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

CV 52 of 2019

BETWEEN:

PUBLIC SERVICE COMMISSION Plaintiff

-and-

PUBLIC SERVICE TRIBUNAL First Defendant

CLAUDE TUPOU Second Defendant

Application for judicial review

JUDGMENT

BEFORE:	LORD CHIEF JUSTICE WHITTEN
Counsel:	Mr S. Sisifa S.G. with Mrs Tupou for the Plaintiff
	No appearance for the First Defendant
	Mr S. Stanton (by video link) with Mrs P. Tupou for the Second Defendant
Date of hearing:	11 May 2020, 13 August 2020
Date of judgment:	1 September 2020

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Introduction

1. In this proceeding, the Plaintiff ("***the Commission***") seeks judicial review of the First Defendant's ("***the Tribunal***") decision to allow an application by the Second Defendant ("***Mr Tupou***") for an extension of time within which to appeal against the Commission's decision to terminate Mr Tupou's employment contract as CEO of the Ministry of Education.

2. The Tribunal did not participate in the proceeding and is thereby taken to abide the decision of the Court.

3. Leave to apply for judicial review, pursuant to order 39 of the Supreme Court Rules, was granted on 30 October 2019. Thereafter, the parties filed almost 3,000 pages of pleadings, affidavits, exhibits and authorities. In the final throes of the second of two days of hearing, discussions between the Bench and Counsel led to the parties agreeing upon the appropriate resolution of the proceeding.

4. Accordingly, these reasons are more succinct than might otherwise have been the case had the parties required the Court to consider and determine every issue raised. However, the issue on which the proceeding was ultimately determined extends beyond the parties hereto and may affect any employees of, or other persons associated with, the Public Service, who are or may become involved in appeals from decisions of the Commission to the Tribunal. Therefore, some exposition of the background, issues and analysis leading to the agreed result is required.

Background

5. The Commission relied on two affidavits of its Acting Chairman, Mr Simione Sefanaia, sworn 1 October 2019 and 25 May 2020. Mr Tupou relied on his affidavit sworn 17 February 2020. From those affidavits and the voluminous exhibit material filed, the following background is distilled.

6. On 31 May 2016, Mr Tupou was appointed Chief Executive Officer of the Ministry of Education for a term of three years. Pursuant to his contract of employment, 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.

7. Clause 25 of the contract, entitled "*Unsatisfactory performance after the initial three and six months review from appointment*", provided that where at any time after the initial three and six month review periods 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, 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, and after giving him an opportunity to be heard, the Commission could terminate his contract of employment and pay him termination payments as set out therein.

8. By comparison, clause 26 enabled the Commission, in consultation with the responsible Minister, and subject to any prescribed disciplinary procedures, to terminate Mr Tupou's contract if, among other things, he breached the Public Service Code of Ethics and Conduct 2010 ("***Code of Conduct***") or where his conduct was such that he should be dismissed under the *Public Service Act* 2002 as amended ("***the Act***") or the Public Service Regulations.

9. Clause 29 permitted Mr Tupou to exercise any prescribed right of appeal procedures provided by any Act or Regulation. Clause 30 provided that the provisions of the Act, any Public Service Regulations and the *Public Finance Management Act* 2002 applied to the parties and their contract.

10. The Commission alleged that Mr Tupou's performance as CEO was unsatisfactory in several respects. The complaints were either initiated or supported by the Minister. 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 contended that that process was conducted in accordance with clause 25 of Mr Tupou's contract.

11. 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 his contract was terminated in accordance with clause 25.2.

Mr Tupou's appeal to the Tribunal

12. On 20 April 2019, Mr Tupou lodged a notice of appeal with the Tribunal in respect of the Commission's decision to terminate his contract of employment. The notice of appeal referred to s.13(5) of the Act which provides that:

> *"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."*

13. It also referred to clause 25 of the employment contract which, as noted above, provided a procedure for termination for unsatisfactory performance. The notice then proceeded to catalogue a history of difficulties between Mr Tupou and the then Minister, which may be summarised as follows:

    (a) In February 2018, he was informed that the Minister and Cabinet had lodged complaints against him to which he was required to respond. The most significant of the complaints related to Mr Tupou's refusal to sign a cancellation of a completed recruitment process and to sign a contract to hire a Mr Piukala's software company instead. The second complaint related to staff not receiving salary increments due to a lack of performance assessments.

    (b) In April 2018, Mr Tupou responded to the complaints. From then until October 2018, he heard nothing further about them from the Minister or the Commission.

    (c) Throughout that period, Mr Tupou maintained his refusal to engage Mr Piukala's software company because he considered it contrary to the Procurement Regulations and with the statements made in the cancellation letter distributed to the bidders. The Minister, on the other

hand, made it quite clear that the contract should be 'sole-sourced' to Mr Piukala.

(d) That impasse led to Mr Tupou receiving a letter from the Commission on 2 October 2018 requiring him to respond to the Minister' complaint and recommendation that Mr Tupou's contract as CEO be terminated. The Minister stated that he was not able, and did not want, to work with Mr Tupou anymore, and that the "cold relationship" developing between them would have a detrimental effect on the progress of the Ministry.

(e) Mr Tupou met with the Commission to discuss the complaint and he agreed that he would try and progress the relationship.

(f) However, on 18 December 2018, the Minister lodged another complaint against Mr Tupou, and this time also with the Prime Minister.

(g) In January 2019, Mr Tupou responded to that complaint. He identified that the reason for the Minister's displeasure was Mr Tupou's refusal to award Mr Piukala the contract. He recounted that, "as punishment", the Minister cancelled most, if not all, trips intended for Mr Tupou and bypassed him in issuing directives to staff. Mr Tupou remained steadfast in his refusal of the Piukala contract.

(h) On 11 January 2019, the Commission responded that the termination of Mr Tupou's contract was justified for unsatisfactory performance and offered him an opportunity to be heard pursuant to clause 25 of his contract. His response was required within seven days although the Commission said he was free to seek more time if required.

(i) On 14 January 2019, Mr Tupou requested further time with reasons.

(j) The next day, the Commission refused his request for further time and demanded his response be lodged by Friday, 18 January 2019.

(k) On that date, Mr Tupou filed another response comprising more than a thousand pages.

