



Government of Tonga

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Public Service Tribunal

PST Appeal No. 1 of 2015

Mr. Mosese Fonohema **Appellant**

Public Service Commission **Respondent**

PUBLIC SERVICE TRIBUNAL:

Mr. 'Aisea H Taumoepeau, SC **Chairman**

Lady 'Eseta Fusitu'a **Member**

Mr. Timote Katoanga **Member**

REPRESENTATION:

Appellant: Ms. Fanau'ifo'ou 'Akauola

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

Date of Hearing: 03 March, 2015

Date of Ruling: 24 March, 2015

Mosese Fonohema v Public Service Commission: PST No. 01/2015

INTRODUCTION

1. The Appellant, Mosese Fonohema, was employed as Sports Development Officer, Ministry of Internal Affairs. He was dismissed from the public service by the Public Service Commission (PSC) under PSC Decision No. 126 of 31 March 2014.
2. The Appellant now appeals to this Tribunal under section 21C of the Public Service Act 2002, as amended.
3. The ground for the appeal is that the penalty imposed was manifestly excessive in view of the events giving rise to it. In support of that ground, three propositions were asserted:
 - (i) The law [Regulation 3(1) of the Public Service (Disciplinary Procedures) Regulations 2010, as amended] is discriminatory in that it is not applied on the same basis to the members of the public service.
 - (ii) The Appellant's circumstances and his state of mind were affected by the unfortunate events that occurred in his family set up.
 - (iii) The Appellant's apology was accepted by the IAAF, and the money in question had been repaid by the Appellant.
4. The Appellant prays to reduce the penalty imposed by PSC.

REPRESENTATION

5. The Appellant is represented by Ms Fanau'ifo'ou 'Akau'ola, an officer from the Ministry of Internal Affairs. However, since there has been no formal notification from that Ministry that Ms 'Akau'ola is acting in her formal capacity as a Ministry's official, the Tribunal exercised its discretion and allow Ms 'Akau'ola, who is not a lawyer, to represent the Appellant in her personal capacity. The Appellant also attended.
6. The Respondent is represented by the Solicitor General, Mr Sione Sisifa, with Ms Salote Vuki from the Office of the PSC in attendance.

BACKGROUND

7. A letter from Mr. Cherry Harvey, Manager Development, Oceania IAAF RDC, on 01 October 2013 confirming that Mr. Fonohema has been invited to attend the educational course 'TOECS Level 1 Lectures Refresher Course' at Oceania House, Gold Coast, Queensland, Australia, from 1st to 3rd December 2013. All of the expenses incurred by Mr. Fonohema whilst in Australia, including meals and accommodation, will be covered by the International Association of Athletics Federations and the Oceania Regional Development Centre, Gold Coast.
8. An Invoice from Palu Aviation Travel Ltd., dated 11 November 2013, was addressed to the Ministry of Internal Affairs (MIA) for the Air Tickets, TBU-AKL-TBU, of 6 people, including Mr. Fonohema, for a total of TOP7,194.00. The cost for each ticket was TOP1,199.00.
9. A Purchase Order, dated 15 November 2013, was addressed to Palu Aviation Travel Ltd from MIA for the airfares of 6 adults for a total amount of TOP7,194.00.
10. An Invoice from Palu Aviation Travel Ltd, dated 29 November 2013, was addressed to Mr. Mosese Fonohema for air tickets, TBU-AKL-TBU, for a total of TOP1,660.00 with the following details: Cost of Air Tickets TBU-AKL-TBU = TOP1,270.00 plus Penalty Fees and Date Changed = TOP390.00.
11. An e-mail on 06 December 2013 was sent from Cherry Harvey, IAAF Oceania Regional Development Centre, to Tueleni of MIA to inform him that according to their communication with Mr. Fonohema, it was led to believe that MIA would pay for his travel between Tonga and New Zealand and they would cover the travel for his course between New Zealand and Australia. However, before Mr. Fonohema was due to leave for New Zealand, he advised them that he paid for his ticket between Tonga and New Zealand as MIA was only paying for his accommodation in New Zealand. Therefore, they paid AUD990.00 to Mr. Fonohema for his return ticket between Tonga and New Zealand under the belief that the MIA was not paying for his tickets.

