CIVIL ACTION NO 5/94

Between: Anthony D. Audoa - PLAINTIFF

and

Chief Secretary - DEFENDANT

HELD

By Law, a Public Servant is not entitled to and cannot be paid any salary or allowance whatsoever while on leave. The Minister, however, may determine that an allowance may be paid to the Public Servant while on leave. That does not confer on a Public Servant any right.

Plaintiff in Person
Diwvedi and Flora for Defendant

BEFORE : DONNE C.J.

IN THE SUPREME COURT OF NAURU

CIVIL ACTION NO. 5/94

BETWEEN : **ANTHONY D. AUDOA**

PLAINTIFF

AND : **CHIEF SECRETARY**

DEFENDANT

Date of Judgment: 31.7.98
Plaintiff in Person.
Dwivedi and Flora for Defendant.

JUDGMENT OF DONNE C.J.

The Plaintiff seeks, inter-alia, a declaration that he is entitled to be paid his full salary as a public servant for the period he was engaged, away from the public service, on a study course at Monash University Melbourne pursuant to a scholarship therefor. The Defendant by way of counterclaim seeks

judgment for $12,669.50 which allegedly was for salary paid to the Plaintiff by mistake during part of the period of his absence.

At the conclusion of the taking of evidence, the hearing was adjourned to enable submissions to be presented in writing by the parties.

The facts established to my satisfaction are:

On the 11th December 1992, the Plaintiff wrote to the Chief Secretary, as Head of the Public Service, advising him of the said scholarship of which he gave full particulars. The purpose of study was for the gaining of the degree of Master of laws. It was to enure for two years. The Plaintiff requested that he be granted leave of absence for that period and that he be paid his full salary during his absence from service.

On 22nd January 1993, the Chief Secretary by letter advised the Plaintiff that he had been granted leave as requested but the request for payment of salary

was declined since it was considered the scholarship carried with it appropriate financial provision to cover his period of study.

The Plaintiff, being dissatisfied with this decision, on the 8th February 1993 wrote to the Chief Secretary seeking reconsideration of his application citing instances he said where salary had been paid to specific public servants under similar circumstances. He requested like treatment in his case.

There was no reply to his letter. Notwithstanding, the Plaintiff, on the 14th February 1993, proceeded to Melbourne to commence his study. He returned to Nauru in April during the University Easter vacation. He again took up his salary request. However, on this occasion he sought the assistance of the Senior Administration Officer Mr. Temaki. In the result Mr. Temaki arranged for the payment of the Plaintiff's salary, including a retrospective accrual amount. The reason for this action is not clear. Mr. Temaki, in evidence said the payment was a mistake. He had been directed

by letter of the policy "that public servants who were granted leave for study should not be paid any allowances. He had been instructed to recover any allowances paid in contravention of that directive. He said he was first aware of the position sometime in 1993. Nevertheless the Plaintiff's salary continued to be paid until the 11th March 1994. Other public servants were also similarly paid. No steps were taken by the Senior Administration Officer to recover any of these wrong payments. He said the decision not to take any such steps was his own and not that of anyone else.

The matter was certainly put to rest on the 4th January 1994 when the then Chief Secretary advised the Plaintiff that the decision of the 22nd January "still stands".

The Plaintiff, however, continued to protest and in February 1994 attempted to obtain an interim injunction requiring payment of his salary to be continued. He was unsuccessful.

In April 1994, he said he met the Chief Secretary in Melbourne at Nauru House. As a result of what he was told, he stated he believed the Government would pay him an accommodation allowance. He followed up this meeting by a letter to the Chief Secretary in May 1994 requesting action on the alleged proposed allowance and censuring him on the decision which denied him his salary. He received no reply to the letter.

The Public Service Act 1962-1979 expressly deals with the position as to payment of salaries to public servants granted leave of absence. Section 55A reads:

> "55A. (1) The Minister may, on the application of an officer, grant to the officer leave of absence for the purpose of pursuing a course of study or training that, in the opinion of the Commissioner, will fit him, or assist in fitting him, to carry out the duties of an office in the Public Service of Nauru.
>
> (2) .....