(l) The following Monday, 21 January 2019, the Commission terminated Mr Tupou's contract for "unsatisfactory performance".

14. Mr Tupou's appeal was based on a myriad of grounds for relief. They included that the Commission's decision:

(a) was dictated by the Prime Minister and the Minister;

(b) had adopted the allegations against him blindly without making its own assessment as the decision-maker and had therefore abdicated its responsibility to consider the merits of his case and simply 'rubberstamped' the recommendation of the Minister;

(c) was for the improper purpose of punishing him for not complying with the orders of the Prime Minister and Minister in relation to the Piukala contract and not agreeing to the Commission's position on a staff restructure, remunerations and promotions;

(d) demonstrated bias against him;

(e) failed to take into account relevant considerations and took into account irrelevant considerations;

(f) breached his legitimate expectation; and

(g) was unreasonable.

15. Mr Tupou sought a declaration that the Commission's decision to terminate was unlawful and an order setting it aside. He also sought orders for payment of what was due to him under his contract had it not been terminated early with a gratuity pursuant to clause 15 (if appropriate) and damages for unnecessary injury to his professional reputation in the sum of $80,000.

16. Mr Tupou's notice of appeal did not specify any contractual or legislative provision by which his appeal was brought.

Mr Tupou's application to extend time within which to appeal

17. On 3 May 2019, Mr Tupou submitted an ex parte application (dated 30 April 2019) to the Tribunal for an extension of time within which to lodge his appeal against the Commission's decision to terminate his employment contract. The grounds of his application included:

18. 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;

19. 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;

20. 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;

21. that the **14 days required by the Act** was not sufficient for him to collate the information required to bring about his appeal; and

22. 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.

23. 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.

24. ...

25. On 30 April 2019, Mr Tupou filed with the Tribunal an ex parte application for an extension of time within which to lodge his appeal. The grounds for his application included his belief that as his contract had been terminated, it was "simply misunderstood that he was no longer an employee as defined under section 21A(2) of the Public Service Act and he proceeded to prepare an application for judicial review".

26. A judicial review application was filed within the three-month period prescribed by order 39 of the Supreme Court Rules. However, an issue of jurisdiction was raised which resulted in Mr Tupou lodging his application for an extension of time before the Tribunal. In his supporting affidavit, Mr Tupou said that he believed the Tribunal possessed jurisdiction for cases such as his, but that if he sought judicial review prior to filing with the Tribunal, his case might be referred back or face a defence of lack of jurisdiction in court. He added that he should not be deprived of the right to appeal because of a mistaken belief as to jurisdiction. Mr Tupou further deposed that he was not seeking reinstatement to the position of CEO of the Ministry and therefore any advertising for his replacement would not be affected and the Commission would not suffer any prejudice if an extension was granted.

27. Like his notice of appeal, Mr Tupou's application for an extension of time within which to appeal did not specify any legislative provision upon which the application was based. However, one of the grounds relied upon, was "that the 14 days required by the Act was not sufficient for the Appellant to collate the information required for him to bring about his appeal".

Relevant legislation governing appeals to the Tribunal

28. Before turning to the Tribunal's decision on Mr Tupou's application to extend time, it is first instructive to consider the statutory framework relevant to appeals from decisions of the Commission to the Tribunal.

The Act

29. Both the Commission and the Tribunal are creatures of statute.

30. Part II of the *Public Service Act* establishes and regulates the operations of the Commission. Section 6 describes the Commission's principal functions as including to appoint, discipline and dismiss employees and resolve employment disputes,[1] determine practices and procedures relating to the discipline and

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[1] s.6(f)

termination of employment of employees[2] and manage and mitigate disputes and grievances.[3]

31. Section 12 requires all appointments, disciplinary matters and terminations within the Public Service to be made in accordance with the Act 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*.

32. As noted above, s.13(5) permits the Commission, after consultation with the relevant Minister, to remove a Chief Executive Officer from office due to nonperformance or misconduct.

33. Part IV provides for the creation of the Code of Conduct for the Public Service with which all employees are required to comply, as well as dispute and disciplinary procedures.

34. Section 21 provides:

> **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.
>
> [emphasis added]

35. Part VA establishes the Tribunal and specifies the subject matter, timing and procedure for appeals to the Tribunal and requirements in respect of its decisions.

36. Similar to s.21(2), s.21A empowers the Tribunal to hear appeals regarding ***any decision*** made by the Commission regarding an employee under the Act or any regulations made thereunder.

37. Relevantly to the instant case, s.21C provides:

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[2] s.6(i)
[3] s.6(q)

> **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.
>
> [emphasis added]

38. Section 22 enables the Prime Minister, with the consent of Cabinet, to make Regulations for the proper and efficient administration of the Act. Section 27 provides that, subject to the Constitution, the provisions of the Act shall prevail when any of its provisions conflict with the provision of any other law.

The Regulations

39. The Regulations which have sprung from ss 21 and 22 of the Act are the *Public Service (Disciplinary Procedures) Regulations* ["***Disciplinary Regulations***"] and the *Public Service (Grievance and Dispute Procedures) Regulations* ["***Grievance and Dispute Regulations***"].

40. Regulation 3 of the Disciplinary Regulations empowers the Commission to initiate disciplinary action of its own motion including against a Chief Executive Officer. The Regulations then set out a series of intricate procedures which include commencing with an enquiry or investigation, categorization as to whether an allegation is a minor or serious disciplinary case, specific provisions for serious financial irregularities, other procedures for serious disciplinary charges, the establishment of a Charge Formulation Committee whose powers include laying appropriate charges against an employee and recommending suspension of employee to the Commission, and the establishment of a Committee of an Enquiry to undertake an investigation. The various available results of enquiries and investigations include penalties such as acquittal,

reprimand, suspension and dismissal or any other action the Commission may consider necessary.

41. Part III deals with appeals to the Tribunal.

42. Regulation 16 provides:

> **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.
>
> [emphasis added]

43. Regulation 21 provides:

> **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.
>
> [emphasis added]

44. For completeness, I refer 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.

45. 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.

