

IN THE KIRIBATI COURT OF APPEAL
CIVIL JURISDICTION
HELD AT BETIO
KIRIBATI

Civil Appeal No 1 of 2009

BETWEEN: **TEAIRO TOOMA**

Appellant

AND: **THE KIRIBATI INSURANCE CORPORATION**

Respondent

Before: Hardie Boys JA
 Tompkins JA
 Fisher JA

Counsel: *Taoing Taoaba* for appellant
 Birimaka Tekanene for respondent

Date of Hearing: 22 August 2009

Date of Judgment: 26 August 2009

JUDGMENT OF THE COURT

Introduction

[1] On 26 April 2007, the respondent terminated the employment of the appellant as general manager of the respondent. The appellant brought proceedings seeking an order of certiorari to quash the decision of the board of the respondent, a declaration that the termination was void and damages, unspecified as to amount. In his judgment delivered on 13 May 2008, the Chief Justice refused the relief sought. From that decision, the appellant has appealed.

[2] The appellant sought leave to bring the appeal against that decision out of time. The respondent not objecting, leave is granted.

[3] The appellant was employed by the respondent since 1985. On 1 January 1995 he was appointed general manager pursuant to a written contract of employment. On 26 April 2007, that employment was terminated by letter of that date,

Terms of employment

[4] The terms of the appellant's employment are recorded in a written employment contract, the relevant terms of which are:

- The employment commenced on 1 January 2005 and was for a period of six months but may be renewed, subject to the termination clause 7. In effect, the term was indefinite.
- The appellant was required by clause 2.3 to comply with the respondent's conditions of service. The employment contract otherwise contained the normal provisions relating to duties, remuneration, leave etc.
- Clause 7 provided so far as is relevant:
 - Either party may terminate this Agreement at any time from the date hereof by giving to the other party one month notice in writing delivered or sent through the post by mail under prepaid registered cover and such notice shall be deemed to have been given 7 working days after posting.
 - The Board reserves the right to terminate this Agreement without notice provided that the Board gives due consideration of the principles of natural justice.

The sequence of events

[5] On 9 November 2006 the chairman of the respondent handed to the appellant a letter dated the previous day and setting out 19 allegations of misconduct. The letter recorded that it was sent after a special meeting of the respondent's board, and also referred to an earlier letter of 6 December 2006 and the respondent's reply of

31 December 2006. The dates of these letters must be an error, perhaps they should have been dated 2005. They were not produced at the hearing in the High Court. Some of the allegations in the letter of 8 November 2006 could amount to criminal offences. A copy of the letter was sent to the Commissioner of Police. The police commenced their investigations on the same day, 9 November 2006. From that date, the respondent was on leave, the police refusing him entry to his room

[6] The respondent replied by letter of 17 November 2006. It is 19 pages long. It contains an exhaustive response to every one of the allegations in the letter of 8 November.

[7] On 13 December 2006 the chairman of the board of the respondent wrote to the appellant advising that the board had decided to give him administrative leave with full pay with effect from 13 December 2006, and that the board would let him know in due course its final decision.

[8] On 1 March 2007 the chairman of the board wrote to the appellant recording its decision that he had not been able to perform to the standard required by clause 2 of the employment contract, offering a bonus of \$2,000 if he chose to resign and advising that if he did not agree to "this forced resignation option" the board would rely on clause 7 of the contract. The letter referred to the board having commissioned "an independent and separate assessment and review on your professional conduct and performance against the benchmark."

[9] Thereafter, the Peoples Lawyer became engaged for the appellant and the Office of the Attorney General for the respondent. By letter dated 12 March 2007 the Office of the Attorney General wrote to the Peoples Lawyer terminating the appellant's employment

pursuant to clause 7.1 of the contract with effect from 26 April 2007 and advising that he will remain on full pay for the notice period. It renewed the offer of a "golden handshake" if he were to resign, the offer to remain open until 16 March 2009. That offer was not accepted.

The Insurance Act 1981

[10] The long title of the act states it is "An act to regulate the business of insurance, to establish the Kiribati Insurance Corporation and for the purposes incidental thereto"

[11] Section 3 of the act effectively gave the respondent the sole right to carry on the business of insurance in Kiribati. However that section was repealed by the Insurance Amendment Act 2008, so the respondent's previous monopoly no longer applies.

