Matatumua Maimoaga v. Lisi Vaai and Others

Supreme Court
Ryan J.
7 September 1988

Practice and procedure—res judicata—*whether a party may adduce a new defence as an excuse to non-compliance with prior judgment.*
Practice and procedure—estoppel—whether defendant may raise a new defence not raised at substantive trial three years before.
Damages—exemplary damages—refusal by defendant to carry out reinstatement of plaintiff—whether defendants' redesignation of position is defence.
Employment—wrongful dismissal—order for reinstatement—defendant's reorganization of public service division—old position redesignated by defendants—whether new position genuinely different or change of title only.

The plaintiff had been dismissed from her position as Superintendent, Division of Nursing, in the Department of Health on 16 October 1978. On 26 January 1981, the plaintiff was granted leave without pay from public service; the plaintiff entered Parliament on 13 April 1982 and remained a Member of Parliament until 31 December 1984. Following an action in the Supreme Court, Mahon J. ordered on 18 July 1985 that her purported dismissal be set aside. Mahon J. declared, further, that the plaintiff had not been validly removed from the post of Superintendent of Nursing. The Electoral Act 1963, section 9 provides that any public servant who is elected to Parliament shall be deemed to have vacated his or her office as a public servant. The defence, in the 1985 action, made no mention of the plaintiff's parliamentary service. In the period following the plaintiff's success in 1985, the first defendant purported to reorganize the Division of Nursing by abolishing the post of Superintendent. A new position, the Director of Nursing, was created and Ms Stowers, the second defendant in the present action, was appointed to that position.

The present action was brought to seek enforcement of the judgment of 1985, including an order quashing the appointment of the second defendant, and an order of mandamus for the reinstatement of the plaintiff.

HELD:

(1) The *res* in the present case was clearly adjudged in the 1985 judgment by Mahon J.

(2) The defendants are now estopped from adopting any new line of legal argument which they could have made in 1985, and the principle of *res judicata* now applies: *Hoystead* v. *Commissioner of Inland Revenue* [1926] A.C. 155 applied.

(3) Mandamus is a discretionary remedy, and although a case for mandamus is clearly present, in all the circumstances, including the age of the plaintiff, the successful performance of the job by the second defendant, and the lapse of time, an award of damages is more appropriate. The plaintiff is awarded

$22,150 for loss of salary, $100,000 for general and exemplary damages, and $5000 costs plus disbursements.

Other cases referred to in judgment:
Henderson v. *Henderson* (1843) 3 Hare 100; 67 E.R. 313
Hoystead v. *Commissioner of Inland Revenue* [1926] A.C. 155
Re Barlow (1861) 30 L.J.Q.B. 271
Vermeulen v. *Attorney-General and Others* 2 May 1985, Supreme Court, Western Samoa, Mahon J.

Legislation referred to in judgment:
Electoral Act 1963, section 9
Nursing Act
Nursing Amendment Act 1981
Public Service Act 1977, section 59
Samoa Amendment Act 1949 (New Zealand), sections 27–28

Other sources referred to in judgment:
Constitution of Independent State of Western Samoa

Counsel:
Dr. G. Barton and *Mrs. R. Drake* for the plaintiff
Mr. T. Grace and *Mr. C. Peterson* for the defendants

RYAN J.

Judgment:
On 18 July 1985 Mahon J., in proceedings between the plaintiff and the first defendant herein, and others, gave a decision which, *inter alia* , provided as follows:

(2) There will be an order setting aside the action of the Public Service Commission in dismissing the plaintiff from her position on 16 October 1978 and purporting to transfer her to another post.

(3) There will be a declaration that the plaintiff has not been validly removed from the post as Superintendent, Division of Nursing, and that she is entitled to receive by way of loss of salary a sum which can only be an estimate having regard to the uncertainties inherent in the (a) (b) and (c) calculations, and I calculate the amount of that loss of salary at 20,000 tala.

Paragraph 4 of the judgment as to the entry of judgment for 20,000 tala loss of salary and 25,000 tala general damages has been given affect to, though the plaintiff has what can only be described as reservations at this stage, although couched in stronger terms in her statement of claim, as to the mode of payment of her loss of salary. She says, however, that, in respect of the order and declaration contained in paragraphs 2 and 3 above, there has been a failure on the part of the first defendants to carry out the decision of the Court.

