

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO. : HBC 424 of 2007

BETWEEN : **FIJI NATIONAL PROVIDENT FUND**

PLAINTIFF

AND : **OLOTA ROKOVUNISEI**

DEFENDANT

COUNSEL : Mr. V. Singh for Plaintiff.
Ms. S.Vaniqi for the Defendant.

Date of Hearing : **3rd September, 2014**

Date of Judgment : **13th May, 2015**

JUDGMENT

1. The plaintiff had filed a writ of summons against the defendant claiming \$90,538.75. The defendant filed his Statement of Defense with a counter claim.
2. Subsequent to a summons to enter judgment on admissions the plaintiff has got judgment in his favor.
3. After an attempt to strike out the defense the counter claim proceeded to trial.

The Counter Claim

4. The defendant filed the counter claim on the basis that he had a contract of Employment with the plaintiff. That he was entitled to be paid the adjustments in benefits and allowance occasioned by the increase in his base salary as General Manager and Chief Executive Officer during the contractual periods from 1.6.01 to 31.5.09.
5. The defendant has claimed a sum of \$179,228 as the sum due pursuant to clause 36(f) of the Contract of Employment.

The Plaintiff's Reply

6. The plaintiff denied owing any sum to the defendant under clause 36(f).
7. Further the plaintiff submits that the defendant's case is based on the increase in his base salary. However, the said base salary was not approved by the Higher Salaries Commissions as it was in contravention of the act.

The Agreed Facts

8. The parties agreed on the following facts at the Pre-Trial Conference:
 - 1) *The Plaintiff is a body corporate and the Trustee of the Fiji National Provident Fund (hereinafter "FNPF") established under the FNPF Act Cap 219 as a provident fund for all employees.*
 - 2) *As Trustee, the plaintiff administers, manages and exercises control over the fund through a General Manager and Chief Executive Officer and staff in accordance with the provisions of the FNPF Act.*

- 3) *The defendant joined the plaintiff in 1976 as a System Engineer rising through its rank to EDP Manager, Assistance General Manager, Deputy Manager to General Manager and Chief Executive Officer with effect from 2001.*
- 4) *The Defendant had been in employment with the Plaintiff for a period of approximately 30years.*
- 5) *On 1st June 2001the plaintiff entered into a written contract of employment with the defendant for a period of three (3) years as its general Manager and Chief Executive officer.*
- 6) *Upon expiry of the contract referred to in paragraph 5 herein, the defendant entered into a subsequent and new written contract of employment with the plaintiff on 1st July,2004, for a period of five (5)years as its General Manager and Chief Executive Officer.*
- 7) *The remuneration package offered in the new contract between the plaintiff and the defendant included a base salary of \$150,000.00. Additional benefits contained within the contract included a housing allowance at the rate of 25% base salary, FNPF excess contribution at rate of 12% of the base salary, 30 working days annual leave and four (4) weeks leave in lieu of gratuity.*
- 8) *The defendant's contract was subsequently terminated by the plaintiff on the 19th April, 2007.*
- 9) *The defendant through his solicitors wrote to the plaintiff on the 28th June, 2007 seeking monies due and owing to him as accrued under the contract at the date of the said termination.*

Issues before Court

9. The following issues are to be determined by the court:
- a. *Whether the defendant's increase in base salary from \$135,778.00 per annum to \$150,000.00 per annum was approved by the Higher Salaries Commission or it was done in contravention of section 11 and 21 of the Higher Salaries Commission Act Cap 2A.*
 - b. *Whether the Defendant is entitled to be paid the adjustments and allowance occasioned by the increase in base salary.*
 - c. *Whether the Plaintiff owes the Defendant the sum of \$179,228.00 ?*
10. This is the determination of the Counter claim of the defendant in the main case. The defendant commenced the case and marked all his documents as "P" documents while the plaintiff's documents are marked as "D" documents.

Defendant's Evidence

11. The Defendant gave evidence and did not call any other witness. The Defendant was working with the plaintiff under a contract from 2001.6.1 for 3 years. The Annual salary was \$135,778 per annum. He had entered into a new contract 'P1' with the board for a period of 5 years from 1.6.04 as per the new contract the annual salary is given as \$150,000 per annum. As per clause 36(f) of the contract he was entitled to be paid in cash all remuneration and benefits accrued to him to the date of the termination. He was terminated on 19.4.07. The defendant claims the difference between \$135,778 and \$150,000 for the period, 61 days leave, a bonus of \$23,965.00. The difference of pay under the new contract was \$97,937.

