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IN THE SUPREME COURT OF TONGA CV 54 of 2016
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

BETWEEN : RIZVI JURANGPATHY

Plaintiff

AND: COMMISSIONER FOR PUBLIC RELATIONS

Defendant

BEFORE LORD CHIEF JUSTICE PAULSEN

Counsel: Mr. W. Edwards Jnr for plaintiff

Mr. 'A. Kefu SC for defendant

Date of Hearing: 10 and 11 November 2016

Date of Ruling: 21 November 2016

RULING

Nature of the case

- [1] The plaintiff is the Chief Executive Officer of the public enterprise, Tonga Communications Corporation (TCC). His conduct in that role is the subject of an investigation by the defendant (the Commissioner) under the *Commissioner for Public Relations Act 2001* (the Act).
- [2] Prior to the commencement of the Commissioner's investigation, the plaintiff filed a defamation action in the Magistrates' Court against the Newspaper Kele'a, a member of the Legislative Assembly, Mr. Mateni Tapueluelu, the publisher of the Kele'a, Mrs. Laucala Tapueluelu, and the

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editor of the Kele'a, Mr. Ofa Vatikani. He says the issues arising in the defamation action and in the Commissioner's investigation are substantially the same and he is seeking an interim stay of the Commissioner's investigation until his defamation action has been heard and determined.

[3] The plaintiff also argues that the Commissioner has exceeded his powers in the conduct of his investigation and has failed to observe natural justice. As a second cause of action he is seeking a declaration that the investigation is vexatious and an abuse of process or has been conducted unfairly in excess of jurisdiction.

[4] Finally, the plaintiff seeks an order that an affidavit of Mrs. Fololeni Tolu, which the Commissioner has before him, be released to him so that he may commence a prosecution against her for perjury.

The facts

[5] In comprehensive submissions Mr. Edwards set out the facts in detail. There is no need for me to do so to the same extent for the purposes of this ruling.

[6] In June 2015, Mr. Mateni Tapueluelu made allegations against the plaintiff which were subsequently the subject of an article in the Newspaper Kele'a. The allegations were, broadly speaking, that in his capacity as the Chief Executive Officer of TCC the plaintiff had committed indecent acts upon, and was having affairs with, staff members, was

misusing funds of TCC and dismissing employees for improper reasons. The plaintiff denied the allegations.

- [7] On 13 July 2015, the Prime Minister, Hon. S. 'Akilisi Pohiva, wrote to the plaintiff to express his serious concerns about the plaintiff's conduct as CEO of TCC. He recommended that the plaintiff resign. The Prime Minister wrote:

The weigh [sic] of these allegations such as the misuse of position, company resources, invading the private calls of customers including the indecent moral [sic] behaviour, is a serious breach of public trust in the public enterprise.

- [8] The plaintiff did not resign. In response to the publication of the allegations in the Kele'a he commenced his defamation action in the Magistrates' Court, which is presently part heard.
- [9] Mr. Tapueluelu then referred the allegations to the Commissioner under section 11(1) of the Act. The Commissioner was of the view that Mr. Tapueluelu was not a person affected for the purposes of the section but otherwise considered the allegations fell within his functions and should be investigated. In August 2015, the Commissioner decided to conduct an own motion investigation (section 11(2) of the Act). However, following submissions from the plaintiff's lawyer the Commissioner put his investigation on hold pending the completion of the defamation action.

[10] There the matter might have rested but that on 15 July 2016 the Prime Minister wrote to the Commissioner advising that he had received a complaint against the plaintiff from more than 60 employees of TCC (the complaint) and asking the Commissioner to consider the matter and provide advice as to the appropriate action to be taken in respect of the plaintiff. The complaint from the TCC employees listed seven specific issues of concern including disrespectful and inappropriate conduct towards female staff, inappropriate touching, kissing and texting of female staff, buying a car for a staff member the plaintiff was dating and buying an air ticket at the request of a female staff member he was dating. The complaint also referred to divisions within TCC, which it was said were mainly a result of the behaviour of the plaintiff, and that attempts to have the employees' concerns addressed within TCC had failed and were swept under the carpet. The complaint also noted that there were other matters the employees wished to raise.

[11] The Commissioner regarded the Prime Minister's letter as a referral by the Prime Minister under section 11(3) of the Act. On 29 July 2016, he wrote to the Prime Minister that he consented to an investigation, which he would commence forthwith.

