Prasad v Morris Hedstrom (Tonga) Ltd

Supreme Court, Nuku'alofa
Dalgety J
Civil Case No.154/1991

18 & 19 August, 27 September, 1993

Employment - dismissal with notice - written contract of employment
Company - secretary - obligations, powers and duties.

The Plaintiff was employed as the Defendant's financial controller under a written contract, for a fixed term at two years. He was also the company secretary (without any extra remuneration).

He was dismissed on one month's notice, as required by contract; and shortly after notice he was purportedly removed as Secretary, by the Board.

He sued for salary and other allowances and expenses running after the notice of dismissal took effect; and for overtime worked; the defendant counter claimed for an allowance over paid.

Held:

1. The Plaintiff was still the Secretary, but in name only; and that position did not entitle him to any additional remuneration.
2. His position was governed by the contract of employment as to salary and allowances and as to dismissal and he was owed a small sum accordingly which would be deducted from the amount over paid to him by the Defendants leaving a balance owing by the Plaintiff to the Defendant.
3. No claim for damages for breach of contract had been pleaded or made out.
4. Discussion on the position of a company secretary in Tonga, and his obligations powers and duties.

Note - this matter went on Appeal and Judgment was varied in the Court of Appeal see [1993] Tonga L.R. 69 immediately below; inter aliaa damages were awarded for breach of contract.

Cases referred to : Yetton v Eastwoods [1966] 3 All E.R. 353
Barnett Hoares 4 Co v South London Trainway Co (1887) 18 QBD 815
Panorama Devpts v Fidelis Furnishing Fabrics Ltd [1971] 3 All ER 16

Counsel for Plaintiff : Mr Taufateau

Counsel for Defendant : Mr Stevenson
Statutes referred to : Companies Act, s.53
Company Rules 1918, rr.4,13

Judgment

Francis Prasad, the Plaintiff, was employed by Defendants, Morris Hedstrom Tonga Limited a company registered in Tonga under the Companies Act (cap.27), under and in terms of a written Contract of Employment (Production D.2) entered into at Fiji on 24th June 1991. The contract was for a fixed term of two years subject to extension, but no guarantee of renewal was given : see Clauses 4 and 15 read together. Under and in terms of Clause 3 the declared intention of the parties was that Mr Prasad be employed by the Defendants -

> "as FINANCIAL CONTROLLER but the employer shall have the right to employ the employee on other reasonably kindred work"

Although under Clause 4 it was originally intended that the Plaintiff commence performing the duties of his office in Tonga on 15th July 1991 he did not in fact commence working until 12th August 1991. In terms of Clause 4 his employment was for two years from that date -

> "but the contract is terminable at any time during those two years by not less then one month's notice in writing on either side, or by payment of one month's salary in lieu of notice."

On the first working day of December 1991, the 2nd, the Defendants by letter (P.15) gave notice to the Plaintiff in the following terms -

> "I wish to advise that effective immediately, your services will no longer be required. In line with your contract, Morris Hedstrom Tonga Limited will pay you one month's salary in lieu of notice".

This letter was delivered to the Plaintiff's home on 4th or 5th December. He had attended for work on 2nd December but at about 9 a.m that day the Defendants' then general manager Mr. Reg. Butler - who has since then been sent to Siberia, to manage a retail outlet there - informed the Plaintiff, after an argument, that he was "trespassing in the office." The Plaintiff left and never returned.

This is essentially a very simply case, bedevilled by the Plaintiff's appointment as Company Secretary by the Defendants' Board of Directors on 15th October 1991. The Defendants regarded this as an additional post being reasonbly kindred work to that of financial controller. The Plaintiff regarded it as promotion but did state in examination-in-chief that while he worked as financial controller he "assumed another position", that of company secretary to which the Board appointed him by "floating resolution" in accordance with the company's Articles of Association and "I accepted." He continued to do his work as Financial Controller but held, he thought, a "higher position" because he was now responsible to the Board. That factor is of little importance in the present context. The Plaintiff thought it was and relied on Yetton -v- Eastwoods Froy Limited [1966] 3 All E.R. 353. That case is readily distinguishable. In Yetton liability was admitted and the Court was concerned only with the assessment of damages. The facts of the dismissal are also materially different. That case arose out of the attempt by the defendants in a reorganisation following a take-over to redesignate a joint managing director as assistant managing director but without any loss of benefits or pay. there was

