

IN THE STATUTORY TRIBUNAL, FIJI ISLANDS
SITTING AS THE EMPLOYMENT RELATIONS TRIBUNAL

Grievance No 146 of 2011

BETWEEN: FIJI NATIONAL PROVIDENT FUND

Employer

AND: STEPHEN HALLACY

Worker

Counsel: Ms S Saro, for the Employer
Mr P Howard, for the Worker

Dates of Hearing: Wednesday 16 January 2012; Tuesday 24 January 2012;

Date of Judgment: Friday 27 January 2012

JUDGMENT

**TERMINATION OF EMPLOYMENT CONTRACT – Section 28 Employment Relations Promulgation 2007 –
Presumption of New Contract – Notice provision; variation to existing terms of fixed contract**

Background

1. The Worker entered into a contract of employment with the Employer, on 28 September 2007.
2. The contract of employment was for a fixed period of three years, that other than in the case of poor performance or serious misconduct, was subject to a three month notice provision.
3. Two days prior to the expiration of the contract, the Employer offered the Worker an extension of his contract for a further one month period. It was the case that during

this time, the Employer was in the middle of conducting a recruitment process, of which the Worker was an Applicant. The rationale for the extension of time, was to allow the recruitment process to conclude.

4. Some time on or around the expiration of that one month period, the Employer offered the Worker a further two month extension of his contract. Again, implicit within that correspondence was the fact that the Employer was seeking an additional period in which to conclude its recruitment process.
5. Several days prior to the further expiration of those two months, the Employer in anticipation of the final day of work for the Worker, wrote to the Worker advising him that as a decision had been taken not to complete the recruitment process and fill the subject position, no further contract extension would take place.¹
6. The case of the Worker is that he was entitled to three months notice of termination, as a result of the extension of his contract of employment and the fact that this provision existed in the original contract document. To that end, he relies on the language of the Employer when offering the extension that states:

“All terms and conditions of your employment remain unchanged.”²

7. In addition, by virtue of the manner in which the employment contract has come to an end, the Worker claims additional compensation for humiliation, odium, contempt and lack of employment/revenue earning.³

¹ Even though the language is not that explicit, the intention of the communication was quite clear and unambiguous.

² The presumption that is claimed here, is that if all terms and conditions are to remain, so too should the three month notice provision at Clause 31.

³ **There is also one day’s outstanding pay calculation that was not paid to the Worker** at exit, though it is understood that the Employer concedes this apparent mistake.

The Initial Three Year Employment Contract

8. The employment contract between the Employer and Worker is a 15 page written document.
9. The contract period is for three years. In accordance with Clause 2 ***Contract Amendment***, the contract may be varied at any time by mutual agreement between **the Board or the Chief Executive and the Worker, “recorded in writing, signed and sealed on behalf of the Board.”**
10. The evidence of the Worker in relation to the way in which the initial contract operated, is quite clear. He says that two days prior to its expiration, he had an expectation that it would come to an end. And according to his evidence, in the absence of anything else, that he would accept that position.
11. I presume that Clause 2 of the Contract was also intended for situations where the parties sought to extend the duration of the contract.⁴

Implications of the First and Second Extension Letters

12. There are several issues that flow from this first offer by the Employer to extend the duration of the contract period. In the first place, was this envisaged within the terms of the original contract and if so, did the parties comply with the terms relating to such extension? Secondly, were there any statutory forces that shaped the way in which the extension period should apply?
13. Counsel for the Worker, argues that there are implications arising out of the way in which the offers for extension took place. He says that given the language of the Contract Amendment provision within the original contract document, that any

⁴ Though equally I accept that it could be the case, that an extension sub-clause could have worked in tandem with the termination or notice provisions. There was no evidence put before me, as to what was the intention of either party in relation to this clause, prior to entering into the original agreement.

amendment to the duration of the contract between the parties required the document to be in writing and signed and sealed on behalf of the Board.

