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IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU0044 OF 2000S
(High Court Civil Action No. HBJ0016 of 1998s)

BETWEEN:

SUSANA TUISAWAU

Appellant

AND:

FIJI INSTITUTE OF TECHNOLOGY COUNCIL

Respondent

Coram: Hon. Sir Mari Kapi , Presiding Judge
Hon. Robert Smellie, Justice of Appeal
Rt. Hon. John Henry, Justice of Appeal

Hearing: Thursday, 8th August 2002, Suva

Counsel: Mr. I. Fa for the Appellant
Mr. J. Apted for the Respondent

Date of Judgment: Friday, 16th August, 2002

JUDGMENT OF THE COURT

The appellant is described as a highly qualified lecturer and educator. In 1996 she was employed by the Fiji Institute of Technology as Head of the Centre for Professional Development. In late 1997 she applied for an advertised position with the Institute as Associate Director (Academic). On 10 December 1977 she was offered the position in a letter of that date. She accepted that offer by way of an internal memorandum of the same date. On or about 14 May 1998 the appellant was sent a written form of contract, outlining the terms and conditions of her intended employment as Associate Director. The contract stipulated that the term of the contract would commence on 18 May 1998, and end on 29 July 1999, "the date on which you reach 60 years of age." The appellant was concerned at the short duration of the contract, and raised the issue with the

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respondent Council. The Council was not prepared to extend the term of the contract to a three year period as sought by the appellant, and ultimately after further representations and the exchange of correspondence, the Council on 11 June 1998 withdraw its offer of employment.

On 4 August 1998 the appellant applied to the High Court for leave to seek judicial review of the Council's decision of 11 June 1998 to withdraw its offer of employment.

The application was opposed, but on 27 May 1999 leave was granted.

The substantive application for judicial review was filed on 24 June 1999, and sought the following:

> *(a)* ***AN ORDER FOR CERTIORARI*** *to remove into this Honourable Court the said decision of the respondent made on or aobut the 11th of June 1998 to withdraw from the Applicant its offer of the position of Associate director into this Honourable Court and the same be quashed.*
>
> *(b)* ***A DECLARATION*** *that the respondent acted unlawfully in considering the fact that the Applicant would turn 60 during the tenure of her contract as a reason for the Applicants ineligibility for the position of Associate Director offered to her by the Respondent.*
>
> *(c)* ***A DECLARATION*** *that the Respondent had exceeded its jurisdiction in withdrawing its offer to the Applicants for the position of Associate Director of the Respondent on the ground that she would turn 60 in the course of her contract."*

It also sought damages and costs.

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In a judgment delivered on 7 June 2000 the application for judicial review was dismissed by Byrne J. The Judge traversed and rejected what were the four primary grounds relied upon by the appellant at trial as justifying quashing the decision of 11 June 1998, namely bias, unreasonableness, unlawful discrimination, and legitimtae expectation.

In this Court those same four grounds were again propounded on behalf of the appellant. Counsel however also presented submissions on a point not raised in the High Court nor specified as a ground of appeal in the Notice of Appeal - namely that the Fiji Institute of Technology Decree of 1992 was unconstitutional. The Decree established the Council, and defined its powers. Mr Fa for the appellant accepted that there were serious difficulties in the way of this Court dealing with such a constitutional issue which had not been raised in Court below. We are satisfied it would be quite inappropriate for us to do so, and we accordingly declined the invitation to give consideration to the issue in the context of this appeal.

As earlier stated, the only decision of the Council which is under challenge is its withdrawal of the offer of employment conveyed to the appellant by letter dated 11 June 1998. It is therefore necessary at the outset to identify the offer which was being withdrawn. Mr Fa contended that it was, or at least included, the letter of 10 December 1997 which reads:

> *"Dear Mrs. Tuisawau*
>
> *Re: Offer for Contract Employment*
>
> ***Thank you for having taken the time to attend the subsequent interviews held for the position of Associate Director (Academic).***
>
> ***We are pleased to inform you that the Council of the FIT has unanimously agreed to offer you the position of Associate Director (Academic) for the Institute.***

The Director will discuss with you the specific details related to this offer of contract employment.

We would be grateful if you could formally indicate your acceptance of this offer, as early as possible, to enable us to formalise your appointment.

We look forward to hearing from you."

That letter followed a discussion which the then Director of the Institute, Dr. Harre had with the appellant. The substance of the discussion is contained in a later memorandum prepared by Dr Harre.. He advised the appellant that she was to be offered the position in question on terms and conditions which had been offered to other Senior Managers. A salary of $42,500 was nominated, and Dr. Harre said that because the appellant would attain 60 years of age within the normal 3 + 3 year contract period, she may need to discuss further the term of the contract with the Council . He also expressed the view that it would be unacceptable for her to continue holding senior office in the Union to which she belonged.

