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GOVERNMENT OF FIJI

PUBLIC SERVICE (AMENDMENT) DECREE 2011
(DECREE NO. 36 OF 2011)

IN exercise of the powers vested in me as President of the Republic of Fiji and the Commander in Chief of the Republic of Fiji Military Forces by virtue of the Executive Authority of Fiji Decree 2009, I hereby make the following Decree—

TO AMEND THE PUBLIC SERVICE ACT 1999

Short title and commencement

1. This Decree may be cited as the Public Service (Amendment) Decree 2011, and shall come into force on the date of its publication in the *Gazette*.

New Parts inserted

2. The Public Service Act 1999 is amended by inserting the following new Parts after section 10—

“PART 2A – FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK

Definitions

10A. For the purposes of Parts 2A and 2B, unless otherwise stated or the context otherwise requires—

“discrimination” means any distinction, exclusion or preference based on the grounds set out in sections 10B and 10C;

“employee” means a person employed in the public service, and includes a wage earner;

“employer” means the Government of the Republic of Fiji, and includes the Public Service Commission, any permanent secretary, head of department or any other person or entity who has the authority to appoint, remove or discipline employees in the public service;

“forced labour” means all work or service that is extracted from any person under the threat of any penalty and is not offered voluntarily, but does not include—

- (a) any work or service exacted in accordance with compulsory military service laws for work of a purely military character;
- (b) any work or service which forms part of the normal civic, traditional or religious obligations;
- (c) any work or service exacted from any person as a consequence of a conviction in a court of law, or a court order, provided that the work or service is carried out under the supervision and control of a public authority and that the person is not hired or placed at the disposal of private individuals, companies or associations;
- (d) any work or service exacted in cases of emergency, such as war, calamity, threatened calamity, fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstances that would endanger the existence or well-being of the whole or part of the people of Fiji; or
- (e) communal services of a kind performed by members of the community in the direct interest of the community in accordance with their rules or customary practices;

“sexual harassment” means when an employee is sexually harassed in his or her workplace, or places where employees are gathered for work-related purposes including social activity, when an employer or its representative or a co-employee—

- (a) makes a request of an employee for sexual intercourse, sexual contact or any other form of sexual activity which contains an implied or overt—
 - (i) promise of preferential treatment in that employee’s employment;
 - (ii) threat of detrimental treatment in that employee’s employment; or
 - (iii) threat about the present or future employment status of that employee;
- (b) by the use of a word (whether written or spoken) of a sexual nature or materials of a sexual nature;
- (c) by physical behaviour or gestures of a sexual nature; or
- (d) creates an intimidating, hostile or humiliating work environment by conduct, word or both on the basis of gender,

that subjects the employee to behaviour which is unwelcome or offensive to that employee (whether or not that is conveyed to the employer, its representative or the perpetrator) and which is either repeated or of such a nature that it has a detrimental effect on the employee’s employment, job performance or job satisfaction; In this context, detrimental effect includes the creation of an environment which affects an employee’s physical, emotional or mental health and well-being.

Fundamental principles and rights

10B.—(1) No person employed in the public service shall be required to perform forced labour.

(2) No person shall discriminate against any employee or prospective employee on the grounds of ethnicity, colour, gender, religion, national extraction, sexual orientation, age, social origin, marital status, pregnancy, family responsibilities, state of health including real or perceived HIV/AIDS status, trade union membership, or disability in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment relationship.

(3) Male and female employees shall be paid equal remuneration for work of equal value.

(4) An employee is not obliged to join a trade union.

(5) An employee shall not be prohibited from being or becoming a member of a trade union, and it shall not be a condition of employment that an employee must not be or become a member of a trade union.

PART 2B – EQUAL EMPLOYMENT OPPORTUNITIES

Prohibited grounds of discrimination

10C. For the purposes of this Part, the prohibited grounds for discrimination whether direct or indirect 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, religion or belief.

