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

ERT Dispute No 99 of 2012

BETWEEN: **RATTAN SAMI**

Grievor

AND: **CARPENTERS FIJI LIMITED T/A MORRIS HEDSTROM**

Employer

Appearances: **Mr D Nair for the Grievor.**
Ms D Prakash, Carpenters Legal Unit, for the Employer

Date of Hearing: **Monday 16 September 2013**

Date of Decision: **Monday 7 October 2013**

DECISION

REFERRED GRIEVANCE - Section 194(5) Employment Relations Promulgation; Unfair and Unjustifiable Termination.

Background

1. This matter has been referred to the Tribunal from the Mediation Unit in accordance with Section 194(5) of the *Employment Relations Promulgation* 2007.

2. The claim of the Grievor is that he was unjustifiably and unfairly terminated by the Employer.

3. The matter was the subject of an earlier interlocutory application by the Employer, in which the Tribunal issued a decision on 24 April 2013.

Agreed Factual Matters

4. There does not appear to be any great difference between the parties as to the factual matters in dispute.

5. The Grievor had been employed under several employment contracts, as follows:

Term of Contract	Reason for Termination
22 April 1977 -2 November 2009	Initiated by Employer
9 November 2009 -9 November 2010	Expired and replaced on 4 March 2011.
10 November 2010 – 10 May 2011	Expired. Notified on 1 February 2012.

6. The focus of the grievance simply put, is whether the Grievor had been terminated with justification and fairness.

The Employment Contract

7. There is some speculation as to what was the employment contract in place at the time of the Grievor's termination.

8. The last written contract that was entered into between the parties was dated 4 March 2011.[1]

9. While this contract was signed by the Grievor on 10 March 2011, it had the intended effect of operating retrospectively, as it was intended to cover the period from 10 November 2010, that coincided with the expiration period of the Grievor's previous written contract.

10. It is of little import now, why it was the case that the contract had not been made earlier. It would seem though, that this was just an administrative oversight. In any event the appointment to the position of Chief Clerk was deemed to be "effective from 10 November 2010 to 10 May 2011".

[1] See Annexure 'AS8" of the Affidavit of Mr Avnit Sundar dated 5 July 2013.

11. The employment contract has incorporated by reference, further terms and conditions of entitlement as provided for within the *Master Agreement* made between Carpenters Fiji Limited and Burn Philp (South Seas) Co Ltd and WR Carpenter Group Salaried Staff Association.[2] That Agreement is valid and in force to the extent that it is not inconsistent with the Promulgation, in accordance with Section 265(9).

12. The status and relationship between the various terms and conditions that apply as a result, is somewhat uncertain. The Master Agreement appears to have been developed some 20 years prior to the *Employment Relations Promulgation* coming into force.[3] At Page 4 of the Grievor's Written Employment Contract dated 4 March 2011, under the heading Master Agreement it provides:

> *Your other conditions of employment will be in accordance with the Master Agreement and Company policies for employees of similar status[4] in the Company.*

13. The specific issues that flow out of the inter-relationship between these various entitlements will be canvassed later in this decision.

The Expectation of the Grievor

14. Mr Naird has provided the Tribunal with various case law pertaining to the expectation created by the worker, that his position would be continued, or at least that he would be consulted as part of the decision making process. Specifically he provided the following analysis:

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2 See Annexure "AS10" to the Affidavit of Mr Avnit Sundar dated 5 July 2013.

3 The copy provided within the Affidavit of Mr Sundar appears to have incorporated amendments and variations up to 31 August 1997.

4 I presume that the 'status' of the employee and which policies were to apply to him, were explained prior to or at the time of contract.

