IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

PLAINT NO. 27/10

BETWEEN	**TEVAERANGI TATUAVA** of Tupapa, Rarotonga, Occupation Unknown
	Plaintiff
AND	**COOK ISLANDS FAMILY WELFARE ASSOCIATION (CIFWA)** of Avarua, Rarotonga
	Defendant

Hearing: 20 March 2012

Counsel: Mr Samuel and Mr George for Plaintiff
Ms Rokoika for Defendant

Date: 20 March 2012

JUDGMENT OF CHIEF JUSTICE WESTON

Introduction

[1] The plaintiff claims she was wrongly terminated from her position as Executive Director of the defendant organisation on or about 23 November 2009. In opening it was explained that she was unemployed for seven months and at that time the damages claim brought by her was said to be in the sum of $16,240 (plus general damages for loss of enjoyment of life and so on). In closing, however, the claim had increased. Apparently the plaintiff now seeks a full year's salary by way of damages together with further damages for loss of enjoyment of life.

[2] The defendant organisation, which I will refer to as CIFWA, denies the allegations that it has wrongly terminated the employment of the plaintiff. It says she was dismissed for good cause. In particular, it is said that she failed to prepare two reports upon which external funding was conditional. CIFWA is a non-governmental organisation dependent upon external funding, principally from a body called the International Planned Parenthood Federation (IPPF).

[3] It is common ground that there was no written employment contract. It is clear, though, that there was an oral contract of employment because there is no doubt that for a period the plaintiff was employed by the defendant organisation. Towards the end of that period of employment a manual came to be prepared and that was finalised in or about February 2010. This manual contained provisions relevant to employment including procedures for giving warnings and for dismissing employees in breach. Although that manual was prepared in part under the control of the plaintiff, I do not think it can be said to apply to her employment in any way if, for no other reason, that it was not complete at the time that she left.

Witnesses

[4] The plaintiff gave evidence on her own behalf. I must say that in some respects I found her evidence unsatisfactory. In certain key matters she claimed a lack of knowledge which seemed to me inconsistent with the clear record of what had occurred at that time. For example she seemed to be unusually vague about some of the funding processes but it was clear to me and, I so find, that she did have full knowledge of the funding arrangements made for the organisation.

[5] No other witnesses were called for the plaintiff.

[6] The defence called two witnesses. The first of these was Mrs Opo who was president of the Association up until her resignation some time this year. She gave evidence that she had been with the organisation since the very beginning. Some of the evidence that she gave was confused. In part this reflected difficulties of translation and long and complicated questions which then needed to be translated. I

find that she gave her evidence to the best of her ability and, to the extent that I need to make such a finding, I believe she gave her evidence truthfully.

[7] The second witness called for the defence was Mrs Utanga who was the Programme Officer for the organisation employed in September 2008. She referred to her affidavit which she had previously sworn and she spoke in addition to the details in that affidavit. She gave her evidence in a straightforward manner and I found her evidence helpful and I am prepared to rely on the truthfulness of what she says.

[8] There is not a great deal of conflict between the various witnesses as to what occurred. Most of the factual issues are agreed or certainly the most important ones. Unfortunately, though, there are a few conflicts between the evidence of Mrs Tatuava on the one hand and the defence witnesses on the other. I regret to say that I prefer the evidence of the defence witnesses in such a case. I believe they gave their evidence in a straightforward manner and I prefer their evidence on these issues.

[9] As I will explain shortly, there are some uncertainties as to the role played by Mr Chris Wood, an accountant who provided accounting services to the Association, but I will return to that.

The Facts

[10] I now summarise the facts and make findings as follows.

[11] CIFWA was established some time ago. There was degree of confusion about when that was but I do not think that it really matters for today's purposes.

[12] The plaintiff gave evidence that she was employed on a part-time basis between 2004 and 2006. There is no real dispute about that period. Then in 2006 the plaintiff became the Executive Director of the defendant organisation. She had a wide range of duties and it seems that over time these became more extensive. Her case is that she was overworked and overwhelmed by her job, certainly by 2009. She gave evidence of how the job had expanded and it was strongly argued by her

counsel that the employment of a Finance Director, Mr Rangi, and Mrs Utanga as the Programme Officer was evidence that the job was growing. I believe this evidence is much exaggerated. The Executive Director is an important role in any association and one expects such a person to work longer than the hours of 8.00 am to 4.00 pm. It simply goes with the territory. The Executive Director is the most senior employee and one would expect them to be carrying a considerable burden which is commensurate with the seniority of their position.

[13] I accept that Mrs Opo raised the question of the plaintiff's workload in June 2009 and received assurances that everything was okay and that no problems were being faced by Mrs Tatuava.

[14] In the above circumstances I struggle to accept her evidence that she was overworked and overwhelmed by the job.

