Solicitor General
19/02/20
Scan, email, w/word & file.

**IN THE SUPREME COURT OF TONGA**
**CIVIL JURISDICTION**
**NUKU'ALOFA REGISTRY** **CV 17 of 2017**

BETWEEN:

**RIZVI JURANGPATHY** Plaintiff

-and-

**TONGA COMMUNICATIONS CORPORATION** Defendant

---

**PLAINTIFF'S APPLICATION FOR COSTS AND INTEREST**

# RULING

---

| | |
|---|---|
| **BEFORE:** | LORD CHIEF JUSTICE WHITTEN |
| **To:** | Mr W. Edwards for the Plaintiff |
| | Mrs D. Stephenson for the Defendant |
| **Date of submissions:** | Plaintiff: 19 December 2019, 10 January 2020, 5 February 2020 |
| | Defendant: 24 January 2020 |
| **Date of hearing:** | On the papers |
| **Date of ruling:** | 17 February 2020 |

## Introduction

1. On 18 December 2019, I gave judgment for the Plaintiff in this proceeding in the sum of TOP $165,000, comprising:

   (a) $25,000 for loss of salary;

   (b) $20,000 for relocation expenses; and

   (c) $120,000 for reputational harm.

2. The parties requested to be heard on the question of costs. I directed that submissions on costs and any claim for interest be filed, and that if a hearing was not required by either party, the issue would be dealt with on the papers.

18 FEB 2020

3. The parties have filed submissions and requested that I deal with the matter on the papers.

## Plaintiffs submissions

4. The Plaintiff's submissions may be summarised as follows:

   (a) he seeks an order for interest on the judgment sum;

   (b) he is entitled to an order for his costs of the proceeding (save for any previous costs orders) on the bases that:

      (i) he was generally successful on his claims at trial;

      (ii) costs ought follow the event; and

      (iii) the Defendant's conduct during the investigation and the litigation where it maintained three grounds in defence of its decision to dismiss the Plaintiff for gross misconduct until the commencement of the trial, when it abandoned two grounds and proceeded only on the financial statements issue;[1]

   (c) in reply submissions, that by reason of the conduct of the Defendant's personnel during the course of their investigation leading to his wrongful dismissal for alleged 'gross misconduct', costs should be awarded on an indemnity basis;

   (d) further in reply, he seeks an order for his costs of travelling to Tonga to attend the proceeding; and

   (e) he seeks an order for the return of security for costs in the sum of $10,000 paid into court on 22 August 2017, plus any accrued interest.

## Defendant's submissions

5. The Defendant's submissions may be summarised as follows:

---

[1] Relying upon *Mishka Tu'ifua & ors* v *The Public Service Tribunal & Kautoke* (CV 45 of 2013) where the then Lord Chief Justice held that a costs decision requires ... "a principled application of the costs rules, and an analysis of the facts to see what has given rise to the litigation, taking into account the conduct of the parties whether one of them has contributed to its costs or engaged in other conduct that should influence the costs of decision."

(a) the rule that costs follow the event is not absolute and that the court retains a discretion to determine the level of costs awarded based on various factors including the complexity of the case, the amount involved and the parties' conduct during the litigation;

(b) from the commencement of the proceeding until 12 November 2018, the Plaintiff claimed loss of salary for the balance of what was his contract plus "renewal damages" of $375,000 being three years' salary beyond the expiration of his then contract as if it was assumed his contract would be renewed;

(c) by the Further Amended Statement of Claim, the Plaintiff abandoned his claim for renewal damages, to which the Defendant says he was never entitled. He also abandoned claims for $120,000 for injurious falsehoods and $80,000 for emotional harm and distress and replaced them with his (successful) claim of $120,000 for reputational harm;

(d) prior to the commencement of proceedings, the Defendant attempted to negotiate the Plaintiff's resignation by offering to pay him the balance of his contract (at that time a period of 16 months) which was approximately $166,666 gross. The Plaintiff counter offered by asking for $600,000 which included the renewal claim. No settlement was reached;

(e) during the proceedings, on 21 August 2018, the Defendant made an offer pursuant to Order 24 of the Rules to pay the Plaintiff's salary from the date of dismissal to the end of his contract ($62,734.38 net) with each party to bear their own costs. The Plaintiff rejected that offer and counter offered to accept the sum of $226,807 which comprised $169,863 for salary from 22 April 2017 to 31 August 2018, legal costs to that date of $41,944 and the cost of his airfare of $15,000 (as was provided for by his contract). The Defendant rejected that offer;

(f) the court accepted the Defendant's submission that the Plaintiff's damages for loss of salary was to be limited to the equivalent of three months' notice, or $25,000, which was significantly less than the amount offered by the Defendant both prior to his dismissal and in its 21 August 2018 offer;

(g) the claim did not involve novel or complex issues of law;

(h) amendments to the Plaintiff's pleadings resulted in unnecessary costs;

(i) the Plaintiff's insistence on claiming renewal damages compelled the Defendant to defend the action and prevented the possibility of meaningful settlement negotiations;

(j) for those reasons, the Plaintiff should not be awarded his full costs, but that they should be limited to 80% (as agreed or taxed); and

(k) the Defendant did not make any submissions on interest.