The Tribunal's decision to extend time

46. On 28 May 2019, Mr Tupou's application for an extension of time was heard by the Tribunal.

47. On 25 June 2019, the Tribunal delivered its decision.

48. The Tribunal set out the terms of ss 21 and 22 of the Act and noted that the Disciplinary Regulations were made in the exercise of the powers conferred by those provisions. It described the Disciplinary Regulations as being:

> *"... 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...."*.
>
> [emphasis added]

49. The Tribunal then recited the relevant provisions of s.21C which, as noted above, requires appeals to the Tribunal to be lodged within 14 days after service of the decision to be appealed and also provides that the Tribunal may, upon application in writing **before the due date**, extend the time for making an appeal.

50. Under that provision, Mr Tupou had until 4 February 2019 to lodge his appeal or any application to extend the time for doing so. He filed his appeal on 20 April 2019 and his application for an extension of time on 3 May 2019. Accordingly, there can be no doubt that Mr Tupou did not file his application for an extension of time "before the due date".

51. However, in the face of that almost three month delay, the Tribunal stated:

> *"8. Clearly, the present application is not being made under this provision. Therefore, the requirements imposed by section 21C(3) are not relevant."*

52. The Tribunal expressed its belief[4] that the difference in requirements for lodging appeals under the Act was "intentional" and was the "reason for the apparent discrepancies in the appeal provisions" between the Act and the Disciplinary Regulations. It recapped[5] the requirements of the Act as being 14 days for lodging of an appeal with an extension available only if an application for same was made before the due date (i.e. within the 14 day appeal period). That was compared[6] with the requirements for appeals under the Disciplinary Regulations of 30 days within which to lodge an appeal with an extension being available upon such terms as the Tribunal thinks fit if it considers the justice of the case requires it; in other words, no time limit for any application for an extension of time.

53. The Tribunal also noted[7] that the Grievance and Dispute Regulations require appeals to be lodged within 14 days and do not provide for any right to apply for an extension of that time.

54. The Tribunal then referred to s.10(d) of the *Interpretation Act* which provides:[8]

> "**10 Power to make regulations**
>
> When in any Act which is now or may hereafter be in force power is given to any authority to make rules or regulations, the following provisions shall, unless in any case the contrary is expressly provided or by necessary implication appears to be intended, have effect with reference to the making and operation of the rules and regulations –
>
> ...
>
> (d) no rule or regulation shall be inconsistent with the provisions of any Act;"
>
> [emphasis added]

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[4] [9]
[5] [10]
[6] [11]
[7] [12]
[8] [13]

55. Then, critically in the present case, at paragraph 14 of its reasons, the Tribunal expressed its belief that:

> *"... Section 10(d) above does not apply to the present case. The provision of the Public Service Act [section 21C(3)] which is inconsistent with the Regulations are not relevant, because the Regulations were empowered to be made under different provisions of the Act (mainly sections 21 and 22)."*
>
> [emphasis added]

56. It also opined that it was "clear" that the Disciplinary Regulations and the Grievance and Dispute Regulations "by necessary implication, appear to have been intended to be applied separately."[9]

57. The Tribunal then proceeded to apply regulation 21 of the Disciplinary Procedures to Mr Tupou's application.[10] After recording that it had considered the submissions of the parties and the grounds for the application, the Tribunal stated that it believed that there were "arguable grounds for the appeal to be heard" and therefore held:

> *"18. ... that the justice of the case requires that an extension of time for the lodging of an appeal by the Applicant be allowed."*

The hearing in this proceeding

58. The hearing in this proceeding commenced on 11 May 2020. During submissions that day, two additional issues arose, namely, the adequacy of the Tribunal's reasons for its decision and whether regulations 16 and 21 of the Disciplinary Regulations are inconsistent with s.21C(3) of the Act. The Commission applied for leave to amend its claim. Leave was granted. Amended pleadings were filed.

59. When the hearing resumed on 13 August 2020, Mr Stanton appeared for Mr Tupou by video link from Sydney with Mrs P. Tupou here in Nuku'alofa. Both

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[9] [15]
[10] [17]

counsel reiterated their respective submissions from the first hearing and spoke to further written submissions addressing the additional issues.

The Commission's case

60. The Commission contends that the Tribunal's decision was flawed and that it erred in law, because, in summary:

    (a) the Commission's 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;

    (b) that course was based on advice from the then Acting Attorney General;

    (c) regulations 16 and 21 were only applicable if Mr Tupou was dealt with under clause 26 of his employment contract;

    (d) the Commission did not conduct any disciplinary proceedings against Mr Tupou in respect of which he could rely upon the relevant provisions of the Disciplinary Regulations as the basis for his appeal and application for an extension of time within which to appeal;

    (e) that Mr Tupou was dealt with under clause 25 of his contract means that clause 29 of the contract only gives rise to the rights of appeal prescribed under the Act;

    (f) Mr Tupou's appeal ought be taken to have been lodged under s.21C(2)(b) of the Act;

    (g) as Mr Tupou's application for an extension of time was not lodged within 14 days after being served with the Commission's decision, the Tribunal did not have power to entertain it and it should have been dismissed.

61. Those errors are said to have resulted in the Tribunal taking into account irrelevant considerations, failing to take into account relevant considerations, proceeding on mistakes of fact and law, and that its decision was so unreasonable that no reasonable tribunal could have reached it.

62. On the question of adequacy of reasons, the Commission submitted that:

(a) the Tribunal failed to provide adequate reasons for its decision, particularly at paragraph 8 thereof,[11] and thereby breached the requirements of procedural fairness by preventing the Commission from knowing whether it could 'maintain an action for judicial review on independent grounds such as illegality or irrationality;

(b) by reason of Mr Tupou's failure to stipulate, in both his notice of appeal and application, the statutory basis upon which they were being brought, the Tribunal erred in law and fact when it concluded that the application was not being made under s.21C of the Act and that therefore the requirements therein were not relevant;

(c) the Tribunal failed to provide any reasonable explanation for its finding that regulation 21 applied to Mr Tupou's application when he was never subject to any disciplinary action or sanction which could be subject to an appeal under the Disciplinary Regulations;

(d) while clause 29 of Mr Tupou's employment contract entitled him to exercise any prescribed right of appeal provided by any Act or Regulations, that clause should be construed so that appeal rights under regulations 16 and 21 should only apply if Mr Tupou was dealt with under clause 26 of his contract for misconduct.