The second defendant [Pelenatete Stowers, Director of Nursing], represented by the same counsel who represents the first defendant, has adopted the admissions and denials of the first defendants so that her stance is precisely the same as that of the first defendants. She is to a very large extent the meat in the sandwich of the dispute

between the plaintiff and the first defendants—a largely innocent bystander in a much larger power play, but one whose future is very much tied up in the outcome of this hearing.

The factual situation at this stage is not in dispute to any significant extent and indeed, given the admissions made by the defendants, it was not necessary for the plaintiff to adduce evidence. I have found it helpful, however, to look at the facts as determined by Mahon J. in his decision and for the sake of completeness I reiterate various pertinent passages. [Lines 92–326 are reproduced from the judgment of Mahon J.]

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The Plaintiff on 1 January 1969 was appointed superintendent of the Division of Nursing in the Health Department of Western Samoa. She had gone to secondary school for 4 years in New Zealand and she had received her nursing education in New Zealand between 1955 and 1961, and in 1967 she had obtained her diploma in Nursing Services Administration from the School of Advanced Nursing Studies in Wellington, New Zealand.

During the course of her tenure as superintendent, the Plaintiff had travelled overseas twice under the sponsorship of the Government, and on several occasions financed by grants other than Government grants, when she had presented papers in places such as Sydney, Switzerland, and Nairobi. As part of her duties as superintendent of the Division of Nursing, the Plaintiff had other posts which need not be particularised here but, by way of example, she was a member of the Leper Trust Board and a member of the Health Advisory Committee to the Minister of Health.

The Plaintiff is a registered matai and at the time of this hearing she was a Member of Parliament for Western Samoa.

It was clear from the evidence in the case that, prior to the appointment of the Plaintiff as superintendent of the Division of Nursing and during her tenure, there had been continuing difficulties in the establishment and in the maintenance of a satisfactory nursing service for the country. It is not necessary at this stage to go into these difficulties, but they centred to a large extent on points such as adequacy of training, settlement of career structures within the Nursing Division, salary adjustments and the like. It had evidently been thought by the Public Service Commission, who had appointed the Plaintiff to her position on 1 January 1969, that she was the only realistic candidate for that position. The Commission had advertised the post and there had been four applicants including the Plaintiff, and the Commission had set up a special interviewing panel which included the Director of Health, the Medical Superintendent, the Chief of the Public Health Department, and the Managing Secretary of the Health Department. In addition, the panel included a representative from the Public Service Commission. This interviewing panel recommended the appointment of the Plaintiff and the Public Service Commission had appointed the Plaintiff.

It seems clear from the evidence and from the documents in the case that the Plaintiff was active in planning the future developments of the Nursing Division during the opening years of her term in office, but it is also clear that the implementation of any type of planning was not an easy task. The main difficulty appears to have arisen from the various activities of the Registered Nurses' Association. The Association always had various complaints and the Plaintiff

resolved those complaints as they occurred, but there seemed to be, so far as I can see from the documents, a lack of coherent and organised expression of opinion on the part of the Association except in one or two particular cases, with the result that the resolution of one particular problem by the Plaintiff almost always appeared to cause dissatisfaction with some faction within the Nurses' Association. Then, as time went on, and when the Plaintiff had been in office for around four or five years, a situation appeared to be developing within the Nurses' Association whereby one or two ring-leaders were adopting hostile attitudes towards the Plaintiff and, for reasons which will be examined a little later, the Plaintiff had reason to believe that some of the attitudes towards her on the part of the Association were at a later time politically inspired.

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Then, at the beginning of 1976, an event occurred which was to have a considerable effect upon the career of the Plaintiff and this was the return of a new Government in the Western Samoa elections. There is no doubt on the evidence that the Prime Minister of the new Government and the Minister of Health and other Cabinet members almost immediately displayed a hostile attitude towards the Plaintiff. There was a reason for this. She is the holder of a matai title, and, as was obvious from her bearing and demeanour in the witness-box, a lady of considerable strength of character. But the point that mattered was that she was the sister-in-law of a previous Prime Minister who had been a strong political opponent of the Prime Minister and his colleagues who were elected to office in February 1976, and it was the evidence of the Plaintiff in this case that as from that time there was brought into operation and sustained against her a steady process of departmental warfare designed to drive her from office. I will come to particulars to these allegations later, but the Plaintiff has alleged in these proceedings that the Prime Minister and the Cabinet, together with the Minister of Health and Dr Tapeni, the Acting Director of Health, were all guilty of maintaining this steady campaign aimed at dismissing her from her position and that in their various ways they took certain steps to achieve this result and even went so far as to put pressure on the Public Service Commission to bring about her dismissal.

