

**IN THE EMPLOYMENT RELATIONS COURT**  
**AT SUVA**  
**CIVIL JURISDICTION**

ERCC No. 01 OF 2017

**BETWEEN** : MARGRET CHUTE

**PLAINTIFF**

**AND** : PERMANENT SECRETARY FOR EMPLOYMENT  
PRODUCTIVITY AND INDUSTRIAL RELATIONS

**FIRST DEFENDANT**

**AND** : MINISTER FOR EMPLOYMENT PRODUCTIVITY AND  
INDUSTRIAL RELATIONS

**SECOND DEFENDANT**

**AND** : ATTORNEY GENERAL OF FIJI

**THIRD DEFENDANT**

**BEFORE** : M. Javed Mansoor, J

**COUNSEL** : Ms. S. Fa for the Plaintiff

: Ms. R. Pranjivan and Ms. S. Kapoor for the Defendants

**Date of Trial :** 28 & 29 January 2020

**Date of Judgment :** 16 August 2023

# JUDGMENT

*EMPLOYMENT LAW                      Dismissal – Wrongful termination – Unfair termination –  
Position advertised before termination of contract – Change of project positions into line ministry  
positions under civil service reforms – Section 211 (1) (a) Employment Relations Act 2007*

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1. The plaintiff who served as a mediator with the ministry of employment, productivity and industrial relations (“ministry of employment”) filed action claiming damages for breach of contract of employment, and for unjust and unfair termination of employment.
2. The plaintiff was on a contract for three years, which was to expire on 31 August 2017. However, the plaintiff’s employment was terminated by letter dated 22 September 2016 with effect from 22 November 2016.
3. In her statement of claim, the plaintiff said she was initially appointed a mediator with the ministry of employment in 2001. Letter dated 22 November 2016, which was titled “Notice – Termination of Contract”, was signed by the permanent secretary of the ministry. She had served in government service for well over 40 years.
4. The plaintiff became aware of the termination of her employment when she saw the advertisement for 10 vacant mediator positions in the Fiji Sun on 3 September 2016. The plaintiff’s complaint stems mainly from the fact that her position was advertised before the termination of her contract and without having a discussion with her.
5. The plaintiff stated that the defendants should either have waited for the expiry of the contract or paid her the balance sum due on her contract if her employment was to be terminated immediately. She stated that new guidelines under which mediator positions were advertised enabled only those below 55 years to apply. Therefore, she had not applied for the position.

6. The plaintiff claimed a sum of \$51,000.20 as loss of salary and entitlements. In addition, she claimed general damages for unfair and wrongful termination.
7. In their statement of defence, the defendants denied the plaintiff's claims. They claimed that the plaintiff's contract was terminated in terms of clause 9 (a) of her contract of employment. They stated that this allowed them to terminate her employment with a month's notice, and that the plaintiff was given notice of two months prior to termination. They stated that the permanent secretary of the ministry of employment sent the chief mediator an internal memorandum on 17 August 2016 advising him that the posts within the mediation unit would be advertised in terms of the Open Merit Recruitment and Selection (OMRSC) guidelines. The defendants stated that the mediation unit positions had been project posts, and that in terms of the 2016/ 17 budget, these were established into line positions. Therefore, the civil service recruitment policy applied to the posts, which were advertised in line with OMRS guidelines.
8. In the plaintiff's amended reply, she denied having received an internal memorandum dated 17 August 2016 from the chief mediator notifying that her position would be advertised in terms of the new guidelines. Moreover, her reply stated, the contract of employment did not identify her position as a "project post".
9. The parties raised 23 issues for the court's determination. The main issue is whether the first defendant was entitled to terminate her employment before the expiry of her contract, and whether provisions of the contract were followed in so terminating. Each party led the evidence of two witnesses.
10. It was the plaintiff's position that in order to either renew or terminate the contract of employment, it was necessary to have called for discussions on the matter. The plaintiff said she was not aware of the memorandum dated 17 August 2016 sent by the permanent secretary to the chief mediator stating that mediator positions would be advertised under the new guidelines. She had no prior knowledge of the advertisement. The plaintiff said she felt humiliated when her position was advertised with no intimation to her.

