

Solicitor General.
24/07/17
Scan, email,
upload + file

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

CV 22 of 2017

BETWEEN: NANISE NAU LONGO'AKAU FIFITA

Plaintiff

AND: TONGA BROADCASTING COMMISSION

First Defendant

MINISTER FOR PUBLIC ENTERPRISES

Second Defendant

BEFORE LORD CHIEF JUSTICE PAULSEN

**Counsel: Mr. W Edwards for the plaintiff
Mrs. P Tupou for the first defendant
Mr. 'A Kefu SC for the second defendant**

**Hearing: 21 and 22 June 2017
Date of Ruling: 24 July 2017**

RULING

The issue

[1] This is an application for judicial review. Mrs. Fifita asks the Court to quash what she says was a decision of the Minister of Public Enterprises

rec'd 24/7/17
HSC

made on 1 May 2017 declaring void her reappointment as the General Manger of Tonga Broadcasting Commission (TBC) and a notice of TBC of 10 May 2017 communicating that decision to her. The Minister and TBC argue that the Minister made no decision and that Mrs. Fifita's reappointment was void by operation of law because the Minister's approval was not obtained to it as is required by section 26(1) of the Public Enterprises Act (the Act).

The hearing

- [2] To explain much of what follows I should describe the course of this action which has been unusual. Mrs. Fifita had initially sought an injunction to restrain TBC and the Minister from appointing any other person as the General Manager of TBC. At a hearing on 12 June 2017 I was told that there were no factual disputes and no discovery of documents required and that it would be preferable for the substantive matter to be heard on an urgent basis rather than determine the application for injunction. I set the action down for hearing on 20 June 2017. It was to proceed on the affidavit evidence that was already filed but I reserved leave for any party to give notice to cross-examine. Mrs. Fifita subsequently gave notice requiring the Minister to attend for cross-examination but that notice was withdrawn on 19 June 2017.
- [3] At the hearing on 20 June 2017 counsel presented their legal submissions. Upon reflecting on the submissions overnight I felt that I needed further assistance on some aspects of the evidence. There was a further hearing when counsel addressed me on those matters on 21 June 2017 and I then reserved my decision. Counsel were then advised

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

CV 22 of 2017

by my assistant that my decision would be released on 26 June 2017. Before it was released the Court received a letter from Mrs. Fifita's lawyer, Mr. Edwards, asking that the decision be delayed because Mrs. Fifita wished to submit an affidavit from the former Company Secretary of TBC, Ane Mailangi, which it was said had a 'critical' bearing on the case. That affidavit was filed. I saw counsel in chambers on 27 June 2017. The defendants did not oppose the admission of the further affidavit and I granted leave for it to be admitted. The action was adjourned to 30 June 2017 so that Mr. Kefu could take instructions from the Minister as to whether he wished to respond to the affidavit of Ms. Mailangi. At the conference on 30 June 2017 Mr. Kefu advised that the Minister would file an affidavit in reply to Ms. Mailangi's affidavit. That affidavit was duly filed the same day. There was then a further hearing on 12 July 2017 where counsel addressed me on the significance of the further evidence. There were no requests to cross-examine Ms. Mailangi or the Minister on their affidavits. At the conclusion of that hearing I reserved my decision again.

- [4] What will not be apparent from this narrative is that the admission of the affidavit of Ms. Mailangi marked a fundamental shift in the basis of Mrs. Fifita's case. The heft of her case at the hearing of 20 June 2017 was that she had a right of renewal under her contract of employment which had already been approved by the then Minister or that in withholding his approval to her reappointment the Minister had breached an implied obligation of mutual trust and confidence, did not act in good faith or failed to observe natural justice. Following the admission of Ms. Mailangi's affidavit Mr. Edwards disavowed these

arguments and presented the case on what I understand to be a two-pronged basis. First, he argued that the Minister had in fact given his approval to the reappointment of Mrs. Fifita. Secondly, he argued that the Minister could not withhold his approval because he did not accept the terms of employment agreed between Mrs. Fifita and TBC. On either basis the Minister's letter of 1 May 2017 and TBC's letter of 10 May 2017 were said to be unlawful.

