

IN THE EMPLOYMENT RELATIONS COURT
AT LAUTOKA

ERCC No. 11 of 2021

BETWEEN : VIMLESH NARAYAN

PLAINTIFF

AND : THE FIJI REVENUE AND CUSTOMS SERVICE

DEFENDANT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. D. Nair for the Plaintiff

Ms. R. Malani with Mr. E. Eterika for the Defendant

Date of Hearing : 30 March 2022

Date of Judgment : 25 September 2023

JUDGMENT

EMPLOYMENT LAW *Originating summons – Dismissal – Non renewal of contract – Notice of expiry or renewal not given – Breach of contract – Expectation of contract renewal – Whether employment deemed to continue – Unfair termination – Discrimination – Sections 28, 61, 77 and 211 of the Employment Relations Act 2007*

The following case is referred to in this judgment:

a) *Dewa v University of the South Pacific* [1996] FJHC 125; HBJ 0007].1994S (4 July 1996)

1. The plaintiff filed an originating summons seeking declarations that the defendant's decision on 22 October 2021 in not renewing the employment amounted to a breach of contract and a contravention of the principles of legitimate expectation. The plaintiff stated that the decision was unjustified, unfair and unlawful and that it also contravened sections 61 and 77(1) (c) of the Employment Relations Act 2007 ("the Act"). The plaintiff sought orders for the employment contract to be renewed and for reinstatement without any loss of benefits and entitlements.
2. The plaintiff stated that the defendant was in breach of the contract's renewal clause as the employer was required to comply with a notice period of two months for renewal or non-renewal. The defendant did not comply with this requirement and also gave no reason for non-renewal. The plaintiff claims to have a legitimate expectation to renewal of the contract under section 61 of the Act. The plaintiff said that the defendant's decision to not renew the employment contract was manifestly harsh, disproportionate and cannot be rationally justified in the prevailing circumstances.
3. Annexed to the affidavit in support is an employment verification letter issued by the defendant stating the plaintiff's retirement age as sixty. The letter was issued on 19 September 2018. The plaintiff claims to have incurred substantial financial commitments by utilizing the letter.

4. The affidavit in response was given by Pearlance Antonio, the defendant's team leader, HR compliance, people capability and culture, customs service. The defendant admitted issuing notice dated 22 October 2021, but denied acting in breach of the plaintiff's contract.
5. The defendant conceded that it did not provide advance written notice two months before the expiry of the contract in regard to its renewal as the institution was undergoing a redesign, and that staff were kept informed of this by circular dated 28 June 2021. However, the plaintiff was paid a salary in lieu of notice for the equivalent of two months.

Contract non-renewal

6. At the hearing, the plaintiff referred to clause 6 of the employment contract. This states:

"Upon the expiry of this contract both parties may, by mutual agreement, enter into a new contract subject to performance.

Your contract renewal review will be undertaken as part of the annual review process for the relevant year.

The employer will give the employee two months advance written notice for renewal or expiry of contract".
7. The plaintiff was appointed as principal customs officer from 6 November 2017 to 31 July 2021. The defendant did not send a notice of renewal or expiry in terms of the contract. However, the plaintiff received an extension of three months until 31 October 2021, followed by another extension by a month to 30 November 2021. The plaintiff accepted the short extensions. The plaintiff received the notice of non-renewal on 22 October 2021, a little more than a month before the expiry of the extended contract.
8. The plaintiff's contention is that the contract expired on 31 July 2021, and that the defendant's extension by four months renewed the contract under the same terms. It was submitted that the plaintiff had the expectation that the contract

would be renewed on the original terms in the absence of any adverse performance report.

