

# IN THE HIGH COURT OF KIRIBATI 2014

CIVIL CASE NO. 90 OF 2012

|         |                              |           |
|---------|------------------------------|-----------|
|         | [KARIANAKO KAMAUA            | PLAINTIFF |
|         | [                            |           |
| BETWEEN | [AND                         |           |
|         | [                            |           |
|         | [ATTORNEY GENERAL IRO PUBLIC |           |
|         | [SERVICE COMMISSION          | DEFENDANT |

Before: The Hon Chief Justice Sir John Muria

28 November 2013

*Mr Banuera Berina* for Plaintiff

*Mr Birimaka Tekanene* Solicitor General for Defendant

## JUDGMENT

**Muria CJ:** By a writ issued on 8 June 2012 the plaintiff claims damages against the defendant for wrongful dismissal. The damages claimed by the plaintiff comprises as follows:

1. Damages for pecuniary loss in the sum of \$23,595.43;
2. Compensation for loss of salary for 16 years that the plaintiff could still work in the sum of \$142,272.00;
3. General and aggravated damages in the sum of \$31,775.50;

4. Interest in the sum of \$753.22.

By an amended Defence filed on 8 August 2012, the defendant denies the plaintiff's claim.

**BRIEF BACKGROUND**

The plaintiff, before her dismissal, was employed as an Accounts Clerk by the Government of Kiribati.

In or about 22 October 2009, a report by the Internal Auditor from the Ministry of Finance, was made to the police following the loss of funds under her care in the Office of Te Beretitenti in Bairiki, Tarawa. Criminal investigation then followed in or about 11 November 2009.

Disciplinary actions were also taken against the plaintiff. Following the recommendation by the Public Service Commission, the plaintiff was dismissed in or about 13 September 2010 by Te Beretitenti.

The criminal investigation by the police was not completed until about March 2011. The plaintiff was, on 30 August 2011, charged with one count of embezzlement. The case later went to trial and the plaintiff was acquitted on 6 March 2012.

Against the above background, the plaintiff now claims that her dismissal was wrongful. She claims that her dismissal was taken based on the complaints that were the subject of a criminal proceedings which were not yet concluded. As such the defendant was acting in breach of Clause D. 30 of the *National Conditions of Service*.

The plaintiff also claimed that she should be reinstated following her acquittal on the criminal charge.

#### ISSUES

The main issue in this case is whether the defendant was in breach of Clause D.30 when the PSC advised Te Beretitenti to dismiss the plaintiff. Secondly, what compensation, if any, is due to the plaintiff in the event that her dismissal was found to be wrongful.

#### ARGUMENTS

In his submission before this Court, Mr Berina of Counsel for the plaintiff argued that it was wrong for the PSC to recommend to the President to take disciplinary action against the plaintiff by way of dismissal in this case. The reasons, suggested Counsel, are that, under Clause D.30 of the *National Conditions of Service*, no disciplinary action ought to be taken against the plaintiff since she was still under police investigation over the alleged shortage of revenue collected. Clause D.30 is concerned with procedure to be followed once an employee in the Public Service is made the subject of criminal proceedings.

On the question of reinstatement, Mr Berina argued that the plaintiff, upon being acquitted of the offence, she ought to be reinstated to her substantive post. Counsel relied on Clause D.31 which permits the Government to reinstate the plaintiff to her original post.

In the course of argument, Mr Berina referred to section 99 of the *Constitution*. That provision caters for the position that the powers to appoint and dismiss are vested in the President to be exercised in accordance with the advice from PSC.

On behalf of the defendant, the learned Solicitor General, Mr Tekanene, made written as well as oral submissions to the Court. In his submission, the learned Solicitor General argued that the PSC was not in breach of Clause D.30 of the *National Conditions of Service* in the present case. The disciplinary action taken against the plaintiff, argued Counsel, was done and concluded before the criminal proceedings were brought, against the plaintiff. No charge had been laid against the plaintiff when she was dismissed in September 2010. The charge was only brought against the plaintiff on 30 March 2011 and as such, the learned Solicitor General submitted, the defendant was not in breach of Clause D.30 when he dismissed the plaintiff in September 2010.

The learned Solicitor General also submitted that the PSC did not commit any breach of Clause D.31 when it did not reinstate the plaintiff. It was further contended that there was no basis of reinstating the plaintiff after she was acquitted of the criminal charge brought against her.