(3) An officer granted leave of absence under sub-section (1) of this section is not entitled to be paid salary or allowance under any other provision of this Act in respect of the period of the leave but may be paid, in respect of that period, such allowances (if any) at such respective rates as the Minister determines."

From the section the following it is established: -

1. A public servant granted leave of absence for the purpose of study is not entitled to be paid any salary or allowance during the period he is absent from duty in the public service. Payment of salary is expressly prohibited.

2. The Minister in charge of the Public Service may determine and grant to the absentee public servant a specified allowance during the period of his absence.

3. There is no power to grant the payment of any salary.

4. A determination by the Minister under the section cannot be of general application. Each application by a public servant for an allowance must be considered on its merits.

5. A determination by the Minister is final.

6. The Head of the Public Service, the Chief Secretary, has no power to determine any allowance.

The Plaintiff tendered evidence to establish a practice of discrimination in the administration of the policy by the Minister, some public servants being granted an allowance, while, others, such as himself, being denied it. On this, he sought to invoke a plea of breach of natural justice and sought an order in his favour. I make no finding on the question since, clearly, the plea is not available here.

As above stated the question of payment of any allowance to a public servant on permitted study leave is governed by statute – section 55A (supra). By law, a public servant is not entitled to and cannot be paid any salary or allowance whatsoever while on leave. The Minister, however, may determine that an allowance may be paid to the public servant while on leave. That does not confer on a public servant any right. The payment of any allowance determined the Minister is, in effect, an "ex gratia" payment and unless he can establish the Minister personally granted such allowance to him, the Plaintiff, I am satisfied cannot successfully be awarded it. He cannot here establish any such determination. I am satisfied there was none. The Minister was at all times clear and unequivocal in his decision not to determine any allowance. If there were any agreement to the contrary made with the Chief Secretary as alleged, such would be of no lawful effect.

In the result, I find the Plaintiff was never at any time granted any allowance. He was aware of that when he made his decision to take the

leave granted to him. It was on that basis he must held to have left Nauru to take up his scholarship.

There will be judgment for the Defendant on the claim.

Turning now to the counterclaim, the Defendant paid to the Plaintiff $12,669.50 which it claims from him on the ground that the sum was paid to him by mistake for a period from February 1993 to March 1994.

On the evidence, I am satisfied that this payment, while wrongly made, was so paid due to the inexcusable negligence by servants of the Republic. As I have said, there was a clear and unequivocal decision not to pay any such allowance. It was made in February 1993 and I do not accept that this decision was not known to the Administration Office responsible for salary payments. In any case, if the decision was not conveyed to that department, that omission itself is grossly negligent. The Senior Administration Officer

has said he knew in 1993 of the decision. In spite of this, payments continued until March 1994. In fact, I am far from satisfied the decision was not known to that Officer in April 1993 when the Plaintiff saw him. However, whatever may be the case, there can be no question but that the payments to the Plaintiff could reasonably apply a conclusion that he believed the decision notified to him in January 1993 had been reversed. I accept what he said in his evidence:

> "I thought the Chief Secretary must have mistaken and I wrote again on the 8th February ..... There was no response to that letter. I thought he was still considering my request. When I went back in 1993 he was not available. I had a meeting with Temaki. He looked at my file and approved salary be paid retrospectively."

In my view the above manner in which the question of his salary was dealt with by the Public Service Administration was grossly negligent and culpable. The Minister correctly applied the requirements of section 55A (supra) and his determination not to grant any allowance to the Plaintiff was

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made in January 1993. It was never changed. This apparent attempt by the Administration Office to act contrary to it cannot by any measure be justified.

In the circumstances, it would be unjust to require the Plaintiff to repay the monies incorrectly paid to him. To order that would allow the Defendant to benefit from those acts of, what I have described, as gross and inexcusable negligence.

There will be judgment for the Plaintiff on the counterclaim.

A Certified True Copy of the Original

Steven Donne

CHIEF JUSTICE

G. L. CHIPRA
REGISTRAR, Supreme Court

Solicitor for the Plaintiff : Plaintiff in person
Solicitor for the Defendant: Office of the Secretary for Justice