9. The plaintiff submitted that section 28 of the Act provides a presumption as to a new contract after termination of employment. This submission is misleading. The presumption applies where a notice of termination is given to terminate an indefinite contract, and the employer permits the worker to remain, or the worker, without the express dissent of the employer, continues in employment. In such a situation the notice is deemed to have been withdrawn. The present matter does not fall within that situation. The plaintiff's extended contract had a specific end date, which was confirmed by the notice sent on 22 October 2021.
10. The plaintiff submitted that eight employees who were issued non-renewal notices had their contracts renewed. The plaintiff stated that by retaining a majority of the employees, the defendant acted in a discriminatory way. The plaintiff also complained of a directive to leave the defendant's premises forthwith and that this caused humiliation.
11. The plaintiff submitted that no reasons were given to the defendant in refusing to extend the contract. The plaintiff referred to the decision in *Dewa v University of the South Pacific*¹. In that case, in judicial review proceedings, the High Court was of the view that the employer was under a duty to give reasons for not renewing the plaintiff's contract. The context in this case is not the same. There is no inference from the plaintiff's employment contract of an obligation on the employer to provide reasons.
12. The plaintiff also submitted that only the chief executive officer had the authority to appoint and terminate an employee of the defendant. In this case, it was submitted that the defendant's acting chief executive officer did not have the authority to take a decision concerning the plaintiff's employment or to send a notice declining to renew the contract.

¹ [1996] FJHC 125; HBJ 0007J.1994S (4 July 1996)

13. In reply, the defendant states that it has a discretion in making a renewal offer. Although the collective agreement provided for a retirement age of 60 years, the defendant stated that not all employees retained their jobs till retirement. In regard to the acting chief executive officer's authority to take decisions, the defendant submitted that section 27 (3) of the Fiji Revenue and Customs Act made provision for the appointment of a person to act in place of the chief executive officer. The court accepts the defendant's submission on this point.

Conclusion

14. The plaintiff's contract was to have expired on 31 July 2021. The contract says that two months before expiry of the contract the employer is required to inform the employee whether or not the contract will be renewed. This was not done. Instead, the contract was renewed for a period of three months ending 31 October 2021. Thereafter, it was extended by another month until the end of 30 November 2021 by letter dated 9 September 2021. On 22 October 2021, the plaintiff was informed that the contract would not be extended beyond 30 November 2021.
15. The defendant did not strictly perform the terms of the renewal clause when extending the plaintiff's contract in July 2021. There is no evidence that the plaintiff protested when the contract was extended by the shorter periods. On the contrary, the plaintiff accepted the extension of employment during those two occasions. When the final extension of a month was granted, the plaintiff was given notice that the contract would expire on 30 November 2021. On a reading of the renewal clause and considering the circumstances, it can be concluded that the defendant's strict non-performance of the renewal clause did not affect the expiry of the contract. The plaintiff's employment contract expired on 30 November 2021.
16. The plaintiff refers to the defendant's acts of discrimination by letting other employees to continue in their positions, and in causing humiliation by the manner of dismissal. However, these are matters to be taken up as an employment grievance as defined in section 4 of the Employment Relations Act. Section 211 (1) (a) expressly gives the Employment Relations Tribunal

jurisdiction to hear an employment grievance. A grievance must first be referred to mediation services under the ministry of employment. The provisions of the Act cannot be circumvented by bringing an employment grievance directly to this court, which does not have original jurisdiction to deal with the matter.

17. Therefore, the declarations sought by the plaintiff are declined. The defendant is not in breach of contract in not renewing the plaintiff's employment. The plaintiff cannot claim any expectation to renewal of the contract, which was open through the mutual agreement of the parties, subject to a performance review. The question whether the defendant's decision was unjust, unfair or unlawful is a matter to be addressed by the Employment Relations Tribunal. For this reason, section 77 (1) (c) will not be considered. The defendant has not contravened section 61 as there is no right to continuity of employment in these circumstances. The plaintiff's services were not re-engaged upon termination of employment.
18. The plaintiff's employment was terminated on 22 October 2021. There can be no question of ordering renewal of the contract or reinstatement. The action is liable to be dismissed with costs.

ORDER

- A. The plaintiff's originating summons is dismissed.
- B. The plaintiff is to pay the defendant costs summarily assessed in the sum of \$200.00 within 21 days of this judgment.

Delivered at **Suva** on this 25th day of **September, 2023**.



M. Javed Mansoor
Judge