

IN THE HIGH COURT OF SOLOMON ISLANDS

CIVIL JURISDICTION

Civil Case Number 645 of 2015

BETWEEN: CHARD-RICHARDS MAUI - Claimant
AND: ATTORNEY GENERAL - Defendant
(Representing the Permanent
Secretary – Ministry of Public Service)

Date of Hearing: 17/10/2019 (Trial); 29/08/2022 (Further written submission).
Date of Judgment: 2nd November 2022.

Mr. R. Tovosia for the Claimant.

Ms. P. Taki for the Defendant.

KENIAPISIA; PJ:

JUDGMENT ON A CLAIM FOR BREACH OF CONTRACT AND DAMAGES

Introduction

1. At the time of dismissal on **19/05/2011**, Mr Maui was Chief Accountant, at the Ministry of Development Planning and Aid Coordination (“MDPAC”), Honiara. Mr Maui was confirmed in that position on **4/4/2008**. On **20/6/2007**, Mr Maui executed a contract of employment with the defendant, by accepting a letter of offer from the defendant. The letter of offer contained Mr Maui’s general terms of contract of employment. Clause 6 of the general terms of the contract of employment (contract) provides for Solomon Islands Constitution, General Orders, Financial Instructions and Public Service Regulations from time to time to become terms of the contract (See Exhibit CRM1, of sworn statement by Mr. Maui filed **28/12/2015** for copy of contract).

Reliefs/Remedies Sought

2. Reliefs are not clearly pleaded. However, I can briefly summarise the reliefs sought. Mr Maui is seeking a *declaratory order* that his dismissal from employment was made in breach of a term of his contract and seeks consequential relief for *damages* or *re-instatement* or both. Mr. Maui no longer pursues *re-instatement*, as his age now surpassed the public service retirement age of 55 years. Mr Maui alleged breach of his contract, saying, he was dismissed without *being heard*. Mr Maui alleged that “right to fair hearing” before dismissal is a term of his contract.

Issues

3. There are 3 main issues in this claim. First “*Is right to fair hearing (right to natural justice) a term of Mr. Maui’s contract?*” Secondly, “*Did the defendant breached Mr. Maui’s right to fair hearing at time of dismissal?*” Thirdly “*Is Mr Maui entitled to damages if his right to fair hearing was violated at time of dismissal?*”

Issue Number 1 - Is “right to fair hearing” (“right to natural justice”) a term of Mr Maui’s contract?

4. Court will first seek to establish, if *right to fair hearing (right to natural justice)* is a term of Mr. Maui’s contract. The starting point is Clause 6 of his contract. Clause 6 relevantly stated: -

“This appointment is subject to Solomon Islands Constitution, General Orders, Financial Instructions and appropriate Public Service Commission Regulations as from time to time in force.” (My underlining)

Solomon Islands Constitution

5. Section 116 (1) of the Constitution provides:-

“Subject to the provisions of this Constitution, power to make appointments to public offices (including power to confirm appointments) and to remove and to exercise disciplinary control over persons holding or acting in such office is vested in the Public Service Commission.” (My underlining)

6. Public Service Commission (“PSC”) is a creature of the Constitution established under Section 116 (1). The Constitution clothed the PSC with powers to make appointments to public service and to discipline public officers (like Mr. Maui) under the PSC Regulations of 1979. The said Regulation is a further extended creature of the Constitution. The said Regulation was subsequently amended in 1998 – (Legal Notice No. 123). Mr. Maui’s contract was at all times subjected to the Constitution and the PSC Regulations 1998 (as per Clause 6 of the contract).
7. Counsel for the claimant submitted that the *right to natural justice* is in Section 10 (8) of the Constitution. I disagree. Right to natural justice – of a person accused of misconduct in office to have his side of the story be heard is not the same thing enshrined in Section 10 (8). Section 10 (8) is a general protection of the law afforded to persons accused of general crimes, but not specifically dealing with, a public officer accused of misconduct in office – alleging breach of *right to natural justice*. More correctly, *right to natural justice* is embedded in Section 116 (1) of the Constitution read with the PSC Regulations 1998. It is therefore a correct position in law to say, Mr. Maui has a Contractual Constitutional right to be afforded an opportunity to be heard (*right to natural justice*) before dismissal. That right is embedded in the PSC Regulations 1998 at Regulations 48 and 50 and provides as follows: -

48. “The officer shall be given not less than 7 days to respond to the charge and if he so requests, he may be accompanied by a friend or an official representative of his union. A report of any such interview shall be placed on record and a copy sent to the officer accused of the misconduct.

