Western Samoa

Vermeulen v. Attorney-General and Commissioner of Inland Revenue

Supreme Court
Maxwell C.J.
1 September 1988

Damages—global sum or specific qualification—whether qualification of damages is compensation for capital losss on lost salary.
Damages—loss of salary component—whether Government retains right to assess tax—Income Tax Administration Act 1974, s. 8(b) (ii).
Tax—Income Tax Administration Act 1974—tax liability on lump sum damages for loss of salary.
Tax—withholding of sum as a source deduction—whether the Commissioner entitled to make deduction from Treasury cheque—whether Treasury "employer" as defined by The Income Tax Administration Act 1974.

The plaintiff had successfully sued the Attorney-General, acting for the Minister of Health, winning a judgment of $138,031 for lost salary and punitive damages on 2 May 1985, before Mahon J. in the Supreme Court. (Mahon J. had found that defendants had acted in "malicious abuse of the respective offices" in dismissing the plaintiff.) A duty thereafter fell upon the Ministry of Finance to act in accordance with the certificate of judgment under the Government Proceedings Act 1974, and to pay the judgment debt.

The Commissioner of Inland Revenue, purporting to act under the Income Tax Administration Act 1974, section 8(b)(ii) and section 39, advised the Treasury Department that the portion of the damages described as "loss of salary" was subject to source deduction at a rate of 50%. Treasury sent a cheque to the plaintiff, the net amount including a deduction of $17,070.50 made against the lost salary damages of $34,141. No deductions were made from the larger award of punitive damages.

The plaintiff argued that none of the judgment damages were assessable income, subject to tax; alternatively, if a portion of the judgment damages were so determined, there was no power to withhold the tax at source.

HELD:

(1) A portion of the damages ($34,141.00) in Mahon J.'s judgment was clearly made up of lost earnings.

(2) The Commissioner was entitled to regard those moneys as subject to a tax assessment, although the money was paid as a lump sum, in terms of the Income Tax Administration Act 1974, section 8(b)(ii).

(3) Although $17,070.50 was a correct assessment, there was no power for the Commissioner to require the Treasurer to deduct that assessment at source. The Treasurer was not the taxpayer's employer (Income Tax Administration

Act 1974, section 39) and the Treasurer was bound to pay the full amount by the Government Proceedings Act 1974.

Other cases referred to in judgment:
British Transport Commission v. *Gourley* (1956) A.C. 185; [1955] 3 All E.R. 796
Commission of Taxation v. *Slaven* (1984) 52 A.L.R. 81
Cullen v. *Trappell* (1979) 146 C.L.R. 1
Donselaar v. *Donselaar* [1982] 1 N.Z.L.R. 97
Glenboig Union Fireclay Company Ltd. v. *Commissioners of Inland Revenue* (1922) 12 T.C 428 (H.L.)
Graham v. *Baker* (1961) 106 C.L.R. 340
Henley v. *Murray* [1950] 1 All E.R. 908
McLaurin v. *Federal Commissioner of Taxation* (1961) 104 C.L.R. 381
North Island Wholesale Groceries v. *Hewin* [1982] 2 N.Z.L.R. 176
R. v. *Jennings* (1966) 57 D.L.R. (2d)644
Scott v. *Commissioner of Taxes (N.S.W.)* (1935) 35 S.R. (N.S.W.) 215
Takaro Properties Ltd. v. *Rowling* [1986] 1 N.Z.L.R. 22 (C.A.)
Taylor v. *Beere* [1982] 1 N.Z.L.R. 82
Tilley v. *Wales* [1943] A.C. 386; [1943] 1 All E.R. 280 ; 112 L.J.K.B. 186: 169 LT. 49

Legislation referred to in judgment:
Government Proceedings Act 1974
Income Tax Administration Act 1974

Editorial Observation:
The two parties involved in the *Hewin* and *Gourley* cases were the former employer and former employee. The two parties involved in the instant case were the former employer and the tax collector. A decision, as in *Hewin*, that the defendant former employer should pay a pre-tax, or gross, amount of damages as lost salary to a plaintiff former employee does not resolve the instant dispute between the successful former employee and the tax collector. Presumably a *Gourley*-type decision, where the defendant former employer paid only an after-tax or net amount of damages as lost salary, would not attract the attention of the tax collector.

