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

No.C.1031/95

BETWEEN : FONONGA TU'IPEATAU - Plaintiff;

AND : KINGDOM OF TONGA - Defendant.

Counsel appearing: Mr L Foliaki for Applicant,
Ms L Simiki for Respondent

Date of Hearing: 4 September 1998
Date of Judgment: 25 January, 1999

JUDGMENT OF FINNIGAN J

INTRODUCTION

This is an application for leave to seek judicial review, pursuant to O27 R2(3) of the Supreme Court Rules, of a decision made by His Majesty's Cabinet (Decision No. 1328) on 15 June 1995. Specifically, the applicant seeks an order of certiorari to remove into this Court and to quash that decision. The decision was a decision to dismiss the applicant from the civil service.

The applicant has filed a draft writ and statement of claim, in which he seeks damages, and the respondent has filed a draft statement of defence. In opening his case for the applicant, Mr Foliaki emphasised that the application seeks not a judgment on the merits of the dismissal, but a judgment that natural justice was denied. The applicant seeks to explore, not the justification for the dismissal, but its process. He claims he was not given an opportunity to put his case and have it considered before the decision to dismiss was made. He claims he should have been given reasons, and was not. He claims that as a result he was unjustly deprived of his position, his salary and his pension, for which he seeks damages. He seeks to have the decision set aside, and the opportunity of putting his case before the decision is made.

JUDICIAL REVIEW

The object of this remedy is scrutiny of the actions of a public authority to ensure that they were fair, not to judge whether they were right. In the present case, the applicant focuses on one aspect only of the Court's function, the power to examine the process for breach of natural justice. The Court has that power, but has no power in this application to exercise the power of decision that was exercised, it can only ensure that the power

was not abused. It supervises the procedure. Thus, it is irrelevant whether the actions of the decision-making authority may or may not be subject to appeal.

THE APPLICATION FOR LEAVE

Leave is necessary before an application may be heard (O27 R2(1), Supreme Court Rules). In the present case the Court heard the application on notice, and that hearing was combined with the hearing on the merits. The application for leave is required within three months of the time when the cause of action arose, unless the Court is persuaded that there is good reason for extending that period (O27 R2(2), SCR). The decision under review was made on 15 June 1995, and communicated to the applicant in a letter dated 14 September 1995. The application for leave was filed on 13 December 1995. There is no issue over the filing date under R2(2).

THE EVIDENCE

Sworn statements of fact have been provided by the applicant in his affidavit of 1 July 1996, and by the respondent in the affidavits of Kelepi Makakaufaki (30 January 1997) and Sefita Tangi (3 August 1998). In considering these I have taken also into account the annexures to the applicant's affidavit (27 in number, including one filed at the hearing) and the annexures to the affidavit of Sefita Tangi (2 in number). There were also 5 attachments to the submissions of Ms Simiki, which I have considered. I compliment and thank counsel for the provision of these documents.

The facts I am about to set out are my findings of fact from the evidence in the affidavits and their annexures, and in the annexures to Ms Simiki's submissions. Briefly, the main facts relevant to the claims about the procedure of the dismissal are these. The applicant was the Registrar of Cooperatives and Credit Unions. In March 1994 he was absent on duties in Niuatoputapu. An unsigned letter from members of his staff, dated 8 March 1994, was delivered to the Minister in charge of his department, the Minister of Labour, Commerce and Industries. He understands that the Minister met the staff to discuss the allegations and complaints in the letter. On his return, he was immediately transferred to other, lesser duties. At a meeting with the Secretary of Labour, Commerce and Industries ('the Secretary') on 21 March, he was told that allegations had been made about him by the staff of his department, (the Cooperative Department), that a review of the department had been directed, and that he was temporarily transferred so that the investigations could be investigated and the review be conducted. At the meeting on 21 March he was given a copy of the letter from the staff and its attachments, four pages in all. The letter asked for, in fact demanded, action by the Minister. The three pages attached contained detailed allegations against the applicant, under three headings.

