

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

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*24/11/15*  
**CV 924 of 2004**

**BETWEEN: SEMISI PALU, aka SEMISI PALU  
'IFONI TAPUELUELU  
- Plaintiff**

**AND: KINGDOM OF TONGA  
- Defendant**

**BEFORE LORD CHIEF JUSTICE PAULSEN**

**Date of Hearing: 3 September 2015**

**Date of Ruling: 24 November 2015**

**Counsel: Mr. S. Tu'utafaiva for the plaintiff  
Mr. 'A. Kefu SC for the defendant ✓**

**INTERIM RULING**

[1] Mr. Palu seeks damages for both wrongful suspension and wrongful dismissal in his employment as the Superintendent of Prisons. There have been significant procedural applications in this case. That goes only some way towards

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explaining the very unsatisfactory delay that has occurred in getting to this stage.

- [2] Following attempts to strike out the claim, including an appeal to the Court of Appeal (AC 10 of 2008, judgment 25 February 2009), the Kingdom now accepts liability for both the wrongful suspension and wrongful dismissal. It accepts that Mr. Palu is entitled to damages but disputes quantum.
- [3] The case was set down for hearing on 27 to 29 April 2015. Before the hearing Counsel advised me in Chambers that they considered that there were no factual issues in dispute relevant to the assessment of damages. I was asked to take the briefs of evidence as read and hear no *viva voce* evidence. That is how the case has proceeded.
- [4] I have received written legal submissions from both parties and conducted a hearing to allow Counsel to speak to their submissions.

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[5] This is an interim ruling. I am leaving it to the parties to make calculations of what is owed to Mr. Palu. I will reserve them leave to bring any issues they cannot resolve by agreement back before me for determination.

**The facts**

[6] As this ruling is concerned only with determining the quantum of Mr. Palu's damages the relevant facts can be set out relatively briefly and without much of the detail that appears in the statement of claim and Mr. Palu's brief of evidence. I have of course considered all the evidence.

[7] Mr. Palu was born on 28 October 1949. In November 1971, when aged 22, Mr. Palu commenced employment as a Probationary Prison Officer. On 18 December 1974 his employment as a Prison Warder was confirmed.

[8] Mr. Palu received a number of promotions leading to his appointment on 10 August 1992 as the Superintendent of Prisons.

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[9] The statement of claim pleads that Mr. Palu's terms and conditions of employment were governed by the Prisons Act and Prisons Rules (Cap. 36), Civil Service Regulations published in 1993 known as Estacode and the Pensions Act and Regulations (Cap. 8).

[10] From September 1997 issues arose between Mr. Palu and the then Minister of Police, Hon Clive Edwards. Mr. Edwards made serious allegations against Mr. Palu, including that he was leaking information from the Prisons Department to the Press, that he disobeyed instructions of the Minister and that he had seditious intent.

[11] On 28 September 1998, the Minister removed from Mr. Palu the authority for running the Kingdom's prisons and passed that authority to the Deputy Superintendent, Mr. Sione Falemanu. Mr. Palu and his family were then forced from their living quarters at Hu'atolitoli Prison.

[12] On 22 October 1998, the Minister of Police suspended Mr. Palu from duties without pay with immediate effect on 14 diverse allegations. Mr. Palu had been paid his salary up to

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and including 15 October 1998 but was to receive no further salary.

[13] A court of inquiry was established under section 15 of the Prisons Act to investigate 11 charges against Mr. Palu.

[14] Before the court of inquiry had issued a decision Mr. Palu received a letter from the Minister dated 17 January 2000 stating:

In accordance with the proceedings of the Prison Tribunal you are still subject to it. You are also subject to my ruling until you are dismissed. Any proposal to leave the country now whilst the Tribunal is sitting and while you are under suspension will require my approval. You may choose to ignore that approval and leave as you wish which may have different consequences arising from it.

[15] The court of inquiry delivered a decision on 13 May 2000 convicting Mr. Palu on only one charge and acquitting him on 10 charges. The court of inquiry did not make a recommendation that Mr. Palu be dismissed on the charge on which he was convicted but only fined him a modest sum of \$T25.

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[16] The decision of the court of inquiry was the subject of an application for review to this Court by the Minister of Police.