## Interest

6. The Plaintiff's primary submission in relation to interest was:

> *"4.1 The Plaintiff also seeks interest, where he has had to wait for more than two years to clear his name in Tonga of any negative or adverse."* [sic]

7. In his reply, the Plaintiff submitted that:

(a) interest should commence from the date on which he should have been paid;

(b) the relocation costs 'would have been helpful if he had them to enable his return to Sri Lanka'; and

(c) the damage to his reputation occurred in 2017 so interest on that should run from then, not the date of the judgment.

8. Otherwise, the Plaintiff's submissions were silent as to any legal basis for an entitlement to interest up to judgment or an applicable interest rate.

### *Entitlement?*

9. As discussed recently in *Luna'eva Enterprises v Mosese Manu*,[2] in the absence of any contractual entitlement or relevant statute, a debt does not carry interest: *Re Australian Metal Co Ltd* (1923) 33 CLR 329 ; *Robertson v National Insurance Co of New Zealand Ltd* [1958] SASR 143 ; *President of India v La Pintada Compania Navigacion SA* [1984] 2 All ER 773. Nevertheless, in equity, a court has power to award interest

[2] [2020] TOSC 1; CV 4 of 2019 (22 January 2020).

and to fix the rate at which it should be paid when justice demands it: *Thomas v SMP (Int'l) Pty Ltd (No 6)* [2010] NSWSC 1311.

10. Section 5 of the *Supreme Court Act* confers on the Supreme Court power, among other things, to '*make orders for interest on debts and other moneys payable for such period and at such rates as the court considers appropriate, in accordance with rules of the Supreme Court.*' It is, self-evidently, a broad power. The discretion is to be exercised judicially. It must not be exercised arbitrarily, but in accordance with reason and justice,[3] and having regard to all relevant matters.[4]

11. While Order 30 rule 2 provides for post-judgment interest at the rate of 10% per annum, unless the Court specifies otherwise, the Rules are otherwise silent on the issue of pre-judgment interest.

12. Order 2 rule 3 provides that where there is no provision in the Rules, the rules of procedure under the former Rules of the Supreme Court (RSC) in England (the "White Book") shall continue to apply notwithstanding the substantial and ongoing replacement of those rules by the Civil Procedure Rules 1998 (CPR). Further, order 2 rule 4 provides that if it appears in any given situation that no appropriate provision exists either in the Rules or the English Rules, then the procedure to be followed shall be that prescribed by the Judge and in doing so, the Judge may be guided by any provision in the English Civil Procedure Rules 1998 (CPR).

13. The White Book and the current UK Civil Procedure Rules[5] provide that any claim for interest must be pleaded, and with particulars, such as whether the claim is under the terms of a contract, an enactment or some other basis; and, for specified sums, the percentage rate and the date from which it is claimed.

14. To similar effect is Order 8 rule 2 of the Tonga *Supreme Court Rules* which requires every Statement of Claim to specifically state any claim for interest. That may be interpreted as applying to claims for pre-judgment interest because Order 30 rule 2 automatically applies to judgment debts until the judgment is satisfied.

15. From the original to the Amended to the Further Amended Statement of Claim, the

---

[3] *Taione v Pohiva* [2006] TOSC 23 citing *Ottway v Jones* [1955] 2 All ER 585.

[4] *Bennett v Aigner* [1991] TOCA 1.

[5] CPR 16.4, the power to award interest on damages conferred by s.35A of the UK *Supreme Court Act* 1981.

Plaintiff here has never pleaded a claim for pre-judgment interest.[6] Nor was the issue raised in closing submissions at trial.

16. In my view, the power conferred by s.5(2)(d) of the *Supreme Court Act*, and the circumstances in which it may be enlivened, is conditioned by the words "in accordance with the rules of the Supreme Court". The Plaintiff's present claim for interest has not been made in accordance with the Rules. Moreover, the importance of pleading a claim for interest (with particulars) is that it is part of the fundamental purpose of pleadings: to inform a Defendant of the case it has to meet. To raise a claim now, after judgment, and without any attempted application to amend, presents potential unfairness to the Defendant.

17. However, the Defendant has not taken the point. In fact, it expressly elected to not make any submissions on interest.[7] Had it done so, for the reasons given, I would have been inclined to disallow the Plaintiff's claim for interest.

18. As the Defendant has not opposed interest, I consider it to be in the interests of justice for the Plaintiff to receive some interest on the components of the judgement sum.

19. The Defendant having taken the benefit of authority for the proposition that on the loss of salary claim the Plaintiff was only entitled to an amount which represented the least disadvantageous option available to the Defendant, namely the three months' salary payable on termination for convenience or without cause, the Defendant was obligated to pay that sum and the relocation costs payable under the contract as of the date of dismissal. The Plaintiff has been out of pocket to the extent of those funds since dismissal and the Defendant has had the benefit of retaining them. In those circumstances, an award of interest is appropriate.

*Applicable rate*

20. As to the applicable rate, the default rate of 10% per annum provided by Order 30 rule 2 (unless the court orders otherwise) is applicable to post-judgement interest. For the reasons discussed in *Luna'eva Enterprises v Mosese Manu*, I do not consider that it automatically follows that the default rate of 10% per annum will be applicable in every

[6] Which may be contrasted with the TCC's Statements of Claim against Mr Jurangpathy in proceeding CV 57 of 2017 which consistently claimed interest.

[7] [8.3]

case where a Plaintiff claims pre-judgement interest.

