

IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

PLAINT NO. 56/99

BETWEEN JOSEPH KA

Plaintiff

AND CECELIA SHORT

Defendant

Mr Ka for Plaintiff ;

Mr Mitchell for Defendant

Date of hearing: 11 and 15 May 2001

Date of decision: 15 May 2001

DECISION OF GREIG, CJ

The Plaintiff by his statement of claim dated 10 September 1999 bring these proceedings against the Public Service Commissioner in her own personal name. This is illegitimate and I will say something more about that later.

Mr Ka claims that he was appointed to the Public Service on 16th January 1995 as a direct result of a Cabinet determination. He claims that he was employed to carry out electorate duties to the member of Parliament Dr Joseph Williams for the 5 years duration of his parliamentary term which was to expire and did expire in the general elections of June 1999.

Mr Ka alleges, as is accepted, that the salary payable to him was last paid on or about 10 January 1996 and no other payment was made thereafter. No formal notice of termination or dismissal was ever given to him. He alleges that he continued to carry out his duties and the salary that was then payable to him, he is owed \$78,525.44 together with \$9465.12 owing for annual leave entitlement. He claims those sums by way of judgment and interest therefor for the whole period. He also claimed some declarations and costs.

Mr Ka was appointed to the Public Service by a Cabinet determination in December 1994. The appointment was made by the Public Service Commissioner because he felt bound to accept the direction of Cabinet although under the Constitution he is entitled and bound to make decisions and make appointments on his own.

The Cabinet decision was made against the recommendation of the Reserve Management Committee and the Public Service Commissioner. The letter of appointment under the Public Service Commission is dated 30 January 1995. That confirms the appointment of the appellant on temporary staff as Special Assistant to the Minister of Tourism. The letter of appointment makes it clear that it is made pursuant to the Cabinet Minute and S11 of the Public Service Commission Act 1975. In the body of the letter of appointment there is this paragraph:

“3. As a public servant on temporary staff the provisions of the Public Service Act 1975 applies. It is advisable that you obtain a copy from the Clerk of the Parliament and familiarise yourself with its provisions.”

And the provisions of that Act provide that:

“11. Temporary Salaried Employees: The Commissioner may engage such temporary salaried employees as may from time to time be required and may dismiss any person so engaged with not less than one week’s notice, or, in the case of misconduct, without notice.”

I find therefore that Mr Ka’s appointment was not as he alleges for a term of 5 years but as temporary staff appointed on 1 week’s notice and as a Special Assistant to the Minister of Tourism and on the term that he was to forward to the Minister with a copy to the Public Service Commissioner a monthly report of his activities as that Special Assistant.

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His salary was stopped on 9 January 1996. There has been some doubt as to why and how that occurred but I have been given evidence today by Mr Edward Drollett who at the time had been seconded to Treasury to oversee the financial situation of the government. In accordance with government direction at that time Mr Drollett was to ensure that there were no phantom employees and I am not suggesting Mr Ka was such a phantom employee. But it was required that employees of the government should be proved to be such by time sheets endorsed by the Chief Executive Officer of the Ministry in which they were employed. There were no time sheets for Mr Ka in this special position. In the absence of this, his wages were stopped but no particular notice seems to have been given to him or anyone else of this. Mr Drollett said to me that Mr Teariki Jacob the Chief Executive Officer at the time of the Ministry of State Owned Enterprises would have known. That Ministry it appears was responsible for the payment of the appellant's salary debited to that department. Dr Williams at that time was the Minister of that Ministry. There is no formal notice or other action to terminate the employment requiring one weeks notice.

A number of people seem to have been aware from time to time of the situation and in particular of Mr Ka's complaints but nothing was done. It may well be that as was suggested to me in evidence that because this was a political appointment under government cabinet determination, no one was willing to take any particular action in the matter.

There is, I think however, clearly an implied termination of the employment. In some cases of course non payment of salary or wages is not in itself termination and the employee to claim payment by the issuing of proceedings in Court. There are a number of factors that seem to indicate to me that there was a termination and that it was accepted by Mr Ka. In his letter of 16th April 1996 in which is the first recorded complaint about the termination of his salary, he writes to Mr Teariki Jacob and says that a termination of salary is notice of dismissal. He also says in that letter however that the Minister was surprised that the Cabinet had dismissed him and said it had not. In the second letter of

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18th April 1997 which is headed "Unlawful termination of employment" Mr Ka in the course of that letter makes it clear, in my opinion, that he was and accepts that he was unlawfully dismissed. There are other letters which he has written on the same basis. Moreover he accepted in evidence that after the date his salary stopped he did not continue to submit a written report which indicated his acceptance of dismissal.

In my findings, he was dismissed and the point is to say what is the date. It must be the date in which he first realised that he was no longer employed. There is no particular date that can be calculated precisely but I will take the date as the 23rd January 1996 as the date he ought to have and I am satisfied realised his pay would have been terminated and his employment brought to an end. He is entitled to pay up until that date and because this was a dismissal without notice, he must be entitled to a week's notice.

He has brought these proceedings against the wrong defendant, Cecelia Short is not liable personally. The claim ought to be against the Attorney General. There is no point taken against him and the substance of the case should be resolved. Whether the claim was brought against the Attorney General or anyone else the result would be the same.

Mr Ka did not make any claim in his statement of claim other than the claim for reimbursement as damages and interest.

In submissions to me he has made claim for aggravated and punitive damages. Having regard to his employment there is no ground or basis for either of these and I do not allow them.

On the face of it then he is entitled to judgment for salary unpaid to 23 January 1996 and in addition, one week's salary in lieu of notice. I make no order on the claims for declarations.

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Mr Ka appears in person and is therefore not entitled to costs. As I understand it there may be some question about costs because of some transactions I have become aware of albeit without prejudice. I will reserve the question of costs and counsel may make submissions if they so require.



CHIEF JUSTICE