Mr. Harvey also asked Tueleni to clarify the following:

“Was the Ministry of Sport paying for his travel Tonga-New Zealand return

- *Did he purchase his own ticket and the Ministry was reimbursing him at a later date*
 - *Or did the Ministry purchase Mosese's ticket?*
12. An e-mail on 18 December 2013 was sent from Cherry Harvey, IAAF Oceania Regional Development Centre, to the Appellant informing him that they have been recently advised by the Ministry of Sport that they actually paid for his ticket. They also asked him to repay the AUD990.00 that was paid to him back to Ocean Athletics Association. Cherry also mentioned that *"It is a difficult and disappointing situation that I hope to resolve with you quickly"*.
13. The Appellant sent an e-mail to Cherry Harvey on 18 December 2014 to apologise about the incident. He also asked for forgiveness and to give him time to repay back the money.
14. The Appellant wrote a letter to Mr. Lopeti Senituli, CEO of MIA, on 20 January 2014 to apologise about the incident regarding his air tickets to New Zealand which has affected the relationship between the Ministry and IAAF. He also stated that he already contacted and apologised to the person who was dealing with this matter and arranged with him to give him time to pay back the money.
15. Mr. 'Onetoto Vanisi, Deputy CEO for Sports, Ministry of Internal Affairs, sent an Internal Memo on 05 February 2014 to the CEO, Ministry of Internal Affairs, to formally report on the Appellant's misconduct while attending the Regional Workshop at the Gold Coast, Australia, from 01 to 03 December 2013. Mr. Vanisi also provided the following recommendations:
- " 1. That Mosese Fonohema's case be resolved within the Ministry
2. That Mosese Fonohema be reprimanded, ban from overseas trip for one year effective 1 January 2014 and pay back the money to IAAF as soon as possible."*
16. Cherry Harvey, Manager IAAF Oceania Regional Development Centre, sent an e-mail on 17 February 2014 to the Appellant to pay the AUD990.00 by Friday 11th April. The account details for the payment were also provided.
17. The CEO, Ministry of Internal Affairs, sent a Savingram to the CEO, Public Service Commission, on 24 February 2014 to report the alleged 'serious' breach of the Code of Ethics and Code of Conduct for the Public Service 2010 by the Appellant. The basic allegation was that the Appellant obtained money under false pretenses by claiming that he paid out of his

own pocket the return airfare between Tonga and New Zealand in order to attend an official training program organised by Oceania IAAF Regional Development Centre. As a result, Oceania IAAF Development Centre refunded him the cost of this return ticket for the amount of AUD990.00, although the Ministry of Internal Affairs was the one who was paying for this return ticket.

18. Charge Formulation Committee (CFC) met to discuss Appellant's case. The CFC agreed that the Appellant's case is a serious breach of discipline and to be recommended to the PSC to have him suspended from duty without pay with immediate effect for serious breach to the Sections 3(b), 4(i), 7(f) and 7(h) of the Public Service Code of Ethics and Conduct 2010.

19. PSC Office circulated a paper, dated 01 March 2014, to the Commissioners to report on the Appellant's case with the following recommendation:

"That Mr. Mosese Fonohema, Sports Development Officer, Ministry of Internal Affairs be suspended from duty without pay with effect from 8.30am on the date following the date of the Public Service Commission Decision and that the 'Procedure of serious disciplinary charges' be instituted against him."

20. The Commissioners unanimously approved the recommendation on the paper that was circulated by the PSC Office on 04 March 2014.

21. A letter, dated 04 March 2014, was sent from the CEO of the PSC to the Appellant to inform him of the following PSC Decision No. 90 of 04 March 2014:

"That Mr. Mosese Fonohema, Sports Development Officer, Ministry of Internal Affairs be suspended from duty without pay with effect from 8.30am on the date following the date of the Public Service Commission Decision and that the 'Procedure for serious disciplinary charges' be instituted against him."