63. On the question of potential inconsistency, counsel for the Commission *initially* submitted that:

(a) the relevant provisions of the Act and the Disciplinary Regulations were "not inconsistent" for the purposes of s.10(d) of the *Interpretation Act* as "they each provide rights on appeals on clear and distinct matters";

(b) the basis for the distinction was said to be that appeal rights and timeframes under the Disciplinary Regulations apply in respect of

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[11] Relying upon the English Court of Appeal decision in *R v Civil Service Appeal Board; ex parte Cunningham* [1991] 4 All E.R. 310.

decisions by the Commission on disciplinary matters, whereas the appeal rights and timeframes provided by the Act will apply to any other decisions made by the Commission under the Act;

(c) as Mr Tupou's dismissal was pursuant to clause 25 of his contract, his right of appeal against that decision arose only pursuant to the Act;

(d) in that circumstance, there was no inconsistency between the appeal provisions of the Act and those in the Disciplinary Regulations;

(e) however, because the Tribunal inferentially decided that the Disciplinary Regulations applied to Mr Tupou's appeal and application, the Tribunal "triggered an inconsistency" between s.21C of the Act and regulations 16 and 21 of the Disciplinary Regulations that is prohibited by s.10(d) of the *Interpretation Act*.

64. Finally, the Commission contended that the Tribunal's decision was unreasonable in the '*Wednesbury*' sense,[12] because "it was a known fact to the (Tribunal) that (Mr Tupou) was never subject to any disciplinary action or sanction under the (Disciplinary Regulations)" that could be appealed under regulation 16 or for which an application for an extension of time to appeal could be made under regulation 21.

Mr Tupou's case

65. The written submissions on behalf of Mr Tupou may be summarised as follows:

(a) The initial submissions were largely dedicated to recounting the history and nature of the complaints by the Minister against Mr Tupou.

(b) The Commission's claim in this proceeding amounted to an abuse of process because it filed its application for leave to apply for judicial review at a time when his substantive appeal was being heard by the Tribunal. The Commission failed to comply with directions by the Tribunal so that the hearing of the substantive appeal was not heard until 29 October

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[12] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

2019. Leave to apply for judicial review was granted by this Court on 1 November 2019. Mr Tupou says that throughout that period, the Commission did not make either himself or the Tribunal aware of the Commission's intention to apply for judicial review of the Tribunal's decision to extend time. As a result, the Tribunal has withheld its ruling on the appeal until the outcome of this proceeding. It is submitted that such conduct is "clearly unethical and an abuse of the proper process of the Court" which has "extremely prejudiced (Mr Tupou) financially, emotionally and morally" and amounts to conduct "unfitting of the plaintiff and its position, purpose in government and with its resources versus a dismissed employee without a means of an income." This complaint was not pressed on the second day of the hearing before me.

(c) The Commission's argument that as Mr Tupou's contract was terminated pursuant to clause 25 thereof, his only rights of appeal were pursuant to the Act, is incorrect because clause 29 of the contract allowed him to exercise any prescribed right of appeal procedures provided by any Act or Regulation.

(d) In the course of the proceedings on the application to extend time, it was made clear that the application was made under regulation 21 rather than s. 21C of the Act. It was acknowledged that if Mr Tupou had elected that latter provision, he would have had no prospect whatsoever of an extension of time because the Tribunal would not have had jurisdiction to entertain the application. Reference was made to the submissions on behalf of Mr Tupou on the extension of time application. Sure enough, paragraph 1 of those submissions stated: "*This is an application for an extension of time pursuant to section 21 of the Public Service (Disciplinary Procedures) (Amendment) Regulations 2010 for the Appellant to file his appeal.*" Curiously, however, that assertion does not appear anywhere within the Tribunal's reasons for its decision to extend time. Moreover, the written submissions below do not contain any basis or rationale for the assertion that the application was brought pursuant to the Disciplinary Regulations. Nor do they shed any light on whether the substantive

appeal was being brought pursuant to the Act or the Disciplinary Regulations.

(e) A further reason that the Commission's argument that s.21C(2)(b) of the Act was the appropriate avenue for his appeal is incorrect, is that the main complaints against Mr Tupou related to what could be characterised as breaches of discipline under the Code of Conduct "which would/should give rise to disciplinary proceedings under the ... Regulations". Similarly, as Mr Tupou's appeal could be effectively characterised as one for wrongful dismissal, an appeal could therefore lie under the Disciplinary Regulations.

(f) By reference to a number of English, Australian and New Zealand authorities, the legislation did not intend that a failure to comply with time provisions as apply here would deprive the Tribunal of jurisdiction and render any decision which it purported to make null and void.

66. Following the pleading amendments, the following supplementary submissions were made on behalf of Mr Tupou:

(a) Neither clause 25 nor 26 of his employment contract, nor any other provision of it, excluded Mr Tupou's common law rights. Therefore, where, as here, there is a purported termination for unsatisfactory performance, which in substance and in fact should have been based on alleged misconduct, Mr Tupou is entitled to rely on his common law rights and the Commission's breaches of them.

(b) The Commission cannot take advantage of its own breach by in fact terminating for misconduct albeit under the guise of unsatisfactory performance thereby seeking to preclude Mr Tupou from agitating his complaints before the Tribunal.

(c) As subclause 1.2 of the employment contracts acknowledges, Mr Tupou was appointed pursuant to s.13(2) of the Act. The Act requires a person in the position of Mr Tupou to enter a contract on prescribed terms. Therefore, the contract incorporated the statutory terms and regulations

relevant to termination whether for unsatisfactory performance or misconduct.

(d) In further support of the submission that the true characterisation of the basis for Mr Tupou's dismissal was misconduct, references were made to the evidence of alleged insubordination by him which amounts to misconduct.

(e) The Court "*must make the determination as to whether the matter was 'unsatisfactory performance and accordingly a non-disciplinary matter" or for that matter whether it was in the circumstances, ... misconduct...*".

(f) As the Commission's decision was in effect based on allegations of misconduct, and not unsatisfactory performance, that enabled the "invocation of s.21(2) of the Act and in turn s.21C(2)". Those provisions should be interpreted as part of remedial and/or beneficial legislation when considering Mr Tupou's application for an extension of time.

(g) The Tribunal's decision to extend time was a proper exercise of discretion, and in accordance with *House v R* (1936) 66 CLR 499, "does not permit of the review that is sought to be undertaken by the" Commission here."