21. Firstly, such claims should be pleaded with particulars including an applicable rate of interest, and a basis for that rate. For instance, applicable rates could range from that which the Plaintiff could have earned through investing the subject monies for the relevant period; or, in circumstances where the Plaintiff had to borrow because he was out of pocket, the prevailing lending rates for the relevant period. Other potential rates include the commercial rate, the investment rate, the "true" interest rate, the "wilful default" rate and foreign interest rates.[8]

22. Secondly, there should be evidence to support a claim for interest such as whether the Plaintiff could have and would have invested the monies or whether he has had to borrow in the meantime while waiting to receive them, both with their applicable interest rates. Such is a claim for damages in the nature of interest being pecuniary losses suffered by the Plaintiff as a result of the Defendant's wrong thereby constituting an integral element of the loss for which he is entitled to be compensated by an award of damages.[9]

23. Shortly after his dismissal, the Plaintiff returned to Sri Lanka and has lived there since. In the absence of any evidence as to whether the Plaintiff has suffered any opportunity cost of not being able to invest any part of the monies comprising the judgment sum since his return to Sri Lanka (and at what rate); or, whether he has had to borrow money in the meantime by reason of being out of pocket (and again at what rate), I have decided that the Sri Lanka Central Bank benchmark interest rate is an appropriate rate to use. According to publicly available online information,[10] over the past four years, that rate has averaged 7% per annum.

***Commencement date***

24. As to the date from which interest should run, as I have indicated above, the Plaintiff's loss of salary of $25,000 and relocation costs of $20,000 were payable upon his dismissal. Therefore I shall order that interest of 7% per annum shall apply to those

---

[8] White Book, Spring 2001, [7.0.15].

[9] *Hungerfords v Walker* (1989) 171 CLR 125; *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28 at [35].

[10] Trading Economics report for Sri Lanka where the official interest rates are the Standing Deposit Facility (SDF) Rate and the Standing Lending Facility (SDFR) Rate: https://tradingeconomics.com/sri-lanka/interest-rate.

sums from 21 April 2017.

25. As for the claim for damages for reputational harm, whilst a sum certain was claimed, such damages will always be in the nature of unliquidated damages pending assessment by the court.

26. I do not agree that the reputational harm for which the Plaintiff is to be compensated all occurred in 2017. The figure was arrived at by reason of a number of considerations including the time since the Plaintiff's dismissal to trial, during which, his evidence was that he has been unable to obtain suitable employment due mainly, in his view, to the ongoing stigma associated with the public nature of his dismissal for gross misconduct and the fact that online articles were published at the time and are still visible to any prospective employers.

27. It is customary for interest on such claims for damages to run from the date of the commencement of the proceedings.[11] Here, that was 28 April 2017. However, the claim for damages for reputational harm was not introduced until the Further Amended Statement of Claim filed 12 November 2018. That is the date from which interest on that sum of $120,000 shall commence.

***Conclusion on interest***

28. The resulting calculations of interest then are:

    (a) Loss of salary and relocation costs totalling $45,000 from 21 April 2017 to the date of judgment (18 December 2019), at 7% p.a. = $8,379.86; and

    (b) Damages for reputational harm of $120,000 from 12 November 2018 to the date of judgment, at 7% p.a. = $9,228.49,

    making a total award of pre-judgment interest of $17,608.35.

## Costs

29. Section 15 of the *Supreme Court Act* provides, relevantly, that:

> *"In every action the costs of the whole action of each particular proceeding*

[11] White Book at [7.0.4] citing *Wright v B.R.B* [1983] 2 A.C. 773. See also, and for example, Victoria *Supreme Court Act*, s.60.

*therein and the costs of every proceeding in the Court shall be in the discretion of the Court as regards the person by whom they shall be paid."*

30. From the parties' submissions, the issues to be determined in relation to costs are:

    (a) whether the Plaintiff's costs should be reduced; and

    (b) whether the basis for any such costs should be party party or indemnity.

***Should the Plaintiffs costs be reduced?***

31. In relation to the prelitigation negotiations and offer by the Defendant to pay out the Plaintiff the balance of his contract in return for his resignation, Order 24 rule 1 refers to "a party to a proceeding" making offers which (pursuant to rule 3) might ultimately be seen by the court to be relevant to or have an effect on the question of costs. At the relevant time, the Defendant was not a party to a proceeding.

32. But even if the court were to take into account the Defendant's attempt to negotiate the Plaintiff's resignation and thereby avoid what has turned out to be protracted litigation, and whether such conduct was reasonable and relevant to the current issue of costs, it would be very difficult to put any real weight on the Defendant's effort for two reasons.

33. Firstly, those negotiations took place at a time before the Defendant levelled any allegations against the Plaintiff of gross misconduct and the only issue was the Plaintiff's resignation.

34. Secondly, it is very difficult to fathom why the Defendant, once disappointed by the quantum of the Plaintiff's counteroffer and resultant failure of those negotiations, simply did not exercise its rights under the contract and terminate the Plaintiff's employment for convenience or without cause. In that circumstance, the Defendant would only have been liable to pay the Plaintiff three months' salary and any other entitlements; and, it is very likely this litigation would have been avoided. The failure to take that relatively simple and available contractual course was briefly explored with Mr Panuve during the trial, but never satisfactorily explained.