22. A letter, dated 05 March 2014, was sent from the CEO of PSC to the Appellant to inform him of the charges and the particular of the charges as follows:

"The Charges:

Charge 1

Performing your official duties dishonestly, contrary to section 3(b) of the Public Service Code of Ethics and Conduct 2010.

Charge 2

Whilst on duty overseas behave in a way that ruined the good reputation of Tonga, contrary to section 4(i) of the Public Services Code of Ethics and Conduct 2010.

Charge 3

Knowingly providing misleading information to a request for information, contrary to section 7(h) of the Public Service Code of Ethics 2010.

The particulars of the charges are:

Charge 1

Mosese Fonohema, Sports Development Officer, Ministry of Internal Affairs, between 1 - 3 December 2013, at Queensland, Australia whilst performing official duties you did dishonestly claim AUD\$990 from the Oceania IAAF Regional Development Centre.

Charge 2

Mosese Fonohema, Sports Development Officer, Ministry of Internal Affairs, between 1 - 3 December 2013, at Queensland, Australia whilst on official duties you did ruin the good reputation of the Kingdom of Tonga by dishonestly claiming AUD\$990 from the Oceania IAAF Regional Development Centre.

Charge 3

Mosese Fonohema, Sports Development Officer, Ministry of Internal Affairs, between 1 - 3 December 2013, at Queensland, Australia you misleadingly informed the Oceania IAAF Regional Development Centre that you had personally paid for your return fares between Tonga and New Zealand.”

23. In paragraph 4 of the letter dated 05 March 2014 from the CEO of the Respondent (the charge letter: Respondent’s documents pages 40-41), it informed the Appellant as follows:

“ 4. If you do not dispute these charges, you should inform the Chief Executive Officer of the Public Service Commission in writing 10 days of receipt of this letter, that you do not dispute the charges. You should also set out in that letter any reasons you think that should be considered in order to mitigate the sanction that may be imposed on you.”

24. The Appellant paid AUD990.00 to the Oceania Athletics Association through the Westpac Bank of Tonga on 10 March 2014 to settle the amount that he claimed under false pretences.

25. The CEO of the Ministry of Internal Affairs sent a letter, dated 12 March 2014, to the CEO of the PSC to plea for mercy on behalf of the Appellant and it was based on the following reasons:
- 1) The Appellant has repaid in full to the Oceania IAAF Regional Development Centre the AUD990.
 - 2) The Appellant had admitted in writing and verbally that he made a serious error of judgment and also apologised unreservedly.
 - 3) The Appellant is a good worker and his work is appreciated by his peers inside the Ministry. MIA would be very sorry to lose him as they already lost some of the important staff in the Sport Division.
26. The Appellant sent a letter, dated 13 March 2014, in response to the letter, dated 05 March 2014, from the CEO of the PSC to apologise for his action and plea for mercy. He also provided some of the following mitigation features to be considered by the PSC in making its final decision:
- 1) He already apologised to the Oceania Athletics Association.
 - 2) He already admitted and apologised for his shortfall during the internal investigation.
 - 3) He already paid for the air tickets by Telegraphic Transfer through the Westpac Bank of Tonga.
 - 4) This was his first offence in carrying out his duties as a public servant.
 - 5) A family problem was affecting his state of mind at the time of the incident.
27. PSC Office submitted a paper, dated 28 March 2014, to the Commissioners meeting on 31 March 2014 regarding the Appellant case with the following conclusion:
- “... the PSC Office notes that all sections of the Code of Ethics and Conduct that Mr. FonoHEMA was charged on has not been disputed and as such the fact remains that although he had reimbursed the money owed, he had still misappropriated public funds. The penalty for misappropriation cases has been dismissal.”*
28. According to the minutes of the Commissioners meeting on 31 March 2014 the following recommendations were approved:
- 1) *That Mr. Mosese FonoHEMA, Sports Development Officer, Ministry of Internal Affairs be dismissed from the Public Service with effect from 5 March, 2014 (i.e. date of his suspension from duty without pay)*
 - 2) *That he be paid the equivalent of his salary for any period of earned*

leave days;
3) *That he submits any claim for leaving service benefits to the Retirement Fund Board.*"

