

SUPREME COURT OF NAURU

CIVIL ACTION NO:2 OF 1982

GRAHAM HUGH RUTHERFORD

v.

SECRETARY FOR JUSTICE

JUDGMENT

The facts of this case are agreed. Sometime in 1980 the plaintiff read an advertisement in a newspaper in New Zealand. According to the advertisement the Republic of Nauru had a number of vacancies in its public service and invited persons interested in being appointed to any of them to apply to the Consul-General for Nauru in Auckland. Two of the posts referred to in the advertisement were Instructor at the Trade School in Nauru and Chief Instructor at the same school. The plaintiff sent an application to the Consul-General. He was interviewed by the Consul-General. In October, 1980, he received a telegram offering him appointment as Instructor. He did not accept it immediately because he was awaiting a letter from the Consul-General confirming information which the Consul-General had given him orally at the interview. Inter alia that information related to an entitlement to an allowance of \$725/- payable to the plaintiff if he was appointed and his son remained at school in New Zealand. When no letter had arrived by 3rd November, 1980, the plaintiff wrote to the Consul-General suggesting that a letter from the Consul-General might have gone astray and asking him to answer certain questions; one of them related to the allowance.

On 6th November, 1980, the Acting Chief Secretary decided to offer the plaintiff appointment to the post of Chief Instructor; accordingly he signed a letter addressed to the plaintiff. It contained a formal offer of appointment, was called a Letter of Appointment and had annexed to it a schedule headed "Conditions of Service". The offer was expressed in the letter to be subject to the terms set out in the Schedule. However, it offered appointment simply to "the Public Service of Nauru", not to the post of Chief Instructor. The Acting Chief Secretary sent that letter, with its schedule, to the Consul-General and instructed him to send it to the plaintiff as an offer of appointment to the post of Chief Instructor.

On 13th November, 1980, the Consul-General sent the Acting Chief Secretary's letter, with its schedule, to the plaintiff. He sent with it a letter which did not expressly refer to the Acting Chief Secretary's letter but, after referring to the offer previously sent by telegram, continued "I have now been asked to offer you the post of Chief Instructor". It went on to deal with matters such as medical examination, travel arrangements and the like and concluded with the following sentence: "Should you have any further queries or wish to obtain more information please do not hesitate to ring me."

That letter and the Acting Chief Secretary's letter, with its schedule, were accompanied in the same envelope by another letter addressed to the plaintiff and signed by the Consul-General. In that letter he first answered the questions asked by the plaintiff in his letter of 3rd November. In respect of the allowance, he stated: "An allowance of \$725/- p.a. is payable in the event of your leaving your 17 year old son at school in New Zealand." After answering the questions, the letter concludes "I enclose two copies of your contract and would be grateful if you would sign the original and return it to me in due course, together with other papers listed in my separate letter" (i.e. the visa application, medical examination report forms, etc.).

The forms set out in the schedule headed "Conditions of Service" did not include any relating to the allowance about which the plaintiff had asked. However, having expressly asked for the information about it to be given to him in writing and as it was given in a letter which accompanied the formal offer of appointment, the plaintiff regarded it as a term of the contract and accepted the offer in that belief. Unfortunately the Consul-General had no actual authority to give the plaintiff the information about the allowance. The Republic does not regard it as a term of the contract and has refused to pay \$725/- to the plaintiff.

It is lamentable that the plaintiff, who acted most reasonably in making the inquiry and in enquiring that the information be given to him in writing and who undoubtedly acted in perfect good faith, should have been

obliged to bring these proceedings and that, in the circumstances, the Republic should insist on standing on what it believes to be its strict legal rights. But, as it has done so, it is necessary for this Court to decide whether or not it is correct as to those legalities. Whatever this Court may feel about the moral issues involved, the matter must be decided on the law.

