IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 27/96

BETWEEN: PROFESSOR AIONO DR FANAAFI LE TAGALOA of Alafua, University Professor:

Plaintiff

A N D: HONOURABLE FIAME NAOMI MATAAFA of Motootua, Minister of Education and Pro-Chancellor:

First Defendant

A N D: TAUAVEMEA L PALEPOI of Malifa, Vice Chancellor and THE COUNCIL OF THE NATIONAL UNIVERSITY OF SAMOA, established by sections 7 and 8 of the National University of Samoa Act 1984:

Second Defendant

Counsel: T Malifa for applicant
P Petaia for first respondent
R Drake for second respondent

Hearing: 5 March 1996

Judgment: 11 March 1996

JUDGMENT OF SAPOLU, CJ

This was an ex parte motion for an interim injunction to restrain the first respondent and others from carrying out or implementing a decision by the council of the National University of Samoa or the vice-chancellor of that university to terminate and remove the applicant from her post of professor of Samoan language

and culture, and to restrain the second respondent or any person acting under their authority or direction from advertising the post of the applicant for applications. The Court ordered that the motion should be on notice to the first and second respondents. Accordingly copies of the motion together with the accompanying statement of claim and affidavit by the applicant were served on the respondents.

Before dealing with the motion for an interim injunction, I shall refer to a preliminary matter raised by counsel for the applicant which has already been dismissed. This is in order to clarify the reasons for that dismissal. Counsel for the applicant made the preliminary application that I should disqualify myself from presiding in this case as the applicant's contract of employment with the National University of Samoa which is in issue in these proceedings was prepared by a lawyer in the Attorney-General's Office but I did hold the office of Attorney-General. I pointed out to counsel that if the applicant's contract of employment with the National University of Samoa was prepared by a lawyer in the Attorney-General's Office while I held the office of Attorney-General then I was not aware of it. The application for disqualification was therefore dismissed. Now that I have seen the applicant's contract of employment it is clear that it was made on the 17th day of March 1988. I was only appointed to the office of Attorney-General in May 1988 so I could not have had any knowledge of the applicant's contract of employment being prepared by a lawyer of the Attorney-General's Office. I was not a member of that Office at the time the applicant's contract of employment was prepared in March 1988.

In any event, I think it is important that I should refer to what has been

said by the Court of Appeal in respect of a similar application made in another case. That was the case of *Sonny Stehlin v Police*, C.A. 13/93, judgment delivered on 23 March 1993 where Cooke P in delivering the judgment of the Court of Appeal said :

> "The doctrine of disqualification for alleged bias has to be "applied somewhat robustly in a jurisdiction of the size of "Western Samoa. Indeed, the present tendency of case law "around the world, including a recent decision of the House "of Lords *(R v Cough [1993] 2 All E R 724)*, is in the "direction of robustness in this kind of matter. We are "satisfied that no reasonable member of the Samoan community "would suspect that because he had been involved in the "drafting of a provision which was not in the event even "relevant to the trial, the Chief Justice was disqualified "from presiding at the trial. There was certainly no real "danger of bias. The point is without foundation".

Applying that statement of principles to the present proceedings, I am of the clear view that no reasonable member of the Samoan community would suspect that because a lawyer of the Attorney-General's Office might have prepared the applicant's contract of employment in March 1988 while I was not a member of that Office and before my appointment as Attorney-General in May 1988, I should be disqualified from presiding in this case. There is certainly no real danger of bias and the application for disqualification is without foundation.

Coming back to the motion for an interim injunction, the applicant is the professor of Samoan language and culture at the National University of Samoa (the university). The first respondent is the Minister of Education and pro-chancellor of the university. As pro-chancellor, the first respondent according to her affidavit is an ex officio member of the council of the university. The

second respondent is the vice-chancellor and the council of the university.

By a contract of employment dated the 17th day of March 1988 between the applicant and the university, the applicant was engaged by the university as professor of Samoan language and culture for a term of five years. Then under clause 4 of the contract of employment, the applicant's term of engagement as professor of Samoan language and culture may be renewed in accordance with clause 9 of part II of the general conditions of employment. Clause 9 of part II of the general conditions of employment provides insofar as it is relevant that a contract of employment may be renewed for a further term of three years by mutual agreement between the parties and a staff member on contract should be given not less than six months notice that his or her contract is or is not to be renewed.