## CONSIDERATION AND DETERMINATION

The plaintiff's case as disclosed in her statement of claim is pivoted on her claim that the PSC was in breach of Clause D.30 of *National Conditions of Service* when it dealt with her disciplinary case and recommended her dismissal to the Beretitenti. It was not argued, nor was it suggested, that the Beretitenti did not have the power to appoint, remove and discipline those employed in public offices pursuant to section 99 of the *Constitution*. Thus the plaintiff's focus is on the actions of the PSC.

Clauses D.30 and D.31 of the *National Conditions of Service* are relied upon by the plaintiff in this case. I shall therefore set them out here. Clauses D.30 and D.31 provide as follows:

***"D.30. If criminal proceedings are instituted against an employee, no disciplinary action shall be taken against the employee on any grounds connected with the criminal charge until the conclusion of the criminal proceedings and judgment on any appeal has been given. But the employee may be suspended in accordance with National Conditions D.32 and D.33".***

***"D.31 An employee acquitted of a criminal charge shall not be punished on any charge on which he has been acquitted, and shall be reinstated to his substantive post. All employment benefits that he has forfeited as a result of the criminal charge, shall be fully recovered".***

On the plain reading of Clause D.30 it is clear that it applies when '*criminal proceedings*' are instituted against an employee. Until a Government employee is charged and criminal proceedings are brought against him, a complaint made against him is simply a complaint and he is subjected to investigation either by the police (if the complaint is brought to their attention) or disciplinary authority in the Government's machinery.

In the present case, the complaint over the shortage of revenue was first made to the Internal Auditor's Office following which the matter was referred to the Public Service Commission. Disciplinary charges were preferred against the plaintiff. The charges included the failure of the plaintiff to comply with financial procedures of making regular deposits at the Bank, failure to keep and maintain books of account, and failure to comply with Financial Regulations on handling public funds. She was given the opportunity to give her side of the story to the Commission. After considering the disciplinary charges and considering the materials before it, the Commission decided that the plaintiff should be dismissed and to advise the Beretitenti accordingly. On 13 September 2010, the Beretitenti dismissed the plaintiff.

Up until 13 September 2010, no criminal proceedings were instituted against the plaintiff yet. As such the Public Service Commission was not bound to observe Clause D.30 and so its actions in dealing with the disciplinary charges against the plaintiff and recommending her dismissal to the Beretitenti were perfectly lawful and proper.

The claim that the Public Service Commission had breached Clause D.30 of the *National Conditions of Service* in this case clearly cannot succeed. That being the case, the dismissal of the plaintiff by the Beretitenti on the recommendation of the Public Service Commission is lawful and proper.

Should the plaintiff be re-instated after her acquittal on the criminal charge?

The plaintiff's case is that she should be reinstated following her acquittal. The plaintiff was dismissed on 13 September 2010. The criminal proceedings against her was brought in August 2011 and was acquitted in March 2012.

There are two points that need to be noted in answering the plaintiff's claim for reinstatement. First, had the criminal proceedings been instituted against her before or at the time her disciplinary case went before the Public Service Commission, Clause D.30 would have applied. She would have still been employed but possibly on suspension pending the outcome of the charge brought against her in the criminal proceedings before the Court. Unfortunately that is not the case. The plaintiff had long been dealt with by the Public Service Commission under its disciplinary powers and had been dismissed from office by the Beretitenti. So Clause D.31 would not apply to her.

Secondly, the plaintiff had long ceased to be "*an employee*" of the Government at the time of her acquittal of the criminal charge brought against her. Clause D.31 only applies to "*an employee*" acquitted of a

criminal charge. She could not have been "*an employee*" of the Government on 6 March 2012 and so cannot invoke the assistance of Clause D.31 of the *National Conditions of Service*.

Thirdly, it was entirely in the discretion of the Public Service Commission to recommend to the Beretitenti to re-employ the plaintiff who had been earlier dismissed from the public service. In any case, and in her circumstances, the plaintiff cannot rely on Clause D.31 to claim any right of reinstatement to her old job in the public service.

The claim for wrongful dismissal fails and it is dismissed with costs to be taxed if not agreed.

Dated the 24<sup>th</sup> day of April 2014



**SIR JOHN MURIA**  
Chief Justice