50. “The Board shall take evidence from all parties concerned, including the officer accused of misconduct who may, if he is interviewed, be accompanied by a friend or an official representative of his trade union. The accused officer shall be given the opportunity to be present and to put questions on his own behalf where witnesses are interviewed by the Board and shall be allowed to see or have copies of any documents relied on for purpose of the enquiry.” (My underlining)

8. So indeed, *right to natural justice*, is a term of Mr. Maui's contract by virtue of Clause 6 of his contract. Clause 6 has its origin to Section 116 (1) of the Constitution and PSC Regulations 1998. That right requires that when the PSC alleged serious misconduct in office against Mr Maui, he must be given *right to fair hearing*, in that, he must be given an opportunity to answer to the allegations put against him after proper investigations/inquiries are completed, report produced and charges laid. And then the PSC may make a final decision to discipline Mr Maui.

Procedure PSC should have followed in dismissing Mr. Maui from office consistent with his term of contract on discipline – Procedural fairness

9. Court will now turn to outline the procedure and requirements to discipline Mr Maui contained in the 1998 PSC Regulation – Part VII – Discipline - which is part of Mr Maui's contract by extension of Clause 6 of the contract: -
- (i) Mr Maui was alleged to have committed serious misconduct in office, such misconduct as recognised under *Regulation 44* – ranging from misconduct against Financial Instructions and General Orders (See paragraphs 13 and 14 of Attorney General's written submissions filed 27/07/2022).
 - (ii) *Regulation 45* puts responsibility on public officers (having supervisory responsibility) to report at once misconduct against public officers under their supervision and to deal with disciplinary cases promptly. So, the evidence shows that Mr. Maui's supervisor, the Permanent Secretary of the MDPAC had reported a misconduct case against Mr Maui to the Permanent Secretary of Ministry of Public Service ("MPS") on 10/12/2010 (See sworn statement of Mr Sisiolo filed 10/08/2018, Exhibit NS 16).
 - (iii) *Regulation 46* outlines the content of the report to be made by the supervising officer, about the misconduct allegations made against the alleged culprit public officer.
 - (iv) *Regulation 47*, the Permanent Secretary ("PS") for MPS may make further enquiries deemed necessary and if the PS considered there was misconduct, he/she will inform the concerned officer in writing of the charges of misconduct made against him.
 - (v) *Regulation 48*, require that the accused misconduct officer shall have 7 days to respond to the charges or be interviewed if he wished and a report of any interview shall be placed on record and a copy sent to the officer accused of misconduct.
 - (vi) *Regulation 49*, the PSC may in serious misconduct cases or where it is not satisfied that all the facts of the case has been established, appoint a Board of Inquiry.
 - (vii) *Regulation 50*, the Board shall take evidence from all parties concerned including the officer accused of misconduct. The misconducting officer will be given opportunity to cross examine witnesses that gave evidence against him in the

course of the Board's investigation. The procedure of the Board is very much similar to the court process of fair hearing, where allegations are raised against the misconduct officer, investigations made, evidence produced by the Board against the misconduct officer and the misconduct officer will be given opportunity to cross-examine the Board's witnesses or comment on documentary evidences, the Board put against the misconduct officer.

- (viii) *Regulation 51*, the Board shall supply a report to the PSC through the PS for MPS about the facts established and recommend any changes to the terms of or scope of the charges made against the officer. If the PSC accepts any changes the concerned officer shall be informed in writing by the PS for MPS.
- (ix) *Regulation 57*, where the PSC or officer exercising delegated powers is satisfied that any act of misconduct against a public officer has been established warranting punishment, the PSC or officer exercising delegated powers will impose penalties stipulated in *Regulation 57*, including the punishment of dismissal.

Issue Number 2 – Did the defendant breached Mr Maui's contractual constitutional right to natural justice or right to fair hearing; when PSC invoked the disciplinary process provided in the PSC Regulations 1998 to dismiss Mr Maui?

- 10. **10/12/2010** – A report from the PS for MDPAC containing comprehensive details about Mr Maui's alleged unauthorised expenditure and insubordination was given to PS for MPS. The comprehensive report is at **Exhibit NS 16** of Mr. Sisiolo's sworn statement ("ss) filed **10/08/2018**¹. The report contained a cover letter, 9 pages of detailed report and documentary evidences on unauthorised spendings – request memorandum for lap top computer from Maui; proforma invoice from EN Technology limited; Requisition; General payment voucher and Local purchase order, allegedly reflecting unauthorised payments.
- 11. **2/2/2011** – The PS for MPS acted on the report from the PS for MDPAC and issued a 2 pages letter to Mr Maui containing 5 charges at **Exhibit NS 17** for breach of public service rules:-
 - (i) **Charge 1** – unauthorised facilitation of spending/expenditures from head 486-1229-5799 at the MDPAC.
 - (ii) **Charge 2** – dishonest payments to EN Technologies for computers totalling \$395,476-00 without approval from the PS for MDPAC.
 - (ii) **Charge 3** – Insubordination, in that Mr Maui disobeyed instructions from his PS Supervisor for the MDPAC.
 - (iii) **Charge 4** – Absence from duties without authorisation.

