IN THE HIGH COURT OF TUVALU
AT FUNAFUTI

Case no 3/06

Civil Jurisdiction

Between

Tehumu Lamese
Kristina Tehumu
Nuese Taimi
Puaniu Pelike

Plaintiffs

And

Kaupule o Nanumaga
Pule of Kaupule o Nanumaga

Defendants

BEFORE THE CHIEF JUSTICE

J Grover for plaintiffs
S Kofe for defendants

Hearing: 28 and 29 May 2008
Judgment on quantum:

Judgment

1.On 12 October 2008, judgment in default of appearance on liability was entered in favour of the plaintiffs and the case adjourned to the next sitting of the Court in May 2008 to determine quantum.

2. However, by the time of the next sitting, the Court was faced with applications by the defence to strike out the statement of claim, to set aside the judgment in default and to set aside an interim injunction ordered on 2 June 2006, all of which were unsuccessful, and an application by the plaintiff to change the name of the first defendant which was allowed. The background to the case and more recent events are summarised in the judgment on those applications delivered on 28 May 2008 and I do not repeat them.

3. Each of the plaintiffs has filed affidavits in the applications and the court heard evidence from each of them in respect of the damage suffered in consequence of the defendants' actions. The defence called one witness, Taimoe Mika.

4. The general endorsement on the writ states the claim is for breach of contract. The claim avers a breach of the contract of employment and the prayer includes constitutional redress and reinstatement by way of specific performance. Despite that, there appears to be no dispute that this is a claim for damages for wrongful dismissal and the hearing has proceeded on that basis. Whilst the question of constitutional redress has been pleaded, it has not formed part of the case and specific performance is not a proper remedy for wrongful dismissal

5. In general terms, confining the claim to wrongful dismissal is a limiting factor in the assessment of damages and the general rule is that the financial loss will be based on the assumption that the employer

would have dismissed the plaintiffs in any event. The damages are generally limited to the loss suffered by the dismissed employee caused by the failure to follow the correct procedures. Thus the damages will be for wages lost for the period of proper notice.

6. The plaintiffs were dismissed in mid 2006 and the largely unchallenged evidence of the plaintiffs gives a striking account of the effect the dismissal had on them. There is no challenge that there was no attempt to follow the proper procedures. The decision of the Falekaupule to dismiss any person who was a member of the Brethren Church was made without proper consideration and without any attempt to hear the plaintiffs' side and any alleged members of the Brethren Church were asked to leave the meeting and told of the decision later.

7. Much has been made in the case of the customary authority of the Falekaupule and the decision to dismiss any members of the Brethren Church stemmed from a decision taken by the Falekaupule in 2003 to ban the church from the island. The right make such a decison is awaiting consideration by the Court of Appeal and has been for a very long time. The sooner the necessary steps are taken to convene such a Court the better for all involved in this case.

8. However, it is clear from the unchallenged evidence in this case that the first three plaintiffs were members of that church but that the church had held no public meeting on the island since 2003. As a result, the decision was based on membership of a body which had no physical presence on the island. The evidence suggests that a substantial reason, certainly as demonstrated by the actions of some elders of the EKT church who took part in this decision, was that the plaintiffs had left the EKT.

9. The letter of dismissal sent to the first three plaintiffs stated that the reason for the dismissal was:

> "You did not comply with the requirements of the decision of the Falekaupule in the following manner;
> 1. No contribution of coconuts
> 2. For worshiping the Brethren Church on the island."

10. The unchallenged evidence is that the plaintiffs had all complied with their customary contributions to the
EKT and the community throughout the period in question.

11. The fourth plaintiff denied to the Kaupule and still denies that he is or was a member of the Brethren Church but he acknowledges that his mother and sisters are members and have been since 2003. He protested to the secretary of the Kaupule that he was not a member. His letter of dismissal, written by Taimoe Mika as acting secretary of the Kaupule, stated:

> "I have been instructed by the Kaupule in session no 13 this Wednesday, 7 June 2006, to terminate your employment effective from today. This Kaupule decision was based upon the conclusion of the Falekaupule in their session on 31 May 2006 to terminate the jobs of all who work under the Kaupule and are affiliated with the Brethren.
> As we have discussed before in relation to this matter, it was questioned again and I answered like what we talked about that you are not a member of the Brethren Church.
> It was talked about in the meeting, but in the end it was concluded that you should indeed be dismissed on the grounds that, according to what was seen and the investigations of the Kaupule, you are indeed a member of the Brethren Church."

12. The investigations referred to in that letter were conducted during a ten minute adjournment of the meeting when some members of the Kaupule went out and asked other people about the fourth plaintiff's membership of the Brethren.

13. The overall picture is of a blatant disregard by the Falekaupule and the Kaupule, as its agent, of the regulations and of serious distress to the plaintiffs (which was still apparent in the witness box during this hearing) as a result of the dismissal, the manner in which it was done and the effect on their status in the island community. This latter aspect becomes more significant as the result of a further decision of the Falekaupule that no member of the Brethren church should be employed on the island. I shall return to this aspect.

