Pohiva v. Prime Minister and Kingdom of Tonga

Supreme Court
Martin A.C.J.
6 May 1988

Employment law—dismissal—no warning and no opportunity to make representations—whether dismissal by statutory power or by prerogative—principles of natural justice.
Administrative law—judicial review—statutory power or prerogative power—dismissal of public servant—principles of natural justice.
Fundamental rights—free speech—clause 7 of Constitution—breach of duty to permit exercise of right of free speech.

The plaintiff was appointed to the Department of Education in 1964. He served, almost without fault, for twenty-one years in a series of positions, culminating in promotions to Senior Education Officer in 1984 and 1985. (Three incidents of minor misconduct were found irrelevant.) The plaintiff initiated a current affairs programme on the local radio station in 1981. At various times, the programme caused concern in high places. In particular, the programme of 26 December 1984 contained comment adverse to alleged salary increases for Ministers.
Cabinet resolved that the plaintiff be dismissed summarily and without warning. No official explanation was given and, of course, the plaintiff was given no opportunity to exculpate himself. The plaintiff claimed wrongful dismissal in breach of contract, tortious interference with constitutionally protected rights of free speech, and breach of principles of natural justice as applied to the exercise of a statutory power.

HELD:

(1) The plaintiff has no claim for breach of contract, as the Crown has the power to dismiss at will.
(2) The defendant has breached a duty to permit the exercise of constitutionally protected rights of free speech.
(3) The defendant, whether acting under statutory power or the prerogative, has breached the principles of natural justice.
(4) The measure of damages is lost salary for twenty-seven months, from the time of dismissal until the time the plaintiff entered Parliament ($16,412.50) plus general damages of $10,000, rounded up to $26,500, but with no punitive element.

Cases referred to in judgment:

Addis v. *Gramophone Co. Ltd.* [1909] A.C. 488, [1908–10] All E.R. Rep. 1, H.L.
Bradley v. *Attorney-General* [1988] 2 N.Z.L.R. 454
Cassell and Co. Ltd. v. *Broome* [1972] A.C. 1027; [1972] 2 W.L.R. 645; [1972] 1 All E.R. 801, H.L.

Council of Civil Service Unions v. *Minister for the Civil Service* [1985] L.R.C. (Const.) 948; [1985] 1 A.C. 374; [1984] 3 W.L.R. 1174; [1984] 3 All E.R. 935, H.L.
Denning v. *Secretary of State for India* (1920) 37 T.L.R. 138
Dixon v. *The Commonwealth* (1981) 55 F.L.R. 34
Edwards v. *Society of Graphical and Allied Trades (SOGAT)* [1971] Ch. 354; [1970] 1 W.L.R. 379; [1970] 1 All E.R. 905; [1970] 3 W.L.R. 713; [1970] 3 All E.R. 689, C.A.
Gould v. *Stuart* [1896] A.C. 575, P.C.
Malloch v. *Aberdeen Corporation* [1971] 1 W.L.R. 1578; [1971] 2 All E.R. 1278, H.L.
Moore v. *DER Ltd.* [1971] 1 W.L.R. 1476; [1971] 3 All E.R. 517, C.A.
Ridge v. *Baldwin* [1964] A.C. 40; [1963] 2 W.L.R. 935; [1963] 2 All E.R. 66, H.L.
Riordan v. *War Office* [1959] 1 W.L.R. 1046; [1959] 3 All E.R. 552; [1961] 1 W.L.R. 210 (note); [1960] 3 All E.R. 774, C.A.
Rodwell v. *Thomas and Ors* [1944] K.B. 596; [1944] 1 All E.R. 700
Shenton v. *Smith* [1895] A.C. 229, P.C.
Toafa v. *Attorney-General* [1987] S.P.L.R. 395; [1988] L.R.C. (Const.) 898; (1987) 13 C.L.B. 1217
Tu'akoi v. *Deputy Premier* (1958) 2 Tongan L.R. 196, P.C.C.A.
Yetton v. *Eastwoods Froy Ltd.* [1967] 1 W.L.R. 104; [1966] 3 All E.R. 353

Legislation referred to in judgment:
Broadcasting Commission Act, cap. 130, section 15
Civil Law Act, cap. 14, sections 3 and 4
Civil Service Regulations, regulations 9, 14, and 15
Constitution of Tonga, clause 7
Government Act 1923, section 7
Government Act, cap. 3, section 17

Other sources referred to in judgment:
Mayne and McGregor on Damages (12th ed.) 1961

Counsel:
Dr. Harrison for the plaintiff
Mr. Martin for the defendants

MARTIN C.J.