The first legal issue raised by the defendant is whether the statement made by the Consul-General regarding the allowance was a part of the offer made to the plaintiff or a mere representation. There is no doubt that, although couched in terms of the allowance being payable (*prima facie* a statement of fact), it was intended in the circumstances to be a promise as to what would in the future be paid to the plaintiff. It was, therefore, by its nature appropriate to be included as a term of the contract. The plaintiff was obviously interested in it on that basis. Although not included in the schedule of conditions of service, the statement was in a letter accompanying the Acting Chief Secretary's letter. The Acting Chief Secretary's letter, on its face, did not contain all the terms of the contract; in particular, it did not state the post for which the plaintiff was being offered appointment. The plaintiff had to look to one of the two letters of the Consul-General for amplification of the terms of the offer in that regard. That being so, it was, in my view, reasonable for him to believe that other amplification of those terms might be included in those letters and to regard the statement relating to the allowance as such amplification. Possibly the Consul-General did not intend it to be so regarded; but the test for ascertaining the intention of parties when entering into a contract is not subjective but objective. The Court must decide what a reasonable person looking on would have considered their intentions to be (See e.g. Smith v Hughes (1871) L.R.6 Q.B.597.) I have no doubt such a person would have considered that the parties intended the promise to pay the allowance to be a term of the contract.

The other legal issue raised by the defendant is that the addition by the Consul-General of the term

relating to the allowance to the Acting Chief Secretary's offer was incapable of resulting in that term being incorporated in the contract because only the Chief Secretary had power to make the offer and to state the terms of employment. He relied on Article 68(1) of the Constitution, which vests in the Chief Secretary the power to appoint persons to the public service of Nauru. He submitted, correctly in my view, that the power cannot be delegated. He admitted that the Chief Secretary would employ an agent in making appointments but submitted that the agency should be limited to acting as a channel of communication between the Chief Secretary and persons being appointed to the public service. He accepted that a person dealing with such an agent would not be aware whether a communication received by him in respect of an appointment was authorised by the Chief Secretary or not. Although the defendant did not concede the point, there can be no doubt that the Acting Chief Secretary had held out the Consul-General to be his agent in the broadest of terms. The advertisement in the newspaper asked for applications to be sent to the Consul-General. The Consul-General conducted the interview. The result was an offer, albeit incomplete, signed by the Acting Chief Secretary. Any reasonable person in the plaintiff's position would have regarded the Consul-General as the Acting Chief Secretary's agent with wide powers, including the power to state terms of the offer of appointment. So, unless the defendant succeeds on the constitutional point, the plaintiff must succeed with his claim.

The defendant has submitted that the power to appoint to the public service vested in the Chief Secretary by Article 68(1) ~~which~~ includes a power, exclusive to himself, to fix the terms and conditions of the employment in the posts to which appointment is made. If that is so, all the provisions of the Public Service Act 1961-1971 relating to salaries, allowances, leave and even tenure of office must be void. If by virtue of Article 68(1), the Chief Secretary has the exclusive power to fix the terms and conditions of employment in the public service, Parliament has no power to legislate for those matters. There is, in my view, no good reason for construing Article 68(1) so that it has that

effect. It is most desirable that Parliament should have that power. Article 27 of the Constitution empowers Parliament to make laws for the peace, order and good government of Nauru. That clearly is broad enough to encompass laws relating to the public service. Certainly the power is given "subject to this Constitution"; Parliament cannot legislate so as to take away or interfere with a power conferred by the Constitution. But the power to fix terms and conditions of employment in the public service is not expressly vested in the Chief Secretary. There is no good reason why he should not appoint on terms and conditions prescribed by Act of Parliament. I am satisfied, therefore, that the expression "appoint" in Article 68(1)(a) must be given its normal meaning and not the extended meaning for which Mr. Lang argued.

The fact that no law has been made yet by Parliament to fix the terms and conditions of employment of persons appointed to the public service otherwise than as permanent officers or temporary employees cannot alter the effect of Article 68(1). Nor is it necessary for me to explore the question where the power to fix those terms and conditions now lies. All that is relevant to these proceedings is that they are not vested exclusively in the Chief Secretary; nor, to the extent that he may possess them, is there any provision of the Constitution making them non-delegable. Consequently the defendant's argument that the Republic is not bound by the unauthorised act of the Acting Chief Secretary's agent because it was ultra vires the Constitution must fail. The Consul-General had ostensible authority to include the term in the offer to the plaintiff and the plaintiff entered into the contract on that basis. It is not disputed that the plaintiff has not been paid the allowance to which the term relates. He is, therefore, entitled to succeed on his claim.

Before I conclude this judgment, it is pertinent to comment that the risk of such unauthorised conduct by agents of the Chief Secretary as apparently occurred in this case ^{would be} obviated if the terms and conditions of