In the case of Dewa v University of the South Pacific [1996] FJHC 125; Justice Pathik stated:

> *'Here no doubt Dr. Dewa feels aggrieved by the manner in which the matter of the renewal of his contract was handled. He has therefore come to Court by way of judicial review as he was a member of the staff of the USP at the time when his contract was not renewed'. Justice Pathik quoted the decision of Sir John Donaldson Sir John Donaldson in R v East Berks Health Authority (1984) 3 AER at 429 who stated:*
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> *"The ordinary employer is free to act in breach of his contracts of employment and if he does so his employee will acquire certain private law rights and remedies in damages for wrongful dismissal, compensation for unfair dismissal, an order for reinstatement or re-engagement and so on…." .....*

> *In R v The Mayor and Commonalty and Citizens of the City of London ex parte Matson MATSON [1997] 1 WLR 765 CA it was held, inter alia, that:*
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> > *"fairness and natural justice required that the alderman elect should have been given reasons, because .... (g) the alderman elect's rejection was bound to cast a shadow on his reputation; (b) the giving of short reasons by the court of alderman would not impede the court in the exercise of its powers, but would, on the contrary, enable it to ensure that its decisions in every case are sound, manifestly just, and in the interest of the City"…..*
>
> *The following passage from the judgment of LEGGATT LJ in R v CIVIL SERVICE APPEAL BOARD ex parte CUNNINGHAM (1991 4 A.E.R. 310 (C.A.) at p.325 is apt:*
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> *"There are not here, as in certain contexts there are, any valid grounds for adhering to the general rule that there is no duty to give reasons. On the contrary, there are here particular grounds for departing from the general rule. Mr. Cunningham has a legitimate grievance, because it looks as though his compensation is less than it should be, and yet he has not been told the basis of the assessment. ... The cardinal principles of natural justice are that no one shall be a judge in his own cause and that everyone is entitled to a hearing. But the subject-matter of the decision or the circumstances of the adjudication may necessitate more than that."*.....

On the right to be heard before a person's livelihood is adversely affected, the Fiji Court of Appeal in the matter PSC v LepaniMatea (CA 16/98) upheld that:

"The requirement that a person be given a fair opportunity to be heard before a body determines a matter that affects him adversely is so fundamental to any civilized legal system that it is presumed that the legislative body intended that a failure to observe it would render the decision null and void. If there are no words in the instrument setting up the deciding body requiring that such a person be heard the common law will supply the omission".

15. Clearly all of these considerations are relevant. But first and foremost, the guiding provisions of the *Employment Relations Promulgation* 2007 are the most appropriate starting point in which to assess the statutory rights and entitlements.

The Argument of the Employer

16. The primary argument of the Respondent is captured within its Closing Written Submissions that relies on Section 40 (1) of the *Promulgation.* Section 40(1) provides:

Subject to section 41, a written contract is terminated –
(a) by the expiry of the term for which the contract was made.

17. The argument advanced by the Employer, is that the contract once expired, provided the Employer with a statutory right to bring it to an end as a consequence of that expiration.[5] The alternative argument is, that even if the written contract was deemed to no longer apply, the Grievor was caught by the terms of the *Master Agreement*[6] and by virtue of Clause 1 of that Agreement; his employment was capable of being terminated by the giving of one month's notice.

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[5] My reading of that provision is that there is no need for the Employer to bring it to an end, as the statute automatically terminates the contract.

[6] See Annexure "AS10" to the Affidavit of Mr Avnit Sundar dated 5 July 2013.

18. The Employer maintains that the Grievor had not been told that the contract once expired, would be renewed.[7]

Part V of the *Employment Relations Promulgation* 2007

19. The only way that this matter can be determined, is by the deconstruction of Part V of the Promulgation.

20. It is worthwhile commencing by looking at Section 21, that sets out the objects of Part V. Section 21 reads:

> *The object of this part is to describe contracts of service and to specify the circumstances in which such contracts may be oral and written, **how they subsist** (my emphasis) and are terminated.*

21. Part V of the Promulgation is thereafter broken up into two Divisions. Division 1 has been given the heading "General" and Division 2 – "Written Contracts". Though as Section 23(2) makes clear,

> *..unless the contrary intention appears, (Part V) applies to both an oral and written contract of service.*

22. To make the point, what this means, is that unless there is a contrary intention, the sections contained within Division 1, apply to both oral and written contracts.

