

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

Solicitor General
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12/12/17
CV 52 of 2015

BETWEEN: RINGO FA'OLIU

- Plaintiff

AND: PUBLIC SERVICE COMMISSION

- Defendant

BEFORE THE LORD CHIEF JUSTICE PAULSEN

**Counsel: Mrs. P Tupou for the plaintiff
Mrs. E Langi for the defendant**

Hearing: 24 November 2017

Date of Ruling: 7 December 2017

RULING

The issue

[1] The plaintiff (Mr. Fa'oliu) was the Chief Executive Officer (CEO) of the Ministry of Infrastructure, Transport and Tourism (the Ministry). Upon the expiry of his contract the position was advertised and he applied for reappointment. Although being the preferred candidate the Public Service Commission (the Commission) decided not to appoint Mr. Fa'oliu and to re-advertise the position. The Commission relied upon three reports which had found that during Mr. Fa'oliu's term as CEO there had been failures to comply with procurement procedures, significant

overpayments to contractors and the inappropriate use of daily paid workers without regard for public service policy or budget allocations.

[2] Relying on a plethora of grounds for review Mr. Fa'oliu applies for a declaration that the decision of the Commission not to appoint him as CEO is unlawful and setting it aside. He also asks the Court to direct the Commission to consult with the Minister and appoint him as the CEO of the Ministry. The Commission argues that the decision not to appoint Mr. Fa'oliu was lawful and reasonable and arrived at after a consideration of all of the information it had before it. The Commission asks the Court to dismiss the action.

[3] For reasons that will follow the case falls to be decided on the ground of bias.

The facts

[4] The Commission is established under the Public Service Act and at the relevant time there were four members of the Commission involved in the events that gave rise to this action. The Chairman of the Commission was Mr. 'Uhilamoelangi Liava'a.

[5] Mr. Fa'oliu was employed as the CEO for the Ministry. His contract expired on 2 July 2015. When Mr. Fa'oliu's contract ended the Commission approved the advertisement of the position. The Commission also approved what was described as a 'Tentative CEO Recruitment Timeline' which involved 19 steps beginning with the forwarding of a job description to the Minister for approval on 28 May 2015 to the closure of the file following appointment of the successful candidate on 20 July 2015.

IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

CV 52 of 2015

- [6] Mr. Fa'oliu was one of only two applicants. Both were shortlisted to be interviewed by a panel approved by the Commission. The interviews were carried out on 14 July 2015. Mr. Fa'oliu won the interview and on 20 July 2015 the panel recommended him for appointment.
- [7] In a memorandum to the Commission dated 20 July 2015 the Acting CEO of the Commission noted the Panel's recommendation and that 'the Commission also made initial discussions regarding this appointment during the meeting on 17 July 2015'. There is nothing before me as to what was discussed on 17 July. It appears that the panel's recommendation was again discussed at a meeting of the Commission on 20 July 2015 but no decision was made to accept the Panel's recommendation.
- [8] Mr. Fa'oliu was advised that he had won the interview and that formalisation of his appointment would not be long away. He went to New Zealand on holiday expecting that when he came back to Tonga the appointment would be made and he would commence work. He left on 29 July 2015 and returned on 25 August 2015.
- [9] The Commission harboured reservations about Mr. Fa'oliu's suitability for appointment. A letter dated 24 July 2015 was sent from the Commission briefing the Minister on the status of the recruitment of the CEO. The letter was signed by Mr. Liava'a as Chairman. It stated that the Commission was waiting on a report from a Committee of Inquiry regarding 'the non-compliance of Procurement Regulations of the Ministry of Infrastructure' and that once the report was received the Commission 'will fully consider the outcome of the recruitment for the CEO for Infrastructure'. The letter went on to say that the Commission was also aware of a report of the Acting Auditor General dated 19 June

IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

CV 52 of 2015

2015 'on their factual findings relating to the overpayments to Contractors in the Cyclone Ian Project in Ha'apai'.