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

MAXWELL C.J.

Judgment:
On 2 May 1985 Mahon J. caused to be delivered a judgment in which he awarded damages in favour of the plaintiff in the sum of $138,031 tala. The defendants in that action were: the Attorney-General sued in respect of the Cabinet of Ministers; first defendant, Tofaeono Tile, a former Minister of Health; and Solia Tapeni Faaiuaso, a Medical Officer. The sum was made up as follows:

Loss of Salary	Gross	$61,352	
	Less	$27,211	
			34,141

Interest arrears	25,000
Legal and related expenses	3,890
Exemplary damages	75,000
	$138,031

Costs awarded amounted to $20,000 together with disbursements and travelling and accommodation expenses. On 23 May 1985 the Chief Inspector of the Inland Revenue Department wrote to the Financial Secretary of the Treasury Department the following letter:

> Government of Western Samoa
> Inland Revenue Department
>
> 23 May 1985
>
> cc: Attorney-General
> The Financial Secretary
> Treasury Department
> APIA
>
> Dear Sir
> Re: Tax-Deductions—Dr. Walter Vermullen
> It has come to the attention of this Department that an amount of $34,141 is to be paid to Dr. Walter Vermullen, in respect of the loss of salary as a result of a recent case in the Supreme Court.
> The above award is assessable income in terms of Section 8 (b)(ii) of the Income Tax Act. For the purpose of enabling the collection of income tax, it is necessary for a tax deduction to be made from the above amount at the time of payment, in accordance with Part V of the Income Tax Administration Act.
> Would you please take the necessary action to ensure that a tax deduction at the rate of 50 per cent, be deducted and withheld at the time of making the above payment. The deduction should then be remitted to this Department forthwith, together with a completed "Source Deduction Payment and Tax Deduction Record" (P4).
> Yours faithfully
>
> sgd. E.T. Biber
> Chief Inspector

On 18 July 1985 a letter was sent to the plaintiff in the following terms:

> 18 July 1985
>
> cc: The Minister of Finance
> The Commissioner of Inland Revenue
> The Secretary for Justice
>
> Dr W.J. Vermeulen
> APIA

Dear Sir

PAYMENT OF CERTIFICATE OF JUDGMENT

Attached please find Treasury cheque for $129,927.45 being disbursement in respect of the Certificate of Judgment dated 21 June 1985.
For your record, the disbursement has been calculated as follows:

	$158,031.00	per Court Order dated 9 May 1985 Certificate of Judgment
	$6,129.47	costs, per Certificate of Judgment
	$2,518.62	interest, per Certificate of Judgment ($164,160.47 x 8% p.a. for 70 days)
	$166,679.09	TOTAL DUE
less	$17,196.43	Income Tax withholding tax—see below
	$149,482.66	NET AMOUNT DUE
less	$19,555.21	Payment to PCB as directed by you (letter 4 July 1985)
	$129,927.45	CHEQUE HEREWITH

Income tax has been withheld in accordance with the Income Tax legislation as advised by the Commissioner of Inland Revenue. The amount withheld has been calculated as follows:

(a)	17,070.50	(tax on loss of salary component of Judgment—50% rate)
(b)	125.93	(tax on interest ($2,518.62) at 5% rate)
	$17,196.43	

At the end of the financial year, a formal Certificate, of tax withheld, will be issued to you for enclosure in your income tax return.
The payment of $19,555.21 to the Pacific Commercial Bank, directed by you, has also been released today under separate cover, thereby discharging the entire liability in accordance with the Certificate of Judgment.

Yours faithfully
sgd. Kolone Va'ai
FINANCIAL SECRETARY

As a result of the complaint from Dr. Vermeulen, he received the following letter dated 26 August 1985.

26 August 1985
cc: The Minister of Finance
Commissioner of Inland Revenue

Dr W.J. Vermeulen,
P.O. Box 1400,
APIA

Dear Sir

PAYMENT OF CERTIFICATE OF JUDGMENT

Receipt is acknowledged of your letter dated 19th August 1985.
Your criticism of Treasury's action is considered unwarranted and you are

reminded that Treasury officials took all the necessary steps to enable a smooth transition of the payment made to you in respect of the Judgment, in your favour, against a number of Defendants.

