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

CV 26 of 2016

BETWEEN: LORD SEVELE-'O-VAILAHI
- Plaintiff

AND: PRIME MINISTER OF TONGA
- First Defendant

AUDIT AND GOVERNANCE AUTHORITY
- Second Defendant

BEFORE LORD CHIEF JUSTICE PAULSEN

Counsel: Mr. W. C. Edwards for the plaintiff
Mr. L. Niu for the first and second defendants

Date of Hearing: 24 August 2016

Date of Ruling: 25 August 2016

RULING ON APPLICATION FOR INJUNCTION

[1] This ruling concerns an opposed application by the plaintiff for an interim injunction to restrain the defendants from acting on the second defendant's decision of 26 May 2016 to remove and replace the plaintiff as the Chief Executive Officer and Chairman of the Tonga Pacific Games Organizing Committee and to cease payment of his remuneration and benefits.

rec'd 26/08/16
HHC

[2] Whilst this application was filed on 1 June 2016 it was not heard earlier as it was understood that the defendants agreed to maintain the status quo (that is, not to remove the plaintiff from his position and continue payment of his salary and benefits) pending the hearing of the substantive action. The plaintiff has continued to perform his duties and receive his remuneration until the end of June 2016. As a result of a change of position of the defendants the application was brought on to be heard on an urgent basis.

The facts

- [3] I set out the facts only in so far as they affect this application.
- [4] In late 2012, Tonga was named the host of the 2019 Pacific Games. The Pacific Games Organisation Act 2013 ('the Act') was enacted to provide for the organisation of the Games.
- [5] Section 3 of the Act established the Organizing Committee as the statutory body responsible for the day to day preparation and management leading up to the Games and for the conduct of the Games.
- [6] The plaintiff was appointed as the Chief Executive of the Organizing Committee. He is employed by the Organizing Committee. His appointment was made under section 9(1) of the Act and was for the period April 2014 to October 2019.
- [7] The plaintiff signed a written employment contract with the Organizing Committee on 9 May 2014 which was subject to an agreed addendum dated 23 June 2015. Because of its relevance to

IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

CV 26 of 2016

a submission advanced by the defendants' Counsel, Mr. Niu, I note here that the addendum states that it was entered into because it was recognised by the Organizing Committee that there was a need to ensure that the requirements of natural justice and fairness in any steps taken to terminate the plaintiff's employment "should be spelt out in this contract". The addendum goes on to provide for specific grounds for termination of the plaintiff's employment and that:

If this contract of employment is terminated by the Organizing Committee without the consent of the CEO, then unless the Organizing Committee proves that the termination was reasonable and based on one of grounds set out in (2) hereunder, then the CEO is entitled to damages for wrongful termination of contract and ... other benefits that would have to be paid to the CEO had this contract continued to its full term.

[8] The duties of the Chief Executive are set out in section 9(2) of the Act and include that he is to be the Chairperson of the Organizing Committee, carry out or supervise the work the Organizing Committee has decided to do, control all the activities the Organizing Committee has required and report to the Organizing Committee on the progress of work the Organizing Committee has required to be undertaken. In addition the Act states that he acts as the Secretary of the second defendant ('the Authority') and reports on "progress and problems" to the Prime Minister (section 9(2)).

[9] By section 4(1) of the Act the Organizing Committee consists of not less than 9 persons, although there is power to co-opt other persons from time to time to attend and participate in deliberations

of the Organizing Committee but without any power to vote on any matter (section 4(4)).

[10] Section 4(2) provides that the members of the Organizing Committee shall be appointed by the Authority after consultation with the Pacific Games Council and the Tonga Sports Association and National Olympic Committee (TASANOC). That section however recognises three *ex officio* members of the Organizing Committee, namely the Chief Executive, the Solicitor General and the Secretary General of TASANOC who under section 4(2)(b) hold office "whilst they remain Chief Executive Officer, Secretary General and Solicitor General respectively". In addition under sections 4(2)(c) and (d) the Authority is required to appoint to the Organizing Committee a nominee of both the responsible Minister and the Pacific Games Council.