- [10] The Commission received a copy of the Independent Committee Inquiry Report regarding the alleged non-compliance of certain staff of the Ministry of Infrastructure with the Public Procurement Regulations 2010 dated 19 August 2015 (the Nukunuku report). This Committee had been established by the Commission on 16 January 2015. The Committee had three members including the Chairman of the Commission, Mr. Liava'a.
- [11] The Committee found that Mr Fa'oliu together with another staff member of the Ministry, Mr. Tevita Lavemai, breached the Public Procurement Regulations 2010 in relation to a project for the resealing of a main road a Nukunuku from late October 2012 to April 2014. The consequence of the breach was that the contractor had a long wait for payment and the Ministry had to pay \$31,649.10 of interest. As part of its investigation the Committee had conducted interviews with five people including Mr. Fa'oliu. The report was overdue for release and I consider it a reasonable inference that when the Commission delayed its decision to appoint Mr. Fa'oliu in accordance with the panel's recommendation Mr. Liava'a would have been aware that the Nukunuku report was likely to be critical of Mr. Fa'oliu.
- [12] The Commission also received a copy of the Audit Report regarding the overpayment of contractors engaged by the Government in the Cyclone Ian Reconstruction Project in Ha'apai (the Ha'apai report). Mr Fa'oliu together with other staff of the Ministry of Infrastructure and Tourism were implicated in the report for having approved overpayments in the substantial sum of \$928,207.95.

IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

CV 52 of 2015

- [13] The Nukunuku and Ha'apai reports were discussed by the Commission in a meeting on 21 August 2015. The Commission decided that Mr Fa'oliu would not be appointed to the position of CEO 'in light of the reports.....which has implicated Mr. Fa'oliu performance as a CEO for Government'. The Commission also decided to re-advertise the position, that both applicants were to be informed and that the Minister was to be advised.
- [14] The Commission wrote to the Minister on 24 August 2015. The letter is again signed by Mr. Liava'a. In the letter the Commission advised the Minister that having considered the Nukunuku and Ha'apai reports the Commission had decided that Mr. Fa'oliu was 'not suitable for appointment to the CEO for Infrastructure position' and that the position would be re-advertised. The Commission conveyed its decision to Mr. Fa'oliu in a letter dated 25 August 2015 and again by email on 28 August 2015. The Commission's decision did not please the Minister. On 28 August 2015 the Minister wrote a long letter to the Chairman expressing his disappointment and asking the Commission to reconsider.
- [15] Mr. Fa'oliu then commenced this action. He was granted leave to apply for judicial review of the Commission's decision on 1 September 2015.
- [16] On 9 September 2015 the Commission wrote to the Minister (again the letter is signed by Mr. Liava'a) in reply to the Minister's letter of 28 August 2015. The Commission noted that Court proceedings had been issued by Mr. Fa'oliu and that the Commission had suspended the re-advertisement of the position until the Court made a ruling. The Commission also defended itself against criticism of the Minister that it had acted illegally in not appointing Mr. Fa'oliu.

IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

CV 52 of 2015

[17] On 24 September 2015 the Commission gave instructions to the Solicitor General to put a settlement offer to Mr. Fa'oliu. There were two options to be advanced for his consideration. For present purposes the relevant option, and the one that Mr. Fa'oliu accepted, was as follows

That the Claim be settled by proposing to the plaintiff the following

- i The recruitment process for the CEO for infrastructure be reconvened by the Commission;
- ii The Commission forwards the plaintiff the reports of the Acting Auditor General, and the Commission of Inquiry, and request to provide written comments as to why he should be appointed despite the reports (the comments should be submitted within seven (7) days of receipt);
- iii Upon receipt of the plaintiff's comments, the Commission should then consider whether to appoint the plaintiff.

[18] On 25 November 2015 the Solicitor General advised the Commission that Mrs. Tupou had accepted this settlement offer on behalf of Mr. Fa'oliu and that the recruitment process should be reconvened as from 30 November 2015. On 1 December 2015 the Commission wrote to Mr. Fa'oliu providing him with the Nukunuku and the Ha'apai reports and informing him that the recruitment process for the CEO would be reconvened. Rather ominously (in the sense that it might indicate a predisposition of the Commission to accept the reports at face value) Mr. Fa'oliu was requested to provide his comments 'on why you should be appointed to the position of Chief Executive Officers for Infrastructure despite the attached reports'.

[19] On 11 December 2015 Mr. Fa'oliu submitted a detailed affidavit in response to the content of the Nukunuku and Ha'apai reports. It is not

necessary for me to consider his affidavit in any detail but I must note one matter that he raised. Mr. Fa'oliu noted that Mr. Liava'a was a member of the Committee that prepared the Nukunuku report and that he was also the Chairman of the Commission. Mr. Fa'oliu asserted that Mr. Liava'a had a conflict of interest and questioned his impartiality. This was a serious matter but one that was never, as far as I can see, addressed by the Commission.

