VERMEULEN v ATTORNEY-GENERAL AND OTHERS

Supreme Court Apia
Mahon J
3 - 7, 10 - 14, 17 - 21 September 1984, 2 May 1985

ADMINISTRATIVE LAW - judicial review - natural justice - Commission of Inquiry

CIVIL PROCEDURE - Res judicata -estoppel - previous action for mandamus - Defendants electing not to testify

CONSTITUTIONAL LAW - Misfeasance in public office - "malice" - Public Service Commission - Constitution of Western Samoa Article 15(1) and Article 87

EXEMPLARY DAMAGES - Aggravated compensatory damages

HELD: The Plaintiff succeeded in having purported determinations and recommendations of Commission of Inquiry (in so far as they affected him) set aside, as also the action of the Public Service Commission purporting to abolish the post of Deputy Director of Health. Exemplary damages $75,000 awarded. Costs fixed at $20,000.

CASES CITED:

- Donselaar v Donselaar [1982] 1 NZLR 97
- Dunlop v Woollahra Municipal Council [1982] AC 158, [1981] 2 WLR 693, [1981] 1 All ER 1202, PC
- Erebus Royal Commission, In re [1983] NZLR 662 PC
- Haw Tua Tua v Public Prosecutor [1982] AC 136, [1981] 3 WLR 395, [1981] 3 All ER 14, PC
- Jones v Dunkel (1959) 101 CLR 298
- MacKenzie v MacLachlin [1979] 1 NZLR 670
- R v Burdett (1820) 4 B & Ald 95
- Royal Commission on Thomas Case [1982] 1 NZLR 252
- Takaro Properties Ltd v Rowling [1978] 2 NZLR 314
- Taylor v Beare [1982] 1 NZLR 82
- Trompert v Police [1984] 1 CRNZ 324

LEGISLATION:

- Commissions of Inquiry Act 1964
- Constitution of Western Samoa, Arts 15(1), 84, 87(2) and (3)
- Public Service Regulations 1953, Regulation 89
- Supreme Court (Fees and Costs) Rules 1971, Rule 5

Dr G P Barton and Va'ai for Plaintiff
Anderson for the First, Second and Fifth Defendants
Enari for the Third Defendant
Rapi Va'ai for the Fourth Defendant

Cur adv vult

The Plaintiff in these proceedings is a Belgian by birth but has since 11th February 1975 been a naturalised citizen of Western Samoa.

The Plaintiff is 44 years of age. Having qualified as a medical practitioner at the University of Brussels in June 1964 he emigrated with his wife to the United States of America. There were two children of his marriage and for five years the Plaintiff and his family lived in Hawaii where he was a surgical intern for one year and a surgical resident for four years as part of the Honolulu Surgical Residency Programme. During this time the Plaintiff became interested in tropical medicine and in June 1969 he applied for and was appointed to the position of a contract medical officer in Western Samoa. His position was that of surgeon specialist and he was appointed for a term of three years.

During the initial period of his service in Western Samoa the Plaintiff became interested in various specialised aspects of tropical medicine, in particular the disease known as filariasis. This disease induces swelling of the limbs and the Plaintiff obtained a research grant to study surgical methods to reduce this type of disability. He successfully passed Part 1 of the examination set by the American Board of Surgery. In 1972, whilst on three months furlough, the Plaintiff undertook further medical study in Seattle, successfully completed the Part 2 examination of the American Board of Surgery and became a diplomate of the American Board of Surgery.

In October 1972, after his return to Apia, the Plaintiff was appointed for a second three-year term as a surgeon specialist and he became involved in various fields of public health. It was at about this time that he applied for the vacant post of

Director of Health in the Western Samoan Health Department but the post was given to a New Zealand doctor on a contract basis and the Plaintiff continued on as surgeon specialist with the Department of Health.

In 1974, in consequence of research papers which he had published, the Plaintiff became a Fellow of the American College of Surgery and a member of the International Society of Lymphology.

On 20th February 1974 there was a meeting of the Cabinet of the Government of Western Samoa and its proceedings were recorded in a Cabinet Minute dated 21st February 1974. This document records Cabinet decision which came to be of critical importance so far as the Plaintiff is concerned. In the first place, it records that the Prime Minister's Department was to make an official request to the New Zealand authorities for assistance by providing, under her programme of financial aid to Western Samoa, a doctor to be appointed as Director of Health for at least two years. Then the Government minute went on to record the Cabinet decision that the Public Service Commission be requested to create the position of Deputy Director of Health and to advertise for the same locally at a salary to be determined later. The Government minute then recorded that the person appointed as Deputy Director would be required "to understudy" the Director of Health appointed from New Zealand "with a view of taking over the directorship of the Health Department as the position became vacant".

As will be apparent from the foregoing, it was then clear that the person appointed to the post of Deputy Director of Health was intended to succeed the expatriate Director of Health as and when the term of the latter officer expired.

The doctor appointed to the position of Director of Health was Dr. MacDonald from New Zealand. Later in 1974 the Plaintiff applied for the position of Deputy Director of Health. Positions within the Government Service are made by the Public Service Commission of Western Samoa and the Commission appointed Dr. Asi (I am using his abbreviated name) to the position of Deputy Director. The Plaintiff appealed to the Public Service Appeal Board against the appointment of Dr. Asi, and in March 1975 his appeal was allowed and the Plaintiff became Deputy Director of Health. As government policy stood, the future path of the Plaintiff within the Health Department of the Government now seemed clear. He would "understudy" Dr. MacDonald and then when the position of Director of Health became vacant the Plaintiff would succeed to that position.

In March 1975 the Plaintiff and his wife separated pursuant to a separation agreement and his wife returned to Belgium with the two children of the marriage.

In June 1975 Dr. MacDonald departed from Western Samoa and went back to New Zealand and the Plaintiff then became Acting Director of Health for a short period pending the appointment of Dr. MacDonald's successor who was Dr. McKendrick, a New Zealander. The latter was appointed Director of Health for a two-year term.

It seems clear from the documentation that the Plaintiff was regarded very favourably both by Dr. MacDonald and Dr. McKendrick in respect of his medical skills, and Dr. McKendrick certainly adopted the opinion that the Plaintiff would be a suitable Director of Health once Dr. McKendrick's term had expired. This can be seen by the fact that in August 1975 Dr. McKendrick recommended to the Government that the Plaintiff take a course at the London School of Tropical Medicine in order to further his knowledge in public health. This recommendation was approved by the Staff Training and Scholarship Committee of the Prime Minister's Department and on 22nd August 1975 the Plaintiff left for England. Upon his arrival the training course was changed upon the recommendation of the English authorities, and was accepted by the Western Samoan Government, to a three-month course on health planning at the University of Bradford, England, to be followed by a one-year course at the Liverpool School of Tropical Medicine, and the Plaintiff thereupon began his training in England on that basis.

During his time in England the Plaintiff applied to the Courts of Belgium for custody of his two children and he was successful in that application, the order being made in his favour in April 1976.

In the meantime, an event had occurred which was to have a considerable effect upon the Plaintiff's further career in Western Samoa. The elections had been held in February 1976 and there was a change of government. The Honourable Tupuola Efi became Prime Minister and the Honourable Tofaeono Tile became Minister of Health. The last-named is the third Defendant in these proceedings. The result of the change of government, without any doubt, was to impair the further prospects and promotion of the Plaintiff within the Health Department of the Western Samoan Government by reason of the fact that the new Cabinet and the new Minister of Health adopted the position that the next Director of Health of Western Samoa should be a locally born Samoan.

This latter policy cannot on any rational ground be the subject of criticism. The Director of Health of the country had been conventionally a doctor recruited from overseas, in particular from New Zealand, but as in the case of other top positions in the Government, the time had to come when the country would be entitled to expect that top government administrative positions would be filled by Samoans wherever possible, and this of course would be a characteristic development to be expected not only in

Western Samoa but in any other developing countries in the Pacific region. And it must be emphasised here, in accordance with the submissions made in this respect by counsel for the Government in these proceedings, that the Plaintiff had no legal right to succession to the office of Director of Health. Nevertheless, the Plaintiff had applied for and had ultimately obtained the position of Deputy Director in the expectation, which had clearly been created by the previous Government, that the person holding that position would ultimately succeed to the top position in the Health Department after a suitable period of service under an expatriate Director.

From June to September 1976 the Plaintiff spent three months in Turkey as part of a field assignment to prepare his Master's thesis for a degree in community health and he returned to Liverpool with his two children in September 1976. On 10th December 1976 he was awarded the degree of Master in Community Health and on 26th December 1976 he returned to Western Samoa with his two children.

In the meantime, another event had occurred in Western Samoa which again had a significant bearing upon the Plaintiff's professional expectations. In August 1976 Dr. McKendrick had resigned as Director of Health and I think it a proper inference from the documents that he did so because of the incompatibility of his position with the departmental policies which were now prevailing under the new Government. Upon the departure of Dr. McKendrick, Dr. Tapeni (I am using his abbreviated title), the fourth Defendant in this action, was appointed Acting Director of Health and he was holding that position when the Plaintiff and his two children returned to Western Samoan on 26th December 1976.

The Plaintiff had previously been warned by Dr. McKendrick that if he did not pass his course overseas in tropical medicine, he might find himself in difficulties because of the fact that there had been a change of Government in February 1976 and that the fourth Defendant had become Acting Director of Health.

After his return to the country, the Plaintiff adopted the view that he was now entitled to be appointed by the Public Service Commission to the post of Director of Health but he discovered that this expectation was not to be realised. He continued in the position of Deputy Director of Health with Dr. Tapeni retaining the position of Acting Director of Health, and it is clear, from the documents in the case, that the Plaintiff thereafter became the subject of some degree of oppression by Dr. Tapeni. In the meantime, the Plaintiff had pressed Mr. Muller, Chairman of the Public Service Commission, to appoint the Plaintiff Acting Director of Health in place of Dr. Tapeni upon the principal ground that he held the highest officially appointed position in the Department and he drew attention to the

fact that having successfully completed his community health post-graduate training he had to accept what he described as "the humbling experience" of seeing the lesser qualified medical officer continuing to occupy the highest Public Service position in the Department even though in an acting capacity.

On 6th January 1977 the Plaintiff had a discussion at his home with the Chairman of the Public Service Commission. The Plaintiff expressed the view that it would be normal if he became Acting Director of Health because of the fact that he was Deputy Director of Health. The Plaintiff said that the Chairmen was sympathetic, but said that he was under pressure to keep the fourth Defendant as Acting Director of Health. He advised the Plaintiff to take special leave for a month which would give the Chairman time to think over the situation.

In February 1977 the Chairman of the Public Service Commission advised the Plaintiff to have patience because he said that in about six weeks the Department would be obtaining an expatriate Director of Health. The Plaintiff suggested that his Liverpool Professor might be prepared to take on such a post, and the Chairman in fact wrote to the professor but the latter declined. As will be observed, the Plaintiff was quite content to serve under an expatriate Director.

In April or May 1977 the Chairman of the Public Service Commission told the Plaintiff that the Prime Minister did not want an expatriate Director and the Plaintiff was then asked by the Chairman to prepare a job description for local advertisement. The Plaintiff then prepared such an advertisement and it was in due course advertised. But before the advertisement there was some delay because the Chairman of the Public Service Commission told the Plaintiff that the Prime Minister wanted the fourth Defendant to be given six months trial. The inference to be drawn from this appears to be that the Prime Minister wanted the fourth Defendant to become Director of Health. Some time later the Plaintiff was warned that if he wanted to be Director of Health he should "stay away from these women" meaning a former Prime Minister's wife and also Matatuma Maimoaga, whose informal name is Moana, who later became the Plaintiff's wife.

In addition, Mr. Muller later told the Plaintiff that the Public Service Commission was proposing that an overseas Director of Health again be appointed and this desire to recruit an expatriate was in fact communicated to the Government by Mr. Muller on 13th April 1977. However, a reply from the Cabinet dated 21st April 1977 clearly stated that the wish of the Prime Minister was not to recruit an expatriate and that the Prime Minster wanted a Samoan citizen to obtain the position of Director.

