

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Civil Case No. 106 of 2012

BETWEEN: JEANNE NIOWENMAL
Claimant

AND: PUBLIC SERVICE COMMISSION
First Defendant

AND: REPUBLIC OF VANAUTU
Second Defendant

Before: Justice D. V. Fatiaki

**Counsel: Mr. S. Stephens for the Claimant
Ms. J. Warren for the Defendant**

Date of Ruling: 5 September 2014

RULING

1. In this action the claimant seeks "payment of outstanding salary and underpayment since 10 June 1997 until to date". The claimant also seeks a finding of contempt against the defendant as well as exemplary damages and interest of 10% on any judgment sum awarded together with costs.
2. The background to the claim may be briefly summarized from the agreed facts and the claimant's chronology as follows:
 - By letter dated 16 March 1992 the claimant was appointed to the position of Nurse at **Lycée Louis Antoine de Bougainville School** ("Lycée") on a permanent basis by the School Council. The appointment letter was signed by the then principal of Lycée;
 - By letter dated 12 December 1995 the **Public Service Commission** ("PSC") approved the claimant's "... permanent appointment to the post of Nurse in the Lycée School, Department of Education of the Vanuatu's Government Public Service". The claimant was to be paid an annual salary of VT554,232 in grade **P8.1** of the **Public Service Scales** plus an annual supplement of VT51,000 with effect from the 1st of December 1995;
 - The claimant's appointment letter also stated that the claimant would be required to serve on probation for two (2) years and confirmation of her appointment:



"... will be decided by the Public Service Commission only after expiry of the probationary period or terminate your employment after giving one month notice if your service, conduct or health are not satisfactory";

- By letter dated 10 June 1997 (which was within the above-mentioned probationary period) the Director of the Public Service terminated the claimant's employment without notice or payment of any entitlement ostensibly because the PSC had determined that the claimant's appointment was in breach of Article 57 of the Constitution and the Public Service Staff Manual. In this regard **Article 57(3)** of the Constitution states:

"No appointment shall be made to a post that has not been created in accordance with a law".

- By an urgent application in Civil Case No. 93 of 1997 the claimant and others successfully challenged the termination of their appointment by the PSC. The Supreme Court on 16 July 1997 granted interim orders which provided inter alia:

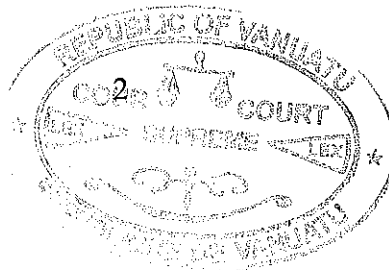
"(b) Each and every one of the petitioners (including the claimant) shall be permitted to keep and continue to keep their respective jobs, posts or positions within the relevant institutions and they shall continue to work and provide services at those jobs, posts or positions with full pay, benefits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

More specifically, Lycée where the claimant was employed was:

"(c) ... restrained from recruiting or attempting to recruit other persons to replace any of the Petitioners concerned.";

- It is common ground that after the above orders the PSC by letter dated 14 August 1997 wrote to the claimant endorsing her *"re-instatement on full salary effective from the 10 June 1997 till the appeal case be heard in Court"* (my underlining for emphasis).
- By an undated letter the then Chairman of the PSC **Joseph Calo** clarified to the claimant that her appointment as a civil servant remained revoked and she had been reverted to her original status where she was employed by the *"... skul komiti nomo, mo olgeta nomo bae oli pem yu nao unda long grant we igo long skul"*;
- For completeness by order dated 7 December 1998, the Supreme Court being satisfied that the parties had settled the dispute, ordered:

"1. That Civil Case No. 93 of 1997 is dismissed";



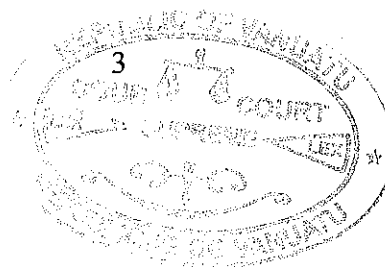
3. In the management of the present claim it became clear from the pleadings and the sworn statements filed by the parties that the case could be determined on a preliminary issue which was agreed as follows:

"Did the claimant continue as an employee of the government after her 14 August 1997 letter of reinstatement?"

4. Plainly, if the claimant's employment as a public servant continued then the State would be liable to pay her any shortfall in her salary. Conversely, if the claimant ceased to be a public servant at any time after 14 August 1997 then she would not be entitled to be paid as a public servant.
5. It is axiomatic that an employment contract can terminate for a number of reasons including where it is a fixed term contract through effluxion of time; through resignation or dismissal; or where it is frustrated or was illegal in its formation; or has been declared void ab initio.
6. In the present case the claimant's appointment as a public servant was for a probationary period of 2 years (ie until December 1997) and its continuation was subject to determination by the Public Service Commission.
7. In this latter regard the evidence is entirely one sided in that the claimant's appointment was never confirmed after the probationary period, instead, by letter dated 10 June 1997 (before the expiration of the probationary period), the claimant was dismissed because her appointment was considered to be illegal in its formation. This effectively brought the claimant's appointment as a public servant to an end.
8. Claimant's counsel relies on a letter dated 2 November 1995 from the DG of Education to the Acting Director Public Service Department to the effect that:

"... budgetary provisions have been included in the 1995 Approved estimates for the Ministry of Education for Secondary Schools personnel per the attached list".