however an obvious loss of status. There is no parallel between that case and the present circumstances. In any event, in this case the Plaintiff after having said in examination-in-chief that he would never accept appointment as Company Secretary with no remuneration at all, went on in cross-examination to accept that apart from appointment and termination his existing Contract continued to apply, even after his appointment as Company Secretary: this I consider to be the true position. In the context of this case that is a very material factor. I am satisfied on the evidence in this case that his appointment as Company Secretary was "reasonably kindred work" to his employment as Financial Controller of the Company. A previous Financial Controller, Mr John Sharma, had some time after taking up post been appointed Company Secretary. He regarded it as an adjunct to his duties as Financial Controller: the work of both posts he considered to be of a reasonably kindred nature. He had a contract of employment in all material respects the same as that which the Plaintiff signed, including a like worded Clause 3. He had no separate contract as Company Secretary and received no additional payment thereof. Mrs Molly Collier gave evidence that the Plaintiff's contract was a standard company contract. The present general manager Mr Antony Ryan was employed also on such a contract, initially as Financial Controller but now also as General Manager. He receives only one salary for performing the work of these two offices. He is an Accountant with many years commercial experience during which he had held the combined posts of Finance Director/Company Secretary and Financial Controller/Company Secretary. In his experience the tasks of a Secretary and Controller are works of a kindred nature. I agree.

Article 130 of the Defendants' Articles of Association concerns the office of Secretary and provides that -

> "The Secretary shall be appointed by the Directors for such term at such remuneration, and upon such a condition as they think fit; and any Secretary so appointed may be removed by them."

No fixed term was attached to the Plaintiff's Appointment as Secretary and accordingly he remained in that office until removed therefrom by the Board. No remuneration was voted by the Board as a fee, salary or honorarium to the Secretary and his only entitlement to payment is under his contract with the Defendants dated 24th June 1991. No conditions were attached by the Board to his appointment as Secretary. The Board were entitled to remove the Secretary at will given the absence of any restrictions on his removal or essential procedures to be follwed other than a decision by the directions. Article 130 does not require the giving of notice or of the opportunity to be heard prior to removal as Secretary. On 16th December 1991 the Defendants circulated what purported to be a motion to remove the Plaintiff as Secretary and replace him with Mrs Molly Collier. The motion took the form of a letter from the General Manager to a Director, Mr Cuthers. One director signed this resolution on 17th December 1991. Two other directors signed, but did not annex a note of the date when they signed. Document D.4 is the Minute in question. Its actual terms are important -

> "16th December 1991 : With the termination of Mr. F. Prasad, the position of Company Secretary has become vacant. Upon approval from the directors this position will be filled by Mrs E.M. Collier. (Signed) Reg. Butler, General Manager.
>
> We hereby approve the appointment of Mrs. M.E. Collier to be Company Secretary for Morris Hedstrom Tonga Limited. (Signed) D.W. Cuthers 17/12/91 : C.J. Ring.

M. Soakai."

Circular resolutions of this sort are perfectly permissable. The three signatories were in fact the whole directors of the company at that time. Notice of this resolution was never communicated to the Plaintiff until after the commencement of these proceedings, but as already indicated there is no notice requirement in the Articles.