29. The CEO of the PSC sent a letter, dated 02 April 2014, to the Appellant to inform him of the PSC Decision No. 126 of 31 March 2014:
30. The Appellant appealed to the Public Service Tribunal on 16 December 2014 against the PSC Decision No. 126 of 31 March 2014.
31. The Appellant paid the required fee for his appeal on 22 January 2015.
32. The hearing of the appeal was conducted on 03 March 2015.

APPELLANT'S SUBMISSION

33. Ms 'Akau'ola submitted that the overall ground for the appeal is that the penalty imposed on the Appellant was manifestly excessive in view of the event giving rise to it. Three propositions were put forward to support the submission:
 - (i) The law is discriminatory with regard to the imposing of the dismissal sanction in the public service;
 - (ii) The family circumstances of the Appellant was distorted and his state of mind was adversely affected;
 - (iii) The money had been repaid to IAAF and the Appellant's apology was accepted.

The law is discriminatory with regard to the imposing of the dismissal sanction in the public service

34. Ms 'Akau'ola submitted that the discretion to decide what amounts to a "minor" or "serious" breach of discipline [as provided under Regulation 3(1) of the Public Service (Disciplinary Procedures) Regulations 2003, as amended], is often exercised in a discriminatory fashion. By giving the discretion to the CEO of Ministries it means that different CEO's make different interpretations of what might amount to a "serious" breach of discipline. Some instances of misappropriation of funds in the past were not given the dismissal sanction as in this case. Different CEO's tend to make different determinations with regard to such matters. The discretion should be given only to the PSC so that it will be exercised uniformly.

35. No specific instances were given by Ms 'Akau'ola of actual situations where such discrimination could be shown or implied.

The family circumstances of the Appellant was distorted and his state of mind thereby adversely affected

36. Ms 'Akau'ola made references to the family circumstances of the Appellant at the time the events took place. His marriage was breaking up and the Appellant's state of mind was thereby adversely affected. There was financial hardship thus forcing the Appellant to do what he did. It was an error of judgment.

The funds have been repaid to IAAF and the Appellant's apology accepted

37. Ms 'Akau'ola also submitted that the Appellant apologized to IAAF and repaid the money. The apology was accepted.

RESPONDENT'S SUBMISSION

38. The Solicitor General tendered very carefully structured written submissions.

A. The sanction of dismissal imposed was appropriate in the circumstances of the offending and that of the Appellant

39. There were three serious breaches of discipline charged against the Appellant:

- (i) Performing of official duties dishonestly;
- (ii) Behaving in a way that ruined the good reputation of Tonga whilst on duty overseas;
- (iii) Knowingly providing misleading information to a request for information.

40. Mitigation on behalf of the Appellant was advanced well before the Respondent imposed sanction:

- (i) On March 2014, the CEO for Internal Affairs submitted a letter of support and mitigate on behalf of the Appellant arguing that –