On 18 July 1985, before the cheque/payment was released, the basis of payment was fully explained to you, including the Income Tax withholding tax, and your *only* query on the net payment was relevant to the costs awarded per Certificate of Judgment. You did not disagree with the taxation issue, nor seek further clarification at the time, and the net payment was therefore made to you the same day.

In relation to your only query, you produced a photocopy of the new Judgment Certificate which showed a higher figure for costs awarded by the Registrar. As Treasury did not possess an original of such document, and require legal advice on the matter, you were advised that the net payment would still be made on the basis of the earlier Certificate and a further cheque would be issue, for the balance, after the legal opinion was obtained. This has been done and the matter is now being referred to the Minister of Finance for his directions, in accordance with section 17 (3) of the Government Proceedings Act.

With regards to your claim that "collection of taxes is the sole responsibility of the Inland Revenue Department" you are advised that *all* employers, payers of interest, dividends, etc., are bound *under statute* to withhold taxes in accordance with the Income Tax Rates Act and the Income Tax Administration Act, thus Treasury has not "overstepped its authority" as claimed. The same statutory authority is that which required Treasury, as your employer, to deduct normal PAYE tax from your salary, or which you have never disputed.

In your Judgment case, Treasury *also* received official advice, dated 23 May 1985, under the authority of the Commissioner of Inland Revenue, that the $64,141 "loss of salary" component of the award, was constituted to be "assessable income in terms of Section 2 (b)(ii) of the Income Tax Act" and Treasury was directed to deduct and withhold "Tax . . . at the rate of 50 per cent". Treasury did not seek such advice but would otherwise still have requested an opinion before releasing the payment.

Insofar as the withholding tax on the interest component is concerned, Treasury is a regular payer of interest and is required, *by statute*, to deduct withholding tax on all such payments. There was no advice, to the contrary, to considered was actual interest [sic] and did not seek an opinion as to whether the $25,000 awarded for interest losses also constitute "interest" for taxation purposes as Treasury feels the Commissioner should have notified us, if such were the case, with his letter of 23 May 1985. The ultimate decision on taxability will of course be vested in the Commissioner when he makes his assessment, after you file your Tax return.

In the light of the above, you will appreciate that Treasury did not exceed its authority, as claimed by you, but merely acted in accordance with both the Statutes of Western Samoa *and* advice from the Commissioner of Inland Revenue. Treasury's letter of 18 July 1985, which was discussed with you before the cheque was issued, clearly states this position and you were also verbally advised on this same issue.

It should also be emphasized that withholding tax is only a preliminary statutory payment, towards final liability, which is only determined upon the issue of an assessment. Such assessment may be disputed by means of formal objection and if you propose to outlay additional legal fees it would appear appropriate to wait

until then to do so. I might add, for the record, that case history under similar legislation has determined that legal costs, in disputing an income tax assessment are not deductible for taxation purposes.
Trusting the above clarifies Treasury's position.

220 sgd R.K. Wright
for: FINANCIAL SECRETARY

There is another correspondence relating to source deductions in respect to interest payments and while I propose touching on the topic it is not in my view necessary to detail the letters.

There are a number of issues upon which the plaintiff seeks declarations, but in effect I believe the most important declarations sought in terms of the prayer are:

1. For Declarations:
(a) that no part of the sum of $166,679.09 payable to the Plaintiff on 18 July 1985 was or is assessable income of the Plaintiff pursuant to ss. 2 and 8 of the
230 Income Tax Act 1974 or otherwise howsoever and in particular:
(i) that the so-called 'loss of salary component' of the amount of damages awarded and payable to the Plaintiff in accordance with the judgment did not constitute a 'benefit' in terms of s. 8 (b)(ii) of the Income Tax Act 1974, and
(ii) that the sum of $2,518.62 interest payable on the judgment sum is not interest in terms of s. 8(g) of the Income Tax Act 1974;
(b) that no part of the amount payable to the Plaintiff in accordance with the certificate issued by the registrar of this Honourable Court was a source of deduction payment within the meaning of s.2(2) of the Income Tax
240 Administration Act 1974.