[17] On 11 October 2001, and before the review was heard, Mr. Palu was dismissed by Cabinet on the recommendation of the Minister. The dismissal was backdated to be effective as from 11 November 1998. Mr. Palu had spent almost three years (22 October 1998 to 11 October 2001) on suspension without pay.

[18] On 2 April 2002, the Supreme Court delivered its decision on the Minister's application for review. Seven challenges to the findings of the court of inquiry were dismissed. Three challenges were upheld on the grounds of error of law. Rather than return those three questions to the court of inquiry for further consideration the Supreme Court simply declared that the acquittals relating to those questions were unlawful. As the Court of Appeal noted in its judgment at [7]:

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That is not at all the same thing as entering convictions which the court of inquiry might or might not have done upon reconsideration.

[19] Mr. Palu commenced this action on 7 December 2004. He did so only after he had petitioned His Majesty and written a number of times to the Prime Minister seeking their intervention. He received no responses to the petition or correspondence. He alleged that both his suspension and dismissal were unlawful. This is now admitted by the Kingdom. For many years it denied any liability.

[20] Mr. Palu was 52 years old when he was dismissed and he says that since his dismissal he has been unable to get employment, although I note that it is a matter of public record that in 2010 he was elected to the Legislative Assembly as a People's Representative.

[21] In his statement of claim Mr. Palu claims under the following heads:

[21.1] Loss of salary (including increments) during the full period of his suspension.

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[21.2] Loss of salary (including increments) from the date of dismissal until he turned 60 years of age (28 October 2009).

[21.3] His pension entitlement calculated up to the date of dismissal.

[21.4] His pension entitlement from the date of dismissal until he turned 60 years of age.

[21.5] Unused leave entitlement up to the date of his suspension.

[21.6] General damages.

[21.7] Interest.

[21.8] Costs.

[22] Damages under additional heads of loss were claimed in Mr. Palu's Counsel's submissions for passage leave, use of a



motor vehicle and free accommodation. None of these were pleaded and no amendment to the statement of claim was sought. I am not prepared to consider them for that reason. In any event, these heads of claim were unsupported by satisfactory evidence.

**General principles**

*Unlawful suspension*

[23] Unlawful suspension may sound in damages but will generally only be recoverable for such period that the employee remains ready, willing and able to work. *Hanley v Pease & Partners Ltd* [1915] 1 KB 698. The measure of such damages will usually be equivalent to the unpaid remuneration during the period of suspension.

*Wrongful dismissal*

[24] Likewise, damages are recoverable for wrongful dismissal. The normal measure is the amount that the employee would have earned for the period until the employer could have lawfully terminated the employment less any amount that the employee did or could reasonably have been expected to

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earn in other employment. The onus is on the employer to show that the employee ought to reasonably have obtained alternative employment.

[25] The common law in Tonga generally implies a term that employment may be terminated by the employer giving reasonable notice. However, where the terms of employment contain the right of either party to terminate on another basis, it is ultimately a question of construction as to whether those provisions are intended to prevail over the implication of a right of the employer to terminate on reasonable notice. *NSW Cancer Council v Sarfaty* (1992) 26 NSWLR 68, 75 approved in *Leiola Group Ltd v Moengangongo* [2010] Tonga LR 85 at [13].

[26] If a party terminates a contract of employment in breach of a term, in assessing damages for the breach, the Court will proceed on the basis that the employer would perform the contract in the manner least disadvantageous to it. *Leiola Group Ltd v Moengangongo* at [30].

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[27] It is now well established that the conditions of employment of statutory officers, which includes prison officers, contain implied terms of fairness and the observance of the rules of natural justice. *Ve'ehala v Kingdom of Tonga* (Unreported, AC 25 of 2014, 31 October 2014, Court of Appeal) at [16]. A claimant who is removed from employment in circumstances that amount to a breach of these implied obligations, and is thereby prevented from performing his duties and receiving his remuneration, may recover damages on a basis analogous to wrongful dismissal. *Ve'ehala v Kingdom of Tonga* at [15] referring to Starke J in *Lucy v The Commonwealth* (1923) 33 CLR 229 at 253.

