

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER:

ERCC 2 of 2020

BETWEEN:

SAVITRI SHANKARAN

PLAINTIFF

AND:

**THE PERMANENT SECRETARY FOR THE MINISTRY
OF EDUCATION, HERITAGE AND ARTS**

DEFENDANT

Appearances:

Mr. D. Nair for the Plaintiff.

Ms. M. Ali and Mr. S. Kant for the Defendant.

Date/Place of Judgment:

Tuesday 4 October 2022 at Suva.

Coram:

Hon. Madam Justice Anjala Wati.

A. Catchwords:

Employment Law – whether the employer, the Ministry of Education, Heritage and Arts had the powers to issue the final warning letter against the worker and implement a decision not to consider the worker for an acting role in the year 2020 – did the actions of the employer amount to penalizing the employee – were the penalties imposed properly – should the actions of the employer be declared null and void – what damages has the worker suffered and is it recoverable?

B. Legislation

- 1. Civil Service (General) Regulations 1999: Reg. 22.*
 - 2. The Constitution of Fiji (“CF”): ss. 127.*
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Cause

1. The plaintiff is a Secondary School Teacher by profession and in the teaching discipline since 1994. She was holding the position of the Acting Vice Principal ("**AVP**") of Bucalevu Secondary School when she was issued with a final warning letter which included the decision that she will not be considered for an acting role in 2020. The letter was issued by the Ministry of education, Heritage and Arts ("**MEHA**").
2. The plaintiff brings this action against the Permanent Secretary ("**PS**") for MEHA seeking certain orders as follows:
 1. *A Declaration that the PS - MEHA has acted contrary to the employment contract of the plaintiff by imposing the final warning letter dated 19 December 2019.*
 2. *A Declaration that the said final warning letter dated 19 December 2019 that was served on the worker is unlawful, unfair and unjustified.*
 3. *A Declaration that the decision to retrain the worker from any acting position in 2020 is unjustified, discriminatory and in breach of the principles of fair labour practices.*
 4. *An Order that the PS – MEHA immediately withdraws the final warning letter dated 19 December 2019 and for the worker to continue acting as Vice Principal at Bucalevu Secondary School, the position which she held prior to the issuance of the final warning letter.*
 5. *Damages and Costs of the Cause.*
3. The plaintiff has deposed an affidavit setting out her position giving rise to the conflict. She says that during term 2 in 2019, when she was still holding the position of the AVP, she was advised by the Principal to conduct an investigation into the conduct of a teacher, namely Kiran Lata who had inflicted corporal punishment on students within the school premises and also on her performance.

4. The plaintiff says that in the course of her investigation, she submitted the report to the Principal for further action as the parent of the child was concerned and making frequent enquiries on the progress of the investigation given the stern policy on corporal punishment policy and the stringent action taken by the Ministry.
5. However on 3 December 2019, she was served with a letter dated 27 November 2019 by MEHA titled "*Show Cause Notice – Defamation of Character*" as outlined below:

"Dear Mrs. Savitri Shankaran

SHOW CAUSE NOTICE – DEFAMATION OF CHARACTER

This is to advise you that it has been alleged you have:

1. *Acted unprofessionally by discussing the performance of a teacher of your school with external parties;*
2. *Failed in your role as a Vice Principal to demonstrate leadership qualities by resorting to defaming the teacher rather than addressing your concerns with her directly;*
3. *Breached MEHA policy Use of Social Media by MEHA employees;*
4. *Breached Civil Service Code of Conduct under section 7 of the Civil Service Act 1999.*

Based on initial investigation there is sufficient evidence to proceed with disciplinary action without further investigation.

Prior to making a decision in relation to this matter I would like to give you another opportunity to present any information in writing that you feel is relevant to the allegation and why an action should not be taken against you. The decision may include, but not limited to (i) no further action being taken, (ii) caution or written warning, (iii) final written warning or (iv) summary dismissal.

Please provide a written response by 5th December, 2019 in order for a decision to be made in relation to this matter. Should you fail to respond by the given date without good reason it will be presumed that you have no explanation to submit and a decision will be made based on the evidence obtained”.