Judgment:

'Akilisi Pohiva claims damages for wrongful dismissal against the Kingdom of Tonga and the Hon. Prime Minister in his official capacity.

On 22 February 1985 Mr. Pohiva was dismissed from his civil service post. As a result of that dismissal he says that he has suffered considerable distress and inconvenience and loss of salary over a long period, and he has lost his accrued pension rights. He seeks compensation and declarations as to the validity of his dismissal.

I. Background

In 1964 Mr. Pohiva was appointed an assistant teacher—a civil service post. He served at various schools and within ten years he was teacher in charge at Nomuka

Primary School, Ha'apai. In 1976 he was sent on a government scholarship to the University of the South Pacific in Suva, where he did well and was transferred from his Dip.Ed. course to a degree course. He graduated B.Ed in 1978. On his return to Tonga he was appointed lecturer at the Teachers Training College. In 1981 he was promoted Head of Social Science at that College. In 1982, after Cyclone Isaac, he was seconded to the National Office for Disaster Relief and Reconstruction (N.O.D.R.R.) as head of the Social Services Division. In 1983 he was promoted officer in charge of N.O.D.R.R., and remained in that post until the work was completed. Then in 1984 he was appointed acting Senior Inspector of Secondary Schools. On 1 October 1984 he was appointed acting Senior Education Officer (Curriculum), and on 28 January 1985 he was appointed to the new post of Acting Senior Education Officer (Policy and Planning). Throughout his career he received annual salary increments.

This brief summary shows a successful career, marked by regular promotions, culminating in a new and important senior administrative post. Less than a month after this appointment, he was dismissed.

It is fair to say that at times during his career he was the subject of official criticism. Three incidents have been mentioned.

1. In 1974 he was absent from school for three days without official permission while he took a school cricket team to play a match on a nearby island. He had sought permission but received no answer. He went anyway. He was punished by the deduction of three days' pay and was given what was described as a final warning (page 26B of the plaintiff's bundle and Exhibit 4).
2. On 26 May 1982 a written complaint was made by the acting Principal of the Teachers Training College, where Mr. Pohiva was a lecturer. The contents of that letter (page 28C of the plaintiff's bundle) were not made known to Mr. Pohiva: it basically consists of a complaint that he lacks respect for authority. It complains that he made unauthorized use of school materials, which was explained during the trial to refer to his use of discarded timber to build an extension to his very cramped quarters to accommodate his family. The extension is still there. It was not, as the letter suggests, a dishonest use for his own personal gain. The Acting Director of Education, Mana Latu, dealt with the complaint by speaking to the Acting Principal. He took no formal action, and did not even think it necessary to discuss it with Mr. Pohiva. He obviously did not regard it as very serious. Nor do I.
3. In 1983 there was a more serious incident, which I shall refer to as the "British incident". Mr. Pohiva was Acting Officer in Charge of N.O.D.R.R.. The British government had agreed to donate a landing craft to convey basic supplies to islands ravaged by the cyclone. When the barge arrived in Suva it was dropped and damaged beyond repair. It would take three months to replace. By then the distribution of basic supplies had been completed. Mr. Pohiva was in Suva. Without consulting anyone in Tonga, he suggested to the British High Commissioner that the money would be better spent in other ways. That was a sensible suggestion on the limited information available to Mr. Pohiva, but there were other considerations. The Government of Tonga needed the vessel and had made plans in expectation of its arrival. The British High Commissioner assumed that Mr. Pohiva was speaking on behalf of his government. Considerable embarrassment was caused with the British

authorities. For this he was reprimanded. But it was not held against him. Soon afterwards he was appointed substantive head of N.O.D.R.R.

The defence produced no evidence of any other criticism of Mr. Pohiva.

A. The Radio Programme

In 1981 Mr. Pohiva initiated a current affairs programme on the local radio, called "Matalafo Laukai". Panels of speakers were invited to discuss matters of current interest. Mr. Pohiva saw it as an educational programme.

Radio broadcasting in Tonga is the responsibility of the Tonga Broadcasting Commission (T.B.C.). Its policy is determined by a Board, the membership of which is, in effect, determined by Cabinet. Cabinet has the power by notice to prohibit the broadcast of any matter. In practice T.B.C. has laid down certain guidelines to ensure that programmes are fair and balanced, and do not contain unduly controversial material. These guidelines display a remarkably tender regard for the dignity of government. They go far beyond observance of the law of defamation or even the normal limitations of broadcasting. Amongst other things they prohibit any "derogatory remarks about . . . the Government of Tonga". I query whether this is not in breach of the right of free speech given by clause 7 of the Constitution, but it is not necessary for me to decide that.

