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

NO.C.814/97

BETWEEN : SIONE TEISINA FIFITA - Plaintiff;

AND : TONGA TELECOMUNICATION COMMISSION - Defendant.

Counsel appearing: Mr Fifita in person,
Mr L Foliaki for respondent.

Date of Hearing: 25 September 1998
Written submissions received: 14 October 1998

Date of Judgment: 5 March 1999

JUDGMENT OF FINNIGAN J

This is an application for judicial review. The applicant seeks declarations that the respondent acted unfairly in breaching an express assurance to him and in disconnecting his telephone service on 18 September 1997. He seeks special damages of $37, being the fee he paid the respondent for reconnection after his phone was disconnected, and general damages of $5000.

Briefly the facts are these. The applicant practises as a lawyer, and rented a phone connection from the respondent. About May 1996 the applicant's phone ceased to work and, since the respondent was unable to repair it or supply a replacement, he obtained and installed his own. He then had discussions with several of the respondent's employees about a reduction in his rental to allow for the fact that he no longer rented a phone from the respondent. These discussions came to nothing, but the applicant states that he was assured that a reduction was possible and needed only to be calculated. That assurance is denied in evidence by the respondent. The applicant wrote twice for a statement from the respondent, but he was never given a statement of a reduced rental amount.

A year later, in May 1997, the applicant's monthly phone account stood at $71.21, which he paid in part, leaving a balance which was then added to the amount of his June account which was due for payment by the end of July. This June account was noted, as per usual practice, that if the account remained unpaid at the end of June the service would be disconnected. During June July and August the process was repeated, with the applicant apparently paying part of the account each month, leaving a balance which was added to

the account the following month. Each monthly account carried a statement that if the account were not paid by the last day of the month the service would be disconnected. The next account received by the applicant, on 18 September, showed the charges for August, together with arrears due from the previous month and arrears from two months previous.

The wording of the statement, taken from the applicant's September account, is:

> "Please pay your account before 3OTH SEPT 1997 or service will be disconnected."

The applicant states that he intended to pay that September account, but first was going to write again for a statement of the reduced amount due. Before he could do anything, the respondent that very day, 18 September 1997, disconnected his phone. He subsequently paid a fee and had it re-connected.

The evidence of one of the respondent's employees is that every month a list of subscribers who have failed to pay is prepared for the general manager for authorisation to disconnect. The usual recommendation is for disconnection of all subscribers who are 2 months in arrears. In preparing the list during September 1997, this employee noted that the account for the applicant's phone number had arrears for June and July, so he listed that number for disconnection. The line was duly disconnected on 18 September. This did not affect the issue of the September account, which was for charges incurred in August.

The applicant submits that the failure of the respondent to supply him with a working telephone and its failure to reduce the rental makes its action in disconnecting his service unfair. He submits that it is particularly unfair because of the assurances given to him that the respondent would allow him a reduced rental, and its failure to fix the amount.

At this stage one must consult the Telecommunications Regulations, to which I have been referred by Mr Foliaki on behalf of the respondent. The Regulations clearly contemplate that all the equipment needed for connection will normally be supplied by the respondent. Both Reg 10 and Reg 40 set that out. The fee fixed under Reg 9 as the base annual rental for an individual line is $50. The rentals are payable in advance pursuant to Reg 16, although Reg 15 allows a different basis on which rentals and call charges shall be paid, i.e. monthly, quarterly etc. by agreement. The defendant's monthly rental charge of $4.17 is the monthly portion of the $50 rental fee fixed by Reg 9 and Schedule I. Reg 10 provides that by paying the rate fixed in Reg 9, the subscriber is entitled to one list of subscribers for each telephone, together with provision and maintenance of all necessary exchange equipment, subscribers' lines and telephones. There is nothing in the regulations which authorises a reduction in the fees for supply of service that are fixed in Schedule I. However, there appears to be nothing in the Regulations which prevents a subscriber from using a telephone provided by himself, subject to Reg 40, i.e. so long as that instrument is authorised by the commission and the subscriber does not interfere with the commission's fittings or wiring. The commission must install it.

This means that, even if the commission may authorise a change in the normal practice and allow a subscriber to supply his own telephone, there can still be no reduction in the charges.

Therefore I conclude that there is no authority for any person to reduce the rental charge in a case where a subscriber is authorised by the respondent to use his own telephone. There can therefore have been no unfairness if any employee assured the applicant that his rental would be reduced, because the assurance, if it was given, was contrary to law and not permitted in the contract for supply.

I turn to the second application for a declaration. The applicant's claim is that the disconnection of his line on 18 September 1997 was unlawful. This claim rests on his claim that the respondent is estopped from denying its assurance to him and estopped by the assurance from disconnecting his line for non-payment. I have found that the assurance, if given, was not valid because it was contrary to the Regulations. However the applicant relies upon an equitable principle whereby the actions of the respondent disentitled it to disconnect.

I am unable to see how in fairness the respondent should not have disconnected the line. The monthly rental was $4.17. If a portion of that were calculated to be for the telephone, it must surely be no more than half. Probably it is less than half because the telephone instrument seems to me to be less than half of what the respondent supplied in supplying the service. However, assuming it to be half, the amount in issue was $2.08 per month. The applicant's evidence (in his September 1997 account) is that by the time the line was disconnected, the charges overdue for more than a month were $40.75, and for more than two months $37.71. His negotiations with the respondent were for only a portion of what was overdue. Over the period of 14 months since he supplied his own telephone, the amount in issue could have been no more than ($2.08 x 14), $29.12. Even if he were to be successful in having his rental reduced, his account would still have been in arrears. The respondent was empowered to disconnect by Reg 45(1), which is worth setting out in full:

> "45. (1) If a subscriber becomes a defaulter in respect of any charges due under the conditions of contract, or any other telephone charges due under these regulations, he shall not be furnished with telephone service of any kind until he shall have discharged his liability to the Commission."

It does not appear to me that there was any unfairness in disconnecting the applicant's line after the arrears of payment had accrued and after notice duly given.

COMMENTS ABOUT THE REMEDY SOUGHT

The claims that the applicant makes against the respondent and the decisions reached so far are, in reality, claims and decisions in the law of contract. The basis of the applicant's claim is the contractual relationship between him and the respondent, and the respondent happens to be a statutory authority. The remedy of judicial review is not available for

breach of contract, even where one of the parties is a public authority and even where there may be an element of equity in the claim. Judicial review is a specialised process by which the Supreme Court exercises its supervisory function over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties (see *Halsbury*, 4th ed Vol 1(1), #60 and following).

DECISION

For the reasons that I have set out, which are both statutory and factual, I treat this claim as a claim in contract in order to determine it, and decide it in favour of the respondent.

Costs was an issue, and I determine it by awarding costs to the respondent, to be agreed or taxed.

NUKU'ALOFA, 5 March 1999.

SUPREME COURT TONGA

JUDGE