IN THE HIGH COURT OF NEW ZEALAND
SITTING AS THE HIGH COURT OF TOKELAU

I TE KŌTI MATUA O AOTEAROA
E NOHO ANA RITE TONU KI TE KŌTI MATUA O TOKELAU

CIV-2017-485-797
[2018] NZHC 1787

BETWEEN	JOVILISI SUVEINAKAMA First Plaintiff
	HETO PUKA Second Plaintiff
AND	COUNCIL FOR THE ONGOING GOVERNMENT OF TOKELAU First Defendant
	ULU O TOKELAU Second Defendant

Hearing:	11, 12 February 2019 Further evidence and submissions received: 18, 22 February 2019 8, 14, 15 March 2019 4, 15, 23 April 2019 1, 31 May 2019 10, 13, 28 June 2019
Council:	J W Goddard and J Kim for Plaintiffs R J Fowler QC and H Wallwork for Defendants
Judgment:	26 July 2019

JUDGMENT OF CHURCHMAN J

"Agi malu mai ko Te Tokelau, ke momoli ai taku fekau"[1]

[1] Invoking the calm wind of "Te Tokelau" to deliver this judgment.

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[1] This decision is divided into five parts:

(a) Part I outlines the factual background to the dispute, and details the claims made by the plaintiffs.

(b) Part II identifies the applicable law.

(c) Part III analyses the disciplinary investigation including the suspension of the two plaintiffs.

(d) Part IV addresses the evidence and submission received following the hearing; and

(e) Part V sets out the Court's finding in respect of damages.

PART I

Background

[2] Tokelau is one of the smallest and most isolated countries on earth. It consists of three coral atolls.[2] They are all true atolls consisting of a central lagoon circled by a coral reef.

[3] The total land area of Tokelau is approximately 11.7 km^2.[3] The three atolls lie just south of the equator. The northernmost, Atafu, is 92 km north-west of Nukunonu, which is 64 km north-west of Fakaofo. Fakaofo is approximately 500 km north of Samoa.

[4] The population of Tokelau is tiny with the 2016 census recording 541 residents on Atafu, 452 on Nukunonu and 506 on Fakaofo. A number of the more senior members of Tokelau's Public Service are required to reside in Samoa, and that accounts for the 42 Tokelauans listed as resident there in 2011.

[5] In 1889, Tokelau became a British protectorate, and in 1926 administration passed to New Zealand. In 1948, the Tokelau Act made it a territory of New Zealand.[4] The Tokelauans are citizens of New Zealand. Beginning in the 1960s, there was significant migration of Tokelauans to New Zealand. The 2013 New Zealand census listed some 7,176 people of Tokelauan ethnicity residing in New Zealand.

[6] Although the three atolls share a common language, culture and history, historically there was some rivalry between them. The three atolls continue to have a significant degree of autonomy today, each island being responsible for its own public service. There is no main town or capital city, that role instead rotating between the three villages.

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2 There is a fourth atoll known to the Tokelauans as Olohega and to Europeans as Swains Island which is culturally, historically and geographically part of Tokelau but is claimed by the United States and administered from America Samoa. It lies between Tokelau and Samoa.

3 Atafu 3.5 km^2, Nukunonu 4.2 km^2 and Fakaofo 4.0 km^2.

4 Tokelau Act 1948**.**

[7] Each atoll has a Taupulega (Village Council), with a Faipule (Customary Leader) and Pulenuku (Village Mayor).

[8] The three villages each contribute delegates to the General Fono (Legislative Assembly). The General Fono (GF) does not sit continuously and meets three times for approximately four days each year. When it is not in session, its delegate, the Council for the Ongoing Government of Tokelau (Council),[5] which is based in Apia, Samoa, discharges its functions. The Chair of the Council, the Ulu o Tokelau (Ulu), rotates between the three atolls with each Faipule serving one year as the Ulu.

[9] Many of Tokelau's most senior public servants, including the General Manager, are based not in Tokelau but in Apia, Samoa which is 500 km away from the closest of the three atolls.

[10] New Zealand appoints an administrator who has overall responsibility for the administration of the Executive Government of Tokelau. This includes the administration of Tokelau's exclusive economic zone. Most of the powers of the administrator in relation to the day-to-day government of Tokelau have been delegated to Tokelauan institutions.[6]

[11] The primary political power in Tokelau sits with the Taupulega. The Taupulega do not always agree on issues such as development priorities for Tokelau. The distance between each of the atolls and the distance between the atolls and Apia, Samoa, where the Council and a number of the most senior public servants are, together with the multi-layered governance structure, can create communication difficulties and misunderstandings. These are a feature of this case.

Air service

[12] Tokelau is one of only two countries in the world that does not have an air service.[7] It is accessible only by boat. The boat trip from Apia takes between 26-36

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5 Which consists of the three Faipule and three Pulenuku.

6 As set out in the Tokelau Act 1948, the Tokelau Administration Regulations 1993 and in the specific delegations from the Administrator to each of the three villages on 29 May 2004.

7 The other is Pitcairn Island.

hours to Fakaofo, with a further six hours to Nukunonu and 10 hours to Atafu. A round trip can take about a week depending on the time taken to load and unload passengers and cargo. None of the atolls has a harbour, and everything has to be offloaded from the ship at sea and ferried to shore in landing barges.

[13] Understandably, issues relating to transport infrastructure are discussed regularly. There have been at least 16 different studies and reports on transport issues commissioned by the Government of Tokelau since 1985.

[14] In October 2015, the GF considered and endorsed a proposal which set out a three-phased approach to establishing an air service. This involved an interim Government-funded seaplane service and a Government-funded airstrip leading eventually to a commercially operated combination seaplane and airstrip-based service.

[15] Following engagement with the Taupulega, a second paper was circulated proposing that the interim air service be a helicopter service. The only written response to the second proposal came from the village of Atafu which, in principle, supported an integrated and phased air service approach, although further detail was required.

The air service proposal

[16] In connection with the preparation of a national capital development budget for the period 2016-2020, the Taupulega were asked to identify what their development priorities were.

[17] As a result of substantial revenues from Tokelau's exclusive economic zone fisheries, and access to its development trust fund, Tokelau was now in a position to fund significant national capital development projects and was no longer entirely dependent upon New Zealand aid for such projects. This gave Tokelau the ability to choose its own development priorities.

[18] At its meeting on 29 January 2016, the Council considered progress with implementation of the Air Service strategy as set out in the October 2015 officials' papers.

[19] In February 2016, at the handover of the new ferry, the Mataliki, which the New Zealand Government had had purpose-built for Tokelau, the New Zealand Minister of Foreign Affairs reminded the Council that when the new ferry project was proposed, Tokelau had indicated that what they wanted was a new ship and not air services.

[20] In July 2016, the GF approved the 2016/2017 budget. This included, for the first time, a specific national capital development budget. That budget totalled $10 million of which $2.5 million was allocated to Air Services (Interim) for the 2016/2017 year. The total budget for Air Services (Interim) was recorded as being $3.5 million. The Air Services project was the first listed in the budget. The second was "Bonded Warehouse and Apia Office" with $2 million allocated for 2016/17 year, and a total budget recorded as $3.7 million.

[21] On or about 26 September 2016, officials had a workshop with Council members where, amongst other things, the Council was briefed about options for implementation of the Interim Air Service, including helicopter and seaplane options and prices. This workshop was immediately prior to the Council meeting in Apia on 28 and 29 September 2016, which confirmed the funding priorities for the 2016/17 capital development budget.

[22] The minutes of that Council meeting recorded: "Negotiations are currently underway to procure a helicopter (inter-atoll) and a seaplane (Tokelau/Apia) for interim service."

[23] This Council meeting assumes major significance in these proceedings because the plaintiffs say that the fact of the confirmation of Tokelau's capital development priorities, and confirmation of the budget for the implementation of those priorities, mean that they were authorised to proceed to implement the interim air service. They

also claim that members of the Council verbally instructed them to urgently progress the capital development projects.

[24] On 28 October 2016, a Twin Squirrel helicopter was purchased for USD$650,000 and on 7 November 2016, a Bell Iroquois helicopter was purchased for USD$1,725,000. These purchases were reported to the Council on 9 November 2016. These developments were also reported to the GF at its November 2016 session. It was at that session that the delegates from Nukunonu requested that the villages be consulted again on the capital expenditure priorities and allegations were made that, in purchasing the helicopters, the plaintiffs had acted beyond their authorisation.

The plaintiffs' claims

[25] The plaintiffs' claims are set out in the second amended statement of claim dated 7 September 2018. However, immediately prior to the hearing, the plaintiffs abandoned the claims that were brought against the third defendant, and the hearing proceeded solely on the basis of the allegations against the first and second defendants.

[26] Although the case was fundamentally about the termination of the contracts of employment between the first and second plaintiffs and the first defendant, the pleadings treated the claim as if it were one advanced on a public law basis and sought the public law remedy of "quashing" various decisions including a decision to suspend the first and second plaintiffs of 13 April 2017, and the decision to suspend them without pay of 30 June 2017.