Each private programme is pre-recorded, and checked by a T.B.C. employee to ensure compliance with the Board's guidelines. As a result of this screening, parts of some of Mr. Pohiva's programmes were omitted, and one programme was not broadcast at all. Mr. Pohiva accepted this without complaint.

The programme sereis caused concern in high places. On 12 April 1983 T.B.C. informed Mr. Pohiva that "The Board was informed that the Tonga Government is seriously concerned about the contents of your programme" and that the programme would be terminated. Mr. Pohiva wrote to point out that he did not know he had done anything wrong, and that he had not been told of any guidelines. His letter was considered at a Board meeting and the programme was allowed to continue. He was supplied with a copy of the guidelines for future reference (copy of the correspondence is Exhibit 6).

The programme continued to be broadcast until 26 December 1984. The programme on that day appears to have given offence. On 3 January 1985 Cabinet determined to exercise its power under section 15 of the Broadcasting Commission Act (cap. 130) and ban the programme. The Manager of T.B.C., Mr. Fusimalohi, learned of this. He wrote to Cabinet to accept responsibility for failure to properly check the programme. In other words, the fault was that of Radio Tonga rather than Mr. Pohiva. He set out proposals intended to avoid such problems in the future, and asked that the ban be reconsidered. His plea was of no effect and on 6 February 1985 a formal notice was issued prohibiting T.B.C. from "broadcasting the programme 'Matalafo Laukai' or any matter in any programme sponsored by those who are or have been sponsors of the 'Matalafo Laukai' programme".

II. The Dismissal

At some time during January 1985 the Hon. Minister of Education, Dr. Kavaliku, was asked to submit to Cabinet a report on Mr. Pohiva. He did so in a savingram dated 31 January 1985 (page 26 in the plaintiff's bundle). The matter was finally considered at a Cabinet meeting on 22 February 1985 when it was resolved that:

Mr 'Akilisi Pohiva is to be dismissed from the Service with effect from today.

It is to be noted that Mr. Pohiva was not told that his future was being discussed. He was given no warning. He was given no opportunity to explain or to make representations. He was dealt with in a manner which can only be described as arrogant and arbitrary.

The decision was conveyed to Mr. Pohiva by the Acting Director of Education, Mr. Latu. He received the Cabinet Decision, called Mr. Pohiva in and simply handed him a copy. He offered no explanation and no comfort to a man who had served his department for over twenty years. He asked no questions of anyone. The manner of informing Mr. Pohiva of his dismissal was as cavalier and arbitrary as the manner of the decision itself.

There are Civil Service Regulations which apply in this situation. Regulation 14 (as amended in 1962) provided that a civil servant who is not of first-class clerk status must be "in every case . . . clearly notified in writing of the grounds of intended dismissal in order that he may have full opportunity of exculpating himself". That applies to every civil servant, however lowly.

Mr. Pohiva was well above first-class clerk status. Regulation 15 applied to him. This states:

15. (1) A Public Officer who is of first-class clerk status or who is in receipt of a salary equal to or above that of a first-class clerk may be dismissed by the Privy Council.

(2) The Premier shall notify the officer in writing of the charge against him, and shall request him to state in writing, within a reasonable time to be specified, any grounds on which he relies for his defence.

(3) If the officer fails to furnish a statement within the specified time, or to exculpate himself to the satisfaction of the Privy Council, a committee of three shall be appointed by the Privy Council to enquire into and report on the grounds of complaint . . .

Under the Regulations, the dismissal of a senior officer is to be carefully and properly investigated before any decision is made.

The present practice appears to be slightly different from that set out in the Regulations. The Chief Secretary, Mr. Tufui, said that it is normal to write to the person concerned, to tell him about the complaints made, and to ask him to explain. This would then be considered by the Civil Service Staff Board who would make a recommendation to the Prime Minister and Cabinet.

What is clear is that whatever procedure should apply, it was not followed. After being notified of his dismissal, Mr. Pohiva wrote a reasoned letter asking Cabinet to reconsider its decision. The Hon. Minister of Education produced a very fair and thoughtful memorandum. The matter was deferred several times and eventually on 10 April 1985 Cabinet determined that the "appeal" be dismissed. Representations were then made by lawyers on Mr. Pohiva's behalf. No proper reply was ever made. During 1986 Mr. Pohiva himself made written representation but received no reply.