12. Higher Salaries Commission has failed to approve "P1" but has given the consent for an all inclusive remuneration to the amount of \$240,000.00 per annum. The document is dated 20.9.06. The defendant agreed that for him to obtain the higher salary it should be approved by the HSC.

Under cross examination the defendant agreed that as per the contract salary plus entitlements came up to \$303,016.00. It is pertinent to note that this amount exceeds the approved remuneration by the HSC. The defendant answered:

Q:- But do you agree with me that it total up to \$303,016.00.

A:- These figures come out from contract and it's what he say, Sir.

13. He had never been paid the new salary reflected in "P1" till his termination in 2007. He had been paid only under the 2001 contract salary. Under cross examination when asked whether he was aware of his new salary scale being approved by HSC the defendant answered that he was aware of getting approval only for \$135,778 per annum.

14. The new contract had not been approved by the HSC. The defendant answered:

Q: Mr. Rokovunisei you haven't answered my question, did HSC approve this contract? The contract as a whole was it approved by the HSC?

A: The new one, no.

The Plaintiff's Evidence

15. The plaintiff called two witnesses. Aisake Taito Executive of FNPF. He is the CEO. He submitted that the remuneration of the executives is determined by the HSC. Under cross examination he admitted that the defendant as at 19.2.07 had 61 days leave balance.

There were several correspondences between the HSC and the plaintiff about the salaries of the executives. As per D12 the HSC has informed the plaintiff to pay the outstanding entitlement up to the date.

Q: So is it fair to say HSC is instructing the FNPF payout their outstanding entitlements. It is fair to say what HSC is directing the chairman of your fund pay them out what they owed.

A: Yes.

16. The witness Mrs Apted was in the HSC in the year 2003. She was the Chairperson. Describing the role of the HSC she stated it sets the salaries of certain position within the government commercial organizations. Salary includes all benefits. In 2003 CEO, General Manager Salaries were approved at \$135,778.00 per annum (D7). As per D7 the total benefits exceeds the approved sum therefore FNPF has been asked to revise the contracts. As per FNPF submission in 2004, the General Manager and Chief Executive Officer gets fringes benefits to the amount of \$65,921 but this was not approved. By D12 the witness had told that the total approved package for General Manager and Chief Executive Officer and the DGM should be \$240,000 and \$200,000. Whatever outstanding up to this day has to be paid separately, but from this day the approved package should be given.

Determination

17. I have considered the evidence before Court and the documents marked. Both parties were given time to file their closing written submissions. However only the defendant filed the written submissions.
18. The confusion in this case has arisen because the plaintiff FNPF had bluntly disregarded the HSC rulings in fixing the salaries for the top executive grades.

19. As per the contract P1 the defendant is offered a basic salary of \$150,000 per annum and as submitted the total package exceeds the HSC approved amount. However it is pertinent to note that as per clause 1 of P1 the said contract is subject to the approval of the HSC. The defendant too conceded in this, thus the amounts offered in P1 was not to be affected till the HSC approval is obtained.
20. Higher Salaries Commission Act in Section 11 and 21 stipulates;

Section 11- (1) "The functions of the Commission shall be;

- a) To consider and determine the salary of the chief executive officer of each of the corporations and bodies specified (either by name or by class) in the First Schedule and the salaries of the holders of such other offices in those corporations and bodies as the Commission may prescribe;*
- b) Notwithstanding anything to the contrary contained in the memorandum or articles of association of any Government controlled company, to consider and determine the salary of the chief executive officer of every such company and the salaries of the holders of such other offices in those companies as the Commission may prescribe;*
- c) To consider and determine the salary of every Permanent Secretary and supervising officer appointed pursuant to section 82 of the Constitution and the salaries of the holders of such other public offices (other than those offices to which section 124 of the Constitution applies) as the Commission may, after consultation with the Public Service Commission, prescribe;*

- d) *To consider and determine the salaries of the chief executive officer of every city, town and district council constituted under the Local Government Act and the salaries of the holders of such other offices in those councils as the Commission may prescribe;*
 - e) *To carry out such other functions as may be conferred or imposed upon it by this Act or any other written law.*
- (2) *In carrying out its functions under paragraphs (a) to (d) of subsection (1) the Commission may fix scales of salaries and may specify the manner in which the scales of salaries fixed by it are to be applied.*
 - (3) *Except as provided in this Act, where the salary payable to any person is fixed under this Act, no amount in excess of the salary so fixed shall be paid any person on account of that salary.*
 - (4) *Any person who makes any payment in contravention of subsection (3) shall be guilty of an offence”.*

Section 21 of the Higher Salaries Commission Act.

