

2. The Plaintiff was employed as an Assistant Teacher since 1988 and was later promoted to Counsellor in 2005, Education Officer in 2012 and acted as principal on promotion from 15 March 2016. From 28 January 2021 the Plaintiff was hospitalized and certified as unfit for work.
3. On 1 March 2021 the Plaintiff was suspended from work for certain allegations vide a letter whilst he suffered from diabetes and foot sepsis resulting in him being certified as unfit for work on 1 February to 22 February 2021, right fifth toe amputation from 25 February to 4 March 2021 and right sided diabetic foot sepsis and unfit to attend work from 5 March to 15 April 2021. On 2nd March 2021 he was again investigated for other allegations.
4. On 22 March 2022 whilst the Plaintiff alleged he was still suffering from his medical condition when the Defendant wrote and informed him that he had deemed to have resigned.
5. On 9 July 2022 the Plaintiff was issued with a final warning letter when the suspension was uplifted.
6. The Defendant denied the allegations and claims.

Facts and Evidences

7. The Plaintiff gave evidence that he had served the Ministry of Education for 33 years and had signed a contract with Saraswati College as Acting Principal in 2019 for 3 years. He then took sick leave as he was sick. He was later suspended from his work. At the time of suspension he was still in hospital and received the information by a phone call and by email. An investigation was conducted and it was later uplifted. Tendered as **Exh 1** is the contract and **Exh 2** is the suspension letter. He was given a final warning tendered as **Exh 3**. He did not return to work as he was still sick and he submitted his sick sheets and leave application to the Ministry through email tendered as **Exh 4 (a) and 4 (b)**. He confirmed there was also a medical report as **Exh 4 (c)**. He was at home when he received an email with a letter informing him that he had Deemed to Resign as he had failed to report to duties. At this time he was on sick leave and Ministry was aware of this tendered as **Exh 5**.
8. In cross-examination he confirmed working for the Ministry for 33 years and was appointed as Acting Principal for Saraswati College. He admitted that in clause 2 of his contract he was required to diligently and faithfully perform his duties to the Ministry. He admitted he was later promoted from vice principal to acting principal at Saraswati College. He admitted there were complaints of his serious misbehavior

and unprofessional conduct and therefore was on suspension on full pay. He admitted on the basis of preliminary investigations he was suspended. He admitted the suspension letter informed him that a full investigation would be required. He admitted the list of complaints against him were serious. He was aware from the suspension letter he would be interviewed and required to respond. After suspension a Notice of Investigation was issued to him informing him of the panel and for him to respond to allegations when the opportunity arose The Notice was marked as "MFI-1". He admitted he was given an opportunity to respond and admitted all due process was offered in the cause of investigation. He was then issued with a final warning letter and suspension was lifted through a letter. He admitted after suspension he applied for 147 days leave without pay on medical grounds and it was approved in a letter dated 20th September 2021. He admitted the approval letter from the Ministry required him to resume duties on 1 February 2022 and if not he had deemed to have resigned. He also was given an opportunity to give a reasonable ground for not commencing on time. He admitted that he was not terminated as his letter was that he had deemed to resign and hence a months' notice was not supposed to be given. Marked as MFI-2 was leave without pay approval. He admitted not resuming duties on 1 February 2022 or 7 February 2022 nor a reason for his absence. He did not apply for leave after 1 February 2022. He admitted receiving the letter confirming that he had deemed to resign. The leave application form he filled in stipulated that retrospective applications would not be granted. He admitted his application for leave was retrospective and given the nature of the leave it would not be approved.