¹ Mr. Sisiolo did not turn up at trial to be cross examined despite due notice given. Court was not prepared to adjourn trial because this was a 2015 matter.

(iv) *Charge 5* – mismanagement of funds under Head 486-1229-5799.

12. **8/02/2010** - Mr Maui responded to the 5 charges by letter dated **8/02/2010** - See **Exhibit NS 18**.
13. **9/3/2011** – PS for MPS issued a show cause letter to Mr Maui reflecting the same content of the letter of **2/2/2011**, seen at **Exhibit NS 21**. Show cause letter repeats briefly the same 5 charges already made known to Mr Maui by letter of **2/2/2011**. This time the brief letter has one page only as opposed to the 9 pages of the same charges contained in the previous letter of **2/2/2011**. Mr Maui again responded to the charges by letter dated **2/5/2011**, addressed to the PS for MPS. By letter dated **19/5/2011**, the PS to MPS advised Mr Maui of his dismissal.
14. The PS for MPS advised that he was acting to dismiss Mr Maui under delegated powers. So far as the Attorney General’s submission is concerned, Mr Maui was given two opportunities to respond to the charges against him. And Mr Maui responded twice. So; Mr Maui’s right to be heard or *right to natural justice* was satisfied by MPS.
15. But that is not all. For the evidence by Mr. Sisiolo shows something very different had happened in the process and procedure the PS for MPS employed to deal with Mr Maui’s alleged misconduct report. Mr Sisiolo explained briefly in evidence how the then PS for MPS handled Mr Maui’s disciplinary case. At paragraph 30 of his ss, current PS for MPS, Mr Sisiolo said Mr Maui was dismissed after the Professional Standards Unit (“PSU”) from the MPS concluded their investigations, with the decision to dismiss coming from the Chairman of PSC.
16. From this piece of evidence; it was clear that the PS for MPS did not dismiss Maui². The Chairman of PSC dismissed Mr. Maui. From this piece of evidence, what I can imply from the whole evidence is that when the PS for MPS received the misconduct report from the PS for MDPAC, the PS for MPS chose to utilise *Regulation 49* of the *1998 Regulations*. That is to say the PS for MPS saw that the allegations were serious misconduct. And PS was not satisfied that all the facts of the case had been established. So; the said PS appointed a Board of Inquiry to do further investigations into the allegations of misconduct against Mr Maui. The Board of Inquiry is the PSU, in the MPS.
17. At that moment, the PS of MPS should ensure full compliance with the procedure for discipline provided in *Regulation 50*. That is to say the PSU should take evidence from all parties concerned including Mr Maui’s own evidence. The PSU should then give audience to Mr Maui. Mr Maui should cross examine any witnesses who gave evidence against him in the course of the PSU’s investigations. Mr Maui should also comment on any documents gathered from investigations made against him. As noted above at paragraph 10, there were many documents given to the PS for MPS supporting the allegations against Mr Maui. The PSU may have gathered more documents from its own investigations. So; the PSU should conduct something like a court hearing with Mr

² However, at Exhibit NS 23, of Sisiolo statement, the dismissal letter came from PS Avui of MPS. Whether dismissed by PS for MPS or Chairman of PSC, it does not make any difference, to my finding on breach of *right to fair hearing*; after PSU was appointed as the Board of Inquiry.

Maui present either himself or a trade union representative to cross examine witnesses and or comment on documents.