11. The plaintiff said she was unable to reapply as she was not below 55 years, although she was qualified to apply in all other respects set out in the advertisement. The plaintiff stated that not all employees were treated alike, and referred to a mediator who was seconded to another section of the ministry. She said she was not given a similar opportunity to work in a suitable ministry role. The plaintiff said that in terms of her employment contract, she was entitled to three months' notice of termination, which she did not receive. She asked the court to award her the balance under the contract and sought general damages as well.
12. Mr. Tevita Kunatuba, who gave evidence on behalf of the plaintiff said that he was employed with the ministry of employment as manager corporate services. The witness broadly confirmed the evidence of the plaintiff that mediators were unaware that their positions would be advertised to be filled by those who are below 55 years of age. The witness said that he did not apply for the position of mediator due to the age limit mentioned in the advertisement. In all there were nine mediators and the chief mediator. He said that some mediators were able to continue in employment within the ministry, and cited instances where this happened. Mr. Kunatuba said that the memo dated 17 August 2016 from the permanent secretary was not brought to the notice of the mediators.
13. Ms. Louise Shackley gave evidence on behalf of the defendants. The witness worked as a quality assurance officer of the ministry of employment. She explained that existing mediator positions were project related. The witness said changes to recruitment were made after the method of government funding underwent change from 2016. She said that the ministry could have continued with the earlier arrangement if funding was made available. She said that mediators were encouraged to apply for the newly advertised positions, because of their experience. The witness said that as the applicant did not apply for the position of mediator, she was not be considered for other positions in the ministry.
14. The next witness for the defendants was Mr. Osea Cawaru. He worked in the departments of defense and national security, and acted as permanent secretary

for the ministry of employment for 6 months in 2016. The witness became the permanent secretary in 2018. He said he was involved with the ministry in implementing changes in 2016, but was not the permanent secretary when the plaintiff's employment was terminated. The witness said he was involved in the appointment of mediators. He was aware of the advertisement in the Fiji Sun, liaised with officials and was also involved in establishing positions within the ministry. The witness confirmed project positions in the ministry were turned into line positions under the new guidelines.

### **Termination of the contract**

15. Clause 5 of the contract of employment states:

- a) "Renewal of the said Contract is subject to the Government requiring the services of the Officer and the Officer agreeing to enter into another contract on a mutually agreed terms; and
- b) Advertising of this position for filling and any renewals of Contract will be made known to Officer within three (3) months before the end of this Contract".

16. Clause 5 (a) and (b) concern the renewal of the contract. Paragraph (b) is not expressed in the clearest terms. It states that advertising of the position for filling and any renewals of contract will be made known to the employee within three months before the end of this contract. This seems to be the basis on which the employee states she was entitled to notice of three months prior to termination of employment. The plaintiff's contract was terminated eight months before it came to an end. The question of renewal of the contract did not arise at that point. Her employment was terminated in terms of paragraph 9 (a) of the contract, and this was stated in the letter of dismissal.

17. Clause 9 states:

- a) "Without prejudice to the provisions of paragraph 12 (relating to dismissal) the Officer will be given not less than one (1) month notice in writing of the date upon which the Contract will be terminated: or
- b) at any time by giving in lieu of the notice aforesaid one (1) month's basic salary in the event:
  - (i) .....
  - (ii) ....."

18. Clause 9 (a) allows the employer to terminate employment with a month's notice. This clause stands independently of clause 5. The employer exercised its rights under clause 9 (a). The plaintiff was given notice of two months by letter dated 22 September 2016.

### **Conclusion**

19. The plaintiff's action is for breach of contract and for unfair termination.
20. The plaintiff's employment was terminated on 22 November 2016 after she was given notice of two months by letter dated 22 September 2016. The termination was in terms of clause 9 (a) of her contract of employment, which permitted dismissal with a month's notice. Therefore, the termination of the plaintiff's employment was not in breach of the employment contract.
21. A point of contention concerned the memorandum dated 17 August 2018 sent to the chief mediator by the permanent secretary. The memorandum, titled "Regularisation of Posts in Line Positions", stated that line positions would be established in terms of a budget decision, and that the OMRS is the first phase towards reforming the civil service. The permanent secretary stated that the posts would be advertised, and encouraged those concerned to re-apply. The memorandum was distributed to the mediation unit, productivity unit, OHS compliance and the workmen's compensation unit.
22. The plaintiff and Mr. Kunatuba declared that they did not receive the memorandum. Witnesses for the defendants were unable to say with certainty that this memorandum was distributed to the mediators. I accept the plaintiff's evidence that she did not receive this memorandum. As a result she was unaware of the termination of her employment until she saw the advertisement in the Fiji Sun.
23. The plaintiff claimed that by their actions the defendants caused humiliation and injury to her feelings. She said that the employer's actions were discriminatory

and done in bad faith. This was the ground upon which the plaintiff made a claim for unfair termination.

24. A complaint of unfair termination must be lodged as an employment grievance in the manner set out by the provisions of the Employment Relations Act 2007. Section 211 (1) (a) of the Act expressly confers jurisdiction on the tribunal to adjudicate on employment grievances. The jurisdiction to hear employment grievances has not been conferred on this court. In the circumstances, the court will not consider the issues concerning unfair termination.

**ORDER**

- A. The plaintiff's action is dismissed.
- B. The parties will bear their own costs.

Delivered at **Suva** this **16<sup>th</sup>** day of **August, 2023**.



M. Javed Mansoor  
Judge