TERMINATION OF EMPLOYMENT BY PAYMENT OF WAGES IN LIEU OF NOTICE: *TAAKE V BROADCASTING AND PUBLICATIONS AUTHORITY*[*]

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INTRODUCTION

This case addressed the issue of whether an employer, who is unhappy with an employee's performance, can terminate an employee instantly by giving wages in lieu of notice, and thereby avoid procedures related to termination for serious misconduct.
It is a short case, but it addresses an important issue. The issue has come up in other Pacific jurisdictions as well and has led to some confusing case authority.[1] As Chief Justice Millhouse notes in this case, such a practice 'is so common, indeed so universal a practice' that cases which clarify the law in this area are to be welcomed. It is not the only recent authority on this point. The 2004 Tongan case of *Weibenga v Uta'atu*[2] deals with the issue in a similarly clear manner. However, *Taake v Broadcasting Publications Authority* has the advantage of having very simple facts and therefore being very concise.

FACTS

Taake was employed by Broadcasting and Publications Authority (BPA) as a driver. He had a written contract. In the translated English version the relevant clause stated:

> 10. Termination of Contract
> a. This agreement (may) be brought to an end by the employer or the employee if one of them give notice for a period of 1 week to end the agreement. This agreement can also come to an end if the doctor reports that the employee is unfit to carry out the work.
> b. The employee can be dismissed for doing any wrongful acts or go beyond the expected behaviours such as:
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> 1. Drunk while on duty
> 2. Late to work
> 3. Failure to report any accident caused to the vehicles by a driver who is on duty. Checked or examined the vehicle before using and report any damages to the Transport Officer.
> 4. The CB must be on every time for any communication with BPA
> 5. Comply with the speed limits
> 6. Compliance with route of the bus which has been decided.
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> Any decision carried out for [BPA] the Chairman of the Board must be notified about it immediately. The employee may complain to the Board.

Minutes of the BPA management meeting on 20 October 2004 stated that on 15 October 2004 Taake

negligently rammed the back of the BPA mini-bus into a tree. A number of other complaints about his performance were also noted. There was no dispute as to the truth of those claims. Management therefore decided to terminate Taake's employment as of 20 October 2004.

The Chief Justice accepted the defendant's evidence that the payday following Taake's termination, 29 October, Taake was given a net payment of $79.30. On the subsequent payday, 12 November, Taake was paid a further $47.20. This was apparently 10 days pay. The Chief Justice did not enquire into the exact amount of the payment, instead stating, 'Whether he was paid as much as that I have not calculated but without calculation it looks clear that he was paid at least seven days' wages.' As Taake had been paid more than one week's wages, and the notice period required in the contract was only one week, there was no question of underpayment for the notice period.

ARGUMENTS FOR THE PLAINTIFF AND THE DEFENDANT

The judgment does not provide much detail on the arguments of the plaintiff or the defendant, instead just providing the gist of each parties' case. The plaintiff argued that as he was dismissed for wrongful misconduct, clause 10(b) applies. This would give the plaintiff the right to appeal the decision to the Board. He claimed $54,163 in damages. This figure was 'based on the assumption that he had six working years left... [and] included $5,000 for damages to reputation'.

The defendant argued that it was not a termination because of misconduct. Instead, it was a termination by notice under clause 10(a), with wages being paid in lieu of notice.

DECISION

The Chief Justice decided in favour of the defendant, stating:

> Instead of giving the plaintiff notice for one week the defendant paid him at least a week's wage in lieu of notice. To give the proper amount of wages in lieu of notice and terminate employment immediately is so common, indeed so universal a practice, that I regard the defendant as having acted in accordance with clause 10(a) of the contract. The defendant can, under such contract as it had with the plaintiff, always sack an employee and avoid possible action for wrongful dismissal by paying a week's wages. Clause 10(d) *(sic)* is then of no effect.

While it was not necessary for him to do so as he had found for the defendant, the Chief Justice also considered what the appropriate damages award would have been if he had found for the plaintiff. He noted that 'there are so many imponderables', such as the chance of a terminated employee falling ill or dying, or finding a new job, and that all these things need to be taken into consideration. So, rather than a straight mathematical calculation based on the number of working years the terminated employee has left, 'It is a case of "wielding the broad axe". It is impossible to find a precise figure for damages.' In this case the Chief Justice would have assessed damages to be $10,000.

Discussion

This decision is to be welcomed for clarifying the question of whether an employer can opt for termination by payment in lieu of notice rather than getting involved in a potentially messy termination for serious misconduct. The answer is an unequivocal "yes".

