IN THE HIGH COURT OF KIRIBATI 2019

CIVIL CASE NO. 21 OF 2019

	[TEKOBA ABERE (SUING AS AN [ADMINISTRATRIX OF THE ESTATE OF [THE DECEASED ABERE BAURO) FOR [ANTENON	**PLAINTIFF**
BETWEEN	**[AND**	
	[ATTORNEY-GENERAL OF BAIRIKI	**DEFENDANT**

Before: The Hon Chief Justice Sir John Muria

31 October 2019

Ms Taaira Timeon for Plaintiff
Ms Tumai Timeon for Defendant

JUDGMENT

Muria, CJ: By a writ filed by the plaintiff on 5 April 2019 and issued out of the High Court on 16 April 2019, the plaintiff claims damages under *Workmen's Compensation Ordinance* (Cap 102) employment benefits pursuant to the *National Conditions of Service* (NCS) and general damages. The plaintiff also claims costs of the action. The defendant denies the plaintiff's claim.

Brief background

2. The deceased, Abere Bauro, was employed by the Government of Kiribati in the Police Service. He was confirmed to the permanent post of Police Constable Rank with effect from 18 April 2006 at a salary level of

15-4 at a salary of $8,957.00 per annum. His terms and conditions of service were governed by the *National Conditions of Service* (NCS).

3. In 2009, the deceased was transferred to the Police Maritime Unit at the Engineering Section and was stationed on board the Kiribati Police Patrol Boat "*RKS Teanoai*". On 13 April 2014 the deceased was on duty at the *Teanoai's* engine room, taking his shift from 0100 hours to 0800 hours. He was found dead at about 0600 hours.

4. The deceased was taken to Betio Hospital at about 7.00 am on 13 April 2014. He was confirmed dead on arrival. That confirmation was made by Dr Tekiang who attended to the deceased on arrival at the Hospital on the morning of 13 April 2014.

5. The plaintiff in this case is the mother of the deceased, suing as Administratrix of the Estate of the Deceased, Abere Bauro.

Plaintiff's Claim

6. The plaintiff's claim is said to have been brought pursuant to section 7 of the *Workmen's Compensation Ordinance* (Cap 102) of the Laws of Kiribati. The plaintiff claims $25,000.00 for total incapacity under the Workmen's Compensation Ordinance, $214,968.00 for loss of employment benefits under the *National Conditions of Service* and $2,500.00 for general damages. The total claim comes to $242,468.00.

7. Since section 7 is pleaded by the plaintiff as the basis for her claim, I set out the provisions of that section here. Section 7 provides as follows:

> **"7(1) Where permanent total incapacity results from the injury the amount of compensation shall be a sum**

equal to 48 months' earnings or $25,000 whichever is less:

Provided that in no case shall the amount of compensation in respect of permanent total incapacity be less than $5,000.

(2) Notwithstanding the provisions of subsection (1) where an injury results in permanent total incapacity of such a nature that the injured workman must have the constant help of another person; additional compensation shall be paid amounting to one-quarter of the amount which is otherwise payable under the provisions of this section".

8. On the plain reading of the above provisions, it is obvious that section 7 is concerned with a situation where a workman who suffered "**permanent total incapacity**" as a result of injury suffered in the course of his employment, is claiming compensation. The deceased in this case died while he was on duty watch at the engine room on board the *RKS Teanoai* on 13 April 2014.

9. In addressing the plaintiff's claim, the submission by Counsel for the plaintiff makes no mention of section 7 of the *Workmen's Compensation Ordinance*. There is also no mention also in counsel's submission as to why reliance was placed on section 7 of the Ordinance to found the plaintiff's claim. Instead, Counsel, in her submission, relied on another section, namely Section 5(1) of the Ordinance.

10. Section 5(1) of the *Workmen's Compensation Ordinance* is concerned with the employer's liability to compensate a workman for personal injury suffered in an accident in the course of his employment. Section 5(1) and (2) provide as follows:

"5(1) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter provided, be liable to pay compensation in accordance with the provisions of this Ordinance; and for the purposes of this Ordinance, an accident arising out of the employment shall be deemed, in the absence of evidence to the contrary, to have arisen in the course of the employment and an accident arising in the course of the employment shall be deemed, in the absence of evidence to the contrary, to have arisen out of the employment.

