

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

CASE NUMBER: ERCC 15 of 2021

BETWEEN: MORITIKEI QELE

PLAINTIFF

AND: FIJI REVENUE AND CUSTOMS SERVICES

DEFENDANT

Appearances: Mr. N. Sharma for the Plaintiff.

Ms. R. Malani for the Defendant.

Date/Place of Judgment: Thursday 08 June 2023 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

Judgment

A. Catchwords:

Employment Law - whether the employees in this case were entitled to a renewal of the contract of employment for the same term as of right upon its expiry after agreeing and accepting two short term contracts and when they have not brought the action with 21 days from the day the employment grievance first arose as required by s. 188 (4) of the ERA: when did the claim for non- renewal of the original contract for the same period first arise- whether the employer was obliged to provide reasons for not renewing the contract -the requisite notice period for non-renewal of the contract.

B. Legislation:

1. *Employment Relations Act 2009 ("ERA"): s. 188 (4).*

Cause

1. The plaintiff brings this action against his former employer for not renewing his employment contract. He seeks the following orders:
 1. *A declaration that the decision made on 22 October 2021 not to renew the plaintiff's contract is unjustified, unfair, unlawful, in breach of clause 6.0 of the employment contract, contrary to section 61 and 77 (1) (c) of the ERA and contravenes the principles of common law that gives him legitimate expectation that his contract would be renewed.*
 2. *That the employment contract be renewed and the plaintiff be reinstated forthwith without any loss of benefits and entitlements.*

Background

2. The plaintiff was employed by the defendant, hereinafter referred to as **FRCS**, as Auditor – Small and Medium at the time of non-renewal of his contract. He was employed by FRCS since 7 December 2015.
3. The parties had entered into a contract of employment on 16 February 2018. The contract was to conclude on 31 July 2021 unless renewed under clause 6.0 or terminated under clause 7.0 of the contract of employment.
4. Upon expiry of the contract on 31 July 2021, the plaintiff's contract was renewed for 3 months with effect from 1 August 2021 to 30 October 2021. The plaintiff's contract was further extended by 1 month by a letter dated 9 September 2021. The contract was to expire on 30 November 2021.
5. On 22 October 2021, FRCS wrote to the plaintiff and advised him that his contract was expiring on 30 November 2021 and that it will not be renewed. The contents of the letter of 22 October 2021 are:

"We refer to your contract of employment with Fiji Revenue and Customs Service (FRCS) dated 13 December 2017 which concluded on 31 July 2021. Reference is also made to the letter of contract extension dated 29 July 2021 where you were granted a 3 month's extension effective from 1 August 2021 to 30 October 2021; and a further contract extension of one (1) month, letter dated 9 September 2021 which will expire on 30 November 2021.

We wish to advise that Fiji Revenue and Customs Service (FRCS) will not renew your employment contract, therefore in accordance with your extension of contract letter dated 9 September 2021 your employment will cease on Tuesday 30 November 2021. However, FRCS does not require you to work out your notice period, hence your last day of work is the day you receive this letter and you will be paid in lieu of the remaining notice period.

Please be reminded that upon your exit, you are bound by the confidentiality clause in section 52 of the FRCS Act 1998. You are requested to do a proper handover of duties to your Supervisor and ensure that all FRCS assets are returned to your immediate supervisor before your exit. All legal entitlements up to and including your last day of work will be paid to you accordingly, subject to the settlement of any dues owed by you to FRCS.

On behalf of the Board, Management and staff of Fiji Revenue and Customs Service, we extend our sincere gratitude to you for the services rendered during your term of employment with the Service. We wish you well in your future endeavors".

Plaintiff's Position

6. The plaintiff says that when his contract was extended twice, the letters of extension did not state that his contract will not be extended so he is entitled to have his contract renewed. He says that the two renewals and the fact that it was not stated in the renewals that his contract will not be extended gave rise to a legitimate expectation that his contract would be renewed.

7. He also says that when he was re-engaged on the same position and on the same terms and conditions, the principal contract which expired on 31 July 2021 was construed as continuous and deemed to have been renewed. The defendant therefore could not have made the decision on 21 October 2021 that his contract has expired on 30 November 2021 and would not be renewed.
8. The plaintiff is also contending that he is entitled to the reasons for non-renewal of the contract. He contends that he had served FRCS without any adverse report or negative performance assessment. The FRCS therefore ought to have provided him with valid reasons why his contract was not renewed. It is also contended that the FRCS ought to have given him reasons for non – renewal of the contract in light of the express provision for renewal of the contract.
9. The plaintiff says that by agreeing to the renewal clause in the contract gave rise to a legitimate expectation that his contract will be renewed subject to satisfactory performance. The plaintiff also contends that the retirement age in the Collective Agreement and the HR Policy is 60 years and he expected to work until that age. That, he contends, is a legitimate expectation.
10. It is further averred by the plaintiff that his employer had acted arbitrarily in determining the issue of whether his contract should be extended. He contends that he was not given any prior notice that the contract will not be renewed and that he was entitled to be heard on the issue of non-renewal.
11. The plaintiff says that he was asked to leave the office on the same day he was furnished with the letter which amounts to summary dismissal. This act of being asked to leave the office immediately was disgraceful, contends the plaintiff, and also humiliating as other staff members were present.
12. The plaintiff says that under the principal contract, there is no provision for payment of wages in lieu of notice for non-renewal as the right to give pay in lieu of notice is applicable when contracts are terminated.

