IN THE COURT OF APPEAL OF TONGA
NUKU'ALOFA REGISTRY

AC 10/2019

BETWEEN	**'ATENISI INSTITUTE INC**
	Appellant
AND	**TONGA NATIONAL QUALIFICATIONS AND ACCREDITATION BOARD**
	Respondent

Coram:	Blanchard J Hansen J
Counsel:	Dr M Horowitz, lay representative of the Appellant Mr S Tu'utafaiva and Mr S Taione for the Respondent
Date of hearing:	23 March 2020
Date of Judgment:	26 March 2020

JUDGMENT OF THE COURT

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[1] 'Atenisi Institute Inc ("**Atenisi**") sought by judicial review application a declaration that it is not subject ("non-compliant") to the requirements of the Tonga National Qualifications and Accreditation Act (the Act) in relation to certain of its courses and a declaration that certain compliance notices issued by the Board established under that Act (the Board) were invalid.

[2] Lord Chief Justice Whitten in a comprehensive judgment delivered on 15 October 2019 dismissed 'Atenisi's claims, including an associated claim for damages. But he held that the compliance notices issued by the Board dated 22 February 2018 and 21 February 2019 were unlawful, invalid and of no effect, declared them to be so and set them aside.

[3] 'Atenisi seeks to bring a limited appeal which does not challenge the refusal of the declarations relating to compliance with the Act. Therefore, the following summary of the facts omits much of the detail in the judgment below that is not relevant to the matters raised before us.

Facts

[4] In 2009 the question arose of 'Atenisi's right to call itself a university. In 2010 the Board refused 'Atenisi's application to register under the Act. 'Atenisi commenced proceedings which were settled on the basis that it would be registered as a tertiary institute. It was so registered in 2011 as a provider under the Act for a twelve-month period.

[5] Registration was renewed on several occasions, the latest being for two years expiring in August 2017. That renewal was on condition that 'Atenisi should submit its program of study for accreditation within six months. 'Atenisi had previously been advised by the New Zealand High Commission that it could not be included in an aid programme sponsored by New Zealand without accreditation under the Act.

[6] On 9 February 2017, 'Atenisi submitted its application for accreditation of its B.A. programme. There followed a lengthy exchange of correspondence and meetings between representatives of the parties concerning 'Atenisi's application. The Board was insisting on certain documentation it put forward being completed by 'Atenisi. The stumbling block from 'Atenisi's point of view was that, it said, the required documentation was unsuitable and unreasonable for assessment of a university, particularly given that it was a small institution. 'Atenisi said that the Board's approach

and documentation deployed the wrong pedagogy to assess 'Atenisi's instruction and that the Board's approach was more appropriate for a technical or vocational school than a liberal arts university. 'Atenisi sought exemptions from what the Board was requiring of it. The Board would not back down, insisting on having its forms (templates) fully completed.

[7] In December 2017 Mrs Moa, of the Board, wrote to 'Atenisi advising that the Minister of Education, in his capacity as chair of the Board, had decided that 'Atenisi had to comply with the Act and certain regulations made under it. That meant 'Atenisi had to work to meet accreditation criteria like all other providers.

[8] In January 2018 the Board resolved that 'Atenisi was required to refrain from delivering specified programmes and was not to enrol any students in 2018 until those programmes were approved and accredited. It issued a letter signed by Mrs Moa so requiring. This was the first of the compliance notices, both of which were in similar terms.

[9] In April 2018 'Atenisi delivered to the Board updated hard copies of its application documents including certain appendices.

[10] In May 2018 these judicial review proceedings were commenced by 'Atenisi. Lord Chief Justice Paulsen granted leave for them to be brought, that leave being expressly limited to the issues of non-compliance with the Act and whether 'Atenisi was a provider subject to the requirement of registration.

[11] By its Third Amended Statement of Claim 'Atenisi sought a declaration that it is not subject to the Act and therefore to the jurisdiction of the Board and that, in effect, the Act does not provide for any sanctions or penalties against it as a provider. 'Atenisi also made a claim of breach of an implied contract alleged to exist between the Board and its "constituency" including 'Atenisi and sought damages for breach of that contract in respect of the loss to it because it had been unable to receive (1) in-country tuition support via NZ Aid for the preceding years, (2) Tonga Vocational Educational Training Funding in 2017/2018 and (3) Cyclone Repair Funding from the Ministry of Education in 2018, such damages to be quantified at trial.

[12] The parties agreed to split the trial such that if 'Atenisi was successful in establishing breach of an implied contract there would be a separate trial on issues of "legal entitlement, causation or quantum".

The Supreme Court Judgment

[13] The Lord Chief Justice condensed the issues to two questions:

(a) Was 'Atenisi exempt from the Act by reason of any of its pleaded grounds or causes of action? ; and

(b) Were the Board's compliance notices lawful? (*'Atenisi Institute Inc v Tonga National Qualifications and Accreditation Board*) [2019] TOSC 45 at [105]).

[14] As well as answering these questions, the Lord Chief Justice traversed a number of matters which were canvassed before him but which in his view did not arise for determination. Save as mentioned below, we need not refer to them, and indeed they appear to have fallen outside the limits of the grant of leave to apply for judicial review.

[15] The Lord Chief Justice found that 'Atenisi was not exempt from the Act and that its various claims for a declaration that it was not subject to the Act must fail. However, as already mentioned, he also found that its challenge to the compliance notices succeeded.

