

## AWARD FOR 2014

OF

## THE ARBITRATION TRIBUNAL

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OF

**DEPARTMENT OF**

# THE REPUBLIC OF THE FIJI ISLANDS

**NO. 49 OF 2005**



**AWARD**

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In the Dispute Between

**FIJI PUBLIC SERVICE ASSOCIATION**

and

**LAND TRANSPORT AUTHORITY**

FPSA : Mr N Tofinga  
LTA: Mr V Vosarogo

**DECISION**

This is a dispute between the Fiji Public Service Association (the "Association") and the Land Transport Authority (the "Authority") concerning the termination of employment of Pita Tuiloma (the "Grievor").



A trade dispute was reported by the Association on 8 June 2001. The report was accepted on 27 July 2001 by the Permanent Secretary who subsequently referred the Dispute to a Disputes Committee. As a consensus decision was not reached, the Minister authorized the Permanent Secretary to refer the Dispute to an Arbitration Tribunal for settlement pursuant to section 5A(5)(a) of the Trade Disputes Act Cap.97.

The Dispute was referred to the Permanent Arbitrator on 26 October 2001 with the following terms of reference:

***"... for settlement over the termination of Pita Tuiloma, Senior Clerical Officer with effect from 31 January 2001. The Union contends that the termination was wrong, harsh, premeditated and outside its jurisdiction".***

The Dispute was listed for preliminary hearing on 10 December 2001. On that day the parties were directed to file preliminary submissions no later than 28 February 2002 and the Dispute was listed for hearing on 30 April 2002.

The Authority filed its preliminary submissions on 1 March 2002 and the Association did so on 7 March 2002.

When the Dispute came on for hearing on 30 April 2002, both parties indicated that they were not in a position to proceed with the hearing. As a result the Tribunal by consent vacated the hearing date and refixed the hearing of the Dispute for 19 August 2002.

As Judicial Review Proceedings had been commenced in the High Court in a similar dispute, that hearing date was also vacated and the Dispute was listed for mention on 3 September, 30 September and 29 November 2002.



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The High Court delivered its Judgement in the State -v- The Arbitration Tribunal and Others ex parte Land Transport Authority (JR No.11 of 2002) on 15 September 2004.

This Dispute was then listed for mention on 19 November 2004. On that day the Dispute was listed for hearing on 24 January 2005. However, the Authority was not in a position to proceed and the Dispute was again listed for mention on 26 January 2005.

The hearing of the Dispute commenced in Suva on 10 May 2005. It was adjourned part heard to 21 June 2005 and concluded on that day. Each party called one witness to give evidence. At the conclusion of the evidence the parties sought and were granted leave to file final written submissions. The Authority filed its final submissions on 18 July 2005. The Association filed answering submissions on 4 August 2005 and by letter dated 18 October 2005 the Authority indicated to the Tribunal that it did not intend to file a reply submission.

The Grievor commenced employment with the Public Service as a clerical officer in the Department of Land Transport on 24 September 1990.

In a letter dated 25 January 2000 the Secretary for the Public Service informed the Controller of Road Transport that :

***"Approval is granted to release Mr Pita Tuiloma, Senior Clerical Officer on full time studies at FIT to pursue a Diploma in Business Studies (Management) with effect from semester 1, 2000 for two (2) years.***



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***Please advise the officer to submit his completed bond documents (in duplicate) and to collect his sponsorship letter for enrollment from the undersigned at the Centre for Training and Development (CTD) Nasese".***

A sponsorship letter dated 3 February 2000 from the Public Service Commission was forwarded to the Fiji Institute of Technology. The necessary Bond documents were executed by the appropriate parties.

The Grievor was absent from work on and from Wednesday 24 January 2001 up to and including Tuesday 30 January 2001 being a total of seven days.

The Authority's Manager Human Resource and Administration (MHRA) wrote an Internal Memorandum dated 31 January 2001 to the Grievor informing him that he was deemed to have resigned. Omitting formal parts, the Memorandum stated:

***"I am to inform that you are hereby deemed to have resigned after failing to report to duties with effect from 24/01/01 to date.***

***No official release was granted to you to resume study leave at FIT, neither have you submitted any results for Semester 1 and 2 of the year 2000.***

***By a copy of this memorandum, Accounts is hereby informed to stop your salary effective from the next salary dated ie. Pay no. 3/2001".***

On the very next day the Grievor wrote to the Chief Executive of the Authority in response to the above Memorandum. The Grievor explained that he had found out that he had failed a subject which meant the loss of his PSC Scholarship. He had spent the time away from work trying to raise the funds to continue the



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course. He also explained that he had a clear understanding with MHRA concerning the need to attend at FIT for pre-enrollment.

