

## Fifita v Minister of Police & Kingdom of Tonga

10 Supreme Court, Nuku'alofa  
Lewis J  
C.614 & 1049/94

21 April & 13 December 1995

*Judicial review - principles - dismissal  
Employment - dismissed - judicial review*

20 The plaintiff unsuccessfully sued over his alleged wrongful constructive dismissal as a prison officer. The matter is set out in full in the Court of Appeal report (where on appeal the plaintiff succeeded) which follows. This report is only as to matters of principles of judicial review in such circumstances.

Held:

1. On judicial review it is not the decision as such which is liable to review, it is only the circumstances in which the decision was reached - the concern is the decision - making process and not the decision.
- 30 2. Immediate dismissal means immediate subject to the constraints of the natural justice principles.
3. In Tonga the Courts have power to review decisions of Cabinet because Cabinet decisions in Tonga are much wider and include many decisions which, in other jurisdictions, would be made by Ministers and their staff. The fact decisions are made by a body of Ministers does not remove the protection of judicial review where the power is given by statute or regulations made under statute. Any exercise of a statutory power is reviewable.
4. A power which affects rights must be exercised judicially.

40 Cases considered : Chief Constable of Nth Wales v Evans [1982] 3 All ER 141  
Kalala v Kingdom of Tonga C.117/93 Ward CJ 31/3/94  
Pohiva v Kingdom of Tonga C.7/86  
Ridge v Baldwin [1964] AC 40

Statutes considered : Prisons Act (& Rules)

Plaintiff in person

Counsel for defendants : Mrs Taumoepeau

### Judgment

Judicial review is sought by the Plaintiff (who is unrepresented) of the circumstances leading to the Plaintiff then an Assistant Superintendent of Prisons resigning from the service.

The Plaintiff alleges that he received a letter from the Minister of Police dated the 4th February 1991 requiring him to take one of two courses:-

- resign of
- suffer dismissal.

The Plaintiff also alleges that the demand amounted to the Plaintiff's constructive dismissal from the service by the Minister of Police the First Defendant and by the Kingdom of Tonga, the Second Defendant. The Application for Judicial review is made pursuant to ex parte leave granted by this court for judicial review on 8 November 1994.

The difference between an appeal from a judicial decision and judicial review is explained in CHIEF CONSTABLE OF THE NORTH WALES POLICE v. EVANS [1982] 3 ALL ER 141 by Lord Brightman who said,

"I... turn to the proper purpose of the remedy of judicial review, what it is and what it is not. In my opinion the law was correctly stated in the speech of Lord Evershed in Ridge v. Baldwin [1964] AC 40 at 96. His was a dissenting Judgment but the dissent was not concerned with this point. Lord Evershed referred to... "A danger of usurpation of power on the part of the courts under the pretext of having regard to the principles of natural justice. I do observe again that it is not the decision as such which is liable to review it is only the circumstances in which the decision was reached and particularly in such a case as the present the need for giving to the party dismissed an opportunity for putting his case." Judicial review is concerned not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

The Plaintiff in this review carries the evidentiary burden as well as the persuasive burden of proof on the balance of probabilities.

Provision is made in the Prison Act (Cap.36) and rules for the discipline and dismissal of prison officers including commissioned officers. Section 15 of the Act provides for a court of inquiry for major offences by prison officers. "Major Offences" is not defined in the act.

Rule 71 of the Rules pursuant to the Prisons Act in particular sub-rule (28) renders any subordinate officer liable to prescribed punishment by the Minister of Police.

Rule 87 provides:-

"87. All Officers must be of good moral principle and unblemished character; intoxication or disreputable conduct of any kind will render an officer liable to immediate dismissal."

The phrase "Immediate Dismissal", must in my opinion be viewed as meaning immediate subject to the constraints of the natural justice principles. In the decision of this court Kaliala and others v The Kingdom of Tonga (1994) 117/93, Ward CJ, delivered 31 March 1994 and in particular at p.6, Dental Therapists sought leave and obtained judicial review of the decision of cabinet concerning a review of their status and pay.

Ward CJ at 6 said:-

100 "I raised the question of the courts power to review a decision of Cabinet but having considered the matter further, I am satisfied my concern was misplaced. When Cabinet makes policy decisions in relation to the government of the country, the court would not have a right of review ... but in Tonga, the laws provide that the decisions of cabinet are much wider and include many decisions which, in other jurisdictions, would be made by Ministers and their Ministerial Staff. Tonga is unusual and possibly unique in the involvement of Cabinet in the general administration of the public service. Matters such as pay discipline, appointment and dismissal of even junior public servants are cabinet decisions. Were they made by a Minister, they would undoubtedly be subject to review and the fact that they are made by a body of Ministers does not remove that protection where the power is given by statute or regulations made under a statute. Any exercise of a statutory power is reviewable, although, as has already been stated, such review does not empower the court to reconsider the merits of the decision itself but only the manner in which it was made by the decision making body except, of course, when the decision falls within the Wednesbury definition of unreasonableness. This accords with the case of Pohiva v The Kingdom of Tonga (Case No. 7/86), in which Martin CJ, considering a case of dismissal of a public servant by cabinet in exercise of a power given under estacode, similarly concluded this was subject to judicial review." (my emphasis)

110 It is not contended by the Plaintiff that this is a case on "Wednesbury unreasonableness". His case is that in the absence of a clear allegation and an opportunity to answer, the statutory powers invoked by the Minister of Police ought be reviewed and the requirement to resign imposed upon him declared to be a denial of principles of natural justice. The Crown submitted during the hearing that the Plaintiff was in breach of rule 87 at the material time and was told why and how. The witness Uepi says that the Minister told the Plaintiff of the complaints against him in the presence of Uepi.

120 The Plaintiff has proved that he resigned. He resigned upon receipt and as a consequence of the letter of the Minister dated 4 February 1991.

The resignation of the Plaintiff is not contradicted by the Defendants. Rather do the Defendants rely upon the fact of the Plaintiff's resignation as his voluntary act which would preclude him from judicial review. That submission bears scrutiny.

130 The defence assertion that the resignation of the Plaintiff was a voluntary act precluding him from judicial review is not in my opinion so simple a matter as the Defendants would have it. In fact on any reading of the letter of 4 February, the Plaintiff was presented with Hobson's choice. The option presented as to the manner of his taking his leave would only make his leaving less uncomfortable. It would not alter the fact of his going.

The decision in RIDGE v BALDWIN [1964] AC 40 decided among other things that a power which affects rights must be exercised judicially. Lord Hodson made the point at 130:-

"The cases seem to me to show that persons acting in a capacity which is not on the face of it judicial but rather executive or administration have been held by the courts to be subject to the principles of natural justice."

140 The Plaintiff however acknowledged and responded to the reprimand warning and

offer of options by specifically accepting the first, namely to accept the advice of the Minister of Police and reform.

It is clear from the evidence that the Minister decided by 4 February 1991 that he would give effect to the Plaintiff's dismissal on the grounds charged against the Plaintiff in July at a time when he had declined offer of a tribunal hearing for precisely the matters for which he had been warned in July 1990, the Minister says so much in exhibit "PY", the letter dated 4 February 1991.

150 I am unable to conclude that from the facts as I have found them to be there has been a denial of natural justice or any basis advanced by the Plaintiff in this review requiring this court to interfere in the administrative process about which the Plaintiff has complained.

The Plaintiff's claims are dismissed.