[12] Incidentally, on 26 July 2016 the Board of TCC also referred the TCC employees' complaint to the Commissioner for investigation. The Commissioner has acknowledged that referral. The Board of TCC has put the plaintiff on

suspension pending the outcome of the Commissioner's investigation.

[13] On 29 August 2016, the Commissioner advised the plaintiff that he had received a complaint against him and summoned him to provide information. The plaintiff was questioned on 1 September 2016.

[14] The Commissioner's office has been conducting its investigation. To date this has involved interviews with over 70 people. I understand that the investigation has some way to go before it will be complete.

The application for an interim stay

[15] The plaintiff submits that in the defamation action the Magistrate will have to resolve issues of fact which are also the subject of the Commissioner's investigation. Examples include whether the plaintiff is having an affair with a staff member, whether he acted indecently towards female staff and whether he bought a car for a female employee he was dating.

[16] Mr. Edwards argued that it is "all a little too convenient" that when Mr. Tapueluelu and his wife were served with the defamation proceedings the Prime Minister, who is the father of Mrs. Laucala Tapueluelu, should receive the same complaints from TCC employees and require the Commissioner to investigate the plaintiff. The plaintiff considers that the making of the complaints and the referral

of them to the Commissioner has been driven by Mr. Tapueluelu and others close to the Prime Minister who have their own agendas and interests to protect. It is unfair, he says, that he should have to fight the allegations on two fronts.

[17] The plaintiff also argues that because of the procedures adopted by the Commissioner, where there is no hearing and he has no right to call witnesses or cross-examine, it is highly likely that the Magistrate and the Commissioner will reach different conclusions on common issues of fact which will undermine the function of the judiciary.

[18] Mr. Edwards referred me to a number of cases concerning applications to stay or adjourn court proceedings where there were concurrent proceedings involving the same issues before distinct tribunals or courts (*Slough Estates Ltd v Slough Borough Council and Another* [1967] 2 All ER 270, *Airport Restaurants Ltd v Southend on Sea Corporation* [1960] 2 All ER 888, *Thames Launches Ltd v Corporation of the Trinity House of Deptford Strond* [1961] 1 All ER 26 and *The Royal Bank of Scotland Ltd v Citrusdal Investment Ltd* [1971] 3 All ER 558).

[19] These cases concerned the court exercising its undoubted jurisdiction to order a stay or adjourn proceedings to prevent abuses of its processes. That jurisdiction arises under the inherent jurisdiction of the court or is conferred by court rules. The plaintiff is not seeking a stay of a court proceeding. He seeks a stay of an investigation of the

Commissioner. Therefore the issues arise whether jurisdiction to order a stay exists and, if so, upon what it is based.

[20] The courts have recognised and exercised jurisdiction to supervise the administration of justice over subordinate tribunals performing judicial functions. This has included ordering a stay to prevent an abuse of process where the court is satisfied that the continuation of a proceeding would involve unacceptable injustice (*Walton v Gardiner* (1992-1993) 177 CLR 378, *R v Chief Constable of Merseyside Police; Ex parte Calveley* [1986] QB 424 and *Herron v McGregor* (1986) 6 NSWLR 246, 254).

[21] These cases concerned judicial tribunals, which are typically charged with receiving and investigating complaints, determining them by adopting conventional court processes and, upon finding a complaint proved, imposing a disciplinary or other sanction.

[22] I accept that in Tonga such jurisdiction is conferred on the Supreme Court by section 5 *Supreme Court (Amendment) Act 2012*, which provides that the Supreme Court has the same powers for the time being vested in the High Court of Justice of England and Wales. However, in my view such jurisdiction must be confined to tribunals exercising a judicial function (for the indicia of which see *NSW Bar Association v Muirhead* (1988) 14 NSWLR 173, 208-214, 215-216) and such jurisdiction is subject, of course, to contrary statutory direction. My present view is that the

Supreme Court does not have jurisdiction to order a stay of the Commissioner's investigation for these reasons.

