

IN THE HIGH COURT OF FIJI
AT SUVA

Civil Action No: HBC 383 of 2015

BETWEEN : AGESH PRAKASH
Plaintiff

AND : FIJI REVENUE & CUSTOMS AUTHORITY
Defendant

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr. D. Sharma, Ms. N. Choo with him for the Plaintiff
Mr O. Verebalavu for the Defendant

Dates of Hearing : 6 and 7 March 2017

Date of Judgment : 10 March 2017

JUDGMENT

1. It may appear to be an oxymoron if this matter were to be described as a claim against the Revenue Authority which is not a claim about Revenue.
2. According to the Statement of Claim, the Plaintiff was appointed on 22 December 2011 under a written Contract of Employment (Contract) to the position of Principal Assessor

Taxation of the Defendant (Revenue) for the period 1 January 2012 to 31 December 2014 (the period) at an annual salary of \$41, 688.

3. On 21 August 2014 he received a Show Cause letter from the Revenue CEO alleging he had official documents of Revenue, in his possession during a Police raid on his property in 2010. Revenue stated this was in breach of Revenue's Records Management Policy (Policy). He was given 14 days to show cause why his employment should not be terminated, and was suspended from his position from 21 August 2014 without salary until further notice.
4. He responded in writing to Revenue on 23 August 2014 setting out his explanation about the 4 types of documents:
 - (i) Copies of correspondence on major files;
 - (ii) Emails and letters written by the Defendant to the Plaintiff;
 - (iii) Returns for Lodgment given to the Plaintiff by people living in his area;
 - (iv) Documents pertaining to overseas artists visiting and performing in Fiji.
5. He provided an explanation why in 2010 he had some original documents relating to overseas artists (sic).
6. He avers his contract was not terminated pursuant to clause 9 of the Contract; he was not afforded any due process; he was not given any recourse to disciplinary processes; that pursuant to the Employment Relations Promulgation 2007 (ERP) his employment was deemed to continue for another 3 years after 31 December 2014 as he was kept suspended by Revenue.
7. Revenue informed him on 20 August 2015, by letter, that his contract would not be renewed.
8. He claims the following:
 - (a) **Special Damages:**
 - (i) Salary from 21st August 2014 to 31st December 2014: \$17,917.00

(ii)	Salary from 1 st January 2015 to 20 th August 2015:	\$28,667.00
	Total	<u>\$45,584.00</u>
(b)	<u>Special Damages for Balance of Contract:</u>	
(i)	21 st August to 31 st December 2017	
	28 months at \$3474.00	<u>\$97,272.00</u>

9. The Plaintiff alleges the Defendant's actions caused him:
 - (a) Depression;
 - (b) Mental Anguish and loss of dignity;
 - (c) Trauma; and
 - (d) A feeling of despair and lack of self worth
10. The Defendant discriminated against the Plaintiff in that:
 - (a) The Defendant ensured that the Plaintiff was not allowed to return to work.
 - (b) The Defendant discriminated against the Plaintiff by virtue of his age and personal characteristics.
11. The Plaintiff brings this claim under the contract, the ERP and common law.
12. The Defendant by its Statement of Defence essentially denies the Plaintiff's contentions while admitting the following:
 - (i) The Plaintiff had in his possession official FRCA documents at his property.
 - (ii) He was advised his suspension would be revoked if he gave a satisfactory response.
 - (iii) That the contract was never terminated but had expired and was not renewed.
13. The Plaintiff in his reply to the Defence said inter – alia the following:
 - (i) He only had copies of the documents that were required as part of his employment.
 - (ii) The Essential National Services Decree does not apply to him "as he was not a Worker but a person employed under a Contract of Service".
14. The Court has perused the Pre – Trial Conference Minutes but as it is a model of prolixity it is inexpedient to reproduce them here.