[28] As to the requirements of natural justice in such as case, the Court of Appeal in *Ve'ehala v Kingdom of Tonga* cited with approval the joint judgment of McHugh, Gummow and Hayne JJ in *Jarratt v Commissioner of Police for New South Wales* (2005) 224 CLR 44, 61-62 as follows:

...at the least that, when the Commissioner was contemplating a recommendation of removal of the applicant the applicant should have been notified of the proposal, advised of any specific allegations against him and the content of any adverse report,

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and given an opportunity to respond to those allegations and any criticisms of his performance as a Deputy Commissioner.

[29] It is instructive to record the words of Gleeson CJ in *Jarratt* at [56] where he said:

What is involved is not the removal in the exercise of monarchical prerogative. What is involved is a statutory power which requires certain procedures to be followed. It is conceivable that there may be cases of valid exercise of the power for reasons, or on the basis of considerations, that are of such a nature that there would be nothing on which a Deputy Commissioner could realistically have anything to say. It is clear, however, that the power may also be exercised for reasons about which a Deputy Commissioner could have a good deal to say. The very breadth of the statutory power seems to me to be an argument for, rather than against a conclusion that it was intended to be exercised fairly. So also is the consideration that, in practice, the power would normally be exercised for cause even though such cause is not legally necessary.

**Damages for unlawful suspension**

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[30] The Kingdom concedes that the suspension was wrongful. It argues, however, that Mr. Palu's damages should be assessed from the date of suspension to the date that he could have been required to retire. This argument proceeded on the basis that Mr. Palu could have been required to retire at 50. For reasons I will come to later in this ruling, I reject this argument but it is unnecessary for me to set out my reasons now.

[31] The Kingdom's argument overlooks the fact Mr. Palu was not required to retire. In fact, he was required to remain in his employment until dismissed. In his letter to Mr. Palu of 17 January 2000 the Minister wrote "You are also subject to my ruling until you are dismissed."

[32] The Kingdom did not attempt to persuade me that that Mr. Palu did not, during the entire period of his suspension, remain ready and willing to render service to the Kingdom. It must necessarily follow that Mr. Palu is entitled to recover as damages his salary (including increments) for the full period of his suspension until dismissal.

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[33] As Mr. Palu was only paid up to 15 October 1998 his entitlement under this head is the equivalent of his salary (including increments) from 16 October 1998 to 11 October 2001.

**For what period are Mr. Palu's damages for wrongful dismissal to be assessed?**

[34] The Kingdom concedes that the dismissal was wrongful. I must determine the date upon which the Kingdom could have brought Mr. Palu's employment to an end.

[35] Neither party argues that Mr. Palu's employment could have been terminated upon reasonable notice. Mr. Kefu submitted that this was an incident of the fact that detailed employment provisions applied to Mr. Palu's employment, in the Prisons Act and Estacode, which must prevail over the implication of such a term. *Leiola Group Limited* at [31].

[36] There has been no attempt by the Kingdom to persuade me that Mr. Palu's employment could have been terminated on disciplinary grounds.

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[37] In a document headed 'Defendant's Additional Grounds for Statement of Defence' the Kingdom pleaded that pursuant to Section 9 of the Prisons Act (Cap 36) Mr. Palu was employed from year to year and that he could only recover damages for what he would have earned from the date of his dismissal to the anniversary of his appointment. The Kingdom took a different approach before me. This is somewhat ironic given my conclusions. What was argued before me was that Mr. Palu's damages must be assessed to the date that he could have been required to retire. Initially Mr. Kefu said that Mr. Palu was required to retire at 51 years (on 28 October 2000) relying on Regulation 5(5)(a) of the Retirement Fund (Administration) Regulations. He has since accepted that those regulations do not impose any retirement age but only set the age at which a public servant is entitled to receive his or her retirement benefits.

[38] In his latest written submissions, Mr. Kefu argued that Mr. Palu's compulsory retirement age was 50, or alternatively 55 years. He relied upon sections 10(2) and (3) of the Pensions

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Act, which he submits applied to prison officers by virtue of section 12 of the Prisons Act.

[39] Sections 10(2) and (3) of the Pensions Act were subject to amendment by the Miscellaneous Amendments (Privy Council) Act 2010 but such amendments did not, of course, apply at the relevant time of Mr. Palu's dismissal in 2001. At the relevant time sections 10(2) and (3) of the Pensions Act and section 12 of the Prisons Act were in these terms:

**Sections 10(2) and (3) Pensions Act**

(2) His Majesty may with the consent of Privy Council require a public officer who is a police officer to retire from the police force of the Kingdom at any time after that police officer has attained the age of 50 years.

