IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY **CV 41 of 2016**

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BETWEEN: **PUBLIC SERVICE ASSOCIATION (PSA)**

Applicant/Proposed Plaintiff

AND :
1 GOVERNMENT OF TONGA
2 PUBLIC SERVICE COMMISSION (PSC)
3 REMUNERATION AUTHORITY (RA)

Respondents/Proposed Defendants

Counsel: **Mr. O Pouono for the Applicant**
Mr. A Kefu SC for the Respondents

Hearing: **9 September 2016**
Ruling: **13 September 2016**

R U L I N G

The application and the procedural history

[1] This is an application for leave to apply for judicial review.

[2] This case has had an unhappy history. The applicant filed an application for injunction on 5 August 2016. It sought an injunction to restrain the respondents from implementing salary structures for the public service which were recommended in Remuneration Authority reports of June 2014 and September 2015 and which it was said had been approved by Cabinet on 8 July 2016. On 8 August 2016, I issued a minute pointing out that what was being sought was in the nature of judicial review but leave had not been granted to commence judicial review proceedings.

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[3] As far as the injunction application was concerned there was no undertaking as to damages, which is a mandatory requirement of the Supreme Court Rules. There had also been delay in applying for the injunction and no obvious justification provided for proceeding on an ex parte basis, nor was it clear to me why the second and third respondents were required parties. Unusually, the application also sought orders that affidavits filed in support of the injunction be treated as confidential (that is, not be disclosed to the respondents) until after the application was determined because the deponents' employment might be at risk if the affidavits were disclosed to the respondents.

[4] Reserving the position as to whether leave to apply for judicial review should be granted, I directed that the application for injunction would proceed on notice. Out of an abundance of caution, I did not require the applicant to serve the affidavits of Losaline Ma'asi, Telesia Ma'asi, Kilifi Polutele, Vilai Ilolahia and annexure 4 to the affidavit of the applicant's General Secretary, Mele Teusivi 'Amanaki. I also directed that the case would be called before me on 12 August 2016 for review.

[5] On 11 August 2016 the applicant filed an ex parte application for leave to apply for judicial review. When the case came before me on 12 August 2016 I was advised that the respondents had not been served with the injunction application. The case was adjourned to 19 August 2016 in the expectation that I would deal with the application for leave to apply for judicial review early the following week.

[6] Having considered the application for leave, on 15 August 2016 I issued a further minute in which I stated that on the information that was put before me I was not satisfied that the applicant had established grounds for obtaining leave to apply for judicial review. In accordance with O.39 Rule 3(1) Supreme Court Rules I said I would hear from Counsel on that application on 19 August 2016. On 19 August 2016 and again on 2 September 2016 I granted adjournments to give the applicant more time to make submissions and put further evidence before the Court in support of its leave application. Consistent with the practice that has been followed in this Court I also directed that I would hear submissions on the application from the respondents' Counsel. On 5 September 2016, the applicant filed a further affidavit of Mrs. 'Amanaki and also some written submissions in support of the application for leave.

[7] The application for leave was heard on 9 September 2016. Both the applicant and respondents were represented by Counsel. I reserved my decision.

The rules

[8] Order 39, Rules 1, 2 and 3 Supreme Court Rules relevantly provide:

> **O.39 Rule 1. When remedy available**
>
> This order applies to any action against an inferior Court, tribunal or public body (including an individual charged with public duties) in which the relief claimed includes an order of mandamus, prohibition or

certiorari, or a declaration or injunction (in this order referred to as "judicial review").

O.39 Rule 2. Leave of Court required

(1) No application shall be made for judicial review unless the leave of the Court has been obtained in accordance with this rule.

(2) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending that period.

(3) An application for leave shall be made ex parte by filing:

(a) an application notice which is to set out concisely the relief claimed and the grounds therefore;

(b) a copy of the proposed writ and statement of claim; and

(c) an affidavit verifying the facts relied on.

O.39 Rule 3. Court's powers

(1) The Court may grant the application without a hearing, but shall not refuse it without hearing the applicant.

(2) The Court shall not grant leave unless satisfied that the applicant has a sufficient interest in the matter to which the application relates.

