IN THE COURT OF APPEAL OF TONGA

CIVIL JURISDICTION **APPEAL NO. AC 22 of 2011**

NUKU'ALOFA REGISTRY **[CV 72 of 2011]**

BETWEEN : **FILILAVA MOALA** - **Appellant**

AND : **1. PUBLIC SERVICE COMMISSION**

2. GOVERNMENT OF TONGA - **Respondents**

Coram : **Burchett J**

Salmon J

Moore J

Counsel : ***Mr. Fa'otusia*** **for the Appellant**

Mr. Kefu **for the Respondent**

Date of hearing : **16 April 2012**

Date of judgment : **27 April 2012**

JUDGMENT OF THE COURT

[1] This is an appeal against a judgment of the Lord Chief Justice refusing to grant leave to the appellant to seek judicial review of a decision to dismiss him from the Public Service.

[2] It is convenient first to refer to the background which was uncontroversial. For some period prior to April 2010, the appellant was employed in the Office of the Prime Minister and had responsibility for managing aspects of the finances of the Office. On 30 April 2010 he was suspended and charged with misconduct. On 13 October 2010 he was dismissed effective from the date of his suspension. The misconduct was said to have been the theft by the appellant of $7000 from a safe in the Office. In addition to the disciplinary charges, the appellant was charged (apparently in March 2010) with theft under the Criminal Offences Act CAP 18. On either 7 December 2010 or 7 January 2011 those criminal charges were dismissed in the Magistrate's Court.

[3] On 17 January 2011, the appellant's solicitor wrote to the Public Service Commissioner seeking the review of the earlier decision to dismiss the appellant and his reinstatement. On 9 March 2011, the Public Service Commissioner wrote to the appellant's lawyer

indicating the matter had been considered by the Commission on 4 March 2011 and the decision to dismiss had been affirmed.

[4] On 30 June 2011 an ex parte application for leave to apply for judicial review of the decision of 13 October 2010 to dismiss the appellant, was filed in the Supreme Court. This application was accompanied by a draft statement of claim and draft writ. This was done pursuant to Order 39 of the Supreme Court Rules 2007. The application was also accompanied by a short affidavit from the appellant's lawyer. The following day a writ was issued by the Registrar of the Supreme Court though the issue of the writ was in error because, at that point, no leave had been given to make the application.

[5] On 3 August 2011 the defendants filed an application seeking an order striking out the plaintiff's claim or, in the alternative, an order requiring the plaintiff to replead so as to remove from the draft statement of claim paragraphs which the defendants asserted were scandalous and vexatious. Without descending into detail, those paragraphs alleged serious financial impropriety on the part of consultants and senior officers working for, or in association with, the Prime Minister. The focus of the allegations

of impropriety was travelling expenses and the use of credit cards. The strike out application was accompanied by an affidavit of the Solicitor-General. The strike out application was made under Order 8 rule 8. It was almost certainly premature as leave had not then been given to the appellant to make the application for judicial review. It would only be when leave was given that the draft statement of claim would become a pleading in a proceeding.

[6] There was a hearing before the Lord Chief Justice on 10 August 2011 at which the appellant and the defendants were represented. After a preliminary ventilation of the question of whether leave to make the application should be granted (the grant of leave was opposed by the defendants), the matter was adjourned part heard until 12 September 2011.

[7] On 31 August 2011 the appellant filed an amended draft statement of claim. There was then the further hearing. On 23 September 2011 the Lord Chief Justice ordered that the plaintiff's application be dismissed. The Lord Chief Justice also published reasons for judgment. The grant of leave to apply for judicial review may often involve consideration of the timeliness of the

application and sometimes, in addition, the merits of the application in a preliminary way. Before referring to the reasons of the Lord Chief Justice, it is convenient to set out the terms of O 39.