In the judgment *Vermeulen* v. *Attorney-General* I have given an account of the Commission of Inquiry which was set up to report to the Head of State in relation to the Health Services of the Western Samoan Government, and I recounted in that judgment the basic recommendations of the Commission, which, simply stated, were that both the Plaintiff and Dr. Vermeulen (to whom she was then engaged to be married) should be each dismissed from their positions in the Health Department.

In these proceedings the Plaintiff makes the same type of claim against the Government and against the other defendants as was made by Dr. Vermeulen in his case. She contends that Cabinet, the Minister of Health, Dr. Tapeni (the Fourth Defendant), and the Public Service Commission, all acted irregularly and illegally which had the result of the Plaintiff being dismissed from office. In the case of the First, Second, Third and Fourth Defendants, it is contended that they acted in abuse of their statutory powers and consequently committed the tort of abuse of public office, and in the case of the Second Defendants, it is contended that, as members of the Public Service Commission, they acted in breach of the constitutional requirement of independence on their part in bringing about the

dismissal of the Plaintiff, and that in addition, they dismissed the Plaintiff from her post as a disciplinary measure without the required procedures of preferring charges against the Plaintiff under the Public Service Act 1977, so that the Plaintiff was punished by dismissal in clear breach of the law.

I will draw attention to the evidence of the Plaintiff in respect of her standing with regard to the Prime Minister, the Minister of Health, and the Acting Director of Health. I can summarise what she had to say as follows.

The Plaintiff was aware at all times that she was not politically acceptable to the Honourable Tupuola Efi after he became Prime Minister in February 1976. This was purely a political situation and the Plaintiff had no option but to accept it. She discussed with the Prime Minister her post within the Health Department, making it clear that in her view there could be no reason why she should not continue to do her best for the people of the country in respect of the Nursing Services of the Health Department.

The evidence of the Plaintiff with regard to the Minister of Health was along approximately the same lines, except that there were instances which revealed, in her opinion, outspoken hostility towards her on the part of the Minister, as opposed to the attitude of the Prime Minister which had uniformly been courteous and noncommittal. In respect of Dr. Tapeni, the Acting Director of Health, the Plaintiff's evidence records various instances of conduct on his part which in her opinion could only be ascribed to malice in the personal sense exerted by him against her.

Therefore, in summary, the evidence of the Plaintiff was that she was the object of hostility, whether overt or concealed, on the part of the Prime Minister, the Minister of Health, and Dr. Tapeni, and that in their different ways they did whatever they could to make her job difficult and to put together a plan which would have the result of dismissing her from office. The plan adopted, according to the case for the Plaintiff, was to use a Commission of Inquiry in which the Health Service would bring about her down-fall from the position of Superintendent of the Nursing Division. I go on to discuss the position of the Plaintiff with regard to the Commission of Inquiry at a later stage in the judgment.

Now I must turn to an equally significant piece of evidence which relates to various comments made from time to time to the Plaintiff by the Chairman of the Public Services Commission, Mr. Muller. The Plaintiff said in evidence that in July 1976 when the new Government had been in power only for about six months, Mr. Muller told her that he was under political pressure to get rid of her. He said that the pressure was being exerted by the Prime Minister himself. In August 1976 Dr. McKendrick (who had been recruited from New Zealand as a contract officer) resigned as District Officer of Health. He had been impressed with the Plaintiff and with the way in which she did her work and he evidently resigned after serving only one year of his two-year term because of difficulties he encountered with the new Government and in connection with this event it was the evidence of the Plaintiff that all divisional heads were upset when Dr. McKendrick resigned. As from that time, Dr. Tapeni, the Fourth Defendant, became Acting Director of Health, and the case for the Plaintiff was that for political reasons he was kept in that position notwithstanding his lack of suitable qualification. When Dr. McKendrick's resignation became known, the Plaintiff said that she was told by Mr. Muller "Heads will roll if anyone tries to play

politics" and he suggested to the Plaintiff that she resign her position. The Plaintiff said that Mr. Muller told her at the same time (August 1976) that if she did not resign, then there would be a Commission of Inquiry into the Health Department, and the clear implication from all this was that the Commission of Inquiry would be urged to bring about the dismissal of the Plaintiff.