9. In re-examination he admitted that the deemed to have resigned letter was dated 22 March 2022. He admitted Ministry had already received his letter of leave on 13 February 2022 when he was given the letter having deemed to have resigned.
10. The Defendant called two witnesses.
11. She was the senior Human Resource officer and was responsible for registering complaints with the Ministry. She joined in 2018. She recalled she knew the Plaintiff as an employee of the Ministry. He was promoted to Counselor in 2005 by the Chief Executive Officer for Ministry. The document was tendered as **Exh D-1**. He was later an Education officer for Navosa/ Nadroga tendered as **Exh D-2**. He was later promoted to principal of Saraswati College in 2016. The contract was signed on 18 March 2016 tendered as **Exh D-3**. He was later issued with contract of Vice principal but Acted as Principal during that time confirming P-Ex 1 contract. The contract was from 6th May 2019 to 6th November 2022. Clause 4 of the contract allowed for leave entitlements. There was 6 days of sick leave without sick sheet, 15 days for sick leave with sick sheet and public holidays. They were not entitled to annual leaves. He requested for and was approved sick leave with sick sheet from 1/2/21 for diabetic foot sepsis. He again applied for sick leave from 25/2/21 due to the same

medical condition tendered as **Exh D-5**. The sick sheet was from 5/3/21 for the same medical condition. Tendered as **Exh D-6**. There were also complaints from Saraswati College against the Plaintiff for allegations of unprofessional conduct. There was an internal preliminary investigation to ascertain the complaint and then a panel of investigators is appointed. Further investigation was then conducted after a full panel was appointed. P-Exh 2 was the suspension letter to the Plaintiff to relieve him of his duties as head of school dated 1/3/21. The letter also carried the allegations against him for unauthorized leave during school hours, teachers running personal errands on his behalf and sending teachers to buy grog and allowing grog to be drunk during officer hours and using vulgar language in the officer to teachers and to the Minister. The allegations were serious against a head of school. A suspension letter was issued and a Notice of investigation was also issued which is part of the process to advise that the investigation is ongoing and informed him that he would be interviewed as well as a written statement be provided with the allegations tendered as **Exh D-7**. The investigation panel provided their analysis and findings to the permanent secretary who made the final decision. A formal letter was given to the Plaintiff. The findings confirmed the allegations. The Plaintiff was to be issued a final warning letter which is Exh P-3. He was suspended from 1/3/21 to 9/7/21. During his suspension the pay history shows that the Plaintiff was fully paid i.e, Pay 1 to Pay 19. This was tendered as **Exh D-8**.

12. In cross-examination she admitted the employment contract did not contain a notice period for a contract for which the person had deemed to have resigned as per Clause 11. Clause 8 requires a notice period for termination with reasons for termination by giving not less than 1 months' notice. She admitted the contract was terminated on the ground it he had deemed to have resigned. She was not involved in the investigation process or suspension of the employment but her team was. The allegations and the appointment of the investigating team was made known to him and filed in their reports. The report was not included during the investigation. There was no complaint letter available in court and is in the file record but not disclosed to the Plaintiff.
13. In re-examination she agreed the heading of clause 8 of the contract referred to circumstances where the Government could terminate the agreement. She agreed Mr Deo initiated the termination by not resuming duties when he deemed to have resigned having not report for duty after 7 days from the resumption date. She admitted she was not part of the investigation panel to discuss the candidates but her team then considered the evidence and presented their recommendations.
14. Defence second witness was a human resource officer who is employed by the Ministry having been employed 4 years ago and handles staff exiting on the basis of resignation or deemed to have resigned. The Plaintiff had deemed to have resigned when he was on leave for 147 days without pay and was supposed to

resume duties on 1/2/22 which he failed to do. His leave was communicated to him by email. There was a letter which approved his leave without pay for 147 days and to resume on the date in the letter. The leave period was from 6/9/21 to 31/1/22. He was to resume on 1/2/22. He was warned in the letter he would have deemed to have resigned if he did not resume. Tendered as **Exh D-9**. The Plaintiff did not resume, did not communicate with him or the Ministry before the date of resumption on why he could not resume. A deem to have resign document was issued to the Plaintiff effective from 1/2/22. He did not resume for 7 consecutive days from 1/2/22 and hence had deemed to resign. During those 7 consecutive days no reason was given for his absence.