After this meeting the Secretary wrote to the applicant on 24 March 1994 confirming some of what had been said. On 24 March the applicant wrote to the Secretary. He called what he had been told of the staff allegations a summary, denied the allegations and refused to answer them as they were a summary. He asked to see the staff letter and supporting evidence, and the names of those who had signed it, before responding. He asked to see the Minister. In reply he received the 28 March written statement of the

actions being taken, mentioned above, which confirmed the 21 March verbal statements made to him. The Secretary wrote that what he had received had been "the full allegations as submitted by officers of the Cooperative Department" and he was directed to answer the allegations. He was told a review of his department had been directed, and that he would be given "an opportunity, if needed, in keeping with the requirements of natural justice, to respond". He was also asked for explanations in respect of a number of other matters.

The following day, 29 March 1994, the applicant wrote a full explanation of the matters raised, and complained to the Secretary about the Secretary's attitude towards him. . On or about the same day he was given a written list, dated 29 March 1994, of his "responsibilities while on temporary transfer to main office (administration)". These included responding to the allegations about him from officers of the department and assisting in the review of the department.

On 19 April he wrote to the Secretary a further full explanation about some of the matters that had been raised and asked the Secretary a number of questions about the allegations.

On 19 April also the applicant wrote to Chief Establishment Officer and Secretary to the Civil Service Staff Board. He said he had become aware of a memorandum from the Civil Service Staff Board to the Cabinet about himself, dated 29 April 1993. He said that the memorandum revealed an even earlier report, submitted by the Secretary directly to the Cabinet on 19 September 1990. He asked for a copy of the earlier report. He asked 7 questions about the natural justice of these documents about himself and his post, prepared and submitted without his knowledge. He then dealt at length with what he said were 8 counts in the 29 April memorandum. He commented on each in detail, and by paragraph. He finished by asking for an independent commission of enquiry to assess his case and to make recommendations upon which the Secretary could base his report to the Cabinet.

Counsel in submissions told the Court that this memorandum, dated a year previous, had made eight allegations against the applicant, to which he had had no opportunity to respond. In his 19 April letter the applicant made detailed responses to the allegations in that memorandum. In counsel's submission the memorandum had alleged that he had acted without authority, and is relevant because it had poisoned peoples' minds against the applicant in advance of the allegations of March 1994.

On 22 April 1994 the applicant wrote to the Secretary, to "address the complaints against me which are not signed but which at the end of the letter states, Workers of the Cooperative Society Department, and is dated 8th March 1994." He went on, "Here is a copy. I did not see this letter until 18 April 1994." He expressed in detail his dissatisfaction with the things said in the letter. He responded specifically to three numbered points in the staff letter. These were not themselves allegations. They were two requests that (i) he be transferred and replaced, and (ii) the auditor audit all money and report to the Cabinet, and a statement (iii) that if the applicant were not transferred then the writers would report direct to the Cabinet and to Parliament. He asked if it was proper that the letter be considered a letter from the workers. He said that the Secretary's

handling of the matter in an illegal and untruthful manner in that no one signed his name, showed that the Secretary disliked him. He said the Secretary disliked him because "I tell you your careless and unwise work, regarding things related to me and the Society".

In this response, the applicant did not address the three pages of allegations that were attached to the letter when it was first submitted. However, he clearly had those allegations in time to reply to them for four reasons. (i) He noted in his 24 March 1994 letter to the Secretary that he had been given the allegations of four pieces of paper and the Secretary in his 28 March 1994 letter refuted his suggestion that the four pages he had been given were only a summary. (ii) He produced the four pages as part of his evidence. (iii) Those allegations were included in the matters put to him for comment by the Acting Auditor-General and by the Chief Establishment Officer in the letter from the Prime Minister's Office, as will be set out below. (iv) He made full comments in answer to those later requests.

On 10 May the applicant wrote to the Secretary, questioning the legality of his transfer to the main office and enquiring about progress of the review because, as he said, "I am waiting". On 31 May 1994 there was a meeting of the applicant, the Secretary, the Assistant Director of Labour, Commerce and Industries, and the Acting Auditor-General. The Acting Auditor-General was seeking information about the matters in the original letter of complaint because, as he said, "my audit opinion will depend on it". The applicant insisted on knowing the identities of those who had written the letter. He asked for the Acting Auditor-General's questions in writing, so that he could answer them in writing. The latter agreed, and on 1 June 1994 he sent the applicant the minutes of their meeting and a written, detailed request for the applicant's representations on seven different areas of enquiry.

