

FAATAUALOFA (FAATAGA) v BOARD OF WESTERN SAMOA
NATIONAL PROVIDENT FUND

Supreme Court Apia
Ryan CJ
12,13 February, 19 February 1992

EMPLOYMENT LAW - unfair dismissal - dismissal for misconduct -
breach of contract.

HELD: No breach of contract as conduct had occurred on the
Defendant's premises that the Defendant believed was
inimicable with its policies and detrimental to its
operations. Defendant was able to avail itself of
S21(4) without relying on misconduct.

CASES CITED:

- Motoi v NPF: Ryan CJ 1990
- Cox v Philips Industires Limited [1976] 3 All E.R. 161

LEGISLATION:

- Labour and Employment Act 1972; Ss 21(4), 21(7)

Drake for Plaintiff
Edwards for Defendant

Cur adv vult

The Plaintiff sues the Defendant for damages for unlawful
dismissal. He had been employed by the Defendant in various
positions including a land officer and finally, down to the date
of his dismissal in August 1990 as membership officer.

The event which led to his dismissal involved the Plaintiff in a
transaction with one Aupaau Tootoo, a villager from Vaitele.
There was a great deal of evidence, most of it of peripheral
value at best, about the circumstances of the transaction. In
essence it involved Aupaau going to the Plaintiff at his place of
employment with the Defendant in March 1990 and giving the
Plaintiff \$1,500. There is a great deal of conflicting evidence
as to just what Aupaau's instructions were - he said he told the
Plaintiff that he wanted N.P.F. land. He said he had been

alerted to the possibility of N.P.F. land becoming available as a result of a radio broadcast. The Plaintiff said that all Aupaau wanted was some land and that he was given carte blanche as it were to deal with the money as he saw fit. The Plaintiff's evidence was backed up by a Mrs Fui and Aupaau's by his wife. It seems to me however that whatever the instructions were what happened next on the part of the Plaintiff was a gross breach of trust, as an employee, and on my assessment of the evidence a departure from the arrangement entered into with Aupaau.

The Plaintiff having received the \$1,500 promptly went to WSTEC and paid \$800 of the sum virtually as a deposit for a block of land in his wife's name. He spent the remaining \$700 on a faalavelave. The Plaintiff's explanation for the land being put in his wife's name was that it was easier that way and that he had had discussions with the Chairman of WSTEC about purchasing some land. I accept the latter part because it was confirmed by the Chairman but I reject entirely the explanation as to the need for the money to go in the wife's name.

Subsequent events, when Aupaau made a complaint to N.P.F. management in late July, proved conclusively that such a step was not necessary - at that time the Plaintiff after pursuing Aupaau and his wife down Beach Road went with them to WSTEC with \$700 and had no difficulty whatsoever in putting the money, all \$1,500 of it, in Aupaau's name for the purchase of the land which I might add has now been completed.

The dash down Beach Road was undoubtedly prompted by the enquiry which had just been commenced by the Defendant acting on the complaint made by Aupaau.

At the commencement of the enquiry the Plaintiff had been asked for a written report on the matter. He failed to supply it and this was considered insubordination by the Deputy Manager. Be that as it may it was certainly most foolish of the Plaintiff not to provide such a report if in fact he was an innocent party.

The Plaintiff was shortly thereafter suspended - he said for 4-5 days - pursuant presumably to S21(7)(b) of the Labour and Employment Act 1972. Having taken that step it was no longer open to the Defendant under Ss.7 at least to dismiss the Plaintiff for misconduct given that Ss.7 provides for 3 alternative remedies available to an employer. The Plaintiff said that he wanted the Defendant to interview Mrs Valasi Fui to verify his explanation but if that is so it is an even stronger reason for submitting the report which had been requested.

On the 1st August 1990 the Defendant wrote to the Plaintiff dismissing him. That letter was in the following terms:

"Dear Faataga

Management had considered your case and had obtained sufficient evidence that you had failed to perform in the highest standard of ethical conduct and in more particular conducting of business with the public in general. We considered reports submitted by the Committee and after further discussion with you on 01 August 1990 at the Fund's Board Room, Management resolved to discontinue your service as an employee of the Fund, effective as from Monday 30 July 1990.

I regret to inform you of the decision but am sure also that you do understand the situation."

The Plaintiff then saw his solicitor who wrote to the Defendant. The reply from the Defendant of 5 September 1990 was a curious document which was clearly quite inaccurate:

"Mr Faataualofa was discharged from his duties on counts of misconduct which not only affect adversely the performance of his official duties, but his actions compromised the trust and the integrity of the position of Lands Clerk he held while dealing with National Provident Fund land tenants. Furthermore, he used his position for his personal gain which in essence brought the Fund into disrepute with the public it serves."

The law governing the termination of a contract of employment has been codified, in part, in S.21 of the Labour and Employment Act 1972. I say in part because as I found in the case of Motoi v NPE in 1990 it is not a complete code. In that case there was a clear breach of contract on the part of the employer which had employed the Plaintiffs for certain positions but had effectively downgraded them to inferior status - a fact situation quite similar to that in Cox v Philips Industries Limited [1976] 3 All E.R. 161 where an English Court awarded damages for breach, for I might say a head of damage which the Plaintiff had not even specified.

Motoi's case is distinguishable from the present one. Here there has been no breach of contract. What occurred was that conduct which the Defendant believed was inimicable with its policies occurred on the Defendant's premises and was in its view detrimental to its operations. It then terminated the Plaintiff's services by payment of salary in lieu of notice. It now concedes that the payment was inadequate given the proviso to S.21(4) but has remedied the shortfall.

Quite apart from the rights contained in S.21 I believe on the evidence before me that the Defendant was quite correct in the view that it took of the Plaintiff's conduct. I simply do not believe him when he says that Aupaau told him he could do what he liked with the money - Aupaau seemed to be the sort of person who had worked long and hard to achieve something in life and that he would not be nearly as stupid as the Plaintiff would have the Court believe. The actions of the Plaintiff in relation to the \$1,500 must have gone perilously close to criminal misconduct and were totally unconscionable.

Notwithstanding my findings on the factual situation I agree with the submissions of Mr Edwards that the Defendant in this particular case was able to avail itself of the provisions of S.21(4) and could do so without having to rely on misconduct. In those circumstances it cannot be said that the Defendant acted unlawfully as alleged and his claim must fail.

There will be judgement for the Defendant together with costs and disbursements as fixed by the Registrar.