



(the Act). Their appointments were confirmed for a period of up to three years. On around 17 June 2016 the Minister advised the plaintiffs that they had been appointed only for the balance of the term of a resigning director who they had replaced and that their appointments had expired and were at an end. Later they were also required to vacate the offices of the Authority.

- [2] The plaintiffs argue that the Minister unlawfully terminated their appointments. They seek a declaration that his decision was invalid and an order setting it aside. In the alternative they seek damages.
- [3] The Minister argues he acted lawfully. He says that notwithstanding that the plaintiffs were advised that their appointments were for up to three years they had replaced resigning directors and their appointments could only be for the remainder of that director's term under section 9(10) of the Act.

**The facts**

- [4] The hearing proceeded on affidavit evidence. There was no cross-examination.
- [5] The Tonga Tourism Authority was established by the Act. Under section 9, the Board of the Authority is to consist of nine directors. Two are *ex officio* directors with no voting rights. The balance are appointed by Cabinet on the recommendation of the Minister. It should be noted that the Act originally contained an error in section 9(1)(b). It provided for the appointment of the two *ex officio* members but only five directors appointed by Cabinet, meaning the Board would consist of only seven and not the intended nine

directors. The error was identified and an amendment to the Act was passed from 30 August 2013.

[6] On 3 May 2013 Cabinet gave approval to the appointment of five directors who along with the two *ex officio* directors were to be the initial Board of the Authority. The five directors were:

- (i) Papiloa Foliaki.
- (ii) Paul Johansson.
- (iii) Shane Walker.
- (iv) Ross Chapman (chairperson)
- (v) Stafford 'Aho.

[7] Cabinet was aware of the error in section 9(1)(b). It decided to correct the error before appointing a full complement of nine directors. For this reason Cabinet made the following decision:

That the following two persons to be approved to be appointed as the two (2) additional directors of the Tonga Tourism upon regularization of the anomaly in section 9 of the Tonga Tourism Act 2012:

- (i) Tévita Palu
- (ii) Kololiana Naufahu

[8] On 31 May 2013, Cabinet rescinded the appointments of Stafford 'Aho as a director and Kololiana Naufahu as an additional director "to be appointed upon correction of anomaly in section 9 of the Tonga

Tourism Act ..." (Decision No. 499). In addition, Cabinet appointed Tevita Palu to replace Stafford 'Aho on the Board:

"...as one of the initial Board of Directors for the Tonga Tourism Authority"

- [9] Following the amendment to the Act to correct the error in section 9(1)(b) no further appointments to the Board were made until 2015. There remained only five Cabinet appointed directors of which four were appointed on 3 May 2013 and one on 31 May 2013. The two additional positions on the Board remained vacant.
- [10] On 16 June 2015 Shane Walker resigned from the Board. On 14 August 2015 the chairperson, Ross Chapman, also resigned from the Board. That reduced the number of Cabinet appointed directors to just three.
- [11] On 1 October 2015 the then Minister of Infrastructure and Tourism, Hon. 'Etuete Lavulavu, submitted a proposal to Cabinet that the plaintiffs be appointed to the Board. The proposal did not state that the plaintiffs were to be appointed to replace resigning directors. One of the plaintiffs, Tomifa Paea, was also to be appointed chairperson of the Board; a position previously held by Ross Chapman. The proposal would increase the number of Cabinet appointed directors to seven.
- [12] Cabinet approved the proposal on 2 October 2015 (Decision No. 1175) and appointed the plaintiffs to the Board. The decision stated that the plaintiffs were to be "added to the current members of the Tonga Tourism Authority Board of Directors". It said nothing about

the plaintiffs replacing resigning directors. Cabinet appointed Tomifa Paea to be chairperson and Paul Johansson deputy chairperson of the Board.

