

Received
06/11/19

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

CV 52 of 2019

BETWEEN:

PUBLIC SERVICE COMMISSION

Applicant

-and-

PUBLIC SERVICE TRIBUNAL

First Respondent

CLAUDE TUPOU

Second Respondent

APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

BEFORE: LORD CHIEF JUSTICE WHITTEN

To: Mr S. Sisifa for the Applicant
The First and Second Respondents

Date of application: 1 October 2019

Date of ruling: 1 November 2019

RULING

Introduction

1. By ex parte application dated and filed 1 October 2019, the Applicant ("*Commission*") seeks leave pursuant to Order 39 Rule 2 of the Supreme Court Rules to apply for judicial review of a decision by the First Respondent ("*Tribunal*") to allow an application by the Second Respondent ("*Mr Tupou*") for an extension of time within which to appeal against the Commission's decision to terminate his employment contract as CEO of the Ministry of Education.
2. The application is supported by the affidavit of Mr Simione Sefanaia, Acting Chairman of the Commission, sworn 1 October 2019, and a proposed Statement of Claim of the same date.

Rec'd 06.11.19
JJC

3. Order 39 of the Supreme Court Rules provides, relevantly:

O.39 Rule 1. When remedy available

This order applies to any action against an inferior Court, tribunal or public body (including an individual charged with public duties) in which the relief claimed includes an order of mandamus, prohibition or certiorari, or a declaration or injunction (in this order referred to as "judicial review").

O.39 Rule 2. Leave of Court required

(1) No application shall be made for judicial review unless the leave of the Court has been obtained in accordance with this rule.

(2) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending that period.

....

4. The grounds upon which administrative action is subject to judicial review have been conveniently classified as ‘illegality’, ‘irrationality’ and ‘procedural impropriety’: *Pekipaki v Fifita* [2018] TOCA 19 at [29].¹

Background

5. From the supporting affidavit and the proposed Statement of Claim the background facts are as follows:
6. On 31 May 2016, Mr Tupou was appointed Chief Executive Officer of the Ministry of Education for a term of three years.
7. Pursuant to his contract of employment:
- (a) Mr Tupou was directly accountable to the Minister and to report to the Commission through the Minister as per reporting requirements and performance assessments set out in his employment contract.
- (b) Clause 25, entitled “*Unsatisfactory performance after the initial three and six months review from appointment*”, provided that where at any time after the

¹ Referring to Lord Diplock in *Council of Civil Service Unions v The Minister for the Civil Service* [1985] AC 374, 410.

initial three and six months period of review from appointment, the Commission determined that Mr Tupou's work performance was unsatisfactory, the Commission (in consultation with the responsible Minister) may discuss the assessment with Mr Tupou and advise him in writing of the areas in which his work is unsatisfactory and give him three months to demonstrate competent performance. Clause 25.2 provided that where at the end of that period, Mr Tupou's work performance remained unsatisfactory, the commission after giving Mr Tupou an opportunity to be heard, may terminate his contract of employment and pay him termination payments set out therein.

- (c) By comparison, and relevantly to the present application, clause 26 was concerned with misconduct. There, the Commission could, in consultation with the responsible Minister, and subject to any prescribed disciplinary procedures, terminate the contract where, among other things, the employee breached the Public Service Code of Ethics and Conduct 2010; or where the employee's conduct is such that he should be dismissed under the Public Service Act 2002 as amended ("*Act*") or the Public Service Regulations ("*Regulations*").
 - (d) Clause 29 permitted Mr Tupou to exercise any prescribed right of appeal procedures provided by any Act or Regulation.
 - (e) Clause 30 provided that the provisions of the Act, any Public Service Regulations and the *Public Finance Management Act* 2002 shall apply to the parties to the contract."
8. The Commission alleges that Mr Tupou's performance as CEO was unsatisfactory in several respects. The complaints were either initiated or supported by the Minister. Suffice to say for present purposes that between 6 February 2018 and 18 January 2019, a process of exchanges of notices and responses, meetings and the like took place between the Commission and Mr Tupou. The commission says that that process was conducted in accordance with clause 25 of the Mr Tupou's contract.