6. The plaintiff says that the letter contained bare allegations against her without any supporting documents or investigation report. Upon receiving the letter, the plaintiff says that she made enquiries with the principal. She was advised by the Principal that the teacher who was being investigated had lodged a report. Based on this information, she provided her response to MEHA on 2 December 2019 as follows:

“1. Acted unprofessionally by discussing the performance of a teacher of your school with external parties.

My response – Upon observing and advising verbally on the officer’s behavior on number of occasions, as there was no change, I had communicated to head of school (The Principal Mr. M. Gani) about the teacher’s behavior (Kiran Lata TPF – 86689) and her attitude with student and her work in general in school. As a head of school, he did not take action in a professional way but jokingly tried to address the issues. As a Vice – Principal these are some of the issues that was communicated:

- a. The teacher inflicting corporal punishment. (Report made by me upon Principal’s instruction since parents have called but no action taken).*
- b. Colluding with teachers and passing remarks to superiors i.e VP.*
- c. Taking refreshment to chief supervisor of the examination during year 12 exams which is an act of bribery and the name of the school could have been under spot light if reported since she is the year 12 Coordinator.*

- d. Taking the year 13 student to her home at night without a formal parental consent to revise the subject that she is teaching. The students were seen to be restless at time of the exam on the next day. (What other activities took place is not known.)

Since the Principal's approach have not made any changes to the officer concerned, I took a stand to counsel the officer but she did not respond to the call instead kept liaising with the Principal. This is an act of insubordination which the Principal cautioned her for this.

2. Failed in your role as a Vice Principal to demonstrate leadership qualities by resorting to defaming the teacher rather than addressing your concerns with her directly.

My response – As the role of Vice Principal of Bucalevu Secondary school I did my level best to demonstrate a good leadership quality with all issues of concern either by teacher or students and have been present in school even after normal school hours to address the issues and made improvement and corrected misbehaviors of some students and new teachers with the help of Assistant Principal. In my view Mr. M. Gani is supporting the officer who has made all this allegation because she is worried that a strict action would be taken against her and because I have made the report and handed over to Mr. Gani. It is an act of revenge where I should go into trouble too. The quality of the pass rate in 2018 is an evidence of my hard work with the help of AP and Mr. Sekope Korolevu.

In this case the head of school and the officer knew that the officer cannot be saved since her case of corporal punishment will be founded. Therefore, this allegation being taken against me so that I cannot take up any leadership roles. The case of behavior of the officer, head of school was reported and he wanted to shelf the case. In addition to this the officer concerned during teaching and learning had been inflicting corporal punishment was habitual. Term 2 week 3 on Friday (24/05/2019), she hit and verbally abused a group of students. Students had fear in them went home reported the incidents to their parents, these parents called and informed me when I was on sick leave on that day. Then I found out from boarder girls that case was true therefore I communicated to head of school for his action. My role as vice Principal, I had been performing my duties to my best of abilities to ensure that academic performance is maximized.

3. Breached MEHA policy on use of social media by MEHA employees:

My response – to clarify I have not uploaded or commented a defamation of character of the concern officer to publish as stated by head of school. The communication was done to one to one basis on messenger was done to gather information on certain behavior. The information gathered would have helped in counselling her for positive change.

4. *Breached Civil Service Code of Conduct under section 7 of Civil Service Act 1999.*

My response – under PSC code of conduct my approach in gathering information was confident as I was trying my best to ensure that information gathered will assist her in counselling and improving her behavior. The officer concerned attempted to reach staffs, my friends and office admin officers in requesting them for written information to use allege against. Basis of confidentiality, I did not disclose any information of an officer to another officer.

Based on my explanation, I am confident that natural justice will be bestowed since I had encountered several occasions of unsupportive action from head of school in addressing issues at school. There are more issues that he could have dealt fairly with but he did not. Such as officers taking leaves and counselling of teachers.

In addition, I was mentally disturbed of the allegation made upon me since it was period of marking of standard exam papers and he requested me to stay home or take leave. I could feel that he was not supportive to me. With so much of effort I had for the benefit of students would become a waste. None the less I am confident in myself that I can prove myself of being good leader”.

