

IN THE EMPLOYMENT RELATIONS COURT AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER: ERCC 26 of 2020

BETWEEN: **FIJI TEACHERS UNION**

FIRST PLAINTIFF

FIJIAN TEACHERS ASSOCIATION

SECOND PLAINTIFF

AND: **FIJI NATIONAL UNIVERSITY**

DEFENDANT

Appearances: Mr. D. Nair for the Plaintiffs.

Mr. F. Haniff for the Defendant.

Date/Place of Judgment: Wednesday 12 February 2025 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

JUDGMENT

A. **Catchwords:**

Employment Law – whether the employer’s act of reminding the employees that their contract which was non-renewable had come to an end amounted to termination of employment and whether the reminder breached the employee’s legitimate expectation for renewal – whether the employees who had been made redundant granted the benefits of the requirements of s. 107 of the ERA.

B. **Legislation**

1. **Employment Relations Act 2007 (“ERA”): s. 107.**

Cause

1. The plaintiffs have filed a claim seeking a declaration that the notice of termination of employment given to its members on 20 November 2020 is unlawful, unjustified and unfair.
2. The plaintiffs claim that the non-renewal of the contract of its members are in breach of their legitimate expectation.
3. It is sought that the notice of termination of employment be withdrawn and that the defendant negotiates with the plaintiffs in good faith regarding their deployment and/or a reasonable redundancy package.
4. It is also sought that the defendant complies with s.107 of the ERA and its Human Resources Policy No.12 pertaining to redundancy.

Employer's Position

5. The employer has filed an affidavit and disclosed the background to the dispute. I will reproduce the employer's position which has not been displaced by any cogent evidence.
6. On or about 28 May 2019, the Government of Fiji made the decision to transfer all operations of the Technical College of Fiji ("***TCF***") to the Fiji National University ("***FNU***").
7. As at 27 December 2019, there were 15 TCF campuses. The decision to transfer all TCF operations to FNU was formalized on 27 December 2019 by the Ministry of Education, Heritage and Arts ("***MEHA***") for and on behalf of the Government of Fiji entering into an Assets Transfer Agreement ("***ATA***") with the FNU. Under the terms of the ATA, the budget of the TCF, the assets and liabilities of TCF would be transferred from MEHA to the FNU.
8. The ATA had a specific section on the status of the TCF employees at the time of transfer. Clause 7 stated:

"[7.1] Employees

At Completion, FNU must absorb the Employees who have agreed to the change of the Employer to FNU. FNU must absorb the Employees:

- (a) *On terms and conditions of employment that are no less favourable than that of the Employee's current terms and conditions of employment;*
- (b) *conditional on Completion occurring; and*
- (c) *expressed to take effect on the Completion Date.*

[7.2] Termination of employment of Transferring Employees

At Completion, the Ministry must release from their employment (with effect from the Completion Date) all Transferring Employees who have by Completion accepted and consented to the change in Employer to FNU made in accordance with clause 7.1.

[7.3] Ministry's Payment Obligations

On the Completion date, the Ministry must, in respect of each Transferring Employee, pay to the Transferring Employee all amounts to which that Transferring Employee is or may become entitled by law or under any agreement or arrangement, in connection with wages, salary, commission, bonuses or allowances accruing or arising in respect of the period up to and including the Completion Date (other than in respect of 10 days annual leave to be carried over to FNU effective from 2 December 2019 and long service leave).

[7.4] FNU'S Indemnity

Subject to Completion occurring, FNU indemnifies the Ministry against all Liabilities suffered, paid or incurred by the Ministry from:

- (a) *any claim by any Transferring Employee for any wages, salary, commission, bonuses and other benefits or entitlements accruing to the Transferring Employee in respect of the period after the Completion Date; and*
- (b) *any breach by FNU of its statutory, contractual or other legal obligations to a transferring Employee after the Completion Date."*

9. Subsequent to the signing of the ATA, 337 TCF employees took up the offer to transfer to the FNU and be employed under FNU's employment terms and conditions.
10. Out of the 337 employees, 247 employees entered into contracts with the FNU that were expiring on 31 December 2019. The 247 employees all entered into similar fixed term employment contracts expiring on 31 December 2019.
11. The relevant clauses of the agreements expiring on 31 December 2019 read as follows:

“[2.3] This contract shall not be renewable and that there should be no expectation of ongoing employment on the part of employee. Nothing in this contract shall be deemed to confer an automatic right of renewal or new contract under any circumstances.

[2.4] For clarity, the worker irrevocably agrees that non-renewal of this contract will not give rise to any course of action of any sort whatsoever against the Fiji National University.

