

**IN THE COURT OF APPEAL OF TONGA**

**CIVIL JURISDICTION**

**AC 17 of 2018**

**NUKU'ALOFA REGISTRY**

**[CV 48 of 2014]**

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**BETWEEN : BUSBY KAUTOKE**

**- Appellant**

**AND : PUBLIC SERVICE COMMISSION**

**- Respondent**

**Coram : Handley J**

**Blanchard J**

**Randerson J**

**Counsel : Mr. D. Laurenson QC & Mrs. 'A. Taumoepeau SC for Appellant**

**Mr. H. Waalkens QC KC & Ms. H. Stuart for Respondent**

**Hearing : 9 April 2019**

**Date of Judgment : 17 April 2019**

## JUDGMENT OF THE COURT

### **Introduction**

[1] In a decision made on 8 August 2012 the Public Service Commission (PSC) terminated the employment of Mr. Kautoke as Chief Secretary and Secretary to the Cabinet and Chief Executive of the Prime Minister's Office (PMO).

[2] He had been found by the Commission to have been in breach of r.10(1) of the Public Service Administration (Public Funds) Regulations 1984 (the Regulations) which reads as follows:

10. Particulars to be inserted in vouchers

- (1) Vouchers for payment should whenever possible attach an original invoice and order supporting the payment. In case where original invoices are not available or applicable, vouchers for payment will contain full particulars of each service, such as dates, numbers and quantities so as to enable them to be checked without reference to any other document.

Mr. Kautoke successfully appealed against the PSC's decision to the Public Service Tribunal (the Tribunal). On 18 April 2017 the Tribunal ordered the setting aside of the termination of Mr. Kautoke's employment and required the PSC to pay his costs on the appeal.

[3] The PSC then obtained leave from the Supreme Court to apply for a judicial review of the Tribunal's decision. In a judgment delivered on 5 October 2018 Lord Chief Justice Paulsen found that the Tribunal (a) had erred in its interpretation of r.10(1) and (b) had erred in law by failing to consider certain relevant evidence. The Lord Chief Justice set aside the Tribunal's decision and referred Mr. Kautoke's appeal against termination of employment back to it for re-determination.

[4] Mr. Kautoke now appeals to this Court against those findings of the Supreme Court.

### **The Facts**

[5] Prior to Mr. Kautoke's appointment as Chief Secretary and Secretary to the Cabinet (CSSC) the Ministry of Finance and National Planning (MOFNP), acting under s.16 of the Public Finance Management Act 2002, and in implementation of Treasury Instructions by its Minister under s.45 of that Act, had made an arrangement with the PMO for a partial delegation of financial management to the PMO. This delegation of responsibility by the Ministry was recorded in a Savingram of 24 October 2008 from the Secretary of Finance and National Planning to the then CSSC. It stated certain requirements, including that the PMO was to ensure the safe-keeping of vouchers and supporting documents recording payments made by the PMO. A separate bank account for the PMO was opened at Westpac Bank of Tonga with designated signatories including the CSSC. The responsible accountable officers of the PMO assigned to work directly in the disbursement of funds in the bank account were to be:

....duly advised to ensure compliance with, relevant requirements of the Public Finance Management Act 2002, related Regulations, Treasury Instructions and Circulars and also other established rules, policies and procedures that govern the disbursements of the public funds. This also includes establishing sound system of internal control and keeping proper books and records to ensure complete and accurate audit trails.

The PMO was to be connected with the MOFNP's Sunsystem computer programme.

[6] The Savingram also recorded:

Additional processes and training of PMO staff

The PMO staff, through on the job training, has been familiar with the processing of orders and vouchers on a manual and automated system

using the sunsystem. In addition to this are: checking of vouchers against established rules, policies and procedures that govern the disbursements of public funds; entering of vouchers into the sunsystem; maintaining registry of cheques and dispersing to customers; posting of cheques to sunsystem; and preparing of bank reconciliation. On the job training of relevant PMO staff on these additional processes had commenced at MOFNP from the beginning of October;

#### Supervision of Accounts

It has been agreed that the daily supervision of Accounts will be headed by Mr. Paula Ma'u, Deputy Secretary ... [who] will be the principal Supervisor to oversee and manage the operation of the Accounts;

#### Maintaining of Records

PMO shall ensure that all original vouchers and supporting documents are kept in a safe place at all times. This is important not only to ensure money keeping of your Office expenditure records but also for audit purposes. These records are subject to periodic check and review by the relevant MOFNP staff and also the scheduled audit visits by the staff of Audit Office.

