IN THE STATUTORY TRIBUNAL, FIJI ISLANDS
SITTING AS THE EMPLOYMENT RELATIONS TRIBUNAL

Interim Decision

Title of Matter:	**Lawrence Raju** **v** **BSP Life (Fiji) Limited**	**(Worker)** **(Employer)**
Section:	**Section 211(1)(a) Employment Relations Promulgation**	
Subject:	**Adjudication of Employment Grievance**	
Matter Number(s):	**ERT Grievance 02 of 2017**	
Appearances:	**Mr S Naidu and Mr P Rae, Fiji Bank and Finance Sector Employees Union, for the Worker** **Mr J Apted, Munro Leys Solicitors, for the Employer**	
Date of Hearing:	**13 March 2017**	
Before:	**Mr Andrew J See, Resident Magistrate**	
Date of Decision:	**28 March 2017**	

KEYWORDS: Age Discrimination; Compulsory retirement based on age at discretion of employer; Section 38 *Constitution (Amendment) Act* 1997; *Human Rights Commission Act* 1999; *Human Rights Commission Decree* 2009; Section 77 *Employment Relations Promulgations* 2007; *Constitution of the Republic of Fiji* 2013; Written law or employment contract imposing a retirements age; Any law or administrative action imposing a retirement age on a person who is the holder of a public office.

CASES CITED:

B and B Constructions (Aust) Pty Ltd v Brian A Cheeseman & Assoc Pty Ltd (1994) 35 NSWLR 227
Craig Williamson Pty Ltd v Barrowcliff [1915] VLR 450
Dickason v University of Alberta [1992] 2 RCS 1103
Fiji Human Rights Commission v Suva City Council (Civil Action 0073 of 2004)
Masidole v State [2003] FJCA 60; AAU0021.2002s (14 November 2003)
McKinney v The University of Guelph [1990] 2 RCS 1103
Singh v The University of the South Pacific ER Grievance No 1 of 2010
Totalisator Agency Board v Wagner and Cayley [1963] WAR 180
Vakalalabure v The State [2006] FJSC 8; CAV0003U.2400S (15 June 2006)

Background

1. This is a referral made to the Tribunal in accordance with Section 194(5) of the *Employment Relations Promulgation* 2007. The referred matter relates to a grievance lodged by Lawrence Raju on 9 December 2016, in which it is claimed that his compulsory retirement from employment, was both unfair and unjustified and a "form of discrimination based (on) Section 77 of the *Employment Relations Promulgation* 2007".

2. The claim of aged based discrimination is directed at the Employer's ostensible reliance on both Clause 17 of the *Memorandum of Agreement* dated 8 June 2001 ("the *Memorandum of Agreement*"), made between Colonial Fiji Limited, Colonial Health Care (Fiji) Limited & Colonial First State Investment Limited and the Fiji Bank & Finance Sector Employees Union and a Termination Clause contained within a written employment contract, entered into between the Grievor and the Employer on or around 24 August 2010 ("the 2010 *Employment Contract*"). Mr Raju's grievance, arises out of the fact that he says he had advised the Employer that he wished to continue working and so to enforce compulsory retirement on the basis of his age in such circumstances, was a breach of the relevant age discrimination provisions within the *Employment Relations Promulgation* 2007.

3. In light of this claim, the Tribunal has taken the view that it would be appropriate to consider the question as to whether or not the relevant clauses contained within the *Memorandum of Agreement* and the *2010 Employment Contract* are discriminatory and unlawful, prior to examining the substantive allegation that the dismissal of the Grievor was either unjustified or unfair.

The *Memorandum of Agreement* 8 June 2001

4. At the centre of this dispute, is a *Memorandum of Agreement* made between Colonial Fiji Limited, Colonial Health Care (Fiji) Limited & Colonial First State Investment Limited and the Fiji Bank & Finance Sector Employees Union.[1] While neither party have provided the Tribunal with any detailed analysis of the Agreement or its origins, it nonetheless appears to contain a wide range of provisions that have been negotiated on behalf of the Union at that time, covering such matters as hours of work, salaries and progression, overtime, leave arrangements, allowances and other related personnel practices and procedures.

5. Clause 17 of the *Memorandum of Agreement* is entitled 'Retirement Age' and provides inter alia:

   (a) (i) The employer may retire its employees in any category (salaried or service workers) or its employees in any category may voluntarily retire upon reaching the age of fifty five (55) years. Staff shall be given three months notice of impending retirement.

   (ii) The employer may at its own discretion re-employ such retired employees for a period not exceeding three years but not beyond the age of sixty of a retired employee. Such engagements shall be through a separate contract on such terms and conditions for a fixed period as mutually agreed between the employer and the Union.

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[1] Note that this is claimed to be the basis of effecting the termination as per Paragraph 1 of the Employer's Preliminary Submission. Though it is acknowledged, that there is also a written employment contract between the parties that also seeks to achieve the same general intent.

6. The *Memorandum of Agreement* made between the Union and the employer under its former business name, was registered as a collective agreement in accordance with Section 34 of the then *Trades Disputes Act* (Cap 97). Because the Agreement has been made under superseded law, it may be first important to consider its status, having regard to how and when it was made and against the backdrop of age based anti-discrimination law that was in place at the time, specifically having regard to the *1997 Constitution (Amendment) Act* ("the *1997 Constitution*") and the *Human Rights Commission Act* 1999.

The 2010 *Employment Contract*

7. In relation to the 2010 *Employment Contract* entered into between the Grievor and the Employer on 24 August 2010,[2] it too has only been vaguely canvassed by either party at this juncture. The Employment Contract does not appear to make any reference to the *Memorandum of Agreement*,[3] rather it seems to set out within the unnumbered contractual provisions and supporting appendices, the collective group of essential terms and conditions that govern the employment relationship between the parties. In relation to the Termination Clause, the relevant provision provides:

> *Subject to the laws of Fiji, CFLL may terminate your employment by retirement upon your attaining the age of 55.*

8. This 2010 *Employment Contract* needs to be considered having regard to the environment at the time that it too was made. That is, in the context where there had been an abrogation of the *1997 Constitution*, where a new *Employment Relations Promulgation* 2007 was now in place and where in 2009, a new *Human Rights Commission Decree* had come into effect.