7. The plaintiff says that after her response she received from MEHA a letter dated 15 January 2020 which was dated 19 December 2019. The letter was a final warning letter which imposed on her penalties in that she was given a final warning and restrained from being considered for any Acting position in 2020. The letter reads:

“I refer to the complaint made against you whilst performing your duties as the Acting Vice Principal at Bucalevu Secondary School. The allegations were:

- *You acted unprofessionally by discussing the performance of a Teacher of your school with external parties;*
- *You failed in your role as the Acting Vice Principal to demonstrate leadership qualities by resorting to defaming the teacher rather than addressing your concern with her directly;*
- *You breached the Civil Service Code of Conduct.*

I have considered your response to the show cause letter dated 27 November, 2019 and have taken into account the evidences you provided.

As the Acting Vice Principal, you are required to perform your duties with care, diligence and high level of professionalism at all times by adhering to the to the Civil Service Code of Conduct under Section 6(2), section 6 (14) and section 7 of the Civil Service Act 1999.

You are expected to behave in a manner that uphold the Civil Service Values and the integrity and good reputation of the Ministry in the course of employment pursuant to Section (12) of the Civil Service Act 1999.

Given the seriousness of your actions, a severe disciplinary action is warranted.

This letter serves as a Final Warning and you will not be considered for acting role for 2020. Any other reported incidents shall not be tolerated and will be dealt with in accordance with the Disciplinary Guideline.

I take this opportunity to remind you once again of the Ministry's policies and that you are required to perform your duties responsibly and professionally adhering to the 2011 General Orders and the Civil Service Code of Conduct and Regulations".

8. The plaintiff says that in terms of career development, she was the potential candidate for the position of the Principal at Bucalevu Secondary School in 2020 upon the retirement of the post holder since she had the qualifications, experience/exposure and served that school since 2016.

9. She says that she was appointed to act on the substantive post of Vice Principal after going through the due process. She complains that there was no justification and reasonable cause for the imposition of the penalty restraining her to continue acting on the post and subsequent elimination from being considered for the same post and the post of the Principal. This has caused her great disadvantage in terms of her career opportunities and affected her rights of equal employment opportunity.
 10. The plaintiff says that MEHA acted in bad faith by failing to take into account that she was merely performing her duties as the AVP in trying to uphold the values and ethical standards of teachers in the management of the school.
 11. The plaintiff also complains that prior to imposing the final warning letter, the disciplinary procedures in Regulation 22 (2) and (3) of the Civil Service (General) Regulations 1999 were not followed and this resulted in procedural impropriety.
- MEHA's Position***
12. The defendant also filed an affidavit and deposed material facts regarding the issue that gave rise to MEHA issuing the final warning letter to the plaintiff. It says that on 24 January 1994, the plaintiff was appointed to the position of a Teacher Secondary by the Ministry. Thereafter the plaintiff served the Ministry in different positions and schools.
 13. On 19 August 2017, the plaintiff was appointed to the position of Assistant Teacher at Bucalevu Secondary School from 13 August 2017 to 15 January 2018.
 14. On 19 August 2017, the plaintiff was appointed as Acting Head of Department, Science at Bucalevu Secondary School from 13 August 2017 to 24 November 2017.
 15. On 8 November 2017, the plaintiff's appointment to the position of Acting Head of Department, Science was extended from 25 November 2017 to 26 August 2018.
 16. On 15 November 2017, the plaintiff was appointed to the position of Teacher Secondary at Bucalevu School from 10 January 2018 to 28 August 2022.