[7] These Treasury Instructions can be seen to have expressly delegated to the PMO the retention of payment vouchers and mention is made in this connection of audit visits by staff of the Audit Office.

[8] The PMO's Westpac bank account operated from 1 November 2008. Public funds were transferred into it from time to time. From December 2008 payments from the Australian and New Zealand Governments were also made into the account. They were intended to be used for the purpose of assisting democratic reform in Tonga under a Constitutional and Electoral Reform Programme (CER). There were therefore two funds in the PMO's bank account: Tongan Government moneys and the CER dedicated funds.

- [9] For some time after Mr. Kautoke's employment commenced in May 2009 there were no audits of the PMO's accounts. Eventually an audit took place and the Auditor General reported unfavourably in June 2011. The report to the Speaker of the Legislative Assembly covered the period 12 December 2008 to 12 May 2011 and said that record keeping had been very poor and that \$595,384 was unaccounted for. Mr. Kautoke responded that the funds had been used for the correct purposes but that some source documents (vouchers) could not be located.
- [10] The Audit Office reported again on 28 October 2011 finding that \$447,259 was unaccounted for in relation to CER funds and \$1,202,716 in relation to government moneys advanced to the PMO. A recommendation was made that because, in the Auditor General's opinion, Mr. Kautoke was responsible for this situation, disciplinary action should be taken against him.
- [11] The findings in relation to CER prompted the New Zealand High Commission to seek an independent review by JKCA, chartered accountants, to determine whether funds donated to the CER project by the Australian and New Zealand Government had been used for their intended purpose. JKCA was able to verify CER disbursements of \$253,062 previously thought to be unaccounted for but it found that \$212,196 from the CER fund had not been used for the intended purpose and should be reimbursed by the Tongan Government to the donor governments. JKCA did not however find any fraudulent actions and was of the view that all transactions were bona fide. It is only fair to record that it has not been suggested that any moneys have been embezzled. Mr. Kautoke's alleged defaults were in relation to absence of proper documentation of legitimate transactions.
- [12] Mr. Kautoke did not challenge JKCA's finding about the CER fund. On 30 January 2012 he submitted what he said were all remaining supporting documents for outstanding cheque payments. But when those further records

were audited by an independent auditor, Ms. Stone, appointed by the PSC, she reported on 13 March 2012 that the correct supporting documents had still not been provided for 229 payments totalling \$796,432.

- [13] On 5 April 2012 the PSC suspended Mr. Kautoke. On 3 May of that year two charges were laid against him under clause 24(b) of his employment contract. That clause read:

The Commission shall in consultation with the responsible Minister [the Prime Minister] and with the approval of Cabinet, and subject to any prescribed disciplinary procedures, terminate this Contract without notice where:

- (a) the Appointee has breached the Public Service Code of Conduct; or
- (b) the Appointee's conduct is such that he should be dismissed under the Public Service Act 2002, Public Finance Management Act 2002 or any Public Service Regulations.

- [14] In a letter of 3 May 2012 from the PSC Mr. Kautoke was told that he was being charged under clause 24(b). The charges and particulars were framed as follows in the letter:

10 The charges are as follows:

- (1) Failure to provide proper vouchers, contrary to regulation 10(1) of the Public Finance Administration (Public Funds) Regulations 1984.
- (2) Failure to provide proper vouchers, contrary to regulation 10(1) of the Public Finance Administration (Public Funds) Regulation 1984.