The Impact of the 1997 Constitution on the *Memorandum of Agreement*

9. Section 38 of the *1997 Constitution* provided:

Section 38 Equality

> *(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 ground of his or her: (a) actual or supposed personal characteristics of circumstances, including .... age ..*
>
> *(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.............*
>
> *(6) A law, or an administrative action taken under a law, is not inconsistent with the right to freedom from discrimination on the ground of:..*
>
> *(a)....*
>
> *(d) age; during the period of 2 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.*

[2] See Annexure BSP1 of the *Employer's Preliminary Submission*.

[3] One could almost assume, that the Employer itself no longer thought that it applied.

(7) 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; ....
but only to the extent that the law is reasonable and justifiable in a free and democratic society.

10. It is noted that in relation to the *Memorandum of Agreement* entered into between the parties, that the former Section 34 of the *Trades Dispute Act* required that:

(6) On receipt of any such agreement the Permanent Secretary shall either-

(a) notify the parties of any matters which he is satisfied are contrary to the provisions of this Act or of any other written law; or

(b) notify the parties that the agreement has been registered.

The Impact of the *Human Rights Commission Act* 1999 on the *Memorandum of Agreement*

11. The Memorandum of Agreement also came about against a backdrop of the *Human Rights Commission Act* 1999. That legislation called up the "prohibited grounds of discrimination" as defined within Section 38(2) of the 1997 Constitution. Specifically, Section 17 of the Act provided:

17. *- (1) 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.*

(2) Without limiting subsection (1), sexual harassment, for the purposes of this section, constitutes harassment by reason of a prohibited ground of discrimination.

(3) The areas to which subsection (1) applies are-

(a) the making of an application for employment, or procuring employees for an employer, or procuring employment for other persons;

(b) employment;

(c) participation in, or the making of an application for participation in, a partnership;

(d) the provision of an approval, authorization or qualification that is needed for any trade, calling or profession;

(e) the provision of training, or facilities or opportunities for training, to help fit a person for any employment;

(f) subject to subsection (4), membership, or the making of an application for membership, of an employers' organization, an employees' organization or an organization that exists for members of a particular trade, calling or profession;

(g) the provision of goods, services or facilities, including facilities by way of banking or insurance or for grants, loans, credit or finance;

(h) access by the public to any place, vehicle, vessel, aircraft or hovercraft which members of the public are entitled or allowed to enter or use;

(i) the provision of land, housing or other accommodation;

(j) access to, and participation in, education.

(4) Subsection (3)(f) does not apply to access to membership of a private club or to the provision of services or facilities to member of a private club.

12.While Section 18 of that Act provided for the exclusion of the prohibition based on genuine occupational requirements and also established the concept of 'genuine justification' for the 'adverse differentiation' (discrimination) in cases other than employment[4], there were no other available exemptions. On that basis, in 2001 when the *Memorandum of Agreement* was registered, this provision of compulsory retirement at Clause 17, was in violation of the *Human Rights Commission Act* 1999.

14. From a constitutional perspective and for the reasons advanced by Coventry J in *Fiji Human Rights Commission v Suva City Council*[5], the *Memorandum of Agreement would* also not be regarded as a law. And on that basis, the test as to 'reasonableness' and 'justification' contained at Section 38(7) of the then Constitution, had no work to do. The Permanent Secretary should have notified the parties that Clause 17 of the *Memorandum of Agreement*, at least insofar as it sought to make available to the Employer some form of compulsory age based retirement, was unlawful. Clause 17 in its present form should not have formed part of the registered agreement. Consistent with the decision in *Suva City Council*[6], any such clause where it seeks to compel retirement based on age, would be void. If that is the case, then the offending component within Clause 17 of the 2001 *Memorandum of Agreement*, does not form part of the Agreement. Once rendered unlawful, it cannot and would not at some later time, be revived. It is therefore not a retained provision that would form part of the employment contract between the parties.[7] Clause 17 of the *Memorandum of Agreement* would have been void insofar as it sought to compel the retirement of employees based on age. The provision to that extent would have been void ab initio.

15. And even though the Employer, makes reference to the preservation arrangements contained within Section 265(9) of the *Employment Relations Promulgation* 2007 that state:

An employment contract that is valid and in force at the commencement of this Promulgation continues to be in force after the commencement of this Promulgation and to the extent that it is not in conflict with this Promulgation is deemed to be made under this Promulgation and the parties to the contract are subject to and entitled to the benefits of this Promulgation,

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4 That is, Paragraphs (f) to (j) of Section 17(3).

5 (Civil Action 0073 of 2004) at [17] to [29].

6 Ibidem at [68].

7 See Section 166(5) of the *Employment Relations Promulgation* 2007

such provisions cannot revive the invalid provision of the 2001 *Memorandum of Agreement* where it was unlawful at the time in which it was made.

The 2010 *Employment Contract*

16. In relation to the 2010 *Employment Contract* entered into between the Grievor and the Employer on 24 August 2010, the relevant Termination provision provides

    Subject to the laws of Fiji, CFLL may terminate your employment by retirement upon your attaining the age of 55.

17. The question again should be asked: What were the laws of Fiji that should be considered at that point in time? The exercise of this ostensible discretion contained within the language of the provision, appears conditional upon whether or not the laws of Fiji will allow for this to occur.[8] Again with the abrogation of the *1997 Constitution*, all that remained at the time of agreement between the parties was the *Human Rights Commission Decree* 2009 and the *Employment Relations Promulgation* 2007. Let us look at each of these pieces of legislation in time order.