23. Let us look at this more closely. Section 24 of the Promulgation is one such provision that applies to both types of contract. Section 25 is another. In fact, when reading each of those Sections, within Division 1, the only provision that directly

[7] Having said that, it would seem that at least on the last occasion that the contract dated 9 November 2009 had expired, some four months had passed before it appears to have been deemed necessary to restate or reissue a new employment contract. (That is, the 12 month contract had expired and no action appears to have been taken to rectify or address that situation until the issuing of the next contract dated 4 March 2011, that operated retrospectively from 10 November 2010).

expresses a contrary intention that it would not apply to a *Written Contract* is Section 35, where the heading reads, 'Presumption as to oral contracts'.

24. Thereafter Division 2 of the Promulgation exclusively deals with Written Contracts, in fulfilment of the objects of Section 21.

25. So let us return to the commencement of Part V and consider the applicability of the relevant provisions relating to this matter.

Presumption as to Period of Contract and When It Is Terminated

26. Section 27 of the Promulgation provides the framework for the presumption as to the period of a contract[8]. Ordinarily and "in the absence of proof to the contrary"[9], the period of contract is to be determined by reference to which wages are payable. So, an employee who is paid at intervals of less than a day or on a daily basis would be presumed to be engaged on a daily basis. An employee paid on a weekly basis, would be presumed to be engaged on that basis. An employee paid on a monthly basis, would be presumed to be engaged on that basis.

27. While no party has provided any argument that the contract of employment dated 4 March 2011, does contain "proof to the contrary" for the purposes of Section 27 of the Promulgation, I do want to raise the issue for the sake of clarity. In my view, the contrary proof to the presumption does exist. Clause 3 of Schedule D to the Master Agreement provides that salaries shall be paid fortnightly, every second Tuesday. Whereas, Clause 1 of Schedule C to the Agreement, states 'Except as hereinafter provided employment shall be by the month." This is an

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8 As Section 29 reveals, this concept of "period of contract" seems to sit within the notion of the duration of the contract or whether it operates within an "indefinite period".

9 As to what constitutes proof to the contrary, is unclear, but presumably the expressed words, whether orally or in writing would suffice. An example may be where a written contract specifically states: "The period of contract shall be an ongoing one, subject to termination in accordance with the Termination clause. You shall be paid on a fortnightly basis."

illustration of the proof to the contrary that the period of contract of the Grievor is not fortnightly, as would otherwise be the case, by virtue of Section 27 in the absence of Clause 1 of Schedule C.

28. But this does not make the contract a fixed term contract in the strict sense of the word, because it is clearly not that.[10] Nor does it make the contract at least at statute, a contract for a definite duration, as Section 28 reveals.

Section 28 of the *Employment Relations Promulgation*

29. Section 28 of the Promulgation provides:

> *(1) Subject to subsection (2), each party to a contract is conclusively presumed to have entered into a contract for an indefinite period.*
>
> *(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*
>
> *(c) to a daily contract where the wages are paid daily.*

30. There is no case being advanced that either the Grievor was performing a fixed task or a daily contract. On that basis, to defeat the presumption, requires the evidence of an expressed provision within the contract, indicating that it is not renewable. [11]

31. Insofar as the Affidavit of Mr Avnit Sundar, Manager Human Resources of the Employer, dated 5 July 2013 is concerned, there is no evidence of any such express provision. Neither the Contract dated 10 November 2009, nor the one dated 4 March 2011, contains any express provision that the contract is not

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[10] A fixed term contract assumes that ceteris paribus, both parties are entitled to the full benefit of the fixed term, or be paid appropriate compensation in lieu thereof. In this case, the contract had a notice provision that allowed it to be terminated by the giving of one month's notice.

[11] The silence of the parties without more, does not satisfy the requirement that there be an expressed term or condition (in this case, in writing, though perhaps that is not necessary, that the term of the contract, "is not renewable".

renewable.[12] On that basis and given there is no evidence of any oral expression, there is a statutory presumption that the parties have entered into a contract for an indefinite duration.

What is the Role of Section 40 of the Promulgation and Does it Defeat the Statutory Presumption of an Indefinite Period Contract ?

32. One of the challenges that is mounted by the Employer has as its focus, the role of Section 40 of the Promulgation.

33. There is a danger here of doing proverbially what is called "putting the cart before the horse". That is, to consider the work of the relevant Sections out of turn.