After the applicant took up her post as professor of Samoan language and culture and having served in that post for close to four years, the council of the university resolved at its 6th meeting held on the 17th July 1992 to extend the applicant's term of employment for a period of twelve months. According to the vice-chancellor's affidavit that was done as the applicant had reached the retiring age of 60 years. No one expressed disagreement with that and it is clear that the applicant's employment was to continue to 1994. Then on the 2nd December 1994 the vice-chancellor wrote to the applicant advising her that the university proposed to advertise her post and that her employment would cease on 31st January 1995. By letter dated the 8th December 1994 the then solicitors for the applicant raised strong objection to the advice given by the vice-chancellor to the applicant. That was followed by further correspondence and discussions between the applicant's solicitors and the university's solicitor

until agreement and settlement was reached. That agreement and settlement are embodied in the letter of 19th December 1994 from the university's solicitor and the letter in reply dated 20th December 1994 from the applicant's solicitors. The relevant terms of that agreement and settlement were that the applicant's contract of employment was renewed for three years from 17th March 1993 to 17th March 1996, and that the contract of employment was to continue to be subject to the terms, conditions of service and policies for the academic and comparable administrative, library and technical staff of the university 1994. Then by letter dated 18th August 1995 the secretary of the council of the university wrote to the applicant advising her that the council had resolved not to renew her contract for a further term and giving the applicant six months notice as required by clause 9 of her terms and conditions of service. The applicant's contract of employment was therefore to end on 17th March 1996 as agreed upon in December 1994. The applicant was also advised in the same letter that her post will shortly be advertised.

I must say here that the agreement reached between the solicitors for the applicant and the solicitor for the university in December 1994 is conclusive on this matter. That agreement expressly stipulated that the applicant's contract of employment was renewed for three years from 17th March 1993 to 17th March 1996. Both parties accepted that position as evidenced by the exchange of letters between their respective solicitors in December 1994. Then in accordance with clause 9 of the applicant's terms and conditions of employment, the secretary of the council of the university by letter dated 18th August 1995 gave to the applicant six months notice of the council's resolution not to renew her contract of employment for a further term. The applicant received that letter

on 28 August 1995, so the six months period required for the notice expired on 27th February 1996 which is before the 17th March 1996 the expiry date of the renewed contract of employment.

It must also be pointed that under clause 9 of the applicant's terms and conditions of employment, any renewal of her contract of employment may be by mutual agreement between the parties. So in the absence of any mutual agreement between the parties, the contract of employment may not be renewed.

Turning now to the specific issues raised in the motion for an interim injunction, it is clear that the letter dated 18th August 1993 from the secretary of the council of the university to the applicant is not in breach of the applicant's contract of employment. That letter was sent to the applicant for the purpose of giving the applicant six months notice of the council's resolution not to renew her contract for a further term as required by clause 9 of the applicant's terms and conditions of employment. So the council through its secretary was acting in compliance with the requirements of the applicant's terms and conditions of employment which are incorporated into her contract of employment.

As regards the question of the first and second respondents acting ultra vires by virtue of the letter dated 18th August 1995, counsel for the applicant did not elaborate on that point and I see no substance in it. As to the point that the renewed term of the applicant's contract of employment should have been five instead of three years, I also see no substance in this point. Clause 9 of the applicant's terms and conditions of employment expressly provides that any

renewal of the contract of employment is for three years. In December 1994 the solicitors for the respective parties to the contract of employment agreed to a renewal of the applicant's contract for three years from 17th March 1993 to 17th March 1996 and the parties clearly accepted that position for there was no further dispute. The point about the letter of 18th August 1995 not giving reasons as to why the applicant's contract of employment was to end on 11th March 1996 is also without substance. The purpose of the letter dated 18th August 1995 was not to end the applicant's contract of employment but to give the applicant six months notice of the council's resolution not to renew the applicant's contract of employment when it comes to an end on 17th March 1996 as already agreed to between the solicitors for the respective parties in December 1994. The purpose of the letter of 18th August 1995 is clear from the terms of the letter and no further reason is needed to convey the purpose of that letter.