<u>The *Employment Relations Promulgation* 2007</u>

18. It would seem uncontroversial that the first occasion in which a comprehensive set of anti-discrimination measures were introduced into Fiji employment law, came about with the introduction of Part 9 of the *Employment Relations Promulgation* 2007. As the Second Reading Speech[9] by the Honourable Minister to the House of Parliament made clear, the *Employment Relations Bill* 2006, had adopted the prohibited grounds of discrimination under the then 1997 Constitution,[10] the *Human Rights Commission Act* 1999 and the *ILO Convention 111* on *Discrimination in Employment and Occupation*. While the prohibited ground of 'age' was not specifically identified as an attribute within the ILO Convention 111 in 1958, some fifty years later, it was identified as a major issue warranting inclusion under anti-discrimination law. So much was made clear upon the further consideration of the *Employment Relations Bill* by the Parliament on 30 November 2006, after having received the Report of the Sector Standing Committee on Social Services. As Hansard records, it was recognised that Clause 6(2) of the Bill should include the term 'age' within the principles of fundamental rights and that its inclusion was consistent with the parallel provisions prohibiting discrimination on the grounds of age within Section 38 of the (1997) Constitution.[11]

19. With that as the legislative backdrop, it is not that surprising that the High Court in 2006, determined that a provision contained within a Collective Agreement that allowed an employer to exercise the right to compulsorily retire a worker because of age, was discriminatory.[12] In any event, several weeks following the handing down of that judgment, the Parliament endorsed the exemption contained within Section 77(1)(d) of the Bill, having regard to the Report of the Sector Standing Committee that recognised the view:

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8 It is almost as if the draftsperson of the Clause had doubts her or himself as to the legitimacy of such a provision.

9 See Parliamentary Hansard 22 June 2006 at p576.

10 See Section 38(2) of the 1997 Constitution.

11 See *Parliamentary Hansard* of the House of Representatives, 30 November 2017 at p1874.

12 See *Fiji Human Rights Commission v Suva City Council* (Civil Action 0073 of 2004) at [68].

that one cannot discriminate against another on grounds of age. (although) Under public service legislation, one could retire on the basis of age.[13]

20. The upshot of all of this, was that Section 77 of the Promulgation was created in the following terms:

(1) If an applicant for employment or a worker is qualified for work of any description, an employer or a person acting or purporting to act on behalf of an employer must not—

(a) refuse or omit to employ the applicant on work of that description which is available;

(b) offer or afford the applicant or the worker less favourable terms of employment, conditions of work, or other fringe benefits, and opportunities for training, promotion, and transfer that are made available to applicants or workers of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description;

(c) terminate the employment of the worker, or subject the worker to any detriment, in circumstances in which the employment of other workers employed on work of that description would not be terminated, or in which other workers employed on work of that description would not be subjected to such detriment; or

(d) retire the worker, or to require or cause the worker to retire or resign, subject to any written law or employment contract imposing a retirement age,

by reason of any of the prohibited grounds of discrimination set out in section 75 or by reason of the worker's involvement in the activities of a union.

The *Human Rights Commission Decree* 2009

21. In relation to the *Human Rights Commission Decree* 2009, it in many respects embraced the general anti-discrimination measures that had existed within the former *Human Rights Commission Act* 1999. The prohibited grounds of discrimination once located only within the Constitution , were now a feature of the Decree at Section 2 Interpretation, where the following was defined:

"prohibited ground of discrimination" means—

(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

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13 See Section 9.90 of the *Report of the Sector Standing Committee on Social Services on the Employment Relations Bill, 2006*. Parliamentary Paper No 49 of 2006 at p128.

(b) opinions or beliefs, except to the extent that those opinions or beliefs involve harm to others or diminution of the rights or freedoms of others,

Provided however, that any law or administrative action which—
(a) ....;
(b) imposes a retirement age on a person who is the holder of a public office;
....

shall be exempt from and shall not infringe or contravene the prohibited grounds of discrimination

22. The prohibition against discrimination is found at Section 19 of the Decree where it states:

(1) 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...
(2) ..

(3) The areas to which subsection (1) applies are—

(a) the making of an application for employment, or procuring employees for an employer, or procuring
employment for other persons;

(b) employment;

(c) participation in, or the making of an application for participation in a partnership;

(d) the provision of an approval, authorisation or qualification that is needed for any trade, calling or
profession;

(e) the provision of training, or facilities or opportunities for training, to help fit a person for any
employment;

(f) subject to subsection (4), membership, or the making of an application for membership, of an employers'
organisation, an employees' organisation or an organisation that exists for members of a particular
trade, calling or profession;

(g) the provision of goods, services or facilities, including facilities by way of banking or insurance or
for grants, loans, credit or finance;

(h) access by the public to any place, vehicle, vessel, aircraft or hovercraft which members of the public
are entitled or allowed to enter or use;
(i) the provision of land, housing or other accommodation;
(j) access to, and participation in, education.

(4) Subsection (3)(f) does not apply to access to membership of a private club or to the provision of services or facilities to member of a private club.

23. Of critical importance to this analysis, is the way in which the exemption for compulsory retirement based on age, was couched within this legislation. Two years earlier, albeit that the legislation is said to have had a gestation period of nearly ten years, the *Employment Relations Promulgation* 2007 had provided the exemption in these terms

    subject to any written law or employment contract imposing a retirement age.[14]

24. The later in time *Human Rights Commission Decree,* narrowed that scope down somewhat, by providing the exemption in the case of,

    any law or administrative action which.. imposes a retirement age on a person who is the holder of a public office.[15]

25. The implication of this later legislative expression will be made clear further on within this decision, suffice to say and consistent with the latin maxim *'leges posteriores priores contrarias abrogant'*, that an earlier Act (in this case the *Employment Relations Promulgation* 2007) cannot amend a later one (the *Human Rights Commission Decree* 2009*)* or affect its construction unless the later Act expressly amends the earlier or requires the two Acts to be read together. Such a view has been well accepted by the Court of Appeal in Supreme Court of Fiji in the case of *Vakalalabure v The State*[16] and has been set out more fully in the case of *Masidole v State*[17] where it was said.

