IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

EMPLOYMENT

CV 291 of 2009

BETWEEN: KEPUELI TONGA
(aka Kepueli Kavaliku)
- Plaintiff

AND : TONGA WATER BOARD - Defendant

S. Tu'utafaiva for the Plaintiff
Mrs 'A. Taumoepeau for the Defendant

JUDGMENT

[1] The Plaintiff began working for the Defendant in 1988 as a labourer. He told me that when he started he did not sign any document. He was not familiar with the Water Board Act or with the policies or directions of the Board.

[2] By January 2008, the Plaintiff had risen to the level of Supervisor Mechanic. He was working at Mataki'eua Production Section. On about 14 January 2008 he and three of his fellow-workers were told to attend a meeting, chaired by the Defendant's Chief Accountant. At that meeting they were told that their job had come to an end. They were not told why. They were each given a memorandum signed by the Defendant's Personnel Officer and Acting Secretary to the CEO. The Memorandum (Document P16) advised that:

"On 10th January 2008 [the Board] approved ... for the following staff [including the plaintiff] of Mataki'eua Production Section to be made redundant w.e.f. 8th January 2008 and all posts to be abolished".

[3] On 16th January 2008 the Plaintiff and his colleagues replied (Document P17). They wrote:

"We hereby give notice of our acceptance of the decision by the Board to make us redundant from work which was conveyed to us at the meeting held and the letter distributed to us on Tuesday 14 January 2008."

[4] On 28 January the Plaintiff and his colleagues again wrote to the Defendant (Document P18) asking:

"..... in this letter to advise us of all the entitlements that we should receive from our redundancy from work ... including to be received before the end of work on Wednesday 30 January 2008 including the following:

1. Redundancy payment
2. Superannuation, transfer value, TWB contributions
3. Vacations leave due and casual leave due
4. Overtime working hours
5. And any other entitlements".

[5] On 11 February the Defendant's Personnel Officer replied (Document P22). He advised that the Plaintiff was entitled to receive:

1.	Superannuation	-	$19447.30
2.	Redundancy	-	$12918.00
3.	Leave	-	$1274.10
4.	Overtime	-	$11.05
	Total	=	$33,650.45

This sum was paid to the Plaintiff by two equal payments made on 12 February 2008 and 15 February 2008.

[6] The Plaintiff's case is that :

(a) The Board did not comply with its own redundancy policy.

(b) That the Plaintiff and his colleagues were not in fact made redundant but were actually compulsory dismissed.

(c) That the Plaintiff was not paid such sums as were due to him under the voluntary redundancy policy which in fact applied to him; and

(d) Additionally or in the alternative, that the Plaintiff was not paid the acting allowances which were due to him following his assumption of increased responsibilities.

[7] Documents P49 to P74 include the Defendant's Policy Manual dated May 2007. At page P58 is the section dealing with compulsory termination of service. As will be seen, compulsory termination only "may become necessary when an officer has been judged no longer able to discharge his duties efficiently or when he

is incapacitated by reasons of physical or mental illness". Neither party contended that these circumstances applied in this case. If in fact the Plaintiff was not made redundant then it appears that there was no scope within the terms of the Policy Manual for him to be compulsorily dismissed (and see also paragraph 8.5 of the Manual "Cessation of Employment").

[8] Pages P69 and P70 are entitled "Redundancy Policy prior to 17 November 1999" and "Redundancy Policy after 1999". The same policies are reproduced at P73. These documents confirm that redundancy will only be found to occur when it is "attributable wholly or mainly to one or more of the following circumstances:

(i) the Board has ceased or intends to cease to carry on the business for which the employee was employed;

(ii) the Board has ceased or intends to cease to carry on its business in the place where the employed (sic);

(iii) the requirements of the Board for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminished;

(iv) the requirements of the Board for employees to carry out work of a particular kind in the place where they were employed have ceased or diminished, or are expected to cease or diminished".

