

**IN THE COURT OF APPEAL, FIJI ISLANDS**  
**ON APPEAL FROM THE HIGH COURT OF FIJI**

**CIVIL APPEAL NO. ABU0128 OF 2006S**  
**(High Court Civil Action No.6 of 1992L)**

**BETWEEN:**

**THE ATTORNEY-GENERAL OF FIJI**

**Appellant**

**AND:**

**PUSHPA WATI**

**Respondent**

**Coram:**

**John Byrne, JA  
Devendra Pathik, JA  
Randall Powell, JA**

**Hearing:**

**Friday, 4<sup>th</sup> July 2008, Suva**

**Counsel:**

**R Green for the Appellant  
Sahu Khan for the Respondent**

**Date of Judgment: Thursday, 10<sup>th</sup> July 2008, Suva**

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**JUDGMENT OF THE COURT**

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[1] The respondent's husband Mr Shiu Narayan ("Mr Narayan") was employed as a postal officer by the Department of Posts & Telecommunications ("the Postal Commission"). In 1985 he was charged and prosecuted for offences relating to postal packets. He was acquitted of those charges by the Magistrates Court at Nadi in October 1987. The Director of Public Prosecutions appealed to the High Court

and that appeal was dismissed in December 1989. A further appeal to the Court of Appeal was abandoned in October 1990.

- [2] As a result of the charges against him Mr Narayan was, in the period 1985 until 1988, interdicted in his employment by the Public Service Commission in accordance with the practice and General Orders which then prevailed in the Civil Service. On 25 April 1988 he resumed his employment as a postal officer.
- [3] Mr Narayan made demands for payment of the salary that had been due to him in the period of his interdiction, being an amount of \$28,236.60 ("the backpay").
- [4] There is no dispute about the quantum of the backpay but on 31 December 1989 the Posts & Telecommunications services provided by the Government of Fiji was taken over by a corporation, Fiji Post & Telecommunications Limited ("the Postal Company") and, until he resigned in October 1990, Mr Narayan was employed by the Postal Company.
- [5] The central issue between the parties at that the trial judge ultimately had to determine was which of the Postal Commission or the Postal Company was responsible for making the backpay to Mr Narayan.
- [6] Finnigan J determined the question against the Postal Commission and ordered judgment against the Attorney-General (who was sued as a representative of the Public Service Commission) in the sum of \$28,236.60 plus interest at 9% per annum from the date of writ (January 1992) to judgment which he fixed at 14.5 years and calculated at \$36,848.76
- [7] The grounds of appeal are firstly that the trial judge erred in finding that the Postal Company was not liable for the backpay and secondly in assessing interest at the rate of 9%.

## The First Ground

[8] Section 69(1)(2) of the P&T Decree 1989 ("the Decree") transferred the rights and liabilities of the Postal Commission to the Postal Company but the trial judge, relied on section 69(4) of the Decree which provided that for the avoidance of doubt that:

*(d) Any such reference to the property, rights and liabilities of the Department of Posts and Telecommunications shall not include ... (i) any contract of employment.*

[9] The trial judge interpreted this as meaning that when the Postal Company took over Mr Narayan as an employee it did not take with him his contract of employment and thus the liabilities of that contract of employment were not transferred to the Postal Company.

[10] The trial judge further held that Mr Narayan's cause of action arose on 29 October 1987, the date of his acquittal by the Nadi Magistrates Court.

[11] The appellant says that section 69(4) of the Decree does not apply to civil servants, whose terms and conditions of employment are covered by the Public Services Act and regulations

[12] The appellant relies on section 69(11) of the Decree which provides that:

*"Any proceeding or cause of action pending or existing immediately before the transfer date or against the Department of Posts & Telecommunications, the Government or any person acting on behalf of the Government in respect of any of such transferred undertaking shall be continued enforced by or against the Company as might have been enforced against the Department of Posts and Telecommunications, the Government or such person, if this Decree had not been made."*

- [13] The hearing was set down for 11 September 2006. On this day the trial judge agreed to hear the matter on the documents on the basis of Agreed Facts and Issues and written submissions. The Agreed Issue was *“whether the Postal Commission is liable to Mr Narayan having regard to the Public Service Commission (Constitutional) Regulations made under the Public Service Act Cap 74 and the Public Service Regulations 1987”* (“the Agreed Issue”)
- [14] On this basis the proceedings against the Postal Company were dismissed. The trial judge ordered that the remaining parties file and serve written submissions and on 31 October 2006 he delivered judgment.
- [15] In its written submissions the Postal Commission invoked section 69(11) of the Decree and submitted that Mr Narayan had made a mistake in electing not to proceed against the Postal Company.
- [16] Mr Narayan in reply submitted that the Postal Commission was, in light of the Agreed Facts & Issues, estopped from raising section 69(11) of the Decree. Further he submitted that the Decree was never pleaded as a Defence. However, as noted above the trial judge proceeded to consider the Decree and decided the issue and the proceedings in favour of Mr Narayan.
- [17] The Postal Commission submission that the Decree point did not need to be pleaded is beside the point. By agreeing to the Agreed Issue and standing by as Mr Narayan, in consequence of the Agreed Issue, discontinued the proceedings against the Postal Company, ought not have been permitted to rely on the Decree or any argument or defence that asserted the Postal Company was responsible for the backpay. Where an unpleaded point or a point that could not reasonably have been contemplated as an issue is raised at the hearing, the court’s task in determining whether a new point should be raised is to give effect to the demands of justice by balancing, on the one hand, the entitlement of a party to have the case