    The repeal of an earlier statute by a later may be effected either expressly or by necessary implication. The implication may be made where the provisions of the later statute are "wholly inconsistent" with those of the former, per Griffith CJ in Goodwin v. Phillips (1908) 7 CLR1 at 7; or the provisions are 'so inconsistent or repugnant that they cannot stand together" or "are irreconcilable", per Barton J. in Goodwin v. Phillips at 10, 11. In Deputy Commissioner of Taxation v. Moorebank Pty Ltd. (1988) 165 CLR 56 at 64 Mason CJ, Brennan, Deane, Dawson and Gaudron JJ referred to the situation where a statute has "effectively covered the field and left no room" for the provisions of the other statute. In Kartinyeri v. The Commonwealth [1998] HCA 22; (1998) 195 CLR 337, Brennan CJ and McHugh J used the term "inconsistent" at 356. Kirby J. used the terms "irreconcilable, or inconsistent" at 421.

    In Goodwin v. Phillips at 10, Barton J. summarized the matter in this way:

    > *"...if, therefore, there is fairly open on the words of the later Act, a construction by adopting which the earlier Act may be saved from repeal, that conclusion is to be adopted."*

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14 See Section 77(1)(d) of the Promulgation.

15 See definition of 'prohibited ground of discrimination' at Section 2 of the Decree.

16 [2006] FJSC 8; CAV003U.2004S (15 June 2006) at [51].

17 [2003] FJCA 60; AAUU0021.2002S (14 November 2003)

In Butler v. Attorney-General for the State of Victoria [1961] HCA 32; (1961) 106 CLR 268, Fullagar J. made the same point when he said at 276;

> *"....there is a very strong presumption that the State legislature did not intend to contradict itself, but intended that both Acts should operate."*

26. It should be noted that Section 20 of the Decree makes provision for genuine occupational exemptions in a manner consistent with Section 85 of the *Employment Relations Promulgation* 2007, however unlike the various Canadian case law that has been referred to within the Employer's Submissions,[18] the legislature has reduced and confined the concept of 'genuine justification' to paragraphs *(f)* to *(j)* of Section 19(3). That is, it does not apply to employment provisions. The only conclusion to be drawn out of all of this, is that for the purposes of the *Human Rights Commission Decree* 2009, compulsory retirement provisions are unlawful other than in the case of any law or administrative action that imposes a retirement age on a person who is the holder of a public office.[19]

The Argument of the Employer

27. The argument of the Employer can be broken down into the following themes:-

    (a) Section 77 (1)(d) of the Promulgation allows such compulsory retirement if it is prescribed under a law or in a contract.[20]

    (b) The provision is a mutually beneficial one, as it also recognises that workers may have a desire to retire;

    (c) That the 2013 Constitution provides for the preservation of laws made between 5 December 2006 and the first sitting of the Parliament under the Constitution.

    (d) That the provision is consistent with international decisions which recognise that retirement ages in collective agreements can be a justifiable exception to an age discrimination prohibition.

28. These issues can be addressed in turn.

Does Section 77 (1)(d) of the Promulgation allows such compulsory retirement if it is prescribed under a law or in a contract?

29. As mentioned and provided for in the reasons above, the application of the Promulgation can only be considered in the context of the *2010 Employment Contract.*

30. In this regard Section 77 (1)(d) of the Act provides:

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18 See for example, *Dickason v University of Alberta* [1992] 2 RCS 1103; *McKinney v The University of Guelph* [1990]2RCS 1103.

19 For an understanding of who may fall within the definition of "public office", refer to Chapter 6 Part D of the 2013 Constitution. See also the brief analysis of the discussion contained within the decision of *Suva City Council* at Paragraphs [40] to [47].

20 See Paragraph 38 of the *Employer's Preliminary Submissions* filed on 10 March 2017.

If an applicant for employment or a worker is qualified for work of any description, an employer or a person acting or purporting to act on behalf of an employer must not—

(d) retire the worker, or to require or cause the worker to retire or resign, subject to any written law or employment contract imposing a retirement age,

by reason of any of the prohibited grounds of discrimination set out in section 75 or by reason of the worker's involvement in the activities of a union.

31. The prohibited grounds of direct and indirect discrimination are set out in Section 75 of the Promulgation. They are:

actual or supposed personal characteristics or circumstances, including: ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age, disability, HIV/AIDS status, social class, marital status (including living in a relationship in the nature of a marriage), employment status, family status, opinion, religion or belief.

32. The key issues to this first question are this.

    (a) Is the Grievor, a worker qualified for work of any description, in a situation where an employer retires the worker or causes him to resign; and if so

    (b) was there a written law or employment contract imposing a retirement age.

33. There is no evidence to the contrary that the Grievor was not qualified for work of any description. The Tribunal accepts that given the Grievor's 33 years of service with the Employer, that he would satisfy that requirement, at least at the relevant time. There also appears no real dispute that the Employer took it upon itself to utilise the provision (whether in the *Memorandum of Agreement* or Employment *Contract*), as a consequence of the Grievor's age.

34. The critical issue is whether or not there was a written law or employment contract imposing a retirement age. The Employer makes no claim to there being a written law that applies to the Grievor for this purpose. All that remains therefore is to ascertain whether or not there is in place, an 'employment contract imposing a retirement age'. Paragraph 37 of the Preliminary Submission of the Employer states:

The meaning of the provision is clear: an employer may not retire or compel the retirement of a worker, unless there is an applicable written law prescribing a relevant retirement age, or the parties have agreed in a written employment contract (either individual or collective) that there should be a compulsory retirement age.