35. In relation to the Defendant's complaints about the Plaintiff's conduct during the proceeding in maintaining a claim for renewal damages to which he was never contractually entitled, in my view, the simple answer is that it was always open to the

Defendant to make an offer of settlement which reflected that assessment. The problem for the Defendant, in respect of the offer it did make during the course of the proceeding, is that while it offered a greater sum for loss of salary than the Plaintiff actually recovered on judgment, the Defendant did not offer any amount for the other two primary components of the Plaintiff's claim, namely, relocation costs (which were never really in dispute) and damages for reputational harm (or its earlier alternative or analogous claims). Even though the offer was served at a time before the Plaintiff amended to replace the claims for injurious falsehood and emotional harm and distress with the claim for reputational harm, in circumstances where the defendant's offer must have been based upon some analysis of risk exposure on liability, to have had a chance of being effective, the offer should have engaged with and made provision for the claim for relocation costs and consequential damages whether they be characterised in the manner the plaintiff originally claimed them or ultimately as reputational harm. In the result, the offer was not as favourable or more favourable than the judgment as a whole. The plaintiff's refusal of the offer was therefore not unreasonable.

36. Further, I do not think it is appropriate to look at the Defendant's offer of 21 August 2018, which dealt solely with the loss of salary claim, in isolation from the rest of the Plaintiff's claims in an effort to determine whether that offer ought to have some effect on the question of costs for the purposes of order 24 rule 3. While it may sometimes be appropriate to consider costs in accordance with the outcomes on particular issues in a proceeding, I do not think that is the case here. That the Plaintiff's offer in respect of loss of salary was more favourable that the amount awarded on judgement, says nothing of the fact that the Defendant maintained its denial of liability throughout on, essentially, the single issue in the case, namely, whether the Plaintiff had been wrongfully dismissed for gross misconduct. The Plaintiff was successful on liability, and on the assessment of damages overall, was far more successful than the amount offered by the Defendant.

37. Finally in this regard, in circumstances where the primary offer was to pay the Plaintiff $62,000 odd in respect of his claim, the secondary offer for each party to bear their own costs was, with respect, unrealistic if it was intended to provide the Defendant with some level of costs protection.

38. Next, while I agree with the Defendant that the issues raised in the proceeding might not

be regarded as novel, I do regard some of the issues of law, including what constituted gross misconduct and the proper assessment of the Plaintiff's claims for damages, to have been of some complexity. The length of the judgment is, in part at least, a reflection of that complexity.

39. In relation to the Plaintiff's pleading amendments during the course of the proceeding, I assume the Amended Statement of Claim was filed as of right in accordance with Order 8 rule 7(1), that is, before the close of pleadings. That rule does not appear to provide for any costs thrown away by reason of the amendment at that point. I do not know whether the Defendant made an application for costs thrown away by reason of the amendment, but in my view, it was open to the Defendant to do so. If it did make such an application of the relevant time, then it would have been determined by Paulsen LCJ.

40. However, in relation to the Further Second Statement of Claim, which required leave of the court, Order 8 rule 7(7) provides that if the Court grants leave to amend any pleading, it may make such order as to costs ... as it thinks just. On 6 November 2018, Paulsen LCJ granted the Plaintiff leave to amend, vacated the trial date and ordered the Plaintiff to pay the Defendant's costs "thrown away on the adjournment". It is not clear whether that order was intended to include the Defendant's costs of having to prepare or amend its defence to the Further Amended Statement of Claim.

41. The counterbalance to the Defendant's complaints about the Plaintiff's conduct in the way in which it amended its claim on a number of occasions and in different respects is the Defendant's abandonment of two of the three grounds of its pleaded defence at the commencement of the trial. While the issue of the Plaintiff's entitlement to renewal damages may be seen as largely, if not wholly, a legal issue, the other two grounds of the Defendant's pleaded defence - the manner in which the tender for the sale of one of the Defendant's vehicles was conducted and allegations of inappropriate sexual misconduct - were far more factually dense and, in my view, would have consumed significant time, effort and expense in preparing for trial. While the documents in support of those defences clearly suggested arguable cases, in my view, they were not strong. The concession by the Defendant in abandoning them was appropriate. It was unfortunate, however, that the decision was not made much earlier in the proceeding.

42. The evident savings in terms of time and costs of the trial itself as a result of the

Defendant's decision not to rely on those grounds falls largely to the benefit of the Defendant. For if the trial had been run on all three grounds, it would have taken far longer and cost far more resulting in a larger costs liability to the (likely) unsuccessful Defendant.

43. Nevertheless, the Plaintiff has been put to the expense of having to meet and prepare its case in relation to the other two grounds of defence right up to the commencement of the trial. In my estimation, those costs are very likely to be much greater than any costs incurred by the Defendant by reason of the Plaintiff's amendments to its pleadings (which largely involved issues of law, not fact).

44. For those reasons, the Defendant's application for a reduction in the percentage of the Plaintiff's costs to be paid is refused.

***Indemnity costs?***

45. In his reply submissions, the Plaintiff contends that the Defendant's conduct during its investigation leading to its decision to dismiss the Plaintiff for 'gross misconduct' warrants an order that the Defendant pay the Plaintiff's costs of the proceeding on an indemnity basis.

*Power to order indemnity costs?*

46. As noted above, s.15 of the *Supreme Court Act* provides, relevantly, that costs shall be in the discretion of the Court *as regards the person by whom they shall be paid.*

47. Curiously, a literal interpretation of the last words emphasised would suggest that the discretion is confined only to 'who pays'. But what about the extent or basis on which they are to be paid?