[11] Relevantly, in light of both the Government's decision to withhold the funds of the Organizing Committee (to which I shall shortly refer) and some of the reasons advanced to support its decision to remove the plaintiff, the Act makes clear that the Organizing Committee is to be a financially autonomous body free and independent of any Government Department (section 5(2)). The Act recognises also that the Organizing Committee shall comply with any directions of the Pacific Games Council "which is to retain overall control of the Games, in accordance with the Host Contract" (section 5(3)). The Host Contract is a lengthy document dated 19 October 2012 between the Pacific Games Council, the Tonga Pacific Games Association and the Government of Tonga which, inter alia, states that the Games are the exclusive property of the Pacific

Games Council and that it is that body which retains overall control of the Games.

- [12] The first defendant is the Prime Minister of Tonga and also the Chairperson of the Authority. The Authority was established by section 15 of the Act. Its roles include appointing members of the Organizing Committee "in accordance with this Act" (section 16(1)(a)), overseeing the "good governance, accountability and transparency" of the Organizing Committee (section 16(1)), making sure that the Organizing Committee plans and works properly to prepare and conduct the Games and to report to the Minister primarily responsible for the Games.
- [13] On 15 December 2015 the first defendant wrote to the plaintiff expressing the displeasure and concern of himself and Cabinet at the performance of the plaintiff and his staff of the Organizing Committee. The letter stated that it was a grave concern that the plaintiff's salary was excessive and exceedingly large and that the plaintiff's contract of employment had been signed without due consultation with the Remuneration Authority as required by section 9(1) of the Act. The letter went on to challenge the appointment, salaries and performance of other staff members, Takitua Taumoepeau and Sakopo Lolohea, and then requested the voluntary resignations of the plaintiff, Mr. Taumoepeau and Mr. Lolohea (as well as one Ringo Fa'oliu) by 18 December 2015. The plaintiff responded in a letter of 17 December 2015 providing a detailed defence of, inter alia, the work of the Organizing Committee and its staff, including Mr. Taumoepeau and Mr. Lolohea, and the Chief Executive's salary. The letter also advised that neither the plaintiff nor any of the staff of the Organizing

IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

CV 26 of 2016

Committee that he had recruited wished to resign from their positions.

[14] On 26 May 2016, the plaintiff received a letter from the first defendant purporting to immediately terminate his employment as the Chief Executive of the Organizing Committee. The letter read:

**Immediate Vacating of Government-Funded PG2019 OC
CEO/Chairman Position by Termination of Employment of
Current Incumbent With Effect From 4:30pm Friday
27/05/16**

In my capacity as Prime Minister of Tonga hence Chairman of the Audit & Governance Authority (AGA), I hereby inform you – the incumbent of the above mentioned position, that the AGA has approved by majority the following AGA Decision:

- 1 That the current employment of Lord Sevele-'O-Vailahi as OC CEO/Chairman including remuneration and benefits be immediately terminated and that he vacates the Office of the OC with effect from 4:30pm Friday the 27th May 2016; and
- 2 That the Solicitor General be appointed Interim CEO/Chairman of the OC under the terms and conditions of his current employment and to take effect immediately after the above stated termination of employment until further notice.

As you may have been aware of from previous leaked AGA circular letter, the justifiable sensible basis of this decision was significant downgrade of the roles of the stated position of concern. This occurred when the Government Facilities Committee (GFC) took

over the majority of the Organizing Committee (OC) roles, so as OC CEO's roles, with effect from 5 February 2016. The position is currently being re-evaluated before it will be re-advertised and to which you may still wish to re-apply in due course.

The decision is in line with Tonga as a sovereign state, Tonga's Public Financial Management Act for frugal and prudent utilization of its public funds in the eyes of the public, and the Pacific Games Organization Act 2013 geared to accommodate the Pacific Games Council's sports event for the Pacific.

Thank you in advance for your cooperation in vacating the said position as per the above AGA Decision.

[15] On 30 May 2016, the Prime Minister's office issued a media release that the Authority had approved that the plaintiff's position as Chief Executive and Chairman of the Organizing Committee be vacated by the plaintiff and that he was to be replaced by the Solicitor General on an interim basis.

[16] The decision has not been accepted by the plaintiff who has continued to work in his role. He has filed an affidavit setting out the work that he has done since the defendants purported to remove him, which has not been challenged by the defendants. The decision has not been accepted either by the Pacific Games Council. It has issued a media release on 31 May 2016 stating that it did not recognise the actions taken to remove the plaintiff which it said were not within the powers of the Authority.