Therefore, taking this evidence as it stands, the Plaintiff had early warning that she was politically not acceptable to the new Government as Superintendent of Nursing for Western Samoa, and that every effort was to be made to procure her dismissal from that post. It is necessary to stress in this regard that the very considerable importance of the discussions between the Plaintiff and Mr. Muller.

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My overall findings in regard to the case are that the Cabinet itself, and consequently the Government, was intent from the outset at procuring the dismissal of the Plaintiff as Superintendent of Nursing, and sought the establishment of the Commission of Inquiry as a means to that end. It was believed that the Registered Nurses' Association would be the appropriate vehicle from which to mount a wholesale attack upon the Plaintiff and I accept the evidence of the Plaintiff that the nurses were persuaded and influenced into making derogatory remarks about the Plaintiff. This was where the Lythgoe report became so important. Mrs Lythgoe had been directed to furnish a report in relation to the Association, and if the report from this independent expert was adverse to the Plaintiff, then it would go a long way to advance the plan of the Government to getting the Plaintiff dismissed from her post. But Mrs Lythgoe examined the attitudes of the Association and their complaints against the Plaintiff and found that the complaints could not be substantiated. Mrs Lythgoe formed the opinion that the interests of the nursing administration had in fact been frustrated by the acts of the Association in making the complaints against the Plaintiff, in particular the complaint that the Plaintiff did not co-operate with the Association. Mrs Lythgoe found that this allegation was quite unsupported in any evidence. I am dealing with the Lythgoe report at some length because Dr. Barton, quite rightly in my opinion, placed great emphasis upon the non-disclosure by the Health Department of this document when the Commission of Inquiry was sitting.

On the evidence, there can be no doubt that this report was in the possession of the Government before the Commission of Inquiry began its hearings. And its production by the Government to counsel assisting the Commission would have effectively destroyed the attack which the Nurses' Association was making against the Plaintiff, it being remembered that the Association was being relied upon as the primary means of bringing about the findings adverse to the Plaintiff.

Once the findings of the Commission of Inquiry had been made, they were used as the basis of the act of the Public Service Commission in dismissing the Plaintiff.

The appointment of the Plaintiff as Principal of a proposed Post-Graduate School of Nursing in reality meant nothing because the nature and function of such [a] school was not described. The Public Service Commission then dismissed the Plaintiff from her position on 16 October 1978 and in relation to her transfer to the proposed new appointment, the Public Service Commission at no time published any notification in the Public Service official circular of the creation of the post of Principal of the Post-Graduate School of Nursing, and never specified

the nature and function of that school. Shorn of all its formalities, the decision of the Public Service Commission amounted to a simple dismissal of the Plaintiff from the post of Superintendent of Nursing:

(a) without properly exercising its discretion under s 27 of the Samoa Amendment Act 1949;

(b) without holding its own inquiry into her conduct and thereby depriving her of her rights of appeal as set out in s 28 of the Samoa Amendment Act 1949; and

(c) exercising disciplinary action against the Plaintiff without giving her any hearing at all.

These steps taken against the Plaintiff by the Public Service Commission, were all taken, in my opinion, with the knowledge and concurrence of the Prime Minister and Cabinet, having regard to contents of the Officials' report to the Prime Minister and Cabinet dated 30 June 1978, it being quite clear that after consideration by the Prime Minister and by Cabinet, the Public Service Commission proceeded to apply the recommendation to dismiss the Plaintiff, and it would be foolish to assume that the Public Service Commission did not follow the direction of the Government in that regard.

As a result of all this, I find that the Plaintiff has proved an abuse by the Prime Minister and members of his Cabinet of their official powers in respect of their conduct towards the Plaintiff before, during, and after the Commission of Inquiry. I am satisfied, as indicated already, that Cabinet encouraged and concurred with every aspect of the conduct of the Minister of Health and the Assistant Director of Health in relation to the monitoring of the material placed before the Commission of Inquiry, which had the effect of removing from the eye of the Commission these three independent reports from overseas experts which, together, must have nullified any attack on the Plaintiff, and I am entitled to place weight upon the evidence of the Plaintiff as to her conversations with Mr. Muller in 1976 and in 1977, in relation to his suggestion that she consider resigning from her position as Superintendent because she was under great political pressure, or going on long leave, and his further statement that there might be a Commission of Inquiry which could result in the Plaintiff's dismissal from the Service. As I have said already, the Plaintiff resisted these overtures. I draw attention to the fact that these opinions expressed by Mr. Muller (who was a member of the Committee of Officials who reported to Cabinet on the Commission of Inquiry report) were substantially set out by the Plaintiff as part of Document "J" which was tendered to the Commission of Inquiry.

