

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

CIVIL ACTION No. HBC 02 of 2020

BETWEEN: **VALENIVALU BUADROMO** 20 Mako Place, Nadera, Unemployed
PLAINTIFF

AND: **PERMANENT SECRETARY FOR EDUCATION, HERITAGE
AND ARTS**
DEFENDANT

Counsel: Mr. N. Damodar for the Plaintiff
 Mr. Kant S. for the Defendant

Date of Judgment : 18.7.2025

JUDGMENT

INTRODUCTION

- [1] The Plaintiff filed this action seeking a declaration that the termination of his employment contract by Defendant was unfair and unlawful and for general and special damages. Plaintiff had also claimed damages for breach of contract.
- [2] Plaintiff was employed with Defendant as a clerical officer since 2011, and he applied for the position of Human Resource Officer (HRO) in 2019 while working as clerical officer.
- [3] Plaintiff was appointed for the HRO's position subject to Probation period of six months on 7.6.2019. This provision that imposed Probation Period to Plaintiff is void as he was already a clerical officer with more than eight years of experience in Civil Service.
- [4] In terms of Section 9(1) of Civil Service (General) Regulation 1999, Plaintiff may be subjected to Probation Period at the '*commencement of his employment in the civil service*'.

- [5] Plaintiff was terminated of his employment by Defendant on 26.11.2019 with one week notice on the basis that he was on Probation.
- [6] During the Probation period there were three 'Employee Performance /Conduct Meetings'(EPM) held on 18.6.2019, 21.6.2019 and 17.9.2019. Second meeting had no recommendation.
- [7] There is no ambiguity as to the said Probation Period as this was clearly stated on a tabulated form on the front page. So, contra *proferentum rule* pleaded by Plaintiff had no application. It applies when a contractual clause is vague, unclear, or open to multiple interpretations.
- [8] Plaintiff was already employed under a contract, in the civil service at the time he was appointed as HRO.. Plaintiff's contracts of employment as clerical officer were renewed periodically, and his last employment contract was as clerical officer was for a term of five years from 13.8.2017 to 12.8.2022.
- [9] It is admitted fact that Plaintiff was assessed positively by his supervisors as a person who could even perform supervisory while such position was found wanting.
- [10] Plaintiff was also assessed as having good *'interpersonal skills and can be dependent on* 'if the supervisor was on leave. These were all positive indicators which shows Plaintiff had proven himself in Civil Service at his position before promotion to a higher position as HRO.
- [11] So, Plaintiff was terminated by Defendant unlawfully as a person in Probation Period on a void term 1(c) of his employment contract which was in violation of Regulation 9(1) of Civil Service (General) Regulation 1999 and he was terminated unreasonably by failure to consider his long service in Civil Service since 2011 and also positive assessments he had received.

FACTS

- [12] The Plaintiff gave evidence himself in support of his claim. The Defendant called Senior Human Resource Officer of Defendant. There is no dispute as to the factual matrix of the action. Plaintiff marked documents P1 and P2 which were previous history of employment in Civil Service as clerical officer.
- [13] Plaintiff was employed as 'Temporary Relieving Clerical Officer' on 11.11.2011. Since then, he had continuously worked in Civil Service in the position as clerical officer and his performance appraisals were favourable. Document marked D6 was his last assessment as Clerical Officer on 17.4.2019, and his supervising officer had commented on it as;

“good interpersonal skills and can be dependent on if supervisors is on leave e.g. when AAO was on leave at the beginning of this year, he has managed the supervisors and markers payments well and they received it on time.

Officer only needs to improve his attendance in which he occasionally arrives late to work.’

[14] It is admitted fact that Plaintiff was assessed positively and where he required improvements necessary arrangements were made for ‘learning and development plan’ with the agreement of all the parties including Plaintiff.

[15] The vacancy for HRO was advertised in document marked (D2). Plaintiff had applied for a post of HRO (Band E), which is a higher position in Civil Service than clerical officer’s position.