On 2 June 1994 the applicant sent on this request to the Secretary, saying he was more than happy to respond, but that all sources of information for his representations were at the Cooperative Department office. In the meantime, he had received from the Secretary a copy of a letter written on 11 May 1994 by the department's accountant. Paragraph by paragraph he responded to the accountant's letter. That letter was not provided to me, but it clearly contained detailed allegations against the applicant, and the applicant was exercising the opportunity to respond to them in writing.

The Secretary obtained the Minister's authorization and responded on 21 June giving access to the files. The applicant went to the office but found that the files had been removed to the Auditor-General's office. On 15 July he told the Secretary that he refused to go to the Auditor-General's office, and on 15 August he sent his answers to the Acting Auditor-General without the benefit of access to the complete records. On 22 August he received from the Acting Auditor-General copies of records needed for answers to the questions, which were in particular about the Audit and Supervision Fund and the Project Fund.

It is important to note, as the applicant has pointed out to the Court in his affidavit, that the Acting Auditor-General had actually completed and submitted his report to the Secretary on 2 July 1994. The report in my opinion was a competent and authoritative

document, it balanced the claims of the staff against those of the applicant and did not favour one to the detriment of the other. It attached copies of the written statements received and relied on for the report. However was far from final, and it did not make many clear findings about fault on the applicant's part. Rather, it raised questions about the matters that had been inadequately answered by the applicant, for further enquiry. It also commented on bad management practices and made recommendations for improvements. The Acting Auditor-General made it abundantly clear that the report was not a final finding about the claims made against the applicant.. It commenced as follows:

> "Our special audit investigation of the above-mentioned has reached the stage of reporting and therefore, the audit findings is hereby reported. I strongly feel that my report is incomplete due to limited information given by the Registrar, Mr Fononga Tu'ipeatau."

Under the heading "Summary and Conclusions" he recommended reconciliation between the applicant and the staff, even though he thought from his investigations that it would be a "swim against the stream". He went on:

> In relation to the financial management related allegations, there are some very important answers to be obtained from the Registrar. Please note that most of the answers required from the Registrar do not necessar[ily] need references to the records. I have the impression that the Registrar is trying to "play politics" here but it is of no assistance at all to our endeavour.
>
> As a consequence, I strongly feel that the foundation on which my recommendations be based upon is not concrete enough because of those incomplete information. Therefore, I strongly demanded that the Registrar must provide those information or severe disciplinary measures be put against him.

First among the Acting Auditor-General's 10 recommendations was a recommendation that there be a reconciliation between the applicant and his staff, under the leadership of the secretary, to determine whether they could work together or should be separated. There were then several recommendations about how the applicant and the staff should perform their duties. There was then a recommendation supporting the temporary transfer of the applicant until the investigation was complete. Dismissal of the applicant was not recommended or mentioned.

The Acting Auditor-General made no formal reports after that.

On 19 January 1995 the Secretary sought from the applicant further explanations in respect of one sum of money raised in the 2 July report, and reiterated that all appropriate data was being offered for his scrutiny by the Acting Auditor-General. On 25 January, the 2 July report was given to the applicant, and on 30 January he wrote to the Assistant Registrar, the Accountant and the Training Officer for any assistance they could give him in replying to the Secretary's request, but they did not answer. He wrote to the Acting

Auditor-General and obtained from him some of the records. He sent progress reports about the one question then under investigation, and on 21 February 1995 he had a meeting with the Acting Auditor-General. On 22 February the latter wrote to him, thanking him for his hard work, but pointing out five things that the applicant, in his view, still needed to recognise. The applicant, on the same day, wrote another explanation, and said he would not give up investigating until agreement was reached between them about the money in question.