A. Reasons for the Dismissal

The defendants admit that the radio broadcast on 26 December 1987 was one of the matters considered, but only one. They plead that he was dismissed "because of an accumulation of unsatisfactory and unreasonable conduct over a period of years".

None of the persons involved in making the decision gave evidence, and it is therefore necessary to examine the surrounding circumstances to see whether that argument is credible.

I have already recited details of the only three matters raised by way of criticism of Mr. Pohiva's past conduct. I have no doubt that if there had been more they would have been mentioned. In my view it is unrealistic to argue that his previous conduct had any material bearing on the decision to dismiss him. Apart from the British incident the complaints were petty, they were old, they were stale, and they had been dealt with appropriately at the time. The British incident was more serious, but had not been held against him. After it he was promoted three times (once very shortly after the incident), given salary increases, and given an increment which is dependent on good behaviour.

It was argued for the defence that Mr. Pohiva's participation in the radio programme was incompatible with his duty as a public servant. Regulation 9 of the Civil Service Regulations prohibits any contribution by a civil servant to a newspaper "on any question of a political or administrative nature". By inference, that probably extends to radio broadcasts which were unknown when the Regulations were drafted. It is fairly clear that the programmes did contain reference to political and administrative matters.

If that argument had been put forward at the beginning it would have carried more weight. But it was never mentioned. It was not pleaded. It was not put forward until the trial. It is helpful to consider the history of the programme. It was initially approved by the Board of T.B.C., including the Hon. Prime Minister and the Hon. Minister of Finance. In 1983 the programme was threatened with closure, but allowed to continue after an appeal by Mr. Pohiva. No suggestion was made to him at that or any time that his programme conflicted with his duties as a civil servant. The Government knew all about his programme, and allowed it to continue. If that issue had been considered important Mr. Pohiva would have been told long ago. I do not believe that it formed any part of the reasons for dismissal.

Indeed, if any of these considerations were held to justify the dismissal, why were they not mentioned before? The defendants have been invited time and again to give reasons, from the first letter from Mr. Pohiva's lawyer and throughout the preliminary proceedings in this action. Until a few weeks before trial no reason at all was put forward. It is instructive to consider the memorandum put to Cabinet by the Hon. Minister of Education (page 38 of the plaintiff's bundle). He, who is best placed to know, finds "no cause based on his performance in the Ministry of Education or N.O.D.R.R. to dismiss the officer". He deals briefly with the earlier complaints, and then goes on to comment at some length on the radio programme. I deduce from that, that the radio programme was the foremost consideration in the decision to dismiss. The Hon. Minister of Education himself told Mr. Pohiva that the main reason for his dismissal was the radio programme.

There is no doubt in my mind that the substantial reason for Mr. Pohiva's dismissal was the content of the radio programme broadcast on 26 December 1984.

B. Was Dismissal Justified?

I have read the transcript of the broadcast. Certain statements were made about a large salary increase for Ministers. I am told they were incorrect. It doesn't much matter, as Mr. Pohiva didn't make those statements. He did make certain remarks

which could be construed as critical of Government, but they were made in reasonable terms. It was argued that the programme was unbalanced because there was nobody to put the Government's point of view. Mr. Pohiva had tried, and failed, to persuade somebody from Treasury to attend. In any event it was for T.B.C., and not Mr. Pohiva, to decide whether the programme was unbalanced to such a degree that it should not be broadcast. But whoever was responsible, I find nothing in that programme which merits the extreme action taken because of it.

If this were an action against a private employer I would have no difficulty in finding for the plaintiff—both as to the reasons for his dismissal and the procedure adopted. But the defence raises the important common law principle that the Crown may dismiss its servants at will, and without remedy. It is a doctrine which has been criticized, but is very firmly established and the defence merits careful consideration.

C. The Relevant Law

By sections 3 and 4 of the Civil Law Act (cap. 14) the common law of England applies, but only as far as there is no other provision in Tongan law. The only relevant provision in Tongan statute appears in section 17 of the Government Act (cap. 3). This states:

17. (1) The Premier . . .

. . .

(4) . . . shall have the power with the consent of Cabinet

(a) to . . . dismiss . . . all Government officers.