determined according to law and, on the other, the public and private interest in the proper conduct of the proceedings:

[18] Generally there is a discretion to allow a new point to be relied upon if it does not unduly prejudice the other party: *Bright v Sampson & Duncan Enterprises Pty Ltd* (1985) 1 NSWLR 346. The prejudice to Mr Narayan however was overwhelming and incurable because of the discontinuance of the proceedings against the Postal Company. The trial judge seems to have taken the view that no practical prejudice would arise because his construction of the Decree favoured Mr Narayan. That approach of course presupposes that an appellate court would uphold the trial judge's construction of the Decree.

[19] The Postal Commission ought not to have been permitted to argue the Decree point and therefore it is unnecessary, and would be embarrassing, for this Court to determine whether the trial judge was correct in his construction of the Decree.

[20] It is not contested that, if no account is taken of the section 69(11) of the Decree, that the Postal Commission, in accordance with the provisions of the Public Service Commission Act and Regulations, was liable for Mr Narayan's backpay.

[21] The First Ground of the Appeal fails.

### The Second Ground

[22] The Postal Commission submits that an interest rate of 5% or even 3% was a more appropriate rate than the 9% assessed by the trial judge, which rate would amount to an "undue penalty" on it.

[23] An award of interest is designed to compensate a litigant for being without the use of their money in the period when the right to that money accrues and the ordering

of payment by the Court. In some jurisdictions the amount of interest for any given period is specified by the Court Rules and goes up and down as general interest rates go up and down. In the Fiji Islands the courts have a discretion to assess the rate of interest but in fixing the rate regard should be had to prevailing bank interest rates.

[24] The difficulty in the present case is that the proceedings, though commenced in 1992 were not determined for over 14 years. As the trial judge observes, the delay was due to the incompetence of the court during the intervening years in managing its own business and could not be placed at the door of any of the parties. However the fact remains that Mr Narayan, or more correctly his estate, Mr Narayan having died in the meantime, has been without his money for 16 years now and the Postal Commission has effectively had the use of that money for the same period.

[25] The award of interest is discretionary and an appeal court ought not interfere unless it can be demonstrated that in the exercise of that discretion a substantial wrong has occurred: ***House v The King*** [1936] 55 CLR 499

[26] However in this case the trial judge, in fixing the rate at 9%, appears to have taken into account an irrelevant matter namely his view that *"it was incumbent on the Commission to know its own obligations and (to know that) its obligations to its employee did not transfer when the employee did. From these submissions I find ample authority for making an award at 9% per annum."*

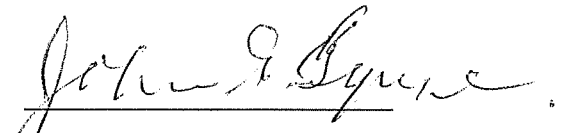
In other words the trial judge has incorporated an element of punishment of the Commission into the process of fixing the interest rate.

[27] The trial judge having erred in the exercise of his discretion, this Court will substitute a more appropriate rate of interest, a rate that takes account of interest

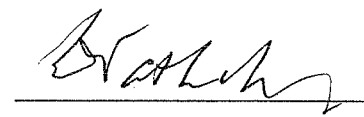
rates awarded by the High Court throughout the period 1992 to 2006. The rate to be fixed in this case is 6%.

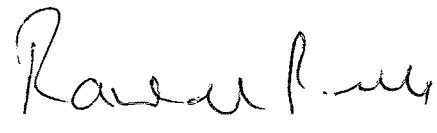
[28] The orders of the Court are:

1. In Order 2 of the Orders of the Court of 31 October 2006 the rate of 6% is substituted for 9% and, accordingly, the figure of \$24,565.84 is substituted for \$36,848.76
2. The appeal is otherwise dismissed
3. The appellant is to pay the respondent's costs of the appeal as taxed or otherwise agreed.

  
Byrne, JA



  
Pathik, JA

  
Powell, JA

Solicitors:

Office of the Attorney-General Chambers, Suva for the Appellant  
Sahu Khan and Sahu Khan, Ba for the First Respondent