14. I am not satisfied that the absence of such formalities renders the variation between the parties void.⁵ As the final page of the original three year contract reveals, the apparent intention of the parties upon entering into the initial three year contract, was that the document would have affixed to it, the seal of the Employer. There is no evidence in the materials that this took place.
15. If that is so, my sense is that the parties have not seen such a formality or its non-adherence, as being a sufficient issue to otherwise displace the practical effect of their conduct.
16. The fact that the parties carried out their obligations under that contract for three years, without such formality, is evidence of that point.
17. On that basis, I am satisfied that nothing turns on that point, nor any prejudice incurred upon either party as a result.

Effect of Section 28 of the Employment Relations Promulgation

18. The more concerning impediment that is raised by My Howard, relates to the affect of Sections 28 and 29 of the Employment Relations Promulgation 2007.

19. Those provisions read as follows:

Presumption as to new contract

28. (1) Subject to subsection (2), each party to a contract is conclusively presumed to have entered into a contract for an indefinite duration.
- (2) Subsection (1) does not apply:
 - (a) to a contract for one fixed period which is expressed to be not renewable;
 - (b) to a contract for a fixed task; or

⁵ Though I accept in some situations it could be voidable.

(c) to a daily contract where the wages are paid daily.

- (3) If notice has been given in accordance with section 29 to terminate a contract for an indefinite period but the employer permits the worker to remain or the worker, without the express dissent of the employer, continues in employment, then unless the contrary is shown, the notice is deemed to be withdrawn with the consent of both parties.
- (4) For the purpose of subsection (3), the parties are, subject to section 29, deemed to have entered into a new contract for the same period and upon the same terms and conditions as those of the contract previously concluded, and the worker is deemed to have maintained continuity of employment for the purpose of any rights either pursuant to this Promulgation, any other written law or pursuant to a collective agreement, which may be applicable.

Provisions as to notice

29. - (1) Subject to subsection (2), a contract for an indefinite period may, in the absence of a specific agreement between the parties to the contrary, be terminated by either party-

(a) if the contract period is less than one week, at the close of a day without notice;

(b) if the contract period is one week or more but less than a fortnight or where wages are paid weekly or at intervals of more than one week but less than a fortnight, by not less than 7 days notice before the employment expires;

(c) if the contract period is a fortnight or more but less than a month or where wages are paid fortnightly or at intervals of more than a fortnight but less than a month, by not less than 14 days notice before the employment expires; or

(d) if the contract period is one month, by not less than one month's notice before employment expires.⁶

(2) The notice required under subsection (1) must be given in writing.

20. I have been unable to ascertain the policy rationale that underpins Section 28 (2)(a) of the Promulgation, although on its face, what it seems to do, is to provide protection and certainty in employment, for those who otherwise may be

⁶ I presume Section 29(1)(d) is meant to read, 'if the contract period is one month or more...'

coerced or **forced without consent, to accept a series of ‘rolling contracts’**, the effect which may be, for an Employer to avoid obligations that arise out of continuous service entitlement. It would also safeguard against individuals employed without any specific understanding as to the intended duration of their contract. Section 28, would in such cases, safeguard against an abrupt and/or unexpected termination of services.

21. In that respect, my impression of the factual scenario before this tribunal is a different one. There is certainly no evidence of any coercive conduct. The extension arrangements appear to be very freely entered into between the parties. The specific duration of the extended periods clearly set out and understood.

Findings in relation to Notice

22. While I am grateful to Counsel for the Worker in referring me to the judgment of *Fijian Teachers Association v President of the Republic of Fiji Islands*⁷, it provides no further insight in relation to this question.

23. Mr Howard’s argument is this. That the three year fixed term contract, is recognised at statute, to be an *indefinite period* contract, on the basis that it does not expressly state that the contract is not renewable.⁸ Thereafter, the subsequent amendments, though not strictly in compliance with the relevant **Contract Amendment** clause, do nothing to change that complexion.