Sexual harassment

10D.—(1) An employer is liable under this section, together with an employee who sexually harasses another employee if the employer fails to take the reasonable steps necessary to prevent sexual harassment of the employer’s employee.

(2) An employer must develop and maintain a policy to prevent sexual harassment in his or her workplace.

(3) Where a complaint of sexual harassment has been made by an employee under this section, the employee's previous sexual experience or reputation must not be taken into account by the employer or a court.

Discrimination in employment matters

10E. If an applicant for employment or an employee 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 employee 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 employees 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 employee, or subject the employee to any detriment, in circumstances in which the employment of other employees employed on work of that description would not be terminated, or in which other employees employed on work of that description would not be subjected to such detriment; or
- (d) retire the employee, or to require or cause the employee 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 10C.

Unlawful discrimination in rates of remuneration

10F. An employer must not refuse or omit to offer or afford a person the same rates of remuneration as are made available for persons of the same or substantially similar qualifications employed in the same or substantially similar circumstances on work of that description for any reason including the gender of that person; provided however that nothing in Parts 2A and 2B shall prevent an employer from prescribing or imposing different rates of remuneration to employees depending on productivity or quality of work or performance of duties and functions.

Criteria to be applied

10G.—(1) Subject to subsection (2) in determining whether an element of differentiation exists, based on the gender of employees, in the rates of remuneration for any work or class of work payable under any instrument, and for the purpose of making the determinations specified in section 10H, the following criteria must apply—

- (a) the extent to which the work or class of work calls for the same, or substantially similar, degrees of skill, effort, and responsibility;
- (b) the extent to which the conditions under which the work is to be performed are the same or substantially similar; or
- (c) the rate of remuneration that would be paid to employees with the same, or substantially similar, skills, responsibility, and service performing the work under the same, or substantially similar, conditions and with the same, or substantially similar, degrees of effort.

(2) An instrument made after the commencement of this Part must not contain classifications of work or rates of remuneration that differentiate on the basis of the gender of employees in the work which male employees or female employees may perform.

(3) An instrument made after the commencement of this Part that contains classifications of work or rates of remuneration that differentiate on the basis of the gender of employees in the work which male employees or female employees may perform is void and of no effect.

Determination of equal pay

10H. If an instrument in force at the commencement of this Part—

- (a) provides separate provisions for the remuneration of employees based on the gender of employees; or
- (b) provides for the remuneration of female employees only,

the employer must, within 12 months of the coming into force of this Part, review the instrument to implement equal pay, by determining—

- (i) the classifications of the work performed by the female employees in relation to work performed by male employees, those classifications being determined in accordance with the criteria set out in section 10G; and
- (ii) the rates of remuneration that would represent equal pay for each such classification, those rates being determined in accordance with the criteria set out in section 10G.

Recovery of remuneration based on equal pay

10I.—(1) A claim to recover remuneration in excess of the amount fixed by an instrument and made on the ground that it is payable due to a determination under section 10H may be made to the High Court as if it were a claim for the recovery of wages.

(2) No proceedings for the recovery of remuneration in excess of the amount payable under an instrument, being an amount claimed on the ground that, that excess is payable under section 10H, may be commenced in the High Court for the recovery of remuneration that became payable more than 3 years before the date of the commencement of the proceedings.

Exceptions in relation to authenticity and privacy

10J.—(1) Parts 2A and 2B do not prevent different treatment based on gender or age where, being of a particular gender or age is a genuine occupational qualification for the position or employment.

(2) Sections 10B and 10E do not prevent different treatment based on gender where—

- (a) the position needs to be held by one gender to preserve reasonable standards of privacy; or
- (b) the nature or location of the employment makes it impracticable for the employee to live elsewhere than in premises provided by the employer; and—
 - (i) the only premises available (being premises in which more than one employee is required to sleep) are not equipped with separate sleeping accommodation for each gender; and
 - (ii) it is not reasonable to expect the employer to equip those premises with separate accommodation, or to provide separate premises, for each gender.