The pleadings and case management

- [17] On 1 June 2016, the plaintiff filed the statement of claim commencing this action, together with ex parte applications for leave to apply for judicial review (which I granted on 13 June 2016) and an injunction to preserve the status quo and allow the Organizing Committee to continue its preparations for the Games until the substantive action is finally heard.
- [18] The defendants filed a statement of defence and counterclaim and recently an affidavit of the Hon. Prime Minister in reply to the injunction application.
- [19] The plaintiff asserts that the defendants' decision to remove him was unlawful as the Act does not provide them with the power to terminate the employment of the Chief Executive. He says that this position can only be terminated in accordance with the proviso to section 9(1) of the Act which gives the Organizing Committee the power to terminate the employment of the Chief Executive at any time and without assigning any reason, notwithstanding any other contractual condition or law. He further argues that the power in section 9 of the Act is to be read subject to the terms of his employment contract, referring to the addendum of June 2015, requiring that any termination of the Chief Executive by the Organizing Committee be made for one of the reasons stated in that document. Alternatively, the plaintiff claims that the defendants did not accord him natural justice as they did not provide sufficient particulars of their reasons for the decision or allow the plaintiff adequate time to respond to the reasons and a reasonable

opportunity to be heard before making the decision to terminate his employment.

[20] In their statement of defence the defendants plead that the appointment of the plaintiff was not in accordance with the Act in that it was not made in consultation with the Remuneration Authority as required by section 9(1). They also assert that the position was not advertised to the public and was therefore not made in accordance with the principles of good governance, accountability and transparency. The defendants also deny that they were required to afford natural justice to the plaintiff before terminating his appointment because the Authority was not his employer nor a party to the plaintiff's employment contract. In any event, the defendants say that they afforded him natural justice. It is pleaded also that the Authority had the power to terminate the plaintiff's employment under section 7 of the Act in the performance of its responsibilities to oversee the good governance, accountability and transparency of the Organizing Committee and "for invalidity of appointment or for down grading of the responsibilities of any member of the Committee".

[21] The defendants have also filed a counterclaim that alleges that the processes by which the plaintiff was appointed and his salary determined were contrary to the Act and invalid because of the lack of consultation with the Remuneration Authority and the failure to publicly advertise the position. They seek a declaration that the plaintiff's appointment was invalid or, in the alternative, that the salary and benefits agreed to be paid in respect of his employment were unlawful and an order for the plaintiff to refund a substantial portion of the salary he has received over and above what the

defendants consider he was entitled to. The defendants plead that as of 15 April 2016 the amount the plaintiff should repay totalled \$264,000 and in addition he should repay a further \$11,000 for every month he works after 15 April 2016.

[22] As I noted earlier, when this application first came before the Court it was agreed that in light of the defendants' willingness to maintain the status quo it was not necessary to determine the injunction application. In a minute of 13 June 2015 I adjourned the plaintiff's application for injunction but granted leave to the plaintiff to bring the application back before the Court should that be necessary. At the same time I was able to give the action an early hearing date of 29-30 August 2016 which was acceptable to the parties,

[23] However, on 4 July 2016 the plaintiff wrote an email to the Ministry of Finance and National Planning because he had learned that the Prime Minister's Office had issued a directive that funds of the Organizing Committee, from which salaries are paid, were to be withheld. On 5 July 2016, Tatafu Moeaki of the Ministry replied to the plaintiff by email that he had been instructed to "defer making any payment to the OC in this new FY 2016/17 until we get clearance from the PMO including the revised role of the OC". The plaintiff wrote to the Prime Minister on 12 July 2016 asking him to reconsider his decision to withhold funds of the Organizing Committee. The plaintiff then received a letter dated 21 July 2016 from the Chief Secretary and Secretary of Cabinet that she had been directed that the Ministry would "continue to hold the funds for the Organizing Committee until the Audit Report for the Committee is submitted". In his affidavit of 11 August 2016 the

plaintiff states that all audits and audited accounts have been provided to the Authority.

