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Public Service Tribunal

PST Appeal No. 2 of 2015

Mr. Claude Temoanarau Tupou **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: Mrs. Petunia Tupou Legal Counsel for the Appellant

Respondent: Mr. Sione Sisifa, SC Solicitor General
 Mr. Tevita 'Aho *Attorney General's Office*

 Mrs. Falemei Fale Deputy Secretaries,
 Ms. Jeanette Vea *Public Service Commission*

Date of Hearing: 10 November, 2015
 26 November, 2015
 16 December, 2015
 18 December, 2015

Date of Ruling: 28 January, 2016

Claude Temoanarau Tupou v Public Service Commission (PSC)

PST Appeal No. 2 of 2015

1. This is an appeal by the Appellant seeking the following decision from the Tribunal:
 - (a) Setting aside the Respondent's decision to re-advertise the position for CEO of the Ministry of Education and Training
 - (b) To vary the Respondent's decision by confirming the appointment of the Appellant as CEO for the Ministry of Education and Training or in the alternative making recommendation to the Respondent to confirm such appointment.
2. The Appellant relied on the following grounds, namely:
 - (i) The decision not to appoint the Appellant and to re-advertise the position for the CEO is in breach of the principles of natural justice;
 - (ii) The decision not to appoint the Appellant and to re-advertise the position of the CEO was based on mistaken facts;
 - (iii) The decision not to appoint the Appellant and re-advertise the position is in breach of the legitimate expectations of the Appellant;
 - (iv) The Commission failed to take into account relevant considerations and sought to take into account irrelevant considerations in their decision not to appoint the Appellant and to re-advertise the position;
 - (v) The decision not to appoint the Appellant and to re-advertise the position is unreasonable and unfair.

BACKGROUND

3. The position of CEO for Education and Training was to become vacant after 02 of May 2015 when Mrs. 'Emeli Pouvalu completed her employment contract.
4. The position for CEO for Education and Training was then advertised and seven candidates were shortlisted to be interviewed.
5. The shortlisted candidates were interviewed on 03 and 04 June 2015 and the interviewing panel unanimously recommended on 05 June 2015 that the position of CEO for Ministry of Education & Training be offered to Mr. Claude Temoanarau Tupou.
6. On 05 June 2015, the PSC by way of consultation, recommended to the Hon. Samuela 'Akilisi Pohiva, Prime Minister and Minister of Education and Training, to approve the

appointment of Mr. Tupou to the position of CEO for Ministry of Education and Training with effect from date of signing the contract.

7. While the consultation was still going on between the Hon. Prime Minister and Minister of Education and Training and the PSC, a complaint was received from Dr. 'Uhila moe Langi Fasi, one of the shortlisted candidates, raised the following issues: confidentiality of the interviewing process, allegations of bias against the panel members and the reprimand of Mr. Tupou for alleged misusing of funds.
8. After the investigations into Dr. Fasi's complaint and the consultation with the Hon. Samuela 'Akilisi Pohiva, Prime Minister and Minister of Education and Training, the Commissioners agreed in their meeting of 28 August 2015 to re-advertise the position of CEO for the Ministry of Education and Training.
9. The decision to re-advertise the position of CEO for the Ministry of Education and Training was conveyed to the Appellant on 31 August 2015.

PSC ACTION AND DECISION

10. On 23 March 2015 the Acting CEO of the PSC wrote to the Hon. Prime Minister and Minister of Education and Training to inform him that the employment contract of Mrs. 'Emeli Pouvalu, CEO for Education and Training, will conclude on 02 May 2015. The CEO's Job Description was also submitted for the Minister's comments and/or approval, prior to PSC proceeding with further necessary action to advertise the position.
11. On 27 March 2015, a Savingram was sent from Dr. Palenitina Langa'oi, Chief Secretary & Secretary to Cabinet, to the A/CEO for PSC to inform her that the Hon. Prime Minister has directed that the advertisement of the CEO for Ministry of Education and Training be placed on hold until further notice.
12. On 14 April 2015, a Savingram was sent from the Chief Secretary & Secretary to Cabinet to the A/CEO for PSC to convey a direction from the Hon. Prime Minister to proceed with the advertisement of the post for the CEO for Education and Training.
13. PSC submitted a letter on 11 May 2015 to the Hon. Prime Minister and Minister for Education and Training requesting his endorsement of the interview panel members.
14. On 12 May 2015, PSC received the following response from Hon. Prime Minister and Minister for Education and Training: *"Please be informed that the Hon. Prime Minister has noted the proposed panels, and the names of the reserving panels, and has thus endorsed the latter to conduct the said interview"*. The approved panel members were:
 1. Dr. Seu'ula Johansson Fua
 2. Rev. 'Alifeleti 'Atiola
 3. Mrs. Mele Taurnoepeau
 4. Fr. 'Aisake Vasima

15. On 28 May 2015, the Acting CEO of the Commission wrote to the Hon. Prime Minister and Minister for Education and Training with the following proposal because Mrs. Mele Taumoepeau will not be available for personal reasons:

"

1. *That the PSC Office progresses the interview panel with 3 confirmed panellists on 3rd and 4th June, 2015 (i.e. Dr. Seu'ula Fua, Rev. 'Alifeleti 'Atiola and Fr. 'Aisake Vaisima) or;*
2. *Your Honour may propose another member to replace Ms. Taumoepeau and we will endeavour to conduct the interview on the 3rd and 4th June, 2015 subject to panel availability.*

The above is submitted for your Honour's information and further direction, please."