13. It is also contended by the plaintiff that his position is still within the established staffing structure of FRCS. There is no reason therefore for his non-employment. He also asserts that majority of the employees have been renewed their contracts and he has been disadvantaged and discriminated.

Defendant's Position

14. The defendant states that the plaintiff had agreed to the two extension of contracts after which the defendant exercised clause 6.1 of the contract in not renewing the contract of employment any further. The two extensions were signed by the plaintiff. The period of extensions were clearly stated in the extension letters and there was misleading intention that his contract will be extended automatically.
15. It is asserted by the defendant that under the contract of employment, the plaintiff is not entitled to and the defendant is not obliged to provide any reasons for the non-renewal of the contracts. The defendant says that it had the discretion to renew or not to renew the contract of employment. The 60 years retirement age does not indicate that all employees will keep their job until that age.
16. The defendant denies that the plaintiff was asked to vacate the premises or leave the premises causing him humiliation and loss of dignity and injury to his feelings.
17. The defendant admits that it did not give the requisite notice of non-renewal but that it paid the plaintiff 2 month's salary in lieu of the notice. The defendant was undergoing an organization redesign and therefore not in the position to provide the notice. The defendant says that the organization was undergoing the right sizing exercise.
18. The defendant also raised that the plaintiff did not exhaust the internal appeals process at the time of filing this application. He had provided his appeal to the decision but refused to attend the meeting to discuss his appeal hence not completing the internal grievance procedure.

Analysis

19. The first issue that I need to address is whether the plaintiff is entitled to a renewal of the contract as of right and whether he can claim to have a legitimate expectation for a renewal of the contract upon its expiration.
20. The relevant provision of the contract that determines the question on the right to renewal as of right and legitimate expectation is clause 6.0 of the employment contract. The clause reads as follows:

6.0 Contract Expiry or Renewals

- “6.1 Upon the expiry of this Contract both parties may, by mutual agreement, enter into a new contract subject to performance.*
- 6.2 Your Contract renewal review will be undertaken as part of the annual performance review process for the relevant year.*
- 6.3 The Employer will give the Employee two (2) months advance written notice for renewal or expiry of contract.”*

Underlining is Mine for Emphasis

21. Clause 6.1 of the contract of employment very clearly indicates that the parties may enter into a new contract upon mutual agreement. This means that the defendant employer will also have to agree for a renewal of the contract. In this case the parties did agree to a renewal of the contract but for a shorter term of three months and then one month following the expiration of the first extension.
22. Both the parties had accepted the renewal and two extensions for shorter periods and both are now bound by the new period of employment which is one month, being the period of employment in the final extension.
23. The plaintiff cannot expect that the principal contract be extended for the same 3 year term for two reasons, the first is that he had agreed to two short term renewals and the

second is that the contract does not provide for a renewal of the contract as of right for the same period.

24. It is very clear from clause 6.0 that there is a possibility of the contract not being extended that is why there is this provision that the plaintiff will be told 2 months in advance about the renewal or the expiry.
25. Since clause 6.0 creates two possibilities for both parties and given the possibility that the contract can come to an end upon its expiry, there cannot be any claim for legitimate expectation.
26. If the contract does not provide for an automatic extension, I do not see how the plaintiff can claim to have a legitimate expectation for a renewal as of right. I also do not see how the plaintiff can claim to have a legitimate expectation for a renewal of the principal contract for the same period as the original one in light of the two short extensions which he accepted.
27. The two short extensions of the contract was an indication to the plaintiff that the defendant was not considering a full term contract. By accepting the short term renewals, the plaintiff had accepted that the principal contract will not be renewed for the full term. The plaintiff had accepted the short term contracts and he cannot complain now about the non-renewal of the principal contract for the full term.
28. In any event, the plaintiff accepted the short term contract because he knew that FRCS was undergoing an organization redesign. A circular was sent to all staff in June 2021 where they were told about the re-design. They were told that FRCS will be undergoing the process of rightsizing the institution. The plaintiff complains that he does not know why his contract was not extended and that he was entitled to be provided with reasons. The evidence before me suggests otherwise.
29. It is clear that the plaintiff knew about the re-design of the organization and when his principal contract was not renewed for the full term, he knew that he will be affected

by the rightsizing of the institution. Further, the contract does not require the defendant employer to provide to the plaintiff the reasons for the non-renewal.

