

## Tu'itupou v Tonga Water Board

Supreme Court, Nuku'alofa  
 Martin C. J.  
 Civil case No. 7/1989

3, 4 and 5 April, 15 June 1990

- 10 *Administrative law – principles of natural justice applicable – compliance with principles*  
*Natural justice – principles applicable to dismissal of senior employee of statutory body – compliance with principles*  
*Employment – dismissal without notice – conduct not justifying summary dismissal*  
*Contract – employment – summary dismissal – conduct not justifying summary dismissal*  
*Damages – exemplary damages – not appropriate*
- 20 *Damages – damages for distress – not appropriate*

The plaintiff was dismissed from a senior position with the Water Board. This dismissal was without notice, and he brought proceedings claiming that it was done contrary to the principles of natural justice and contrary to the terms of his employment.

### HELD:

- 30 (1) The dismissal of the plaintiff was required to be in accordance with the principles of natural justice;
- (2) His dismissal was done in accordance with the principles of natural justice since although no oral hearing was provided he was given adequate opportunity to respond to complaints about his conduct;
- (3) The conduct of the plaintiff was not such as to justify dismissal without notice;
- (4) Adequate notice was 3 months; wages in lieu thereof, with interest, totalled \$902.87;
- 40 (5) The circumstances did not fall within any of the three categories for which exemplary damages may be awarded under *Rookes v Barnard*, nor could damages be awarded for distress caused by the wrongful dismissal.

Cases considered :

*Rookes v Barnard* [1964] 1 All E.R. 367

*Addis v Gramophone Co.* [1909 – 10] All E. R. Rep 1

Counsel for the plaintiff : Mr M. Paasi

Counsel for the defendant : Mr S. 'Etika

### Judgment

50 This judgment was reserved on 5th April 1990 to await a decision of the Privy Council Court of Appeal in the expectation that guidance would be given in that case which would be relevant to this. Unfortunately, that did not occur and the delay has been unnecessary.

'Aisea Tu'itupou was dismissed from his employment with Tonga Water Board in November 1987. He says that his dismissal was done in a manner contrary to natural justice, and that it was in breach of his contract of employment. He also claimed damages for malicious prosecution, but this claim was misconceived and it was struck out at the close of the Plaintiff's case.

### *The Facts*

60 The plaintiff was a long serving employee of the Board. He began his employment on 18 April 1972 at the age of 19 or 20. He progressed through various grades to become foreman mechanic. He was sent overseas to study - in Fiji, New Zealand and Japan - and appears to have been regarded as a valuable employee.

In 1985 the Plaintiff was in charge of the Board's branch at 'Eua. While there he permitted some surplus building materials to be used for the construction of a public hall. I will deal with that incident in detail later.

70 At the end of October 1987 he obtained special leave to go to a relative's funeral in Vava'u. I accept the evidence of the Board's manager, Filipe Koloi, about those events. He told the plaintiff that he was required to return on a particular Thursday, and that he would not be entitled to any travelling allowances. While the plaintiff was in Vava'u, he rang the manager to say that he could not return on the required day, and asked if he could work at the Vava'u branch until he was able to return. The manager was not pleased. He thought it was a ruse to obtain allowances while the plaintiff was in Vava'u. He told the plaintiff very clearly that on no account was he to work for or have anything to do with the Board's office there. During the same telephone conversation, he asked the plaintiff about some complaints which he had received.

80 While in Vava'u, on 5 November 1987 the plaintiff visited the Board's pumping station and there was an incident involving damage to the Board's digger. Again, I will deal with that incident in detail later.

On 6 November 1987 the plaintiff returned to Nuku'alofa on the 'Olovaha. He reported to the manager on 9 November 1987. The manager began to question him about the cement blocks which it was alleged had gone missing in 'Eua while he had been in charge there. The plaintiff left, and later submitted to the manager an application for vacation leave (which was overdue) to begin immediately. He did not wait for a formal reply, but went home. The plaintiff says he went home 90 because the manager told him there was nothing for him to do at the office. The manager denies this. There was clearly some work which he could have done, and I accept the evidence of the manager on this point. I find that the plaintiff was angry at being questioned, and left work without permission.

On 10 November 1987 there was a meeting of a subcommittee of the Board. The minutes (Ex. 7) show that after discussing several routine matters, considered the plaintiff's request for leave. They record :

100 "The Manager-Engineer stated that Mr 'Aisea Tu'itupou had just returned from Neiafu on Friday, 6 November 1987, being there over a week on his own business; when in Vava'u he phoned to say he should work with the office there in order to get travel allowance and this was declined. However he continued to touch Board's things there and broke the new mechanical digger (Scan). On 9 November 1987 he was questioned on this and 388 bricks that he sold in 'Eua pocketing the benefits, because branch manager in 'Eua was enlarging the office there now."

