IN THE EMPLOYMENT RELATIONS COURT

AT LAUTOKA

APPELLATE JURISDICTION

CASE NUMBER:	**ERCA 01 of 2013**
BETWEEN:	**AIR TERMINAL SERVICES (FIJI) LIMITED**
	APPELLANT
AND:	**MOHAMMED SHAMEEM**
	RESPONDENT
Appearances:	*Ms. D. Gandhi the Appellant.*
	Mr. D. Nair for the Respondent.
Date/Place of Judgment:	*Friday 28 September 2018 at Suva.*
Coram:	*Hon. Madam Justice Anjala Wati.*

A. ***Catchwords:***

Employment Law – Absence from work – worker deemed resigned under the provisions of the Collective Agreement – whether the Tribunal was correct in finding that the employer could not have relied on the provisions of the Collective Agreement – Records kept by employer allows for the deeming provisions of the Collective Agreement to be invoked- Employee deemed resigned and as such not entitled to any remedies – did the employer's conduct affect the worker's integrity and/or cause him any humiliation and injury to feelings – Otherwise was the order for reinstatement justified.

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1. Mohammed Shameem ***("Shameem")*** was employed by Air Terminal Services ***("ATS")*** since 13 February 1998 as a permanent part-time passenger assistance agent. He was

considered as having resigned from the employment on 12 August 2004 by the employer. He was sent a letter to this effect on 12 August 2004.

2. The employer had invoked Article 2F of the collective agreement between the parties which states that:

"An employee who fails to resume work within 14 days after completion of an approved leave shall be deemed to have resigned from the company's service".

3. The employer's position was that the worker was on approved sick leave from 8 July 2004 to 26 July 2004. It contends that the worker was required to report to duties on 27 July 2004 but he failed. He did not report to work thereafter for 14 consecutive days when Article 2F was invoked against him.

4. The worker's position was that he was not on approved leave prior to 27 July 2004 and as such ATS had miscalculated 14 consecutive absences to be in a position to apply Article 2F of the agreement. The worker on the other hand admits that he was absent from work on 27 July 2004 until termination but claims that he was on sick leave since and had informed his superior of his absence.

5. After 4 years of his dismissal, the employee lodged a grievance in the Employment Relations Tribunal ***("ERT")*** on 14 April 2008. In that regard, there was substantial delay by him to take any legal action to vindicate his rights.

6. The ERT found that Article 2F could not have been invoked because the employee was not on approved leave from 8 July 2004 to 26 July 2004. It relied on a letter of 2 August 2004 by the Manager Passenger Services Mr. Filipe Tuisawau to the Chief Executive Officer of ATS. The ERT states that the letter indicates that Mr. Filipe Tuisawau's concern was that the employee had not reported to work since 8 July 2004 because he had called in sick from 8 July 2004 to 26 July 2004 and had not filled in the P3 form which is an application for sick

leave. According to the ERT, given the concerns expressed that the employee had not reported to work from 8 July 2004, his leave could not have been approved.

7. I think it is at this stage at which I shall mention that I do not have the benefit of the letter and other exhibits tendered in the ERT. All the documents and part of the trial notes are missing from the records and after an enquiry the court was informed that the ERT Registry does not have the complete records. The records were missing for some reason including the audio records of the evidence of the witnesses.

8. The Registrar of the ERT could find some records which was bound and given to the Court. The counsel were informed of that position and enquired if they could by consent come up with an agreed version of a supplementary record from their personal documents and notes. That could not be done so it was agreed that the appeal would be heard on the existing record.

9. I am bereft with the evidence adduced in the ERT and my decision is based on the evidence that the ERT has summarized in its judgment. It is very important that court records be kept safe and intact for appeal purposes to ensure smooth prosecution of an appeal. Both the parties will be prejudiced in absence of such a record.

10. The ERT found that the termination was unlawful and unfair and ordered the employee to be reinstated to his former position. ATS was also ordered to pay one year's lost wages to the employee for unlawful dismissal and 2 years lost wages as compensation for humiliation, loss of dignity and injury to the feelings of the worker.

11. Aggrieved with the decision, ATS appealed both the findings of the ERT and the remedies ordered. The employer cross-appealed and stated that the ERT did not consider that the employee had lost chances of his promotion and that his reinstatement should be with full privileges such promotion, Fiji National Provident Fund contributions and leave entitlements. It was also contended that the ERT should have ordered that the employee

be re-instated without the requirements of a medical checkup, police clearance and security clearance.

12. Before I delve into the issues, it is essential to state that after the ERT's decision on 8 August 2012, I am informed by the counsel that the employee was reinstated on 1 February 2013. After the reinstatement, an appeal was filed challenging the decision of the ERT. Leave was granted to appeal out of time.

13. Subsequently, Shameem was terminated on 17 May 2013 for reasons which the court was not made aware of. That second termination is not part of the issues that are before me as that aspect has not been litigated. Mr. Nair had asked me to look into the second termination and decide on the aspect but he has asked for something which is beyond my ambits without having heard the evidence on that aspect. As such, I decline to deal with the issue.

