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

NO.C.447/99

BETWEEN :	*1.*	***'ISOPE 'AKAU'OLA***	-	***First Plaintiffs;***
	2.	***VISESIO SELE***	-	***Second Plaintiffs.***

AND : ***TONGA TELECOMMUNICATIONS COMMISSION***

\- ***Defendant.***

BEFORE THE HON. CHIEF JUSTICE WARD

Counsel: Miss Tonga for plaintiffs
Mr L. Foliaki for defendant

Hearing : 3, 4 and 12 April, 2, 8 and 9 May

Judgment: 6 June 2000.

Judgment

Both plaintiffs were employed by the Tonga Telecommunications Commission up to January 1999 when they were dismissed. The first plaintiff had worked for the TTC for fifteen years and held the position of assistant accountant at the time he was dismissed. The second plaintiff started working with the TTC in 1984 and held the position of head bookkeeper.

The reason given for the dismissal of both these men was that they each had a very large telephone bill outstanding and failed to settle it when required to do so. In the case of the first plaintiff, his bill exceeded $7,000.00 and, in the case of the second, it exceeded $12,000.00.

In the early part of 1998 the, then, General Manager told the Board that he had just become aware of the scale of outstanding accounts of some of his staff. It was an initial point of dispute that he must have known this well before and the Commission had allowed this to continue for some considerable time. I find it remarkable if he had not known before but he did not give evidence, having since left the Commission.

The minutes of the Board meetings refer to the fact that most of the very high sums were owed by employees working in the finance section. The suggestion is made that they were in some way able to use their position to hide the state of the accounts from him. I have absolutely no evidence to support an allegation of any such improper conduct. The plaintiffs, however, suggest that the allegation was a factor that influenced the Board in its decision to dismiss the plaintiffs and that they were never told of it or given an opportunity to answer it.

On the evidence before me I am satisfied that such a suggestion was made to the Board but I am equally satisfied that it was not considered further and formed no part of the decision to dismiss the two plaintiffs.

The matter of the outstanding accounts was discussed at a meeting of the TTC subcommittee on 23 June 1998. It was reported that six employees had outstanding bills in excess of $4,000.00 and their telephones had been disconnected. After further discussion it was decided to recommend that the Board should give those employees six months to pay off the bills or be subject to instant dismissal.

That recommendation was approved by the Board at a meeting on 26 June 1998 and a memorandum to that effect was circulated to eight senior personnel including the Chief Accountant and the Accountant. How far it went beyond them is a matter of dispute in the case. The first plaintiff told the court he never saw it until March 1999 - well after he had been dismissed. The second plaintiff similarly never saw it but said he heard rumours of its contents.

However, on 31 July 1998, each plaintiff was sent a letter by the Internal Auditor. These were in identical terms apart from the details of the sum outstanding and the amount to be paid off. The second paragraph reads:

> "The Board has directed on Decision Number 149 of 26th June 1998, that you are to settle this account within six months from the date of the Decision or subject to disciplinary action. Therefore it is my duty to ascertain that you comply with this direction."

It then continues to state the manner in which the account is to be paid and concludes with the words:

> "You are now given a period of 14 days from the date shown above to make the necessary arrangement with the Finance section for direct deduction from your salary or otherwise. Should you require more information, please do not hesitate to contact me."

The second plaintiff wrote a letter to the Chairman of the Management Committee on 26 August 1998:

> " Dear Sir,
>
> This letter is written with much respect to represent and to submit a request from those employees whose telephone debts have been long overdue. It is requested that a submission be made on our behalf to the Board of the Commission to extend for another 1 ½ years Board Decision No 149 of 26/6/98 giving us a total of 2 years altogether. This would give us adequate time to pay off our debts. We have received from the Commission's Auditor the amount that we should pay fortnightly but the problem is the debts cannot be paid because of loans to the banks and the maintenance of our families.

We do not contest the long overdue debts but we respectfully request that you kindly submit our request to the General Manager and the Board of the Commission to change their decision because we do not enjoy working since we have been informed of their decision.

We do hope this matter is quickly resolved and a new decision by the Board is made that will encourage our working environment at the Commission.

Respectfully,

Visesio Sele (for those whose debts are long overdue TTC)"

On that letter is a hand written note by the General Manager addressed to the Internal Auditor and dated 31 August 1998:

"Please prepare submission to the Board. Management Committee have agreed to submit this request to the Board."

A submission was prepared, considered by the Board and rejected on 28 September 1998.

On 20 November 1998, the Internal Auditor again wrote to each plaintiff advising him of the rejection of their request. The wording is awkward but I am satisfied the meaning was clear to the plaintiffs. I set out the letter to the first plaintiff. That to the second plaintiff is identical apart from the sums of money.

"I regret to inform you that the Board had decided (number 221) on 28th September 1998 to withdraw a request on your behalf for leniency with respect of time given to settle your outstanding telephone account. This has therefore reinforce the effect of the Board's decision, number 149 of 26 June 1998.

