



Government of Tonga

Public Service Tribunal

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Mr. 'Aisea H. Taumoepeau, SC - Chairman

Lady 'Eseta Fusitu'a - Member

Mr. Timote Katoanga - Member

PST Appeal No.04 of 2014

Appellant: Ms. 'Ana Tupou Sue Kaitapu

Respondent: Public Service Commission

Representation:

Appellant: Ms. Kilisitina Tuamei'api
Ministry of Finance &
National Planning

Respondent: Mr. Sione Sisifa, SC
Ms Charlotte Vuki
Acting Solicitor General
Deputy Secretary, Public
Service Commission

Date of Hearing: 21 August, 2014

Date of Ruling: 26 August, 2014

‘Ana Tupou Sue Kaitapu v Public Service Commission

PST Appeal No. 4/2014

1. This is an appeal by ‘Ana Tupou Sue Kaitapu (the Appellant) against a decision, Public Service Commission Decision (PSCD) No. 239 of 02 July 2014, of the Public Service Commission (PSC), which reads as follows –

“That the request by Ms ‘Ana Tupou Kaitapu, Assistant Procurement Officer, Ministry of Finance and National Planning to take study leave with pay be not approved”.

Background

2. The Appellant was employed as a daily paid employee in the Ministry of Finance and National Planning since 21 September 2009.
3. From 12 March 2012 to 30 June 2013 there was a “*freeze placed on all appointments/promotion*” both to established staff and daily paid labourers, except for new scholars and cases of emergencies [PSCD No. 60 of 21 February 2012; PSCD No. 302 of 22 June 2012; PSCD No. 01 of 04 January 2013].
4. That the “*freeze placed on appointments/promotion*” was extended to 31 December 2012, under PSCD No. 302 of 22 June 2012.
5. Under PSCD No. 01 of 04 January 2013, the “*freeze placed on appointments/promotion*” was extended to 30 June 2013.
6. The total period of the “*freeze on appointments/promotion*” was lifted as from 30 June 2013.
7. The Appellant was employed on daily paid basis from 21 September 2009 until 14 February 2014. She was appointed (on 14 February 2014) to the established post of Assistant Procurement Officer under PSCD No. 51 of 14 February 2014.

8. The Appellant was “*awarded a Government Scholarship 2014 for three (3) years at Lincoln University funded by the New Zealand Government*”. The scholarship was awarded on 28 October 2013.
9. Clearly, the Appellant was employed on daily paid basis when she applied/nominated for the scholarship. It is also clear that the award of the scholarship was made on the basis that she was a daily paid employee.
10. After the Appellant was awarded the scholarship, new policies under the Public Service Policy Instructions 2010, as amended, came into existence, as follows –

“IC.9 Study Leave : An employee on probation, shall not be eligible for study leave until they have completed their probationary period and have been confirmed to their current post.”

6E.1 Conditions for Long-Term Scholarship: “(5) The Scholarship Committee and the Chief Executive Officer shall ensure that scholarship is not awarded to an employee who is still on probation”.

11. (a) The above new policies came into effect on 03 December 2013 (PSCD No. 515).
 - (b) The Appellant was appointed to a permanent post (Assistant Procurement Officer) on 14 February 2014.
 - (c) She applied for study leave as from 19 February 2014, the date of departure for her studies under the scholarship.
 - (d) Leave with pay was not approved on 02 July 2014 (PSCD No. 239).
12. The documents tendered in support of the Appellant’s appeal conceded that “*Ms Kaitapu’s employment status with the MOFNP was probationary, rendering her ineligible for study leave*” but never-the-less requested “*that this case be given due consideration and that exemption from strict adherence to the PSC policies be granted in this case.*”
 13. In section 2 of the Interpretation Act, an “*Act*” is defined to include “*an Ordinance passed by the King and Privy Council, proclamation, regulation, rule, notice or other instrument made or*

issued in pursuance of an Act.” The Public Service Policy Instructions 2010 is an instrument made or issued under the Public Service Act 2002. As such, it is a statutory instrument, and an exemption there from may only be made pursuant to a power/discretion given under the legislation. There being no such power/discretion, the Appellant cannot be exempted from the provisions of the Public Service Policy Instructions 2010.

