

BETWEEN

TEARIKI RONGO OF Rarotonga,
Businessman

PLAINTIFF

AND

TE AU O TONGA KONITARA
VAKA a statutory body constituted
pursuant to the Rarotonga local
Government Act 1997

DEFENDANT

Judgement of the Chief Justice

Dated this 5 day of March 2001.

This is a claim by the Plaintiff for damages for wrongful dismissal from the position of Chief Administration Officer of the defendant. The damages claimed include the sum of \$82,273.49 for the salary for the full term of the contract of employment to 28 June 2003 and the sum of \$2000.00 for injury to the plaintiff's reputation and his feelings and stress anxiety and humiliation for his dismissal.

The defendant while admitting the basic facts on which the plaintiff's claim is founded denies that there was a wrongful dismissal but asserts that it was entitled to review and vary the contract of employment and that the plaintiff unreasonably refused to consider a review. Furthermore the defendant asserts that the plaintiff breached the terms of the contract entitling the defendant to terminate the contract at the time and the manner it did.

The basic facts of the case were not in dispute. The plaintiff was employed by the defendant as Chief Administration Officer on the terms of a written contract dated 28 June 1999. That contract was prepared and typed by the plaintiff. The terms of a draft also prepared by the plaintiff were discussed by the Council. The final document was approved by the Council and signed on its behalf by the Mayor or Konitara Tutara Mr. Upoko Keu.

The term of the contract was three years expiring 28 June 2003. The emoluments of the position were a salary of \$30,000.00 per year to be paid weekly, a rental of \$123 per week for the use of the plaintiff's furniture premises and equipment and a weekly petrol allowance of \$20.00. Wages were to be paid every Friday for the five working days commencing on Wednesday and ending on Tuesday. The working hours were to be 8 am to 4 pm Monday to Friday. As well the plaintiff was to be entitled to annual leave of 21 days, sick leave of 21 days, bereavement leave of 3 days and all statutory holidays.

A further benefit for the plaintiff was that the defendant was to purchase for the use of the plaintiff a cell phone "for the purpose of receiving incoming calls only in dealing with the business of the Vaka."

The plaintiff had the right to terminate the contract on two weeks notice. The only express right of termination by the defendant was in these words:

"If the employee is proven unable to carry out its (sic) duties, due to reasons of sickness and others, the employer shall give the employee one-month with pay to allow time to vacate the position"

Clause 12 provided that amendments to the agreement "shall be reasonably made and can only become effective if agreed upon by both parties." The next and final clause read:

"This agreement shall be reviewed at the end of every budget year from the signing date"

The plaintiff took up his position under the contract. He had been working previously in a printing firm Are Printing Ltd which was owned or partly owned by him. It was understood that those businesses would continue with the plaintiff participating in it. To this end the premises used by that business was to be used by the plaintiff to carry out his Vaka duties.

He was also involved in a firm Island Friends which provided consulting advice. The fact that he and his wife had an interest in this business was not known to the Council

On 18 August 2000 the Council met and resolved that the salary of the plaintiff be reduced to \$18000.00 per year and that he be employed on a part time basis, that the arrangement for the use of the plaintiff's premises be cancelled and that new premises be sought at another place. There followed a meeting of members of the defendant with the Secretary of Internal Affairs. The members of the defendant again agreed that the contract be varied as resolved on the 18th August but with the additional cancellations of the petrol allowance and the cell phone and reconsideration of the plaintiff's entitlement to terminate the contract.

On 30 August 2000 the plaintiff received a notice signed by the Mayor Mr Keu and the Metua Konitara Teokotai Tuaivi, Matapo Oti and Tekura Potoru. The notice headed Notice of Termination read as follows:

"As agreed in a meeting today, we the Undersigned do hereby give You one month or 30 days notice for the termination of your employment as Chief Administration Officer of the Office of the Te Au O Tonga Vaka Councils. As of this date your salary remains on full pay until the expiration of 30 days with payment of whatever leave due to you. All office equipment are to be moved to our new premises forthwith"

It is agreed that with that notice the plaintiff's employment was terminated. That notice was not justified in terms of the contract. The defendant had no right under the contract terms to dismiss the plaintiff in that way. It can be justified either on the grounds that the contract contained provision for reasonable review which the defendant had undertaken in reducing the salary and cancelling the various terms mentioned above in the meetings in August or on the grounds that the plaintiff had misconducted himself sufficiently gravely to amount to a repudiation of the contract.

The defendant put forward evidence, which was intended to explain some of the background to the making of the contract. There was a dispute as to how the plaintiff was approached, whether he or the Mayor suggested the sum of \$30000.00, the way in which the contract negotiations were handled and the relative sophistication or lack of it of the parties. In the end the contract stands to be read and construed as it was written and accepted by the parties. None of them sought legal advice and no doubt the contract favours the plaintiff as employee and drafter of it. It is not by

any means a complicated document. It is readily understood and while it might be said to be generous it does not require anything beyond an ability to read to be aware of its tenor and meaning. There can be no foundation for any suggestion that the defendant or its members were over awed or over reached by the plaintiff. I have no doubt that the parties at the time were sufficiently aware of the meaning and effect of the terms of the document. They were, I believe, content with the agreement and the future employment of the plaintiff.

