IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY CV 44 of 2014

BETWEEN: JOHN CAUCHI - ***Applicant***

AND: JUDICIAL APPOINTMENT S and DISCIPLINE PANEL

- ***Respondent***

BEFORE HON. JUSTICE CATO

J U D G M E N T

(Chambers Application)

Mr Niu SC for the Applicant

Mr Kefu Acting Attorney- General for the Respondent.

[1] The Applicant sought leave to review a decision of the Respondent Panel dismissing his complaints in relation to the manner the Chief Justice, had conducted a trial of an action commenced by him against the Government for damages for alleged wrongful dismissal.

[2] The trial had ended with the Chief Justice discharging the jury as a consequence of the Applicant applying for a discharge on the basis that the provisions of the Constitution and of the Supreme Court Act gave the Applicant the right to have the jury, and not the Judge, decide his claim, and that the trial should be recommenced, accordingly.

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[3] Briefly, the issue which had concerned the applicant and the Court at trial was whether clauses 11, 99, 100, and 111 of the Constitution and section 13(3) of the Supreme Court Act granted the Applicant the right to have the jury decide his claim. The Chief Justice was of the view that the jury was to determine the issues of facts and questions of legal liability arising out of those determinations fell for his determination, and the trial proceeded accordingly from the 19th to the 26th November 2013, with all the witnesses for both parties heard by the jury before they were discharged. He also had considered that this approach had the support also of the plaintiff at trial.

[4] The Chief Justice, on the application of the plaintiff, on the 26th November, 2013 discharged the jury and adjourned the case to the 23rd January 2014 when he indicated he would give written reasons for doing so. On the 23rd January, he gave written reasons which inter alia stated that the plaintiff had agreed to proceed with the trial on the basis that the jury was to decide only the questions of facts, and furthermore maintained that the function of the jury was to assist the Judge to decide disputed questions of fact only whilst the Judge would decide the question of liability. The fact of any concession being made was disputed by the Applicant.

[5] On or about 14th March 2014, the Applicant lodged with the Panel three complaints against the Chief Justice claiming misconduct in that;

(a) He had acted in breach of his oath as Chief Justice and as a Judge to perform truly with impartiality his duties as a Judge in accordance with the Constitution and laws of the Kingdom in that the provisions of the Constitution and the Supreme Court Act granted the plaintiff the right to have a trial by jury in his claim against the defendant in that case and to have the jury decide his claim. The Judge directed and ordered that the jury would decide only the facts and he, the Judge, would decide on the law the questions of liability, it

being contended that this deprived the plaintiff of his constitutional right to a civil trial by jury on the question of liability. He, therefore, it was claimed had acted in breach of the Constitution and the Laws of the Kingdom.

(b) It was also claimed that he had breached his oath to perform truly and act with impartiality as Chief Justice and as a Judge under the Constitution and the laws of the Kingdom in that he acted with partiality against the plaintiff on that day by publishing his reasons for discharging the jury on the 26th November, 2013, and stating wrongly and incorrectly that the plaintiff had agreed or that this counsel had agreed on his behalf that the Judge to decide only the facts and not the question of liability, whereas that was not, the Applicant contended, the case. The Applicant further contended that this meant that the Judge had wrongfully used the concession to wrongfully allow a claim for costs against him for the aborted trial.

(c) It was further claimed that the Judge had acted in breach of his oath as Chief Justice and as a Judge to perform truly and impartially his duties in that he had acted with partiality against the Applicant in that he;

a. would not allow the plaintiff to give or produce evidence which was not particularized in the pleading whereas he allowed the defendant in the case to give evidence which was not particularized in the pleadings;

b. led and conducted cross-examination whilst and instead of the defendant counsel in that case cross-examing; and

c. was discourteous to the plaintiff and embarrassed the plaintiff in front of the jury whilst the plaintiff was giving evidence by questioning the plaintiff as to whether he was ignorant of the new clause 87 of the Constitution.