15. At the outset of the hearing Counsel on both sides agreed that the Defendant's Bundle of Documents is to be an Agreed Bundle (AB).
16. The Plaintiff (PW1) then gave evidence. He said he had been employed by the Revenue for 33 years. In the course of doing inspections, documents were with him in the hotel or at home. He was employed on contracts, the latest of which was that dated 22 December 2011. (Exhibit P1). Clause 2.1 thereof provided the term would be for 3 years. Clause 10 imposed a duty of confidentiality.
17. PW1 said he did amendments to one, Mahendra Chaudhary's return according to information and instructions of the general manager of Revenue. Officers of the Office of the D.P.P took documents from a drawer in his house. These documents were his and also taxpayers' returns for 3 or 4 taxpayers. These were not lodged with the Revenue but kept by him at home. He was a Justice of the Peace (J.P) and taxpayers knew he would deliver documents to the Revenue office. He was on long service leave then and the documents taken from his house were actually for lodgment. The officers took official memos marked to him from his house. Folders for certain tax payers were found in his house by the officers.
18. The Plaintiff said he was suspended with no pay. There was no disciplinary procedure against him. He expected the Revenue to reinstate him but they did not. He registered a partnership with the Registrar of Titles. The Revenue did not allow him to register a business under his name, so he could not register a business.
19. In December 2016, the Revenue gave him a licence to be a tax agent and he has started as a tax agent, but the income is marginal. He said he is now 58 years old and had a heart attack this year.
20. Under cross – examination the Plaintiff said it was the C.I.D team who raided his house. They took from his house official documents from the Revenue office to him. He has no letter and no evidence to show that it is authorised by the Revenue to take documents

home. It is a privilege of JPs whether to take tax documents. He has no evidence that other JPs are doing this. He did not have his medical records in court. His house was on fire in 2004. There will be risk in taking documents home. There is a Record Management Unit (RMU) to secure the premises and there is a record file room. He disagreed his actions would prevent the CEO from renewing his contract.

21. The Plaintiff now closed his case and the Revenue opened its.
22. The Revenue's witness was Shameem Khan (DW1), the acting director of the Revenue who was the Chief Investigating Officer. He set out the process flow for disciplinary proceedings against employees of the Revenue and said the CEO makes the final decision whether to terminate or to reinstate an employee.
23. By Exhibit P5, the Plaintiff was advised of the expiry of his contract. A contract is not automatically renewed. All employees are not allowed to take documents home nor to receive tax returns at home. While on leave an employee cannot take documents home but must hand over documents to his relief. If documents are found at home, it is a serious breach of the (Conduct and Discipline) Regulations (Regulations) and of s. 52 of the Fiji Revenue and Customs Authority Act.
24. Under cross – examination, DW1 said there was no legislation that revoked the regulations which are law. The Authority decided to do away with the regulations as it was proving too expensive to continue with the tribunal.
25. The Revenue did not investigate itself but relied on the Police search list which was good enough for the Authority to proceed with the disciplinary action against the employee.
26. The Plaintiff was charged by the Police and until the matter was determined by the Court, the Authority could not make a decision. The Plaintiff's contract was not terminated but died a natural death. The Authority made a decision not to renew the contract rather than terminate because they wanted to give him an opportunity to get alternative employment.

27. DW1 said it was Standard Operating Procedure (SOP) that all documents are to be kept in the RMU in house. The Plaintiff was keeping sensitive and confidential documents relating to high profile cases of the Authority and at no time were these documents supposed to be in the hands of the Plaintiff. The file relating to Mr. Mahendra Chaudhary was to be with the Revenue and not in the Plaintiff's place. If the Plaintiff had authority he should have produced it. DW1 looked at the file and there was no such letter.
28. In re – examination DW1 said in his 27 years of service, he has had instructions from seniors and managers not to take official documents home.
29. With that the Defendant closed its case and Counsel on both sides made their oral submissions.
30. Counsel for the Plaintiff submitted that the Plaintiff had showed cause by writing 2 letters. DW1 said the Regulations were revoked and the Authority was doing the same thing for all employees and the Plaintiff had not been singled out. DW1 also said the contract can be renewed with the Revenue giving a form to the staff. This was denied to the Plaintiff. Counsel said it was obligatory to give notice of the end of a contract and the Plaintiff had been denied a licence because he was still employed by the Revenue. He said DW1 conceded the procedure had not been followed and that the Revenue had erred. DW1 was not able to produce the policy on not taking documents home. Counsel concluded by saying the contract was indefinite unless it stated it was not renewable.
31. Counsel for the Revenue then submitted. They acknowledged that they did not follow the principles of natural justice. The Plaintiff breached regulation 3 (5) of the Regulations. There were verbal instructions not to take the documents home. He said by virtue of s. 30 (1) (b) of the Essential National Industries (Employment) Decree 2011 the Court could not question the right of the CEO to terminate the Plaintiff's services. He also said the Plaintiff could not rely on automatic renewal of his contract because of his breach of regulation 3 (5) of the Regulations.