I am therefore satisfied that the case for the Plaintiff has been made out in these proceedings and that the actions referred to taken by the Cabinet and by the Second, Third, and Fourth Defendants represented an abuse of public office and an infringement of the Plaintiff's rights under the Constitution, and also under the Samoa Amendment Act 1949.

The Plaintiff is entitled to damages under two headings. In the first place, there is her loss of earnings from the time when she was dismissed as Superintendent of Nursing, and in the second place, she is entitled to damages for the distress and injury to her health which followed her dismissal and, as in the case of Dr. Vermuelen, I think this is clearly a situation in which an award of exemplary damages must be made so as to mark the Court's disapproval of the flagrant

disregard for the Plaintiff's constitutional and other legal rights by the Government and by the Public Service Commission in the steps which they took aimed at procuring the Plaintiff's dismissal from her position.

That then sets the scene for the present proceedings. The plaintiff says that the first defendant has ignored the findings and consequential orders made by Mahon J. in paragraphs 2 and 3 of his decision at page 22 and that the present action is one to enforce that judgment and in addition to compensate the plaintiff for the distress and loss caused to her in the three years since the decision, for that failure to abide by the decision of the Court. She claims in her prayer the following relief:

1. for an order quashing or setting aside the purported appointment of Pelenatete Stowers as described in paragraph 14 hereof to the position of Director of Nursing;
2. for the issue of a writ of mandamus directed to the Public Service Commission requiring the Commission to reinstate the Plaintiff to the position of Superintendent, Division of Nursing;
3. for damages against the Public Service Commission:
   (i) for loss of opportunity to earn salary as pleaded in paragraph 13.1 hereof amounting to 22,150 tala;
   (ii) for general damages (including exemplary) damages amounting to 150,000 tala;
4. for the costs of and incidental to this action; and
5. for such further or other relief as may be just.

On 27 November 1985 the first defendant wrote to the plaintiff in the following terms:

1. The relevant judgment of the Supreme Court, in particular parts (i), (ii) and (iii), are noted although by way of comments, the Commission disagrees with the reference to the dismissal of Ms Matatumua Maimoaga . . . as this was not the case.
2. The Commission quite agrees that the decision of the Court is clear. As well, it appreciates that its practical effect was to reinstate Ms Matatumua Maimoaga to the position of Superintendent, Division of Nursing.
3. In point of fact, however, Ms Matatumua Maimoaga forfeited Office and her services in the Public Service Commission terminated upon her election as a Member of Parliament in early 1982 and, for that matter, your attention is respectfully drawn to the provisions in Section 9 of the Electoral Act 1963.
4. Consequently, the considered view of Commission is that it is not now under any obligation to consider re-employment in the Public Service of Ms Matatumua Maimoaga, or for that matter as Superintendent, Division of Nursing.

It should be noted that section 9 of the Electoral Act 1963 was not pleaded as a defence in the earlier action. It has been so pleaded in this action.

The plaintiff had on 26 January 1981, prior to the determination of the first action, been granted leave without pay from the public service. Notwithstanding that decision of the first defendant, the list of employees in the public service, a statutory obligation cast on the first defendant by section 59 of the Public Service Act 1977, did

not, for the first day of January 1982 and 1983 include the plaintiff. Other members of the public service who were on leave without pay were so included, but for some inexplicable reason the plaintiff was not.

The Plaintiff was a Member of Parliament from 13 April 1982 until 31 December 1984. The fact was known to all parties when the first hearing took place and is referred to in the judgment at page 1.