16. There were seven candidates were shortlisted for the position of the CEO for Ministry of Education and Training as follows:
1. Mr. Claude Tupou
 2. Mrs. Emily Pouvalu
 3. Mr. 'Uhila moe Langi Fasi
 4. Mrs. 'Emeline Tuita
 5. Mr. Vilimaka Foliaki
 6. Mr. 'Olikoni Tanaki
 7. Mr. Tevita Vea'ila
17. The interviews of the shortlisted candidates were carried out on 03 and 04 June 2015 and the members of the interviewing panel were Fr. 'Aisake Vaisima (Principal of 'Apifo' ou College), Rev. 'Alifeleti 'Atiola (Principal of Tupou College) and Dr. Seu'ula Fua (Director of Institute of Education, University of the South Pacific).
18. On 05 June 2015, the interviewing panel submitted their report on the result of their interviews with the total score awarded to each candidate as shown in the table below:

Candidate	Panel Members			Total Points per Candidate
	Fr. 'Aisake Vaisima	Rev. 'Alifeleti 'Atiola	Dr. Seu'ula Fua	
Mr. Claude Tupou	80	90	96	266
Mrs. 'Emeli Pouvalu	70	90	95	255
Dr. 'Uhila moe Langi Fasi	69	90	79	238
Mrs. 'Emeline Tuita	64	55	64	183
Mr. Vilimaka Foliaki	49	57	44	150
Mr. 'Olikoni Tanaki	42	28	18	88
Dr. Tevita Vea'ila	32	34	21	87

19. On the same report of 05 June 2015, the interviewing panel recommended that *"The panel was unanimous in recommending that the position of Chief Executive Officer, Ministry of Education and Training be offered to Mr. Claude Tupou."*
20. On 05 June 2015, the Acting CEO of the Commission sent a letter to the Hon Prime Minister and Minister for Education and Training to convey the outcome of the interviews of the shortlisted candidates for the position of CEO for Education & Training with the following recommendations:
- "
- i. *That the outcome of the interviews for the position of Chief Executive Officer for Education and Training be endorsed and;*
- ii. *That the Public Service Commission be approved to formalise the appointment of Mr. Claude Tupou to the position of Chief Executive Officer for Education and Training with effect from the date of signing of CEO contract."*
21. A letter was sent from the Chief Secretary and Secretary to Cabinet on 16 June 2015 to the Chairman of the PSC to convey the following direction from the Hon. Prime Minister with regard to the PSC letter of 28 May 2015: *"That the appointment of the Chief Executive Officer for the Ministry of Education & Training is to be put on hold until further notice, please"*

It is noted that the required response ought to have come from the Hon Minister of Education and Training not the Hon Prime Minister.

22. On 19 June 2015, a Savingram was sent from the Acting CEO of the Commission to the Chief Secretary and Secretary to Cabinet to advise that the Prime Minister's directions was noted by the Commissioners with the following request for clarifications:

- "
1. *Your letter of June 16 June, 2015 (Annex 1) refers to our letter of 28 May, 2015 (Annex 2) which was regarding an update on the PSC's Office attempts to convene the panel directed by the Hon. Prime Minister;*
2. *Our letter of 05 June, 2015 (Annex 3) to the Hon. Prime Minister conveyed the outcome of the Chief Executive Officer for Education and Training interview;*
3. *Your letter of 16 June, 2015 does not make reference to our submission of 05 June, 2015.*
4. *In this respect, and for records purposes, I have been directed to seek your confirmation please, if your letter of 16 June, 2015 is also intended to address our letter to the Hon. Prime Minister dated 05, June 2015."*

23. On 26 June 2015, Dr. Fasi sent an e-mail to the Chief Secretary & Secretary to Cabinet and copied to employment@psc.gov.to to complain about the interviewing process and

also for the selection of the Appellant to the position of CEO of the Ministry of Education.