The other matters are I suggest ancillary and will flow from my decision in respect to these issues.

It is clear from the judgment of Mahon J., that he saw the treatment received by the plaintiff in the most compelling terms. At pages 71–72 of the decision he says:

I now come to the question of exemplary damages, and consider that this is the strongest possible case for such an award. I propose in this respect to follow the guidelines of the New Zealand Court of Appeal set in *Taylor* v. *Beere* [1982] 1 N.Z.L.R. 82 and in *Donselaar* v. *Donselaar* [1982] 1 N.Z.L.R. 97. No doubt there is ground here for applying the principle of aggravated compensatory damages in
250 view of the protracted distress and injury to feelings sustained by the Plaintiff, but I propose to submerge this factor within the concept of exemplary damages as reflecting the condemnation of this Court of the arbitrary and flagrant disregard of the Plaintiff's rights by the First, Third and Fourth Defendants who acted as public officers in wilful and knowing contravention of the Plaintiff's rights under the Constitution, with the additional element, if it be one, of exercising malice against him. I assess exemplary damages in the sum of $75,000 tala.

In the initial hearing, orders as to *certiorari* were sought and obtained and the determinations and recommendations of the Commission of Inquiry insofar as they

affected the plaintiff were set aside, as was also the action of the Public Service Commission in purporting to abolish the plaintiff's post as Deputy Director of Health. The claim succeeded based on misfeance. From a perusal of the plaintiff's statement of "out of pocket expenses" the learned judge adopted the flow of gross salary earnings as if Dr. Vermeulen had remained Deputy Director of Health from 21 October 1977 down to the date of the judgment. It seems to me that there were certain minor issues raised by counsel for the defendants of a technical nature, but I regard the issues as being those as set out by Dr. Barton in paragraphs 5 : 1 and 5 : 2 of his synopsis:

1. was the sum of $34,141 calculated on the basis of loss of income by Mahon J., assessable income pursuant to section 8(b) and (j) of the Income Tax Act 1974?
2. was the sum of $2,518.62 attributable to interest assessable income in the plaintiff's hands under section 8 (g) and (j) of the Income Tax Act 1974?
3. irrespective of the result in regard to the above questions, did the Treasury have lawful authority to withhold the sum of $17,196.43 from the total sum payable to the plaintiff?

I must say that from the outset, in spite of Dr. Barton's assurances, I had great misgivings as to my role in interpreting what Mahon J. intended by his orders as to damages. My reluctance to enter this arena was compounded by a close analysis of his Honour's judgment. No judgment could have been couched in terms more favourable to Dr. Vermeulen. It is a remarkable indictment of certain members of Cabinet and others and no stronger remarks could be made to reinforce this than:

> All the First, Third and Fourth Defendants were public officers, and I think acted in malicious abuse of their respective offices, or acted maliciously in the sense of having an intention to injure the Plaintiff when they knew that they did not possess the powers which they respectively purported to exercise. I am also satisfied that the Plaintiff was a person to whom the respective defendants owed a duty in the exercise of their official powers, and it is clear in my opinion that the Plaintiff suffered damage as a result of the malicious acts of the defendants in carrying out their professed public duties. (page 67, paragraph 2)

It is interesting to speculate upon the view which Mahon J. might have taken had he been faced with the very problem which confronts me. A tremendous argument is placed before me that this is a global figure and his Honour merely analysed the means whereby this figure was reached.

I turn to a review of the decisions which were cited to me.

Tilley v. *Wales* [1943] A.C. 386 related to the commutation of a certain sum. It was held by the House of Lords that:

> so much of the sum of £40,000 as related to commutation of pension was not taxable under sch. E, as being in the nature of a capital payment substituted for a series of recurrent and periodic sums which partook of the nature of income, but that so much as was paid in compromise of the reduction of salary was so taxable, as being within the charge on profits from the office of director.