The defendants adduced evidence by way of interrogation of the plaintiff, affidavit, and orally. That evidence was of little assistance to either defendants' case and was apparently thought necessary because of the castigation of the first defendant and the other defendants at the first trial, by the trial judge, for the failure to give evidence at that hearing. As I have said it was of little assistance to the defendant; for example, the current chairman of the Public Service Commission sought to point out that the current Director of Nursing is a creature with quite different responsibilities from the former Superintendent of Nursing, the post of Superintendent of Nursing having been abolished by the Nursing Amendment Act 1981 and replaced by the post of Director of Nursing. That evidence was exposed under cross-examination as amounting to a distinction without a difference insofar as any suggested change of duties was concerned. The change of title was little more than an attempt by Parliament to make the path of removal of the plaintiff easier, at least superficially, but failed to recognize the resolution of the plaintiff in hanging onto what she considered her just entitlement. It really was typical of the sort of conduct referred to by Mahon J. at page 21 of his decision when he deals with the question of malice towards the plaintiff. Other nomenclature in the Act was also changed, but all that the Act really changed in substance was the need for registration of nurses. That change was not expressed to be retrospective and could not possibly interfere with the status of the plaintiff and Superintendent/Director if she still held that position, which according to Mahon J. she did.

There is no need in any event for the Superintendent/Director of Nursing in my view to be registered. The person who holds that position does not hold it as a nurse in any sense of the word carrying out the "duties of a nurse". The incumbent will be presumably have some nursing background but is primarily an administrator employed by the Health Department not a "hospital or other institution". Accordingly the fanciful interpretation which the defendants asked the Court to give to the word "nurse" is rejected as is the defence based on section 26 of the Nursing Act.

The defendant also proffered by way of defence the view that the plaintiff should have applied for the position of Director of Nursing when it was advertised after the 1981 amendment. She did not do so, that is common ground, as had her husband Dr. Vermullen for the position of Director of Health. The fact which that application met was clearly a pointer to the fate of any application made by the plaintiff given the political animosity towards her and Dr. Vermullen. He himself had applied for mandamus in respect of his position but Eichelbaum J. had refused such an order on the basis that a minute made by the Public Service Commission did not satisfy the requirements of the Public Service Act. Dr. Barton submits on behalf of the plaintiff that her position is different. I agree. She was the incumbent of the position and had been so for some time and there had been no substantive change in the position of the Director of Nursing *vis-à-vis* the Superintendent of Nursing—a name change yes, a substantive change no.

The principal defence mounted by the defendants in the action is foreshadowed by the letter on 27 November 1985. It involves the provisions of section 9 of the Electoral Act 1963 and article 83 of the Constitution.

They provide as follows:

9 Members disqualified from being public servants—If any public servant is elected as a Member of Parliament he shall, forthwith upon the date on which he is declared so elected, be deemed to have vacated his office as a public servant.

Article 83 Interpretation—The "Public Service" means the services of Western Samoa; but does not include service remunerated by way of fees or commission only, honorary service, or service in any of the following capacities, namely as—

(a) Head of State; or
(b) A member of the Council of Deputies; or
(c) Prime Minister or a Minister; or
(d) Speaker or Deputy Speaker; or
(e) A Member of Parliament; or
(f) A Judge of the Supreme Court or any other judicial officer; or
(g) Attorney-General; or
(h) Controller and Chief Auditor; or
(i) A member of the Public Service Commission who is not an employee of the Public Service at the time of his appointment to be a member of the Public Service Commission; or
(j) An officer of police or an officer of prisons; or
(k) A member of any uniformed branch of any defence force; or
(l) A Pulenuu; or
(m) The Clerk of the Legislative Assembly, and the other officers and employees of the Legislative Assembly.

Neither of those provisions was put forward as a defence in the earlier proceedings. Had they been, the outcome may well have been different, but I can only assume given the absence of the plaintiff's name from the public service list in 1982 and 1983 that the first defendant did not consider the plaintiff to be a public servant in any event. Regardless of what the attitude of the first defendant was, however, the simple fact of the matter is that the first defendant did not adopt any defence which that line of argument may have afforded and is clearly estopped in these proceedings from now taking that approach. The parties were *ad idem* as to the principles involved in *res judicata* stemming from *Henderson* v. *Henderson* [1843] 3 Hare 100 down to the present time. In *Hoysted* v. *Commissioner of Inland Revenue* [1026] A.C. 155, a decision of the Privy Council, at pages 165–166, the following passage occurs:

> Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle, namely that of setting to rest rights of litigants, applies to the case where a point, fundamental to

the decision, taken or assumed by plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs.

