IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY **C.NO.864/98**

BETWEEN : FOLOLISI MASILA : **Plaintiff**

AND : 1. SAIMONE HELU
2. TONGA WATER BOARD : **Defendants.**

BEFORE THE HON. JUSTICE FINNIGAN

COUNSEL : Mr Hola for Plaintiff,
Mr Taumoepeau for Defendants.

Date of Hearing : 26 July, 1999
Date of Judgment : 24 August, 1999

INTERLOCUTORY RULING OF FINNIGAN, J

The matter for decision is an interlocutory motion to strike out the claim.

The writ was issued on 24 June 1998 and a statement of defence was filed on 29 July 1998. The statement of defence pleaded to all the allegations in the statement of claim, and raised an alternative defence that the proceeding should be by way of Judicial Review.

The present motion was filed on 1 July 1999. On 6 July the plaintiff filed, in this action, an application for leave to seek Judicial Review. The application does not acknowledge that it is made out of time or that it needs further leave for that reason. It should not be part of the present action.

By agreement the motion to strike out the action, which was left rather late, was argued in place of the substantive trial on 26 July 1999. It is based on the four grounds in the Supreme Court Rules (SCR) O8 R6(1) that (i) the statement of claim discloses no reasonable cause of action, (ii) the action is scandalous frivolous or vexatious, (iii) that it is prejudicially unclear and (iv) that it is an abuse of process.

I pause to mention in summary the statement of claim. It pleads in its prayer for relief two separate causes of action. The first is (a) a claimed wrongful "suspension demotion" with related failure to pay annual increments, the second is (b) a claimed wrongful suspension and dismissal by the first defendant. In the preceding narrative the plaintiff claims that the two are closely linked. He says he was dismissed for sexually harassing a fellow-employee, but that this was a disguise for other reasons going back to 1995 that by themselves were not sufficient for even the "suspension demotion" that had occurred earlier, let alone the ultimate dismissal. He then pleads (c) that he and his family suffered loss and damages and shame because of his wrongful dismissal by the second defendant. The remedies he seeks are (d) reinstatement and back pay, and (e) general damages of $100,000.

The defendants rely on SCR O8 R6. I consider first the first ground of the motion to strike out the claim. There is no place for evidence in this. SCR O8 R6(2) provides that no evidence shall be heard on an application to strike out a pleading on this ground. The decision is made on the pleading itself. Both counsel proceeded on that basis. The submission is that the statement of claim seeks remedies that amount to orders of certiorari and/or declarations, which are remedies obtainable by Judicial Review. The claim having been filed more than three months after the pleaded date of the second (later) cause of action, the submission runs that Judicial Review would not have been available without leave, and cannot be sought by the

subterfuge of an ordinary action. Counsel for the defendants submitted that Judicial Review was the correct form of proceeding because the statement of claim sought to challenge the nature of the decision-making process and not the merits of the decision itself. The authority on which he relied is *Fotofili v Free Wesleyan Church* [1994] Tonga LR 111.

Counsel for the defendants supplied copies of all the cases he relied on, and that is appreciated.

The essence of that judgment, and this argument is that if/when the claimant seeks to challenge a decision-making process by the particular remedy of review by the Court, then Judicial Review is the proper procedure. The question raised by this submission is whether the plaintiff is seeking to use that procedure under the guise of an ordinary action or whether he is simply seeking remedies for claimed wrongs as actions which on their merits were in breach of his rights at law.

It seems to me that the statement of claim, verbose and meandering and repetitive though it is, clearly claims that the defendants cannot justify their actions of suspension, demotion and dismissal because they were in breach of his rights at law. He challenges not only the process but the decision itself. That is a claim to be brought by writ of summons and tried on its merits. It has been my frequent experience that in such cases the remedy sought and, where appropriate granted, is a declaration that the defendant's actions were wrongful. Declaration is a remedy available by writ. The first ground, that the statement of claim discloses no reasonable cause of action, cannot succeed.

The second ground is that the action is scandalous, frivolous or vexatious. For this, counsel relies on an affidavit sworn by the first defendant. In his submission the affidavit shows clearly that the

plaintiff was dealt with in accordance with the principles of natural justice, and that the claim of wrongful dismissal is clearly contrary to the evidence. This argument cannot succeed until the Court has made findings of fact. The rule "*audi alterem partem*" dictates that both parties must have given their evidence and had it tested before the Court may make findings of fact. Counsel relied on the decision of this Court in *Lanivia v Sunia,* unrep. C366/99, judgment delivered on 29 June 1999, but that was a final determination of an application for extension of time in which to seek leave to apply for Judicial Review. Both parties had filed affidavits about the facts for the purpose of that determination. That has not occurred here. The plaintiff has not sought to respond by affidavit, except to affirm on oath the main claims in the statement of claim.

The words 'frivolous and vexatious' are the contrary of 'a serious question to be tried', see *American Cyanamid* [1975] AC 396 at 408, per Lord Diplock. The question is, does the statement of claim state a serious question for trial. There is a serious question stated, in fact more than one, and what the defendant has disclosed in his affidavit is (perhaps some of) the facts of his intended defence. This ground cannot succeed.

