



"The Commission is currently revising salaries, gratuity arrangements and other benefits and conditions, with implementation of changes planned for 1 July 2007. Any changes made to such items will not result in overall remuneration and benefits which are in any way less favorable to the Appointee.

c) Clause 17.3 "Renewal of Contract:"

"Where the Contract is to be renewed, it is a requirement that a new contract document be prepared, under conditions no less favorable than the existing Contract to be duly signed by both parties. This new Contract is to be agreed and signed prior to the expiration of the existing contract."

d) Clause 19.2 "Early cessation of contract by the Appointee:"

"When the Appointee wishes to bring about the cessation of this employment contract, prior to the normal contract expiry date as specified in Clause 1, he/she will be required to provide a minimum of three (3) months notice in writing, or provide payment of an amount equivalent to three months total remuneration value in lieu thereof unless such requirement is waived by the Commission."

e) Clause 19.3 "Early cessation of Contract by the Commission:"

"When the Commission elects to bring about the cessation of this employment Contract, prior to the normal contract expiry date as specified in Clause 1, it will be required to provide three (3) months notice in writing to the Appointee..."

f) Clause 19.5 "Summary Termination:"

"Where the Appointee's Contract is brought to an end by reason of an offence characterized as a breach of the Public Service Code of Conduct [etc] ... There will be no obligation on the Commission to provide the period of notice defined in Clause 19.3."

g) Clause 21 "Application of Public Service Act, Public Finance Management Act and Regulations:"

"The provisions of the Public Service Act 2002, any Public Service Regulations and the Public Finance Management Act 2002 shall apply to the parties to this Contract."

[2] On 6 November 2008 (Document P31-36) a number of variations to the Contract were agreed as was provided for in Clause 3.2 of the Contract.

[3] On 23 January 2009 (Document P38-39) the Commission advised the Plaintiff that following "a job well done during the first two years of [his] contract" his appointment was extended for a period of three

years ending on 1 January 20120. The Plaintiff accepted this extension on 29 January 2009 (Document P-37).

- [4] The relevant part of the Public Service Act 2002 which was applied to the Contract by Clause 21 was Section 20 which is as follows:

"A Head of Department or employee of the Public Service shall take a leave of absence upon registering as a candidate for election to the Legislative Assembly and shall resign if elected."

- [5] On 20 September 2010, the Public Service Act 2002 was amended by the Public Service (Amendment) Act 2010. Section 4B stated the objects of the Amendment Act to include the establishment of "an apolitical public service that is effective and efficient in serving the Government and the public." Section 43 enumerated the "Principles of the Public Service" including (a) "the Public Service is apolitical, performing its functions in an impartial professional and competent manner." The term "apolitical" was defined to mean:

"employees performing their duties in an impartial, ethical and professional manner without involving any political activities including not associating with any association that has a political mandate which is or may be contrary to Government policy."

- [6] By Section 18 of the 2010 Act, Section 20 of the 2002 Act was deleted and replaced with the following new Section 20:

20- "Candidacy for Legislative Assembly, town officer or district officer."

"A Chief Executive Officer or employee in the Public Service shall resign upon registering as a candidate for Election to the Legislative Assembly, the office of town officer or district officer."

- [7] About one month prior to the passage of the Amendment Act notice was given by the Second Defendant that a General Election for representatives to the Legislative Assembly was to be held on 25 November 2010 and that candidates for election were required to register on 21 October 2010.
- [8] It appears that following its passage the Amendment Act prompted a number of questions to be asked about its consequences. On 14 September 2010 the Commission wrote to all Heads of Department (Document P-40) advising them that:

"for Civil Servants intending to resign from the Public Service so they can register as a Parliamentary Candidate, the period of notice will be waived."

It is clear that the period of notice in question was that required by Clause 19.2 of the contract.

- [9] On 27 September 2010 the Plaintiff wrote to the Commission (document D-6) advising them:

"I have issue with your instructions given in [Document P-40].