Nothing else is shown in the evidence to have occurred until 15 June 1995, on which day the Cabinet decided formally that the applicant was "suspended from duty without pay with effect from the date following that of Cabinet decision, and that the disciplinary procedure be instituted immediately". The applicant was advised the following day. On 30 June, the applicant received from the office of the Prime Minister a formal document. It was written on behalf of the Chief Establishment Officer. It was addressed to him and it commenced as follows:

> "CHARGES RELATING TO ALLEGATONS OF FAVORITISM, UNAUTHORIZED USE OF GOVERNMENT PROPERTY AND MISAPPRPRIATION OF PUBLIC FUNDS
>
> The Acting Auditor-General has forwarded a report dated 2 July 1994 in which various allegations were made against your good self. It was on the basis of this report that Cabinet in C.D. No. 911 of 15 June 1995 approved your suspension from duty without pay with effect from 16 June 1995.
>
> The charges are as follows:
>
> *Charges relating to the Administration of the Department*
>
> According to evidence submitted by staff of the Cooperative Department:
>
> [Details of 4 allegations were set out here]
>
> *Charges Relating to Improper Financial Management*
>
> 2.1 You failed to exercise proper financial management in accordance with the law and regulations in that:
>
> [Details of 9 allegations were set out here]
>
> I am inviting you to submit a representation on your behalf as to why disciplinary action which might even result in your dismissal from the Service should not be taken against you for the charges referred to above.
>
> Please note that any representation you may wish to make should be submitted to be received by this office within fourteen (14) days from the date you received this letter....."

On 10 July 1995 the applicant wrote to the Prime Minister. His letter commenced in the following way:

> "I convey my true respects to you. I want here to give my explanations regarding the allegations against me which have caused you and the Honourable Ministers of the Cabinet to make a decision to suspend me from the civil service.
>
> I know well the procedures to be performed regarding your decision, but I request and I do not wish to be presumptuous but could you kindly have a thorough look at this letter because I gave all the Honourable Members of Cabinet a copy, so that my voice and my rights can reach them directly as I have done my duty with a clean heart and to the utmost of my ability. ...."

There followed a lengthy and detailed statement by the applicant about each of the allegations made against him in the letter of 30 June 1995. He addressed each one in turn. His representations covered all the details of the allegations. His explanations and comments were set out clearly in headed paragraphs and sub-paragraphs.

The next event revealed by the evidence was on 14 September 1995. The Acting Secretary wrote to the applicant that the Cabinet, in Decision No. 1328 of 12 September 1995, had dismissed him from the civil service with effect from the date of his suspension, 15 June 1995.

THE SUBMISSIONS

Full and detailed submissions were made by counsel for both parties at the hearing, both orally and in writing. In the time since the hearing I have considered these closely. The major submission of Mr Foliaki was that there is a requirement in law for the exercise of natural justice, ie (a) the decision-maker must be disinterested and unbiased, and (b) the person affected by the decision must be given adequate notice and the opportunity to make representations, and (c) the decision-maker must genuinely consider any explanation given, and (d) the decision-maker should give reasons for the decision.

Mr Foliaki relied upon several English and Tongan authorities, chief among which were *Commodities Board v Christine 'Uta'atu* [1990] TLR 92 (PC), *Tu'itupou v Tonga Water Board* [1990] TLR 99, and an apparently unreported judgment of Martin CJ, *Pohiva v Kingdom of Tonga,* C7/86. The first of these three cases makes clear the fundamental reasons for holding that the principles of natural justice apply in the present case, and I have found it helpful.

In addressing the issue of unbiased decision-making, Mr Foliaki criticised the role of the Acting Auditor-General. That person, who conducted the review of the department and

asked some of the questions, was the brother of the person who looked likely to succeed the applicant if dismissed, and who has in fact succeeded him.

In addressing the issue of opportunity for explanation, Mr Foliaki submitted that the evidence shows the applicant was given only bits and pieces of the allegations against him, and was asked only some of the questions, and was asked questions without being told the basis of the questions or the charges against him. He submitted the applicant was denied access to the letter of complaint by the staff and was refused the identities of those who complained. He submitted the applicant was refused access to the Minister for the purpose of explanation. He submitted that the applicant was never given the opportunity to controvert, correct or comment on the evidence or information that might be relevant to the decision. He submitted that there was a memorandum to the Cabinet from the Civil Service Staff Board about the applicant which was never shown to or discussed with the applicant. Thus, in his submission, the Cabinet had prior information and submissions about the applicant without his knowledge or input.