I have previously indicated my view that it is not within my province to question the validity or the integrity of the policy of the new Government in this respect, but it is evident that the Plaintiff continued to be of the opinion that either he would be appointed to the position of Director or that there should be appointed an expatriate Director under whom he was fully prepared to serve as Deputy Director in terms of the arrangement which had been set up by the previous Government.

In the result, the Public Service Commission acted in accordance with the obvious preference of the Prime Minister and the Cabinet in the matter. The Commission decided to recruit a Samoan citizen as Director of Health and the Plaintiff was asked to prepare a job description which would be advertised in the ordinary way. The Plaintiff prepared a job description in which he specified one of the qualifications to be that the person appointed should hold a postgraduate degree in community health, and this was a qualification which he himself had obtained but which none of the other possible candidates held. It will be remembered that the Plaintiff was a Samoan citizen and consequently the job description made it possible for him to be appointed as Director.

The next step was that the Minister of Health (the Honourable Tofaeono) reported to his Cabinet colleagues that in his opinion it was essential that the Director of Health be a locally born doctor with matai title. The relevance of holding a matai title was that it would give the Director that degree of special authority over the Samoan community which is vested in the holder of such a title and it was evidently proposed that such a step would go some way towards repairing a considerable number of internal differences within the Department which had been apparent for some time. But the Plaintiff, when he discovered the intimation of the Minster, did not see the matter in that light. He saw it only as an attempt by the Minister to block the appointment of himself as Director. Although this recommendation to Cabinet was not officially accepted, the Acting Prime Minister wrote to the Chairman of the Public Service Commission on 31st August 1977 referring to the desire of the Minister that the post of Director be filled by a suitable local officer holding a matai title. The Plaintiff in these proceedings claims that this letter was an unlawful and unconstitutional action by Cabinet in that it purported to direct the Public Service Commission to have regard to the Minister's wishes.

In the meantime, the job description drafted by the Plaintiff, which had been advertised in the Public Service Official Circular of 25th August 1977, was cancelled and was replaced by a new vacancy advertised on 15th September 1977. The job description as now advertised was clearly not as much in favour of the

Plaintiff as the previous job description had been. The Plaintiff had applied for the position of Director in terms of the first description, and then re-applied in terms of the second description.

The Public Service Commission then decided to appoint a specialist panel to screen the various applicants for the post of Director of Health, and this procedure was not uncommon so far as the Public Service Commission was concerned. On 30th September 1977 the Plaintiff and other applicants (including the fourth Defendant) were interviewed by the specialist panel which included as an adviser a professor of medicine from New Zealand, and on 3rd October 1977 the panel wrote to the Public Service Commission advising that all applicants had been interviewed and recommending that the Plaintiff be appointed Director of Health.

The Public Service Commission was in no way bound by the recommendation of the panel. As previously stated, the panel was constituted purely for advisory purposes. However, the Commission on or about 21st October 1977 in fact decided that the Plaintiff should be appointed Director of Health. The only record of this decision is contained in a memorandum delivered by Mr. Muller to the Prime Minister. In view of the importance of this document, it should be recorded in full and it reads as follows:

> "'CONFIDENTIAL'
>
> POSITION DIRECTOR OF HEALTH
>
> 1. The Commission in considering this appointment acknowledges the difficulties that have arisen through various influences that have been brought to bear.
>
> 2. In its previous decision, the Commission recommended that an experienced expatriate be recruited for a term of not less than two years. This would provide the opportunity for those officers in the department with potential for management and administration to supplement their present experience in these fields. This would also afford the time necessary to resolve many of the factional differences that exist within the department. It was the Commission's opinion that the development in the National Hospital and District Medical Services which presented a fundamental dilemma in the effective use of resources required the services of a highly qualified and experienced health administrator. Regrettably the appointment of an expatriate was not approved by Government. Under this constraint Commission has no alternative but to appoint a local officer.

3. The Commission acknowledges the ill effects caused by the delay in making a substantive appointment.

4. The presentations made to the Minster by the Acting Secretary of Western Samoa Registered Nurses' Association on behalf of one candidate can only be considered as political and of necessity disregarded by the Commission.

5. Similarly, the representations to the Minister by the Western Samoa Medical Association was considered political. Further this was considered by the Commission as unconstitutional particularly under the discriminatory provisions of Article 15 of the Constitution.

6. The derogatory remarks by the Minister against the Commission were set aside as it was believed that the Minister had not been fully informed of the issue at the time.

7. The Commission in deciding on the appointment took into consideration the overall merit of each candidate. In assessing this the Commission considered the general criteria involving qualifications, specialised training, general experience, past performance and personal attributes.

8. Each candidate showed some weaknesses. Though Dr. Tapeni had been Acting Director for over one year, there has been little apparent improvement in the administration of the department. However, he has had good specialised training. During his administration considerable political pressure had been thrust on the Commission.

   Dr. Faamatala has had similar training but there has been some questions concerning his performance of duties. This may have been compounded by his membership on boards, executives and councils.

   Dr. Vermuelen has been considered best in qualifications and previous performance and possibly in general experience. He has undertaken surveys and research and has published medical papers besides having been in charge of a specialised major unit. His possible weakness may lie in his relative lack of experience. Similarly, however the other main contenders would also suffer from the lack of experience necessary to make a success of the appointment. It is of note that experience would play a lesser role to performance in making a success of

such a position. Two elements that could question his suitability as director are firstly the complaint that he had manoeuvered through political influence to be appointed Deputy Director of Health. This appointment had been made by the Board of Appeal who were informed at the time of his citizenship status.

Secondly, there have been several hints made regarding his moral behaviour involving his marital status and his association with a female member of the staff of the department. The Commission was not able to confirm or refute these suggestions.

9. The Commission is aware that the appointment of a Deputy Director does not necessarily give the incumbent the succession as of right to the Directors position. In fact, the Deputy Director is graded lower than three other divisional head positions.

10. The Commission still feels that an experienced expatriate would be the best appointment but considered that it would be demoralising to all concerned if a local appointment was not made.

11. The Commission unanimously decided to appoint Dr. W. Vermuelen to the position of Director of Health which will be confirmed subject to all appeals being heard.

12. The Commission, further, feels confident of this decision as it is supported by the interviewing panel selection and by a previous appeal board decision regarding the position of Deputy Director of Health for which the same principal contenders were applicants.

PDM:BMW
21.10.1977."

The evidence is undisputed that when Mr. Muller attended with this document upon the Prime Minister, the latter plainly disagreed with that decision and instructed Mr. Muller that the appointment was not to be formalised in the meantime because he proposed to set up a Commission of Inquiry into Western Samoan Health Services. This was followed by the statement in the Legislative Assembly by the Minister of Health that there would be no appointment of a new Director of Health until a full inquiry had taken place into the activities and the general state of affairs of the Health Department and it soon became known that a Commission of Inquiry would be constituted under the Commissions of Inquiry Act 1974. This decision was made by Cabinet on 2nd November 1977. It so happens that the Plaintiff was at this time unaware that a decision to appoint him as Director had in fact been made by the Public Service Commission.

However, he had reason to believe that he might have been the successful candidate. But whatever his hopes may have been, it was now clear that any appointment of a Director of Health was to be deferred until the findings of the Commission of Inquiry were known.

On 14th February 1978 the Commission of Inquiry was duly appointed. The Chairman was Sir Gaven Donne, a former Chief Justice of Western Samoa. There were two expatriate members who were both doctors from New Zealand, namely Dr. K.W. Ridings and Dr. Bruce Faris. There were in addition two Samoan members, namely Papli'i Alesana Stanley and Seuamuli Saolotoga Beutin.

Assistance was sought from the Crown Law Office in New Zealand to provide counsel to assist the inquiry, and one of the Crown Counsel from the Crown Law Office in due course attended Apia in that capacity and the sittings of the inquiry commenced on 10th March 1978 and continued until 21st March 1978.

Early in 1978 the Chairman of the Public Service Commission said to the Plaintiff upon an informal occasion that the pending Commission of Inquiry would "reveal everything", including a "cover-up" by the Plaintiff of the carrying out of abortions by nurses at the hospital. This was said to have taken place in September 1977 during the period when the Plaintiff was Acting Director of Health. The Plaintiff said he was staggered to hear this allegation. Upon discovering what had been going on in respect of the abortion activities, the Plaintiff had disclosed the facts to the Chairman of the Public Service Commission in 1977 and he had also consulted the Attorney-General. The Plaintiff had told the Chairman of the Public Service Commission of the steps which he had taken. The Plaintiff then ceased to have any association with these misdemeanours because as at September 1977 the fourth Defendant was again to become Acting Director of Health and the Plaintiff had let the matter rest there. But from all this the Plaintiff became aware that at the Commission of Inquiry there would be made against him various allegations including this allegation which was certainly quite unfounded. It could hardly be said that the Plaintiff had been party to a "cover-up" of this abortion incident when he had specifically consulted the Attorney-General as to the right steps which were required to be taken. But the Plaintiff now had clear warning that he was to be the subject of attack before the Commission of Inquiry, and that unfounded allegations against him might be made.

The Plaintiff was evidently willing to co-operate as best he might with the Commission of Inquiry and ultimately he prepared a series of voluminous submissions which he in due course presented to the Inquiry. But having regard to the course of procedure adopted by the Commission of Inquiry, and to its ultimate findings, he took the view that the substantial purpose of the

Government in appointing the Commission was to discredit himself and to frustrate any chance he might have of being appointed as Director of Health. He visited counsel assisting the Commission in order to gain some information as to how his submissions were to be presented. By 1978 the Plaintiff had been employed by the Department of Health for a period of nearly nine years and he was proposing to tender, as I have indicated already, a series of submissions and a narrative of facts which would necessarily be very extensive. But when he visited counsel assisting the Commission he says that counsel sat down behind his desk, reached for his pen, and evidently proposed to take a note of what the Plaintiff had to say and reinforced the urgency of the occasion by saying to the Plaintiff "Come on, Doctor, we haven't got all day". Not unnaturally, the Plaintiff was deeply affronted by this approach. It almost appeared, so the Plaintiff thought, as if counsel had been imperfectly instructed as to the long and detailed history of the numerous factual disputes and personal confrontations which had distinguished the administration of the Department of Health during the time when the Plaintiff had been in its employ. He therefore set about the task of preparing his own submissions which were developed in the form of "case histories" illustrating various areas of internecine discord and maladministration which had given rise, in his opinion, to the present unsatisfactory organisation of the Department. In addition, he engaged local counsel, and instructed his counsel to apply to be made a party to the Inquiry in view of the fact that his own interests would be so immediately affected by the Inquiry's deliberations.

When the hearings of the Commission of Inquiry opened on 10th March the Plaintiff's counsel made application for the Plaintiff to be cited as a party but this application was refused. The Commission announced that the Plaintiff was entitled to be present throughout, and to be represented by counsel but there was to be no cross-examination and the Plaintiff was entitled to present his own submissions.

As it turned out, the Commission spent only five days in open session. Some witnesses were heard in camera, including Mr. Muller, the Chairman of the Public Service Commission, and other information, as is clear from the Commission's report, was gathered in circumstances unknown to the Plaintiff. Shortly after the conclusion of the hearings, namely on 23rd March 1978, the Commission of Inquiry made a request to Cabinet that no appointments of permanent positions should be made in the Department of Health already the subject of acting appointment until after Cabinet had considered the report of the Commission. At that stage the Commission of Inquiry was aware from Mr Muller's evidence that both the selection panel and the Public Service Commission had unanimously decided that the Plaintiff was the best person for appointment as Director of Health, and one of the submissions for the Plaintiff in this case has been that the

Commission of Inquiry lacked lawful authority to intervene in this way with the statutory process of appointment and thus contravene the constitutional independence of the Public Service Commission.

On 23rd May 1978 the Commission of Inquiry presented its report to the Government. In that report it recommended a restructuring of the Department of Health and in particular that what was called the "present excessive number of sections in the Public Health Division" be consolidated into five main sections. Of direct relevance to the position of the Plaintiff were recommendations that the post of Deputy Director of Health be abolished forthwith, and that as a matter of general policy Cabinet should decide that the person holding the position of Director or Director-General of Health be the holder of a matai title. In addition it was recommended that the Plaintiff, his official post having been abolished, be appointed to have charge of the Section of Epidemiology and Communicable Diseases in the Division of Public Health.

