IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2022-485-764
[2023] NZHC 2686

BETWEEN	SIAOSI HETO PUKA Plaintiff
AND	ATTORNEY-GENERAL First Defendant
	MURRAY McCULLY Second Defendant

Hearing:	28 August 2023
Counsel:	J W Goddard and B J Peck for Plaintiff B J R Keith and G Verhaeghe for Defendants
Judgment:	26 September 2023

JUDGMENT OF RADICH J

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Introduction and summary

[1] The defendants have applied to strike out the plaintiff's claim on the grounds that none of its three causes of actions are legally tenable and that it is an abuse of process.

[2] Siaosi Puka (the plaintiff) was employed by the Government of Tokelau, most recently in the role of Director of Finance. In late 2016, the plaintiff and Jovilisi Suveinakama (who was then the General Manager of the Tokelau Public Service) purchased two helicopters on behalf of the Tokelau Government.[1] They said that the purchases were made in accordance with instructions from the Council for the Ongoing Government of Tokelau (the Council)[2] and that it was consistent with the terms of the 2016/17 Budget of Tokelau's Legislative Assembly, the General Fono.

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1 Mr Suveinakama is not a party to or involved in this proceeding.
2 The body which exercises executive authority in Tokelau and which is described further below.

[3] A review undertaken by an external consultancy found the purchases to have been unauthorised by the Tokelau Government. Following an employment investigation, it was found that there had been serious misconduct in the purchase of the helicopters. The contracts of employment of the plaintiff and Mr Suveinakama were, as a result, terminated by the Council on 24 November 2017.

[4] The plaintiff and Mr Suveinakama then brought proceedings in which they challenged the decision of the Council to terminate their employment contracts (the Tokelau High Court proceedings). In a decision of 26 July 2019, Churchman J, sitting as the High Court of Tokelau, found, among other things, that the Council had a substantive basis for concluding that there had been serious misconduct and that the plaintiff and Mr Suveinakama's dismissal was reasonable and justified (the Tokelau High Court decision).[3]

[5] On 29 July 2021, the Court of Appeal, sitting as the Court of Appeal of Tokelau, declined the plaintiff's application for an extension of time to appeal Churchman J's decision.[4]

[6] The plaintiff now brings this proceeding in which he says (in broad terms for introductory purposes) that the Ministry of Foreign Affairs and Trade (through the Attorney-General) and the former Minister of Foreign Affairs:

(a) acted in breach of a document called "the Joint Statement of Principles of Partnership Between New Zealand and Tokelau" (the Joint Statement) in ways that are related to the termination of his employment;

(b) induced a breach of his employment contract through certain acts and communications; and

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3 *Suveinakama v Council for the Ongoing Government of Tokelau* [2019] NZHC 1787 [Substantive Judgment]. It was found also that the plaintiff's and Mr Suveinakama's initial suspension by the Council was unlawful, as was their subsequent suspension without pay such that the Court awarded as damages, interest on their back-paid salary for the period during which they were suspended without pay.

4 *Puka v Council for the Ongoing Government of Tokelau* [2021] NZCA 349 [Leave to Appeal Judgment].

(c) caused him economic loss by unlawful means.

[7] The defendants say that the Joint Statement cannot found the claim that has been advanced, that the causes of action in tort could not be made out on the pleadings and that, in any event, the proceedings fall to be determined under Tokelau law and were brought outside the two-year limitation period for civil claims. They say, in addition, that the causes of action are an abuse of process, as they seek to relitigate issues that were the subject of the Tokelau High Court decision – or that they should have been brought in the Tokelau High Court proceedings.

[8] The plaintiff says that his claim has the potential to succeed, that it does not relate to matters already determined and that, at this stage – prior to the filing of the statement of defence and discovery – it could not be said that the causes of action pleaded are clearly untenable.

[9] For the reasons I go on to give, I am quite satisfied that the causes of action are so clearly untenable that they could not possibly succeed.

[10] As important as the Joint Statement is to the political relationship between New Zealand and Tokelau, this case – contrary to the way in which it has been framed by the plaintiff – is not of constitutional significance. In response to similar submissions advanced in the Tokelau High Court proceedings, Elias CJ (sitting as the High Court of Tokelau on an interlocutory issue) said that she did not accept that constitutional issues were raised and that, rather:[5]

> It is a claim for unlawful dismissal and raises the sufficiency of the investigation that led to termination of the plaintiff's employment by the Council for the Ongoing Government of Tokelau.

[11] The Court of Appeal, sitting as the Court of Appeal of Tokelau, agreed. It said in the face of a submission that the litigation was historic and unprecedented, that the plaintiff's proposed appeal was instead more appropriately described as a private claim for damages.[6]

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5 *Suveinakama v Council for the Ongoing Government of Tokelau* [2018] NZHC 1670 at [12] [Hearing Location Judgment].

6 Leave to Appeal Judgment, above n 4, at [50].

[12] Similarly, here, the plaintiff's claim, broadly put, is for alleged interference by individuals in the New Zealand Government in events that led to his dismissal. As with the Tokelau High Court proceedings, it is in reality a private claim for relief in which the plaintiff challenges the basis for his dismissal. It is able to be dealt by considering whether, through the application of relevant legal principles, the pleading is able to be sustained.

Factual background

Tokelau

[13] Tokelau is a non-self-governing territory of New Zealand, comprising three coral atolls in the South Pacific Ocean – Atafu, Nukunonu and Fakaofo – which lie just south of the Equator. Its nearest neighbour, Samoa, is approximately 500 kilometres south of Fakaofo.[7] In a census in 2016, the total population of Tokelau was recorded as being 1,499.

[14] Tokelau is an isolated territory. It does not have any form of air service. The boat trip from Apia in Samoa to Fakaofo in Tokelau takes between 26 and 36 hours. None of the atolls have a harbour.

[15] In 1889, Tokelau became a British protectorate and, in 1926, administration passed to New Zealand. In 1948, under the Tokelau Act 1948, Tokelau was declared to form part of New Zealand.[8] New Zealand appoints an Administrator of Tokelau (the Administrator).[9] The Administrator has overall responsibility for the administration of the Executive Government of Tokelau. Many of the Administrator's powers in relation to the day-to-day governance of Tokelau have been delegated to Tokelauan institutions. Administrative and legislative powers of the Administrator of Tokelau are delegated to the Taupulega (village council of elders) of each of the three villages of Tokelau. A single village is located on each of the three Tokelauan atolls.

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7 There is a fourth atoll known to Tokelauans as Olohega and to Europeans as Swains Island which is culturally, historically and geographically part of Tokelau but is claimed by the United States and administered from America Samoa. It lies between Tokelau and Samoa.

8 Tokelau Act 1948, s 3.

9 See Tokelau Administration Regulations 1993.

[16] Authority for national issues is delegated by the three Taupulega to a General Fono and, when the General Fono is not in session, to the Council as its delegate. The nature and composition of each of those entities may be described more particularly as follows:

(a) The General Fono comprises representatives of the Taupulega, the Fatupaepae (women's group) and the Aumaga Taulelea (men's group).

(b) The Council comprises three Faipule (village head) and the three Pulenuku (elected mayors) of the three villages of Atafu, Nukunonu and Fakaofo. It is chaired by the Ulu o Tokelau (the head of Government) on a rotating basis and includes eight ministerial portfolios.

(c) The Office of the Council rotates with the Ulu-ship and is responsible for providing support and advice to the leaders of Tokelau when the General Fono is not in session. The General Fono is generally in session three times a year.

[17] Tokelau has expressed its desire to move towards greater self-government, which both the New Zealand Government and the United Nations Special Committee on Decolonization support.[10] There were referenda on self-determination in February 2006 and October 2007. A Constitution of Tokelau has been drafted in anticipation of the repeal of the Tokelau Act 1948 which, to date, remains in force and is administered by the Minister of Foreign Affairs.[11]

The Joint Statement of Principles of Partnership Between New Zealand and Tokelau

[18] The Joint Statement was signed on behalf of New Zealand and Tokelau on 21 November 2003. Its preamble is in the following terms:

> New Zealand and Tokelau ("the Partners") wish to affirm their ongoing relationship, to honour their shared past and to build upon the close historical, social and cultural links between their people.

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10 See United Nations *Draft resolution on the question of Tokelau* A/AC.109/2021/L.23 (18 June 2021).

11 Hearing Location Judgment, above n 5, at [3].

> By articulating in this Joint Statement the principles underpinning the partnership and each Partner's expectations of the other, the Partners hope to create a framework within which they can work together to maximise the benefits of the relationship. They wish to strengthen cooperation between New Zealand and Tokelau, and to provide a firm foundation for ongoing and constructive dialogue about their relationship.
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> The Joint Statement also looks forward, recognising that Tokelau has the right to self-determination, and that New Zealand has a responsibility to facilitate that process in Tokelau's best interests.

