pending and you should be following up, concentrating and spending time on:-

- i. 2008/2009 Financial Reports
- ii. Collection of outstanding Rates
- iii. Corporate and Succession Plans
- iv. Filling of vacant positions
- v. Implementation of numerous Council's resolutions in all departments that are still pending
- vi. It is over 6 months, I am waiting for a SCC Hotline Number
- vii. No outcome or progress to bonus payment to 3 former SCC contracted officers now terminated.

[10] The plaintiff sent memorandum explaining the steps she had already taken to resolve the matters raised above by the Special Administrator. Paragraph 12 of the memorandum date 25th January 2011 sent by the Special Administrator to the plaintiff it is stated:

Yesterday afternoon, Monday, 24/1/11, the Director Local Government gave me a letter from the Permanent Secretary for Local Government, Urban Development, Housing & Environment highlighting most of the issues mentioned above including other complaints given directly to the Ministry office regarding your performance, attitude and behavior that cannot be tolerated anymore and that as Special Administrator of this Council, it is my responsibility to take appropriate action against you.

In her reply dated 25th January 2011 the plaintiff states:

...I have requested a clarification of the CEO's role and the SA's role on two separate occasions without success therefore I take this opportunity to request again a copy of my responsibilities so that I can ensure there are no duplications or confusion over responsibilities.

- [11] The plaintiff at the hearing relied on the document titled "JOB DESCRIPTION" which was tendered in evidence. Her duties and responsibilities are very clearly set down in the said document. On the other hand from what she has stated in her reply it appears she has functioned as the Chief Executive Officer of the Council for nearly a year without having any idea as to what her responsibilities were.
- [12] The other issue raised by the Special Administrator was that the plaintiff was having meetings with Director and other staff spending lot of time during working hours. According to her own reply there had been two hourly meetings every week and later she had reduced it to once a fortnight.
- [13] Plaintiff's witness Ms. Kaliti Mate was the Human Resource Manager of the Council from 2010 to 2013. She said she had no issues working with the plaintiff. She had a god relationship with the plaintiff and she was surprised to hear the termination of the plaintiff's employment. In cross-examination she said having regular meetings may have been a concern of the Special Administrator and again she said it concerned him.
- [14] Witness Josese Rakuita, CEO Levuka Town Council testified that prior to this he was the Director Local Government. He said he knew the plaintiff and he was aware of some issues involving the plaintiff. He also said the Special Administrator has difficulties in working with her. He had informed the Permanent Secretary about this and he convened a meeting. He testified further that the plaintiff was by passing the Special

Administrator and there were lot of complaints from the public and the Permanent Secretary had a meeting with the Minister which was followed by a strongly worded letter (P4).

- [15] In cross examination the learned counsel for the plaintiff questioned the witness as to whether he has any written complains. No written complaints were tendered in evidence. However, failure to tender written complaints is not a ground to totally disregard the evidence of this witness. There is no rule of evidence that every piece of evidence has to be corroborated by documentary evidence. It is a question of creditability. There is nothing on record challenging the credibility of this witness.
- [16] From the correspondences transacted between the Special Administrator and the plaintiff it appears that plaintiff has had no regard for the directives of the Special Administrator and she had been taking decisions arbitrarily. She had send two officer to the Ministry by passing the Special Administrator. Her explanation was that the Special Administrator at the time was abroad but there is nothing in evidence to say that it was so urgent and she could not contact the Special Administrator for his approval.
- [17] The plaintiff's action is based on the employment contract entered into between her and the defendant. The burden therefore, is on the plaintiff to prove that the defendant breached the contract. The only allegation against the defendant is that it terminated the contract unlawfully or unreasonably but the evidence adduced show that it was the attitude of the plaintiff towards her superior in office and the other employees and her failure to discharge her duties led to the termination of the contract.
- [19] In Clause 9.5 of the contract it is provided for dismissal without notice or warning for serious misconduct. But in the instance the plaintiff was informed about her alleged acts of misconduct on several occasions.
- [20] In the letter of termination of employment it that the plaintiff was still on probation.

Clause 2 of the contract says:

The term of this contract shall be for a period of 3 years commencing on 31st May 2010. You will be on probation for a period of six (6) months effective from the above date and confirmation of your appointment will

be dependent on your achieving the Key performance Indicators (KPIs) that have been mutually agreed by the Employer and yourself.

[21] For the reasons set out above the court is of the view that the termination of the employment of the plaintiff was correct.

[22] Clause 13 of the contract provides as follows:

13.1 Where any personal grievance arise, or any dispute or difference arises between the parties on the interpretation or application of these contractual arrangements or any associated matters, then the matter shall be referred to an arbitrator by agreement of both parties.

13.2 Both parties agree that there shall be no right to use any other Tribunal or dispute procedure to resolve the personal grievances or disputes of differences that arises between them in respect of this Contract. The parties agree that the arbitration shall be final and binding.

[23] The dispute between the plaintiff and the defendant has not been referred for arbitration. Under the above clauses the only remedy available to the parties is to refer the matter for arbitration and they are not entitled to resort to any other mode of dispute resolution.

[24] The defendant also raised an issue that the plaintiff's action is time barred. The plaintiff's services were terminated on 15th March 2011. She filed action in the High Court (having Employment Jurisdiction) on 14th January 2016. After the Essential National Industries (Employment) Decree 2011 was enacted the proceedings before that court was terminated on 06th July 2015. The court also ordered that the plaintiff is given liberty to file proceedings in the Civil Court.

[25] The plaintiff filed this action on 08th June 2018 more than eight years after the termination of her employment.

[26] Section 4(1)(a) of the Limitation Act 1971 provides that actions founded on simple contract or on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

[27] The question then arises as to what point of time the cause of action arose. The submission of the learned counsel for the plaintiff is that it arose on the day the order

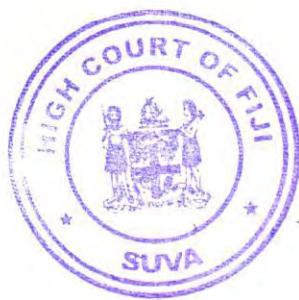
of the High Court (Employment) was sealed by the Chief Registrar. Sealing of an order is a ministerial act. The order of the court becomes effective at the time it is signed and pronounced by the Judge.

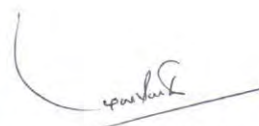
[28] The proceedings were instituted by the plaintiff in the High Court (Employment) within the time prescribed by section 4 of the Limitation Act. However, proceedings before this court were instituted before this court long after the period prescribed by section 4 of the Limitation Act expired. But the proceedings before the High Court (Employment) was terminated by operation of law. The High Court (Employment) in terminating the proceedings made order that the plaintiff was at liberty to file a civil action. This order in my view does not have the effect of extending the period within which the action should have been brought. After the termination of proceedings before the High Court (Employment) the plaintiff had nearly two years to institute these proceedings. For these reasons the court holds that the action of the plaintiff has been filed out of time.

[29] For the reasons aforementioned the court makes the following orders.

ORDERS

1. The action of the plaintiff is dismissed.
2. The plaintiff is ordered to pay the defendant \$5000.00 as costs (summarily assessed) of this action.




Lyone Seneviratne

JUDGE

07th August 2020