9. The process concluded on 21 January 2019, when, after having received and considered Mr Tupou's final written response, the Commission determined that Mr Tupou's performance remained unsatisfactory and that his contract be terminated in accordance with clause 25.2.

The Tribunal's decision

10. On 3 May 2019, Mr Tupou submitted an ex parte application (dated 30 April 2019) to the Tribunal for an extension of time for an appeal to be lodged against the Commission's decision to terminate his employment contract. The grounds of his application included:
 - (a) that as his contract had been terminated, he misunderstood that he was no longer an employee as defined in s.21A(2) of the Act and proceeded to prepare for filing for judicial review;
 - (b) that application was filed but there was an issue in relation to jurisdiction and it was clear that the Tribunal possessed the jurisdiction for his appeal;
 - (c) that refusing an extension of time would be unjust in that he would be deprived of his right to challenge the termination of this contract;
 - (d) that the **14 days required by the Act** was not sufficient for him to collate the information required to bring about his appeal; and
 - (e) that he was not seeking reinstatement to the position of CEO of the Ministry of Education and Training and therefore the advertising and engagement of a replacement CEO would not be affected, nor, as a result, would there be any prejudice to the Commission if an extension was granted.
11. I note in passing that Mr Tupou did not contend that the 14 day period was insufficient for him to make an application for an extension of time within which to lodge an appeal.
12. On 28 May 2019, Mr Tupou's application for an extension of time was heard by the Tribunal.

13. On 25 June 2019, the Tribunal delivered its decision, in which it concluded:

"18. The Tribunal considers that the justice of the case requires that an extension of time for the lodging of an appeal by the Applicant (Mr Tupou) be allowed.

19. It is so ordered."

14. In its reasons for allowing the application, the Tribunal described sections 21 and 22 of the Act as providing that the procedures for dispute resolution and disciplinary matters under the Act shall be prescribed by Regulations. It observed that the *Public Service (Disciplinary Procedures) (Amendment) Regulations ("Disciplinary Regulations")* "were specifically designed and intended by the legislators to operate separately with regard to appeals relating to 'disciplinary matters' as distinct from the provisions enacted under Part VA (PUBLIC SERVICE TRIBUNAL) of the ... Act....".
15. That Part contains s.21C which, in summary, requires appeals to the Tribunal to be lodged within 14 days after service of the decision to be appealed. It also provides that the Tribunal may, upon application in writing **before the due date**, extend the time for making an appeal.
16. Mr Tupou's application for an extension of time was not made before the due date.
17. So much was noted by the Tribunal. However, it continued:
- "18. Clearly, the present application is not being made under this provision. Therefore, the requirements imposed by section 21C (3) are not relevant."*
18. No reasons for the first sentence were stated.
19. The Tribunal expressed its belief that the differentiation of requirements for appeals under the Act as opposed to those in relation to 'disciplinary matters' was intentional. It noted [11] that appeals relating to disciplinary matters made under sections 21 and 22 of the Act, as provided by the Disciplinary Regulations (regulations 16(3) and 21), the time to lodge an appeal is 30 days and an extension of time may be given upon such terms as the Tribunal thinks fit if it considers the justice of the case requires it.

20. The Tribunal also compared [12] the *Public Service (Grievance and Dispute procedures) (Amendment) Regulations* 2010, which were also made under sections 21 and 22 of the Act, describe different procedures for lodging an appeal by an employee, as opposed to an appeal by an Association. Those appeals must also be lodged within 14 days but there is no prescribed right of extension to that period.
21. The Tribunal then referred to s.10(d) of the *Interpretation Act* which provides, in terms, that no rule or Regulation shall be inconsistent with the provisions of the Act which empowered the making of such rule or Regulation. However, Tribunal did not believe that s.10(d) applied because the provisions of the Act [s.21C(3)] which were inconsistent with the Regulations, were not relevant, "because the Regulations were empowered to be made under different provisions of the Act (namely, sections 21 and 22)".