35. If the argument pertaining to the applicable written law is set aside, what we have is the residual suggestion by the Employer, that where *parties have agreed in a written employment contract (either individual or collective) that there should be a compulsory retirement age*, then such arrangement is not discriminatory. So as to be clear it is worth showing this interpretation, against the precise language of the provision at Table 1.

Table 1: A comparison of the statutory provision and the meaning provided by the Employer

The Residual Provision	The Meaning Provided by the Employer
subject to any ...employment contract imposing a retirement age	*parties have agreed in a written employment contract (either individual or collective) that there should be a compulsory retirement age*

36. At the outset, what Section 77(1) of the Promulgation does, it to render discriminatory, any such retirement based on the prohibited ground of discrimination, in this case age, subject to whether or not any employment contract imposing a retirement age is in place. So the question remains, is there an employment contract imposing a retirement age in place?

What is an Employment Contract?

37. Section 4 of the Promulgation defines employment contract to mean:

> *a collective agreement or apprenticeship contract specified under this Promulgation or any other written law or an oral or written contract of service between a worker and an employer*

38. To make things clear, an 'employment contract' can be:

(i) A collective agreement. That is in turn defined at Section 4 to mean:

> an agreement made between a registered trade union of workers and an employer which—
>
> *(a)* prescribes (wholly or in part) the terms and conditions of employment of workers of one or more descriptions;
>
> *(b)* regulates the procedure to follow in negotiating terms and conditions of employment; or
>
> *(c)* combines paragraphs *(a)* and *(b)*;

(ii) An apprenticeship contract specified under this Promulgation or any other written law.[21]

(iii) An oral contract of service

(iv) A written contract of service.

39. It does not appear as proposed by the Employer, confined to *a written employment contract (either individual or collective).*

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[21] See the references to Apprenticeship Contract as set out at Section 36(2) and Section 97(3) of the Promulgation. Note the reference to the *Training and Productivity Authority Fiji Act*

Is the Employment Contract 'Imposing' a Retirement Age?

40. Once the type of employment contract has been identified, one must then ask the question, does it 'impose' a retirement age? It is the word 'imposing' that becomes key to the analysis. The meaning of this word must be found by the way in which it is used within the legislation. In the case of the expression, 'written law imposing a retirement age', the imposition is one created by the parliament. That is, there is a compulsion to cease employment. It is mandated by law. Subject to any constitutional limitations, it is not an option. It is an imposition to apply to categories of workers as determined. For example, Section 14 (1) of the *Civil Service Regulation* provides:

> *An employee must be retired from the civil service on reaching 55 years, unless the Constitution or any other written law specifies a different age in respect of any employee.*

41. The Employer's Submissions in effect argue that in the case of an individual or collective written contract, that where a provision has been mutually agreed, then such a situation gives rise to an 'imposition'. But it is hard to see how such a meaning could be viewed as comparable to that of a statutory imposition, particularly now having regard to the language contained both within the later in time provisions found within the *Human Rights Commission Decree* 2009 and the 2013 Constitution.[22] For example, in support of the Employer's interpretation, it would have been easy for parliament to have drawn a distinction between what is meant by the respective expressions, but that does not appear to have been done. Despite the submissions of the Employer, the Tribunal is not of the view that Section 77(1) (d) of the Promulgation provides that in one case, there is a statutory imposition of a written law and in the other, a voluntary way in which parties to an employment contract can elect whether to agree or not, to a compulsory age requirement.

42. The reason for this appears clear. First and foremost, the expression must be used consistently where it is applied within the legislation and more particularly within one location.[23] The context of the word once achieved and applied to one expression, needs to be then applied consistently to that second expression, particularly where it is used in a collective sense. To allow for anything else, will yield quite perverse outcomes and ones that seem at odds with the later language of the *Human Rights Decree* 2009 and the 2013 Constitution. In the case of a Collective Agreement, Apprentice Contract, Oral Contract or Written Contract, providing that there is an agreement between the parties, within any of these types, this would, according to the Employer's argument, ceteris paribus, be sufficient to otherwise defeat a claim against age discrimination.

43. With due respect to the Employer, that appears too far-fetched a result. There would be no purpose of having any age discrimination law, if a significant aspect to it, that is, the termination of persons based on age, was not allowed to have effect. The imposition would appear to be something that occurs by virtue of the condition being imposed directly by statute, or indirectly by way of contract. Such a view would appear to be consistent with the meaning provided both within the former and current Constitutions, as well as the Human Rights laws that make reference to an *administrative action taken or imposed under a law*. No other meaningful and consistent construction of the provision can be given.[24]

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22 It is also difficult to comprehend how that notion of impose would be able to apply in the context of an oral contract.

23 See *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450 at 452-453.

24 See for example, *Totalisator Agency Board v Wagner and Cayley* [1963] WAR 180 at 183-189; *Quazi v Quazi* [1980] AC 744 at 809.

44. In 2010, when the Employment Contract between the parties was entered into, the only imposition that could occur would be one that drew from the parameters that had been provided for, by virtue of the former Constitution and the *Human Rights Commission Decree* 2009. The limitation as to who could secure compulsory retirements under the legislation appears quite clear. The fact that the Constitution was ultimately abrogated did nothing to diminish the statutory regime that together made up Fiji anti-discrimination law. There was simply no imposition arising out of any law or administrative action that gave rise to the making of a contract.

Is the Clause 17 of the Memorandum of Agreement Designed to be Mutually Beneficial?

