

- (iv) An order for the employment contract of the Plaintiff to be renewed without any loss of entitlements or benefits;
- (v) Any further orders or relief that this Court deems appropriate and expedient in the prevailing circumstances.

Background

- 2. The Applicant joined the Public Service in `990 as a primary school teacher until he was appointed as Head Teacher at Tavua Primary in 2016. He was later attached to Ministry of Education in the Ba office and was then posted again where he was again attached from 2018 with the Ministry of Education. His contract was from 13 August 2017 to 17 January 2019. On 4th February 2019 he was served with a notice that his contract which expired on 18 February 2019 would not be renewed because of allegations of indecent assault.
- 3. His allegation is that he was not given an opportunity to be heard before an independent tribunal prior to arrival at a decision. It denied him his right to fair labour practices and procedural fairness. He alleges he should have been given automatic renewal.

Affidavit Evidences

- 4. The Applicant relies upon his Affidavit in support of his application which states as follows-

“4. That on or about 22nd March 2017 I was verbally advised to be attached to the Ba education office until 3rd April 2017 when I was advised to report to Moto Primary School and from the beginning of 2018 was attached to the Ba Education Office.

5. That on or about 19th August 2017 I was issued with a contract as Head Teacher Bocalevu Muslim Primary School effective from 13th August 2017 until 19th January 2019. Copy of the contract is annexed as RRC=02.

6. That after my contract had expired on 19th January 2019 I continued to be employed of the Ba Education Office until 4th February 2019 when I was served with a notice that my employment contract will not be renewed based on the allegation that I had indecently assaulted a woman inside my school quarters. Copy of the said letter is annexed as RRC-03.

7. That the allegation upon which my contract was not renewed was not proven through the public service disciplinary tribunal and further I was not given the opportunity to defend myself against the same allegation.

8. That I am advised and verily believe that I should have been given the opportunity to present my case before an independent and impartial tribunal and by denying me this opportunity resulted in breach of the constitutional right to be heard and natural justice.

9. That I further say the decision not to renew my contract was based on the unsubstantiated allegation without giving me a fair trial renders the Respondent acted in breach of the principles of fair labour practices and I was further denied procedural fairness.

10. That I further say that the Respondent by not complying with clause 15 of the employment contract. That it is to give me one month notice of the non-renewal of the contract had acted arbitrarily and in bad faith and render the said decision as unlawful, unfair and unjustified.

11. That I am advised that the renewal of contract within the Ministry of Education is automatic as such a view of my continuous employment after the expiry of the contract it should have been renewed for a further three years.

12. That I further say that since the notice not to renew the contract was issued after the contract had expired and based on unsubstantiated allegations, this constitutes a dismissal, The defendant cannot invoke two causes for my non-employment as such the employer acted in bad faith.”

5. The Defendant deposed an Affidavit through its Permanent Secretary as follows –

“5. The during the term of the Applicants position as Head Teacher at Tavua Primary school, the Ministry received a complaint of gross misconduct against the Applicant. The Applicant was alleged to have indecently assaulted a woman, namely Remivani Adi (“Complainant”) at the school quarters that the Applicant was occupying at that time, on 16 September 2016 (“Allegation”).

6. The Allegation was reported to the Fiji Police Force and the Applicant had been charged for indecent assault pursuant to section 212 of the Crimes Act 2009 (“criminal charge”). A copy of the letter from the Fiji Police Force about the outcome of the investigation into the allegation and the charges are annexed and marked “AB-3”.

7. On or about 3 April 2017 the Applicant was transferred to Moto Sanatan School.

8. Earlier in 2018, the Applicant was verbally informed by the Director Primary and Divisional Officer Western at the Ba Education officer to report to the Education Office and the applicant worked at the Ba Education Office until the expiry of the final contract.

Investigation

9. During the course of the Applicants criminal proceedings, between the period January to May 2017 the Ministry was provided with the following documents-

- (a) Summary of Facts dated 4 March 2017;
- (b) Statement of Remivani Adi dated 20 January 2017;
- (c) Statement of Amrit Prasad Sharma dated 10 February 2017;
- (d) Statement of Vinay Kumar dated 10 February 2017;
- (e) Statement of Pauliasi Masibara dated 17 February 2017;
- (f) Statement of Vani Diani dated 17 February 2017;
- (g) Statement of Shailesh Kumar dated 7 April 2017;
- (h) Statement of Sunil Dutt dated 7 April 2017;
- (i) Caution Interview of Ramesh Chand Raman signed on 28 February 2017;
- (j) Statement form of Ramesh Chand Raman dated 20 March 2017;
- (k) Statement of Remivani Adi dated 23 May 2017;
- (l) Statement of Vinay Kumar dated 23 My 2017;
- (m) Statement of Amrit Prasad dated 23 May 2017 and
- (n) Bail undertaking of Ramesh Chand Raman.