[27] Contractual damages were also sought, being salary and benefits for the period 24 November 2017 to 10 January 2019 for the first plaintiff, and salary and benefits from 24 November 2017 until the date of the issue of the judgment in this matter for the second plaintiff. The second plaintiff also sought an order of "reinstatement" to the role of Director of Finance. General damages, interest and costs were also sought.

[28] The challenges can be grouped under four broad headings:

(a) that there was no proper authorisation to carry out a disciplinary investigation;

(b) that the investigation was not undertaken in accordance with the rules of natural justice;

(c) that the two suspensions were unlawful; and

(d) the decision to dismiss lacked substantive justification.

PART II

Applicable law

[29] This Court is authorised to sit as the High Court of Tokelau under s 3 of the Tokelau Amendment Act 1986, which is required to be read together with the Tokelau Act 1948.[8]

[30] As set out in earlier interlocutory decisions in this matter, the laws in force in Tokelau are as specified in ss 3A, 4, 4B and 6 of the Tokelau Act 1948.[9] Section 3A refers to rules made by the GF (to the extent those rules are not inconsistent with other enactments or regulations and international obligations),[10] such rules being subject to disallowance by the Administrator.[11] Regulations may be made by the Governor-General in respect of Tokelau under s 4 of the Tokelau Act 1948. The common law of England is in force except to the extent it is excluded by any enactment or is inapplicable to the circumstances of Tokelau.[12] New Zealand statutes only apply if their application to Tokelau is provided for in the legislation.[13]

[31] There was a debate between counsel as to whether the reference to English common law was as it stood as at 1996 or as it currently stood as at the date of the hearing.[14] In the end, we are not required to resolve that issue as counsel agreed there was unlikely to be any material differences, at least in relation to the common law relating to employment agreements, between 1996 and 2019.

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8 Tokelau Amendment Act 1986, s 1(1).

9 *Suveinakama & Puka v Council for the Ongoing Government of Tokelau and the Ulu o Tokelau* [2017] NZHC 3171 at [4] (Thomas J); *Suveinakama & Puka v Council for the Ongoing Government of Tokelau and the Ulu o Tokelau* [2018] NZHC 1670 at [6] (Elias CJ).

10 Tokelau Act 1948, s 3B.

11 Tokelau Act 1948, s 3F.

12 Section 4B of the Tokelau Act 1948 provides:
Application of common law of England
(1) After the commencement of this section, English common law including the principles and rules of equity, for the time being, shall be enforce in Tokelau, except to the extent–
(a) that it is excluded by any other enactment in force in Tokelau; or
(b) that it is inapplicable to the circumstances of Tokelau.
Elias CJ in the 2018 decision (above n 8) referred to the common law of England as received in New Zealand as at 1840, however this appears to be in error as there is no reference to 1840 in the Tokelau Act 1948.

13 Section 6.

14 Section 4B was inserted into the Tokelau Act on 1 August 1996 by s 4 of the Tokelau Amendment Act (NZ) 1996.

[32] Other sources of legal obligations are the Tokelau Administration Rules 1993 (NZ); the Crimes Procedure and Evidence Rules 2003; the Tokelau Contract Rules 2004; the Finance Rules 1989; the Tokelau Public Service Rules 2004; the Tokelau Regulations (NZ) 1993; and the Tokelau Employment Commissioner Rules 2016.

[33] Each of the plaintiffs was issued a Tokelau Public Service Employment Contract which described the employer as "the Government of Tokelau". The first plaintiff's employment contract is a three-year fixed term contract commencing on 11 January 2016 and ending on 10 January 2019. The contract seems to be a generic Tokelau Public Service contract. In relation to the concept of "serious misconduct", it refers to the Tokelau Public Service Human Resources Manual ("the Manual") and Code of Conduct. To that extent, the definition of "serious misconduct" in the manual and the concept of "breach of the Code of Conduct", as set out in the code, become terms of the employment agreements.

[34] The Manual is a code for the rights and obligations in relation to public service employees. Chapter 13 deals with disciplinary provisions. Section 13.4(a) sets out relevant procedural provisions in relation to the conduct of disciplinary investigations. It is worth setting out in full.

> **13.4 Disciplinary action – Other employees**
>
> (a) When the Employer raises with a staff member a disciplinary matter it will undertake an appropriate investigation before undertaking any substantive disciplinary action. The matter will be dealt with under the following key principles:
>
> (i) promptness – any action should be taken as soon as possible;
>
> (ii) impartiality – disciplinary procedures will be applied to all staff equitably;
>
> (iii) consistency – similar action will be taken for similar offences;
>
> (iv) Non-punitiveness – the purpose of the disciplinary action is to prevent recurrences of the behaviour (unless deemed serious enough for instant dismissal). The emphasis is on prevention not retribution;
>
> (v) Fairness – the degree of discipline will relate to the nature of the offence;
>
> (vi) Natural Justice, encompassing:

(a) substantive justification – did the action of the employee justify the resulting action taken by the employer?

(b) procedural fairness – ensuring that justice is done.

[35] In relation to the disciplinary investigation, s 13.4(b)(ii) states:

> The Employer will advise the employee of the specific matter causing concern and give them a reasonable opportunity to provide any reasons or explanations for the problem.

[36] Section 13.4(c) provides:

> The Employer may delegate its authority to carry out any part of the investigation and disciplinary process to a sub-ordinate, but cannot delegate the authority to suspend, demote or dismiss an employee.

[37] Among the disciplinary actions identified in s 13.4(d) are "suspension (with or without pay)" and dismissal.

[38] The Tokelau Employment Commissioner Rules 2016 includes in the description of the role of the Commissioner:[15]

> To recommend to the relevant employer the appointment, promotion, confirmation, discipline and dismissal of employees, and resolve employment disputes.

[39] In relation to disciplinary investigations, the relevant obligations are:

(a) that an appropriate investigation take place before any substantive disciplinary action;

(b) that the employer may delegate its authority to carry out any part of the investigation and disciplinary process but cannot delegate the authority to suspend, demote or dismiss an employee;

(c) the principles of both substantive and procedural natural justice apply to any investigation and substantive disciplinary action;

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15 Tokelau Employment Commissioner Rules 2016, r 5(l).

(d) disciplinary action includes suspension (with or without pay).

[40] The second plaintiff's employment contract is also a generic Tokelau Public Service contract. It was for a fixed term of employment of two years commencing Monday, 3 August 2015 and ending Wednesday, 2 August 2017. The contract contains the same reference to the Manual[16] and Code of Conduct.

[41] The Public Service Rules 2004 provide:[17]

> The Council for the Ongoing Government is responsible for discipline and termination of employment of the General Manager Apia and Directors and for the final decision of any appeal against a decision of the General Manager Apia or of a Director.

[42] The rules also provide:[18]

> No person shall be employed in the National Public Service unless appointed to that employment under these Rules.

[43] Rule 4(2) provides:

> Every person employed in the National Public Service or in the public service of a village shall, unless otherwise expressly provided in the employment contract, be employed in accordance with the conditions set out in the Tokelau Public Service Manual and with any instructions issued by the employer.

[44] This rule has the effect of incorporating all of the content of the Manual into the plaintiffs' employment agreements.

The investigation

[45] The plaintiffs claim that in March 2017, the GF decided that the Tokelau Public Service Commissioner (TPSC or Commissioner) would undertake a Commission of Inquiry "which would be a review into the helicopter issue".

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16 Also, sometimes referred to as the Tokelau Human Resources Manual 2004.
17 Public Service Rules 2004, r 2(3)(ii).
18 Rule 3(1).

[46] It is alleged that what was intended initially to be a Commission of Inquiry was transformed into a disciplinary investigation into the actions of the two plaintiffs without proper authorisation.

[47] To address this issue, it is necessary to set out some background information.

[48] After the 18 December 2016 Council meeting where the officials were instructed to cease work on the Interim Air Service and submarine cable development projects, New Zealand's Ministry of Foreign Affairs and Trade (MFAT) were advised of the purchase of the two helicopters. Following consultation by the Administrator of Tokelau, the three Taupulega were advised in February 2017 that the Administrator was commissioning an independent review of the purchase of the helicopters to cover governance, decision-making, accountability and financial delegation processes, and the conduct of the public service.

[49] That review was undertaken by the consultancy Martin Jenkins & Associates Ltd in Apia, Samoa, between 27 February and 3 March 2017. The final report is dated 16 March 2017.

[50] Its overall conclusion was that the helicopter purchases were not authorised by Tokelau's government. However, it made a number of observations which indicated that certain systemic issues had contributed to that outcome. Some relevant observations include:

> - Tokelau's approach to governance is underpinned by the primacy of atoll villages and is characterised by devolved decision-making and localised provision of core public services.
>
> - A key part of the public sector that supports the Council for Ongoing Government and the General Fono in its implementation of policies and strategies related to the national interest and including the provision of enabling transport infrastructure is located in Apia, making for logistical challenges in ensuring adequate communication and engagement with Taupulega and some senior members of the public service who are atoll based.
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> - At a meeting of the Council for Ongoing Government in Apia in September 2016, officials reported on progress in establishing an interim air service including that they were "negotiating to secure the acquisition of the AS350 helicopter" (Samoa Helicopters Ltd) and a Seaplane (most likely a Twin Otter 300/400) amphibious aircraft for

air services to Tokelau. In its written record of the meeting, the Council expressed appreciation of work being done so far, but did not endorse or agree to the purchase of helicopters.