18. Following that, the PSU should report to the PSC through the PS for MPS about the outcome of their investigation. It is normal for the PSU to make recommendations. And the PSC will then take appropriate measures to discipline Mr Maui, including dismissal. If that was the case, then you can comfortably say Mr Maui had a fair hearing in the disciplinary process employed to deal with his reported misconduct allegations.
19. Here the PS for MPS opted to appoint the PSU. The PSU had carried out investigations one sided, because there is no evidence that Mr Maui appeared before the PSU in a court like manner hearing. And the PSU did not hear Mr Maui's side of the story. It seems the PSU relied mainly on documents and statements or witnesses it had before it that includes Mr Maui's responses to the charges and his PS's report and documents supplied. That information should become PSU's case against Maui. The PSU should have a report from PS for MDPAC (with documents), charges laid by PS for MPS, other documents because it has carried out investigation into the report. Then a court like hearing should take place under *Regulation 50*.
20. Submissions by Attorney General that charges were made twice and Mr. Maui responded twice (*right to fair hearing* afforded) would have merit, if the PSU was not appointed to carry out further investigations. Now that the PS for MPS had decided to appoint a Board (the PSU) he could only dismiss after the PSU had made further investigations, hear Mr Maui and then recommend a decision to PSC. Up to the time when, the PS for MPS appointed the PSU to do further investigations and when the PSU took over investigatory role, everything that the PSU had in its custody were all allegations (report from PS MDPAC, documents supplied by the reporting PS, charges, other documents that may have been collected by PSU and witnesses interviewed during investigation). Those allegations could only be substantiated, if and only, when the PSU conducted a court like manner hearing under *Regulation 50*, whereby Mr. Maui would have the opportunity to challenge the allegations. That did not happen. What happened was that PSU completed the investigation, forwarded it to the Chairman of PSC or PS of MPS and the Chairman of PSC or PS for MPS made the decision to dismiss Mr. Maui by letter dated **19/05/2011**. I am satisfied that the Chairman of PSC and or the PS for MPS did not follow lawful procedure and requirements as per the *PSC Regulations 1998*, when they dismissed Maui from public service. That was a clear breach of Maui's term of contract which require that the PSC must not dismiss Mr. Maui unheard. In other words, Mr. Maui's *right to natural justice* was violated or Mr Maui was denied procedural fairness and hence a breach of a term in his contract (*right to fair hearing*).

Issue Number 3 – Is Mr. Maui entitled to damages now that his right to fair hearing under contract was violated?

21. Counsel have not covered in submission liability for damages arising from breach of contract - *right to natural justice* (a term of Mr. Maui's contract). I should first hear liability for damages either in contract law or constitutional law or both, in the circumstances, where there was breach of "contractual constitutional right" of a public service employee. Counsel have cited case law authorities on Judicial Review Claim remedies, not on remedies for breach of contract and consequential damages. Court and

Counsel have not really focussed on liability for damages under contract and or the Constitution. Court will still need to hear submissions on liability for damages before taking the next step of assessing damages.

The Law

22. *Waroka case*³, as early as 1990's made some fundamental pronouncements on important considerations for PSC to consider, when dismissing public officers. The set of facts and remedies sought are very different from the present case. However; the important considerations that the Court laid down in *Waroka*, echoes well, valid and relevant in terms of adherence to legal requirements for dismissal of public employees; as per the *PSC Regulations 1979* (at present *PSC Regulations 1998*). The important considerations, or legal requirements, *Waroka* bring to our jurisprudence are: -

- (i) PSC has power to discipline public employees but must follow proper procedure, as per the *PSC Regulations 1979* or at present *PS Regulations 1998*.
- (ii) PSC employee must not be dismissed, until he/she has had an opportunity to answer to the allegations against him or her. The dismissal authority (PSC) should hear the dismissed employee's responses, before dismissal.
- (iii) PSC employees had a *right to fair hearing (right to natural justice)* – not to be dismissed unheard. Fair hearing or natural justice is a right conferred by law – common law right, given re-enforcement in the Constitution (*Section 76 (b), Schedule 3, 2 (1) and (2) read with Section 116 (1) of Constitution and PSC Regulations 1979 (now Regulations 1998)*).
- (iv) Allegations should never be the basis of terminating a PSC employee, unless they are substantiated. The process by which allegations are substantiated is by hearing the “accuser” and the “accused”, an elementary principle of natural justice as accepted and followed in a free and democratic society.
- (v) Termination of PSC employee, should not be taken lightly. For termination will affect the officer's right, status and livelihood of the officer and his/her dependants.

23. Mr Waroka was seeking reliefs inter alia for declaration that his dismissal was unlawful, ultra vires and so null and void. Present case, Mr Maui is seeking declaratory reliefs for breach of contract and damages for breach of contract. In *Waroka*, the Court held that his termination was unlawful for breach of his *right to fair hearing (right to natural justice)*. In this case, I concluded above that the PSC breached a term of Mr Maui's contract (*right to fair hearing or right to natural justice*). So; in the final analysis, in the scheme of things, as aforementioned discussed, Court will conclude that Mr. Maui's termination was unlawful as it lacked procedural fairness under the *PSC Regulations 1998*. Court will make declaratory orders on the 3 issues identified for this trial as follows: -

23.1 Right to fair hearing (right to natural justice) is a term of Mr Maui's

³ *Waroka –v- Habu (1992) SBHC 78; HCSI-CC 41 of 1992 (11th June 1992)*.

contract.

- 23.2 Mr Maui's contractual right to fair hearing was violated in the disciplinary process employed to dismiss him and hence a breach of his contract.**
- 23.3 Court will still hear arguments on liability for damages or compensation prior to any assessment of damages.**
- 23.4 Cost against the defendant on standard basis to be assessed, if not agreed.**
- 23.5 Mention on 6th December 2022, at 9:30 am.**

