IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:	**ERCA 07 of 2017**
BETWEEN:	**BSP LIFE (FIJI) LIMITED**
	APPELLANT
AND:	**LAWRENCE RAJU**
	RESPONDENT

Appearances:	*Mr. J. Apted for the Appellant.*
	Mr. N. Sharma and Mr. D. Nair for the Respondent.
Date/Place of Judgment:	*Wednesday 24 February 2021 at Suva.*
Coram:	*Hon. Madam Justice Anjala Wati.*

JUDGMENT

A. Catchwords:

Employment Law – the contract of the employee came to an end upon him reaching the retirement age-the employer relied on the retirement clauses in the Memorandum of Agreement and the Employment Contract – Employee filed a grievance under the ERA requiring the ERT to determine whether the actions of the employer was discriminatory given its practice that it continued to employ other workers who were subject to similar retirement clauses and had reached the retirement age and also whether the provisions on retirement lawful under s. 77(1) (d) of the ERA – the question on the appeal is whether the terms of reference before the ERT and the ERA gave it the mandate and the jurisdiction respectively to hear and determine whether the retirement clauses were unfair age discrimination provisions in that it breached the 1997 Constitution and the HRCA; whether the ERT is correct in its findings that s. 77 (1) (d) of the ERA had been impliedly repealed by the HRCD (now

the HRADCA); and whether s. 77(1) (d) of the ERA excludes parties from agreeing to a retirement age by an employment contract.

B. Legislation:

1. ***Constitution of Fiji: s. 44(1).***
2. ***The Employment Relations Act 2007 ("ERA"): ss. 77(1)(d); 110 (5); and 218(2).***
3. ***Human Rights and Anti-Discrimination Commission Act 2009 ("HRADCA): s. 38(1).***

Cause/Background

1. The appeal before me is by the employer. It seeks to challenge the decision of the Employment Relations Tribunal ***("ERT")*** of 28 March 2017. The finding of the ERT was that the dismissal of Lawrence Raju reliant on the retirement age clauses in the Memorandum of Agreement ***("MOA")*** and the employment contract is discriminatory. In its findings, which I will elaborate on further, the ERT stated that the retirement age clauses are unfair age discrimination provisions and cannot be relied upon to bring the contract of the worker to an end.

2. Mr. Raju had been employed by BSP Life (Fiji) Limited for some 32 years. He was given 3 months' notice of his retirement through which he was informed that his employment will come to an end on 30 November 2016

3. The letter of retirement, in its material part, reads:
   "As per conditions stipulated in the Collective Agreement, we hereby give you three month notice of impending retirement, the notice being effective from 30 August 2016.

   Your last day of work will be Wednesday, 30 November 2016. We will advise your manager of the logistics that will need to be completed prior to your retirement.

   As you will exhaust all your leave entitlements on 9 September 2016, management has also agreed to allow you to proceed on paid leave with effect from 12 September 2016 to 30 November 2016 to accommodate your need for further medical attention and recuperation.

Details of your retirement package are outlined in the attached schedule..."

4. The employee and his Union disputed the notice of retirement. The contention was that the employee's agreement was required to retire him, that other staff had worked beyond 55 years and that the employer should give him more than the *"normal retirement package"* because of his debt. The employer, however proceeded with its decision to retire him on 30 November 2016.

5. The employee then reported a grievance to the Mediation Services Unit on 21 November 2016. His grievance read as follows:

   "BSP LIFE is my employer for the last 32 years. They have advised me that they wish to retire me at the age of 55. BSP Life has allowed other employees to continue employment after reaching 55 years of age. I view my retirement as unfair and unjustified since I have already indicated to my line managers of my intention to continue my employment with BSP life during earlier discussions.

   I also view this as a form of discrimination based on section 77 of the Employment Relations Promulgation 2007.

