

**IN THE EMPLOYMENT RELATIONS COURT**

**AT SUVA**

**ORIGINAL JURISDICTION**

**CASE NUMBER:** ERCC 15 of 2017

**BETWEEN:** **KRISHNA ANAND SWAMY**

**Plaintiff**

**AND:** **FIJI NATIONAL UNIVERSITY**

**Defendant**

**Appearances:**

*Mr. D. Nair for the Plaintiff.*

*Mr. F. Haniff and Ms. P. Devi for the Defendant.*

**Date/Place of Judgment:**

*Thursday 30 May 2024 at Suva.*

**Coram:**

*Hon. Madam Justice Anjala Wati.*

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**JUDGMENT**

**A. Catchwords:**

*Employment Law – plaintiff brings a claim for breach of contract on the basis that his contract was not renewed- the renewal of the contract was intercepted by redundancy- the employer had to follow the applicable procedures in ss. 107 and 108 of the ERA to end the contract which it otherwise was under an obligation to renewed as the conditions of the renewal were met- claim dismissed.*

**B. Legislation:**

*Employment Relations Act 2007 (“ERA”): ss. 107 and 108.*

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***The Claim***

1. The Plaintiff brings a claim for breach of contract when it was not renewed after expiry.

2. Krishna Anand Swamy ("**Swamy**") was employed by the Fiji National University ("**FNU**") as Director of Properties and Facilities under a contract of employment from 1 May 2014 to 30 April 2017.
3. On 20 February 2017, FNU wrote a letter to Swamy and informed him that his contract will not be renewed on the grounds that it was seeking to restructure the Senior Management Roles Position. It stated in the letter that it was shortly going to seek to establish 2 new divisions, Capital Infrastructure and Estates and Facilities. The letter reads as follows:

*"20 February 2017*

*Dear Mr. Krishna A. Swamy  
Director Properties and Facilities*

*Following a period of extensive consultation, regarding the future structure of senior management roles at Fiji National University (FNU), I am writing to inform you that FNU will not be renewing your appointment as Director Properties & Facilities which ends on 30 April 2017.*

*We will shortly be seeking to establish two new division. Capital Infrastructure and Estates and Facilities and plan to recruit Directors to head up each of these new divisions.*

*The Director Capital Infrastructure will bring together the planning and government liaison functions currently undertaken by Planning and Development, Properties and Facilities and Finance. The aim is to create a single unit which liaises with government ministries and oversees the work of project managers for major capital infrastructure projects.*

*The Director Estates and Facilities will oversee the day to day repair and maintenance work undertaken by Properties and Facilities and the auxiliary service functions undertaken by Uni-Services. The key aim will be to create a customer-focused service that is responsive to the needs of students and staff.*

*FNU plans to advertise these new roles on March 1 2017. You will have the opportunity to be considered for these and other appropriate vacancies at FNU. Should you apply for and be selected for an alternative role at FNU it will be assumed that your service is unbroken.*

*I would like to hold a meeting with you on week of 20<sup>th</sup> February to discuss in greater detail the rationale behind the proposed changes and develop a plan for dealing with its implications.*

*Please indicate to the P.A – Vice Chancellor, Amita Swamy, a suitable time for us to meet with the Consultant Director, HR and myself next week...”*

4. The plaintiff says that the decision to not renew the contract was in breach of clause 4 of the contract of employment.

#### ***The Defence***

5. The defendant denies any breach of contract. It says that there was no right of automatic renewal of the contract. The defendant's position is that the FNU underwent restructure and the worker's position was de-established. He was informed of this in advance. He was also consulted.
6. The defendant's position is that the worker failed to take any positive actions to mitigate the loss arising out of the restructure in that he was offered a short term consultancy position which he refused. He also refused to accept an offer for a short term extension of contract for 3 months when the restructure process was delayed. He then did not apply for any new positions created under the restructure when requested to do so.
7. The defendant says that the worker was paid more than the restructure pay. It therefore refutes that it is liable for any claim for compensation.