15. In cross-examination he admitted receiving an email on 13/2/22 from Plaintiff about his absenteeism. The matter was given to PSC to decide whether to consider the case. The 7 days expired on 7/2/22. The letter for deem to have resigned was sent on 22/2/22 and was delayed as they were awaiting permanent secretary to approve. She was aware of the reason for the Plaintiff being absent. Before the letter was issued the Ministry knew he was sick. The Permanent secretary terminated the contract. There was no consent by the Minister.
16. In re-examination there was no leave application or medical report submitted within the 7 day period in which he had deemed to have resigned. There was no reasons provided within the 7 day period. The Permanent Secretary has the discretion to terminate the contract of the employee as it is in the General Order. It is the Plaintiffs responsibility to provide a leave application prior to the date of resumption. He failed to resume from the 1/2/22 to 7/2/22. Therefore he had deem to resign.

Law and Analysis

Deemed to have resigned

17. The parties had entered into an employment contract and executed the contract to show their agreement to the terms and conditions.
18. In Fiji National University -v- Basilio Ravuyawa [2015] FJHC 1032; ERCA11.2014 (24 December 2015) where Wati J held that:

86.“from the evidence, I find that the employee was not able to establish that he informed anyone of his absence and if he was not able to do so, I do not find that he had any valid explanation why he could not do so. The employer was therefore correct in holding that the employee had terminated his employment contract and refusing to provide any further work to him from 21 March 2011.

87. The employee has therefore under the contract deemed to have **resigned** from the employment. The employer did not dismiss him.

88. Even if the employer dismissed the employee, there was lawful cause for it to do so. It did not breach any procedure under the requirements for summary dismissal. None has been alleged to have been dismissed in that the written reasons for the dismissal or the up to date pay was not given.”

19. In the facts in this case, there is no contention that the Plaintiff was employed with the Ministry of Education through an employment contract.
20. Thereafter there is no contention in the evidence that the Plaintiff went on approved medical leave. He was informed in his approval of leave letter on his resumption date.
21. It was when he failed to resume within the 7 day period (from 1/2/22) that it was assumed that he had deemed to have resigned.
22. After the 7 day period, the Plaintiff then forwarded his medical report seeking further medical leave on 13 February 2022. He applied when the leave application form did not allow for back dating of applications for leave, which he had full knowledge of. His application for further medical leave sort to backdate his current medical condition, for which a medical report was tendered. However by this time the Ministry was processing the Human Resources recommendation regarding the Plaintiff's term of employment.
23. In this case, his application for further medical leave was made known after the 7 day period in which he had deemed to resign.
24. As an officer of the Ministry, the Plaintiff was aware of the procedures and regulations regarding leave applications having been an employee of the Ministry for 30 plus years.
25. The provisions of his contract stipulate in clause 4:-

(a) "Subjection to clause 4 (b), the Officer is entitled to entitlements in accordance with the general orders;

(b) If in the end of the Term or earlier termination of this contract, the Officer has outstanding leave or any other entitlements owing to the Officer, the outstanding leave or other entitlement will either be paid or utilized by the Officer prior to the end of the Term or earlier termination of this contract."

26. General Orders 304 (a) (ii) renders a civil servant to have deemed to have resigned if he failed to resume work after leave within 7 days thereafter.
27. Thus the Plaintiff thereafter informed the Ministry that he was still on medical leave and tendered a medical sick sheet to confirm the same. The Sick sheet required him to be on medical sick leave for a further period of 3 months given his current medical condition.
28. The sick sheet report was not contradicted by the Defendant and the Court holds that the sick sheet established that the Defendant was still sick.
29. Therefore there is good reason for the Plaintiff to have failed to resume work and also failed to have contacted the Ministry on time prior to the end of the 7 day period. He was still under strict bed rest. Furthermore the Ministry was well aware of his current sickness and this the Court found that when the Ministry failed to process immediately after the expiration of the 7 day period for deem to have resigned, the Ministry had the alternative option of disciplining the officer for having failed to attend work.
30. The Court finds that the Ministry had failed to properly assess the medical report by the Plaintiff, given that he had contacted the Ministry prior to the letter of 22 March 2024 and it was well within the powers of the Ministry to have continued his employment given that his explanation was plausible.
31. Thus in having exercised its discretion, the Ministry had acted unlawfully in rendering him to have deemed to resign when his evidence pertaining to the reasons for failing to resume work were plausible and was not contradicted by any opposing evidence from the Ministry. Furthermore the Plaintiff had sent his application and evidences prior to his termination and it was well within the Ministry's powers to exercise their discretion to sanction the Plaintiff.

