

IN THE SUPREME COURT OF SAMOA

HELD AT APIA

BETWEEN:

SIMO'O TIATIA of Matautu-tai

Plaintiff

A N D:

WESTERN SAMOA KITANO

LIMITED a duly incorporated
company having its registered office
at Apia

Defendant

Counsels: KM Sapolu for Plaintiff
VC Nelson for Defendant

Date of Hearing: 3rd April 1998

Date of Decision: 23rd December 1998

Decision of Vaai, J

The plaintiff in this action is a former employee of the defendant Hotel Company. He has worked for the hotel for some 19 years until his service was terminated in May 1997. He claims loss of salary for wrongful dismissal and breach of contract, interest, solicitor client costs and costs of this action.

The Facts:

The plaintiff initially worked for the hotel company as a waiter, gradually moving up in rank to Restaurant Supervisor; then to Restaurant Manager and to Food and Beverage Manager; and finally as a Function and Entertainment Manager. He has

had no formal training in the hotel or restaurant business and consequently does not possess any certificate, diploma or other qualification in the trade. He held the position of Function and Entertainment Manager from the 1st January 1997 by virtue of an agreement in writing whereby the defendant company agreed to employ the plaintiff as Function and Entertainment Manager for a term of 1 year from the 1st January 1997 to 31st December 1997. By the said agreement the defendant company agreed to pay the plaintiff during the duration of the agreement:

- (a) a salary of \$16,224 per annum payable fortnightly;
- (b) an overtime allowance of \$7,800 per annum payable fortnightly.

Certain facts are agreed to between the parties and these are set out:

- (1) That on the 5th May 1997 the plaintiff supervised a luncheon function held at the Robert Louis Stevenson Museum at Vailima.
- (2) During the function, the Function organisers invited the plaintiff and other helpers to consume the surplus food and beverage. This they did.
- (3) On the same day the defendant terminated the plaintiffs employment on the grounds of unauthorised consumption of food and beverage. The plaintiffs actions were not authorised by the defendant's General Manager who took the view the Plaintiff had misconducted himself and his actions were likely to bring the Defendant Hotel into disrepute. In terms of clause 6 (b) of the Plaintiff's contract, this warranted instant dismissal.

The letter of dismissal reads:

05 May 1997

*Mr Simoo Tiatia
Matautu
APIA*

Dear Sir

RE: TERMINATION OF EMPLOYMENT

This is to advise that your services to this organization have been terminated with immediate effect.

The reason is as follows:

"For the unauthorised consumption of food and beverages, the property of the Attorney General's Department while on duty at the Vailima Museum on May 5, 1997."

Please return all hotel property (i.e. uniforms) as soon as possible, so that your final payment can be processed.

As a result of the above action, you are hereby prohibited from entering and/or using the hotel's facilities for one (1) year from today's date.

Yours sincerely

Junichi Kasuga
ACTING GENERAL MANAGER

*cc: Operations & Maintenance Manager
Personnel Manager
Accounts Manager*

- (4) The plaintiff sought legal advice and the plaintiffs Solicitor replied to the termination letter as follows:

8 May 1997

*The Acting Manager
Hotel Kitano Tusitala
SOGI*

Dear Sir

re: SIMO'O TIATIA

I act for Simo'o Tiatia whose service you terminated by letter of 5th May 1997.

I refer to the reason you gave for termination and advise that I have made enquiry to the organiser of the function for the Office of the Attorney General, Mrs Tina Tuiletufuga Silva. She advised that at the end of the function, she invited all workers who served and assisted the office including members of the Police Band, the cleaners and gardeners and members of the hotel staff, to eat what was left over as the catering was for about 120 people not all of whom attended. She was also made aware at a later stage, that there were about three trays of food that were left in the hotel van and later taken away by your staff, which food by your own reasoning, was property of the Attorney General's office as it had all been paid for.

Mr Tiatia instructs that he informed you during your meeting on 5th May, that he and other members of your staff had the permission of the function organiser from the Attorney General's office to eat some of the food.

Your allegation therefore of unauthorised consumption of food and beverage is baseless and uninformed.

It is my view that your action is unreasonable, made without any proper enquiry and constitutes unlawful dismissal of an employee.

Mr Tiatia therefore seeks full payment of his salary for the remaining period of his contract to the 31st December 1997 plus overtime allowance and all entitlements under the Labour and Employment Act.

Your advice to him that you will set off his final pay against the expenses paid for his medical treatment in New Zealand is strongly contested. As employer, you are liable for the acts of your employee who caused injury to Mr Tiatia on your premises and during the course of his employment. In view of your position now, my client will consider legal action against your company for negligence and reserves his right to sue notwithstanding any other claims he makes in this letter.