In addressing the issue of genuine consideration and genuine reasons, Mr Foliaki relied on a 1994 English judgment, *R v Lambeth LBC ex p. Walters*, which may be authority for a proposition that the statutory administrative process is infused with the concept of fair treatment of those who are affected. He submitted that it should be the law in Tonga that basic fairness requires those in authority to give reasons when exercising powers of discipline. He relied upon *R v Civil Service Appeal Board ex p. Cunningham* (1991) All ER 310 (CA) as authority to submit that the Cabinet was under a duty, as if it were the English Civil Service Appeal Board, to show where it directed its mind and thus to indicate whether it complied with the principles of natural justice.

In response, Ms Simiki drew attention to the evidence and addressed some of Mr Foliaki's submissions on the facts. She submitted that the applicant had shown a full understanding of the allegations against him and had fully responded. I accept her submissions about the facts, and my decision reflects that. She also addressed the law, and submitted that the applicant's dismissal was governed by the Civil Service Regulations (the 'Estacode'), which are made under the authority of s25 of the Government Act, cap 3. These provisions, and particularly s17(4) of that statute, in her submission form a code for civil service employment in Tonga and exclude the English common law. They lay down the procedure to be followed. In her submission the procedure of that code was correctly followed.

S 25 of cap 3 gives to the Cabinet the power to make regulations for the administration of the civil service (such as the 'Estacode'). S 17 prescribes the powers of the Prime Minister. These include the power to dismiss government officers with the consent of the Cabinet. The Estacode provides, at Section G, for the Civil Service Staff Board, and prescribes its main function. This is to advise the Prime Minister and the Cabinet on "all aspects of Establishment matters affecting staff employed by the Tonga Civil Service". The Estacode provides at G3 that "[it] is the responsibility of the Civil Service Staff Board to submit recommendations to Cabinet on the action which, in the Board's view, should be taken on individual cases of appointment....dismissal (or any other form of termination) and disciplinary action. For this reason, all such cases must be referred by

Heads of Departments, or the Establishment Division of the Prime Minister's Office, to the Civil Service Staff Board in the first instance. The Board will then discuss each case, and, provided they are satisfied that no further information or enquiries are necessary will submit their recommendations to Cabinet."

The disciplinary procedures of the Estacode for serious charges are set out in Section K(b), particularly at K(b) 5 (b). Those procedures seem generally to have been followed in the present case, except that there is no evidence for the final step which is as follows:

> 4. The Chief Establishment Officer should provide full and detailed account of the case including the representation made by the officer to the Civil Service Staff Board for consideration and subsequently to Cabinet for decision.

Even though there is no evidence, Ms Simiki submitted that this procedure had been followed. She accepted that to follow the procedure correctly, the officials concerned must not only follow the steps in the Estacode, they must also adhere to the principles of natural justice. In my view, on the second point she is right, but her first submission is not fully supported by the evidence that was placed before me.

Ms Simiki examined in detail the applicant's claims of lack of notice of the charges and lack of opportunity to explain, and submitted that on the facts these claims were without foundation. She examined also the claim that the Cabinet was obliged to give reasons, and submitted that there should not in Tonga be a general duty on the Civil Service Staff Board, or on the Cabinet, to give reasons for suspension or for dismissal of a civil servant. She submitted that the present case should be distinguished from *R v Civil Service Appeal Board* (above) because of the provisions of the Government Act and the Estacode. In her submission, since those legislative provisions clearly omit a requirement for the giving of reasons, a requirement should not be imported.

In any event, Ms Simiki submitted, the reasons for the dismissal were clear. She pointed out that the Prime Minister's Office, in the letter dated 30 June 1995, set out clearly and in detail the charges, together with the possibility of dismissal if the explanations were unsatisfactory. In her submission, not only did the applicant have clear notice of the allegations and their consequence, and clear, adequate, opportunity to comment so as to avoid that consequence; from all of that he had a clear indication, if he were dismissed, of the reasons why. She cited another case bearing on natural justice, *Touliki Trading Enterprises Limited v Squash Export Company Limited* (unreported) Appeal Case No 3/1995. She submitted on that authority that it was enough to give adequate notice of the charges requiring answer and adequate opportunity to answer them, with knowledge of the available consequences.