As will be observed, the Plaintiff's official position had not only been abolished but he had been demoted and in due course, after Cabinet had received a report by the Minister of Health and a committee of officials as to the Commission's recommendations, the Plaintiff was in November 1978 transferred to the position which the Commission of Inquiry had recommended. However, in March 1979 the Plaintiff applied for appointment to the position of Chief of the Division of Public Health but the Public Service Commission appointed a Samoan doctor to that position and in July 1979 the Public Service Commission appointed Dr. K.J. Ridings (who had been a member of the Commission of Inquiry) to be Director-General of Health for a period of three years. In the meantime the Plaintiff had successfully appealed to the Public Service Appeal Board against his failure to be appointed Chief of the Division of Public Health and on 25th August 1979, in consequence of his successful appeal, the plaintiff was appointed Chief of the Division of Public Health.

I must here embark upon a brief digression. On 5th June 1978 the marriage of the Plaintiff to his wife was dissolved by an Order of the Supreme Court of Western Samoa. On 12th August 1978 the Plaintiff remarried. He had been unofficially engaged for some months before that date to Moana who was the Superintendent of Nursing for Western Samoa. As will be recalled, the Plaintiff's first wife had departed for Belgium in March 1975 and in the following year he had obtained custody of the children by order of a Belgian Court. The Plaintiff's friendship with Moana had political affiliations which were not approved of by the Government. The Plaintiff had been warned by the Chairman of the Public Service Commission that his friendship with Moana was not assisting his position within the Department.

Moana in due course brought her own action against the Government as a result of her being dismissed from the office of Superintendent of Nursing, and I heard her case at the same time as I heard the case for the Plaintiff in these proceedings. My judgment in the case of Moana will follow the judgment which I am in the course of writing in the case of the Plaintiff. It should be pointed out, I think, that Moana is not only the holder of a matai title and a Member of Parliament, but is also quite obviously a lady of considerable strength of character. The Plaintiff's case in these proceedings therefore is that he and Moana were together the objects of joint persecution by the Government, and I should record at this point that it was as a result of the recommendations of the Commission of Inquiry that Moana was dismissed from her position as Superintendent of Nursing.

On 16th October 1978 the Plaintiff had received a letter from the Public Service Commission advising him of his new position and this was the first he heard that the recommendation of the Commission of Inquiry had been adopted. The Plaintiff saw Dr. Tapeni and said that seeing he was in charge of communicable diseases, what would his duties be? Dr. Tapeni said that the Plaintiff would be in charge of venereal diseases, yaws and typhoid. The disease of yaws had been eliminated 20 years previously. The Plaintiff's specialties of leprosy and filariasis had been removed from his control even though he had been a member of the Leprosy Trust Board and had been in charge of leprosy treatment for a very long period of time. Filariasis was now a lesser problem but needed constant surveillance. In the result, by 1979 the Plaintiff's duties were limited to treating cases of venereal disease and giving vaccinations.

As will be seen, the Plaintiff's career in the Department of Health had now taken a very adverse turn. The Plaintiff had previously been the subject of high commendation not only from his Department but also from well-informed individuals. These particulars may be recorded as follows:

(a) On 1st October 1974 the Department of Health had written to the Public Service Commission with regard to candidates who had applied for the position of Deputy Director. Seven applicants had been interviewed. As well as the Plaintiff, they included Dr. Asi, Dr. Tapeni (the fourth defendant), and Dr. Schuster. It was the unanimous opinion of the three officials who interviewed the applicants that "one candidate stands out as being superior to all others for appointment to the particular position. He is Dr. Walter Vermeulen".

(b) During the term of Dr. MacDonald's six months appointment expiring in June 1975, the Plaintiff had been regarded most favourably, and it is to be noted that when Dr. MacDonald reported to the Government on 24th April 1975, his recommendation that Dr. McKendrick be his own successor, he referred to the appointment of a Deputy Director of Health and he said it was assumed that the appointee would ultimately take over the position of Director of Health. Then on 12th June 1975 when Dr. McKendrick had been appointed, Dr. MacDonald asked the Public Service Commission to appoint the Plaintiff to be Acting Director of Health for the interim period and on the following day that appointment was made.

(c) On 8th March 1975 Mr. Hutchison, the Financial Secretary to the government, reported to the Minister of Finance a proposal that the Plaintiff attend an international conference of lymphology to be held in South America and in the course of that recommendation he said:

> "Dr Vermeulen's dedicated work in Western Samoa is well recognised, and it is considered an honour that he should have been asked to present a paper to this international congress."

Then later in the memorandum the Financial Secretary went on to say:

> "Dr. Vermeulen's fine work in Western Samoa is recognised, and the benefits of his participation in this international congress are appreciated. Treasury therefore recommends your support of the proposal by the Honourable Minister of Health."

(d) It will be recalled that it was Dr. McKendrick who instigated the overseas study of the Plaintiff in 1975 and it was Dr. McKendrick's opinion that this course of post-graduate study would fit the Plaintiff for the position of Director of Health when a vacancy in that office occurred.

These independent and highly informed opinions of the ability of the Plaintiff which had been expressed in 1974 and 1975 are therefore to be seen as being in sharp contrast to his ultimate fate as a departmental officer in 1979 when he had been relegated to the menial tasks of treating venereal diseases and giving vaccinations.

On 22nd December 1980, following lengthy inquiries by his legal advisers into all these events, the Plaintiff instituted this action in the Supreme Court of Western Samoa.

During the course of obtaining discovery of documents from the various defendants, there was produced from the Government archives the memorandum dated 21st October 1977 recording the decision to appoint the Plaintiff Director of Health, this being the document delivered to the Prime Minister by Mr. Muller. I have already quoted the full text of this memorandum.

The Plaintiff up until production of this document had not any prior knowledge of its existence, and was not even aware that a decision to appoint him as Director of Health had been made. Upon reading this memorandum it appeared to the legal advisers of the Plaintiff that it might provide a short cut to a successful conclusion of the outstanding differences between the Plaintiff and the Government. Whereas in terms of the existing statement of claim it had been alleged that the conduct of the Government had prevented the appointment of the Plaintiff, it now seemed clear that the Public Service Commission had in fact decided that the Plaintiff was to be appointed. The Plaintiff's advisers accordingly issued a second writ seeking a declaration that he had been validly appointed as Director of Health and was now lawfully entitled to take office as Director General of Health; an order of mandamus directed to the Public Service Commission requiring it to appoint him to the position of Director-General of Health; a declaration that consequent upon the appointment of the Plaintiff there had been no lawful vacancy in the position either of Director of Health or of Director-General of Health; an order setting aside the appointment of Dr. Schuster as Director General of Health following the resignation of Dr. Ridings, and finally an injunction restraining Dr. Schuster from acting as Director General of Health.

The pleadings in this action recited the issue of the first writ and made it clear that the second writ was issued without prejudice to the first.

The "mandamus action", if I may call it that, was heard before the Supreme Court in Western Samoa at Apia on 12th and 13th December 1983 before Mr. Justice Eichelbaum of the High Court of New Zealand.

At this hearing evidence was given by Mr. Muller with reference to the document which had been delivered to the Prime Minister and also with reference to the general procedure under which Public Service appointments were made. According to Mr. Muller, the practice of the Public Service Commission was to decide on an appointment at one meeting and then confirm that appointment at the next meeting, that is, the decision to make the appointment was not at that time a decision carrying with it any effect. It

only became effective when it was confirmed at the next meeting. It was put to Mr. Muller in cross-examination that he was referring to the ordinary practice of confirming the accuracy of the minutes of a previous meeting. Mr. Muller had said brief minutes were kept of each meeting. But he insisted that there were two separate procedures. One was the procedure just referred to, whereby the decision was not effective until that decision was confirmed at the next meeting, and the other procedure was the normal one of confirming the accuracy of the recorded minutes.

Such a procedure seems, on any view of the matter, to have been distinctly unusual. It was the statutory function of the Public Service Commission to appoint an applicant to a specific vacancy duly advertised, and it might have been thought that such a function was complete once the Commission had reached a decision that the appointment be made. The appointment would be subject to appeal by an unsuccessful applicant to the Public Service Appeal Board, but subject to the disposal of any such appeal, the decision reached by the Commission might be thought to have been final. However, although the minutes of the Public Service Commission were not available at the hearing before Eichelbaum, J., Mr. Muller maintained that this unusual procedure was standard practice.

Mr. Muller also testified that in the case of senior appointments it was normal as a matter of courtesy to inform the Minister concerned before any public announcement was made. In this case, the appointment was for various reasons a particularly sensitive one, so he saw the Prime Minister, and Mr Muller's evidence was that the Prime Minister told him that the Government intended to establish a Commission of Inquiry and requested the Public Service Commission to defer action on the appointment until the outcome of that Inquiry was known. This request was confirmed in the letter from the Cabinet Secretariat to the Public Service Commission dated 4th November 1977. Mr Muller testified that the Public Service Commission at its next meeting, following his interview with the Prime Minister agreed to follow that course.

In relation to the minute of 21st October 1977, which bore the initials of Mr. Muller and a typist in typescript at the foot, and was not signed, Mr. Muller said that this was for the internal information of the Commission and was intended to be attached to the minutes of the meeting at which the decision to appoint the Plaintiff had been made. Mr. Muller said that the minutes of the meeting at which it was decided to appoint the Plaintiff and the minutes of the subsequent meeting following his discussion with the Prime Minister would confirm the two-stage process of which he had spoken, but, as I have said, these minutes were not available for production before Eichelbaum, J. although a diligent search had been made by counsel for the Attorney-General.

It so happened that by the time of the mandamus action the Plaintiff's advisers were in possession of the written statement of evidence which had been given in camera by Mr. Muller to the Commission of Inquiry. Part of this evidence read as follows:

> "The panel after deliberations and interviews recommended to the Commission the most suitable candidate. The Commission also reviewed the merits of all applicants and decided on an appointment. I went and saw the Prime Minister and informed him of the Commission's appointment, and he then told me that the Government intended to hold a Commission of Inquiry into the Health Department, and he requested that no action be taken that could prejudice the Commission of Inquiry."

Dr. Barton, who appeared for the Plaintiff as leading counsel in the mandamus action, naturally placed reliance upon the phrase "the Commission's appointment", but it was held by Eichelbaum, J., in his subsequent written decision that this phrase had to be read in the context of the immediately preceding phrase "decided on an appointment" which he held was consistent with the evidence given by Mr. Muller in the mandamus action.

On this crucial issue of fact, namely whether the Plaintiff had been appointed on 21st October 1977 to the office of Director of Health, Eichelbaum, J., held against the Plaintiff. He decided the point primarily upon the factor of credibility. He accepted that the system of confirmation had been in practice before Mr. Muller became Chairman of the Public Service Commission and consequently came to the conclusion that there had not been any appointment of the Plaintiff but rather a recorded intention to appoint the Plaintiff. That intention had been frustrated by the request of the Prime Minister to defer any appointment until the Commission of Inquiry had been held, and accordingly it had not been proved by the Plaintiff that he had been appointed Director of Health.

Having made the finding just referred to, Eichelbaum, J., went on to consider Regulation 89 of the Public Service Regulations 1953 which deals with the mechanics of appointment. It is required by Regulation 89 that every appointment to a position in the Public Service "shall be in writing under the hand of the Commission". In the course of extensive legal argument relating to Regulation 89, it had been submitted that because all the members of the Commission had concurred in the contents of the minute the typed initials of the Chairman could be said to be equivalent to a signature by the Commission members. After examining the authorities in detail, Eichelbaum, J., rejected that argument and the result therefore was that even if there had been an appointment in favour of the Plaintiff, and the learned judge had held against that submission, nevertheless there was no valid appointment because Regulation 89 had not been complied with.

Those findings disposed of the case in favour of the defendants but Eichelbaum, J., went on to consider what he might have done had the Plaintiff succeeded in establishing that he had been appointed Director of Health. The basic remedy sought by the Plaintiff was mandamus directed to the Public Service Commission but mandamus will not lie unless the office is vacant. Accordingly, the Plaintiff had to establish that by suitable orders the Supreme Court had power to remove Dr. Schuster from office.