24. The e-mail from Dr. Fasi was forwarded by the Chief Secretary & Secretary to Cabinet to Mrs. Falemei Fale of the PSC on 26 June 2015.
25. A Savingram was sent on 16 July 2015 from the Chief Secretary & Secretary to Cabinet to the Acting CEO of the Commission regarding Dr. Fasi's e-mail of 26 June 2015 for the PSC's necessary actions in respect of their procedures.
26. At the Commissioners Meeting of 17 July 2015 the Acting CEO briefed the Commissioners on the complaint from Dr. Fasi and the following discussion was extracted from the minutes:
 - *It was raised that the CEO for Education appointment is still on hold awaiting a decision from the responsible minister.*
 - *It was agreed to circulate the complaint for the information of the Commission.*
27. A Memorandum to the Public Service Commission, PSC Circulated Cases No. 24 - 20 July, 2015 provided the following comments from the PSC Office against the queries that had been raised by Dr. Fasi in his e-mail of 26 June 2015.

"

<i>Query from Dr. Fasi</i>	<i>Response to Query</i>
1. <i>Did the panel sign a confidential declaration</i>	1. <i>Panel members contract of employment have confidentiality agreements. The panel members are also requested when they accept to participate as panel members to ensure information provided are treated with the appropriate confidentiality. However it is noted for future recruitments that panel members are reminded about maintaining confidentiality of the outcome of the interview.</i>
2. <i>Is it true that Dr. Fua is one of Emily's referees? ff true, is this not a conflict of interest?</i>	2. <i>All panel members signed a conflict of interest form and Dr. Seu'ula did indicated that her conflict of interests were apparent as she has worked with four (4) people being interviewed (Form is attached as Annex 2) The PSC Office notes that</i>

	<p><i>Dr. Fua's declaration was discussed in the panel report which Dr. Fua confirmed that she was still able to make a professional and objective judgement and would not be unduly influenced by the fact that she has knowledge of these candidates.</i></p>
<p>3. <i>Information has come out that the panel had picked Mr. Claude Tupou to be the CEO for MET. However, candidates have not been formally informed of the outcome of the interview.</i></p>	<p>3. <i>The PSC Office has not formally informed of the outcome of the interview given that the recruitment process has been put on hold by the Hon. Prime Minister.</i></p>
<p>4. <i>The integrity and skills and experience of the panel members are being questioned. It was also queried as to how they were chosen</i></p>	<p>4. <i>Panel members utilized for the interview was approved by the Hon. Prime Minister. It is noted that there are some very serious accusations against the panel and should be disregarded as unwarranted given that they had signed their declarations of conflict.</i></p>
<p>5. <i>Did the PSC check relevant CVs and experiences to ensure that marking done by the panel was appropriate?</i></p>	<p>5. <i>All relevant information including application letters and CVs were provided to the panel to make informed decision.</i></p> <p><i>The Commission initially had referred to their CVs hence being shortlisted for interview.</i></p>
<p>6. <i>Mr Claude Tupou was reprimanded together with others for misuse of funds at the CDU which they paid into their personal bank accounts? Does PSC shortlist and interview such a person to become a leader of a Ministry?</i></p>	<p>6. <i>The PSC Office has checked its records and it shows that Mr. Claude Tupou was internally reprimanded and warned on the 28 June 2011 on the ground of 'inaction' regarding mishandling of funds in the purchase of printed materials on sale from CDU. This matter was never referred to the PSC Office as a serious disciplinary case but rather was dealt with as an internal disciplinary.</i></p>
<p>7. <i>That the panel provide a response as to what Claude had achieved in the Ministry?</i></p>	<p>7. <i>The PSC Office notes that the panel had carried out its duties as required and it is not necessary to provide a response to this</i></p>

28. According to the minutes of the Commissioners Special Meeting on 21 July 2015, on the Agenda Item 1.3 "*Complaint regarding CEO recruitment process*", the PSC Office was required to compile all the relevant documents in Mr. Tupou's Personal File regarding his case for submission to the Commission.
29. On 22 July 2015, an Internal Memorandum was sent from the Acting CEO of PSC to the Commissioners of the PSC with the relevant documents relating to Mr. Tupou's case for their information and further directions prior to the PSC Office progressing with further necessary actions.
30. A Commissioners Meeting was held on 24 July 2015 and the following points were extracted from the discussions recorded in the minutes of that meeting:
- *The Commission further discussed Dr. Fasi's complaint and it was agreed to submit a letter to the Minister for Education and Training requesting his comments on the background of the case concerning Mr. Claude Tupou.*
 - *It was also agreed that a copy of the above letter be addressed to the Acting CEO for Education and Training to provide relevant documentations regarding this case as a way of testing his integrity...*
 - *The Commission agreed to extract only the part of the letter regarding Dr. Fasi's accusations regarding Fr. Vaisima and request Fr. Vaisima to provide a response to these allegations...*
 - *The Chairman of the Commission also conveyed that the Hon. Prime Minister directed that the CEO advertisement be advertised on number of media outlets such as radio, television and newspaper. "*
31. On 28 July 2015 a letter was sent from the Chairman of PSC to the Hon. Prime Minister to inform him that PSC has received a complaint from one of the applicants regarding the CEO recruitment process and also referred to a mishandling of fund case at the Curriculum Development Unit (CDU) which involved Mr. Tupou. The Chairman also requested on behalf of PSC the kind assistance of the Hon. Prime Minister in providing the relevant information and documentations pertaining to the mishandling of funds which involved Mr. Tupou and other senior staff at CDU.
32. Another letter was also sent out from the Chairman of PSC to the Appellant on 28 July 2015 to inform him that PSC has received a complaint from one of the applicants regarding the interview process and also referred to a mishandling of funds case at CDU which involved himself and other senior staff at the Ministry of Education and Training. As a result, the PSC Office is collecting the relevant information and documents to help substantiate or disprove the allegations and requesting his assistance in providing relevant information and documentations.