(Collectively referred to as “Investigation Documents”) The investigation documents are annexed and marked “AB-4”.

10. Having considered the investigation documents. It was evident that:

- (a) on or about 19 September 2015, the Applicant tried to engage the Complainant to perform household chores at the school quarters occupied by him (“Quarters”).
- (b) On 20 January 2017 the Complainant reported that on 19 September 2019 the Applicant had indecently assaulted her at the Quarters by touching her breasts;
- (c) Amrit Prasad Sharma (“Amrit”) and Vinay Kumar (“Vinay”) who were working on the school compound on 19 September 2016 ocnfirmed that they heard a female scream from the direction of the Applicants school compound quarters between 10am to 11am.
- (d) Amrit saw the Applicant walking towards the school quarters and Vinay confirmed that the Applicant came out of his school quarters around the same time;
- (e) Pauliasi Masibara, the Complainants husband, confirmed that during Term 3 of the 2016 school year the Complainant informed him about the Applicant indecently assaulting her while she was working at the Quarters; and
- (f) Vani Diani, the Complainant’s relative, also confirmed that the Complainant informed her of being indecently assaulted by the Applicant in or about September 2016.

11. It was evident from the investigation documents that the Allegation against the Applicant was severe and it was therefore incumbent on the Ministry that necessary action was taken towards safeguarding the interests of the students and staff of Tavua Primary School and the Applicant was accordingly transferred from Tavua Primary School.

12. On 31 January 2019 Issued a letter to the Applicant informing that his final contract which had expired on 18 January 2019 would not be renewed (“Notice”). A copy of the letter is annexed and marked “AB-5”.

Response to Applicants affidavit

13. I make no comment as to paragraph 1 of the Applicants affidavit.

14. I admit to paragraph 2 of the Applicants affidavit.

15. I admit paragraph 3 of the Applicants Affidavit and further say that all civil servants including teachers, have always been subject to the General Orders Civil Service Act 1999 (including subsidiary legislation) and the Employment Relations Act 2007.

16. I admit paragraph 4 of the Applicants affidavit.

17. I admit paragraph 5 of the Applicants affidavit and reiterate paragraph 4 hereinabove.

18. Save to say the Final Contract actually expired on 18 January 2019, I admit paragraph 6 of the Applicant’s Affidavit and further reiterated paragraph 12 hereinabove.

19. On response to paragraphs 7,8 and 9 of the Applicants Affidavit,I say that by virtue of my position I am authorized to appoint, remove and initiate disciplinary action against staff in the Ministry with the agreement of the Minister responsible for the Ministry. Accordingly, I exercised my authority in agreement with the Minister responsible for the Ministry, not to renew the Applicants Final Contract by issuing the notice.

20. I deny paragraph 10 of the Applicants Affidavit and further say that:

(a) by signing the Final Contract the Applicant acknowledged and agreed that the completion of the period of employment at the end of the term, he would not be entitled to any further period of employment and that his employment would cease unless further extension is granted; and

(b) the Applicant was informed through the Notice about the decision not to renew his Final Contract and the delay in informing the Applicant of the non-renewal of Final Contract does not automatically grant the Applicant with the right of renewal of Contract. I further say that the Applicants renewal of Contract at the discretion of the Permanent Secretary as set out in the terms of the Final Contract.

21. I deny paragraph 11 of the Applicants affidavit and further say as follows:

(a) The Applicants appointment as Head Teacher under the Final Contract was only for a Fixed Period 13 August 2017 to 17 January 2019;

(b) In accordance with the Final Contract the Applicant was not entitled to any further period of employment at the completion of the term of the Final Contract unless further extension is granted by the Permanent Secretary; and

(c) I the Applicant was advised of the non-renewal of the Final Contract as started in paragraph 12 hereinabove.

22. I deny paragraph 12 of the Applicants affidavit and further say that as the Permanent Secretary for the Ministry I have the discretion to not renew the Applicants Final Contract upon its expiry.”

