

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

CV 91 of 2011

Solicitor General
01/11/16
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BETWEEN: SIOSAIA NGALO'AFE HAFOKA VE'EHALA

- **Plaintiff**

AND: KINGDOM OF TONGA

- **Defendant**

BEFORE LORD CHIEF JUSTICE PAULSEN

Counsel: Mr. L. M. Niu SC for the plaintiff

Mr. 'A. Kefu SC for the defendant

Date of Hearing: 18 October 2016

Date of Ruling: 31 October 2016

RULING

[1] The plaintiff, Mr. Ve'ehala, seeks damages for the wrongful termination of his employment as a police officer. The defendant (the Kingdom) accepts that Mr. Ve'ehala's employment was wrongfully terminated and that damages are payable. What is in issue is the quantum of those damages.

Recd
31/10/16
AM

The facts

- [2] Mr. Ve'ehala's brief of evidence was admitted by consent and he was not cross-examined.
- [3] The Kingdom did not call any evidence.
- [4] Mr. Ve'ehala was born on 22 December 1962 and he is now 53 years old. He was enlisted into the police force on 12 March 1986. He was then 23 years old. He rose to the rank of Sergeant.
- [5] On 29 May 2007 Mr. Ve'ehala was interdicted from duty by the Minister of Police. This is suspension without pay. The reason for the interdiction was that a complaint had been made that Mr. Ve'ehala had behaved improperly towards a young woman. A letter received from the Minister of Police advised Mr. Ve'ehala 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 further requirements".
- [6] Mr. Ve'ehala received no further advice about the complaint between the period 29 May 2007 and 9 October 2007. On 9 October 2007 he received a letter from the Acting Commander of the Police that on 26 September 2007 Cabinet had approved his dismissal with effect from 29 May 2007. No reasons were given for the decision to dismiss. Mr. Ve'ehala was never charged with any offence in relation to the complaint nor were disciplinary proceedings taken against him under Part V of the Police Act (Cap. 35) (Police Act). At the time of his dismissal Mr. Ve'ehala was 44 years old.

- [7] In around 1998 Mr. Ve'ehala took a loan from Westpac Bank for \$20,000 to build a house for his family with repayments to be made from his salary. He took further loans in 2004 and 2007 to extend and renovate the house. His evidence is that the total outstanding in 2007 was \$60,000 with repayments being made fortnightly from his salary. He said that when he was suspended the loan went into default and civil proceedings were taken against him by the Bank in 2009, which he could not defend. The Bank agreed that it would take no action against him to sell the house awaiting the outcome of his claim against the Government. He said that as at 31 August 2015 the interest on the loan was \$55,002.12 which was charged at 11% per annum from the date of his default in 2007.
- [8] Following his dismissal Mr. Ve'ehala planted crops for sale and to feed his family and he obtained financial help from relatives overseas through remittances, which were neither regular nor sizeable.
- [9] Mr. Ve'ehala's evidence is that he did not know and was never told that police officers were employed on five year engagements and that there was never any procedure followed whereby the employment of a police officer was renewed every five years. His understanding (and he said the understanding of other police officers) was that if he worked well and served until he was 50 years old he could voluntarily retire and that he had to retire at 55 years of age. During his 21 years in the police force he knew 27 police officers who retired at 55 years of age.
- [10] Mr. Ve'ehala said that police officers conducted their personal affairs based on an expectation that they would serve until 55 years of age and that banks were aware of this and for that reason gave loans to be repaid in 10 or 15 years. He said if he had been aware that his employment could be terminated every five years with no assurance of

renewal he would not have made any financial commitment in excess of five years. In something of a contradiction he also said "But my loan in 2007 [was] to be repaid in 15 years so that I would be able to repay it all with interest when I would retire in 2022 when I attain age 55". Mr. Ve'ehala will be 60 years old in 2022.

