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

NO.C1023/98

BETWEEN :		SALOME TUKUAFU	-	**Plaintiff;**
AND :	1.	KINGDOM OF TONGA	-	**Defendants.**
	2.	LIA L. MAKA		

BEFORE THE HON JUSTICE FINNIGAN

COUNSEL: Mr Edwards for Applicant,
The Solicitor-General for the Respondents.

Date of hearing: 25 March, 1999
Date of Judgment: 7 April, 1999

JUDGMENT OF FINNIGAN, J

This is an application for Judicial Review. In particular the applicant seeks a remedy in the nature of certiorari, quashing a decision of the second defendant, who was principal at Tonga High School. That was a decision whereby the applicant, a pupil, was suspended from attendance at the school for three weeks from 13 July 1998.

There is no issue that this remedy may be sought in the present circumstances. The two issues are whether the second defendant applied the rules of natural justice, and whether the second defendant had power at law to suspend the applicant.

The parties have had legal representation of a high degree of skill, and are entirely clear that this is not a review of the merits of the applicant's behaviour or of the second defendant's decision about that behaviour. I accept the ample authorities cited to me on that point.

THE REMEDY

The applicant's claim is that the procedure adopted by the second defendant in making the decision to suspend was in breach of natural justice, because she relied upon certain evidence which she did not make known to the applicant. She did not give the applicant the opportunity of refuting it or making representations about it.

In the alternative, her claim is that the second defendant's action was taken without authority because the power to dismiss pupils was a statutory power, which had not been given to her.

THE FACTS – THE FIRST PART OF THE APPLICATION

Briefly, the facts are that on 22 June 1998 the second defendant had reason to believe the applicant had been consuming alcohol on the school premises during school hours. In the school rules, which are not challenged as to validity, this was classified among the most serious offences. For such offences the penalty prescribed was at the discretion of the principal and the Education Department. For less serious offences upon repetition the rules prescribed suspension, so suspension was one of the options open to the principal.

On Wednesday 23 June the second defendant began an enquiry by asking questions of the applicant and several other pupils. The applicant at first denied the allegation but later went to the principal and said she was now aware that when she drank from her bottle on the day in question some alcohol had been added to her drink without her knowledge. Other pupils gave their accounts, including the one said to have added the alcohol. She advised the deputy director of education of her enquiry. In his reply he told her it was essential that if there was any punishment, it should be made immediate for the school rules to be effective. On Monday 29 June the second defendant made a decision to suspend the applicant, and telephoned the applicant's mother. The applicant's father came to the school that day. He wanted to talk with the pupils who had provided the evidence on which the second defendant had made her decision. This was arranged. The second defendant and the applicant's father met all those pupils in a group.

After that, the applicant's father asked the second defendant to carry on her investigation.

In the days that followed, the second defendant sought further information as requested. Three pupils, none of whom had said anything before, made statements to her, in writing at her request. She approached a fourth who had given answers in her earlier enquiry, and explained to her that she was "the only person who was with the group who really knew what happened", and asked for that pupil's account in writing. On receiving and reading those statements, on or after Monday 6 July, the second defendant decided they were only further evidence of what she had already concluded. One of the statements in particular, she thought "confirmed that the [applicant] not only drank the alcoholic mixture, she did it with full knowledge that it was an alcoholic drink".

On Thursday 9 July she wrote to the applicant's parents and advised them:

> "... after careful deliberation over additional information that I have gathered on the alleged drinking incident where your daughter and a few of her classmates were involved. I have made a definite decision, and that decision is to suspend your daughter...."

> Strong and compelling evidence points out that not only your daughter did consume alcohol on Friday 12 June 1998, in school uniform and at school, but that she did this knowingly....

On 13 July she wrote to the deputy director and advised the names of three pupils whom she had suspended for the drinking incident, including the applicant. She advised the names of 5 other pupils as well, whom she had suspended for other reasons. She sought the deputy director's decision.

THE SUBMISSIONS

Both counsel made able submissions. I have taken the time to read all of the authorities which Mr Edwards supplied in full, and the statutory provisions to which he referred me. I have also considered fully the able submissions of Mr Taumoepeau on behalf of the defendants, and the authorities that he also provided in full. The submissions of both counsel were of a high order and are the foundation for my decision.