- (a) The Appellant had repaid the funds in full;
 - (b) The Appellant had admitted and apologized for the offending and that it was a serious error of judgment;
 - (c) The Appellant is a distinguished and able employee in the Ministry.
- (ii) In his reply to his charges on 13 March 2014, the Appellant advanced further mitigation features and begging for mercy:
 - (a) The funds taken were repaid in full;
 - (b) Admitting and apologized to the offending during internal inquiry into the allegation;
 - (c) This was his first offending;
 - (d) The motive for the deception was due to family and personal problems.
41. All these mitigating features were submitted to and took into consideration by the Respondent before imposing sanction on 31 March 2014.
42. The mitigation features were submitted to the Respondent for consideration on 28 March 2014.
43. In order to determine whether the sanction of dismissal was excessive, one would have to consider the aggravating and mitigating features of the offending.
44. Aggravating features of the offending from the Respondent's perspective:
- (i) the offending was premeditated, deliberate and systematic (it was not a serious error of judgment);
 - (ii) there was high level of deception (deceiving local authorities, and a distinguished international organization) on the part of the Appellant;
 - (iii) there was serious breach of trust (trust of Government as employer, and IAAF as international funding agency);
 - (iv) at the time of the offending, the Appellant knew that there were serious consequences;
 - (v) if it weren't for the inquiry within the Ministry and from the IAAF, the offending would not have been detected;
 - (vi) the Appellant's deception had victimized not only the Government as his employer, but also IAAF, an international organization;
 - (vii) the offending had caused embarrassment and ruined the good reputation of Tonga;
 - (viii) the Appellant was a senior officer who should have known better and acted responsibly.

45. Mitigating features of the offending from the Respondent's perspective:
- (i) the Appellant had admitted the offending in the first available opportunity;
 - (ii) the Appellant had apologized to the IAAF for his action;
 - (iii) the Appellant had repaid the funds in full to the IAAF.
46. In weighing the aggravating and mitigating features for the Appellant, the aggravating features clearly outweigh the mitigating features.
47. The appropriate sanction was dismissal considering the circumstances of the offending and that of the Appellant.
48. The sanction of dismissal not only punishes the offender, but also sends out a clear message to the public service that offending of the kind is unacceptable, and thus deters others.

B. The sanction had adversely affected the circumstances of the Appellant and his family is not a valid mitigation feature or a valid ground of appeal

49. There was high deception involved on the part of the Appellant when committing the offences.
50. The offending was premeditated, deliberate and systematic (it was not a serious error of judgment).
51. The Appellant knew that there were serious consequences of his actions but chose to take the risks.
52. The Appellant at the time of committing the offences should have thought about the circumstances of his family in the event that he is caught.
53. That advancing adverse family circumstances due to sanction is not a valid mitigation feature (or valid ground of appeal), or an excuse to avoid appropriate sanction.

C. The fact that the IAAF had accepted the apology by the Appellant, and that the Appellant had repaid the funds in full were mitigations already taken into account by the Respondent

54. The mitigation of IAAF accepting apology and funds repaid in full were advanced well before the Respondent imposed sanction.
55. On 12 March 2014, the CEO for Internal Affairs submitted a letter of support and mitigate on behalf of the Appellant.
56. In his reply to his charges on 13 March 2014, the Appellant advanced further mitigation features.
57. Those mitigations were considered in advance, having considered all aggravating and mitigating features; the respondent deemed that dismissal was the appropriate sanction.

TRIBUNAL'S FINDINGS

The law is discriminatory with regard to the imposing of the dismissal sanction in the public service

58. It was submitted on behalf of the Appellant that the law is discriminatory, and regulation 3(1) of the Public Service (Disciplinary Procedures) Regulations 2003, as amended, was specifically referred to.
59. The thrust of this submission is asserting that the current law which gives the discretion to a CEO to decide what might be "serious" breach of discipline is bad law, and it should only be given to the PSC who would exercise such discretion in a non-discriminatory manner.
60. A blanket assertion that the state of the law is bad cannot be regarded as an excuse to reduce or escape disciplinary sanction. It is a matter for the Legislative Assembly to change the law if it is considered to be bad. The law must be applied as it is.
61. Except as stated below, there was no flaw in the disciplinary processes that took place. The charges against the Appellant were admitted. The Appellant was invited to provide mitigating factors in the letter dated 05 March, 2014 (the charge letter: Respondent's documents pages 40-41). The principle of procedural fairness was complied with [refer Supreme Court decisions: **Sione Finau Moala v PSC & Kingdom of Tonga** (27 June 2014); *Ex parte Siosifa T Tu'utafaiva* (04 December 2012)]

62. This appeal is based purely on the premise that the dismissal sanction was manifestly excessive in view of the offending by the Appellant.
63. The mitigating features were advanced and put before the Respondent, as detailed in the Appellant's letter dated 13 March 2014, and the CEO for Internal Affairs' letter dated 12 March 2014 and presented to the Respondent in its meeting of 31 March 2014.
64. The Tribunal finds that the Appellant was accorded ample opportunity for mitigation before the sanction was imposed by the Respondent.