- That Apia based public servants were put in a difficult situation that required them to make difficult judgements. On the one hand they were under instructions from the Ulu and Council for Ongoing Government to proactively progress an interim air service (and other capital initiatives). Doing so would enable the General Fono to demonstrate achievements near the end of its three year term (after many years of talk and inaction). On the other hand, officials were also under very clear direction to fully engage with villages on priorities for capital development and the detail of the proposed interim air service.

- That it was difficult for the General Manager of the public service to exercise necessary coordination across senior members of the public service and Ministers. On this, it seems clear that this is a difficult role. It requires a whole of public service understanding of priorities and interconnections between the works of public servants. To this end, we note that the General Manager does not have direct accountability for the employment of public services or a direct line of authority to exercise this coordination.

[51] On 9 March 2017, an interim copy of the Martin Jenkins report was provided to the Administrator. The GF met between 6 and 10 March 2017, and the minutes of that meeting note that the draft report had been received.

[52] The Administrator attended the GF meeting in March and spoke about the interim report. He encouraged the Government of Tokelau to instruct the Tokelau Public Service Commissioner, "to draw on the findings of this review and to conduct a review in relation to the public service and public servants' execution of their duties and obligations".

[53] The minutes also record that the GF agreed:

(i) to commission an inquiry into the helicopter issue;

(ii) to refer to the Public Service Commission to carry out a review into the helicopter issue.

[54] The Administrator was concerned that the agreement recorded in the minutes to "commission an inquiry" had been interpreted as a decision to commence a "Commission of Inquiry". By letter of 4 April 2017, he wrote to the Ulu and Council indicating that instituting a Commission of Inquiry would, in his view, be a departure

from the GF decision. A Commission of Inquiry was something only the Administrator could authorise. He pointed out that the Martin Jenkins' review, which he had commissioned, had addressed issues relating to governance and public service processes, and that what the Minister (Hon Murray McCully) had called for was "a review to determine if any public servants had breached the Tokelau Public Service code of conduct or performed poorly."

[55] The letter intimated that he would use his residual powers and intervene if a Commission of Inquiry was instituted rather than an investigation into whether any public servants had breached the Tokelau Public Service Code of Conduct or performed poorly.

[56] Upon receipt of this letter from the Administrator, the Council directed the Tokelau Public Service Commissioner to carry out an employment investigation and also to include in that investigation concerns about the officials' role in the purchase of a property for the Tokelau Apia Liaison Office (TALO) at Matautu in Apia, Samoa.

[57] The plaintiffs' case is that the Council acted beyond its powers when it directed the TPSC to conduct the employment investigation.

[58] The plaintiffs' argument was that the only thing that the GF authorised was a "Commission of Inquiry" and that the employment investigation was therefore unauthorised with the Council having acted beyond its powers when it directed the TPSC to conduct the employment investigation. However, this argument overlooks the fact that the GF's decision was both to "commission an inquiry" and to refer the matter to the TPSC for a review. That "review" was clearly intended to be an employment investigation. It also ignores the delegations that have been given to the Council.

[59] Section 4 of the Tokelau Act 1948 provides that the Governor-General can make regulations "for the peace, order and good government of Tokelau". Regulation 5 of the Tokelau Administration Regulations 1993 (NZ) empowers the Administrator to delegate his powers.

[60] Instruments of delegation of powers by the Administrator to the villages and thence to the GF effective from 1 July 2004 include: "managing the … National Public Service". Regulation 7 of the Tokelau Administration Regulations 1993 provides:

> Where pursuant to regulation 5, the Administrator delegates any power to the General Fono, then, in any case where the General Fono is not in session, the Council for the Ongoing Government may exercise that power in the same manner and with the same effect as if the power had been delegated to the Council for the Ongoing Government under that regulation.

[61] The GF was not in session at the time of the Council decision to authorise the employment investigation therefore the Council clearly had authority to make that decision and to direct the Commissioner accordingly.

[62] The plaintiffs raised an alternative argument that the Tokelau Employment Commission Rules 2016 did not authorise the Commissioner to carry out an employment investigation. However, r 5(1)(l) of those rules provides that the role of the Commissioner is to "recommend to the relevant employer the appointment, promotion, confirmation, discipline and dismissal of employees, and resolve employment disputes".

[63] It is implicit in a power to recommend discipline and dismissal of employees and resolve employment disputes that the Commissioner has the power to ascertain the relevant facts by way of undertaking an investigation. I am therefore satisfied that the Council lawfully authorised the TPSC to commission the employment investigation.

The first suspension

[64] By letters of 13 April 2017, the Commissioner wrote to each of the plaintiffs advising them that they were suspended for the duration of the disciplinary investigation. The letters did not provide any reason for the necessity for a suspension and made the statement that: "Your suspension does not constitute disciplinary action".

[65] The letter provided that during the course of the suspension, salary would continue to be paid and that the plaintiffs were entitled to their normal contractual benefits including medical benefits, superannuation allowance, life and accidental

death and disability insurance, education allowance, use of motor vehicle (including insurance, fuel and reasonable maintenance costs), and accommodation and utilities allowance.

[66] Neither of the plaintiffs' employment agreements conferred a contractual entitlement to suspend. The Manual does refer to suspension but Chapter 13.4(d) states that suspension (with or without pay) falls within the category of "disciplinary action". Other than as a "disciplinary action", the Manual does not authorise suspension.

[67] The plaintiffs claim that the Commissioner had no authority to suspend either of the plaintiffs because he was not the employer of the plaintiffs and that, in any event, in accordance with the provisions of the Manual, a suspension was a disciplinary process and therefore subject to the employer observing the rules of natural justice. They submit that the rules of natural justice entitled the plaintiffs to be consulted about a proposed suspension before it occurred. The defendants concede that no such consultation occurred.

[68] There was no direct evidence from the defendants as to why the Commissioner wrote the letters of suspension. However, Mr Kings (the then Administrator and Deputy Secretary of the Pacific and Development Group at MFAT) in his affirmation of 16 February 2018 stated that on 11 April 2017, he was advised by the Ulu that the Council had recommended that the plaintiffs be suspended during the investigation.

[69] On 11 April 2017, Mr Kings wrote to the Ulu. That letter noted that the Commissioner was undertaking an inquiry into the performance of the plaintiffs. It then said:

> It would provide New Zealand with greater confidence in the ongoing operations of the Tokelau Public Service if this week these officials were suspended while the investigation is being undertaken.
>
> I understand that in fact their suspension has already been requested by the Council for Ongoing Government. I would therefore ask that this be actioned as soon as possible.

[70] It seems reasonable to infer that this letter of 11 April 2017, along with an instruction from the Council, was the catalyst for the Commissioner sending the letters of 13 April 2017. While the Council may have requested the Commissioner to suspend the plaintiffs, there is no evidence of them having identified a reason which justified the suspension.

[71] In his affirmation of 16 February 2018, Mr Kings sets out why he thought that suspension was required, but these are not the views of the Council and, in any event, they were not communicated to the plaintiffs at the time. There is no evidence that the Council applied their minds to identifying a lawful basis for the suspension. It is not a contractual right conferred by the employment agreements, and the only circumstance in which the Manual permitted suspension was in the context of disciplinary action. None of the procedures mandated by the Manual as being required prior to the imposition of a disciplinary sanction were complied with. These suspensions were clearly unlawful.

Procedural defects in investigation

[72] The plaintiffs allege a number of procedural defects in the way in which the investigation was carried out. These include:

(a) that the investigator was biased and should not have been appointed;

(b) the plaintiffs were not provided with full particulars of the allegations against them;

(c) the plaintiffs were not given the opportunity to be heard;

(d) the scope of the investigation was unlawfully limited to an inquiry only into the actions of the plaintiffs; and

(e) the investigation was unlawfully expanded to include consideration of the purchase of the Matautu property in Apia, Samoa which had occurred some 12 months previously.

Bias

[73] The plaintiffs allege three grounds of bias:

(a) that the investigator (Aleki Silao) was biased because he had applied in both 2013 and 2015 for the General Manager role filled by the first plaintiff;

(b) that he had had significant involvement in the development of a paper called "Tokelau Public Service Reborn" that was tabled at the GF meeting of March 2017; and

(c) that the terms of reference developed for the investigation indicated pre-determination by the investigator as a result of the use of the words "the unauthorised purchases".

[74] The concept of bias is well established in employment law. In the case of *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School*, the Employment Court discussed the concept of bias generally and in the employment context.[19] It cited with approval,[20] the following definition of bias from GDS Taylor, *Judicial Review: A New Zealand Perspective*:[21]

> "Bias" is a predisposition to decide a cause or an issue in a certain way which does not leave one's mind properly open to persuasion. It results in an inability to exercise one's functions impartially in a particular case. The predisposition may stem from financial interest, personal relationship, ideology, and inclination, the manner in which powers are exercised, or from the composition or nature of authority concerned.