[20] On or around 17 December 2015 another report was received by the Commission from the Auditor General. It was a report of a special audit review of daily paid labourers engaged by the Ministry (the daily paid report). The daily paid report was critical of the Ministry and implicated Mr Fa'oliu directly. The report stated that recruitment of daily paid works was undertaken 'recklessly' without reference to either the approved budget allocations or the Public Service policy on daily paid/casual recruitment and recommended that overpayments made to daily paid workers be recovered from the accountable officers of which Mr. Fa'oliu was one. The daily paid report was not referred to Mr. Fa'oliu for comment at this stage.

[21] The Commission wrote to Mr. Fa'oliu on 21 December 2015 acknowledged receipt of his affidavit and provided him with a further opportunity to submit any new evidence or information relevant to the case for the Commission's final consideration, but without mentioning the daily paid report. Not surprisingly it was not clear to Mr. Fa'oliu what the Commission wanted him to provide when he had already submitted a lengthy response to the Nukunuku and Ha'apai reports. Mrs. Tupou wrote to the Commission on 6 January 2016 requesting the Commission to provide a list of issues it wished Mr Fa'oliu to address and an opportunity to make an oral presentation to the Commissioners.

IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

CV 52 of 2015

- [22] The Commission met on 15 January 2016 and discussed Mrs. Tupou's letter. There is a record of the discussion in a memorandum of the Acting CEO of the Commission which notes that Mr. Liava'a had discussed Mr. Fa'oliu's case with the Prime Minister. There is no explanation as to why he would have considered that to have been appropriate. The memorandum records that the Commission had formed the view that as CEO Mr. Fa'oliu was responsible to provide direction to employees and monitor and ensure compliance by the Ministry with relevant regulations. It was 'stressed' that the Nukunuku and Ha'apai reports confirmed that there had been non-compliance with regulations. The Commission had formed the view that its decision not to appoint Mr. Fa'oliu 'still stands' and that the position was to be re-advertised. The Commission resolved to convey that 'decision' to the Solicitor General for his legal advice. From this point in time it certainly appears that the Commission's mind was firmly fixed against Mr. Fa'oliu.
- [23] The Commission met again on 10 February 2016. The minutes record that that Mr. Liava'a addressed the meeting on the subject of Mr. Fa'oliu's case and on the advice of the Solicitor General the Commission took the view that Mr. Fa'oliu's affidavit and supporting documents were sufficient for it to make a decision. This seems rather peculiar when it appears that in truth a decision had already been made at the 15 January 2016 meeting to reject Mr. Fa'oliu's appointment.
- [24] The Commission wrote to Mrs. Tupou on 11 February 2016 advising that its letter of 21 December 2015 did not raise any further issues for Mr Fa'oliu to address, but only gave Mr Fa'oliu a further opportunity to submit any new evidence; or any relevant information which he might consider relevant to his case before making its decision. The Commission advised that there was no need for Mr Fa'oliu to provide oral

IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

CV 52 of 2015

representations and that Mr. Fa'oliu would be given a further seven days to submit any new evidence or relevant information.

- [25] On 3 March 2016 Mrs. Tupou wrote to the Commission that Mr. Fa'oliu had heard that staff at the Ministry had been advised that Mr. Fa'oliu would not be appointed as the CEO 'regardless of whether the decision of the Public Service Commission was correct, lawful or otherwise'. She stated that her instructions were that if the Commission should make an adverse decision against Mr. Fa'oliu then he should first be given an opportunity to be heard on any and all grounds relied upon.
- [26] There was another meeting of the Commission on 11 April 2016. The Commission's Senior Legal Officer was asked to provide a legal opinion 'as to the grounds for refusing the appointment' of Mr. Fa'oliu. Again one cannot but be concerned at the manner in which the request for advice was apparently expressed.
- [27] On 15 April 2016 the Commission wrote to Mrs. Tupou advising that the accusation that Mr. Fa'oliu would not be appointed CEO regardless of whether the Commission's decision was correct or not was unfounded. For the first time the Commission furnished Mr. Fa'oliu with a copy of the daily paid report and requested his responses to it within seven days.
- [28] The Commission allowed an extension of time for Mr. Fa'oliu to provide his further submissions. On 24 May 2016 Mrs. Tupou wrote to the Commission responding on Mr. Fa'oliu's behalf, *inter alia*, to the daily paid report. Whether intended or not the last paragraph of Mrs. Tupou's letter highlights the concern I have expressed earlier as to the manner in which the Commission was apparently approaching the reconvened recruitment process when she wrote, '..I am instructed to thank the Chairman and the Commissioners for allowing and giving my client this

IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

CV 52 of 2015

great opportunity....to provide comments on why he should not be appointed ...**despite** the provided Audit Reports'.

