

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)

[2002] WSSC 27

By Anita Jowitt^[*]

The United Kingdom, Australia and New Zealand have developed legislation that supercedes the somewhat harsh common law position that there is no requirement for procedural fairness on the part of the employer in cases of summary dismissal for misconduct. In the Pacific legislatures are not so active. There remain a number of jurisdictions in which there are no legislative measures to alleviate the common law position in respect of the need for procedural fairness. Indeed this point has been explicitly commented on in relation to Fiji, in the case of *Diners Club (NZ) Ltd v Pre Narayan*^[1]. The *Diners Club v Narayan* case states that in Fiji, in the absence of statutory provisions requiring fair process, the common law position applies, and there is no requirement for employers to exercise fair process during dismissal.

In contrast, Samoa's courts have been active in trying to develop the common law so as to make up for perceived legislative deficiencies. However, the latest case on this issue, *Pouono v The Corporation of the Presiding Bishop to the Church of Jesus Christ of the Latter Day Saints*^[2] suggests that prior developments are incorrect, and that a common law principle of fair process in relation to dismissal is not developing.

I BACKGROUND OF THE CASE

The plaintiff commenced employment as a payroll clerk in November 1996. In January 2000 the plaintiff, together with another employee, was dismissed for the unauthorised use of the petty cash. She was paid two weeks salary in lieu of notice.

Issues

The plaintiff argued that she was unfairly or wrongfully dismissed on the following grounds:

1. That she did not misuse money from the petty cash, so there was no just cause to dismiss her.
2. That, in the event that the court held that there was no just cause for dismissal, then the defendant had no right to terminate the plaintiff by way of notice, or payment in lieu of notice.
3. That, in the event that the court held that there was just cause for dismissal, then the dismissal was procedurally unfair, and in breach of the rules of natural justice.

A fourth issue, that of defamation, also arose. The plaintiff's argument here was that the letter of reference given to the plaintiff after her termination, on her request, was defamatory.

II THE COURT'S FINDINGS

Issue 1

On the basis of the evidence before it the Court found that the plaintiff had misused the petty cash money, and had borrowed money without authorisation on more than one occasion. It then went on to consider whether this misuse of funds was sufficient to justify instant dismissal. The Court's starting position was the unargued and uncontested principle that 'the degree of misconduct that will justify dismissal is a question of fact'. (at page 2.) The English case of *Laws v London Chronicle*^[3] was used as support for the *obiter* comment that 'a single act of disobedience or misconduct could justify dismissal only if it is of a nature which goes to show that the employee is repudiating the contract of service or one of its essential conditions.' (at page 5.)

On the facts, the Court decided that the plaintiff's breach was of such a serious nature that it was ground for summary dismissal.

Issue 2

The basis of the plaintiff's argument was that the defendant had no right to terminate the contract in the absence of misconduct. The basis of the argument appeared to be that this would be a breach of equity – it would be unfair to dismiss the employee in the absence of misconduct. In other words, equity should override s 21(3) of the *Labour and Employment Act 1972*, which states that:

Either party to a contract of service may at any time give the other party notice of his intention to terminate a contract.

The Court firmly rejected this argument. It referred to an earlier Supreme Court decision, *Lui Lauano v Yazaki Eds Samoa Ltd*^[4] which held, in accordance with common law principles on termination by way of notice, that:

the employer is entitled to terminate without any cause or grounds, or without disclosing any reasons provided that the termination is on reasonable notice. (at page 6)

Issue 3

The plaintiff's third argument was that termination on the grounds of misconduct requires procedural fairness in order to be legal. Because the defendant did not give the plaintiff an opportunity to be heard it had breached an implied term of the contract.

The plaintiff relied on the New Zealand case of *NZ Food Processing Union v Unilever NZ Ltd*^[5] which sets out minimum requirements for procedural fairness that the employer must follow in order to correctly dismiss an employee for misconduct. These are notice of the specific allegation of misconduct, a real opportunity for the employee to answer the allegation, and an unbiased consideration of the employee's explanation.