Provided that –

(a) The employer shall not be liable under this Ordinance in respect of any injury, other than an injury which results in partial incapacity of a permanent nature, which does not incapacitate the workman for a period exceeding 3 days from earning full wages at the work at which he was employed; and

(b) If it is provided that the injury to a workman is attributable to the serious and willful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent incapacity, be disallowed.

(2) For the purpose of this Ordinance, an accident resulting in the death or serious and permanent incapacity of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if such act was done by the workman for the purposes of and in connection with his employer's trade or business".

11. It is section 5 which deals with the employer's liability for compensation for the death or incapacity of an employee resulting from

injury arising out of and in the course of employment. Counsel's reliance on section 5 would be more appropriate than section 7 of the Ordinance. In any case, in the Court's view, it does not matter if section 7 is the wrong section to rely on or section 5 is more appropriate to establish her claim for Workmen's Compensation for the death of her son. To my mind, the most important question for the Court to determine in this case is whether the plaintiff is entitled to claim Workmen's Compensation for the death of her son due to injury arising out of and in the course of the deceased's employment.

Defendant's Case

12. The defendant's case, as put by Counsel, is that the plaintiff is not entitled to claim Workmen's Compensation in this case. The basis for the defendant's argument is that the deceased died while he was sleeping and as such his death was not work-related or arising in the course of his employment.

13. As a branch of the defendant's argument, Counsel for the defendant submits that there is no evidence to establish that the deceased suffered injury resulting in his death. Thus it is said that the defendant is not liable to pay damages.

14. Counsel for the defendant also takes the point that section 7(1) as pleaded by the plaintiff is not the appropriate provision under which to bring the plaintiff's claim. Counsel suggested that a claim in fatal cases ought to be brought under section 6 of the Ordinance. For completeness, I set out section 6 which provides as follows:

"6. Where death results from the injury –

(a) If the workman leaves any dependents wholly dependent on his earnings, the amount of compensation shall be a sum equal to 48 months' earnings or $25,000 whichever is less:

Provided that in no case shall the amount of compensation under this paragraph be less than $250.

And provided further that where in respect of the same accident compensation has been paid under the provisions of section 7 or section 8 there shall be deducted from the sum payable under this paragraph an sums so paid as compensation;

(b) If the workman does not leave any dependents wholly dependent on his earnings, but leaves any dependents in part so dependent the amount of compensation shall be such sum, not exceeding in any case the amount payable under paragraph (a), as may be agreed upon or, in default of agreement, as may be determined by the court to be reasonable and proportionate to the injury to the said dependents;

(c) If the workman leaves no dependents, the reasonable expenses of the burial of the deceased workman and the reasonable expenses of medical attendance on the deceased workman, not exceeding in all the sum of $250.00 shall be paid by the employer".

Issues

15. The main issue in this case is whether the defendant should pay compensation to the plaintiff for the death of her deceased son under the *Workmen's Compensation Ordinance*. The defendant's argument put to the Court raises two further issues and the Court would have to deal with those issues as well. The two further issues are: whether the deceased suffered injury resulting in his death; and whether the injury suffered arose out of and in the course of the deceased's employment.

Whether deceased suffered injury

16. There is no dispute in this case that the deceased was employed by the Government of Kiribati in the Police Service since 18 April 2006 and up to the date of his death on 13 April 2014. Ms Timeon contended, however, that the deceased was "**not injured at all nor his death was work-related**". Thus raising the two issues outlined above.

17. The evidence from Dr Taniera Tekiang is that the deceased most likely died of "**heart attack**" although the doctor was not able to say exactly what caused the "**heart attack**". As there is no other evidence to state otherwise, the Court must accept that the deceased died of heart attack. This now leads to the argument poised by the defendant, namely that "**heart attack**" is not an injury. To that I shall now turn.

18. It is generally understood that heart attack is when the heart stops functioning due to the loss of blood supply to the heart. The loss of blood supply to the heart is usually caused by a complete blockage of the coronary artery. (Dr William C Shiel Jr MD, FACP, FACR).

19. Counsel for the plaintiff did not deal with the issue of whether "**heart attack**" is an injury. I think Counsel should address the issue since the plaintiff's claim is brought under the *Workmen's Compensation Ordinance* which provides that an employer is only liable to pay compensation to a workman who suffered injury arising out of and in the course of employment. Counsel for the plaintiff simply assumed that because the deceased in this case died in the course of his employment, compensation must be paid. Such an approach to litigation especially in a case such as this, can be fatal to a plaintiff's case. The issue has been raised in this case by the defendant, and the Court must deal with it.