#### ***Evidence, Law and Analysis***

8. I will start off with the worker's claim that there was a breach of contract when the employer did not renew the contract of employment. The worker says that the employer had breached clause 4 of the employment contract.
9. Clause 4 of the contract of employment tendered in evidence as ***Plaintiff's Exhibit 1*** reads:

**4. Renewal**

*Subject to a medical report from a medical practitioner nominated by the University that certifies that the party offered this contract is medically fit to perform the duties of Director of Properties & Facilities, and subject to satisfactory performance judged through a formal review of performance carried out by the Vice- Chancellor at least 6 months prior to the end of the contract, the University shall extend the contract upon such terms and conditions as may be mutually agreed to by both parties. At every contract extension, a satisfactory medical report would be required.*

10. The reading of clause 4 is plain and clear. If there were no issues regarding the plaintiff's medical fitness and if his work performance was satisfactory, the employer was obliged to renew his contract. The words "*the University shall extend the contract upon such terms and conditions as may be mutually agreed to by both parties*" makes it clear that the University was under an obligation to renew the contract if the plaintiff was medically fit and had satisfactory performance. However the terms and conditions of the renewal were to be mutually agreed to by both parties.
11. Before the University could fulfill its obligation under clause 4, the renewal of the contract was intercepted by redundancy in that some of the positions in the FNU were to be de-established. The plaintiff's position was one of it.
12. The purpose of the redundancy is clearly explained by the then Vice Chancellor of FNU, Mr. Nigel Healey. He testified that the position of the plaintiff was too broad to handle all essential work of the University. It was therefore to be abolished entirely and in its place the Division of Capital Infrastructure and Division of Estates and Facilities was to be created.
13. The Division of Capital Infrastructure was going to liaise with Government Ministries and oversee the work of project managers for major capital projects like Labasa and Koronivia. The Division of Director Estates and Facilities was to look after repair and maintenance work of FNU's properties.
14. Redundancy can affect both an existing contract and a one which is due to end by expiry. In this case, although the University was obliged to renew the contract as per clause 4 of the contract of employment, it got affected by redundancy precluding the University from fulfilling its obligation. The University

therefore brought the contract to an end due to redundancy. This is clearly explained in its letter of 20 February 2017.

15. Since the plaintiff was otherwise entitled to a renewal of the contract but for the redundancy, the University was then under a duty to follow the applicable procedure established under s. 107 of the ERA as far as it affects the plaintiff. I am mindful of the fact that this was not a termination of contract and as such some procedures will not be necessary to follow.

16. Section 107 of the ERA reads:

**"[107] Provision of Information**

*(1) If an employer contemplates termination of the employment by redundancy of workers for reasons of an economic, technological, structural or similar nature, the employer must-*

*(a) Provide the workers, their representatives and the Permanent Secretary not less than 30 days before carrying out the terminations, with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out; and*

*(b) Give the workers or their representatives, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimize the terminations and on measures to mitigate the adverse effects of any terminations on the workers concerned, such as action to attempt to find alternative employment or retraining.*

*(2) In this part-*  
***economic*** means maintained for profit;

***structural*** means in relation to a company, corporation, business enterprise or workplace the manner in which such entity is organized, managed or administered; and

***technological*** means a matter concerning, or use of, technology or information technology."

17. In accordance with s. 107, I find that the only applicable procedure that the employer had to carry out in this instance was as follows:

1. *to provide the worker with not less than 30 days before ending the contract, the relevant information about restructure and inform him that his contract will not be renewed with the information on the number of people who were to be affected and the period over which the restructure was to be established; and*
2. *Provide the worker with an opportunity for consultation on measures to be taken to mitigate the adverse effects of the non-renewal.*

18. The uncontroverted evidence is that the plaintiff was informed for over 30 days that his position was going to be de-established and that his contract was not going to be renewed. He was informed of all those people who were to be affected and the period in which it was thought to de-establish the positions.

19. On 5 December 2016, the Vice Chancellor Mr. Healey had presented his paper "*Fiji National University Council – Vice Chancellor's Report to University Council*" to the FNU Council and advised of his intention to restructure the support services, subject to consultation with Senior Management Group ("*SMG*") Members.

20. The paper was then presented at the SMG meeting on 5 December 2016. It was resolved at that meeting that the consultation on the proposed changes to the Division of Properties and Facilities would be open until 13 January 2017. The minutes of the meeting were tendered in as *Defendant's Exhibit 1*.

21. I accept Mr. Healey's evidence that the worker Swamy did not provide any feedback to the proposed changes to his Division. There is no evidence that he did.