34. Section 29(1) of the Promulgation[13] sets out the basis by which a contract for an indefinite period comes to an end.

35. Firstly, the notice of termination must be in writing.[14] Secondly, in the absence of a specific agreement between the parties, the various time periods are given, that correspond with the deemed contract period.

36. As mentioned earlier, in the present case, the contract period is deemed to be monthly by virtue of the combined effect of Clause 1 of Schedule C to the Agreement and Section 27(1) of the Promulgation. The Employment Contract specifically states at page 3 and the Master Agreement at Clause 4 of Schedule C, that either party may terminate the employment by the giving of one month's notice. This is also consistent with Clause 29(1)(d) of the Promulgation, which is the statutory requirement in such a case.

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[12] The silence of the parties without more, does not satisfy the requirement that there be an expressed term or condition (in the case, in writing though orally would suffice) that the contract "is not renewable".

[13] Provisions as to notice.

[14] See Section 29(2).

37. That is how the contracts for an indefinite duration are to be terminated in all cases other than in the case of summary dismissal.[15]

38. The role of Section 40(1)(a) of the Promulgation is residual to this.

39. In the case of a contract that is not for an indefinite period (eg for a fixed period contract where it is expressed to be not renewable), the provision makes clear that it is brought to an end, without any further action of either party, at that time in which the term of the contract expires.

40. That is, there is no requirement for notice to be given by either side. It is automatically deemed that the contract is at an end, with the expiration of its term.

41. I cannot see how the Employer can seek to rely on this provision at all. There is no evidence whatsoever that the parties had accepted that the contract was at an end. No conduct to suggest otherwise. Neither is there evidence of any deliberate conduct that they thereafter sought to continue the employment relationship outside of that contract, but nonetheless on the terms that had been in place during the preceding period. Both parties appear to have acted as though the contract was on foot and even if the Tribunal's interpretation of the law was incorrect, at the very least[16] what we have is a situation where the terms of the Master Agreement remain. That is a monthly contract, capable of being terminated by the giving of one month's notice, though still subject to the

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[15] See Section 33 of the Promulgation and note too the relevant Clause within the Contract of Employment at Page 3. (I note that the Master Agreement reference at Clause 4 (ii) of Schedule C is obsolete).

[16] Without going into the finer details of whether the terms and conditions of the written contract would remain in place, in that case would be a much bigger task to analyse, but ordinarily the prima facie position would be that they would.

scrutiny inherent with the Promulgation that such termination, be both fair and justified.[17]

42. The statutory safeguards set out within the Promulgation, appear to have been in put in place to protect workers against the very type of case that this one appears to be. That is, where there has been administrative uncertainty or oversight. An employee reliant on a livelihood derived through the employment relationship, is entitled to more. Had the Employer sought to have brought the duration of the Grievor's employment to an end, by prescribing a specific expiry period, it was free to do so, providing that it expressly indicated that the period would not be renewed. Whether there are any legal considerations that flow from that course needs to be considered on a case by case basis.

What Is the Effect of the Master Agreement In Place?

43. While the various provisions such as Sections 162 and 164 of the Promulgation prescribe the requirements for a Collective Agreement's form and effect, the status of an Agreement, is a little unclear.

44. Section 166 (5) of the Promulgation provides:

> *The provisions of a collective agreement must be an implied condition of contract between a worker and an employer to whom the collective agreement applies.*

45. Such a situation distinguishes this relationship between contractual and statutory employment entitlements that may exist in other neighbouring jurisdictions.[18]

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[17] The Employer could hardly argue that the default position after 10 May 2011, was that a fixed period non-renewable contract was still in place.

[18] See for example, the treatment that has been given to this related question in the case of *Byrne v Australian Airlines Ltd* [1995] HCA 24 at [64] to [94].

46. In any event, the relationship between the effect of the application provision that is Section 164 and the specific provisions pertaining to Employment Contracts at Part 5 of the Promulgation, need to be explored.