[15] There was evidence that during this period the plaintiff was studying through Auckland University of Technology. She gave evidence that she was not undertaking this work during work hours. Mrs Utanga in her affidavit, paragraph 9, deposed to the contrary. Mrs Utanga was not cross-examined on this and, as I said above, in case of conflict I prefer Mrs Utanga's evidence on that front. So therefore I find that the plaintiff was studying during work hours. In one sense that is not a relevant point but in another it helps explain the burden that she claims she was labouring under.

[16] I also note that, of the two employees, one of them was employed from September 2008 and so had already been there more than a year at the time of the plaintiff's dismissal. I also note that Mr Rangi who was employed in October 2009 was a part-time position.

[17] I do not believe there is any proper basis put forward by the plaintiff which would explain her failure to undertake her job properly. I will explain shortly the ways in which I believe she did fail to perform her job properly.

[18] I now come to the year 2009. During 2009 there were various reports that needed to be completed and sent to the IPPF in order to get moneys from them. The details of this can be found at page 13 of the Funding Agreement that the plaintiff signed on behalf of the organisation. This document was signed by her in May 2009 but the evidence appears to establish that this was a consistent pattern that had been in place prior to then. So I find that the plaintiff would have known that in order to achieve the various remittances described as 'the 1st to the 5th remittances' she would have needed to ensure that reports were lodged by certain dates.

[19] The first of the two key reports we have been talking about in the case is the 2008 Audit Report. It is accepted that this would have been due by 31 May 2009. The second report is described as the Half Year Report and that would have been due by 31 July 2009.

[20] It seems to be common ground that the plaintiff had the obligation to ensure these reports were prepared and submitted, and equally it is common ground that she did not do so. As a consequence of that, the funding was not received when it should have been. I understand the funding was subsequently received when the reports were supplied (by CIFWA once the plaintiff's employment ended).

[21] The plaintiff gave various explanations for the delays in getting these reports done (in addition to work pressure). I start with the 2008 Audit Report. Her explanation was that she had given everything to the accountant Mr Chris Wood and had done so by 3 October 2008. She says that Mr Wood told her that he would then get on and do the report. There was no such evidence called from Mr Wood and I gave notice to the plaintiff before she closed her case that I might draw adverse inferences as to what Mr Wood could or could not say in a case such as this if he were not called.

[22] I note that both the plaintiff and the defendant have claimed to rely on comments made by Mr Wood and in the defence affidavits there is evidence given as to what he says which is directly inconsistent with what the plaintiff says. In all of these circumstances, I can form no adequate view as to what Mr Wood did or did not say to the plaintiff. It seems to me inherently unlikely from everything I have seen

that Mr Wood would have told the plaintiff that she could go to China in 2009, but I do not actually need to address that matter. It is clear by this time the report was well overdue. It is also clear that the report was not yet complete. I find that Mrs Tatuava had been told that she could only go to China if the report was complete. It was not complete. No explanation has been given as to how she then went to China other than a reference to Mr Wood saying apparently that she could do so.

[23] I now turn to the Mid Year Report. Mrs Tatuava says she had done a draft of this before she went to China. Again that is not a particularly satisfactory explanation because the arrangement was that she should not go to China unless the report had been prepared. So, on her case, the best she can say is she had prepared a draft. However, no-one has ever been able to find this draft. Mrs Utanga gave evidence of searching on the computer that Mrs Tatuava used at work and also searching the office. She was not cross-examined on that evidence. I accept that Mrs Utanga was not able to find the report. Mr Samuel, in closing, said the draft might have been in handwriting but there was no evidence to that effect. I have come to the conclusion that there was no such draft report. I do not accept Mrs Tatuava's evidence that she had prepared a draft. I conclude there was no such draft prepared at the time she went to China.

[24] In the matters raised by Mrs Tatuava, in explanation to the delays, it was also said that because she travelled a lot she was not able to get on and do the reports. The evidence was that she travelled twice in 2009, once to Singapore and once to China. I have already mentioned the China trip above. I do not believe that either of these trips could be an explanation for the undoubted delays that occurred.

[25] CIFWA also made complaints that PAYE payments were not made but these seem to have been consequential upon the failures that I have already mentioned. I do not think I need to discuss them further.

[26] In my opinion the plaintiff was seriously in breach of her contract in failing to undertake these reports.

[27] I have also noted that the Minutes of two meetings in March and June 2009 show that the question of compliance with these reporting requirements was raised with the plaintiff. The Minutes were before the Court and were discussed by various of the witnesses. No-one challenged their accuracy although the plaintiff said that she gave further explanation as to why the reports had not been prepared. But the fact remains that Board members told her that she was in default of her obligations and that she needed to get on and complete these. In my opinion there can be absolutely no doubt that that was her obligation and that she failed to do that. If in fact she was overwhelmed in her job I would have expected her to say that at the time. However, there is no reference in the Minutes. If the plaintiff were to answer that and say the Minutes are inaccurate then I still would have expected her to follow up in some form to say that she was overwhelmed and needed further assistance. There is no evidence that she did.

[28] The plaintiff went to China on the 3rd October. I do not draw any inference that she did so with the authority and the blessing of the Board. Indeed there really is no evidence of this other than what Mr Wood apparently said to her.