45. Once the first of the four contentions made by the Employer in its submissions have been defeated, the others appear to follow a similar fate. Of course it is the case that workers would have a desire to retire. Workers are entitled, subject to providing the relevant statutory notice, to resign or retire from the workforce. They are entitled to resign from employment, at any stage. And so too is an Employer entitled to bring an employment contract to an end, providing that it is done lawfully and with justification. What cannot happen, is that a person can be terminated in their employment because of their age. There is no mutual benefit in providing that discretion. As Coventry J said in *Suva City Council,*[25]

    There are many authorities concerned with the limitation or modification of anti-discrimination provisions by agreement between the parties concerned. In the 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 Association of Public Employees v Newfoundland Hospital etc [1996] 2 SCR3). 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....

46. The circumstances for why a worker may seek to retire from the workforce at the age of 55 years or earlier, may be quite distinct from that of a worker who has significant financial obligations and many dependents to support. A female or male worker may yearn or by necessity, require an opportunity for financial independence or continuing income earning in their later years. On occasions, employers may wish to offer financial incentives for workers to take a voluntary retirement that possibly may achieve the same result as a compulsory retirement scheme; however compulsion and voluntarism are the polar opposites. Imposition cannot mean in one sense to compel and in another to allow parties to enter into agreement. Such a situation is also distinguishable from that raised by the Employer in the case of *Jagjit Singh v The University of the South Pacific,*[26] where it was held by the Chief Tribunal that the authority that gave rise to the compulsory retirement of Mr Singh, was one founded in law, by virtue of the *Staff Ordinance 2006*. The present case is reliant on the contractual entitlement to do so only.

47. The Employer in its *Preliminary Submissions* relies on the Canadian case of *McKinney v The University of Guelph*[27], citing the reference to the mutual benefits of a Collective Agreement,

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25 Op cit at [63]

26 ER Grievance 1 of 2010 (17 March 2012) at p7.

27 [1990] 2 RCS 1103

"represent(ing) a total package balancing many factors and interests". Yet that case too is clearly distinguishable. Under Section 1 of the *Canadian Charter of Rights and Freedoms*, there is a test available to justify the limitation of a 'charter right', where it can be shown:-

> *(i)* *The objectives of the law limiting the right, are sufficiently important to warrant the limitation (exemption); and*
>
> *(ii)* *The outcomes of a 'proportionality test', in which an evaluation of the impugned law is balanced against the nature of the right, the extent of its infringement and the degree to which the limitation furthers other rights or policies of importance in a free and democratic society.*

48. That is not a test available under Fijian anti-discrimination law. Under Section 21 of the *Human Rights Commission Decree* 2009, the test for 'genuine justification' is set out. In Fiji, unlike Canada, it does not apply to issues pertaining to age discrimination of employment, but is stated as follows:

> *Adverse differentiation by reason of a prohibited ground of discrimination in relation to any of the areas referred to in paragraphs (f) to (j) of section 19(3) is not unfair discrimination if there is genuine justification for the differentiation.*

49. Those provisions where the test can be applied, pertain to the following:-

> *"(f) subject to subsection (4), membership, or the making of an application for membership, of an employers' organization, an employees' organization or an organisation that exists for members of a particular trade, calling or profession;*
>
> *(g) the provision of goods, services or facilities, including facilities by way of banking or insurance or for grants, loans, credit or finance;*
>
> *(h) access by the public to any place, vehicle, vessel, aircraft or hovercraft which members of the public are entitled or allowed to enter or use;*
>
> *(i) the provision of land, housing or other accommodation;*
>
> *(j) access to, and participation in, education."*

The 2013 Constitution provides for the preservation of laws made between 5 December 2006 and the first sitting of the Parliament under the Constitution

50. The next issue that is raised by the Employer is reliant on Section 173 of the present Constitution, insofar as it provides for the continuance of any laws made during the period between 5 December 2006 and the first sitting of the Parliament under the Constitution. There is simply no dispute insofar as that proposition is concerned. The *Employment Relations Promulgation* 2007 is the central labour law of the country. But the continuance of the compulsory retirement provision within the 2001 *Memorandum of Agreement*, cannot rely on the 2013 Constitution for salvation.

51. A provision that is void ab initio will not travel the passage of time on that basis. Insofar as the 2010 Written Contract is concerned, for the reasons advanced earlier, its status would not be affected or fall within the purpose of the preservation arrangement provided for within Section 173 of the 2013 Constitution.

That the provision is consistent with international decisions which recognise that retirement ages in collective agreements can be a justifiable exception to an age discrimination prohibition.

52. The final argument that the Employer raises is that such provisions within Collective Agreements have been deemed justifiable exceptions to an age discrimination prohibition in international decisions. In specific support of that proposition, Counsel relies on the cases of *Dickason v The Governors of the University of Alberta and the Alberta Human Rights Commission*[28] and *McKinney & Ors v University of Guelph*[29] With due respect to Counsel, the cases referred to, come out of a different time and statutory regime. Remarkably while venturing all the way to Canada for some supportive law, the Employer makes no reference to the prohibition that exists much more locally, for example, under Australia's *Age Discrimination Act* 2004;[30] or in the case of New Zealand, where age is a prohibited ground of discrimination both within Section 105(1) of the *Employment Relations* Act 2000 and at Section 21(1) (i) of the *Human Rights Act* 1993.

53. The fact of the matter is that the Canadian cases that have been cited by the Employer, took place prior to the broader 'take up' of anti-discrimination law in many countries. In the case of several of the complainants in *McKinney*, that had unsuccessfully sought to file complaints within the Ontario Human Rights Commission, the Commission had no jurisdiction to deal with matters with respect to the employment of persons over the age of 65 years, at that time. That situation has now changed. Furthermore, in the case of *McKinney,* the issue was a restricted one insofar as the question that was asked, was whether or not the university's compulsory retirement policy, violated Section 15 of the *Canadian Charter of Human Rights and Freedoms* on the basis that the University formed part of the government apparatus within the meaning of Section 32(1) of the Charter and that the retirement policy was in fact one made by law. The case before this Tribunal does not deal with the reliance on a compulsory imposition founded in law. In any event, as mentioned earlier, the scope of Section 1 of the Canadian Charter, that makes provision for a 'justification test' to be applied, does not apply to the Fijian Human Rights legislative regime.[31]

The 2013 Constitution

54. The Employer additionally submits that Section 26(8) of the Constitution provides that retirement ages are an exception to the constitutional right to equality and protection from discrimination. Section 26 provides:

> *Right to equality and freedom from discrimination*
>
> *(1) Every person is equal before the law and has the right to equal protection, treatment and benefit of the law....*

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28 [1992] 2 R.C.S 1103

29 [1990] 3 R.C.S. 229

30 Aside to say in the case of *Qantas Airways Limited v Christie* 193 CLR 280, that the relevant provision of the then Australian workplace law and that of the Fiji provision in question are different.