[19] The Joint Statement refers, in broad terms, to principles that include the following:

(a) New Zealand and Tokelau will work together in a dynamic relationship of partnership, within the context of the law, and on a cooperative and consultative basis. The relationship includes the holding of "senior-level official talks" at least once a year, in Tokelau, Wellington or Apia.

(b) New Zealand and Tokelau will work together with the United Nations to support self-determination for Tokelau, and to support the retention of Tokelauan language and culture.

(c) New Zealand will provide economic assistance to Tokelau, with the key goal of improving the quality of life of the people living in the villages of Tokelau. It is recognised that "Tokelau is entitled to a good and satisfactory standard of services and infrastructure" and that this entitlement should be progressively met.

(d) The defence of Tokelau will be the responsibility of New Zealand, as will foreign affairs, on Tokelau's behalf.

(e) Tokelau does not have an international legal personality separate from that of New Zealand and New Zealand will enter into binding treaty obligations on Tokelau's behalf.

The plaintiff's employment

[20] The plaintiff was first employed by the Government of Tokelau in 1996. From August 2015, he was employed on a full-time, fixed-term contract which was to end on 2 August 2017, although he remained employed beyond that date. He reported directly to the Minister of Finance and, as with a good part of the Tokelau Government, worked from Apia in Samoa.

Circumstances leading to the plaintiff's dismissal

[21] Reflecting a general concern in Tokelau about its isolation, the plaintiff and others wished to ensure that Tokelau developed its own air service. The concerns are underlined by events that have resulted in the death of Tokelauans as a result of the time taken to evacuate those in need of medical care to Apia.

[22] Transportation services have been the subject of regular and intense discussions between Tokelau and the New Zealand Government for some decades. In February 2016, a new ferry, purpose-built for Tokelau – the *Mataliki* – was handed over to the Council by the New Zealand Government. The *Mataliki* had been built on the understanding that Tokelau's preferred transport option was a new ship rather than air services.

[23] In July 2016, the General Fono approved the 2016/2017 budget, which included the allocation of $3.5 million for the establishment of "interim air services". A Council meeting in Apia on 28 and 29 September 2016 confirmed funding priorities for the 2016/2017 year. The minutes of the meeting included an entry in the following terms:

> Negotiations are currently underway to procure a helicopter (inter-atoll) and a sea plane (Tokelau/Apia) for interim service.

[24] On 28 October 2016, the plaintiff and Mr Suveinakama purchased a Twin Squirrel helicopter for USD $650,000 and, on 7 November 2016, they purchased a Bell Iroquois helicopter for USD $1,725,000. The Council was informed of the purchases on 9 November 2016.

[25] In a session of the General Fono in November 2016, concerns were raised (primarily, it is understood, by delegates from Nukunonu) about the adequacy of consultation with the villages on the purchase of the helicopters and about the authority of the plaintiff and of Mr Suveinakama to purchase the helicopters.

[26] The plaintiff's position was that the helicopters were purchased in accordance with the Council's instructions to progress identified capital development priorities in the September 2016 meeting and were consistent with the decision that had been made by the General Fono in setting the 2016/2017 budget.

[27] Following a meeting on 18 December 2016, the Council instructed officials to cease work on the development of the interim air services project and the Ministry of Foreign Affairs and Trade (MFAT) was then advised of the purchase of the helicopters.

The plaintiff's dismissal

[28] In early 2017, the issue came to the fore in the New Zealand and Tokelau news media with the second defendant, who was then the Minister of Foreign Affairs, questioning the purchase of the helicopters in the context of the recent provision of the *Mataliki*, funded by the New Zealand Government. The Administrator at the time, David Nicholson, advised the three Taupulega in February 2017 that he was commissioning an independent review of the purchase of the helicopters.

[29] The review was undertaken by consultancy firm Martin Jenkins & Associates Ltd in Apia between 27 February and 3 March 2017. In its final report of 16 March 2017, it was concluded that the helicopter purchases were not authorised by Tokelau's Government. The authors of the report said: "In its written record of the [September 2016] meeting, the Council expressed appreciation of the work being done so far, but did not endorse or agree to the purchase of helicopters".[12]

[30] The Administrator attended a meeting of the General Fono between 6 and 10 March 2017 at which the Martin Jenkins report was discussed. He encouraged the Government of Tokelau to instruct the Tokelau Public Service Commissioner "to draw

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12 See Substantive Judgment, above n 3, at [50].

on the findings of this review and to conduct a review in relation to the public service and the public servants' execution of their duties and obligations".[13] The second defendant had, at about the same time, called for "a review to determine if any public servants had breached the Tokelau Public Service code of conduct or performed poorly".[14]

[31] Minutes of the March 2017 meeting record that the General Fono agreed:[15]

(a) to commission an inquiry into the helicopter issue; and

(b) to refer to the Public Service Commission to carry out a review into the helicopter issue.

[32] The Council then directed the Tokelau Public Service Commissioner to begin an employment investigation.[16] The plaintiff and Mr Suveinakama were suspended on 13 April 2017 for the duration of the investigation on full pay and retaining entitlements to their contractual benefits.[17]

[33] In the investigator's report of 22 September 2017, it was concluded that the purchase of the helicopters had not been approved by the Council and that there was a lack of supporting documentation to show that the helicopters could have been operational between Tokelau and Samoa.[18] In the Tokelau High Court decision, Churchman J described the conclusions in the investigator's report in the following way:[19]

> [149] The report notes that the approved budget for interim air services for the 2016/2017 financial year was $2.5M but what was actually spent was $5.3M. The report also noted that Mr Puka's final draft report identified some significant regulatory hurdles but that report was not received until after the helicopters had been purchased.
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> [150] The report also noted the lack of input from the Government of Tokelau's lawyer in relation to any aspect of the helicopter purchase.

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13 Substantive Judgment, above n 3, at [52].
14 At [54].
15 At [53]
16 At [56].
17 At [64]–[65].
18 At [148].
19 Substantive Judgment, above n 3.

> [151] Two significant conclusions were:
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> > … the helicopters were purchased far in advance of the Government of Tokelau being in any meaningful position to undertake any commercial flying operations in the short term as anticipated and advised to Council by Mr Puka and Mr Suveinakama.
> >
> > … the helicopters were purchased without any confirmation or true understanding by anyone within the Government of Tokelau as to how long it would realistically take to get all necessary civil aviation approvals and permits to commence flying commercially.
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> [152] In relation to the plaintiffs' claim that the 26 September 2016 Council meeting effectively approved the helicopter purchase, the conclusion of the investigator was that the phased implementation of the air service was subject to a number of qualifications including a requirement for significant input from the Taupulega. What had been put to the Council was also something that involved sea planes whereas two helicopters had been purchased.

[34] The plaintiff and Mr Suveinakama provided written responses to the report and met with the Tokelau Public Services Commissioner, Mr Perez. Mr Perez then concluded that there had been serious misconduct in the purchase of the helicopters and recommended to the Council that the plaintiff and Mr Suveinakama be dismissed.[20] The Council accepted those recommendations and the plaintiff and Mr Suveinakama's employment was terminated on 24 November 2017.

The Tokelau High Court proceedings

[35] The plaintiff and Mr Suveinakama filed proceedings in the High Court of Tokelau challenging the termination of their contracts of employment and seeking contractual and general damages. Proceedings were brought against the Council, the Ulu o Tokelau and the Administrator. An application for an interim injunction was declined by Thomas J in December 2017.[21] Then, in July 2018, Elias CJ declined the plaintiffs' application for the proceeding to be heard in Tokelau, finding, as noted above, that the claim did not raise constitutional or cultural issues which would suggest that Tokelau might be the appropriate venue for the trial.[22]

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20 Substantive Judgment, above n 3 at [159]–[160].

21 *Suveinakama v Council for the Ongoing Government of Tokelau* [2017] NZHC 3171 [Interim Injunction Judgment].