   I seek my continuance of employment without any loss of pay and benefits from the date of retirement…"

6. It is prudent that I outline the relevant provisions of the collective and individual contract of employment pursuant to which the employer invoked the retirement age. They are:

   1. *Clause 17 (a) (i) of the MOA entered between the employer and the Fiji Bank and Finance Sector Employees Union on 8 June 2001. The MOA was registered on 1 August 2001; and*

2. *The employment contract dated 24 August 2010 between the employee and Colonial Fiji Life Limited* ***("CFLL")****.*

7. Clause 17 (a) of the MOA reads:

"(i) The employer may retire its employees in any category (salaried or service workers) or its employees in any category may voluntarily retire upon reaching the age of fifty five (55) years. Staff shall be given 3 months' notice of impending retirement.

(ii) The employer may at its own discretion re-employ such retired employees for a period not exceeding three years but not beyond the age of sixty of a retired employee. Such engagements shall be through a separate contract on such terms and conditions fixed for a period as mutually agreed between the employer and the Union."

8. The contract of employment reads as follows:

"Subject to the laws of Fiji, CFLL may terminate your employment by retirement upon your attaining the age of 55. You may also exercise the right to retire upon the attainment of this age…"

9. The grievance filed by the employee, as I see it, raises two separate issues. The first is whether the retirement was unfair and unjustified given the employers alleged action of continuing employment of other workers who had reached the retirement age and not applying the same to him when he had expressed his intention to continue with the employment.

10. The second issue before the ERT was whether the retirement age provisions were unfair age discrimination provisions under s. 77 of the ERA.

Issue Determined by the ERT

11. When the grievance was called before the ERT, it observed that the matter raised a legal issue which was whether the provisions of the MOA and the Employment Contract allowing for retirement at the age of 55 was unfair age discrimination.

12. The ERT was of the view that this issue should be decided first and that there was no need to call evidence to resolve the same. It was of the view that if the matter was to be resolved in favour of the employer, it might dispose the grievance without the need for an oral hearing.

13. The matter was therefore listed for preliminary hearing by way of submissions. The employee's position was that s. 26(3) of the 2013 Constitution of Fiji prohibited age discrimination and s. 77(1) (d) of the ERA did not allow an employer to impose a retirement age on a worker.

14. The employee also took the position that clause 17 (a) (i) of the MOA did not allow the employer to compulsorily retire the employee because the clause uses the word *"may"*. Since other workers had not been retired at that age, the employee in question was unlawfully discriminated by the employer.

15. The appellant's position was that it was entitled to retire the employee under the collective agreement and the individual contract and that the provisions of retirement was lawful under s. 77(1) (d) of the ERA.

16. The employer had further argued that s. 77(1) (d) was not affected by the 2013 Constitution since s. 173(2) and (4) of this Constitution does not allow any court to decide if s. 77 (1) (d) was constitutional. In any event, s. 26(8) of the 2013 Constitution said that a law which imposed a retirement age was not unfair discrimination. S. 77(1) (d) indirectly imposed retirement ages.

17. The employer also took the position that pursuant to the international law, retirement age under the collective agreements could be lawful and not amount to unfair discrimination despite the law granting protection against discrimination.

18. The employer had also submitted that the MOA was knowingly negotiated by the employer and the employee's union against the background of the 1997 Constitution so the Union had accepted the retirement age as fair. The employee had also later accepted the retirement age by signing the employment contract. The provisions therefore cannot be said to be unfair.

19. The employer had argued that the decision in the *Proceedings Commissioner, Fiji Human Rights Commission v. Suva City Council High Court Civil Action Number 0073 of 2004* did not apply because that case was decided under the 1997 Constitutional Bill of Rights which was applicable only to government and public bodies and officers. It did not apply to a private employer. That case was also based on equality non-discrimination section which had been abrogated at the time this issue was being decided. Different wordings are now in place.