This appears to conflict with the Civil Service Regulations which gives power to dismiss to the Privy Council. Which should prevail? The Regulations were made by Privy Council in 1922. They contain no indication of the authority under which they were made. No reference to them appears in the Gazette for 1922. In 1922 there was a statutory power under the Government Act 1923. Section 7 of that Act provided:

7. . . . the King and Privy Council may . . . pass Ordinances . . .

(ii) relating to the control and management of various departments of Government.

I will presume therefore that the Regulations were made under that statutory power. But Regulations do not have the force of statute, and the statute must prevail where there is inconsistency between them.

The power of dismissal is statutory, under section 17(4) of the Government Act. It is exercisable by the Hon. Prime Minister with the consent of Cabinet, and not as stated in the Civil Service Regulations. It is not an exercise of prerogative power.

The procedure of dismissal is not prescribed in any Tongan statute. The Regulations do not have the force of statute, and insofar as regulations (as opposed to statute) may purport to restrict the Crown's right to dismiss summarily they are void as being against public policy (*Riordan* v. *War Office* [1959] 3 All ER 552, *per* Lord Diplock at p. 557). The Regulations are directory only, and not binding on government, whether in contract or by statute.

There being no statutory authority as to the procedure for dismissal, the common law of England applies, including the rule that the Crown may dismiss its servants at pleasure.

D. The Plaintiff's Claims

There are three grounds upon which the claim is advanced.

1. Contract—Much of the arguments and case law cited relating to the exercise of Crown prerogative is irrelevant to this aspect of the claim. The power to dismiss at will does not rest on some special exercise of Crown prerogative. It rests on a term which is implied into every contract between the Crown and a civil servant that it may be terminated at will by the Crown. This applies to every such contract unless the power is clearly excluded by statute. See, for example, *Shenton* v. *Smith* [1895] A.C. 229; *Gould* v. *Stuart* [1896] A.C. 575; *Denning* v. *Secretary of State for India* (1920) 37 T.L.R. 138; and, more recently, *Rodwell* v. *Thomas* [1944] 1 All E.R. 700 and *Riordan* v. *War Office* [1959] 3 All E.R. 552.

There is no statutory exclusion. The Civil Service Regulations are directory only. The Crown has the power to dismiss at will and is not bound in contract to follow the procedure laid down.

The plaintiff's claim in contract fails.

2. Tort—The plaintiff alleges interference with his right to exercise free speech which is enshrined in clause 7 of the Constitution:

> It shall be lawful for all people to speak, write or print their opinions and no law shall ever be enacted to restrict this liberty. There shall be freedom of speech and of the press for ever . . . [subject to the laws of defamation and for the protection of the monarch and the royal family].

Mr. Martin argues that the plaintiff's remedy, if any, can only lie in contract. I disagree. Clause 7 establishes a constitutional right. Every person has the right of free speech. By necessary implication, it also imposes a duty—a duty on every person to permit the exercise of that right. The duty is owed to all persons. Any interference with that right is a breach of duty and a tort. If such a breach of duty causes loss to someone, that person is entitled to be compensated. A person who has suffered this type of wrong may seek his remedy in tort, even though he may be able to frame his claim in some other way. And when dealing with fundamental rights the court will not stand on technicalities. It looks at the reality of the situation and unless there are compelling reasons to the contrary will provide a remedy.

What was the reality of the situation? In the absence of any believable explanation for the dismissal I can only draw the obvious conclusion. The reality of the situation is that Mr. Pohiva was dismissed because he was a thorn in the side of Government. He was held responsible for a series of radio programmes which contained material critical of Government. Cabinet was not satisfied with merely banning the programme. They were determined to punish, and if possible silence, the person whom they believed to be responsible for it. It was a blatant move to suppress criticism. It was a decision taken with malice and in bad faith.

As Dr. Harrison put it, speech which is punished is not free. This was an interference with Mr Pohiva's right of free speech and the defendants are liable in tort.

3. Administrative Law—I will consider this leg of the plaintiff's argument in case I should be wrong in my previous conclusion. Mr. Pohiva says that the decision to dismiss him was reached unfairly, and was therefore invalid.

The principles of natural justice require that a person is entitled to know what complaint is made against him and to have an opportunity to give his explanation. As

Lord Reid put it in *Malloch* v. *Aberdeen Corporation* [1971] 2 All E.R. 1278: "The right of a man to be heard in his own defence is the most elementary protection of all". It is admitted that the principle was not observed in this case, but the defence argues that, because of the peculiar position of the Crown, there was no obligation to act fairly.