- [23] First, the Commissioner is not exercising a judicial function, for reasons I will set out below.
- [24] Secondly, the existence of such jurisdiction appears contrary to section 20 of the Act, which provides that proceedings before the Commissioner are not to be subject to any challenge in any court except on the ground of a lack of jurisdiction. The plaintiff does not advance an argument that the stay should be ordered because of a lack of jurisdiction.
- [25] Thirdly, whilst I accept that the court might in judicial review proceedings make an order prohibiting the Commissioner from proceeding with an investigation in excess of his powers, the plaintiff would need to obtain leave of the court before commencing such an action (O. 39 *Supreme Court Rules*) and has not done so here.
- [26] In any event, had I considered jurisdiction did exist to grant a stay I would not have granted one. The plaintiff's application is based on the premise that the proceedings before the Magistrates' Court and before the Commissioner are in truth between the same parties and concern the same issues. I do not accept this submission.
- [27] In relation to the identity of the parties, none of the defendants in the Magistrates' Court action are involved in

the investigation before the Commissioner. I do not accept the submission Mr. Edwards made that I should regard the Prime Minister (or the TCC employees) as doing the bidding of Mr. Tapueluelu. There is nothing at all to suggest to my mind that the Prime Minister is motivated by anything other than the best interests of TCC.

[28] In relation to the alleged commonality of issues, whilst I accept some common questions of fact will arise, that is as far as the similarities extend. The proceedings before the Magistrates' Court and the investigation before the Commissioner are of a very different nature, involving different enquiries, utilising fundamentally different processes and ultimately will result in very different outcomes.

[29] The action before the Magistrates' Court is obviously a judicial proceeding. The processes the Magistrates' Court must follow are those conventionally adopted by courts involving an adversarial contest where there is a hearing, the parties have a right to be present and may call evidence, cross-examine and address the court on the law or the facts. The principal questions for determination are whether the plaintiff has been defamed and, if so, what monetary compensation will right that wrong. The Magistrates' Court's decision is, subject to rights of appeal, final and binding on the parties. The decision will itself create new rights enshrined in the judgment of the court which will be the basis for further action or enforcement.

[30] On the other hand, the Commissioner's investigation is not a judicial proceeding. The Commissioner decides what inquiries are to be made and it is not necessary for the Commissioner to hold a hearing (section 14(1) of the Act). There is no right for the subject of an investigation, or any other person interested in the matter, to be heard or to call evidence or to cross-examine witnesses (s.14(3) of the Act). The Commissioner and his staff are bound by secrecy obligations in respect of all matters which come to their knowledge in the exercise of their functions, which will of course include evidence from people interviewed in the course of an investigation (section 17(1) and (3) of the Act). The Commissioner is not concerned with questions of liability or compensation. The purpose of the investigation is to right administrative wrongs in the public sector and to promote open and accountable government. The Commissioner can only report and make recommendations; he cannot issue binding rulings (sections 11(3) and 18 of the Act). His findings are not subject to reconsideration or appeal (except by way of judicial review) and no new rights are created. The plaintiff's rights will remain unaffected regardless of the Commissioner's findings.

[31] I do not see any basis for the plaintiff's contention that he is prejudiced because the Commissioner's investigation is proceeding at the same time as his defamation action. Mr. Edwards submitted that there was a risk that should the report of the Commissioner be issued before the judgment of the Magistrates' Court the Board of TCC might rely on his findings to dismiss the plaintiff. There is nothing in this

point. The Board could not rely on the findings of the Magistrates' Court or the Commissioner to conclude that there are grounds to dismiss the plaintiff. The Board would be required to reach a decision based on its own inquiries.

[32] Nor can I see any basis in logic or in the evidence for the submission that it is likely that the Magistrates' Court and the Commissioner will reach different conclusions on the facts. However, should that prove to be the case, the plaintiff's rights under the ruling of the Magistrates' Court will not be affected.

[33] The application for a stay is refused.

Affidavit of Fololeni Tolu

[34] The plaintiff learned of a serious allegation that was made against him by Mrs. Tolu in an affidavit which had been provided to the Commissioner. The plaintiff's counsel asked for the affidavit, intending to bring a prosecution against Mrs. Tolu for perjury. The Commissioner refused his request. The plaintiff has sought what is described as an order for discovery of Mrs. Tolu's affidavit.

[35] The Commissioner has produced Mrs. Tolu's affidavit. It is an annexure to the affidavit of the Chief Executive Officer of the Commissioner's Office, Mrs. Linda Folaumoetu'i.

[36] I have grave doubts that I had any jurisdiction to make the order the plaintiff has sought but I do not need to now

concern myself with that. Mr. Kefu accepts that the affidavit is now in the public arena and that the plaintiff may make use of the document, subject to the qualification that its admissibility is a matter to be resolved in any court proceeding in which the plaintiff seeks to produce it.