[9] Where there has not been undue delay in bringing an application for leave the Court must still be satisfied that there is an arguable case for review (*Moala v Public Service Commission* [2012] TOCA 14; AC 22 of 2011 (27 April 2012)). The burden upon the applicant in this regard is not onerous. Mr. Kefu referred me to the judgment of Lord Diplock in *Inland Revenue Commissioner v National Federation of Self-Employed and Small Businesses Limited* [1981] 2 All ER 93, 106 where he said:

> The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.

[10] However, the Court will not grant leave where the case is frivolous, vexatious or hopeless. The purpose of the requirement that leave be obtained is to ensure that an applicant may only proceed to a substantive hearing if the Court is satisfied that there is a case fit for further investigation on a full *inter partes* hearing (White Book, 1991 Edition at 53/1-14/8; *Davey v Aylesbury Vale District Council* [2008] 2 All ER 178).

The reasons this application fails

[11] The applicant has not satisfied me that it has even an arguable case for review. My reasons can be summarised as:

[11.1] The pleadings are defective;

[11.2] The issues raised are not justiciable;

[11.3] There is no arguable ground advanced for review.

Defects in the pleadings

[12] A statement of claim serves a number of purposes in civil proceedings. These include defining the claim so that the Court knows what it must rule upon and fairly informing the defendant of the case that it must meet. This is reflected in Order 8 Rules 2(b) and (c) Supreme Court Rules which states that a statement of claim must contain:

> (b) the material facts upon which the plaintiff relies giving such particulars of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances as may suffice to inform the Court and the party or parties against whom relief is sought of the plaintiff's cause of action;
>
> (c) the relief or remedy sought and shall state specifically any claim for interest;

[13] The New Zealand Court of Appeal said in *Price Waterhouse v Fortex Group Ltd* (Unreported, Court of Appeal, CA 179/98, 30 November 1998):

> What we are saying is that both the Court and opposite parties are entitled to be advised of the essential basis of a claim or defence and

> all necessary ingredients of it, so that subsequent processes and the trial itself can be conducted against recognisable boundaries. Neither the Court nor opposite parties should be placed in the position of having to deal with a proposition of whose substance adequate notice has not been given in the pleadings.

[14] Defective pleadings can, in most instances, be remedied by amendment. That said, leave should not be granted to an applicant seeking judicial review in circumstances such as exist here, where the statement of claim is discursive, repetitive, omits essential information relevant to the claim, contains significant contradictions and generally requires substantial amendment. Mr. Kefu submitted that it would be unfair to require the respondents to reply to the statement of claim in its present form. I agree and consider that the respondents would have difficulty responding to the statement of claim in a meaningful way. Had I not had the benefit of reading the affidavits filed in support of the injunction application, the statement of claim would have been largely incomprehensible to me.

[15] The most significant defect in the statement of claim in my view is that it does not clearly state what decisions are being challenged, the content of those decisions or the grounds upon which the challenge to those decisions is being advanced. The starting point is paragraph 5 of the statement of claim. It purports to describe the nature of the claim. The claim is said to be that the implementation of new salary structures approved by Cabinet on 8 July 2016 was a breach of a memorandum of understanding of 3 September 2005 between a Cabinet subcommittee on behalf of the Government of Tonga and a negotiation team of the Interim Committee of Civil Servants (the

memorandum of understanding). That at least is stated with reasonable clarity but when one reads further it appears that other decisions are under challenge and for different reasons, although there has been no attempt to differentiate between different causes of action and there is just one prayer for relief.

[16] Paragraph 7 of the statement of claim alleges that 800 public servants have submitted written grievances to the Public Service Commission against the new salary structures. Paragraph 8 then alleges that the implementation of the new salary structures without first addressing the public service employees' grievances is a breach by the Public Service Commission (not Cabinet) of its obligations under sections 6-8 Public Service (Grievances & Dispute Procedures)(Amendment) Regulations 2010 (the regulations). Later in paragraph 11 it is pleaded that in failing to comply with the regulations the Public Service Commission was acting on behalf of the Government without further explanation.

[17] Paragraph 7 also refers to a decision of Cabinet of 27 April 2016 "for the consultations to be carried out" from which I infer (although it is far from clear) that it is being asserted that Cabinet was to consult on the new salary structures. There is no further detail of the 27 April 2016 decision or on the scope of the expected consultation. Paragraph 9 enigmatically pleads that the rescinding of the decision of 27 April 2016 by Cabinet on 13 May 2016 was a breach of the regulations without previously stating that such decision had been rescinded or the circumstances under which it was rescinded.

