PROCEEDINGS COMMISSIONER, FIJI HUMAN RIGHTS COMMISSION v SUVA CITY COUNCIL (CIV0073 of 2004)

HIGH COURT — CIVIL JURISDICTION

COVENTRY J

21, 22 June, 17 November 2006

Civil and political rights — discrimination — age discrimination — Constitution of the Republic of Fiji (Amendment) Act 1997 Ch 4 ss 21, 38, 43(2), 194(1) — Human Rights Commission Act ss 17(1), 18, 36(1).

Caroline Tilly Martin (Caroline) was employed in the Parks and Gardens Department by the Suva City Council (Council) in 1967 and became a member of their established staff in 1974. She continued in horticultural work with the Council until her compulsory retirement. In 1999, a retirement notice was sent to Caroline giving her 6 months' notice of the Council's intention to retire her. She was then 54 years old and would be 55 in January 2000. The notice was in accordance with clause 19(ii) of the Master Agreement, the collective agreement (agreement), between the Council and the Suva City Council Staff Association in 1979. A fresh retirement notice was issued to Caroline in 2001. In 2002, the Human Rights Commission held a formal inquiry. The Petitioner commenced formal proceedings and the issue was whether the clause in the agreement, which allows the Council discretion to compulsorily retire an employee, once the employee reaches the age of 55, offended the Constitution and the Human Rights Commission Act provisions against age discrimination.

Held — On the basis of the affidavits presented, there was nothing to show that the treatment of Caroline by way of compulsory retirement was anything other than discriminatory or directly differentiated adversely against her interests by reason of her age. There was no need to make a comparison with others who might or might not have been "retired" in the same way. The discrimination was not between those aged 55 years or over, but between those aged 55 years or over and those aged less than 55 years.

Clause 19 of the agreement between the Council and its established workers unfairly discriminated against persons over the age of 55 years and over the age of 60 years and to that extent, they must be declared void. Just by reaching a particular age and for no other reason, an employee was rendered liable to lose employment by way of "retirement". Thus, it discriminated against the Council's employees who are over the age of 55. The effect of the clause clearly disadvantaged all those over the stipulated age, a disadvantage which was not present for those under that age.

Application granted.

Cases referred to

Douglas College/Kwanthen Faculty Association v Douglas College [1990] 3 SCR 570; *Fogelberg v Association of University Staff of New Zealand* (2000) 6 HRNZ 206; *Newfoundland Association of Public Employees v Newfoundland Hospital* [1996] 2 SCR 3; *State v Arbitration Tribunal; Ex parte Suva City Council Staff Association* [2000] FJHC 51, cited.

Andrews v Law Society of British Columbia [1989] 1 SCR 143; *McKinney v University of Guelph* [1990] 3 SCR 229, considered.

Shameem and *U. Ratuvili* for the Human Rights Commission

S. Sharma and *T. Waqanika* for the Suva City Council

[1] Coventry J. Caroline Tilly Martin was born on the 22 January 1945. In 1967 she was employed by the Suva City Council and in 1974 became a member of their established staff. She was employed in the Parks and Gardens

Department. In 1972 she attended the Parks and Reserves Department in New Plymouth, New Zealand for a 3-month attachment. She proved herself to be an enthusiastic and studious person during that visit. She continued in horticultural work with Suva City Council until her compulsory retirement.

[2] On 2 November 1999 a retirement notice was sent to her giving her 6 months notice of the council's intention to retire her. She was then 54 years of age and would be 55 in January 2000.

[3] This notice was said to be done in accordance with clause 19(ii) of the master agreement, the collective agreement, between the council and the Suva City Council Staff Association dated 17 August 1979.

[4] Clause 1 of that agreement reads: Retirement — the normal age of retirement from the council service will be 60 years, except that —

> (i) …
> (ii) On or after attaining the age of 55 years, an officer may be compulsorily retired by the Council provided that the officer must be given six months notice of the intention so to retire him

[5] After various procedures a fresh retirement notice was issued to Caroline Martin on 13 December 2001. By a letter dated 21 February 2002 the Human Rights Commission announced that they were holding a formal inquiry.