11 The particulars of the charges are:

- (1) Busby Kautoke, Chief Secretary and Secretary to Cabinet, on or about the period of 15 May 2009 to 9 July 2010, at Nuku'alofa, while being the chief executive officer of the Prime Minister's Office, and thus the accountable officer responsible for public expenditure under the Public Finance

Management Act 2002 in the Prime Minister's Office, you failed to ensure that you and your staff keep proper vouchers for payments in the amount of \$212,196.40, with regards to the expenditure in relation to the Constitutional and Electoral Reform project, in order to allow for proper accounting records and audit purposes.

- (2) Busby Kautoke, Chief Secretary and Secretary to Cabinet, on or about the period of 15 May 2009 to 9 July 2010, at Nuku'alofa, while being the chief executive officer of the Prime Minister's Office, and thus the accountable officer responsible for public expenditure under the Public Finance Management Act 2003 in the Prime Minister's Office, you failed to ensure that you and your staff keep proper vouchers for payments in the amount of \$796,432.10 with regards to the expenditure from the Prime Minister's Office Advance Account, in order to allow for proper accounting process, the details of which are set out in Annexure 1 of this letter.

- [15] After a hearing before the PSC, at which Mr. Kautoke was represented by counsel and after consultation with the then Prime Minister, the PSC terminated Mr. Kautoke's employment on 8 August 2012.

### **The Tribunal hearing**

- [16] There was evidence that some records, including vouchers, had been removed from the PMO to the MOFNP, because of difficulty in accessing the Sunsystem from the PMO. Mr. Kautoke claimed that this was how 229 vouchers for payments of \$796,432 came to be missing and that they had never been returned to the PMO by MOFNP. The Tribunal accepted this explanation and made a finding that Mr. Kautoke was unaware of the removal of records from the PMO to the MOFNP. It noted that the Deputy Secretary was the person designated as the principal supervisor of the bank account. It found as a fact

that a proper voucher had been properly made out for every payment. It said that r.10 (1) requires the presentation of proper vouchers but any failure in this regard is the failure of the signing officer as specified in r.12. The Tribunal was of the view that what r.10 (1) is aimed at is that full particulars are given in a voucher so things like numbers, quantities and dates can be checked without reference to any other document. It is not concerned, the Tribunal said, with vouchers being kept safely after payment has been made, which is what Mr. Kautoke was said to have had responsibility for and in respect of which he was said to be in breach. The Tribunal went on to say that because the Treasury Instruction in the Savingram placed responsibility for daily supervision of the bank account on the Deputy Secretary, the failure to record removal of records to the MOFNP and their subsequent loss was not properly attributable to Mr. Kautoke. It therefore set aside the PSC's decision terminating his employment contract.

- [17] The PSC then sought and obtained the leave of the Supreme Court to apply for a judicial review of the Tribunal's decision.

#### **The judgment appealed from**

- [18] Although there were before the Tribunal two charges referring to two amounts of money it was agreed that there was an overlap between them. We were told by counsel that the hearing in the Supreme Court therefore proceeded in relation to the second charge only – referable to the 229 cheques totalling \$796,432 for which vouchers were not provided. Despite this the Supreme Court judgment at times refers to charges (plural) as will be seen from the following summary of the judgment.

- [19] In his judgment of 5 October 2018 the Lord Chief Justice said that he considered that in its decision the Tribunal had mischaracterised the nature of the charges faced by Mr. Kautoke by saying that the charges were that he was

the officer who had signed the vouchers or dictated their contents and that the vouchers did not contain the particulars which r.10(1) required. That was an error because the charges were not concerned with who signed or dictated the contents. The allegation was that vouchers were not kept. The Tribunal had concluded at para. [56] of its decision) that the regulation did not impose any duty on the officers who signed the vouchers or dictated their contents to keep them safely for audit purposes after payment had been effected. The Lord Chief Justice was however of the view that an obligation to retain vouchers must necessarily be implied. The regulations were in force under s.48 of the Public Finance Management Act and must be read consistently with the objects of that Act – responsible management of the Kingdom’s finances, transparency and legal accountability of those entrusted with responsibility for handling the Kingdom’s finance and economic assets. The retention of proper financial records, such as vouchers, was consistent with those objects.