Was the termination unfair?

32. Having considered that the termination was unlawful, the evidence by the Plaintiff was that the Ministry failed to take into consideration his medical report although he had filed his application for leave and appended his medical report to explain the reasons for not resuming on time.
33. The Court also found that the Ministry failed to consider his current medical condition which was proven by evidence and therefore acted unfairly to deem him to have resigned when he had plausible reasons for failing to resume work.

34. The Court found on a balance of probabilities, sufficient evidences that the actions of the Ministry was unfair towards the Plaintiff when they refused to continue his employment despite knowing of his medical condition.
35. As a result the Plaintiff was suffering from lack of self-worth, despair and humiliation for the manner in which the Ministry had dealt with his terms of employment whilst suffering from his medical conditions affecting his health. Although there was no direct evidence of any report gauging his current trauma, there is sufficient evidence from the Plaintiff that he suffered as a result of the termination of his terms of employment which rendered him incapable to find work.
36. The Court finds therefore that the Plaintiff is to be awarded some reliefs as damages for unfair termination.

Suspension was unlawful

37. Whilst being on medical leave, the facts which was not contradicted by Defence, was that the Plaintiff was suspended without pay from 1/3/21 whilst he was on sick leave with sick sheet at the hospital as an in-patient. There was a letter of 2/3/21 informed the Plaintiff of another investigation into allegations of misconduct. This was after preliminary investigation was conducted.
38. During investigations, the Plaintiff, in his evidence, admitted to having been asked to prepare and provide a response which he did. The investigations then prepared and reported back to the Ministry who then arrived at a conclusion. The Court found from the evidences of the Defendants, which was not contradicted by the Plaintiff, that all the investigation procedures were properly followed and that Plaintiff was informed of the allegations and reasons for suspension. He was also asked to respond to the allegations which he did which he did and the analysis of the report was forwarded to the Ministry. He was later warned as part of his disciplining.
39. During the period of suspension the Court accepts that there is not contradicted evidence that the Plaintiff was fully paid. The pay slip confirms this. Therefore the Court finds that the procedures for suspension and thereafter a warning letter was exercised properly and there was no breach of contract nor a breach of natural justice as claimed.
40. The Court therefore finds that the suspension was not unlawful or unfair.

Entitlement of the Plaintiff

41. The Plaintiff has claimed for rescinding of the termination which the Court finds cannot be imposed at this point as he is no longer able to provide proper teaching services given his disability.

42. Therefore it would be in his interest that he be paid for the remainder of his contract from date for which he was deemed to have resigned which was rendered unlawful by the Court until when his contract expired.
43. The provisions of his Contract stipulate that the renewal of the contract is the discretion of the Permanent Secretary and hence there is no legitimate expectation that his contract would be renewed.
44. Despite the argument by the Plaintiff that the suspension was subsequent to the termination of his contract is correct, however the reasons for termination were entirely different from the reasons for his suspension.
45. The Court found that he was suffering from some form of anguish and despair during his termination because of the unfair manner in which his terms of employment was terminated.

Costs

46. Court will award the Plaintiff costs for ½ day trial summarily assessed at \$1000.

Orders

47. The Court Orders as follows:
 - (i) The Court declares that the deem to have resigned is unlawful and hence renders the termination unlawful as well as unfair;
 - (ii) That the Plaintiff is to be awarded his full salary and all entitlements and benefits from the effective date in which he was deemed to have resigned to the date in which his contract expired;
 - (iii) Post judgment interest at 5%;
 - (iv) Costs of \$1000 to the Plaintiff.



High Court – Suva

1 March 2024