[75] In appointing a delegate to undertake part or all of a disciplinary investigation, if an allegation of bias is made against that delegate, one of the factors to be considered is the depth of pool of potential suitable people.[22] Where the pool of people suitable

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19 *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1992] 3 ERNZ 243.

20 At 272.

21 Graham Taylor *Judicial Review: A New Zealand Perspective* (Butterworths, Wellington, 1991) at [13.46].

22 See the observations of the Employment Court in *Kennedy v Rusty Anchor Ltd* EmpC Christchurch CC2/04, 19 February 2004 at [42].

to undertake an investigation is very limited, it may simply not be possible to appoint someone totally independent.

[76] It was appropriate for the TPSC to appoint a senior member of the TPS to undertake the investigation. There were only three potential candidates, one of whom was closely related to one of the plaintiffs. That factor disqualified her. Another was unwell, leaving Mr Silao, a long serving senior and experienced member of the TPS, as the only suitable appointee. The limited pool of candidates is a factor which bears on the question of whether a reasonable person acquainted with the situation would have reasonable grounds for suspecting bias. The other relevant factor is whether it could be said there was a real likelihood that in the circumstances of the case Mr Silao would be biased.

[77] The fact that he had applied for the General Manager's position in 2013 and 2015 was not unusual. The Tokelau Government had adopted the practice of appointing senior officials on fixed term contracts of relatively short duration. This meant that such roles were regularly contested. It is unsurprising that Mr Silao was one of a small number of potential candidates who applied for the position. There was no evidence to indicate any animosity or ill-will on his part toward the first plaintiff, and neither would a reasonable person have suspected that this factor would have resulted in him being biased.

[78] The allegation that Mr Silao was biased as a result of his involvement in the "Tokelau Public Service Reborn" paper arose from the fact that among the many changes that this paper proposed for the Tokelau Public Service, was a requirement for the General Manager to be fluent in written and spoken Tokelauan in order to enhance the communication between officials and the Taupulega. It was implied by the plaintiffs that this recommendation was targeted at the first plaintiff who, although married to a Tokelauan, is of Fijian nationality. The implication was that, if the proposal in the paper was accepted, the first plaintiff would be ineligible for appointment because he did not meet the language tests.

[79] The further implication was that Mr Silao had drafted the paper with the proposed language requirement in it in order to disqualify the first plaintiff, so he could apply for the role himself.

[80] This theory was explored by the plaintiffs' counsel. A government minister, Mr Siopili Perez, was questioned by him during the course of the hearing. Mr Perez did not accept that the first plaintiff lacked Tokelauan language skills, noting that he had not required a translator to communicate with Mr Perez and, as far as Mr Perez was concerned, had adequate Tokelauan language skills.

[81] As noted above,[23] the issue of communication difficulties between officials and the Taupulega had been clearly identified. It is unsurprising that Mr Silao, in his capacity as a senior official, would have been tasked with coming up with suggestions as to how recognised communication difficulties could be improved. The paper "Tokelau Public Service Reborn" explores a number of ways of making improvements to the operation of the public service that are designed to address some well-known shortcomings. No reasonable person would conclude that the report was drafted with the purpose of targeting the first plaintiff.

[82] A further allegation of bias was that the terms of reference referred to the purchases of the helicopters as "the unauthorised purchases". It was alleged that this demonstrated that the investigator had commenced the investigation with a closed mind.

[83] It is not clear who actually drafted the terms of reference. It may have been the TPSC or Mr Silao, or someone else. Mr Silao's letter to the plaintiffs' lawyers of 25 May 2017 said: "The Government of Tokelau has now approved the Terms of Reference for the investigation". Irrespective of exactly who drafted them, it appears that the Government (either the GF or Council) was ultimately responsible for their final content.

[84] The use of the words "the unauthorised purchases" in the terms of reference was used to identify the particular transactions that there was concern about (the

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[23] See, for example, the extracts from the Martin Jenkins review set out at [48].

acquisition of the two helicopters) and to distinguish it from the concern about the purchase of the Matautu property which was acknowledged to have been authorised but alleged to have been the subject of unprofessional advice.

[85] The same paragraph that first used the words "the unauthorised purchases" had, shortly before, used the words "alleged not to have been authorised by the Ongoing Government of Tokelau". It is clear from reading the paragraph as a whole that what was being put was allegations rather than conclusions. A reasonable person acquainted with the relevant facts would not interpret the failure to repeat the word "alleged" on all subsequent occasions in the terms of reference as being evidence of a real likelihood of bias on the part of the investigator.

[86] Accordingly, the allegations of bias are without foundation.

Full particulars

[87] The plaintiffs assert that at the very commencement of Mr Silao's investigation they should have been provided with "full particulars of the allegations including the primary allegation that they had breached the Finance Rules 1993".

[88] The submission that the terms of reference for the investigation should have contained all the details of the allegation, and the submission that the defendants should, and could, have provided that information at that point, is misplaced.

[89] At the time of the commencement of the investigation, other than the fact that two helicopters had been purchased and that no independent valuation evidence had been obtained in relation to the Matautu property purchase, the defendants had little idea of what the actual facts were. That was the whole purpose of undertaking an investigation. It was only once the facts were ascertained that it became apparent that no documentary records (either in hard copy or electronic form) in relation to the helicopter purchases or the Matautu property appeared to exist at the offices of the first defendant.

[90] At that preliminary stage, the investigator could not have known of the lack of due diligence processes (such as the failure to obtain necessary international civil

aviation permissions) or the absence of a business plan or business case in relation to either the helicopters or the Matautu property.

[91] As issues emerged during the course of the investigation, these were put by Mr Silao to the plaintiffs for response. He also drew to their attention the apparent complete absence of the sort of documentation that would have been expected to exist in the first defendant's offices in relation to both transactions. He invited the plaintiffs to provide him with such documentation as they had.

[92] The terms of the initial suspension also permitted the plaintiffs to seek access to their offices for the purposes of preparation of their responses. It does not appear that either of them took advantage of that opportunity.

[93] Although neither of the plaintiffs complied with the investigator's request that they meet with him in Atafu, Tokelau, they did provide detailed written responses to the various queries that the investigator made. The first plaintiff's response ran to some 52 paragraphs over eight pages. The second plaintiff's response was a similar length. A large quantity of supporting documentation was also provided.

[94] I am satisfied that, as the investigation proceeded, the investigator provided the plaintiffs with details of the issues of concern and the plaintiffs were able to make a comprehensive response. I note that neither of the plaintiffs indicated to Mr Silao that they were unable to respond because they did not understand the details of what his concerns were.

[95] The plaintiffs say that the principal allegation that their failure to obtain formal written approval from the GF for the purchase of the helicopters was a breach of the Finance Rules 1993 was never put to them. These rules require that any transaction involving a sum of greater than $50,000 must be approved by the GF.

[96] There was no reference to the Finance Rules 1993 in the report from the investigator or the subsequent recommendations from the Commissioner to the Council. Where the reference comes from is the affidavit of Siopili Perez dated 16 April 2018. However, although neither the investigator nor Commissioner referred

specifically to the Finance Rules 1993, what is clearly alleged was that the purchase of the two helicopters was not authorised by the GF. The fact that the purchase was over $50,000 and needed written authorisation adds nothing to that allegation. The plaintiffs got the opportunity to set out their view as to why they believed the purchase of the helicopters was authorised.

[97] As far as the investigation undertaken by Mr Silao is concerned, I am satisfied that the plaintiffs did have sufficient details to be able to respond appropriately.

[98] I will address separately the question of whether the second part of the investigation was undertaken in a procedurally fair manner.

[99] It is important to remember that the requirements of natural justice in relation to an employment investigation do not require the same type of formal hearing as would be the case with a criminal prosecution.

[100] The submissions of Mr Goddard, for the plaintiffs, complain that "the plaintiffs had no opportunity to question any witnesses and to comment on the evidence and argument of the whole case".

[101] The requirements of natural justice in relation to an employment investigation do not oblige the employer to parade the witnesses of fact before the employee so that the employee can cross-examine them on what they have said. The important thing is that the employee understands the substance of the case they have to answer and have the opportunity to put such evidence before the investigator that they wish to.[24] The investigation process is an inquisitorial one rather than an adversarial one.

Legal representation

[102] The plaintiffs claimed that their rights to procedural fairness were breached when they were denied the right to legal representation in relation to their meeting with the investigator. This is said to have arisen as a result of the practical effect of the investigator insisting that he would not meet with them in Apia but only in Tokelau.

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[24] Mary Foley and Cassandra Kenworthy *Personal Grievances* (online ed, Thomson Reuters) at [4.1.01(1)] and [4.1.11].

Because the only way to get from Apia to Tokelau is by boat and a round trip would take several days (not including the duration of the meeting with the investigator), the plaintiffs' case is that the cost to them and inconvenience to their legal advisors meant that they were effectively denied the important right of legal representation.

[103] By letter of 25 May 2017, the investigator advised the plaintiffs that they were required to attend for interviews in Tokelau on either 15 or 16 June 2017. The letter advised that they had been booked to travel on the MV Mataliki departing Apia on 14 June 2017.