[6] The matter was not resolved and by letter of 27 January 2003 the Human Rights Commission informed Suva City Council that it intended to issue formal proceedings. On 29 September 2004, the Proceedings Commissioner of the Fiji Human Rights Commission issued proceedings against Suva City Council under s 36(1) of the Human Rights Commission Act. In these proceedings they sought seven reliefs including declarations, orders and damages on behalf of Ms Martin.

[7] By a ruling on preliminary issues dated 3 November 2005 I directed that argument concerning paras 1 and 3 of the originating process be heard first. This judgment concerns those paras 1 and 3.

[8] The paragraphs read as follows.

> 1. A declaration that the compulsory retirement policy of the defendant based on chapter 4 clause 19(ii) of the Collective Agreement between the defendants and Suva City Council Staff Association directly discriminates against its employees over the age of 55 contrary to section 38(2) of the Constitution;
> 2. …
> 3. An order declaring the Collective Agreement void and unenforceable in so far as it offends section 38(2) of the Constitution in imposing a compulsory retirement age;
> 4–7 …

[9] I have before me the affidavits of Caroline Martin filed on 29 September 2004, 10 February 2005 and 30 May 2006, the affidavits of Jale Toki filed on 29 September 2004, 10 February 2005 and 30 May 2006, the affidavit of Ganga Devi Pillay filed on 20 January 2006, the two affidavits of Eroni Ratukalou filed on 3 April 2006 and the two affidavits of Illitomasi Verenakadavu filed on 24 December 2004. I also have written submissions from the parties together with supporting authorities and other documents. In the outcome, the evidence in the affidavits was only of background importance in the resolution of these issues. The evidence the Defendants sought to adduce by their summons of 20 June, para 1, would not apparently have had any bearing on the issues: see ruling in respect of that summons dated 17 November 2006.

[10] In essence, the Human Rights Commission states that the clause in the collective agreement which allows the council in its discretion compulsorily to retire an employee, once the employee reaches the age of 55, offends the Constitution and the Human Rights Commission Act provisions against age discrimination. They say it is therefore void and unenforceable.

[11] The Commission further avers that the compulsory retirement age similarly offends the age discrimination provisions and is void and unenforceable.

[12] The current Constitution of Fiji is the "1997 Constitution" as embodied in the Constitution Amendment Act 1997. Previous constitutions had not included measures concerning discrimination upon the grounds of age. Section 38 is headed "Equality" and states:

> (1) Every person has the right to equality before the law.
> (2) A person must not be unfairly discriminated against, directly or indirectly, on the grounds of his or her:
> (a) actual or supposed personal characteristics or circumstances including race, ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age or disability; or
> (b) opinions or beliefs, except to the extent that those opinions involve harm to others or the diminution of the rights or freedom of others;
>
> or on any other ground prohibited by this Constitution.
> (3) Accordingly, neither a law nor an administrative action taken under a law may directly or indirectly impose a disability or restriction on any person on a prohibited ground.
> (4) (Rights of access without discrimination on prohibited grounds to shops, hotel, services etc.)
> (5) (Facilitation of reasonable access for disabled persons).
> (6) A law, or an administrative action taken under a law, is not inconsistent with the right to freedom from discrimination on the grounds of:
> (a)–(c) …
> (d) age;
> (e) …
>
> during the period of two years after the date of commencement of this Constitution if the law was in force immediately before that date and has remained continually in force during that period.
> (7) A law is not inconsistent with subsection (1), (2) or (3) on the ground that it:
> (a) …
> (b) imposes a retirement age on a person who is the holder of a public office;
> (c)–(e) …
>
> but only to the extent that the law is reasonable and justifiable in a free and democratic society.
> (8)–(10) …

[13] A considerable number of questions and considerations have been raised by the parties during the course of the proceedings. I will deal with each in turn under the headings of specific questions.

Does s 38 apply to the Suva City Council?

[14] Section 38 of the Constitution of Fiji is contained in Ch 4 which is entitled "Bill of Rights". The first section of that chapter is entitled "Application" and reads as follows:

> 21-(1) This Chapter binds:
> (a) the legislative, executive and judicial branches of government at all levels; central, divisional and local; and

(b) all persons performing the functions of any public office.