[29] The Commissioner's Senior Legal Officer subsequently prepared an opinion for the Commission concluding that it was 'only timely, reasonable, fair and just under the principles of administrative law to re-appoint Mr. Fa'oliu as the CEO for the Ministry of Infrastructure'. On 3 June 2016 the Commission met again and did not accept the advice it had received from its Senior Legal Officer which it regarded as deficient as it 'did not support the Commission's position thus the [*Solicitor General*] should be requested to provide further legal advice on this before the Commission reconsiders the case.'

[30] The minutes of the meeting record that the Chairman spoke to the Nukunuku report and the findings of the Committee that Mr. Fa'oliu was ultimately responsible for the failure to comply with the procurement procedures. The Ha'apai report was also referred to which it was said implicated Mr. Fa'oliu as he was responsible for signing off payments. The minutes also refer to legal advice the Commission had received that the original decision not to appoint Mr. Fa'oliu did not observe natural justice because he had not been given the opportunity to respond to the Nukunuku and Ha'apai reports. The Commission was of the view that this failing had now been remedied and that the Commission needed to be mindful that '....we only look at the employees' rights but we need to also advocate for the rights of the employer.' The Commission called for the Solicitor General's advice and agreed to convene a special meeting once that advice was received.

[31] The Commission decision not to appoint Mr Fa'oliu as CEO was conveyed to Mrs. Tupou on 11 July 2016. The letter stated that the Commission

IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

CV 52 of 2015

was of the opinion that Mr. Fa'oliu should not be appointed based on the Nukunuku report ('This non-compliance occurred whilst Ministry of Infrastructure was under the responsibility of Mr. Fa'oliu as Chief Executive Officer'), the Ha'apai report ('...in which Mr. Fa'oliu was responsible for approving those payments') and the daily paid report ('Mr. Fa'oliu [endorsed] the recruitment of daily paid labourers from 2014-2015 (prior to July 2015) without making proper reference to the Approved Budget Allocations').

- [32] In a letter dated 20 July 2016 Mrs. Tupou wrote to the Commission challenging that decision and the reasons set out by the Commission in its letter of 11 July 2016. When by 11 August 2016 no response had been received to that letter Mrs. Tupou wrote again to the Commission. On 24 August 2016 the CEO of the Commission wrote to Mrs. Tupou outlining in detail the reasons for the Commission's final decision not to appoint Mr Fa'oliu. On 6 October 2016 Mrs. Tupou responded to the Commission's letter expressing the view that the Commission had failed to give proper consideration to the relevant facts and other matters and indicating that Mr. Fa'oliu intended to continue with his Court action against the Commission.
- [33] This action had stalled because the Court understood that the parties were working towards settlement. When they did not settle they came back before the Court and timetable directions for the filing of amended pleadings and affidavits were made. There were slippages in the timetables. The action was set down for hearing before Scott. J in July 2017 but could not proceed due to 'substantial breaches of the timetable'. I made further timetabling orders and set the case down for hearing on 23-24 November 2017. My minute of a pre-trial conference on 15 August 2017 notes the further failure by the parties to comply

with the timetable and the imposition of a further timetable to ensure that the hearing proceeded. The action was heard on 24 November 2017.

The pleadings and the requirement for leave

- [34] The relevant pleadings are Mr. Fa'oliu's amended statement of claim dated 20 February 2017 and the Commission's amended statement of defence of 20 March 2017. In the amended statement of claim Mr. Fa'oliu challenges only the decision of the Commission 'that it will ***not*** appoint him as CEO for the Ministry of Infrastructure' of 11 July 2016'. He does not challenge the earlier decision of the Commission to the same effect that was conveyed to him on 25 August 2015. As I raised with Mrs. Tupou at the commencement of the hearing, this poses an immediate problem for Mr. Fa'oliu. He was granted leave to seek judicial review of the earlier but not the latter decision. It is only the latter decision he now seeks to challenge.
- [35] Order 39 Rule 2(1) Supreme Court Rules provides that no application for judicial review may be commenced unless leave of the Court has been obtained. Mrs. Tupou appreciated the difficulty and conceded that leave had not been sought or obtained. She made an oral application that leave be granted.
- [36] I do not consider that Mr. Fa'oliu's failure to obtain leave is fatal to his action. Order 4 Rule 1 Supreme Court Rules provides that a failure to comply with the Rules is to be treated as an irregularity and 'shall not nullify the proceedings'. That still leaves the question of whether it is appropriate for me, at this very late stage, to grant Mr. Fa'oliu leave to apply for judicial review and to extend time for the application for leave

to be made (O.39 Rule 2(2)). I consider it is appropriate to do so and so order for the following reasons.