In accordance with our billing records as at the end of October 1998, you owed the Tonga Telecommunications Commission an amount of T$7,641.21. This is a percentage change of 0% from the balance owed as at the end of June 1998. This outstanding amount is to be settled in six (6) month's time from the date of the above Board decision (26/6/98) or subject to instant dismissal.

Considering the severity of the disciplinary action, it is my duty to ascertain that you comply with this direction. This direction is confirmed to be carried out as has been reminded on Board decision number 238 of 29 October 1998.

I also wish to refer you to my earlier letter, which I had stated the amount you should had been paying per fortnight I order to settle your telephone account. But as shown above, you have made no progress. Should you still want to avoid the consequences of the disciplinary action for failure to settle your telephone account, you are to make three equal payments of T$2,547.07 over the next three pay days.

Should you require further information, please contact the under signed immediately."

Despite the reference to the Board decision of 26 June and to the risk of instant dismissal, it is noteworthy that neither plaintiff asked to see the decision. However, on 15 December 1998, the first plaintiff made a single payment of $1,500.00. The second plaintiff paid nothing.

On 29 January 1999, a letter was delivered to each of them dismissing them from that date.

That is the decision challenged in this action.

It should be added that the plaintiffs wrote a joint letter to the Board after their dismissal asking to be allowed to return to work with the Commission, apologising for their disobedience and undertaking and promising "regarding our telephone accounts, whatever arrangements you make regarding the amount of payment and for how long to be paid in full, we shall comply with it."

The staff subcommittee considered this and recommended that the Management Committee should meet them and hear their appeal. Both plaintiffs were seen on 4 March 1999.

The first plaintiff told them he planned to settle his account within one week. The second plaintiff stated he planned to pay his debt off in two years and forfeit his outstanding vacation leave as part of it. He was advised that his case would be stronger if he tried to pay sooner but he did not accept that advice. On the evidence before the court I am satisfied that, had either paid at least a substantial amount towards his debt at that time, he would in fact have been reinstated. Neither has paid anything more.

The plaintiffs' statement of claim challenges the dismissal in the following terms:

"13. That the Defendant's board has no authority under the Act to dismiss the Plaintiffs for the reason of unsettling their telephone bills.

14. That section 45 of the Telecommunications Regulations provides the method to adopt in case of default subscribers such as the case of the Plaintiffs in default of settling their telephone bills.

15. That the dismissal of the Plaintiffs by the Defendant through its Board is contradictory to the provisions of the Act and therefore unlawful.

16. That the dismissal of the Plaintiffs by the defendant was in breach of natural justice for they were not personally heard or given an opportunity to be heard by the Board before making its decisions.

17. That the dismissal of the Plaintiffs by the Defendant was in breach of natural justice for accumulation of their telephone bills were not by fraud or cheating but with the knowledge and permission of the Defendant through its general Manger and chief Accountant who have control of permitting subscribers telephone lines to operate or to disconnect in view of the outstanding balance in respect of their telephone bills.

18. That the reason for the dismissal of the Plaintiffs by the Defendant is unfair and in breach of natural justice for many default subscribers whose telephone bills are above those of the plaintiffs yet they are not penalised by the Defendant."

I deal with the provisions of the Act first. Miss Tonga for the plaintiffs submits that the power of the Commission under the Act to dismiss its officers and staff is separate from the power it is given to deal with defaulting subscribers. The latter is covered by Regulation 45 and gives the power to discontinue the service. As the reason for the dismissal was the failure to pay and regulation 45 is the only provision for default, she says the Commission was exceeding its powers when it dismissed the plaintiffs..

Mr Foliaki for the defendant says the power to dismiss under section 10(d) gives a wide discretion to the Commission:

> "10. ...the Commission has power to-
> (d) engage, employ, pay and dismiss such officers and staff as it deems necessary for the conduct of its business, in accordance with the provisions of this Act"

Further, section 9 charges the Commission with a duty "to operate, maintain and develop the domestic telecommunications system in an efficient and profitable manner to the best advantage and interest of the Kingdom."

It cannot, he contends be in accordance with those provisions to allow such large bills to remain outstanding especially by its own employees.

I do not accept that regulation 45 has any relevance to the dismissal. The power to disconnect a defaulting subscriber is separate from any disciplinary action the Commission deems necessary for the efficient and profitable conduct of its business.

I am satisfied the Commission did have the power to dismiss these plaintiffs for the failure to pay off these bills in accordance with the Board's direction.

Passing to the question of whether the manner in which the decision was made was in breach of the principles of natural justice, there is no dispute that the Commission is a public body and that public law applies. As a result, it is bound to observe the principles of natural justice.

The plaintiffs' case is that the suggestion that these bills had accumulated to such a large extent because the plaintiffs used their position in the finance section to hide the fact from normal scrutiny by the Commission influenced the decision to dismiss. That allegation was never communicated to the plaintiffs and they never had an opportunity to answer it. Miss Tonga points to the severity of the disciplinary action taken and suggests it must have been for more than simply the failure to pay the bills and so the Board must have considered the suggestion of concealing the accounts.