- [13] On 5 October 2015, Hon. Lavulavu wrote to the plaintiffs offering them appointment to the Board for a term of up to three years. The correspondence to each plaintiff was substantially the same except that in the case of Tomifa Paea he was also offered the role of chairperson. The letter to Tomifa Paea read:

**Re: OFFER AND ACCEPTANCE OF APPOINTMENT TO BE A  
CHAIRMAN/DIRECTOR FOR THE TONGA TOURISM  
AUTHORITY (TTA)**

Pursuant to Section 9 of the Tonga Tourism Authority (TTA) Act 2012, as amended, I am writing to offer you an appointment to the position of Chairman/Director of the Tonga Tourism Board of Directors as approved by Cabinet on 2 October 2015, Cabinet Decision (CD) No.1175.

Your appointment, as Chairman/Director, will be for a term of up to three (3) years and to be effective from the date of the CD, 2 October 2015. Other conditions of your appointment/position are included, but not limited to Sections 8, 9 and 10 of the TTA Act 2012 (as amended).

Attached, please find a copy of the TTA Act and Amendments as on the Crown Law Department's website. [www.crownlaw.gov.to](http://www.crownlaw.gov.to). This will provide you with a description with regard to your role as Chairman/Director to guide you in your work.

If you accept the offer of appointment, please sign and complete the attached form and return to the undersigned within the next 5 working days from the date of this letter.

Should you have any enquiry relating to this matter please do not hesitate to contact the Hon. Minister of Tourism.

- [14] Each of the plaintiffs accepted the offer of appointment to the Board.

- [15] On 30 October 2015 Paul Johansson resigned from the Board.
- [16] On 26 January 2016, Hon Lavulavu wrote to the plaintiffs and confirmed their appointments to the Board. The letter again referred to their appointments as being for a period of up to three years. The letter to Tomifa Paea read as follows:

According to the authority vested on the Minister by the Tourism Act 2012 and pursuant to Section 10(2)(a) of the Tonga Tourism Authority (TTA) Act 2012 as amended.

I have offered and you have accepted your appointment to the position of Chairman/Director of the Tonga Tourism Board of Directors as approved by Cabinet on 2<sup>nd</sup> October, 2015 Cabinet Decision (CD) No.1175.

Your appointment as Chairman/Director will be for a term of up to three (3) years and to be effective from the date of the Cabinet Decision. Other conditions of your appointment/position are included, but not limited to Sections 8,9,10 of the TTA Act 2012 (as amended).

I wish you a successful term on the Board and look forward to working in close relationship with you to achieve our common goals for tourism and the nation as a whole.

- [17] In his affidavit, 'Etuete Lavulavu says that the proposal he submitted to Cabinet was for the appointment of the plaintiffs as new members of the Board and that in his oral submission to Cabinet he sought approval that they were to serve a term of three years. He also says that Cabinet's approval was for the plaintiffs to serve a full three year term and that his discussions and correspondence with the plaintiffs was on the basis that they would be appointed for a three year term. At paragraph 7 he states:

The appointment of the four new members under my submission of 1<sup>st</sup> October 2015 which was approved by Cabinet on the 2<sup>nd</sup> October 2015, under CD No. 1175 was for a new term of 3 years there was no suggestion at any point that they were to serve only the remainder of the Directors that had resigned otherwise I would have clearly set that out in my letter.

- [18] There is evidence from Sione Moala-Mafi, who worked as the executive assistant to the Hon Lavulavu, that he advised the Minister that the plaintiffs would "according to the law, serve the remaining term of the initial Board according to section 9(10) of the Act" and that "The former Minister did not take my advice". The Minister says that he was told by staff, including Sione Moala-Mafi, that the Hon. Lavulavu was advised that the "new appointments could only serve out the remainder of the existing term."
- [19] 'Etuete Lavulavu denies that he was given such advice. On balance I prefer his evidence. It appears to me unlikely that he would have chosen, contrary to clear advice, to have misled the plaintiffs as to the period of their appointments. Regardless, what is clear is that the plaintiffs were advised by Hon. Lavulavu and understood that they had been appointed for three years.
- [20] The Minister was appointed to replace the Hon. Lavulavu on 18 April 2016. He says that he learned after 3 May 2016 that the plaintiffs were continuing to perform their duties when their appointments had expired in contravention of the Act. There was evidence that in around early June 2016 the plaintiffs met with the Minister and were informed that their appointments were only for the remainder of the terms of resigning directors.