I therefore give notice that if my client is not paid his full salary and allowances and entitlements as aforesaid within seven(7) days of the date of this letter, legal proceedings will ensure without further notice to you for unlawful dismissal.

Yours faithfully,

Katalaina M Sapolu

The defendant's solicitor responded by letter dated 21 May 1997 withdrawing the letter of termination and giving the plaintiff notice pursuant to clause 6(a) of the contract of employment. The defendant also offered payment to the plaintiffs salary up to the date of enquiry of the one month notice period; that is, up to 21 June 1997.

(5) The plaintiff maintained he was wrongfully dismissed and he seeks the full salary and allowances payable for the unexpired period of the contract subject to adjustments for tax and NPF.

(6) The plaintiff also claims interest on the outstanding amounts.

Clause 6 of Contract of Employment says -

6 Termination of Contract

(a) If either party wishes to terminate this contract for reasons other than those contained in paragraph 6(b) below, either party may do so by giving to the other one (1) months notice of termination and in the case of the hotel, one (1) month's salary in lieu of notice may be paid to the employee.

(b) Instant dismissal without notice or salary in lieu of notice will be given in cases of Employee dishonesty, misconduct or the employee doing any act which in the opinion of the Hotel General Manager is likely to bring the hotel or any of its officials guests, servants, agents or employees into disrepute whether or not such an act is directly connected with the affairs of the hotel.

The plaintiff contends he was wrongfully dismissed because he and other hotel employees under his management were granted permission by the hosts of the function on the 5th May 1997 to consume the left over food and beverage. It was therefore wrong to terminate the contract under clause 6(b). In other words according to the contract, in the particular circumstances as existed, the defendant could not exercise its right under clause 6(b) to dismiss the plaintiff instantly.

On the other hand the defendant alleges its General Manager acted in accordance with the terms of the contract when he dismissed the plaintiff by exercising his powers under clause 6(b); because the plaintiff has acted in a manner which in the opinion of the defendant's General Manager was likely to bring the hotel into disrepute.

Essentially the argument by the plaintiff is that he was given permission by the host of the function to consume the food and beverage. In my view the issue is not whether the plaintiff was granted permission by the host to consume the food and the liquor. The issue is whether the consumption of the food and beverage by the plaintiff at the premises where the function was held was seen by the Manager of the defendant as likely to bring the Defendant Hotel into disrepute. It is in my view irrelevant whether this particular plaintiff who has been in the hotel business for some 19 years was given permission to eat and drink at the premises where his presence was required to serve and cater. Clause 6(b) of the Contract of Employment gives to the Manager of the defendant the sole discretion to issue instant dismissal without notice or salary in lieu of notice if the employee does any act *which in the opinion of the Hotel General Manager* is likely to bring the Hotel into disrepute. The reasons for the instant dismissal are specifically stated in the letter of dismissal:

“For the unauthorised consumption of food and beverages, the property of the Attorney’s Department *while on duty* at the Vailima Museum.”

It is not contended by the plaintiff that his actions did not bring the defendant Hotel into disrepute. He has simply rested his case on the premise that the food and beverage he and his co-workers consumed was the property of the Attorney General’s Department and they had permission to eat and drink.

For that reason his Solicitor wrote to the Manager of the defendant hotel that the dismissal of the plaintiff was effected without proper enquiry whether the plaintiff and his co-workers were authorised to eat and drink. But the defendant need not make any inquiries as to whether the plaintiff was invited to eat and drink because the defendant’s manager was satisfied the plaintiff and those under his supervision ate and

drank while on duty. Actions which he considered likely to bring the Hotel into disrepute and accordingly under clause 6(b) of he is entitled to dismiss without notice. This he did.

I now refer to the letter of the 21st May 1997 from the defendant's solicitor to the plaintiff's solicitor withdrawing the letter of termination under clause 6(b) and substituting it with notice of termination under clause 6(a). After considering the evidence and especially the correspondences between the parties I am not prepared to conclude that this letter is an admission by the defendant that it unlawfully terminated the contract under clause 6(b). At the time the letter was written the plaintiff had threatened legal proceedings if the plaintiff was not paid his full salary, allowances and entitlements for the unexpired term of the contract within 7 days. Accordingly I am of the view the letter by the defendant of the 21st May 1997 was more an attempt to settle the dispute between the parties.

For the above reasons I give judgment for the defendant. This judgment does not preclude the plaintiff from any entitlements he is entitled to under the Labour & Employment Act. I make no orders as to costs.



JUDGE