33. The Acting CEO of the Commission sent a letter on 28 July 2015 to Fr. Vaisima to inform him that PSC has received a complaint from one of the applicants regarding maintaining the confidentiality of the information during interview process. The applicant has informed the PSC Office that Fr. Vaisima had shared confidential information with the public on the following and requesting his response to the accusations:

"

- *The panels individual marking assessments.*
- *The applicants responses to the questions posed to them.*
- *That you had stated that one of the applicants has attitude problems therefore is not suitable for the CEO position. "*

34. The Chairman of PSC sent a letter on 28 July 2015 to Dr. Fasi to acknowledge the receipt of his e-mail of 26 June 2015 and to advise that the matter is currently considered by the Commission. The outcome of the Commission's consideration of his complaint will be provided in due course.

35. Mrs. Pouvalu, one of the applicants, wrote to the Chair of the PSC to raise two personal and professional concerns about the delay in announcing the result of the interview:

1. *I need affirmation of the results to consider 'my future ' in order to move on. The delay has critical impacts which are unfair, non-transparent, suspicious and reflective in the ineffective Processes and Procedures of PSC in this case. It highly impinges on the integrity of the Commission.*
2. *The Ministry has lapsed in some critical developmental progress without a substantive CEO, whoever it may be."*

36. According to the minutes of the Commissioners Meeting on 31 July 2015, the PSC Office was tasked with following action items:

1. *PSC Office to provide a response to Mrs. Pouvalu's letter informing her that the recruitment process is currently on hold due to a complaint received from one of the applicants for the position.*
2. *PSC Office to write a letter to all shortlisted applicants for the CEO for Education and Training advising them that the recruitment process is currently on hold due to a complaint received from one of the applicants for the position. "*

37. The Acting CEO of the PSC wrote a letter to the Appellant on 03 August 2015 to inform him that the recruitment process for the position of CEO for Education and Training is currently on hold as a complaint was received against the recruitment process and he will be informed of the Commissioner's further consideration of this matter once confirmed.

38. On 04 July 2015, the Appellant wrote to the Chairperson of the PSC in responding to the Chairperson's letter of 28 July 2015 and stated the following in his letter:

"... I consider these allegations extremely serious for three reasons;

- 1. That L as an applicant is alleged to have had something to do with the recruitment process? Am I alleged to have influenced the decision makers?*
- 2. That I mishandled funds while working for the Ministry. This is a criminal offence and if such allegations were known to an applicant why have they left it until now to raise?*
- 3. These allegations amount to the defamatory remarks which damage my reputation. The prolong of the announcement of the CEO and the allegations now put before me will no doubt subject and expose me to ridicule, contempt, hatred and to be shunned by those have seen it and the community in due course.*

It is difficult to ascertain what exactly is required when the complaint and allegations put against me are not provided to me. Accordingly, I respectfully request that a copy of the complaint be furnished so, that;

- i) I am aware of the complainant;*
- ii) I can answer the exact allegations made against me.*

... For your kind information, I am indeed aware of one incident around 2011 or 2012 where allegations of mishandling of funds in sales of books by CDU were raised in Parliament. As a result of these allegations a full audit of the accounts was ordered and the matter was handled by a Parliament Sub-Committee. Since then there has been no further developments. I understood that this matter has been settled three or four years ago and was confirmed by the previous Honourable Minister of Education in Parliament and in meetings of the Ministry that no mishandling occurred at the time.

*I am unsure whether these allegations are re-visitation of those past allegations or fresh ones, but I am keen of the details. **If** these allegations relate to the past allegations, that information should be available from the Auditor General's office and/or Parliament Sub-Committee that undertook the enquiry.*

I respectfully convey my wish to oblige with your request but hope and anticipate that given such serious allegations have been lodged against me that the principles of natural justice will be observed where the allegations are clearly set out before me and I am afforded an opportunity to be heard and respond to those allegations"