[104] By letter of 29 May 2017, the first plaintiff's Samoan-based lawyer objected to the requirement that the interview be in Tokelau. The letter said:

> … we ask that the interview take place in Apia so that his Apia-based counsel can attend with him. It is not reasonable to expect Mr Suveinakama to attend interviews in Tokelau when his place of employment and residence is Apia. This is a public service commission review and the public servants we would reasonably expect to be interviewed, as well as the investigator, are resident in Apia. It is only fair and reasonable that the interview with our client is conducted in Apia.

[105] That letter also sought an urgent meeting between the first and second plaintiffs' legal counsel and the investigator in Apia on 31 May 2017. The second plaintiff's Apia lawyer also wrote to the investigator in identical terms.

[106] By letter of 30 May 2017, the investigator agreed to meet the lawyers on 31 May in Apia. In relation to the requirement that the plaintiffs be interviewed by him in Tokelau, the letter said:

> Mr Suveinakama and Mr Heto Puka are employed by the Government of Tokelau, not Samoa. It is not unreasonable to request and to expect members of the Tokelau Public Service to attend in Tokelau for the purpose of this investigation as well as for any other matters as required by the Government. All employees of the Tokelau Public Service who are required to work in Apia are compensated for being away from Tokelau.

[107] The meeting on 31 May between the investigator and the plaintiffs' legal advisors did not resolve the issue of where the interviews with the plaintiffs should take place.

[108] On 7 June 2017, the first plaintiff's lawyer wrote to the investigator on this topic setting out his client's position. The relevant portion of the letter said:

> - Mr Suveinakama is entitled to have his legal counsel present at his interview and his legal counsel is located in Apia. Should the interview be held in Tokelau, Mr Suveinakama will have no access to legal representation during the interview.
>
> - Apia is the location of our client's employment and ordinary residence (and similarly for the investigator).
>
> - You have already conducted interviews in Apia which form part of the investigation into our client. This includes both interviews of senior Tokelau public servants resident and employed in Apia, and the Ulu of Tokelau, while he was transiting in Apia en route from Tokelau to an overseas meeting.
>
> - Conducting the interviews in Tokelau would create additional delays and costs for our client.
>
> In these circumstances, it would be unduly burdensome, unfair and unreasonable to compel our client to travel 24-32 hours by boat to Tokelau for the purpose of being interviewed.
>
> Your legal counsel has raised jurisdictional concerns and stated that the interviews need to be conducted in Tokelau so that the interviews are subject to Tokelau law. She further stated that the Council of the Ongoing Government of Tokelau instructed that the investigation must be "brought back to Tokelau". We note that you similarly reference this instruction in your email (7 June) and request that you provide to us a copy of this decision of the Council.

[109] The second plaintiff's lawyer also wrote a letter on 7 June 2017 in identical terms.

[110] The letter of 7 June did not persuade the investigator to change his position. His position is set out in his letter of 10 June 2017. Relevant parts of that letter read:

> Your clients carry out their duties and functions in Samoa at the pleasure of the Council and are subject to follow any lawful direction given by Council as part of their employment. Your clients also ought to be aware of their contractual obligations to travel to Tokelau from time to time when required to do so.
>
> I am concerned that your clients appear to be holding the mistaken belief that they can, as part of their terms of employment, refuse a perfectly lawful and reasonable direction by their employer to return to Tokelau to be interviewed. Respectfully, that belief is quite mistaken and runs the risk of being perceived as offensive to and a direct refusal to follow a lawful direction of the Council.

> …
>
> Mr Suveinakama has requested that I provide a copy of the decision of the Council requiring that the investigation be "*brought back to Tokelau*". The Council is not required to provide a copy of any such written decision to your clients. It is sufficient that I have been instructed to inform you that the Council requires that your respective clients' interviews be carried out in Tokelau. The Council does not need to justify this lawful direction to the satisfaction of Mr Suveinakama.
>
> …
>
> Notwithstanding your respective clients' concessions that they are prepared to agree that the laws of Tokelau would apply to any interviews being conducted in Samoa the Council considers it is necessary for the most significant interviews of the investigation to be carried out in Tokelau. This is not an unreasonable or an unusual direction in the circumstances.

[111] At [27] of his report dated 22 September 2017, the investigator said:

> … after consultation with the Council, I was instructed that the interviews were to take place in Tokelau to ensure that they are carried under the jurisdiction of Tokelau (not Samoa).

[112] This statement does not make sense. Not only had the lawyers for the two plaintiffs expressly agreed that, if the interviews took place in Samoa, Tokelau law would apply, irrespective of where the interviews took place, Tokelau law would have applied. It was Tokelau law that governed the employment agreements of the two plaintiffs and, as set out above, Tokelau law which provided the rights and obligations arising under the employment agreement.

[113] The conduct of the investigation was also not a matter with which the Council had any lawful right to interfere. They had commissioned an independent investigation and it was up to the investigator (subject to compliance with the terms of reference) to decide how to go about conducting the investigation.

[114] An investigation of this nature is one where the principles of natural justice entitle the employees to be represented. The investigator clearly saw the interviews of the plaintiffs as potentially giving rise to important legal issues because he had arranged for Ms Wallwork, a lawyer practising in Samoa, to travel with him by boat to Tokelau for the purpose of advising him during the interviews.

[115] While requiring the plaintiffs to travel to Atafu (the most distant of the Tokelau atolls from Samoa) did not deprive them totally of access to legal representation because they could, as the investigator had done, have arranged for their lawyers to travel by boat with them to Atafu, stay there for the duration of the interviews and then travel back by boat to Samoa, the cost of doing this would have been substantial.

[116] It is also conceivable that some arrangements may have been able to be made whereby the plaintiffs accessed legal advice by way of telephone or possibly Skype (no such offer was made, nor any evidence presented on this point). However, this would have meant that the investigator would have the benefit of a lawyer physically present at all times during the investigation and able to see and hear everything that went on, while the employees would not have been in that position.

[117] If there had been a credible reason for holding the interviews on Atafu instead of in Samoa, where both the investigator and the plaintiffs were based, it would have been a matter of balancing the importance of that reason against the significant disadvantage of effectively depriving the plaintiffs of the right to the same quality of legal representation that the investigator had. However, the only reason given at the time, namely the need for Tokelau law to apply to the meetings, is not such a reason.

[118] In this case, the principles of natural justice meant that, in the absence of any countervailing justification, the interviews should have taken place in Samoa where the plaintiffs would have had ready access to legal advice and assistance without having to incur the cost of several days of travel on the part of their legal advisers in order for them to be able to attend the meeting.

[119] There is no doubt that, pursuant to their employment contracts, the plaintiffs could lawfully be required to travel to Tokelau. However, that is not the end of the inquiry. As the investigator alluded to in his letter of 10 June 2017,[25] such instructions had to be both lawful and reasonable. The inquiry is, therefore, whether, in the circumstances, the instruction was reasonable. For the reasons set out above, an instruction which effectively deprived the plaintiffs of the right to legal assistance could not, in the circumstances of this case, be described as reasonable.

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[25] The relevant parts of which are set out at [104] above.

Intervention by Fakaofo Taupulega

[120] In an unexpected twist, a copy of an email sent to the plaintiffs by Mete Lui on behalf of the Taupulega of Fakaofo at 16:15 on 13 June 2017 was copied to the Commissioner. The English translation of the email from the original Tokelauan starts by saying:

> Please may I as a servant of Taupulega Fakaofo to convey message to you TPS Commissioner from Hui Faipule and Hui Pulenuku that the Taupulega of Fakaofo has instructed Heto and Joe not to travel to Atafu.

[121] This email was used as a justification by the plaintiffs for their refusal to travel to Tokelau to be interviewed. In his written statement to the investigator of 15 July 2017, Heto Puka stated that:

> I believe the Fakaofo Taupulega had also respectfully informed the Atafu Taupulega and the Commissioner of its decision and instruction to me, with a culturally appropriate apology for the "extensive arrangements". … On 13 June, I found myself in an invidious position of obeying you or the Taupulega of Fakaofo, my village. I think it is important that you recognise I was caught in a classic "catch 22" on that day, despite the earlier remonstrations which you refused, this in the end was the reason why according to you, I "refused" to attend the interviews in Atafu.

[122] Where the Council has validly initiated an employment investigation and an investigator has been appointed to conduct that, it is not for the Taupulega of one of the villages to attempt to interfere with that by purporting to give instructions which not only interfere with the investigator's work but countermand a direction given by the investigator in the course of that work. There is no basis for Mr Puka to suggest that, of itself, this instruction justified his failure to travel to Atafu.

[123] However, what this incident illustrates is the willingness of a Taupulega to alter their position and purport to resile from, or act contrary to, a decision of the Council.

[124] The full text of the email of 13 June 2017 from the Taupulega of Fakaofo confirms that not only is the Taupulega of Fakaofo attempting to interfere in a duly authorised investigation, they were taking issue with a number of other aspects of the investigation. This willingness to ignore what had already been decided and to attempt to revisit settled decisions is an unfortunate feature of the way the Fakaofo Taupulega have behaved in this matter.

Expansion of investigation to consider the purchase of the Matautu property

[125] The plaintiffs allege that the scope of the investigation was unlawfully expanded because of the extension to include the Matautu transaction.

[126] This allegation can be disposed of quickly.