[11] Mr. Ve'ehala asserts in his evidence that it was not fair for the Government to argue that his employment could terminate in 2011. Again in apparent contradiction of his evidence that he had understood he would serve until he retired at 55 years of age, he said that the Government should compensate him "for the years it led me to believe that I would have been employed, i.e. until 31/12/2022".

[12] The total sum Mr. Ve'ehala seeks as damages is \$278,633.47 made up of the following amounts:

Salary from 28 May 2007 to 31 December 2022	\$190,710.97
Government contribution to Retirement Fund	\$19,975.94
Entitlement from the Pension Act	\$12,944.44
Bank Interest from 1 April 2009 to 31 August 2015	\$55,002.12
Total	\$278,633.47

The positions of the parties and the measure of loss

[13] There is no dispute that Mr. Ve'ehala is entitled to both salary for the period of his interdictment and the amount claimed under the Pension Act amounting to \$12,944.44. I do not refer to them further and expect they have, or shall be, paid. The amounts that are in dispute are lost salary following dismissal, the Government contribution to the Retirement Fund and bank interest.

[14] Notwithstanding that Mr. Ve'éhala was a public servant employed under a contract of service that was subject to statutory provisions and qualifications, he is entitled to recover damages on a basis analogous to wrongful dismissal.

[15] The measure of such damages is the estimated actual loss sustained as a reasonable consequence of his dismissal. This includes any salary and the value of any benefit to which he was or might have been entitled and of which he was deprived by reason of the dismissal; subject to deduction for any sum paid in respect of his removal and any loss that he has avoided by obtaining alternative employment. In appropriate cases it may be necessary also to discount an award in respect of future earnings to present day value to avoid over-compensation but the Kingdom has raised no such argument (*Jarratt v Commissioner of Police for New South Wales* (2005) 224 CLR 44 referred to in *Ve'éhala v Kingdom of Tonga* [2014] Tonga LR 235, 241 at [15], *Palu v Kingdom of Tonga* (Unreported, Supreme Court of Tonga, CV924/2004 24 November 2015, Paulsen LCJ) and *Lavarack v Woods of Colchester* [1967] 1 QB 278, 301).

[16] In the application of these principles it must be understood, as Lord Diplock said in *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278, 294, that:

..the first task of the assessor of damages is to estimate as best he can what the plaintiff would have gained in money or money's worth if the defendant had fulfilled his legal obligations and had done no more.

[17] To the same effect the Court of Appeal noted in *Leiola Group Ltd v Moengangongo* [2010] Tonga LR 85 at [30] that in assessing

damages the Court proceeds on the basis that an employer would perform the contract in the manner least disadvantageous to itself. So if, for instance, an employer could have dismissed an employee by giving reasonable notice it is to be assumed it would have done so even though, in fact, it summarily dismissed the employee (*Leiola* at [30]). In *Palu v Kingdom of Tonga* I found that the plaintiff's employment was from 'year to year' and his damages were assessed accordingly.

[18] I do not understand either party takes issue with these principles. It is in the manner of their application that the parties' positions substantially diverge.

[19] Mr. Ve'ehala argues that his damages should be assessed on the basis that he would have remained employed until he turned 60 years old on 31 December 2022.

[20] The Kingdom argues that under the Police Act Mr. Ve'ehala was employed on a five year engagement ending on 12 March 2011 and that his damages must be assessed to that date. In the alternative the Kingdom argues that damages should be assessed to the date Mr. Ve'ehala will reach the voluntary retirement age of 55 years on 31 December 2017. Because of the conclusion I have reached it has not been necessary to consider this alternative argument.

Statutory framework - Police Act

[21] Mr. Ve'ehala was enlisted as a police officer under the Police Act. The Police Act was repealed and replaced by the Tonga Police Act 2010. I will refer to the relevant sections of the Tonga Police Act (Tonga Police Act) later in this ruling.

[22] Section 11 of the Police Act provided that every police officer was enlisted to serve by the Minister of Police with the approval of Cabinet and that his service commenced from the date of enlistment.