39. A Commissioners Meeting was held on 07 August 2015 and the following discussions were extracted from the minutes:

- *The Chairman informed the Commissioners that the letter we had submitted to Mr. Tupou was to simply ask if he had been reprimanded and why. However, in Mr. Tupou's letter, he has raised other issues and did not provide a response to our question.*
- *The Chairman of the Commission informed the Commissioners that he already discussed the CEO recruitment with the Prime Minister and he advised that his views are that we are over concerned with the outcome of the interview only rather than the background of the recommended candidate. The Hon. PM had also raised that there is a need to re-advertise the CEO position.*
- *A comment was raised for the Commission to make their decision rather than delaying the process and at the same time continue to remind the Prime Minister on a way forward.*
- *It was raised that the suggestion to re-interview the position is not supported given that the interviews have been completed. Another option they may consider is if the recommended candidate is not suitable for the position, then the JS₁ runner up should be appointed to the position.*
- *The Commissioners therefore agreed for the PSC Office to write a letter to Mr. Tupou and inform him that our letter requested that he explains whether it was true that he was reprimanded and why. Mr. Tupou is to be informed that his response is to be received as soon as possible. "*

40. A letter from the Chairman of the PSC was sent to the Appellant on 07 August 2015 to acknowledge the receipt of his letter of 04 August 2015 and to seek "*relevant documents and explanation as to the mishandling of funds in the purchase of printed materials on sale from CDU in 2011.*" The Commission also wanted to confirm if he was reprimanded on 28 June 2011, ref: SW7/15/11 due to inaction with regards to his responsibilities as Deputy Director, Quality Assurance.

41. On 14 August 2015 Fr. Vaisima wrote to the Acting CEO of the PSC to acknowledge the receipt of her letter of 28 July 2015 and with the following comments:

"... First of all I would like to put the accusation in context. After the interview we were told that the confirmation of the successful candidate would be within 2 weeks. I left for Fiji for 2 weeks and returned to Tonga on 26th July. It was with that assumption and an information received that your Office has publicly announced the results. It was on 2nd July, during Coronation festivities, that I met the successful candidate and I congratulated him, a month later from the interview. It was during that conversation that I realized that the process was not yet completed. However, I wish to state here that the ranking of the candidates was part of our conversation but not the details of the interview questions and my personal opinion on any one of the candidates.

... It was in sincerity of intention to congratulate not to breach confidentiality nor put down anyone. And I sincerely hope that this honest mistake would not become a scapegoat for any delay in the process but rather to assist you and the Commission in a way forward on this matter... "

42. On 17 August 2015 the Acting Chief Secretary and Secretary to Cabinet sent a Savingram to the Acting CEO for Education and Training and Acting CEO of the Commission in responding to the letter from the Chairman of the PSC on 28 July 2015 to collate all relevant information and documents regarding the reprimand of Mr. Tupou and forward to the PSC office for further necessary action.
43. Commissioners held a special meeting on 18 August 2015 with the following discussions extracted from the minutes:
 - *The Chairman of the Commission informed the Commission that he had a meeting with the Hon. Prime Minister on 18 August 2015 in which the Hon. Prime Minister directed to re-advertise the CEO position for Education and Training.*
 - *However the Commission noted that the recruitment was put on hold as informed from the Prime Minister's Office hence a formal conveyance of that direction must be received.*
 - *It was agreed for PSC Office to write a letter to the Chief Secretary and Secretary to Cabinet referring to their letter submitted to the PSC Office advising to hold the recruitment process for the CEO for Education and Training and request that the Hon. Prime Minister's directions to re-advertise the position be provided in writing.*
 - *Upon receipt of the Hon. Prime Minister's directions to re-advertise the position, PSC Office is to inform all applicants accordingly"*
44. On 18 August 2015 the Appellant wrote to the Chairperson of the PSC to acknowledge the receipt of his letter dated 07 August 2015 and stated that reprimand dated 28 June 2011 was premature, unfounded and without basis. He also enclosed the following documents:
 - Reprimand Letter dated 28 June 2011, Ref.: SW7/15/11
 - A letter dated 27 September 2012 signed by Acting High Commissioner of New Zealand and High Commissioner of Australia addressed to the Honourable Minister, Dr. 'Ana Taufe'ulungaki concluding that *"there is no evidence to support allegations of fraud. The information you have authorized your Ministry to provide has enabled us to also confirm that procedures were in fact followed."*
 - Relevant Cabinet Decision dated 28 September 2012.
45. On 20 August 2015, the Acting CEO of the Commission wrote to the Chief Secretary and Secretary to Cabinet that in order to facilitate the Hon. Prime Minister's verbal direction to re-advertise the CEO position for Education and Training, the PSC respectfully

requests His Honour's directions to be provided in writing by the Prime Minister's Office for record purposes. Upon receipt of His Honour's written directions, the PSC will proceed with further necessary action.