The plaintiff also relied on the Samoan case of *Motoi & Vaomua v Western Samoa National Provident Fund*^[6], another case in which it was argued that the dismissal was procedurally unfair. In that case the Supreme Court stated, at p 335:

The common law of course never stands still. In my view this is a classic case where the court should look at the equity of the situation. There are no binding decisions on this court which would prevent it from taking the course which I propose to take. It seems to me that in this day and age employees should have the rights which are set out in legislation in most other jurisdictions... to security of tenure without being subjected to dismissal for dubious and inconsequential decisions.

The Court rejected the plaintiff's arguments. First it said that the New Zealand case had no relevance to Samoa as it had been decided in the context of the New Zealand *Industrial Relations Act 1973*, and Samoa has no equivalent legislation.

Second, the decision stressed that the role of the Court is not to act as a de facto legislature:

The functions of the court need not be emphasised; legislation policies are dictated to and governed substantially by the state of the economy so that it would in my view not only be dangerous but also contrary to established principles for this court to be guided by the underlying principles of the legislations of the more economically developed nations like NZ.... Sections 21 and 40 of our Labour and Employment Act do not deprive the employer of his common law power to dismiss the employee instantly for misconduct. This is clearly a case where the defendant as employer was acting under purely common law powers to dismiss. The defendant is not required to comply with the rules of natural justice (at page 7).

Issue 4

The alleged defamation at the centre of the fourth issue was a letter of reference prepared by the finance manager in which the following was stated:

[The plaintiff] was terminated from our office due to mishandling of funds. She is an unreliable employee. I do not wish to recommend her to any employer. (at page 8)

The plaintiff was given this letter in an envelope. When she read this letter she walked into the Centre Manager's office and gave him the letter to read. The Centre Manager threw the letter into the rubbish bin and typed another reference for the plaintiff. Later a copy of the letter was faxed to the defendant's solicitor after the plaintiff commenced proceedings.

The Court dealt quickly with the defamation matter by saying that there was no publication of the letter by the defendant. The plaintiff herself showed the letter to the Centre Manager, so this could not be publication by the defendant. Faxing the letter to the defendant's solicitor was also not publication as it 'was necessitated by the course of action taken by the plaintiff..' (at page 8)

Outcome

Judgment was given for the defendant, and the plaintiff was ordered to pay costs of \$1500.

III DISCUSSION AND COMMENT

In terms of the development of the common law of employment in issue 3, that of a common law requirement of procedural fairness, is the most interesting. The fact concerning issue 2, as to whether there is a requirement for procedural fairness when terminating by giving notice also deserves some comment.

It is quite clear in common law that either party can terminate an open-ended contract at any time by providing proper notice. This common law position is extended by s 21 of Samoa's *Labour and Employment Act 1972*, which appears to allow both fixed term and open-ended contracts to be terminated

by giving notice. In this situation no reasons need be given and no procedures need be followed. However, a number of cases have implicitly or expressly tried to argue that a requirement of procedural fairness exists when termination is done by giving notice or payment in lieu of notice.^[7]

On the face of it, such arguments appear to be without legal basis. However, these arguments have largely arisen in cases in which the employee has argued that he or she has been wrongfully dismissed (where there has been dismissal for serious misconduct, but no serious misconduct has been committed), and the employer has instantly terminated the employee, paying wages in lieu of notice. The question of whether there needs to be procedural fairness in order to dismiss an employee properly for serious misconduct has therefore, it seems, been confused with the separate issue of whether there needs to be procedural fairness in order to properly dismiss an employee by way of notice. In the present case and in the *Motoi* case, the two central cases as to procedural fairness in relation to dismissal for misconduct, the plaintiffs had been paid wages in lieu of notice. Argument as to whether there is any need for procedural fairness in respect of summary dismissal for misconduct was therefore not strictly relevant.