I believe that the Public Service (Amendment) Bill does not apply to my case as my current contract was signed well before the said Bill was passed by the Legislative Assembly. Since the Constitution prohibits the enactment of any retrospective laws that "may curtail or take away or affects rights or privileges existing at the time of the passing of such laws" the Public Service Commission's requirement looks to me to be unlawful."

- [10] On 15 October the Commission replied. It advised the Plaintiff that it did not agree with him that the amended Section 20 did not lawfully apply to him and further advised him that upon registration as a candidate, whether or not at the time he was on annual leave, he would be deemed to have resigned from the public service.
- [11] The Plaintiff registered as a candidate and on 29 October 2010 the Commission decided that it be accepted that the Plaintiff had "ceased" his contract of employment (see Document D-18). This decision was approved by Cabinet on 11 November 2010 (document D-29).
- [12] The writ was issued on 1 December 2011. The Plaintiff sought damages for "unlawful termination" of his contract.

[13] The Statement of Defence was filed on 14 May 2012. On the question of liability there are no factual issues. It was however pleaded:

[i] that the Contract was "frustrated by law" specifically by the amendment to Section 20 of the 2012 Act which came into force on 27 September 2010;

[ii] that the amended law was not challenged in the Courts;

[iii] that the Plaintiff was aware of and understood the amendment;

[iv] that the Plaintiff was free to decide whether or not to register; and

[v] "Knowing the amendment and its consequences, the Plaintiff nevertheless went ahead with his registration.

In the alternative, it was pleaded that acceptance by the Plaintiff of gratuity amounting to \$19,200 together with leave payments together totalling \$12472.31 which sums were only payable upon cessation of contract, amounted to an acceptance by the Plaintiff that his contract had been lawfully terminated. In the circumstances the Plaintiff was "estopped from making this claim."

[14] On 25 October 2012 there was a very short hearing at which the only evidence was that of the Plaintiff and all the documents disclosed were admitted by consent.

[15] The Plaintiff told me that he wanted to register as a candidate but did not want to resign and did not resign. In his view the amended section 20 did not apply to him and there was no need for him to comply with it. After he received document P-43 he accepted that his contract had been terminated and although he was not successful in the General Election he did not attempt to return to work.

[16] The Plaintiff agreed that he had accepted gratuity and leave payments because he thought he was entitled to them, whether or not he had been validly terminated. Since the termination he has not found gainful employment and his decision to accept the payments offered reflected his concerns about his financial situation. It was never his intention to give the impression that by accepting these payments he was accepting that his contract had been validly determined.

[17] Written submissions were filed by both counsel shortly after the hearing and I am grateful to counsel for their assistance. As will be seen from the submissions, Mr. Kefu suggested that the central questions were whether Section 20 was applied retrospectively to the Plaintiff and whether his acceptance of perquisites following his deemed cessation of employment estops him from bringing the present action. Mr. Niu also focussed on the applicability of the amended Section 20 to the Plaintiff and suggested that the new section not only did not apply to the Plaintiff but was in fact unconstitutional. So far as the acceptance of leave and gratuity payments were concerned, Mr. Niu submitted that there was nothing to show that the parties had agreed that payment and acceptance would constitute settlement of the Plaintiff's claim.

[18] The consequences of the acceptance of perquisites by the Plaintiff can conveniently be taken first. Although the Defendants say that the Plaintiff is estopped as a result it is not clear to me on what precise ground that argument is advanced. Part VII of the Evidence Act (Cap 39) provides four statutory definitions of estoppel but each involves a representation of fact, rather than a mere representation of intention (eg not to sue). It might be suggested that by accepting these payments the Plaintiff agreed to waive his rights under the contract or alternatively the compromise his claim, but the Plaintiff denied having entered into any such agreements with the Defendants. Before a compromise or waiver can be relied upon the precise terms of such agreements must be satisfactorily proved. In the present case while acceptance of the payments is not disputed, there is no evidence at all from the Defendants to contradict the Plaintiff's assertion that he accepted what he was offered because he needed the money which he thought was anyway owed to him. In my view the Defendants have failed to show that the Plaintiff's acceptance of these moneys followed any agreement reached between the parties and in particular, any agreement by the Plaintiff to forbear.

