Becheserrak v. ROP, 7 ROP Intrm. 111 (1998)

KATSUTOSHI BECHESERRAK,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CIVIL APPEAL NO. 45-97
Civil Action No. 781-88

Supreme Court, Appellate Division
Republic of Palau

Argued: August 14, 1998
Decided: September 30, 1998

Counsel for Appellant: Johnson Toribiong

Counsel for Appellee: Scott J. Campbell, Assistant Attorney General

BEFORE: JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice; and R. BARRIE MICHELSEN, Associate Justice.

BEATTIE, Justice:

This is the most recent of the several appearances this case has made before this Court. [1] Two issues are presented by the instant appeal. The first is whether a wrongfully dismissed public service employee is entitled to pre-judgment interest on any back pay that is awarded to him. The second is whether a wrongfully dismissed public service employee has a duty to mitigate the damages he incurs as a result of the dismissal. The Trial Division concluded that such an employee is not entitled to pre-judgment interest and that he does have a duty to mitigate his damages. We affirm.

I.

Becheserrak's employment as a Classroom Teacher III was wrongfully terminated on February 1, 1988. His position as Classroom Teacher III fell within the National Public Service System as defined by the National Public Service System Act. 33 PNC §§ 101 & 202. After appealing his termination and obtaining a court order requiring that he be reinstated in his former position, Becheserrak was reinstated on July 11, 1995. During his more than seven years of unemployment, Becheserrak made no effort to seek employment.

[1] The factual background of this case is set forth in our previous decisions. *See Becheserrak v. ROP*, 5 ROP Intrm. 63 (1995), and *Becheserrak v. ROP*, 4 ROP Intrm. 103 (1993).

The Trial Court found that, had Becheserrak made a reasonable effort to obtain new employment, he would have become employed by October 31, 1990. Becheserrak does not dispute that finding. The parties stipulated that, had Becheserrak not been terminated, he would have earned $29,225.85 as a Classroom Teacher III from February 1, 1988 to October 31, 1990, and an additional $57,863.06 from October 31, 1990 to July 11, 1995, when he was reinstated. The Trial Court entered judgment for Becheserrak for the sum of $29,225.85, finding that the additional $57,863.06 was a loss that Becheserrak could have avoided if he had sought other employment after he was fired. The Trial Court also denied Becheserrak's claim for pre-judgment interest on the grounds that appellee was immune from such a claim due to the doctrine of sovereign immunity.

⊥112 On appeal, Becheserrak contends that the Trial Court erred in concluding that he had a duty to mitigate his damages by seeking new employment. He also contends that the Trial Court erred in denying him pre-judgment interest.

II.

The National Public Service System Act provides that an employee may contest his dismissal by filing an action in court 33 PNC § 426(b). That section further provides that:

> If the court finds that the reasons for the action are not substantiated in any material respect . . . the court shall order that the employee be reinstated in his position, without loss of pay and benefits.

33 PNC § 426(b)(2). [2] Appellee, the Republic of Palau, argued below that § 426(b)(2) did not give Becheserrak any right to an award of back pay, contending that Becheserrak's only remedy was reinstatement in his former job with at least the same pay and benefits he had when he was terminated. The Trial Court rejected that construction of the statute and held that Becheserrak was entitled to an award of back pay. Appellee does not contest the Trial Court's construction of the statute. Thus, we assume, without deciding, that § 426(b)(2) does not preclude an award of back pay to a wrongfully terminated employee.

In computing the amount of back pay to which Becheserrak was entitled, the Trial Court concluded that Becheserrak could not recover any loss of pay which he could have avoided by making reasonable efforts to secure new employment. Becheserrak contends that the plain meaning of § 426(b)(2) relieved him of any duty to mitigate damages by seeking new employment after he was dismissed from his job. The resolution of this issue turns on what is meant by the phrase "without loss of pay and benefits" in § 426(b)(2).

Although the phrase "without loss of pay and benefits" is ambiguous, we believe that the meaning of that phrase is that a wrongfully discharged employee is to be compensated for the wages he loses as a result of the wrongful termination of his employment. A wrongfully

[2] Although the National Public Service System Act was amended in 1994, *see* RPPL No. 4-23, the quoted portion of § 426(b)(2) was not changed.

discharged employee who obtains new employment from which he earns as much as he would have earned had he never been terminated has not lost any wages due to his wrongful discharge. Such an employee would be entitled to reinstatement under § 426(b)(2), but would not be entitled to any back pay, since an employee must only be compensated for actual losses. [3] Similarly, if an employee earned some money as a result of his new employment, but his earnings were less than he would have made had he not been discharged, the wages he earned in his new job would be deducted from the back pay award to which he would be otherwise entitled.