Findings of the ERT/ Kernel Issues on Appeal

20. The ERT made a finding that the retirement clauses in the MOA and the employment contract were unlawful age discrimination provisions. In arriving at the conclusion, the ERT examined the retirement clauses in the MOA and the Employment Contract. Its findings were:

    1. *The MOA was registered as a Collective Agreement ("CA") under s. 34 of the Trade Disputes Act (Cap 97). Since the CA has been made under the law that has now been repealed, it was important to consider its status, having regard to how and when it was made and against the backdrop of age based anti-discrimination law that that was in place at the time, specifically having regard to the 1997 Constitution (Amendment) Act and the Human Rights Commission Act 1999* ***("HRCA")****..*

        a. *Clause 17 of the MOA was void ab initio as it breached s. 38 of the 1997 Constitution and the HRCA when in was made in 2001. In arriving at this conclusion, the ERT applied the decision of* ***Coventry J*** *in* ***Proceedings Commissioner, Fiji Human Rights Commission v. Suva City Council (supra).***

b. The Registrar of Trade Unions should have refused to register the MOA when it was presented to him under the Trade Disputes Act which is now repealed.

2. The Employment Contract also needed to be scrutinized having regard to the environment at the time it was made since the 1997 Constitution had be abrogated and the new ERA and the new Human Rights Commission Decree 2009 ***("HRCD")*** *(now the HRADCA) had come into effect.*

a. S. 77(1) (d) of the ERA had been impliedly repealed by the HRCD (now the HRADCA) so that it only allowed retirement ages to be imposed by law or administrative action or indirectly by a contract and not directly by a contract.

b. A contract which provided a compulsory retirement age could not in any case fall within s. 77(1) (d) of the ERA because the word "imposed" used in that section referred to "imposition by law" which suggested something compulsory and could not cover anything voluntarily agreed in the contract.

c. The retirement clause in the Employment Contract was inconsistent with the HRCD (now the HRADCA) and to that extent void. This clause was already void when it was made in 2010 so could not continue in force under s. 173 of the 2013 Constitution. S. 26(8) of the 2013 Constitution could not save the retirement clauses in the MOA and the Employment Contract as the provisions were already void in 2013.

d. The employer had relied on the Canadian cases which should not be followed in Fiji as the cases were decided under the Canadian legislation. That legislation is outdated and different from the Fijian provisions on retirement age. The ERT stated that it should follow the more modern approach set in the Australian and New Zealand legislation which contains provisions against the retirement.

e. The employer had not argued that the retirement age was not "unfair" under s. 26(7) of the 2013 Constitution.

21. It is against the findings of the ERT, that the employer appeals raising various grounds. I do not think that it is necessary for me to outline each and every ground of appeal raised by the employer.

22. To my mind the most important issues arising from the appeal are the following, determination of which alleviates the need to examine the remaining grounds of appeal.

    (i) Whether the terms of reference before the ERT gave it the mandate to determine whether the retirement clauses in the MOA and the Employment Contract were unfair age discrimination provisions in that it breached the 1997 Constitution and the HRCA?

    (ii) Whether the ERT had jurisdiction under the ERA to determine whether the retirement clauses in the MOA and the Employment Contract were unfair age discrimination provisions in that it breached the 1997 Constitution and the HRCA?

    (iii) Whether the ERT is correct in its findings that s. 77 (1) (d) of the ERA had been impliedly repealed by the HRCD (now the HRADCA) ; and

    (iv) Whether s. 77(1) (d) of the ERA excludes parties from agreeing to a retirement age by an employment contract.

Employees Position on Appeal

23. At the appeal hearing, the employees counsel conceded that the ERT had made an error of law in its findings that the retirement clauses in the MOA and the employment contract were unlawful age discrimination provisions. I must note that prior to the appellant addressing the court on all grounds of appeal, there was no indication by the counsel for the employee that the appeal was conceded too.

24. What the employee however desires is to have the grievance heard and determined on his allegation that the employers actions in retiring him was discriminatory in light of it

continuing to employ some retired workers but not him when he has expressed his wish to continue with the employment.