[5.1] This contract constitutes consensus between the parties and supersedes all communication, negotiations, arrangements and agreement, either oral or written, between the Worker and the former employer (Ministry of Education, Heritage & Arts) with respect to the subject matter of this employment contract from the Fiji National University.

[5.3] This contract supersedes any previous contract of employment between the parties and the Ministry of Education, Heritage & Arts.”

12. These 247 employees signed fresh fixed term FNU contracts expiring on 31 December 2020.
13. At the expiry of their contracts of employment on 31 December 2020, 247 employees were not offered fresh contracts of employment with the FNU.
14. Further, 8 of the initial 337 MEHA employees resigned in 2020, 1 employee resigned in 2019 and 5 employees were dismissed from their employment with the FNU due to disciplinary issues.
15. The remaining 76 employees were made redundant. Out of these 76 employees, 12 were made redundant on 14 January 2021. The remaining 62 were made redundant on 11 February 2021.
16. In 2020, before the redundancy, the FNU started a review process by setting up a committee to look into the mainstreaming and consolidation of the ex-TCF operations into FNU to improve efficiency. This committee reviewed programmes from campus to campus to ascertain sustainability of the TCF operations.
17. The review found that enrollment at each of the campuses was low and reflected in the teacher-student ratio at each of the campuses.
18. On 18 November 2020, FNU wrote to each of the 76 employees advising them as follows – each letter was similar except for the change in the name and address:

“18 November 2020

The Senior Management Group (SMG) of FNU had set up a committee to look into mainstreaming and consolidating the ex-TCF operation into FNU campuses with the objective of improving efficiency through economies of scale. The committee reviewed programmes campus by campus to ascertain sustainability.

As a result, mainstreaming of programmes into FNU campuses will proceed from the beginning of next year. Your position in the present campus is no longer required as programmes will be taught by staff currently employed at those FNU campuses. We will try to redeploy you in the meanwhile failing which your position will be made redundant.

The University encourages you to apply for any suitable positions which may be advertised internally or externally. If at the end of 31 December 2020, a successful redeployment outcome for you is not forthcoming we will payout your redundancy entitlement pursuant to our Redundancy Policy.

You and your representative (union) are invited to attend consultation with management. Details on the consultation will be advised soon.

Please feel free to contact us should you need any clarification or wish to discuss the matter further.

*Ours sincerely,
Professor John Chelliah
Director Human Resources”*

19. The employees and their representatives were invited to attend the consultation with the management. Consultations were held on 19 November 2020 for the Central Division at the Suva Campus, on 23 November 2020 for the Western Division at the Dr. Shaukat Ali Campus and 27 November 2020 for Vanua Levu at the Vanua Levu Arya Campus. The consultations were done by the Human Resources Department of the FNU facilitated by Professor Chelliah.
20. During this consultation staff were provided with the relevant information including the reasons for the contemplated redundancy, the number and categories of workers likely to be affected and the period over which the redundancy is intended to be carried out. Staff were also advised on the measures the FNU will take to avert or to minimize redundancy and measures to mitigate the adverse effects of any redundancy. Staff were encouraged to target marketing and not to hold enrolments.
21. For all the three consultations, staff were advised that:

(a) *TCF has 13 programmes spread across 15 campuses. Not all the campuses are viable for all the programmes due to low student numbers, which is why FNU is working towards a strategy to mainstream the TCF programmes into FNU main campuses to achieve economies of scale. Operations of ex-TCF campuses which are within close proximity to FNU campuses will have their operations moved to those FNU campuses. Programmes will be offered based on demand at FNU campuses. The programmes will be offered based on the demand for programmes rather than making all programmes run at all campuses with small student numbers. FNU campuses have better facilities and infrastructure.*

(b) *Tertiary Scholarship and Loans Board (“TSLB”) has increased the threshold age from 15 to 17 years. With the increase in the age criteria, enrolment numbers are likely to drop down as students will rather opt for FNU certificate 3 programmes than TCF’s certificate 2.*

22. There were 52 teaching staff, 7 heads of campuses and 3 administrative staff facing redundancy. These staff were asked to assist with marketing TCF programmes for December 2020 until the TSLB deadline for applications closed on 24 January 2021. There were 1000 places available under the TSLB loans scheme for TCF. The Registrar had confirmed that there were only 67 enrolments (out of 82 applications) who would qualify i.e., at least 17 years of age for TSLB. It was clear that carrying on with TCF operations would be unsustainable.

23. The FNU consulted with the Department of Labour on the possible closure of the TCF campuses. The FNU also informed the Ministry of Employment of the possibility of redundancy.