Both counsel helpfully referred to a large body of case law, from which it is clear that this is a branch of the law which has developed very substantially in recent years. I hope that counsel will not think it discourteous if I omit most of the steps by which
370 the law has evolved and state the law as I understand it now to be. I should add that I derive no help from the one Tongan case cited—*Tu'akoi* v. *Deputy Premier* (1958) 2 Tongan L.R. 196—or the Tuvalu case of *Toafa* v. *Attorney-General* [1987] S.P.L.R. 395. In neither case did the Court address its mind to the issues of breach of constitutional rights or to administrative law remedies.

Whether the plaintiff was dismissed under a statutory power contained in the Government Act, or, as the defence argue, under the Crown prerogative, the exercise of that power may be reviewed by the Court—not as to the decision itself, but to ensure that the decision was reached in the correct manner.

The earlier authorities were considered at length in *Ridge* v. *Baldwin* [1963] 2 All
380 E.R. 66. This case established that the exercise of a statutory power may be reviewed, and that in certain circumstances it must be exercised in accordance with the principles of natural justice. If it is not so exercised when required, the decision is void. The law developed further in the case of *Council of Civil Service Union* v. *Minister for Civil Service* [1984] 3 All E.R. 935, where it was made clear that the power to review an executive decision applies whether the source of the power to make that decision is statute or prerogative. Lord Diplock classified under three heads the grounds upon which administrative action is subject to control by the court. One category is "procedural impropriety", which includes failure to observe the rules of natural justice when they apply.

390 That case also confirmed the concept of legitimate expectation. As Lord Fraser put it (at pp. 934–44):

> . . . even when a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and if so the courts will protect his expectation by judicial review as a matter of public law.

Applying this to the facts of this case, if Mr. Pohiva had a legitimate expectation that he would be given notice of any complaints and the opportunity to put forward his explanations, the Court may set aside any decision made if his expectation was not met. I am encouraged in this conclusion by the knowledge that courts in Australia
400 and New Zealand adopt a similar approach (see, for example, *Dixon* v. *The Commonwealth* (1981) 55 F.L.R. 34 and *Bradley* v. *Attorney-General* [1988] 2 N.Z.L.R. 454).

The evidence about this was not disputed. Mr. Pohiva said that he knew the Civil Service Regulations procedure for dismissal. He said: "I expected to be able to talk to them—to make an appointment to see the Minister of Education and put my case to them. I expected them to follow Civil Service Regulations". The Chief Secretary, Mr. Tufui, told us about the present procedure, which is different from that laid down in the Regulations, but it is clearly normal procedure, and well known, that a person

is told what he is supposed to have done wrong and given the chance to explain himself. That evidence, with the fact that this right is set out in the Civil Service Regulations which govern the conditions of service, leaves me in no doubt. Mr. Pohiva, like all civil servants, had a legitimate expectation that before he was disciplined in any way, let alone dismissed, he would be given the opportunity to defend himself. He was denied that opportunity. The decision-making process was flawed. The decision itself was therefore invalid.

E. Other Arguments

I must deal briefly with two other matters raised by Dr. Harrison. He says that the decision was invalid because the Hon. Prime Minister was not at the relevant Cabinet meeting. The Hon. Deputy Prime Minister presided. There was no evidence, he says, to show that circumstances had arisen under which the Hon. Deputy Prime Minister was entitled to act. It is not necessary. It is presumed that a person acting in a public capacity was properly appointed and duly authorized to act. There is no evidence to suggest otherwise.

Alternatively, he says that the dismissal was effected by Cabinet as a whole, and not by the Hon. Prime Minister with the consent of Cabinet, as the statute requires. This really is splitting hairs. Again, he is defeated by a presumption. A public act is presumed to have been carried out properly, and there is no evidence to the contrary.

F. Special Damages

There are three preliminary matters to consider.

1. The period over which special damages should be calculated. Conventionally these are calculated up to the date of trial, but an earlier date may be taken if circumstances so dictate. Mr. Pohiva was dismissed on 22 February 1985. In 1987 he was elected to Parliament. He was sworn in on 28 May 1987. His salary and allowances as an M.P. were substantial. I accept the evidence of the Accountant-General about that. During the 1987 session he received a total of $23,459.56. He is entitled to a further $5,637.33, making a total entitlement of $29,096.89. For reasons of principle, Mr. Pohiva does not intend to draw certain allowances. But he is entitled to do so.

If his parliamentary earnings are to be taken into account, the higher figure must be applied. That figure comfortably exceeds his special damage claim and if taken into account in mitigation of his damages it will reduce special damages to nil.