[127] The plaintiffs were employed by the Government of Tokelau. When the GF was not in session, the Council was the body through which the Government of Tokelau acted.

[128] The Government was free to include, within matters to be investigated, any employment issue that it felt required investigation. In this case, the Council clearly resolved to hold an employment investigation and, when they settled the terms of reference, chose to include in that investigation issues to do with the Matautu purchase. That was an option available to them in their capacity as employer. It was not unlawful.

[129] The fact that it was not unlawful is not the same thing as saying that ultimately the investigator's findings in respect of this matter supported the disciplinary outcome. But that is a separate question as to whether the Government of Tokelau could investigate this issue.

Second suspension

[130] When the plaintiffs refused the instruction from the investigator to travel to Tokelau to be interviewed, the investigator advised the Council of this. The Council then met and considered this.

[131] By letters of 30 June 2017 sent to each plaintiff, the Council informed them that the Council had met to consider their refusal to travel to Tokelau and said:

> The Council has considered the various explanations and reasons raised by you in your lawyer's letter as to why you did not believe that you should have to return to Tokelau to assist with the investigation process. The Council does not accept your reasons for refusing our clear direction as legally valid nor in accordance with acceptable Tokelauan customs and protocol or the TPS Code of Conduct for public servants.

[132] The letter went on to claim that "there must be a breakdown in trust between yourself as a senior manager of the TPS and the Council." The letter also said that, by not following what was said to be a lawful direction of the Council:

> …you also do not seem to appreciate or care for the need to maintain respectful relationships in the usual Tokelauan manner. This is what saddens the Council the most are that your actions are not those that are expected of a true Tokelauan public servant.

[133] The letter then said that the Council had concluded that the plaintiffs' actions were "a clear breach of clause 13.1(b)(i) of the TPS HR Manual for disobeying, disregarding or wilfully failing to carry out a lawful order or instruction of the Council."

[134] The Council then said that, pursuant to cl 13.4(d)(ii) of the Manual, the plaintiffs should "now be suspended without pay pending the outcome of the investigation".

[135] At no stage prior to sending this letter were the plaintiffs informed that the Council saw their actions as a breach of the code of conduct potentially justifying discipline. Neither were they informed that the Council regarded their refusal to travel to Tokelau to be interviewed as a breach of some important cultural norm.

[136] While the plaintiffs, through their lawyers, certainly informed the investigator of the reasons why they believed it was unreasonable for them to be required to travel to Tokelau to be interviewed, they never knew that those explanations would be considered by the Council in the context of whether or not to impose the disciplinary sanction of suspension without pay (or any other disciplinary sanction).

[137] The Council's letter, for the first time, raised claims of a breakdown in relationships between the plaintiffs and the investigator, and the plaintiffs and the Council. The suggestion that Tokelauan custom had required the plaintiffs to travel to Atafu as directed, had also not previously been raised as an issue.

[138] These failures are all fundamental breaches of the rules of natural justice.[26]

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[26] See *Tawhiwhirangi v Attorney-General* [1993] 2 ERNZ 546.

[139] Given the finding I have made that, although lawful, the directive to travel to Atafu to be interviewed was, in the circumstances unreasonable, there was also no substantive basis for imposing the disciplinary sanction of suspension without pay. This action was clearly unlawful.

[140] The suspensions without pay imposed by the letter of 30 June 2017 took effect from 13 July 2017 until they were ultimately withdrawn in response to the first plaintiff's application for injunctive relief in November 2017.

[141] By letter of 5 July 2017, the investigator wrote to the plaintiffs' solicitors saying that he had "been directed to continue the investigation under the same terms. This means that your clients' request to be interviewed here in Samoa must be declined." The letter acknowledged receipt of a written statement and raised a number of additional issues in respect of which comment was invited.

[142] By letter dated 18 July 2017, the plaintiffs, through their New Zealand lawyers Morrison Kent, provided further statements to the investigator including responses to the various queries raised in the letter of 5 July 2017. The letter noted that, the plaintiffs had been disadvantaged by the investigator's failure to provide material upon which the allegations were based and as at that point, neither MFAT nor the Office of the Minister responsible for MFAT had provided any of the relevant information requested pursuant to the Official Information Act 1982 requests, such requests having been made at the latest, by 28 April 2017.

[143] The letter pointed out what was said to be "significant financial and non-financial disadvantage" to the plaintiffs as a result of the suspension without pay and requested that this be reconsidered. It again repeated the request for the plaintiffs to be interviewed in Apia. It enquired as to the timing of delivery of a draft investigator's report for the plaintiffs' review.

[144] By letter of 26 July 2017, the investigator responded to the request that the plaintiffs be reinstated on full pay. He indicated that this issue was not part of his delegated responsibilities and was "a collective decision by the Executive or Council

of the Ongoing Government of Tokelau as conveyed by the Ulu of Tokelau in his letter".

[145] In relation to the letter from the Fakaofo Taupulega the day before the scheduled boat trip to Tokelau, the investigator said:

> For your information, the three Taupulegas or Council of Village elders must agree collectively to intervene successfully, at short notice, on a decision by the Executive or Parliament.

[146] Despite further entreaties from the lawyers from the plaintiffs, there was no change to the suspension.

Second part of the investigation

[147] The investigator's report was dated 22 September 2017. The report accepted that the plaintiffs were employed pursuant to the Manual. The report noted a lack of hard copy files and documentation in relation to both the helicopter purchase and the purchase of the Matautu property. It also noted the absence of the sort of documents that might be expected such as:

(a) any agreement with Grey Investment Group regarding shared ownership of the Squirrel helicopter;

(b) records of quotations being obtained on helicopters prior to purchase;

(c) the copy of the sale and purchase agreement or invoice in relation to the Bell helicopter;

(d) supporting documents regarding payment of NZD$14,010 in respect of graphics; and

(e) in respect of the Matautu property, no record of advice received or evidence of discussions around the price arrived at.

[148] The investigator found that the purchase of the helicopters was never approved by Council and there was a lack of supporting documentation to show that the

helicopters would have been operational between Tokelau and Samoa. The report noted that there was a lack of invoices supporting substantial payments which had been approved by Mr Puka. The lack of a business case for the purchase of the helicopters was also cited as being of concern.

[149] The report notes that the approved budget for interim air services for the 2016/2017 financial year was $2.5M but what was actually spent was $5.3M. The report also noted that Mr Puka's final draft report identified some significant regulatory hurdles but that report was not received until after the helicopters had been purchased.

[150] The report also noted the lack of input from the Government of Tokelau's lawyer in relation to any aspect of the helicopter purchase.

[151] Two significant conclusions were:

> … the helicopters were purchased far in advance of the Government of Tokelau being in any meaningful position to undertake any commercial flying operations in the short term as anticipated and advised to Council by Mr Puka and Mr Suveinakama.
>
> … the helicopters were purchased without any confirmation or true understanding by anyone within the Government of Tokelau as to how long it would realistically take to get all necessary civil aviation approvals and permits to commence flying commercially.

[152] In relation to the plaintiffs' claim that the 26 September 2016 Council meeting effectively approved the helicopter purchase, the conclusion of the investigator was that the phased implementation of the air service was subject to a number of qualifications including a requirement for significant input from the Taupulega. What had been put to the Council was also something that involved sea planes whereas two helicopters had been purchased.

[153] The report also noted that even though the Atafu Taupulega had written on 12 November 2015 advising that it supported Phase 1 of the proposal, this was subject to certain conditions including that Atafu received 10 per cent of the shares in the proposed joint venture enterprise.

[154] In relation to the purchase of the Matautu property, the report noted that there was a significant lack of documentation and that the only valuation report was one which had been obtained by the vendor for its own purposes which gave a value of ST$10,094,000 in the context of a particular proposed development (the Lava Hotel).

[155] The report said that, based on what were said to be current market values, "the Government of Tokelau has potentially paid at least ST$2,600,000 too much for the Matautu property".

[156] The report noted that the plaintiffs were of the understanding that the vendor of the Matautu property would invest much of the sale proceeds in a joint venture air service with the Tokelau Government but that there was no documentation of any sort recording this.

[157] The report noted the absence of involvement of the Director of Transport and Support Services whose department was responsible for managing all land purchases by the Government of Tokelau. It noted that the Director should also have been involved in the proposal to purchase the helicopters as transport fell within his sphere of responsibility.

[158] In response to the argument that the plaintiffs reasonably assumed that the 29 September 2016 Council meeting provided authorisation for the purchases of the helicopters, the investigator found:

> Even if Mr Suveinakama was under a mistaken belief that the purchases were approved by the Council, it was incumbent upon him to also ensure that there was a robust business case for the purchases with appropriate supporting documentation.

[159] A copy of the investigator's report was provided to the plaintiffs on 4 October 2017. They were given until 4 November 2017 to provide their responses. They were also provided with an opportunity to meet face-to-face with Mr Perez, the TPS Commissioner. He met with the second plaintiff on 1 November 2017 and with the first and second plaintiffs, and their respective lawyers, on 14 November 2017.

[160] The Commissioner, having considered the written investigation report and the responses from the plaintiffs (which had been both face-to-face and in writing) concluded that there had been serious misconduct justifying dismissal.