DECISION OF THE FIRST PART

The application is in two parts. In the first part, Mr Edwards, correctly, restricted himself to the second stage of the second defendants' enquiry. He seeks review of the decision because of what followed after the visit by the applicant's father. Up till that time the applicant had had every opportunity to comment upon and question the allegations about her and the things said by the other students. She had been free to approach the second defendant, and had done so in order to say what she had to say. She had been given as well the opportunity of having her father present so that he could hear assess and question the evidence upon which the second defendant had reached her decision to suspend.

That last-mentioned point is crucial. It must be remembered that before the applicant's father heard and questioned the other students the second defendant had already made her decision. She had announced it to the applicant's mother and father. What happened after that was her response to the father's request that he be allowed to become involved in the process. She did nothing to suspend the applicant, and agreed to the father's involvement. After that the father asked her to reconsider her decision. Instead of acting on her decision she did what the father asked, and conducted further enquiries. This was in accordance with the rules of natural justice. She approached one other pupil who may have had some information, and found that she did. Two pupils by themselves approached her. What they said she had them put in writing. She asked a fourth, who had given oral answers during the first part of the enquiry, and who had been present during the questioning by the applicant's father, to put her statement in writing. Those four statements were before the Court in evidence. None of them contained new information that was favourable to the applicant. What one of them contained, the second defendant said she found compelling. It was not however compelling her to a decision; it was compelling only as confirmation of the decision that the applicant and her parents knew she had already reached.

There was no obligation of fairness on her to disclose to the applicant the new evidence because it confirmed that the applicant had knowingly drunk alcohol at the school. It

confirmed to her that what she had already decided was right, and that decision had been reached by a fair process.

As it happened, after confirming her decision, the second defendant did show the four written statements to the applicant's father. She made it clear why she had confirmed her decision. She could not have done more to involve him in the process. In doing so, she made him aware that, whether or not they were telling the truth, a substantial number of the pupils had accused his daughter of consuming alcohol at school, and not merely on 12 June 1998. He might perhaps have chosen to address that, rather than pursue these proceedings.

The application, in its first part, must fail.

THE SECOND PART – THE FACTS AND DECISION

I turn to the second part of the application. It is said that the necessary chain of authority did not exist to permit the second defendant to exercise the power to dismiss. The power to dismiss pupils in government schools arises from the general power in s 18(2) of the Education Act cap 86. That power, to control all government schools, is the Minister's. Under Ss 8 & 9 of that Act the Minister must appoint a director of education and such other officers as he may deem necessary, and the director must carry out the Minister's directions. Under s 8(2) the Minister may give directions, consistent with the Act, in other words he may delegate his powers, to the director and any other officer of the Ministry.

These are the statutory provisions upon which the Solicitor –General relied in submitting that the necessary delegation of power was made, to enable what occurred.

The process followed by the Principal, from her affidavit, was this:

> ".... on Thursday 9 July 1998, I wrote a letter to the [applicant's] parents informing them of my decision to suspend the [applicant] beginning on Monday 13 July 1998....
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> .... on Monday 13 July I saw the [applicant] at school and called her in asking her whether her parents had received my letter of 9 July 1998. I told her that the letter was her suspension...I rang her mother [and] told her what I [had] told the [applicant]....
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> .... on the same day, I sent a Savingram to the Deputy Director of Education, Viliami Takau informing him of my decision to suspend the [applicant] and others. This also sought his endorsement...."

The savingram dated 13 July 1998 was headed "Suspension Cases", and was, in part, as follows:

Please be advised that the following students are suspended for reasons detailed hereunder:

[Names and reasons set out. For three of the names the reason for suspension was the same – "Drinking in the school compound and in uniform on June 12 1998". One of those three was the applicant, and she was stated to have been suspended from that day, 13 July. For one of those three students, the period of suspension was stated to be "Indefinitely until recommendation for dismissal is approved". The savingram contained a recommendation that that particular student be dismissed, with reasons. The power to dismiss that is given to the Minister in s 18(2) of the Education Act is not one that he has delegated.]

For your information and decision, please.

Yours faithfully, [etc].