(3) Parts 2A and 2B do not prevent different treatment based on gender, race, ethnic or national origins, or sexual orientation in relation to an occupational or employment position where the position is that of a counsellor on highly personal matters such as sexual matters or the prevention of violence.

(4) If, as a term or condition of employment, a position ordinarily obliges or qualifies the holder of the position to live in any premises provided by the employer, the employer does not commit an offence against Parts 2A and 2B by omitting to apply that term or condition in respect of employees of a particular gender or marital status if in all the circumstances it is not reasonably practicable for the employer to do so.

Exceptions in relation to disability

10K.—(1) Subject to subsection (4), sections 10B and 10E do not prevent different treatment based on physical disability if—

- (a) the position is such that the person could perform the duties of the position satisfactorily only with the aid of special services or facilities and it is not reasonable to expect the employer to provide those services or facilities; or

- (b) the environment in which the duties of the position are to be performed or the nature of those duties, or of some of them, is such that the person could perform those duties only with a risk of infecting others with an illness, and it is not reasonable to take that risk.

(2) Subsection (1)(b) does not apply if the employer could, without unreasonable disruption, take reasonable measures to reduce the risk to a normal level.

(3) Sections 10B and 10E do not apply to terms of employment or conditions of work that are set or varied after taking into account—

- (a) any special limitations that the disability of a person imposes on that person's capacity to carry out the work; and
- (b) any special services or facilities that are provided to enable or facilitate the carrying out of the work.

(4) An employer who employs 50 or more employees may employ physically disabled persons on a ratio of at least 2% of the total number of employees employed by the employer.

Exceptions in relation to age

10L.—(1) Sections 10B and 10E do not apply in relation to a position or employment where being of a particular age or in a particular age group, is a genuine occupational qualification for that position or employment, whether for reasons of safety or for any other reason.

(2) Sections 10B and 10E do not prevent payment of a person at a lower rate than another person employed in the same or substantially similar circumstances where the lower rate is paid on the basis that the first mentioned person has not attained a particular age, not exceeding 18 years of age.

(3) Sections 10B and 10E do not prevent preferential treatment based on age accorded to persons who are paid in accordance with subsection (2).

(4) Sections 10B and 10E do not prevent the imposition of a mandatory or voluntary retirement age in the public service.

Exceptions in relation to family status

10M. Sections 10B and 10E do not prevent restrictions imposed by an employer—

- (a) on the employment of a person who is married to, or living in a relationship in the nature of marriage with, or who is a relative of, another employee if—
 - (i) there would be a reporting relationship between them; or
 - (ii) there is a risk of collusion between them to the detriment of the employer; or
- (b) on the employment of a person who is married to, or living in a relationship in the nature of marriage with, or is a relative of, a employee of another employer if there is a risk of collusion between them to the detriment of that person's employer.

General qualification on exceptions

10N. No employer is entitled, by virtue of any of the exceptions in this Part, to accord to a person in respect of a position different treatment based on a prohibited ground of discrimination even though some of the duties of that position would fall within those exceptions if, with some adjustment of the activities of the employer (not being an adjustment involving unreasonable disruption of the activities of the employer), some other employee could carry out the particular duties which fall within those exceptions."

Section 6 amended

3. Section 6 of the Public Service Act 1999 is amended—

(a) by deleting subsection (3), and substituting the following—

“(3) An employee, when acting in the course of employment in the public service, must treat everyone with respect and courtesy, and without coercion or harassment of any kind, including sexual harassment, or discrimination (whether direct or indirect) on any of the prohibited grounds of discrimination contained in Parts 2A and 2B of this Act.”

(b) by inserting the following new subsection (4A) after subsection (4):

“(4A) An employee, when acting in the course of employment in the public service, must uphold and comply with provisions governing the fundamental principles and rights at work and the equal employment opportunities, as prescribed under Parts 2A and 2B of this Act.”

GIVEN under my hand this 29th day of July 2011.

EPELI NAILATIKAU
President of the Republic of Fiji