The facts

- [5] TBC is a public enterprise. Mrs. Fifita has been a long term, loyal and able servant of TBC. Since October 2008 Mrs. Fifita has been TBC's General Manager. It is common ground that she was the Chief Executive Officer of TBC for the purpose of the Act.
- [6] Mrs. Fifita had a written contract of employment with TBC for the period of 1 November 2013 to 30 October 2016.
- [7] Clause 1.1 of the contract is set out below. The last sentence of this clause which refers to renewal of the contract, is particularly relevant to the present case. The clause states:
- The term of appointment of this Contract is for a period of three (3) years, commencing from **1st November, 2013 to 30th of October, 2016**. The term is renewable unless otherwise terminated by Agreement between the parties or under this contract.
- [8] Clause 1.2 contained an acknowledgment that Mrs. Fifita's appointment was made under section 26 of the Act.

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

CV 22 of 2017

- [9] Clause 2 provided that the contract could be varied but the variation had to be in writing and approved by the Board.
- [10] Clause 3 set out Mrs. Fifita's responsibilities which included her entering into a 'written Performance Agreement with the Responsible Minister' as set out in Schedule B to the contract.
- [11] Clause 18 provided that TBC was to notify Mrs. Fifita in writing not later than three months before the expiry of the contract if the contract 'will be renewed or extended or the post will be advertised'.
- [12] Under clause 22 the contract could be terminated by Mrs. Fifita giving three month's notice or payment in lieu of notice and by TBC for reasons other than misconduct by giving three month's notice or payment in lieu after consultation with the Board.
- [13] Schedule A to the contract contained a detailed job description and Schedule B a long list of performance indicators relevant to Mrs. Fifita's role.
- [14] Mrs. Fifita says that prior to the expiry of the contract she made the then Chairman of the Board, Mr. Tapu Panuve, aware that her contract was up for renewal and she understood from him that it would be renewed. Despite a sub-committee of the Board conducting a review of her performance and finding it satisfactory Mrs. Fifita's contract was not renewed.
- [15] Mrs. Fifita became aware that there was concern about the wording of her contract and that she might not be granted a renewal. The affidavit

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

CV 22 of 2017

of Ms. Mailangi explains this. In a letter of 5 October 2016 the Minister wrote to the Chairpersons of the Boards of Public Enterprises setting out his expectations for the operation of Public Enterprises. These included that all CEO positions would be advertised when they came up for renewal. Ms. Mailangi said that the members of the sub-committee that were reviewing Mrs. Fifita's performance were concerned that the renewal provision in her contract appeared to be in conflict with the Minister's letter and legal advice was sought.

[16] I understand Mrs. Fifita also sought legal advice from Mrs. Petunia Tupou in which she expressed the view that the Minister could not require the General Manager's position to be advertised. Mrs. Fifita also took advice from another lawyer, Mr. Clive Edwards. On 28 October 2016 Mr. Edwards wrote to the Chairman of TBC asserting that Mrs. Fifita was entitled to a renewal.

[17] In his first affidavit the Minister says that he became aware that Mrs. Fifita's contract was up for renewal on 1 November 2016 when advised of that by the Chairman. On 8 November 2016 the Minister met with the Chairman, the Chief Executive Officer for Public Enterprises, the Solicitor General and legal counsel for TBC, Mr. Ralph Stephenson. Ms. Mailangi was also at the meeting. Ms. Mailangi's evidence is that the Minister was given advice concerning the renewal of Ms. Fifita's contract and gave his approval to the renewal but, importantly, his approval was not unconditional. Ms. Mailangi says that the Minister required Mrs. Fifita's contract to be amended 'so that the renewal clause and any other clause of concern would not appear again in her future contract'.

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

CV 22 of 2017

She goes on to say that the subsequent renewal of Mrs. Fifita's contract was in 'conformity' with the understanding reached at the meeting 'but certain terms and conditions had to be amended.' She states that 'I do accept that the Minister had very serious concerns with the renewal clause....'

