Mr. Sisifa
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IN THE COURT OF APPEAL OF TONGA

CIVIL JURISDICTION AC 18 of 2016

NUKU'ALOFA REGISTRY [CV 91 of 2011]

BETWEEN : SIOSAIA VE'EHALA

- Appellant

AND : KINGDOM OF TONGA

- Respondent

Coram : Moore J
Blanchard J
Hansen J

Counsel : Mr. L. M. Niu SC for the Appellant
Mr. S. Sisifa SC for the Respondent

Date of Hearing : 10 March 2017

Date of Judgment : 16 March 2017

JUDGMENT OF THE COURT

[1] In 2007 Mr. Ve'ehala was a sergeant of police in the Tonga Police. He had been a police officer since 1986. On 29 May 2007 he was suspended without pay while a complaint against him of sexual impropriety was investigated. It is important to say that he has never faced disciplinary proceedings, nor any criminal charge, in relation to that complaint. Nevertheless on 9 October 2007, without any reasons being given, he was dismissed from the Police with effect from 29 May. It is now accepted by the respondent that this was an unlawful dismissal in respect of which Mr. Ve'ehala is entitled to damages.

[2] In the Supreme Court, Lord Chief Justice Paulsen correctly directed himself that in assessing damages for breach of a contract of employment the Court proceeds on the basis that an employer would perform the contract in the manner least disadvantageous to itself, citing *Leiola Group Ltd v Moengangongo* [2010] Tonga LR 85 at [30]. This principle applies to contracts generally. The Chief Justice found that Mr. Ve'ehala was in 2007 enlisted for a 5 year period under s.12 of the Police Act (Cap. 35) which provided:

> 12 *Duration of service*
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> *Every police officer shall, in the first instance, be engaged to serve for a period of 5 years and subsequently for further periods of 5 years, each re-engagement being at the option of the Minister of Police and subject to retirement or discharge or any other provision of this Act.*

[3] The five year period of Mr. Ve'ehala's employment at the time of his dismissal was to end on 12 March 2011. Therefore, the Chief Justice held, Mr. Ve'ehala's damages for "lost salary" should be calculated to that date. Mr. Ve'ehala, on the other hand, maintains that, if not unlawfully dismissed, he would have remained a police officer until compulsory retirement at 60, namely on 22 December 2022, and that his damages should have been calculated by the Supreme Court on that basis.

[4] The matter is complicated by the fact that after Mr. Ve'ehala's dismissal but before the 5 year period would have ended, the Police Act was repealed and replaced by the Tonga Police Act 2010.

[5] That Act came into force on 2 February 2011. We were referred by counsel to the following provisions of the new Act:

42 Police Employment Committee may appoint persons

(1) The Police Employment Committee may, in accordance with this Division, appoint persons as members of Tonga Police.

(2) A person may be appointed as:

(a) a police officer; or

(b) an administrative staff member.

43 Appointment of members and conditions of appointment

(1) The Police Employment Committee may appoint a member:

(a) on an ongoing basis; or

(b) for a period specified in the instrument of appointment.

(2) The conditions of appointment are as the Committee determines in writing.

183 Police officers

(1) This section applies if, immediately before the commencement of this section, a person was enlisted to serve in the Tonga Police Force, under section 11 of the Police Act (Cap 35).

(2) On the commencement of this section, the person is taken to have been appointed as a police officer in Tonga Police under section 42(2)(a) of this Act:

(a) Until the end of the term of the original engagement; and

(b) On the conditions of the original engagement that are consistent with this Act; and

(c) At the same rank as under the Police Act (Cap 35)

[6] Mr. Niu's argument on this appeal concentrated on these sections of the 2010 Act but before dealing with it we should describe the way in which the Chief Justice approached the old s.12. He found that the meaning of s.12 was clear. Police officers were enlisted to serve for fixed periods of 5 years. The respondent had admitted that in practice s.12 was not observed. Apparently re-enlistments were not notified to a police officer each 5 years. But, as the Chief Justice rightly said, that did not mean that s.12 was not good law or could be ignored. The continuance of employment beyond the end of the set period of engagement had to be regarded as the exercise by the Minister of the option expressly given to him in s.12 to re-engage an officer. He said that what s.12 contemplated was that the Minister might make a positive decision (to re-engage) not a negative one (not to re-engage): "The failure to exercise the option does not bring the employment to an end and cannot amount to a dismissal when the police officer's period of engagement has simply expired".