[161] In conveying this recommendation to the Council, the investigator set out his reasons by way of summary:

(a) lack of written reports to the Council and the Ulu, including reports on costing being provided prior to signing of a sale and purchase agreement for the helicopters;

(b) lack of any written authorisation beyond approval of an Interim Air Services Plan;

(c) lack of documentary records of the transaction, including absence of records of the joint venture;

(d) payment of the whole purchase price of the helicopters by the Tokelauan Government rather than a contribution from the joint venture being received;

(e) lack of regulatory or compliance approval to fly the helicopters; and

(f) in relation to the Matautu property, what was said to be an overpayment for the property of ST$2.6M than the actual valuation of the property.

[162] The recommendations were forwarded to the Council and accepted by the Council without either of the plaintiffs being given any opportunity to address the Council in person in relation to the recommendations or to provide further written submissions.

[163] By letter dated 24 November 2017 from the Commissioner, each of the plaintiffs were advised of the summary termination of their employment as of 24 November 2017.

Substantive decision

[164] The plaintiffs assert that the decision to dismiss them was substantively unjust. This is effectively an allegation that no aspect of their conduct was capable of amounting to serious misconduct.

The Matautu purchase

[165] The main concerns of the Commissioner in relation to the Matautu purchase were:

(a) that there was no adequate documentation relating to the transaction;

(b) that the joint venture arrangement with Grey Investment Group that the plaintiffs' thought was relevant, was not subject to any documentation at all and the proposal for GIG to invest part or all of the sale proceeds and the air service did not eventuate;

(c) that Tokelau paid too much for the property to the tune of about 25 per cent of the purchase price.

[166] The allegation which was given greatest prominence in both the investigator's report and the Commissioner's recommendation is that Tokelau paid "too much" for the Matautu property. The investigator arrived at that conclusion by noting that the valuation document which the vendor had provided to the plaintiffs was based on the assumption that a new hotel would be built on the site and that, without such a development, the value of the site would have been somewhat less.

[167] The investigator then proceeded to recalculate the value on the assumption that the lower figures of a value "per perch" in the vendor's valuation reflected the true value of the property.

[168] In producing a valuation, a valuer is attempting to estimate what a willing buyer would pay a willing seller for a particular property. The valuation exercise assumes that there is a market for the type of property and that there are sufficient

transactions in the market to be able to assess what a particular property should sell for in that market. A number of these assumptions are not applicable in the present case.

[169] The background to the purchase of the Matautu property is that, for a considerable time, the Council had been looking for an alternative to Tokelau's Savalalo site in Samoa. In particular, it wanted a site close to the wharf and big enough for the construction of a bond store. It was estimated that there were annual cost savings in the order of $500,000 to be made by way of efficiencies in the transport of cargo and people, and in the reduction of storage costs.

[170] The Council had been unsuccessful in identifying any property which met their needs.

[171] The Matautu property was never actually on the market. As the valuation document confirms, it had been the proposal of the vendor to construct an upmarket hotel on the site.

[172] However, the vendor became aware of the Council's need for a site close to the wharf. It was also aware that the Council had not been able to identify such a site. The vendor offered the site at the price it was willing to sell for.

[173] There was no evidence that the vendor was ever willing to sell the site at a figure which represented the "going rate" for commercial property in Apia, and it is therefore unrealistic to imply, as the investigator did, that the "going rate" represented the true value of the site.

[174] Given that the Council had been looking for some time and had been unable to identify any other site that met their requirements, it is unrealistic to suggest that, as far as the Council was concerned, the real value of this site could be ascertained by reference to per perch figures in the vendor's valuation report. Because of its particular attributes, this site had a value to the Council greater than the value of commercial land in Apia generally.

[175] It is also important to note that, in October 2015, delegates from the Taupulega were sent to Apia to assess the property. The Council knew exactly what they were getting for their money. At no stage did they instruct either of the plaintiffs to obtain a new or independent valuation. That is hardly surprising: they got a property that met their needs precisely and which was within their budget.

[176] It is also to be noted that the purchase of the Matautu property was authorised by the Council and occurred a year prior to the investigation. At no stage during that intervening period did the Council suggest there was anything inappropriate in the manner in which the property was purchased. It is difficult not to avoid the conclusion that had the issue with the helicopters not arisen, nothing further would have been heard about this issue.

[177] However, during the course of the helicopter investigations, certain aspects of the purchase became apparent which would not have previously been obvious to the Council. These were the lack of documentation around the purchase generally, and the lack of any documentation in relation to what was represented by the plaintiffs as being a joint venture with the vendor.

[178] These matters are rightly issues of concern which were capable, on their own, of amounting to serious misconduct.

[179] Therefore, while the statement that the plaintiffs caused the Matautu property to be bought at an overvalue equivalent to some 25 per cent of its price is unjustified, there are aspects of this purchase that could properly be characterised as serious misconduct.

[180] The plaintiffs' proposition that the 26 September 2016 Council meeting effectively approved the purchase of the helicopters is unsustainable. As at that point, Atafu had given written approval in principle subject to certain conditions. No corresponding written approval had been received from Nukunonu or Fakaofo. The latest proposal that had been put to the Council was for an interim air service that consisted of a helicopter (inter-atoll) and a seaplane. While there had been approval

in principle of a three-phased implementation of an air service, that could not realistically be said to be approval for the purchase of two helicopters.

[181] The fact that budget provision had been made for the implementation of Stage 1 of the air service proposal is also not decisive as the amount actually spent on the helicopters exceeded the budget provision.

[182] Just as with the Matautu purchase, there was a legitimate concern as to the adequacy of the documentation supporting the purchase, including financial records such as invoices for the payments made. There was also lack of a business case around the feasibility of a helicopter service and an apparent absence of documentation for the obtaining of the necessary regulatory approvals, including obtaining what would have been a necessary Air Operator Certificate from Samoa.

[183] It seems that, in order to make a helicopter service between Samoa and Tokelau viable, approval was necessary from American Samoa to use Swains Island for fuel drop-off and/or storage and landing. That had not been obtained.

[184] The failure of the plaintiffs to involve the Director of Transport and Support Services in the decision-making around the purchase of the helicopters is a departure from prudent practice, as was the failure to involve the Government of Tokelau's lawyer in documenting the transactions and obtaining the necessary regulatory approvals.

[185] It cannot be said that, in categorising these sorts of issues as serious misconduct, the Council's decision was unreasonable or unjustified. Once conduct has legitimately been categorised as serious misconduct, then there are a range of options open to an employer. While it would have been open for the Council to deal with these matters by way of warning and some form of educative process, it cannot be said that dismissal was beyond the range of available outcomes.

[186] I have not overlooked the possibility that one of the factors that may have impacted on the decision to dismiss is the refusal of the plaintiffs to travel to Atafu for the meeting and the evident displeasure of the Council at that decision. However, I

note that there is no reference to this in the reasons for the finding of serious misconduct that was Annexure A to the recommendation from the Commissioner to the Council.

[187] To the extent that the Council's displeasure at the plaintiffs' refusal appears to have had any disciplinary outcome, that seems to be confined to their decision to change the suspension from one "on pay" to one "without pay". For the reasons detailed above, that decision was unlawful. However, the unlawfulness of the suspension does not mean that there was no substantive justification for the dismissals.

[188] For the reasons set out above, I accept that there was a substantive justification for a finding of serious misconduct and for a decision to terminate the plaintiffs' employment, albeit I do not accept that there was an appropriate basis for the Council's finding that the plaintiffs were guilty of serious misconduct which resulted in the Council paying ST$2.6M more than the actual value of the Matautu property.

Public law issues

[189] In both the second amended statement of claim and the submissions on behalf of the plaintiffs, the case has been advanced as if it were effectively a judicial review. The plaintiffs' first and second causes of action asserted the existence of reviewable errors of law. This claim was advanced in addition to the contractual based third to sixth causes of action.

[190] The plaintiffs sought the public law remedy of "quashing" various decisions including:

(a) the decision to carry out the disciplinary employment investigation;

(b) the decision to dismiss; and

(c) the suspension decisions.

[191] While it is fair to say that the scope of judicial review has expanded enormously over the last half century,[27] it does not extend as far as to make public law remedies available in respect of a private contractual dispute.

[192] This case is fundamentally about a claim that the Council, as employer of the plaintiffs, breached their contracts of employment. It is appropriately and exclusively governed by the law of contract supplemented by the first defendant's adoption of the concept of procedural fairness in relation to disciplinary investigations and outcomes.

[193] Under the law of contract, there is no power to "quash" a decision. If the contract has been breached then the remedies available are those under the Tokelau law of contract, including the English Common Law relating to contracts of employment.

[194] The relevant Tokelau statutory provisions are the Contract Rules 2004 and the Crimes, Procedure and Evidence Rules 2003.

[195] Having determined that the Council's decision to terminate the plaintiffs was lawful, but that the decision to change the plaintiffs' suspension from one "on pay" to one "without pay" was unlawful, the final issue to address is that of what damages are appropriate in the circumstances. This issue is, essentially, what has led to the delay in issuing this decision, as it had not been fully addressed in submissions.

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[27] See the analysis in Graham Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, 2014) at [1.01].