9. Unfortunately the annexed letter does not include any "*attached list*" of the Ministry of Education personnel or positions that the approved estimates was intended to cover and therefore it is unclear whether the claimant's position as Nurse at Lycée, was covered by the approved estimates. Even if it did, that is not the period complained about in the claim namely June/August 1997 to the present.
10. Since the claimant's "*reinstatement*" in August 1997 she has not been paid in accordance with her appointment letter of 12 December 1995 and after exhausting all avenues including a complaint to the Ombudsman and receiving the support of the then Acting Prime Minister, the claimant finally issued the present proceedings on 26 June 2012 (ie: 15 years after the events complained about).



11. In its defence the defendants maintain that the claimant's appointment in December 1995 was "to a post that does not exist within the Public Service structure and that such position was never budgeted for". Accordingly the claimant's appointment was unconstitutional and was properly revoked. Although the revocation was challenged in Civil Case No. 93 of 1997 and temporarily suspended, the case was ultimately dismissed, and, presumably with that dismissal, the earlier interim orders of the Court that temporarily reinstated the claimant were also brought to an end.
12. In the absence of a formal Deed of Settlement or any recorded terms of settlement in the Court's dismissal order, it is difficult for this court, now, to state with any certainty what the terms of settlement were between the parties to Civil Case No. 93 of 1997 in December 1998 and that is a matter which it was the claimant's duty to affirmatively establish.
13. Be that as it may, the Acting Secretary of the PSC, **Laurent Rep**, has deposed in his further sworn statement dated 14 August 2014:

"4. I understand that the settlement on the issue of employment between the claimant and defendants has been made in the Civil Case No. 93 of 1997 when it was dismissed. Further, I understand that the settlement was that the claimant should be and was appointed as a nurse at Lycée School as the position of a nurse is not within the Public Service Structure of Education and thus was not budgeted for".

(my underlining)

Later he deposed:

"5. I understand that the PSC did not revoke the letter of re-instatement of the claimant dated 14 August 1997 but the claimant's termination will be determined by the outcome of Civil Case No. 93 of 1997".

and noted that:

"8. The general structure of the Department of Education that was used in 1995 shows the position of a nurse is not within the organizational structure of Education ..."

and finally:

"9. However the position of a nurse is within the organizational structure of Lycée School within "Infirmary" ...";

14. This latter statement is corroborated and supported by **Goretti Lunabek** the Principal of Lycée who deposed:

"From August 1997 to the present the claimant is employed by the Lycée School Council and was paid by the school budget ... since August 1997 she was never appointed by PSC to any PSC established position."



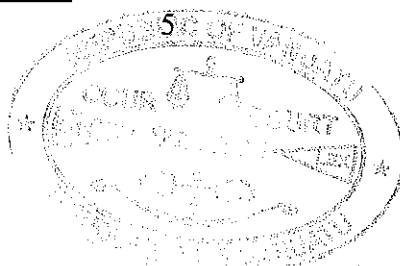
She also specifically deposed that:

"On 1995 the claimant made a request to the Public Service Commission ("PSC") to become a Public Servant and she was appointed on a permanent staff and thus was paid by the Government until June 1997".

15. In this latter regard **Waimini Perei** the then Director of the Public Service who was named first respondent in Civil Case No. 93 of 1997 and who was the author of the claimant's 10 June 1997 dismissal letter makes it very clear that as from the date of the letter the claimant ceased to be a civil servant and government would no longer employ the claimant in her nursing post nor would it pay her any salary in the event that the claimant continued to work in the position.
16. I accept at once that the interim orders in Civil Case No. 93 of 1997 had the immediate effect of temporarily suspending the claimant's dismissal "... *until further orders ...*" but that does not mean that the claimant continued in her position after the case was dismissed in December 1998. Nor does the interim order constitute a declaration that the claimant's dismissal or PSC's reason(s) for terminating the claimant's employment was either unlawful or unjustified.
17. In the present context the "*further order*" in Civil Case No. 93 of 1997 was an order dismissing the claim in its entirety and, with it, the temporary suspension of the claimant's dismissal came to an end without any definitive judicial pronouncement or resolution of the claimant's claims and complaints about the status of her continuing employment at Lycée.
18. In similar vein, the PSC's reinstatement letter which is heavily relied on in support of the claim is expressly made: "... *till the appeal case be heard in Court*". In other words, like the Supreme Court's interim orders the PSC's reinstatement letter was a temporary conditional measure which was also brought to an end by the settlement of the claim and the dismissal of the "*appeal case*" namely Civil Case no. 93 of 1997.
19. In my view there was no need for PSC to withdraw or revoke the claimant's reinstatement because it was always a temporary measure and always subject to the final outcome of Civil Case No. 93 of 1997 which, as already noted, produced no affirmative orders or declarations in the claimant's favour.
20. In light of the foregoing my very clear answer to the preliminary issue is:

"Yes, the claimant was in the continuous employment of the Public Service from 10 June 1997 until 7th December 1998 after which date the claimant ceased to be an employee of the Public Service".

21. The claimant is therefore entitled to be paid her full public service salary from 10 June 1997 until 7 December 1998 and it is so ordered, together with, interest of 5% per annum on the "*short-paid*" salary which counsels are directed to calculate and disclose in a Joint Memorandum for the consideration of the Court to be filed by 12




September 2014. However, her claim for exemplary damages and contempt are dismissed as misconceived and unproven.

22. Although the defendants have referred to the provisions of **Section 20** of the **Employment Act** the provision does not entirely exclude any claim for unpaid salary, but, in any event I do not consider the section applies to the above judgment which is merely a recognition and enforcement of the terms of the Courts interim orders of 16 July 1997 and the defendant's own letter of 14 August 1997.
23. The claimant having partially succeeded in the claim is awarded standard costs to be taxed if not agreed.

DATED at Port Vila, this 5th day of September, 2014.

BY THE COURT


D. V. FATIAKI
Judge.