30. I must also say that if the plaintiff was aggrieved that his contract of employment was not renewed for the same term as the principal contract then his employment grievance arose on 29 July 2021 when he was given a shorter term of contract. He therefore ought to have filed his claim within 21 days from 29 July 2021 as required by s. 188 (4) of the ERA which states that ***“any employment grievance between a worker and an employer in essential services and industries that is not a trade dispute shall be dealt with in accordance with Parts 13 and 20, provided however that any such employment grievance must be lodged or filed within 21 days from the date when the employment grievance first arose...”***.

Underlining is Mine

31. FRCS is an essential service and industry and any employee who has an employment grievance must file an action within 21 days from the time when the grievance first arose. In this case, the plaintiff is complaining about the non-renewal of the principal contract for the same period. Even if it is complaining that his contract was renewed for a shorter period then in both cases, the cause of action arose on 29 July 2021 when he received a letter indicating a renewal for a shorter term. The plaintiff filed his claim on 5 November 2021 which is out of time and precluded by s. 188 (4) of the ERA.
32. The plaintiff is also complaining about the lack of the requisite notice for non-renewal of the contract when it expired. Under clause 6.3 of the contract, the employer was entitled to give to the plaintiff 2 months advanced written notice about the renewal or expiry of the contract. The plaintiff received a letter on 29 July 2021 extending his term of contract for 3 months which the plaintiff accepted. If the plaintiff is raising that he did not receive the 2 months' notice of the renewal of the contract then his claim should have been filed within 21 days from 31 May 2021 which was when the plaintiff was entitled to a notice for a renewal. This would be the date on which the 2 months advance notice was expected by the employer.

33. The plaintiff did not lodge or file any claim within 21 days of 31 May 2021 for non-compliance of the contract of employment and any claim for the requisite notice period not being complied with is now time barred under s. 188 (4) of the ERA.
34. In any event, when the contract of employment was extended for the second time for 1 month only, there could not have been a requirement for 2 month's advance notice for non-renewal. It is inconceivable how the employer can provide 2 months' notice of expiry of the contract after having granted an extension for a month. The notice period in the principal contract cannot be applied to the final extension. It is an unworkable provision given the short term extension of one month.
35. Given its unworkability, what can be reasonably expected from the employer is a reasonable period of notice. A reasonable period for a month's contract would be a week's notice which I find the employee received from the employer.
36. Even if the employer is required to give the 2 months' notice period and it has failed in complying with it, then the plaintiff was compensated by being paid for the notice period although there is no provision in the contract for payment in lieu of notice of non-renewal.
37. If damages were to be calculated for the loss that the plaintiff suffered for not being given the notice, it would naturally be wages and benefits lost for the 2 months period. I do not see how the plaintiff can legally and equitably claim a breach of the contract of employment in light of being paid and in light of not having brought an action within time when he did not receive the required notice.
38. The plaintiff also complains about being asked to vacate the office on the day of the letter. He says that this amounts to summary dismissal. The defendant disputed that the plaintiff was asked to vacate the premises. However, in its letter of 22 October 2021, the defendant has admitted that the plaintiff's contract was to end on the day he received the letter. The plaintiff was paid for the remaining working days. The payment of the contract period was accepted by the plaintiff. The letter also clearly indicated that he

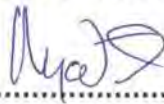
was to end his work due to expiry of the contract and not that he was being dismissed. That was clear in the plaintiff's mind and he also was paid for the period he did not work. In the circumstances, I do not find that the plaintiff can maintain a claim for unlawful dismissal.

39. The plaintiff is also complaining that a performance assessment was not carried out under clause 6.2 of the contract which states that "*your contract renewal review will be undertaken as part of the annual performance process for the relevant year*". The defendant clearly admits that there was no issue surrounding the plaintiff's performance. The plaintiff is insisting that since he was a good employee he ought to have received another 3 years term for his contract. This claim does not assist the plaintiff because even if the assessment was carried out, it was not going to influence or affect the decision that the defendant took not to extend the contract any further.

Final Orders

40. For the reasons outlined above, I dismiss the plaintiff's claim. Each party is to bear their own costs of the proceedings. The findings of this case also applies to the following matters:

1. *Akosita Valamalua v. FRCS - ERCC 17 of 2021.*
2. *Naleni Mala Sharma v. FRCS - ERCC 16 of 2021.*
3. *Alice Anjana Singh v. FRCS - ERCC 18 of 2021.*
4. *Dekesh Nand v. FRCS - ERCC 19 of 2021.*
5. *Paulini Raditora Lomavatu v. FRCS - ERCC 20 of 2021.*



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Hon. Madam Justice Anjala Wati

Judge

08.06.2023



To:

1. *Mr. N. Sharma for the Plaintiff.*
2. *FRCS In - House Legal.*
3. *Files: Suva ERCC 15 - 20 of 2021.*