The minute continues to record that the plaintiff had become too self-important, and that "... even though a mechanic, he worked in the office for the last 2 years since no one could work with him in Mataki'eua" (the pumping station).

110 So these minutes record only 3 complaints :

- (i) damage to the machine in Vava'u;
- (ii) disposal of cement blocks in 'Eua; and
- (iii) inability to work with other Board employees.

The Manager said that several other complaints were discussed at that meeting, but I do not accept his evidence about that. He was the secretary, and if they were he would have recorded them.

The sub-committee resolved :

*"Recommendation*

- 120 (i) that Mr 'Aisea Tu'itupou, Foreman-mechanic, be suspended and withhold payment of salaries from 9 November 1987.
- (ii) give him 14 days to answer in writing the charges laid against him and why the Board should not dismiss him.
- (iii) Manager-engineer to lodge a complaint to the Police Department to investigate the loss of 388 bricks from 'Eua office.

On the following day, the manager wrote to the plaintiff (Ex. 1), advising him of his suspension and requiring his comments on

"... the following charges:-

- 130 (i) that you ... disobeyed the Manager-Engineer, in that you continued to work with the Neiafu water scheme which result in the mechanical digger broke-down, after you were told on 30 October 1987 in the phone that you dissociate yourself from that office since you went to Vava'u in your own business.
- (ii) that you ... took the plumbers van, about lunchtime, on 27 October 1987, without being authorised to do so.
- (iii) that you ... arranged to sell to Mr Masila of 'Eua about 308 concrete bricks belonging to the Board, and did not deposit benefits from this into the Boards revenue.
- 140 (iv) that while you were head of 'Eua, various tools ordered to your care had disappeared ...
- (v) that you surpass yourself and your authority about Mr Seti Finau in that you questioned the temporary recalling of Mr 'Aisake Pakofe from leave and searching for driver Peni.

The mechanics of Mataki'eua refuse to work with you, the plumbers refused to work with you, the office staff hated your interference! How do you explain these? after you had been warned repeatedly about it.

(vi) About June 1987 you had run away with driver Peni in the 4WD gearings that would cost about T\$262. You had wanted to pay for this yourself. Why? and When?

(vii) Your water account still about \$100 without your attempt to lower it, even though you tried to stop its disconnection.

This letter requested him to comment on not only the three matters referred to by the sub-committee but five other matters, including some extremely petty. It is difficult to resist the conclusion that the manager had decided to get rid of a troublesome employee and threw in everything that he could think of.

The plaintiff replied in writing (Ex. 3), commenting in detail on each matter. It is unnecessary to quote his letter. It gives substantially the same explanations as he give in evidence. His explanation, in his letter and in evidence, were these:

1. *The damaged digger*

He says that he took his son to show him the Neiafu pumping station, and there found a trainee operator learning how to operate the digger. He thought that it looked unsafe. He suggested that the legs be widened to make it more stable. The branch manager, Timote Lavulavu, was there and did not object. The plaintiff adjusted one leg; a mechanic, Palate Saulala, adjusted the other. The leg adjusted by Palate was not properly fixed and when the machine was operated again the leg broke.

2. *The plumber's van*

He admits that he used this for his own purposes. He urgently needed to draw some cash from the bank. The manager was not there to ask, nor was the driver. He took it for a few minutes. He said that he had done this before, and had never been challenged about it.

3. *The cement blocks*

Some cement blocks were left over from previous building work. They were stored outside and began to deteriorate. He asked the manager what he should do about them, and was told to do what he thought best. Later, the town officer Moeaki Takai (aka Masila) asked if he could take the blocks to help construct a new hall, (as there were no such blocks available at the time) on the understanding that they would be replaced when required. He said that Hon Tuita had told him to ask. The plaintiff agreed, and said he made a record of the transaction.

4. *The missing tools*

He says that all the tools were there when he left 'Eua.

5 (a) *Complaints to Seti Finau*

Seti Finau was the plaintiff's superior. The plaintiff admits asking him why another employee, 'Aisake Pakofe, had been recalled from leave to do a job which he thought others could have done. He thought the question was reasonable and was surprised that it became an issue.

(b) *Searching for the driver Peni*

He recalls nothing at all of this incident.

(c) *Bad relations with other employees*

He denies this and says that others are responsible if morale is bad.

6. *Misuse of 4WD vehicle*

One evening he asked the driver Peni to take him to the pumping station. This was work. After completing his work they went on to Tokomololo where they had a meal. This was unauthorised private use. He allowed Peni to take the vehicle to get some cigarettes. Peni took the vehicle elsewhere and was involved in an accident. He denies any liability for the accident.