Has the Commissioner exceeded his jurisdiction

[37] The plaintiff alleges that the Commissioner has acted without jurisdiction for three principal reasons. First, he argues that not all of the TCC employees who have signed the complaint have been affected by the conduct in issue. Secondly, he says that the Commissioner is making enquiries about matters which are not raised in the complaint and which are the responsibility of the Board of TCC. Thirdly, he argues that the Commissioner has not observed the requirements of natural justice.

[38] At this point I note again section 20 of the Act which provides:

No proceeding of the Commissioner shall be held bad for want of form, and except on the ground of a lack of jurisdiction, no proceeding or decision of the Commissioner shall be liable to be challenged, reviewed, quashed or called into question in any Court.

[39] A question that arose in argument was whether, before being able to challenge the Commissioner's jurisdiction, the plaintiff had first to obtain leave to seek judicial review (O.

39 *Supreme Court Rules*). Mr. Edwards argued that leave was not required as the plaintiff seeks only a declaration and not judicial review. The Court of Appeal recently noted the long established jurisdiction of the court to entertain proceedings which seek only declaratory relief (*Minister of Revenue and Customs v Prasad* (Court of Appeal of Tonga, AC 7 of 2016, 14 September 2016). For the purposes of this proceeding, Mr. Kefu was prepared to accept that the court has jurisdiction to grant declaratory relief.

[40] In relation to the question of the scope of the Commissioner's inquiries, under section 11(3) of the Act the Prime Minister is able to refer to the Commission 'any matter' other than a matter concerning a judicial proceeding which the Prime Minister considers should be investigated.

[41] The courts in other jurisdictions have adopted a broad, purposive interpretation to Ombudsman's legislation (of which the Act is an example) consistent with the unique public role that an Ombudsman is intended to fill (*British Columbia Development Corporation v Friedmann (Ombudsman)* [1984] 2 SCR 447). That is an approach with which I agree.

[42] Mr. Kefu argues that the Commissioner's power under section 11(3) of the Act to investigate 'any matter' is very broad and not limited by reference to the functions of the Commissioner under section 11(1) of the Act to investigate matters of 'administration'. In his submission the Prime Minister may, under section 11(3) of the Act, refer to the

Commissioner any subject that he may choose for inquiry. Such power is, he noted, subject to the safeguard that it is ultimately the Commissioner who must give consent to an investigation. I agree with Mr. Kefu's submission.

[43] This was the approach taken by the Supreme Court of Victoria in *Glass v The President of the Legislative Council and Anor* [2016] VSC 507. The case concerned provisions in the *Ombudsman Act 1973* allowing the Legislative Council to make referrals to the Ombudsman in respect of 'any matter, other than a matter concerning a judicial proceeding' which it considered ought to be investigated by him. At paragraph [210] of that judgment Cavanough J said:

Nevertheless at first sight, at least, the expression 'any matter' in s 16(1) of the *Ombudsman Act 1973* appears to be used....in the sense of 'any subject matter that may be chosen for inquiry'. It is true that that is a very broad concept. However, it is difficult to think of any more narrow meaning which the expression 'any matter' might ordinarily bear in the context of a statute providing for one body to refer any unspecified thing to another body for investigation.

[44] The question that arises is, what was the matter that the Prime Minister referred to the Commissioner for investigation?

- [45] The plaintiff's challenge to the Commissioner's investigation focuses unduly upon the content of the TCC employees' complaint and in particular the seven specific issues listed in it. It overlooks that the Commissioner's investigation is not being undertaken upon the complaint but upon a referral by the Prime Minister under section 11(3) of the Act.
- [46] The Prime Minister's referral of 15 July 2016 refers to the complaint but it is plain that the 'matter' that is being referred is not the complaint itself. The Prime Minister is concerned generally with what he describes as volatility in the workplace of TCC resulting from the conduct of the plaintiff. That is the matter under investigation.
- [47] The plaintiff also argues that the complaint does not set out how each and every TCC employee who signed the complaint was affected by the allegations. The plaintiff would argue that in relation to the allegation that the plaintiff was kissing a staff member in his office it is only the one staff member who was kissed who could be affected by that behaviour. There is no merit in this submission. First, as I have noted, the investigation is pursuant to the Prime Minister's referral and it is certainly not necessary that he be personally affected by the subject of the investigation. Secondly, even if that were not the case the behaviour alleged *in toto* could reasonably be said to affect all employees of TCC by demoralising the workplace and creating a hostile work environment.