Regulation 4 of the Company Rules 1918 require the keeping of a register of "Director or managers" of the company and any change in personel must be notified to the Registrar of Companies. There is no like provision in respect of the Company Secretary. Even the Annual Return required by Rule 13 does not require the identity of the secretary to be disclosed and indeed the return can be signed by the secretary or a manager of the company. Unlike many Commonwealth Countries the Company Secretary has no exalted status nor significant statutory obligations, powers or duties in terms of the Companies Act or subordinate legislation. The contrast with for example United Kingdom legislation is startling. In Tonga, he is not a statutory officer of the company. Perhaps the only section of the Act from which this might be inferred in Section 53 which concerns the making of a Statement of Affairs in liquidation proceedings : such a statement has to be verified by the "Secretary or other chief officer" of the company or any director or "officer" of the company. The first reference to officer qualifies "chief" only and not the earlier reference to the "secretary". The latter reference in its context must mean a person other than a chief officer or secretary of the company such as a director or ex-director. At common law the secretary of a company was regarded as no more than a "mere servant" : Barnett, Hoares & Co. -v- South London Tramways Co. [1887] 18. QBD.815 per Lord Esher M.R. at page 817. All that changed in the United Kingdom primarily because of the role ascribed to secretaries in modern companies legislation : see Panorama Developments (Guildford) Limited -v- Fidelis Furnishing Fabrics Limited [1971] 3 All E.R. 16 per Lord Denning M.R. at page 19. The English secretary certainly is an officer of the company he serves. There is no parallel legislation in Tonga imposing like duties on a secretary. His duties under the Articles of the Defendant company are not particularly burdensome. Nevertheless the plain reading thereof, particularly Article 125, suggests to me that this company does regard the secretary as an officer of their company. They must therefore record all secretarial appointments in their minutes : Article 102 (c). The Plaintiff made great play of the fact that he was a corporate officer, not just a humble worker. For what it is worth I find that he was an officer of the Defendants during the period he held office as such.

The difficulty I have is in deciding when he ceased to act as secretary. Article 101 is clear authority for Board resolutions being circulated and, once signed, being treated "as valid and effectual as if . . . passed at a meeting of the directors duly called and constituted." Document D.4 is clearly a resolution within the terms of this Article and the decision contained therein is a valid Board decision. But precisely what is it that the Board have decided? There can be do dubiety that they appointed Mrs Collier as company secretary. I have no reason to doubt that to that extent this minute was effective as from 17th December 1991. It did not however, in explicit terms, remove Mr. Prasad from office as Company Secretary. Mr Butler in his report to the Board obviously thought that his letter of 2nd December 1991 was apt to sever the Plaintiff's connection with the Defendants in all respects, but such a belief has no foundation in law. That letter clearly terminated the Plaintiff's employment with the company, but Mr Butler as General

Manager was not empowered at his hand to appoint or dismiss Company Secretaries. Only the Board could do this. The earliest date at which it could be said that the Plaintiff's employment as Company Secretary ceased was 17th December 1991. But did it? Decisions to appoint or remove a corporate officer should be expressed in clear and unambiguous terms or in language from which such an intention can clearly be inferred. In this case the actual decision of 17th December says nothing about Mr Prasad whatsoever. It does not say that the directors appoint a new secretary, Mrs Collier, the word "new" perhaps being sufficient to indicate that they have dispensed with the previous incumbent. Nor does it say that she has been appointed in place of the existing holder of that office. There is no decision whatsoever removing the Plaintiff from office. The Defendants cannot rely on the wording of Mr Butler's report to the Board as the basis for asking me to infer that Mrs Collier supplanted Mr Prasad as company secretary for Mr Butler's report proceeds upon an erroneous assumption already referred to. The Board have therefore never exercised their mind as to whether or not to remove Mr Prasad from office. In my opinion there is nothing in theTongan Companies Act to prevent the appointment as secretary of more than one person at the same time, that is "joint secretaries". If there had been then the appointment of Mrs Collier, by operation of law, could be construed without undue difficulty as warrant for the termination of the then incumbent's appointment. Reluntantly I am forced to the conclusion that the Plaintiff has never validly been dismissed from his office as secretary and still retains that position, albeit jointly with Mrs Collier since 17th December 1991. The reality of course is that he has never carried out any of the duties of that office since then, and the Defendants are not of a mind to invite him to do so or, equally, to chastise him for deriliction of duty.

Had the office of Secretary carried with it its own remuneration or contractual conditions (which it did not), then the Plaintiff's claim would have been manifestly different from that brought before this Court. On his own belated admission the Plaintiff recognised that his June 1991 contract regulated the terms of his employment in all respect, except quoad his appointment as Company Secretary and removal from that office where the Articles prescribed a particular procedure to be followed. The extent of his financial claim arising out of the premature termination of his contract of employment is therefore condltioned by the terms of that agreement. The fact that he remains a Company Secretary, albeit in name only, is an irrelevance in the context of damages.

