

# IN THE HIGH COURT OF KIRIBATI 2018

CIVIL CASE NO. 5 OF 2012

[ATABU KAIKAI  
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BETWEEN [AND  
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[ATTORNEY GENERAL IRO COMMISSIONER OF POLICE      PLAINTIFF  
DEFENDANT

Before: Sister Bernadette Mee Eberi fdnsc, Commissioner of the Court

Delivered on 1 October 2018

*Ms Maitinnara* for the Plaintiff

*Ms Bruce* for the Defendant

## JUDGMENT

### 1. BACKGROUND OF THE CASE

- A. The plaintiff was at all material times a prison warden appointed by the defendant to serve on Christmas Island in the Line Island. He reached the retirement age of 50 on 15 May 2011 while serving on Christmas Island. The plaintiff is from the island of Nonouti in the southern part of Kiribati.
- B. The plaintiff brought these proceedings against the defendant relying on the National Conditions of Service which generally govern the plaintiff's entitlement. The plaintiff claimed maintenance expenses while in Christmas Island and Tarawa awaiting repatriation to his home-island.

01/10/18

## **2. SUMMARY OF PLEADINGS**

C. Ms Maitinnara of Counsel for the plaintiff claimed that the defendant failed to honour its obligation when made the plaintiff and family remained on Christmas Island awaiting his repatriation to Nonouti after his retirement on 15 May 2011 without paying him any subsistence allowance. The plaintiff and family returned to Tarawa on 14 November 2011. The plaintiff felt aggrieved and claimed damages in the amount of AU\$43,250.00 for subsistence expenses the total costs while awaiting in Christmas Island for his repatriation. Further, the plaintiff claimed AU\$145.00 daily for the number of days spent in Tarawa awaiting the settlement of his claim from the 16 November 2011 until he and family were returned to Nonouti Island.

## **3. INGREDIENTS OF CLAIM TO BE PROVED**

D. Ms Maitinnara of Counsel for the plaintiff has to prove on the balance of probabilities that:

1. The defendant has an obligation to repatriate the plaintiff and family upon retirement of the plaintiff from Christmas Island to Nonouti Island;
2. The decision of the defendant in failing to pay a subsistence allowance to the plaintiff while awaiting their repatriation was unjustifiable;
3. The content of the plaintiff's letter dated 3 August 2011 chose to waive his right for repatriation and that the principle of estoppel is applicable in the circumstance;

In addition, Ms Maitinnara must prove that as the result of the defendant unlawful decision made her client suffer damages, being the claimed subsistence expenses and other costs.

#### **4. UNDISPUTED ISSUES**

- E. Both parties agreed in their submissions that the plaintiff wrote a letter to the defendant on 3 March 2010 and on 3 August 2011 expressing his interest to further his staying in Christmas Island after his retirement for personal reasons and that the budgeted repatriation monies for him and family could be paid to him. It is further agreed that the defendant on the 1 September 2011 replied by letter (Exh PW1) refusing the applications in the aforementioned letters of the plaintiff and that the plaintiff was demanded to board the vessel to return to Tarawa as organized by the defendant.
  
- F. The defendant did not dispute the submission of the plaintiff that he and family arrived in Tarawa on 14 November 2011 and due to the failure of the defendant after being contacted by the plaintiff to organize the transport and accommodation the plaintiff entered the Betio Lodge and on 26 November 2011 the defendant took him and family out of the hotel and accommodate them in one of its houses.
  
- G. It is also agreed that the defendant arranged a transport for the plaintiff and family to return to Nonouti and that the plaintiff was notified on the 22 November 2011 the same date the vessel was departing to Nonouti. It was further agreed by the defendant that the aforementioned letter did not include the name of the vessel and departure time and the plaintiff did not board the vessel en route to Nonouti.

#### **5. DISPUTED ISSUES**

- H. The defendant used the defense of estoppel on the basis that the plaintiff and his family failed to board voyage 160/11 MV Matangare from Christmas Island to Tarawa that was arranged by the defendant. On that basis, the plaintiff has waived his legal right for repatriation to Nonouti. She further argued that the defense of estoppel was inappropriate in the circumstance as her clients complied truly and fully with the decision of the defendant.

- I. In order for the defense of estoppel to succeed, both parties agreed for an adjournment to discover from the Kiribati Shipping Services Limited (KSSL) evidence to prove of whether the plaintiff and family boarded voyage 160/11 MV Matangare from Christmas Island to Tarawa.
- J. The defendant further claimed that the plaintiff chose not to board the vessel arranged for him and family to return to Nonouti. The plaintiff claimed that he and family missed the boat due to the failure of the defendant to notify him within a reasonable time to board the vessel that was leaving to Nonouti, failing to specify the vessel and ignore the time the vessel was to depart. The plaintiff further argued that the defendant did not arrange a transport to take him and family to the wharf and that the notice served on him was given him three (3) hours before the boat departed.