If a civil servant becomes an M.P. he must resign. On a balance of probabilities I believe that Mr. Pohiva would have run for election in 1987 whether or not he were still a civil servant. He would have had to resign—at the latest by the day he was sworn in. He would have continued to receive his salary up to then, but no longer. He would then have earned his income as an M.P. whether or not he had been dismissed in 1985. He is entitled to be compensated for what he has lost. He has lost his civil service salary up to 28 May 1987. Special damages should therefore be calculated up to that date.

2. Mitigation. A person is obliged to take reasonable steps to reduce his loss. Mr. Martin argues that Mr. Pohiva did not do so. He says he could have found work as a teacher. He called Mr. Sevele, Director of Catholic Schools, who said that in their schools a well-qualified and experienced teacher might be paid equivalent to government scale, but without special allowances which government teachers

receive. He also said: "if he (Mr. Pohiva) had applied for a job there would have been a large question mark over him" because of his dismissal. Mr. Martin also called Mr. Likiliki, principal of an Anglican School. He said they pay salaries "not as high but very close to government pay". But graduate teachers at present have a ceiling of $5000—substantially less than what Mr. Pohiva was earning. He also said that the character and conduct of applicants is one of their major concerns, and that a person "of doubtful character" would not get a job. He declined to say whether Mr. Pohiva came into this category, but the tenor of his evidence was that he would have had some difficulty in getting a job with them.

The onus is on the defence to show that the plaintiff failed to take reasonable steps to obtain alternative employment. "The standard of reasonableness is not high in view of that fact that the defendant is an admitted wrongdoer" (*Mayne and McGregor on Damages*, 12th ed., 1961, para. 158, quoted with approval by Davies L.J. in *Moore* v. *DER Ltd.* [1971] 3 All E.R. 517, at p. 520). The plaintiff is only required to mitigate his damage by accepting other work if, having regard to his standing and experience, and background, it is one that he can reasonably be expected to accept (*Yetton* v. *Eastwoods Froy Ltd.* [1966] 3 All E.R. 353; *Edwards* v. *SOGAT* [1970] 1 All E.R. 905, at p. 911).

After his dismissal Mr. Pohiva had to vacate his government quarters. It is fair to say that he was allowed to remain there for several months. During that period he was building a home for himself and his family and was not available to work elsewhere. After that he obtained occasional temporary jobs from which he earned $2900 net. He applied for a post at the University of the South Pacific in late 1985 but did not get it. Apart from that he made no other job applications. In particular he made no attempt to return to teaching. There was no point in his doing so. His chances of obtaining a teaching post at a similar status and salary to that which he had lost had been destroyed by his dismissal, in particular the manner in which it was done, which left the public unaware of what he had done. It could have been something very serious. On the face of it, he could not be trusted.

No responsible employer of teachers could be expected to take the risk of employing him. In any event Mr. Pohiva says, and I accept, that there were no suitable posts available. The defence has not shown that any suitable alternative employment was available to him.

3. Would Mr. Pohiva have continued in government service? In January 1985 he had applied for a post outside government, as Financial Manager with Tonga Cooperative Federation. He did not get it. The Hon. Minister of Education had urged him not to leave the Department. Before he was dismissed he was undecided whether to take the job if it were offered. On a balance of probabilities, I find that he would have remained in government service until he became an M.P.

G. Calculation of Special Damage

Immediately before his dismissal Mr. Pohiva was earning a salary of $7750 p.a., with increments of $300 p.a. to a maximum of $8350. He held an acting appointment, but his previous history strongly suggests that he would have continued to be paid on that scale.

I calculate his loss of earnings to 28 May 1987 as follows:

2¼ years salary at $7750	$17,437.50
Loss of first year's increment	$ 300.00

Loss of second year's increment (three months)	$ 75.00
Total loss of earnings	$17,812.50
During that period he earned	$ 2,900.00
Leaving a net loss of earnings of	$14,912.50

In addition he claims loss of accommodation benefit. As a civil servant he was provided with a subsidized government quarter for which he paid 7% of his salary, up to a maximum of $500 p.a. He says it would have cost him $150 per month, or $1800 p.a. to rent private accommodation, but no other evidence of that was given. There is insufficient evidence to substantiate that part of his claim.

On the evidence of the Chief Establishment Officer, Mr. Mangisi, he is entitled to accrued leave passages of $1500. His total special damages are therefore *$16,412.50.*

H. General Damages

These are claimed for loss of future earnings, loss of pension rights and for disappointment, distress and inconvenience. He also claims aggravated damages.