Ms Simiki addressed the issue of unbiased adjudicator. She submitted that the Acting Auditor-General was acting in a statutory role under ss3 and 9(2) of the Public Audit Act cap 66. In her submission no substitution was possible, and natural justice gave way to legislative authority. In any event, she noted, it was not the Acting Auditor–General who made the decision. His report was considered, she submitted, by the Civil Service Staff

Board, which in her submission made the decision. The Board, she submitted, had more before it than merely the report of the Acting Auditor-General.

Not all of these submissions are based on evidence. The respondent submitted only very limited evidence. The affidavit of the Deputy Auditor-General, Sefita Tangi, proved (at para 3) only the same facts about the Acting Auditor-General's report as were already proved by the applicant. The affidavit of the Chief Establishment Officer, Kelepi Makakaufaki, proved that after the above report was received, the Cabinet suspended the applicant without pay and then "instituted proper disciplinary procedures", without saying what those procedures were. He then went on:

> 4. Disciplinary procedures were instituted against the [applicant], he was charged, given an opportunity to be heard and a decision was made after the consideration of all the relevant fact.

After setting out the charges that were stated in the 30 June 1995 letter, this deponent went on:

> 8. The defendant [respondent] considered all the relevant investigation report, the charges laid, answers to the charges, representations by all the officers involved and came to a decision.

There is no reference in any of the evidence to the Estacode, and there are only limited facts before the Court to enable the Court to decide whether it was followed or not. In particular, there is no evidence at all that Section K(b), 5(b) was followed. There is no evidence that the Chief Establishment Officer provided full details of the case to the Civil Service Staff Board for consideration before the case went to the Cabinet for decision. There is no explanation of who is meant by "the defendant".

In my opinion there is a serious deficiency in the evidence of the Respondent. The applicant is claiming that the respondent treated him unfairly in carrying out the dismissal procedure. It is insufficient for the respondent to reply simply that it carried out the procedure. That tells the Court nothing. It is for the respondent to give evidence about the facts of what was done, so that the Court may decide. As it happens, the applicant provided sufficient evidence in the present case to decide the application that has been made, but in principle the respondent should have revealed on oath the details of how the applicant was dismissed.

DECISION

The respondent does not dispute that the Cabinet's decision to dismiss the applicant is susceptible to the remedy of judicial review. The applicant's claim is that he was not given an opportunity to put his case and have it considered before the decision to dismiss was made. He claims that as a result he was unjustly deprived of his position, his salary and his pension. The object of his application is scrutiny of the actions of the authorities to ensure that they were fair, not to judge whether they were right. In the present case, the applicant focuses on two aspects only of his dismissal. He asks the Court to examine

the process to see if he was given an adequate opportunity to answer the allegations upon which his dismissal was based. He also asks the Court to declare that reasons should have been given.

There is nothing unusual or new in principle about this case. I have taken the trouble to set out in reasonable detail the facts and the submissions because in my view they make the outcome self-evident. This is not a case requiring development of a new principle, or even lengthy analysis of old ones. It is a decision to be made mostly on its facts. I shall deal first with the claim that reasons should have been given.

R v Civil Service Appeal Board (above) is a case of different character from the present. The decision applies to statutory decision making tribunals and not to employers who are dismissing employees. In that case the board was not the body that made the decision to dismiss the employee. It was an appeal tribunal. It decided that the dismissal had been unfair, and awarded compensation. The employee claimed that the compensation was lower than in other similar cases. The board refused to state reasons for the compensation award it had made. The employee sought judicial review of the board's decision on two grounds, one of which was breach of natural justice. Both the lower court and the Court of Appeal granted the application. The lower court did so on the ground of legitimate expectation. The Court of Appeal added a second ground (at 318j) that the board was set up by statute as a fully judicial body, independent of both employer and employee, and carried out a judicial function when hearing the employee's appeal against dismissal.

The Court of Appeal, per Donaldson MR, (at 319f) held that natural justice required the board, because it was a judicial tribunal, to give sufficient reasons to show to what they were directing their minds in answering that question, and thereby indirectly to show, not whether their decision was right or wrong, but whether their decision was lawful. In other words (at 320e) fairness requires a judicial tribunal such as the board to give sufficient reasons for the parties to know the issues which it considered, and to know whether it acted lawfully. However, in the present case, the Cabinet was not an appeal tribunal. It was not carrying out that review function, was not acting as a judicial body, and was not obliged by the judicial principle to state reasons for its decision. So, the first principle of that case cannot help the applicant.

