

BETWEEN : *ATTORNEY GENERAL* - Plaintiff ;

AND : 1. *VIOLA ULAKAI* - Defendants.  
2. *LAUMANU PETELO*  
3. *NANISE FIFITA*  
4. *NALESONI TUPOU*  
5. *TAVAKE FUSIMALOHI*  
6. *TONGA BROADCASTING COMMISSION*

BEFORE THE HON. CHIEF JUSTICE WARD

**Counsel:** Mr Kefu for the Prosecution  
Fourth Defendant in person

**Date of hearing:** 9<sup>th</sup> February 2000.

**Date of order:** 10<sup>th</sup> February 2000.

### Penalty

On 15 December 1999, I found the defendants guilty of contempt for broadcasting the contents of a statement of claim from an action that had been filed in the Supreme Court by the fourth defendant. I imposed no penalty on the first, second, third and fifth defendants and fined the sixth defendant, the radio station, \$1,000.00.

The fourth defendant was not able to attend on the day I gave judgment and has now appeared to address the court on penalty. He has filed written submissions and addressed the court further on penalty and in mitigation and, in deference to his research, I give brief written reasons for my decision.

The defendant is a practising lawyer of some experience both in New Zealand, where he has his principal practice, and in Tonga. He does not dispute that he gave the documents to the radio station and accepts he failed to consider the

consequences properly or to advise adequately the person to whom he passed the documents.

I found on the evidence I had before me that his actions went further and showed a reckless disregard of the possible use of the documents he disclosed. I was also satisfied that he had passed those documents to the radio station with the deliberate intention of influencing the trial of the action by putting pressure on the defendants to make them settle or to deter them from defending rather than leave it to trial.

Mr Tupou has cited cases from other common law jurisdictions, particularly England and New Zealand, where the court has ordered the defendant to pay the costs of the proceedings and imposed no separate penalty. There are many cases where this course has been followed including, notably in England, *Home Office v Harman* where a solicitor was the defendant and the contempt related to her professional conduct. That was an unusual case where the documents she disclosed had already been read in open court and the contempt was her failure to observe her own undertaking. There are many, and more recent, cases of "media contempt" in England where newspapers have been fined very substantial sums and been ordered to pay the costs as well.

With respect to the learned judges in other jurisdictions, I do not consider a costs order should be regarded as a penalty nor should it be used in place of a penalty. If the contempt is sufficient to merit a pecuniary penalty, the court should determine the appropriate level to reflect the contemnor's blameworthiness and impose a fine accordingly.

Whether or not a defendant should pay the costs of the proceedings may be dependent on other factors. If, having considered them, the court decides to order costs, it should not influence the level of fine except, possibly, in relation to the defendant's means and his ability to pay.

This was not, as I have said in my previous judgment, a very serious contempt as far as the broadcast was concerned. The decision to pass no penalty on the officers of the radio station took account of that. I also considered that the fact the document was supplied by a lawyer in the case may well have misled them and that they had no actual intention to prejudice the trial.

The position of Mr Tupou is different. He was the lawyer in the case and he passed those documents with the clear intention of influencing the court proceedings. The manner in which he did it made it impossible for the defendants to have any opportunity to know of the case brought against them before the broadcast.

This is an application for committal but I do not consider that to be the appropriate order here. Such a penalty should be used only in the most

serious cases and it has rarely been imposed in 'media contempt' cases. The reason is that the intention of the publication in such cases is rarely to interfere with possible proceedings. However, where such an intention has been proved, the courts in other jurisdictions have not shrunk from making such an order.

The court decides the seriousness of the contempt on the likelihood and degree of interference with the due administration of justice and the culpability of the offender. Those, together with the subsequent actions of the offender are, therefore, the principal considerations in deciding the proper sentence.

I have already stated that I consider the culpability of this defendant high because of the clear and deliberate intention to influence the proceedings he had instituted. In such a case, I cannot accept this would be sufficiently measured by an order solely to pay the costs.

He has told the court that he done nothing like this before and has received a salutary lesson. I accept that is the case and I also recognise that making such a statement publicly in the court in which he practices is not easy. I accept his unqualified expression of remorse is genuine.

In all the circumstances, I consider the proper penalty is to order a fine of \$3,000.00.

These proceedings were brought about by his actions. The broadcasters should have exercised more care in the inclusion of such a report in their news item but the whole matter grew from Mr Tupou's action in supplying the documents in the manner in which he did. I see no reason why he should not be liable for the major part of the costs. He will pay two thirds of the costs of these proceedings to be taxed if not agreed.



**DATED:** 9<sup>th</sup> February 2000.

**CHIEF JUSTICE**