The Grievor pointed out that he had not been given any opportunity to explain his absence and had as a result not been afforded natural justice. He asked for the decision to be reconsidered.

The Grievor also dealt with the question of the results. He pointed out that Semester 1 results had been forwarded and were on file. Semester 2 results were not yet formally available. In fact, the material presented to the Tribunal showed that the formal notification of results was dated 6 February 2001 and confirmed the Grievor's information that he had failed one of the three subjects undertaken in Semester 2 of that year.

The Tribunal should state that the issue of the results does not have anything to do with the deemed resignation.

By Internal Memorandum dated 8 February 2001, the MHRA informed the Grievor that after thoroughly considering his explanation, the decision to treat the seven days absence as a deemed resignation remained.

It is at this stage appropriate to refer to PSC Circular No.10 of 1995 dated 5 April 1995. The subject matter concerns, amongst other things, vacation work for officers on scholarships and attending local institutions. The circular points out that these officers are required to work during their vacations. Clause 3 (III) states that with effect from the date of the Circular:



***"During the Christmas break, officers will be allowed two (2) weeks leave immediately after the end of semester before being recalled to duty. They will be released from duty a week prior to the commencement of the new semester".***

The FIT 2001 Almanac showed that Pre-enrollment and payment of fees for all students commenced on Monday 8 January 2001. It would appear that Semester 1 lectures commenced on Monday 19 February 2001.

In his evidence the Grievor pointed out that at the end of Semester 2 in 2000 he had returned to work immediately and had not utilized the two weeks leave to which he was entitled under Circular 10/95. The Grievor also stated that as a matter of practice it was not necessary to complete a leave application to enroll as a scholarship student.

The Tribunal accepts that the Grievor was absent from work for seven days. The Tribunal also accepts that the Grievor did not offer any explanation for his absence until 1 February 2001 after he had received what in effect was a memorandum terminating his employment as he was deemed by the Authority to have resigned. The Tribunal accepts the Grievor's explanation for his absence. The explanation is supported by the documents tendered as evidence and was not effectively challenged by the Authority during the course of cross-examination.

The decision by the Authority to treat the seven days absence as a deemed resignation was taken under Regulation 20 of the Public Service Regulations 1995 (the Regulations).



Regulation 20 of the Regulations so far as is relevant, states:

**"(1) This Regulation applies to an employee who is absent from duty without leave and does not have a reasonable excuse for the absence.**

**(2).....**

**(3) If, within 7 days of the beginning of the absence, the employee does not tell the commission the reason for the absence and the expected date of his or her return to duty, the employee is taken to have resigned from the public service and forfeits all rights and entitlements in relation to the employee's public service employment.**

**(4) The Commission may decide that:**

**(a) subregulation (3) does not apply to the employee, or**

**(b) subregulation (3) applies to the employee but the employee does not forfeit all or particular rights and entitlements in relation to the employee's public service employment.**

**(5) This regulation does not prevent the employee from being disciplined under these regulations for the absence".**

This Dispute is really concerned with two issues relating to Regulation 20. The first is whether the Regulation was applicable to the Authority and the Grievor. The second is whether the application of the Regulation by the Authority was reasonable or fair.

The Authority was established by the Land Transport Act 1998 and assumed the functions of the former Department of Road Transport with effect from 10 July 2000. Section 19 (3) of the Land Transport Act states:



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***"The Authority may enter into an agreement with the Public Service Commission to provide for the secondment of public officers to the service of the Authority on such terms and conditions as may be specified in the agreement".***

It is the Tribunal's view that this provision deals with the on-going employment of those public servants who formerly worked with the Department of Land Transport and who were to move across to the newly created statutory authority. It is in addition to the general power to employ persons necessary for the proper carrying out of the provisions of the Act which is contained in section 19(1).

The Tribunal is satisfied that although there may not have been a formal written agreement as contemplated by section 19 (3), the Authority had, by its actions, agreed to the secondment of former employees of the Department of Land Transport to the Authority.