48. Order 46 of the rules is concerned with taxation of costs. It is silent on the issue of indemnity costs.

49. Order 47 is concerned with assessment of costs. Rule 2 provides for allowance of all such costs, charges and expenses as are reasonably necessary or proper for the attainment of justice or for maintaining or defending the rights of any party. Otherwise, Order 47, too, is silent on the issue of indemnity costs. Although rule 5 provides for certification by the Court of costs at a higher rate than the relevant scale, I do not

consider that to be an appropriate source of power to order generally that a successful party's costs be paid at higher than the standard basis of party/party. In that regard, such applications for uplift are to be made prior to the hearing in respect of which the costs are to be incurred. That is not the usual procedure required for an application for solicitor/client or indemnity costs at the conclusion of a proceeding based on the conduct of a party.

50. In fact, the only provision within the Rules which expressly provides for indemnity costs is order 45 rule 6(3), by which, if the Court is satisfied that, following a mediation, a party's unreasonableness led to no agreement, that party may be ordered to pay the other party's costs of the mediation on an indemnity basis.

51. Superior courts in other common law jurisdictions are conferred by the statutory instruments which create them, or their respective rules, with express power to order indemnity costs.[12]

52. Here, in Tonga, Finnigan J in *Polynesian Airlines v Kingdom of Tonga* [2000] Tonga LR 145, observed that:

> *"There is no statutory provision in Tonga for taxing costs on the indemnity basis, i.e. reimbursement by the paying party of all costs incurred by the receiving party except those unreasonably incurred or unreasonable as to amount. ... However the Supreme Court in Tonga has a statutory discretion about* ***who may pay the whole costs*** *(S15 SCA Cap 10) and the Court may order costs on that basis...."* [emphasis added]

53. With respect to his Honour, I doubt that the text of s. 15 may be read to mean that the Court has discretion to order the "whole costs" if that be interpreted as indemnity costs. To do so would require the actual words "the costs of the whole action" to be rearranged to read "the whole costs of the action".

54. His Honour referred to the decision of *Fonua v MBf Bank Ltd* [1999] TOSC 51 as one in which indemnity costs had been ordered. In that case, Ward CJ found that the claim before him was "not established and was unlikely ever to succeed" and that despite advice, the advice on his chance of success, the Plaintiff chose to proceed to trial on a

---

[12] For example, *Federal Court of Australia Act* 1976 - Sect 43; NSW *Uniform Civil Procedure Rules* 2005 - Reg 42.5; Victoria *Supreme Court Act* 1986 - Sect 24; New Zealand *High Court Rules* 2016, rule 14.6; UK *White Book*, rule 44.4.

hopeless case. He therefore ordered costs in favour of the Defendant to be taxed on a *solicitor and own client* basis to "ensure the Defendant (was) out of pocket as little as possible in financial terms". His Honour recorded that there was no dispute before him that the court has the power to order costs and that s.15 gives the court a discretion to award them subject only to the terms of the proviso which was not relevant in that case (or the present). He noted that the discretion must be exercised judicially and the general rule is that a successful party is entitled to his costs but that rule is qualified to include disentitling circumstances such as misconduct. As with the current rules, his Honour observed that the former Order 29 governed the question of costs but did not assist on whether an award of costs must be limited to party/party costs or may be made in relation to solicitor/client costs. He concluded that the discretion given by s.15 extended to making such an order.

55. In *re Friendly Island Fishing Company Ltd (in liquidation)* [2003] Tonga LR 327, Ford J held that an award of costs on an indemnity basis was rare but that the court had complete discretion when it came to costs. His Honour clarified that in that case, counsel's application for costs on an indemnity basis was intended to mean costs on a solicitor and own client bases which generally would give an entitlement to all costs incurred except in so far as they are of an unreasonable amount or have been unreasonably incurred. No detailed analysis of the source of the court's power to order either form of enhanced costs order is revealed in the judgment.

56. Similarly, in *Uata v Kingdom of Tonga* [2006] Tonga LR 205, Webster CJ opined that "*Superior Courts of general jurisdiction have power in the exercise of their discretion to award costs, with full power to determine by whom and to what extent they were to be paid, although with the number of limitations on the exercise of that discretion.*"

57. As I have not heard any argument on this issue, I shall refrain from expressing any concluded view on it.

58. My tentative view, however, is that for the following reasons, it is more likely than not that this Court has a general discretion in respect of costs, which extends to and includes determinations as to the level or basis of taxation upon which costs are to be paid.

59. Firstly, and consistent with the Court of Appeal's remarks in *Estate of Wong v Commercial Factors Ltd* [2011] TOCA 9 at [35], s.15, a provision empowering the

Court, "should be broadly construed so as to give it full efficacy" and "to enable justice to be administered". Having regard to the context[13] and purpose of the provision, it would be surprising if the Legislature intended the Court's discretion on costs to be limited only to deciding which party ought pay the costs of another party, without any discretion as to the level or basis on which such costs are to be paid. If the Court did not enjoy such a broad discretion, not only would it be out of step with virtually all other Superior courts of record in the common law world, it may be left unable to adequately address the range of conduct engaged in by some parties, including contravention of their obligations under the Rules, breaches of procedural orders and directions of the Court and the resultant delays, costs and other injustices imposed on other parties so affected.

60. Secondly, a power to award costs can be conferred expressly or by necessary implication: *Queensland Fish Board v Bunney* [1979] Qd R 301 at 303. The broad construction placed upon statutory powers conferred upon superior courts dictates that it is more likely that a court will imply a power to award costs in a superior court than an inferior court.