(3) A public officer who is a police officer shall, unless he is retained and his service is prolonged in case of emergency, retire from the police force of the Kingdom when he has attained the age of 55 years.

**Section 12 of the Prisons Act**



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Every prison officer shall...by virtue of his appointment be deemed to be a constable and to have all the powers and privileges of a constable.

[40] The Kingdom's argument is that in sections 10(2) and (3) of the Pensions Act 'police officer' is to be read as 'police officer or prison officer' and consequentially that 'police force' is to be read as 'police force or prisons service'. I do not accept that argument.

[41] Section 20 of the Pensions Act (inserted by Act 13 of 1998) states that, inter alia, the Pensions Act does not apply to a public officer who as at 30 June 1999 "is aged less than 50 years". Mr. Palu was such a public officer and accordingly Sections 10 (2) and (3) could not apply to him. This is a complete answer to the Kingdom's submission. But even if this was not so I would not have accepted the submission as a matter of statutory construction.

[42] Section 12 did not deem a prison officer to be a 'police officer'. It deemed a 'prison officer' to be a 'constable' and then only for the limited purpose of conferring upon the prison officer the "privileges and powers of a constable".

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[43] The word 'constable' cannot be regarded as synonymous with the term 'police officer' as 'constable' was specifically defined in the Police Act as "any police officer appointed to that rank and includes a recruit".

[44] This leads to a conclusion that section 12 had a much more limited scope than the Kingdom contends. This is to an extent reinforced by the fact that the only power or privilege of a constable to which the section specifically refers is the rather prosaic matter of the carrying of a staff.

[45] In their ordinary sense, and in the context in which they appeared in section 12, the words "powers and privileges" could only mean the authority to do some act in the performance of duty (power) and to enjoy some particular and peculiar benefit (privilege). Those words could not reasonably be taken to refer to a liability of being subject to compulsory retirement earlier than other public officers, which is the effect of section 10(2) and (3) of the Pensions Act.

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[46] Section 12 simply conferred upon prison officers limited legal powers and privileges that 'constables' enjoyed such as those contained in Part IV of the Police Act. Not all the powers and privileges under Part IV were conferred on constables. Some were reserved to police officers of more senior rank and could not be exercised by a constable however. Examples were contained in sections 22 and 34 of the Police Act.

[47] The Kingdom's argument requires a tortuous approach to the interpretation of sections 10(2) and (3) of the Pensions Act which is simply unnecessary. If it was intended that those sections were to apply to prison officers this could have been simply stated.

[48] Mr. Palu's Counsel argued that whilst Mr. Palu had no absolute entitlement to be employed to the age of 60 his damages should be assessed on that basis.

[49] He relied upon what he said was the Prisons Department's practice that, subject to the requirements of good character

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and fitness, prison officers were employed until retirement at age 60. This is an unsound argument in my view.

[50] If Mr. Palu had no entitlement to be employed to age 60 it follows that his employment could have been brought to an end on an earlier date. That power might arise under the Prisons Act, as an express term of employment or, in the absence of that, under an implied power to do so on giving reasonable notice.

[51] In *Fonua v Tonga Communications Cooperation* [2007] Tonga LR 291 the plaintiff argued that his damages for wrongful dismissal had to be assessed on the basis that he was entitled to be employed until he was 60 years of age. The Court of Appeal rejected this argument and noted at [18]:

Under the Tonga Telecommunications Act (Cap 96) the Board has the power to dismiss the Plaintiff as deemed necessary for the conduct of the business of the Commission subject to the observance of and compliance with the Rules of natural justice: See *Commodities Board v Uta'Ato* [1990] Tonga LR 92.

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There is no absolute right to employment up to the age of 60 and I am satisfied that the plaintiff could have been lawfully terminated under the provisions of the Act. An employee's expectations that he will remain in the job until retirement is not sufficient. The period of time is up until the employer could lawfully have terminated the employee. The Court is not to analyze the claims that the employee would not have been dismissed had proper procedures been followed: See *Janicuk v Winerite Ltd* [1998] IRLR 63. But a reasonable time or reasonable notice must be given. Much will depend on the employees, skills, his age and his long service: see *Stuart v Armaguard Security* [1996] 1 NZLR 484.