[29] While the plaintiff was overseas the Board resolved to suspend her at a meeting on 16 October. The plaintiff's counsel endeavoured to argue that the Minutes showed bias on the part of the Board. I am not prepared to draw any such inference. I can see no suggestion of bias on their part.

[30] Mrs Tatuava returned to Rarotonga on or about 22 October and went into the office. At that time, she met with the President, Mrs Opo, and Dr Fariu who was a board member and Acting Executive Director. She was told of her suspension. She said she gave an explanation for the circumstances leading to the late reports but nonetheless she was then told to go home.

[31] Mr Samuel in his closing submissions downplayed the importance of this meeting saying that it was already a *fait accompli* that the plaintiff had to leave. It is true that by this time a decision had been made to suspend her but I believe that in doing so the Board was acting reasonably as it was giving itself time to consider the

situation. Mrs Tatuava had an opportunity to give her explanation to two senior board members and on her own evidence she did so.

[32] There was then a meeting of the Board on 12 November 2009 at which a decision was made to terminate her employment if she would not otherwise resign. There was a meeting on the 13th at which she was asked to resign but she did not do so. A letter of termination dated 23 November was given to her.

Discussion

[33] I find that the plaintiff's failure to provide the 2008 Audit Report and the Half Year Report was gross misconduct. She knew she had to provide these and had ample opportunity to do so. She simply failed in her obligations. She gave various excuses but in my opinion they are just that, they are excuses. I do not believe they are adequate explanations.

[34] I also find that on the 22nd October the plaintiff was given an opportunity to provide an explanation. In a perfect world I believe that opportunity could have been a better one but nevertheless she was given an opportunity and on her own evidence she took it.

[35] She was provided a letter of suspension on 26th October. Ms Rokoika in closing made the point that there was no response by the plaintiff to that letter. That is true but I am not inclined to put too much weight on that. Certainly, though, I note it did provide her with an opportunity to reply had she chosen to do so.

[36] I do not accept Mr Samuel's closing submission that the plaintiff's employment was terminated at the meeting on 22 October. The whole case was presented on the basis that her employment was terminated on 23 November and indeed even her statement of claim asserts that. I believe that the submission made in closing is not supported by the facts. I conclude that her employment was terminated on 23 November. I do not place any weight on the letter from Dr Fariu apparently referring to her employment being terminated on 22 October. Although

there was no evidence from Dr Fariu I noted a later email from him apparently correcting that position and referring to the situation being a suspension.

The Law

[37] The parties are in agreement that the common law applies in this case because there is no relevant statutory law in the Cook Islands. I am aware that there is an Employment Bill before the House but it is yet to be passed. I have also been advised by counsel that there are no cases in the Cook Islands which would assist me in dealing with the issues before the Court.

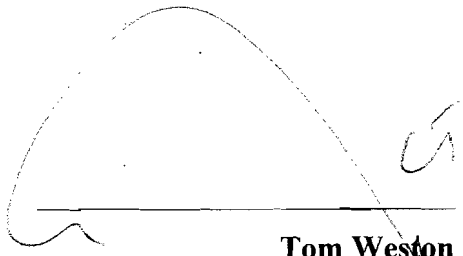
[38] Ms Rokoika has submitted that under the common law there is no requirement that an employer warn an employee before dismissal. She also submits there is no requirement that an employee be given a reasonable opportunity to respond and there is no reason that needs to be given for the dismissal.

[39] I asked Mr Samuel whether he is able to present me with any authorities in response to those submissions but he was not able to do so. Instead he referred generally to an obligation to extend the principles of natural justice. When I pressed him, though, he was not able to say why the Court in this instance should rely on those principles.

[40] That leaves me somewhat rudderless in relation to this topic. Certainly I would be reluctant to find that there was no obligation in Cook Islands law as it presently stands to give someone notice and an opportunity to provide an explanation before their employment is terminated. However, in the present case, I note that there were at least two verbal warnings given to the plaintiff which are recorded in written Minutes. There can be no doubt that those warnings were given. I also believe that an opportunity was given to her on the 22nd October to provide an explanation and she did so. In those circumstances I believe that the plaintiff did give her notice of its concerns and did give her an opportunity to address it. Therefore I do not need to make a final decision as to the extent to which Cook Islands law does or does not include such obligations. That is because, in this case, I believe CIFWA met those obligations.

[41] Therefore I believe the dismissal of the plaintiff was justified. That leaves one matter outstanding, however, and that is her suspension. I was advised that she was suspended without receiving pay. In my opinion that was in error. She should be paid for the period of her suspension and I am told that the figure is $2,900 and I order that sum be paid to her.

[42] The plaintiff has mainly failed in her case but she has succeeded partly in relation to the question of suspension. My provisional view is that costs should lie where they fall but I am now going to invite counsel to address me on that matter. I have heard from counsel who will file memoranda on costs.



Tom Weston
Chief Justice