17. On 3 May 2018, the plaintiff was appointed to the position of AVP at Bucalevu Secondary School from 7 May 2018 to 23 November 2018.
18. On 6 January 2019, the plaintiff was again appointed as AVP at Bucalevu Secondary School from 9 January 2019 to 22 November 2019.
19. On 10 November 2019, the Ministry received a complaint against the plaintiff by a teacher of Bucalevu Secondary School by the name of Kiran Lata alleging that the plaintiff had disclosed information relating to the complainant's performance and disciplinary issue to external parties being the Chief Exam Supervisor and Ms. Kiran Lata's mother in law through the Facebook Messenger App. Ms. Kiran provided MEHA with screenshots of messages with the complaint letter.
20. The complaint and the response of the plaintiff was reviewed by MEHA. The former PS MEHA was satisfied that the allegation against the plaintiff was well founded and therefore amounted to a breach of confidentiality under the employment contract, the Civil Service Code of Conduct under the Civil Service Act 1999, and the Ministry's Social Media Policy 2019.
21. The defendant's position is that any appointment into the civil service is based on open merit and selection process in accordance with the Constitution of Fiji and Fijian Civil Service Open Merit Recruitment and Selection Guideline. The plaintiff was only restricted from any Acting appointment in 2020. This in no way precludes the plaintiff from applying or being considered for the substantive post of Vice Principal or Principal therefore the plaintiff's allegation is flawed and baseless.
22. The decision to issue the final warning letter was made after considering the complaint and determining the explanation of the plaintiff. The plaintiff has misinterpreted the provisions of Regulation 22 of the Civil Service (General) Regulations 1999 as no disciplinary action had been instituted in the Public Service Disciplinary Tribunal ("*PSDT*") in relation to the matter and consequently there could not have been any penalty directed by the PSDT for the PS to implement.

23. The PS was satisfied of the allegation against the plaintiff which is grounds for summary dismissal, however the former PS exercised her discretion to only issue a final warning letter and restraint her from holding an acting position in 2020. The plaintiff only acted as the Vice Principal and not a Principal and an acting appointment does not guarantee substantive appointment to that position. The plaintiff's appointment for AVP had expired on 22 November 2019.

Issues, Law and Analysis

24. The parties have not framed or outlined the issues that they wish to have determined from the court. All that has been done is that the parties have files their respective affidavits and presented their submissions to Court. It was left to the court to work out the issues that arose out of the pleadings and the arguments raised in Court. I find the issues are as follows:

1. Did the final warning letter and the decision that the plaintiff will not to be considered for an acting position in 2020 constitute a penalty which the PS MEHA could have imposed on the plaintiff on her own and without the agreement of the Minister responsible for MEHA as required under s. 127(7) of the CF or without referring the matter to the PSDT under Regulation 22 of the Civil Service (General) Regulations 1999?

2. What are financial consequences and losses suffered by the plaintiff?

25. I will start off by considering whether the final warning letter and MEHA's decision that the plaintiff will not be considered for an acting role in 2020 amounts to a discipline penalty. It is the position of the defendant that it did not institute any disciplinary action against the plaintiff and that the final warning letter and the decision not to allow the plaintiff an acting role in 2020 does not amount to a penalty, consequently there is no reason why the plaintiff should be aggrieved.

26. Ms. Ali says that the plaintiff would have been summarily dismissed for breaching the public service code of conduct but instead of dismissal she was only issued with a final warning letter. She argued that a final warning letter does not amount to a penalty. She referred me to the case

of *State v. Public Service Appeals Board and Public Service Commission, Ex-parte Melini Torowale [2008] FJHC 352 (17 December 2008)* whereby the applicant had argued that the issuance of a final warning letter meant that the same conduct could not be made the subject of disciplinary proceedings and tried to elevate warning letters to the level of disciplinary proceedings.

27. Ms. Ali relied on paragraphs 14 and 15 of the judgment to substantiate her argument:

“[14] The letter of 18th January 2007 was only a warning letter not a disciplinary proceeding conducted by the PSC which is the relevant authority to discipline civil servants. It was a letter written from within the department. The department has no powers to discipline. The Public Service Act deals with misconduct of public servants and provides for disciplinary penalties which may be imposed. Once a public servant has been charged and dealt with, then the same matter cannot be reopened. The applicant, however, is trying to elevate warning letters to the level of disciplinary proceedings.