24. So what is the effect of that scenario, when on 24 January 2011, the Employer had indicated to the Worker, that it would not conclude its recruitment process for

⁷ [2008] FJHC 59

⁸ While the contract does not expressly state that fact, on its face it seems implicit by virtue of the fact that the contract is for a fixed year period. In any event, I am prepared to view the contract before me as having not complied with that requirement.

the role of Manager Projects and would no longer seek to renew or extend his current contractual term?

25. In my mind, based on the assumption that the indefinite period contract was in place, the manner in which it is brought to an end, is governed by Section 29 of the Promulgation.⁹
26. Section 29 envisages that either the parties agree specifically to how and when the contract comes to an end, or they must follow the statutory notice provisions.
27. There is nothing that arises out of this factual scenario and based on the evidence before me, to suggest other than the fact that the parties had by their conduct and their contractual documentation (the three year contract, the extension letter dated 26 October 2010 and the extension letter dated 27 November 2010) entered into a specific agreement as to how the contract would come to an end. That specific agreement was, that with the affluxion of a fixed time period, the contract would come to an end. On both occasions the time period being of a relatively short duration.
28. By entering into the one month extension (a fixed period), the worker was on notice at the outset of that period, that the contract would terminate at the expiration of the one month. There was no evidence put to me, of any representations to the contrary.
29. To suggest otherwise, particularly in relation to the first extension period would produce an absurd result.¹⁰

⁹ The focus of the parties attention may not have been on the Promulgation per se, but there appears no doubt that there was no intention of importing into the extended short-run arrangements, any notice period.

¹⁰ **In the case of the Worker's claim, an extension of one month would require a three month notice period; simply an impossibility. Or even if one relies on the submission of Mr Howard by virtue of the notice requirement under Section 29 and assuming the absence of a specific agreement; how was the the giving of one month's notice to be issued? Should it be issued on the same day that the extension was also agreed to?**

30. **The final ‘specific agreement’ was entered into by the Worker, as evidenced by his counter signature to the extension offer dated 27 November 2010.**
31. It was only after receiving news that the Employer would not go through with its recruitment process and fill the position that the Worker had applied for,¹¹ the Worker then sought to claim his entitlement for notice, reliant on what he claims was a preserved entitlement.¹²
32. I do not accept that at the time the Worker entered into a further agreement with the Employer on 30 November 2010,¹³ that he had any expectation that he was entitled to a three month notice period.
33. It was the evidence of this witness that on the 26 October 2010, two days before the expiration of the original contract, that in the absence of anything else, his services would be no longer required and he would be entitled to no other **compensation arising out of the expiration of the contract’s term.**
34. I do not accept that when he was offered an additional **one month’s extension to the contract**, that he could possibly in those circumstances, say that the three month notice period would still apply. For a mature and experienced professional such as the worker is, that simply is not a credible position for this tribunal to accept.
35. The subsequent further two month extension takes the analysis no further.
36. One final issue I wish to comment upon, is the argument advance by the Worker, that his ultimate termination of employment¹⁴, was undertaken without the

¹¹ It is noted that the evidence of the HR Manager, Mr Tonawai was that the Worker was the top ranked candidate for appointment as a result of the interview process.

¹² The preserved entitlement being the three months notice provision contained at Clause 31 of the Original Contract document.

¹³ The date the Worker signed the second extension letter.

¹⁴ In my view it was simply the expiration of his extended contract.

lawful authority of the Employer, but at the behest of the Human Resources Manager, who it is claimed is at a seniority level that has no capacity to do such things. I reject any such proposition. On two occasions, the Worker acted upon the ostensible authority of the Manager Human Resources in extending his employment contract. The Worker acted and relied upon that authority to his own advantage. He cannot now claim that the Manager Human Resources did not have the authority to advise him that no further opportunities for contract extensions existed.