(2) The rights and freedoms set out in this Chapter apply according to their tenor and are subject only to the limitations under laws of general application permitted by this Chapter and to such derogations as are authorised under Chapter 14 (Emergency Powers).

(3) Laws made, and administrative and judicial actions taken, after the commencement of this Constitution are subject to the provisions of this Chapter.

(4) In considering the application of this Chapter to particular legislation, a court must interpret this Chapter contextually, having regard to the contents and consequences of the legislation, including its impact upon individuals, groups or communities.

(5) This Chapter applies to all laws in force at the commencement of this Constitution.

(6) To the extent that it is capable of doing so, this Chapter extends to things done or actions taken outside the Fiji Islands.

[15] At p 12 of my ruling on preliminary issues dated 3 November 2005 I stated:

> Suva City Council falls within the provisions of sub-paragraph (a) of section 21(1) being part of Local Government:
>
> Section 88(2) of the Local Government Act Cap. 125 states "the provisions of this Act relating to the powers and duties of Councils are in addition to and not in derogation of the provisions of any other written law relating to such powers and duties and in the exercise of their powers and the performance of their duties in relation to any matter for which provision is made by any other law, the Council shall act in conformity therewith".

[16] I am satisfied that the provisions of s 38 do apply to Suva City Council.

Is or was the collective agreement "Law" for the purposes of Ch 4?

[17] The 1997 Constitution of Fiji was drafted relatively recently. In this regard the framers of the Constitution and parliament would have had the advantage of knowing which articles in other constitutions had worked well and which had caused problems in the field of Bills of Rights.

[18] One particular concern in this regard is the meaning of the word "law" in this context. While acts passed by the legislature are clearly law, judicial opinion has differed as to whether or not collective agreements entered into by, for example, public hospitals, or universities are "law" for the purposes of rights cases. The starting point for the interpretation of a Constitution is the plain meaning on the face of the document. That must be placed within the framework and construction of the surrounding sections and chapters. There must also be a purposive interpretation, the Constitution being a living document.

[19] Chapter 4 has its own interpretation section, namely s 43:

(1) …

(2) In interpreting the provisions of this Chapter, the courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter.

(3) …

[20] The Defendants seek to argue that the collective agreement between the Suva City Council and the Staff Association is not "law" and therefore is not subject to the anti-discrimination provisions of s 38(2).

[21] In the case of *McKinney v University of Guelph* [1990] 3 SCR 229 the Supreme Court of Canada had to decide whether the university's policies (assuming it formed part of "government") of a mandatory retirement age of 65 breached s 15 of the Canadian Charter of Rights and Freedoms. In order for s 15(1) of the Charter to apply the alleged age discrimination had to be one made by "law". Opinion on this point was divided. La Forest J (one of the majority) stated:

> The most obvious form of law for this purpose is, of course, statute or regulation. It is clear, however, that it would be easy for government to circumvent the Charter if the term law were to be restricted to these formal types of law making … On the assumption that the universities form part of the fabric of government, I would have thought their policies on mandatory retirement would amount to a law for the purposes of section 15 of the Charter.

[22] Wilson J (dissenting) stated "law" should be given a:

> liberal interpretation encompassing both legislative activity and policies and practices even if adopted consensually. The guarantee of equality applies irrespective of the form the discrimination takes. Discrimination, unwittingly or not, is often perpetuated through informal practices. Section 15 does not require a search for a discriminatory "law" in the narrow context but merely a search for discrimination which must be redressed by the law.

(See also, for example *Douglas College/Kwanthen Faculty Association v Douglas College* [1990] 3 SCR 570.)

[23] I do not find that the Fiji Constitution produces the same difficulties. Section 38 is entitled "Equality". It is clear, in my judgment, that the subsections of s 38 do not have running throughout the requirement that any prohibited acts must arise out of anything describable as "law".

[24] Subsection (1) states that "Every person has the right to equality before the law".