[7] We agree. It is unfortunate that the Minister did not adopt a practice of formally notifying re-enlistment when an officer's 5 year period of employment came to an end. But, in the absence of a notice bringing the employment to an end at the expiration of a 5 year period, the employment should under s.12 be taken to have

been rolled over for another 5 year period. That meant that at the time of Mr. Ve'ehala's dismissal the earliest date on which his employment could have been terminated without cause (ie. discharge under s.17 of the old Act), was 12 March 2011. Accordingly, if the 2010 Act had not been passed, damages would properly be calculated on the assumption that the Minister would have lawfully brought the employment relationship to an end on that date.

[8] Did the new Act alter that position? Paulsen CJ thought not, and we agree. The Chief Justice said that the position was governed by s.183 of the 2010 Act. Subsection (1) applies the section to a person who was immediately before the commencement of the section (on 2 February 2011) enlisted as a police officer under s.11 of the old Act, which Mr. Ve'ehala still would have been but for his unlawful dismissal. (We comment that the dismissal was unlawful but, because the Court will not specifically enforce an employment contract at the behest of an employee who has been given notice of dismissal, it was effective to terminate the employment).

[9] Subsection (2) of s.183 then provides that on the commencement of the section such a person is to be taken to have been appointed

as a police officer under s.42(2)(a) of the 2010 Act until the end of the term of "the original engagement" and on the conditions of the "original engagement" that are consistent with the 2010 Act.

[10] The Chief Justice said that the requirement that a person be enlisted immediately before the commencement of the section required only that the person retained their status as an enlisted officer upon its commencement, and that the "original engagement" meant the engagement under which the police officer was employed on the commencement of the section. There would otherwise be a lacuna whereby there would be no provision in the 2010 Act in relation to the continued service of existing police officers other than those serving their first engagements. Again, we agree with him.

[11] Mr. Niu's argument on this appeal relied upon the fact that the Police Employment Committee has not taken any steps under s.42(1) of the 2010 Act to re-appoint members who were serving police officers under the old Act after their current 5 year periods elapsed. Under s.43 it could appoint them either on an ongoing basis or for a specified period. Just as the silence of the Minister under the old s.12 was taken to be a re-appointment for another 5 years, counsel said that the silence of the Committee amounted to

an exercise of its authority under ss.42 and 43 to appoint those serving officers on an ongoing basis after their current 5 year periods. Mr. Niu submitted that the Committee, unlike the Minister, had no option of the kind referred to by the Chief Justice in relation to s.12. Its only choice was to re-appoint for a specified period or on an ongoing basis. Therefore, the argument went, when Mr. Ve'ehala's period of re-engagement would have otherwise ended on 12 March 2011, the Committee had to be regarded as having re-appointed him under the new Act on an ongoing basis until his compulsory retirement age. Mr. Niu pointed out that as Mr. Ve'ehala was not then facing any disciplinary or criminal charge, there was nothing to prevent this.

[12] This argument, which appears not to have been advanced below, is ingenious but we do not accept it. It may be that police officers serving 5 years terms under s.12 of the old Act are to be taken to have been appointed on an ongoing basis under s.43(1)(a) of the 2010 Act in the absence of action by the Committee on the expiry of their 5 year appointment current at the commencement of the 2010 Act. But if so, that does not assist Mr. Ve'ehala. The exercise the Court is engaged upon in fixing his damages is to pinpoint the date upon which his employer could have lawfully terminated the employment. In the absence of the 2010 Act, that date was 12

March 2011. Section 183(2)(a) preserved that position. The Police Employment Committee did not have to re-appoint him on any basis after that date. If he had actually been a serving officer and the Committee had done nothing, it is arguably the position that he should be taken to have been re-appointed after 12 March 2011 on an ongoing basis. But in reality his employment had long since ceased (as from 9 October 2007) so the Committee's silence is not a relevant matter. For the purpose of assessing his damages the critical factor is that the Committee had the power not to appoint him, just as it can decline to appoint anyone who is not a police officer but is applying to become one.

[13] This result is consistent with the "breach-date" rule for the assessment of damages for breach of contract, namely that damages are normally to be assessed as at the date of breach which is when the cause of action arises: *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 at 468 and *Johnson v Agnew* [1980] AC 367 at 400. Since the 2010 Act did not exist when Mr. Ve'ehala was dismissed, the better approach may therefore be to disregard it entirely in assessing the damages payable to him.

[14] The Chief Justice was therefore right to direct calculation of the "lost salary" damages from the date of dismissal to 12 March 2011.

(It was not disputed in the Supreme Court that Mr. Ve'ehala was entitled to his salary for the period of suspension prior to dismissal). The appeal therefore fails.

[15] The orders of the Court are:

1. The appeal is dismissed;
2. The appellant must pay the respondent's costs in this Court, to be taxed if not agreed;
3. Costs in the Supreme Court are to be determined by that Court.

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Moore J

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Blanchard J

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Hansen J