[18] In his second affidavit the Minister acknowledges that the advice he received at that meeting was that TBC had to renew Mrs. Fifita's contract because of the renewal provision in clause 1.1. He said he was disappointed with the advice. Consistent with his letter of 5 October 2016 he wanted the position advertised. He said that he did not give his final approval to the renewal of Mrs. Fifita's contract and wanted the Chairman to work with the legal advisers to review the possibilities as to whether the position could be advertised and if not to negotiate with Mrs. Fifita to remove the final sentence of clause 1.1 of her contract before submitting the contract to him for his approval. The Minister said that he did not give his approval to Mrs. Fifita's reappointment subject to the change to clause 1.1 as Ms. Mailangi believed.

[19] Ms. Mailangi recognises that the Minister required that the renewal provision be removed from Mrs. Fifita's contract and the possibility that the Minister might require amendment of 'any other clause of concern'. This is all consistent with the Minister's evidence that the matter was left on the basis that the Chairman would look into the issues discussed and go back to the Minister 'before [TBC] would make the appointment under the new employment contract'. I therefore accept the Minister's

evidence that he did not give any final approval for the renewal of Mrs. Fifita's contract.

- [20] On 15 November 2016 Ms. Mailangi sent an email to Mr. Pita Moala, a member of the sub-committee considering the renewal of Mrs. Fifita's contract. In that email Ms. Mailangi appears to say that at the meeting of 8 November 2016 it was agreed that Mrs. Fifita's contract would be renewed subject only to the removal of the right of renewal from clause 1.1. The email ends '...if [*Mrs. Fifita*] agrees to that slight variation, then the paper could be tabled in the next board [*sic*] by the Sub-committee or even via circulation for Board endorsement'. On the basis of her own evidence that advice was incorrect.
- [21] On 21 March 2017 Mrs. Fifita signed a new employment contract with TBC for the period 31 October 2016 to 1 November 2019. The contract appears to be on the same terms as her previous contract with one change to clause 14 relating to the payment of a pension upon termination. There was no change to remove the right of renewal. It is an unsatisfactory feature of the case that there was no evidence of any negotiation between TBC and Mrs. Fifita over the inclusion or removal of the renewal provision in her contract. There was no evidence that Mrs. Fifita had agreed to the removal of the renewal provision from her contract.
- [22] The Minister says that it was brought to his attention on 22 March 2017 that Mrs. Fifita's contract had been renewed without his consent. He met with the Chairman and was told of the renewal. He was both surprised and gravely disappointed that Mrs. Fifita had been

reappointed 'without my final approval'. The Minister then travelled overseas for a time.

- [23] The Chairman of TBC, Mr. Panuve, then resigned. He was replaced on 1 May 2017 by Mr. 'Ahongalu Fusimalohi. On the same day the Minister wrote to Mr. Fusimalohi about Mrs. Fifita's contract and said that he had not received a copy of her contract or been informed of her reappointment which required his approval. He said he considered that any agreement 'purportedly' made with Mrs. Fifita was void under section 30(1) of the Act. He also referred to section 30(3) of the Act. It provides that a Chief Executive Officer appointed in good faith in contravention of the Act is deemed to have resigned his office from the date he is advised of that fact by the Chairman of the Board. The Minister directed Mr. Fusimalohi to inform Mrs. Fifita of that fact as soon as possible and noted that the appointment of a Chief Executive Officer for TBC was an urgent task.
- [24] On 10 May 2017 Mr. Fusimalohi wrote to Mrs. Fifita advising her that due to the fact that 'the shareholder through the Minister of Public Enterprises have decline [sic] to consent to your appointment, your contract is not legally effective' and '...your existing contract of employment is not legally effective because the shareholders have declined to approve it/consent to it.'
- [25] The Minister felt that Mr. Fusimalohi's letter did not accurately state his position. In a further letter of 17 May 2017 to Mr. Fusimalohi the Minister expressed concern with the use of the phrases 'decline to consent to your appointment' and 'decline to approve it/consent to it'

because they were erroneous and misleading. The Minister said he wanted to make it clear that he had not declined his approval to Mrs. Fifita's contract because the Board of TBC had never sought his written approval of it. These proceedings followed and were filed on 17 May 2017.