46. Commissioners held a meeting on 21 August 2015 with the following discussions extracted from the minutes of that meeting:
- *A comment was raised regarding Mr. Claude Tupou's letters in which he does not explain why he was reprimanded however claims that we (PSC) are in favour of the complaint.*
 - *It was raised that from Fr. Vaisima's letter, he admitted that it was an honest mistake in which he regrets. The Commission agreed to acknowledge of his letter.*
 - *It was agreed to await the Hon. Prime Minister's formal conveyance of his direction for re-advertisement before we re-advertise the position and then respond to Dr. Fasi, Mrs. Pouvalu, Mr. Tupou conveying the PM's direction to re-advertise the position.*
 - *It was agreed for the PSC Office to write to Mr. Claude Tupou to acknowledge receipt of his letter dated 18 August 2015 however, inform him that he has still not provided a response to the question asked of him. As such, he is to be informed that we (PSC) will not be requiring any further responses from him. The letter is to be signed by the Chairman of the Commission.*
 - *The Commission was also informed that panel members contract does include a confidentiality clause and they are also reminded by the facilitator at the beginning of the interview about maintaining interview matters confidential. "*
47. The Appellant wrote to the Chairperson of the PSC on 21 August 2015 to inform him that he received a Savingram, dated 17 August 2015, on 21 August 2015, from the Acting Chief Secretary and Secretary to Cabinet directing that staff at his office is made available to assist the PSC Office in searching for documents regarding the reprimand of the Appellant's alleged mishandling of funds in the purchase of printed materials on sale from the CDU, Ministry Education and Training. He also stated:
- ".... It is unsatisfactory that I, instead of receiving a response to my requests am delivered a directive from the Acting Chief Secretary and Secretary to Cabinet at your behest to provide information I have already provided to you.*
- The documents I have provided you confirm that there was no mishandling and yet you continue to write to others and now will conduct a search of Ministry's records and manuals looking for documents regarding a reprimand that I have stated was premature, unfounded and unwarranted. This insistence that I was reprimanded due to mishandling offends at the CDU unit amounts to tainting my reputations and defamation of character. "*

48. The Chairman of the PSC wrote to the Appellant on 24 August 2015 to acknowledge the receipt of his letter dated 18 August 2015 and to inform him that the Commission has considered his submission and is of the view that he has not yet clarified why he was reprimanded. The Appellant was also informed that the Commission will not be requiring any further response from him regarding this matter.
49. The Chief Secretary and Secretary to Cabinet wrote to the Chairman of the PSC on 27 August 2015, in reference to the PSC Office letter dated 20 August 2015 (Ref: STF. 4/3/4/2/9), to convey the following directions from the Hon. Prime Minister:
- *That the Public Service Commission disregard the direction regarding the appointment of the Chief Executive Officer for Education and Training to be "put on hold until further notice" and proceed as necessary, and;*
 - *That the Public Service Commission to proceed with the interview of the vacant PSC Commissioner position. "*
50. The Commissioners held a meeting on 28 August 2015 and the following discussions were extracted from the minutes of that meeting:
- *The Chairman of the Commission informed the Commissioners that a copy of the letters to Mr. Tupou and his responses are submitted for the Commissioners information.*
 - *However, it was clear that Mr. Tupou has not responded to our request. The aim of our letters was to test his integrity.*
 - *A comment was raised on the status of the letter from the Chief Secretary and Secretary to Cabinet given that the directions are not clear. The Public Service Commission had already provided a recommendation to the Hon. Minister for the appointment of Mr. Claude Tupou however the Prime Minister's Office sent a direction for the recruitment to be put on hold. Given that the Prime Minister has directed verbally to advertise the position of CEO for Education and Training the Prime Minister's Office needs to convey to the PSC in writing that the hold on the recruitment is lifted so that the Commission can issue a decision on this case.*
 - *A comment was raised that the PSC remain with its initial recommendation to appointment Mr. Claude Tupou.*
 - *However, a comment was raised that given that there is a complaint against the PSC and its procedures for recruitment the position should be re-advertised. The Commission also noted and confirmed that the outcome of the interview was relayed by one of the panel members to the successful candidate which the panel members confirmed as an honest mistake on his part. The Commission also noted and raised the need to ensure confidentiality of the outcome of the interview is maintained.*
 - *The Chairman of the Commission informed the Commissioners that they (i.e. Chairman, A/CEO PSC Office, Hon Prime Minister & Chief Secretary & Secretary to Cabinet) had a meeting yesterday (i.e. Thursday 27 August, 2015)*

with the Hon. Prime Minister and Hon. Prime Minister had again confirmed that he is in agreement that the CEO position for Education and Training be re-advertised.