It is impossible to regard the letter of 10 December as an offer the acceptance of which would create a binding contract. It expressly stated the need to discuss specific details of the contract of employment. We doubt the letter can be coupled with Dr Harre's earlier discusison with the appellant because the power to employ staff is vested solely with the Council under s.5(b) of the Decree. The Director has power to recommend appointments, but that in no way binds the Council. That the parties accepted there was as at December 1997 no binding contract of employment is made abundantly clear by the subsequent correspondence. On 21 May 1998, the Fiji Teachers Association on behalf of the appellant wrote to the Council registering disappointment on a particular aspect of the contract of employment "just recently offered to the appellant." The appellant had earlier on 18 May 1998 advised the Council that she wished to be represented by the Association in "negotiating the the terms and conditions of my

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contract for the post of Associate Director." She referred expressly to the written document of 14 May. On 5 June 1998, the appellant sent a memorandum to the Council complaining of the denial to her of representation regarding the new contract, and noting that she had not as at that date been appointed as Associate Director. In her first affidavit the appellant noted her concern and dissatisfaction with the terms and conditions of her proposed contract of employment in relation to the term of the contract, and in her second affidavit she confirmed that at no stage was the contract period negotiated.

All this points inevitably to the conclusion that the offer withdrawn on 11 June 1998 was, and could only have been the offer contained in the written form of contract dated 14 May 1998.

Even if it were possible to read the letter in conjunction with Dr Harre's discussion, the essence of that combination is that no more was made than a promise to offer the appellant employment as Associate Director at a salary of $42,500, on usual terms and conditions applicable to senior management, but with the caveat that the duration of the contract may need to reflect the fact that the appellant would attain 60 years of age within the relatively near future. Such an offer was in fact forthcoming, and was contained in the form of the contract dated 14 May 1998 which was sent to the appellant. The reality of the situation is that that was the only offer which could be withdrawn - nothing else, including the letter of 10 December, was capable of acceptance so as to create a binding contract. Re-instatement of that offer is devoid of practical value to her, because it contains a provision which is unacceptable.

But even if the matter can be looked at more broadly, and the letter of 10 December can be said to be included in the withdrawal of 11 June and the general offer (on terms yet to be finalised) is reinstated, the appellant faces insurmountable difficulties. As noted, her only challenge is to the validity of the wihdrawal, not to the attempted imposition of any particular terms or conditions - they were all, including the duration provision, imposed by the latest on 14 May 1998. Those decisions did not feature in the

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leave application nor in the substantive review application.

It is clear beyond doubt that the decision to withdraw the offer of employment was based and based solely on the appellant's refusal to sign the contract in the form submitted to her. Each of the four grounds relied upon as vitiating the withdrawal is based on the age 60 limitation. It is impossible to say that the question of that limitation could in any way have impacted on the decision to withdraw the offer. Under each heading, Mr Fa had to come back to what was the real thrust of the complaint, namely the imposition of the age 60 "cut off" provision. It was that provision which led to the appellant's refusal to sign, and that refusal in turn led to the withdrawal. There is no proper linkage between the imposition of the term and the withdrawal of the offer so that any vitiation of the former could impact on the latter. We repeat, the decision to incorporate that provision has never been under challenge in this proceeding. That may well be, as Mr Apted contended, because the time limitation on seeking leave to review that decision had passed prior to the commencement of any proceeding.

For the sake of completeness, we turn now to consider the factual background to the four bases relied upon to support judicial review.

The first is unlawful discrimination. It was submitted that to impose a cut off directly related to the appellant's age was unlawful because it infringed the Constitution. Mr Fa relied upon s.38(6)(d) of the 1997 Constitution,but as Mr Apted pointed out that provision did not come into force until 27 July 1998, which was after any of the decisions in question. The 1997 Constitution did not have retrospective effect, and the events in question could only be covered by the 1990 Constitution. Section 16 of the latter defined discriminatory conduct, age not being included in the prohibition against affording different treatment to different persons. Mr Fa's alternative submisison that the age restriction was "potential" racial discrimination has no substance. Accordingly the imposition of the age restriction to the duration of the intended contract was not unlawful

discrimination. No source other than the Constitution was suggested as a basis for declaring the decision an unlawful discrimination.

The second basis was a plea of the so-called Wednesbury unreasonableness principle. We agree with Byrne J. that the decision to limit the duration of the contract to when the appellant attained 60 years of age could not possibly come within this principle. It is clear that the cessation of employment at 60 years of age was a general principle, and indeed recognised by the appellant's own union.

The third basis was a claim of legitimate expectation. That principle too can have no application to the present facts. Byrne J. put the matter succinctly when he held that the only expectation which the appellant could properly have had was one that she would be employed as Associate Director but on terms and conditions to be offered by the Council. The problem over her age was advised to by Dr. Harre prior to the receipt of the letter of 10 December, and the appellant was well aware that the problem would have to be resolved by the Council.

The fourth basis was a claim of bias. Again it is impossible to bring this concept within the factual situation. There was simply no evidence that the Council was biased, either actually or apparently, against the appellant. On the contrary, it was prepared to offer her employment. The fact that expatriate persons may have been employed after attaining 60 years of age in circumstances where no suitable local applicants were available, or even that other local employees have continued to serve after

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that age, cannot possibly constitute legal bias.

For the above reasons we are satisfied that the appeal must fail, and it is accordingly dismissed.

The respondent is entitled to costs which we fix at $1,500, together with disbursements to be fixed by the Registrar.

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Hon. Sir Mari Kapi, Presiding Judge

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Hon. Robert Smellie, Justice of Appeal

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Rt. Hon. John Henry, Justice of Appeal

FIJI COURT OF APPEAL

Solicitors:

Messrs. Fa and Company, Suva for the Appellant
Messrs. Munro Leys and Company, Suva for the Respondent

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