Commission's case

22. The Commission contends that the Tribunal's decision was flawed and that it erred in law, because, in summary:
 - (a) its decision to terminate Mr Tupou's employment contract was based on clause 25 of his contract and not under the provisions of the Disciplinary Regulations referred to above;
 - (b) it never initiated any disciplinary proceedings against Mr Tupou in respect of which he could rely upon the provisions of the Disciplinary Regulations for an appeal or for an application for extension of time within which to appeal;
 - (c) the appropriate avenue for his appeal to be lodged is under the Act; and
 - (d) as Mr Tupou's appeal was not lodged within 14 days after being served with the Commission's decision of 21 January 2019, his application for an extension of time should have been rejected.
23. The Statement of Claim recites much of the chronology set out above and of the key contentions by the Commission as summarized immediately above. The Commission seeks a declaration that the Tribunal's decision was unlawful and therefore invalid, and an order setting it aside. The grounds for that relief are stated

to be that the Tribunal failed to take into account relevant considerations and took into account irrelevant considerations, namely:

- (a) that the Commission's decision to terminate Mr Tupou's employment contract was based on clause 25 thereof and not under the provisions of the Disciplinary Regulations;
 - (b) the Commission never initiated any disciplinary proceedings in respect of which an appeal could lie under the Disciplinary Regulations or an application for extension of time within which that appeal could be made;
 - (c) the appeal had to be lodged under s.21C(2)(b) of the Act as the appropriate avenue for appeal against the Commission's decision;
 - (d) as the appeal was not lodged within 14 days after being served with written notice of the decision, the application for an extension of time should have been rejected.
24. The grounds also include that the decision was based on mistakes of fact. The same particulars are recited. It is also pleaded that the decision was, in all the circumstances, so unreasonable that no reasonable Tribunal could make it, and was flawed, and therefore unlawful and void.

The Act

25. The relevant provisions of the *Public Service Act* include:

2 Application of this Act

(1) This Act shall apply to the following persons — (a) All chief executive officers and employees in a Government Ministry, as listed in Part 1 of Schedule I; ...[which includes the Ministry of Education and Training]

4C Principles of the Public Service

The Public Service shall apply the following principles —

(k) Provides a fair system of review of decisions taken in respect of employees;

6 Principal functions of the Commission

The functions of the Commission are to —

...

(p) assist as appropriate Chief Executive Officers in the performance of their functions relating to the management of their Ministries; (q) manage and mitigate disputes and grievances; (r) regularly consult stakeholders on matters regarding the interests of the employees; (s) assess or undertake, in consultation with the relevant Minister, an annual performance review of the Chief Executive Officers; a

PART III - PUBLIC SERVICE

12 Employee matters to be under Act

All appointments, promotions, disciplinary matters and terminations in respect of the Public Service shall be made in accordance with this Act and any written policies of Government as directed by Cabinet, provided that employees of the Ministry responsible for education and training below the position of Chief Executive Officer shall be dealt with under the Education Act.

13 Chief Executive Officers

(5) The Commission shall, after consultation with the relevant Minister, remove a Chief Executive Officer of a Ministry from Office due to non performance or misconduct.

PART IV - CODE OF CONDUCT, DISPUTE AND DISCIPLINARY PROCEDURE

19 Code of Ethics and Conduct

The Commission shall, with the consent of Cabinet, issue a Code of Ethics and Conduct for the Public Service, which shall be published in the Gazette, and which all employees in the Public Service shall comply with.

19A Serious Breach of Code

(1) An employee may report a serious breach of the Code of Ethics and Conduct to the Chief Executive Officer, if in relation to another employee, or to the Commission, if the report relates to the Chief Executive Officer or an issue that would be inappropriate to report to the relevant Chief Executive Officer.

(2) Upon receipt of a report under subsection (1) the Chief Executive Officer or the Commission shall, unless the report is considered to be scandalous, frivolous or vexatious: (a) investigate it; or (b) appoint another person to investigate it.

(3) The Chief Executive Officer or the Commission shall ensure that the findings of an investigation are dealt with as soon as practicable.

PART IV - CODE OF CONDUCT, DISPUTE AND DISCIPLINARY PROCEDURE

21 Dispute resolution and disciplinary matters

(1) The procedure to determine disputes and disciplinary matters under this Act shall be prescribed by Regulations.

(2) A person who is dissatisfied with a determination may appeal to the Public Service Tribunal.

PART VA – PUBLIC SERVICE TRIBUNAL

21A Establishment of Tribunal

(1) There shall be a Public Service Tribunal established under this Act.