[18] Paragraph 10 appears to contain a further claim. It refers to a Notice of Employment Dispute submitted by the applicant to the Public Service Commission on 30 March 2016 on behalf of its members. It does not state what the notice related to or what was being sought on behalf of the applicant's members. It is then alleged that the implementation of the new salary structures without addressing the notice was a breach by the Public Service Commission of the regulations.

[19] Finally, paragraph 12 of the statement of claim pleads that the implementation of the new salary structures without first "replying back to the employees" was a breach of natural justice "on the rights of the employees to know what has been done to their grievances and a chance for a fair dialogue regarding their benefits at work".

[20] Mr. Pouono advised me that his instructions are that the decisions under challenge are solely Cabinet decisions 661 and 662 of 8 July 2016 (the statement of claim does not actually refer to Cabinet decisions 661 or 662) which it is alleged approved the implementation of the recommendations of the Remuneration Authority in its reports of June 2014 and September 2015. The Cabinet decisions were not put before the Court and Mr. Pouono said that his client does not have them. There is at least some evidence of the decisions in annexure 32 to the affidavit of Mrs. Amanaki of 5 August 2016, which is a letter dated 11 July 2016 from the Prime Minister's Office to Mrs. Amanaki in which it is stated:

I am also to inform that Cabinet have also considered the update reports on the First Remuneration Report June 2014 and the Second Remuneration Report September 2015 also including Remuneration related policies and Cabinet Decision No. 661 and No. 662 respectively, have approved the implementation of these reports with effect from 1st July 2016.

[21] From what I am able to glean from the papers, and with the assistance of what Mr. Pouono has told me, I understand that what the plaintiff is seeking is judicial review of Cabinet's decisions 661 and 662 of 8 July 2015 to implement the recommendations of the Remuneration Authority as to the remuneration and other benefits of public service employees contained in the Remuneration Authority's reports of July 2014 and September 2015. I further understand that the grounds advanced are the following:

[21.1] The decisions breach the memorandum of understanding because employees' grievances have not been addressed.

[21.2] The decisions breach regulations 6-8 of the regulations which impose a procedure for resolving employment grievances brought by employees because employee grievances have not been addressed.

[21.3] The decisions breach regulations 12-20 of the regulations which impose a procedure for resolving employment disputes brought by an employee association because the applicant's Notice of Employment Dispute has not been addressed.

[21.4] The decisions breach natural justice because the employees' grievances have not been addressed.

[22] I now turn to consider whether there is an arguable case:

[22.1] That Cabinet's decisions are justiciable or whether those decisions are non-justiciable on account of their policy and political content;

[22.2] That any public law principle justifying review is engaged on any of the grounds that are advanced by the applicant.

Are the decisions justiciable?

[23] Recently in the judgment of Elias CJ and Arnold J in *Ririnui v Landcorp Farming Limited and others* [2016] NZSC 62 at [1] the learned judges of the New Zealand Supreme Court said as follows:

> This is a judicial review case. Judicial review is a supervisory jurisdiction which enables the courts to ensure that public powers are exercised lawfully. In principle, all exercises of public power are reviewable, whether the relevant power is derived from statute, the prerogative or any other source. The courts acknowledge limits, however. These limits are reflected primarily in the notions that the case must involve the exercise of a public power, that even if the court has jurisdiction, the exercise of power must be one that is appropriate for review and that relief is, in any event discretionary.

[24] In P A Joseph's leading text '*Constitutional and Administrative Law in New Zealand*' (4th Ed at 22.5, page 873) the author notes that although no public administration is immune from review *per se*:

> The courts respect the constitutional and institutional differences between the branches [of Government] and defer over decisions involving: the national interest, polycentric issues, macro-economic policy, the allocation of public resources, the mediation of sectional interests and moral preferences.

[25] The English and Australian courts recognise the need for deference based on a consideration of the status of the decision maker and the nature of the power being exercised (*Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374, *Minister for Arts v Peko-Wallsend Ltd* (1987) 75 ALR 218, 225-227, *Aye v Minister for Immigration and Citizenship* (2010) 187 FCR 449, *South Australia v O'Shea* (1987) 163 CLR 378, 389). In *Council of Civil Service Unions* (supra) Lord Diplock at pages 408-409 said:

> To qualify as a subject for judicial review the decision must have consequences which affect some person other than the decision maker, although it may affect him too. It must affect such other person either:
>
> (1) by altering rights or obligations of that person which are enforceable by or against him in private law; or
>
> (2) by depriving him of some benefit or advantage which either:

(a) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment; or

(b) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

[26] Decisions which directly affect the rights or circumstances of an individual, or persons readily ascertainable and few in number, are more likely to be open to review but that is not the case where the decision is dictated by broad policy considerations of public interest or does not involve questions to which the judicial processes are adapted to provide the correct answer (Lord Diplock (supra) at page 411). In such cases the policy considerations may require the "submerging of individual disadvantage" (*Peko-Wallsend* (supra) at [84]).