61. Thirdly, as a superior court of record, this Court's inherent jurisdiction - a jurisdiction not derived expressly or by implication from statutory provisions conferring particular jurisdiction – extends to awarding costs under a power incidental and necessary to the exercise of jurisdiction which is conferred on the court: "*Law of Costs*" by G E Dal Pont, 2003, Lexis Nexis Butterworths [6.11].

62. That may be compared with another aspect of the Court's inherent costs jurisdiction being ancillary to the prevention of an abuse of the court's processes: *Ward v Western Australia* (1999) 163 ALR 149 at 151-2, where Lee J explained:

> *"In some circumstances the power to make an order sounding in costs may be essential for the due administration of justice and, therefore, an integral part of the judicial power. Such an order is not calculated to provide compensation to a party or expense incurred in the litigation, but to protect the integrity of the processes and function of the court by imposing appropriate sanctions with the conduct of a person is inimical to those objects. Such a sanction may be an order directing a person... to pay*

[13] Including other statutory instruments, *in pari materia,* such as ss.89 and 90 of the Constitution and the relevant rules referred to above.

*costs... Such circumstances may arise where there has been use of the process of the court for an ulterior purpose, for example, commencement of litigation, issue of a witness summons or drafting if a pleading of a pleading to embarrass, harass or oppress a party to litigation or other person."*

63. In any event, any further consideration or debate about whether the Court has power to order solicitor/client or indemnity costs may well be arid, for the practice appears to have become so engrained in the jurisprudence of the Kingdom, that it has almost been universally accepted as part of the Court's powers whether its source be clauses 89 and/or 90 of the *Constitution*, the *Supreme Court Act* or the *Rules*. While there are few reported or published decisions in which indemnity costs have been ordered, there are quite a number where solicitor/client costs have been ordered (referred to in footnotes below).

*Distinctions between the bases for taxation of costs.*

64. Party and party costs are those that are necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed. Such a definition is reflected in the terms of Order 47 rule 2 (1) of the *Supreme Court Rules*. The proper principle upon which costs are taxed on this basis is that the successful party should be indemnified against the necessary expense to which he has been put in prosecuting or defending the action, although costs incurred in conducting the litigation more conveniently are not included.[14]

65. Solicitor and client costs are those costs reasonably incurred and of reasonable amount which are likely to be greater in scope than the allowance on a party/party basis.[15] As observed by Dal Pont (ibid), there is a distinction in the nomenclature between costs on a solicitor and client basis and those on a solicitor and *own* client basis. The latter involves an approach akin to an indemnity basis of taxation. There are judges who assimilate the solicitor and client basis to the indemnity basis even though the latter starts from the position that all costs are allowable on taxation. This may explain the trend in court rules elsewhere to move from taxation on a "solicitor and client" basis to taxation on an "indemnity basis".

66. Indemnity costs means all costs incurred except any which have been unreasonably

[14] Halsbury's at [745].

[15] *Monfort Brothers of St Gabriel v Jaimi Associates* [1998] TOSC 1 referring to *EMI Records Limited v Ian Cameron Wallace Ltd and Anor.* [1982] CH. D. 980.

incurred or are of an unreasonable amount. In applying those exceptions, the receiving party will be given the benefit of any doubt.[16]

*Conduct warranting an order for indemnity costs*

67. Courts in the United Kingdom, Australia and New Zealand have long accepted the general principle that the usual award of party/party costs to the successful party should be made unless 'there is some special or unusual feature in the case to justify the court exercising its discretion in that way'.[17]

68. It is not possible to define the exact circumstances in which indemnity costs might be ordered. The categories for the award of indemnity costs are not rigid. It is a matter, in each case, of the judge exercising his discretion on the facts before him.[18]

69. The question must always be whether the particular facts and circumstances of the case in question warrant the making of an order for payment of costs other than on a party/party basis. However, the existence of particular facts and circumstances capable of warranting the making of an order for payment of costs, for instance, on the indemnity basis, does not mean that judges are necessarily obliged to exercise their discretion to make such an order. Subject to the discussion on the jurisdiction of this Court above, costs are usually always in the discretion of the trial judge. Provided that discretion is exercised having regard to the applicable principles and the particular circumstances of the instant case, its exercise will not be found to have miscarried unless it appears that the order which has been made involves a manifest error or injustice: *Free Serbian Orthodox Church Diocese for Australia and New Zealand Property Trust v Bishop Irinej Dobrijevic (No 3)* [2017] NSWCA 109.

70. Examples of conduct for which indemnity costs have been ordered include:

    (a) where a party to litigation acts in a way that could be described as disgraceful or

---

[16] *Singleton v Macquarie Broadcasting Holdings Ltd* (1991) 24 NSWLR 103.

[17] *Bellamy's Australia Limited v Basil (No 2)* [2019] FCAFC 169 citing *Colgate-Palmolive v Cussons* (1993) 46 FCR 225, *Australian Transport Insurance Pty Ltd v Graeme Phillips Road Transport Insurance Pty Ltd* (1986) 71 ALR 287 at 288, *Trade Practices Commission v Nicholas Enterprises* (1979) 28 ALR 201 at 207 and *Preston v Preston* (1982) 1 All ER 41 at 58. See also *Slater v Blomfield* [2019] NZCA 664.