6. In response, the Applicant deposed a further Affidavit stating –

“4. The issue of renewal of Contract was further clarified by the Civil Service Reform Management on 22 May 2019 that the renewal of contract is based on the results of performance. A copy of the said correspondences is annexed as RR-01.

5. I dispute paragraph 4 as the contract did not specify that it was a final contract and further put the respondent to strict proof that the said contract was a result of the Job Evaluation Exercise.

6. I categorically deny paragraph 5 and put the respondent to strict proof. I further say that there was no any merit in the allegation as a result in which the Respondent had subsequently promoted me as Head Teacher at Bocalevu Primary School on 19 August 2017.

7. In reply to paragraph 6 I say that the police report is dated 17 April 2019 and this effectively implies that the Respondent carried out its investigations after I had moved the court on 14 February 2019. Therefore at the material period when it was decided not to renew my contract. There was no adverse performance report against me.

8. In reply to paragraph 9 and 10 that I am innocent until proven guilty by law and the Respondent by improperly using the privileged court documents without the express approval of the Court is prejudicial to the Court proceeding and my right to a fair trial. I further believe the Respondent is in contempt of the court which will be pursued separately.”

The law on an action commenced by Originating Motion

7. Under Order 5 rule 5 of the High Court Rule (“HCR”) provides that :

“Proceedings to be begun by motion or petition (O.5, r.5)

5. Proceedings maybe begun by originating motion or petition if, but only if, by these rules or by or under any Act the proceedings in question are required or authorized to be so begun.”

8. Hence an application made by way of Originating Motion can only commence if required or authorized by the rules or by an Act of law.
9. Order 8 rule 3 of the HCR prescribes the manner in which a Notice of Motion in an originating motion must be prepared for filing and served:

“3.-(1) The notice of an originating motion must be in Form No. 6 in Appendix A and the notice of any other motion in Form No. 7 in that Appendix.

Where leave has been given under rule 2(2) to serve short notice of motion, that fact must be stated in the notice.

(2) The notice of a motion must include a concise statement of the nature of the claim made or the relief or remedy required.

(3) Order 6, rule 4, shall, with the necessary modifications, apply in relation to notice of an originating motion as it applies in relation to a writ.

(4) Issue of the notice of an originating motion takes place upon its being sealed by an officer of the Registry.”

10. The question is whether the Applicant had appropriately dealt with this matter properly by commencing via an originating motion?

Motions filed under High Court Rules (“HCR”)

11. The following proceedings under the HCR require that the matter commence by Originating Motion. The matters or actions, are as follows:
 - (i) An application for Judicial Review after leave is granted (Order 53 of HCR).
 - (ii) An order for constitutional redress in accordance with Order 25 of the High Court Rules and section 44 of the Constitution requires that all claims seeking for declaration and injunctions should be by way of Motion and Affidavit.
 - (iii) In Order 55 of the HCR, an appeal from a Tribunal, Magistrates Court or person.

- (iv) Proceedings by case stated to the High Court on questions of law from the Court, Tribunal or Arbitrator or Minister, in accordance with Order 56 of the HCR.
- (v) An application that an award by an Arbitrator or umpire is not binding on a party as it was made without jurisdiction and made to a judge of a high court must be made in accordance with Order 57 of the HCR.
- (vi) An appeal or application to the High Court under the Trademarks Act under Order 100 (7) of the HCR.

12. The application before this Court does not appropriately fall within the ambit of the provisions of the HCR regarding originating motions. The applications are not an appeal from the Tribunal, question of law from the Tribunal or Arbitrator, Magistrates Court or Minister, it is not an award by an arbitrator sort to be set aside in Court nor an appeal under the Trademarks Act.

Employment Relations Act (“ERA”)

13. Applications that may proceed by Notice of Motion specifically stipulated under ERA are as follows:
- (i) An appeal from the Permanent Secretary is made by Notice of Motion to the Tribunal within 20 days by Notice of Motion (section 239 of the ERA).
 - (i) An appeal from the Trade Union is made to the Tribunal by way of a Notice of Motion (section 240 of the ERA);
 - (iii) An appeal against a decision of the Minister under Part 18 or 19 of the ERA by filing a Notice of Motion to the Court (section 241 of the ERA);
 - (iv) A party aggrieved by a decision of the Tribunal may by right appeal to the High Court or by leave of the Court (section 242 of ERA).

Law on Declaratory orders

14. Order 15 rule 18 of the HCR empowers the Court to make declaratory orders. It states –

‘No action or other proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sort thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed’.