[24] Against the background of these developments on 20 July 2016 the Court received a request from Mr. Nui, on behalf of the defendants, to adjourn the trial scheduled for 13-14 September 2016 because of the Prime Minister's travel commitments. A conference was convened with Counsel on 28 July 2016. At that conference I was made aware, in broad terms, that an issue had arisen as to the payment of the plaintiff's salary but Counsel were confident that this would be resolved. I made it clear that I would only entertain the application for an adjournment of the trial if the status quo was maintained and this was understood. Email correspondence from Mr. Niu to the plaintiff's Counsel, Mr. Edwards, dated 28 July 2016 (immediately following the conference) confirms that Mr. Niu conveyed to the defendants "the direction of the [Lord Chief Justice] agreed in chambers that the status quo be maintained i.e. that the funds of the [Organizing Committee] not be withheld (although the audit report has not be [sic] done by the OC but that report be still required and must still be produced in the meantime)". It was on this basis that I agreed to adjourn the trial until 13-14 October 2016 but again reserved leave for the injunction application to be brought on "should any steps be taken to alter the status quo". On 12 August 2016 I received an application from the plaintiff that the application for injunction be heard as the plaintiff's salary (as well as the salaries of other staff of the Organizing Committee) continued to be withheld. I set the application down for hearing on 24 August 2016 to provide time for the defendants to file evidence in opposition to the application for injunction should they wish to do

so and an affidavit of the Hon. Prime Minister was subsequently filed.

The Hon. Prime Minister's affidavit

[25] The Hon. Prime Minister's affidavit in opposition to the injunction application is a brief document. It deals principally with the process by which the plaintiff was appointed, the allegedly rushed nature of that process, the fact that the role was not advertised and that terms and conditions of the plaintiff's appointment were referred to the Remuneration Authority but for its 'information' only. The affidavit does however acknowledge that the plaintiff's appointment and terms of employment were agreed to by the Authority.

[26] The Hon. Prime Minister states that the Authority has a responsibility to ensure that the funds of the Organizing Committee are properly applied and as the Authority is not satisfied it has directed that the funds of the Organizing Committee be stopped. Relevantly for present purposes it is said:

We have therefore requested audited report of the OC for 2014-2015 and they have been forwarded but we have found them to be incomplete and we have advised them to complete them and they have still not done that up to now. We have yet to receive the audited report for 2015-2016.....

We believe that the appointment of the plaintiff as CEO was grossly improper because the position was not properly advertised for fair opportunity for application by the public and because the salary of \$180,000 per annum plus 20% retirement contribution is grossly excessive and it was agreed upon without proper consultation with

the Remuneration Authority as we believe is required by the Act to be done. We believe that the Act envisaged that the remuneration of a CEO of the OC is to be comparable to the salaries set by the Remuneration Authority for other CEO's of Government and statutory bodies of Government.

And as the plaintiff did not wish to accept our decision to dismiss him and has continued to for us to continue [sic] to pay him his salary, we therefore decided to stop payment of his salary by stopping the funds to the OC. We believe that we would fail in our responsibility under the Act to ensure the good governance, transparency and accountability of the operation of the OC if we allow the salaries of the plaintiff and the OC to continue to be paid when we know they are grossly excessive and we believe unlawful.

It is also relevant of course to point out that the responsibilities of the plaintiff and of the 3 men he has engaged has been substantially reduced by the removal of the responsibility for the games facilities from the OC to the Government Games Facilities Committee.

[27] As far as the allegation that natural justice was not observed, all that the Hon. Prime Minister has to say relevant to that matter is:

Before the plaintiff's contract was terminated, I held a meeting with the plaintiff at my office where I asked him to step down from his position as CEO of the [Organizing Committee] whilst the Government reconsiders the role of the CEO with a view to advertising it. The plaintiff refused to stand down.

[28] I should note for completeness only that there is no requirement in the Act that the position of the Chief Executive be advertised

publically nor is the audit report of the Organizing Committee for the 2015-2016 year yet due (section 18(3)). I also note that a notable feature of the affidavit is the absence of any engagement on the question of where the balance of convenience lies in relation to the granting or refusal of the injunction.

The legal principles

[29] When deciding whether to allow an application for an interim injunction, the Court should follow the approach set out in *American Cyanamid Company v Ethicon Limited* [1975] AC 396 and *Klissers Farmhouse Bakeries v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) as follows:

[29.1] Is there a serious question to be tried?

