

IN THE EMPLOYMENT RELATIONS COURT
AT SUVA

ERCC 25 of 2021

BETWEEN : **JONETANI VUTO**

PLAINTIFF

AND : **FIJI REVENUE AND CUSTOMS SERVICE**

DEFENDANT

BEFORE : **M. Javed Mansoor, J**

COUNSEL : **Mr. K. Verebalavu for the Plaintiff**

: **Mr. E. Qalo with Ms. S. Malani for the Defendant**

Date of Hearing : **26 July 2023**

Date of Judgment : **01 February 2024**

JUDGMENT

EMPLOYMENT

Non-payment of acting allowance – Applicability of internal acting policy – Whether acting policy an implied term of the contract – Agreement by plaintiff to accept allowance – Section 26, 27 & 28, Fiji Revenue & Customs Service Act 1998 – Section 23 (1) & (4), Employment Relations Act 2007

1. The plaintiff was appointed acting chief executive officer (CEO) of the defendant from 16 January 2021 till 17 September 2021. This action is to recover a sum of \$88,719.40, which the plaintiff says are allowances that the defendant should have paid him in terms of the defendant's internal acting policy for acting as its CEO. Instead, he says, the defendant paid him an acting allowance of \$50,000.00 per annum, which was inconsistent with the defendant's acting appointment policy. The action is based on the breach of an implied term of the employment contract.
2. In its statement of defence, the defendant denies the claim and states that the plaintiff was paid an acting allowance approved by the minister of economy, and that he had accepted the payment throughout his acting period of eight months.
3. The parties raised the following issues:
 - i. "Whether the defendant's acting appointment policy dated 1 October 2019 is valid and binding.
 - ii. Whether the defendant's acting appointment policy dated 1 October 2019 is applicable to the plaintiff?
 - iii. Whether the plaintiff sought advice, during his term as acting chief executive officer, from the defendant on whether the acting appointment policy 2019 was correctly being applied to his circumstances?
 - iv. Whether the defendant's action is contrary to the acting appointment policy dated 1 October 2019?
 - v. Whether the FRCS Act 1998 overrides the acting appointment policy 2019?

- vi.* Whether the defendant's acting appointment as chief executive officer was in addition to his substantive role as director border".
4. The plaintiff summoned six witnesses. Yee Fay Lay was the first witness. She was the chair of the Fiji Revenue and Customs Service (FRCS) board from January 2020 to 31 December 2022, and issued the plaintiff's acting appointment letter. The witness confirmed that the plaintiff was paid an acting allowance of \$50,000.00 in addition to his salary. She said that the appointment was made under section 27 of the FRCS Act, and disagreed that the allowance is discriminatory. The witness said that both parties agreed upon the contents of letter dated 11 February 2021, and that at a meeting prior to the appointment, the plaintiff expressed satisfaction with the terms of the acting appointment. She said that the plaintiff continued to be the director of border control, and that the acting appointment was an additional responsibility. The plaintiff gave his resignation by letter dated 2 September 2021.
 5. The plaintiff joined FRCS in 1989. He said that his acting appointment was preceded by a meeting at the Reserve Bank of Fiji, where he was verbally offered the position of acting CEO with an allowance of \$50,000.00. He signed and accepted the offer, and agreed to take the appointment for the additional allowance. Although he was aware of the acting policy at FRCS, he said that he was not paid the correct amount under the policy. The plaintiff said that after he received his acting appointment there was no change in his base salary or FNPF entitlements. The plaintiff said he did not seek advice prior to signing his acceptance, and did not make inquiries about the allowance during the period of his appointment. The reason he did not make inquiries was because senior officers had a strained relationship with the board at that time, especially as a redundancy was proposed for executive officers. At one point, the plaintiff said that his acting appointment did not run alongside his substantive position, but agreed on another occasion that the responsibilities referred to in his letter of appointment were additional to the duties in his substantive role.
 6. The defendant's chief of staff, Shvindra Nath, was unable to say whether the acting policy applied to all employees. He said the CEO's appointment was approved by the minister upon the FRCS board's recommendation. Anshu

Arisma Singh, the chief financial officer, said that all acting appointments are based on the institution's acting policy. She said that where there is an acting appointment, the appointee is paid 95% of the permanent holder's salary. She stated that the finance division acts on the minister's letter, the board directive and the staff member's acceptance letter in compiling salaries. Muneshwari Sayal Rao, the team leader, human resources, confirmed that the CEO is appointed by the board in consultation with the minister in terms of the Act, but was uncertain whether the acting policy applied to the acting CEO.