Determination

25. The first issue that I need to determine is w*hether the terms of reference before the ERT and the ERA gave it the mandate and the jurisdiction respectively to determine whether the retirement clauses in the MOA and the employment contract were unfair age discrimination provisions, having breached the 1997 Constitution and the HRCA.*

26. I have identified the terms of reference before the ERT. One of the issues that the employee had required the ERT to decide was whether the retirement clauses in the MOA and the employment contract were lawful under s. 77 of the ERA. The only law under which the employee wanted the issue of legality decided was the ERA and not otherwise, He had filed his claim under the ERA and not under any other written law.

27. Specifically, the employee had not asked for a determination on whether the said retirement clauses were lawful under the Constitution and/or the HRCA or the HRCD (now the HRADCA).

28. At the hearing, the parties had only submitted on the issue raised by the grievance and not extended their submissions to include whether the said provisions on retirement were lawful under the constitution and the HRCA or the HRCD (now the HRADCA).

29. When the issue was not raised and identified as one that the ERT was required to deal with, the determination of the same then breached the fundamental principle of law to hear all the affected parties before arriving at a conclusion.

30. I need not over emphasize the principle and the rule on natural justice. All I need to say is that if a party is deprived of being heard, he is denied access to justice. The court denying the right to proper access to justice commits a procedural error and the final outcome of the decision will be impeached if it can be shown that the outcome would have been different if the affected party was heard.

31. Normally a party deprived of the right to be heard is either sent back to the trial court to be heard or the appellate court hears the deprived party to remedy the error. I find that the ERT erred in its powers to proceed on its own to hear and determine the issue in reference to the Constitution and the HRCA. I will however not re-hear the issue as it is not required that I do so since I have already identified that the employee had not brought an action under the Constitution or the Human Rights legislation for me to intervene and make a finding. This then takes me to the issue of jurisdiction.

32. Whilst the ERT had the jurisdiction to determine whether a worker has been discriminated under the ERA, the issue of whether the worker has had his rights affected under the Constitution and the HRCA or the HRCD (now the HRADCA) is not a matter for the ERT. It is the High Court which has exclusive jurisdiction to determine a question of breach of the rights protected by the Constitution and the HRCA or the HRCD (now the HRADCA): ***See. S. 44(1) of the Constitution of Fiji and s. 38(1) of the HRADCA.***

33. If the worker wanted to have the issue of the legality of the retirement clauses determined under the Constitution, he ought to have filed a constitutional redress application in the High Court

34. Further, it is the High Court which has powers to hear a cause of action under the HRCA and the HRADCA. If the applicant elected to bring proceedings under the HRCA or the HRADCA, he could not then file a cause of action under the ERA. This is made clear in s. 110(5) of the ERA. The provision reads:

    "…, where a grievance concerns discrimination …, a worker must elect whether he or she proceeds under this Act or the Human Rights and Anti – Discrimination Commission Act 2009, but not both".

35. Since the action was already filed under the ERA, it was clear that the employee did not wish to proceed under the HRADCA which meant that the ERT could not determine whether the HRCA or the HRADCA has been breached.

36. I find that the ERT went beyond its jurisdiction to determine that the retirement clauses were unlawful under the Constitution and the HRCA.

37. The second issue is whether the ERT had the jurisdiction to make a finding that s. 77(1) (d) has been impliedly repealed by the HRADCA. The ERA was initially the Employment Relations Promulgation 2007. The Promulgation came in force before the 2013 Constitution.

38. S. 173 (4) of the 2013 Constitution ousts any tribunal or the court from having jurisdiction to accept, hear, determine, or in any other way entertain, or grant any order, relief or remedy, in any proceeding of any nature whatsoever which seeks or purports to challenge or question the validity or legality or the constitutionality of any Promulgation made between 5 December 2006 until the first sitting of the first Parliament under the Constitution.