Eichelbaum, J., accepted Dr. Barton's submission that the common law prerogative writ of quo warranto would have been available to the Plaintiff as part of the law of Western Samoa by virtue of Article 114 of the Constitution. Consequently, Dr. Schuster could have been removed from office by virtue of that writ, and prima facie mandamus would then issue in terms of the claim advanced by the Plaintiff. But Eichelbaum, J., went on to hold that as a matter of discretion he would not have been prepared to grant mandamus. He took the view that because of the lapse of time and flow of events, it would not have been right at that stage to compel the Department by that process to accept a person who had been appointed to the position more than six years previously but had never served in it. The learned judge pointed out that there had been significant alterations to the public health system since 1977 and that the Health Department had been separated from the Public Service, and that hospital services and primary health care had been divorced from the Department of Health. These comments related to the passing of the "Western Samoa Health Service Board Act 1981" but, as Dr. Barton pointed out before me, Eichelbaum, J., was in error insofar as he relied on the enactment of that legislation because, although on the statute book, it was not in force as at the date when His Honour gave judgement. Nevertheless, quite apart from any statutory changes, the learned judge was concerned with the passage of time which had elapsed since the date of the claimed appointment of the Plaintiff and with respect, I agree that this must have been a significant factor if the question of granting mandamus had fallen for decision.

In the result therefore the Plaintiff failed in the mandamus action, and the reason I have had to review the circumstances of that case is because it was argued before me by Mr. Anderson on behalf of the Attorney-General that the judgment in this case precludes the Plaintiff from succeeding in the present writ either on the ground of estoppel (in one or more of its forms) or on the ground of abuse of court process. I heard this argument before hearing all the evidence in this case and intimated in due course that I would rule against Mr. Anderson and would incorporate my reasons in this judgement, but before doing so there is something which must be said about the evidence given by Mr. Muller before Eichelbaum, J.

As will be recollected, it was the evidence of Mr. Muller, and such evidence was accepted by Eichelbaum, J., that the minutes of the meeting at which it was decided to appoint the Plaintiff as Director of Health, and the minutes of the meeting held after the discussion with the Prime Minister, would together confirm the two-stage process which he had described to the learned judge. This can only have meant that the minutes of the first meeting would have recorded the decision to appoint the Plaintiff, and that the memorandum of 21st October 1977 would have been attached to those minutes, and that the minutes of the next meeting would have recorded the non-confirmation or rescission of the decision in compliance with the request of the Prime Minister. But at the hearing before me, the minutes of the Public Service Commission over the relevant period of time were produced, having been unearthed by the diligence of counsel for the Attorney-General. I regret to say that those minutes do not confirm the testimony of Mr. Muller before Eichelbaum, J.

The question of appointing a Director of Health is referred to in the minutes of a meeting held earlier in 1977 where it is recorded that action on this matter was to be deferred, this being quite a common procedure, as appearing by reference to all the minutes, when something on the agenda was left over until a future time. But that is the last reference in the minutes to the appointment of a Director of Health. There are no minutes recording the decision of 21st October 1977 to appoint the Plaintiff to that position. There are no minutes subsequent to the meeting with the Prime Minister which refer to the matter. The whole subject matter of the action before Eichelbaum, J., is therefore nowhere referred to in any of the minutes of the Public Service Commission. It may be that Mr. Muller was honestly mistaken when he assured Eichelbaum, J., that the steps to which he had referred were recorded in the minutes of the Public Service Commission, but in the result the evidence which he gave on this vital point was clearly incorrect, and it is by no means impossible that had the Public Service Commission minutes been available to Eichelbaum, J., he might have come to a different decision as to whether there had been an actual decision to appoint the Plaintiff. However, this may not have affected His Honour's view as to non-compliance with Regulation 89 of the Public Service Regulations 1953 but I am not in a position to express any opinion on that matter.

Despite what I have just said, it was correctly conceded by Dr. Barton that as a result of the judgement in the mandamus action, the decision that there had been no appointment for the Plaintiff was res judicata as against the Plaintiff in the present proceedings.

I now come back to the submissions of the Attorney-General to the effect that the judgment in the mandamus action has the effect that the Plaintiff is estopped from seeking the relief sought in

prayers numbers 2 and 3 of the amended statement of claim, or alternatively that it is an abuse of the process of the Court for the Plaintiff to seek such relief. The declaration sought in prayer number 2 is that the Plaintiff is entitled to be appointed Director-General of Health and the remedy sought in prayer number 3 is the issue of mandamus against the Public Service Commission. On the estoppel point, Mr. Anderson cited a number of authorities involving the application not only of estoppel but also of issue estoppel and submitted that there was no essential difference between the mandamus action and the relief claimed in this action. In the mandamus action the Plaintiff sought a declaration that he was in fact appointed, whereas in these proceedings he seeks a declaration that he is entitled to be appointed. Further, the point was taken that the second defendants in the present action are the individuals who were at the material time the Chairman and members of the Public Service Commission whereas the Public Service Commission should itself be the correct defendant and in the mandamus action the Attorney-General was sued only on behalf of the Public Service Commission. Consequently, looking at the matter in point of substance, the Public Service Commission was the defendant in both proceedings and a finding in its favour in the mandamus action precludes a slightly different but related finding in the Plaintiff's favour in the present proceedings.

As indicated to counsel at the conclusion of this argument, I take the view that the estoppel point does not assist the Defendants in the present action. In relation to the question of appointment of the Plaintiff, the issue in this action is not the same as the issue in the mandamus action. In the mandamus action a declaration was sought that the Plaintiff had in fact been appointed Director of Health, whereas in the present action the Plaintiff seeks a declaration that he was entitled to be appointed to that position and would have been appointed had it not been for the commission of a tort by the Government and its employees. The result therefore is, as I see it, that even reducing the argument to the narrower element of issue estoppel the defendants' contention must fail.

The other branch of Mr. Anderson's argument was founded upon abuse of legal process. This of course is only stating the estoppel argument in wider and more general form, but even considered as a distinctly separate element of the argument for the Attorney-General, I must hold that having regard to the fact that the mandamus action was issued without prejudice to this action, and that the mandamus action was merely a shorter mode, based upon a distinctly different ground, of achieving the same general result as is sought to be obtained in the present action, it cannot be said to be an abuse of Court process to pursue the present action against the background of the mandamus decision. Broadly speaking, as Mr. Anderson submitted, the result sought to be achieved was the same in the mandamus action as in the present

action. But that consideration does not assist the argument for the Attorney-General. What has happened is that the document of 21st October 1977 upon which the Plaintiff solely relied in the mandamus action has been held to be not available as a foundation for relief to the Plaintiff insofar as the Plaintiff was then contending that he had been appointed to the position. The Plaintiff is now continuing the action previously constituted, on the basis that the document of 21st October 1977 does not have the legal effect for which the Plaintiff had contended in the mandamus action, and in my view the basis of the case for the Plaintiff is materially different from the basis of his claim in the mandamus action. Under these circumstances it cannot in my view be said that by continuing the first action the Plaintiff is in any way abusing the process of the Court, and for the reasons just expressed, the application of the Defendants to strike out the prayers for relief contained as numbers 2 and 3 in the amended statement of claim must fail.

The question whether the Plaintiff was in fact appointed as a matter of law to the position of Director of Health has been determined against the Plaintiff in the mandamus action, and consequently that issue is res judicata as against the Plaintiff, but that is the sole extent of the advantage accruing to the Defendants from the determination of Eichelbaum, J., in the mandamus action.

I now go on to complete the narrative of events as they relate to the Plaintiff's career. In March 1979, being at that time in charge of communicable disease, the Plaintiff applied for appointment to the advertised position of Chief of the Division of Public Health. On 3rd May 1979 the Public Service Commission appointed someone else to that position but on 25th August 1979, following a successful appeal the Plaintiff was appointed Chief of the Division of Public Health. However, after he had brought his proceedings, Dr. Ridings, who was then Director of Health, asserted to the Plaintiff that the bringing of the action amounted to disloyalty towards the Government. The Plaintiff and his wife then went to see the Chairman of the Public Service Commission and asked for leave without pay because of their positions as Plaintiffs in the pending action against the Government. The Chairman said he was relieved to receive this request because he had been asked by the Department to suspend both the Plaintiff and his wife because of the Court case. They were each then given special leave without pay on an indefinite basis and the Public Service Commission could call them back for duty whenever it wished.

The Plaintiff then attempted to start a farming business and he obtained various loans for that purpose. The farming venture was not successful and the Plaintiff sustained substantial losses as will be later described. However, he still kept a watch on his position with the Department. Dr. Ridings resigned as Director-

General of Health before his three-year term was up and the position was then advertised. The Plaintiff then appealed against that appointment and the appeal is still pending and its determination has been deferred pending the outcome of this action.

On 27th March 1984, at a time when the Government had been dismissed from office as a result of fresh elections, the Public Service Commission wrote to the Plaintiff saying that "the Health Department are in dire need of your expertise and services" and the Commission asked whether the Plaintiff would return to work for the Health Department. The Plaintiff acceded to this request and at the time of hearing of this action he is Chief of the Division of Public Health.

I must now turn to the nature of the claim which has been brought against the Western Samoan Government in these proceedings and proceed to assess the evidence in relation to that claim.

The types of relief which the Plaintiff claims in this action are set out as follows in pp.40 and 41 of his Amended Statement of Claim dated 22nd August 1984. The prayer for relief reads as follows:

"1. For a declaration that KEITH WOODHAM RIDINGS was not validly appointed to the position of Director-General of Health;

2. For a declaration that the Plaintiff is entitled to be appointed Director of Health (or as Director-General of Health) in accordance with:

   (a) the recommendation to that effect by the selection panel referred to in para. 11 hereof; and

   (b) the decision of the Public Service Commission referred to in para. 11A hereof;

3. For the issue of a writ of mandamus directed to the Public Service Commission to appoint the Plaintiff to the position of Director of Health (or as Director-General of Health) as from 30th September 1977 or as from such other date as this Honourable Court may direct;

3A For a declaration that in advising the Head of State to appoint the Commission of Inquiry Cabinet acted in abuse of its discretionary power under the Commissions of Inquiry Act 1964;

3B For a declaration that the proceedings of the Commission of Inquiry were vitiated by breaches of the rules of natural justice;

4. For an order quashing or setting aside the purported determinations and recommendations of the Commission of Inquiry referred to in para. 20 hereof;

5. For an order quashing the action of the Public Service Commission described in para. 22 hereof;

6. For a declaration that the plaintiff has not been validly removed from the post of Deputy Director of Health and is entitled to receive the salary and emoluments attributable to that post (together with interest thereon) from 16th October 1978 (giving credit for salary received by the Plaintiff in respect of other posts to which he has been purportedly appointed since that date);

7. For general (including exemplary) damages (other than against the fifth Defendants) amounting to 200,000 tala;

8. For the costs of and incidental to this action; and

9. For such further or other relief as may be just."

The factual background justifying this series of claims on the part of the Plaintiff must now be referred to.

The basic facts upon which the Plaintiff relies are that he would have been appointed Director of Health as from 30th September 1977 had not the Prime Minister and Cabinet intervened in the procedure of the Public Service Commission, and that this intervention was unlawful. The evidence and the documents which surround this allegation are voluminous and detailed but it is sufficient, in my opinion, to isolate in brief terms the facts upon which the Plaintiff relies.

By the Constitution of Western Samoa the Public Service Commission is established as a separate instrument of State. This can be seen by referring to Article 84. It is clear, as submitted by counsel for the Plaintiff, that the intention of Article 87 is that the Public Service Commission will discharge its function independently of Government control. However, the Constitutional policy thus referred to is expressed to be subject to the provisions of clause 3 Article 87 and this refers to the power of the legislature to designate "as a special post" any post of head of department. Once such a post has been designated in that manner, the Public Service Commission ceases to have responsibility in relation to it. The statutory responsibility

in this respect is vested in the Head of State, acting on the advice of Cabinet after Cabinet has consulted the Public Service Commission.