The Public Enterprises Act

[26] Upon reading the Act it is immediately apparent that the Minister has what Mr. Kefu described as an important supervisory role over the operations of Public Enterprises. It is not necessary for me to set out the provisions in detail but I note the following. The powers, duties and functions of the Minister are as set out in the Act. He can with the consent of Cabinet exercise all the rights and powers of the shareholder and owner of the Government's interests in Public Enterprises (section 9). Under section 11 the Minister has powers to omit or include provisions in a Public Enterprise's statement of corporate intent. Under sections 12 and 14 the Minister with the consent of Cabinet appoints Directors and fixes the remuneration of Directors. He can remove Directors also. Under section 18 the business plan of a Public Enterprise must be submitted to the Minister for review before it is adopted. The Board is obliged to consider any comments of the Minister. The Board has obligations to report to the Minister in half yearly and annual reports under sections 19 and 20. Under section 21 the Board must meet with the Minister and agree on principles upon which a dividend will be paid in each financial year. The Minister has wide powers under

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

CV 22 of 2017

section 23 to require the Board to supply such information relating the affairs of the Public Enterprise as the Minister shall direct.

[27] Of direct relevance to the present action are sections 26 and 30 of the Act, the relevant parts of which I set out below.

Section 26

- (1) The board shall with the approval of the Minister, appoint a Chief Executive Officer who shall be responsible for managing the public enterprise and implementing the decisions of the board.
- (2) The Chief Executive Officer shall be employed under a written performance based contract of employment with the public enterprise which shall contain the following minimum provisions-
 - (a) the objectives to be achieved by the public enterprise;
 - (b) the performance expected of the public enterprise;
 - (c) a review of the performance of the Chief Executive Officer;
 - (d) adherence by the Chief Executive Officer to the public enterprise statement of corporate intent produced by this Act.

Sections 30 (1) and (3)

- (1) The appointment of a person as director or Chief Executive Officer in contravention of the provisions of this Act shall be void.

.....

(3) A Chief Executive Officer appointed in good faith in contravention of this Act shall be deemed to have resigned his office from the date that he is advised of that fact by the Chairman of the board.

Discussion

[28] Mr. Edwards emphasised that this action is a challenge to the Minister's letter to the Chairman of TBC of 1 May 2017 and the Chairman's letter to Mrs. Fifita of 10 May 2017 which he said were unlawful notices declining the Ministers approval to the reappointment of Mrs. Fifita.

A right of renewal or extension

[29] I had understood from Mr. Edwards' oral presentation that it was accepted that clause 1.1 was a right of renewal of Mrs. Fifita's employment contract rather than a right to an extension of the contract. However in Mr. Edwards' written submissions he argues at [6.5] that Mrs. Fifita 'always had a right to extend her contract of employment with [TBC], where the renewal is an extension of the contractnot a completely new contract...'. This is a very confusing analysis. Clause 1.1 was a right to renew Mrs. Fifita's employment contract. That construction is consistent with the terms of the contract as a whole, which distinguishes between a renewal and an extension, and the relevant statutory scheme, particularly sections 26 and 30 of the Act. In law the distinction is an important one. A right to an extension once exercised simply extends the term of an existing contract. A renewal creates a new contract.

[30] In this case however the distinction is somewhat academic. TBC clearly purported to renew not extend Mrs. Fifita's contract. She entered into a new contract with TBC on 21 March 2017 and it expressly provided that it was subject to section 26 of the Public Enterprises Act. Her reappointment therefore undoubtedly required the Minister's approval but that approval was never obtained for the reasons I have already given.

[31] I therefore reject Mr. Edwards' first argument on behalf of Mrs. Fifita that the Minister gave his approval to her reappointment.