1. Loss of Future Earnings—Mr. Pohiva's term as an M.P. expires in 1990. He may or may not be re-elected. If he is not elected he says he will be at a disadvantage in the employment market. That may be, but loss of earnings capacity cannot be presumed; it must be proved. Having found that he would have resigned from the civil service in any event to become an M.P., I cannot then say that he would have suffered some future loss of earnings, job security, and possible promotion in the civil service. I am reduced to speculation about his future prospects elsewhere and that is not enough. I allow nothing for loss of future earnings.

2. Loss of Pension Rights—The plaintiff is now forty-seven. If he had continued in service he could have retired at fifty. If he continued on his last salary scale (as I have found likely) he would have been entitled to a pension on retirement of $4035.83 p.a. If he continued to age fifty-five he would be entitled to a further 5/60 making his pension $4371.25 p.a. There is no entitlement to a pension but in practice he would have received it. On retirement, he could have claimed a lump sum payment equivalent to five years' pension. If he had died in service, his widow would have received a sum equivalent to one year's salary. But if he had resigned before fifty, he would receive nothing. I have already found that he would have retired to become an M.P. On that basis he has lost nothing by way of pension rights as a result of his dismissal and I allow nothing for it.

3. Distress and Inconvenience—These speak for themselves. I will consider that with the next head of —

4. Aggravated Damages—These may be awarded to give a plaintiff additional compensation for the conduct and motives of the defendant, the way in which the wrong was done and the effect that this produced on him.

Mr. Martin cited *Addis* v. *Gramophone Co. Ltd.* [1908–10] All E.R. Rep. 1 as authority that aggravated damages cannot be awarded for wrongful dismissal. That rule applies only in contract. At page 54 Lord Atkinson makes it clear that if some other cause of action arises from the same facts such damages may be awarded.

I have already commented on the conduct and motive of the defendants. The

manner of communicating the decision to Mr. Pohiva almost beggars belief. Let us consider the position in which he found himself. He had reached a senior, well-paid, and responsible position. He had a wife and five children, the oldest being fourteen. No one else in the family had an income. They depended entirely on Mr. Pohiva's earnings. They lived in a government quarter and had no house of their own. All this, after more than twenty years' loyal service, was swept away, without warning, without explanation, and without a shadow of justification. The distress and anxiety must have been immense.

I do not believe that Mr. Pohiva's reputation and standing in the community was substantially affected by his dismissal. But the damage he suffered was undoubtedly increased by the motives of the defendants and the manner in which the decision was made and communicated to him.

I assess aggravated damages, taking into account the distress and inconvenience caused, at $10,000. Total compensatory damages therefore total $26,412.50, which I will round up to $26,500.

5. *Exemplary damages*—Exemplary damages are also claimed. These may be awarded to punish a defendant for his behaviour and to deter him and others from repeating the behaviour. They may only be awarded in a limited number of circumstances, one of which is where there has been oppressive, arbitrary, or unconstitutional action by a servant of government (which term includes the defendants in this action). Such damages should only be awarded if the compensatory damages are insufficient to punish and deter (*Cassell & Co. Ltd.* v. *Broome* [1972] 1 All E.R. 801).

The circumstances of Mr. Pohiva's dismissal encompassed all three elements—it was oppressive, arbitrary, and unconstitutional. But I do not think it necessary to award any additional damages for the purpose of punishment or deterrence. The findings of this judgment, and the payment of compensation to Mr. Pohiva, are sufficient to achieve that purpose.

I. Administrative Law Remedies

I have found that the decision to dismiss Mr. Pohiva was taken in breach of the rules of natural justice and was therefore void. There will be a declaration to that effect. So far as reinstatement is concerned, he does not want it; he wants to continue being an M.P.

I have considered making a declaration that, by reason of his dismissal, the plaintiff became entitled to the same rights and remedies as if he had been unlawfully dismissed. But it seems to me preferable to take the next step and award him those remedies. It is now well established that damages may be awarded on an application for judicial review. Under this head I would assess damages on the same basis as in tort. He is entitled to the same sum whether in tort or by way of judicial review.

An order will therefore be made, and judgment entered, in the following terms.

1. It is declared that the purported dismissal of the plaintiff by Cabinet Decision no. 276 dated 22 February 1985 is invalid.
2. It is ordered and adjudged that the defendants do pay to the plaintiff the sum of $26,500 damages, together with his costs to be taxed if not agreed.