22 See Hearing Location Judgment, above n 5.

[36] The Administrator, as third defendant in the proceeding, applied for an order for security for costs from the plaintiffs. Johnston AJ, again sitting as the High Court of Tokelau, made an order for a relatively modest sum to be paid by way of security by the plaintiffs and stayed the plaintiffs' claims against them until security was paid.[23] Following the decision, the plaintiffs consented to their claim against the Administrator being stayed. In a Minute of 1 February 2019, Churchman J recorded that the consequence of that stay was that allegations against the Administrator "are irrelevant and will not be able to be pursued at the hearing".[24]

[37] I set out some of what Johnston AJ said in his decision because the Administrator was sued as a representative of the New Zealand Government and the claim against him shares features with the claims against the defendants in this proceeding. This is particularly relevant in the light of Churchman J's comments as noted above. In considering the strength of the claims against the Administrator in that case, Johnston AJ said:[25]

> The first and most striking point is that, in their prayers for relief, the plaintiffs do [not] seek any remedy against the third defendant. Unlike their claims against the first and second defendants, which review the lawfulness of the various steps taken leading ultimately to the termination of the contracts of employment in November 2017, the claim against the third defendant is effectively that he was instrumental in preventing the first defendant from establishing a commission of inquiry in relation to the process for the acquisition of the helicopters. The plaintiffs say such a commission of inquiry would have removed the focus from them to the actions of their superiors and demonstrated that systemic error was what lead to the apparently unauthorised purchase.
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> That appears to me to be an extremely long bow for the plaintiffs to draw. The causative link between the actions of the third defendant in vetoing a commission of inquiry, if that is what he did, and the termination by the Tokelauan authorities of the plaintiffs' employment contract is not at all obvious.
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> As all the authorities accept, a judge making an assessment of the merits of the case at an early stage such as I am doing can do nothing but form an impression. The impression I have, though, and it is a relatively firm one, is that the plaintiffs' claim against the third defendant is not strong.

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23 *Suveinakama v Council for the Ongoing Government of Tokelau* [2018] NZHC 3339 [Stay Judgment].

24 *Suveinakama v Council for the Ongoing Government of Tokelau* HC Tokelau CIV-2017-485-797, 1 February 2019 (Minute No. 3 of Churchman J).

25 Stay Judgment, above n 23, at [29]–[30].

[38] The hearing of the plaintiffs' substantive claims came before Churchman J in February 2019. He held, by way of summary:

(a) The argument that the minutes of the General Fono meeting in March 2017 required the establishment of a "commission of inquiry", such that the employment investigation into the plaintiff and Mr Suveinakama was unauthorised, was not sustainable. The direction in the minutes was to "commission an inquiry". An employment investigation had been intended and was put in place by the Council lawfully through delegations it held.[26]

(b) The initial suspension of the plaintiff and Mr Suveinakama in April 2017 was not lawful as a lawful basis for the suspension had not been identified.[27]

(c) While certain alleged procedural defects could not be sustained, the instruction requiring the plaintiff and Mr Suveinakama to travel to Tokelau to be interviewed by the investigator in circumstances in which their legal counsel were not able to travel with them was not reasonable such that the subsequent suspension of the plaintiffs without pay pending conclusion of the investigation was in breach of the principles of natural justice.[28]

(d) The Council's decision, in categorising the conduct of the plaintiffs as serious misconduct, was not unreasonable or unjustified.[29] Accordingly, the Council's decision to terminate the plaintiffs' employment was lawful while the decision to change the plaintiffs' suspension from one that was "on pay" to one that was "without pay" was unlawful.[30]

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26 Substantive Judgment, above n 3, at [57]–[61].
27 At [71].
28 At [119] and [139].
29 At [185].
30 At [195] and [216].

(e) The appropriate remedy was to award interest at the rate of five per cent on their withheld salary between the dates it was payable and the date on which it was eventually paid.[31]

[39] On 9 March 2021, the plaintiff applied to the Court of Appeal for an extension of time to appeal.[32] The Court of Appeal declined that application on the basis that explanations for the substantial delay were not sufficient and, as mentioned, on the basis that, contrary to the submissions for Mr Puka, the proposed appeal did not engage or raise issues of constitutional significance. It was, as the Court said, a private claim for damages arising out of an employment agreement.[33]

The plaintiff's claim in this proceeding

[40] The statement of claim begins with broad allegations that the actions of MFAT officials and of the then Minister of Foreign Affairs interfered with the plaintiff's employment contract with the Government of Tokelau, leading to his dismissal.

[41] The plaintiff's first cause of action is advanced pursuant to the Joint Statement. It alleges that the first defendant breached its obligations under the Joint Statement. It is alleged, in particular, that the first defendant:

(a) compelled the Government of Tokelau to cease implementation of the interim air service and other infrastructure projects;

(b) failed to provide any air services for Tokelau since its administration of Tokelau commenced in 1926, which has placed the lives of Tokelauans in jeopardy.

(c) was obligated, when issues arose after the purchase of the helicopters, to resolve those issues with respect, consultation and cooperation in accordance with the Joint Statement, but instead:

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31 Substantive Judgment, above n 3 at [218].

32 The Court of Appeal of New Zealand sitting as the Court of Appeal of Tokelau. Mr Puka made the application alone.

33 Leave to Appeal Judgment, above n 4, at [47]–[51].

(i) refused to order a commission of inquiry;

(ii) interfered in the Government of Tokelau's investigation;

(iii) pressured the Government of Tokelau to take unlawful actions including suspending the plaintiff;

(iv) withheld information from the plaintiff and the plaintiff's legal advisers including the draft Martin Jenkins report;

(v) arranged for media coverage which set the agenda for the employment investigation and disciplinary process;

(vi) removed David Nicholson as Administrator after he expressed some sympathy for the position of the plaintiff and Mr Suveinakama;

(vii) refused to facilitate alternative dispute resolution for the employment investigation and disciplinary process;

(viii) implemented tight controls on spending by the Government of Tokelau until the plaintiff and Mr Suveinakama were dismissed; and

(ix) assumed control, unilaterally and without public consultation, over Tokelau's development priorities.

[42] The plaintiff alleges that the second defendant made defamatory comments in the media, which damaged the plaintiff's reputation as a trusted and experienced leader of the Tokelau Public Service, and that he made it clear that there would be tighter controls on Tokelau's capital development programme unless responsible people were held accountable.

[43] It is said that the second defendant's comments set the agenda for the Martin Jenkins review, the plaintiff's employment investigation and disciplinary process, the

first defendant's interactions with the plaintiff, the Ulu and the Council, and the first defendant's approach towards future national capital development purchases.

[44] Under the first cause of action, the plaintiff seeks declarations that the first and second defendant acted inconsistently with the Joint Statement and that it breached certain clauses in the Joint Statement. Declarations are sought to the effect that the defendants acted inconsistently with the Joint Statement and breached certain of its clauses.

[45] The second cause of action is in tort. The plaintiff alleges that the first and second defendant interfered with his employment contract with the Government of Tokelau. He says that the defendants induced a breach of his employment contract by:

(a) the second defendant's comments to the media;

(b) the Administrator preventing the Council from holding a commission of inquiry;

(c) the New Zealand Government exercising tighter control over Tokelau's capital development programme; and

(d) a phone call and a letter from a New Zealand Government official to the Ulu o Tokelau raising the employment status of officials linked to the purchase of the helicopters (that is, the plaintiff and Mr Suveinakama).

[46] It is said that, as a result a series of meetings between October 2015 and February 2017, the first defendant's officials and the second defendant knew or ought to have known that their conduct, as described, would induce a breach of the plaintiff's employment contract.

[47] The third cause of action, also in tort, pleads that the defendants used unlawful means to cause him loss. It is said that the unlawful means included:

(a) forcing the Ulu o Tokelau to suspend the plaintiff;

(b) targeting the plaintiff and Mr Suveinakama as the people responsible;

(c) engaging Martin Jenkins to make a case that the purchase of the helicopters was not authorised by the Government of Tokelau;

(d) changing the focus of the review from being a commission of inquiry to a disciplinary employment investigation;

(e) interfering with the Government of Tokelau's implementation of the Tokelau National Capital Development Plan; and

(f) the second defendant making defamatory comments in the media.

[48] Under the second and third causes of action, the plaintiff seeks the following relief:

(a) his annual salary and allowances of NZD$158,751 from the date of his dismissal until his retirement (amounting to $3,968,775);

(b) legal costs of $163,159;

(c) general damages of $25,000 relating to an unpaid loan to the Taupulega of Fakaofo; and

(d) interest.

The strike out application

[49] The defendants say that there is no reasonably arguable claim because:

(a) the Joint Statement is not engaged by the allegations made by the plaintiff and cannot in any case found the claim that is pursued;

(b) the second and third causes of action are derivative claims relating to the plaintiff's dismissal from his employment by the Tokelau Government and, the plaintiff having unsuccessfully challenged that

dismissal in the Tokelau High Court proceedings, no derivative claim can arise; and

(c) the claim falls under the jurisdiction of, and ought to have been advanced, before the High Court of Tokelau – but is in any case time-barred under r 104(2) of the Crimes, Procedure and Evidence Rules 2003 (Tok).