[19] As has been seen in paragraph [9] above, the Plaintiff suggested, when he wrote to the Commission, that the requirement that he resign upon registration "unlawful". As has also been seen, Mr. Niu suggested (in paragraphs 27-30 of his written submissions) that section 20 as amended was unconstitutional. That second suggestion was never pleaded and was not the subject of full argument and therefore I do not think it was properly before me. In my view, the central issue in this case is whether the Defendants were entitled to

amend the terms and conditions of the Plaintiff's service by applying the amended section 20 of the Act.

[20] In the absence of any supervening legislation, the terms of the Plaintiff's contract seem clear and the provisions governing its variation equally so. Clause 21 incorporated the provisions of the Public Service Act 2002 into the contract. In my view, the requirement being for the terms of a contract to be certain, the Act as incorporated could only be in the form in which it stood prior to any amendment made subsequent to the formation of the contract. The contract could only be amended (clause 3.2) by agreement in writing between the parties. Apart from the amendments referred to in paragraph [2] above, no relevant agreement was ever reached to alter the contract, let alone to allow it to be amended by incorporating a new section 20.

[21] While it is not to be doubted that Parliament may, by Act, alter the terms of contracts freely entered into, in Tonga, Acts of Parliament are subject to Clause 20 of the Constitution:

"It shall not be lawful to enact any retrospective laws in so far as they may curtail or take away or offer rights or privileges existing at the time of the passing of such laws."

[22] In *Storey v Graham* [1899] 1 QB 406, 411 it was explained that by a "right" is meant "a specific right which in one way or another has been acquired by an individual, and which some persons have got and others have not got." In *Fulivai v Kainuanu* [1962] 2 To.L.R 178, 183

the Privy Council expressed the view that the (Clause) "only refers to vested and not contingent rights."

[23] In *L'Office Cherifien v Yamashita Ltd* [1993] 3 WLR 266,273 Sir Thomas Bingham quoted *Craies on Statute Law* 7<sup>th</sup> Ed. (1971) at p 387. A statute is retrospective if it:

"takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty or attaches a new disability in respect of transactions or considerations already past."

This definition was described as having received "high judicial endorsement" as representing the modern law by the House of the Lords [1994] 1 AC 486, 524.

[24] In my opinion among other rights secured by the contract to the Plaintiff included the right to "take leave of absence upon registering as a candidate for election to the Legislative Assembly", i.e without having to resign from the service "unless elected". That right, to remain employed within the service despite standing for Parliament, was taken away by the decision to apply the terms of section 20, as amended, to the Plaintiff. It was a right taken away, or in other words, a variation of a contractual term, without obtaining the Plaintiff's agreement as was required by Clause 3.2.

[25] Mr. Kefu argued that nothing that was done had removed the Plaintiff's constitutional right to stand for election and that he remained as free as before to decide whether or not to exercise that

right. It is not however, the right which is here in issue, it is the dramatic alteration of the consequences of its exercise. It could not plausibly be argued that a paratrooper whose parachute had been confiscated had not had his freedom to jump curtailed.

[26] Although a number of other submissions were made on behalf of the Defendants, I did not find that they advanced their case. In particular the suggestion made at the end of his submission by Mr. Kefu, that Section 20 was procedural rather than substantive (as to which see *Wright v Hale* (1860) 6 H&N 227, 232 and *Republic of Costa Rica v Evianger* (1876) 3 Ch. D 62, 69) did not find impress me and had not been pleaded.

[27] In my view, the unilateral amendment of the Plaintiff's contract by the application to him of the requirements of section 20 as amended, was a breach of his contract, entitling him to damages. Although both counsel addressed me on the quantum of damages, unfortunately, I still do not find the figures and calculations clear. Accordingly there will be Judgment for the Plaintiff with damages to be assessed following further submissions.

**DATED: 18 December 2012**

E. Takataka

18/12/2012.

  
CHIEF JUSTICE