*[15] The object of warning letters is to caution a person or try to get a person to reform. Its purpose is not investigatory and punitive like that of disciplinary proceedings. In *Tagicakibau v. PSC (2001) FJHC 12 Justice Fatiaki* in comparing punishment after investigation with warning letters remarked obiter that “This latter prohibition would be rendered meaningless if the officer’s conviction could subsequently be resurrected for the purpose of undermining his efficiency...The same cannot be said however, of warning letters and counselling sessions or other non-disciplinary measures”. The prohibition he was considering there was officer being punished twice for the same offence...”*

28. First of all, let me address the argument by Ms. Ali that the final warning letter was issued to avoid summary dismissal which MEHA could have undertaken without referring the matter for discipline action. What Ms. Ali is trying to insinuate is that the plaintiff should be happy that she was not dismissed but only issued with a final warning letter.

29. I find this argument constitutionally unfair. By raising this argument, the defendant is indicating that there was such serious misconduct on the part of the plaintiff that it warranted summary dismissal. If there was to be any summary dismissal then pursuant to s. 127(7) of the CF, the PS MEHA could not have carried out the summary dismissal on her own without the agreement of the Minister responsible for MEHA. I find that the rationale behind seeking the agreement of the Minister is that the latter would independently look at the allegations and see if the same is met to justify summary dismissal and then endorse the decision to summarily dismiss the employee.

30. Section 127 (7) of the CF states:

“The permanent secretary of each ministry shall have the authority to appoint, remove and institute disciplinary action against all staff of the ministry, with the agreement of the Minister responsible for the ministry”.

31. In this case, the defendant arrived at a finding that the plaintiff was guilty and instead of summarily dismissing the plaintiff it considered it proper to issue a final warning letter. Did the defendant then have to obtain the agreement of the Minister? I find the answer in the affirmative. If the final warning letter was a substitute to summary dismissal, then again the agreement of the Minister was essential. The defendant had found the plaintiff guilty for which she could have been summarily dismissed. The Minister had to be in agreement with the findings of the defendant and agree to issuing a final warning letter instead. There is no provision in the law which allows MEHA to make and implement any decision without having the agreement of the Minister.

32. Let me now examine whether the final warning letter amounts to a discipline penalty. The contents of the warning letter clearly indicates that the PS MEHA found the plaintiff guilty of the allegations and considered it prudent to warn her not to repeat such conduct in future. I find that the final warning letter is equivalent to reprimanding the plaintiff for her conduct and warning her from repeating any such behavior. Reprimand is one of the discipline penalties outlined in the Civil Service (General) Regulations 1999. I find that MEHA could not have

imposed the final warning letter without the disciplinary action procedure outlined in Reg. 22 of the *Civil Service (General) Regulations 1999*.

33. It is not disputed that MEHA does not have the powers to discipline staff. If it wishes to discipline any staff, it has to have the agreement of the Minister responsible for MEHA to institute the disciplinary action. The PSDT will then hear the charges against the worker and arrive at a suitable penalty and direct the PS to implement the same as per Reg. 22 of the *Civil Service (General) Regulations 1999*.

34. Regulation 22 (1) reads:

“ 22 (1) If a disciplinary action is instituted against an employee, then the Public Service Disciplinary Tribunal upon being satisfied that the employee has breached the Civil Service Code of Conduct, may direct the permanent secretary to implement one of more of the following penalties –

- (a) terminate the employee’s employment;*
- (b) demote the employee, provided that the disciplinary charge is related to performance and the employee had good performance record at a lower level prior to promotion;*
- (c) transfer or redeploy the employee to other duties, provided that the disciplinary charges relate to the specific location of the employee;*
- (d) defer a merit increase in remuneration for the employee for a specified period;*
- (e) reduce level of the employee’s remuneration, provided that the reduction is within the salary band or classification for the position occupied;*
- (f) impose a penalty of not more than 10% of the employee’s annual salary;*
- (g) reprimand the employee; or*
- (h) forfeit all or part of the employee’s remuneration which was withheld during period of suspension from duty.*

(2) A permanent secretary must implement the penalty that the Public Service Disciplinary Tribunal directs the permanent secretary to implement under subregulation (1)...”

