

**IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY**

CV 45 OF 2013

Solicitor General

14/06/16

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+ File.*

**BETWEEN: MISHKA TU'IFUA, LITILI 'OFANOVA, SIMIONE
SEFANAIA, FINAU TUTONE and TSUTOMU NAKAO**

- Plaintiffs

AND: THE PUBLIC SERVICE TRIBUNAL

- First Defendant

AND: BUSBY KAUTOKE

**- Second
Defendant**

BEFORE LORD CHIEF JUSTICE PAULSEN

Hearing: By way of written submissions

Date of ruling: 14 June 2016

**Counsel: Mr H Waalkens QC/KC and Mrs D. Stephenson
for the plaintiffs**

**Mr. D A Laurenson QC and Mrs. 'A. N.
Taumoepeau SC for the second defendant**

RULING ON COSTS

[1] In a ruling of 8 April 2016 I allowed the plaintiffs' (the Commission) application for judicial review. I invited Counsel to reach agreement on costs but if they could not do so I reserved

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leave for them to file memoranda. Agreement was not reached. On 26 May 2016 Counsel for the Commission filed a memorandum applying for costs against the second defendant (Mr. Kautoke). It was accompanied by bills of costs totaling \$8,690.75. On 8 June 2016 I received a memorandum from Counsel for Mr. Kautoke opposing the Commission's claim for costs. I then received a reply memorandum for the Commission dated 9 June 2016. The memoranda clearly identify the areas of disagreement.

- [2] The Commission argues that the usual rule that costs follow the event ought to apply. Mr. Kautoke says that costs should lie where they fall.
- [3] In support of the submission that the Court should depart from the usual rule, Mr. Kautoke submits that the judicial review proceeding was only necessary because of the erroneous position taken by the then Counsel for the Commission before the Public Service Tribunal that there was a procedural flaw in the process terminating Mr. Kautoke's employment which was fatal to the Commission's defence of Mr. Kautoke's appeal.
- [4] Although acknowledging that strictly speaking it was the Tribunal that ultimately made the error of law, Mr. Kautoke argues that it was the Commission that caused the error to be made.

- [5] It is also argued that it was not surprising that the Tribunal would accept the Commission's own submission that Mr. Kautoke's appeal had to be allowed, when on the face of it that appeared to be the legally correct position.
- [6] It is also argued that Mr. Kautoke cannot be criticised for opposing the judicial review claim as the result of the case was not obvious at the outset and that such costs as the Commission incurred were likely to be incurred in any event. This is because to overturn the decision of the Tribunal the Commission was required to pursue its claim and satisfy the Court that the Tribunal's decision was legally wrong and should be set aside.
- [7] The Commission strongly rejects these arguments.
- [8] The Commission contends that all that happened before the Tribunal was that the Commission's Counsel quite properly brought to the Tribunal's attention that the criteria specifically referred to in Mr. Kautoke's employment agreement had not 'seemingly occurred'. It submits that it was the Tribunal, not the Commission, that made the decision that was the subject of the judicial review proceeding and that Mr. Kautoke's Counsel concurred in that result so that it could not be said that the Tribunal's decision was the fault or sole error of the Commission.
- [9] Secondly, the Commission argues that rather than accepting that his opposition to the application for judicial review was incorrect

Mr. Kautoke vigorously defended the proceeding and it was only as a result of that defence that the costs of the proceeding were incurred. The Commission also argues that consistent with the jurisdiction of the Court to sensibly impose a costs order against an unsuccessful party this Court has already awarded costs against Mr. Kautoke on previous applications.

[10] Finally the Commission argues that the suggestion that the Commission would have incurred its costs in any event in order to satisfy the Court that the Tribunal's decision was wrong is 'fundamentally flawed' as it would have surely sufficed if the parties had filed a consent memorandum consenting to the orders sought by the Commission in the judicial review.

[11] Counsel referred to *Gemmell v Gemmell* [1924] NZLR 248 and *Queen Elizabeth II National Trust v Green Growth No.2 Ltd* [2015] NZHC 343 which I have considered along with the submissions made in respect of them.