> *"**O.39 Rule 1. When remedy available***
>
> *This order applies to any action against an inferior Court, tribunal or public body (including an individual charged with public duties) in which the relief claimed includes an order of mandamus, prohibition or certiorari, or a declaration or injunction (in this order referred to as "judicial review").*
>
> ***O.39 Rule 2. Leave of Court required***
>
> *(1) No application shall be made for judicial review unless the leave of the Court has been obtained in accordance with this rule.*
>
> *(2) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending that period.*
>
> *(3) An application for leave shall be made ex parte by filing:*
>
> *(a) an application notice which is to set out concisely the relief claimed and the grounds therefore;*

(b) a copy of the proposed writ and statement of claim; and

(c) an affidavit verifying the facts relied on.

O.39 Rule 3. Court's powers

(1) The Court may grant the application without a hearing, but shall not refuse it without hearing the applicant.

(2) The Court shall not grant leave unless satisfied that the applicant has a sufficient interest in the matter to which the application relates.

....."

[8] In his reasons, the Lord Chief Justice proceeded on the footing that the "date from when grounds for the application first arose" was the time of the dismissal in October 2010 and, accordingly, the three-month period referred to in O 39 r 2 (2) ran from that date. The Lord Chief Justice accepted the defendants' submission that the application was well out of time but acknowledged that the consequences for the appellant of the decision to dismiss him were obviously very serious and indicated that if good grounds suggestive of error were placed before the court, the three month period might well be extended.

[9] Ultimately, however, the Lord Chief Justice indicated he was satisfied no good reason for extending time had been advanced and the appellant had not demonstrated that he had an arguable case for judicial review. Earlier in his reasons, the Lord Chief Justice indicated he had studied the amended draft statement of claim of 31 August 2011 and concluded that it did not disclose any shortcomings in the procedures preceding the decision to dismiss nor did it establish that it was arguable that the decision taken was wholly unreasonable.

[10] We turn now to consider the appeal. The starting point is to note that this is an appeal from the exercise of a discretionary power to refuse leave to apply for judicial review. For an appellant to succeed in an appeal from the exercise of a discretionary power, it is necessary to demonstrate that the discretion was exercised on wrong principles, involved some fundamental misapprehension of the facts or involved taking into account irrelevant considerations or failing to take into account relevant ones: *Pohaha and Tauelangi v Kinikini* (1981–1988) Tonga LR 116 and *House v R* (1936) 55 CLR 499.

[11] Order 39 follows the English RSC Order 53: see *'Asitomani v Superintendant of Prison* (2003) Tonga LR 84. The English provisions, though sometimes criticised, were intended to create a speedy and efficient mechanism for the application of public law in the judicial review of administrative decisions. Accordingly, an applicant must move promptly and within the specified limit of three months. In the present case, the Lord Chief Justice was correct in identifying the three month period as commencing from the time of dismissal and in concluding that the application was "well out of time". That is not to say, in appropriate cases, intervening events might not reasonably explain delay including time taken in pursuing alternative legal remedies: *Judicial Review of Administrative Action*, de Smith, Woolf & Jowell, 5th ed, 1995 at 15-021. However the delay in the present case was sought to be explained by the time taken in making representations to the Public Service Commission in January 2011 and, following their rejection in March 2011, the lawyer representing the applicant being distracted by other legal commitments and the difficulty in getting instructions. No error of principle is disclosed in the circumstances in the Lord Chief Justice not accepting these explanations for the lengthy delay.

[12] The central focus of the appellant's case in the appeal was that the Lord Chief Justice was in error in concluding that no arguable grounds were disclosed in the appellant's case for challenging the decision to dismiss. At least before the Court of Appeal, the challenge to the decision to dismiss was advanced on the basis that the decision to dismiss was manifestly unreasonable. That is, the decision was infected with what is often described as *Wednesbury* unreasonableness: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. However it must be borne in mind that in relation to this ground of judicial review, there is a very high threshold for establishing the requisite unreasonableness. Lord Greene MR described the test and threshold in the following way in *Wednesbury* at 230:

> *"It is true to say that, if the decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere* [and later] *to prove the case of that kind would require something overwhelming."*

[13] In the present case there are two matters referred to in the appellant's amended draft statement of claim which are particularly relied on by the appellant's counsel in this appeal. We

assume, without deciding, that at the stage of deciding whether to grant leave, the merits of the applicant's case can be assessed by the Court simply by reference to facts the applicant asserts are true. The first matter is the acquittal of the appellant in the Magistrates Court and the second is the asserted exoneration of the appellant by the Auditor-General.