[50] The defendants say also that this proceeding is an abuse of process because:

(a) the claim seeks to relitigate the plaintiff's unsuccessful claim in the Tokelau High Court proceedings;

(b) the plaintiff's claim against the defendants – there pursued against the Administrator of Tokelau – was pursued in the Tokelau High Court proceedings and was stayed by that Court in December 2019;

(c) the plaintiff nonetheless again attempted to raise allegations about the defendants before the High Court of Tokelau, that Court ruling that the allegations would not be read;[34]

(d) the plaintiff nonetheless again attempted to raise allegations about the defendants before the Court of Appeal, that Court holding that "the proposed appeal does not extend to any issues concerning the Administrator or his conduct"; and

(e) the claim as now sought to be pursued advances those allegations against the other defendants to the plaintiff's unsuccessful claim.

[51] The plaintiff opposes the application on the grounds that, by way of summary:

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[34] See Substantive Judgment, above n 3, at [208], where Churchman J directed that, in circumstances in which the plaintiffs had withdrawn their claim against the Administrator, submissions which included assertions about statements or actions of the Administrator or MFAT would not be read.

(a) if the defendants had refrained from acting inconsistently with the Joint Statement, their actions could not be described as unlawful;

(b) the third cause of action is not a derivative action and a declaration is available under the Declaratory Judgments Act 1908;

(c) the proceeding could provide useful development and guidance;

(d) the claim was brought correctly in the New Zealand High Court under New Zealand law;

(e) the Court cannot be certain at this stage that the claim is clearly untenable;

(f) the plaintiff has had difficulty in obtaining information from the defendants;

(g) a plea of abuse of process is not a defence to a substantive claim;

(h) the proceeding is not in any event an abuse because the claims in this proceeding are made in tort against different defendants, in a different jurisdiction, address different issues and arguments and there is in any event no right to claim damages for other than property loss in any action under Tokelau law;

(i) the findings in the Tokelau High Court decision do not prevent findings being made in this proceeding; and

(j) but for the alleged unlawful and unjustified interference of the defendants, the plaintiff's suspension and dismissal would not have occurred.

Legal principles on strike out application

[52] The Court may strike out all or part of a pleading if it discloses no reasonably arguable cause of action or is otherwise an abuse of the process of the court.[35] Counsel for both parties agreed that the principles that apply to strike out on either ground are well established, being that:[36]

(a) the pleaded facts are assumed to be true, except where allegations are entirely speculative and without foundation;

(b) the causes of action must be so clearly untenable that they cannot possibly succeed;

(c) the power to strike out is one to be exercised sparingly;

(d) the fact that an application to strike out raises difficult questions of law requiring extensive argument does not eliminate the possibility of strike out; and

(e) particular care is required in areas where the law is confused or developing.

[53] The threshold that must be met before a proceeding can be struck out is deliberately set high. It is important to preserve access to the courts. However, it is clear that an attempt to relitigate matters that have already been determined constitutes an abuse of the Court's processes.[37]

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35 High Court Rules 2016, rr 15.1(1)(a) and 15.1(1)(d).

36 See *Attorney-General v Prince* [1998] 1 NZLR 262, (1997) 16 FRNZ 258 (CA) at 267; endorsed in *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] per Elias CJ and Anderson J.

37 See *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 541, [1981] 3 All ER 727 (HL) at 733; *Barber v Green Cabs Ltd* HC Wellington CIV-2010-485-2221, 16 February 2011; and *Collier v Butterworths of New Zealand Ltd* (1997) 11 PRNZ 581 (HC).

The issues

[54] Several issues arise on the strike out application for each cause of action. At one level, under each cause of action, an issue arises as to whether or not the pleaded claim could be sustained on any basis. At another level, questions arise as to whether the causes of action could be tenable on the pleaded facts. And, at another level – in relation to the second and third causes of action – an issue arises as to whether or not Tokelau law, rather than New Zealand law, should be applied and, if so, whether the case is time-barred as a result of the limitation period that applies in Tokelau.

[55] Beyond that, an overarching issue arises as to whether or not the proceeding is an abuse of process on the basis that, in part, it relitigates the plaintiff's unsuccessful claim in the Tokelau High Court proceeding and that, to the extent that there are new pleadings, they could, and should, have been brought in the Tokelau High Court proceedings.

[56] I will use the following broad issues to frame and address the points that arise:

(a) Does the Joint Statement create binding obligations on the part of the New Zealand and Tokelau Governments such that it could form the basis for declaratory relief at all and, in any event, are the terms of the Joint Statement engaged by the plaintiff's claim as pleaded in the first cause of action?

(b) What is the law that applies to the plaintiff's claim in the second and third causes of action? Is it the law of Tokelau or the law of New Zealand? If Tokelau law applies, is the plaintiff's claim time-barred?

(c) Given the findings in the Tokelau High Court decision that the plaintiff's dismissal by the Tokelau Government was lawful and justified, is the second cause of action reasonably arguable?

(d) Given those findings, is the third cause of action reasonably arguable?

(e) Is this proceeding an abuse of process?

First issue – the Joint Statement

The positions of the parties

[57] The defendants' position, expressed in broad terms, is that the Joint Statement is a non-binding standard that sets out the principles and aspirations for the relationship between the Government of New Zealand and the Government of Tokelau. As such, it is said that the Joint Statement does not afford a cause of action and, in particular, it does not confer rights upon the plaintiff that can be the subject of declarations.

[58] Further, it is said that approximately half of the material pleadings in this case comprise allegations against the Tokelau Government alone and much of the remainder concerns the interactions of the two governments. Accordingly, it is said, the claim would involve this Court determining the lawfulness of actions of the Tokelau Government.

[59] It is said that the terms of the Joint Statement are, in any case not engaged by the plaintiff's claim as pleaded.

[60] The plaintiff says that the Joint Statement is a "constitutionally important document". He says that it "set[s] out the accepted norms which govern the relationship between Tokelau and New Zealand" and that it is a "source of obligations, duties, rights and entitlements". Moreover, the plaintiff has described it as "the most important document governing the relationships between the two governments".

[61] The importance of the document, it is said by the plaintiff, is reflected in statements that have been made by New Zealand to various United Nations bodies. Reference is made, for example, to documents reported by New Zealand to the United Nations Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. In those documents, New Zealand has referred to the Joint Statement, describing it as a basis for both countries working in partnership to achieve self-determination for Tokelau.

[62] Reference is made also to New Zealand's relatively recent report to the United Nations about New Zealand's compliance with the International Covenant on Economic, Social and Cultural Rights – and to its report to the Human Rights Council for its universal periodic review in which it was said that the Joint Statement affirms the:

> …partners' shared values of human rights, commitment to good governance and respect for the rule of law, and notes the responsibility of both parties, including the importance in working together in a partnership based on trust, openness, respect and mutual accountability.

The plaintiff says that, if the Joint Statement cannot form the basis of a cause of action, then there could be no accountability which arises from its terms.

[63] The plaintiff has referred also to MFAT's four-year plan, dated October 2021, in which the Joint Statement is described as a "formal statement of the relationship between Aotearoa New Zealand and Tokelau" referring, again, to "trust, openness, respect and mutual accountability" and to the document setting out "New Zealand's obligations to provide economic and administrative assistance to Tokelau which, at Tokelau's request, is focused on improving the quality of life on the atolls".

[64] Building from these references, Mr Goddard has said that the Joint Statement can be seen as a document which is a "formal record of a number of constitutional conventions" between New Zealand and Tokelau and that it "should be regarded as part of the common law of New Zealand". The Supreme Court's decision in *Ellis v R* – which refers to tikanga as being a part of the common law of Aotearoa New Zealand – is cited as authority for the proposition that, in circumstances in which Tokelau is, under the Tokelau Act, a part of New Zealand, the Joint Statement should be seen to be a source of law.[38]

[65] Mr Goddard goes so far as to say that the Joint Statement is analogous to Te Tiriti o Waitangi and that, were it not to be seen in that light, it would be regarded as a nullity, "…which echoes the decision of Prendergast CJ in *Wi v Bishop of*

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[38] See *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239.

Wellington which regarded Te Tiriti as a nullity…".[39] He says that a declaration is available under s 17 of the Crown Proceedings Act 1950 on this basis.

[66] The plaintiff commissioned a legal analysis on this (and other issues I come on to mention) from Debra Angus, a barrister with particular expertise in international law.[40] By agreement, Ms Angus' analysis is to be regarded as forming part of the plaintiff's submissions.

