

BETWEEN: **JEANNE NIOWENMAL**
Appellant

AND **PUBLIC SERVICE COMMISSION**
First Respondent

AND **REPUBLIC OF VANUATU**
Second Respondent

Coram: *Hon. Justice John Von Doussa*
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Dudley Aru
Hon. Justice Mary Sey
Hon. Justice Stephen Harrop

Counsel: *Mr Saling Stephens for the appellant*
Mr Frederick Gilu (SLO) for the respondents

Date of Hearing: *Tuesday 28 April 2015*

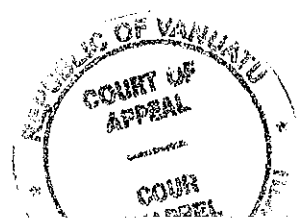
Date of Judgment: *Friday 8 May 2015*

JUDGMENT

Introduction

1. Jeanne Niowenmal is a nurse at the Lycee Louis-Antoine de Bouganville in Port Vila. Between March 1992 and 13 November 1995 she was employed directly by the school but by letter of 12 December 1995, the Public Service Commission ("PSC") approved her permanent appointment, with effect from 1 December 1995, as a public servant working in that position.
2. The terms of appointment included the following:

"You will be required to serve on probation for two (2) years only and confirmation of your permanent appointment will be decided by the Public



Service Commission only after the expiry of the probationary period or terminate (sic) your employment after giving one month's notice if your service, conduct or health are not satisfactory."

3. Within that two-year period, on 10 June 1997, the Director of the Public Service terminated Mrs Niowenmal's employment without notice or payment of any entitlement because the PSC had determined that her appointment had been in breach of Article 57 of the Constitution and the Public Service Staff Manual.
4. Mrs Niowenmal and a number of other public servants in the same position urgently applied to the Supreme Court, in Civil Case 93 of 1997, on an ex parte basis, for interim relief by way of a mandatory injunction.
5. On 16 July 1997 the Supreme Court ordered:

"That until further orders by this Honourable Court.....

- b) each and every one of the Petitioners shall be permitted to keep and continue to keep their respective jobs, posts or positions within the relevant institutions, and they shall continue to work and provide services at those jobs, posts or positions within the relevant institutions, and they shall continue to work and provide services at those jobs, posts or positions with full pay, benefits and privileges."*

6. On 14 August 1997, the Director of the Public Service Department wrote to Mrs Niowenmal in the following terms:

"RE: REINSTATEMENT

*I am writing to advise you that the Public Service Commission at its meeting held on 29th of July 1997, has endorsed your reinstatement on full salary effective from 10th June 1997, **till the appeal case can be heard in Court.***

By the copy of this letter the Finance Department is advised to make the appropriate action." (emphasis added)

7. On 7 December 1998, Civil Case 93 of 1997 in which Mrs Niowenmal was one of the Petitioners was dismissed. The wording of the Court order was as follows:

“UPON HEARING Mr Ishmael A Kalsakau for the respondents

AND Mr Robert E Sugden file (sic) a notice of ceasing to act in this case for the Petitioners and none of them was present;

Being satisfied that the parties have settled this dispute;

IT IS HEREBY ORDERED:

- 1) *That Civil Case No. 93 of 1997 is dismissed.*
- 2) *No Order as to costs.”*

8. There was no appeal against that decision but in June 2012, Mrs Niowenmal issued Civil Case No. 106 of 2012 in which she sought payment of outstanding salary and underpayment of salary from 10 June 1997. She claimed that the Supreme Court had ordered her reinstatement on 16 July 1997, that this had been confirmed by the PSC on 14 August 1997 and that because the reinstatement had never been revoked the PSC was obliged to pay her as a public servant on full salary for the ensuing period.
9. In his judgment of 5 September 2014, the Supreme Court Judge, Justice Fatiaki, partly upheld the claim and directed that Mrs Niowenmal was entitled to be paid her full public service salary from 10 June 1997 until 7 December 1998 (being the date when the Civil Case No. 93 of 1997 was dismissed).
10. Mrs Niowenmal has appealed to this Court and contends that the Supreme Court was wrong to limit the claim to that period.
11. Although there are a number of stated grounds, as we understood Mr Stephens the essential argument is that the effect of the reinstatement by the PSC on 14 August 1997, which has not subsequently been revoked, is that Mrs Niowenmal has remained a public servant ever since. He points out that the letter refers to the hearing of “ the appeal case” in Court and that there has never been any such appeal case, let alone one which was heard and determined in Court.
12. The respondents concur with the Supreme Court judgment and submit the appeal should be dismissed.