7. *Unpaid water bill*

He admits owing money. He denies trying to stop disconnection; and says he had made arrangements to pay it off by deductions of \$5 from every salary payment.

On 16 December 1987 the subcommittee met again. The minute (Ex. 8) records:

(b) Mr 'Aisea Tu'itupou

The sub-committee noted the reply from Mr 'Aisea Tu'itupou ...

1. (the damaged digger)

More information needed from Mr Palate Saulala.

2. (the plumber's van)

Mr 'Aisea admitted guilty and had paid it.

3. (the cement blocks)

Under Police action and needed information from Masila.

4. (the missing tools)

Could not (be) disproved.

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5. (Complaint to Seti Finau etc.)

Guilty as opinion clashed against authority.

6. (Unauthorised use of 4WD vehicle)

Guilty of improper use of vehicle.

7. (Unpaid water bill)

Normal consumer.

8. Get his 7 days deducted for absence."

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The sub-committee decided to reconsider the matter when all the information was available.

Further enquiries were made into two matters, which were next considered by the subcommittee on 9 February 1988.

(i) *the damaged digger.*

It will surprise no one that Palate Saulala blamed the Plaintiff for the damage; but the subcommittee appears to have accepted this statement, in a letter, without query, without interviewing him, and without even asking the manager at Vava'u for his comments.

(ii) *the cement blocks.*

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Moeaki Takai (Masila) had confirmed the plaintiff's explanation that the blocks had been taken on the understanding that they would be replaced when required, and offered to replace them forthwith. They decided to require them to be replaced but to continue with the police prosecution. The minutes also record that :

"My 'Aisea Tu'itupou had definitely exceeded his authority in parting with these bricks to Mr Moeaki Takai."

On the basis of its findings, the subcommittee recommended that the plaintiff be dismissed from the date of his suspension (9th November 1987); forfeit the value

of the bricks; and that outstanding leave be deferred until they concluded their investigations.

250 On 19 February 1988 the report of the subcommittee was considered by the full Board. The minutes (Ex. 10) show that it accepted the findings of the subcommittee but disagreed with its recommendation. It decided simply to dismiss the plaintiff from the date of his suspension.

On 22 February 1988 the manager wrote to the plaintiff (Ex. 4) informing him of the Board's decision. He pointed out that he would not be entitled to any leave due; and gave as the reason merely that.

"The Board noted that you had acted beyond your authority in various occasions."

260 The Police investigated the report of the missing bricks. The plaintiff was charged with embezzlement. On 19 July 1989, at 'Eua before Webster J and a jury he was found not guilty. If the evidence was anything like that which I have heard in this case, it was the only possible verdict.

On 30 January 1989 this action was commenced.

#### The Issues

##### The right to a fair hearing

270 Counsel for the defendant conceded that the Board is a public body, and that public law applies to it; it was therefore obliged to observe the principles of natural justice.

Mr Paasi complained that the manager did not put all the complaints to the plaintiff during their discussions on 9 November 1987. He did not have to. The term "fair hearing" is misleading because there is no right to an *oral* hearing in these circumstances. The employer must:

- (i) inform the employee of the allegations against him, in sufficient detail to ensure that he fully understands them;
- (ii) give the employee a reasonable opportunity to present any explanation; and
- 280 (iii) genuinely consider any explanation given.

If the employer does these things he complies with his obligation to provide a fair hearing.

The Board did all these things. The manner in which it reached its decision was fair, and on the facts the plaintiff's claim on the ground of breach of natural justice fails.

##### Breach of contract

290 An employee can be dismissed at any time, without cause, on being given proper notice. The period of "proper notice" is affected by many things, including the seniority of the employee, and his length of service. In this case the plaintiff had served the Board for 15 years and was a senior member of its staff. Reasonable notice in his case would have been 3 months.

An employee may be dismissed without notice only if his conduct is so bad that the continuation of the employer/employee relationship is impossible. It is necessary to examine each of the grounds of complaint to see whether, individually or cumulatively, they demonstrate that the plaintiff merited instant dismissal, with loss of his accrued leave and other rights.

1. *The damaged digger*

300 In the absence of any evidence to the contrary I accept the plaintiff's evidence about what happened. He had been told to keep away and not to interfere with the Board's operation in Vava'u. But he did what he did in a genuine effort to help, and with the implied approval of the branch manager who could have stopped him if he wanted. It was not his fault that the mechanic failed to secure the other leg properly. Perhaps he should have checked this himself. But at most, this incident merited no more than a reprimand.

2. *The plumber's van*

310 The plaintiff admitted that he took the van when he had no right to do so. Again, he was wrong, but this was a minor matter and merited no more than a reprimand.

