

IN THE COURT OF APPEAL OF TONGA

CIVIL JURISDICTION

AC 7 of 2013

NUKU'ALOFA REGISTRY

[CV121 of 2011]

BETWEEN : **1. PUBLIC SERVICE COMMISSION
2. KINGDOM OF TONGA**

- **Appellants**

AND : **VILIAMI FUKOFUKA**

- **Respondent**

Coram : **Salmon J
Blanchard J
Ward J**

Counsel : **Mr Adsett AG & Ms Kautoke & Ms Katoa for
the Appellants
Mr Niu SC for the Respondent**

Date of Hearing : **2 April 2014**

Date of Judgment: **9 April 2014**

JUDGMENT OF THE COURT

- [1] This appeal is against a judgment of the Lord Chief Justice in which he upheld a claim by the respondent for damages for wrongful dismissal.

Background

- [2] On 17 January 2007 the respondent was appointed by contract as Head of Department for the Ministry of Education, Women's Affairs and Culture. His appointment commenced on 1 January 2007 and was for a period of 2 years with the opportunity for extension for another 3 years. The contract was in fact extended for the further period ending on 1 January 2012. The contract was varied in 2008. The principal purpose of the variation was to provide certain additional benefits to the respondent.
- [3] Central to the arguments in this Court and the Court below was clause 21 of the original contract which provided:

"Application of Public Service Act, Public Finance Management Act and Regulations.

The provisions of the Public Service Act 2002 any Public Service Regulations and the Public Finance Management Act 2002 shall apply to the parties to this Contract."

- [4] It will be noted that one of the statutes referred to in the clause set out above is the "Public Service Act 2002". At the time the contract was entered into s.20 of that Act provided:

"A Head of Department or employee of the Public Service shall take a leave of absence upon registering as a candidate for election to the Legislative Assembly and shall resign if elected."

- [5] On the 20th September 2010 the Public Service Act was amended by the Public Service (Amendment) Act 2010. The amending Act emphasises the apolitical nature of the Public Service. S 18 of that Act deleted S 20 of the 2002 Act and replaced it with a new S 20:

20 - "Candidacy for Legislative Assembly, town officer or district officer."

"A Chief Executive Officer or employee in the Public Service shall resign upon registering as a candidate for Election to the Legislative Assembly, the office of town officer or district officer."

- [6] It can be seen that the amendment made a significant change to the law. Whereas previously an employee could take leave of absence upon registering as a candidate for election and was required to resign only if elected, the new provision required an employee to resign upon registering as a candidate.
- [7] About a month prior to the passing of the 2010 amendment the Crown gave notice that a general election would be held on 25 November 2010 and that candidates must register on 21 October 2010.
- [8] The passing of the amendment raised questions about its consequences. To answer one of these questions the Public Service Commission (the Commission) wrote to all Heads of Department advising that:

“for Civil Servants intending to resign from the Public Service so they can register as a Parliamentary Candidate, the period of notice will be waived.”

The period of notice referred to was that required by Clause 19.2 of the contract if an employee wished to resign. It should also be

noted that one of the provisions of the amending act changed the title of "Head of Department" to "Chief Executive Officer."

[9] The respondent wished to register as a Parliamentary candidate and correspondence ensued between him and the Commission. The respondent maintained that the amending act did not apply to him because his contract was signed well before its passing. He invoked the provisions of the Constitution prohibiting the enactment of retrospective laws and maintained that his position, if he registered as a candidate, would be governed by s.20 in the form it was in at the time his contract was signed.

[10] The Commission replied advising it did not agree with his interpretation and that if he proceeded with registration he would be deemed to have resigned from the public service.

[11] Notwithstanding this warning the respondent registered as a candidate. The Commission determined that he was deemed to have resigned and paid him a gratuity payment together with leave and retirement fund payments to which he was entitled. The respondent was not elected to Parliament and brought these

proceedings seeking damages for unlawful termination of his contract.

The judgment in the Supreme Court

[12] The Lord Chief Justice rejected a claim by the appellant that the acceptance by the respondent of the payments made to him estopped him from bringing his claim. There has been no appeal against this part of the judgment.

[13] The Lord Chief Justice held that clause 21 of the contract imported the provisions of the Public Service Act into the contract and that because of the necessity for certainty the imported terms must be those of the Act at the time of the contract. Thus one of the rights secured by the contract was the right to take leave of absence upon registering as a candidate and he would only be required to resign if elected. He held that the decision to apply the terms of the amended S 20 varied a contractual term without obtaining the respondent's agreement as required by clause 3.2 of the contract. He also referred to clause 20 of the Constitution which prohibits the enactment of retrospective laws insofar as they curtail or take away rights or privileges existing at the time of the passing of such laws. He upheld the respondent's claim and awarded damages.

Discussion

- [14] Central to a determination of this appeal is the question as to whether s.20 of the Public Service Act in the form it was when the contract was signed became a term of the contract. The Lord Chief Justice held very clearly that it did and his conclusion followed inevitably from this.
- [15] We do not agree. In our view clause 21 of the contract did not have the effect of making all the provisions of the legislation referred to therein terms of the contract. Many of the provisions are irrelevant to the purpose of the contract. Nor can it have that effect in relation to sections or regulations which might be seen to confer a benefit on particular employees. If this were the case it would create uncertainty as to the contractual terms. We agree with the statement in Burrows, Finn and Todd Law of Contract in New Zealand 2nd edition at para 3.7 that “the courts have long insisted that any agreement which is to have contractual force must be in terms which define with a sufficient degree of certainty the obligations which the parties are to undertake”. In our view the purpose of the clause was just to draw the attention of parties to the contract to statutes and regulations that were relevant to their

duties. It merely stated what would be the case even if the clause were not there. In our view it would take much more specific words to make these statutory provisions or parts of them terms of the contract. In fact it is quite unnecessary to do so because the parties to the contract had the obligation to comply with the laws of Tonga regardless of its terms. Had the parties intended to incorporate s.20 as a term, the contract would have to specifically record this.

[16] Mr Niu argued that in Tonga the reference to a statute which includes the year of its passing had the effect of not including any subsequent amendments. In order for amendments to be included the words "as amended" would have to have been added. We do not agree. Amendments to the Act became a part of the Act as from the time of the amendment. In fact s.33 of the Acts Interpretation Act makes that clear. It provides:

"Every Act amending another Act shall, unless the contrary intention appears, be read and construed with that other Act and as part of that other Act."

No contrary intention appears in the amending legislation so that the new s.20 became part of the original act on its enactment.

[17] Nor is there any question of retrospectivity. The provisions of the new s.20 only affected those registering as a candidate from the time of its enactment. In passing the amending provisions Parliament was exercising its function as lawmaker. There is no provision of the Constitution which would prevent the enactment of the new s.20.

[18] For the reasons set out above the appeal is allowed. The judgment of the Court below is set aside as is the award of damages and the costs order. The appellant is entitled to costs in this Court and in the Supreme Court to be taxed if not agreed.



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Salmon J

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Blanchard J

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Ward J