[25] Subsection (2), taking the approach to interpretation I am required to do by s 43(2), is a broad injunction against unfair discrimination upon the grounds set out. I do not find by its wording or its contextual setting that such injunction is or should be limited to laws or administrative actions taken under law, whether directly or indirectly. Section 21(1) (above) states specifically which bodies and persons are bound by Ch 4. Subsection (2) states the rights and freedoms apply according to their tenor.

[26] Subsection (4), concerning right of access to shops, hotels, public restaurants etc without discrimination on a prohibited ground is consistent with this. It would be an unnecessary and artificial limitation of what is stated in subss (2) and (4) were they to be limited to law or administrative actions taken under law.

[27] Subsection (5) places a positive onus on proprietors of shops, hotels, public restaurants etc to facilitate reasonable access for disabled persons to the extent prescribed by law. This in effect requires parliament to pass a law requiring the same and then persons to adhere to it. It cannot be said that the restricting requirement of "law" has any place in this subsection.

[28] Further, subs (3), in my judgment, was deliberately drafted the way it is to acknowledge this issue and reads consistently with this interpretation of s 38. By its wording subs (3) is an adjunct to subs (2). The latter precludes unfair discrimination and following on that the former states "accordingly, neither a law

nor an administrative action taken under a law may directly or indirectly impose a disability or restriction on any person on a prohibited ground". Had s 38(2) only applied to law or an administrative action taken under a law there would have been no need for subs (3), particularly when it starts with the word "accordingly".

[29] Subsection (6) then continues the sequence of thought by stating that a law, or administrative action taken under it, is not inconsistent with the right to freedom from discrimination on some of the grounds stipulated in subs (2), for a period of 2 years after the date of commencement of the Constitution. This is clearly a transitional provision allowing time for any laws, or administrative actions taken thereunder, to be brought into line with subs (2). At the end of the 2-year period then such discrimination is unlawful. This subsection does not in any way mean that a breach of subs (2) can only come about through a "law" or administrative action taken under the law.

[30] Subsection (7) is also consistent with this approach. It permits a law to be valid despite subss (2) and (3) in certain set circumstances "only to the extent that the law is reasonable and justifiable in a free and democratic society".

[31] Although I have not set out subss (8)–(10) they are not inconsistent with this approach.

[32] I must also look to s 21 to ascertain if it is consistent with this approach. I consider it is. Subsection (1) states which persons and bodies are bound. Subsection (2) states "the rights and freedoms set out in this Chapter apply according to their tenor". This does not suggest that the equality provisions of s 38 only apply to laws or administrative actions taken under law. The full breadth of the rights and freedoms are to be applied. Subsection (2) does stipulate that there might be limitations and sets out the circumstances namely "and are subject only to the limitations and laws of general application permitted by this Chapter and to such derogations as are authorised under Chapter 4". That means that if any law is to limit or derogate from any right or freedom set out in Ch 4 then such law is limited in its scope to that permitted by the chapter.

[33] Section 21(3) is also consistent. It renders laws made and administrative and judicial actions taken after the commencement of the Constitution subject to the provisions of Ch 4. This is a positive injunction to ensure that laws, administrative and judicial actions are subject to the chapter. It does not mean that the prohibition on discriminatory actions must arise from some law or administrative or judicial action.

[34] Subsections (5) and (6) of s 21 are also consistent with this approach.

[35] Part 3, "Unfair Discrimination", of the Human Rights Commission Act is also consistent with this approach. Section 17 states:

> It is unfair discrimination for a person, while involved in any of the areas set out in subsection (3), directly or indirectly to differentiate adversely against or harass any other person by reason of a prohibited ground of discrimination.

Subsection (3)(b) stipulates "… employment …"

[36] Section 38 of the Constitution applies to the legislative, executive and judicial branches of government at all levels and all persons performing the functions of any public office. Section 17 of the Act extends the prohibited grounds of discrimination to those fields of activity listed in subs (3) including employment, partnerships, professions, training, provision of goods, services and facilities, access to public places and transport, land, housing, education etc. Procedures and remedies are prescribed.

[37] This section extends the prohibition upon unfair discrimination from activities in the public arena to those in the private arena as set out in the section, and extends the prohibition from those bodies and persons defined in s 21(1) to, in effect, all persons.