The Master Agreement

47. I do wish to make some additional comments about the *Master Agreement Between Carpenters Fiji Limited and Burns Philp (South Seas) Co Ltd & WR Carpenter Group Salaried Staff Association* that came into force on 26 October 1977. As mentioned earlier, that agreement came into existence, approximately twenty years before the making of the *Employment Relations Promulgation* on 1 October 2007. [19]

48. It is noted that the Duration of the Agreement is provided for within Schedule J as follows:

> *This Agreement shall come into force on 1st July, 1997 and shall remain in force until 30th June, 1998 and thereafter until the expiry of six week's notice of termination has been given by either party.*

49. It would appear that neither party has given notice of their intention to terminate the Agreement by the giving of that six week's notice. That is, the Agreement remains on foot, despite the fact that some of its terms and conditions appear inconsistent with the Promulgation or simply out of date.[20] To impress the point,

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[19] See Promulgation No 36 of 2007.

[20] Note the effect of Section 265(9) of the Promulgation. I say this on the assumption that the Staff Association is a registered trade union of workers and therefore the Master Agreement is regarded as both a collective agreement and employment contract for the purposes of the Promulgation. (See relevant definitions at Section 4 of the Promulgation).

some are redundant[21] and some may even possibly be unlawful[22]. So where does that leave the Employer's argument in relation to the tenure of the Grievor's employment?

50. I note that at Paragraph 18 of the Affidavit of Mr Sundar, he states:

> *That the employer exercised its contractual right to non-renew the contract of the Grievor.*

51. That may be the case, but those contractual rights must still run sub-ordinate to the specific statutory prescription. If it is the case that the terms and conditions of the Master Agreement are regarded as either an implied condition of contract[23], or terms and conditions that are incorporated by reference,[24] or even if they had their own standing as an enforceable legislative instrument[25] , then at best the argument of the Employer is, that it had in place a 'monthly contract' that continued to be renewed, unless otherwise brought to an end by the giving of one month's notice.

52. This all seems rather convoluted. If it is claimed that the contract shall be by the month, with a termination provision that provides for the giving of one month's notice[26], then it would seem that this arrangement does nothing to defeat the presumption at Clause 28(1) of the Promulgation.

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21 For example, Clause 4 (ii) of Schedule C – deals with the Employment Act; the Annual Leave provision in the case of dismissal at Schedule F4 and Maternity Leave arrangements referenced at Schedule F8.

22 Such as the compulsory retirement age of workers at Clause 5 of Schedule C2.

23 By virtue of Section 166(5) of the Promulgation.

24 By express reference of the Agreement within the written contract document.

25 Which it doesn't appear that they do, by virtue of Section 166(5) of the Promulgation. Though if that were the case, contractually those terms would not then be incorporated into the written contract as they would stand alone.

26 See Clause 4 of Schedule C to the Master Agreement.

53. The implied condition imported into the contract, is not supported by any of the categories of case that are found at Section 28(2). The contract is not a fixed period non-renewable contract, nor is it for a fixed task, nor does it relate to a daily contract. The presumption is not affected by Clause 1 of the Master Agreement.

54. Of course then, the termination provisions set out at either Page 3 of the Contract dated 4 March 2011 and Clause 4(i) of the Master Agreement and/or Clause 29(1)(d) of the Promulgation, would thereafter apply.

55. The Employer would be perfectly free to bring the contract to an end, but it needs to do so now, having regard to the obligations that are imposed within the *Employment Relations Promulgation* 2007,[27] to ensure that the termination is both justified and fair.

Was the Termination Justified and Fair?

56. As previously discussed in *Nale's* case[28], while the *Employment Relations Promulgation* 2007 does not set out a statutory framework for how unfair dismissals within employment should be adjudged,[29] the Promulgation does nonetheless provide strong signposts that termination in employment (whether with or without notice, or with or without cause) should be undertaken fairly.

57. Consider for example the language at Section 230(2) of the Promulgation. The Tribunal and Court both have powers to remedy or resolve grievances that arise out of "unjustifiable or unfair dismissals". Yet these terms are not defined within Section 4 of the Promulgation.

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[27] Whether viewed directly or indirectly.

[28] *Nale v Carpenters Fij Ltd* [2012] FJET 3

[29] Compare and contrast for example the statutory framework contained at Part 3.2 of Chapter 2 of the *Fair Work Act* 2009.