However, this Court of Appeal judgment does not end there. Both the lower court and the Court of Appeal rejected the principle which Mr Foliaki submitted should become a natural justice principle in Tonga. This is the claimed general rule of the common law or, if that be different, a principle of natural justice that a public law authority should give reasons for its decisions. This proposition was rejected by Donaldson MR (at 317e) as "unarguable", but the Court of Appeal also rejected the principle for which Mr Simiki argued, that as the Estacode does not have a requirement for giving reasons then the Court should not import one. In his judgment (at 318f) Lord Donaldson MR cited with approval a dictum of Lord Bridge in *Lloyd v McMahon* [1987] 1 All Er 1118 at 1161, which is worth citing here in full, because it applies to decisions of the Cabinet under the Estacode.

'My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.'

Thus, it is open to the Courts in individual cases to find on the evidence that there were additional procedural requirements. Therefore, in an individual case the need to attain fairness may well dictate a need to state reasons for a decision.

I need note only one more feature of this judgment. The Court of Appeal adopted and applied (at 319e) a dictum of Lord Lane CJ in *R v Immigration Appeal Tribunal, ex p Khan (Mahmud)* [1983] 2 All ER 420. This demonstrates that, since at least the time of that 1983 case, the courts have accepted the principle in administrative law that reasons for decisions, even when required, need not be stated if they are obvious.

I find as follows:

1. When a public official or public body such as the Cabinet informs a civil servant that he or she has been dismissed, the facts of the case may require that the person be made aware of why he or she was dismissed. However, the authorities cited to me do not in my view establish a legal requirement for cases like the present that the decision-maker must invariably state to a person affected by a decision the reasons for that decision. Justice and fairness must prevail throughout the procedure, but what is required must depend on the circumstances as they develop. There may be cases of instant suspension leading to dismissal for serious misconduct, and in such cases the reason for the suspension and dismissal may be so obvious that it does not need to be stated. There may be cases of dismissal for the reason that the employee has been convicted of an offence arising out of the employment, eg. theft by a police officer, theft or fraud by a customs official. Justice in such cases may not require any statement of a reason, because the reason is obvious.

2. In the present case, the applicant knew from the beginning that his performance of his duties was under challenge, and he was made aware as time passed of specific claims and questions. When he was dismissed at the end of the process, it was because of those claims and questions. In other words, the reasons for his dismissal are obvious and should have been obvious to him. In the ultimate, these were the specific allegations put to him in the letter of 30 June 1995, which he was told might cause his dismissal, subject to his explanations. When the Cabinet informed him that he was dismissed, he can have been in no doubt what

the reasons were. His explanations had been insufficient to sustain confidence in him as an employee.

3. Therefore, I think that in the present case the obligation of fairness did not require the Cabinet to state reasons for dismissing the applicant. This is not because the Estacode distinguishes the situation in Tonga from that in Britain, but because the question whether reasons are necessary is governed by the facts of the individual case.

4. The decision-maker in the present case was the Cabinet. From the wording of its decision, wherein it accepted a recommendation made to it, I deduce that it acted on a recommendation in the normal course of events, ie a recommendation from the Civil Service Staff Board. That conclusion is supported by the evidence of the 30 June 1995 letter from the Prime Minister's Office. In that letter the final statement of charges and 14-day opportunity to make representations were offered to the applicant by the Chief Establishment Officer, and that is precisely the procedure in the Estacode, Section K(b),5(b). The next procedural step was for the Chief Establishment Officer to provide those representations to the Civil Service Staff Board for consideration and subsequently to the Cabinet for decision. This is what appears to have happened, and the applicant has not claimed there was any departure from the ordinary procedure.

5. The Secretary, the Acting Auditor-General, the Civil Service Board and the Cabinet were all bound during the investigation and decision in the present case to act in accordance with the principles of natural justice. In particular this required each of them to be sure that the following things had happened: (i) that the applicant had been made fully aware of the allegations against him, (ii) that he had had ample opportunity of making representations about those allegations, (iii) that those representations has been considered without pre-formed attitudes and in an unbiased way, and (iv) that the reasons for any decision made against the applicant were, at the end, clear to him.