[23] Section 8 of the Police Act provided that the command, superintendence and direction of the police force vested in the Minister of Police who had the power, subject to the provisions of the Act and obtaining the approval of Cabinet to, *inter alia*, make appointments of all police officers and make orders for the general government of police officers. Section 8(1) read as follows:

8 Power of the Minister of Police.

- (1) The Minister of Police shall have command, superintendence and direction of the Force subject to the provisions of this Act and may, with the approval of Cabinet —
- (a) make appointments, promotions and reductions in rank in respect of all police officers;
 - (b) make orders for the general government of police officers in relation to their enlistment, discharge, training, arms, clothing, equipment and other appointments or services; and
 - (c) make orders for the distribution, inspection and generally for the maintenance of efficiency and discipline in the Force or the prevention of neglect.

[24] Section 12 of the Police Act provided that every police officer was in the first instance engaged to serve for five years and subsequently for further periods of re-engagement of five years at the option of the Minister (*Ve'ehala v Kingdom of Tonga* [2014] Tonga LR 235, 241 at [14]). The section provides:

12 Duration of service.

Every police officer shall, in the first instance, be engaged to serve for a period of 5 years and subsequently for further periods of 5 years, each re-engagement being at the option of the Minister of Police and subject to retirement or discharge or any other provision of this Act.

[25] Section 16 of the Police Act allowed for the prolongation of any police officer's service during an emergency. This provision was replaced by the Police (Amendment) Act 2008, with a new provision which took effect from 13 February 2009 (after Mr. Ve'ehala's dismissal). The new provision required police officers to compulsorily retire at age 60 years except in the case of officers who were, upon the commencement of the amendment, aged between 50 and 54 who could voluntarily retire at age 55 years. I note that section 12 of the Police Act was unaffected by the amendment.

[26] Section 15 of the Police Act placed restrictions upon police officers' liberty to resign or withdraw from service, other than by retirement, without the consent of Cabinet.

[27] Section 17 of the Police Act provided for the discharge of police officers 'at any time' as follows:

17 Discharge.

- (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 Tonga Police Act 2010

[28] The Police Act was replaced by the Tonga Police Act 2010 (Tonga Police Act) which came into force on 2 February 2011. The Tonga Police Act made substantial changes to, *inter alia*, the process and terms upon which police officers were engaged.

[29] Under section 32 the Police Employment Committee was established. Its functions include appointing, determining the conditions of employment of, and taking disciplinary action against members of the police.

[30] The power of the Police Employment Committee to appoint persons as members of the Tonga Police is contained in section 42 which provides:

42 Police Employment Committee may appoint persons

- (1) The Police Employment Committee may, in accordance with this Division, appoint persons as members of Tonga Police.

- (2) A person may be appointed as:
 - (a) a police officer; or
 - (b) an administrative staff member.

[31] Section 43 provides that members of the Tonga Police may be appointed on 'an ongoing basis' or a 'period specified in the instrument of appointment' and otherwise on conditions as the Police Employment Committee determines. Section 43 reads:

43 Appointment of members and conditions of appointment

- (1) The Police Employment Committee may appoint a member:
 - (a) on an ongoing basis; or
 - (b) for a period specified in the instrument of appointment.
- (2) The conditions of appointment are as the Committee determines in writing.
- (3) A member may be paid a salary increment:
 - (a) only after 12 months service for each increment; and
 - (b) only after a satisfactory performance appraisal from his supervisor for that 12 months service.

[32] Section 44 provides that appointees to the Tonga Police shall serve a probationary period as follows:

44 Appointees to be on probation

- (1) The appointment of a person as a member of Tonga Police is subject to 2 years probation.
- (2) The Police Employment Committee may terminate the person's appointment if the Committee is satisfied that, at any time during the probation period:

- (a) the person has not performed his duties in a satisfactory manner;
 - (b) the person is not a fit and proper person to be a member of Tonga Police;
 - (c) the person has failed in his duties as a member of Tonga Police;
 - (d) the person has committed a breach of discipline; or
 - (e) it is appropriate for any other reason to terminate the appointment.
- (3) Subject to subsection (4) and unless the person's appointment is terminated sooner under subsection (2), the Committee shall, at the end of the probation period:
- (a) confirm the person's appointment by written notice to the person; or
 - (b) terminate the person's appointment.
- (4) If, at the end of the person's probation period, the person is subject to any disciplinary or criminal proceedings, the Committee may defer making a decision under subsection (3) until the completion of those proceedings and any reviews or appeals in relation to those proceedings.