(h) Regulation 16 of the Disciplinary Regulations provides a right of appeal against any decision of the Commission to the Tribunal. As clause 29 of the contract enabled Mr Tupou to exercise any prescribed right of appeal provided by any Act or Regulation, the contract was clear and literally "covered the field". Regulation 21 enabled the Tribunal to extend time, at any time, upon such terms as it thinks fit, if it considered the justice of the case required it.

(i) On the question of potential inconsistency between the Act and the Disciplinary Regulations,[13] as the dismissal was in truth based on alleged misconduct "the appeal must be lodged in accordance with s.21C(2)(b)

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[13] [55]

and thus capable of being determined .as a disciplinary matter in accordance with s.21(1) of the Act".

(j) The Court of Appeal's observation in *Attorney General v Qian* [2019] TOCA 20 at [32] is "trite law". A number of other New South Wales decisions were cited in support of the principles in relation to inconsistencies between an enabling enactment and its regulations.

(k) It was then submitted[14] that "*there is no basis for discerning the inconsistency in respect of the Regulation and the Statute in the manner as sought to be undertaken with respect to the determination of such a provision.*"

(l) Therefore, there was no error of law on the face of the Tribunal's decision to extend time nor was the decision unreasonable in the *Wednesbury* sense.

Consideration

67. The grounds upon which the Tribunal's decision may be judicially reviewed have been conveniently classified as 'illegality', 'irrationality' and 'procedural impropriety': *Pekipaki v Fifita* [2018] TOCA 19 at [29]. Accordingly, the Court here is not concerned with the merits of the Tribunal's decision, but rather the process and procedure by which it arrived at its decision to extend time. Among other things, the Tribunal's decision must reflect a correct understanding of the law that regulates its decision-making power and must give effect to it.

68. The above factual and statutory background and summaries of the active parties' cases in this proceeding reveals the following principal issues for determination:

(a) whether the Tribunal's reasons for decision were adequate;

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[14] [72]

(b) the relevance or otherwise of whether Mr Tupoou's appeal and application to extend time were brought under the Act or the Disciplinary Regulations;

(c) 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; and

(d) whether the relevant appeal provisions of the Disciplinary Regulations are inconsistent with the corresponding provisions of the Act, and if so, the effect of any such inconsistency.

Adequacy of reasons

69. Section 21F of the Act provides, relevantly:

> (1) The Tribunal may make an order to affirm, vary, or set aside the Commission's decision.
>
> (2) The Tribunal shall –
>
> (a) make a written decision on an appeal as soon as practicable after the hearing has been completed; and
>
> (b) cause a copy of its decision to be served on each party to the proceeding within 7 days of the decision.
>
> (3) A decision referred to in subsection (2) shall include the Tribunal's reasons for the decision and its findings on material questions of fact and reference to the evidence or other material on which those findings were based.
>
> ...
>
> [emphasis added]

70. In my view, a decision on an appeal as referred to in subsection (2) includes not only the final decision on the substantive appeal but also decisions on what may be regarded as interlocutory applications such as that presently under consideration made during the course of (or, 'in') an appeal. For instance, had the Tribunal refused the application to extend time, that would have disposed of the substantive appeal albeit without adjudication on its merits. In either event, reasons are required. It may be noted that regulation 20(2) of the Disciplinary Regulations differs from the Act in that it requires the Tribunal to provide only a

summary of its reasons. The Grievance and Dispute Regulations are silent on the issue.

71. The principles relevant to the nature and content of a statutory obligation on an administrative tribunal to provide reasons for its decisions were assayed recently in *Public Service Commission v Public Service Tribunal* [2020] TOSC 58.[15] In a statutory context, the common law principle of fairness often provides the basis for the duty applying as the giving of reasons is essential to allow effective supervision by the courts: *R (on the application of CPR Kent) v Dover District* [2018] 2 All ER 121. A statutory requirement to state reasons is a requirement to say "why". To answer that "why", the relevant tribunal must identify the applicable law, ascertain the relevant facts, and then determine in light of that law and those facts the results which follow: *Ansett Transport Industry (Operators) Pty Ltd v Wraith* (1993) 48 ALR 500 at 507. The statement of reasons must explain the actual path of reasoning in sufficient detail to enable a court to see whether the decision is vitiated by error: *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 [55]. Reasons must be adequate and intelligible and must set out the conclusions on the principal important controversial points at issue indicating how any issue of fact and law was resolved. Parties to the proceedings and the courts should be able to see what matters have been taken into consideration and what view has been formed by the tribunal on the points of fact and law which arise: *South Buckinghamshire District Council v Secretary of State for Transport, Local Government and the Regions* [2004] 4 All ER 775.

72. Where adequate reasons are required but not given, a court may regard that as an error which vitiates the decision and may grant a quashing order and remit the matter for a fresh decision: *R v Westminster City Council, ex p Ermakov* [1996] 2 All ER 302. However, appellable error arising from inadequate reasons which gives rise to a miscarriage of justice does not necessarily result in a new trial. In an appropriate case, the reviewing court may

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[15] CV 49 of 2019 (19 August 2020) at [70] to [74].

itself determine the matter: *Mount Lawley Pty Ltd v Western Australian Planning Commission* (2004) 29 WAR 273.

73. Arguably, given the significant delay in lodging it, the first decision before the Tribunal on Mr Tupou's application was whether the Tribunal had jurisdiction to deal with it. That in turn required a determination as to whether the application was governed by s.21C of the Act or regulation 21 of the Disciplinary Regulations. That was an important decision for the obvious reason that if the Act applied, the Tribunal did not have jurisdiction to entertain the application.