⊥113 To compensate Becheserrak for lost wages which he reasonably could have avoided by seeking new employment would be inconsistent with the statutory intent of compensating only for actual losses, for it is a firmly rooted principle of law that one is not entitled to recover for a loss he could have reasonably avoided. *See Restatement (Second) of Contracts* § 350 (1981); *Ford Motor Co. v. E.E.O.C.*, 102 S.Ct. 3057, 3065 n. 15 (1982). We find nothing in the language of § 426(b)(2) that indicates a legislative intent to preclude the application of this firmly rooted principle of law in computing back pay awards.

We hold that in computing the amount of back pay to which an employee is entitled under § 426(b)(2), the phrase "without loss of pay" contemplates that wages earned by the employee from other employment secured after his discharge, and wages which the employee could have earned had reasonable efforts been made to obtain other employment, should be deducted from the back pay award to which the employee would otherwise be entitled.[4]

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[3] At oral argument, Becheserrak's counsel argued that if Becheserrak had taken another job in the public service, he would have been entitled to keep all his earnings from that government job and still collect all of the pay he would have made in his Classroom Teacher III position had he not been fired. We reject the notion that § 426(b)(2) was intended to allow such "double dipping".

[4] There may be cases where the only other work the employee is able to obtain involves an entirely different line of work, or demeaning conditions and pay, etc. We leave open the question whether the employee's duty to make reasonable efforts to obtain other employment requires that he accept such career changes, demotions, etc. *See Ford Motor Co.*, 102 S.Ct. at, 3065. Here, the Trial Court found that Becheserrak could have secured a teaching or counselor position similar to the position he previously held, had he made any effort to do so.

III.

The Trial Court ruled that Becheserrak's claim against the Republic of Palau for prejudgment interest was barred by the doctrine of sovereign immunity. Becheserrak contends that the Trial Court's ruling should be reversed for two reasons.

First, Becheserrak argues that sovereign immunity was impliedly waived by enactment of § 426(b)(2) and its mandate that a wrongfully discharged employee be reinstated "without loss of pay". Becheserrak contends that he will suffer a loss of pay if he is not awarded prejudgment interest on his back pay award to compensate him for the denial of the use of funds which he would have had long ago but for his wrongful discharge. According to Becheserrak, sovereign immunity was therefore impliedly waived by the OEK when it provided for reinstatement "without loss of pay" in § 426(b)(2).

Before considering this argument, it will be helpful to discuss the source of the sovereign immunity doctrine, which we have held to be inherent in the government's status as a sovereign. *Tell v. Rengiil* , 4 ROP Intrm. 224, 227 (1994). The doctrine of sovereign immunity is "a principle with origins in early English common law." The *Oxford Companion to the Supreme Court of the United States*, 806 (Kermit L. Hall ed., 1992). Although the underlying rationale for the doctrine in England was rejected by United States courts, the concept was acknowledged at an early point in United States Supreme Court history. *See United States v. Lee* , 1 S.Ct. 240, 247-252 (1882). Consequently, the defense of sovereign immunity is a "common law doctrine" in the United States. *Seminole Tribe of Florida v. Florida* , 116 S.Ct. 1114, ⊥114 1139 (1996) (Stevens, J., dissenting on other grounds).

In cases before this Court, United States common law principles are the rules of decision in the absence of applicable Palauan statutory or customary law. 1 PNC § 303. Because the defense of sovereign immunity is part of the common law "as generally understood and applied in the United States", the defense is available to the appellee here, to the extent that it is not otherwise waived by statute. We have previously held, however, that a waiver of sovereign immunity cannot be implied. It "must be unequivocally expressed by statute." *Superluck Enterprises, Inc. v. RQP* , 6 ROP Intrm. 267, 271 (1997). It follows that, as *Superluck* held, a waiver of immunity on a general claim does not waive immunity for prejudgment interest on the general claim. *Id.*

The dissent asserts that we should decline to follow *Superluck* in the instant case, contending that, just as the lack of express language in 33 PNC § 426(b) requiring a discharged employee to make reasonable efforts to mitigate damages did not prevent the reduction of appellant's award for failure to mitigate, the lack of any express waiver of sovereign immunity for prejudgment interest should not prevent the award of such interest. This argument, however, overlooks the fact that it is the application of well settled principles of common law--mitigation of damages on the one hand and sovereign immunity on the other--that leads to our resolution of both issues.