14. Mr Kofe has correctly pointed out the decision in *Addis v Gramophone Company* [1909] AC 488 applies in this jurisdiction with the result that the Court will not award damages in a case of wrongful dismissal for injury to feelings. I bear in mind the challenges to the strictness of this rule in such cases as *Johnson v Unisys Ltd* [2003] 1AC 518; [2001] 2 AllER 801 and *Johnson v Gore Wood and Co* [2002] AC 1; [2001] 1AllER 481 but I do not consider they have yet changed the general principle as stated in the *Addis case*.

15. The purpose of damages is to compensate the actual loss caused by the wrongful dismissal. In this case, the loss is the wages that they would have received had proper notice been given but the Court must also consider any consequential loss flowing from the dismissal.

16. The circumstances in Tuvalu, especially in the outer islands, are such that, the chances of paid employment are very limited. In consequence, any paid employment is valuable especially when it with the Kaupule or any other public body. Any person in such employment will be likely to wish to keep that employment and I accept the evidence of the plaintiffs that they hoped to continue in their employment in the foreseeable future.

17. I stated in the case of *Seta Katea v Niutao Kaupule* and another, High Court Case number 2/06, 26 October 2007:

> "... the evidence accepted by the Court suggests [the plaintiff] had a firm and reasonable expectation that she would continue in that employment. Salaried work on Niutao is not easy to come by and it is to be expected that, in normal circumstances, she would have ensured she retained her position."

18. A similar position is seen in this case. With the exception of the fourth plaintiff who was, on one occasion only, warned about drinking, there is no evidence of any suggestion that the work of any of the plaintiffs had in any way fallen below standard or that they had in any other way failed to perform it properly. They were simply dismissed because of the allegation they had failed to contribute coconuts, which I accept was and is untrue, and because of their membership of the Brethren Church. I am also satisfied that the manner of the dismissal and the attitude and conduct of the members of the Falekaupule have ensured that they will not be able to obtain any alternative employment on Nanumanga. The evidence shows all too clearly that such an additional consequence of their dismissal was the stated aim of the Falekaupule.

19. In order to succeed in a claim for damages, the plaintiff must satisfy the court both of the fact of the damage, in this case the fact of the loss of income from this employment, and of the amount. However, lack of absolute certainty should not prevent an award where it is clear from the evidence that some substantial loss has been caused. I am satisfied that the court must include in its assessment of damages, a

consideration of the near certainty that there will be no alternative form of paid employment. The issue, therefore, is what is a reasonable and proper way to evaluate that effect in damages.

20. In *Ratcliffe v Evans* [1892] 2QB 524, Bowen J stated:

> "In all actions ... where the damage actually done is the gist of the action, the character of the acts themselves which produced the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage ought to be stated and proved. As much certainty and particularity must be insisted on ... as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage was done. To insist on less would be to relax old and intelligible principles. To insist on more would be the vainest pedantry."

21. I am satisfied on the evidence before me that the direct consequence of the wrongful dismissals by the Kaupule implementing the decision of the Falekaupule is irreparable financial loss to the plaintiffs far beyond the period of notice. It is not possible to ascertain by precise evidence for how long a period the plaintiffs should be compensated.

22. Lord Diplock pointed out the problem in *Mallett v McMonagle* [1970] AC 166:

> "The role of the court in making an assessment of damages which depends on its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past, a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend on its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate of what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages it awards."

23. I accept that, had it not been for the wrongful dismissal, these plaintiffs would have continued to work for the Kaupule and, having lost that employment, they will not be able to obtain any other paid employment on Nanumaga. Clearly the defendants cannot be liable indefinitely for the loss of earnings consequent on the dismissals but I accept there must be some obligation to compensate the plaintiffs for the time they will need to adjust to their new circumstances and the need to find alternative means to provide the necessities of life for their families' and their own subsistence. In the *Seta Katea case*, the plaintiff left Niutao and was able to obtain similar employment on Funafuti. It maybe that the plaintiffs will have to resort to such a step but none has expressed any wish to leave their island. I accept that is reasonable and to force a native of Nanumaga to leave his island cannot to be accepted as a reasonable consequence of dismissal.

24. I therefore consider that the defendants must be liable to pay damages for a reasonable period whilst the plaintiffs adjust and make alternative provision for their means of livelihood.

