

BETWEEN : **TILILA VAIOLETI** - **Applicant;**
[Houma]

AND : **TONGA DEVELOPMENT BANK** - **Respondent.**
[Nuku'alofa]

BEFORE THE HON CHIEF JUSTICE WARD in chambers.

Counsel: Mr Fifita for the Applicant
Mrs Vaihu for the Respondent

Date of hearing: 18th ^{March} ~~April~~, 1999
Date of ruling: 7th April, 1999

Ruling

The applicant was employed by the respondent Bank in May 1996 as a probation loans officer and, by December 1998, had risen to senior loans officer. In that month she was dismissed.

She now seeks leave to apply for judicial review of the decision to dismiss her. The relief she seeks is a declaration her dismissal was unlawful, certiorari to quash the decision and mandamus to reinstate her. She has alleged in her affidavit in support that the Bank is a statutory body and that the dismissal did not follow proper procedure. It was unfair and unlawful and a breach of natural justice.

Although the original application for leave is ex parte, I considered it would be helpful if I heard submissions from both parties as to whether the fact that the respondent bank was a statutory body was sufficient to give it the requisite element of public law to make judicial review the appropriate remedy.

In determining whether a case is appropriate for judicial review, the court must consider whether it is an action that requires the enforcement of private or public law rights. The definition of public law is not clear and modern case law is continually changing the distinction between private and public law rights. Moreover, judicial review has been allowed in some cases involving substantial elements of private law and refused in some where there is undoubtedly a public law element. In general terms, the more a case involves the enforcement of private law rights, the less likely

it is that the court will consider it is a suitable case for judicial review. However, if there is no apparent common law remedy open to the aggrieved party, the court will be slow to refuse that party the opportunity of judicial review. It is important to remember also that, although the remedies of declaration and injunction are now included in the scope of Order 27 (following the English RSC Order 53) those remedies may also be appropriate and available in a private law action.

This is case of dismissal from employment. The employee's remedy in such a case usually lies in the field of private law and so is not susceptible to judicial review. However, the courts have granted a right to judicial review in cases of this nature where there is a sufficient element of public interest.

The applicant suggests her dismissal was in breach of natural justice. It was not so long ago when those words had almost magical qualities in obtaining leave to apply for judicial review but the courts in England have moved away from that position to a large extent. For example, in *R v East Berkshire Hospital Authority ex p. Walsh* (1985) QB 152 the applicant was a senior nursing officer who claimed to have been dismissed in breach of the rules of natural justice. The Court of Appeal held that such an allegation involved infringement of a purely private law right and had no element of public law. Purchas LJ said, "In my judgment the inquiry ought to be directed to the rights alleged to be infringed and the remedies sought rather than the status enjoyed, qua contract or appointment, by the applicant." The court moved away from the limiting remarks of Lord Wilberforce in *Malloch v Aberdeen Corporation* (1971) 2 AllER 425 where he suggested that the only employment cases from which the rules of natural justice were excluded were "pure master and servant cases".

In order to qualify for judicial review, there must be some statutory restraint on the exercise by the public body of its powers of dismissal but, even in such cases, judicial review may be refused if the dismissal was rooted in contract and not in the exercise of a statutory power per se (*R v Derbyshire County Council ex p. Noble*). and, even where it was rooted in statute, the statute must create a restriction on the public body in its capacity as a public body and not as an employer generally; *Ridge and Baldwin* (1964) AC 40.

In the present application, the Bank is a statutory body but there is nothing to suggest the applicant's employment was governed by anything other than contract and her remedy must lie in a claim in private law. Leave is refused.

NUKU'ALOFA: 9th April, 1999



CHIEF JUSTICE