[20] The Lord Chief Justice identified other matters supporting such an implication:

[61] Turning to the words of r.10 itself, it requires that vouchers be completed in ‘every respect before payment is made’ (r.10(2)). The vouchers are to be completed in ink or typewritten and signed in ink thereby creating a permanent record. Consistent with this, the regulation also refers to the circumstance of vouchers containing full particulars so as to enable them to be checked without reference to any other documents. Such checks might be necessary both before and after the payment to which the voucher relates has been made. All of these matters support an implication that vouchers are to be retained.

[62] The implication is consistent also with other provisions of Part III of the regulations (in which r.10 appears). Regulation 12 concerns an officer being responsible for the accuracy of every detail on the voucher. The issue of an officer’s responsibility for the accuracy of a voucher is most likely to be a matter of concern after payment has been made. Furthermore, r.15(2) provides that entries of payments in a Payment Cash Book will be consecutively numbered and those numbers affixed to the supporting vouchers. The Tribunal itself accepted that an obligation to retain vouchers was implied from this regulation.

[21] The Lord Chief Justice said (at [65]) that the Tribunal had overlooked that the ultimate responsibility to retain vouchers must have lain with Mr. Kautoke as

Chief Executive Officer of the PMO. He had in fact acknowledged his responsibility in cross-examination.

[22] The Tribunal's conclusion that the particulars of the charges were not particulars of breach of r.10 was not accepted by the Lord Chief Justice for another reason:

[68] Underlying the Tribunal's approach is the interpretation of the words 'provide' (in the charges) and 'keep' (in the particulars) as meaning to 'retain'. This is incorrect. In the context of the charges laid against Mr. Kautoke the word 'keep' can mean 'properly complete' or to 'prepare'. In common usage to keep proper accounting records means to properly prepare them. A breach of r.10 may occur whether vouchers are prepared but not retained or were never prepared. In either sense the vouchers are not kept and cannot be provided (as the charges alleged). This is the way in which the PSC's case was presented before the Tribunal.

The PSC had clearly advanced to the Tribunal the argument that the vouchers were not kept in the sense that they never existed; a clear breach, the Chief Justice said, of r.10.

[23] In summarising this portion of his judgment the Lord Chief Justice said:

[74] The Tribunal then fell into error in respect to this ground of review in at least three respects as follows:

- (a) It mischaracterized the nature of the charges;
- (b) It was wrong to conclude that r. 10 does not contain an implication that vouchers are to be retained and safely kept; and
- (c) It was wrong to conclude that the particulars of the charges did not state any breach or failure under r. 10

[24] In view of these findings it was unnecessary for the Court to consider an application that had been made by the PSC to re-formulate the charges.

[25] As a further ground of review, the PSC also alleged that the Tribunal had failed to consider or had ignored relevant evidence in making a finding that vouchers had been removed from the PMO by MOFNP without Mr. Kautoke's knowledge. At para [30] of its decision the Tribunal had said:

The Tribunal believes, on balance of probabilities, that there was a proper voucher properly made out for every payment for which a cheque was issued by the PMO in respect of the two sums stated in the charges and that those vouchers were removed by the MOFNP in pursuance of their duty to check and review those records and for the entry of those records into the Sunsystem. In removing those records, the MOFNP staff failed to record in writing and signed by them, an inventory of the records that they removed, to be retained by them and by the PMO. The loss and disappearance of those records cannot be attributed to the Appellant, who was not the principal Supervisor or Supervisor of those records and because he was unaware of the removal of the records altogether until after the Auditor General had carried out his audit of the PMO cheque account in October 2001.

[26] The Lord Chief Justice drew from this passage four findings by the Tribunal:

- (a) That records of payments, vouchers and supporting documents in respect of the PMO bank account were removed by MOFNP staff to MOFNP for entry into the Sunsystem by its staff;
- (b) The Sunsystem entries were made from vouchers relating to each cheque and that there was a proper voucher made out for every payment for which a cheque was issued in respect of the two sums stated in the charges;
- (c) The MOFNP staff failed to keep an inventory of the records they removed; and
- (d) The loss and disappearance of those records could not be attributed to Mr. Kautoke who was not the principal or daily supervisor of those records and because he was unaware of their removal.