24. Each of the 76 employees were paid redundancy payments equivalent to or better than the prescribed amount under the Employment Relations Act.

25. All 15 Campuses of the ex-TCF is now closed. Similar programmes that were formally offered by the TCF continues to be offered through the 28 vocational secondary schools around Fiji.

Plaintiff’s Position

26. The plaintiffs say that the employer should not have given a letter informing the employees that their contracts would not be renewed as that amounts to termination of their contracts. It is also contended that that letter breached the employees’ legitimate expectation of renewal of their contracts.

27. The plaintiff’s also argued that the employees who were made redundant were deprived of the procedural benefits under s. 107 of the ERA.

Issues

28. The defendant has raised 3 preliminary issues as follows:

1. *None of the plaintiffs have established that it has locus to bring the proceedings for want of:*

- (i) *evidence that both the plaintiffs are registered trade unions having capacity to sue and be sued under s.144(c) of the ERA;*
- (ii) *nexus between the plaintiffs and the defendant to sue as there is no collective agreement between the parties; and*
- (iii) *evidence that the said employees are members of the plaintiffs and have given the plaintiff's consent to bring the proceedings.*

29. The substantive issues to be determined are:

- (1) *Were the employees whose contract came to an end terminated from work?*
- (2) *Were the procedures laid out in s. 107 followed for those employees who were made redundant?*

Law and Analysis

30. In respect of the preliminary issues, I find that these were not raised by the employer in its affidavit in opposition. The locus to bring the proceedings were not challenged. If the issues were properly raised, the plaintiffs would have had a chance to provide evidence on whether both are registered trade unions, whether there is a Collective Agreement between the parties, and whether the affected employees are its members and have given consent to bring the proceedings. These evidence can only be properly provided through an affidavit.

31. If I deal with the preliminary issues, the plaintiff's will be prejudiced as both have not been given an opportunity to produce evidence to address the defendant's concerns raised so late.

32. I will only deal with the substantive issues. The first one is whether the employees whose contract came to an end terminated from work and whether their legitimate expectations were breached?
33. I must clarify that the letter issued to the employees stating that the contract will not be renewed is not a letter of termination. It is only a reminder to the employees that their contract is coming to an end and will not be renewed as initially agreed by the parties.
34. These employees initially had their contracts expiring on 31 December 2019. Their contracts were extended to a further year to 31 December 2020. The letter of extension given to each of these employees states that the *“appointment will cease on 31 December 2020. This temporary contract is not renewable and there should be no expectation of ongoing employment on the part of the employee.”*
35. Each employee accepted the contract in the form it was given to them. Each accepted that the contract was a temporary one. It was fixed for one year and clearly expressed to be non-renewable. After having agreed to work for one year and accepting that the contract of employment will not be renewed, there is no justifiable basis to assert breach of legitimate expectation for renewal of the contract.
36. The employees were not terminated. Their contracts simply came to an end. There was no letter of termination. The entire basis for the application is wrong.
37. When the contract came to an end and the employer did not wish to renew the same, it was under no obligation to enter into any negotiation with the union.
38. The next issue is the complaint that when 76 employees were made redundant, s. 107 of the ERA was not complied with.
39. S. 107 of the ERA states:

“[S.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

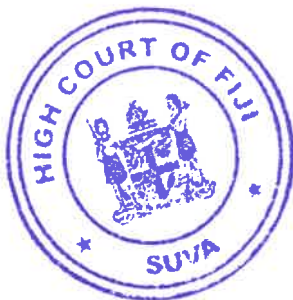
- (b) *give the workers or their representatives, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimize the terminations and on measures to mitigate the adverse effects of any terminations on the workers concerned, such as action to attempt to find alternative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

40. Indisputably 76 employees were made redundant. Out of these 76 employees, 12 were made redundant on 14 January 2021. The remaining 62 were made redundant on 11 February 2021.

41. The affidavit of the employer clearly establishes that it complied with s. 107 of the ERA. What it did before carrying out the redundancy is outlined in paragraphs 16 to 24 of this judgment. I need not repeat the same. There is no evidence to refute that the employer did not carry out the processes. I find that there was compliance with s. 107 of the ERA.

Final Orders

42. In the final analysis, I do not find any merits in the claim by the plaintiffs and I dismiss the same. I order costs against both the plaintiff's in the sum of \$2,500 each to be paid to the defendant within 21 days.



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Hon. Madam Justice Anjala Wati

Judge

12.02.2025

To:

1. *Mr. D. Nair for the Plaintiffs.*
2. *Haniff Tuitoga Lawyers for the Defendant.*
3. *File: Suva ERCC 26 of 2020.*