[6] Consequently, the Applicant contended that the Panel should recommend to his Majesty in Council that the Chief Justice should be dismissed for gross misconduct. Complaint and relief was also sought in relation to the actions of the Attorney- General by the Panel. The Chief Justice and the Attorney - General, who were members of the Panel also, withdrew from the Panel's hearing.

[7] On the 25th March 2014, the Panel determined that both applications should be dismissed. In so far as the relief sought against the Chief Justice was concerned, the Panel in a decision delivered by the Interim Lord Chancellor for and on behalf of the Judicial Appointment and Disciplinary panel (Mr Harry Walkens KC) stated;

> "The Panel does not accept your assertion that the Lord Chief Justice was functus officio following the Court's decision on 26th November 2013 where it discharged the Jury. To the contrary the Lord Chief Justice remains still seized of the matter. As is apparent from the last page of your letter of complaint, there are numerous other applications (presently adjourned to 28th March you say) which remain extant.
>
> Moreover, the first paragraph of your complaint letter makes it plain you have instructed counsel to appeal the matter about which you have complained.
>
> In the circumstances, it would be quite improper for the Panel to consider the matter further which will indeed run the risk of having the effect of interfering with the course of justice. The litigation, including any rights of appeal, must be pursued and determined before the Panel will entertain further considerations of your complaint."

[8] The Judicial Appointments and Discipline Panel was constituted under the provisions of clause 83(C) of the Constitution. The Panel consisted of the Lord Chancellor as Chairman, the Lord Chief Justice, the Attorney - General, and the Law Lords being persons versed in

the law as the King from time to time shall appoint. The Panel is responsible inter alia for recommending to the King in Privy Council, the appointment of eminently qualified person to the Judiciary, the disciplining of members of the Judiciary, and the dismissal of members of the Judiciary for bad behavior through gross misconduct or repeated breaches of the Code of Judicial conduct.

[9] It is plain that this application in seeking a recommendation that the Chief Justice be dismissed is involved principally with issues relating to the propriety of his rulings and his interpretation of the provisions of the Constitution and the Supreme Court Act relating to the responsibilities of a Judge and a jury in relation to findings of fact, questions of liability in a civil jury action, and the correct legal approach to these questions. Ordinarily, civil cases do not involve trial by jury and a Judge alone trial in civil matters is the usual procedure in Tonga. Plainly, these issues and the division of responsibility had troubled the Chief Justice from the outset of the trial. Contentious also was whether the Applicant through his counsel had, as the Judge asserted, agreed at the outset to the approach which the Judge had adopted. These issues, in my view, could only be properly decided in any authoritative way by appeal to the Court on Appeal. Other issues for which review had been sought related to the conduct of the Judge. Issues of this kind also, in my view, can only be properly evaluated on appeal, in the full context and circumstances of the case.

[10] The Panel in its reasons had been informed that the Applicant had given instructions to appeal the matters about which he had complained, and this was one important factor in their decision not to proceed with the application. Rightly, in my view the Panel considered that it was premature to entertain the complaints. The Panel, however, said that whilst the application would be dismissed "if at the conclusion of the litigation, including any appeal/ judicial review, you wish to pursue the matter further then you may submit your complaints." The approach adopted by the Panel, in my view, was correct. The approach is consistent and analogous with that

stated by the commentators, Aronson and Dyer , 2nd ed, 2000, at page 580 in relation to judicial discretion and review generally;

> "The dominant approach in the older cases used to be to treat as irrelevant the fact that the appellant had appeal rights. Most of the modern cases are quite different, viewing the existence of an appeal for the applicant as a consideration relevant to the exercise to refuse prerogative relief."

Further, the writers say;

> " It is submitted that the case for discretionary refusal on the basis that the applicant should first use their appeal rights is stronger in the nisi stage) for those jurisdictions still requiring a leave requirement)."

I consider that the Panel could not be faulted in the approach that was taken in this case when declining to entertain the complaints and dismissing the application on the basis that to do so was premature.