- [37] First, the Commission has never taken the point that leave was not obtained and did not do so even when I raised it at the hearing. Secondly, the failure to obtain leave was an oversight in the rather unusual circumstances of this case where the parties agreed to reconvene the recruitment process leading to a fresh decision which was also subject to challenge. It is clear neither party considered that leave was necessary for Mr. Fa'oliu to continue with his action. Thirdly, the ultimate aim of the Court is to attain justice between the parties and technical rules of procedure should not supplant or defeat that aim. For the reasons that follow I consider this action raises an important issue that the Court should determine as between Mr. Fa'oliu and the Commission justifying the granting of leave.

The preliminary question of jurisdiction

- [38] As noted earlier the Commission is established under the Public Service Act. Its principal functions are set out in section 6 of the Act which include the appointment and dismissal of public service employees. Section 12 provides that all appointments in respect of the Public Service shall be made in accordance with the Act. Section 13 provides that it is the Commission that shall, after consultation with the Minister, appoint the Chief Executive Officer of a Ministry.
- [39] In reliance upon *Fifita v Tonga Broadcasting Commission* (Unreported Supreme Court, CV 22 of 2017, 24 July 2017 Paulsen LCJ) Mrs. Langi submitted that as the Commission has not made any appointment of a CEO under section 13 of the Act there has been no exercise of its discretion that may be subject to review. I do not agree. *Fifita* turned

on the effect of ss.30(1) and (3) of the Public Enterprises Act. Section 30(1) provided that the appointment of a Chief Executive Officer of a Public Enterprise made in contravention of the Act was void. Due to the self-executing nature of section 30(1) Mrs. Fifita's appointment was void independent of any act or decision of the Minister. It was for that reason that there was no right of review. This case does not concern the Public Enterprises Act.

- [40] The Court's remedial power by way of judicial review is broad and it does not require the making of a decision in the traditional sense (*Royal College of Nursing v Department of Health and Social Security* [1981] AC 800). In any event the Commission's power to appoint a CEO to a Ministry necessarily carries with it the power to refuse to appoint. They are two sides of the same coin. When the Commission refused to appoint Mr. Fa'oliu it exercised a power that gave rise to a real (not hypothetical) controversy between it and Mr. Fa'oliu which affected his livelihood and reputation. That exercise of power is subject to judicial review.

The question of bias

- [41] I am going to turn to what I consider is the principal issue that arises in this case which is bias. I should mention immediately that in law the term 'bias' has a number of meanings and a finding of bias can be made without any serious reflection upon a decision maker (J R S Forbes '*Justice in Tribunals*' 2014 The Federation Press at [15.15]). The question of bias arises in this case because of Mr. Liava'a's dual roles as both a member of the Committee that prepared the Nukunuku report and Chairman of the Commission.

- [42] It is a well understood axiom of the law that justice must not only be done but should manifestly and undoubtedly be seen to be done (*R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256 (DC)). Justice will not be done and will not be seen to be done if a decision maker has a predisposition resulting from prejudice or preference towards one of the parties or their case, or from personal interest or relationship material to the case (P A Joseph '*Constitutional and Administrative Law in New Zealand*' Thomson Reuters 4th Ed at [25.5]). It has been held that a preconceived idea that neither party to a cause is worthy of belief amounts to bias (*R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, 265).
- [43] A decision which is biased will be set aside and in a case where a decision has not yet been made the Court may restrain the decision maker from proceeding further (Forbes (*supra*) at [15.3]).
- [44] Bias will be 'presumptive' in cases where a decision maker has a direct pecuniary interest in the outcome of a case. That is not what we are dealing with here. This case is concerned with apparent bias. Apparent bias arises where a decision maker has some personal or professional relationship with a party or a witness or a prejudice against or preference towards a particular party or result or a predisposition leading to a pre-determination of the issues (Joseph (*supra*) at 25.5).
- [45] There is no bright line between what is permissible and impermissible partiality of a decision maker. The line shifts with the factual and legal context of a case. A higher standard and more rigorous level of scrutiny can be expected of a Judge or a decision maker acting pursuant to statutory powers (as is the case of the Commission acting pursuant to

powers conferred by the Public Service Act) than say a decision maker in a low level administrative body or an incorporated sporting club.