25. As I have said, the decision of the Falekaupule means that they will not have any chance of paid employment. Alternative sources of cash income are extremely limited and the plaintiffs will probably have to rely on farming or fishing with a small chance of establishing some form of occupation which may bring in cash. None of those will be easy for a person suddenly deprived of the employment on which he has relied for some years and reasonably expected to be able to rely for many years to come. The first plaintiff, Tehumu Lamese, has been able to take such a step to provide income but it also highlights his problem. Having been employed by the Kaupule as a mechanic since 2000, he has attempted to set up his own mechanical workshop. As a result of the Falekaupule's decision, he only

receives work from other members of the Brethren Church. It produces a cash income but the earnings are not steady or predictable and are well under half the salary he received when employed by the Kaupule. I accept possible alternative sources of cash by which the other plaintiffs might mitigate their loss will be very unlikely and note that, at the time of the hearing two years later, they have not obtained any employment.

26. As I have stated, the defendants cannot be held liable indefinitely and I consider the court must attempt to assess a reasonable period to adjust to the loss of the regular income they had every reason to believe would continue. I consider that the proper award is to order damages on the basis of the wages the plaintiffs would have earned for two years in the employment from which they were wrongfully dismissed.

27. Besides claiming general and special damages there is also a claim for punitive or exemplary damages. The only basis upon which exemplary damages might be awarded in this case would be that there had been oppressive, arbitrary or unconstitutional conduct by government servants. Whilst it may be that, since the passing of the Falekaupule Act, the Falekaupule and the Kaupule will come within a wide definition of government servants, the matter has not been sufficiently argued in this case and I do not make such an award.

28. However, in the assessment of general damages, the Court may consider conduct and character of either party as aggravating or mitigating the damage and, therefore, of the damages. In this case, the minutes of the meeting of the Falekaupule show that the members were acting maliciously and deliberately intending to cause the most serious consequences to the plaintiffs for reasons totally unconnected with their employment. Those actions seriously and intentionally aggravated the harmful effect of the dismissals and I consider that is a matter which must be taken in aggravation of the damages awarded.

29. The Kaupule is the agent of the Falekaupule and implemented its decisions and so is equally liable for any such aggravating effect. The evidence of how the members of the Kaupule investigated the fourth plaintiff's membership of the Brethren Church shows the disregard for the proper procedures was continued in the Kaupule. I shall order aggravated damages of 50% of the total general damages awarded in each case.

30. The period of notice required under the Regulations is not clear but an employee wishing to resign must give one calendar month's notice; regulation 706 (i), and I shall take that as the period of notice for which salary should have been paid had the dismissal been done in accordance with the regulations.

31. All the plaintiffs have claimed special damages and those figures have not been challenged.

32. Finally, the plaintiffs all refer to untaken leave and, possibly, other entitlements. I do not have sufficient evidence of any such entitlements but I note that, in circumstances covered by regulations 7.3 and 7.4, the secretary is obliged to advise the person leaving the service of his or her rights, terminal benefits and entitlements, if any. I order that the secretary of the Kaupule shall advise each plaintiff of any such entitlements and ensure they are paid. This must be done within one month of this judgment and the Court must be advised by the secretary when it has been done.

33. I take each plaintiff in turn.

Tehumu Lamese

His salary was, after deductions, $92 per fortnight ($2392p.a.). I order the following damages:

One calendar month notice		199
A further two years salary reduced by 25% on account of the income he is now able to earn from his business	(i.e.4,784 – 1196)	3,588
Aggravated damages of 50% of 3787 (3,588+199)		1,893

His wife has proved special damages incurred by both her and her husband totalling $3,312. That figure includes various sums for subsistence whilst the family had to stay on Funafuti. I accept costs are higher on Funafuti but they would have had to provide for them on their own island and so I shall reduce those claims by 50%. Leaving a sum of $1772 which, divided between the two plaintiffs, gives $886 each

Kristina Tehumu

Her affidavit gave her salary as $60 per fortnight but in her oral evidence she stated that was the monthly payment ($720 p.a.)

One month notice	60
Two years salary	1,440
Aggravated damages of 50% of 1,500 (1,440 + 60)	750
Special damages	886

Nuese Taimi

This plaintiff was past the retiring age but stated that some teachers were able to work on until they were 60. She hoped and expected to be able to do so and there is no indication on the evidence that would not have been the case. Her salary was $75 per fortnight ($1950 p.a.).

One calendar month notice	162
Two years salary	3,900
Aggravated damages of 50% of 4062 (3900 + 162)	2.031
Special damages	655

Puaniu Pelike

He was receiving $79 per fortnight (2054 p.a.).

One calendar month notice	171
Two years salary	4,108
Aggravated damages of 50% of 4,279 (4108 + 171)	2,139
Special damages	770

Order

34. Both defendants are jointly and severally liable for damages to each plaintiff in the following total sums:

Tehumu Lamese	$6,566
Kristina Tehumu	$3,136
Nuese Taimi	$6,748
Puaniu Pelike	$7,188

35. Within one month, each plaintiff is to be advised by the second defendant of any entitlements or benefits to which he or she is entitled and the Court is to be advised by the said second defendant when such entitlements have been paid.

Gordon Ward
Chief Justice

Delivered at ~~Nuku'alofa~~ Tuvalu on
the 27 day of August 2008.