[12] I do not perceive that there is any real difference between the parties on matters of principle. In determining questions of costs the Court is exercising a discretion which must be exercised judicially and on a principled basis. The usual rule is that the successful party is entitled to costs unless the Court, in the exercise of its discretion, deprives it of that right. One reason why a successful party may be refused or receive a

reduced award of costs is where that party is seeking an indulgence or where the object of the suit is to correct a mistake made by that party (*Gemmell* at pg 249 and *Queen Elizabeth II National Trust* at [9]). As Wylie J noted in the *Queen Elizabeth II National Trust* case at [10], in such cases what is required is:

..a principled application of the costs rules, and an analysis of the facts to see what has given rise to the litigation, taking into account the conduct of the parties and whether one of them has contributed to its costs or engaged in other conduct that should influence the costs decision.

[13] There is a failure by the Commission to recognise the part it played in the error that led to this judicial review proceeding. Of course it is the case that ultimately it was the Tribunal that made the decision that was subject to review. But that overlooks the substance of what actually occurred. Mr. Kautoke's case was based on particularised grounds of appeal. He did not take the point that Cabinet's approval had not been obtained before terminating his contract. That matter was raised at the hearing by the Commission's Counsel. It was raised, not by way of information to the Tribunal, but because the Commission considered that the failure to obtain Cabinet's approval was fatal to its defence of the appeal.

[14] The Tribunal recorded the matter in its ruling in this way (at [14]):

The Solicitor General therefore submitted that there was a procedural flaw in the process undertaken with regard to this case that proved fatal to the defence of the Respondent and the continuation of the hearing.

[15] For that reason alone the merits of Mr. Kautoke's appeal were never considered.

[16] It is clear from the Tribunal's ruling that the Tribunal was taken by surprise by the Solicitor General's submission. At [17] of the ruling it records:

It was only at this March 2013 hearing that the Tribunal was made aware by the Solicitor General of the requirement for Cabinet approval in the contract that was not complied with by the Public Service Commission which proved fatal to the case of the Respondent. This flaw should have been found and dealt with at a much earlier stage.

[17] I do not therefore consider that it is surprising that the Tribunal allowed Mr. Kautoke's appeal and little can be taken from the fact that Mr. Kautoke's Counsel 'acquiesced or concurred' in the Tribunal making an order allowing the appeal. On the face of it the Solicitor General's argument appeared to be sound, making it unnecessary to consider the merits of the appeal further.

[18] This proceeding was necessary in very large measure because of the position the Commission adopted before the Tribunal and

also because the argument advanced by the Solicitor General before the Tribunal was only raised at a very late stage.

[19] In so far as the Commission argues that Mr. Kautoke's vigorous defence of the claim caused the costs to be incurred, I accept that Mr. Kautoke has taken positions which have added to the costs incurred but as the Commission's Counsel notes, at paragraph 19 of his first memorandum, costs have already been awarded in respect of those matters.

[20] The issues that the Court ultimately had to decide were far from straightforward and the points taken by Mr. Kautoke at the hearing were all reasonable ones. The result of this proceeding was certainly not obvious at the outset (*Elizabeth II National Trust v Green Growth No.2 Ltd* at [18]). The issues were important ones and Mr. Kautoke cannot be criticized for arguing the matter fully.

[21] I also consider that there is some force in Mr. Kautoke's argument that the costs (or at least a substantial portion of them) that the Commission incurred would have been incurred in any event even if Mr. Kautoke had not opposed the judicial review claim. The hearing itself was relatively short with Counsel speaking to written legal submissions. I would expect that the Court would have required a hearing and such legal

submissions to be presented even had Mr. Kautoke not opposed the review.

Result

[22] I consider that there are proper reasons to depart from the usual rule that costs follow the event.

[23] The Commission's application for costs is declined.



A handwritten signature in black ink, appearing to be "O.G. Paulsen".

O.G. Paulsen

NUKU'ALOFA: 14 June 2016.

LORD CHIEF JUSTICE