[67] Ms Angus questions whether international law principles should determine whether the Joint Statement could found a cause of action. She has said, however, that even if an international law framework is applied to the Joint Statement, the changing doctrine of sources of international law means that "soft law" is increasingly persuasive in the international system.[41] With that in mind, Ms Angus refers to traditional sources of international law (which might include sources described as "soft law" or "informal law") as being used by New Zealand Courts in three different ways:

(a) where international law has direct effect in domestic law – when incorporated by statute or in cases of customary international law considered to be automatically part of the common law;[42]

(b) where New Zealand statutes are interpreted by drawing on international treaties and international law;[43] and

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39 *Wi v Bishop of Wellington* [1877] NZJurRp 183.

40 Ms Angus' work was presented, initially, as expert evidence to address aspects of the law of Tokelau. It was sought to be admitted under s 25 of the Evidence Act 2006. However, because the opinion contained descriptions and provided some analysis of New Zealand, questions arose as to its admissibility and so, in a minute of 23 August 2023, I directed ultimately by consent that Ms Angus' opinion was to be received as a part of the plaintiff's submissions but on the basis of the Court's acknowledgement that it had been written by Ms Angus with the duties of an expert in mind.

41 Referring to An Hertogen and Anna Hood *International Law in Aotearoa New Zealand* (Thompson Reuters, Wellington, 2021) at 18.

42 Referring to *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA).

43 Referring to *New Zealand Airline Pilots' Association v Attorney-General* [1997] 3 NZLR 269 (CA).

(c) by acting as a constraint on the exercise of discretionary decision-making.[44]

[68] Ms Angus makes the point that whether or not the Joint Statement is more than a non-binding standard is a complex issue which could not be viewed simply through an international law lens given that Tokelau has no international legal personality that is independent of New Zealand. However, she makes the point that there are some difficulties in founding a cause of action on obligations arising under the Joint Statement, particularly as the document is between the governments of New Zealand and Tokelau and there is no relationship to the plaintiff which would engage any rights in a direct sense. She has suggested that these issues may best be determined in a substantive hearing.

Discussion

[69] It seems to be sufficiently clear that the Joint Statement is a non-binding set of principles agreed between the Government of New Zealand and the Government of Tokelau. As such, I do not see the basis upon which it could form the basis of a cause of action.

[70] At one level, even a binding international instrument does not, unless there is implementing legislation, have the force of law that would be required in order to found a cause of action.[45] It is accepted by the parties that the principles are not, by their nature, an international agreement. That must be so as Tokelau forms part of New Zealand, but on the basis that each country has governments subject to separate laws enforced through separate courts. Accordingly, the Joint Statement cannot have the force of law of an international instrument that is implemented through domestic legislation or, in the absence of implementing legislation, be a relevant decision-making consideration. It is something different again.

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44 Referring to *Tavita v Minister of Immigration* [1994] 2 NZLR 257, [1994] NZFLR 97 (CA) in which it was found that the Crown should not be blind to international obligations, some of which are so important that no reasonable Minister could fail to take them into account when making a discretionary decision.

45 *New Zealand Airline Pilots' Association v Attorney-General*, above n 43, at 281; and *Maclaine Watson & Co v Department of Trade and Industry* [1990] 2 AC 418 (HL) at 500.

[71] As is set out above, the introductory paragraphs to the Joint Statement refer to the document as a set of principles through which the Governments of Tokelau and New Zealand "hope to create a framework within which they can work together and to strengthen cooperation between New Zealand and Tokelau".

[72] In this sense, the Joint Statement describes, in an aspirational way, interactions between two governments. That is not something with which the Court can engage. It is a document of a political rather than a legal nature. The approach the two governments take to their relations is not something that is amenable to review. The allegations under this head (relating, for example, to the New Zealand Government assuming control over Tokelau development priorities or applying pressure) are concerned directly with those interdependent relations at a political level.

[73] I do not see any basis upon which the Joint Statement could, as the plaintiff has submitted, be a source of obligations, whether as a constitutional convention or as forming part of the common law, in the sense that tikanga does.[46] It certainly could not have the status of Te Tiriti o Waitangi, as the plaintiff has suggested. In short, Te Tiriti is a document intended to be binding which acts as a guarantor of rights, signed nearly 200 years ago. The Joint Statement is an aspirational political document. In addition, a non-binding statement such as the Joint Statement is not susceptible to a declaration under s 17 of the Crown Proceedings Act 1950. The Declaratory Judgments Act 1908, which is applied by the Crown Proceedings Act, is confined to declaring contested legal rights.[47]

[74] While, as Ms Angus explains, international instruments, even on a "soft law" approach, can be relevant in the interpretation of statutory powers, the plaintiff in this case relies directly on the Joint Statement. I cannot see any basis upon which that could be permissible. There is no statutory power in issue in the present proceeding to which the Joint Statement could attach as a relevant consideration.

[75] In any event, I agree with the point Mr Keith makes that, if the Joint Statement was able to found a cause of action, its terms could not support the claim as pleaded.

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46 See *Ellis v R*, above n 38, at [263]–[272] per Williams J.

47 See *Gouriet v Union of Post Office Workers* [1977] UKHL 5, [1978] AC 435 at 501.

[76] The claims as pleaded in the first cause of action are at two levels. The first is at a broad level which relates to the facts underpinning the purchase of the helicopters – the event that led to the plaintiff and Mr Suveinakama's dismissal. The second is at a narrower level and relates to the dismissal itself. I look at each in turn.

[77] Under the broader set of claims, it is pleaded that MFAT "compelled the Government of Tokelau to cease implementation of the interim air service and other infrastructure projects", that it "failed to provide any air services for Tokelau since its administration of Tokelau commenced in 1926" and that this has placed "Tokelauans' lives in jeopardy".[48] However, it is to be observed that the plaintiff has pleaded also in the statement of claim that the New Zealand and Tokelauan governments have worked together over many years on potential air services for Tokelau. For example, in 2010 and 2011, the New Zealand Government proposed the building of an airport in Tokelau but the Tokelauan Government did not agree.[49] In 2015, an agreement was reached for New Zealand and Tokelau to work actively on the development of air services, despite Tokelau choosing a new ship instead of air services in 2013.[50] Moreover, as is pleaded, in 2019, New Zealand's Prime Minister announced that the New Zealand Government would build an airport on Nukunonu.[51]

[78] Against that background it is to be recalled that, in 2019, Churchman J, sitting as the High Court of Tokelau, found that the plaintiff and Mr Suveinakama had proceeded with the purchase of the helicopters without authority from the Tokelau Government and without obtaining necessary regulatory approvals.[52]

[79] Under the narrower set of claims, the focus of the cause of action is, primarily, upon the plaintiff's dismissal. Even although it has already been found that there was no lawful basis for the plaintiff to have purchased the helicopters, the pleading is that MFAT should have proceeded with more respect, consultation and cooperation under the Joint Statement rather than proceeding in each of the ways that are alleged.[53] The

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48 Plaintiff's Statement of Claim at [157]–[159].
49 At [26].
50 At [29] and [30].
51 At [152].
52 Substantive Judgment, above n 3, at [182]–[184].
53 Plaintiff's Statement of Claim at [161].

allegations there include an alleged refusal to order a commission of inquiry,[54] interfering in the employment investigation, pressuring the Government of Tokelau to take unlawful action, withholding information,[55] arranging media coverage, removing the Administrator, but declining to use alternative dispute resolution, implementing controls on Government spending by Tokelau and assuming control of development priorities.

[80] The short point is that none are these are matters between the two governments of New Zealand and Tokelau. Accordingly, they fall outside the terms of the Joint Statement. They cannot form the basis for the cause of action as pleaded.

[81] For these reasons, the declarations that are sought under the Joint Statement in the first cause of action could not be available to the plaintiff. The first cause of action discloses no reasonably arguable cause of action.

Second issue – New Zealand or Tokelau law?

The positions of the parties

[82] The defendants submit that the plaintiff's claim falls to be determined under the law of Tokelau and that it is time-barred under Tokelau law. It is said that the plaintiff's claim repeats substantially the allegation that the plaintiff did not engage in serious misconduct and that his dismissal was unjustified and unlawful – matters that relate to actions of the Tokelau Government. It is submitted that this claim could only have been, or ought to have been, pursued in the Tokelau High Court proceeding to determine those underlying issues given that the plaintiff's employment contract was governed by Tokelau law.

[83] It is said that jurisdiction for the allegations in question is to be determined by where the alleged breaches of contract and losses occurred, not where the alleged inducement or interference took place. Consequently, it is said, the claim is subject to the two-year limitation period fixed by r 104(2) of the Crimes, Procedure and Evidence

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54 Despite Churchman J having already found that there was no basis for a suggestion that the Council had directed a commission of inquiry. See Substantive Judgment, above n 3, at [58].