22. Then on 31 January 2017, the Vice Chancellor Healey met with the plaintiff Swamy to discuss with him directly the proposed changes to his Division. Mr. Healey's evidence in regards to that meeting is:

*"I met with Mr. Swamy on 31 January 2017 to discuss with him directly the proposed changes to his Division. Mr. Cartmell was also present with me. The meeting between Mr. Swamy and I was amicable. He was fully aware of the proposed changes to his Division as it has been discussed at least since December 2016*

*We discussed the challenge of dealing with major capital infrastructure projects, which entailed working closely with the Construction Implementation Unit of the Ministry of Economy and following*

*Government tender protocols closely, as well as managing contractors, while at the same time managing a large team of tradesman and grounds men who were dealing with routine maintenance. We also discussed the unhelpful separation between Uniservices, which managed the cafeterias and student residences, and the repairs and maintenance function of Properties and Facilities. Mr. Swamy agreed that the reconfiguration of services to create a dedicated team to manage major capital project and a larger division to manage the day to day operations of the campus made sense".*

23. After the consultation with the plaintiff, a Progress Paper was prepared. The Progress Paper was tendered in evidence as ***Defendant's Exhibit 20***. The Progress Paper was presented to the Senior Management Group Meeting on 20 February 2017. The minutes of that meeting was tendered in evidence as ***Defendant's Exhibit 21***.
24. Mr. Swamy was part of that meeting. After that meeting Mr. Swamy received the letter of 20 February 2017 about non- renewal of his contract due to restructure.
25. The evidence therefore clearly reflects that the plaintiff was well aware of the restructure since 5 December 2016. He was part of the information process and he knew that his position was going to be de-established. He therefore could not expect renewal of his contract on the same position. The position was not going to exist anymore.
26. I will now turn to whether the plaintiff was given an opportunity to minimize the effects of non-renewal. The employer asked the worker to take up temporary consultation work on the same pay. The worker did not exercise this option. It also asked the worker to take up 3 months contract of the same position as the restructure was delayed. The worker refused this as well.
27. The employer then had to appoint other people to the Acting position until the position was properly advertised and filled. If the worker had taken the offer, he stood a good chance to be selected to the position due to his expertise.
28. The worker was also asked to apply for the new positions. The positions were advertised in the Fiji Sun on 3 June 2017 and was also on the University's website. The worker did not apply. He says that he did not see the advertisements. He ought to have checked FNU's website at least.
29. I find that the employer gave the worker enough opportunities to minimize the loss by redundancy. He did not take up the opportunities.

30. The plaintiff was also paid more than the redundancy payment. Under s.108 of the ERA, the employer was under an obligation to pay to the worker not less than one week's wage as redundancy pay for each completed year of service in addition to the worker's other entitlements.
31. The worker was on an annual salary of \$74,587. His weekly salary would come to \$1434.37. He was entitled to 7 weeks of salary as he had worked for 7 years. This would calculate to \$10,040.59. That would be his actual redundancy pay under the law. He was however paid \$22,949.71. He was also paid his annual leave.
32. The employer says that the sum of \$22,949.71 reflects the 4 months' notice period. It says that whilst it could have only paid the worker redundancy pay, which worked out to be less than what it paid, it preferred to pay the worker more so that it did not in any way disadvantage the worker.
33. The employer says that it usually gives 6 months' notice to any worker if the contract is not to be renewed. In this case it gave 2 months' notice and 4 months equivalent pay in lieu of notice. I do not find that the worker was disadvantaged. If his contract was renewed for 3 years, it could still be terminated under s.107 of the ERA after giving of the 30 days' notice on the relevant matters.
34. Since the contract was affected by redundancy on restructure, I find that the University did not have to renew the contract under clause 4 of the contract of employment. There was no breach when it did not renew the contract.
35. The plaintiff has also claimed damages for unfair dismissal. There is no evidence to establish that the employer's conduct in not renewing the contract was so improper that it caused the worker humiliation, loss of dignity and injury to his feelings.

*Costs*

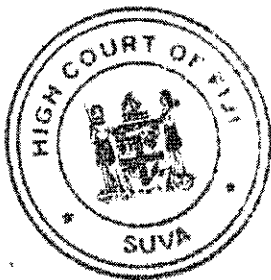
36. The plaintiff is unsuccessful in his claim. The issue is whether costs should be awarded against him. The defendant is entitled to costs. However, I will not make any order for costs in this case due to the circumstances that confronted the parties.
37. The worker would have had his contract renewed but for the restructure. He did not take advantage of the opportunities available after the restructure but an order for costs against him, would to my mind,



be unjustified. It would be another matter if his contract of employment did not contain a clause entitling him for a renewal and he brought this claim.

***Final Orders***

38. In the final analysis, I dismiss the plaintiff's claim. I order each party to bear their own costs of the proceedings.



A handwritten signature in black ink, appearing to read "Anjala Wati".

*Hon. Madam Justice Anjala Wati*

Judge

30.05.2024

To:

1. *Mr. D. Nair for the Plaintiff.*
2. *Haniff Tuitoga Lawyers for the Defendant.*
3. *File: Suva ERCC 15 of 2017.*

