Laki Niu.

31/10/14.

IN THE COURT OF APPEAL OF TONGA

CIVIL JURISDICTION AC 25 of 2014

NUKU'ALOFA REGISTRY [CV 91 of 2011]

BETWEEN : SIOSAIA VE'EHALA

- Appellant

AND : KINGDOM OF TONGA

- Respondent

Coram : Salmon J
Handley J
Hansen J
Tupou J

Counsel : Mr L. Niu SC for the Appellant
Mr Kefu, A/AG for the Respondent

Date of Hearing : 20 October 2014

Date of Judgment: 31 October 2014

JUDGMENT OF THE COURT

[1] This application for leave to appeal is against a decision of the Lord Chief Justice striking out the appellant's amended statement of claim . The claim sought damages for wrongful dismissal from the Police Force.

[2] The Chief Justice took the view that the proceeding, though presented as a private law claim for damages arising from breach of contract, was in reality an out of time motion for judicial review without leave having been obtained beforehand.

[3] In para 9 of his judgment the Chief Justice said:

> *"In my view both counsel have overlooked the fundamental point which is that as a general rule, public servants do not have contracts of employment. Subject to statutory limitations the Crown has the right to terminate the employment of Public Servants at will. The statutory limitations invariably import the rules of natural justice into the dismissal procedure and when those rules are not observed the procedural shortcomings may lead to the dismissal being quashed. When this happens the officer is regarded as not having been dismissed at all, rather as having retained the entitlements, including salary, which he would have continued to enjoy had he not been wrongfully dismissed. Ordinarily there is no room for an award for damages once certiorari has issued in respect of an unlawful dismissal."*

[4] The Chief Justice then said that the statement of claim while it asserts the existence of a contract, provides no detail of it. He referred to *Ram Prasad v The Attorney General* [1999] FJCA 52 where the Fiji Court of Appeal held:

> *"... the judge was correct to conclude that, as the appellant had been appointed under a statutory provision, public law applied to his appointment and any claim resulting from his dismissal could only be brought by an application for judicial review".*

With respect we are of the view that the law has developed since that judgment was given. As will be seen we hold the view that the appellant's claim is one in private law.

[5] The Chief Justice concluded that although no application to strike out had been made the Court had the power to take this step of its own initiative and he proceeded to do so.

[6] The history of these proceedings is of relevance. As recorded in the judgment, on 28 May 2007 the appellant was interdicted from duty by the Minister of Police. An interdiction is a suspension without pay. The appellant was advised of his interdiction by letter from the Minister dated 28/5/2007. The reason given for the

interdiction was that a complaint had been made regarding inappropriate actions in relation to a young woman. The letter recorded that "Investigative and legal works will be commenced against you in regards to this complaint and you will be informed on a later date of any further requirements".

[7] In fact the appellant was not advised of "any further requirements". The next step was a letter of 8 October 2007 advising the appellant that the Cabinet had approved his dismissal from the Police with effect from 29 May 2007. The Cabinet decision was made on 26 September 2007. The letter gave no reasons for the dismissal and the appellant was not given the opportunity at any stage to be heard by the Cabinet. However it is pleaded that on receiving the advice of interdiction the appellant met the Minister of Police in May 2007 and told him that the complaint received was false and he supported this with a written statement confirming the denial. The Minister told him he would be informed of the outcome of the investigation but as recorded above this did not happen.

[8] The statement of claim also records that the appellant made enquiries with the police officer in charge of the investigation and

was advised that there was no ground for the complaint. It is also pleaded that in July 2010 the appellant appealed to the Prime Minister against his dismissal but received no response.

[9] The statement of claim was not issued until September 2011 which was shortly after Mr Niu was instructed. We were told that the appellants former Counsel, who was elected to Parliament in 2010, tried to resolve the matter in discussion with the Minister of Police. The judgment records that in October 2011 the respondent applied for leave to file a defence out of time and leave was granted to file a defence within 3 days. Over two years later no defence had been filed and Mr Niu filed notice of intention to proceed. On the 8th November 2013 the matter came before the Chief Justice who expressed the opinion that the action appeared to be for judicial review but leave had not been sought. He set the preliminary matter down for hearing on 12 December. On the 28th November the appellant filed an amended statement of claim which replaced a claim for reinstatement or alternatively salary, with one for special damages amounting to $171,529 representing a claim for salary from the date of dismissal until the appellants 60th birthday being the retirement age. A statement of defence was filed in

January 2014. The Chief Justice repeated his view that the claim was in reality one for judicial review and asked for written submissions from each party. His judgment followed.