[48] The plaintiff also argues that the Commissioner has exceeded jurisdiction because he is investigating matters concerning the staff sick bonus, the CEO's bonus, the 910 call centre and the Next Generation Network. There is evidence that questions have been put to TCC employees about these issues by the Commissioner in the course of his investigation (see the affidavits of Teisa Atiola, Kilisitina Taufu, Kosema Pameti, and Ane Mailangi). The plaintiff says that these subjects are matters of policy made by the Board of TCC for which he is not responsible. His primary concern is that when interviewing him the Commissioner did not advise him that these subjects were under investigation or give him an opportunity to comment on them.

[49] The plaintiff argues this was a breach of his rights under clause 11 of the *Act of Constitution* and section 14(3) of the Act. Clause 11 is not apposite as it is concerned with criminal proceedings before a court. Section 14(3) provides that a Department, organisation or person adversely affected by any report or recommendation of the Commissioner should first be given an opportunity to be heard.

[50] Much of the plaintiff's concern will have been eliminated by the evidence of Mrs. Folaumoetu'i that the Commissioner's intention is to ensure the process of his investigation is fair and that this will include calling the plaintiff back to respond to any matters which may be adverse to his interests. Mrs. Folaumoetu'i said that this has always been the Commissioner's intention. The plaintiff was interviewed

early in the investigation and as the investigation has progressed new issues have been raised which the plaintiff will be heard on.

[51] That leaves the plaintiff's objection that these subjects are not relevant to the Commissioner's investigation. The court is not going to declare an investigation which is clearly within the Commissioner's jurisdiction vexatious or an abuse in excess of jurisdiction simply because some questions have been asked which the subject of the investigation contends are not relevant. It is certainly not clear to me that the subjects in issue can have no relevance to the Commissioner's investigation or that there is any risk of an adverse finding being made against the plaintiff in respect of them. It would create a very bad and chilling precedent if this court was to involve itself in the minutiae of the Commissioner's work, which, it seems to me, is what section 20 of the Act was intended to avoid.

[52] The plaintiff also alleges that he has been denied natural justice because he is not being afforded the same rights he would have in court (paragraph 5.17.5 of the plaintiff's submissions). The plaintiff submits that he is entitled to full disclosure of all the evidence that is given in the investigation, a right to a hearing where witnesses will give their evidence, a right to cross-examine and a right to call his own witnesses in rebuttal.

[53] I do not accept this submission which proceeds from the erroneous position that the Commissioner is conducting a

judicial proceeding. The Commissioner is not a judge, he does not preside over a court and proceedings before him are not judicial proceedings.

[54] It is well established that the obligations of natural justice may be modified or excluded entirely at the will of the legislature. As was noted in *Bretttingham-Moore v Municipality of St Leonards* (1969) 121 CLR 509, 524 by Barwick CJ:

[Where] the legislature has addressed itself to the very question...it is not for the court to amend the statute by engrafting upon it some provision which the court might think more consonant with a complete opportunity for an aggrieved person to present his views.

[55] The Act makes it clear that the Commissioner has a very wide discretion over the conduct of his investigations. Proceedings are conducted in private (section 14(2) of the Act) and there is no right of full disclosure as the Commissioner shall maintain secrecy in respect of all matters which come to his knowledge in the exercise of his functions (section 17 of the Act). It is not necessary for there to be a hearing, from which it must follow that there is no right of cross-examination of witnesses (section 14(3) of the Act) and no party is entitled as of right to be heard by the Commissioner, subject only to the qualification that there is a right to respond to adverse findings or recommendations (proviso to section 14(3) of the Act). It

follows that the plaintiff's submission that he has been denied natural justice is misconceived and must fail.

[56] I would add at this juncture that I am not without some sympathy for the plaintiff's concerns about process. Whilst not wishing to imply that the Ombudsman is legally obliged to follow any particular process, it appears to me that there has been, as far as the plaintiff is concerned, a lack of transparency. Specifically, the letter advising the plaintiff of the investigation did not make it clear that it was upon referral from the Prime Minister under section 11(3) of the Act and referred to the complaint. This caused much confusion at the hearing. There does not appear to have been any clear advice given to the plaintiff as to the process the Commissioner intended to follow or that he would be called back to be heard on any matters that arose in the course of the investigation which were adverse to his interests. These are steps that could have easily been taken and may possibly have averted this action.

Result

[57] The plaintiff's claim is dismissed.

[58] If the Commissioner wishes to seek costs he should apply within 28 days.




O.G. Paulsen

NUKU'ALOFA: 21 November 2016

LORD CHIEF JUSTICE