## **6. THE FINDINGS OF FACT**

### **1. On his own accord the plaintiff returned to Tarawa**

- K. The plaintiff's evidence was that he applied to remain in Christmas Island after his retirement due to personal reasons but his applications were rejected by the defendant and was demanded to return to Tarawa. Thus, he and family returned to Tarawa as directed by the defendant.
- L. The applications of the plaintiff were made by letter dated 3 August 2011 Exhibit D3 and 16 August 2011 Exhi PW1. The reply and decision of the defendant was conveyed in the letter of Mr Tewaniti dated 1 September 2011 refusing the repatriation monies to pay to the plaintiff and that he and family were to board the vessel which the fare was paid already by the defendant.
- M. The Local Purchase Order and Purchase Voucher No 200/67 'Exhibit D2' dated July 2011 supported payment made by the defendant to the KSSL for the fare of the plaintiff and family from Christmas Island to Tarawa and that the name of the plaintiff and family were written on the Purchase Voucher.

- N. In paragraph 4 of the affidavit of Mr Tewaniti, he stated that the message to the plaintiff to board vessel MV Matangare was made on or about 7 September 2011.
- O. In paragraph 19 of his own affidavit, the plaintiff' stated that he and family arrived in Tarawa on 14 November 2011 and further in his evidence during examination he claimed that he and family boarded the vessel voyage 160/11 MV Matangare from Christmas Island to Tarawa as arranged by the defendant.
- P. The evidence of Bwebwentau Mamaua showed that the Captain's Log Book of the MV Matangare in voyage number V160/11 arrived in Christmas Island sometimes in July and departed on 5 November 2011.
- Q. I accept the evidence of Ms Maitinnara of Counsel to the plaintiff that the defendant at all material times have never communicating his acceptance of the plaintiff's applications to remain in Christmas Island. If so, there was no evidence produced in court to prove such intention. Hence, I found the defendant's evidence based on empty gestures.

## **2. The Principle of Estoppel**

- R. Based on the aforementioned evidence above, I believe to use the defense of estoppel in the circumstance is inappropriate.

## **3. Transport back to Nonouti**

- S. The defendant's argument was that the plaintiff intentionally wished not to board the vessel that departing to Nonouti on 22 November 2011 despite the notification made to him by way of letter dated 22 November 2011 Exhibit D3.
- T. In paragraph 20 of the plaintiff's own affidavit, he agreed of the notification made known to him to depart to Nonouti on 22 November 2011. Further in paragraph 21 the plaintiff made an implied intention that he was not prepared to leave to Nonouti.

U. First and foremost, I found the content and deliverance date of the letter of the defendant dated 22 November 2011 to the plaintiff most unreasonable and frivolous. The content of the letter lacked support in evidence and the date and hour of deliverance of the same letter is most unreasonable. However, the latter relies on the former. On the balance of probabilities, I find the defendant failed to support the content of the letter dated 22 November 2011 either by way of sworn evidence or in the closing submission of the defendant therefore cannot stand.

**7. The relevant extracts from NCS are as follows:**

*C. 10 (i) Except where statutory provisions otherwise provide, an employee must retire on reaching the age of 50 years.*

*(ii) Cabinet, in its meeting 29/01 (2) of 13/9/01, has decided that as a policy for retiring officer, a permanent employee who has satisfactorily served Government up to the official retirement age including any authorized extension and has to be repatriated back to his home island, his terms of appointment is allowed to continue working and to continue occupying a Government housing until the first available transport to his home island ready (PSO Memo No.29/01).*

*H.15 An employee travelling on retirement or on termination of appointment other than on dismissal, and on completion of contract, is entitled to transport for himself, his wife and all of his children from place of duty to his home island in the class appropriate to his post provided the passages are taken up within six months.*

*E.45 On retirement: an employee proceeding by sea on retirement or on leave pending retirement at Government expenses will be eligible to take with him at Government expenses up to 600 u. ft. of effects. To qualify for this allowance, transport of baggage must take place within six months of the employee's last day of duty.*

**8. CASE AUTHORITY CONSIDERED**

*Attorney General IRO Commissioner of Police – Judgment [2014] KIHc 43; Civil Case 15 of 2011 (31 August 2011)*

### **APPLICATION OF FACTS AS FOUND TO INGREDIENTS OF CLAIM**

I am satisfied that the defendant failed on the balance of probabilities to support his argument that the plaintiff's application to stay in Christmas Island has been accepted and approved and officially communicated to the plaintiff. Further, I find that the instruction included in the letter dated 22 November 2011 was most unjustifiable.

The defendant must comply with his responsibilities under the NCS.

### **CONCLUSION**

I therefore find that the plaintiff has proven his claim.

### **FORMAL DECISION**

Accordingly, judgment for the plaintiff with the followings orders:

1. Defendant to pay subsistence expenses for the plaintiff and family the amount of AU\$43,250.00 for the period spent in Christmas Island;
2. Defendant to pay the sum of \$145.00 each day to the plaintiff and family for the number of days spent in Tarawa until date of repatriation to Nonouti.
3. Cost to the plaintiff.

  
SISTER BERNADETTE MEE EBERI FDNSC  
COMMISSIONER