[16] Plaintiff was appointed as HRO on 7.6.2019. Employment contract contained a probation period of six-month (the employment contract marked P4 as well as D3.) At that time Plaintiff was in Civil Service since 2011 and his last contract of employment was for five years from 13.8.2017.

[17] According to the Clause 1(d) of document marked D3 and P4; prior employment contract with the Defendant was void. So, his employment contract as clerical officer was ‘void’ from 7.6.2019.

[18] After promotion to HRO Plaintiff encountered some issues where Employer Performance Meetings were held to address the issues. First of such EPM was held about eleven days after contract of employment as HRO entered.

[19] On 18.6.2019 first EPM was held and according to notes which were not signed by Plaintiff indicate ‘disruptive behaviour’ as

‘... a sensitive situation with members of other teams in the Recruitment and Selection, whereby you (Plaintiff) were vocalizing your (Plaintiff’s) concerns in regard to how you (Plaintiff) feel a fellow colleague is giving you (Plaintiff) her workload, causing other staff to attend to your concerns while working hours’

[20] Plaintiff had also replied to alleged behaviour and had stated he was ‘sabotaged’ with ‘offloaded’ work from others. He had raised the issue of unequal distribution of work.

[21] Plaintiff was recommended certain measures and targets and reviewing of the implementation.

- [22] Next EPM was on 21.6.2019 and the performance issue discussed was relating to an incident where Plaintiff was 'missing' from his working station from 11.20 to 12.20 pm on the same day and Plaintiff had explained his reasons for absence, and no actions recommended. So second EPM meeting had no outcome.
- [23] Third and final EPM for Plaintiff was held on 17.9.2019 and this involved issues relating to teamwork, sharing of knowledge with team, communication team leader, sharing of work.
- [24] Plaintiff had in above mentioned EPM agreed to discuss further with Assistant Manager and staff.
- [25] Plaintiff was directed specific action regarding his attendance and quality of the reports he make. A review date of 24.10.2019 given.
- [26] There was no evidence of any review of EPM or progress of the actions recommended in EPM held on 17.9.2019
- [27] On 26.11.2019, Plaintiff was terminated by letter with heading '*Terminate of Employment within Probation*' marked P6 and same is also marked as D4.
- [28] So Plaintiff was terminated from employment in Civil Service by document marked P6/D4 which stated that termination was in terms of Section 127(7) of the Constitution of Republic of Fiji read with clause 1(c) of employment contract.

JURISDICTION

- [29] Court of Appeal in *Capital Insurance Ltd v Kumar* [2025] FJCA 70; ABU091.2023 (22 April 2025) held, (Per Premathilake C RJA)

"[10] Earlier, the Court of Appeal had said in a somewhat different context and in response to a different argument by the appellant that the Employment Relations Act (ERA) does not remove the jurisdiction of High Court (as opposed to ERC) to entertain claims involving employment contracts, the jurisdiction of the High Court in such matters has not been excluded by the ERA, and *it is a claimant's choice whether to institute an action under the ERA or under the Common Law and the applicant is not precluded from bringing an action in common law in the High Court for breach of the employment contract.* The Court agreed that an action filed under common law for breach of contract is not governed by the ERA hence the ratio of **Vinod** has no application to a situation contemplated in **Suva City Council**. It appears that in **Suva City**

Council following respondent's dismissal she had filed a Writ of Summons and Statement of Claim in the High Court (not in the ERC) against the appellant alleging *breach of contract and unlawful termination* and claiming typical common law reliefs such as damages etc.