55 All of which are matters covered in the Tokelau High Court decision.

Rules (Tok) (the CPE Rules) which falls to be applied by this Court by s 55 of the Limitation Act 2010.

[84] The plaintiff says that, because Tokelau is part of New Zealand, New Zealand law should apply, including the six-year limitation period. Mr Goddard refers to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the New Zealand Bill of Rights Act 1990 in support of a submission relating to entitlements to a fair public hearing and to effective remedies. He suggests that the law of Samoa might apply as that is where the plaintiff was living when he was dismissed. He refers to the defendants being based in Wellington and to the Administrator being based in Apia.

[85] Mr Goddard refers to the CPE Rules which provide that the causes of action in tort cannot be the subject of proceedings in Tokelau unless the tortious acts result in property loss. He refers also to the possible application of the Private International Law (Choice of Law in Tort) Act 2017, which came into force in December 2017, on the basis that the consequences of the plaintiff's dismissal endured beyond that date.

Discussion

[86] The second and third causes of action allege, essentially, wrongful interference by the defendants in events that led to the disciplinary process that resulted in the plaintiff's dismissal. As is discussed in further detail when considering the defendants' claim that the proceeding is an abuse of process, critical components of this proceeding were raised and dismissed in the Tokelau High Court decision. A primary point is that the plaintiff elected to proceed under Tokelau law in the Tokelau High Court proceeding to determine the allegations that underline this proceeding.

[87] As Mr Keith says, this proceeding repeats the plaintiff's allegations (although already determined against him) that he did not engage in serious misconduct and sets out a series of allegations that are concerned with acts or omissions on the part of the Tokelau Government. Mr Keith observes, by reference to a table comparing the allegations in this proceeding with the allegations in the Tokelau High Court proceeding, that more than half of the material parts of the present claim as pleaded

were covered by allegations in the Tokelau High Court proceeding.[56] What this proceeding does is add allegations about the present defendants into the mix. But that does not change things to such an extent that New Zealand law will now apply.

[88] The central allegation is that the defendants interfered with the plaintiff's contract of employment with the Government of Tokelau. The plaintiff's employment contract was governed by Tokelau law. Equally, the law that applies to the torts of inducement to breach contract, and the use of unlawful means to cause loss, is the law of the place in which the alleged breaches of contract and losses occurred, not of the place in which the alleged inducement took place.[57] As such, I consider that Tokelau law applies.

[89] The issue could not be approached, as Mr Goddard has suggested, on the basis that, under s 3 of the Tokelau Act, Tokelau is declared to form part of New Zealand such that New Zealand law would apply. The Tokelau Act is clear in providing that New Zealand statute law does not apply to Tokelau unless expressly provided and that the body of law that applies in Tokelau (rules made by the General Fono, regulations made under the Act and English common law) is distinct from the law that applies in New Zealand.

[90] There is no basis upon which to conclude that the pleaded losses occurred either in New Zealand or Samoa. The plaintiff's employment contract was with the Tokelau Government and the events leading to the plaintiff's dismissal were all centred upon Tokelau. That is where the alleged breach of contract and the pleaded losses occurred.

[91] The plaintiff has referred to the decision of the Supreme Court in *Brown v New Zealand Basing Ltd* in which it was concluded (in relation to the potential application of discrimination provisions in the Employment Relations Act 2000 to Auckland-

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56 Including allegations about the circumstances and the terms of the plaintiff's employment, the Tokelau Public Service Commission, the steps that the plaintiff and others took in relation to air services, decisions made by the General Fono, and about the Tokelau employment investigation being flawed in various respects.

57 See *Long Beach Holdings Ltd v Bhanabhai & Co Ltd* [1994] 2 NZLR 28, (1993) 7 PRNZ 394 (CA); and M Pawson *The Laws of New Zealand: Choice of Law (Torts)* (Online looseleaf ed, LexisNexis) at [152]; citing *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, [1989] 3 All ER 14 (CA).

based pilots working for Hong Kong company Cathay Pacific) that certain statutory employment rights have a sui generis character, not necessarily dependent on the proper law of the employment agreement.[58] It was found that particular provisions in the Employment Relations Act indicated that it was intended to apply, in some circumstances, with cross-border features. There is no statutory regime of that sort in question here.

[92] Mr Goddard has said that it may be relevant that the Tokelau Court of Appeal refused to apply the Tokelau two-year limitation period. However, that is to misconstrue the Court's decision on the point. The Court of Appeal was dealing with an application for leave for appeal out of time from the Tokelau High Court decision. Mr Goddard had submitted in that case that, although significantly outside the 20 working days generally allowed for bringing an appeal under the Court of Appeal rules, the period of time taken was less than the two years permitted under the Tokelau CPE Rules for bringing a civil claim. The Court of Appeal was simply making the point that Mr Puka, in that case, had misinterpreted r 104 of the CPE Rules which refers to the limitation period for filing a civil claim, not to the filing of a civil appeal.[59]

[93] If, as I have found the case to be here, the law of Tokelau is to apply to this proceeding, the relevant related question is whether Tokelau limitation law must be applied.

[94] Section 55 of New Zealand's Limitation Act 2010 applies to (amongst other proceedings) a civil proceeding before a New Zealand Court "whenever the substantive law of a foreign country is to be applied in that proceeding". The section provides that, in those cases "the limitation law of that foreign country is part of the substantive law of that country and must be applied accordingly in that proceeding". It goes on to provide that, in those circumstances, the limitation law of New Zealand must not be applied in the proceeding.

[95] The plaintiff, through the analysis prepared by Ms Angus, suggests that s 55 does not apply here because Tokelau is not a "foreign country". A "foreign country"

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58 *Brown v New Zealand Basing Ltd* [2017] NZSC 139, [2018] 1 NZLR 245.
59 See Leave to Appeal Judgment, above n 4, at [21].

means a country other than New Zealand and "country" includes a state, territory, province or part of a country.[60] I agree with Mr Keith's submission that a sensible reading of s 55 in light of s 4 of the Tokelau Act 1948 would see Tokelau limitation laws applying to claims to be determined under Tokelau law in a New Zealand Court.

[96] The plaintiff, through Ms Angus' submissions, goes on to say that, even if the Court considered that Tokelau is a "foreign country" for the purposes of these proceedings, there is a discretion on public policy grounds not to apply the limitation in Tokelau law.

[97] In circumstances in which:

(a) the plaintiff chose to bring his proceeding challenging his dismissal by the Tokelau Government under Tokelau law in the Tokelau High Court;

(b) that proceeding included allegations – of the type made in this proceeding – against the New Zealand Government through the Administrator;

(c) the plaintiff elected to discontinue his claims against the Administrator in that proceeding;

(d) the expanded derivative claims against the defendants that are made in this proceeding could have been brought in the Tokelau High Court proceeding as a part of the plaintiff's challenge to the employment investigation;[61] and

(e) this proceeding was brought over three years after the conclusion of the Tokelau High Court proceeding.

I cannot see a public policy exception argument as being sustainable.

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60 Limitation Act 2010, s 4.

61 That is, by framing the allegation that the defendants' interference in the employment investigation was such that it contributed to the breach of contract.

[98] Ms Angus has discussed also under this head to the prospect of there being "two pathways" for determining legal issues as between New Zealand and Tokelau. She has referred to a paper from Professor Tony Angelo KC (who has had a considerable role in the development of the law of Tokelau) which, amongst other things, discusses the establishment of the General Fono and its recognition under legislation in both New Zealand and Tokelau. She has cited the following observation from Professor Angelo in that paper:[62]

> The General Fono is not defined in New Zealand law. Therefore, if an issue arose as to the nature of the body, that would be decided in the New Zealand High Court either as a High Court for Tokelau using Tokelau law (the Standing Orders of the General Fono are not in Tokelau distinguished from other rules made by the General Fono) or as the High Court for New Zealand with Tokelau law being a matter of foreign law to be proved by fact evidence. This proof is becoming much easier because of the documentation of the activities of the General Fono.

[99] That may well be the case, but it does not apply to the circumstances here. This is not a case concerned with a constitutional issue as between New Zealand and Tokelau and nor is it concerned with the substantive definition of the content of Tokelau law. It is a case that relates to the plaintiff's dismissal and his arguments that the defendants contributed to actions on the part of the Tokelau Government that breached his employment contract.

[100] For these reasons, I am satisfied that it is the law of Tokelau that applies in this case and that, therefore, the claim is subject to the two-year limitation period set by s 104(2) of CPE Rules which falls to be applied by this Court under s 55 of the Limitation Act 2010. The claim is, accordingly, well out of time.