The Authority and the Public Service Commission then entered into an agreement on 28 July 2000 with the Association. Clause C of that Agreement states:

***"The employment of all the permanent established and unestablished staff of the former Department of Road Transport who have been seconded to the Land Transport Authority by the Public Service Commission shall be absorbed by the Land Transport Authority with effect from 10 July 2000".***

Clause (f) of the Agreement provided :-

***"The Public service terms and conditions of employment applicable to all staff shall continue to apply from 10 July 2000 to 31 December 2000 or until a new Collective Agreement is concluded between the Government side and the Association".***



It would appear that a Collective Agreement was not concluded between the parties until 17 December 2001.

As a result the Tribunal has concluded that in January 2001 the Grievor was employed by the Authority on the Public Service terms and conditions of employment applicable at the time. The terms and conditions were contained in amongst other documents the Public Service Act 1999 and the Public Service Regulations 1999, and included Regulation 20.

It does not matter that the definitions of "employee" and "public service" in the Public Service Act exclude employees of statutory authorities. It is the definitions which made it necessary for the Agreement of 28 July 2000 to expressly state that the terms and condition employment of employees absorbed by the Authority from 10 July 2000 should be the same as those applicable to the public service.

At this stage it is appropriate to note the decision of the High Court of Fiji in the The State -v- The Arbitrator Tribunal and Others ex parte Land Transport Authority (supra). This was an application for Judicial Review of Award No. 9 of 2002 of the Tribunal. The same parties were involved in that Dispute which related to similar issues. In particular the Court was required to consider the Agreement dated 28 July 2000 between the parties and disciplinary proceedings under the Public Service Act and Regulations.

The High Court took the view that since all the actions taken by the Authority were under the Public Service Act and Regulations and as the Grievor in that Dispute (as in this Dispute) was governed by the Public Service terms and conditions of employment it was logical to conclude that the disciplinary action



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was still vested in the Public Service Commission (See page 11 of the Judgement).

On the basis of that recent High Court decision, the Tribunal feels compelled to conclude that the Public Service Commission or its delegate was the appropriate body or person to proceed against the Grievor under Regulation 20 of the Public Service Regulations.

Furthermore, the Tribunal is not satisfied that the Authority has acted reasonably or fairly in its decision to treat the Grievor's absence as a deemed resignation.

Subregulation (1) states that the Regulation itself only applies to an employee who is absent without leave and does not have a reasonable excuse for the absence. The Tribunal is satisfied that a reasonable employer having considered the written explanation provided by the Grievor would have concluded that the excuse was reasonable. Subregulation (4) (a) clearly contemplates a reasonable excuse being provided by the employee some time after the seven days absence when he has returned to work.

In addition, the Grievor should have been given the opportunity to provide his explanation or excuse prior to the Authority taking the decision that the seven days absence should be deemed as resignation from the Authority.

In relation to the issue of appealing, there is no evidence or material to suggest that the Grievor was prevented from exercising any right of appeal he may have had pursuant to sections 25 and 26 of the Public Service Act 1999.

In conclusion the Tribunal is satisfied that the Authority has acted beyond its jurisdiction and that its decision taken under Regulation 20 (3) was unfair. The



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Grievor should be re-instated from the date on which the deemed resignation took effect. However, the Tribunal is satisfied that the Grievor should have been a more responsible employee by making some effort to inform the Authority at least during his absence as a matter of courtesy as to the reason for his absence and its likely duration. Under the circumstances the Grievor is to be paid six months arrears of salary and the balance of the time is to be deemed as leave without pay.

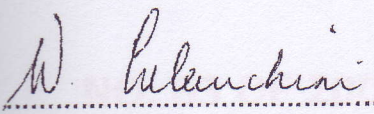
### AWARD

The Authority acted outside its jurisdiction by proceeding to deal with the Grievor under Regulation 20 of the Public Service Regulations 1999.

The Authority's decision to treat the Grievor's seven days absence without leave as a deemed resignation was unfair and unreasonable.

The Grievor is to be reinstated with effect from the date on which the deemed resignation took effect. He is to be paid six months arrears of salary and the balance is deemed as leave without pay.

**DATED** at Suva this 3<sup>rd</sup> day of November 2005

  
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**ARBITRATION TRIBUNAL**