(2) The Tribunal shall hear appeals regarding any decision made by the Commission regarding an employee under this Act or any regulations made under this Act.

21C Appeals

(1) Any person who is dissatisfied with a decision of the Commission may appeal to the Tribunal.

(2) An appeal under subsection (1) —

(a) shall be in writing; and

(b) shall be lodged with the Secretariat of the Tribunal within 14 days after the person making the application has been served with written notice of the Commission's decision.

(3) The Tribunal may, upon application in writing before the due date, extend the time for making an appeal.

PART V - MISCELLANEOUS PROVISIONS RELATING TO THE PUBLIC SERVICE

22 Regulations

The Prime Minister may with the consent of Cabinet, make Regulations for the proper and efficient administration of this Act.

27 Act to prevail

Subject to the Constitution, the provisions of this Act shall prevail when any of its provisions conflict with the provision of any other law.

The Disciplinary Regulations

26. The *Public Service (Disciplinary Procedures) Regulations* provide, relevantly:

3 Determination of a breach of discipline

(2) Notwithstanding sub-regulation (1), the Commission may initiate a disciplinary action on its own motion including any disciplinary action against a Chief Executive Officer.

PART III - APPEAL TO THE TRIBUNAL

16 Appeals

(1) An employee has the right to appeal to the Tribunal against any decision of the Commission.

(2) An appeal shall be in the prescribed form set out in Schedule I of these Regulations.

(3) The employee shall lodge his appeal with the Secretary of the Tribunal within 30 days following receipt by the employee of the written communication of the decision of the Commission.

(4) At the same time as he serves notice on the Tribunal, the employee shall serve a copy of the notice on the Commission. (5) The appellant shall pay the prescribed fee set out in Schedule II to these Regulations to the Secretary of the Tribunal.

21 Extension of time

The Tribunal may extend any time specified by these Regulations upon such terms as it thinks fit, if it considers that the justice of the case requires it.

27. The Tribunal referred [15] to the *Public Service (Grievance and Dispute Procedures) Regulations*. Those regulations apply to, inter alia, “employment disputes” meaning disputes between the employer and an association relating to terms and conditions of employment, and “employment grievances” meaning grievances that an employee may have against the employer or another employee in relation to his employment, or one or more conditions of it, being affected to his disadvantage by unjustifiable action taken by the employer or that his employment conditions disadvantage or discriminate against him. Regulation 10 provides a right of appeal against any decision or non-compliance with procedural requirements of the Regulations by an employer. Such appeal is to be filed within 14 working days of receipt of the decision. Regulation 19 provides a right of appeal to an Association against any determination by the Commission of an employment dispute or non-compliance with procedural requirements of the Regulations, such appeal to be filed within 14 working days of receipt of the decision. Those Regulations do not contain any express provision conferring power on the Tribunal to extend those periods.

Consideration

28. The Tribunal’s decision was issued on 25 June 2019 but only served on the Commission on 1 July 2019. Order 39 rule 2(2) requires an application for leave to be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending that period. This application was filed on 1 October 2019. Grounds for the application cannot possibly arise before the aggrieved party receives notice of the subject decision. Accordingly, in my view, no issue of delay arises on this application for leave. If I am wrong about that, then the short delay of some 5 days, together with the existence of an arguable case for review as discussed further below, constitute good reasons for extending the period.
29. The Court must be satisfied that there is an arguable case for review. The burden upon the applicant in that regard is not onerous. It is unnecessary to protract these reasons unnecessarily by going into an in-depth analysis at this stage. If, on a quick perusal of the material available, I am of the view that it discloses what might on further consideration turn out to be an arguable case in favour of granting the Commission the relief claimed, then , in the exercise of judicial

discretion, leave ought be granted: *Flyniu Airlines Ltd v Faletau* [2006] Tonga LR 1; *Public Service Association (PSA) v Government of Tonga* [2016] TOSC 34 at [9].