[52] It follows from this that Mr. Palu is not entitled to have his losses assessed until aged 60 years.

[53] The terms of Mr. Palu's employment were largely, but not exclusively, contained in the Prisons Act and Prisons Rules (Cap. 36) and it is to those that I now turn.

[54] Section 8 provided that all appointments and promotions of prison officers (which includes the Superintendent of Prisons) were to be made by the Minister of Police with the approval of Cabinet.

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[55] Section 9 is an important provision in the present context.

It provided that every prison officer would on his first appointment be engaged for a probationary period of two years and that at the end of that period "he may if of good character and fit for further service be re-employed from year to year".

[56] Section 9 must be read with rule 91 of the Prison Rules, which provided that probationary periods might be extended and probationary officers were liable to dismissal on one months notice if found unsuitable "and at any time without notice for misconduct". There was no similar provision in relation to prison officers who had successfully completed their probationary period.

[57] It follows that prison officers, other than those on probation, had "a set period of engagement with provision for re-engagement." *Ve'ehala v Kingdom of Tonga* at [14].

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[58] It will also be observed that there was no requirement that a decision not to re-engage a prison officer be exercised only for cause.

[59] Section 10 provided that no prison officer could resign or withdraw from duties without the consent of the Minister and were subject to conviction if they did so.

[60] Other provisions dealt with misconduct. Sections 15 and 16 provided for courts of inquiry to be established to hear charges of breaches of discipline or offences brought against a prison officer (except those of a petty nature). Section 19 provided that the Minister might "after full inquiry" impose punishments for any petty breach of discipline or the Prison Rules.

[61] Under section 20 the Minister had the power "for misconduct or inefficiency to reduce any prison officer to a lower grade or suspend any prison officer".

[62] Section 21 provided that the Cabinet on the recommendation of the Minister or any court of inquiry

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(established under section 15) "may dismiss any prison officer."

[63] In my view, the Kingdom was lawfully entitled to bring Mr. Palu's employment to an end upon the expiry of an appointment, which, pursuant to section 9 of the Prisons Act, was from "year to year". As I have noted, there was no requirement that such power be exercised only for cause. No such requirement can be implied. However, the power was subject to the obligations of fairness and observance of the rules of natural justice.

[64] Should the Kingdom have proposed to exercise its power (and not re-engage Mr. Palu) then given Mr. Palu's length of service, seniority and the events that were the background to his suspension and dismissal, the requirements of natural justice would not have been satisfied by a perfunctory process. The proposal would have been a matter upon which Mr. Palu would have had a good deal to say.

[65] Mr. Palu's employment as a prison warder was first confirmed on 18 December 1974. He was employed year to



year thereafter. It is inconceivable that had the Kingdom proposed on the date of his dismissal to not re-engage him that it could, consistent with the observance of and compliance with the rules of natural justice, have arrived at a final decision and exercised the power prior to the anniversary of his employment on 18 December 2001. I consider then that the earliest date upon which the power could have been validly exercised was 18 December 2002. Mr. Palu's damages for wrongful dismissal should be assessed on that basis.

### **Damages for lost salary post dismissal**

[66] For the reasons I have already set out Mr. Palu's loss of salary as a result of his dismissal must be calculated for the period from his dismissal on 11 October 2001 to 18 December 2002.

### **Pension**

[67] It is convenient to deal with Mr. Palu's claim for his pension both before and after dismissal together.

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[68] The evidence given by Mr. Palu as to his entitlement to a pension was most unclear and, it appeared to me, that the submissions of his Counsel as to the manner in which Mr. Palu expected his entitlements to be satisfied was contrary to his pleading.

[69] The Kingdom relied on evidence from Mr. Saia Havili, the Chief Executive Officer of the Retirement Fund. His evidence, which I accept, was that prior to 1 July 1999 public servants who retired from the public service received a pension under the Pensions Act but that all public servants under the age of 50 years, or with less than 15 years service, before 1 July 1999 were transferred to receive benefits under the Retirement Fund Act and Retirement Fund (Administration) Regulations. As I have noted, Mr. Palu was such an employee as he was under 50 years of age on 1 July 1999.