There is one other matter raised by counsel for the applicant. It is that by letter dated 24th October 1994, the solicitor for the university advised the applicant's present solicitor that the applicant's post will not be advertised until the various issues in dispute have been resolved. In that same letter, the solicitor for the university also advised that the letter of 18th August 1995 addressed to the applicant will not be withdrawn. However by letter dated 5th February 1996 the solicitor for the university advised the present solicitor for the applicant that the post of the applicant will be advertised. I have serious reservations about the admissibility of those two letters because of the without prejudice rule of evicence : see the judgment of this Court in *Ansett Transport Industries Ltd v Polynesian Airlines (Holdings) Ltd* delivered on 22 July 1994. Be that as it may, I am of the clear view that the letter of 24th October 1995

does not in the circumstances of this case estop the second respondent from advertising the post of the applicant. Much more is required to raise an estoppel against the second respondent and thus prevent the second respondent from now advertising the post of the applicant.

Turning now to the approach to be applied in an application for an interim injunction, this Court in *Saleimoa Plantation Ltd v Murray Roy Drake*, C.P. 211/95, judgment delivered on 12 December 1995 accepted the approach stated by Cooke P in the decision of the New Zealand Court of Appeal in *Pasquarella v National Finance Ltd [1987] 1 NZLR 312* where it is said :

> "The approach by Quilliam J to the question of an interim "injunction was in accordance with the judgments of this "Court in *Consolidated Traders Ltd v Downes [1981] 2 NZLR "247* and *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries "Ltd [1985] 2 NZLR 129*. That is to say, the Judge con- "sidered the two major subjects, namely whether there was "a serious question to be tried and the balance of conve- "nience, and ultimately he stood back and in substance "asked where overall justice lay, describing this step as "implementing the residual discretion of the Court to be "exercised upon the basis of the whole facts of the case. "In my opinion, Quilliam J's judgment was both a good "illustration of the way in which a New Zealand Court "should approach interlocutory injunction applications in "principle and a justified balancing exercise on the "particular facts".

Applying that approach to the motion for an interim injunction in this case, the first question is whether there is a serious question to be tried. I think the answer must be in the negative. As I have said, the express and written agreement reached between the solicitors for the respective parties in December 1994 was that the applicant's contract of employment was to be renewed for a

three year term from 17th March 1993 to 17th March 1996. So that renewed contract of employment must end on 17th March 1996. By letter dated 18th August 1995 the secretary of the council of the university gave six months notice to the applicant of the council's resolution not to renew her contract of employment for a further term as required by clause 9 of the applicant's terms and conditions of employment. Thus there is no breach of contract by the university, or its council, or any of the respondents. Accordingly there is no serious question to be tried. The matter should end there. In deference however to the submissions by counsel, I will move on to consider the balance of convenience factor.

It is to be noticed that there is no undertaking as to damages filed on behalf of the applicant. There is also no evidence to show whether the applicant has the means to compensate the respondents for damages if the interim injunction sought is granted but her claim fails at the substantive hearing. On the other hand, counsel for the second respondent informed the Court that if the present motion is denied but the applicant's claim succeeds at the substantive hearing the university has the means to pay damages to the applicant. That was neither disputed nor denied by counsel for the applicant. Counsel for the applicant merely said that the applicant will be unemployed if her motion for an interim innjunction is denied. I do not accept that. Given the applicant's talent and expertise, she should be able to find other areas where her talents and expertise could be utilised. I am also of the view that if the applicant happens to succeed at the substantive hearing, damages would be an adequate remedy for early of wrongful termination of her contract of employment. Given the view I have reached on the first two factors, it will not be necessary to go further and consider the third factor.

In all then, the motion for an interim injunction is dismissed. This matter is adjourned to 18th March 1996 for the respondents to file statements of defence. Question of costs is reserved.

There is one final matter. Counsel for the first respondent made application to strike out the first respondent from these proceedings. He presented well prepared submissions in support of his application. I intend no disrespect to learned counsel for the first respondent and his well prepared submissions by not answering his submissions in this judgment. It is just that I am of the view those submissions raise important issues which require careful consideration but there is a pressing urgency on the Court to deliver this judgment without further delay. Counsel for the first respondent is however granted leave to present again his submissions and application to strike out the first respondent at the substantive hearing of this matter.

T F M Sakuda

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CHIEF JUSTICE