14. I have gone through the evidence as summarized by the ERT and the remaining of the records. I find that the ERT was not correct in analyzing whether ATS had approved Shameem his sick leave from 8 July 2004 to 26 July 2004. Although, the employee had not reported to work during this period, he called in sick and filled in his sick leave application late. What matters is that ATS had decided to approve his leave albeit later because he had informed ATS about his sickness. The approval need not be in writing but the fact that ATS did not take any issues with his absence and allowed him concession for those days does indicate, as the witness for ATS testified, that the leave was approved in principle. It was then the duty of Shameem to report to work on 27 July 2004.

15. The leave detail record of ATS does indicate that the employee was marked as sick from 8 July to 26 July, 2004***(except for the days he had worked after swapping his shifts being 9 July and 22 July)***. With that and the evidence of the employer that it had given approval in principle for the days to be used a sick leave; the ERT could not substitute its own views that leave was not approved.

16. On other occasions, the employer had approved the employee's sick leave although he had exhausted his entitlement. Even on those occasions, he had filled in his application late but had informed about his absence and the reason. If the employer had been generous and understanding on those occasions, there was no reason why it would not adopt the same practice of allowing Shameem to take leave for the 8 to 26 July period because Shameem had already informed the employer about his sickness. It is therefore clear that when ATS decided to approve leave for that period that decision cannot be questioned and revisited because that was the prerogative of the employer to decide and implement.

17. Shameem did not report to work on 27 July 2004. That is clear from the employer's record. He had two days off which is 28 July and 31 July 2004 as per the employer's records. Excluding those two days and including 27 July to 12 August, 2004, the employee was away from work for 14 consecutive days. That fulfills the requirement of Article 2F to find that the employee is deemed to have resigned from work.

18. Shameem says that his supervisor one Mr. Sundar had orally approved him leave. Mr. Sundar was not subpoenaed to give evidence. The employer's record does not show that any approval was granted to the employee to take leave from 27 July 2004 and as such, the evidence of the employee cannot be given weight.

19. If the employee had worked during any period from 27 Augu2004 to 12 August 2004, he would have some form of evidence or the fellow workers as witnesses to testify that. His assertions that he worked on 1st August and was approved leave on 2 August are not established by the records of ATS and any substantiating evidence of the employee.

20. I find from the evidence of the employee that he was deemed to have resigned pursuant to Article 2F of the Collective Agreement and that he is not entitled to any remedies from the employer.

21. It is important to mention that the employee is a diabetic patient and that was his sickness which caused him to be away from work frequently. He had been on medical treatment but his absence from work is at an alarming rate. He had been very fortunate to be given concession for being away from work for so many days prior. The employer was aware of his sickness. He took that to his advantage and failed to inform ATS why he would not come to work from 27 July, 2004.

22. It is also the duty of a worker to inform the employer about his absence so that alternative suitable arrangements can be made from time to time to require another employee to stand in for the absent employee. Unexplained absence and time away from work causes unexpected hindrance to the business of any employer and the employers can take appropriate actions(s) to curb the situation. In this case, the employee has a history of absenteeism which the employer gave concession to. When he failed to turn to work and no one was aware where he was and why he was away from work, the employer had the right to invoke the provisions of the Collective Agreement to consider that he has deemed to have resigned from the employment. I find that as a result, the remedies awarded to the employee were not justified to any extent.

23. I think it is important to comment on the 2 years wages that was awarded as compensation for humiliation, loss of dignity and injury to the feelings of the worker. The award was based on the following facts found by the ERT:

"ATS is an employer that preaches and practices worker participation in management resulting in this awareness of ownership and creating a big village of workers who watch each other. So no one can imagine the humiliation of being terminated from ATS",

24. The above indicates that the remedy was awarded because the ERT assumed that humiliation flows from dismissal. The purpose of awarding this remedy was not to compensate an employee for humiliation arising from the fact of the dismissal itself. The purpose was to ensure that even at the time of the dismissal, the employer shows good

faith to its employees and carries out the dismissal in a dignified manner. This principle forbids the employers from conducting itself in a manner which in inappropriate *(based on the circumstances of each case)* and tends to cause the employee embarrassment, humiliation and injury to his feelings. There was no evidence from any party that the employer had conducted itself in a manner which humiliated the worker or caused injury to his feelings. The award was thus not justified.

25. On the remedy of reinstatement, the ERT ought to have also considered that that worker had not lodged any grievance for 4 years. The employer is expected to have found someone else in his place in the 4 years. The order for reinstatement was in 2012 which was 8 years after the employee had resigned or deemed to have resigned. In a situation where the employee contributes to such substantial delay, reinstatement is often not the best remedy.

26. In the final analysis, I allow the appeal by the employer and find that the employee was deemed to have resigned from work and as such he is not entitled to any remedies from the employer.

27. I do not make any order for costs against the employee in light of his long term unemployment.

Anjala Wati

Judge

28. 09.2018

To:

1. *Neel Shivam Lawyers for the Appellant.*
2. *Mr. D. Nair for the Respondent.*
3. *File: Lautoka ERCA 01 of 2013.*