[70] Each public servant who was transferred to the Retirement Fund was assessed as to their transfer value from the Government's pension scheme to the Retirement Fund. In

the case of Mr. Palu that was \$46,745. This figure was provided by the Ministry of Finance and National Planning and confirmed by the Audit Office.

[71] Calculations were then provided by Mr. Havili of Mr. Palu's Leaving Service Benefit (section 5 of the Retirement Fund (Administration) Regulations 1999) assuming retirement at ages 50, 51, 55 and 60.

[72] I have held that Mr. Palu's damages for wrongful dismissal should be assessed on the basis that his employment could not have been terminated until 18 December 2002. His Leaving Service Benefit under the Retirement Fund Act and Retirement Fund (Administration) Regulations must be assessed on the same basis; that is retirement on 18 December 2002.

### **Unpaid leave**

[73] The statement of claim pleads that due to the exigencies of his job Mr. Palu was unable to take 400 days leave for which he is owed \$22,784. No details of the unused leave are

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provided in the statement of claim or in Mr. Palu's brief of evidence. That is unsatisfactory but fortunately there does not appear to be a great difference in the positions of the parties.

[74] The Kingdom provided a brief from Mr. Tevita 'Ofahefolau Vehikite who gave evidence of Mr. Palu's leave entitlements. On the basis of this evidence Mr. Kefu accepted that Mr. Palu was entitled to leave entitlements calculated to 28 October 1999 (when Mr. Palu turned 51 years) totaling \$22,087.40 (\$19,878.66 after taxation). I adopt that figure as Mr. Palu's entitlement under this head.

**General Damages**

[75] The statement of claim seeks general damages for the unreasonable period of suspension and wrongful dismissal which "caused distress, humiliation to and loss of reputation of, the plaintiff". Mr. Palu's brief of evidence simply repeats what is in the statement of claim.

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[76] The amount claimed is large at \$150,000. Whilst I can readily infer that Mr. Palu would have suffered distress and humiliation and some loss of reputation at the manner in which he was treated, there is little in the way of evidence to support the claim.

[77] It is a general rule that damages are not available to compensate an employee for distress, anxiety, injury to feelings or damage to reputation as a result of a breach by the employer either during employment or due to the manner of dismissal. *Addis v Gramophone Co* [1909] AC 488 is usually quoted as authority for this principle.

[78] Whilst in *Koloa v Helu* [1999] TLR 227 Finnigan J. did award \$4,750 for general damages in a wrongful dismissal case, I do not accept that his decision was correct as it was based on the law of New Zealand not Tonga. Although the Court of Appeal did not interfere with the award on appeal (*Helu v Koloa* [2000] TOCA 20) it does not appear that it was argued before the Court of Appeal that the Judge was wrong in law in making the award and the Court noted simply that:

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We are not persuaded that the trial Judge's assessment of damages was either excessive (as was contended for the Board) or inadequate (as was submitted for Mr. Koloa). On the contrary, in our opinion, the amounts awarded were, in each case, within a range that was plainly open to the primary Judge to assess as a fair measure of compensation in the present circumstances.

[79] The weight of authority is that, at least in Tonga, general damages may not be awarded for wrongful dismissal. *Tu'itupou v Tonga Water Board* [1990] TLR 99, 106 per Martin CJ.

[80] In *Leiola* the Court of Appeal noted, at [34], that whilst it is conceivable that damages for loss of reputation and hardship might be ordered for conduct that involved a breach of an implied term of mutual trust and confidence such damages were to compensate an employee for financial loss only.

[81] And most recently in *Mafi v Public Service Commission* (Unreported, CV 237/2000, 27 June 2014, Supreme Court, Scott LCJ) the Lord Chief Justice said:

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It is the long-standing practice of the Court not to award damages for distress caused by wrongful dismissal (*Addis v Gramophone Co Ltd* [1909] AC 488).

[82] The rule in *Addis* has been subject to much criticism. In some jurisdictions, such as New Zealand, the Courts were prepared to recognise a right to damages for distress and humiliation that arises from the manner of dismissal. Despite this *Addis* has proved resilient elsewhere.

[83] In *Johnson (A.P) v Unisys Limited* [2001] UKHL 13 Lord Steyn said at [18]:

Addis's case was decided in the heyday of a judicial philosophy of market individualism in respect of what was then called the law of master and servant. The idea that in the eyes of the law the position of a servant was a subordinate one seemed natural and inevitable. And in Addis's case it may have been the background to the adoption of a special restrictive rule denying in all cases to employees the right to recover financial loss which naturally flowed from the manner of their wrongful dismissal. Since 1909 there has been a fundamental change in legal culture..."