[21] On 17 June 2016 the Minister sent a letter to the plaintiffs giving written notice of the completion of their terms "effective today". There is evidence that the third and fourth plaintiffs did not receive this letter but nothing turns on that as they were earlier advised that the Minister regarded their appointments as at an end and subsequently were required to vacate the Authority's premises on this basis. The letter of 17 June 2016 read:

**Subject: Notice of Completion of Term as Director of the  
Tonga Tourism Authority Board**

I write to thank you for your contributions over the past year as a Director of the Tonga Tourism Authority Board. As you are aware, you were appointed by Cabinet on 2 October, 2015, subject to Section 9 of the *Tonga Tourism Authority Act 2012*.

Your appointment replaced another resigned Director. Section 9(10) of the Act applies whereby your appointment is for the remainder of the term for which the vacating Director was appointed. The term of the original Directors has been duly completed. As such, effective today your appointment as a Director of the Tonga Tourism Authority is ended.

I understand that former Minister Lavulavu wrote to you on your appointment stating it would be for a term of up to three (3) years, but we must follow what the Act states.

You can be further reappointed but this will be subject to Cabinet approval. I am currently considering this, and will be submitting my recommendations to the Cabinet in due course.

I understand that there is a monthly fee for your services. Accordingly, the fee for June 2016 will be paid. Once again, I thank you for your valuable contributions and effort in helping to promote our tourism industry. I also trust this is not the end of our work and cooperation.

[22] The plaintiffs did not accept that their appointments were at an end. Tomifa Paea wrote to the Prime Minister on 23 June 2016 (copying in

all Cabinet Ministers and others) asking for Cabinet to maintain their positions on the Board for three years in accordance with its decision of 2 October 2015. He received no response to that letter.

[23] The plaintiffs continued to perform their duties as directors. On 21 July 2016 they received a letter from the Acting Chief Executive Officer of Tourism acting on behalf of the Minister requiring them to vacate the premises of the Authority. That letter read as follows:

A notice was delivered to you on 17 June 2016 that your appointment as a director of Tonga Tourism Authority had expired on 3 May 2016.

Please note that you were appointed under section 9(10) of the Tonga Tourism Authority Act 2012, which provides that every person appointed to fill a vacancy shall be appointed for the remainder of the Term for which the vacating Director was appointed.

Under section 9(10) of the Act, your appointment was for the remainder of the term for which the vacating Director was appointed. The original Director who vacated the office was appointed for a term of 3 years commencing on 3 May 2013 until 3 May 2016. Upon vacating his position as Director, you were then appointed on 2 October 2015 to replace that position. It is therefore by virtue of section 9(10), that your appointment should be effective from 2 October 2015 until 3 May 2016.

We note that you were initially appointed for a term of 3 years commencing on 2 October 2015. However, we are of the view that under section 9(10), that your appointment was lawful from 2 October 2015 until 3 May 2016. After 3 May 2016, your appointment is deemed void because it is contrary to section 9(10) of the Act.

It has been brought to the attention of the Hon. Minister of Tourism that you are still using the office premises of the Tonga Tourism Authority.

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As such, on behalf of the Hon. Minister of Tourism, you are kindly advised again to vacate the Tonga Tourism Authority office premises immediately.

We wish you all the best in your future endeavors.

- [24] On 21 July 2016 Tomifa Paea wrote to the Minister stating, inter alia, the plaintiffs' position that their appointments were for three years and expressing disappointment that the Minister had not responded to emails and correspondence. He requested, on behalf of the plaintiffs, a meeting to avoid legal action. There was no evidence of any response to that letter. On 29 July 2016 it was reported in the media that Cabinet had approved the appointment of a new Board to the Authority. I understand however that some of those appointed were disqualified persons and not entitled to sit on the Board.
- [25] There was evidence of how the parties behaved in the following weeks and months. It did not assist me to resolve this case. Some of the evidence appeared to be given to support an argument that the plaintiffs' were removed so that the Minister could secure for himself use of the funds of the Authority in connection with the Heilala pageant. The evidence did not establish that allegation to my satisfaction.
- [26] The first and second plaintiffs commenced this action on 12 August 2016 and sought an interim injunction to restrain the Minister from removing them from their positions on the Board pending further order of the Court. In a written ruling of 13 September 2016 I dismissed that application but the Minister gave an undertaking that he would not make any further appointments to the Board until the

Court had ruled on this case. The third and fourth plaintiffs then applied and were joined as parties to the action.