[101] The second and third causes of action fall to be struck out on this basis alone. However, for completeness, I go on to consider, the second and third causes of action to explain why they are not, on their face, sustainable in any event.

Third issue – is the second cause of action reasonably arguable?

[102] In the statement of claim it is pleaded that the defendants induced a breach of the plaintiff's employment contract.

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62 Tony Angelo "Establishing a Nation – A Second Look" (2001) RJP 235 at 247.

[103] The four basic elements of a claim for inducing breach (sometimes referred to as an "interference") were set out by the Court of Appeal in *Diver v Loktronic Industries Limited*:[63]

(a) there must be a legally enforceable contract in existence;

(b) the defendant must have engaged in conduct which in fact induced a breach of the contract;

(c) the defendant must have known that his or her conduct would induce the breach; and

(d) the defendant's conduct in inducing the breach must have caused loss or damage to the plaintiff.

The positions of the parties

[104] The defendants say that this cause of action is not sustainable given the terms of the Tokelau High Court decision, that their alleged interference did not in any event cause the loss that is claimed, and that allegations in the statement of claim relating to the plaintiff's suspension were remedied in the Tokelau High Court decision.

[105] In its submissions on this cause of action, the plaintiff begins by alleging that the Council, as the plaintiff's employer, breached his employment contract in a range of ways. Thirteen detailed subparagraphs are used to explain that allegation. Then it is said that these breaches were induced by the defendants' conduct. Ten different particulars are given of that submission. Each of those allegations refers to conduct on the part of the Tokelau Government, the Council or the Tokelau Public Service Commission. None of these allegations align with the allegations under this head in the statement of claim.[64]

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63 *Diver v Loktronic Industries Limited* [2012] NZCA 131, [2012] 2 NZLR 388 at [30] and [33].
64 See Plaintiff's Statement of Claim, at [169]–[170].

Discussion

[106] There are three primary points to be made on this cause of action.

[107] The first is that there cannot have been a breach of contract induced by the defendants because it has been held conclusively in the Tokelau High Court decision that the Tokelau Government was entitled to find, under the plaintiff's employment contract, that he had committed serious misconduct and to dismiss him. There has been no breach of contract. Therefore the inducement claim must fall away.

[108] Secondly, the conduct that is pleaded as amounting to interference cannot have caused the losses claimed. The plaintiff's dismissal was the result of the determination by the Tokelau Government that the plaintiff's acts in purchasing the helicopters amounted to serious misconduct warranting dismissal. That is the cause of the plaintiff's alleged loss.

[109] Thirdly, to the extent that it was found in the Tokelau High Court decision that the plaintiff's suspension was unlawful – a matter discussed throughout the plaintiff's submissions on this point – that breach was not induced by the defendants. Nor did the suspension cause the pleaded loss as the plaintiff retained his salary and benefits during the course of the first suspension and, insofar as the second suspension is concerned, the Tokelau Government repaid salary and entitlements that had been withheld and Churchman J in the Tokelau High Court decision restored any further element of loss by awarding, as damages, interest on those back-paid sums.

[110] For these reasons, the second cause of action is in my view clearly untenable and could not possibly succeed.

Fourth issue – is the third cause of action reasonably arguable?

[111] The essential pleading by the plaintiff in this cause of action is that "the means used by the first defendant [were] unlawful". The "unlawful means" pleaded against the first defendant are described in the statement of claim.[65] It is then pleaded that the second defendant "used unlawful means by making defamatory comments about the

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[65] Plaintiff's Statement of Claim, at [180].

plaintiff and the purchase of the helicopters to media outlets in February 2017".[66] It is said that this alleged conduct was deliberate and that the defendants intended the plaintiff to suffer loss.[67]

[112] The plaintiff has described the tort of causing economic loss by unlawful means as "a novel and developing area of the law". However, I do not think that a description of that sort frames the position correctly. In *Intellihub Ltd v Genesis Energy Ltd*, the Court of Appeal, referring to Lord Hoffman's decision in *OBG Ltd v Allan*, said:[68]

> In explaining the narrow ambit of the tort Lord Hoffman stressed:[69]
>
> > The common law has traditionally been reluctant to become involved in devising rules of fair competition … It has largely left such rules to be laid down by Parliament. In my opinion, the Courts should be similarly cautious in extending a tort which was designed only to enforce basic standards of civilised behaviour in economic competition, between traders or between employers and labour.

[113] The Court of Appeal went on to say, in *Intellihub:*[70]

> The ingredients of the unlawful means tort were cast narrowly in *OBG Limited v Allan* because the House of Lords was satisfied that regulation of economic competition is best left to Parliament. … The Supreme Court of Canada has also emphasised the narrow limits of the unlawful means tort.[71] We can find no authority to support the notion that unlawful means is a broad and evolving tort.

[114] Claims of causing economic loss by unlawful means are uncommon in New Zealand and elsewhere. The narrow scope of the tort to which I have referred would appear to reflect an intention to leave competition and industrial relations law to statute.[72] The elements of the tort may be expressed in the following way:[73]

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66 Plaintiff's Statement of Claim at [181].
67 At [182]–[183].
68 *Intellihub Ltd v Genesis Energy Ltd* [2020] NZCA 344, [2020] NZCCLR 29 at [30].
69 *OBG Ltd v Allan* [2007] UKHL 21, [2008] AC 1 at [56].
70 At [40].
71 Citing *AI Enterprises Ltd v Bram Enterprises Ltd* 2014 SCC 12, [2014] 1 SCR 177 at [29]–[35].
72 Cynthia Hawes "Interference in Business Relations" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thompson Reuters, Wellington, 2023) at 790–791. See also *Secretary of State for Health v Servier Laboratories Ltd* [2021] UKSC 24 at [60], [69] and [95].
73 See *Intellihub v Genesis Energy Ltd*, above n 68, at [33]; *OBG Ltd v Allan*, above n 69, at [49], [51], [57], [58] and [62]; and *Todd*, above, n 72, at 792.

(a) the defendant must have committed an unlawful act that interferes with the actions of a third party;

(b) the unlawful act relied upon must be unlawful towards that third party and civilly actionable by that third party;

(c) it is not sufficient to make allegations about an act that is in breach of regulatory or similar obligations;

(d) the unlawful act must have the effect of limiting the third party's capacity to dealt with the plaintiff;

(e) the defendant must have intended to cause loss to the plaintiff– it is not sufficient that loss is only foreseeable;

(f) the intention to harm the plaintiff must have been the predominant or effective cause of the unlawful act– if the respondent acted for other reasons, the tort is not made out; and

(g) the claimant must have suffered loss as a result of that unlawful action.

[115] The plaintiff says, by way of summary, that the defendants interfered unlawfully and intentionally, in actions of the Tokelau Government which resulted in the plaintiff's dismissal and caused him loss. Mr Goddard says that the defendants forced the Council to act inconsistently with the decision of the General Fono to order a commission of inquiry and that, accordingly, the Council was acting inconsistently with the requirement that it follow decisions made by the General Fono. He submits that the defendants imposed fiscal controls that were in breach of the Joint Statement and that, therefore, their actions were unlawful.

[116] It is said, effectively, that the defendants targeted the plaintiff by suggesting that his dismissal was necessary for relationships between New Zealand and Tokelau to be progressed appropriately.

Discussion

[117] As with the second cause of action, the fundamental point is that the cause of the plaintiff's loss was his misconduct in purchasing the helicopters in circumstances which have already been found, in the Tokelau High Court decision, to have warranted his dismissal.

[118] In any event, there is no tenable basis upon which it could be said that the particular matters pleaded could have caused the plaintiff's loss. I look at each of those matters in turn:

(a) as discussed above, the suspensions did not cause the plaintiff loss;

(b) it has been found in the Tokelau High Court decision that the plaintiff and Mr Suveinakama were responsible for purchasing the helicopters;

(c) engaging Martin Jenkins to provide a consultancy report could not be an unlawful act against the Government of Tokelau;

(d) a commission of inquiry had not been proposed;

(e) as found in the Tokelau High Court decision, the Council did not stop the implementation of the interim air services plan, did not approve the purchase of the helicopters and, even in the event that it could have been said that MFAT had interfered in some way, that could not constitute an unlawful act against the Tokelau Government which caused loss to the plaintiff; and

(f) even if the second defendant had made defamatory comments about the plaintiff (which is not clear and would be a matter of evidence) they were not an unlawful act against the Government of Tokelau which could establish interference and nor did they cause loss to the plaintiff.

[119] For these reasons, the third cause of action is in my view clearly untenable and could not possibly succeed.

Fifth issue – is the claim an abuse of process?