3. *The cement blocks*

Instant dismissal would have been justified if the plaintiff had been dishonest.

320 The manager Filipe Koloi said that the plaintiff never mentioned these blocks to him. I do not believe him. He was a most unconvincing witness. He was particularly evasive when questioned on this point. He admitted that he knew that the blocks had gone missing in July 1986 when the audit report drew attention to the discrepancy. He may well have known earlier. Yet he did nothing until October 1987, when he made up his mind to get rid of the plaintiff. He has given no satisfactory explanation for his lack of action. If he thought the materials had been taken dishonestly, it was his duty to act promptly. I conclude that he knew that they had *not* been taken dishonestly.

There was undisputed evidence that the transaction was effected openly, and that another Board employee actually counted the blocks and helped with their delivery. I accept the plaintiff's evidence that he asked the manager what to do with the surplus blocks and was told to do what he thought best. I find that

- 330 1. the arrangement the plaintiff made with Moeaki Takai was as he described it;  
2. that there was nothing dishonest or improper in it;  
3. that it was done within the authority given to him by the manager; and  
4. that the manager knew this from the start.

On the facts, this incident does not justify summary dismissal.

4. *The missing tools*

340 The plaintiff denies any responsibility and says that all the tools were there when he left. The subcommittee noted on 16 December 1987 that this explanation "could not be disproved." He did not have to disprove anything. There was no evidence at all that any tools had gone missing, or if they had that the plaintiff was at fault in any way. Again, this complaint would have been known for a very long time before October 1987; and in the absence of any evidence at all of dishonesty it could not justify instant dismissal.

5(a) *Complaints to Seti Finau*

This is the most extraordinary complaint of all. It suggests that an employee who questions anything which is done by his superiors, however foolish it may appear, is liable to instant dismissal. Even the sub-committee appears to believe this, as the minute on 16 December 1987 records:

"Guilty, as opinion clashed against authority."

350 That is NOT the law. In any civilian occupation an employee must obey orders; but he is entitled to question the decisions of his superiors in a reasonable manner without risk of dismissal.

*5(b) Bad relations with other employees*

The evidence showed that some staff got on well with him and some did not. The letter says "... you had been warned repeatedly about it ..." but the evidence failed to establish anything more than a request by Seti Finau to transfer him from his section, which was done. Nothing was proved which would justify instant dismissal.

6. *Misuse of 4WD vehicle*

360 On the plaintiffs own admission, he had been in charge of the vehicle and had gone with the driver on a short unauthorised trip. Then he had permitted the driver to take it to get some cigarettes. The driver went elsewhere, and was involved in an accident. The Board says that the plaintiff was responsible for that. That is not correct. He was responsible for what he authorised the driver to do, and no more. He was wrong to use the vehicle privately, and to let the driver do the same. But the offence was not serious, and did not justify dismissal without notice.

7. *Unpaid water bill*

370 There is no evidence that the plaintiff abused his position as an employee of the Board; and no evidence to contradict his statement that he had started to repay by deductions from his salary. This complaint too is petty.

*Conclusions*

Mr Etika for the Board very properly conceded that no single one of these complaints would have justified dismissal without notice, but argued that taken together they did.

380 The only serious allegation related to the missing cement blocks, and if proper investigations had been carried out it would have become clear that no dishonesty was involved. The other allegations are petty, and in my view have been inflated out of all proportion in an attempt to create a case against the plaintiff. The truth is that he was a difficult employee; the manager became fed up with him and determined to get rid of him. He could have done so by giving him proper notice. But he didn't. He went about it in an underhand way. Neither individually nor cumulatively do the complaints against the plaintiff justify his dismissal without notice.

I find that the plaintiff was wrongfully dismissed, in breach of the terms of his contract of employment.

*Damages*

390 The plaintiff is entitled to damages equivalent to the salary he would have received if he had been given proper notice. I have found that to be 3 months. His annual salary was \$2,875. His loss of earnings is therefore \$718.75. He has been kept out of that salary since 9 November 1987 and is entitled to interest at 10% per annum up to today. I calculate that to 1st June 1990 at \$184.12.

He claims general damages, but damages cannot be awarded for distress occasioned by wrongful dismissal (*Addis v Gramophone Co* [1909 - 10] All E.R.



Rep 1). He also claims exemplary damages, but these can only be granted in a very limited number of situations (as set out in *Rookes v Barnard* [1964] 1 All E.R. 367) none of which applies here. The plaintiff is entitled to compensatory damages only.

Judgment will be entered against the defendant for \$718.75 loss of earnings plus \$184.12 interest to 1st June 1990, a total of \$902.87. He is also entitled to his costs to be taxed if not agreed.