[10] In can be seen from the above summary that the issue to be addressed in written submissions was the question of whether the proceedings were properly brought as an ordinary action or whether they should have been brought as an application for judicial review. If the former they were issued in time. If the latter they were out of the time (an application for leave to proceed must be made within 3 months from the date when grounds for the application first arose). There is provision for an extension of time for good reason.

[11] Mr Niu sought leave to appeal which the Chief Justice granted on the 11 August 2014. The grounds of appeal set out in the notice of appeal claim that the Supreme Court failed to consider the fact that the claim was based on two grounds – unlawful dismissal or alternatively breach of contract of employment. The notice of appeal claims that the dismissal was unlawful because the appellant was given no opportunity to be heard thus breaching the

rules of natural justice. At the hearing before us Mr Niu sought leave to add further grounds of appeal claiming that Order 39 of the Supreme Court Rules (which provides for judicial review) is ultra vires s.7 of the Crown Proceedings Act.

[12] As can be seen from the above discussion the central issue is whether the appellant proceedings are required to be brought by way of judicial review. For the reasons that follow we have concluded that the law does not require that procedure to be followed.

[13] In *'Asitomani v Superintendent of Prisons* [2003] Tonga LR 84, a decision referred to by the Respondent in the Court below, Ford J (as he then was) discussed this issue in the context of a claim by a prison officer. His comments at pps 88–89 provide a useful discussion of the developing approach by the Courts to these issues. We respectfully adopt his views as our own in this case.

> *"I mention these matters because, in theory at least, judicial review proceedings were designed to enable the court to deal with applications more speedily and at less expense than had previously been the case. It would appear, however, that those objectives have not been achieved in the present proceeding.*

When the judicial review procedure was introduced back in 1977, in the form of Order 53 of the English Rules of the Supreme Court, it created, as was described in the ***White Book*** *(1991) pp.14/1 and 14/6:*

> *"... a uniform, flexible and comprehensive code of procedure for the exercise by the High Court of its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals or other persons or bodies which perform public duties or functions ... The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself."*

Order 27 of the Tonga Supreme Court Rules follows the English RSC Order 53. The review procedure can be invoked only where some element of public law is involved and it is not an available remedy to a litigant seeking to enforce private rights only. In Vaioleti v Tonga Development Bank *[1999] Tonga LR 57, Ward C.J. refused an application by an employee for judicial review of his dismissal decision. The Chief Justice made the following observations:*

> *"In determining whether a case is appropriate for judicial review, the court must consider whether it is an action that requires the enforcement of private or public law rights. The definition of public law is not clear and modern case law is continually changing the distinction between private and public law rights. Moreover, judicial review has been allowed in some cases involving substantial elements of private law and refused in some where there is undoubtedly a public law element. In general terms, the*

more a case involves the enforcement of private law rights, the less likely it is that the court will consider it is a suitable case for judicial review."

The present case, perhaps, illustrates some of the shortcomings that can arise when a plaintiff uses the review process, instead of ordinary action, to seek redress for grievances arising out of an employment relationship. Although based in public law, in the sense that the relationship is regulated by the Prisons Act (Cap 36) and the Prison Rules rather than a written contract of employment, the plaintiff's grievances inevitably involve private rights and as such the review process is inappropriate. The remedies now being sought could have been invoked in a private law action.

There are exceptions to this general observation. In certain public law situations it will be appropriate for an employee to use the review process to seek from the court, for a particular purpose, one or other of the prerogative remedies. Had the plaintiff, for example, used the judicial review process during the long period of his suspension to review the Minister's actions at that stage then the matter may have taken an entirely different course and his dismissal may never have come about.

The main reason for the inappropriateness of the judicial review process is that in most employment related cases the litigant is not so much concerned with reviewing the decision-making process as with seeking a judgment based on the merits. When that is the objective, a litigant should simply proceed by way of ordinary action. As May L.J. observed in R v East Berkshire Health Authority, ex parte Walsh [1984] 3 All ER 425 (at 434):

"Employment disputes not infrequently have political or ideological overtones, or raise what are often described as 'matters of principle'."

On top of that, disputes arising out of disciplinary actions almost inevitably involve sharp conflicts in evidence with claims and counterclaims being thrown around with abandon. In such situations, it is appropriate that the court should determine the merits of the case on oral evidence properly tested by cross-examination. That option, however, is not available when a plaintiff elects to proceed by way of judicial review rather than ordinary action. In judicial review proceedings no oral evidence is called. The issues are determined on the strength of the affidavit evidence before the court and cross-examination on that affidavit evidence is the exception rather than the rule.