[27] In *Stewart v Ronalds* [2009] NSWCA 277 at [42] and [43] the Court stated:

> Central to the identification of the kinds of decisions amenable to review by the courts is the suitability of the subject for judicial assessment and, in particular here, whether the assessment of the legitimacy or otherwise of the decision depends on legal standards or by reference to political considerations...

> ...Essential to the task is the identification of the controversy, its limits and character. Often the nature and extent of rights of individuals, whether of a proprietary or other character, as affected by the asserted wrong will bespeak a justiciable controversy. The presence of standards capable of being assessed legally may do likewise...

[28] In *Couch v Attorney General* [2010] 3 NZLR 149 at [161] the Supreme Court of New Zealand said that the courts should be very reluctant to embark on "an examination of general government policies, priorities and funding decisions." This caution is particularly apposite here.

[29] Section 6(g) of the Public Service Act (as amended in 2010) provides that it is a principal function of the Public Service Commission to:

> determine the respective designations and other terms and conditions of employment, including the remuneration, for employment for employees subject to the approval of Cabinet.

[30] The Public Service Act does not set out any specific process or procedures to be followed by the Public Service Commission in assessing public service employees' remuneration or terms of employment or by Cabinet in deciding whether to grant its approval to them. There is however the Public Service Policy 2010, made pursuant to section 23 of the Public Service Act by the Public Service Commission with the approval of Cabinet, which provides some guidance on what the Public Service Commission must consider, focusing on fairness, affordability and the circumstances of the national economy. Policy 39(1) provides that the Public Service Commission shall undertake a review of remuneration paid in the

public service every three years. Policy 37 sets out principles to apply to the remuneration paid to public service employees which includes at (a), (e) and (l):

> remuneration shall be affordable to the Government, fair and appropriate within the national economy;
>
> salary scales shall be reviewed formally at least once every 3 years...;
>
> any changes in remuneration may be implemented over time and as they become affordable to the Government.

[31] For the Court to investigate Cabinet's decisions that are challenged in this case the Court would necessarily need to scrutinise the deliberations in Cabinet and the basis upon which the decisions were made, which must include matters of macro-economic policy, social policy, affordability and the proper allocation of the Kingdom's resources. These are "quintessentially political questions" that this Court is not suited to adjudicate upon. It is not the function of the Court to do so in my view (*Stewart v Ronalds* (supra) at [45]).

[32] That this is the case is reinforced by the fact that so far as Cabinet's decisions may adversely affect employees in the public service they have rights to seek redress either individually or through an employee association under the regulations. An employee may raise an employment grievance which includes circumstances where the employee claims that his employment or one or more conditions of it are affected to his disadvantage by unjustifiable action of his employer or that his employment conditions disadvantage or discriminate

against him. An employee association may give notice of an employment dispute on behalf of its members and seek redress for its members in respect to any dispute relating to their terms and conditions of employment. The availability of these avenues to resolve disputes and grievances leads me to the view that judicial review is neither necessary nor desirable.

Is review justified on any of the grounds advanced

[33] Although the finding that the matters raised are non-justiciable is enough to dispose of this matter I will now deal with the grounds advanced by the applicant for review and consider whether any of them are arguable. I am of the firm view that they are not.

[34] The common feature shared by the proposed causes of action is the assumption of an obligation on Government to consult with the applicant and public service employees and to address their concerns and grievances before giving its consent to the introduction of new salary structures. This is clear from paragraph 14 of the statement of claim which states:

> Government will not lose anything by deferring the implementation of the new salary structures to allow them time to complete the consultations, address grievances finalise the new structures and clarify to the employees the new salary structure and how it works including the bonus system.

[35] I can see nothing in the Public Service Act which imposes such an obligation nor could it be expected or required when Cabinet's decision is so pre-eminently one of policy (Joseph at 25.3.3 and page 1043).