32. Counsel for the Plaintiff in his reply said the Plaintiff is not a worker and s. 26 (2) of the Decree does not apply here. S. 30 (1) (b) also does not apply here and the Court can deal with the matter. This is not an application for Judicial Review. The Plaintiff's evidence was not challenged by cross examination.
33. At the conclusion of the arguments, I informed I would take time to consider my decision. Having done so I shall now proceed to deliver my judgment.
34. At the outset I shall state that I need to clear away some misperceptions that seem to have arisen on both sides. Counsel for the Revenue says the Court has no jurisdiction to question the CEO's decision to terminate the Plaintiff's services. This is surprising since he started off by acknowledging the Revenue did not observe the principles of natural justice here. Counsel does not seem to be aware that one of the grounds on which a decision may be quashed is a failure to comply with the rules of natural justice in a case where these rules are applicable (See the Supreme Court Practice 1995 page 854). Fortunately for him, Counsel for the Plaintiff got him off the hook by submitting this was not an application for Judicial Review.
35. In any case it is puzzling that Counsel would want to submit as above when the Contract of Employment (Exhibit P1) states in the final para of the preamble that "..... the Courts of Fiji have exclusive jurisdiction to entertain any action in respect of this Agreement".
36. I have not been advised that the instant action is not an action in respect of the Contract or that the High Court is not one of the Courts of Fiji.
37. In any event a judge worth his salt would look askance at a Counsel inviting him to abdicate his bounden judicial duty to decide a matter before him, especially when the judge can incisively decide the issue from within the 4 corners of the Contract itself. And this is precisely what I propose to do now.
38. The salient terms of the contract are appended below:
 - (i) It is a contract for 3 years, the term of which (clause 2.1) will be from 1 January 2012 to 31 December 2014 unless earlier terminated under clause 9.0.

- (ii) Under clause 8, a new contract on term completion may by mutual agreement of both parties be entered into.
39. Counsel for the Plaintiff submitted that the contract was an indefinite one unless it stated it was not renewable, relying on s. 28 of the ERP. Counsel for the Revenue submitted the Plaintiff could not rely on the automatic renewal in this case because of his breach of regulation 3 (5).
40. If I may say so, the Court need not rely on either Counsel's submission. This is because the lawmaker's intention can be clearly discerned, viz that the presumption of a contract for an indefinite period does not apply "(a) to a contract for one fixed period which is expressed to be not renewable". Such an expression is to be found in the words of clause 8, starting with "New Contract On Term Completion" and going on to "Both parties may, by mutual agreement enter into a new contract".
41. It is as plain as a pikestaff that the Contract is for one fixed period which is expressly not renewable. If it were otherwise the wording would not include words like "new contract", "term completion", and "enter into a new contract".
42. I therefore find and I so hold that s. 28 (1) of the ERP is expressly inapplicable to the instant case.
43. In the event, the Contract expired on 31 December 2014 and no new contract was entered into by the Revenue and the Defendant. This was made known to the Plaintiff very clearly in the Revenue's letter (Exhibit P5) dated 16 September 2015, belated though it was. Thus any entitlement to salary on the part of the Plaintiff would have ceased on the expiry and if any salary up to that date has not been paid, the Revenue should take immediate steps to ensure that this is done.
44. Before I pronounce my judgment there are a few matters I wish to clarify. One is the reference to a rolled over contract which would end at a future date. I could find no

reference to such a nebulous concept in the text books on labour law. Indeed Counsel did not cite any authority for this proposition.

45. In fact, Merriam Webster's Dictionary gives the legal definition of "roll over" as "to defer payment"; "to renegotiate the terms of (a financial agreement)"; to place funds in a new investment of the same kind" while the Oxford Advanced Learner's Dictionary defines "roll over" as to allow money owed to be paid back at a later date.
46. The second is the Plaintiff's allegations that he suffered mental distress, a heart attack and discrimination. These have to be proved by the Plaintiff to the requisite standard in a civil proceedings ie. on a balance of probabilities. It may be categorically stated the Plaintiff did not provide even an iota of proof or medical evidence of these allegations.
47. Finally in the light of the decision I have arrived at, it would be inexpedient to refer the various issues canvassed during the course of the hearing, though I have earlier given a full picture of the evidence and the submissions. To do so may lead to the erroneous conclusion that the Court was distracted by a red herring.
48. In the result, the Plaintiff's action is dismissed, the claims for special and general damages are disallowed and judgment entered for the Defendant. In the particular circumstances of this case the Court will make no order as to costs.

Delivered at Suva this 10th day of March, 2017.



.....
David Alfred
JUDGE
High Court of Fiji.