Thus, taken both *ANZ Banking Group Pte Ltd v Sharma and Suva City Council* together, the legal position appears to be that an action under common law based on breach of employment contract resulting in unlawful termination seeking common law remedies may be filed in any High Court. However, if and when the action is founded and properly pleaded as unjustified or unfair dismissal leading to breach of contract of employment, the ERC has jurisdiction under the ERA. If the action is based on employment *grievance* and pleaded as such, the ERC has no jurisdiction. Therefore, the forum will be determined by the manner in which action is couched including the remedies sought. The difference of forum and jurisdiction of the High Court and ERC appears to depend on the true character or characterization of the action as pleaded. It is not just a matter of form but rather substance of the action."

- [30] According to the Court of Appeal, Plaintiff could maintain this action where he sought following orders;
- a. A declaration that the termination of contract is unjustified, unfair and unlawful.
 - b. General damages for the payment for loss of earnings for the balance of the contract. The details of which are as follows:
 - i. For the loss of earnings and livelihood from 23/11/2019 to 6/6/2024; in the sum of F\$100, 547.41 exclusive of 10% FPNP of Base Salary. F\$10,628.90 as 10% FPNP employer contribution from 23/11/2019 to 6/6/2024.
 - c. Judgment in the sum of \$106,299.06 as special damages as per paragraph 16.
 - d. Damages to be assessed for wrongful / unlawful termination.
 - e. Damages to be assessed for breach of contract.
 - f. Interest from the date of filing of this action at a rate to be determined until judgment.
 - g. Post-judgment interest at the rate of 4% per annum.
 - h. Costs; and
 - i. Such further or other reliefs as this Honourable Court deems just in the circumstances.

Legality of Probation Period

- [31] The Plaintiff was appointed as a Temporary Relieving Clerical Officer with Defendant from 23 .11. 2011. He was then appointed as a Clerical Officer under the contracts of service from 12.8. 2015. His last contract as clerical officer was for five years from 13.8.2017 to 12.8.2022
- [32] On 28.1.2019, Defendant had advertised the positions of HRO for which the Plaintiff was appointed from 7.6.2019. This was a higher position than Clerical Officer's position.
- [33] Prior to appointment as HRO, Plaintiff's performance was assessed periodically. Document marked P3 was the assessment on 23.3.2028 and in that supervisor had commended as
- “Maintain (sic) good working relationships with coworkers and able to answer customer queries.
Work assigned are completed on time with minimal errors.
Usually adjust well to change in the workplace
Reports are accurate and well written using correct grammer’
- [34] According to 2018 assessment Plaintiff was assessed as '*consistently exceeded expectations*. This position is not in dispute. This is high level of competence in his work as clerical officer.
- [35] According to supervisor's comment of P3 he had no disciplinary case and had even worked on weekends without any payment for meals or overtime. These are commendable behaviour and rare commodity in the level of clerical officer. There was no evidence that these were considered before his termination was recommended.
- [36] Plaintiff's competence is reinforced in 2019 assessment marked D6 though Plaintiff was not assessed as 'fully competent' in this assessment. According to the Definition this means
- ‘Achieves a rating of 100% -fully competent in all areas of performance assessment including minimum of 75%-80% of planned work within approved timeline is able to perform all duties of the role with normal supervision as applicable to the level of the position.’
- [37] From the evidence presented it is not in dispute that Plaintiff had worked in Civil Service since 2011 without major complaint or issue. There were no evidence of any EPM held during this time. His work ethic and interpersonal relationships with colleagues and others workers and even with customers were rated positively by his supervisors.
- [38] Plaintiff had even worked as supervisory capacity when the need required to do so, and this indicate not only his capacity but also teamwork and

commitment to work. He had even worked during weekends without additional meal or overtime allowance, indicating his work ethic based on completion of work rather than completion of time at work.

[39] Such a person is an asset to any organisation, and this is specially so in Civil Service as it deals with public and provides a service to public as opposed to profit or revenue generation.

[40] From the evidence Plaintiff had worked as clerical officer which had exceeded expectations, and his only misgiving was absenteeism. It is also evidenced that Plaintiff had integrated to Civil Service and there was no requirement for Probation Period being imposed on him, only because he was appointed for higher position than clerical officer's position.