20. The *Workmen's Compensation Ordinance* does not appear to say that "**heart attack**" is an injury for the purpose of compensation claim under the Ordinance. However, there can be no question that a "**heart attack**" is an injury to the heart. But is it an "**injury by accident**" arising out of and in the course of the employment of the deceased? This issue had been dealt with in a number of cases.

21. In the English case of *Fenton –v- Thorley & Co*. the House of Lords, in a Workmen's Compensation claim. Stated that the expression "**accident**" in the *Workmen's Compensation Act 1897* was used in the popular and ordinary meaning of the word to mean a mishap that is unlooked for or unwanted and not expected. The workman in *Fenton –v- Thorley* case ruptured himself when trying to turn a wheel of a machine in the course of his employment. The Court hold that the workman suffered "**injury by accident**" within the meaning of the *Workmen's Compensation Act*.

Injury "*arising out of*" and in the course of employment

22. The case of *Fenton –v- Thorley & Company* was followed in the Fijian case of *Singh –v- Lautoka General Transport Company Ltd* [2005] FJHC 285; HBC 0387. 1995 (4 November 2005). In **Singh** there was evidence of a medical history of the deceased suffering of incidents of heart attack way back in January 1993. He was discharged on 15 January 1993 and was to go for medical review on 22 February 1993. The deceased's sick report was shown to his employer who read it. On 23 January 1993 the deceased returned to work under threat from his employer that if he did not do so, he would lose his job – "**the boss wants you back otherwise you will be working for someone else**".

23. The evidence in that showed that the deceased was not feeling well but continued to work as a driver because he did not want to lose his job. Then on or about 30 January 1993, the deceased had an episode of heart attack at home. He fell down and was rushed to the Hospital at Lautoka. He died on arrival. The Court found that in view of his medical condition, the work done by the deceased since 23 January 1993 was a "**causative trigger factor**" in the onset of the heart attack suffered by the deceased on the morning of 30 January 1993 resulting in his death.

24. In the present case, the deceased's hours of work shift was from 0100 to 0800 hours on 13 April 2014. In the morning at about 0600 hours, his work colleague checked on the deceased and discovered that he was dead. The cause of death was not known. Even the doctor could not determine the exact cause of death and whether the cause of death was related to work or not. The Doctor simply put it as "**heart attack**" since "**no one lives after the heart stopped**".

25. There is no evidence in this case that the deceased had any medical history of heart attack or any other illness. The deceased had a healthy employment record. Even ASP John Mote never mentioned any adverse conditions of his employment records. It is therefore very difficult to ascertain any causative connection between the deceased's duty and his death at the time of his death.

26. The factor of causation is vital in this case for the plaintiff to establish since the injury causing death must be one that is "**arising out of**" as well as "**in the course of employment**", a dual requirement. It is not enough to simply show that the injury occurred in the course of employment. It must also be established by evidence that it "**arose out**

of" the employment of the deceased denoting that there must be a causal relationship or connection between the injury (heart attack if it was a heart attack) and the deceased's employment. That the words "**arising out of**" denoting a causal relationship or connection, is pointed out in *Government Insurance Office of New South Wales –v- R J Green & Lloyd Pty Ltd* (1965-1966) 114 CLR 437.

27. The phrase "**in the course of employment**" means in the course of work which a workman is employed to do. The deceased in this case died some time between 0100 and 0800 during his hours of work-shift. There is therefore no difficulty in finding that the deceased died "**in the course of employment**". The plaintiff has established that factor in this case.

28. However, I venture to suggest that the words "**arising out of and in the course of employment**" denote the central feature of the *Workmen's Compensation Ordinance*. So that any injury resulting in death or incapacity (permanent or partial) must be connected with the employment and must arise out of it.

29. When one reflects on these thematic words, it becomes obvious that they bore out the salient objective of the law which is to safeguard the rights of the workers and their families while at the same time to protect the employers. Thus the liability to pay compensation will arise only if the injury occurs "**arising out of and in the course of employment**". Outside of that requirement a claim for compensation under *Workmen's Compensation Ordinance* will fail.