Mr Edwards pointed out that the present situation in respect of delegation of the Minister's powers is set out in the affidavit of Viliami Takau, who is the deputy director of education responsible for all government schools at the secondary level. In the affidavit the deponent states that the power to suspend students from secondary schools was usually exercised by the Minister himself. However, the affidavit annexed a copy of the Minister's approval, by internal memorandum on 26 February 1998, for delegation of this power, among other powers, to the director, for exercise by the relevant deputy director, except in controversial matters, which were reserved for the director. The affidavit annexed another internal memorandum, which authorised the implementation of that delegation from 5 May 1998. The affidavit establishes that Viliami Takau was the relevant deputy director in June and July 1998. In the affidavit he states that "the authority to suspend a student from a secondary school is, in practice, exercised by the deputy director for each division". That practice he described in detail as follows:

> "…. the usual procedure for the suspension of a student from a Government school at the secondary level is that the principal of the School must consult me before any action is taken. The principal must then investigate the matter and then make a recommendation to me on the appropriate course of action. I would then endorse the principal's decision if I deem fit to do so. However in cases involving serious offending, it is the usual practice for punishment to be implemented immediately in order for the school rules to be effective.
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> …. in the week of 22 June 1998 the Principal of Tonga High School, Lia Maka …. informed me verbally that a group of students were suspected of consuming alcohol on the school premises. I then informed the Principal that the usual criteria had to be fulfilled before any decision is made, which involves gathering evidence and informing the parents of the student. I also informed her that because of the offending in this case, it is essential that any punishment should be made immediate for the rules to be effective.

About the suspension in the present case he went on to say:

> "…. on 13 July 1998 I received a Savingram from the Principal recommending the suspension of several students including the [applicant]….
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> …. on 14 July I discussed this matter with the Director of Education, Paula Bloomfield. We agreed that the proper course of action was to suspend the [applicant]. The Director then informed the Principal by telephone that we endorsed her recommendation, and that he would send a Savingram to confirm the Director's endorsement.
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> …. on 21 July 1998 I sent a Savingram, which confirmed the endorsement of the Principal's recommendation…."

That 21 July savingram commenced:

> I refer to your Savingram of July 13 on the above-stated subject and would like to confirm that the Ministry endorses your decision.

The questions raised in these proceedings are, (i) who exercised the power and suspended the student, and (ii) was that exercise of the Minister's power in accordance with the law that governs delegation of statutory powers? It may be said that the power to suspend students from government schools is created by the legislation and must be exercised in accordance with the legislation, because it is a power to infringe rights. If the power is not exercised as the law directs, then it is not exercised.

Who suspended the student? The answer is to be found in the actions taken, rather than the words used. But first the words: the Principal told the student, her parents and the deputy director that she had decided and carried out the suspension. And that is the truth. She stopped the student attending classes from 13 July until 3 August. For his part, the deputy director's action, and his words, occurred over a week later. His words were "the Ministry endorses your decision".

After considering the evidence of what occurred, I cannot escape the conclusion that the words *are* what happened. On 9 July the Principal wrote to the parents, saying she had decided to suspend, and on 13 July she told the student the same, and the suspension started that day. Only after these events had occurred did the Principal write to the deputy director and advise that she had decided to suspend, and had suspended. Only after that, on 21 July, over a week into the 3-week suspension, did the deputy director play any part in the suspending action. What he did was endorse, on behalf of the Ministry, which has no powers in the matter, the action of the principal.

So clearly, I find, the suspension was the action of the principal. Was that in accordance with the law? Authority for the Minister to delegate the power to suspend is clear. The

chain of delegation is also clear. The Minister approved a proposal that his power to suspend be delegated to the director, for exercise by the relevant deputy director. The delegation to the deputy director was not made by the director, and thus did not offend against the maxim *delegatus non potest delegare* (the person receiving delegated power cannot delegate it to somebody else). The delegation down to deputy director level was made by the Minister, the holder of the power, and was within the authority given to the Minister to do that by s 8 (2) of cap 86. Thus the deputy director lawfully had been given the power to suspend pupils in government schools.

Did the principal have the power to suspend? Clearly no. That power was delegated to the deputy director and he could not delegate it. The Principal exercised it. She acted outside her powers, and the deputy director did not exercise his.

What is the outcome? I have found that the second defendant adopted a fair procedure in reaching her decision, and it follows that the decision cannot be challenged as unfairly reached. I have found however that the wrong procedure was used in putting the decision into effect. So, something that cannot otherwise be challenged was done by the wrong person. There has been no injury caused to the applicant by that. No award in damages is warranted. I note that Mr Edwards on behalf of the applicant refrained from putting any great emphasis on this aspect of the application, and that I think was the correct thing to do. I make no order.

However, the applicant seeks her costs and is entitled to them. Costs are awarded to the applicant, against the second defendant. I expect they should be paid by the first defendant. They are to be agreed or taxed.

SUPREME COURT TONGA

NUKU'ALOFA, 7th April, 1999

JUDGE