[18] *Munkenbeck and Marshall v McAlpine* 44 Con. L.R. 30, CA. *Australian Transport Insurance Pty Ltd v Graeme Phillips Road Transport Insurance Pty Ltd* (1986) 10 FCR 177 at 178; 71 ALR 287 at 288; *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225; 118 ALR 248; *Bass Coast Shire Council v King* [1997] 2 VR 5 at 29.

deserving of moral condemnation;[19]

(b) where a party has acted unreasonably in connection with the litigation in breach of the direction of the court;[20]

(c) where the losing party has engaged in unmeritorious, or deliberate or high-handed or other improper conduct such as to warrant the court showing its disapproval and at the same time preventing the successful party being left out-of-pocket;[21]

(d) where a party appealed and did not make out any ground of appeal and should have known that an appeal was hopeless;[22]

(e) whenever it appears that an action had been commenced or continued in circumstances where the Plaintiff, properly advised, should have known that he had no chance of success. In such cases, which are fortunately rare, the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law;[23]

(f) misconduct in the litigation may be grounds for awarding costs on a more generous basis than standard. As a rule, it is the conduct of the party as litigant, not conduct prior to the commencement of the litigation that is relevant.[24] However, there may be circumstances justifying departure from the ordinary rule;[25]

(g) the making of an allegation, known to be false or irrelevant, that the opposite

---

[19] *Wailes v Stapleton Construction & Commercial Services Ltd* [1997] 2 Lloyds' Rep. 112; *Glyne Investments Ltd v Hill Samuel Life Assurance Ltd*, UK June 17, 1997, unreported, Moses J.

[20] *Baron v Lovell, The Times*, September 14, 1999, CA. referred to in the White Book, 2001 [44.4.2]. See also *R.T. Group Ltd v Belbes* [2015] TOSC 52 at [17], where Scott J held that awards of indemnity costs are rather unusual and are generally awarded only in cases of contumelious default.

[21] *Australian Guarantee Corp Ltd v De Jager* [1984] VR 483 at 502; *Re Smith; Ex parte Rundle (No 2)* (1991) 6 WAR 299; *New South Wales Medical Defence Union Ltd v Crawford* (1993) 11 ACSR 406 at 428 (NSWSC).

[22] *Sunland Waterfront (BVI) Ltd v Prudential Investments Pty Ltd* [2013] VSCA 265.

[23] *Fountain Selected Meats (Sales) Pty Ltd v Int Produce Merchants Pty Ltd* (1988) 81 ALR 397 at 401; *Colgate-Palmolive v Cussons* (1993) 46 FCR 225; *DS Clarke Nominees Pty Ltd v Adder Holdings Pty Ltd* [2015] FCA 277. See also *Slater v Blomfield* [2019] NZCA 664 applying *Bradbury v Westpac Banking Corp* [2009] 3 NZLR 400 at [29] which adopted Goddard J's approach to indemnity costs in *Hedley v Kiwi Co-operative Dairies Ltd* (2002) 16 PRNZ 694 (HC) at [11] who adopted the categories of Sheppard J in *Colgate-Palmolive Co v Cussons Pty Ltd*, supra. See also Niu J in *ANZ Banking Group Ltd v Koto* [2019] TOSC 51 at [15].

[24] *NMFM Property Pty Ltd v Citibank Ltd (No 2)* (2001) 187 ALR 654.

[25] *Ali v Hartley Poynton Pty Ltd (No 3)* [2002] VSC 292; *Velissaris v Fitzgerald* [2008] VSCA 152 at [20]; *Sitzler Savage Pty Ltd v Northern Mining Holdings Pty Ltd* [2012] VSC 104; *Slater v Blomfield*, supra.

party is guilty of fraud;[26]

(h) conduct which causes loss of time to the court and to other parties;[27]

(i) conduct which amounts to a contempt of court;[28]

(j) the failure until after the commencement of the trial, and without explanation, to discover documents, the timely discovery of which, would have considerably shortened, and very possibly avoided, the trial;[29]

(k) an imprudent refusal of an offer of compromise – where a party who has rejected an offer ultimately fails to achieve a better outcome than provided for in the offer may lead to a presumptive entitlement to indemnity costs with respect to the period subsequent to the offer. It is necessary for the party seeking indemnity costs to demonstrate that the other party's refusal of the offer was unreasonable;[30]

(l) where a late substantial amendment was sought during trial which could lead to the adjournment of the trial;[31]

(m) conduct in the litigation amounting to an abuse of process;[32]

(n) on strike out applications, where a Plaintiff with an arguably good cause of action persistently fails to properly plead the case;[33] and

(o) where a Plaintiff persists in prosecuting a proceeding without regard to the evidentiary difficulties in the case.[34]

---

[26] *Forester v Read* (1870) 6 LR Ch App 40; *Christie v Christie* (1873) 8 LR Ch App 99; *Degman Pty Ltd (in liq) v. Wright (No. 2)* (1983) 2 NSWLR 354; *Andrews v Barnes* (1988) 39 Ch D 133; *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189 at [7]; cf *Harrison v Schipp; Cameron v Schipp* [2001] NSWCA 13; *Hypec Electronics Pty Ltd (in liq) v Mead* (2004) 61 NSWLR 169 at [45]–[46] ; *Moyes v J & L Developments Pty Ltd (No 3)* [2007] SASC 268; *Slater v Blomfield*, supra.

