

IN THE KIRIBATI COURT OF APPEAL]
CIVIL JURISDICTION]
HELD AT BETIO]
REPUBLIC OF KIRIBATI]

Civil Appeal No. 3 of 2014

BETWEEN **OSANG BARANIKO** **APPELLANT**

AND **SOLAR ENERGY COMPANY LTD** **RESPONDENT**

Before: Paterson JA
 Blanchard JA
 Handley JA

Counsel: *Botika Maitinnara* for appellant
 Birimaka Tekanene for respondent

Date of Hearing: 13 August 2014
Date of Judgment: 15 August 2014

JUDGMENT OF THE COURT

Introduction

1. This is an appeal against a decision of the High Court in an employment dispute between the appellant Mr Baraniko, and the

Solar Energy Company Ltd (the respondent). Leave is required as the appeal has been initiated nearly five months out of time.

2. In a judgment given on 6 January 2013 the Commissioner awarded the appellant:
 - The balance of one month's salary in lieu of notice – he had previously been paid two weeks' salary
 - General damages of \$2,000
 - Costs

3. The Commissioner rejected claims for:
 - Unpaid wages from the date of termination “until the date when there is sufficient evidence to support the appellant's claim”;

 - Reinstatement.

The appellant's position is that the Commissioner erred in law in rejecting these two claims. There is no cross appeal.

Background

4. The appellant was employed by the respondent on a temporary basis until 14 March 2005, when he was appointed as a manufacturing assistant on a permanent basis.

5. On 23 December 2010 he received a letter from the respondent advising that his employment “will cease or come to an end with effect from Wednesday 29 December 2010”. The grounds for the termination as stated in the letter were that the respondent was forced to lay off staff because of increasing ongoing operational costs and the appellant was a temporary employee. His salary was to be paid to 29 December 2010 together with “another two weeks salary in lieu”.
6. The appellant attempted to have the respondent reconsider its decision on the ground that he was a permanent employee. The respondent appears to have ignored the request to have the matter reconsidered.
7. The appellant then sought relief by seeking a summary judgment in a High Court proceeding. On 28 October 2013 the High Court gave judgment on the appellant’s summary judgment application. The Commissioner encouraged the parties “to come to an agreement as to damages within two weeks from” 28 October 2013.
8. Although the summary judgment order was not specific the relief sought other than damages was

“a declaration that the termination of appointment is null and void based on the termination letter dated the 23rd December 2010”.
9. When the parties failed to reach agreement on damages the Commissioner heard the parties on damages on 23 November 2013 and gave judgment on 6 January 2014.

10. The reasons given by the Commissioner in declining the relief in the two claims under appeal were:
 - (a) The claim for unpaid wages was disallowed because there was no evidence that the appellant was out of employment for the period claimed; and
 - (b) Reinstatement was not granted because the respondent no longer needed the appellant's services.

Discussion

11. This appeal cannot succeed and leave to appeal out of time will not be given.
12. The reason that this appeal cannot succeed on the wage issue is that the *Conditions of Service* under which the appellant was employed contained the following provision:

“Employment may be terminated by either party giving one month notices to the other party. Either party can pay one month salary in lieu of this notice”.

The respondent was entitled to terminate the appellant's employment on one month's notice without cause.

13. The law on damages for unlawful termination of an employment contract is settled: see *Mahmud v Bank of Credit and Commerce International* [1998] AC 20 and *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169 at [19]-[24]. In the latter case the New Zealand Supreme Court cited with approval the following citation from the judgment in *Gunton v Richmond-upon-Thames London Borough Council* [1981] 1 Ch 448 at 473:

“An unlawful dismissal is ex hypothesi a premature dismissal. The damages recoverable, having regard to the plaintiff’s duty to mitigate his damages, are the moneys needed to compensate the plaintiff for his net loss of salary or wages during the period for which the defendant was bound by his contract to employ the plaintiff. In the case of a fixed term contract, the assessment will extend over that fixed term. In the case of a contract terminable by notice, the assessment will extend over the period which would have had to elapse before the defendant could lawfully have dismissed the plaintiff.....”
14. The respondent could have lawfully terminated the appellant’s employment by one month’s notice. He is entitled only to the balance of one month’s salary which the Commissioner correctly awarded him.
15. There was no contractual right to reinstatement and there is no such right at common law. Such an order would in effect be a mandatory order which would place on the courts a supervisory role which they are reluctant and not equipped to accept. Furthermore, in this case it would be completely inconsistent with

the right to terminate on one month's notice on payment of salary for that period.

Decision

16. For the above decisions the application seeking leave to appeal is dismissed.
17. The respondent did not seek costs.



Paterson JA



Blanchard JA



Handley JA