[29.2] Does the balance of convenience favour the granting of the injunction?

[29.3] Does the overall justice of the case favour the granting of the injunction?

[30] In the usual case the interaction between the principles was described in the following way by Moore J in *Mike Pero (New Zealand) Limited v Heath and Ors* [2015] NZHC 2040:

[25] Thus the Court must first consider whether there is a serious issue to be tried and, if it determines there is, whether damages would provide an adequate remedy and against that, where the balance of convenience properly lies. In assessing the balance of convenience, regard may be had to

the adequacy of damages should relief not be granted, the relative strength of each party's case and the impact of a decision on the rights of third parties.

[26] Finally the Court is required to step back and consider what overall justice requires having regard to these considerations.

[31] Where an interim injunction is sought in the context of a judicial review proceeding however, as in the present case, this approach needs to take account of the public law factors involved (*R v Ministry of Agriculture, Fisheries and Food and Anor, Ex Parte Monsanto Plc* [1999] QB 1161 (*R v MAAF, Ex parte Monsanto*); *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment of Belize and Anor (Practice Note)* [2003] UKPC 63 [35] (*BACONGO v Department of the Environment of Belize*)). These include the overarching consideration that to ensure societal and legal stability, it is generally in the public's interest that decisions of public authorities are respected until dealt with before the Court (*R v MAAF, Ex parte Monsanto; R v Secretary of State for Transport, Ex parte Factortame Limited and Ors (No 2)* [1991] AC 603, 673-674 (*R v Secretary of State for Transport, Ex parte Factortame*)). I had full regard to this principle in the assessment of the present application.

[32] Given the element of public interest involved in judicial review proceeding the most important factor for the Court's consideration will generally be whether the balance of convenience favours the injunction rather than whether damages would provide an adequate remedy (*R v Secretary of State for Transport, Ex parte Factortame*).

[33] The Court must assess the balance of convenience taking into account the strength of the claimant's case and the extent of the loss or prejudice that would be suffered by each party if the Court grants or does not grant the injunction and one of the parties is then successful in Court (*R v Secretary of State for Trade and Industry, Ex parte Trades Union Congress* [2001] 1 CMLR 8 [27]).

[34] Whether or not to grant an injunction in judicial review proceedings is of course always a matter for the Court to determine in its discretion and in consideration of all the circumstances of the case (*BACONGO v Department of the Environment of Belize; R v Secretary of State for Transport, Ex parte Factortame*).

Is there a serious issue to be tried?

[35] The plaintiff's first argument is that the plaintiff's appointment was invalid because it was not publically advertised and there was not proper consultation with the Remuneration Authority. There are immediate difficulties faced by this argument. First, the plaintiff's appointment was approved by the Authority. Mr. Nui argued that this does not matter as that appointment was made under another Government but it is to be noted that it is not the Government but the Authority that made the decision under review. Secondly, upon a proper reading of the Act it is the Authority that is required to consult with the Remuneration Authority over the engagement of the Chief Executive (section 9(1)) and what the Authority now seeks to do is set up its own failure to consult with the Remuneration Authority to remove the plaintiff. Thirdly and most relevantly, the correct approach for determining whether the infringement of a statutory provision will result in invalidity is to ask

whether it was the purpose of the legislation that an act done in breach of such a provision should be treated as invalid and that in determining the question of purpose, regard must be had to the language of the relevant provision and the scope and object of the whole statute (*Supervisor of Elections and Ors v Sione Tupouniua* (Unreported, Court of Appeal, AC32/2014, 24 November 2014, Scott Salmon and Hansen JJ) and *Project Blue Sky Inc and Ors v Australian Broadcasting Authority* 153 ALR 490). In my view having regard to the words of section 9(1) which requires only consultation with the Remuneration Authority and not its consent to either the appointment or terms of appointment of the Chief Executive, the scheme of the Act as a whole as well as the statutory role, functions and powers of the Remuneration Authority as set out in Part III and section 13 of the Remuneration Authority Act 2010 (which is primarily to make recommendations on the salaries and other monetary benefits of certain Officers) it is difficult to see how a failure to consult, or any inadequacy in the level of consultation, with the Remuneration Authority will invalidate the appointment of the Chief Executive.