But the position of Director of Health is a post specified by Act of Parliament and is not a "special post" for the purposes of Article 87(3) of the Constitution. For this reason, it is beyond doubt that the position of Director of Health remains within the ordinary range of posts within the Public Service for which the Public Service Commission alone has responsibility.

There is a provision in Article 87 which is frequently to be found in statutes of similar import in countries where there is no constitution. By sub-clause (2) of Article 87 it is provided that the Public Service Commission shall have regard to "the general policy of Cabinet relating to the Public Service, and shall give effect to any decision of Cabinet defining that policy conveyed to the Commission in writing by the Prime Minister". It was suggested in this case from time to time that various suggestions or directions by the Prime Minister or Cabinet made to the Public Service Commission might fall within Article 87(2). I am satisfied that this is not so. I have dealt with this aspect of general cabinet policy already, and although it might have been within the letter and the spirit of Article 87(2) for Cabinet to direct that all heads of Department should be local born Samoans, or words to the effect, this could not possibly be so in my opinion, where a direction related to the appointment of a person to a particular position in the Government service. I am therefore satisfied that none of the suggestions or directions made by Cabinet to the Public Service Commission in relation to the post of Director of Health was protected by Article 87(2).

It is at this point that the claim of the Plaintiff in these proceedings is brought into focus. His case is, stated in brief form, that the intervention by the Prime Minister and Cabinet in relation to decisions of the Public Service Commission was unlawful as far as this case is concerned, not only because such interventions were in breach of the Constitution but also for an entirely different reason, namely, that the conduct of the Prime Minister and Cabinet, and of the Minister of Health and of the fourth defendant, all amounted individually to the tort of abuse of public office. I propose to deal in the first place with the allegations of tort.

I first of all consider the position of the Hon. Tupuola Efi, who was Prime Minister as from February 1976. The evidence satisfies me beyond any doubt that it was the settled wish of the Prime Minister to see to it that any future Director of Health be a locally born Samoan. It might have been necessary to recruit an expatriate as Director of Health for a limited period of time, having regard to the special situation which then existed within the Department of Health, but the aim of the Prime Minister

certainly was that very shortly the Director of Health and all his successors in the future would be locally born Samoan people. To my mind, the evidence in support of this finding is clear. On 13th April 1977 the Chairman of the Public Service Commission submitted to Cabinet that an expatriate Director of Health be advertised for. On 21st April 1977 the Cabinet Secretary advised that the Prime Minister did not want an expatriate. It was said that in the Prime Minister's view, the problems in the department were not to be put to one side "to fester" through the appointment of an outsider. Then on 24th August 1977 the Minister of Health wrote a Cabinet minute asking Cabinet to approve as Director of Health a "local born Samoan doctor" with appropriate qualifications coupled with a recommendation that such a person also hold a matai title. It is to be recalled that the Plaintiff was a Samoan citizen and the effect of the Cabinet minute was to evade that aspect of the Plaintiff's status by insisting not only upon a locally born Samoan citizen, but one holding a matai title.

On 25th August 1977 the Public Service Official Circular advertised the vacant position of Director of Health and this advertisement was in fact drafted by the Plaintiff. It contained no reference to a candidate being a locally born Samoan, and it placed considerable emphasis upon experience and qualifications in the public health field. The Plaintiff then applied, along with others, for the position so advertised. But then on 31st August 1977 the Acting Prime Minister wrote to the Chairman of the Public Service Commission asking that any appointment be delayed indefinitely until the return from overseas of the Minister of Health. The next step was that on 14th September 1977 Cabinet decided that the question of appointment of a Director of Health could be resolved by readvertising the position in accordance with a notice which had been prepared by the Attorney-General. On 15th September 1977 the position was readvertised, and the previous advertisement was cancelled. This new advertisement was a description which was very much against the Plaintiff. The Plaintiff then reapplied for the post of Director of Health in terms of the new advertisement.

I must pause at this stage to say that this sequence of events certainly appears to be a striking example of the determination of the Prime Minister and Cabinet to influence the Public Service Commission in the discharge of its statutory duties. In the ordinary course, the Commission would have followed standard procedure in dealing with applications in response to the first advertisement. But the Cabinet immediately involved itself. There were discussions between the Public Service Commission and the Attorney-General and there can be no doubt, on the evidence, that the Prime Minister was party to the discussions. There is also no doubt, on the evidence, that the Public Service Commission yielded to the Government in this respect and failed to act independently of the Government in terms of its

constitutional duty. To use the phraseology adopted by the official Cabinet Minute, the matter was to be "satisfactorily settled" in terms of the wishes of the Prime Minister and the Cabinet. Although the Acting Prime Minister is recorded as disclaiming any intention to encroach upon the functions of the Public Service Commission in this particular respect, that disclaimer can carry no force in view of the undisputed sequence of events.

And now I come to the fact which is crucial in the dispute involved in these proceedings. As already mentioned, the Public Service Commission proceeded to enter upon its normal process of selecting the right person for appointment to a leading government post. It appointed the selection panel which after interviewing all applicants, including the Plaintiff, decided unanimously on 3rd October 1977 that the Plaintiff was the person best qualified for appointment as Director of Health. The Public Service Commission then took the advice of the panel into consideration, reviewed the merits of all candidates independently, and then unanimously decided to adopt the recommendation of the panel and reached a firm decision to appoint the Plaintiff as Director of Health. That decision is a matter of record, and I have referred already to the sequence of events following that decision. The Chairman of the Public Service Commission interviewed the Prime Minister and handed him the minute of the Commission [of Inquiry] in which the decision referred to was recorded. It is beyond question that the Prime Minister immediately intervened to stop the appointment being formalised.

The Chairman of the Public Service Commission explained in his evidence to the Commission of Inquiry and to the Supreme Court in December 1983 that he had only called upon the Prime Minister to inform him of the Public Service Commission decision as a matter of courtesy. However, I am unable to accept that explanation. I think it clear beyond doubt that this visit by the Chairman of the Public Service Commission, and in particular the response of the Commission to the Prime Minister's reaction, demonstrated its subservience to the wishes of the Government in connection with the appointment under review. The Prime Minister requested that the appointment be deferred. The Chairman agreed. The reason given by the Prime Minister was that he intended to appoint a Commission of Inquiry to look into the whole structure of the Department of Health, but I only direct attention to the point that the possibility of convening a Commission of Inquiry had been under consideration by the Government for a very long time. The fact that a decision to appoint a Commission was made as soon as the Prime Minister discovered the decision of the Public Service Commission is only capable, in my view, of one inference. The Commission of Inquiry was to be set up so as to defer indefinitely the appointment of the Plaintiff. The coincidence in time is inescapable.

I have referred already to the files of the Public Service Commission and in particular to the record of its minutes. The minutes are silent as to the meeting with the Prime Minister and to what happened thereafter. Not only did the Public Service Commission agree to defer its appointment of the Plaintiff indefinitely, but it did so in circumstances which it was careful not to record. I can only conclude that the Chairman and the members of the Public Service Commission were well aware that they had been impeded in the execution of one of their constitutional functions in a manner which was in breach of the constitution. I can see no other reason for the omission from the detailed minutes of the Commission of this remarkable step on the part of the Commission. The only permissible inference is that the Public Service Commission had abdicated its independence in the matter and had yielded to the decision of the Prime Minister and his Cabinet to stop by any means at its disposal the appointment of the Plaintiff.

By way of postscript to the findings just made, I cannot overlook the evidence of the Plaintiff, which I accept, as to the various discussions which he had from time to time with the Chairman of the Public Service Commission. It is clear, in my opinion, that the Chairman admitted to the Plaintiff that he was under an apprehension that unless he complied with the wishes of the Cabinet with regard to the appointment of someone to the position of Director of Health he would suffer retribution at the hands of the Government. There were times, so it appeared, when the Chairman was in sympathy with the Plaintiff, and I have not forgotten the fact that in the end he and his colleagues unanimously decided to appoint the Plaintiff to the position of Director. But, as I have said, this decision was followed by an immediate attendance by the Chairman upon the Prime Minister with the obvious intention of justifying or explaining away the decision which the Commission had made. And then, when the Prime Minister stated that the appointment was not to be made, the Chairman accepted that direction from the Government. I only add these particulars to demonstrate the awareness of the Chairman that he felt himself obliged to accept the dictates of Cabinet in carrying out his statutory duties. No one could envy the Chairman his position, as his livelihood appeared to depend in his own opinion upon whether he accepted Government direction in the carrying out of his duties. But the evidence of the Plaintiff as to his various conversations with the Chairman has the effect of confirming the view which is implicit from the documents that the Government was intent upon controlling the functions of the Commission in this particular case and that the Chairman assented to that usurpation of the powers of the Public Service Commission.

Such is the narrative of events insofar as they affected the Honourable Tupuola Efi, who was Prime Minister as from February 1976. That narrative, which is based upon the evidence and the

documents at the hearing, clearly establishes the fact that it was the settled wish of the Prime Minister to see to it that any future Director of Health be a locally born Samoan. It might have been necessary to recruit an expatriate as Director of Health for a limited period of time, having regard to the special situation which then existed within the Department of Health, but the aim of the Prime Minister certainly was that very shortly the Director of Health and all his successors would be locally born Samoan people. I have already referred to the letter from the Cabinet Secretary dated 21st April 1977 and the Cabinet Minute dated 24th August 1977 prepared by the Minister of Health, where the Minister asked Cabinet to approve as director a "locally born Samoan doctor" coupled with a recommendation that such a person should also hold a matai title. I think it is a proper inference from all the evidence that the suggestion that the Director hold a matai title arose from the realisation that the Plaintiff was a naturalised Samoan citizen and that this is also the explanation for the phrase "locally born".

I have given careful consideration to the submissions of Mr. Anderson in respect of the case advanced by the Plaintiff against the Prime Minister and the Cabinet. It was submitted that the letter of 21st April 1977 did not purport to express the wishes of Cabinet, but referred only to the wishes of the Prime Minister. It was submitted that the letter did not "direct" the Public Service Commission in any way, but merely expressed a viewpoint and that the letter did not intrude in any manner upon the independence of the Public Service Commission.

Substantially the same arguments were advanced by Mr. Anderson in respect of the letter of 24th August 1977 from the Minister of Health to Cabinet in which his preference for a locally born doctor with a matai title was emphasised. It was pointed out by Mr. Anderson that Cabinet did not support this recommendation. Then, in relation to the letter of 31st August 1977, written by the Acting Prime Minister to the Chairman of the Public Service Commission, it was submitted by Mr. Anderson that the reference in that letter to the strongly-held views of the Minister of Health did not amount to an unlawful and unconstitutional action by Cabinet, and it was further contended that it did not purport to direct the Public Service Commission to comply with the wishes of the Minister. As Mr. Anderson correctly pointed out, the Acting Prime Minister only requested the Public Service Commission to delay an appointment until the Minister of Health was able to express his views.

I am not persuaded by any of these submissions that there was not constant pressure being exerted, not only by the Prime Minister, but also by his Cabinet (which included the Acting Prime Minister and the Minister of Health), against the Public Service Commission to avoid appointing as Director of Health anyone who was not a locally born Samoan. I also consider that the

inference is clear that a single person was being aimed at by this Government pressure, and that this person was the Plaintiff. He was the only person under consideration for this post who was a Samoan citizen but who was not a locally born Samoan. No matter how these approaches to the Public Service Commission were expressed, I can have no doubt, looking at the whole of the history of the matter, that they did in fact amount to pressure being applied on the Public Service Commission, and if that pressure was aimed at restricting the appointment of the Minister of Health to a person who was a Samoan by birth, then it was not the type of general direction authorised by the Constitution but was a specific attempt to limit the appointment of a particular office to a locally born Samoan and was consequently in breach of Article 15(1) of the Constitution by which it is provided that "all persons are equal under the law and entitled to equal protection under the law". It was consequently unlawful for the Prime Minister or Cabinet or the Minister of Health to specify that the holder of the post of Director of Health should as a matter of general policy be a locally born Samoan, and it was also unlawful to impose the further specification that such a person should hold a matai title. What I have just said also applied to the Public Service Commission and to the Commission of Inquiry. It was not permissible for either of these organisations to specify or recommend the type of discriminatory appointment to which I have referred.

