

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

CV 121 of 2011

BETWEEN : VILIAMI FUKOFUKA - Plaintiff

**AND : 1. THE PUBLIC SERVICE COMMISSION
2. KINGDOM OF TONGA - Defendants**

Mr L.M. Niu for the Plaintiff

Mr 'A. Kefu (Solicitor General) for the Defendants

DECISION

[1] This is an application by the Defendants to strike out the Statement of Claim as disclosing no reasonable cause of action (RSC O.8 r8(1)(a)). In accordance with the Rules, no evidence is considered on such applications (O8 r8(2)).

[2] The Statement of Claim pleads that the Plaintiff was appointed under contract by the First Defendant to the position of Chief Executive Officer, Ministry of Education, on 17 January 2007. On 1 January 2009 the appointment was renewed for a period of 3 years.

[3] On 1 January 2009 section 20 of the Public Service Act 2002 read as follows:

“A Head of Department or employee in 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.”

[4] According to paragraph 8 of the Statement of Claim:

“In or about August 2010 the second defendant caused a public notice to be announced that the general election of the representatives of the legislative assembly was to be held on 25 November 2010 and the registration of candidates for the election was to be held on 21 October 2010.”

[5] According to paragraph 10:

“[The Plaintiff] announced his candidacy and awaited registration as a candidate which was to be held on 21 October 2010.”

[6] On 20 September 2010 the Public Service (Amendment) Act 2010 came into force. Section 20 of the principal Act was replaced by the following section:

“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] Section 23 of the Amendment Act also provided that section 26 of the principal Act should thereafter read:

“Every Chief Executive Officer who was appointed before the coming into force of the Public Service (Amendment) Act 2010 shall continue in such employment for the remainder of the term of his appointment and may be re-appointed in accordance with this Act.”

[8] On 21 October 2010 the Plaintiff registered himself as a candidate for the election. According to paragraph 16 of the Statement of Claim:

“On 29 October 2010 the first defendant decided that the plaintiff be accepted to have ceased his contract of employment with effect from 21 October 2010. That decision was conveyed to the plaintiff on 1 November 2010.”

[9] According to paragraph 20 of the Statement of Claim. “The plaintiff says that the defendants have unlawfully terminated his contract of employment and the defendants are liable to pay him [damages].”

[10] In support of the application, Mr Kefu advanced three arguments:

- (i) The Plaintiff’s employment was terminated by operation of Section 20 of the Act, as amended;
- (ii) The Plaintiff exercised a free choice to register as a candidate, in full knowledge of the consequences; and

- (iii) By accepting retirement fund, gratuity and leave payments the Plaintiff conceded that he had been lawfully terminated and was estopped from asserting the contrary.

[11] Mr Niu referred to two authorities : *Ex parte President and Trustees of "Tonga Ma'a Tonga Kautaha"* To. L.R. 1908-1959 page 9 and *Schafer-Macdonald v Health Practitioners Registration Council & Anor* (1997) To. L.R. 69 from which it emerged that the gravamen of the Plaintiff's complaint is that the amendment to the principal Act was applied to him retrospectively, in breach of clause 20 of the Constitution which reads"

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

[12] In Mr Niu's submission the Plaintiff had a contractual right to take leave, rather than resign, when he stood for Parliament.

[13] In my view it is not at all clear that the amended Act, as applied to the Plaintiff, was not applied retrospectively. I am also of the view that it is arguable that the choice offered to the Plaintiff was not the choice offered by the Act as amended, but by the Act in the form in which it stood when the terms and conditions of the Plaintiff's employment were agreed. Lastly, in the absence of anything to show that the Plaintiff agreed to accept the gratuity and other payments to him in lieu of exercising the right to sue for breach of contract, I am not satisfied that any estoppel has been shown to exist.

[14] Mr Niu accepts that the Statement of Claim might have been more accurately drafted and Mr Kefu suggested that the Defendants' application was justified by the pleadings as they presently stand. The Court will however generally give leave to amend a defect in the pleadings when it is satisfied that the result will be a reasonable cause of action (see *White Book* 1988 Edn. paras 18/19/5 and 18/19/7).

[15] The application is dismissed. However, in the circumstances the costs will be reserved.

DATED: 29 February 2012.

M.D. Scott
CHIEF JUSTICE

N. Tu'uholoaki
29/2/2012