Appellant’s Submission

14. The representative for the Appellant based her submission on the following grounds:

- (a) The Appellant was awarded the scholarship on 28 October 2013 which pre-dated the policy amendments on 03 December 2013.
- (b) The Appellant was unaware of the amendment to the Public Service Instructions.
- (c) The Respondent failed to give reasons/or clarify its decision on 02 July 2014 not approving the Appellants request for study leave with pay.
- (d) There is sufficient funding to justify grant of study leave with pay, and establishment of a post prior to award of the scholarship.
- (e) It is the intention of the Appellant to finish her studies and return to work in developing the Central Procurement Unit, which is a critical area of Government.
- (f) Serving 4 years in the Ministry of Finance and National Planning without staff entitlements serves to contribute to the Ministry in other means thus saving funds thereby, and will continue to do so with a student leave of only 50% annual wages, 25% second year, and third year with no pay.

Respondent’s Submission

15. The legal counsel for the Respondent made the following submission :

- (a) At the time of the award of the Appellant's scholarship, she was a daily paid labourer and thus not eligible for leave entitlement.
- (b) The Appellant was effectively subjected to section 1C.9 of the Public Service Policy Instructions 2010 (as amended).
- (c) Sufficient funding to justify establishment of a post and grant of study leave with pay does not affect the position of the Public Service Instruction 2010 that the Appellant was ineligible for study leave with pay.
- (d) There is no legal requirement for the Respondent to give reasons for or clarify its decision.

Tribunal findings

16. The Tribunal has carefully considered the appeal before it and has reached the following conclusions:

- (a) The Appellant was employed as daily paid employee with the Ministry of Finance and National Planning from 21 September 2009 until her appointment as Assistant Procurement Officer on 14 February 2014.
- (b) The award of the scholarship to the Appellant on 28 October 2013 was made on the premise that she was not an established employee.
- (c) As a daily paid employee, the Appellant was not eligible to any leave entitlement.
- (d) The amendments to the Public Service Policy Instructions 2010 on the 03 December 2013 did not affect the position of the Appellant, when the scholarship was awarded.
- (e) The "*freeze on appointments/promotion*" was lifted on 30 June 2013, and that provided an opportunity for the parties concerned to pursue the issue of study leave without pay.

- (f) When the Appellant was appointed as an Assistant Procurement Officer on 14 February 2014, section 1C.9 of the Public Service Policy Instructions 2010, as amended, regarding the probation conditions applied to her.
- (g) The Appellant's 6 months probation had not yet completed when she left to take up her scholarship on 20 February 2014. Furthermore, it has not been completed when her application for leave with pay was not approved by PSC on 02 July 2014.
- (h) There is no discretion under the Public Service Policy Instructions 2010, as amended, to exempt the Appellant from section 1C.9.
- (i) There is no legal requirement for the Respondent to give reasons for its decision [Tuputupu v PSC PST Appeal No. 07/2013].

Order of the Tribunal

17. Under section 21F of the Public Service Act 2002 (as amended), the Tribunal may make an order to affirm, vary, or set aside the Public Service Commission's decision.

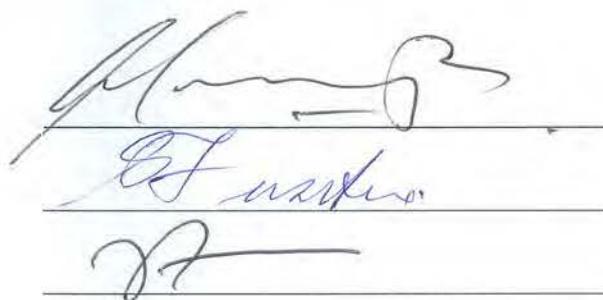
18. The Tribunal makes the following orders:

- (j) The PSC Decision No. 239 of 02 July 2014 is affirmed;
- (ii) The appeal is dismissed.

'Aisea H Taumoepeau

Lady 'Eseta Fusitu'a

Timote Katoanga



The image shows three handwritten signatures, each written on a horizontal line. The top signature is the most stylized, the middle one is more legible, and the bottom one is the simplest.