The family circumstances of the Appellant was distorted and his state of mind was adversely affected

65. The offending by the Appellant was highly deceptive and clearly premeditated and deliberate. It was not merely an error of judgment. If it had not been for the inquiry within the Ministry and from IAAF, the offending would not have been detected.

The funds have been repaid to IAAF and the Appellant's apology accepted

66. The Appellant's apology was tendered and accepted by the IAAF, and the funds were repaid.

THE SANCTION

67. In any disciplinary process under the public service legislation, the sanctions that could be imposed if a penalty is warranted, are provided in Regulation 10 of the Public Service (Disciplinary Procedures) Regulations 2003, as amended. Those sanctions are listed as follows:

“ (a) reprimand;

(b) stoppage of pay by way of restitution (in whole or in part) of loss or damage caused by the employee;

(c) stoppage of a future increment, removal of an increment, or increment;

(d) transfer to another post or locality;

(e) demotion;

(f) suspension;

(g) dismissal; or

(h) any other action that the Commission may consider necessary.”

68. It appears from the above list that the sanction of dismissal is at the top end, if not the most severe of the sanctions that can be imposed.

69. The possible sanctions were brought to the attention of the Respondent when it considered the Appellant’s case (Respondent’s documents page 47 paragraph 2).

70. However, the minutes of the meeting do not show how the Respondent reached the conclusion to impose the dismissal sanction. The minutes only show that it decided to dismiss the Appellant. This raises some difficulties to the Tribunal.

71. In imposing the sanction of dismissal, it appears that the Respondent categorised the actions of the Appellant to be close, if not the worst offending that might be committed by a member of the public service, so as to warrant the imposition of the sanction of dismissal.

72. The Constitution is the supreme law of the land. Clause 23, as amended by Act No. 3 of 2013, provides a guideline with regard to the type of offending that might be considered as most serious to warrant the imposition of the sanction of dismissal.

73. Clause 23 provides -

“No person having been convicted of a criminal offence and sentenced to imprisonment for more than two years, shall hold any office under the Government whether of emolument or honour nor shall he be qualified to vote for nor to be elected a representative of the Legislative Assembly unless he has received from the King a pardon together with a declaration that he is freed from the disabilities to which he would otherwise be subject under the provisions of this clause.”

(Proviso)

74. Under Clause 23, a person is debarred from the public service if he/she is **convicted and sentenced to imprisonment for more than two years**. That situation may well be the worst possible scenario for the sanction of dismissal to be imposed.

75. The Tribunal believes that the offending of the Appellant falls short of the worst scenario as provided by Clause 23 of the Constitution, and imposing of the sanction of dismissal on the Appellant is manifestly excessive.

76. The appeal is allowed.

ORDER OF THE TRIBUNAL

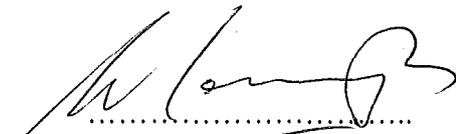
77. Section 21F (1) of the Public Service Act 2002, as amended, provides that the Tribunal may make an order to affirm, vary, or set aside the PSC decision.

78. The Tribunal makes the following orders:

(i) The PSC Decision No. 126 of 31 March 2014 is set aside;

(ii) This case is referred back to the PSC to consider the appropriate sanction for the Appellant, in view of Clause 23 of the Constitution (as amended by Act No. 3 of 2013);

(iii) No order for costs.



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'Aisea H Taumoepeau



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Lady Eseta Fusitu'a



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Timote Katoanga