

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

CV 65 of 2015

**BETWEEN : DOWAGER LADY 'ESETA FUSITU'A
- First Plaintiff**

**AND : DOWAGER LADY TUNA FIELAKEPA
- Second Plaintiff**

**AND : HON. POASI TEI
(MINISTER FOR PUBLIC ENTERPRISES)
- Defendant**

W. Edwards for the Plaintiffs/Respondents

'A. Kefu SC (Acting Attorney General) for the Defendant/Applicant

DECISION

[1] In December 2013 the Second Plaintiff was re-appointed as a director of the Tonga Broadcasting Commission (TBC) for a period of 3 years. In May 2014 the First Plaintiff was reappointed as director and chairperson of TBC, also for a period of 3 years.

[2] In 2015 the Government decided to review its "National Strategic Development Framework" and in June 2015 it decided to re-organise the TBC which is one of the public enterprises subject to the provisions of the Public Enterprises Act 2002. (The Act).

- [3] In May, June and July 2015 the proposed reforms were explained to the chairpersons and directors of the 15 public enterprises under review. In order to implement the proposed reforms it was deemed necessary to replace the existing boards of directors. The directors were invited voluntarily to relinquish their appointments and to accept financial compensation. The Plaintiffs declined to accept this invitation.
- [4] In August 2015 the Plaintiffs and the Ministry appeared before the Commissioner for Public Relations and as a result the compensation package was improved. The Plaintiffs did not accept the improved compensation and refused to resign.
- [5] In September 2015 Cabinet decided that those directors (apparently only the Plaintiffs) of TBC who refused to accept the package would be terminated by the application of Sections 14(6) and/or 14(7) of the Act.
- [6] On 29 September 2015 the Ministry advised the Plaintiffs that if they continued to refuse to resign, their contracts would probably be terminated.
- [7] On the same day the Plaintiffs again rejected the invitation to resign.
- [8] On 16 October 2015 the Defendant wrote to the First Plaintiff. Paragraph 2 of the letter is as follows:

"After careful and thorough consideration of your response to my letter of and (sic) the relevant documentations. I regret to advise that I have decided with the consent of Cabinet to terminate your appointment as a Director and the Chairperson of the Board of Directors of the Tonga Broadcasting

Commission, with effect from 4.30pm on Monday 19 October 2015”.

[9] The Defendant also wrote to the Second Plaintiff in like terms and explained to both that the grounds for his decision were his determination that the Plaintiffs were in breach of Sections 14(6) and (7) of the Act.

[10] On 20 October 2015 Cato ACJ, on application made ex parte, granted an order restraining the Defendant “from terminating the Plaintiffs’ position as Directors of Tonga Broadcasting Commission according to a Cabinet decision dated 16 October 2015”, until further order of the Court. The matter was then adjourned for mention before the Lord Chief Justice on 6 November 2015.

[11] On 6 November, after the Plaintiffs proposed Statement of Claim had been filed, leave to move for judicial review of the decision to terminate the Plaintiffs was granted. Leave was also granted:

“to apply for an order restraining the Defendant from terminating the Plaintiffs from their appointments as Directors of the Tonga Broadcasting Commission”.

[12] This is an application by the Defendant to set aside the interim injunction. A notice of opposition to the interim injunction was also filed.

[13] Both Counsel filed helpful written submissions for which I am grateful. Mr Stanton’s submissions, adopted by Mr Edwards, put very briefly, were that there was a serious issue to be tried and that the balance of convenience suggested that the injunctions be continued. He stressed the Plaintiffs’ claim to have been unfairly

treated and the "grave and serious" allegations made against them.

[14] In an affidavit dated 21 October the Solicitor General Mr Sione Sisifa described the circumstances in which the order of 20 October 2015 was made. Although the Attorney General's Office was served with notice of the application it appears that no details of the time and place at which the application was to be heard were given. The copy notice on the file also omits these important details.