[12] Section 5 provides that the five person board is appointed by the Minister responsible for Finance. Section 17 requires the board to report to the Minister at the end of each financial year and s 19 provides that the Minister may give general and special directions to the board.

[13] These and other provisions have the effect of making the respondent, in fact if not in strict legal definition, a state owned corporation.

[14] Section 26 relates to staff. The relevant clauses are:

(1) For the purpose of enabling it to discharge its functions under this Act the Corporation may entrust the general superintendence and administration of its affairs to a management concern.

(3) The termination of appointment, dismissal and disciplinary control of the staff of the Corporation shall be vested in the Corporation.

[15] The term "management concern" is not defined. Its meaning in this context is unclear. It may mean a management group, or it may mean a general manager. But however it is to be interpreted, we find no basis for concluding that the position of general manager was intended to be of such a kind that the clear words of s 7.1 are to be modified to give the employment some kind of elevated status that affects the ability of the respondent to exercise the right given to it by s 7.1.

The competing contentions

[16] The appellant submitted:

- [a] The position of general manager has a special status and an element of public employment and service, with the result that before the right to terminate contained in clause 7.1 is exercised, the respondent had the right to be heard.
- [b] The respondent as general manager had a legitimate expectation to be heard before his contract is terminated under clause 7.1.
- [c] Natural justice should be implied into the terms of clause 7.1

[17] The respondent submitted:

- [a] The act does not give the general manager any special protection.
- [b] There is no basis for implying a right to be heard before the respondent can act under clause 7.1.

6

[c] Even if the appellant had the right to be heard before the respondent terminated his contract under clause 7. 1, he was given that right.

Conclusion

[18] This was not a case of dismissal. The appellant's employment was terminated in accordance with the terms of his contract. On those terms and in the absence of any grounds for implying a natural justice term into the contract, "...the exercise of the power does not have to be justified. A power to dismiss without cause is a power to dismiss for any cause or none." *Nicholas Reda and Another v Flag Ltd (Bermuda)* ([2002] UKPC 38). This applies equally to a right to terminate.

[19] There are no grounds for implying into clause 7.1 the rules of natural justice. It is not necessary to do so to give the clause business efficacy. But perhaps the most convincing reason against the implication of the term is that it is expressly included in the next subclause, clause 7.2. This shows beyond doubt that the parties considered the rules of natural justice and decided that they should apply only to the circumstances referred to in clause 7.2.

[20] As we have held in § [19] the act does not result in the position of general manager having any particular status that qualifies the power to terminate given by clause 7.1.

[21] Even if the appellant did have the right to be heard before the respondent terminated his employment under clause 7.1, he exercised that right in considerable detail. The letter of 8 November 2006 set out all the matters that the board was considering. His reply of 17 November 2006 set out in exhaustive detail all that he wanted to say in reply to each of the allegations. By doing so he effectively exercised his right to be heard.

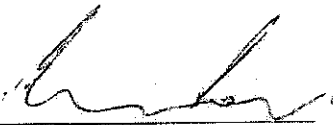
[22] In § [12] we refer to the board commissioning an assessment and review on the appellant's conduct. If a report on that assessment were ever received, it was not given to the appellant. Nor has it been disclosed at the hearing. We assume that the appellant has not sought discovery of it. In the absence of the report, we cannot express any view on whether the material it contained was such that it ought to have been disclosed to the appellant.

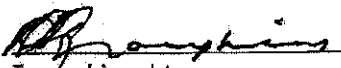
[23] A right to be heard does not necessarily mean a right to be heard in person. What is essential is that the person has a proper opportunity to put before the relevant body all that he wanted to say in response the grounds being considered by that body.

[24] This not a case of dismissal without reasons of the kind considered by Lord Wilberforce LJ in *Ridge v Baldwin* [1964] AC 40. Here very full reasons were given to the appellant and his response was received by the board before it made the decision to terminate.

Result

[25] The appeal cannot succeed. It is dismissed with costs to be fixed or agreed.


Hardie Boys JA


Tempkins JA


Fisher JA