74. The Tribunal's answer to the question was expressed in paragraph 8 of its decision:

> *"8. Clearly, the present application is not being made under this provision. Therefore, the requirements imposed by section 21C(3) are not relevant."*

75. Unfortunately, there is nothing clear at all about this pivotal aspect of the Tribunal's decision. Firstly, no reasoning whatsoever was provided by which to hope to understand the conclusion in the first sentence. Secondly, had it intended to have accepted the assertion in paragraph 1 of the written submissions on behalf of Mr Tupou before it, the Tribunal was required to have at least stated that acceptance as some basis for its conclusion that the application was not made under the Act. Even so, for the reasons mentioned above, there was nothing of the kind stated in either the notice of appeal or the application itself. Moreover, the submission did not contain any factual or legal basis for the bald assertion that the application was brought under regulation 21. Thirdly, the Tribunal's reasons did not note that the grounds for Mr Tupou's application included "*that the 14 days required by the Act was not sufficient for the Appellant to collate the information required for him to bring about his appeal*". On a moment's reflection, that could only be interpreted as a reference to the requirements of s.21C of the Act. Fourthly, it was common ground that the Commission's communicated decision to terminate Mr Tupou's contract was not specified to have been pursuant to the Disciplinary Regulations and that the relatively intricate procedures prescribed by the Regulations were never followed during the course of the many, varied and repeated complaints by the

Minister, through the Commission, about Mr Tupou's performance. Yet, the Tribunal failed to make any reference to those matters in purporting to arrive at its contrary decision that the application was made pursuant to the Regulations.

76. One is therefore left with little doubt that the inclusion in Mr Tupou's submissions of the assertion that his application was being made under regulation 21 was a belated, albeit understandable, attempt to gain the benefit of the temporally favourable terms of that regulation and escape the fatal consequences of the Act.

77. In my view, paragraph 8 of the decision does not contain any or any adequate reasons. On this issue, the Tribunal failed to identify the applicable law, ascertain the relevant facts, and then determine in light of that law and those facts the result which it considered should follow. The lack of reasons has left the Commission and this Court unable to ascertain whether this important part of the decision is internally vitiated by an error of law. But for the further and far more insurmountable obstacles for the defence of the Tribunal's decision overall, as discussed below, I would have been minded to set aside the decision for inadequate reasons and remit the matter for further consideration and elucidation of, at least, this aspect of the Tribunal's decision.

Act or Disciplinary Regulations?

78. Both the Commission and Mr Tupou dedicated the majority of their material and submissions in this proceeding to seeking to demonstrate that in the case of the Commission, the dismissal was pursuant to clause 25 of the contract which therefore attracted the appeal provisions in the Act; and in the case of Mr Tupou, that his dismissal was in truth for misconduct which therefore attracted the appeal provisions of the Disciplinary Regulations.

79. In my view, both approaches are problematic, at least; and will ultimately be seen to be misconceived.

80. The Commission's reliance on clause 25 of the contract runs headlong into s.12 of the Act which required Mr Tupou's appointment, i.e. the terms of his contract of employment, to be in accordance with the Act. While s.13(5) empowers the

Commission to remove Mr Tupou for unsatisfactory performance or misconduct, the process or procedure and the results of termination in terms of severance payments provided for in clause 25 do not appear anywhere within the Act or any of the regulations. Mr Sisifa did not contend otherwise. That therefore raises a question as to whether clause 25 is inconsistent with the Act and/or its regulations.

81. Further, insofar as it may be thought that clause 25 is supported by s.6(i) of the Act which includes as part of the Commission's functions to 'determine practices and procedures relating to ... the discipline and termination of employment of employees', there is an obvious tension (if not conflict) with s.21(1) which provides that procedures for determining disputes and disciplinary matters under the Act shall be prescribed by Regulations, which, pursuant to s.22, are to be made by the Prime Minister with the approval of Cabinet.

82. Conversely, Mr Tupou's efforts to characterise the underlying factual complaints against him as amounting to alleged misconduct or disciplinary matters, and not unsatisfactory performance, so as to engage the Disciplinary Regulations, does not, in my view, provide a satisfactory solution.

83. Unsatisfactory performance is not defined anywhere within the relevant statutory framework. The plain meaning of the words comprising the phrase suggests that it must include failing or refusing to comply with the instruction or direction of an authorised person within the Ministry. The Disciplinary Regulations are concerned with breaches of discipline. Clause 7 of the Code of Conduct deems any breach of the Code to be a breach of discipline for the purposes of the Disciplinary Regulations. Clause 5(2) of the Code requires every employee to, inter alia, '(c) establish co-operative workplace relations based on consultation and communication' and '(e) comply with all lawful and reasonable directions given by someone who has authority to give the directions'. Therefore, the Commission's complaints that Mr Tupou's performance was unsatisfactory because, among other things, the Minister refused to work with him and he failed to comply with the Minister's direction to award the software contract to Mr Piukala's company, could equally be

regarded as breaches of the Code and thus breaches of discipline under the Disciplinary Regulations.

84. However, Mr Tupou's case in this regard, of purported wrongful dismissal for misconduct, thereby opening the way to regulation 21, entirely ignored the fact that the Commission did not employ any of the procedures required by the Disciplinary Regulations for any investigation and dismissal for either unsatisfactory performance (as stated by the Commission) or misconduct (as perceived by Mr Tupou).

85. Despite Mr Stanton's suggestion to the contrary,[16] a review of the notice of appeal confirms that is bereft of any reference to the Commission failing to comply with the procedures prescribed by the Disciplinary Regulations.

86. Further, while there is no prescribed form of notice of appeal under the Act, both the Disciplinary Regulations and the Grievance and Dispute Regulations contain almost identical forms which require an appellant to specify a section of the Act under which the appeal is brought. Mr Tupou's bespoke notice of appeal did not follow the form provided by the Disciplinary Regulations, nor did it contain any reference to any section of the Act under which the appeal was being brought.

87. Accordingly, in my view, any purported distinction between decisions of the Commission pursuant to the Disciplinary Regulations and any other decision by the Commission said to be 'made under the Act' is misconceived.

88. The Commission's power to make any decisions concerning the employment of employees within the Public Service arises from and is defined by sections 6, 7 and 13(5) of the Act. So too, the right to appeal to the Tribunal against any decision or determination of the Commission in relation to any dispute or disciplinary matter arises solely from s.21(2) of the Act. That breadth of subject matter is likely to cover the gamut of any and all complaints an employee might have with any decision of the Commission, including, for instance, issues

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[16] Transcript, p.21 of 24.

concerning remuneration, terms of appointment, job descriptions, and of course, breaches of discipline, performance and/or dismissal.

