

Scan & file + refer  
+SG

*[Signature]*  
14/12/15

**IN THE SUPREME COURT OF TONGA  
APPELLATE JURISDICTION**

---

AM 18 of 2015

**BETWEEN: R. T. GROUP LIMITED  
(trading as Tin Tin Fashion)**  
**- Appellant**

**AND: RICARDO BELBES**  
**- Respondent**

**Mr. 'A. Pouvalu for the Appellant  
Mrs. D. Stephenson for the Respondent**

**JUDGMENT**

[1] The Appellant operates a tailoring business in Fatafehi Road. In June 2013 the Appellant and the Respondent entered into an employment contract the general effect of which was that the Defendant would come to Tonga to work for the Appellant as a tailor/master cutter for a period of two years before returning to the Philippines. The cost of his travel was to be borne by the Appellant.

[2] According to the amended Statement of Claim the contract was not approved by the Philippine authorities and accordingly a second contract was entered into on 12 August 2013. It is in broadly similar terms to its predecessor.

[3] It is not in dispute that the Defendant came to Tonga after signing the second contract and that he began working in the premises operated by the Plaintiff.

*Rec'd 04/12/15*  
*[Signature]*

- [4] The Defendant did not serve the full term of employment. The Plaintiff's case is that the Defendant, after lying about a heart condition was repatriated by it to the Philippines. According to a Statement of Defence the Defendant was suffering from workplace stress and the Plaintiff "of her own accord" decided to return the Defendant to the Philippines "to punish him for complaining that he was suffering from workplace stress".
- [5] It appears that shortly after returning to the Philippines the Defendant returned to Tonga and took up employment with another tailor. The Plaintiff seeks damages for breach of contract.
- [6] The matter was set for trial on 28 November 2014. On that day the Plaintiff did not appear either personally or by counsel. Costs of \$250 were awarded against the Plaintiff. On 20 January 2015 the trial was set down for hearing on 23 February. On the day of the trial counsel for the Plaintiff sought an adjournment in order to amend the Statement of Claim. It appears that shortly before making this request Mrs Stephenson had written to Mr Fakahua pointing out that the 12 August contract was between the Defendant and a Company Tin Tin Fashion Ltd which had ceased to exist when the contract was entered into. The Magistrate (Mr Mafi) granted the adjournment but in a detailed ruling dated 18 March awarded the Defendant \$350 costs thrown away.
- [7] The amended Statement of Claim was filed on 13 March. It asserted that the August contract was "wholly relevant to these proceedings".

- [8] On 20 March 2015 the Defendant filed an application to strike out the Plaintiff's claim. Counsel for the Defendant submitted that there was no privity of contract between the parties and stated that this had been made known to Mr Fakahua on two occasions. Despite receiving this advice the Plaintiff had persisted with the claim. In these circumstances indemnity costs were sought. A copy of Counsel's detailed Submissions was filed on 12 May.
- [9] On 19 May Counsel for both parties appeared before Magistrate Ma'u. It was agreed that a written response to the Defendant's application would be filed by 2 June. In fact it was not filed until the 18<sup>th</sup>. Mr Fakahua requested that the matters raised by Mrs Stephenson be determined "on the hearing rather than this application".
- [10] On 23 June 2015 Magistrate Ma'u struck out the Claim and awarded the indemnity costs requested. He purported to act pursuant to section "79(4)" of the Magistrates Court Act. So far as I can see there is no such section while section 79 has no application to this matter.
- [11] The Appellant makes complaints:
- (1) that the application should have been dealt with by Mr Mafi who was seized of the action;
  - (2) that the application should not have been decided without giving the parties an opportunity to address the Court;

- (3) that the Magistrates' Court has no power to strike out an action; and
- (4) that the decision to award indemnity costs was unwarranted.

[12] Detailed written submissions were filed by both counsel and the appeal was heard on 20 November. I am grateful to counsel for their assistance on that occasion.

[13] In my view the suggestion that Mr Mafi was seized of the matter and that therefore Mr Ma'u erred in ruling on the application cannot succeed. While a Magistrate who has adjourned a trial part-heard should not transfer it for continuation or completion to another Magistrate I can find no objection to interlocutory applications in the same matter being heard by more than one Magistrate as long as questions of credibility of witnesses are not involved.

[14] While there is a presumption that proceedings should take place in open Court with Counsel present I can find no general objection to a decision being taken on the basis of written submissions and without a further hearing providing the parties agree. In this case however, as has been noted, Mr Fakahua asked for the issue raised by Mrs Stephenson to be decided at the trial. In my opinion it was unwise to strike out the Plaintiff's claim and to award indemnity costs without allowing Mr Fakahua to make his representations in open Court.

[15] I do not accept that the Magistrates' Court has no power to strike out. In my opinion Mrs Stephenson has correctly referred to section

59(3) of the Magistrates' Courts Act. But at the same time it is not to be doubted that the power to strike out should only be exercised in the clearest case and when the case of the party to be struck out is clearly unarguable or an abuse of the process of the court.

[16] In my view the Plaintiff's case is clearly arguable, at the very least. As already noted, it is not in dispute that the Defendant actually came from the Philippines to Tonga and returned to the Philippines at the Plaintiff's expense and that he did not complete his two year contract. While it seems that the description of the employer "Tin Tin Fashion Ltd" was not in fact correct it is not in dispute that the Plaintiff traded under the name "Tin Tin Fahion". In these circumstances while strictly there may be no privity of contract, equity may well provide relief. In my opinion the decision to strike out the claim was mistaken and must be reversed.

[17] It follows that the award of indemnity costs must also be set aside. I would only add that such costs are rather unusual and are generally awarded only in cases of contumelious default.

[18] In his ruling Magistrate Mafi expressed his frustration at the dilatory manner in which Counsel for the Plaintiff had handled the litigation. I agree. I believe that frustration with the delays caused by Plaintiffs' counsel was at least partly responsible for leading the Magistrate into error.

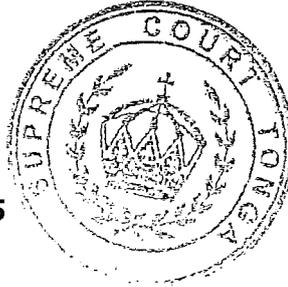
**IN THE SUPREME COURT OF TONGA  
APPELLATE JURISDICTION**

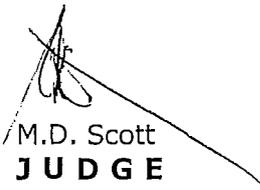
---

**AM 18 of 2015**

- Result:**
1. The appeal is allowed and the matter remitted to the Magistrates' Court for continuation;
  2. In all the circumstances there will be no order for costs;

**DATED : 3 DECEMBER 2015**



  
M.D. Scott  
**JUDGE**