- *It was raised that the re-advertisement of the position will not affect Mr. Tupou given that he is welcome to re-apply for the position.*
- *The Commission therefore agreed and approved for the position of CEO for Education and Training to be re-advertised to ensure fairness to all applicants in light of the complaint against the PSC and also taking into consideration the consultation with the Hon. Prime Minister and Minister for Education and Training.*
- *It was therefore agreed for PSC Office to write a letter to all applicants for the CEO position and inform them of the following:*
 - i. *Thank them for taking the opportunity to apply for the CEO position for Education and Training*
 - ii. *The CEO position will be re-advertised and they are welcome to re-apply."*

51. The Appellant sent a letter to the Chairperson of the PSC on 28 August 2015 to confirm the receipt of his letter of 24 August 2015 and wish to avoid any doubt as to his position by making the following clarifications:

"

1. *The reprimand which I was requested to explain in my opinion was premature, unfounded and unwarranted.*
2. *The content of the reprimand letter refer to an allegation of "inaction" on my part. What the "inaction" referred to was not particularized.*
3. *I cannot assume what the author meant and did not wish to interpret on my own hence my suggestion that the best person to explain the reason for the reprimand would be author.*
4. *The allegations that has been labeled by the letters from your office as "mishandling offunds" were unsubstantiated and therefore, dismissed.*
5. *The insistence that there was mishandling offunds is irresponsible and misplaced of the complaint if that is where this enquiry originate from.*
6. *Neither I nor the officers involved have been charged or disciplined from 2012 to date because the allegations were proven incorrect. I have provided the evidence of that to your office. "*

52. On 31 August 2015 the Appellant wrote another letter to the Chairperson of the PSC to draw his attention to section 4(3) of the Public Service (Disciplinary Procedures) Regulations which stated "(3) After each reprimand the employee shall sign an agreement with the Chief Executive Officer acknowledging that he has been reprimanded. " The Appellant also mentioned that:

"... I had never been required to sign such an agreement and therefore my view that the reprimand was premature, unfounded and unwarranted.

Further, how can one be penalised for a vague reprimand that was not done in compliance with the requirements of law under the Public Service Act? ...

I also attach hereto an exchange of e-mails regarding the issue when it was raised again in 2012 in Parliament. You will note that the author of the reprimand's comments in her e-mail confirming that she, through the Honourable Minister has provided the answers to all the questions and that "we" all knew the answers. I leave the rest to your interpretation ... "

53. On 31 August 2015, the Chairman of the PSC wrote to the Appellant to advise him of the outcome of his application as direction by the Public Service Commission.

"The Public Service Commission after taking into consideration the assessment panel's finalisation of its finding and in consultation with the Hon. Prime Minister and Minister of Education and Training has directed that the position of CEO for Education and Training is to be re-advertised.

You are welcome to apply again should you wish to do so. "

54. The Commissioners met on 04 September 2015 and following discussions were extracted from the minutes of that meeting:

"

- A comment was raised regarding Mr. Tupou's letter dated 31 August, 2015. It was noted that Mr. Tupou has not responded to the our question in which he has not admitted that he was reprimanded, however, the fact remains that he was reprimanded. The Commission also noted that the Education staff who were reprimanded had deposited government funding into a trustee account which is a breach of the financial management act.*
- The Commission also noted that the issue with the complaint by Dr. Fasi and the request by Mr. Tupou to be given a copy of the letter of complaint is not appropriate as the complaint was against the Commission and its procedures.*
- It was agreed for the PSC to release the re-advertise the CEO position for Education and Training as soon as possible.... "*

55. On 07 September 2015, the Appellant wrote a letter to the Chairperson of the PSC to acknowledge the receipt of his letter of 31 August 2015. In this letter, the Appellant drew the attention of the Chairperson to section 8 of the Education Act for the purposes of the re-advertisement and also made a final request for copies of the said complaints to be disclosed in order that he rectifies the injustice that has been inflicted on his reputation. The Appellant also enclosed the two media releases in which he stated: "*... the media have launched into a vicious defamatory campaign that directly affected and continue to injure my work reputation. Because these damaging reports and material are out there uncorrected I will continue to be regarded with feelings of hatred, contempt, ridicule, dislike and disesteem.... "*

1. *Annexure A: Ko hai 'e CEO Potungaue Ako? (Talanga -Monite 13 Siulai 2015)*
2. *Annexure B: Transcription of Radio 89.5 FM News on 18th August 2015"*

56. The Commissioners met on 18 September 2015 and according to the minutes, the PSC Office was tasked with the following Action Items:

"PSC Office to respond to Mr. Tupou and inform him of the following:

- o *Acknowledge receipt of his letter*
- o *Inform Mr. Claude Tupou that there was no complaint made against him however the complaint was against the PSC and why the Commission did not consider the fact that Mr. Tupou had been reprimanded which is why the Commission requested for more information.*
- o *The letter is to be signed by the Acting CEO of the Commission. "*

57. On 24 September 2015 the Chairman of the PSC told Radio and Television Tonga news that the reason for re-advertising the position was after the Hon. Prime Minister did not give any reason of why he did not approve the recommendation that was put forward to him. Furthermore, the Hon. Prime Minister was contacted to provide a reason for not approving the appointment of the Appellant but the Hon. Prime Minister did not provide any reason to the Commission. The Hon. Prime Minister only gave a copy of the Ministry's reprimand letter that was given to the Appellant in the past years. As the Hon. Prime Minister did not provide any clarification for the reason why he did not approve the appointment of the Appellant or if it was based on the reprimand letter or not, they agreed to re-advertise the position.