So far I have dealt with the position of the Prime Minister and of the Cabinet in relation to the activities of the Public Service Commission and in relation to the Government attitude in respect of the Plaintiff. I now turn to the particular position of the third defendant, the Minister of Health. I have covered already the history of events so far as the Minister was concerned. I have given careful consideration to the submissions of counsel for the Minister, together with the submissions of Mr. Anderson, which relate to the part played by the Minister in these events. The general effect of those submissions was that the Minister was the Political Head of the Department and was entitled to convey to the Prime Minister and to Cabinet his own opinion as to the right person for the appointment as Director of Health and that he did nothing except carry out the ordinary role of the political Head of Department where the question of appointing a permanent head was under consideration. However, the evidence does not allow me to take that benevolent view of the Minister's conduct. In the first place, he must have been party to the Cabinet decisions which were made in this matter. He was, after all, the political head of the Department of Health. But then there are certain recorded incidents in which he was involved and I am bound to take these incidents into consideration. On 19th September 1977 he held a meeting in his office in which he attacked the Plaintiff in very hostile terms. The attack was based upon the circular of that date which the Plaintiff had arranged to be distributed to all Health Department

staff, and I can have no doubt that the attack made upon the Plaintiff by the Minister in respect of the circular was entirely without justification. This incident was followed by a letter of the same day sent to the Plaintiff, with copies to the Prime Minister, Minister for the Public Service Commission, Chairman of the Public Service Commission, and the Acting Minister of Health, in which the Minister made strongly critical observations concerning the Plaintiff which again, on any view of the evidence, were without any proper justification. Then there is the sequel to the findings of the Commission of Inquiry when the special committee set up to examine the recommendations of the Commission of Inquiry formulated its report to the Cabinet. On document 319 produced as part of the evidence for the Plaintiff in this case there is recorded the decision of the Cabinet Committee in relation to the recommendations of the Commission of Inquiry, and there are some handwritten remarks inserted in the margin which have clearly been proved to be written by the Minister of Health. Those remarks make it patently clear that the intent of the Minister was to attempt if possible to treat the Plaintiff so harshly as to induce the Plaintiff to resign. To some extent it might be said that the Minister was entitled to take into account the recommendations of the Commission of Inquiry, but the tone of the handwritten commentary, in the writing of the Minister, is sufficient in itself to establish the proposition which I have just referred to. So far as the Minister was concerned, the recommendations of the Commission of Inquiry seemed to be the last act in the saga of governmental attitudes and conduct towards the Plaintiff, and I am afraid that the Minister's handwritten note is too revealing to support any other interpretation than the one which I have just made.

Finally, it is I think a necessary inference that the Minister of Health was at all times party to the various acts committed by the fourth Defendant as Acting Director of Health to the detriment of the Plaintiff. It is also clear, I think, that the Minister was necessarily a party to the various Cabinet decisions in this matter. The events to which I have just referred demonstrate, in my view, an attitude of direct hostility against the Plaintiff which never wavered. The third Defendant has been shown, in my opinion, to have been actuated throughout by ill-will towards the Plaintiff.

I now turn to the allegations of malice against the fourth Defendant which are set out in paras. 16(e)-(o) inclusive, with the exception of para. 16(g) in which the allegation therein contained was abandoned by the Plaintiff during the hearing.

These allegations against the fourth Defendant are made principally in respect of those periods of time when he was Acting Director of Health, and they extend from March 1977 to August 1979.

The allegations against the fourth Defendant amount on the pleadings to 17 specific matters. Such allegations, enlarged and clarified by the production of particulars by the Plaintiff, amount in my opinion to a series of false accusations or unwarranted criticisms of the Plaintiff. In the majority of cases, the allegations are all a matter of record. These allegations of malice were met in every case by applications for particulars, and such applications, which I might describe as being skilfully and meticulously proved, were responded to in terms which disclosed in detail the substance of the allegations. As in the case of the other Defendants, the statement of defence filed on behalf of the fourth Defendant not only denied the allegations of malice, but put the Plaintiff to proof thereof, and the result was that the Plaintiff gave in the course of his evidence a narrative of the prolonged sequence of events which gave rise to his claim. A large proportion of the Plaintiff's detailed evidence in this respect was devoted to clarifying his allegations of malice against the fourth Defendant, and in addition to his oral testimony he referred to the file of agreed documents and also to several documents which were not in the agreed file, but which were admitted in evidence by the Defendants.

The Plaintiff was then cross-examined at considerable length, principally by counsel for the Attorney-General, but additionally by counsel for the third and fourth Defendants. The tactical basis of cross-examination in relation to the case against the fourth Defendant in particular became clear as it proceeded. Each allegation of malice was explored as if it stood alone, the object being to justify, or at the very least to suggest an explanation which could justify, the specific conduct of the fourth Defendant of which the Plaintiff complained.

Although this approach was adopted in the case of the allegations against all Defendants, it had particular relevance in relation to the fourth Defendant by reason of the large number of allegations which had been made against him. Broadly speaking, in relation to a single incident, any letter, or direction, or other conduct of the fourth Defendant was suggested to be only a reasonable and bona fide response to a situation or event which the fourth Defendant honestly believed to be worthy of official attention or censure.

That general submission was repeated by Mr. Anderson on behalf of the Attorney-General during the course of his submissions in reply where he analysed in accurate detail every aspect of the fourth defendant's conduct in respect of each allegation and sought by this process to demonstrate a reasonable probability that the fourth Defendant was only acting in the course of his duty as an officer within the Department when he took the measures against the Plaintiff which were the subject of complaint.

It is at this point relevant to draw attention to the response of the Plaintiff to these various instances of conduct on the part of the fourth Defendant which clearly evinced hostility towards the Plaintiff. The Plaintiff was very careful, as I interpret the evidence, to see to it that his own defence or explanation for accusations made against him by the fourth Defendant was, wherever possible, placed on record, and there can be no doubt that if the fourth Defendant, or for that matter the Minister, believed that they could subjugate the Plaintiff, they were under a mistaken impression. The Plaintiff struck me in the witness box as being highly intelligent, extremely fluent, and a man capable of maintaining a steady defence in this departmental strife. His recollection of events as given in evidence was clear and detailed to a remarkable degree, and despite the very long period of time which he spent in the witness box and the sustained cross-examination by counsel for the Attorney-General, and by counsel for the third and fourth Defendants, his credibility on every issue was, in my opinion, in no way impaired, and I accept his evidence on any disputed point without reservation.

I have listened to the examination in chief of the Plaintiff and to his cross-examination by counsel for the Defendants, and I have made a careful study of the relevant documentation. Despite the explanations which have been advanced on behalf of the defendants for the series of allegations and criticisms to which I have referred, I am satisfied that in each and every case the 17 allegations of malice against the fourth Defendant have been proved. It is a case, in my opinion, where each of the allegations made by the Plaintiff has been shown to be either deliberately untrue or, unfounded in the sense of not being based upon any reasonable interpretation of the conduct of the Plaintiff. If unfounded allegations of this kind proceed from inadequate investigation or an absence to make any due inquiry, then of course, they must in the ordinary sense be treated as evidence of malicious acts on the part of the fourth Defendant. I am using the word "malicious" in this context as embracing not only its legal meaning but its popular meaning. I think the motivation of the fourth Defendant in making these untrue or unfounded allegations against the Plaintiff is clear. The object was to build into the Departmental files a series of documented indictments of the Plaintiff relating to the manner in which he carried out his work. I do not doubt that in the result an impartial observer, not having heard the explanation of the Plaintiff in regard to all these matters, would treat this documentation as being very impressive. As I have said, it was constructed by a doctor who over most of the period of time was Acting Director of Health and who wanted to become Director of Health, and it might reasonably have been believed, in the

absence of any explanation from the Plaintiff, to have amounted to a formidable case against the suitability and the ability of the Plaintiff to carry out any senior executive position in the Department.

In assessing these allegations made by the Plaintiff, and in balancing the various factors advanced on behalf of the fourth Defendant in cross-examination tending to mitigate the severity of his conduct, I think there are three factors which I am required to notice:

(a) I have to bear in mind that it is only the documented material in this context which could be relied upon by the Plaintiff, because he would have no knowledge of other hostile and damaging comments about his work which might verbally have been made to people in the Department, and in particular to the Minister, by the fourth Defendant. I am not proposing to place undue weight upon this consideration. The fourth Defendant is entitled to contend, through his counsel and through counsel for the Attorney-General, that he is to be judged only upon the revealed commentaries which he made from time to time to the detriment of the Plaintiff. However, it would be quite unreal, and contrary to ordinary experience of the administration of Government Departments, to disregard the certainty that these documented observations by the fourth Defendant were reinforced from time to time by a concurrent verbal campaign conducted by him against the Plaintiff and that these verbal commentaries, as I have said, would have been directed not only towards the staff of the Department but towards its Parliamentary head.

(b) There can be no doubt in my opinion that the campaign engaged upon by the fourth Defendant against the Plaintiff was aligned with the recorded hostility of the Minister of Health towards the Plaintiff. It is perhaps only necessary here to refer to the allegation contained in para. 16(m) of the Amended Statement of Claim. This sub-paragraph alleges collaboration by the fourth Defendant with the Minister of Health in obstructing the Plaintiff in the carrying out of the C.H.P. exercise in which the World Health Organisation was interested, and in which the Department had the backing and support of the World Health Organisation. Upon a review of the detailed evidence which was given by the Plaintiff and upon a study of all available documents regarding this matter, there can be no doubt that this collaboration did exist in this particular case. So that although it is not necessary for the Plaintiff to show any kind of conspiracy between the Minister of Health and the fourth Defendant in relation to the campaign which each of them in his different ways conducted against the Plaintiff it is a legitimate inference from this example alone that the fourth Defendant

was acting in accordance with the open campaign being conducted by the Minister against the Plaintiff. The point I am making here is that the fourth Defendant should not be considered as waging some form of purely personal vendetta against the Plaintiff, with his conduct being assessed in that light alone. It is quite one thing for a departmental official to maintain from time to time a series of criticisms against one of his inferior officers not upon any reasonable basis but upon the footing of personal dislike. This is a feature of Government Departments and of large corporations which from time to time is revealed when litigation takes place. So that although there was without much doubt some degree of personal hostility by the fourth Defendant against the Plaintiff, his conduct is not explicable on that ground alone, and can only be related to his own ambition, approved by the Minister, to become Director of Health.

(c) What I am now about to say is very much in line with comments just made. But I think it calls for a particular expression of opinion. In assessing the motivation of the fourth Defendant I am necessarily restricted by reason of the fact that the fourth Defendant elected not to testify. If his conduct in making these 17 untrue or unwarranted criticisms and allegations is to be explained upon the basis of personal animosity alone, then what was the source of that state of mind? There has been nothing in the evidence, as I understand it, to suggest that there was ever any prior incident or conduct on the part of the Plaintiff which could have inspired this long process of denigration of the Plaintiff indulged in by the fourth Defendant over this period of nearly two and a half years. It is not a case, as is commonly found, where one can point to an initial deep-seated conflict of personality which gives rise to a subsequent campaign of this kind. So the ultimate question in this context must be, was it the case that this was mere personal animosity of a kind which, as I have said is not uncommonly found in relations between various staff members and executive offices of departments and corporations, or was it in reality a manifestation by the fourth Defendant of his desire to act in accordance with what he knew was the Cabinet view, and the Minister's view, that by any means available the Plaintiff had to be prevented from obtaining the top executive post within the Department?

In my opinion, whilst not overlooking the possibility that there may have been some early personality clash which has not distinctly been revealed, I must come to the conclusion that these allegations by the Plaintiff against the fourth Defendant, which I have held to be proved, were indeed part of a campaign by the Government and by the Minister to destroy the Plaintiff's chance of being appointed Director of Health. The length of time

involved coupled with the sheer intensity of the fourth Defendant's campaign against the Plaintiff cannot lead in my opinion to any other result.

Before considering the legal effect of the findings just made with regard to the conduct of those particular defendants, I must look at the allegations made by the Plaintiff in respect of the Commission of Inquiry.