[33] Much of the argument in this case was focused on the transitional and saving provisions of the Tonga Police Act and in particular sections 183 and 188 which I set out below:

183 Police officers

- (1) This section applies if, immediately before the commencement of this section, a person was enlisted to serve in the Tonga Police Force, under section 11 of the Police Act (Cap 35).

- (2) On the commencement of this section, the person is taken to have been appointed as a police officer in Tonga Police under section 42(2)(a) of this Act:
 - (a) until the end of the term of the original engagement; and
 - (b) on the conditions of the original engagement that are consistent with this Act; and
 - (c) at the same rank as under the Police Act (Cap 35).
- (3) Nothing in this section prevents the terms and conditions being varied, after the commencement of this section, in accordance with this Act.

188 Actions and instruments

- (1) This section applies to:
 - (a) any act done, step taken or decision made under a provision of the Police Act (Cap. 35), if the act, step or decision continued to have effect immediately before the commencement of this section; and
 - (b) an instrument made under a provision of the Police Act (Cap. 35), if the instrument was in force immediately before the commencement of this section.
- (2) If there is a corresponding provision of this Act for the provision of the Police Act (Cap. 35), the act, step, decision or instrument:
 - (a) continues to have effect, according to its terms, but with the changes that are necessary:
 - (i) to make it consistent with this Act; and
 - (ii) to adapt its operation to this Act;
 - (b) is taken to have been done, taken or made under the corresponding provision of this Act.

- (3) The act, step, decision or instrument may be varied, amended or revoked under this Act.
- (4) In this section:
"instrument" includes an approval, authorisation, certificate, classification, declaration, delegation, determination, direction, identity card, order (given orally or in writing), notice, permission, policy, procedure, proclamation, recommendation, warrant or other instrument (other than regulations).

Section 12 of the Police Act

- [34] The Kingdom argues, in reliance upon section 12 of the Police Act, that Mr. Ve'ehala's employment would, had he not been dismissed, have come to an end on 12 March 2011 at the conclusion of his last five year engagement. It submits that the Minister could then have lawfully refused to re-engage Mr. Ve'ehala and accordingly his damages must be assessed to that date.
- [35] It was accepted by the Kingdom that section 12 had not been applied in practice but Mr. Kefu argued that was of no consequence and what mattered was that section 12 could have been applied to Mr. Ve'ehala.
- [36] For Mr. Ve'ehala, Mr. Niu argued that section 12 was enacted "for the lawful reduction of the number of police officers and the reduction of the establishment". On this basis he submitted that the Minister had no power "not to re-engage a police officer" except to further one of the objects in sections 17(a)(b) or (c) of the Police Act. In the case of misconduct, under section 17(d), he submitted that section 12 could never be relied upon "to dismiss a police officer" because the

Act separately provides processes for dealing with allegations of misconduct.

[37] Mr. Niu concluded that the Kingdom was therefore not entitled to "bring [Mr. Ve'ehala's] contract of employment to an end....on 12 March 2011" because Mr. Ve'ehala had not been pronounced mentally or physically unfit (section 17(a)), there was no reduction of the establishment (section 17(b)), and Mr Ve'ehala was not likely to cease to be an efficient police officer (section 17(c)). Mr. Nui sought to support his argument by reference to Mr. Ve'ehala's evidence that he was never told that he was employed on five year engagements and that section 12 was not applied.