**The Act**

[27] The Act established the Authority and was enacted to advance the development of tourism in Tonga. There are objectives and guiding principles in sections 3 and 4, which do not appear relevant to the issues arising in this case. Section 5 provides that nothing in the Act shall affect the operation of any other law prescribing requirements applying to the tourism sector including, under section 5(1)(h), "labour and employment, and occupational safety and health". This was relied upon by the plaintiffs.

[28] Section 6 establishes the Tonga Tourism Authority. Section 8 provides that there is to be Board of directors of the Authority. The powers and functions of the Authority are set out in sections 16 and 17 of the Act.

[29] Section 9 deals with the appointment, qualifications and removal of directors. I will set out the whole of the section below, but note now that the arguments advanced by the parties focused on sections 9(1), (2), (9) and (10). Section 9 reads:

**9. Appointment of Directors**

(1) There shall be 9 Directors in the Board, consisting of –

(a) Two ex officio Directors who shall be the Chief Executive Officers of the respective ministries responsible for tourism and national planning. The ex officio directors shall have no voting rights;

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- (b) Seven Directors appointed by Cabinet, on the recommendation of the Minister, subject to the competency, experience and skills outline in paragraph (c);
- (c) The appointed Directors shall have skills and proven experience in one or more of the following:
- (i) organisational governance with a clear understanding of the distinction between management and governance;
  - (ii) financial management and/ or strategic planning; (iii) corporate directorship;
  - (iv) extensive knowledge and recognised experience in Tongan culture and tradition;
  - (v) extensive knowledge and understanding of tourism sector and strategic marketing.
- (2) The Cabinet, on the recommendation of the Minister, shall –
- (a) appoint the Chairperson from any of the Directors appointed under subsection (1)(b);
  - (b) fix the remunerations that Directors shall receive.
- (3) Each Director shall be appointed for a term of 3 years, and may be reappointed.
- (4) The Directors shall be appointed after due process of recruitment, by Cabinet in consultation with the Minister.
- (5) A Director shall not be a person who is –
- (a) under 18 years of age;
  - (b) an undischarged bankrupt;
  - (c) prohibited from being a director under the Companies Act;
  - (d) not a natural person;
  - (e) convicted of an indictable offence;

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(f) who has any judgment against him/her for an amount of TOP\$5,000 or more; and/ or have an unpaid judgment of TOP\$3,000 or more; and

(g) a candidate to and/ or a member of the Legislative Assembly

(6) Any Director who found guilty of an indictable offence and/ or have a judgment against him or her for an amount of TOP\$50,000 shall be removed from the Board immediately. Any Director(s) who registered as a candidate to the Legislative Assembly or a member of the Legislative Assembly shall be deemed to have resigned effecting immediately.

(7) A Director may be removed from the Board by the Minister, with the consent of Cabinet and after due investigation, for incompetence, incapacity, bankruptcy, neglect of duty, or serious misconduct.

(8) Any Director of the Authority may at any time resign his/her office by giving four weeks written notice to the Minister.

(9) If any Director of the Authority dies, or resign, or is removed from office, the vacancy shall be filled by the appointment of a Director by Cabinet on the recommendation of the Minister.

(10) Every person appointed to fill a vacancy shall be appointed for the remainder of the term for which the vacating Director was appointed.

**The arguments advanced by the parties**

[30] The plaintiffs allege that the Minister unlawfully removed them from the Board. They rely on five common chapter headings for judicial review in support of their challenge. Both counsel proceeded on the assumption that the vacancies on the Board to which the plaintiffs had been appointed had arisen from the resignation of previous directors. As I pointed out to counsel, this assumption was incorrect. As a consequence the result of this case is straightforward and I am not required to consider all the grounds advanced by the plaintiffs.

Notwithstanding that, there is some benefit in briefly setting out counsels' arguments as they were presented to me.