[11] Mr Niu SC submitted on this application, and Mr Kefu agreed, that the jurisdiction of the Panel and the appeal procedure were entirely different. Mr Niu contended it followed that the Panel was sufficiently competent to consider the matters of complaint and should do so, and thus I should grant leave to allow this application to proceed. I consider, however, that, in the absence of rulings from the Court of Appeal, the Panel could not properly determine whether the Chief Justice had in his conduct of the trial been in error, still less that he had been impartial in his conduct of the trial, and was guilty of serious misconduct.

[12] In his argument, Mr Kefu contended that the applicant's claim for leave should fail on a number of grounds. First, he submitted that there was no proper application in this case because there was no affidavit in support to present evidence to support the proposed statement of claim; second, that the applicant had filed his application late, third, that he was not entitled as of right to a hearing before the Panel, fourth, the complaint did not amount to a breach of discipline, fifth the complaint was on a point of law against procedure taken in a

civil case, and should properly be dealt with by an appeal to a Court of Appeal. Further, he contended that the Supreme Court action was still active, and the applicant was capable of receiving the remedies he was seeking against the Crown from the Court.

[13] I consider there was an adequate affidavit accompanying the proceedings, and that, although the application was filed on the 23rd June 2014 shortly before the expiry of the three month period, this would not have influenced me against granting leave to review had I considered that the Applicant had an arguable case, for review. Mr Kefu put the test, following the approach of Lord Diplock in Inland Revenue Commissioners v National Federation of Self- Employed and Small Business Ltd [1981] 2 ALL ER 93, 106. Also, Karalus v Royal Commission of Inquiry into the sinking of MV Princess Ashika , 9th August, 2010, as that the Applicant must show an arguable case. I agree with Mr Kefu's submission that the complaints set out in the first two claims for review are essentially complaints of error of law and should be dealt with in the normal way through an appeal to the Court of Appeal. I do not see that the Panel can properly assess, as I have said, whether the Judge had been, as was claimed, seriously in dereliction of his office unless the correct legal approach had been authoritatively first determined by the Appeal Court. Even if the Court of Appeal, however, were to have ruled that the Judge had fallen into error, this, in my view, would not mean that the Judge warranted censure or justified any complaint being taken to the Panel under either the disciplinary power or more seriously, as here, the power of dismissal for gross misconduct. The mere fact that a Judge has fallen into error cannot mean that disciplinary proceedings should follow.

[14] I also agree with Mr Kefu that the complaints relating to procedure or the manner of questioning do not reach that threshold where a complaint either of a breach of discipline or misconduct is justified. Robust questioning even from Judges is not uncommon, and sometimes justified. Whether the conduct of the Judge was appropriate in the circumstances of the case or conversely manifested bias as the Applicant claims, was a matter which could not be determined in isolation but had to be considered in the whole

context of the case and was also in my view an appeal question; likewise with any argument relating to admissibility of evidence. I do not consider, in any event, that the complaints or allegations advanced by the Applicant here, in any event, in the context of a lengthy and rather complex trial could be said to attain the threshold standard that the Applicant has to meet in advancing his application for relief based upon the very serious allegation of judicial bias or partiality that must be demonstrated before a recommendation could form the foundation for the Judge's dismissal on the basis of misconduct, a submission which Mr Kefu also made. I also agree with Mr Kefu that, before dismissing the application, the Panel was not obliged to hear the applicant in person. A Tribunal is entitled to determine an application on the written material tendered in support of a complaint. Local Government Board v Arlidge [1915] AC 120 Pedras v Prime MInister and others CA Tonga, 31st October, 2014.

[15] For all these reasons, I decline the Applicant leave to review the decision of the Respondent Panel dated 25th March 2014. The Respondent was in my view correct in the approach it took to the Application, and in its decision to dismiss the Application.

[16] I award costs to the Respondent to be taxed by the Registrar within 30 days hereof.

DATED: 28th NOVEMBER 2014 **JUDGE**