In the first place there was an attack by the Plaintiff upon the validity of the conduct and procedure of the Commission of Inquiry. I heard very considerable legal argument on this matter. A great deal of time was spent by counsel in examining the exact scope and ambit of the powers of such a Commission set up under the Commissions of Inquiry Act, in particular with reference to the status of the opinions which such a Commission might express in its report. But to my mind the significant dispute in this area was in relation to one question only, and that was whether the report of a Commission, insofar as it affected the Plaintiff and his wife, was legally invalid because the requirements of natural justice had not been complied with by the Commission. In the present action that question is of course confined to the position of the Plaintiff himself.

In 1978 when this Commission began its hearings it was entitled, as the law then stood, to hear evidence in camera or to receive statements of which the Plaintiff had no knowledge and to act upon that secret evidence in whatever way it thought fit. It may be, as was suggested in one of the early New Zealand cases, that there has always been an overriding duty on such a Commission to give any party affected by secret submissions an opportunity to be heard as to the content of those submissions. I think that this must be so having regard to the case law, but only to the extent that the person against whom findings are made or opinions expressed in the report is to be made generally aware of allegations against him.

The terms of the Warrant of Appointment in the present case were specific in that the Commission was authorised to hear evidence other than in open hearing and that it was obliged not to divulge the details of that evidence. However, despite this process of hearing considerable submissions in private, one which has been adopted over and over again in recent years by Royal Commissions of Inquiry in Australia, the law in recent times outside Australia has undergone a change. I believe that this Commission of Inquiry was required to indicate to the Plaintiff the nature of each of the allegations which had been made against him other than in open session, but there is no doubt that this procedure was not adopted.

I am of the opinion that the Commission made an initial mistake in not giving the Plaintiff and his wife the right to be parties to the Inquiry. They were told that this was not a case where scapegoats were to be found and that it would be quite sufficient if the Plaintiff sat at the Inquiry, listened to what was said and gave such rebutting evidence as he might think was advisable. I need hardly say that this was a misrepresentation of the powers of the Commission. One of the express terms of reference of the Commission was to ascertain whether there had been misconduct within the Department by any of the personnel.

Having regard to the course of proceedings, and to what I must assume to have been the knowledge of the Commission as to the scope of its Inquiry, it was I think essential that the Plaintiff and his wife be given this status as otherwise they would be deprived of the full opportunity to defend themselves against any allegations which might be made. All that was allowed by the Commission to both the Plaintiff and his wife was to allow them to sit with their counsel and to listen to what went on. The Commission did not allow production of evidence from other persons on the part of the Plaintiff and did not allow cross-examination of witnesses. As a result of the secret evidence, the Plaintiff and his wife were each prevented from effectually rebutting many of the prejudicial allegations made against them in hearings in camera or in the very large number of written statements lodged with the Commission and which neither the Plaintiff nor his wife ever saw.

One of points made against the Plaintiff at the Inquiry and of which he was not aware was contained in a letter sent by the Secretary to the Minister of Health dated 5th February 1976 and the letter had been sent to the third Defendant. This letter was not read at the Inquiry. The letter alleged that the Plaintiff had a "poor working relationship" with other people in the Department and this evidence, the Plaintiff says, could have been rebutted by a large number of persons.

Another significant piece of evidence against the Plaintiff, and it was accepted by the Commission, was a statement by Dr. Schuster which referred to "a foreigner muscling in" and asserting that the Plaintiff was "a dubious character". This evidence was given in private. The Plaintiff did not find out until 1982 who the maker of the statement was.

I cite these two examples so as to show the procedure adopted by the Commission and the manner in which the Plaintiff was affected thereby.

It was not until discovery was obtained in the present proceedings that the Plaintiff and his wife found out that there were no less than 44 written statements lodged with the

Commission which they did not see. It is against that background that I must look at what the Commission eventually decided with regard to the Plaintiff and his wife.

In its report the Commission recommended certain administrative readjustments within the Health Department and I am not concerned with those in the present case except to say that although they were given effect in legislation subsequently passed, the legislation has never yet come into force. What the Commission essentially did was to make specific recommendations with regard to the position of Director of Health and to the position of Superintendent of Nursing. What follows is a summary of the opinions of the Commission on these latter points.

1. It was decided that the Director of Health should be a local born Samoan with a matai title. It will be observed that this had always been the wish of the Prime Minister and Cabinet.

2. It was decided that the fourth defendant was the most suitable person within the knowledge of the Commission to become Director of Health, or Director-General of Health in terms of the new title decided upon by the Commission. It was suggested that he should undergo a period of apprenticeship under a new expatriate director and subject to the ultimate decision of the Public Service Commission, which the Commission acknowledged had the final say, it was nevertheless made perfectly clear by the Commission that the fourth Defendant was the only man for the job. It will be noted that this recommendation was totally at variance with the careful and considered decisions made by the Public Service Commission having read the report of the specialist panel whereby the Public Service Commission had preferred the Plaintiff to all other applicants including the fourth Defendant.

3. The Commission went out of its way to make it clear that in its opinion the Plaintiff was quite unsuited for the position of Director of Health, not only because he did not have a matai title, but because of an alleged deficiency on his part in the area of staff relations.

4. The Commission quoted from evidence given in secret to the effect that the Plaintiff was a "foreigner muscling in" on the local situation and so on, and that this was being done for his own material advantage. I pause only to say that this finding or opinion was made in context of merely referring to an opinion which had been expressed, but the general tenor of the Commission's view on that point was clearly that this criticism was right. This particular criticism was on any view of the matter quite unfounded. The salary attached to the position of Director of Health

was probably one-tenth of the salary which the Plaintiff could have commanded in the exercise of his professional expertise in Hawaii, for example. The simple fact of the matter is that the Plaintiff had decided to make his life in Western Samoa because he wanted to serve the community in that country and he had indeed gone to the length of becoming a Samoan citizen.

5. The Commission decided that the post of Deputy Director of Health be abolished. This is a decision which it is difficult to understand. It is of course standard practice for a permanent head of a department to have the assistance of someone nominated as either Assistant or Deputy to the post which he occupies, so that when he is away or indisposed or otherwise not available then there is someone who automatically takes his place. As a matter of ordinary public knowledge the constitution of a Department of State like this would almost always provide for a deputy or assistant to a permanent head, and I can see nothing to warrant the suggestion that this post of Deputy Director, specifically created by Cabinet direction some years before, should be abolished.

6. As a result of the decision to abolish the post of Deputy Director, the Plaintiff was then in the opinion of the Commission to be relegated to a subordinate position within the Department but, so it was hoped, with no diminution in his salary.

7. Finally, the Commission recommended that the Plaintiff's wife be dismissed from the position of Superintendent of Nursing and was to be transferred to a new post which in fact did not exist at that time. I shall have to deal with this in connection with the different claim advanced by the Plaintiff's wife, but for present purposes the recommendation of the Commission illustrates its decision to advise the Government that the Plaintiff and his wife both be dismissed from the positions which they then held within the Department.

It is not necessary to appraise the extent to which the Plaintiff had the opportunity to answer such of the above findings or recommendations which involved his own position. In regard to the recommendation that the post of Deputy Director be abolished, it is clear from the transcript of the Plaintiff's oral evidence before the Commission of Inquiry that his views as to the abolition of the post were not sought. The fourth Defendant was asked this question but the Plaintiff himself was not consulted. Nor was the Plaintiff given the chance to make comment on the passage in the fourth Defendant's written submission (which he had not seen) that the role of the Deputy Director in the administration of the Department "is very small". There is no

doubt that by reason of his past experience he could have effectively answered that criticism in a sense which would have destroyed the opinion of the fourth Defendant.

There is the recommendation of the Commission that the Plaintiff should be demoted to be head of the section dealing with communicable diseases. This suggestion was never put to the Plaintiff and it is quite clear from the evidence which he gave to me that he did hold and still holds very strong views on this matter.

But the basic flaw in the proceedings of the Commission of Inquiry, as I see it, was that the Plaintiff was given no opportunity to meet the various arguments which had been addressed to the Commission against his supposed suitability for appointment as Director of Health. He was not able to answer the criticisms of his personality or ability made by the Chairman of the Public Service Commission, or by Mr. Atoa, or by Dr. Sila, simply because he was not made aware of those criticisms. As Dr. Barton says, Mr. Muller's evidence was given in camera, the particular criticism in Mr. Atoa's evidence was made in his written submission (which was not disclosed) and the opinion of Dr. Sila was one of the 44 written submissions which were not disclosed at the hearing.

In other words, these were substantial omissions in procedure so far as the Plaintiff was concerned. To put the matter broadly, his career [was] in the Department, which had reached its consummation by the decision (unknown to him) of the Public Service Commission to appoint him Director of Health, was in effect destroyed by the findings of the Commission based on material which was not disclosed to the Plaintiff.

In view of the law as now expressed in the cases Royal Commission on Thomas Case [1982] 1 NZLR 252 and In re Erebus Royal Commission [1983] NZLR 662 (PC) there can be no doubt that this Commission of Inquiry failed to comply with the law. What it did, in effect, was to hear evidence which the Plaintiff never heard and to use that evidence as part of its condemnation of the Plaintiff in its report. I repeat that the Commissioners in the present case acted throughout in 1978 in accord with what the law was then considered to be, or substantially so, but by reason of the Thomas and Erebus decisions, which were cases decided in 1982 and 1983, the acts of the Commission of Inquiry in not making the Plaintiff aware of the allegations made in secret testimony is fatal to the validity of its ultimate conclusions insofar as the Plaintiff was concerned.

I hope it will not be thought that I have overlooked the careful submissions of Mr. Anderson on behalf of the Attorney-General to the effect that there was no "determination" in recommendations by [to] the Commission of Inquiry which could legally have

affected the Plaintiff's career in any way. I think that this submission presupposes that there would need to be some strictly legal effect flowing from the Commission of Inquiry Report which had damaged the Plaintiff. I do not agree with that view of the matter. The fact is that the Government first of all set up the Committee to examine the recommendations, then received that Committee's report, and then proceeded to accede in full to the recommendations of the Committee insofar as they affected not only the Plaintiff but his wife. Certainly the Government was under no obligation to comply with the views of the Commission which were essentially advanced by way of recommendation in terms of the authority vested in the Commission. On the other hand, by reason of the invalidity of the procedure of the Commission of Inquiry, it is certainly not possible for the Government in these proceedings to place any reliance upon the Committee's recommendations as justifying the action taken against the Plaintiff and his wife.

It is part of the Plaintiff's case that the group of persons acting as the Commission of Inquiry was actuated by malice against the Plaintiff in the formulation of its recommendations to the Government. I am reluctant in the extreme to accede to such a submission, having regard to the character and standing of the persons who comprised the Commission. However, for reasons which I have just been explaining, I think the objective onlooker, appraised of all the facts and circumstances, might reasonably suspect that the principal object of the Commission was to drive the Plaintiff and also his wife from their positions within the Health department. So far as I am concerned, not one finding of the Commission relating adversely to the Plaintiff and his wife can be justified in the light of the protracted evidence and voluminous documentation produced before me. But I am not prepared to find malice against the fifth Defendants. I would only hold that they acted unlawfully, for the reasons which I have given.

I now return to the allegations of malice made against the Prime Minister, the Cabinet, the third Defendant, and the fourth Defendant. I must look at those conclusions and see what they amount to in terms of liability in tort against the Plaintiff. I now proceed to deal with the case against each of those Defendants founded upon the alleged commission of the tort of misfeasance in public office.

Although this involves a degree of repetition, I shall summarise the approach of the Defendants to the allegations of malice which were advanced. Each allegation was placed in isolation, and then the validity of the Plaintiff's contention was tested by response to the known facts involved in the incident under review. Did the inference sought to be sustained by the Plaintiff really flow from an examination of his oral evidence and from related documents? With regard to a single incident, was the letter or

direction or other conduct of the Defendant not a reasonable and bona fide response to a situation or event which the Defendant may honestly have believed worthy of official attention or censure?

But the answer of the Plaintiff was, reinforced and amplified by the submissions of his counsel Dr. Barton, that it was the totality and continuity of the conduct of each defendant which must be reviewed, and that on this footing, isolated explanations or excuses for isolated incidents could not avail the Defendants against whom malice was alleged.