The *res* in the present case was clearly adjudged by Mahon J., namely that the decision of the first defendant in dismissing the plaintiff from her post and transferring her to another post was set aside. He also stated quite unequivocally that the plaintiff was not validly removed from the post of Superintendent of Nursing. Nothing could be plainer but that the decision held in no uncertain terms that the plaintiff was the lawful incumbent of the position of Superintendent of Nursing and that the first defendant was required to recognize and give effect to that finding. But no, the first defendant now seeks to raise a point which clearly went to the heart of the matter on the earlier occasion. Its omission, whether negligent or calculated, is something that the first defendant must now live with. Parties have, subject to any appellate process, one day only in Court. On that day they must put forward all of the evidence and argument available—to suggest anything else, as the defendant in reality suggests here, would be to proliferate litigation and to subvert completely the doctrine of *res judicata*.

Accordingly in my view just what the provisions of section 9 and Article 83 mean or result in, in relation to this case, do not require consideration. A defence based on them was available at the prior hearing. It was not utilized and cannot now emerge like a phoenix from the flames to incinerate the plaintiff's case. I therefore agree entirely with the plaintiff's submission that this action is simply to enforce the earlier judgment—to bring to heel, as it were, a commission reluctant to abide by and give effect to the decision of this Court. It is in my view outrageous that the Commission should have treated the decision of this Court in such an offhand manner. The plaintiff was declared to be the incumbent of the position and the Commission, whether it liked it or not, was bound in law to give effect to that. What relief is the plaintiff entitled to? She seeks an order quashing or setting aside the appointment of the second defendant and an order of mandamus requiring the first defendants to reinstate the plaintiff, together with damages. The claim for damages for loss of salary amounting to 22,150 tala was not really questioned as to quantum and obviously that claim has been made out.

The defendants argued that mandamus was not an appropriate order to make. In essence mandamus, in this context, is an order which can compel a tribunal to perform a public duty incumbent upon it. That is precisely what the plaintiff requires the first defendants to do. She says the first defendant has a public duty to reinstate her to a position that she has held for many years but refuses to do so. A case for mandamus clearly lies. However, mandamus is a discretionary writ or order. The remedy will not be granted where there is a remedy equally convenient, beneficial, or effectual (*Re Barlow* [1861] 30 L.J.Q.B. 271). In this case it seems to me that if an order for mandamus is to be issued then the quantum of general damages would be significantly reduced. The contrary applies naturally enough. At the conclusion of counsels' submissions I raised with counsel the problems which have manifested themselves over the years with the Nurses' Association and the likelihood of the continuation of those problems and the impact that they would have on the health services of Samoa. In addition no criticism of any type has been levelled at the

second defendant in the carrying out of her duties standing in for the plaintiff, because that is all she has been doing in a strictly legal sense. Under section 6 of the Public Service Act a person cannot remain in the public service beyond the age of sixty years unless with the special consent of the Commission. She is presently fifty-two years of age. Her maximum salary at present as Director of Nursing is 13,425 tala per annum. She has claimed general damages of 150,000 tala for mental anxiety, physical strain, and loss of enjoyment of life. Mr. Grace advances the remarkable theory that because she has not had psychiatric or similar treatment or been admitted to an institution, then she should not really succeed in a claim for mental anxiety. The plaintiff has had to go to extraordinary lengths to enforce her rights.

The toughness of character which she must possess, given the nature of the earlier proceedings, the elation after the decision was given, and the inevitable blow which she suffered with the letter of 27 November 1985, is something which the Court can only admire.

I have reached the conclusion that, given the history of this whole sorry affair, it would be in the interests of the community as a whole, if the plaintiff used her undoubted talents in a direction other than in the field of nursing. I have no doubt, having perused all of the data in this matter, that she will be able to do this should she so wish. Having said that, however, in no way diminishes from her having established the right to the relief which she seeks. She has been totally vindicated in her stand, but in my view she can be compensated by way of damages which must be considerable, given the wrong which has been done to her and the distress which the failure of the first defendant to implement the judgment of this Court, has resulted in.

In the exercise of my discretion I accordingly decline to grant the relief which the plaintiff seeks in paragraphs 1 and 2 in her statement of claim. As regards pages 3(1), she will have judgment for $22,150. As regards paragraph (ii), she will have judgment in the sum of 100,000 tala under the heading of general and exemplary damages. Hopefully the award of general and exemplary damages will provide some solace for the plaintiff and will sheet home to the first defendants that nobody is above the law.

As to costs, the plaintiff is entitled to a substantial figure which I fix at 5000 tala, together with disbursements as fixed by the registrar, plus the reasonable costs of travel of the plaintiff's counsel. There will be no order for costs in respect of the second defendant; the order for costs is to be met by the first defendants.

Reported by F.T.