35. I therefore find that the final warning letter issued by MEHA is null and void. Even if I am wrong in arriving at this conclusion, one cannot overlook another aspect of the plaintiff's employment that was affected by the warning letter. Before I elaborate on this further, I turn my mind to the case referred to be my Ms. Ali. The facts of that case was entirely different from this. In that case the employee was terminated for late arrivals and absenteeism without leave. There were 44 charges laid against the worker in that case. The worker was tried and terminated from work.
36. In that case, the worker raised that the disciplinary charges related to conduct prior to 18 January 2007 for which warning letters had been issued. The worker had there argued that no disciplinary charges could be laid for late arrivals and absenteeism without leave occurring before 18 January 2017. The court found that the final warning letter did not preclude the employer from relying on the conduct of the worker prior to 18 January 2007.
37. It is my finding that the facts of this case is entirely different. In that matter, the issue was whether the worker's conduct which was the subject of the warning letter could be relied on to show habitual late arrivals and absenteeism without leave in the disciplinary proceedings. That is not the issue here. In this case, I am required to investigate the effect of the final warning letter on the plaintiff.
38. Further, the allegations in the *Melini Torowale* case was based on the arrival and attendance records kept by the employer and no further evidence was needed by the employer to issue the warning letters. When the disciplinary action was instituted, the employer in that case was entitled to rely on its records from the past even though the final warning letter was issued.
39. In the proceedings before me, the nature of the allegations against the plaintiff could not be established from the records of the defendant alone. It required making a finding of fact and since MEHA had arrived at a finding of guilt, it had to obtain the agreement of the Minister to either summarily dismiss the worker or to refer the same for disciplinary action.
40. The warning letter was not a simple warning letter. It also contained a punitive decision of MEHA that the plaintiff will not be considered for any acting appointment for the year 2020.

One must not forget that the plaintiff was AVP of the school since 3 May 2018 to 23 November 2018 and then from 09 January 2019 to 22 November 2019. Her substantive post, on the evidence before me was Teacher Secondary from 10 January 2018 to 28 August 2022.

41. The plaintiff was AVP for over one and half years. After the warning letter was issued, she did not act on that position anymore. Even if the substantive position was vacant, the plaintiff would not have been allowed to act in this position as per the warning letter. If the substantive position was vacant then it is possible that the plaintiff would have continued to act in that position. I thus find that the restraint was punitive in that it precluded the plaintiff from being considered for equal employment opportunities. This amounts to a punishment on her without being able to have the allegations against her determined by an independent Tribunal, the PSDT.
42. In fact the warning letter says that the plaintiff will not be considered for an acting role in 2020. This does not only preclude the plaintiff from being considered for the acting appointment of the VP but also for any other acting appointment including that of a Head of Department or a Principal's position.
43. Ms. Ali argued that the letter does not preclude the plaintiff from being considered for the substantive position of the Vice Principal or the Principal. She relied on annexure SK10 which is an internal document of MEHA titled Form D. The form contains the internal decision of the Human Resources Team.
44. The HR Team makes certain recommendations to the PS MEHA. One of the decisions is to issue a final warning letter to the plaintiff and that the plaintiff not be considered for acting appointment as VP 2020. Although the position of VP is mentioned in this Form D, there was no mention of this in the final warning letter. There was then no way for the plaintiff to know that she could apply for the substantive position of the VP or the Principal or an acting position for any other higher role. She was not given the Form D to know that the restriction only applied to the acting position of the Vice Principal.