Finally, in considering the course of proceedings in relation to these evidential matters, I am obliged by law to take into account the fact that none of the Defendants elected to testify. As strongly submitted by Dr. Barton, this circumstance overshadows the case for each Defendant.

If the case for the Plaintiff established facts, or legitimate factual inferences which were sufficiently strong to call for an evidential answer, then the failure of a defendant to testify is a fact which I am required to consider in assessing whether, on the whole of the case for each side, the allegation by the Plaintiff on a particular issue was proved on the balance of probabilities, bearing in mind the serious nature of the allegations of malice. The validity of that rule in criminal cases, within the context of proof beyond reasonable doubt, was recently affirmed in New Zealand by the decision of the Court of Appeal in Trompert v Police [1984] 1 CRNZ 324. As pointed out by Richardson, J., who delivered the judgment of the Court, the question always is whether the proved facts call for an explanation. His Honour referred to the leading case of R v Burdett (1820) 4B & Ald 95 and to the recent opinion of the Judicial Committee in Haw Tua Tua v Public Prosecutor [1982] AC 136 and had no doubt, subject to the qualification just mentioned, that the failure of a defendant to testify in a criminal case may lawfully be taken into account when considering whether the charge is proved beyond reasonable doubt. The same rule applies in civil cases - see the judgment of Windeyer, J., in Jones v Dunkel (1959) 101 CLR 298 - and it may be a truism to say that the rule has never seriously been questioned in civil cases.

In the present case I am satisfied on the evidence for the Plaintiff that his allegations of malice raised in each instance a case which on the facts called for an explanation from each Defendant. No evidential explanation was forthcoming, despite the fact that each Defendant had been under notice for a long time, not only because of the pleadings but also by reason of the Commission of Inquiry and Public Service Appeal Board hearings, that the Plaintiff in this action would allege malice on the part of those Defendants who in fact had to face the allegations at

the trial. Failure by any Defendant to testify does not conclude the action against him - but I have been obliged to take the significant fact into account, against the background of the long and detailed evidence for the Plaintiff, in deciding whether his allegations of abuse of public office have been proved.

I now must look at the legal consequences of the conclusions which I have reached in relation to my findings as to the conduct of the Defendants in this action.

The basic claim for the Plaintiff is that he seeks damages of 200,000 tala against the Defendants, other than the members of the Commission of Inquiry. The basis for these claims is the tort of misfeasance in public office.

There can be no doubt that this tort does exist as a separate basis of legal liability and there are many academic writings supporting this view. However, within the context of judicial precedent, the extent of the nature of the tort has been defined in authoritative terms by the Privy Council in Dunlop v Woollahra Municipal Council [1982] AC 158 where this species of wrong is described as "the well-established tort of misfeasance by a public officer in the discharge of his public duties". The nature of the tort is also clarified and discussed by Richardson, J., in Takaro Properties Limited v Rowling [1978] 2 NZLR 314 at 338.

The act complained of must be either an abuse of power actually possessed or an act which is a usurpation of authority which is not possessed, but the essential ingredient of the tort is the presence of malice in the exercise of the purported exercise of a statutory power. Malice obviously includes a state of mind representing malice in the popular sense, namely an attitude of ill-will or spite against the Plaintiff, and then there is the different situation where an official acts beyond his jurisdiction with knowledge of that fact. But there can be no difference between those two motivations insofar as this particular tort is concerned. It is to be emphasised that malice in this context will include a situation where there is no element of personal spite or ill-will. It includes the case where a person is actuated by reasons which are collateral to and not authorised by the rules of conduct by which he is bound. In a case of this sort, a public officer may exercise his official powers against another person for reasons devoid of ill-will but motivated by the desire to reach a result not comprehended by the power of decision or the power of discretion with which he has been invested. To take the present case as an example, it was submitted by Dr. Barton that, even if the Prime Minister was not actuated by hostility or ill-will towards the Plaintiff, and even if his motive in stopping the Plaintiff's appointment as Director

of Health was because of his genuine belief that the Plaintiff's racial origins should preclude his appointment to office, then that state of mind amounts to "malice" within the accepted legal definition.

In the present case, I am satisfied that all the elements of the tort have been proved by the Plaintiff against the first, third and fourth Defendants. In my opinion, all these respective Defendants were public officers, and I think acted in malicious abuse of their respective offices, or acted maliciously in the sense of having an intention to injure the Plaintiff when they knew that they did not possess the powers which they respectively purported to exercise. I am also satisfied that the Plaintiff was a person to whom the respective Defendants owed a duty in the exercise of their official powers, and it is clear in my opinion that the Plaintiff suffered damage as a result of the malicious acts of the Defendants in carrying out their professed public duties.

It was contended for the fourth Defendant that as Acting Director of Health he was not a public officer in respect of the Plaintiff, in that the Plaintiff was not a member of the public but an employee of the same Department as the fourth Defendant, and the same submission was made on behalf of the third Defendant, the Minister of Health. In my view, however, no matter what the departmental position of the Plaintiff was, he was a person to whom all Defendants had a duty in respect of the discharge of their obligations and duties as public officers. I cannot see any escape from that conclusion.

In this respect, however, the fourth Defendant may stand in a slightly different position. It was strongly argued on his behalf that he and the Plaintiff had for a considerable time been at loggerheads within the Department and that the Plaintiff's complaints against the fourth Defendant, and to some extent against the third Defendant, arose merely out of personal confrontation stemming from animosity between department officials, which, of course, is a fairly well-known aspect of the operations of both central and local governments. In this regard Mr. Anderson placed particular reliance upon the case of MacKenzie v MacLachlan [1979] 1 NZLR 670, which was a decision of the High Court of New Zealand delivered by Moller, J. The Plaintiff was an Assistant City Engineer employed by a local authority and the Defendant was the Town Clerk and General Manager of the local authority. The claim of the Plaintiff was that the Defendant's conduct towards him was oppressive and arbitrary, and Mr. Anderson submitted that in broad terms, allegations made by the Plaintiff in that case amount to the same complaint as advanced in this case against the third and fourth Defendants. Moller, J., found that the dispute between the

Plaintiff and the Defendant was a personal dispute which had no direct connection with any specific powers conferred on the Defendant or on the local authority by the Municipal Corporations Act.

In this case, however, I do not believe that the defence which prevailed in McKenzie v MacLachlan can be sustained. With regard to the third Defendant, there are certain expressions of opinion expressed by him which appear to be personally hostile to the Plaintiff, but I am satisfied that they arose out of the fact that the third Defendant did not want anyone appointed to the post of Director of Health who was not a locally born Samoan and preferably holding a matai title.

In the case of the fourth Defendant, the defence may have been on stronger ground. Some of the recorded comments of the fourth Defendant against the Plaintiff are in terms so hostile as to amount almost to personal abuse of the Plaintiff. On the other hand, there is nothing in the history of the relationship between the Plaintiff and the fourth Defendant which could justify the assumption that their differences merely arose from personal incompatibility. The fact was that the fourth Defendant wanted to be Director of Health and considered himself to be the only appropriate appointee. The Prime Minister and the Minister of Health, though not formally going on record as favouring the fourth Defendant for the post, nevertheless were strongly opposed to the appointment of the Plaintiff. While Dr. Barton does not allege any conspiracy engaged in by the Defendants to cause damage to the Plaintiff by depriving him of the office to which the Public Service Commission had decided to appoint him, he nevertheless submitted, and in my opinion correctly, that the Minister of Health must have been aware of and must have approved the various steps taken by the fourth Defendant to block the Plaintiff's advance within the Department and to impair his reputation by various accusations which cannot on any grounds be supported. As I see the matter, it was a case where the unlawful acts of the fourth Defendant as a public officer, which were constant and repetitive, naturally created a state of indignation on the part of the Plaintiff, and this is a very different thing from asserting that their differences originated in personal animosity and were thereafter controlled by that factor.

For those reasons, I find the case of the Plaintiff proved against the first, third and fourth Defendants on the basis of his claim that they respectively committed the tort of misfeasance in public office, and thereby caused him damage.

In fairness to the Prime Minister in office at that time, I must make it clear that in my view there was on his part no personal spite or animosity against the Plaintiff in the sense that there is no evidence supporting that suggestion. His obvious desire to stop the Plaintiff being appointed Director of Health was

dictated by his belief that the time had come when only a locally born Samoan should attain that post. But, his conduct in stopping the pending appointment of the Plaintiff amounted, for that very reason, to a malicious exercise of his functions in the technical sense because he was acting in contravention of the Constitution when he intervened against the independence of the Public Service Commission. As to motivation of the third and fourth Defendants, I have already expressed my views. As to the members of the Public Service Commission, they must have know that in yielding to this pressure from the Government, they were acting unlawfully, and as to the members of the Commission of Inquiry, they must have been aware, in my opinion, that their request that the Public Service Commission defer any further appointments was also in breach of the Western Samoan law which prohibits any influence or attempted influence being exercised against the Public Service Commission.

Having reached these conclusions, I now go on to consider and determine the nature and extent of the remedies to which in my view the Plaintiff is entitled.

As to mandamus, I think that the submissions of Mr. Anderson must prevail. The Plaintiff was unlawfully prevented by the first, third and fourth Defendants from being appointed Director of Health by the second Defendant, but he had not that legal right to appointment which would warrant an issue of mandamus. If I could grant that remedy, I would do so, but I can only express the expectation that the Plaintiff's deprivation of impending office will be assessed by the Public Service Appeal Board as a relevant factor when considering his appeal, supposing that such appeal is pursued.

As to certiorari, there will be orders as sought by the Plaintiff setting aside the purported determinations and recommendations of the Commission of Inquiry insofar as they affect the Plaintiff, and setting aside the action of the Public Service Commission purporting to abolish the post of Deputy Director of Health.

As to the declarations sought by the Plaintiff, I think it unnecessary to consider those remedies and abstain from making any orders in view of the orders of certiorari already made.

As to damages, the Plaintiff must clearly succeed in recovering a substantial award. Under the heading of loss of salary, the gross loss in my opinion has been proved at 61,352 tala less 27,211 tala which results in a loss of 34,141 tala. I consider the claim for legal and related expenses of 3,890 tala to be legitimate and proved. In an effort to mitigate his loss, not being permitted to practise medicine privately, the Plaintiff and his wife have incurred interest arrears of 53,750 tala, but this sum, under the circumstances prevailing in a business which is continuing, cannot in my opinion be considered a final loss, and

I therefore assess this loss at 25,000 tala and direct that it be paid to the Plaintiff with a responsibility resting on him to account to his wife for such part thereof to which she may in the joint venture be entitled.

I now come to the question of exemplary damages, and consider that this is the strongest possible case for such an award. I propose in this respect to follow the guidelines of the New Zealand Court of Appel set in Taylor v Beare [1982] 1 NZLR 82 and in Donselaar v Donselaar [1982] 1 NZLR 97. No doubt there is ground here for applying the principle of aggravated compensatory damages in view of the protracted distress and injury to feelings sustained by the Plaintiff, but I propose to submerge this factor within the concept of exemplary damages as reflecting the condemnation of this Court of the arbitrary and flagrant disregard of the Plaintiff's rights by the first, third and fourth Defendants who acted as public officers in wilful and knowing contravention of the Plaintiff's rights under the Constitution, with the additional element, if it be one, of exercising malice against him. I assess exemplary damages in the sum of 75,000 tala.

I therefore award the Plaintiff as against the first, third and fourth Defendants damages as calculated above up to the trial of the action in the total sum of 138,931 tala.

In terms of Rule 5 of the Supreme Court (Fees and Costs) Rules 1971, I fix in full of all costs in respect of these protracted proceedings the sum of 20,000 tala together with disbursements and travelling and accommodation expenses of counsel from New Zealand as may be fixed by the Registrar, and order that such costs and disbursements be paid by the first, third and fourth Defendants to the Plaintiff.

I am indebted to all counsel for their assistance in this litigation, and I express my appreciation, in particular, to Mr. Anderson for his integrity and skilful dedication to the formidable task with which he was confronted in undertaking the main defence to this claim.