[27] *Ugly Tribe Co Pty Ltd v Sikola*; *DS Clarke Nominees Pty Ltd v Adder Holdings Pty Ltd*, supra. See also Ford J in *Salvation Army (Tonga) Trust v Nau* [2001] Tonga LR 66 referring to *Harley v McDonald* [2002] 1 NZLR 1 (PC) at [67].

[28] *Ugly Tribe Co Pty Ltd v Sikola*; *DS Clarke Nominees Pty Ltd v Adder Holdings Pty Ltd*, supra.

[29] *Ugly Tribe Co Pty Ltd v Sikola*, supra.

[30] *Bellamy's Australia Limited v Basil (No 2)* [2019] FCAFC 169 referring to *Fountain Selected Meats (Sales) Pty Ltd v Int Produce Merchants Pty Ltd*, supra, *Colgate-Palmolive v Cussons*, supra and *DS Clarke Nominees Pty Ltd v Adder Holdings Pty Ltd*, supra;

[31] *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 4)* [2015] FCA 570.

[32] *Re Wilcox; Ex parte Venture Industries Pty Ltd* (1996) 141 ALR 727; *Bollag v A-G (Cth)* (1997) 149 ALR 355 at 376. See also Shuster J in *Vaitu'ulala v 'Iongi* [2010] TOSC 18.

[33] *Sammy Russo Stores Pty Ltd v Safeway Stores Pty Ltd* (1998) ATPR ¶41-641; *Liberty Financial Pty Ltd v Scott* [2005] VSC 472.

[34] *Yates Property Corporation Pty Ltd v Boland (No 2)* (1997) 147 ALR 685.

*Conclusion here*

71. Having considered the above principles and examples with the circumstances of the instant case, I am not persuaded it is appropriate to order indemnity costs here.

72. Firstly, the first indication the Plaintiff gave of seeking such an order was in his reply submissions on costs and interest. Where a plea is to be made for indemnity costs by reason of the other party's pre-litigation conduct, in my view, and as a matter of procedural fairness, it should be pleaded. Further, the Plaintiff here did not raise the issue in his primary submissions on costs. It was clearly open to him to do so. It was inappropriate to raise the issue for the first time in reply submissions. The Defendant has not and will not have an opportunity to respond. The action must be brought to finality.

73. Secondly, in applying the general rule that it is the conduct of the party as litigant, not conduct prior to the commencement of the litigation, that is relevant, the Defendant's conduct of the litigation does not warrant an order for indemnity costs. The Plaintiff will be compensated on a party/party basis for the costs of having to address the other two bases of defence abandoned at the commencement of the trial. The Plaintiff has not suggested that they should never have been run or that they were doomed to fail. Had that been the case, then it was open to the Plaintiff to bring a summary judgment application in respect of those defences much earlier.

74. Thirdly, and alternatively, even if the Defendant's pre-litigation conduct were to be taken into account, then while it:

    (a) was clearly unsatisfactory and fell below that expected of any employer, especially a Public Enterprise Company here in the Kingdom; and

    (b) necessitated the Plaintiff bringing this action,

    I do not consider that it constitutes some special or unusual feature in the case to justify the court exercising its discretion to award costs on a more generous basis than standard.

75. In and of itself, the Defendant's said conduct, in my view, falls short of conduct which might be described as 'disgraceful conduct or deserving of moral condemnation'.

Further, there was no evidence during the trial on which any safe conclusion could be reached, nor did the Plaintiff submit, that the Defendant's actions during the events leading to the dismissal were motivated by malice or taken in wilful disregard of the known facts or the clearly established law.

76. Ultimately, the case was one of an employer who undertook processes to investigate allegations of misconduct on the part of an employee. Errors during the execution of those processes together with an erroneous interpretation of what constitutes 'gross misconduct led to the decision to dismiss. Those errors, and resultant breaches of the Plaintiff's rights, have been compensated for in the damages awards in the judgment.

77. In those circumstances, to order indemnity costs would, in my view, overcompensate the Plaintiff and amount to an inappropriate penalising of the Defendant.

***Travel costs for the proceeding?***

78. I have accepted that the effects of the publicity surrounding the Plaintiff's wrongful dismissal for gross misconduct caused him to have to return to Sri Lanka where he has resided since. The Plaintiff has had to travel from Sri Lanka to Tonga to prosecute this action and attend the trial to give evidence and instruct counsel. I consider that the Plaintiff's reasonable costs of that travel and for that purpose are reasonably necessary or proper for the attainment of justice and they should be allowed on any party/party taxation.

## Result

79. The Plaintiff is entitled to interest on his claims up to the date of judgment in the total sum of $17,608.35.

80. Pursuant to Order 30 rule 2 of the Supreme Court Rules, interest will accrue on the judgment sum plus the above interest, at the rate of 10% per annum, until the judgment is satisfied.

81. The Defendant shall pay the Plaintiff's costs of and incidental to the proceeding (excluding any costs the subject of previous orders), on a party/party basis, to be taxed in default of agreement. Such costs are to include the Plaintiff's reasonable costs of return travel from Sri Lanka to Tonga for the trial of the action.

82. There has been no opposition to the Plaintiff's request for return of security for costs in the sum of $10,000 paid into court on 22 August 2017, plus any accrued interest. That order will be made.

83. A separate final order reflecting the above will accompany this ruling.


NUKU'ALOFA
17 February 2020

M.H. Whitten QC
LORD CHIEF JUSTICE