[46] Whether or not a decision maker is biased does not depend upon that decision maker's personal opinion but is to be assessed objectively. I adopt as the test that a judge/decision maker is disqualified if the circumstances are such that a fair-minded lay observer might reasonably apprehend that the judge/decision maker might not bring an impartial mind to the resolution of the question that the judge or decision maker has to decide (*Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; *Porter v Magill* [2001] UKHL 67, *O'Neill No.2 v Her Majesty's Advocate* [2013] UKSC 36, *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72 and Joseph (*supra*) at 25.5(2)). It is the possibility not the probability of bias that is important. But the existence of bias is not to be lightly inferred. The functions of a decision maker cannot depend upon the suspicions of the ultra-sensitive, paranoid or cynical person (*S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358, 374). For this reason the examination of an allegation of bias must be rigorous.

[47] The person alleging apparent bias must establish a causal connection between the perceived disqualifying interest of the decision maker and the apprehension of bias. This involves two steps namely (*Saxmere* (*supra*) at [81]):

- (a) The identification of what it is said might lead a decision maker to decide a case other than on its legal and factual merits; and
- (b) An articulation of the logical connection between that matter and the feared deviation from the course of deciding the case on its merits.

[48] I now turn to consider the two step test which I have referred to above. The first issue is what is it that might lead Mr. Liava'a to decide not to appoint Mr. Fa'oliu as CEO other than on the merits. The matter advanced is that in addition to being Chairman of the Commission Mr. Liava'a sat on the Committee that wrote the Nukunuku report which was highly critical of Mr. Fa'oliu. It is therefore necessary to say something more about the Nukunuku report and Mr. Fa'oliu's response to it.

[49] The Nukunuku report begins by noting that the Committee was appointed by the Commission to investigate alleged non-compliance of 'certain staff' of the Ministry with the Public Procurement Regulations 2010 relating to the resealing of a main road at Nukunuku. It then describes the scope of its work which included determining whether Mr. Fa'oliu was aware of the actions of the staff involved with that project and to determine the non-compliance with the Public Procurement Regulations. The scope leaves little doubt that the Committee was concerned with the question of whether Mr. Fa'oliu was personally implicated in any unlawful procurement activities.

[50] The Nukunuku report concluded that the relevant procurement procedures were not followed (paragraph 20(i), (ii)(a) to (d)) and that:

The Committee finds that both the CEO and Tevita Lavemai were or should have been, aware of these breaches in the proper procurement procedures. (paragraph 20)

In summary the Committee finds that the CEO was aware of the actions by Tevita Lavemai mainly because he (CEO) had to approve those actions first. Furthermore, the CEO was, or should have been aware that the actions by Tevita Lavemai were approved to be taken

in clear breaches of the proper procurement procedures. (paragraph 43)

The Committee also finds that the CEO was aware of the actions taken by Kalesita and the stress that she was under due to projects being allowed to commence before the proper procurement procedures are followed. (paragraph 44)

The Committee finds the consequences of the breaches by the CEO and Tevita Lavemai to be:

- (a) A very long wait by Malapo Quarry to be paid their money,
- (b) The Ministry has to pay 2% interest which the Committee finds to be \$31,649.10 for seven months. (paragraph 48)

The Committee recommends that both the CEO and Tevita Lavemai be dealt with pursuant to Regulation 57 which provides:

'Every officer involved in procurement who breaches any provisions of these Regulations commits a disciplinary offence which shall be dealt with under sections 39 and 40 of the Public Finance Management Act 2002 and the Public Service (Disciplinary Procedure) Regulations 2003.

[51] These findings were of a nature that they reflected badly on Mr. Fa'oliu's suitability to be CEO of a Ministry and were relied upon by the Commission when it decided it would not appoint Mr. Fa'oliu (both when it made its first decision in August 2015 and again in July 2016).

[52] When Mr Fa'oliu was given an opportunity to respond to the Nukunuku report he did so in a lengthy affidavit of 11 December 2015 referring not only to factors which provided relevant context to the allegations against

him but also directly challenging the Committee's findings, including all of the findings that I have set out above.

[53] The second issue is whether there is a logical or causative link between the factor said to disqualify Mr. Liava'a and the feared deviation from deciding upon Mr. Fa'oliu's appointment on the merits.

[54] A classic example of apparent bias is where a decision maker acts in his/her own cause such as where the decision maker is a party in the very litigation he is deciding upon (*Sisson v Canterbury District Law Society* [2011] NZCA 55 at [20]). As Joseph (*supra*) notes at [25.5(5)] a decision maker may also trigger the bias disqualification where a plaintiff/prosecutor becomes involved in the decision making (*Murdoch v New Zealand Milk Board* [1982] 2 NZLR 108 (HC)). Parallels can be drawn between this case and those cases where it has been held that a decision maker should not act in his/her own cause.