PART IV

Developments since hearing

[196] On 18 February 2019, following the hearing, Mr Goddard for the plaintiffs sought leave to file further brief submissions on damages. Mr Fowler, counsel for the defendants, filed a memorandum on 22 February 2019, opposing this application and indicated that, if leave were to be granted, separate timetabling and possibly evidence would be required, as issues of mitigation of damages and contribution would need to be addressed.

[197] As submissions on the applicable law as to general damages were potentially going to be of some assistance of the Court, I granted leave for such submissions to be made.[28]

[198] On 8 March 2019, Mr Goddard filed a synopsis of submissions on general damages. He also made an application for leave to file further evidence relating to remedy by way of affidavit that would come within the following categories:

(a) evidence relevant to the quantum of the plaintiffs' salaries and benefits;

(b) a full copy of the Human Resources Manual which provides for leave entitlements, benefits and disciplinary provisions;

(c) evidence relevant to the duration of fixed-term positions for senior government appointments; and

(d) evidence of events which have occurred since the hearing and which are relevant to remedy, including the first plaintiff's withdrawal from his position as Permanent Secretary for the Ministry of Local Government with the Government of Fiji.

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[28] *Suveinakama v Council for the Ongoing Government of Tokelau* CIV-2017-485-4797, 27 February 2019 (Minute No 6) at [8].

[199] On 14 March 2019, a memorandum for the third defendant was filed addressing evidential issues that arose as a consequence of the stay of this proceeding against the third defendant.

[200] On 15 March 2019, Mr Fowler filed submissions in reply on general damages. He also filed on that same date a memorandum in response to the application for leave to file further evidence. That memorandum indicated that the defendants did not oppose leave being granted for the first three categories of proposed evidence, but did oppose the fourth category on the ground that it would introduce a whole new factual enquiry about events that have occurred well after the first plaintiff's employment contract would have expired and seeks to raise a claim of NZ$434,898. A further ground of opposition was that any such heads of loss or additional claims would be well beyond the ambit of any contractual remoteness test.

[201] In a minute dated 19 March 2019, I noted that neither the statement of claim nor the evidence filed on behalf of the first plaintiff had advanced any claim in relation to his withdrawing an application for the position of Permanent Secretary for the Ministry of Local Government with the Government of Fiji.[29] On that basis, such evidence was not relevant to the claims advanced and I also found that there was substance in the defendants' submission that such evidence would go well beyond the ambit of any contractual remoteness tests. Accordingly, while leave was granted to the plaintiffs to file further evidence on the first three categories, leave was declined in relation to the fourth category.[30] That evidence was to be filed within 10 working days, with the defendants having 10 working days to file any evidence in reply.[31]

[202] Various affidavits were filed in April 2019,[32] and on 1 May 2019, a joint memorandum was filed, with counsel stating that, given the filing of further evidence

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29 *Suveinakama v Council for the Ongoing Government of Tokelau* CIV-2017-485-4797, 19 March 2019 (Minute No 7) at [4].

30 At [6].

31 At [7].

32 On 4 April 2019, Mr Puka, filed an affidavit dated the previous day, followed by a second affidavit dated 4 April 2019, which was filed the following day. Mr Suveinakama, filed an affidavit dated 2 April 2019 on 15 April 2019. On 26 April 2019, a second affidavit of Mr Perez sworn on 23 April was filed for the defendants.

since their respective submissions of 8 and 15 March 2019, further submissions to address evidential matters would assist the Court in determining this matter.

[203] On 17 May 2019, I issued a minute in which it was noted that neither counsel wished to cross-examine any of the deponents but both were of the view that further submissions addressing the evidential matters contained in the affidavits would assist the Court.[33] Accordingly, the plaintiffs were given 14 days to file and serve further submissions, with the defendants having 14 days to reply.

[204] The plaintiffs filed these further submissions on 31 May 2019.

[205] On 10 June 2019, the first and second defendants filed a memorandum in response, submitting that much of the plaintiffs' submissions repeated those already made and it was only [39] onwards that addressed what was to have been to object of the submissions. Accordingly, directions were sought from the Court as to the ambit of submissions required from the 17 May 2019 minute.

[206] The following day, the third defendant filed a memorandum seeking a direction that certain passages in the plaintiffs' 31 May 2019 submissions which include assertions about statements or actions of the third defendant and MFAT fall within the terms excluded by the February minute and, therefore, should not be read.

[207] By memorandum dated 13 June 2019, Mr Goddard responded, contending that those passages were necessary to set out the appropriate factual context for this Court to assess and determine remedies. It was noted that the submissions for the first and second defendants on general damages had gone well beyond the question of general damages, referring to two affirmative defences. The plaintiffs, however, had not objected, nor had orders been sought that those paragraphs not be read. Rather, a more reasonable approach to responding to allegations in their further submissions was adopted. Given that the plaintiffs' claim against the third defendant has been stayed, Mr Goddard argued that the third defendant lacked standing to respond to further submissions and, consequently, no weight can attach to its legal arguments.

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[33] *Suveinakama v Council for the Ongoing Government of Tokelau* CIV-2017-485-4797, 17 May 2019 (Minute No 8) at [2].

[208] I issued a minute dated 18 June 2019 responding to those memoranda.[34] I directed that the defendants did not need to respond to anything set out in the plaintiffs' memorandum prior to [39], nor to address the issues set out in [47]-[52], and reiterated that submissions should be confined to the issue of general damages, including matters of quantum, remoteness and contribution.[35] As it was not appropriate that, in submissions that should have been confined to the issue of general damages, unrelated allegations should have been made against the third defendant, I stated that I would not be reading the relevant paragraphs.[36] I directed that counsel for the first and second defendants provide written submissions in response to those parts of the plaintiffs' submission that relate to the issue of general damages, such submissions to be filed and served within 14 days.[37]

[209] The Court received those submissions on 28 June 2019.

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34 *Suveinakama v Council for the Ongoing Government of Tokelau* CIV-2017-485-4797, 18 June 2019 (Minute No 9).
35 At [16]-[18].
36 At [20].
37 At [21]-[22].

PART V

General damages

[210] The plaintiffs sought an award of general damages for both physical inconvenience and mental distress which takes into account the reputational damage they have sustained. As to quantum, while it was initially argued that their claim should be seen as being commensurate with the seriousness of the breaches in *Hammond v Credit Union Baywide* in which the Human Rights Review Tribunal made an order for general damages of $98,000,[38] the claim was later quantified at $35,000 each.

[211] However, under s 4B of the Tokelau Act, the English common law applies except to the extent that it is excluded by any other enactment in force in Tokelau. Rule 143 of the Crimes, Procedure and Evidence Rules 2003 provides: "There is no right to claim damages for other than property loss in any action at Tokelau law."

[212] Rules 82 and 83 of the Contract Rules 2004 relevantly provide:

> **82. Remedies**
>
> Where a contracting party commits a breach of the contract the other party may seek any or all of –
>
> (i) monetary compensation for the loss suffered by the breach;
>
> (ii) the award of any profit gained by the other contracting party from the breach;
>
> (iii) …
>
> **83. Measuring damages**
>
> Damages for breach of contract consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

[213] Counsel for the plaintiffs submitted that "property" should be defined broadly in accordance with the definition of "property" in the High Court Rules and the

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38 *Hammond v Credit Union Baywide* [2015] NZHRRT 6 at [189].

Property Law Act 2007, and argued that, once a broad definition is adopted, the plaintiffs' general damages claims do not fall within the r 143 exclusion.

[214] However, this submission fails to take into account the fact that it is not New Zealand law that applies but the law of Tokelau, so any broader definition that might be provided for under New Zealand law is not of relevance. Accordingly, as Tokelau law does not provide for general damages, they are not available to the plaintiffs.

Specific damages

[215] In quantifying their claim for damages, the plaintiffs, along with unpaid salary, claim for such costs as accommodation, travel, transport, retiring leave and relocation expenses. However, I have found that it was only the decision to suspend without pay that was unlawful and that salary was reinstated in November 2017, albeit without interest on that unpaid salary having been included. Accordingly, in terms of specific damages, the only amount due the plaintiffs is a sum representing the interest owing on that salary.

Result

[216] For the reasons given above, the first and second defendants' decision to terminate the plaintiff's employment contracts were lawful. The decision to suspend the plaintiffs without pay from 13 July 2017 to 24 November 2017 was, however, unlawful.

[217] While those suspensions were withdrawn, and salary backdated, no interest was paid on that salary for the period it was unlawfully withheld.

[218] The plaintiffs are entitled to interest at the rate of 5 per cent on their withheld salary for the period between the dates it was payable and the date on which it was eventually paid. That should be a simple sum to calculate but if the parties are unable to agree, the plaintiffs shall file a memorandum setting out their calculation within 30 days of the date of this decision, and the defendants will have 14 days within which to file a reply.

[219] Although the plaintiffs have had some success, it is only to a very minor extent. My preliminary view is that this is an appropriate case for costs to lie where they fall. If the parties disagree then I direct that the defendants are to file submissions within 14 days of the date of this decision, with the plaintiffs having 14 days to reply. A decision as to costs will then be made on the papers.

Churchman J

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