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[84] In most jurisdictions the need for the development of the common law in the area of wrongful dismissal, to reflect changing attitudes in the community, does not exist because of the introduction of statutory unfair dismissal regimes. These inevitably provide for awards to be made that compensate employees for mental distress and non-pecuniary injury consequent upon the unfairness of the dismissal. The creation of these statutory rights, it is argued, makes development in the common law unnecessary and undesirable. *Johnson* per Lord Millett at [80].

[85] Tonga does not have such legislation and as a result employees here are left with a common law action for wrongful dismissal where they are able to recover only direct pecuniary loss, usually represented by wages for a short period of notice, and nothing for hardship that may result from the manner of dismissal, even if that involves unjust imputations on their honesty and damages their reputation. There is substantial injustice in this.



[86] Having said all of that, if there is to be change in the law it is a matter for the Court of Appeal or reform by the Legislative Assembly. For present purposes I am constrained by the law as it is stated in *Leiola* and cannot make an award of general damages in Mr. Palu's favour.

### **Interest**

[87] Mr. Palu claims interest at 10% but states no legal basis for the claim. The Court's power to award interest on judgments and debts exists under section 5 (2)(d) Supreme Courts Act (Cap. 10) which is in very wide terms. It states that this Court has the power to:

- (d) make orders that interest accrue 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.

[88] Mr. Palu has sought interest on a compounding basis. The law traditionally frowns on awards of compound interest as it leads to the overcompensation of claimants. This is dramatically demonstrated by the calculations submitted in

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support of Mr. Palu's case. I decline to award compound interest.

[89] Most often interest on damages awards is ordered from the date of the commencement of the proceeding. It is said that this is the most appropriate approach because it preserves the current rights of the parties prior to the issue of proceedings and provides an incentive to the debtor/defendant to settle claims without forcing the creditor/plaintiff to resort to court proceedings. However, other approaches are taken from time to time. *Fonua v Tonga Communication Cooperation*.

[90] The approach that I consider is most reasonable in the circumstances of this case is to award damages from 18 December 2002, being the earliest date that Mr. Palu's employment could have been terminated. Mr. Palu was deprived of his entitlements for a period of years where it would have been premature for him to have commenced this action. An award of interest from 18 December 2002 provides fair compensation for him having been deprived of those entitlements for such an extremely long period of

time. Interest should accrue at the flat rate of 10% per annum.

**The result**

[91] As I noted at the start of this ruling, I intend to leave it to the parties to calculate Mr. Palu's entitlements based on the findings I have made.

[92] Those findings can be summarised as follows. Mr. Palu is entitled to judgment for the following:

[92.1] Damages for wrongful suspension represented by his loss of salary (including increments) for the period 16 October 1998 to 11 October 2001.

[92.2] Damages for wrongful dismissal represented by his loss of salary (including increments) from 12 October 2001 to 18 December 2002; and

[92.3] His Leaving Service Benefit under the Retirement Fund Act and Retirement Fund (Administration)

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Regulations assessed on the basis of retirement on 18 December 2002.

[92.4] Unused leave entitlement in an amount of \$22,087.40.

[92.5] Interest on the amounts in paragraph 92.1, 91.2, 91.3 and 91.4 from 18 December 2002 to the date of this judgment at the flat rate of 10 per centum per annum.

[93] I make no awards for general damages or for the other heads of loss for which there was no pleading.

[94] Leave is reserved to the parties to apply for further orders consequential upon any of my findings in the event of disagreement.

[95] In respect of costs, I know of no reason why Mr. Palu is not entitled to his costs but I have not heard from the parties. I formally reserve costs on the basis that if there is any

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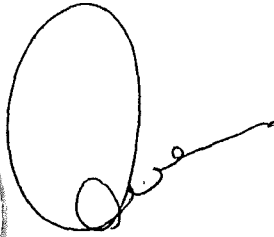
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disagreement either party may apply for a ruling within 21 days.

   
O.G. Paulsen  
**LORD CHIEF JUSTICE**

**DATED: 24 November 2015.**