[41] In terms of Civil Service Act and Civil Service (General) Regulation 2019 a Probation Period is discretionally, so it is not mandatory. A Probation Period can only be imposed at the commencement of employment with Civil Service. So, every time a person is promoted or appointed to higher position in the Civil Service, a Probation Period cannot be imposed on to such person.

[42] In UK Supreme Court decision Autoclenz Ltd v Belcher and others, [2011] 4 All ER 745 considering the bargaining power of the parties in employment contracts and held that employment contracts cannot override statutory provisions. Similarly Clause 1(c) of employment contract of Plaintiff marked D3 violates Regulation 9 of Civil Service (General) Regulation 2019 and void in law.

[43] Regulation 9 of Civil Service (General) Regulation 2019 states,

“[CIV 13,250] Appointments to be on probation

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(1) A person appointed to the civil service as an employee may be on probation at the commencement of his or her employment in the civil service. *[subreg (1) am Act 2 of 2016 s 20, effective 16 February 2016; subst LN 34 of 2017 reg 5, effective 23 May 2017]*

(2) The period of probation must not exceed 6 months. *[subreg (2) subst LN 20 of 2023 reg 3, effective 1 January 2023]*

(3) A permanent secretary may confirm the appointment of a person before the end of the period of probation. *[subreg (3) am LN 99 of 2016 reg 34, effective 1 December 2016]”*

[44] Accordingly, not only Plaintiff did not require a Probation Period due to his competency level and experience in Civil Service, but also it was unlawful to insist on Probation Period of six months in the employment contract as HRO.

- [45] In UK House of Lords decision *Eastwood and another v Magnox Electric plc; McCabe v Cornwall County Council and others*, [2004] 3 All ER 991 held, by acting in unfair manner employer can be subjected to a cause of action quite apart from being acting on that and terminating an employee.
- [46] Accordingly, Plaintiff was treated unfairly from the time he was subjected to a Probation Period and this had led to unlawful termination. The damage had occurred from unlawful termination by application of Clause 1(c) of employment contract of 7.6.2019 which is void in terms of Regulation 9 of Civil Service (General) Regulation 2019. So Plaintiff's termination is unlawful.
- [47] Defendant cannot override Civil Service (General) Regulation 1999 more specifically Regulation 9 and accordingly clause 1(c) of the employment contract is void. So reliance on this and termination of Plaintiff was unlawful. Plaintiff was not serving a Probation Period and cannot be subject to Probation Period as he was already employed with Civil Service for more than eight years when he got appointment as HRO.

Plaintiff 's Performance as HRO

- [48] The Defendant's position is that soon thereafter, it had ascertained that the Plaintiff was underperforming in his new role as HRO. Within a month he had developed some issues or behaviour unsuitable for teamwork in the workplace. So, there were two EPM held where Defendant was allowed to state his response to specific behaviour issues stated in the said meetings. Accordingly nothing was recommended in the second EPM after Plaintiff explained his reasons for the alleged conduct of being away from his work place.
- [49] EPM were held on 18.6.2019, 21.6. 2019 and 17 .9. 2019. Plaintiff's responses in the three meetings were also recorded in workplace with recommended action and also review for respective EPMs. They were marked as D5.
- [50] There was no evidence of how the reviews were done and the results of the reviews. What is the purpose of EPMs where 'Success Measures' and Target Dates' given with 'Review Dates' if such reviews were not conducted?
- [51] First EPM of 18.6.2019 had addressed 'Following Instruction', 'Teamwork' and "Communication Process', 'Conduct' with recommendation of 'daily monitoring' as review method. There is no report or evidence how these were monitored and the results of that. As regard to 'Punctuality' review

date was set 30.6.2019 but again there was no evidence of monitoring these recommendations. This EPM further stated as

‘we will have future sessions to discuss your progress of these issues mentioned above Effective Immediately from 18.6.2019 and should these patterns follow through without any positive change further steps shall be taken to counter these issues.’