58. Section 4 of the Promulgation defines the term "dismissal" to mean:

> *any termination of employment by an employer including those under Section 33"*

59. In the case of a written contract, for example, such dismissals would include, any termination of employment that is unilaterally initiated by the Employer, including termination arising under:-

- Section 41 (in the case of a worker's inability to fulfill the contract[30], or due to sickness or accident; and
- Section 33 (that deal with the circumstances in which summary dismissal is justified);[31] and
- Section 29 (in all other cases where termination is provided with notice).[32]

60. I regard this as a case of termination provided with notice.

61. As the Tribunal has previously indicated, it thereafter follows that for a dismissal to be justified, it would need to be capable of demonstration that it was just, right or valid; capable of being defended with good reasoning. A decision would be unfair, if it was harsh, unjust or unreasonable.[33] To be fair may include warning the employee that dismissal may result from conduct; notifying the employee of allegations made against her or him and giving that person a right to respond to any of the allegations or reasons otherwise advanced as to why the position should come to an end.[34]

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30 In my mind this would cover a wide range of circumstances dealing with capacity to perform.

31 It is unlikely that a dismissal would occur in the case of a Section 40 fixed term contract, where such contract had come to an end with the effluxion of time.

32 If these terminations were not to be included, so much would be clearer by their exclusion from the definition of "dismissal" at Section 4 and the avoidance of the use of the term termination within

33 Clearly there may on occasions be an overlap of the concepts and considerations.

34 Though it is noted that some of these considerations may not have been recognized at common law, prior to the Promulgation coming into effect.

62. So it would seem the intention of the Promulgation is to ensure that all terminations of employment are both justified and fair. Unlike the common law, the Promulgation does not just concern itself with the manner in which the dismissal was executed, but whether or not it was justified or fair as a substantive decision. A remedy for reinstatement would not be made available, if the role of a tribunal was only confined to the manner in which an employer treated a worker at dismissal and not whether or not, the decision to terminate was actually justified in the first instance.

Reason Provided to the Grievor

63. On this occasion, the Tribunal is advised that the sole reason for terminating the Grievor's employment was for the fact that the written contract of employment had expired. That may be a valid reason, if it was the case that the Employer did not want the work performed by anyone else for example, or if the role had come to an end, or even if it felt that the Grievor was incapable of undertaking the role.[35]

64. There is a lack of evidence before the Tribunal on this point. At one level, the Tribunal is to assume that the business reasons for bringing the role to an end were legitimate, but the Employer appears not to want to fully disclose what those reasons are. I am of the view that the Grievor's personal contribution to the Employer over such a lengthy period of time, was not so irrelevant, that he did not deserve either some forewarning of his impending termination, or at least an opportunity to canvas whether or not there were any other possible roles or opportunities that he may be eligible for consideration in.

65. After all, the Grievor had committed 34 years service to the Employer. Surely, if it is not being alleged that he was either incompetent or unwilling to undertake his tasks, that he was entitled to some canvassing of the issues and exploration as to what may or may not be available.

[35] There was some suggestion made by Mr Sundar in cross-examination, that the Grievor did not possess the base educational qualification now prescribed for the role he occupied. Though it was also conceded that this was not the reason for termination, nor was that put to the Grievor prior to being terminated.

66. The Tribunal fully appreciates that the Grievor also could have very easily sought to enquire as to what his renewal prospects would be, prior to 1 February 2012. Despite the fact that there may have been a statutory presumption that his employment was to continue, the Grievor was also aware that he had been provided with a contract with a definite appointment period. The fact that this was the second one he had been given since 2009 and that the duration of these contracts were reducing in length, should have possibly alerted him to the notion that his ongoing tenure may have been in jeopardy. That is not to say that he still had no rights at law, but only that the Employer's conduct appeared to be wishing to bring the Grievor's time with the Company to an end.

67. The conduct of the Employer in my mind falls short of an enlightened employer in matters of human resource management. If there is no complaint of the worker's conduct, surely he was entitled to be treated in a different manner than he was.[36] In the circumstances, I can neither find the conduct of the Employer justified nor fair.