[27] The Lord Chief Justice accepted the PSC's criticism of the Tribunal's failure to consider and address material evidence relevant to those four findings. It had, he said, relied principally (if not solely) on a spreadsheet prepared by Mr. Kautoke's daughter-in-law to support its findings that vouchers existed and were used by MOFNP to update the Sunsystem. But it did not refer to evidence that the entries could have been made from sources other than vouchers, including cheque butts and bank statements.

[28] The Lord Chief Justice said that the finding that Mr. Kautoke was not responsible for the loss of the vouchers because, *inter alia*, he was not the principal supervisor or responsible for the daily management of the accounts was "a most surprising one" for which there was, in his view, an absence of any

probative material. It was contrary to Mr. Kautoke's statutory responsibilities as CEO of the PMO. It was contrary to a letter provided by the Deputy Secretary, Mr. Ma'u, put before the Tribunal by Mr. Kautoke and to Mr. Kautoke's own evidence. The Tribunal had not referred to this evidence.

[29] At para [115] of his judgment the Lord Chief Justice set out other "material evidence" relevant to the Tribunal's principal findings of fact that he said was not considered by the Tribunal. He concluded that its failure to consider this evidence was an error of law. The decision of the Tribunal was unsafe and must be set aside. Because, in relation to this ground of review, the correction of error required a re-assessment of the facts, the Lord Chief Justice set aside the ruling of the Tribunal and referred Mr. Kautoke's appeal back to it for further hearing and re-determination in accordance with his judgment.

#### Submissions of counsel

[30] For the appellant, Mr. Laurensen QC submitted that the Supreme Court erred in concluding that an obligation to retain and safely keep vouchers must necessarily be implied in r.10(1). That regulation had nothing to do with what is to happen to vouchers after payment is made. It places no obligation on any person in the PMO in relation to the keeping of vouchers for accounting, audit or any other purpose. Counsel submitted that the purpose of r. 10(1) was merely to ensure that, before a payment using public funds is made, sufficient information is provided (with or in a voucher) to ensure that it is proper to make the payment – that it can be justified. If r.10(1) (as opposed to some other provision) was intended to impose an obligation on an officer to retain vouchers, it would say so expressly and identify which officer is responsible, as r.5(2) does for receipts. There are other ways than r.10(1) of addressing who is responsible for the safekeeping of vouchers: a Treasury Instruction under s.45 of the Public Management Act 2002 or, as in this case, a Savingram recording an agreement between the MOFNP and the PMO. Mr Kautoke faced a formal

regulatory disciplinary process and if the formulated charge alleged contravention of a regulatory provision, it must be proven that it has been contravened by conduct particularised in the charges. Mr. Kautoke had accepted that if the charges can be read as including an allegation that the vouchers never existed, that would be capable of being a breach of r.10(1), but there was no factual finding capable of supporting such an allegation.

[31] On the second ground of appeal, relating to the Tribunal's finding that vouchers had been removed from the MOF to the MOFNP, Mr. Laurensen said that the Supreme Court should not have interfered with the Tribunal's finding of fact. It was not the function of judicial review to resolve alleged factual errors. The Court must uphold a decision-maker's findings if there was some material of probative value capable of supporting the decision, even if there was a respectable body of evidence on the other side of the argument. The approach taken by the Supreme Court had, instead, required the Tribunal to refer to, respond to, and give reasons for not accepting the PSC's evidence. Counsel submitted that there was evidence capable of supporting all the Tribunal's factual findings, including its finding that Mr. Kautoke was not responsible for the loss of vouchers because he was not the principal supervisor of records and the finding that vouchers had been properly made out for every payment covered by the charges and that they had been removed by MOFNP staff pursuant to their duty.

[32] For the PSC, Mr. Waalkens QC supported the Supreme Court's view that r.10(1) implicitly included a requirement that proper accounting records must be retained; and if they had never existed at all this would have amounted to an express breach of the regulation. Regulation 10(1) expressly required vouchers to be kept "so as to enable them to be checked without reference to any other documents". In concluding that it was the particulars of each service that must be able to be checked in this way, not the vouchers, the Tribunal had not explained how they could be so checked if the vouchers had not been retained. The regulation did not make any sense without a requirement for retention

being implied. That conformed with the legislative intent. The allegation in the charge, as particularised, was of not keeping, ie being unable to produce, proper records for accounting purposes and Mr. Kautoke had plainly understood that was the case against him.