- [31] Mrs. Tupou focused her submissions on section 9 of the Act. She argued that sections 9(1) and (9) are to be read disjunctively with each giving Cabinet a distinct power of appointment of directors to the Board. As the plaintiffs' appointments were intended to be 'new appointments' for three years section 9(10) did not apply to them. She argued that there was no conflict between the terms of the plaintiffs' appointments and section 9(10).
- [32] Mrs. Tupou submitted that it followed that the plaintiffs were entitled to complete their three year appointments subject only to the Minister removing them on any of the grounds in section 9(7). As the Minister did not rely on section 9(7) it followed that the Minister had unlawfully terminated the plaintiffs' appointments in his letter of 17 June 2016.
- [33] Mrs. Tupou advanced four further matters in support of her submissions. First, that under section 9(2)(a) the chairperson may only be chosen from a director appointed under section 9(1)(b) (and not section 9(9)) and therefore Tomifa Paea, could only ever have been a new appointment to the Board. Secondly, it was not reasonable or fair for directors to be appointed for what may be very short periods. Thirdly, that because of section 5(1)(h) of the Act, section 9 should be interpreted in a way that was consistent with existing employment laws which, she said, recognise legally binding contracts of employment. Finally, that the interpretation of section 9

that she advanced was consistent with the overall purpose of the Act to promote the development of tourism.

[34] For the Minister, Mr. Sisifa submitted that the legislative intention was that the whole Board would be replaced every three years. Section 9(1) and (9) were to be read together and vacancies on the Board created by death, retirement or removal could only be filled by an appointment under section 9(9).

[35] Mr. Sisifa also argued that the Minister made no decision in this case which could be subject to judicial review. As the plaintiffs had all been appointed to fill a vacancy created by the retirement of a director section 9(10) prevailed over the terms of their appointments. He relied upon the Court of Appeal's decision in *Public Service Commission Anor v Fukofuka* [2014] Tonga LR 89. It followed, he argued, that the Minister was correct to have regarded the plaintiffs' appointments as having expired.

#### **Discussion of counsel's arguments**

[36] The meaning of section 9 is plain. Appointments to the Board are to be for a period of three years. However, if during the term of an appointment a director dies, resigns or is removed the person replacing him can only be appointed for the balance of the vacating director's term.

[37] Sections 9(9) and 9(10) are expressed in mandatory terms and state that a vacancy on the board "shall be filled" and that the person appointed "shall be appointed for the remainder of the term for which the vacating Director was appointed". Notwithstanding all that Mrs.

Tupou had to say I do not accept, as her argument requires, that Cabinet may choose to fill a vacancy created by retirement, death or removal by way of a 'new appointment' for a full three year term.

[38] Turning to Mr. Sisifa's arguments, I do not necessarily accept that the Minister's actions are not reviewable by the court. Even if it were the case that the Minister did not terminate the plaintiffs' appointments, the court's remedial power to grant declarations is broad. Relevantly, it has been exercised where a Minister has acted under a mistake of law even though there was no 'decision' amendable to review (P A Joseph *'Constitutional and Administrative Law in New Zealand'* at 22.6(2) page 886 and see *R v Secretary of State for Employment, ex parte Equal Opportunities Commission* [1995] 1 A.C. 1 (HL)). In any event, for the reasons that follow, my conclusion is that the Minister was not entitled to regard the plaintiffs' appointments as having expired and that he did make a decision to remove them from their positions on the Board.

[39] I accept Mr. Sisifa's argument that the terms upon which a director is engaged as a matter of contract cannot change or prevail over the terms of the appointment as defined by statute (*Fukofuka* (supra) and *Tuifua and Others v Public Service Commission* (Supreme Court of Tonga, CIV 45/2013, 8 April 2016)). However, it is not the case that entire Board's must be replaced every three years.

[40] As this case aptly demonstrates, there may be circumstances requiring new appointments to the Board (by which I mean appointments other than to replace a director who dies, resigns or is removed) to be made at different times and as each appointment

"shall be" for a term of three years such appointments will necessarily come to an end at different times also.