At page 392 Viscount Simon L.C. said:

> Moreover, apart from previous authority, I should myself take the view that a lump sum paid to commute a pension is in the nature of a capital payment which is substituted for a series of recurrent and periodic sums which partake of the nature of income.
> But can the same view be taken of an arrangement made between an employer and his servant under which, instead of the whole or part of a periodic salary, a single amount is paid and received in respect of the employment? Generally speaking, I think not.

This case is clearly distinguishable. The amount was agreed between the parties and was a contractual arrangement entered into in consideration of a reduction of salary. The principle enunciated is perfectly clear and accepted by me, but I do not find it of assistance in this instance.

Of more immediate interest is *McLaurin* v. *Federal Commissioner of Taxation* (1960–61) C.L.R. 381. An offer of £12,350 was made to the appellant in full settlement and accepted. The Commissioner sought to assess the appellant by way of tax on £10,640 of this sum, as part of the appellant's assessable income. Reference to support this was made to the valuer's itemised report. It was held:

> . . . that the sum did not take the place in the appellant's hands of assessable income, so that no part of it could be treated by the respondent as such.
> The character of a single undissected sum accepted in settlement of a claim for unliquidated damages cannot be affected in the hands of the recipient by a consideration of the uncommunicated reasoning which led the prayer to agree to it.

At page 391:

> It is true that in a proper case a single payment or receipt of a mixed nature may be apportioned amongst the several heads to which it relates and an income or non-income nature attributed to portions of it accordingly. But while it may be appropriate to follow such a course where the payment or receipt is in settlement of distinct claims of which some at least are liquidated, or are otherwise ascertainable by calculation: it cannot be appropriate where the payment or receipt is in respect of a claim or claims for unliquidated damages only and is made or accepted under a compromise which treats it as a single, undissected amount of damages. In such a case the amount must be considered as a whole.

Again it seems to me that the learned judge did dissect the calculation of the amount to be awarded and apportioned a sum to loss of salary.

Heavy reliance was placed on *Glenboig Union Fireclay Company Limited* v. *R. Commissioners* XII T.C. 428. At page 455, Lord Dundas said:

> The first and larger sum was received as compensation in respect of an embargo laid by the Railway upon the Appellants against working a certain portion of the minerals held by them in leasehold. Now, the Appellants' lease was, I apprehend, one of their heritable capital assets. The effect of the embargo was, so to speak, to carve out a portion of that asset, *quoad* which the Appellants were permanently

excluded from beneficial possession and enjoyment. The compensation was a *surrogatum* for the loss of this part of the capital asset. So received, the sum under consideration was surely of the nature of capital, not of revenue. The Appellants' Counsel pointed out that the sum was awarded by the learned Arbiter as being equivalent to his estimate of the capitalized amount of profits of which, by the embargo, they were deprived. Ergo, it was contended, the sum is for loss of profits, and is not of the nature of capital. In this argument there lies, I think, a double fallacy. In the first place, what we must consider is not the measure by which the amount of compensation was arrived at, but what it was truly paid for, and, as already indicated, I think the compensation was paid for the loss of a capital asset. In the second place, and this is perhaps just another way of stating the same thing, the sum can surely not be described as profits arising from the Appellants' trade or business; for it arose not from the exercise of that trade but in respect that the Appellants were prevented from dealing in their business with, and earning any profits from, a portion of their mineral estate.

The gravamen of this decision is whether the issue in dispute could be regarded as a capital asset or whether it prevented a profit being acquired—as Lord Buckmaster said at page 463:

> In either case the capital asset of the Company to that extent has been sterilised and destroyed, and it is in respect of that action that the sum of £15,316 was paid.

There is a world of difference between a finding that an item was a capital asset and that it was income. The *Glenboig* principle is quite clear but does not apply to the facts before me.

There is no question but that the language used to describe a payment is not conclusive, but I cannot agree that *Henley* v. *Murray* [1950] 1 All E.R. 908 is of any assistance. That case dealt with an agreement *inter* parties, not as here a finding by a Supreme Court judge of equal jurisdiction. In that case a bargain was struck and reference is made to "the substance and truth of the bargain". I do not find this decision of any assistance. Dr. Barton argues that the payment was not compensation for loss of office. Here he is quite correct. By virtue of the decision of Mahon J., the plaintiff was deemed not to have lost his office. Surely on any analysis and by a perusal of the flow chart of the senior executive of the Health Department, Mr Tuilagi, the selection of options made by the learned judge was on the basis of Dr. Vermeulen remaining Deputy Director General of Health. Option (c) speaks "salary of the Deputy Director of Health" and estimated gross earnings. Indeed the certificate reads:

> I certify that I have reviewed the above calculations and found them to be a satisfactory approximate of salaries earnings for this officer.