The *Superluck* rule, as the dissent notes, was derived from cases in the United States

which for over a century have recognized the sovereign immunity defense to claims for interest absent an express and unequivocal statutory waiver of the defense. *See Library of Congress v. Shaw*, 106 S.Ct. 2957, 2962-63 (1986). Thus, the rules governing waiver of sovereign immunity, like the doctrine of sovereign immunity itself, are derived from well settled United States common law--the law which the OEK has mandated that we apply as the rule in our decisions in the absence of a contrary customary or statutory law. 1 PNC § 303. There is no customary or statutory law in Palau which permits the sovereign immunity defense to be defeated in the absence of an express waiver. We see no basis for ignoring settled common law principles on the sovereign immunity issue, just as we saw no basis to ignore common law principles in construing the statutory language "loss of pay".

The dissent also contends that 14 PNC § 503 reflects a legislative intent to allow prejudgment interest claims unless they are expressly disallowed. That statute provides that

> Actions may be brought against the government . . . which shall be liable to the same extent as a private person under like circumstance, for tort claims; provided, that the government . . . shall not be liable for interest prior to judgment . . . .

14 PNC § 503 (emphasis supplied). The argument is that, if the legislature intended that sovereign immunity for prejudgment interest could only be waived by express, unequivocal language--and assuming that the underlined portion of section 503 does not constitute such language--it would not be necessary to specify ⊥115 in § 503 that the government shall not be liable for prejudgment interest.

As the appellant points out in his brief on appeal, the language of § 503 was taken from the United States Federal Tort Claims Act, 28 U.S.C. § 2674. [5] Yet, in the United States it has long been settled law that a waiver of sovereign immunity for prejudgment interest must be express and unequivocal, notwithstanding the language of the Federal Tort Claims Act. *See Library of Congress v. Shaw*, 106 S.Ct. 2957 (1986). There is no indication that when this same language was adopted in Palau it was with the intention of rejecting the construction given to it by the United States courts. To the contrary, "[i]t is a well-established principle of statutory construction that when one jurisdiction adopts the statute of another jurisdiction as its own, there is a presumption that the construction placed upon the borrowed statute by the courts of the original jurisdiction is adopted along with the statute . . . ." *United States v. Aguon*, 851 F.2d 1158, 1164 (9" Cir. 1988). We do not, therefore, view anything in 14 PNC § 503 as a signal that the legislature intended to waive sovereign immunity for prejudgment interest on statutory claims unless the language of the statute provided otherwise.

Next, Becheserrak relies on cases from the United States wherein the United States Postal Service has been held liable for pre-judgment interest, urging us to adopt the reasoning of those cases. *See e.g. Loeffler v. Frank*, 108 S.Ct. 1965 (1988). The *Loeffler* line of cases hold that,

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[5] The Federal Tort Claims Act provides that "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment . . . ." 28 U.S.C. § 2674.

where congress launches a governmental agency into the commercial world--as it did with the United States Postal Reorganization Act--and the enabling legislation of the enterprise allows it to "sue and be sued", immunity is waived and the agency is subject to the same liability as a private enterprise. The *Loeffler* fine of cases is inapposite here. The National Public Service System Act did not launch any commercial enterprise, nor does it contain the important "sue and be sued" language. Thus, even if we were inclined to adopt the reasoning of *Loeffler*, it would have no application to the facts of this case.

The statute at issue in this case, 33 PNC § 426(b)(2), does not contain an unequivocal, express waiver of sovereign immunity for prejudgment interest claims. Therefore, the claim for prejudgment interest is barred by sovereign immunity. *Superluck v. Enterprises, Inc. v. ROP* , 6 ROP Intrm. 267 (1997).

CONCLUSION

For the foregoing reasons, the decision of the Trial Court is AFFIRMED.

MILLER, Justice, concurring in part and dissenting in part:

I concur in parts I and II of Justice Beattie's opinion for the majority, but respectfully dissent from part III rejecting appellant's claim for prejudgment interest. In my view, we are quite right to conclude that, although 33 PNC § 426(b)(2) does not mention mitigation, it is a fair reading of ⊥116 legislative intent that the OEK meant to incorporate - and did not mean to abolish - that principle in enacting a remedy for wrongfully discharged government employees. I would also conclude, however, that the absence of any mention of prejudgment interest in the statute does not resolve the question whether it may be recovered and that it is also a fair reading of legislative intent that it should be included as part of the statutory remedy.