“Where any corporation or body specified in the First Schedule or any Government-controlled company or any council constituted under the local Government Act considers that any salary which it proposes to agree to, or pay, will or may tend to lead to unreasonable disparities or inappropriate relativities with any salary determined by the Commission under section 11, it shall, before agreeing to or committing itself to the payment of, such salary, consult with the Commission and have due regard to any opinions expressed by the Commission and to any relevant salary determined by the Commission”.

As per section 11 and 21 the Plaintiff submits that they cannot act under the contract 'P1' without approval of the HSC.

21. The courts attention was brought to Section 20(1) of the Higher Salaries Commission Act which states "*every determination of the commission shall prevail over any contract of service to the extent that there is any conflict between the determination and the contract, and the contract shall thereafter be construed and have effect as it had been modified so far as necessary in order to confirm to the determination.*" Thus the HSC determination will prevail over the contract.
22. I find as per the evidence of both the Plaintiff and the Defendant that, the contract P1 had never been approved by the Higher Salaries Commission.
23. As I have stated earlier when the parties entered into P1 the 2004 contract, a clause was inserted that it was subject to HSC approval. The parties were not at variance on this issue. It is also pertinent to note that the defendant had not been paid under P1 as it had never got the HSC approval.
24. As per D9 the HSC in 2003 has approved the salary of the Chief Executive Officer to be \$135,778 per annum. The defendant admitted that even though he signed P1 he had been paid only a salary of \$135,778.00 per annum.
25. I find the document D12 marked by the defendant as P4 is a letter by the HSC written on 20.9.2006. As per PW2 who was the author of the document, HSC had only approved a total package for Chief Executive Officer and General Manager to be \$240,000. In evidence PW2 clarified that this amount consists of the monetary value of all fringe benefits and other components with the base salary.
26. Under cross examination it was established that based on P3 the defendant was getting a total of nearly \$334,846 per annum as benefits and allowance. The Defendant submitted

that even though a lot of benefits was included in the salary, he was not taking all of them. This court is not inclined to accept the defendant's evidence that even though he was entitled to certain benefits he did not always necessarily get them. When a total package is offered in my view it's a total package, whether one takes it or not.

Answering the issues.

27. As per P1 the defendant had been offered a base salary of \$150,000 per annum. However as mentioned earlier this was subject to the plaintiff obtaining approval from the HSC. The defendant was aware of these conditions when he entered into the contract. In his own evidence the defendant admits that the said P1 contract was never approved by the HSC.
28. The defendant's document P5,P6 and Plaintiff's document D1, D2, D3, D4, D5, D6, D7, D8, D9, D11, D12, D14 are all correspondence between the HSC and the Plaintiff pertaining to increasing the salary reflected in the contract P1.
29. However as per the defendant's evidence as well as the evidence of the plaintiff's witness PW2 who was the Chairperson of the Higher Salaries Commission, has established that the said P1 contract was never approved by the HSC in its presented form.
30. The Defendant's entire claim is based on seeking the payment of adjustments and allowance occasioned by the increase in the base salary as reflected in P1. The parties were not at variance on the issue that what the defendant had been paid was his earlier base salary of \$135,778 per annum. There was no evidence led by the defendant to establish that his dues under the said base salary of \$135,778 per annum have not been given to him.
31. When the base salary reflected in P1 is not approved by the HSC, the defendant's claim on the difference between his salary and the salary reflected in P1 fails.

32. Thus answering issue (a) it is my view that the increase in the base salary from \$135,778.00 per annum to \$150,000.00 per annum had never been approved by the HSC. It is also pertinent to observe that when the Plaintiff entered into P1 by inserting a clause making P1 subject to HSC approval the Plaintiff has avoided a direct contravention of Section 11 or 21 of the HSC Act.
33. By the letter marked D12 the HSC in 2006 has approved a total package of \$240,000 for the post the defendant was holding. However it includes the allowances and variables.
34. The Defendant is claiming for bonuses based on the new base salary. However his evidence on the issue is based on an assumption. In view of evidence submitted and the defendants own admission that P1 was not approved by the HSC it was incumbent on the defendant to lead evidence as to the benefits he was entitled to and the benefits he has not got. The onus was on the defendant to prove his counter claim.
35. At this stage it is pertinent to note the second issue raised before Court. The said issue reads as *“whether the defendant is entitled to be paid the adjustments and allowances occasioned by the increase in base salary?”* It is also pertinent to note that as per the evidence in the absence of HSC approval, I conclude the defendant’s base salary has not been increased to the amount reflected in P1. In the absence of approval by the HSC the Court has considered the implication of Section 20(1) of the Higher Salaries Commission Act. Accordingly the issue the way it is raised has to be answered in the negative.
36. The defendant brought to the attention of the court the document “P4” where the HSC has stated *“ the above maximum total remuneration package are fixed for the contract period, outstanding entitlements owed to the officers up to this should be paid out separately, the details of which should be submitted to the commissions”*. The defendant contended that as per this paragraph the HSC has not objected to the plaintiff giving whatever was owed to the defendant till the letter “P4” was issued.