However, even though the issue has not been strictly relevant, both the *Motoi* and the *Pouono* cases have apparently decided based on the common law of procedural fairness in relation to summary dismissal. Both take opposing views as to the role of the court. In *Motoi* the decision indicates that judicial activism is appropriate in situations where the legislation of Samoa has overlooked an issue, and therefore the law 'lags behind' the approach that has already been legislated in other common law jurisdictions. In support of this position it could be added that in Samoa, law is not regularly reviewed and that there is no law commission to identify and rectify deficiencies in the law. Further, common law in other jurisdictions (apart from Samoa) never got the chance to develop as the legislatures had stepped in to rectify what was seen to be a deficiency in the law. Before legislative reforms there were some cases indicating that the employer's common law implied duty of confidence and trust created a duty to act in a fair and reasonable manner when dismissing an employee for misconduct.^[8]

Ten years later *Pouono* firmly rejects the court's activist role. Vaai J states: 'The functions of the court need not be emphasised; legislation policies are dictated to...' (at page 7) Is this sound? Of course the courts are duty bound to follow the legislature. But in this instance the legislature is silent on the procedures to be followed in the case of dismissal for misconduct. All that section 21(6) of the *Labour and Employment Act 1972* states is that '[e]ither party to a contract of service may terminate such contract without notice in the event of any wilful breach by the other and in such case no payment in lieu of notice shall be required, but without exoneration for payment of any sum due for work actually performed'.

So what considerations should be applied? Vaai J further stated that 'legislation policies are dictated to and governed substantially by the state of the economy so that it would in my view not only be dangerous but also contrary to established principles for this court to be guided by the underlying principles of the legislations [sic] of the more economically developed nations like NZ.' (at page 7), Again, the particular context of the country, including its economic state, should be at the forefront of a judge's mind when he or she is engaging in judicial activism. But what are the possible negative economic consequences of requiring an employer to inform the employee of alleged misconduct, give the employee an opportunity to answer and listen fairly to that employee's answer?

The employer should still establish that, on the balance of probabilities the employee has committed some form of serious misconduct. Otherwise the employer opens itself to be sued for wrongful dismissal (or dismissal with no just cause). Not requiring procedural fairness is not costly in any way for the employer. Procedural fairness can be satisfied, in many instances, by a letter and a meeting, again not particularly costly.

To say that the court should not be guided by legislation of other countries is also sound on one level,

problematic on another. Courts in one jurisdiction are not bound by legislation in other jurisdictions. But the courts' interpretation of that legislation can be used as a guide, particularly when the legislation has codified a developing common law principle, and judicial pronouncements essentially continue a stream of common law development which was formalised by statute.

IV CONCLUSION

My preference or 'bias' on the subject should be apparent by now. Even though the *Motoi* case was not sound because the plaintiffs were dismissed with pay in lieu of notice, and not summarily dismissed for misconduct, I like the *Motoi* approach. There is no conceptual reason why the employer's implied common law duty to act in a fair and reasonable manner should not extend to the manner of dismissal. Indeed, there is case law to suggest that this principle was developing in other jurisdictions before legislation overtook the need for common law development. In countries in which the legislature is less active, if statute has not clearly denied the right to procedural fairness, the development of an existing common law principle to cover this situation is not impermissible judicial activism.

The *Pouono* case is also not sound because the plaintiff was dismissed with pay in lieu of notice, and not summarily dismissed for misconduct. However, it may have made the right decision for Samoa. But before this matter is finally settled, more argument in court about whether the common law actually does already implicitly require or support the concept of procedural fairness in cases of summary dismissal for misconduct, and the economic implications of recognising this as a common law principle for Samoa are needed. Until then Samoa is left with two unsound, conflicting and opposing Supreme Court decisions, and cases are open to be argued either way.

[*] Lecturer, School of Law, University of the South Pacific, Port Vila, Vanuatu.

[1] (1997) 43 FLR 299.

[2] ([2002] WSSC 27 < <http://paclii.org.vu/cgi-paclii/displ/ws/cases/WSSC/2002/27.html> > 8 September 2003 (Copy on file with author). References to excerpts from the judgment will be cited by giving page numbers in which the excerpt appears.

[3] [1959] 2 All ER 285.

[4] Unreported, Supreme Court Samoa, 9/8/00, Wilson, J.

[5] [1990] 1 NZILR 35.

[6] [1980 – 1993] WSLR 333.

[7] See for eg . *Lui Lauano v Yazaki Eds Samoa Ltd* (above n 4 ; *Motoi & Vaomua v Western Samoa National Provident Fund* (above n 6); *Keil v Polynesian Airlines* ([1980 – 1993] WSLR 222 (S Ct) & 395 (CA))

[8] Stephen Gibbs (ed) *Butterworths Employment Law Guide* (4th edition) 1055 -59.