[33] The second ground of appeal, counsel said, concerned the Tribunal's factual finding that the records had been moved to the MOFNP without Mr. Kautoke's knowledge. The Supreme Court had correctly identified the Tribunal's failure to consider certain evidence at all. Mr. Wallkens submitted that a complete failure by a Court (or as here, a Tribunal) hearing a general appeal to consider and address material evidential matters, is an error of law. This was, he said, quite distinct from a review of the weight of evidence and the conclusions drawn from it. The Supreme Court had identified multiple areas where the Tribunal had failed to even consider relevant evidence on which the PSC relied. Alternatively, the decision of the Tribunal needed intensive review taking into account the nature of the decision being reviewed by the Supreme Court (individual rights being in question) and the statutory context of concerns regarding the use of public funds, large portions of which had been donated by other governments. The Tribunal had made an unreasonable decision. The finding of the Tribunal that the accounting records had been moved to the MOFNP was, as the Supreme Court determined, unsustainable on the evidence. It had been made in the face of contradicting evidence to which the Tribunal had not referred. The evidence established that Mr. Kautoke clearly was responsible for the monitoring of the system and had not discharged his responsibility in relation to the vouchers and other accounting records.

### **Discussion**

[34] There are three matters to be determined by this Court:

- (a) What r.10(1) requires to be done with vouchers after they are made out to authorise a payment by the PMO;

- (b) In the light of (a), the extent of Mr. Kautoke's contractual and regulatory responsibilities in relation to completed vouchers; and
- (c) Whether the Supreme Court, on a judicial review application, was entitled to interfere with the Tribunal's findings of fact and the conclusions it drew from them.

**(a) The regulation**

[35] We are in complete agreement with the Lord Chief Justice about the meaning of r.10(1). It requires that "vouchers for payments will contain full particulars of each service such as dates, numbers, quantities *so as to enable them to be checked without reference to any other documents*". [Emphasis added] The Tribunal considered that the word "them" referred to the particulars only, not to the vouchers as such; and therefore all it required was that the particulars be recorded so that they could be checked without reference to any other document. That checking would presumably occur in the making out of a cheque for the purpose of each payment. The Tribunal considered that after this had happened the regulation did not oblige the PMO to keep the voucher safely so that it could be further checked for some other purpose or examined during an audit of the Office. But, as the Lord Chief Justice observed, the checking of a voucher might be necessary, as a matter of good financial practice, both before and after the payment was made. That would include checking that a voucher actually existed in which the particulars of the payment were set out.

[36] In our view, the purpose of r.10(1), read against the background of the regulation as a whole and the legislation under which it operates – the Public Finance Management Act - and the Public Audit Act, is to ensure that vouchers are kept so that it can be verified that they exist and that each voucher contains the requisite information about each payment. The need to carry out checking could arise long after a payment is made and, in particular, during regular auditing. The Public Audit Act requires the Auditor General to undertake audit

programmes to examine “transactions, books and accounts and other financial records of Ministries and Government agencies”: s.10(1). “Books and Accounts” is defined to include vouchers: s.2(1). The auditing process would be hindered if a voucher did not have to be kept after its use in the process of making payments. Therefore, although r.10 (1) does not explicitly state that vouchers are to be retained or kept thereafter, in context that is really so obvious as not to need an express statement. It is readily and properly to be implied from the reference to the ability for vouchers to be checked (“so as to enable them to be checked”).