7. The defendant, lead the evidence of P. J Antonio, the senior investigation officer at FRCS. She said that the practice was for the CEO to handle appointments below the position of director, while the board handled the CEO's appointment in consultation with the minister.
8. The plaintiff says that the acting appointment allowance is non-negotiable and that all employees are entitled to it. The policy states it is applicable to all full time employees, and the plaintiff argues that it is an implied term of the contract. The plaintiff drew the court's attention to section 23 of the Employment Relations Act 2007. Section 23 (1) states:

"Subject to subsection (4), the terms of a contract must be such terms as are agreed between the parties or which apply by virtue of custom or practice or which are implied by law".

Section 23 (4) states:

"If a worker falls within the description of worker to whom an employment contract applies, the worker's terms and conditions of employment must include terms and conditions of employment contained in the employment contract while it is in force except where the terms and conditions of employment in that employment contract are less beneficial to the worker than those applicable under (3)".

9. The plaintiff was on a contract from 28 August 2020, which was to conclude on 31 October 2023. The position description dated October 2019 gives the position title as "Director Border". The document sets out his key accountabilities. By letter dated 22 January 2021, the minister for economy, civil service and communications appointed the plaintiff as acting chief executive officer. The

letter set out *inter alia* the plaintiff's base salary and acting CEO allowance. The letter states that the acting appointment is to remain valid until such time a substantive appointment for the position is made.

10. By letter dated 11 February 2021, the chair of the FRCS board, Fay Yee, issued the plaintiff a letter titled, "Acting Appointment: Chief Executive Officer". The letter states:

"Your acting appointment is from 16 January 2021 until further notice and you will receive an acting allowance of \$50,000.00 per annum inclusive of FNPF for the period of your acting appointment. In addition to the acting allowance you will be allowed to use the official Chief Executive Officer vehicle for official purpose".

On the same day, the plaintiff signed and accepted the appointment.

11. The plaintiff received an annual allowance of \$50,000.00 in addition to his salary applicable to his substantive position. He agreed to the allowance for the additional duties he performed. The plaintiff's appointment letter makes it clear that his substantive position of director border control was to continue. The plaintiff admitted this in cross examination, although he later said that he was asked to function as CEO on a full time basis. There is no correspondence on this matter. The plaintiff held office temporarily for a period of eight months. By letter dated 2 September 2021, the plaintiff resigned from the position of acting chief executive officer. The letter made no reference to claims concerning the acting allowance.
12. The plaintiff was appointed by the defendant in consultation with the minister after he accepted the terms of his appointment. The appointment of the CEO and that of an acting appointment is not on the same footing as that of other employees. Section 26 of the FRCS Act concerns the appointment of employees, agents and consultants. A separate provision – section 27 – governs the appointment and functions of the chief executive officer. The section states that the service may appoint the CEO in consultation with the minister and by notification in the gazette upon such terms as the service may determine. Section 27 (3) makes provision to make an acting appointment for the position of the CEO in consultation with the minister.

13. Section 28 (1) of the FRCS Act 1998 states that, “upon the recommendation of the chief executive officer, the service may endorse policies and procedures relating to employees of the service and such policies and procedures shall constitute the conditions of employment of the employees of the service”. Section 28 (2) (c) states that the policies and procedures referred to in subsection (1) shall relate to the remuneration and conditions of employment within the service.
14. The court is of the view that any policy concerning employees of the service must give way to the provision in section 27 of the FRCS Act concerning the appointment of the chief executive officer. The section provides that the service may appoint the chief executive officer, after consultation with the minister, on such terms and conditions as it may determine, and stands distinct from section 26 of the Act, which is applicable to all other employees of the Act. For these reasons, the defendant cannot be said to have been in breach of the plaintiff’s employment contract.

ORDER

- A. The action is dismissed.
- B. Parties will bear their costs.

Delivered at **Suva** on this 30th day of **January, 2024**.



M. Javed Mansoor
Judge