68. There is no evidence before the Tribunal that the Grievor's work role had been made redundant, nor that he was incapable of performing his tasks. The only reason that the Employer gives for his termination, is that the contract had come to an end. Unfortunately for the Employer, the statutory protections provided for within the Promulgation, require more. I find accordingly.

Remedy

69. I am not prepared to reinstate the Grievor.

[36] While I also note that Mr Sundar's Affidavit contains warning and disciplinary letters pertaining to previous roles held by the Grievor, none of those relate to his position as Chief Clerk and on that basis are not persuasive or influential in determining the present matter.

70. It seems that his continued employment following his termination and reinstatement in 2009, was not something that was going to be a sustainable arrangement.[37]

71. I note within the Master Agreement that there are several entitlements that would ordinarily be made available to an employee at termination. This includes the payment of any unused annual leave and long service leave [See Clause 2 (b) of Schedule F]. I anticipate the Grievor has been paid his full entitlements to these accrued benefits.[38]

72. Based on my calculations, the Grievor has worked for the Employer for 34 years and 9 months. Whether or not he had a reasonable and founded expectation that his employment with the Employer would continue, is hard to determine.[39] In any event, he is now without employment. Given the unique circumstances of this case, I intend to treat the matter more akin to redundancy, rather than a case of gross unfairness.

73. The Grievor should have been put on notice that his tenure was no longer certain, when the Employer sought to place him on a term appointment of 12 months duration and thereafter reduced the term of his next appointment to only 6 months. It seems, though there is no direct evidence to make this conclusion, that all was not well within the employment relationship.

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[37] While the issue of the Grievor's earlier reinstatement is not particularly relevant, from a longer term perspective, it is nonetheless suggestive of the difficulties that may on occasions be encountered in cases of this type.

[38] This decision is made on the assumption that he has. Of course the Grievor would be free to pursue any unpaid entitlements in the ordinary course.

[39] The discussions that gave rise to the reinstatement of the Grievor in 2009, would have been interesting in this regard.

74. While there has been a lack of candour in the conduct of the Employer in this regard, it still could have undertaken the task of termination with far more professionalism and courtesy than what it did. [40]

75. I believe that the Grievor is entitled to be paid a compensatory amount equivalent to that otherwise available as redundancy payment under Section 108 of the Promulgation. Though to make matters clear, I intend to award the Grievor the amount equivalent to 34.75 week's salary, consistent with the length of service.[41] That calculation is to be based on the salary at termination that equates to $271.90 per week ($9,448.55).

76. In addition, I believe that the Grievor should be entitled to some further compensation for the lost benefits that he would have received, had he continued on in his employment up and until his retirement.

77. On the basis that he had already served nearly 35 years worth of employment, I do not regard such an expectation as been farfetched or fanciful.

78. I will make provision for a further compensatory amount of 10 week's salary equivalence as a result of that lost benefit. ($2,710.00)

79. The Grievor's representative is free to make application to the Tribunal for costs, within 14 days.

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[40] A good test for human resource practitioners would be how they would like to be treated in the same circumstances.

[41] That is, I have not turned my mind to the effect of Section 108, in the case of entitlements otherwise claimed prior to the commencement of the Promulgation.

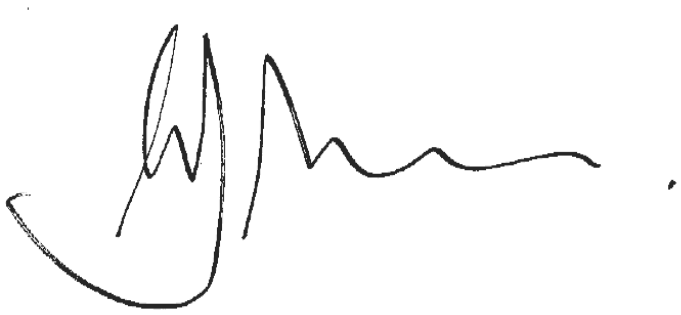
Decision

The Tribunal determines that:

(i) The Employer is to pay to the Grievor the amount of $12,158.55 within 21 days.

(ii) The Grievor's Representative may make application for costs within 14 days.

I order accordingly.



Mr Andrew J See
Resident Magistrate