Discussion and Decision

13. Mrs Niowenmal's argument misconstrues the effect of the interim orders of 16 July 1997, the Public Service Director's letter of 14 August 1997 and the effect of the dismissal of Civil Case No. 93 of 1997.
14. The interim orders made were just that: interim. They are typical mandatory injunctive orders made on an urgent interlocutory ex parte basis at the outset of a proceeding intended to preserve the status quo pending examination and determination of the merits of the claim. As the orders themselves state they only apply "until further orders by this Honourable Court". They are provisional and temporary orders which do not in any way uphold the claim beyond accepting that it raises a serious question to be tried and that the balance of convenience favours their being made so as to avert irretrievable prejudice to the claimants before their claim is determined.
15. It is in our view obvious that the reference in the letter of 14 August 1997 to "the appeal case" is a reference to the claim in Civil Case No. 93 of 1997. To someone with legal training it is plainly a misnomer because that was a claim at first instance rather than an appeal case. However, the author of the letter was a layperson who can be forgiven for the error, particularly because nobody involved in the case at the time could possibly have been misled by it. The letter means no more than that, following the interim orders of the Court on 16 July, the Public Service Commission was acting appropriately in careful compliance with the order quoted above, pending the further order of the Court and ensuring that the Finance Department also acted in accordance with it. The letter conveys a provisional and conditional reinstatement only. Seen in its proper context, there is no basis for inferring from the letter that the PSC resiles in any way from its belief in the correctness of its termination decision or from its defence to the claim.
16. The position then was that all parties to the case would await further orders of the Court. There was only one further order and that was to dismiss the proceeding unconditionally on 7 December 1998, with the Court recording that it was satisfied the parties has settled their dispute. The effect of the order was to put Mrs Niowenmal back in the position she was in before the proceeding was issued, namely she was on a two-year probationary contract. Confirmation of her permanent appointment was to be decided by the Public Service Commission only at the end of that period i.e. on or after 1 December 1997. No such confirmation was ever given.

17. The result in our view is that Mrs Niowenmal ceased to be a public servant from 1 December 1997. Between 1 December 1997 and 7 December 1998 she was, as Justice Fatiaki found, the beneficiary of the interim and conditional reinstatement pursuant to the Court's interim orders which continued in force until 7 December 1998. Those orders were superseded by the dismissal order. It is distinctly arguable, to say the least, that the proper view, in retrospect, is that Mrs Niowenmal was not a public servant beyond the end of her two-year probationary period on 1 December 1997. Otherwise she would be in a better position than if she had not issued Civil Case 93 of 1997 which was resolved by dismissal and without any finding that it was a valid claim. However there is no cross-appeal by the respondents against Justice Fatiaki's judgment so we say no more.
18. We agree with Justice Fatiaki that there was no need for the PSC to withdraw or revoke the reinstatement by letter of 14 August 1997 because it was always a temporary measure subject to the final outcome of Civil Case No. 93 of 1997. Once that was dismissed, all parties should have understood the reality that the interim orders the Court had made on 16 July 1997 had merged in the dismissal and were effectively discharged. Consequently and by necessary implication, any action taken by the parties in compliance with those orders also came to an end.
19. There was no direct proof before the Court of the terms of the settlement that had apparently been reached and which led to the dismissal of the claim on 7 December 1998. Mr Stephens submitted that the onus was on the respondent to establish the terms of such a settlement. We do not agree. Mrs Niowenmal was effectively claiming that, notwithstanding the unconditional dismissal of the claim challenging her termination, she remained a public servant. The onus was on her to prove, not on the respondent to disprove, that there was a settlement under which the PSC had agreed that she was reinstated and that it was obligated to pay her accordingly. She did not provide any such evidence.
20. The only evidence as to the basis for settlement was that of the Acting Secretary of the PSC, Laurent Rep. He said that the post occupied by Mrs Niowenmal did not exist within the Public Service structure and was accordingly never budgeted for. There was no suggestion that the PSC agreed as part of the settlement to reinstate Mrs Niowenmal; on the contrary the PSC considered it was in law unable to do so and it appears Mrs

Niowenmal must have accepted that and allowed her claim to be dismissed because of that unfortunate reality.

21. The appeal is dismissed with standard costs awarded to the respondents against the appellant. These are to be taxed if they cannot be agreed.
22. We understand that the matter will now return to Justice Fatiaki for implementation of his judgment as set out in paragraph 21 of that judgment.

DATED at Port Vila this 8th day of May, 2015

BY THE COURT



Hon. John von DOUSSA
Justice of the Court of Appeal