15. In order 5 rule 4 (2) of HCR states that –

"Proceedings –

(a) in which the sole or principal question at issue is, or is likely to be, one of the construction of an Act or of any instrument made under an Act, or of any deed, will contract, or other document, or some other question of law, or

(b) in which there is unlikely to be any substantial dispute of fact,

are appropriate to be begun by originating summons unless the plaintiff intends in the proceedings to apply for judgment under Order 14 or Order 86 or for any other reason considers the proceedings more appropriate to be begun by writ ..."

16. The application before this court relates to the interpretation of the contract as well as the application of the provisions of the Employment Relations Act. The Application seeks for declaratory orders.
17. Hence it would have been appropriate for the Applicant to seek for declaratory order reliefs under the Originating Summons (see Ram Gopal –v- AG [1992]Fiji LwRpt 14; [1992] 28 FLR 211 (6 November 1992) Fatiaki J who stated that seeking declaratory orders by Originating Summons is correct where the confiscation of the passport by Immigration Officers under the Immigration Act which is a private law claim can be sort.
18. Declaratory reliefs should not be granted where they do not give any foreseeable consequences for the parties (cited from Patton and Storck Ltd –v- Central Rentals Ltd [2008] FJCA 106; ABU 118.2006 (24 April 2008) Byrne J.A, Mataitoga J.A and Scutt J.A. referred to Gardner –v- Dairy Industry Authority of New South Wales [1977] 52 ALJR 180 at 188; Church of Scientology –v- Woodward [1982] HCA 78; [1982] 154 CLR 25 at 62; Ainsworth –v- Criminal Justice Commission [1992] HCA 10; [1992] 175 CLR 564 at 581-2.)
19. The key elements to determine an application for declaratory judgment were considered in Dreunamisimisi -v- Rabuka [1994] Fj Lawrpt 12; [1994] 40 FLR 67 (12 April 1994) which referred to the case and stated –

“There is not the slightest doubt in my mind that in terms of Section 46 of the Constitution and Order 15 rule 18 of the High Court Rules, this Court has the necessary power and jurisdiction to deal with the various issues raised in these proceedings provided that the three matters or features enumerated by Lord Dunedin in Russian Commercial and Industrial Bank v. British Bank for Foreign Trade [1921] 2 AC 438, 447-8, are present, namely:

"The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought."

20. Hence for the Court to consider an application for the construction of a contract as well as the application of the law to determine whether to grant declaratory reliefs, the Court must determine the application in light of the proper format in which the application is placed before this court.
21. In this instance both the HCR and the ERA, does not articulate specifically that declaratory judgments can be sort by way of an originating motion or a notice of motion. Order 15 rule 8 of HCR also does not specifically articulate the appropriate procedure.
22. However from the cases cited, it is clear that where the question in issue requires consideration of the law and no disputed facts, that the application should commence by originating summons.
23. Therefore because there has not been any originating summons filed and the application is sort by Notice of Motion, the Court finds no grounds to make any determination as the application by the Applicant has commenced in the incorrect format.
24. In any event, if for instance the Court must determine that there is some light at the end of the tunnel, and maybe the ERA does apply the Court referred to the ERA.
25. In this instance, there is no application for Appeal nor Grounds of Appeal filed in this Court for this case relying upon the ERA. This is an application for declaratory orders only.
26. Furthermore, in order to determine whether or not to grant declaratory orders, the court cautions itself that the issue in contention is the decision of the Ministry to not renew an expired contract and the failure of the Ministry not to give the Applicant the right to be heard for investigations for allegations of sexual assault against him.
27. Therefore to challenge the decisions made by the Permanent Secretary with the Minister, an appeal should have been filed against them in the appropriate Courts in accordance with the ERA. This was not done.
28. Furthermore if the Tribunal, Arbitrator, Magistrate or Umpire is of the view that there are issues or questions of law to be determined in the High Court, the correct procedure was for the Applicant to filed their application before the Tribunal and for the Tribunal to transfer the application to the High Court to determine ón a case stated' the difficult question of law. This was also not done.
29. It is on this basis that the Court finds that this application cannot stand. There is no foot to stand on as the matter is a defective application for which cannot be cured. The proper procedure is to dismiss this action and allow the application to properly file their application

in accordance with the HCR, bearing in mind the limited timelines it has and the fact that if it were to seek applications viz a viz, the application would have been delayed.

30. Even if I were wrong and there is provision for which the Court should have still considered the application before it the Court therefore turns towards the declaratory orders sort.