37. PW2 the author of the letter P4 explained that the HSC was unaware as to the amount the defendant was paid. So they said that whatever was owed should be paid and the approved salary should be paid from the date of P4. In her evidence the PW2 stated:

Q: Now in paragraph when it says that both had been enjoying package beyond what HSC had approved and if this has been placed in 2001. Is this what you are referring to when you said they were already been paid?

A: Yes, looking at that we can the HSC saw that whether they are receiving at the time which was not approved. They had to clear it, pay the Chief Executive officer out and start fresh with its new package of the new contract.

38. As per the Sections 11 and 20(1) of the Higher Salaries Commissions Act a remuneration package that is not approved cannot be paid. I find the Defendant entered into P1 contract with this knowledge. The P1 contract consists of a clause which makes it subject to the HSC approval. The defendant has admitted that pending the HSC approval, he was working for the old salary.
39. I find as per the evidence the defendant was never paid the amount or the benefits in P1. He had been earning the base salary approved in 2001 till the date of termination. Under the circumstances it is clear that the HSC was unaware of the amount paid to the defendant. They had been unaware of the fact as to whether he had been paid under the P1 contract. PW2 the author of "P4" submitted what the HSC has meant was that under whatever scale the defendant was paid what was owed to him should be paid. The plaintiff has continuously submitted that the Defendant was paid under the 2001 salary scale. It was submitted that by P4 what the HSC meant was that the defendant should be paid whatever that was due to him under the salary scale that he was been paid. Both parties are not at variance of the fact that the defendant had been paid only under the 2001 salary scale. In view of Section 20(1) of the High Salaries Commissions Act I accept the submissions of the plaintiff.

40. Accordingly, in my view what the HSC has meant by P4 has to be construed to state to give the meaning “whatever the dues **under the salary scale, the defendant was placed** had to be paid”. I come to this conclusion considering the provisions of Section 11, Section 20 (1) of the Higher Salaries Commission Act and the evidence of the author of P4. When specific provisions are laid in the act even the HSC cannot override them. Thus the Defendant’s contention that what the HSC has meant was for Plaintiff to pay all dues under P1 has to be rejected, as P1 had never been approved.
41. In the given circumstance it is incumbent on the defendant to prove the benefits he was not paid, and under what salary scale he was been paid. However I find the defendant has failed to establish these facts. The defendant contradicts his own evidence when he concedes that his salary was not paid under ‘P1’ as it was not approved by the HSC, yet then claims the reliefs under P1.
42. The defendant has failed to establish the benefits or allowances that he has been deprived of. He has failed to establish under which salary scale he had been paid and whether there was any dues under that salary scale. As per the evidence submitted I conclude that the Defendant has failed to prove that the base salary has been increased from \$135,778 per annum to \$150,000 per annum. The defendant has failed to establish that the Higher Salaries Commission had approved the said salary increase reflected in P1. As per the evidence P1 was never approved in the form the defendant has entered into the contract.
43. I find the Defendant’s entire Counter-Claim is based on the P1 contract. In the absence of any evidence to prove that the Higher Salaries Commission approved the increase in the base salary or approved the contract P1 the Defendant has failed to prove his entitlement to his Counter-Claim.
44. The Defendant has failed to lead any documentary evidence or witnesses to establish under what basic salary scale his bonuses and other fringe benefits has been calculated.

45. The defendant's entire claim is based on the unapproved salary scale reflected in P1. Considering the provision of Section 11 and 20 (1) of the HSC Act and the evidence laid before this Court, I am inclined to answer issue number (c) in the negative.

Conclusion

46. Accordingly for the above stated reasons. I conclude the defendant has failed to prove his counter claim on a balance of probability, thus the counter-claim is dismissed with a cost of \$1000 summarily assessed.



Mayadunne Corea

JUDGE

13.5.2015