There was produced to the Court a Cash flow forecast for the year commencing July 1999. It bore the date in handwriting 22/3/99. The plaintiff said that this was made available to him after he took up his office as Chief Administration Officer. It proposed a budget for the year of \$326,163.00. Of that some \$115,125.00 incorporated the personnel expenses, the operating costs and the overheads which were mainly the rent of the council premises. The rest of the outgoings were grants and projects totalling \$206,000 of which the item Vaka projects amounted to \$110,000.00. A further draft budget which it was said was prepared by the plaintiff showed a reduced total expenditure at \$103,762.00. That included the salary of the Chief Administration Officer at \$18,000.00 for the year. The grants and projects were no more than \$17,000.00.

The income of the Council was and is bulk funding through the Government. What was projected for that was not forthcoming. In the first months of the plaintiff's employment there were additional funds available from late payments from the previous year which enabled him to maintain expenditure at budgeted figures but as the reduced bulk funding became effective the budget could not be maintained. This was the reason for the reduced budget forecast and the Councils' move to vary the employment contract by reducing the salary and the terms of employment to a casual one.

It is the defendant's claim that it was entitled to review the employment contract and that the plaintiff unreasonably refused to accept the proposals made by the defendant. This claim is founded on the last two clauses in the contract document. That there was an entitlement to review the contract as expressed at the end of every budget year is clear. But amendments to the contract had to be reasonable and they only became effective if accepted and agreed upon by both parties. This does not authorise a unilateral variation. It requires a review process and an agreement between the parties.

More importantly the review and thus the amendment to the contract was to be reasonably made. That means that the amendments themselves had to be reasonable. No doubt that could include a reduction in salary but it would have to be reasonable in the circumstances of the case as evidenced by the budget and the future of the Council affairs. What was proposed was not in my opinion reasonable. A reduction from \$30,000 to \$18,000 is substantial and coupled with the change in status to casual employment and the loss of the other benefits suggested put the whole variation outside the properly applied terms of the contract. In my judgment the plaintiff was justified in refusing to accept the proposals made. That defence fails.

The defendant's claim of misconduct by the plaintiff justifying dismissal are based on a number of actions and circumstances which need to be dealt with separately. It is necessary to note however that it is the overall effect of such actions and conduct which have to be weighed to satisfy the onus on the defendant. As I have said the question is whether the conduct is sufficiently grave to amount to a repudiation by the employee of the contract. It is also relevant to note here that the defendant employer may rely on grounds of dismissal, which are discovered subsequently to the actual dismissal. This is of importance here because the investigations and inquiries of counsel have brought to light anumber of the items of conduct which are now complained of and which were unknown to the council and its members at the time the plaintiff was dismissed.

The first of the items and perhaps the most important was the allegation that the plaintiff had used his position for private gain without disclosing his personal interests to the defendant. It is alleged that this was a breach of his fiduciary obligations and was a breach of the Secret Commissions Act 1994/995.

This arose out of the plaintiffs involvement in the preparation and promotion of a management plan. The purpose of the plan was to allow the Vaka council to have a clear work program and to

link its legislative responsibility with its work programs. That description comes from a paper prepared by the plaintiff for submission to the New Zealand High Commission for funds to underwrite the preparation of the management plan. The plaintiff was the progenitor and promoter of the project. He said in evidence that this was over and above his ordinary duties which seemed somewhat surprising given his title and position in the council. What was complained of was that he arranged for his firm Are Printing to print the plan and for his firm Island Friends to carry out the editing and verifying of technical information, the layout design and typesetting of the plan and the design and art work. An invoice for \$1255.00 from the firm was presented to the council for payment of these items. The company Are Printing Ltd made a quote addressed to the plaintiff for the printing of the plan in the amount of \$3450.00. Finally an invoice for \$500.00 was presented to the council by the plaintiff for a workshop assistant. The assistant was a Mr Sila an employee of Are Printing but he did not receive the full amount of the invoice. A substantial part of the amount was received by the plaintiff himself for his own use or for the use of his printing firm.

The council was aware that the printing firm was the plaintiff's. The quote for the printing was put to the council through the plaintiff and was accepted. It is surprising that there was only one quote particularly as the project plan referred to advertising for the assistant and appeared to contemplate advertising or quotations from qualified consultants for the work done by Island Friends. That that firm was to do this work was set out in the project but it was not known to council that the plaintiff was involved in the firm and thus would benefit directly from its employment. The employment of Mr Sila in the project was again not disclosed to the council beforehand. The Council was not aware that he was an employee of the plaintiff. The fact that the account for his work was it seems inflated to provide an additional gain to the plaintiff through his association with Mr Sila was equally unknown to the Council.