In non-statutory cases, we have permitted the award of prejudgment interest in contract cases, *Ngirausui v. Baki* , 4 ROP Intrm. 140 (1994), *A.J.J. Enterprises v. Renguul* , 3 ROP Intrm. 29 (1991), applying the common law as reflected in Section 354 of the Restatement of Contracts (2d), and recognizing that prejudgment interest is "normally designed to make the plaintiff whole." *NECO v. Rdialul* , 2 ROP Intrm. 211, 214 (1991). We have not yet had occasion to decide whether any statutory remedy enacted by the OEK permits such an award.

As with our conclusion with respect to mitigation, statutory silence should not be dispositive. "[T]he failure to mention interest in statutes which create obligations [need not be] interpreted . . . as manifesting an unequivocal congressional purpose that the obligation shall not bear interest." *Rogers v. United States* , 68 S.Ct. 5, 7 (1947). Rather, interest should be "granted or denied . . . on particular statutory obligations by an appraisal of the congressional purpose in imposing them." Id.[6] Here, it seems to me sufficient to say that the statutory direction to

[6] This rule is not followed with respect to claims against the government. *See e.g., Richerson v. Jones*, 551 F.2d 918, 925 (3d Cir. 1977) ("[W]hen claims against the government are involved, the rule is just the opposite. Interest is proscribed unless expressly allowed."). As I

reinstate employees "without loss of pay and benefits" reflects an intention to restore them to the position they would have been in had they not been fired, and to recognize that, without the addition of interest, an employee who receives his pay in 1998 will be in a worse position than had he received it in 1988. *See e.g., Philip Carey Mfg. Co. v. N.L.R.B.*, 331 F.2d 720, 729-31 (6th Cir. 1974) (upholding, in absence of express statutory provision, award of interest on back pay awards). The statutory intent of "compensating only for actual losses", see Majority Opinion at 4, interpreted in the government's favor as supporting the application of mitigation principles, should also be interpreted in appellant's favor to ensure that all of his "actual losses", including his loss of use of the moneys owed him, are compensated.

The majority's rejection of appellant's claim does not rest upon any divination of a contrary legislative intent, but rather upon the application of an interpretive rule that prejudgment interest will not be awarded under a statute providing a remedy against the government unless the right thereto is "unequivocally expressed." In my view, the adoption of such a rule is unwarranted and threatens to undermine, rather than to reflect, the intent of the legislature. In *Library of Congress v. Shaw* , 106 S. Ct. 2957, 2962 (1986), from which the majority's rule is derived, the U.S. Supreme Court noted that "[for well over a century, this Court, executive agencies, and Congress itself consistently have recognized that federal ⊥117 statutes cannot be read to permit interest to run on a recovery against the United States unless Congress affirmatively mandates that result." In view of that history, it is entirely fair to say that where Congress does not "affirmatively mandate" prejudgment interest as to claims against the United States, it intends that such interest should not be recovered.

The "no-interest rule" has no comparable history in Palau, and there is thus no reason to conclude that congressional silence on the subject of prejudgment interest reflects any intent or assumption that such interest should not be awarded. To the contrary, one of the principal statutes relating to sovereign immunity reflects, if anything, the contrary assumption. 14 PNC § 503, which was originally enacted as 6 TTC § 252, permits the filing of tort claims against the government, but provides specifically that "the government . . . shall not be liable for interest prior to judgment." That exclusionary language, which would not be necessary if there were an established no-interest rule, belies any assumption that the silence of the First OEK in enacting the statute now in question - which was re-enacted at the same time as § 503 as part of the original Palau National Code - reflects a clear intent to forbid the recovery of such interest. I do not mean to suggest that silence should be interpreted to require the payment of interest. Rather, I suggest only that we should treat the matter of prejudgment interest as an open question to be resolved on a statute-by-statute basis, and which should be resolved, in this instance, as I have set forth above.

The majority suggests that, irrespective of its merits, we are required by 1 PNC § 303 to apply the no-interest rule. I disagree. I accept the notion that sovereign immunity is a common law doctrine and that, pursuant to § 303, it may be raised by the government "to the extent that it is not otherwise waived by statute." Majority Opinion at 7. But that, of course, begs the question of whether it has been waived by the statute at issue here, and I strongly disagree, for at

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argue below, however, there is no historical basis for such divergent treatment here.

least two reasons, that § 303 has any role to play in answering that question.