89. That the same right of appeal is repeated in s.21C of the Act does not detract from the Act being the wellspring for rights of appeal. In fact, that provision, as with s.21A(2) which refers to 'any decision made by the Commission', only serve to reinforce the view that the Act confers a right of appeal to the Tribunal from ***any*** decision of the Commission, regardless of the nature or characterization of the underlying dispute or the subject matter of the Commission's decisions.

90. From there, s.21(1) merely provides that the procedures to determine disputes and disciplinary matters under the Act are to be prescribed by Regulations. As subordinate legislation, the relevant Regulations cannot themselves confer some separate or additional right of appeal to that already provided by the Act. In that sense then, every appeal is made pursuant to the Act.

Clause 29

91. Similarly, Mr Tupou's reliance on clause 29 of his contract – enabling him to exercise any right of appeal procedures provided by any Act or Regulation - does not assist.

92. Although, as discussed above, the terms of his contract were subject to the Act, it was nonetheless a species of commercial contract between the parties to it. To construe the terms of a commercial contract, the Court asks 'what a reasonable businessperson would have understood those terms to mean'.[17] To answer that question, 'the reasonable businessperson [is] placed in the position of the parties'.[18] The terms are construed objectively and the subjective intentions of the parties are irrelevant.[19] The objective approach requires reference to the text and its ordinary meaning, together with the context, being

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[17] *Siemens Gamesa Renewable Energy Pty Limited v Bulgana Wind Farm Pty Ltd* [2020] VSC 126 citing *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656-7 [35] (French CJ, Hayne, Crennan, and Kiefel JJ) ('*Woodside*'); *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116 [47] (French CJ, Nettle and Gordon JJ) ('*Mount Bruce*').
[18] *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544, 551 [16] (Kiefel, Bell and Gordon JJ) ('*Ecosse*').
[19] Ibid.

the entire text of the contract including matters referred to in the text; and the purpose. Unless a contrary intention appears in the contract, the court is entitled to approach the task of interpretation on the assumption that the parties intended to produce a commercial result, and should construe it so as to avoid a commercial nonsense.[20] However, the court does not weigh the commerciality of the agreement, and business commonsense is a topic on which reasonable minds may differ.[21] Further, at common law, a court may supply, omit or correct words to avoid absurdity or inconsistency.[22]

93. On its proper construction, clause 29 provided Mr Tupou with the right to exercise any prescribed appeal procedures *relevant* to the subject matter of the Commission's decision Mr Tupou wished to appeal. For instance, it would not be reasonable, and indeed would be a nonsense, to suggest that Mr Tupou would be entitled pursuant to clause 29 to insist upon the procedures provided by the Disciplinary Regulations in respect of a dispute between he and the Commission about, say, remuneration.

94. The infelicities and imprecision in drafting found in clause 29 of the employment contract, similar to those found in ss 21(2), 21A and 21C(1) of the Act relative to regulations 16 (1) and 21 of the Disciplinary Regulations, in fact bare out the real question in this case, namely, what occurs when both the Act and the Regulations provide for different appeal periods and the circumstances in which such periods may be extended?

Conflict between the Act and the Disciplinary Regulations

95. Even if it could be accepted that Mr Tupou's appeal and application were brought pursuant to regulations 16 and 21 of the Disciplinary Regulations, the Tribunal's analysis of the legislative relationship between the Regulations and

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[20] *Woodside* (2014) 251 CLR 640, 656-7 [35] (French CJ, Hayne, Crennan, and Kiefel JJ).
[21] *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181, 198 [43] (Gleeson CJ, Gummow and Hayne JJ) ('*Maggbury*').
[22] *Fitzgerald v Masters* (1956) 95 CLR 420, 426-7 (Dixon CJ and Fullagar J); *MAAG Developments Pty Ltd v Oxanda Childcare Pty Ltd (as trustee for the Oxanda Education Services Trust)* [2018] VSCA 289, [53]-[55] (McLeish, Hargrave JJA and Almond AJA); *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq)* (2019) 99 NSWLR 317, [6]-[10] (Leeming JA).

the Act and their respective different appeal regimes, constituted a further error of law.

96. There can be no doubt that the appeal regime in s.21C of the Act – requiring appeals to be lodged within 14 days and any application to extend that period to be filed before the expiration of that period – and the regime in regulations 16(3) and 21 – requiring appeals to be lodged within 30 days with extensions of that period available at any time if the Tribunal considers the justice of the case requires it – are wholly inconsistent.

97. At paragraph 14 of its decision, the Tribunal acknowledged the inconsistency.[23] During argument before this Court, Mr Sisifa eventually recanted the position advanced in his written submissions. On the other hand, the written submissions on behalf of Mr Tupou did not in fact engage with or directly answer this issue. During his oral submissions, Mr Stanton correctly conceded the point.

98. What then is the effect of the inconsistency? The Tribunal's attempted reconciliation at paragraphs 5, 9 to 12, 14 and 15 of its decision was, with respect, plainly wrong. Its belief that the Disciplinary Regulations (as well as the Grievance and Dispute Regulations) were intended by the legislators to operate separately from the Act failed to appreciate that the relevant language in both the Act and the Disciplinary Regulations provides for appeal periods and extensions thereto in respect of *any decision* (or determination) of the Commission without differentiation as to the type of decision or subject matter thereof.

99. And therein lies the drafting vice at the heart of this case. Had Parliament intended for a universal appeal period and extension mechanism in respect of any decision by the Commission, then the Regulations ought not have included any or any inconsistent appeal period and extension mechanism for decisions made pursuant to the procedures provided for by those Regulations. Conversely, had Parliament intended for different appeal periods and extension

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[23] [14] of its decision.

mechanisms to apply depending on whether the relevant decision of the Commission was made in accordance with procedures provided for determining disputes and disciplinary matters by relevant Regulations, then it should not have provided any appeal period or extension mechanism as found in s.21C(2) and (3) of the Act. Alternatively, it could have carved out from the references to "a decision" of the Commission throughout the Act, any decision produced by the procedures prescribed by the Regulations. So, for instance, had s.21C(2) of the Act read: "*Any appeal under subsection (1), other than appeals against any decision of the Commission made in accordance with the procedures prescribed by any Regulations to the Act....*", inconsistency could have been avoided.