Throughout the University of the South Pacific (USP) region[3] most employment contracts[4] can be terminated "at will". There is no need for an employer to give reasons for termination just so long as the proper length of notice is given. Instant termination can also be carried out in the event the payment of

wages in lieu of notice is provided. This legal principle should be clear, and the judgment of Chief Justice Millhouse confirms that arguments to the contrary are simply non-issues. Maybe this case will help to stop lawyers from continuing to overlook this fixed legal principle.

There are, however, a couple of points in the judgment that do not rest as easily. The first is the question of when the payment of wages in lieu of notice must be made. In this case full payment was not made until 23 days after the termination. Whilst late payment of the wages in lieu of notice was not an issue in this case, it can be noted that section 14(3) of the *Employment Act* [Cap 30] (Kiribati) states that:

> All wages due to a worker whose contract is terminated by his employer shall be paid to him on the day on which such contract is terminated, or if this is not possible, on the first day, not being a rest day or public holiday, after the day on which such agreement or contract is terminated.

The late payment of wages was therefore in breach of the law. In this situation the issue was probably not argued because payment was made and therefore the possible amount of damages for late payment would be very small. However, immediate payment of wages in lieu of notice is a common requirement across various USP jurisdictions.[5] An *obiter* comment by the Chief Justice about the timing of wages in lieu of notice would have served to remind employers of the legal requirements in this regard. The lack of an *obiter* comment is not, however, a criticism of the decision. Rather, it reflects the wishful thinking of a labour law lecturer who would like a "perfect" precedent.

The second point is more significant and relates to the Chief Justice's comments about damages. Here both counsel for the plaintiff and the Chief Justice appear to have confused the measure of damages for breach of contract with the tortious measure of damages for loss of ability to work following a personal injury.

A suit for wrongful dismissal is a claim that there has been a breach of the employment contract. The measure of damages under contract aims to put you into the position you would have been in had the contract been fulfilled. This is determined by what the employee should have been paid had the contract been properly terminated. In the case of contracts that can be terminated by notice, then the amount of damages is determined by the length of the notice period. Whilst *Addis v Gramophone Co Ltd* [1909] AC 488 remains authority for the point that in general there can be no claim for loss of reputation due to the fact of dismissal, an employee may have a claim for damages if notice is given in such a way that it causes the employee undue distress or humiliation. This head of damages is a fairly new addition to employment law, only being affirmed through the House of Lords cases of *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20 and *Johnson v Unisys Limited* [2001] 2 All ER 801.

In this case the amount of damages should have been 1 week's salary, and not $10,000 as the Chief Justice had estimated. As the facts of the case did not indicate that the employee was dismissed in an unduly distressing or humiliating manner no additional payment for humiliation appears to be warranted.

The Chief Justice's comments on the amount of damages he would have awarded were merely *obiter* and did not have any bearing on the outcome of the case. It is, perhaps, for this reason that they were not thought out with particular thoroughness. Despite this flaw the judgment in *Taake v Broadcasting and Publications Authority* remains a useful authority for the legal principle that termination by wages in lieu of notice is a legitimate option for employers who wish to terminate a problematic staff member but who do not want the potential trouble of going through the procedures for termination due to serious misconduct.

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[*] [2005] KIHC 50.

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[1] Some of these have been discussed in Anita Jowitt, 'Common Law Fair Process Requirements in

Relation to Termination of Employment *Pouono v The Corporation of the Presiding Bishop to the Church of Jesus Christ of the Latter Day Saints* (Samoa)' (2003) 7(2) *Journal of South Pacific Law* http://law.vanuatu.usp.ac.fj/jspl/archive/vol722003/Pouono (Accessed 06 July 2006).

[2] [2004] TOSC 43 http://pacliff.org.vu (Accessed 06 July 2006).

[3] USP Member countries are: Cook Islands, Fiji, Kiribati Marshall Islands, Nauru, Niue, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu.

[4] In some jurisdictions different rules apply to fixed term and open-ended contracts. The common law rule is that open-ended contracts can always be terminated by way of notice, but that a clause allowing for termination by way of notice must be included in a fixed term contract in order for it to be able to be terminated early by way of notice. In some countries, such as Vanuatu and Kiribati, legislation has maintained the common law position. However, some countries, such as Samoa, have passed legislation that allows for fixed term contracts to be terminated by way of notice even in the absence of an express contractual term to that effect.

[5] See, for example, s 13(2) *Labour and Employment Act 1972* (Samoa); s 16(3) *Labour Act* [Cap 73] (Solomon Islands); s 16(8) *Employment Act* [Cap 160] (Vanuatu).