This appeal

[16] We need not describe or comment on the Lord Chief Justice's reasons for his conclusions on the matters that he actually determined as 'Atenisi's appeal expressly does not challenge those conclusions or the orders made by the Lord Chief Justice in [280] of his judgment. The limited nature of the challenge now attempted by 'Atenisi presents an immediate difficulty for it. As the New Zealand Supreme Court pointed out in *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55; [2008] 1 NZLR 13 at [25], it is fundamental that an appeal must be against the result to which a decision maker has come, namely the order or declaration made - or, we would add, refused - not directly against the conclusions reached by the decision-maker which led to that result; there is no right of appeal against the reasons for a judgment, only against the judgment itself. Even less so can there be an appeal against the *obiter dicta* of a Court, that is, remarks made or opinions expressed by a Judge incidentally or collaterally, being unnecessary to the decision in the case and therefore of no precedential value (being remarks or opinions from which a subsequent Court is free to depart if the matter appears differently to it).

[17] Doctor Horowitz, the Dean of 'Atenisi, is not a lawyer but has been given permission to represent it in these proceedings. He expressed concern about certain statements made by the Lord Chief Justice in his judgment describing two of them as

"impediments" to the bringing of any future case against the Board and one as an "omission". The Lord Chief Justice had declined to express any view on the applicability or appropriateness of the templates specified by the Board as part of the accreditation documentation. He said that 'Atenisi had not sought any relief in relations to its complaint about the templates, which 'Atenisi had in fact completed and submitted. There had as yet been no decision by the Board on 'Atenisi's application which might be amenable to judicial review. That remains the position.

[18] Dr Horowitz's first "impediment" concerned an express reservation by the Lord Chief Justice about whether the Court would actually review the assessment criteria adopted by the Board. He had said it was a matter in respect of which the Court could be expected to exercise a high degree of deference to the views of the Board:

> "The concept of an applicant for accreditation dictating to a statutory accrediting body the bases upon which the applicant contends its application should be assessed is problematical to say the least." (At [137])

[19] In our view the Lord Chief Justice was plainly not intending to express himself in authoritative terms. If and when an application for judicial review is made in respect of the future decision of the Board (assuming of course that it is unfavourable to 'Atenisi, which it may not be), the Lord Chief Justice or another Judge would be free to take a different view if it was considered that the Board had misdirected itself or failed to take account of a relevant matter, had regard to an irrelevant matter or made an entirely unreasonable decision. Having said that, however, we should add that where a decision-maker has specialist expertise a Court will be appropriately cautious in differing from it on a technical matter like methodology. We consider that was really all that the Lord Chief Justice was saying.

[20] The second "impediment" complained about by Mr Horowitz was that the Lord Chief Justice had said that it was not a matter for the Court to usurp the statutory role of the Board by deciding whether 'Atenisi should be registered under the Act as a university (at [120]). Dr Horowitz's criticism of this remark betrays a lay-person's misunderstanding of the role of the Court in judicial review. Speaking in general terms, what the Court examines is the process adopted by the decision-maker, including what it considered or did not consider, and whether it fell into legal error, for example, misinterpreting its own statute. If the Court is able to identify an error of that kind, it will set aside the decision and order the decision-maker to reconsider the matter on a proper basis. But, as the Lord Chief Justice said, it will not usurp the decision-maker's function and make the decision itself or order it to make a particular decision unless, quite unusually, that is the only possible decision open to the decision

maker. There are also very rare cases in which, while the Court cannot pinpoint exactly how the decision-maker has erred, the actual decision reached is so extraordinary that there must have been something fundamentally wrong with the way it was made and the Court will set it aside for unreasonableness.

[21] Doctor Horowitz's "omission" was the fact that the Court did not stipulate a date by which the Board must make a decision on 'Atenisi's application. But that is hardly surprising as the Court was not asked to do this. What 'Atenisi sought in its pleadings, and indeed all it was entitled to seek in terms of the limited grant of leave, was a declaration of exemption from the Act and the setting aside of the compliance notices. In this connection we do however draw the Board's attention, as indeed the Supreme Court has also done, to Regulation 17(3) of the Tonga National Qualifications and Accreditation Regulations 2010 which provides for applications to be processed promptly.

[22] Finally, Dr Horowitz sought on this appeal that this Court should grant 'Atenisi leave "to amend its prayer for damages out of time so as to be triggered by the Court's revocation of the [Board's] recruitment ban". This refers to the claim by 'Atenisi in its Third Amended Statement of Claim for damages for breach by the Board of the alleged implied contract with 'Atenisi said to have been created by a representation on the Board's website which, it was alleged, bound the Board to exempt 'Atenisi from assessment for registration and accreditation. The damages sought are for the losses referred to above (in para [11]). However, any award of damages obviously depended upon establishing the exemption and that claim failed with no appeal being pursued in respect of it.

[23] We agree with the Lord Chief Justice that, for the reasons he gave, the implied contract claim was misconceived. No other damages claim was pleaded. In particular, none was pleaded in relation to the (invalid) compliance notices. We note that in a ruling on 21 October 2019 the Lord Chief Justice said that, without expressing a view, it might be open to 'Atenisi to consider issuing fresh proceedings for any damages it says have been caused by reason of the unlawful notices.

Composition of the Court

[24] We have heard this appeal pursuant to an order made by the Lord Chief Justice under the Court of Appeal (Constitution of Court) Rules.

Result

[25] The appeal is dismissed with costs against 'Atenisi in favour of the Board to be fixed by the Registrar.

Blanchard J

Hansen J