[15] According to Mr Sisifa, the hearing of the application had already begun when he appeared on the morning of 20 October. He advised the Court that the application was opposed and that papers in opposition were currently being prepared. He also pointed out that the notice of termination served on the Plaintiffs, 4.30pm on 19 October had expired. Mr Sisifa's evidence then continues:

"Justice Cato then stated that he is not ready to deal with the application for injunction because he is hearing a murder trial and therefore prefer for the application to be dealt with by the Lord Chief Justice when he returns from overseas.

Justice Cato then stated he is going to make an interim order granting the application and that the Defendant can apply to rescind or vary the order in due course".

[16] As appears from the Lord Chief Justice's order of 6 November no application to extend the order of 20 October has been heard by the Court prior to the hearing on 20 November. It is also plain

that the 20 October order was intended to do no more than preserve the status quo on an interim basis. The merits of continuing the injunction beyond a very short period were not taken into consideration.

[17] When an interim injunction is granted "the matter should be adjourned for no longer than a day or so". A Defendant must promptly be given an opportunity of being heard. "When the matter comes back into the list it will not be for the Defendant to establish why the injunction should be dissolved. It carries no onus. Instead the Plaintiff has the task of persuading the Court that the circumstances of the case are such as to require the injunction to continue" (see *Westpac Banking Corporation v Prasad* [1998] FJCA 38).

[18] Having considered the papers before me I am satisfied that the Plaintiffs have an arguable case. If successful, the result will probably be that the Court will declare that their dismissals were void, entitling them to claim unpaid salary for the unexpired period of their contracts. The second question however, is whether on the balance of convenience the Defendant should be restrained from preventing them from discharging their duties as directors pending the hearing of the action.

[19] In deciding this question, the first consideration is whether damages (or in this case payment of remuneration owed) would be a sufficient remedy. The second is whether more harm will be done by refusing or granting the injunction (see generally *American Cyanamid Co. v Ethicon Ltd* [1975] AC 396; [1975] 1 All E.R. 504).

[20] In Part B of his written Submissions, Mr Kefu argued that the balance of convenience strongly favoured the Defendant. Following the voluntary resignation of the other directors TBC is left without a functioning Board. Government is unable to proceed with its reform of Tonga's public enterprises. If the injunction were to be continued then this situation would be likely to last for at least another 5 months. To continue the injunction would, in other words, be severely detrimental to good administration.

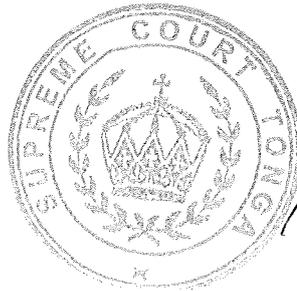
[21] Mr Kefu also suggests that when the injunction was granted on 20 October the Plaintiffs' contracts had already been terminated by the period of notice having expired at 4.30pm the previous day. Mr Stanton characterizes this argument as "nonsense". I do not agree and it is not clear to me that the precise terms of the letters of 16 October were drawn to the Judge's attention (see paragraph 27 of the supporting affidavits) when the interim injunction was granted. Where an interim injunction is applied for all the facts must be laid before the Court and nothing suppressed otherwise the order may be set aside without regard to the merits.

[22] It is clear from the papers filed that lengthy negotiations took place between the parties before the letters of 16 October were sent. I have already referred to the letter of 29 September. In their letter of 2 October 2015 the Plaintiffs warned that "we reserve our rights to again notify you that we will seek ex parte injunctive relief if you move to terminate our positions". In my opinion the circumstances were not such as to justify applying ex parte at all: the Plaintiffs had more than enough time to make application inter partes in the normal manner.

Result: I am not satisfied that the Plaintiffs have discharged the onus resting upon them to show that the injunctions granted on 20 October should be continued. On the contrary I am satisfied that on the balance of convenience they should cease to have effect forthwith.

The Plaintiffs did not dispute the Defendant's contention that he personally should not have been named as a party. I agree. The Defendant will be renamed "Minister of Public Enterprises for and on behalf of the Kingdom of Tonga".

DATED: 3 December 2015




**M. D. Scott
JUDGE**