31 See Section 21 of the *Human Rights Decree* 2009.

(3) 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 ...age,

(4) A law or an administrative action taken under a law may not directly or indirectly impose a limitation or restriction on any person on a prohibited ground.

(7) Treating one person differently from another on any of the grounds prescribed under subsection (3) is discrimination, unless it can be established that the difference in treatment is not unfair in the circumstances.

(8) A law, or an administrative action taken under a law, is not inconsistent with the rights mentioned in this section on the ground that it...
— (b) imposes a retirement age on a person;

55. The Employer cannot rely on Section 26(8) of the Constitution as authority for retaining a clause from a Memorandum of Agreement that is now nearly 16 years old. It is neither a law nor an administrative action taken under a law. In the case of the *2010 Written Contract*, it too is neither a law nor an administrative action taken under a law. Notably here, the Employer has not made reference to the role, if any, that Section 26(7) of the Constitution should play in any analysis.

Could a Compulsory Retirement Policy be Otherwise Fair in the Circumstances?

56. For the sake of completeness, there remains one final submission by the Employer that needs to be ventilated. The Employer has drawn an analogy to the then 1990 and 1992 Canadian decisions, where at least in the case of *Dickason,* it was argued within the majority judgment that the overall benefits within a Collective Agreement need to be assessed as to whether or not the advantages of what are contained as part of the bargain, need to be factored and counterbalanced against any burdens that may be imposed.

57. For the reasons that the Tribunal has already alluded to in the case of *McKinney,* the legislative regime is not comparable. Though so as not to leave that submission unanswered, this question of representative bargaining and whether the activities of a couple of individual union bargaining agents can be deemed as covering all persons both Union and non-Union, has been considered in a decision of the Victorian Supreme Court in *Ryan v Textile Clothing and Footwear Union and Anor*[32]. Relevant issues that could be relied upon when forming a view as to the representativeness of the bargaining process, would be:-

    (i) Whether all employees at the time when the Agreement was made, were given the opportunity to vote;

[32] [1996] 2 VR 235 (13 March 1996)

(ii) Whether terms within the Agreement remain on foot;

(iii) Whether new employees to the Employer, particularly given the shifts in international labour law and the specific statutory expressions of Government would regard the compulsory retirement arrangement, discriminatory.

58. The Tribunal has also alluded to similar issues being identified by Coventry J in the case of *Suva City Council*, where the question of bargaining away the human rights of others, has been briefly canvassed. While these issues may not be directly relevant to any threshold question before the Tribunal, they may nonetheless be useful signposts to persons seeking to advance arguments reliant upon Section 26(7) of the Constitution on future occasions. Those considerations are nonetheless best left to another time.

Submissions of the Grievor

59. Within the *'Workers Further Submissions'* a brief history in relation to the formation of the *2001 Memorandum of Agreement* is set out.[33] Consistent with its earlier submissions, it is stated that the retirement envisaged by Clause 17(a) (i) of the Agreement, is not to be "enforced by the employer but mutually agreed".[34] It is submitted, that Section 77(1) (d) of the Promulgation is clear in its application that retirement age shall not be imposed on a worker. From an economic point of view, the Submission states:

The Constitution of the Republic of Fiji prohibits unfair discrimination on the ground of age. This in a broader context in our society provides special protection to elderly people. In Fiji people above the age of 65 qualifies (sic) for a monthly pension and special treatment for the usage of public transportation. Such benefits are not extended to people who turn 55 years and it is important for worker in this age to continue to be employed and earn salaries and wages to supplement their living.

60. The Union argues that even if there was a capacity to exercise such a discretion, that where it was exercised unfairly or in an arbitrary matter, it cannot be said to be exercised in accordance with the spirit of the provision contained within *the Memorandum of Agreement*, or for that matter the later *Employment Contract.*

Conclusions

61. The Tribunal concludes that the *Employment Relations Promulgation* 2007 and the *Human Rights Commission Decree* 2009 set out the existing statutory limitations for age discrimination in employment. The laws are now shaped by the framework and principles set out within the 2013 Constitution. The 1997 Constitution provided a two year window for discriminatory provisions to be sun-setted out of existence.

62. After that time, outside of where there was a law or administrative action taken under a law, such provisions were rendered unlawful. Clause 17 of the *2001 Memorandum of Agreement* was void to the extent that it offended the 1997 Constitution and the *Human Rights Commission Act* 1999. It was void ab initio.

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33 See Section 2.0 of the Submissions.