[38] I am unable to accept Mr. Ve'ehala's interpretation of section 12. The meaning of section 12 is clear. Police Officers were enlisted to serve for fixed periods of five years. I have not overlooked the concession made by the Kingdom that in practice section 12 was not observed. What that means, in my view, is that the continuance of the employment of police officers beyond the end of their set period of engagement must be regarded as the exercise by the Minister of the option to re-engage them. It does not mean that section 12 was not good law or can be ignored. The enquiry that this Court is engaged in is necessarily counter-factual. It is required to determine the earliest date that Mr. Ve'ehala's employment *could* otherwise have come to an end had he not been dismissed.

[39] Mr. Ve'ehala's argument proceeds on the false premises that section 12 requires the Minister to decide "not to re-engage a police officer" and that should such a decision be made that brings the employment to an end and amounts to a dismissal (paragraphs 5 and 13 of Mr. Nui's submissions). This approach turns section 12 on its head.

What the section contemplates is that the Minister may make a positive decision (to re-engage a police officer) not a negative one (not to re-engage). The failure to exercise the option does not bring the employment to an end and cannot amount to a dismissal when the police officer's period of engagement has simply expired.

[40] Even if section 12 was regarded as requiring the Minister to make a decision "not to re-engage" there is nothing in the Act to suggest that his decision must be exercised for the limited purposes of section 17. The duration of police officers' engagements are independently "subject to retirement or discharge on any other provision of this Act". Section 17 is such a provision dealing with discharge for cause and provides that the Minister may discharge a police officer 'at any time' and not just at the end of a period of engagement.

[41] Mr. Nui submitted section 12 should be interpreted in a restricted way because he could not conceive of any reason the Minister would have a right to not re-engage police officers except for the reduction of the establishment. That submission overlooks that engagements for set periods offer substantial benefits to both parties to an employment relationship including administrative flexibility and a reduction in the frequency and risks associated with legal claims, amongst others. The submission also renders section 12 redundant when the power to discharge a police officer on the reduction of establishment ground exists under section 17 in any event.

[42] For those reasons, and subject to Mr. Ve'ehala's alternative arguments which I discuss below, I find that Mr. Ve'ehala was employed for a set period which, had it not been for his earlier dismissal, would have expired on 12 March 2011 and that there

would have been no obligation upon the Minister to re-engage him. It is to be assumed for the purposes of assessing his damages that the Minister would not re-engage him. Accordingly his damages are to be assessed up to 12 March 2011.

The Tonga Police Act

- [43] Mr. Ve'ehala presents alternative arguments in support of his submission that his damages should be assessed to the age of 60 years. These arguments are based on the Tonga Police Act.
- [44] The first argument is that sections 11 and 12 of the Police Act (providing for the enlistment of police officers and their five yearly re-engagements) were replaced by sections 42 and 43 of the Tonga Police Act. It is submitted that from the commencement of the Tonga Police Act existing police officers were appointed on an ongoing basis or for a set period if specified in the instrument of appointment. On this basis Mr. Nui argued Mr. Ve'ehala's employment would not have come to an end on 12 March 2011 but would have continued on an ongoing basis until his compulsory retirement at the age of 60 years. I do not accept this argument.
- [45] Mr. Ve'ehala's circumstances had he remained employed would, in my view, have been governed by section 183 of the Tonga Police Act. Section 183(1) states that it applies to a person who was immediately before the section's commencement enlisted to serve in the Tonga Police Act under section 11 of the Police Act. Section 183(2) provides that on the commencement of the section such a person is to be taken to have been appointed as a police officer under section 42(2)(a) of the Tonga Police Act at the same rank until the end of the term of 'the original engagement' and on the

conditions of the 'original engagement that are consistent with the [the Tonga Police Act]'.