37. I reject the claim for a notice payment of three months, on the basis of the above.

Damages to Professional Reputation

38. There is evidence before the Tribunal of a breakdown in communications between the Worker and his then immediate supervisor, that I believe contributed to this grievance. The Worker was clearly upset by the fact that the Employer did not proceed with its recruitment exercise. There is no evidence before me though, that this decision was not taken legitimately.

39. Counsel for the Worker, acknowledged that the Worker was not claiming that he had been misled or misrepresented by the Employer as a consequence of its conduct.

40. Mr Howard also referred me to the decision of Central Manufacturing Company Ltd v Kant¹⁵, in which the question of the implied duties owed by an employer to an employee, as well as the shifting common law approach to unfair termination, was considered by the Supreme Court.

41. The focus of that case and the duties owed to the worker in that instance, are **distinguishable. That was a case where a worker's contract was brought to an end**, by the employer waiving the requirement for the worker to work through the notice period and also subsequently justifying its conduct, reliant on a series

¹⁵ [2003] FJSC 5

of misconduct allegations, none of which had been put to the employee at the time of the termination.

42. As I have already concluded, the case before me relates to the consensual contracting of parties. There is no evidence before me of any issue relating to conduct, reputation or hurt or humiliation that arises out of the conduct of the Employer.

43. While I accept that the Worker has not been able to find full-time employment since his services were no longer required by the Employer, the burden of that unfortunate situation should not be borne by the Employer. There is nothing in the conduct of the Employer that has been brought before this Tribunal, that would justify any basis for ordering compensation against it.¹⁶

44. I am not prepared to entertain any claim for compensation on that basis.

One Days Unpaid Salary

45. The Worker claims that he was not paid for his final day's pay on 28 January 2011.

46. This has been acknowledged by the Manager Human Resources, as a due entitlement and the worker should be paid that amount forthwith. I order accordingly.

Other Issues

47. It remains unclear to me, why the Worker should have pursued the claim for outstanding salary entitlements of one day, when such a matter could have been easily resolved. To that extent, the worker has incurred unnecessary legal costs relating to that aspect of his claim.

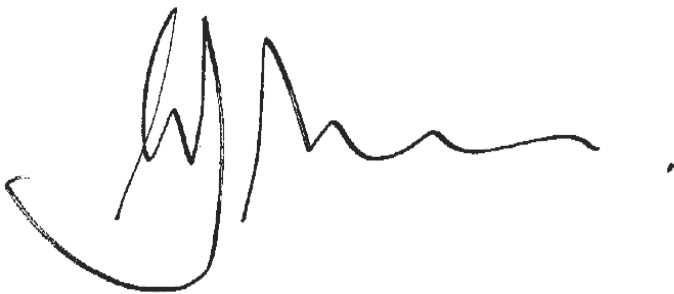
¹⁶ I nonetheless note, that the Worker's supervisor did not attend his farewell function. I equally note though, that the Worker made no effort to say goodbye to his supervisor prior to leaving on 28 January 2011, nor did he speak to that person in the final week of his employment.

48. I order that the Employer pay the Worker an additional sum for legal costs in the amount of \$150.00.

DECISION OF THE TRIBUNAL

49. The Tribunal orders:

- (i) That the claim by the Worker **for three month's base salary** in lieu of notice be dismissed.
- (ii) That the claim by the Worker for compensation for the loss of earnings and loss of dignity be dismissed.
- (iii) That the Employer pay to the Worker **within seven day's hereof, the amount of one day's salary equivalence**, including interest charged at 5% to the date of payment, for the pay entitlement not made to the Worker and otherwise due, on 28 January 2011.
- (iv) That the Employer pay the Worker within seven days hereof, an additional amount of \$150.00, being partial contribution to **the Worker's** legal costs for expenses unnecessarily incurred.

A handwritten signature in black ink, appearing to read 'A. See', with a large, stylized initial 'A' and a long horizontal stroke extending to the right.

Mr Andrew J See
Resident Magistrate