34 See Paragraph 3.0 of the *Workers Preliminary Submissions* as filed on 17 February 2017.

63. In the case of the *2010 Written Contract*, the only legislative backdrop that was in place when it came into force was that provided for within Section 77 of the *Employment Relations Promulgation* 2007 and the *Human Rights Commission Decree* 2009. There was no Constitution in place, when the contract was made. The *Employment Relations Promulgation* sought to embrace at the time, the laws as they were reflected within the 1997 Constitution, the *Human Rights Commission Act* 1999 and the *ILO Convention 158*. Two years later, the *Human Rights Commission Decree 2009*, as the later and more specific purpose legislative expression,[35] clarified the present state of the law and narrowed the scope of when and how the exemption for compulsory retirement should take place. As Table 1 illustrates, the 2013 Constitution, has for all intents and purposes embraced the same language as that contained within the *Human Rights Decree.*

64. The proviso contained within Section 77(1)(d) of the Promulgation allows for compulsory retirement where *any written law or employment contract impos(es) a retirement age.* The manner as to how the contract imposes the retirement age must be read in a way that is consistent with the *Human Rights Commission Decree* 2009 and now the 2013 Constitution. It appears more likely that any 'contractual imposition' arises as a consequence of an administrative action taken under or imposed by law.

Table 1: Current Legal Framework for Fijian Age Discrimination in Employment Law

Legal Authority	Prohibition	Exemption
Constitution 2013	Section 26(3)	Section 26(8) – Any law or administrative action taken under a law on the ground that It imposes a retirement age on a person.[36]
Human Rights Commission Decree 2009	Section 19	Section 2 – Any law or administrative action which imposes a retirement age on a person who is the holder of a public office.
Employment Relations Promulgation 2007	Section 77(1)	Section 77(1) (d) - subject to any written law or employment contract imposing a retirement age.

65. The present state and hierarchy of the law, to the extent that the expression can adequately capture the inconsistencies between statutory provisions, can be represented in Diagram 1.

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35 See earlier the discussion drawing on the latin maxim, *leges posteriores priores contrarias abrogant*.

36 There is a further exemption available under Section 26(7) of the Constitution, however for present purposes, that issue is not relevant to the issue under consideration.

Section 28 *Constitution* 2013

Section 17 *Human Rights Commission Decree* 2009

Section 77(1) (d) *Employment Relations Promulgation* 2007

Diagram 1: Hierarchy of Age Discrimination in Employment Law

66. For that reason, the only way that the contract could be assessed on or around 24 August 2010, was having regard to the combined operational effect of the *Employment Relations Promulgation* 2007 and the *Human Rights Decree* 2009. To that end, the *2010 Written Co*ntract where it purported to provide discretion for the Employer to effect compulsory retirement, subject to the laws of Fiji, could not be relied upon. Generally speaking, the laws of Fiji at that time, would have prohibited the exercise of such a discretion. While one may now argue, that if the laws have now changed, then a new way of interpreting that provision can be found, such an approach does not appear to be consistent with the language of the clause, nor what seems to be the intention of the parties at the time.[37]

New Written Contracts that Come Into Force after the Promulgation of the *2013 Constitution*

67. With the advent of the 2013 Constitution and its assent on 6 September 2013, a new set of governing principles are now in place. Sections 26(7) of the Constitution recognises that:

> *Treating one person differently from another on any of the grounds prescribed under subsection (3) is discrimination, unless it can be established that the difference in treatment is not unfair in the circumstances*

68. Section 26(8) of the Constitutions provides that:

[37] Care must logically be taken in any attempt to construe the terms based on the factual matrix provided and not what may be later claimed was the intention of the parties at the time. (See for example, *B and B Constructions (Aust) Pty Ltd v Brian A Cheeseman & Assoc Pty Ltd* (1994) 35 NSWLR 227.

A law, or an administrative action taken under a law, is not inconsistent with the rights mentioned in this section on the ground that it...
— (b) imposes a retirement age on a person;

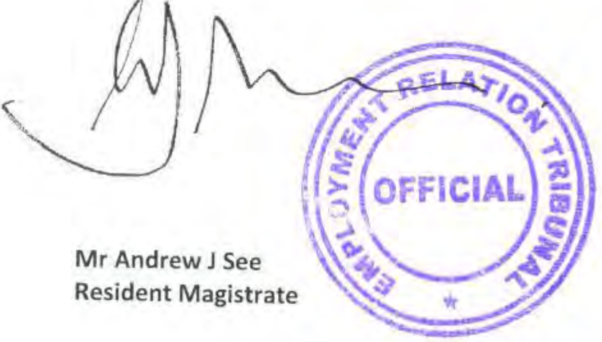
69. This consideration is now the new constitutional overlay to Section 77 of the *Employment Relations Promulgation* 2007 and Section 19 of the *Human Rights Commission Decree* 2009. It is an issue that will need to be explored by parties who wish to test the question of whether there has been a difference in treatment and whether discrimination based on age, is fair in the circumstances. At the time the 2010 *Employment Contract* was entered into, there was no constitutional overlay. The right to compulsorily retire within the Termination Clause, remained "subject to the laws of Fiji". On its face, it would appear that the contractual expression can only be considered meaningful at the time the contract came into effect. Neither party would be capable of otherwise predicting the way in which the laws of the country may change from time to time. In any event, the reliance on Section 26(7) of the Constitution, is not an argument that has been agitated by the Employer. There is no evidence to suggest that the *2013 Constitution* was designed to act retrospectively, other than to preserve the force of laws as provided for by Section 173. There is certainly nothing that the parties have raised in submissions that indicate that the Constitution seeks to revive any such provisions, that had either been unlawful or without effect as a consequence of earlier laws.

70. For the above reasons, the Tribunal forms the view that any reliance on the *2001 Memorandum of Agreement* or the *2010 Written Employment Contract* where it provides for the compulsory retirement of the Grievor, is unlawful. Subject to any appeal by the parties, the matter will be relisted for mention and the issuing of further Directions in order that the substantive issues of the grievance may now be determined.

Decision

71. It is the decision of this Tribunal that:

    (i) Any dismissal of the Grievor, reliant upon either Clause 17(a)(1) of the 2001 *Memorandum of Agreement* or the Termination Clause within the *Employment Contract* dated 24 August 2010, is discriminatory at law, where it compulsorily seeks to terminate the Grievor's employment, based on the prohibited ground of age.



Mr Andrew J See
Resident Magistrate