[55] In *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 Lord Denning said:

No man can be an advocate for or against a party in one proceeding, and at the same time sit as a Judge of that party in another proceeding. Everyone would agree that a Judge or a barrister or solicitor (when he sits ad hoc as a member of the Tribunal) should not sit on a case to which a near relative or close friend is a party. So also a barrister or solicitor should not sit on a case to which one of his clients is a party. Nor on a case where he is already acting against one of the parties. Inevitably people would think he would be biased.

[56] *Hannam v Bradford City Council* [1970] 2 All ER 690 concerned a school teacher at a school maintained by the Council whose employment was

terminated at a meeting of the school's governors and he was given notice to that effect. Subsequently a staff sub-committee of the Council met to hold an inquiry as to whether it should exercise a power to prohibit the dismissal of the teacher which existed in the school's articles of governance and the Council's conditions of service for teachers. Three of the ten members of the sub-committee were governors of the school. The staff sub-committee resolved not to prohibit the teacher's dismissal and this was later affirmed by the full Council. It was held that the decision of the sub-committee could not stand because the presence of the three governors of the school on the sub-committee gave rise to the possibility of bias. Lord Justice Widgery reasoned at 698:

So far as bias is concerned, I, like Sachs LJ, am satisfied that there was a real likelihood of bias in this case....I am much impressed by the fact that when the staff sub-committee sat down to consider what the plaintiff would regard as an appeal, the chairman was a member of the governors against whose decision this so-called appeal was being brought. I think that if it had been disclosed at the outset that no less a person than the chairman of the staff sub-committee was a member of the governors in question, the immediate reaction of everyone would have been that some real likelihood of bias existed. I say that with every respect to the distinguished gentleman who chaired the staff sub-committee on this occasion; but when one is used to working with other people in a group or on a committee, there must be a built-in tendency to support the decision of that committee, although one tries to fight against it, and this is so although the chairman was not sitting on the occasion when the decision complained about was reached.

- [57] The Court in *Hannam* recognised that the appearance of bias might arise as a result of factors such as institutional and personal loyalties but in

the present case we are concerned with more than that. When Mr. Liava'a sat on the Committee that prepared the Nukunuku report he made or concurred in findings that reflected upon Mr. Fa'oliu's fitness as the CEO of the Ministry. When Mr. Liava'a then sat on the Commission to consider Mr. Fa'oliu's appointment he was likely to have already formed a view that Mr. Fa'oliu was not a suitable person to be reappointed to that role. Furthermore, it could not be expected that Mr. Liava'a would impartially assess Mr. Fa'oliu's responses to the Nukunuku report when Mr. Fa'oliu was directly challenging findings that Mr. Liava'a himself had made or concurred in. It is too much to expect that Mr. Liava'a would consider what Mr. Fa'oliu had to say in response to the Nukunuku report open to the possibility that his Committee's conclusions might be incorrect. I think any fair minded observer would conclude that Mr. Liava'a was likely to have had a biased disposition towards Mr. Fa'oliu.

- [58] There are three further points that need to be made. First, a party may waive their rights of objection to a disqualifying interest of a decision maker. That did not occur here. Mr. Fa'oliu asserted his objection to Mr. Liava'a sitting on the Commission.
- [59] Secondly, there can be no suggestion that Mr. Liava'a had to sit on the Commission out of necessity. There were four members of the Commission but the Public Service Act only requires a quorum of three (section 5(11)). Mr. Liava'a could have recused himself and the Commission could still have decided Mr. Fa'oliu's application free from any accusation of bias.
- [60] Thirdly, Mrs. Langi submits that because there were three other members of the Commission Mr. Liava'a's presence was not material. I

do not accept that. In my view if one member of a decision making body is biased then the tribunal as a whole is disqualified (*McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504; *R v Suffolk Justices* (1852) 18 QBD 416 and *Australian Workers' Union v Bowen* (No.2) (1948) 77 CLR 601. 631). As Forbes (*supra*) says at [15.2];

The law recognises the possibility that other members were affected by their colleague's actual or apparent inability to be fair. One member with a closed mind may have a disproportionate influence on the group and his presence is enough to raise a reasonable suspicion that the others are prejudiced too.

[61] I am fortified in my view on this issue by the fact that Mr. Liava'a had particular influence over the Commission by virtue of the fact that he was the Chairman. I also note that the documents before the Court show that in meetings of the Commission he spoke to the Nukunuku report and the manner in which its conclusions reflected upon Mr. Fa'oliu's fitness for appointment. I have also noted in my summary of the facts my disquiet about what some of the documents reveal may have been a predetermined view towards Mr. Fa'oliu's application.