In McClaren v Home Office [1990] ICR 824 the Home Office sought to strike out an action brought against it by a prison officer upon the ground that the plaintiff ought to have proceeded by way of judicial review. The action related to a dispute over working hours. The plaintiff's appeal against the judge's order striking out his action was allowed by the Court of Appeal. Woolf L.J. said (at 836):

"In relation to his personal claims against an employer, an employee of a public body is normally in exactly the same situation as other employees ... the fact that a person is employed by the Crown may limit his rights against the Crown but otherwise his position is very much the same as any other employee. However, he may, instead of having an ordinary master and servant relationship with the Crown, hold office under the Crown and may have been appointed to that office as a result of the Crown

exercising a prerogative power or, as in this case, a statutory power. If he holds such an appointment then it will almost invariably be terminable at will and may be subject to other limitations, but whatever rights the employee has will be enforceable normally by an ordinary action. Not only will it not be necessary for him to seek relief by way of judicial review, it will normally be inappropriate for him to do so."

In *Kingdom of Tonga v Palu aka Tapueluelu* [2009] Tonga LR 86 this Court considered an appeal on a wrongful dismissal claim brought by the Superintendent of Prisons. That claim was brought as an ordinary action and it appears that procedure was accepted by the parties in the Supreme Court as appropriate. It was not necessary for this court to rule on the issue.

[14] There are close similarities between the appointment provisions for prison officers and those for police officers. The Prisons Act Cap 36 provides for the appointment of prison officers to be made by the Minister of Police with the approval of Cabinet (s.8). The Police Act Cap 35 provides for police officers to be enlisted to serve by the Minister of Police with the approval of Cabinet (s.10). Both statutes provide for a set period of engagement with provision for re-engagement. In each case there is a prohibition on resignation

without consent. Both statutes set out the circumstances in which an officer may be dismissed. In our view if claims for wrongful dismissal may be made by way of ordinary action for a prison officer the same should apply for a police officer.

[15] A decision of the High Court of Australia discussed in the *Kingdom of Tonga v Palu* also concerned a claim for wrongful dismissal. *Jarratt v Commissioner of Police for New South Wales* (2005) 224 CLR 44 supports the approach of the Supreme Court Judges in *'Asitomani* and *Palu*. In the joint judgment of McHugh, Gummow and Hayne JJ this was said at p.63:

> *"Upon the footing that the purported removal of the applicant from his statutory office was invalid, the authorities in this Court indicate that the refusal to allow the applicant to perform his duties for the balance of his term and receive his remuneration was without justification and amounted to, or was 'analogous to', wrongful dismissal. The reasoning in the authorities appears sufficiently from the statement of Starke J in Lucy v The Commonwealth (1923) 33 CLR 229 at 253...:*
>
> > *'The relation between the Crown and its officers is contractual in its nature. Service under the Crown involves, in the case of civil officers, a contract of service – peculiar in its conditions, no doubt, and in many case subject to statutory provisions and qualifications – but still a contract. And, if this be so, there is no difficulty in applying the general law in relation to servants who are*

wrongfully discharged from their service. A servant so treated can bring an action against his master for breaking his contract of service by discharging him. The: measure of damages in such an action is not the wages agreed upon, but the actual loss sustained, including, of course, compensation for any wages of which the servant was deprived by reason of his dismissal.'

This reasoning indicates why, in the present case, the award of damages by Simpson J did not cut across the principle that, where there has been a denial of procedural fairness in the exercise of statutory or prerogative powers, the law does not recognise a cause of action for damages and confines the complainant to public law remedies.

In assessing damages in a case such as the present and by analogy to an action for wrongful dismissal, it may well be urged that account has to be taken that at some time in the balance of his term the applicant may have been liable for removal under procedures which did meet the requirements of the Act. However, statements of Rich J and of Starke and Dixon JJ in Geddes v Magrath (1933) 50 CLR 520 at 530-531, 533-535 appear to suggest the contrary and that the presence of a power of removal would be disregarded in assessing damages against the respondents."

[16] We conclude that the appellant had a contract of employment with the Government. The conditions of that employment are set out in the Act. They include the provision as to discharge in s.17:

> *"17. (1) Any police officer may with the approval of Cabinet be discharged by the Minister of Police at any time –*
>
> *(a) if he is pronounced by a Government medical officer to be mentally or physically unfit for further service;*
>
> *(b) on reduction of establishment;*
>
> *(c) if the Minister considers that he is unlikely to become or has ceased to be an efficient police officer so that it is desirable in the public interest that he should be discharged from the Force; or*
>
> *(d) for misconduct.*
>
> *(2) Every police officer discharged under the provisions of the last preceding sub-section, other than those dismissed for misconduct, shall be given one month's notice of intention to discharge him from the Force or, at the option of the Minister of Police, one month's pay in lieu of such notice."*