[46] The Kingdom argues, in reliance upon section 183, that the duration of Mr. Ve'ehala's engagement would have been unaffected by the introduction of the Tonga Police Act. However, Mr. Ve'ehala argues that section 183 would not apply to him. This is because the section applies only to persons enlisted 'immediately before' the commencement of the section. A police officer is, Mr. Niu argued, enlisted only once and in the first instance engaged to serve for a period of five years. A police officer serving following re-engagement was not to be regarded as enlisted 'immediately before' the commencement of the section. This interpretation is supported, he submitted, by the references to 'original engagement' in sections 183(2)(a) and (b) which must be taken to refer to a police officer's first five year engagement. Resourceful though it is, I do not accept this argument.

[47] Police Officers were 'enlisted' under section 11 to 'serve in the Force'. They remain enlisted throughout the period of their service. They do not cease to be enlisted because they serve during a period of re-engagement. It follows that the requirement that a person be enlisted "immediately before the commencement of this Act" requires only that the person retained their status as an enlisted officer upon the commencement of the Tonga Police Act. This is so whether they were serving a first or subsequent engagement.

[48] I accept that use of the words 'original engagement' in sections 183(2)(a) and (b) might be considered ambiguous but I agree with the Kingdom's submission that the clear intention is that those words mean the engagement under which a police officer is employed on

the commencement of the section. Any other interpretation would create a lacuna whereby there would be no provision in the Tonga Police Act in relation to the continued service of existing police officers other than those serving their first engagements. That would be an absurd result and would extend to the circumstances of special police officers, under section 184, and other staff, under section 186. Both sections 184 and 186 contain the same reference to 'original engagement'.

[49] The second argument advanced is tortuous. It is submitted that the Court must read the words 'under section 42(2)(a)' in section 183(2) as 'under section 42(a) and section 43(1)(a)' and section 183(2)(a) must be taken to apply only to police officers in their first five year engagement whilst section 183(2)(b) and (c) apply to all police officers appointed under the Police Act. In this way, it is submitted, police officers appointed under the Police Act, other than newly appointed officers, would not need to apply for reappointment under the Tonga Police Act and such appointments would necessarily be on an ongoing basis.

[50] I can see no justification for a wholesale redrafting of section 183 for a number of reasons. First, the meaning of section 183 is to my mind perfectly plain and does not produce any repugnant or undesirable result justifying a strained construction. Secondly, I do not accept that the objects that it is submitted would be advanced by the proposed construction reflect the Legislature's intentions. The Tonga Police Act anticipates that police officers may be appointed for fixed periods at the conclusion of which they would be expected to apply for re-appointment (sections 42 and 42). Thirdly, section 183 applies to all police officers enlisted under section 11 of the Police Act at the commencement of the section and there is no rational basis for

treating police officers serving first and subsequent engagements differently.

[51] The final argument advanced is that there is no specific provision in the Tonga Police Act to provide for police officers with two or more re-engagements immediately prior to the commencement of the Act. Mr. Niu argued that by virtue of section 188(2) of the Tonga Police Act a decision to appoint a police officer under section 12 of the Police Act is to continue to have effect according to its terms but with such changes as are necessary to make it consistent with the Tonga Police Act. This he said required that "the 5 yearly term would be changed, by operation of law, to be a term of "an ongoing basis".

[52] I do not accept this submission either. First, there is a specific provision dealing with the position of police officers serving periods of re-engagement; it is section 183. Secondly, I do not accept that there is any 'decision' made under section 12 which might be subject to section 188 nor anything that could be regarded as a provision corresponding to section 12 in the Tonga Police Act. Thirdly, even if section 188 was to apply, section 12 is not in my view inconsistent with the Tonga Police Act because section 43(1) recognises engagements for specified periods.

The bank interest

[53] Mr. Ve'ehala claims that as a result of his dismissal he was not able to pay his bank loan and interest accrued amounting to \$55,002. He argues that the interest is a pecuniary loss which is a direct and natural consequence of his dismissal and ought to be recoverable.

[54] The Kingdom argues that the interest is not recoverable as it was not incurred as a result of Mr. Ve'ehala's dismissal but was an obligation he assumed to the bank. I was also referred to comments in *Leiola* and *Palu* to the effect that in Tonga losses for 'hardship' are not generally recoverable.