[38] Section 38(2) prescribes rights founded on the underlying desire to eradicate unfair discrimination. To limit the rights to "law" or administrative actions taken under "law" in the Fiji Constitution is an artificial and unwarranted restriction.

[39] Accordingly I find that the wording of the Constitution of Fiji is such that I do not need to address the question as to whether the city council's collective agreement was "law".

Are the employees of Suva City Council holders of "A Public Office"?

[40] I have already found that Suva City Council is an executive branch of government at divisional or local level. Section 38(7) of the Constitution states that "a law is not inconsistent with subsection (1), (2) or (3) on the ground that it: "… (b) imposes a retirement age on a person who is the holder of a public office …".

[41] Public office is defined at s 194(1) of the Constitution as meaning,

> (a) an office created by, or continued in existence under, this Constitution;
> (b) an office in respect of which this Constitution makes provision;
> (c) the office of a member of a Commission,
> (d) an office in a state service (the public service, the Fiji Police Force or the Republic of Fiji Military Forces) (public service means "the service of the State in a civil capacity …");
> (e) an office of judge;
> (f) an office of magistrate or an office in a court created by Parliament;
> (g) office in, or as a member of, a statutory authority; or
> (h) an office established by a written law;

The only offices which might be applicable are (d) "an office in a state service" and (g), "an office in, or as member of, a statutory authority". There is something of a circularity of definition as "state service means the public service (and police and armed forces)" and public service means the "service of the State in a civil capacity". This necessarily asks the question what is "service of the State". There is no definition and a lack of clarity as to whether "State" includes or excludes local government for these purposes.

[42] In deciding whether or not an employee of Suva City Council holds an office in a state service or holds an office "in, or as a member of, a statutory authority" I first look at the nature and type of the offices described in that definition at (a)–(c), (e), (f) and (h). It is difficult to say that Ms Caroline Martin as a horticultural worker or employees such as baths caretakers, library staff, market attendants, (see: s 2, para 8 of the collective agreement) were meant to be included in that description as holders of a public office.

[43] This interpretation is strengthened when one looks at the definition of "local government officer": s 194(1). That term means "a person holding or acting in any office of emolument in the service of a local authority but does not include a person holding or acting in the office of a member of any such authority". Ms Martin and her colleagues clearly fall into the former category and not the latter. Local authority means "a council of a city, town or district or any other similar body prescribed by the Parliament". Suva City Council is a "local authority".

[44] If local government officers did fall within (d) or (g) there would have been no reason to give there a separate definition. They would be part of the public service of the state or hold office in a statutory authority.

[45] This interpretation is supported by s 145(1) which lists those disqualified for appointment as a member of an independent service commission. The list reads "(a)–(c) …, (d) the holder of a public office or (e) a local government officer". The framers of the Constitution clearly contemplated that the two were separate and distinct. Had "holder of a public office" included "local government officers" there was no reason for a separate definition nor to have a para (e) in this subsection. Local government officer is not mentioned elsewhere in the Constitution.

[46] I have looked through the collective agreement and come to the conclusion that those covered by it as employees and in particular Ms Martin, are not officers in a state service or holders of a public office for the purposes of s 38(7) of the Constitution.

[47] Accordingly, the exception in s 38(7) does not apply to them. In any event counsel have not sought to argue there is any law yet in force under s 38(7). This exception cannot apply.

Is clause 19 of the collective agreement discriminatory?

[48] There is no definition of discrimination in the Constitution or the Human Rights Commission Act.

[49] In the case of *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 (*Andrews*), a case before the Supreme Court of Canada, at 18 McIntyre J. stated:

> Discrimination may be described as a distinction, whether intentional or not, based on grounds relating to personal characteristic of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. Distinction based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

[50] In a keynote address to the New Zealand Judicial Seminar on Gender Equity at Rotorua in New Zealand on the 16 May 1997, Fraser JA, in a paper entitled "*The Jurisprudence of Equality and Canada's and New Zealand's International Human Rights Obligations*", when summarising the principles stemming from the *Andrews* case stated:

> First, the Supreme Court made it clear that sameness of treatment is not necessarily equality. Instead, "for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions". Second, the court expressly rejected the "similarly situated" test on the basis that it was "seriously deficient" for equality comparisons because it excluded any consideration of the nature of the law or its impact on different people. Justice McIntyre, who wrote the majority decision, went so far as to say that the tests could even justify Hitler's Nuremburg Laws as long as Jews were treated similarly. Third, the court confirmed that discriminatory intent was not required. What was important was the impact of the law on the individual or group concerned. Fourth the court stressed the importance of conducting an equality inquiry in its larger social, political and economic context.