30. A decision maker must understand correctly the law that regulates his decision-making power and must give effect to it": *Pekipaki v Fifita*, supra. In my view, the principal question here is whether the Tribunal erred in law by misdirecting itself as to the applicable statutory or regulatory provision by which the application before it was to be determined.
31. That question appears to turn, to a large extent, on the proper characterisation of the Commission's decision to terminate Mr Tupou's employment contract pursuant to clause 25 thereof. The Tribunal proceeded on the basis that the decision concerned a 'disciplinary matter' and was therefore subject to the appeal provisions of the Disciplinary Procedures, which by regulations 16(3) and 21 thereof, conferred on the Tribunal a discretionary power to extend the 30 day period within which the appeal was to be lodged. If that characterisation was incorrect, and the appeal was one made, or to be made, under the Act (as Mr Tupou's application seemed to acknowledge), then what power did the Tribunal have to extend time?
32. A number of other or subsidiary issues arise. For instance:
 - (a) Was the period for lodging an appeal in respect of the Commission's decision governed by the Act or by the Disciplinary Regulations?
 - (b) What was the basis for the Tribunal's expressed view that Mr Tupou's application was not being made under s.21C of the Act?
 - (c) What was the basis for the Tribunal's apparent view that Mr Tupou's appeal was in respect of a 'disciplinary matter'?
 - (d) What is a "disciplinary matter" or "breach of discipline" within the framework of the Act and the Disciplinary Regulations? Presumably, a breach of the *Public Service Code of Ethics and Conduct 2010* would constitute a disciplinary matter giving rise to proceedings under the Disciplinary Regulations. Clause 25 of Mr Tupou's contract does not refer to any breach

of the Code or other breach of discipline. It is solely concerned with unsatisfactory performance. Can unsatisfactory performance involve or arise from a breach of the Code or of discipline? Do the "Misconduct" provisions in clause 26, in contradistinction to clause 25, attract the operation of the Disciplinary Regulations?

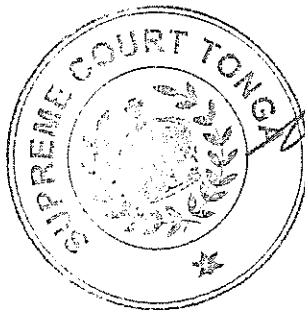
- (e) Was the procedure undertaken by the Commission, in reaching its decision to terminate, one which was prescribed by, or ought to have been subject to, the Disciplinary Regulations? While clause 25 of Mr Tupou's contract (in contrast to 26) does not expressly state that the procedure for termination for unsatisfactory performance there is subject to any prescribed disciplinary procedures or the Disciplinary Regulations, does the general 'catch all' provision of clause 30 nonetheless render the procedure in clause 25 subject to the Disciplinary Regulations?
- (f) If Mr Tupou's appeal is not subject to the Disciplinary Regulations, was the time for lodging the appeal as prescribed s.21(C)(2) of the Act?
- (g) If so, and given Mr Tupou's application was not made within 14 days of receipt of the Commission's decision, what power did the Tribunal have to extend time?
- (h) Was the Commission's decision to terminate:
 - (i) a "decision" for the purposes of s.21C(1) of the Act; or
 - (ii) a "dispute" or "disciplinary matter" for the purposes of s.21(1) of the Act; or
 - (iii) a "determination" for the purposes of s.21(2) of the Act?
- (i) If both the Act and the Disciplinary Regulations are applicable to Mr Tupou's appeal, are regulations 16(3) and 21 inconsistent with section 21 (C)(2) and (3) of the Act, in contravention of s.10(d) of the *Interpretation Act*?
- (j) If so, does the Act take primacy?

33. The above analysis of issues arising is not intended to be exhaustive. It will be a matter for the Commission to prosecute its claim as it sees fits. However, the issues above do highlight that the instant application for leave clearly gives rise to an arguable case for review.

Result

34. Accordingly, leave is granted for the Commission to apply for judicial review in respect of the Tribunal's decision dated 25 June 2019 to extend the time within which Mr Tupou was required to lodge his appeal against the Commission's decision dated 21 January 2019 to terminate his employment contract.
35. The Applicant/Plaintiff is to file and serve the following documents within 14 days hereof:
- (a) the ex-parte application for leave;
 - (b) the affidavit in support;
 - (c) the Writ;
 - (d) the Statement of Claim; and
 - (e) this Ruling.
36. Costs of this application shall be costs in the cause.

NUKU'ALOFA
1 November 2019



M.H. Whitten
M.H. Whitten QC
LORD CHIEF JUSTICE