In cross-examination these matters were put to the plaintiff as being improper conduct which he knew to be improper. The impropriety being the obtaining a profit and gain secretly and contrary to his duty to the council as a principal servant of it. The plaintiff denied any knowledge of such impropriety or of any duty to the council which might make such secret and gainful operations contrary to that duty. I find it difficult to believe that the plaintiff as a business man and an educated man would not know that any employee has a duty to devote himself to the interests of that employer and not engage in business secretly to make a gain out of his separate operations which arise only through his employment. Whether he knew or not the conduct engaged in through the Island Friends firm and the use of Mr Sila to feather his own nest were clearly outside and beyond the limits of proper conduct as the Chief Administration Officer of the Vaka.

This conduct seems to breach the provisions and prohibitions of the Secret Commissions Act as well. Although the plaintiff may not have been aware of that Act he must be aware that ignorance of the law does not excuse the breach of it. This is a further reason for disapproving his conduct and operations in relation to the project.

It is relevant to note here that the account for Are Printing was paid by the council but the printing was never carried out. The reason for this was that the Mayor did not approve and sign the acknowledgement page in the document because he did not agree with the wording of it. I would have thought that that was a matter for the Mayor and not for the CAO or the printer. It seems in the result that the plaintiff has received a windfall which is undeserved.

The second complaint against the plaintiff arose out of his use of the cell phone. As I have noted that was provided for use in his office as CAO and for receiving inward calls only. The purpose of this was to ensure that the plaintiff could be reached at all times even when he was out of his office.

There was produced to the Court copies of the Telecom account for the used of the cell phone from 1 November 1999 to 26 March 2000. The detailed breakdown showed the date, number called, time and charge for each individual call made and showed separately the incoming calls. The evidence from this is clear that the phone was used substantially for outgoing calls. A number of these are to the Vaka Council number and to the number of the Mayor. Though not strictly within the terms of the agreement there could be no real complaint about these calls, as they must be presumed to be on Council business. However a substantial number of calls are to the numbers

of Are Printing and to the plaintiff's personal number. Since the printing office was also used as the plaintiff's base for the council work there may be some difficulty in ascertaining if these calls were for council business or the plaintiff's printing business. The calls to his personal line are clearly in breach of his obligation under the employment contract.

I note that there are a large number of other outgoing calls to unidentified numbers which are unexplained but are strictly contrary to the terms of the employment contract.

The plaintiff did not to my satisfaction explain these calls when they were put to him. He was not able to explain why he had not paid for his personal calls. The implication must be that he ignored the terms of the contract and used the cell phone at will as if he was entitled to do so. That was a deliberate breach of his obligation.

It was claimed against the plaintiff that he had failed to comply with his obligation to work an eight hour day. The particular complaint on this head was that he was difficult to reach at the office or on his phone. The implication being that he was spending an undue time on his own affairs and businesses.

The arrangement between the council and the plaintiff was always going to be difficult to track. To employ someone who is entitled to spend time on his own affairs and business means that inevitably he will spend time on his own affairs at a time when the council or the Mayor and others will expect him to be available and working for the council. Of course the contract specified the working hours from 8 am to 4 pm. But occasional departure from that could not be deemed unreasonable. Witnesses for the council said that there were frequent occasions when they were unable to reach the plaintiff but without any specific times or dates. I am not satisfied that the plaintiff's conduct on this point is such as to amount to a breach of his obligations.

The relations between the council and the plaintiff deteriorated during the time of employment. The council became suspicious of the plaintiff and began to think that he was preferring himself and his own interests to that of the council. As the income of the council dropped the plaintiff took measures to reduce the outgoings. That included the cancellation of payments to the councillors and attempts to reduce and cancel car rental payments. While doing this the plaintiff continued, without reduction, the payments and allowances to himself and his printing business for the use of the premises. In the end the council could not afford a CAO at the rate and terms agreed upon originally. There was a feeling among the councillors that the plaintiff was not working for the council but for himself. The arrangement between them was no longer sustainable.

Whatever reason or motive brought the council to the point of dismissal the question for me is whether the plaintiff so conducted himself as to justify dismissal. The justification may appear afterwards but of course must have existed and amounted to a breach and in effect repudiation of the contract.

Weighing the conduct of the plaintiff overall and having regard particularly to the evidence of the obtaining of private gain through his office secretly and contrary to the interests of the council and his deliberate and flagrant misuse of the cell phone I have concluded that the plaintiff did in the course of the employment contract breach his obligations as an employee to such an extent as to justify his dismissal. The plaintiff's claim must fail.

There will be judgment for the defendant. The defendant is entitled to costs and disbursements and witness expenses to be fixed by the Registrar.

Langford CJ