Unlawful, unjustified and unfair dismissal

31. The allegation by the Applicant is that the decision of the Ministry viz a viz is unlawful, unjustifiable and unfair.
32. In order to determine if it is unlawful, the Applicant must firstly prove that the provisions of the ERA have not been complied with.
33. The argument of the Applicant is that the Ministry should have renewed his expired contract on the basis that he:
 - (i) Was entitled to a renewal based on his merit and performance as per the Ministry's policy and based on the previous renewals and promotions by the Ministry despite his age being the retirement age;
 - (ii) Was unlawfully terminated on the basis that there were disciplinary investigations against him for sexual assault for which he was not given his right to respond to the allegations.
34. According to the letter of non-renewal, the Applicants contract had expired and that there were also pending disciplinary investigations against him for sexual assault.
35. The contract entered between the parties on 17 January 2017 for 3 years stated in clause 5 that-
 - “(a) on completion of the period of employment at the end of the Term, the Officer will not be entitled to any further period of employment and the Officers employment will cease forthwith unless further extension by the Government; and
 - (b) renewal of the contract is subject to the Government requiring the services of the officer and the officer agreeing to enter into another contract on mutually agreed terms.”
36. The provisions of the Contract are very clear. There is no need for the parties to seek contra preferendum rule as the contract speaks for itself. No other oral evidence is needed.
37. The contract envisages where the contract comes to an end. The discretion to renew or otherwise the contract rests with the Ministry viz a viz the Permanent Secretary on a new contract entered into with the Applicant.

38. In this instance the letter issued to the Applicant for non-renewal refers to the pending criminal investigation and pending matter in court, the decision to not renew the contract after the expiry of the contract in light of the investigations and the conclusion by the permanent secretary that the act by the Applicant amounted to gross misconduct.
39. The applicant's contract was extended until 31 January 2019, although not in writing, for a short period until the letter was issued deeming the contract to have expired on 17 January 2019. During this time the Applicant was duly paid.
40. The termination of the contract stems therefore from two premises:
 - (i) That there was an act of gross misconduct on the Accuse based on the investigations of the police which was pending in the criminal courts when the termination letter was issued;
 - (ii) That the contract had also expired and therefore was not to be renewed.
41. The court finds that if the Permanent Secretary had relied solely on the basis of termination for gross misconduct, then the termination would have been unlawful as there are procedures for which the Permanent Secretary was required to follow by obtaining an explanation from the Applicant prior to terminating him.
42. The Permanent Secretary had relied upon the responses in the caution interview as the reply to allegations to arrive at the conclusion not to renew the contract.
43. Although the Permanent Secretary has no entitlement to explain the reasons for summary dismissal, at least he should have heard the Applicants responses to the allegation prior to making a decision.
44. The permanent secretary thereafter also considered that the Contract had expired and thus the parties could not renew the contract unless the parties were both willing to enter into a new contract.
45. Therefore having exercised her powers not to renew the contract, she did so on the basis of the gross misconduct and also on the basis that the contract had expired.
46. On this basis, the act of the Permanent Secretary was lawful. The court finds that despite the explanation, the arrival of the contract to an end, placed the parties at a position to enter into a new contract only at the consent of parties.
47. This was never agreed upon by the parties. Therefore the legitimate expectation is misconstrued.
48. However, as to whether the decision was unjustifiable or unfair, the Applicant was to prove that he suffered from the dismissal emotionally and caused him harassment embarrassment.

49. There was no evidence of this submitted into court.
50. Therefore the Court finds that the claims for unfair and unjustifiable actions is not proven.
51. The Court finds that it cannot make any declaratory orders as such and dismiss the application. The court also finds no legitimate expectation was made pertaining to the renewal of contract as both parties were required to agree to the new terms of contract, for which was unable to be attained.

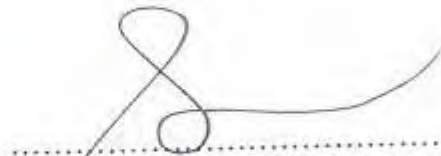
Costs

52. The Court finds that costs should be imposed against the Applicant and will award costs of \$300 to the Respondent.

Orders of the Court:

53. The Court orders as follows:
- (i) *That the application for declaratory orders is dismissed;*
(a) *That costs be awarded to the Respondent for \$300.*




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Mrs Senileba LWTT Levaci
Acting Puisne Judge
High Court – Suva, 20 November, 2023