I have already found that, although I accept that the suggestion was mentioned at a Board meeting, it formed no part of the decision to dismiss. There was, therefore, no need to seek the plaintiffs' answers and no failure of natural justice in taking that course in relation to the allegation.

There is no doubt that the penalty was extremely severe but the decision of the Board on 26 June 1998 was not just confined to the six employees whose bills exceeded $4,000.00. The decision covered a large number of outstanding accounts and the penalty for failure to pay was graded according to the sum outstanding. If the total decision is considered, it is clear that the penalty threatened by that decision was a logical grading in accordance with the amount owed. It should also be remembered that the penalty was not for having such a large bill but for failing to comply with the Board's instruction to pay it off within six months.

The second limb of the plaintiffs' case on natural justice is that the two plaintiffs were not given a fair hearing in the sense that they were not given clear information about the decision the Board and were unable, therefore, to present any explanation.

Both plaintiffs say they were not shown the decision of 26 June 1998. I am not satisfied that they were. The second plaintiff says he heard rumours of its contents. The first plaintiff says he never saw it or knew of its contents at the time. I am satisfied they knew of the contents and also knew that they could see the decision but never asked to do so.

Both plaintiffs say that the phrase, in the letter of 31 July 1998, that they would be "subject to disciplinary action" misled them. Had they realised that included dismissal they would have acted differently. I accept it was an unfortunately imprecise form of words but I do not accept on the evidence that the plaintiffs could or would have acted any differently if it had specifically stated they were liable to dismissal. In any event, I am satisfied that the plaintiffs did know of the terms of the decision of 26 June and, if they had considered the letter of 31 July was altering that, would have take the writer up on his offer to explain it further.

The letter of 20 November 1998 referred to instant dismissal clearly enough and it was less than a month later that the first plaintiff paid $1,500.00. However, his case is that he was never given a copy of that letter and so, on his own case, it could not have been that factor which spurred him into action.

I am satisfied beyond doubt on the evidence that both the plaintiffs were served with a copy of the letter of 20 November. I am satisfied they had heard the threat of dismissal before that and they certainly did then. They still failed to pay off the bills except for the part payment by the first plaintiff.

The requirements of a fair hearing do not, as Martin CJ pointed out in Tu'itupou v Tonga Water Board (1990) Tonga LR 99 at 104, give a right to an oral hearing.

> "The term "fair hearing" is misleading because there is no right to an *oral* hearing in these circumstances. The employer must:
>
> (i) inform the employee of the allegations against him in sufficient detail to ensure that he fully understands them;
> (ii) give the employee a reasonable opportunity to present any explanation; and
> (iii) genuinely consider any explanation given.

> If the employer does these things he complies with his obligation to provide a fair hearing."

It would have been better in this case if the Board had ensured that the plaintiffs were given a copy of the decision of 26 June. However, I am satisfied that the order to pay within six months and the consequence of failure were clearly put in the letter of 31 July. Again it would have been sensible to use the actual phrase that was in the Board decision but I am satisfied that the reference to disciplinary action clearly includes any form of disciplinary action including dismissal.

I have no doubt that each plaintiff knew that the decision was to dismiss them if they failed to pay. It defies common sense that such a point would not have been known by all the defaulting staff. Neither plaintiff sought to clarify the point at any stage and I am satisfied that was because they knew the penalty that had been decided should they fail to comply.

Whether or not the penalty was harsh is not a matter for this court to determine. The question for the court in such cases is whether the process by which the decision was reached was fair in terms of natural justice.

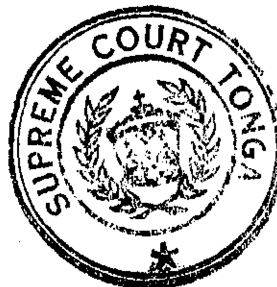
The plaintiffs have failed to satisfy me that it was unfair. On the contrary, the evidence satisfies me that the requirement to pay was fairly and clearly put to the plaintiffs and they knew exactly what would be the consequence of failure to comply with the Board's decision that the bills should be paid within six months.

I am equally satisfied that both had ample time to make any submission as the second plaintiff did. I am satisfied that submission was considered properly and fully by the Board before it reached its decision.

For six months the plaintiffs knew that they must pay off their bills in six months. For most of that time they knew the penalty would be dismissal and they failed to take any step to comply apart from the $1,500.00 paid in the case of the first plaintiff. The Commission was acting within its powers in those circumstances to dismiss them and it complied with the requirements of natural justice in the manner in which it was done.

I do not need to deal with the claim for damages.

The plaintiffs' claim fails and is dismissed with costs to be taxed if not agreed.



NUKU'ALOFA: 6th June 2000. **CHIEF JUSTICE**