30. The three cases referred by Counsel for the defendant are *Tearawa –v- Attorney-General in respect of Ministry of Line and Phoenix*

Group [2014] KIHC 53; Civil Case 30 of 2011 (31 July 2014); *Tabuia –v- Attorney-General in respect of Ministry of Fisheries and Marine Resources Development* [2012] KIHC 38; Civil Case 19 of 2011 (7 September 2012); and *Timoara –v- South Pacific Marine Services* [2015] KIHC 56; Civil Case 207 of 2010 (10 July 2015). The case of **Tearawa** was concerned with a claim for permanent partial incapacity. It is of little help in this case.

31. The case of **Tabuia** was a claim under contract of service as well as under the *Workmen's Compensation Ordinance*. No discussion was raised in that case on to the meaning of the words "**arising out of**" employment. The Court dealt with the case on the basis that the deceased died "**in the course of his employment**" without deciding on the first limb of the phrase "**arising out of**" employment. That case is therefore distinguishable from the present case.

32. In **Timoara** the claim was brought under a Collective Agreement between the Kiribati Islands Overseas Seamen's Union and the South Pacific Marine Services. The case really turned on the meaning of accident. That case is different in nature to one we are concerned with in the present case.

33. Counsel for the plaintiff cited three cases including the case of *Timoara –v- South Pacific Marine Services* (above). The other cases cited by Counsel are *Fiji Sugar Corporation Ltd –v- Labour Officer* [1995] FJHC 38; Hba 0005J-936 (17 February 1995) and *Clayton & Co Ltd –v- Hughes* [1910] AC 242.

34. In the case of *Fiji Sugar Corporation –v- Labour Officer*, the Court was concerned with a claim for workmen's compensation where the deceased was known to have an existing pre-heart condition and

diabetes. The doctor confirmed that the deceased had a history of ischaemic heart disease. The work which he had been doing prior to his death was stressful and added stress on his heart condition, accelerating his death.

35. The case of *Clover, Clayton & Co Ltd –v- Hughes* was cited in the *Fiji Sugar Corporation Ltd –v- Labour Officer* case to buttress the meaning of "**personal injury by accident**". The Court (Lord Macnaghten) held that "**injury by accident**" must be given its popular meaning, that is to say, it is an "**accidental injury**" or "**accident**".

36. In the present case, I have already found that a "**heart attack**" is an injury to the heart. Whether it is an "**accident**" or an "**accidental injury**" remains unanswered. No argument on the point has been made by the plaintiff. Perhaps, understandably, this is because the deceased died in his sleep or simply the point was ignored. But assuming it is an accidental injury (which the plaintiff must establish) the plaintiff must establish one of the two vital elements of her claim, namely, that the deceased's accidental injury "**arose out of**" the work that he was called to perform on 13 April 2014.

Claim under National Conditions of Service

37. The plaintiff also claims compensation under the *National Conditions of Service*. Reliance was placed on Clause H.16 of the *National Conditions of Service*. That provision states as follows:

> **"Injury**
>
> **H.16 An employee who is injured while travelling on first appointment, on transfer or on duty will be regarded as having received that injury on duty in the actual course of**

> **duty and, provided the injury was not incurred through his own default, will be entitled to the appropriate benefits".**

38. That provision is concerned with an employee who is injured "**while travelling**" on first appointment, on transfer or on duty. The deceased in this case was not injured while travelling to work. He was at work and found dead in his sleep. Clause H.16 has no application in the present case. As such the plaintiff's claim under Clause H. 16 of the *National Conditions of Service* must fail.

Conclusion

39. In the present case, even if I were to give a liberal view of a heart attack as an "**accidental injury**" I am not satisfied that the plaintiff has established that the accidental injury (heart attack) suffered by the deceased was one "**arising out of**" the employment of the deceased. Thus I find that the deceased died in the course of employment but that the heart attack he suffered had not been proved to have arisen out of his employment.

40. In the present case and on the evidence before the Court, the plaintiff has failed to establish that the deceased's injury (heart attack) resulting in his death was an injury "**arising out of**" his employment. This finding is fatal to the plaintiff's claim in this case.

41. The plaintiff has failed to establish her claim in respect of the death of the deceased under the *Workmen's Compensation Ordinance*

and the *National Conditions of Service* in this case. The plaintiff's claim is dismissed with costs to be taxed if not agreed.

Dated the 13th day of November 2020

SIR JOHN MURIA
Chief Justice