6. There was a memorandum critical of the applicant sent to the Cabinet in April 1993 without his knowledge. He was correct in claiming that there had been a breach of natural justice in that. The Cabinet is a public decision-making body which under the Government Act and the Estacode has the power to discipline and dismiss public servants. Any information given to the Cabinet which may later influence the Cabinet in a decision about a public servant's performance of his or her duties should, in justice, be given also to the employee concerned. The employee should have the opportunity to refute or comment on claims of fact in such reports. In the present case, however, the applicant wisely took the first opportunity of giving a full and detailed explanation of all the complaints in the document, and sent a copy to the Minister, the Secretary and the Chief Secretary and Secretary to Cabinet. On balance, any prejudice to the applicant was overcome.

7. The applicant did not immediately take the opportunity of responding to the initial allegations by the staff in their letter of 8 March 1994. He did not directly learn the identity of his accusers. As the matter unfolded however, the identity of the original instigators of the investigation became irrelevant. So did their original three pages of complaints, because the complaints themselves became supplanted by the detailed questions put to the applicant by the Secretary and the Acting Auditor-General. They were supplanted again when the specific charges were conveyed to the applicant by the Prime Minister's Office, and the applicant directly replied.

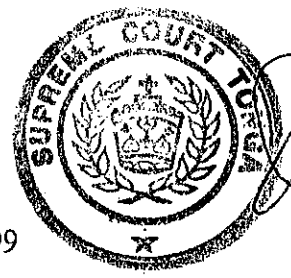
8. The Acting Auditor-General was the brother of the person who might benefit from the applicant's dismissal. For him, the principles of natural justice included a heavier obligation to avoid the suggestion of bias than existed for the other government officials who considered the applicant's case. I find as a fact that he did avoid the suggestion of bias, because he based his report on representations and answers to his questions which were given by both the staff and the applicant to his questions. He attached copies of the representations and other documents on which he had relied. Finally, he reported factually (i) that there was insufficient information from the applicant for final determinations of some issues, and (ii) that he was unable to make final recommendations. In any event, he did not recommend the applicant's dismissal. It is a measured and rational document. Nothing that the Acting Auditor-General reported appears on objective examination to be exaggerated, biased or wrong. The report itself can have been of only limited value to those who decided whether the applicant's conduct merited dismissal. Its main function seems to have been to suggest the questions which needed answers from the applicant, and those were the questions which subsequently were put to him by the Acting Auditor-General and by the Prime Minister's Office.

9. Over the period between 8 March 1994 and 15 June 1995, the allegations about the applicant were put to him at various times, and his written responses show he was in no doubt what they were. Sometimes they are put wholly, as when he was given the letter of 8 March 1994 from the staff with its attachments, and in the letter from the Prime Minister's Office dated 30 June 1995. Sometimes questions were put individually for individual response, as when the Acting Auditor-General wrote to him on 1 June 1994 and when the Secretary wrote to him on 19 January 1995. To every allegation he had the chance of responding, and to every allegation he did respond. He responded in full detail, more than once. He wrote nine separate detailed letters of explanation including the letter refuting the undisclosed memorandum of 29 April 1993. From the evidence I am unable to accept that he was refused access to files and records that were necessary to his answers. For several of the allegations, detailed facts and figures were not required. Where details were desirable, the files were made available. I find that the applicant protested about the way these things were done, but it was not necessary for fairness that the enquiry be conducted in the ways that he preferred. It is my opinion that the statement of charges sent to him on 30 June 1995 by the Prime Minister's Office, and his detailed response to those charges, are by

themselves a sufficient answer to his claim that he was not treated fairly. He was made fully aware that a decision was to be made about his employment, on the basis of his response to the allegations about him. He acknowledged that he understood this at the beginning of his response.

For these reasons of fact and of law, I am bound to find that there was no unfairness in the procedure of the applicant's dismissal. I have no alternative but to refuse leave and dismiss the application.

There will be costs to the respondent, to be agreed or taxed.



NUKU'ALOFA, 25th January, 1999 JUDGE