Other ground that are advanced

[62] Mrs. Tupou advanced a number of other grounds in support of Mr. Fa'oliu's case. I was not impressed with them. Whilst trying to fit her arguments within the traditional chapter headings of review (illegality, irrelevant considerations, mistake, etc) her arguments appeared to me to fall into two broad categories. First, Mrs. Tupou challenged processes that the Commission had adopted at arriving at its first decision not to appoint Mr. Fa'oliu. Any criticisms that might have been leveled against the Commission were remedied when the parties agreed to settle and

reconvene the recruitment process. Secondly, Mrs. Tupou challenged the Commission's reliance upon the Nukunuku report, the Ha'apai report and the daily paid report. The heft of her argument was that the findings in the reports were wrong or that blame lay with other people or that the reports should not have been considered by the Commission. Mrs. Langi was correct when she submitted that Mr. Fa'oliu attempted to shift blame.

- [63] The conclusion I have reached on the issue of bias is sufficient to resolve this case and I am not going to respond to the specific arguments that Mrs. Tupou raises except to say this. In my view the Commission was entitled to have regard to the contents of the three reports. They raise questions as to Mr. Fa'oliu's suitability for appointment as CEO of the Ministry. They are evidence concerning his actual performance in the role. The Commission's obligation was to impartially consider and evaluate the contents and conclusions in those reports having regard to any information and explanation which was presented by Mr. Fa'oliu. The conclusions the Commission reached based on its consideration of the material before it was unlikely, absent any question of bias, to be open to successful challenge unless they were not reasonably open to it.

Remedies

- [64] In judicial review remedies are discretionary but the Court should vindicate rights when a plaintiff makes out a substantial ground for relief unless there is good reasons for refusing it (*Wendco (NZ) Limited v Auckland City Council* [2015] NZCA 617 and *Fusitu'a anor v Minister of Public Enterprises* (Supreme Court, CV 65/2015, 29 March 2016 Paulsen LCJ).

IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

CV 52 of 2015

- [65] I consider that Mr. Fa'oliu is entitled to a declaration that the decision of the Commission of 11 July 2016 to not appoint him as CEO was unlawful. He also seeks additional relief requiring the Commission to consult with the Minister and appoint him as the CEO of the Ministry. In the exercise of my discretion I am not prepared to grant further relief. I consider that the granting of a declaration is sufficient vindication of Mr. Fa'oliu's rights.
- [66] Whilst I have found that the Commission acted unlawfully it cannot be denied that the information which it had before it cast a shadow over the prospect of Mr. Fa'oliu's appointment. It is an unanswered question whether the Commission would have refused to appoint Mr. Fa'oliu if Mr. Liava'a had not been involved. In light of the findings made against Mr. Fa'oliu in the three reports it is quite possible that it might have done so. Any challenge to that decision in reliance upon the sorts of arguments advanced before me would have faced formidable hurdles.
- [67] It would be inappropriate to require the Commission to consult with the Minister for the appointment of Mr. Fa'oliu without some reconsideration of his suitability by the Commission untainted by any appearance of bias. However to refer the matter back to the Commission now would raise the prospect of yet further litigation between these parties. Related to this, the parties have been dilatory in the pursuit of this action. The position of CEO has been vacant since July 2015. As early as August 2015 the then Minister was expressing concern at the impact the lack of a CEO was having on the Ministry and National Infrastructure projects. Almost two and a half years have gone by since then. The position should be filled in the public interest as soon as possible.

IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

CV 52 of 2015

[68] In my view the interests of the parties and the public can be best advanced if the Commission is now free to re-advertise the role of CEO for the Ministry. Mr. Fa'oliu will of course be entitled to apply for the position on an even footing with all other applicants.

Result

[69] I grant leave to Mr. Fa'oliu to apply for review of the Commission's decision of 11 July 2016 not to appoint him as the CEO of the Ministry of Infrastructure, Transport and Tourism.

[70] I make a declaration that the decision of the Commission of 11 July 2016 to not appoint Mr. Fa'oliu as CEO of the Ministry of Infrastructure, Transport and Tourism was unlawful.

[71] I decline to grant any further relief.

[72] Mr. Fa'oliu is entitled to his costs to be fixed by the Registrar if not agreed,



NUKU'ALOFA: 7 December 2017

[Signature]
O.G. Paulsen
LORD CHIEF JUSTICE