**(b) Mr. Kautoke’s responsibility**

[37] The particulars of the charge against Mr. Kautoke alleged failure to ensure that he and his staff kept proper vouchers for payments in the amount of \$796,432 (the missing 229 vouchers). As CSSC, Mr. Kautoke could not, however, be expected to shoulder the blame for isolated or occasional deficiencies in the keeping of vouchers. He was not the principal supervisor of accounts in terms of the Treasury Instruction conveyed by the Savingram, which directed that the daily supervision of accounts would be handled by the Deputy Secretary who was “the principal Supervisor to oversee and manage the operation of the Accounts.” In the agreed three tier system for the keeping of financial records of the PMO Mr. Kautoke’s responsibility as CSSC was to monitor the records system. That appears from a document (“Annex 1”) attached to a letter written by Mr. Paula Ma’u who was Deputy Secretary but ceased to hold that position before Mr. Kautoke was appointed CSSC and thus was not in that office at the time of the payments for which vouchers are missing. Mr. Ma’u’s letter was in evidence, without objection, before the Tribunal.

[38] Mr. Ma’u’s letter said:

As far as I can recount the division of work on keeping of accounting records for this Partial Financial Management Devolution to PMO, involves three levels as detailed in the attached Annex 1. The daily custodian

of financial records was the responsibility of the accounting support staff. The weekly supervision was my responsibility and the Chief Secretary & Secretary to Cabinet was responsible for monitoring of the system. The Chief Secretary & Secretary to Cabinet and I were among the five authorized signatories of the cheques and vouchers plus checking the supporting documents, which all form the required main records of the financial system to be kept.

The allocation of responsibility to the CSSC in Annex 1 included "Records System monitoring" with the comment "This is undertaken randomly, about two or three month interval". We note that the length of time during which payments in respect of which vouchers are missing or could not be located without delay was about nine months.

[39] In order to adequately perform his monitoring function and discharge his responsibility under r.10(1) Mr. Kautoke necessarily had to satisfy himself that staff were following a standard and satisfactory procedure for the making of payments that involved the completion, retention and storage of all vouchers. He needed also (a) to make the random inspections of files in which vouchers were supposed to be held to see that this procedure was being adhered to and (b) to take steps to satisfy himself that the Deputy Secretary was fulfilling his duty under Annex 1, ie. to undertake "weekly supervision of records keeping undertaken by the support staff". The CSSC was under a duty to inquire into any deficiencies observed as a result of his inspections and to require restoration and recovery of any missing records. It must also have been part of his monitoring duties to require the Deputy Secretary to advise of any significant problems being encountered in respect of record keeping. The system for the storage of vouchers and other accounting records needed to include a method of recording and tracing where they were being kept from time to time. Mr. Kautoke's responsibility in this regard was to ensure that the PMO, in particular the Deputy Secretary, was aware at all times of the physical location of the vouchers so that they could be checked at any time.

[40] In summary, it was Mr. Kautoke's responsibility under r.10(1) to see that there was in place a system for the making out and preserving of vouchers for all payments and that this system was continuing to function, enabling vouchers to

be checked without delay for audit or other purposes. The Tribunal had to decide whether he had discharged his responsibility as we have described it or whether he was in breach of r.10(1) for not doing so. Because the Tribunal fell into error in its interpretation of the regulation and therefore of Mr. Kautoke's responsibility under it, the Lord Chief Justice correctly set aside its ruling and sent the case back to the Tribunal for re-hearing and re-determination.

**(c)The Tribunal's findings of fact**

- [41] The Lord Chief Justice went further than this and, having expressed his view on aspects of the Tribunal's findings of fact and the conclusions it drew from them, said that its failure to consider certain evidence, which he identified([26]-[29] above), amounted to an error of law that also required the setting aside of its decision as "unsafe".
- [42] Sympathetic thought we may be towards at least some of the Lord Chief Justice's criticisms, we think he went too far in finding that there was an error of law of this nature; and that he therefore impermissibly trespassed into issues of fact which were for the Tribunal alone to assess.
- [43] In giving judgment on a judicial review application a court will only rarely be justified in overturning the evaluation of evidence by the decision-maker entrusted by law with that task and setting aside its conclusions of fact. The decision-maker, in making that evaluation and drawing its conclusions, must of course have proceeded upon a correct interpretation of relevant law, must have taken account of relevant considerations and ignored irrelevant considerations. To fail in any of these respects is an error of law. The rare exceptional situation when a decision-maker's conclusions of fact are susceptible of being set aside is when those conclusions are so clearly insupportable as to amount to an error of law. The following summary was given by the New Zealand Supreme Court in *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZCR 721 at [26], a case

involving an appeal on a question of law but equally applicable to judicial review:

An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law; proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow* ([1956] AC14 at p.36) a state of affairs “in which there is no evidence to support the determination” or “one in which the evidence is inconsistent with and contradictory of the determination” or “one in which the true and only reasonable conclusion contradicts the determination”. Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test.