[51] Discrimination against older persons is now generally regarded as unacceptable. This is confirmed in many international policy documents and in the legislation of the majority of countries. There is a clear trend towards the elimination of age barriers even in the few areas in which discrimination continues to be tolerated, for example mandatory retirement ages from public service or access tertiary education.

[52] The demography of most countries is changing. People are living longer and healthier lives and wish to remain in employment beyond what have traditionally being regarded as normal retirement ages. It is generally accepted that age does not determine a person's ability and should not be used as a guide for access to or retention of employment: see for example the consideration of the Human Rights Act 1993 in New Zealand and its consideration in *Fogelberg v Association of University Staff of New Zealand* (2000) 6 HRNZ 206.

[53] I am, of course, in this judgment addressing discrimination at older ages and not younger ages.

[54] On a plain reading of clause 19(ii) of the agreement an employee of Suva City Council, when she or he reaches the age of 55 years, may be compulsorily retired by the council. The employee has no say in the matter. This is clearly discriminatory. By dint of reaching a particular age and for no other reason an employee is rendered liable to lose her or his employment by way of "retirement". This discriminates against the council's employees over the age of 55.

[55] The fact there is a discretion within the council whether or not it exercises the power to retire a person is irrelevant. The fact that someone over that age is liable, at the discretion of the council, to be retired does not save it from being discriminatory.

[56] The compulsory retirement age of 60 years is discriminatory. The fact that in exceptional circumstances someone might continue to work beyond that age is irrelevant. The effect of this clause clearly disadvantages all those over the stipulated age, a disadvantage which is not present for those under that age. The line is drawn by age and nothing else. The Defendants have not sought to say that, in itself clause 19 is not age discriminatory.

Is the discrimination "Unfair" for the purposes of s 38(2) of the Constitution?

[57] At the outset it must he stated that nowhere in the affidavits, arguments or law placed before the court by the Defendants have they sought to put forward any rationale for the discriminatory provisions in clause 19. This was one of the subjects of an application made on the first day of the hearing for an adjournment. The application was refused. It was made too late: see my ruling, with reasons, dated 17 November 2006.

[58] The Constitution and the law require that there be no discrimination on the grounds of age save for s 38(7) together with its restriction on extent, s 38(8)–(10) and in certain areas of the field of employment. The last is recognised in authorities although difficult questions are thrown up. (For example, see: The report of Professor Bob Hepple, M Coussey and T Choudhury entitled, "*Equality: A New Framework — Report of the Independent Review of the Enforcement of Anti-Discrimination Legislation*", 2000 at para 2.65 recommended further study on the difficult issue of "compulsory" or "mandatory" retirement policies.)

[59] Section 17(1) of the Human Rights Commission Act states:

> It is unfair discrimination for a person, while involved in any of the areas set out in subsection (3), directly or indirectly to differentiate adversely against or harass any other person by reason of a prohibited ground of discrimination.

[60] Section 18 of the Human Rights Commission Act specifically states:

> (1) It is not unfair discrimination in relation to any of the areas referred to in paragraphs (a) to (e) (which include age) in section 17(3) if the prohibited ground of discrimination is a genuine occupational qualification.
>
> (2) For the avoidance of doubt, adverse differentiation by reason of a prohibited ground of discrimination is a genuine occupational qualification where a position for the purposes of an organised religion and a differentiation complies with the doctrines, rules or established customs of the religion.

[61] I do not find persuasive the Defendants' arguments that the retirement age in the agreement came about in the course of an agreement negotiated by the Staff Association and the council. The agreement itself predated the 1997 Constitution. Before that date there were no anti-age discrimination provisions in the Constitution. The agreement was not negotiated and signed, in respect of the retirement clauses, with the age discrimination provisions in mind. Indeed, the law then, in this regard was in its earlier stages of development.