[9] It was the Defendant's case that (iv) above applied. The Defendant's CEO Saimone Helu told me that before 2007 the Production Section at Mataki'eua relied on about 30 diesel pumps to extract underground water. It was to service these pumps that the Plaintiff was employed. In 2007 the Board began experimenting with electric pumps that needed no servicing and, after a grant was received from the European Union, all but seven of the diesel pumps were replaced ; this was why the Plaintiff and his colleagues were made redundant.

[10] It was suggested in cross-examination that after the Plaintiff and his colleagues were terminated, daily-paid workers were recruited in their place. It was not disputed that daily paid workers were taken on but the Plaintiff himself accepted that the work that they performed was different from the work on the diesel pumps for which he had been employed. His own evidence was that he had not been able to work since his termination as he had only been trained for one thing: servicing diesel pumps, and could do no other work. In my view, the recruitment of daily paid workers to perform different tasks from those performed by the workers declared redundant did not affect the integrity of the redundancy decision.

[11] Having heard the Plaintiff himself and the two Defendant's witnesses I am satisfied that the Plaintiff's redundancy was a genuine redundancy caused by a change in work methods. The next question is whether the redundancy policy procedures were properly followed.

[12] As will be seen from the final paragraphs of P69 and P70 and from the two paragraphs 4 on Document P73 :

> "Before any employee is made redundant in accordance with this policy, he/she must be informed of such intention and given the opportunity to comment, at least one month before a decision is made by the Board."

[13] The evidence of Saimone Helu, was that :

> "We thought we only had to give one month's notice *after* the decision was taken, by way of appeal". (emphasis added).

Furthermore, it is plain from the Minutes of the Board Meeting on 10 January 2008 (item 9.6) at which the redundancy decision was reached and from document P16, that the final decision was taken by the Board *before* a response from the employees had been obtained, not *after* the response, as was required by the Redundancy Policy. The question that then arises is whether the failure to follow the proper procedure invalidated the termination.

[14] In my view, the acceptance by the Plaintiff and his colleagues of the decision to terminate them had the effect of waiving the defects in the manner in which the decision was implemented. As already noted, I accept that in fact the Plaintiff had become redundant because of the adoption of new work methods following the installation of electric pumps. Additionally, the Plaintiff told me:

> "I understood we were being told to resign. We were just told we were redundant. I do not know what redundant means. I do not

know the difference from being dismissed. I just know my job had come to an end."

Later he told me:

"I was happy that I was going to receive some money. I willingly signed the letter (Document P17)".

However:

"I was not really content with the amount as I was told later that I was entitled to more. Mosese Latu told me it was not enough. I sought advice from Mosese Latu, the Chief Administrator. I understood from him that the Board had not acted justly."

[15] As I find it, the real issue in this case is not whether the termination was a compulsory dismissal dressed up as a redundancy (as is pleaded in paragraph 8 of the Statement of Claim) but whether the Plaintiff received the correct compensation after he accepted his termination, howsoever it was described.

[16] Mosese Latu, who had advised the Plaintiff, gave evidence on his behalf. He referred me to document P2 paragraph (iii) dated 6 November 2006 in which it is stated:

"The Board approved the Government's Redundancy Policy as Tonga Water Board's new redundancy policy (refer attachment) BD0973".

The date of the Board's approval was 24 October 2006 as may be seen from Exhibit D1. On that date, the Board approved the new Policy which was stated to be :

> "a) An employee who has worked for more than 24 months, payment of 3 months basic salary plus 5% of basic salary for each completed year of service paid at the employees substantive appointed level up to a maximum of 12 months pay ;
>
> b) An employee who has worked for less than 24 months will be paid on a pro-rata basis".

[17] It is important to understand that what was approved by the Board was not an entirely new redundancy policy but was rather a further variation of Clause 2 of the policy (the entitlements clause) which was brought into being in 1995, was revised in 1999 (see Exhibit P1) and which was now being revised again.