First, as the majority acknowledges, § 303 applies only "in the absence of written law." In my view, by its plain terms, § 303 simply does not apply in interpreting the scope or meaning of a statute. The common law is not irrelevant to statutory interpretation,[7] but the applicability of any particular common law doctrine turns not on the operation of § 303, but rather on whether it comports with statutory intent.[8] Thus, for example, we conclude today that mitigation is required by § 426 not merely because it is part of the common law, but because it comports with "the statutory intent of compensating only for actual losses." See Majority Opinion at 4. If we did not believe that the doctrine of mitigation was consistent with legislative intent, that doctrine would not be applicable notwithstanding its firm entrenchment in the ⊥118 common law and notwithstanding the existence of § 303.

Second, I disagree in any event that the no-interest rule is a "rule[] of the common law" within the meaning of § 303. The no interest rule is, at bottom, a method of statutory construction.[9] I think it is simply a contradiction in terms to speak of a common law rule for interpreting statutes, and I do not believe that the OEK has dictated that we must follow U.S. ground rules in interpreting a statute that it has enacted. Again, the no -interest rule is one we may consider, but we are surely not bound to do so and we should not for the reasons I have previously stated.

I note finally that I do not believe my proposed resolution of this case is contrary to the principle of stare decisis. I agree with the view that adhering to precedent "is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right." *Burnet v. Coronado Oil & Gas Co.* , 52 S.Ct 443, 447 (1932) (Brandeis, J., dissenting). Nevertheless, while I am aware that the no-interest rule was recited by the Court last year in *Superluck Enterprises v. ROP* , 6 ROP Intrm. 267 (1997), I believe that adoption of that rule was not necessary to its result, and need not, as a matter of precedent, be followed here. [10] In *Superluck*, the trial court awarded prejudgment interest against the government for two reasons:

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[7] "It is an axiomatic principle of statutory construction that in effectuating Congress' intent courts are to fill the inevitable statutory gaps by reference to the common law." *F.D.I.C. v. Bledsoe*, 989 F.2d 805, 810 (5th Cir. 1993).

[8] "[C]ommon law doctrines are appropriately applied [in interpreting statutes] only when the principles underlying such doctrines are consistent with the congressional intent underlying such statutes." *Petropoulos v. Columbia Gas of Ohio*, 840 F. Supp. 511, 515 (S.D. Ohio 1993).

[9] Part of the no-interest rule is the notion that interest may not be recovered from the government absent a waiver of sovereign immunity. That is perhaps a rule applicable under § 303. But the heart of the no-interest rule, which I do not believe applicable, is a rule for divining whether such a waiver has occurred, which is a matter of statutory interpretation.

[10] Even if I otherwise agreed with the result in *Superluck*, I am doubtful whether a rule first announced in 1997 should be applied to a statute enacted in 1982. To do so "is to change the rules for lawmaking after Congress has already acted." *Atascadero State Hospital v. Scanlon*, 105 S.Ct. 3142, 3153-54 n.7 (1985)(Brennan, J., dissenting). When the OEK enacted § 426, "it could have had no idea that it must obey the . . . rule adopted by the Court for the first time [in *Superluck*]." *Id.*

"because the obligation to pay restitution arose in an action in which the Republic of Palau had invoked the Court's jurisdiction" and because, at an early stage of the litigation, predecessor counsel for the government had agreed that such interest should be recovered. 6 ROP Intrm. at 271. The trial court did not rely on any statutory provision, and Superluck did not refer to any in supporting the trial court's judgment. *See* Appellants/Cross-Appellees' Responsive Brief in Civil Appeal No. 31-95 (March 3, 1997), at 9-10; *see also* Petition for Rehearing (December 19, 1997).

Unlike here, the Appellate Division in *Superluck* was not presented with a statute that waived sovereign immunity, but was silent as to interest. Rather, it was not presented with any statute at all to interpret.[11] In such circumstances, the holding of the Appellate Division, I would suggest, was expressed in the simple statement that "[t]here is no statute that waives sovereign immunity for ⊥119 prejudgment interest on the restitution claim." *Id.* at 272. There was no need for the Court to answer the question whether a statute that waived sovereign immunity generally could be interpreted to allow an award of prejudgment interest or whether, as the Court suggested and now holds, there must be a specific waiver as to such interest. That question is squarely presented for the first time here, and I would answer it differently for the reasons stated above.

[11] Indeed, the Court expressed uncertainty as to the statutory basis for the government's waiver of sovereign immunity as to restitution generally. *See* 6 ROP Intrm. at 271 ("We assume, without deciding, that sovereign immunity on that claim has been waived by 14 PNC § 501(2).").