[44] It had been said that the decision can be set aside where the body entrusted with the decision has reached a decision based on a material mistake as to an established fact: *Halsbury's Laws of England, Judicial Review* Vol 61A (2018) at [624]. But it seems to us that this is simply an example of a decision that is insupportable or untenable because of that basic mistake of fact.

[45] Having heard extensively from counsel concerning the factual errors of the Tribunal, as the Lord Chief Justice held them to be, we do not consider that even collectively, they were so egregious as to give rise to an insupportable decision (if errors of law had not otherwise been made, as we have found). In so concluding, we have taken into account the nature of the Tribunal's decision.

[46] Now that the matter is to be remitted to the Tribunal we ought to refrain from expressing any view on those factual issues. We will however, make three comments. The first is about the Lord Chief Justice's reliance on the New Zealand Court of Appeal case of *Business Distributors Ltd v Patel* [2001] ERNZ 124, CA220/00 13 August 2001. In our view, that case dealt with an unusual situation that was unlike the present one. The complaint made against the decision-maker (the Employment Court) was that on a general appeal to it from

the Employment Tribunal one of the grounds of appeal had been the failure of the Employment Tribunal to engage with certain important evidence. The Employment Court overlooked this ground of appeal and did not traverse the evidence, even briefly which would have been enough. The Employment Court's failure to respond to a ground of appeal was, the Court of Appeal said, an error of law. But that is not this case. It has not been asserted that the Tribunal overlooked a ground of Mr. Kautoke's appeal to it against his dismissal by the PSC. The Court of Appeal in fact commented:

If the Employment Court had traversed these matters even very briefly in its decision, and had concluded that nevertheless the Tribunal's decision should not be disturbed, BDL could not now expect this Court to interfere with the Employment Court's judgment unless it was able to clear the very high hurdle of showing that there was no evidence to support the Court's decision. Normally an attempt to have this Court review the balance of the evidence, as if engaged upon hearing a general appeal, must fail, even if we ourselves might have assessed the evidence differently. This is because a complaint about the weight of evidence and the conclusion drawn from it by the adjudicator is an entirely factual question and does not raise any issue of law.

[47] Secondly, the Tribunal has been criticised in the Supreme Court for failing to refer to some pieces of evidence. But there is ordinarily no need for a fact-finding body to make express reference to every piece of evidence. It is not to be assumed without good reason that it has overlooked something which was before it merely because it has not made reference to it.

[48] Thirdly, we have explained above (at [37] – [40]) the nature of Mr. Kautoke's responsibility in relation to the safe-keeping of vouchers by the PMO. If the Tribunal finds it to be the case that he really was unaware of a breakdown in the records system as a result of which the missing vouchers were either never created or were lost, that alone will not provide him with a defence under r.10(1) if his unawareness was because he failed in his supervising or monitoring duties as we have described them, for example, if he had not carried out the requisite random checks on how the system was working in practice and on

how the Deputy Secretary was fulfilling his role in it. Part of the supervising responsibility was to see to it that the PMO knew where its records were being kept at all times. In that respect, Mr. Laurenson conceded there was no record kept of the documents removed from the PMO nor of those returned later by the MOFNP. And, of course, the vouchers relating to the 229 cheques have still not been found.

## Orders

- [49] (a). The appeal is dismissed.
- (b). The Supreme Court's orders setting aside the Tribunal's ruling of 18 April 2017 and referring Mr. Kautoke's appeal back to the Tribunal for re-hearing and re-determination are confirmed, save that it must now be re-determined in accordance with this judgment.
- (c). There will be no order for cost in this court.



*K Handley*

Handley J

*J Blanchard*

Blanchard J

*A Randerson*

Randerson J