- [41] The Minister states that Cabinet's decision to appoint the plaintiffs "could not have been made had positions on the Board not become vacant" and that although the plaintiffs were appointed by the former Minister for three years this was unlawful. When faced with a situation of following the law or allowing the Board to continue for three years in contravention of the Act the Minister says he chose to follow the law. He does not justify his actions in advising the plaintiffs that their appointments were at an end on any other basis. I consider that the Minister did not follow the law because he was wrong that the plaintiffs were appointed to fill positions that had become vacant through the resignation of directors.
- [42] Although under section 9(1)(b) Cabinet was to appoint seven directors, at no time prior to the appointment of the plaintiffs had it appointed more than five directors to sit on the Board at any one time. Importantly, there were always two vacancies on the Board other than those created by the resignation of a director. Any director appointed to fill those vacancies would be entitled to serve a term of three years under section 9(3).
- [43] It must therefore be the case that at least two of the plaintiffs were appointed to fill positions on the Board that had always been vacant and that they were entitled to serve for three years. The Minister was not entitled to regard their appointments as having expired by 17 June 2016 (or any earlier date), just seven months after their appointment.

- [44] But which two plaintiffs filled those particular vacancies? It is not possible to say because the Hon. Lavulavu did not distinguish between the plaintiffs when appointing them. He regarded them all as entitled to three year appointments. The defendant did not distinguish between the plaintiffs either when advising them that their appointments were at an end. He regarded them, incorrectly, as all replacements for retiring directors.
- [45] I understood Mr. Sisifa to accept, when the facts were drawn to his attention, that the Minister was not entitled to regard the appointments of all the plaintiffs as having expired. Understandably, he was not able to say which of the plaintiffs were to be regarded as replacements for retiring directors and which were to be regarded as new appointments nor could he suggest a method by which the court might make that assessment.
- [46] Mr. Sisifa did submit that Tomifa Paea should be regarded as a replacement director because he had been appointed as chairperson in place of Ross Chapman, but I do not accept that submission because the appointment of a director to the Board and the appointment of the chairperson are separate matters.
- [47] The Minister has made fundamental mistakes. He was mistaken in his belief that all the plaintiffs were replacements for retiring directors. He was mistaken when he considered that all the plaintiffs' engagements had expired. He is not now able to satisfy the court that the appointment of any plaintiff had expired. The Minister was therefore also wrong when he advised the plaintiffs that their

appointments were at an end and required them to vacate the Authority's premises.

[48] It does not matter whether the Minister's mistakes are regarded as being of law or of fact. The making of an error of law is one of the established grounds of judicial review and what a plaintiff must establish is that an error was made and that it was material in the sense that it influenced the outcome of any decision under review. It is trite that a decision will be subject to review if the maker has no power to make it or misconstrues a statute or asks itself the wrong questions when exercising a power under it (Joseph at 23.4.1 and 23.4.2).

[49] Similarly, the court may intervene where the mistake is one of fact where the decision of fact is a condition precedent to the exercise of a power or the error resulted in a decision that was unreasonable (*Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721). There is no dispute here that unless the plaintiffs were appointed to replace retiring directors the Minister had no power to remove them from the Board as he purported to do.

### **Conclusion**

[50] The plaintiffs' are successful. I make a declaration that the Minister acted mistakenly and unlawfully when on or around 17 June 2016 he advised the plaintiffs that their appointments on the Board of the Authority were at an end.

[51] The plaintiffs have also sought orders quashing the Minister's decision and returning them to the Board, or alternatively damages. I did not

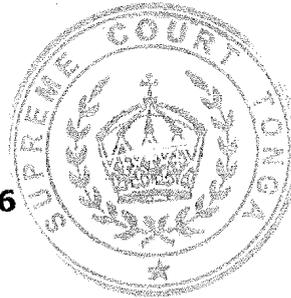
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hear from counsel on these alternatives and so reserve my decision on what further relief should be granted pending a further hearing, which counsel should arrange with the Registrar of the Court.

[52] Costs are reserved with leave granted to either party to apply.



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

O.G. Paulsen

**Lord Chief Justice**

**Nuku'alofa: 20 December 2016**

**N. 'Inafo  
20 /12/2016.**