I find it difficult to reconsider the reasoning in any other way but that it refers to His Honour's loss of salary. The question now to be decided is whether the award under this heading was for damages for capital and not income.

In *Takaro Properties Ltd.* v. *Rowling* [1986] 1 N.Z.L.R. 22 C.A. an appeal was allowed against a finding of Quilliam J. In support of my own misgivings I refer to the decision at page 64 where Woodhouse P. said:

Absence of High Court assessment:

390 There can be no doubt that this Court is much handicapped by not having the assistance of an assessment by Quilliam J. of the value of the opportunity to trade out of trouble which was lost to the company; and of any other head of damages. And in any ordinary situation it would clearly be better to refer the case back for his further attention and conclusion. The situation of course is not ordinary, if only because already aspects of litigation at one stage or another have reached the High Court or this Court on no fewer than six occasions and over the long period of 10 years. In addition both counsel requested that the assessment of damages should be undertaken here both for reasons of time and expense and also because it is said there is basic material before the Court sufficient to enable
400 a fair calculation to be made.

Despite all this I confess that initially I did not consider it would be wise for this Court to attempt to make what had to be the first and what necessarily would be a very broad assessment in this difficult area of the case. I thought that it would be safer to remit the issues to the High Court for appropriate attention and if necessary further inquiry there. But now further time has gone by and finally, in agreement with the other members of the Court, I think we must do what we can to bring the case to an end.

The plaintiff relied on the remarks of the President when he said at page 65:

A rather indirect but perhaps useful analogy concerns claims by individuals who
410 have suffered personal injury and loss by the negligent conduct of others. They do not present themselves to the Court on the basis of lost capital worth but in terms of diminished or lost earning capacity measured by the present value of the lost future earnings.

And again at page 74 where Cooke J. said:

Similarly when before the Accident Compensation Act 1972 an action lay for personal injuries caused by negligence, a plaintiff was awarded damages not for loss of earnings but for loss of earning capacity; in the assessment of such loss reference was made to the prospects of earning had the tort not been committed.

While a figure was assessed in that decision for general damages the real question of
420 its assessability as profit is not examined. If there was a loss it was in my view quantified.

Again heavy emphasis is placed by counsel for the plaintiff on the decision in the decision in *N.I. Wholesale Groceries* v. *Hewin* [1982] 2 N.Z.L.R. 176 (C.A.). There it was held, *inter alia*, Somer J. dissenting, that taxation should not be taken into account in the assessment of damages of compensation for loss of office. Compensation should be determined on the basis of the gross earnings the employee would have received. With the greatest respect to the plaintiff the position as he states it is not as clear-cut as he would have it in that decision. There is an important decision under the heading

430 *Damages—the taxation implication*, on page 189. There is nothing in that review which takes away from the State its right to demand tax in certain instances. While the headnote suggests *R.* v. *Jennings* was "referred to", it is clear the Court saw this as

a compelling decision. The majority decision refers to there being "considerable force" in some of the criticism in *Gourley*:

> Income tax is not an element of cost in earning particular income receipts. Each dollar of income lost is worth $1 to the plaintiff whether at the end of the day he saves it, spends it on himself or uses it to discharge liabilities including any liability to income tax he may have to meet. And what the plaintiff would have done with his money had he not suffered the injury complained of is irrelevant so far as the defendant is concerned.
>
> If the State has elected not to demand payment of tax upon a lump sum compensation receipt it is not open to the defendant to complain about that consequence of tax policy and have the Courts transfer the benefit to him or his insurance company.