45. I also find Ms. Ali's argument strange. If the plaintiff was precluded from being considered for an acting role for VP in 2020 then how could she be considered for the substantive position of the VP or the Principal or an acting role for any other higher position? Ms. Ali's submission is counter – intuitive. Further, if that is the position that is taken by MEHA, then the plaintiff ought to have been clarified of this aspect. How is the plaintiff to know that she could apply for the substantive position of the VP or the Principal or acting position for any other higher role? Is it not normal for anyone to think that if one is precluded from acting on a role then one cannot or will not be considered for the substantive position or for an acting position in the higher category?
46. The effect of the restraint on the plaintiff has two consequences. One is financial and the other is professional. I repeat that if the substantive position of the VP was vacant then it was the plaintiff who could have acted in that position in 2020. The plaintiff would have been paid for acting in that role. There is therefore potential impact on her earnings.
47. Secondly, there is an impact on the plaintiff's career in that the preclusion is an adverse report against the plaintiff which will always be in her records. When and how she is marked down for this is something that is contingent and can have an impact on the plaintiff. Further, if the plaintiff was entitled to act in the VP's position in 2020 and did not only because of the final warning letter containing the restraint, then there is a negative impact on her career as well. She is being impacted in not being able to have additional terms of experience in that role which often is a consideration in the open merit recruitment scheme.
48. I therefore find that the restraint could not have been imposed on the plaintiff without the agreement of the Minister responsible for MEHA and without following the procedures for the disciplinary action.
49. I now turn to the issue of the claim for damages. The plaintiff claims that she is entitled to financial loss that she sustained as a result of not being able to act as the VP in the year 2020. When the decision via the final warning letter took effect, the plaintiff's acting appointment had expired. There is no evidence before me that in the year 2020, the substantive position of the VP was still vacant or that the Ministry had appointed someone else to that position to act

instead of the plaintiff. If someone else acted on the position then I must be satisfied that that person was no more appropriate and suitable to act on the position than the plaintiff herself and that it would have been the plaintiff who would have acted in that position had it not been for the restraint.

50. I am also aware that the plaintiff has acted in the VP's position twice. Her two previous acting positions were intercepted by some months for example there was an intervening period of 1 ½ months between the first and the second acting appointment. Given the breaks between the two appointments, there is further uncertainty surrounding the periods of loss of earnings that the plaintiff actually suffered.
51. If damages are claimed then it is for the plaintiff to establish the damages with certainty. The damages sought in this case is merely speculated. It would have been proper that there was tested evidence on the concerns that I have identified. The affidavit evidence does not address the concerns I have on the issue of damages.
52. I must also sort out the issue of the plaintiff's claim that she held the position of the Head of Department and that that was her substantive post for which she has not been paid. She has attached a contract of employment to her affidavit in reply which states that she was promoted to the position of the Head of Department [2] in Science for a period of 3 years with effect from 17 January 2012 in the grade ED5D at Holy Cross College at a salary of \$24,563 in the scale \$24,563 - \$28,874.
53. It is my finding that this contract had expired in January 2015. The plaintiff then signed a contract for the position of the Assistant Teacher on 23 August 2017 for a period of 5 months at a salary of \$30,615.98 in the salary band F. She then acted as Head of Department on her substantive position of an Assistant Teacher. She no longer held the substantive position of the Head of Department.
54. Her last contract of employment indicates that she was holding the position of a Teacher Secondary from 10 January 2018 to 28 August 2022 in the salary band F. There is no evidence that she was acting as the Head of Department when she held the position of the Teacher

Secondary. In absence of any evidence, I do not agree with Mr. Nair that the plaintiff should be paid the salary of the Head of Department.

Final Orders

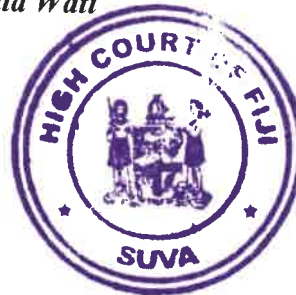
55. In the final analysis I find that MEHA had acted contrary to its powers in issuing the final warning letter against the plaintiff and restraining the plaintiff from an acting role in the year 2020. Such acts amounts to a penalty which can only be imposed on the plaintiff by PS MEHA if the Minister responsible for MEHA agrees or by the PS MEHA upon directions issued by the PSDT pursuant to a disciplinary action heard and determined upon the agreement of the Minister.
56. I therefore declare that the final warning letter and the decision not to consider the plaintiff for an acting role in 2020 is null and void and has no effect. The said final warning letter is to be expunged from the records.
57. The claim for damages is dismissed.
58. The plaintiff shall have costs against the defendant in the sum of \$3000 to be paid within 21 days.



Hon. Madam Justice Anjala Wati

Judge

04. 10. 2022



To:

1. *Mr. D. Nair for the Plaintiff.*
2. *Office of the Attorney General for the Defendant.*
3. *File: Suva ERCC 2 of 2020.*