The third ground, as argued, is related to the second. This is that the pleading is unclear or may otherwise prejudice or delay the fair trial of the action. Counsel relied on Halsbury 4th ed Vol 36 at #74. The law stated there is that the defendant is entitled to have the case against him presented in an intelligible manner, but that the power to strike out should be used only in plain and obvious cases. Severing the objectionable parts is an alternative to striking out if the remaining pleading clearly discloses a cause for trial, and I shall return to that aspect. I bear in mind what this Court said in *Kaufusi v Kingdom of Tonga,* C1310/98, unrep., ruling delivered 1 March 1999 (which Ruling generally was upheld on appeal, CA10/99 unrep., judgment 23 July 1999). This is that 'unclear' must [be taken to] include any case

where the pleading is so unclear that the other party cannot know with any certainty the case which he has to answer. That finding is in accordance with the general application of O8 R6. The discretion to strike out is reserved for obvious cases.

Here again the Court is entitled to consider the first defendant's affidavit. Having done so, it reveals that the first defendant knows full well the case that is pleaded. It reveals also that he is in possession of evidence which, if accepted in entirety, would amount to a complete answer to the plaintiff's claims. However, the Court has not heard evidence from the plaintiff about his claims. This ground must fail.

The defendants' fourth ground is that the writ is an abuse of process because it is the wrong procedure. Counsel relied on *Fotofili* (above), and submitted that the present claim should be struck out because the proper proceeding is Judicial Review. *Fotofili* was a clear case of proceedings brought in the Supreme Court by writ, which could only have been brought by way of application for Judicial Review. A similar case is *Faleola v Kingdom of Tonga*, CA4 & 5/99, unrep., judgment 23 July 1999, which counsel mentioned. What is the justification for claiming that the plaintiff is in fact seeking Judicial Review? The justification offered is that the remedies claimed, declaration, reinstatement and damages are similar to or in the nature of certiorari. But the plaintiff has not pleaded any breach of natural justice, or any excess of authority, error of law or any wrong-doing by any inferior court or tribunal or by any other entity that is charged with the performance of public acts or duties. He is not seeking supervision of a public body's administrative actions. It is not just the decision-making process that he challenges, but also the merits of the decisions to suspend, demote and/or dismiss him. He is entitled to seek by writ a declaration of his rights and remedies for breach; see Halsbury 4th ed Vol 37 #252. Reference to The Water Board Act, cap 92 shows beyond doubt that the second defendant is a public body, but no reliance is placed on that by counsel for the defendants in the

argument. Neither is the point helpful in itself, the second defendant as a public body may be sued in tort and/or contract. The fourth ground likewise must fail.

DECISION

It is clear to me that the statement of claim is sufficient to survive a motion to strike it out, but in the exercise of my discretion I shall direct that certain superfluous and distracting parts of it be severed.

Before that however, there is a question of particulars. The question emerges from the pleadings, what is the legal basis of the plaintiff's claim? I have described the statement of claim above as verbose and meandering and repetitive. It is worse than that, it moves back and forth in time and it particularises any number of facts that have no place in a basic pleading. But worst of all it does not particularise the plaintiff's claims by stating what made the acts of the defendants wrong. Is this a clam in tort? On its face that is the more likely conclusion. But is it for breach of contract? Or is it for breach of the Water Board Act, or some other law?

The plaintiff must particularise that part of his claim in an amended statement of claim. It will be insufficient for him to rely on vague aspirations of unfairness. The Court will expect in the statement of claim a clear concise statement of what law is relied on. The authorities above make it clear that the defendants have the right to know what case they have to answer. The plaintiff must specify the nature of the legal principle/s relied on, in a way that fully and fairly informs the Court and the defendants of the legal aspects of his claim. In doing so he must state a case that is triable at law. If the plaintiff fails to do that then he may expect the court itself to act of its own motion to strike out the pleadings

I return to the severance point. In filing the amended statement of claim, counsel for the plaintiff is directed to omit paragraph 1, and to amend paragraph 4 so that it reads:

> 4. The second defendant is a body corporate that appoints the first defendant.

Thereafter, after the heading 'Particular of Facts', omit the following paragraphs: 9, 10, 11, 12, 13, 15, 18, 20, 22, 24, 25, 26, 28 and 29. The remaining 15 paragraphs are to be re-numbered accordingly and before the prayer for remedies there is to be further pleading of what is the claim at law.

I further direct that the amended statement of claim be filed and served before 4pm on 31 August 1999. If that is done the matter will then be called at a directions hearing so that further delay is minimised.

COSTS

The plaintiff has successfully resisted the motion to strike out the statement of claim, but it is not a case where he should have his costs. The inexpert pleadings have been wasteful in the Court's hearing time and in the time of counsel. There is no order for costs.

NUKU'ALOFA, 24 **August 1999**

SUPREME COURT TONGA

JUDGE