[62] Section 38(6) of the Constitution gave a grace period of 2 years to rectify matters if a law, or an administrative action taken under a law, was inconsistent with the right to freedom from discrimination on the grounds of age and other grounds. This does not help the Defendants in any way. Further, it was not sought to be argued that the Suva City Council was in a transitional stage, after the coming into force of the 1997 Constitution on 7 July 1998, from its old retirement provisions to Constitution compliant ones at the time Ms Martin was "retired".

[63] There are many authorities concerned with the limitation or modification of anti-discrimination provisions by agreement between the parties concerned. In the *Newfoundland Association of Public Employees v Newfoundland Hospital* [1996] 2 SCR 3 (*Newfoundland Hospital*) case it was stated that "Human rights legislation sets out a floor beneath which the parties cannot contract out. Parties can contract out of human rights legislation if the effect is to raise and further protect the human rights of the people affected": *Newfoundland Hospital*. For example, a staff association comprising for the most part heterosexual males of one particular race could not conclude any kind of collective agreement which discriminated against persons of a particular sexual orientation or women or those of a different race. To allow this would mean those without bargaining power might be coerced or forced to give up their rights under human rights legislation. I need not decide whether, given the wording of s 21(2), (the rights and freedoms … "are subject only to the limitations under laws of general application permitted by this Chapter and to such derogations as are authorised under Chapter 14") contracting out to any degree is permitted in Fiji.

[64] Accordingly, I do not need to consider to what extent other than specifically stated in the Constitution on the Human Rights Commission Act the provisions against discrimination on the grounds of age can legitimately be modified, or contracted out of as these issues have not been raised by the Defendants and there is no evidence specifically directed to them.

[65] The Defendants have further argued that, on several occasions, the issues of discrimination on the grounds of age and whether or not the collective agreement is "law" have been litigated before the Arbitration Tribunal. First,

whether or not such a tribunal can consider such matters, it is not the ideal forum in which to canvass them. Further, in any event, I have found that the fact that the collective agreement is not "law" and this makes much of the tribunal's deliberations irrelevant for the purposes of the application of s 38(2) of the Constitution.

[66] I have read the Arbitration Tribunal awards which have been placed before the court. I do not find they help in coming to a conclusion upon the issues in these proceedings. This court is, of course, not bound by the rulings and decisions of the Arbitration Tribunal. I do not overlook the judicial review proceedings in *State v Arbitration Tribunal; Ex parte Suva City Council Staff Association* [2000] FJHC 51. The issues were referred to by Scott J, but he found he was not required to rule thereon.

[67] On the face of the affidavits before me, there is nothing to show that the treatment of Caroline Martin by way of compulsory retirement was anything other than discriminatory or directly differentiated adversely against her interests by reason of her age. I need not make a comparison with others who might or might not have been "retired" in the same way. The discrimination is not between those aged 55 years or over, but between those aged 55 years or over and those aged under 55 years.

[68] In my judgment, clause 19 of the collective agreement between Suva City Council and its established workers unfairly discriminates against persons over the age of 55 years and over the age of 60 years and to that extent they must be declared void. Accordingly I make the declarations which are requested at paras 1 and 3 of the originating process.

[69] It may well be to the benefit of all if the retirement provisions of the collective agreement are renegotiated given the country's Constitution and its anti-age discrimination provisions, in the light of the Hepple Report (above), other such reports and the authorities and with the help of the Human Rights Commission. There are also complex issues associated with entitlement to retirement benefits, such as those from the Fiji National Provident Fund, the position of others in the public field and other considerations. Publications from other countries which address these issues may be of assistance.

[70] I will adjourn this case for a short time for the parties to attempt to resolve the remaining issues between them. Given Caroline Martin's state of health now, I would urge the parties to resolve her claims as quickly as possible. If agreement is not possible, then I will give further directions.

[71] I am grateful to counsel in this case for the assistance I have received from their researches and arguments.

Application granted.