39. In determining that the provisions of s. 77 (1) (d) was impliedly repealed by the HRCD, now the HRADCA, the ERT directly breached the constitutional provision in that it determined the legality of s. 77 of the ERA. It also breached s. 110(5) of the ERA and s. 38(1) of the HRADCA by hearing an issue under the ERA but determining the same in reference to the HRADCA.

40. If for some reason the ERT felt that it was important to resolve the issue in reference to the Constitution and/or the HRADCA, the proper procedure then was to transfer the matter to the Employment Relations Court for determination of the same: ***s. 218 (2) (a) of the ERA.*** The Court would have then provided some guidance in the matter and if it was necessary to resolve the question of law, invited the relevant stakeholders like the State and the Human Rights Commission to make submissions before arriving at a conclusion. In not exercising its powers under s. 218 (2), the ERT clearly breached its powers by determining the legality of the retirement clauses in reference to the Constitution and the HRADCA.

41. The other matter that I need to determine is whether the retirement clauses constitute unfair age discrimination under s. 77(1) (d) of the ERA which states that *"if an applicant for employment or a worker is qualified for work of any description, an employer or a person acting or purporting to act on behalf of an employer must not retire the worker, or to require*

or cause the worker to retire or resign, ***subject to any written law or employment contract imposing a retirement age…"***

42. The plain interpretation of the above section is that s. 77(1) (d) has created exceptions to what can amount to unfair age discrimination. The exception is if the retirement age is imposed by a written law or an employment contract.

43. I am very surprised that the ERT found that due to the use of the term *"imposing"* in the above s. 77(1) (d), the resulting effect is that the provision does not cover parties voluntarily agreeing to a retirement clause in an employment contract but includes retirement age imposed indirectly by way of a contract.

44. I find it absurd and counter-intuitive to hold that a retirement age imposed on a worker indirectly by way of a contract is valid but not valid if it is voluntarily agreed to by the parties. How can retirement age imposed on a party indirectly by a contract be accepted as an exception but not retirement agreed to by parties through a contract? The latter is a better way of dealing with retirement ages. I find The ERT had improperly read into the provision the words *"indirectly by way of contracts"* when the legislature has not clearly intended that.

45. The ERT ought to have given the section a plain interpretation instead of complicating the same by importing words of its own and giving a meaning resulting in absurdity.

46. I find that if the parties have voluntarily agreed to retirement clauses in an employment contract than the same is not unfair age discrimination under s. 77 (1) (d) of the ERA. In this case too, the retirement clauses were not unlawful.

47. On the question of costs, although the employee had conceded to the appeal and requires that the matter be sent back for a substantive determination, I find that the employer would not have had to come to this Court if the issue was not raised in the first place and the employee agreed to have only the substantive matter. The employer had to undergo expenses in the appellate court to have the issue clarified.

48. I have seen Mr. Apted's effort in compiling legal authorities and submissions, all of which consumed human and financial resources. He has paid for the court records and attended court on various occasions. Since there was no indication that the appeal was conceded to, Mr. Apted had to argue the appeal in the same manner as if it was defended.

49. It would be unfair if costs were not granted to the employer. I will however impose costs at a lower end bearing in mind that the employee has retired and the substantive grievance is yet to be determined.

Final Orders

50. In the final analysis I find that the retirement clauses under the MOA and the employment contract are not unlawful under s. 77(1) (d) of the ERA.

51. I order the ERT to hear the substantive grievance as soon as possible. The Senior Court Officer of the Court must send the file to the Registrar of the ERT for allocation of a call over date before the ERT. The parties and their counsel must be advised of the date before the ERT.

52. I order costs in favour of the employer in the sum $3,500 to be paid within 21 days.

……

Hon. Madam Justice Anjala Wati

Judge

24. 02.2021

To:

1. ***Munro Leys Solicitors for the Appellant.***
2. ***Nilesh Sharma Lawyers for the Respondent.***
3. ***File: ERCA 07 of 2017.***