[55] Mr. Ve'ehala's evidence concerning the bank loan is unsatisfactory. He refers to a loan in 1998 which was 'paid down' and then to a loan in 2004 for an unspecified amount. He does not say if the 2004 loan was 'paid down'. He then speaks of a loan in 2007 but not when in that year the loan was taken out. The relevance of this is that the Kingdom could not be responsible for a loan to renovate Mr. Ve'ehala's house taken out after the date of dismissal. To add to this unsatisfactory position, whilst Mr. Ve'ehala says that interest accrued because he could not repay the loan he does not distinguish between interest that was to be charged on the loan in any event and interest that was incurred by reason of his default. On the basis of the evidence I find the claim to interest to be unproven.

[56] I also note that before the hearing Mr. Ve'ehala filed a bundle of documents. As it was not referred to in the course of the hearing or by Mr. Ve'ehala in his brief of evidence it is not clear whether it was intended that I would refer to it. Out of an abundance of caution and to do justice to Mr. Ve'ehala, I have referred to the documents to see if they shed any light. I note that in the bundle is a statement of claim in proceedings between the Westpac Bank and Mr. Ve'ehala and that it is pleaded that the 2007 loan was obtained in or around 28 November 2007, that is after Mr. Ve'ehala's dismissal. I do not assume what is stated in that document is correct, only that it has not provided support for Mr. Ve'ehala's claim.

[57] In any event, the bank interest is not recoverable in my view because as a matter of law it is too remote from the breach. A useful statement of principle in relation to remoteness of damage appears in Chitty on Contracts (29th ed, Vol 1 at 26-046) as follows:

If there is no explicit clause in the contract dealing with the assessment of damages, the law supplies a standard test which specifies the extent of responsibility implicitly undertaken by the promisor. There is a reciprocal allocation of risks; the precise legal test is examined below but it can be said in general terms that the promisor implicitly accepts responsibility for the usual consequences of a breach of the promise in question, while the promisee implicitly accepts the risk of any other consequences. (In other words, the promisee implicitly agrees not to hold the promisor responsible for unusual consequences.) The test should ultimately depend on the express or implied intention of the parties. Hence, the promisor may be liable for an unusual type of loss where he is made aware of the risk and thus expressly or impliedly accepts responsibility for it.

[58] In *The Heron II* [1969] 1 A.C 350, 385 Lord Reid put the matter this way:

The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation.

[59] There is nothing to suggest that the Kingdom had special knowledge such that it should be taken to have assumed the risk of liability accruing under Mr. Ve'ehala's loan nor can it be said that such loss

flows naturally upon his dismissal. No authority was provided to me to suggest otherwise.

Result

[60] I propose to accede to Mr. Kefu's request that I leave it to the parties to calculate and agree on the amount that is owing to Mr. Ve'ehala based on my findings.

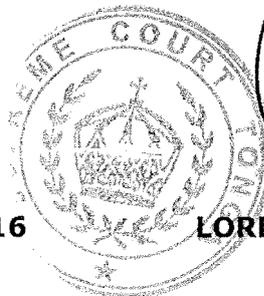
[61] My findings are as follows:

[61.1] Mr. Ve'ehala's lost salary is to be calculated from 26 September 2007 to 12 March 2011.

[61.2] Mr. Ve'ehala is entitled also to receive the Government contribution to the Retirement Fund calculated to 12 March 2011.

[61.3] Mr. Ve'ehala's claim for bank interest is dismissed.

[62] I was not addressed on the questions of interest or costs. I reserve leave for either party to apply for the Court to determine any dispute as to Mr. Ve'ehala's entitlement under this ruling including any claims for interest and costs. Such application should be made within 42 days of the date of this ruling.



A handwritten signature in black ink, appearing to read "O.G. Paulsen", is written over the seal.

O.G. Paulsen
LORD CHIEF JUSTICE

NUKU'ALOFA: 31 October 2016