[36] The defendants' second argument relies upon section 7(1) of the Act which provides:

Without prejudice to section 4(2)(a)(c) and (d) any member of the Organizing Committee, may be removed from office by the Authority for disability, inefficiency, bankruptcy, neglect of duty, misconduct or permanent departure from Tonga, or may resign his office by written notice addressed to the Chairperson.

[37] The defendants argue that under section 7(1) the Authority has a general power to remove any member of the Organizing

Committee. My view at this stage of the proceeding is that the section does not confer any such power on the Authority. As I have noted earlier, section 4(1) and (2) of the Act are concerned with the appointment of the members of the Organizing Committee. Section 4(2)(b) states that the members specified in sections 4(1)(a)(b) and (c) (that is the Chief Executive, the Secretary General of TASNOC and the Solicitor General) are *ex officio* appointments "holding office whilst they remain Chief Executive Officer, Secretary General and Solicitor General." In contrast, the other members of the Organizing Committee may be removed by the Authority (in the case of the nominees of the Minister and Pacific Games Council after receiving notice that they wished to change their nominees) at any time without cause. The opening words of section 7(1) which read "Without prejudice to section 4(2)(a)(c) and (d)" are intended to make clear that the powers to remove members appointed under those particular sections (which do not include the *ex officio* members) are unaffected by the power vested in the Authority to remove those members for any of the reasons set out in section 7(1), namely for "disability, inefficiency bankruptcy, neglect of duty, misconduct or permanent departure from Tonga or he may resign his office by written notice addressed to the Chairperson". The powers of removal in sections 4(2)(a), (c) and (d) are intended therefore to work in conjunction with the powers in section 7.

- [38] The power of removal in section 7(1) cannot apply to *ex officio* members of the Organizing Committee as they hold their office whilst they remain the Chief Executive, Secretary General of TASNOC and Solicitor General (section 4(2)(b)). The Chief Executive is employed by the Organizing Committee and it is only the Organizing Committee that is given the express power under

the Act to terminate his employment upon which his membership on the Organizing Committee depends. Section 9(1) of the Act provides as follows:

Provided that notwithstanding any other contractual condition or law, Organizing Committee may at any time and entirely at its discretion and without assigning any reason, terminate the employment of the Chief Executive Officer with immediate effect, subject to any rights of compensation that may be specified in the employment contract.

[39] In my view the Act does not give or confer any power on the Authority to terminate the Chief Executive's employment under section 7 or otherwise.

[40] Relevant to this it is to be noted that section 4(1) provides that the Chief Executive, Secretary General of TASNOC and the Solicitor General "shall" be members of the Organizing Committee. If the Authority had a power to remove *ex officio* members they could not be replaced whilst they held their qualifying offices as there is no power granted to the Authority to replace an *ex officio* member who is removed from Office. There is therefore no power in the Act for the Authority to replace the Chief Executive with the Solicitor General on a temporary basis or otherwise as it has purported to do in this case.

[41] A third argument was advanced by Mr. Niu that if the Act did not expressly confer upon the Authority the power to terminate the plaintiff's employment then it must have an implied power to do so to give effect to and perform its function to oversee the good governance, accountability and transparency of the Organizing

Committee (section 16(1)(b)). He asked me to refer to the Interpretation Act. Section 9 of that Act states that:

Where in any Act...power is given to any person to do or enforce the doing of any Act or thing all such powers shall be understood to be given as are reasonably necessary to enable any person to do or enforce the doing of the act of thing.

[42] In my view this argument is barely tenable because section 16(1)(b) does not confer on the Authority any power and nor would the implication of the implied power for which the defendant's contend be necessary or proper in light of the clear statutory intent that the employment of the Chief Executive may only be terminated by the Organizing Committee.

[43] It is not strictly necessary for me to go on and consider the alternative allegation of the plaintiff that he was not afforded natural justice. It will suffice to say that if it was ultimately to be held that the Authority did have the power to remove the plaintiff there is a strong case that natural justice had to be observed. The evidence before the Court, particularly the Hon. Prime Minister's affidavit, suggests that the removal of the plaintiff was perfunctory.