The Defendants are required by Clause 4 to pay the Plaintiff a month's salary in lieu of notice. The dismissal in my opinion took effect on 5th December 1991 when the notice was delivered to him, not from the 2nd when he was labelled a trespasser and required to leave the company premises. He did not receive and in my opinion is entitled to his pay for the period 1st - 5th December, namely 5/30 x 2000 pa'anga = 333.33 pa'anga gross or 300 pa'anga net of income tax at 10 per centum. Clause 1 of the Contract specifies that the annual salary was 24,000 pa'anga per annum, 2000 pa'anga monthly. He was also entitled to be paid 1,000 pa'anga per month, payable monthly in arrears, as an entertainment allowance : Clause 14. He is entitled to one-sixth of that sum as well for the period from 1st - 5th December, namely 1/6 x 100 pa'anga = 166.66 pa'anga gross or 150 pa'anga net of tax. In my opinion he is not entitled to any entertainment allowance after 5th December. That is an "allowance", not "salary." Clause 1 expressly states that the salary payable is the equivalent of 2,000 pa'anga per month. Under and in terms of Clause 4 the Defendant's paid the Plaintiff one month's salary in lieu of notice. It is now conceded by Counsel that

pension fund contributions due under Clause 2 have in fact been paid and I am not therefore concerned with this issue. The Defendants' Counsel gave an undertaking, which the Plaintiff's Counsel accepted, that the Defendants would honour their obligations under Clause 7 when called upon to do so by that Plaintiff, namely to pay the costs of economy class air passages [Tonga - Fiji (Suva)] for the Plaintiff, his wife and two children both under the age of 18 years as 5th December 1991, together with freight, and insurance on not more that five cubic metres of cargo (being the basic allowance of 3m and an additional one for each child) subject to the contractual upper limit on value of 1,000 pa'anga per m.

He is not entitled to anything else. In particular, he has no good claim at law for salary after 5th December 1991 (apart from said payment made in lieu of notice); for entertainment allowance after that date; or thereafter to any payment in respect of accommodation or household expenses or in respect of the loss of his company car. In Paragraph 1 of his Answers to the Defendants' Counter-Claim he claims to be entitled to salary and entertainment allowance up until the 9th December 1991 "as per public notice in the Tongan Chronicle dated 27th February 1992". That notice is not contained within either party's bundle of productions and this matter was not raised at the Trial. For reasons already given, I regard the proper cut-off date as 5th December 1991 (being the date of receipt of Dismissal notice). In paragraph 2 of the said Answers he also seeks recompense for the overtime he worked. I accept without hesitation that he worked a considerable amount of overtime on the affairs of and for the benefit of the Defendants, but his contract makes no provision for the payment of any overtime. For that reason alone this head of claim is rejected. Mr. Prasad claims that Mr Butler promised to pay him overtime but I did not believe the Plaintiff when he said this. Such an exceptional provision would be totally contrary to company policy for management staff. I much prefer and accept the evidence of Mr Sharma that the policy of the Defendants was that management level contract staff were "not entitled to overtime" payments. In any event Section 79 of the Evidence (cap. 13) makes oral evidence inadmissable to vary a written contract unless the case can be brought within one of the six provisos to that section. There is no evidential basis for that here.

As is evident from production D.9 and D.10 an arithmetical error was made in the calculation of the Plaintiff's entitlement to Salary and Entertainment Allowance in the period from the commencement of his employment to end November 1991, of 133.79 pa'anga. The Defendant's have counter-claimed for repayment of this sum. I consider that this claim is well founded. They also seek repayment of 516.13 pa'anga in respect of Holiday Pay overpaid to the Plaintiff. Under Clause 10 no holiday pay is due until there has been one year's continuous service. That is how I construe the terms of that clause that -

> "The employer will grant the employee holiday leave on the basis of twenty eight consecutive days on full pay for each completed twelve months of continuous service . . ."

The Plaintiff is not entitled to the Holiday Pay paid to him. The Defendants are entitled to reclaim this sum.

The Defendants are therefore entitled to be repaid by the Plaintiff the sum of 649.92 pa'anga. From this should be deducted the sums to which I have found the Plaintiff entitled, namely 450 pa'anga, leaving a balance due to the Defendants by the Plaintiff of

199.92 pa'anga. Accordingly I shall pronounce an Order in the following terms - IT IS ORDERED AND ADJUDGED THAT the Plaintiff do pay to the Defendants the sum of 199.92 pa'anga.