[18] It was the Plaintiff's case, based principily on Mosese Latu's advice, that the policy which had been adopted by the Defendant Board was not the revised existing policy but was in fact an entirely new policy, the details of which are set out at Exhibits P3, 4 and 5, a letter from the Public Service Commission addressed to the Defendant's General Manager, dated 16 November 2006.

[19] As I find it, there are three major problems with these contentions. First, the part of the policy set out in Exhibit D1 (see paragraph 16 above) is not consistent with the Policy set out in the letter of 16 November. Secondly, the evidence was that the Defendant is not part of the Civil Service, is a government owned business entity

and as such is not subject to arrangements made by the Public Service Commission. Thirdly, the PSC's policy applied to a programme of *voluntary* redundancy, not, as in this case, compulsory redundancy.

[20] From the evidence, not least that of the Plaintiff, it is clear to me that although he accepted the decision to terminate him, the termination was compulsory and was not voluntary. The fact that he agreed for accept the terms of compensation offered to him does not mean that the decision to terminate the Plaintiff was made with consent. In my opinion, the argument that the Plaintiff was entitled, upon his termination from the Defendant to the entitlements available to those who had accepted the offer of voluntarily redundancy governed by the policy adopted by the Public Service Commission in about November 2006 cannot succeed.

[21] As has already been noted (in paragraph 5 above) the Defendant calculated the Plaintiff's entitlements under the Redundancy Policy adopted in October 2006 to be $33650.45. It was not the Plaintiff's case that these calculations were incorrect but in paragraph 15 of the Statement of Claim it was stated that the payments made did not reflect his promotion to acting foreman in 1997. It was argued that if his acting promotion had been taking into account the Plaintiff would have been entitled to an additional $21,151.00.

[22] The evidence on this issue was somewhat unsatisfactory. The Plaintiff told me that despite receiving a number of promotions, among them Leading Hand Mechanic and Supervising Mechanic,

he never received the appropriate acting allowance. In reply to my question the Plaintiff told me that he began acting as Foreman in 1997 but despite holding the post for over 10 years until his employment was terminated he never received any acting allowance. On the other hand, he never raised the matter with his employer either.

[23] The Plaintiff's claim to have acted for 10 years without receiving an acting allowance was supported by Mosese Latu who was for at least part of the time the Defendant's Chief Administrative Officer. His evidence was that the acting appointment was not approved by the CEO even though the Plaintiff was performing the duties of the position.

[24] The Defendant's Personnel Officer at the time 'Elisiva Tapueluelu confirmed that the Plaintiff was not paid any acting allowances but she did not know whether he was authorised to act in the positions as claimed.

[25] Unfortunately Saimone Helu, who told me that there was a Personal File for the Plaintiff in existence, was not asked to produce it and was not questioned in any detail about acting appointments that might have been held by the Plaintiff.

[26] The only material which appears to provide any reliable evidence on this question is two personnel lists for the years 2006 to 2007 and 2007 to 2008. (Documents P35 and P43). These documents show that the Plaintiff was promoted to Foreman Mechanic in July 2004 and that he was again promoted to Supervisor Mechanic in July 2007. These personnel lists are inconsistent with the

Plaintiff's evidence that he acted as Foreman from 1997 to 2008 without ever being formally promoted.

[27] It seems clear from all the evidence that during the years under consideration there were several re-arrangements of positions, duties and responsibilities. Titles of positions were changed as new methods of working were introduced and old methods phased out. While it may have been the case that the Plaintiff sometimes acted in positions without receiving any acting allowance, I do not accept his claim that he acted for 10 years without receiving any allowance for performing these duties.

Result:

[28] In my opinion the basis on which the Plaintiff's redundancy entitlements was calculated correctly reflected the circumstances in which he ceased employment with the Defendant and were correctly calculated to correspond to the Plaintiff's service to the Defendant. Accordingly to Plaintiff's claim fails and judgment will be entered for the Defendant.

DATED: 15 June 2012.

M.D. Scott
CHIEF JUSTICE

N. Tu'uholoaki
15/6/2012