[14] As to the first matter, it must be borne in mind that the standard of proof in criminal matters is beyond reasonable doubt. This is not a standard which, at least in the ordinary course, would be applied in administrative decision-making including the making of a decision to dismiss a public servant. In other words, facts established in criminal proceedings might not prove the commission of a crime beyond reasonable doubt. However those same facts could well provide a sufficiently firm factual foundation for a decision to dismiss which was reasonable or, putting it slightly differently, reaching a decision that an employee should be dismissed on those same facts does not demonstrate, of itself, that the decision is unreasonable in a *Wednesbury* sense.

[15] The second matter is the asserted exoneration of the appellant by the Auditor-General. We should emphasise that any report which the Auditor-General may have prepared, was not in evidence before the Lord Chief Justice nor in evidence before us. However the asserted fact (in the amended draft statement of claim) that the Auditor-General exonerated the appellant must be balanced with the admission in the same draft statement of claim that the appellant confessed to stealing the money. It is true that in the amended draft statement of claim the appellant said the confession was not true and recounted facts explaining why he had made the false confession. However the fact that the confession was made places the exoneration by the Auditor-General in a slightly different light. Also, in the appellant's written submissions in the appeal, the finding or ruling of the Auditor-General was said to be that "there was not enough evidence to indicate that the appellant was responsible to (sic) the $7000 that went missing from the PM's Office safe". There is a material difference, in our opinion, between a conclusion that there was not enough evidence to prove particular conduct and exonerating a person from that conduct. In our opinion, the mere fact that the Auditor-General appears, at best for the applicant, to have had real reservations about whether the appellant stole

the money would not constitute something which was even arguably "overwhelming", to use the language of Lord Greene, so as to demonstrate the appellant had an arguable case that the decision to dismiss was manifestly unreasonable in the *Wednesbury* sense.

[16] In the result, we are not satisfied the Lord Chief Justice erred in the exercise of the discretionary power to refuse leave in any way which might attract appellate intervention.

[17] We conclude by noting that a claim for damages was made in the present case in the proposed application for judicial review. It does not appear to us, as presently advised, that the plaintiff would be precluded from suing for damages for wrongful dismissal. This observation should not be taken to be an invitation to the plaintiff to commence such proceedings nor a suggestion that any such proceedings would be likely to bear fruit.

[18] However it is possible that those advising the appellant were not (and perhaps the legal profession more generally is not) entirely sure what are appropriate procedures. It is, we apprehend, an

emerging legal issue in the Kingdom. Some decisions addressing aspects of this are *Vaiolete v Tonga Development Bank* (1999) Tonga LR 57 (Ward CJ – private rights in relation to a dismissal should not be pursued in judicial review proceedings) and to similar effect see *'Asitomani v Superintendent of Prisons* (2003) Tonga LR 84 and the decision of Thomas J in *Palu v Kingdom of Tonga*, unreported, Supreme Court, 11 May 2005; *Faleola v Kingdom of Tonga* (1999) Tonga LR 114 (Court of Appeal – the mere fact that judicial review proceedings concerning a dismissal had failed did not preclude the prosecution of an action for wrongful dismissal); *Tapueluelu v Soakimi* (2001) Tonga LR 105 (Ford J – proceedings concerning the misconduct of a public servant which truly raise public law issues should be commenced by way of judicial review); and *Fonua v Tonga Communications Corporation Ltd* (2002) Tonga LR 29 (Ward CJ – it is not necessary to bring judicial review proceedings to challenge a dismissal by a public authority even though the decision is otherwise amenable to judicial review).

[19] The appeal is dismissed with costs.

Burchett J

Salmon J

Moore J