[44] For these reasons I am satisfied that the plaintiff has established an arguable case that the purported removal of him from his office as Chief Executive was unlawful.

Where does the balance of convenience lie?

[45] In relation to the balance of convenience, as I noted the Hon. Prime Minister's affidavit had little to say which was relevant to this issue.

The plaintiff has remained in his position performing his duties since the Authority purported to remove him. It is apparent from the plaintiff's fourth affidavit that a significant amount has been achieved in that time and there was no attempt by the defendants to contend otherwise or to suggest that they will suffer any loss or detriment should the plaintiff remain in office pending the hearing of this action. I accept that if the plaintiff is granted the injunction his salary will have to be met from the funds which are presently being withheld from the Organizing Committee but there is nothing to suggest that this will result in financial prejudice.

[46] In his oral submissions Mr. Niu suggested that the balance of convenience favoured the defendants because the plaintiff could be compensated in damages should it ultimately be found that his employment was terminated unlawfully. This is not a strong argument. The plaintiff's employment is with the Organizing Committee not the Authority. It would appear unlikely that he will have a right to compensation from the Organizing Committee even if he is ultimately successful. Mr. Niu argued that this did not matter as the plaintiff would have a claim against the Authority but he did not articulate the legal basis for such a claim. Even assuming a right to compensation from the Authority there is nothing before me to suggest that the Authority would accept its liability to pay the plaintiff damages and there is no offer to provide an undertaking to do so. The plaintiff has however provided an undertaking as to damages and the defendants have not taken issue with it or suggested that the plaintiff is not able to honour it.

[47] There is clearly prejudice to the plaintiff that will arise should I not grant him the injunction. There is the obvious financial prejudice in

not receiving his salary until the case is heard. Furthermore, Mr. Edwards submitted with some force that the Authority has made plain its intention to remove the duties of the Chief Executive and the Organizing Committee with no statutory authority to do so. He submitted, and I accept, that any such change will prejudice the plaintiff and impact upon his ability to perform his duties should he be successful in this action.

[48] Mr. Edwards also submitted that the physical removal of the plaintiff from his position will result in damage to his reputation for which he will have no ability to seek compensation in damages. Whilst I do not put great weight on this final matter I think there is some merit in the submission that even ultimate victory may not fully restore the reputational damage which may be caused should the plaintiff now be forced from office.

[49] For these reasons I am of the view that the balance of convenience favours the plaintiff and the maintenance of the status quo pending the hearing of the substantive action.

Should the injunction be granted in the overall justice of the case?

[50] In assessing the overall justice of the case the following factors weigh with me. Based on the arguments that have been presented to date I consider that the plaintiff has a strong case that the defendants acted unlawfully in purporting to remove him from office. Furthermore, for the defendants' parts there has been an inconsistency of approach as to the reasons justifying the decision. I am mindful that the trial of this action is in October and it might

be thought that there is no pressing need to grant the plaintiff interlocutory relief in light of that. Against that however, the plaintiff would have pursued his application when it was first filed had there not been clear indications that the defendants would maintain the status quo. I do not think the plaintiff should therefore be prejudiced by the defendants' change of position at a late stage.

Conclusion

[51] The plaintiff has satisfied me that he has a strong case that the actions of the defendants in purporting to remove him as Chief Executive and withhold his remuneration were unlawful. The balance of convenience favours the maintenance of the status quo pending the hearing. I am also satisfied that it is proper to grant an interlocutory injunction restraining the defendants from taking any steps to remove the plaintiff from office as Chief Executive and requiring them to make payment of his salary and other benefits pending the hearing of this action. I will make orders to that effect.

Result

[52] The order I make is as follows:

Pending further order of this Court the defendants, their employees, agent or servants, are restrained from acting upon or carrying out the removal of the plaintiff as the Chief Executive of the Tonga Pacific Games Organizing Committee (appointed under the Pacific Games Organizing Act 2013) and he is to be paid all remuneration and to receive all other benefits due to him in the

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

CV 26 of 2016

performance of that role including any remuneration or benefits withheld from him since 1 July 2016.

[53] The plaintiff is entitled to the costs of this application which shall be fixed by the Registrar if not agreed.


O.G. Paulsen


NUKU'ALOFA: 25 August 2016

LORD CHIEF JUSTICE