100. As discussed in *'Atenisi Institute Inc v Tonga National Qualifications and Accreditation Board* [2019] TOSC 45, if the words of a statute are clear and unambiguous, they themselves indicate what must be taken to have been the intention of Parliament, and there is no need to look elsewhere to discover their intention or meaning.[24]. The Court must give effect to the ascertained purpose of the legislature.

101. In my view, there is nothing unclear or ambiguous about the relevant provisions of the Act. In particular, s.21C pellucidly provides a right of appeal to any person who is dissatisfied with any decision of the Commission, subject to such appeal being lodged within 14 days after service of the decision and any application to extend being made within that period. This judgement seeks to give effect to Parliament's evident intention. The tension has arisen due to the Disciplinary Regulations (which, pursuant to s.22 were made by the Prime Minister with the consent of Cabinet) containing an inconsistent appeal period and extension mechanism, which was perhaps drafted without regard to or appreciation for the corresponding provisions of the Act.

102. Even if any relevant provision of the Act could be demonstrated to be unclear or ambiguous, none of the recognized circumstances which might otherwise permit the exceptional reading in of qualifications or words in interpreting the

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[24] *Gough Finance Ltd v Westpac Bank of Tonga* [2005] Tonga LR 390 at 394.

Act apply here.[25] Firstly, the purpose of the Act, insofar as it relates to appeals from the Commission to the Tribunal, can be achieved by its present wording. Secondly, it is not possible to state with certainty whether Parliament intended a universal appeals regime in respect of all decisions by the Commission or, having regard to the Regulations, whether it intended different regimes depending on the nature of a dispute or other subject matter of the Commission's decisions. Thirdly, and in any event, it would not be possible to effect any corrections to the Act, the Disciplinary Regulations, or both, without too great a rewriting of the defective language.

103. That brings us finally to paragraph 14 of the Tribunal's decision in which it expressed its belief that s.10(d) of the *Interpretation Act* did not apply because the inconsistency between the Act [s.21C(3)] and the Regulations was "not relevant because the Regulations were empowered to be made under different provisions of the Act (namely sections 21 and 22)".

104. That finding misinterpreted all the provisions to which reference was made. During submissions, Mr Stanton agreed that the finding could not be defended. Mr Sisifa did not contend otherwise. Firstly, s.10(d) prohibits regulations from being inconsistent with the provisions of any Act; not the other way around. Secondly, any logic purportedly underpinning the proposition that the overt inconsistency was not relevant because the Regulations were made pursuant to ss 21 and 22 of the Act, is almost impossible to comprehend. Read together, the effect of those generic provisions is that Parliament intended that the procedures for determining disputes and disciplinary matters under the Act were to be prescribed by Regulations for the proper and efficient administration of the Act. They say nothing about the drafting defects described above, nor the prohibition in s.10(d).

105. Section 10(d) of the *Interpretation Act* 'embodies a well-established principle of statutory interpretation that a general power to make regulations will not

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[25] *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586; *Sheehan v Watson* (supra); *Air New Zealand Ltd v McAlister* [2008] 3 NZLR 794.

authorise the making of regulations that are inconsistent with a law made by Parliament': *Attorney General v Xi Yun Qian* [2019] TOCA 20 at [32].[26]

106. If anymore be required, s.27 of the Act itself caps off the analysis, and reflects the above principle, by providing that:

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

107. Accordingly, and as agreed by counsel for both the Commission and Mr Tupou at the conclusion of the hearing, the provisions of regulations 16(3) and 21 of the Disciplinary Regulations are impermissibly inconsistent with s.21C of the Act. They have been made in contravention of s.10(d) of the *Interpretation Act* and are therefore ultra vires the Act and invalid.

Result

108. By reason of the foregoing, the Tribunal's decision was infected by inadequacy of reasons, errors of law and failure to take into account relevant considerations.

109. As regulations 16(3) and 21 of the Disciplinary Regulations are declared invalid, with the Act taking primacy, the only operative provision governing times for appeals to the Tribunal from the decision of the Commission and the circumstances in which the Tribunal could extend that appeal period, was s.21C(2) and (3) of the Act.

110. Ordinarily, the result of such findings would be to remit the matter back to the Tribunal for further consideration. However, Mr Tupou's application for an extension of time within which to appeal was filed outside the 14 day (or "due date") prescribed by subsection (3). Therefore, the period within which the Tribunal may have exercised discretion to extend time had expired. Accordingly, the Tribunal had no jurisdiction to extend time.

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[26] Citing *Federal Capital Commission* v *Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 588; *De L* v *Director – General, NSW Department of Community Services (No.2)* (1997) 190 CLR 207 at 212.

111. Therefore, and again as agreed by counsel, there is no utility in remitting the matter back to the Tribunal. As Mr Stanton candidly stated, neither the application the subject of this proceeding nor any fresh application for an extension of time would, or could, responsibly be pursued.

112. That therefore marks the end of Mr Tupou's appeal to the Tribunal. He is, however, left to his common law rights on any separate action he may wish to bring for alleged wrongful dismissal.

113. The formal orders will therefore be:

    (a) The Plaintiff's claim is allowed.

    (b) It is declared that:

        (i) Regulations 16(3) and 21 of the *Public Service (Disciplinary Procedures) Regulations* are inconsistent with and ultra vires the *Public Service Act* and are therefore invalid.

        (ii) Having been filed beyond the due date prescribed by s.21C(3) of the *Public Service Act*, the Public Service Tribunal did not have jurisdiction to entertain the Second Defendant's application for an extension of time within which to appeal the Plaintiff's decision to terminate his employment contract.

    (c) The decision of the Public Service Tribunal dated 25 June 2019 is quashed and set aside.

    (d) The Second Defendant's application for an extension of time within which to appeal the Plaintiff's decision to terminate his employment contract is dismissed.

114. As to costs, having regard to the fact that although the Commission ultimately succeeded in its claim:

    (a) it did not succeed on every issue, including, importantly, the inconsistency issue at least as it was originally pleaded and argued;

(b) it was represented by the Attorney General's Office; and

(c) the reason for its success was attributable more so to defects in legislative drafting than any act or omission on the part of Mr Tupou or his conduct of these proceedings,

I propose to make no order as to costs.

115. Any application for a different costs order is to be filed within 14 days of the date hereof.

NUKU'ALOFA
1 September 2020

M.H. Whitten QC
LORD CHIEF JUSTICE