[36] As the Court noted in *Peko-Wallsend* at [81]:

> Government at all levels would become unworkable if there were an obligation, before making any decision which may be financially disadvantageous to an individual, to seek out and to hear all affected persons. It was for this reason that both Lord Diplock [in *Council of Civil Service Unions*] and Mason J [in *Kioa v West* [1985] HCA 81] carefully defined the types of decisions to which the obligation applies. They did so by reference to the direct and immediate effects of those decisions. For them it was not enough that the instant decision might lead to some future decision or action which would have the specified effect.

[37] The applicant's grounds for review are untenable for other reasons also.

[38] The first ground is that the Cabinet decisions breach clause 7 of the memorandum of understanding. The statement of claim pleads that the memorandum of understanding was entered into following a six and a half week strike of civil servants in 2005 as a result of their dissatisfaction with the 2005 public service salary review. Clause 7 states:

> The implementation of the Public Service Salary Review that was approved by Government on 30 June 2005 as effective on 01 July 2005 will be deferred for two (2) years.

[39] The statement of claim pleads that Cabinet's decision to implement that new salary structure without addressing the public service employees' grievances was a breach of clause 7. In paragraph 7 of the statement of claim it further pleads that the two year deferment in 2005 to implement the new salary structures was to allow time for Government to undertake consultation and to address grievances. This argument faces insurmountable hurdles. Clause 7 says only that the 2005 salary review will be deferred for two years. It says nothing about future consultation on reviews of salary structures. Secondly, the memorandum is a political document which expressed a convergence of will of the parties but could not have been intended to create legally binding obligations. Even if the memorandum of understanding were to be considered binding, the present salary review of public servants remuneration was not conducted until 2014/2015 well outside the two year period provided for in the memorandum and there has been no breach of it.

[40] The next grounds advanced are that the implementation of the new salary structures without addressing the employees' grievances or the applicant's Notice of Employment Dispute breached the regulations. The statement of claim fails to identify what the grievances or the Notice of Employment Dispute specifically relate to or how the requirements of the regulations have not been complied with. In so far as the Public Service Commission has breached the regulations by

failing to comply with its procedural requirements, judicial review is neither necessary nor appropriate when both the public service employees and the applicant have a remedy (other than judicial review) to appeal to the Public Service Tribunal (regulations 10 and 19).

[41] In a supplementary affidavit of 2 September 2016 Mrs. Amanaki states that the applicant has chosen to apply for judicial review due to its past experience of the Public Service Tribunal and specifically because the Tribunal has ruled that the applicant is not an employee association. She says that for this reason the applicant cannot give a notice of dispute under the regulations. I do not accept her evidence. It is apparent from the statement of claim and Mrs. Amanaki's first and supplementary affidavits that the applicant has already served a notice of dispute under the regulations. At paragraph 13 of her supplementary affidavit Mrs. Amanaki states "That in order to protect our members, we have filed notice of dispute grievance under the umbrella of Public Service Association". Secondly, in respect of the decision of the Public Service Tribunal to which Mrs. Amanaki refers (*Public Service Association v Public Service Commission* (PST Appeal 3/14, 28 July 2014) all that the Public Service Tribunal decided was that the applicant had failed to prove that it was either registered according to law or that it had public service employees within its then current membership (paragraph 12 of the ruling). These are matters that it was required to establish under the regulations (see the definition of association in regulation 2). It may establish those matters in any future proceeding, including a Public Service Tribunal proceeding in relation to the present matter. Mrs. Amanaki also

referred to alleged harassment of the applicant's officers that occurred some years ago and to the fact that the Ministry of Labour had given notice in 2014 that it intended to petition the Court to wind up the applicant. I do not consider that any of these matters are relevant to any question I must decide or that they explain or justify the applicant applying for judicial review when other more appropriate avenues are open to it.

[42] The final ground advanced is that natural justice requires that the employees who have filed grievances have a right to know how they have been dealt with before the new salary structures are introduced. This ground does no more than dress up the other grounds advanced in another guise and adds nothing to them.

Result

[43] The application for leave to apply for judicial review is refused. It must follow that the applicant's application for injunction is dismissed and I so order.

[43] If any party seeks costs they may apply within 14 days. My preliminary view is that costs should lie where they fall.

O.G. Paulsen
LORD CHIEF JUSTICE

NUKU'ALOFA: 13 September 2016.