- [52] There was no evidence of any continuous or dally monitoring recommended in EPM. It is evidenced that Plaintiff’s performances were assessed favourably before his promotion to HRO, but soon after he was appointed as HRO on 7.6.2019 first EPM was held on 18.6.2018. This related to issues relating to teamwork.
- [53] Plaintiff was assessed positively for interpersonal relationships among the colleagues as a clerical officer and was very dedicated officer who had worked even during weekends without payment for meal or overtime, indicating commitment for work over remuneration or reward.
- [54] Plaintiff in his evidence also voiced that others in his team were ‘playing with phones’ while he was working and their work was offloaded to him. This can happen in an organization where ‘Y’ type self-motivated and over dedicated and committed being overwhelmed with offloading of difficult or time-consuming work.
- [55] There was no evidence that this aspect was addressed in EPM in the recommendation or monitoring. It is also clear that the issue of equal distribution of work raised by Plaintiff as root cause of first EPM was dealt or addressed with specific directions or why it was not considered.
- [56] The issue relating to second EPM held on 21.6.2019 had no specific actions recommended or comments and it is assumed that the explanation given by Plaintiff was accepted without reservation or comment and the chapter was closed.
- [57] The last of the three EPM held on 17.9.2019 had raised issues relating to Plaintiff’s work and accuracy of the reports he had prepared. Certain directions given such as paying more attention to details, double checking and request for clarification when it was required.
- [58] This last EPM also had raised the issue of his attendance, and this seemed to be an issue that continued for some time. He was directed specific actions for that in EPM of 17.9.2019.
- [59] It is admitted fact that Plaintiff was terminated as a person in ‘Probation Period’, in terms of P6. This is an error on the law for the reasons given

earlier. Apart from that document marked D7 shows that the purpose of D7 was 'to request the approval of the Acting Permanent Secretary with the concurrence of the Honourable Minister for Education, Heritage and Arts for termination of employment contact of 'Plaintiff 'within his probationary period giving him a week's notice'. So, Plaintiff was terminated as a person in 'Probation Period' without considering his previous conduct in the Civil Service which was unreasonable other than it being unlawful for the reasons given earlier.

[60] Plaintiff's employment contract was terminated on the basis that he was on Probation Period in accordance with clause 1(c) of the Employment Contract and section 127 of the Constitution of the Republic of Fiji.

[61] Plaintiff's cause of action based on unlawful termination is established as he was considered as a person subjected to Probation Period on the mistake of law.

[62] Accordingly, Plaintiff is entitled to damages for unlawful termination of employment on 26.11.2019. Plaintiff is entitled for the damages based on his employment contract as sought as special damages.

[63] Assessment of Damages.

Plaintiff was employed under employment contract marked as P4 and D3 where his annual salary was \$22,215.38.

Plaintiff is entitled to said salary from his termination of employment on 26.11.2019 to 6.6.2024. \$100,547.41.

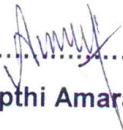
CONCLUSION

[64] Plaintiff was subjected to an employment contract that contained Probation Period in violation of Regulation 9 of Civil Service (General) Regulation 1999. Accordingly this provision is void and cannot be acted upon. Defendant had terminated Plaintiff unlawfully relying on clause 1(c) of employment contract. Defendant thus breached the employment contract and statutory provision and liable for damages. Plaintiff is granted damages assessed \$100,547.41 . Cost of this application is summarily assessed at \$3,000.

FINAL ORDERS.

- a. Plaintiff was terminated his employment unlawfully.
- b. Defendant is ordered to pay Plaintiff as sum of \$100,547.41
- c. Cost of this action is summarily assessed at \$3000 to be paid within 21 days.




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Deepthi Amaratunga
Judge

At Suva this 18th day of July, 2025.

Solicitors

Nilesh Sharma Lawyers

Office of the Attorney-General