There is no doubt that the right of a state to seek to recover tax on a lump sum is not removed—and there is clearly an acknowledgment of the existence of a tax liability. I have considered the other decisions referred to me by Dr. Barton, namely:

Cullen v. *Trappell* (1980) 146 C.L.R. 1
Graham v. *Baker* (1961) 106 C.L.R. 340, 346–347
Commissioner of Taxation v. *Slaven* (1984) 52 A.L.R. 81, 93
Scott v. *Commissioner of Taxes (N.S.W.)* (1935) 35 S.R. (N.S.W.) 215

but I can find nothing of any further assistance and I am satisfied the position is clear. I do not find that Mahon J. fixed a global all-in figure. While there was a sum total, this was in all respects specifically quantified. One of the sums involved was that of loss of salary. The plaintiff was deemed never to have lost his job and what he was likely to have earned was set out under a specific heading by the learned judge, less an amount earned and deducted in mitigation. The wording in the decision is accepted in the only manner in which it can be accepted and that is in the way it is described in the judgment.

The Treasury saw fit to make a certain deduction purportedly under section 8(b)(ii) of the Income Tax Administration Act 1974. While I have some misgivings as to whether if the Commissioner made an election, that was the end of it, I am now satisfied that the Commissioner did not err. As I see it the amount awarded was properly construed as the measure of the plaintiff's lost opportunity to earn a salary. That opportunity was lost to him by the removal of the office of Deputy Director of Health. What he received was compensation for that loss and put him as closely back to his original position as was possible. Bearing in mind that the plaintiff did earn income over this period of time which was set off against the gross amount, I believe the Commissioner could have regarded the sum as salary with the same result of justifying the assessment of tax on the sum quantified as loss of salary. It is not my function to question the amount of the assessment, but my finding is that the Commissioner of Inland Revenue was entitled to separate the sum of $34,141 and assess tax at an appropriate rate thereon.

The next question for me to determine is whether the Commissioner was entitled to require the withholding of the sum as a source deduction payment. It is argued by the plaintiff that, because the provisions of section 17 of the Government Proceedings Act 1974, the proper procedure was followed and the proper certificate of judgment was sent to the Minister of Finance, and that there was a duty on the

Minister to pay the full amount. The important provisions of the section are these:

17. Satisfaction of orders against the Government—

...

(2) Where in any civil proceedings any order (whether for costs or otherwise) is made by the Court in favour of any person against the Government or the Attorney-General or any Government Department or officer of the Government, and the person in whose favour the order is made so requests, the proper officer of the Court shall issue to that person, without payment of any fee, a certificate in the form numbered 3 in the Schedule to this Act or to the like effect:

Provided that, if the order provides for the payment of money, the Court by which the order is made or any Court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the money so payable, or any part thereof, shall be suspended, and (if the certificate has not been issued) may order any such directions to be inserted therein.

(3) On receipt of any such certificate the Minister of Finance, without further appropriation than this section, may cause to be paid to the person therein named the amount payable by the Government under the order, together with any costs allowed him by the court and the interest, if any, lawfully due thereon, and may also perform or give effect to the terms of the order so far as it is to be satisfied by the Government.

Section 39 (1) of the Income Tax Administration Act 1974 provides:

39. Tax deductions to be made by employers—

(1) For the purpose of enabling the collection of income tax from employees by instalments, where a source deduction payment is made to an employee, who is a resident (other than a company, trustee, public or local authority unless lawfully required to do so by the Commissioner) or to any employee who is a non-resident or to an agent for any such employed, the employer or other person by whom the payment is made shall, at the time of making the payment, make a tax deduction therefrom in accordance with this Part of the Act:

Provided that if a tax deduction is not made in any such case section 55 of this Act shall apply to the employee if he is a resident, and sections 43 and 44 if he is a non-resident.

Who was the employer of the plaintiff? In view of the decision of Mahon J., he would have been employed by the Health Department, and the Public Service Commission would have been the paymaster of the plaintiff. I am satisfied, however, and in view of my previous finding that the award of $34,000 comes within the provision of emolument, and if any other criteria were satisfied the plaintiff would fail on this ground.

I turn now to the effect of section 91 of the Income Tax Administration Act 1974. Section 91 provides:

570 of either defendant and while I have found the sum should not have been withheld my reasons are such that I do not consider either defendant should be penalized.

Costs are reserved.

Reported by F.T.