Discussion

[120] The defendants say that the plaintiff's claim is an abuse of process in that it seeks to relitigate matters determined already in the Tokelau High Court decision. They say that, to the extent that new allegations arise against the defendants in this proceeding, they could, and should, have been brought in the Tokelau High Court proceeding.

[121] The plaintiff says that the defendants were not parties to the Tokelau High Court proceeding. Therefore, it is said, the claim is not an attempt to relitigate issues heard in those proceedings. The plaintiff says that the allegations against the defendants have not been litigated previously and that there is simply an overlap in the subject matter. It is submitted that the primary issue in the previous proceeding was whether there was a breach of the employment contract, which is different to the issues that arise in this proceeding. It is said, in addition, that the claims brought in tort in this proceeding could not have been raised in the previous proceeding because claims for damages for anything other than property loss are not actionable in Tokelau.

[122] Mr Keith emphasises the decision of the Court of Appeal in *Fraser v Robertson* in which it was found that, although the doctrine of *res judicata* applies in a narrow sense to relitigation of proceedings between the same parties, it applies in a broader sense also to issues that, even if raised against other potential defendants, ought to have been raised in the earlier litigation.[74]

[123] The doctrine, applied in this wider sense, has been found to cover issues "so clearly part of the subject matter of earlier litigation that they could and ought to have been raised therein. It is treated as an abuse of process to raise such issues for the first time by a new proceeding …".[75]

[124] *Fraser* is directly on point. In that case, the plaintiff had challenged, successfully, her dismissal by the State Services Commission. The Court had ordered

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74 *Fraser v Robertson* [1991] 3 NZLR 257, (1991) 3 PRNZ 175 (CA) at 260.
75 *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 at [62].

that the charges against her be reconsidered. Following reconsideration, the dismissal was upheld. In a second set of judicial review proceedings, the plaintiff challenged her dismissal again, but adding a new cause of action challenging her previous suspension without pay. The Secretary for Justice was the defendant in the second proceeding but not in the first. The Court of Appeal found that, although the Secretary was not a party to the first proceeding, so that the doctrine of *res judicata* in its narrowest sense did not apply, the doctrine does apply to issues so clearly part of the subject matter of the earlier litigation that they could and ought to have been raised in that litigation. It was an abuse of process to raise such issues for the first time through a new proceeding.[76]

[125] Further, and relatively recently, in *McGoughan v DePuy International Ltd*, the Court of Appeal found that a judgment in another jurisdiction may lead to issue estoppel and that it is an abuse to pursue a claim to an unsuccessful conclusion in one jurisdiction and then to seek to pursue that claim in another, subject to a "special circumstances" exception for significant new arguments or evidence so long as those arguments or that evidence could not have been adduced with reasonable diligence in the earlier proceeding.[77]

[126] The plaintiff and Mr Suveinakama had, in the Tokelau High Court proceeding, sought, first, to stop an investigation into their conduct by the Tokelau Public Service Commissioner and then challenged their dismissal consequent on that investigation. Those proceedings were brought against the Ulu o Tokelau, the Council and, until January 2019, against the Administrator of Tokelau, a statutory office holder within the first defendant, MFAT.

[127] The claim proceeded on the grounds that the investigation into their conduct was unfair and unlawful, the decision of the Council to suspend the plaintiff and Mr Suveinakama was unlawful, and that the findings of misconduct were wrong. The Tokelau High Court proceedings involved allegations also relating to the defendants

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76 *Fraser v Robertson*, above, n 74, at 260.

77 *McGoughan v DePuy International Ltd* [2018] 2 NZLR 916, [2018] 2 NZLR 916 at [69], [93]–[98] and [100]–[103]. See also *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 (HL); and *Arnold v National Westminster Bank Plc* [1991] 2 AC 93 (HL) at 109.

in this proceeding including reference to media statements made by the second defendant and about the Martin Jenkins consultancy report.

[128] As outlined above, it was found in the Tokelau High Court decision that the investigation had been lawful (amongst other things, dismissing the commission of inquiry objection), that the findings of serious misconduct were justified, that the dismissal was justified and not in breach of the plaintiff's contract of employment. In addition, the plaintiff's application to appeal out of time was declined by the Court of Appeal.

[129] The defendants do not, in terms of s 50 of the Evidence Act 2006, seek to use the findings of fact made in the Tokelau High Court decision to prove the existence of facts in this proceeding. They refer to the Tokelau High Court proceeding and decision only to show the way in which issues in this case have been the subject of the previous litigation.

[130] I accept the defendants' submission that the claim in this proceeding repeats allegations determined already in the Tokelau High Court decision, including allegations against both governments. It is pleaded in this proceeding, as it was in the Tokelau High Court proceeding, that the plaintiff was subjected unlawfully to an investigation, that he was found, wrongly, to have committed serious misconduct, and that he was dismissed wrongly. Pleadings about the alleged decision not to convene a commission of inquiry, the Martin Jenkins report, the April 2017 suspension and the second defendant's comments in the media feature in both cases.

[131] I agree also with the defendants' submission that, in any event, the present proceeding advances allegations against one or both governments and other causes of action that clearly could have been brought in the Tokelau High Court proceeding.

[132] The plaintiff says that it is not, as a matter of law, possible to bring claims in tort for anything other than property damage in the Tokelau High Court such that the allegations now made could not have been brought in that proceeding. That submission is made on the following basis:

(a) Under s 4B of the Tokelau Act 1948, the English common law is in force in Tokelau, except to the extent "that it is excluded by any other enactment in force in Tokelau".

(b) Rule 143 of the CPE Rules provides that "there is no right to claim damages for other than property loss in any action at Tokelau law".

(c) Consistent with r 143, r 159 of the CPE Rules provides that "property loss which results from a tortious act wherever committed shall be actionable as a Tokelau tort …".

[133] However, the short point is that the allegations that are made against the defendants in this proceeding could have been made as a part of the causes of action in contract in the Tokelau High Court proceeding – on the basis of alleged contributions on the part of the defendants to the alleged breaches of contract. As the pleadings in this proceeding, and in the Tokelau High Court proceeding, show, the allegations made by the plaintiff are in fact against both governments.

[134] The Tokelau Contract Rules 2004 provide a comprehensive regime for damages remedies and would have been broad enough to carry allegations relating to contribution.[78] It is as though the plaintiff brought a part of the allegations he wished to make in the Tokelau High Court proceedings and then brought the balance here. The allegations in this proceeding could certainly in my view have been brought in the Tokelau High Court proceeding and so, consistent with the position in *Fraser v Robertson*, it is in my view an abuse of process to bring this proceeding.

[135] There are in my view no special circumstances that would warrant a different approach. There are no significant new arguments or evidence that could not have been adduced with reasonable diligence in the earlier proceeding.[79]

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78 That is to some extent what was done in the Tokelau High Court proceedings in the first instance in any event through naming the Administrator as a defendant and making allegations in the nature of interference in the breach against him. The fact that in that proceeding, curiously, relief was not sought against the Administrator and that, following security for costs being ordered in the Administrator's favour, the claim against him was stayed, do not alter the fact.

79 *McGoughan v DuPuy*, above n 77, at [93]–[98].

Concluding comments and outcome

[136] Unlike the position in *Queenstown Lakes District Council v Palmer*, upon which the plaintiff has relied, this is not a case in which rights of access to the courts or to justice are restricted unreasonably in the event that the substantive claim cannot be heard.[80] Equally, it is not a case in which the defendants seek to use rules in an oppressive way as mentioned in *New Zealand Social Credit Political League v O'Brien*, another case upon which the plaintiff has placed some reliance.[81] Access to justice is provided through the hearing of this application and a sufficiently clear conclusion has been able to be reached.

[137] On the basis of the many reasons given in this decision, it is my view that none of the three causes of action in the proceeding are legally tenable. The second and third causes of action fall under Tokelau law and are subject to the two-year limitation period for civil claims. In addition, given that some of the allegations in the proceeding did form part of the Tokelau High Court decision and that, in any event, all of them could and should have been brought in that proceeding, this proceeding is an abuse of process and should be struck out on that basis.

[138] Accordingly, I make an order striking out the plaintiff's claim.

[139] If costs are sought and cannot be resolved between the parties, then the defendants may, within 15 working days from the date of this decision, file a memorandum and the applicant may, within a further 15 working days, file a memorandum in response. Any such memoranda, including schedules, should be limited to five pages in length.

Radich J

Solicitors:
John Miller Law, Wellington for Plaintiff

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80 *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 at 555.
81 *New Zealand Social Credit Political League v O'Brien* [1984] 1 NZLR 84 at 95.

Crown Law, Wellington for Defendants