Limits on the Minister's power to withhold approval

[32] Mr. Edwards then argued that the Minister has no power to withhold his approval to the reappointment of Mrs. Fifita. He said it is the Board's responsibility to appoint the Chief Executive under section 26(1). The Board had reviewed Mrs. Fifita's performance and found it satisfactory. Mr. Edwards said that the Minister could not be concerned with the terms upon which a Chief Executive Officer is appointed except to the extent that they did not comply with the law. In support of his submission he referred me to section 26(2) of the Act which he submitted set out the only lawful requirements of a Chief Executive Officer's contract of employment. I do not accept Mr. Edwards' submission.

[33] As a matter of common sense and of law no person can be said to be appointed to a position of employment unless and until the terms of such appointment have been agreed. The Minister's consent must

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

CV 22 of 2017

necessarily relate both to the identity of the proposed appointee and the terms of the appointment.

[34] This is consistent with the scheme of the Act and specifically to the plain intention that to the extent set out in the Act the Minister has a wide supervisory role over the affairs of Public Enterprises including the appointment of Directors and Chief Executive Officers. The interpretation of section 26(1) which Mr. Edwards urges upon me cannot be correct as it would undermine the very integrity of the scheme of the Act. It would reduce the Minister to a mere functionary in the matter of the appointment of a Chief Executive Officer. There is nothing in the Act to suggest an intention to impose such limits on the Minister's powers.

[35] I find no support for Mr. Edwards' submission in section 26(2). That section is concerned only with the minimum provisions of a Chief Executive Officer's employment contract. In relation to Mrs. Fifita's contract the Minister had legitimate reason to be concerned that it contained a right of renewal. That provision was inconsistent with Government policy which required that posts be advertised and thereby subject to open competition. I have found that the Minister never gave his approval to the reappointment of Mrs. Fifita but even had his approval been given subject to the removal of the renewal provision that was a condition the Minister was entitled to impose.

Section 30 is self-executing

[36] The next issue concerns the operation of section 30. Under section 30(1) no Chief Executive Officer of a Public Enterprise can be appointed in a manner that contravenes the Act. It is a requirement of the Act that the appointment of a Chief Executive Officer be with the Minister's approval. Any appointment in contravention of the provisions of the Act 'shall be void'. It does not acknowledge of the possibility that non-compliance with the Act might be overlooked or waived in the exercise of the Minister's discretion.

[37] The operation of section 30(1) is self-executing. That means that the consequence that Mrs. Fifita's appointment was void for non-compliance with the Act is independent of any act or decision of the Minister. There is no discretion exercised by the Minister or any decision made by him in the application of section 30(1) which can be subject to review or require the observance of natural justice or an implied obligation of mutual trust and confidence (*Minister of Revenue and Customs v Prasad* (Unreported, Court of Appeal, AC 7 of 2015, 14 September 2016) at [14]). Likewise, I do not consider that the Board of TBC made any decision that can be reviewed when it wrote to Mrs. Fifita on 10 May 2017 advising her that her contract of employment was not legally effective. That was conduct giving effect to a consequence determined by the Act itself.

The application must fail

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

CV 22 of 2017

[38] It follows that Mrs. Fifita's application for judicial review must be dismissed. I have considerable sympathy for her. She has by all accounts been an excellent employee. I make no comment as to whether she may still have remedies available to her in respect of any failings of the Board of TBC to obtain the Minister's approval to her reappointment.

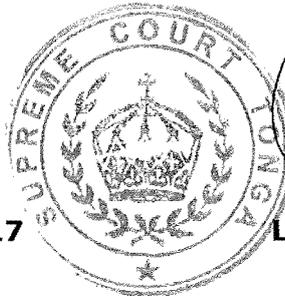
[39] I should note that there was some evidence put before the Court by Mrs. Fifita that she was not reappointed because the Prime Minister is angry with journalists at TBC. This issue hardly featured at all in counsel's arguments and was not relevant to the issues I had to decide.

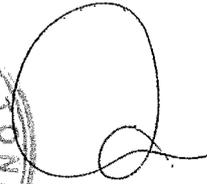
Result

[40] The plaintiff's application is dismissed.

[41] I will hear from the parties on costs if they cannot agree by the filing of memoranda within 14 days.

NUKU'ALOFA: 24 July 2017




O.G. Paulsen
LORD CHIEF JUSTICE