The conditions of employment also include implied terms of fairness and observance of the rules of natural justice. A statutory scheme replaces the monarch's prerogative to dismiss at pleasure. Referring again to the *Jarratt* judgment Gleeson CJ said at p.51:

> *"The common law rule concerning service at pleasure was established long before modern developments in the law relating to natural justice, and the approach to statutory interpretation dictated by those developments. It was also established at a time when public service was less likely to be subject to statutory and contractual regulation than at present. We are here concerned, not with the pristine common law principle, but with a statutory scheme of office-holding and employment."*

And at pps. 56-57:

> *"We are not here concerned with the monarch's 'prerogative' power to dispense with the services of a subject at pleasure. We are concerned with a statutory scheme for the management of the Police Service and for the employment of its members, likely to have been intended to embody modern conceptions of public accountability. Where Parliament confers a statutory power to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, Parliament is taken to intend that the power be exercised fairly and in accordance with natural justice unless it makes the contrary intention plain. This principle of interpretation is an acknowledgment by the courts of Parliament's assumed respect for justice."*

And in the joint judgment of McHugh, Gummow and Hayne JJ the same view of the application of the rules of natural justice was expressed (p.61-62) and they added: "at the least that, when the Commissioner was contemplating a recommendation of removal of the applicant, the applicant should have been notified of the proposal, advised of any specific allegations against him and the content of any adverse report, and given an opportunity to respond to those allegations and any criticisms of his performance as a Deputy Commissioner".

The *Jarratt* judgment also contains some useful comments on the assessment of damages in such cases.

[17] Although the letter of dismissal gives no grounds for taking this step it seems clear that the only applicable ground in s.17 must be ground (d) i.e. for misconduct. There has never been any suggestion that any other ground could apply and in any case the other grounds require one month's notice to be given or one month's pay in lieu, neither of which occurred in this case. Subject to contrary evidence at trial it would appear that the appellant should have been advised of the ground of dismissal and the basis for it and should have been given the opportunity to be heard before dismissal took effect. The failure to take these steps breaches an implied term of his employment that his employer was obliged to treat him fairly and in accordance with natural justice.

[18] There is a further provision in the Police Act relevant to the appellant's employment. The appellant, who held the rank of sergeant, was subject to ss.40 and 41 relating to interdiction:

> *"40. (1) The Minister of Police may, subject to confirmation by Cabinet, interdict from duty any police officer below inspectorate rank pending trial for any offence whether under the provisions of this Act or before a court and pending determination of any appeal.*

(2) *A police officer interdicted from duty under the provisions of this section shall not by reason of such interdiction cease to be a police officer:*

Provided that the powers, privileges and benefits vested in him as a police officer shall, during his interdiction, be in abeyance but he shall remain subject to the same responsibilities, discipline and penalties and to the same authority as if he had not been interdicted.

41. A police officer interdicted from duty under the provisions of sections 39 and 40 of this Act shall not, save as is hereinafter provided, be entitled to receive any pay in respect of the period of such interdiction:

Provided that –

(a) he shall be allowed to receive such portion of his pay as Cabinet may direct; and

(b) if the proceedings against such officer do not result in the dismissal of the police officer, he shall be entitled to the full amount of the emoluments which he would have received if he had not been interdicted."

As already indicated the appellant was not tried or even charged with an offence. No proceedings of any kind were brought against him. On this basis it seems that the appellant must be entitled to his wages for the period of interdiction.

[19] Mr Kefu for the respondent argued that the appellants claim is purely a public law claim and in support of that submission noted

that the terms of appointment, employment and dismissal of the appellant were based on statute. The authorities referred to above establish that this is no bar to a private law claim. Mr Kefu also claims that the appellant did not plead a contract or identify which provisions of that contract had been breached. We do not agree. There is specific reference to the terms and conditions of his employment, expressions which suggest a contract. In para 13 of the amended statement of claim specific reference is made to "a breach of the contract of employment". Breaches of the alleged terms and conditions are expressly referred to.

Conclusion

[20] We are satisfied that the appellants claim is a private law claim properly brought as an ordinary action. We hold that as pleaded the appellant had a contract of employment with the respondent. The amended statement of claim sufficiently pleads a contract, the terms of it and a breach of those terms. On the pleadings the failure to hear the appellant before dismissing him for misconduct is a clear breach of the rules of natural justice the observance of which is an implied term of the contract. In the light of our findings it is unnecessary to consider whether leave should be granted in

respect of the appellants further grounds of appeal. For the above reasons we allow the appeal and reinstate the statement of claim. The pleadings should now be finalised as a claim in contract with any appropriate amendments so that the matter may proceed to interlocutories and trial. The appellant is entitled to costs in this Court and in the Supreme Court.

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Salmon J

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Handley J

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Hansen J

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Tupou J