58. On 29 September 2015, the Acting CEO of the PSC wrote to the Appellant to acknowledge the receipt of his letter of 07 September 2015 and conveyed the following:

"The Commission wishes to convey herewith that the complaint received was against the Public Service Commission and the Chief Executive Officer recruitment process. However, the complaint did query as to why the Commission during the recruitment process did not consider your reprimand hence the request for further information as previously conveyed. "

APPELLANTS SUBMISSIONS

A. Breach of the Principle of Natural Justice

59. Generally the principles of natural justice requires that when an adverse finding may be made against a person, that such person is entitled to a fair opportunity to be heard before a decision adverse to him is made.

60. A list of necessary steps to be observed in order to ensure that natural justice is observed include the followings (*Continuing Legal Education Publication 2007 by NZ Law Society on Judicial Review at p.17*):

- Giving prior notice of proposed findings or risk of likelihood of adverse findings;
- Giving prior notice of allegations that the person ... is to answer;
- Disclosing the relevant material relied upon;
- Giving prior notice of a proposed decision;
- Disclosing the reasons for the proposal and material relied upon;
- Giving the adversely affected person a fair opportunity to make representations; and
- Giving proper consideration to those representations.

61. In the circumstances of this case:

- The Appellant was denied access by the Respondent to the allegations made against him and therefore could not answer them directly;
- The relevant material relied upon by the Respondent and the Hon. Minister which was a complaint by Dr. Fasi was withheld from the Appellant;
- There was no notice of the Respondent's proposed findings or risk of likelihood of adverse findings;
- The Appellant was advised that the post would be re-advertised **after** the Respondent had made its decision, he was not afforded the opportunity to be heard on the charges made against him by the complainant;
- The representations that the Appellant did make were not given due and proper considerations by the Respondent;
- The requests made of the Appellant by the Respondent was respectfully submitted to be "*rather juvenile in most if not all respect*" and that no reasonable body of decision-makers entrusted with powers to make decisions on appointments of heads of departments would conduct themselves in this manner.

62. Despite numerous requests by the Appellant it is evident from the Minutes of the Respondent's meetings that they held the view that the complaint by Dr. Fasi was not to be disclosed to the Appellant.

63. The Respondent's request for confirmation of the Appellant's reprimand and an explanation as to why he was reprimanded is stated in the minutes to constitute "*a test of his integrity*". In this exercise, the Appellant was unaware and uninformed that he was being subjected to such a test.

64. At the time the Respondent made the request to the Appellant on the 28th July, 2015, it was already in possession of the relevant materials submitted by the A/CEO of the PSC, Respondent Document pages 72-79 (R72-79).
65. The Respondent was already aware as a result of the materials provided above that the reprimand was not a serious matter but ignored it.
66. The Respondent's letter of 28th August, 2015, Appellant Document page 3 (A3), clearly state that the complaint *"referred to a mishandling of a case at the Curriculum Development Unit (CDU) which involved yourself and other senior officers The Commission in consideration of the complaint is collecting relevant information and documents to help substantiate or disprove the allegations made in the letter of complaint."*
67. Clearly the Commission was considering the allegations raised in the complaint and clearly they made a conscious decision not to disclose those allegations to the Appellant.
68. The Appellant's response of 4th August, 2015 sought to:
- a) Obtain clarification as to what he is being alleged to have done;
 - b) Request a copy of the complaint;
 - c) Explain the difficulty he had in responding to their request and the reasons under paragraph 3;
 - d) Advise that he was aware of a reprimand back in 2011 or 2012 and proceeded to explain that because of that reprimand a full audit was carried out and the matter was handled by a Parliamentary Sub-Committee;
 - e) The Appellant directed that they will be able to obtain the relevant information from those two offices.
69. The minutes recorded by the Respondent in their meeting of 7th August, 2015 is inaccurate as the:
- a) Appellant had responded to their question and that he had indicated that he was reprimanded back in 2011 or 2012;
 - b) The Appellant had not denied in any of his responses the reprimand, his position was that it was premature and unfounded;
 - c) The Appellant had also stated that he could not explain the reason behind the reprimand and that only the author could.

70. In the Appellant's letter of 18th August, 2015, he indicated at (A13) that when he searched the files at his offices, he could not locate copies of the reprimand but found a copy on a closed file. The documents were most likely uplifted and those were the ones provided to the Commissions at R72-97.
71. Attached to the above letter were copies of a joint letter from the Australian High Commission and New Zealand High Commission together with a Cabinet decision which cleared the Ministry of Education and Training of any wrongdoing which was the basis of the relevant reprimand.
72. In the Respondent's minutes of 21st August, 2015 (R38), it continues to record its view that the Appellant had not explained why he was reprimanded but decided not to request any further response from him.
73. There is no evidence that:
- a) The Respondent even considered the Appellant's responses in full with an open mind and as a result failed to note what his responses were;
 - b) The Respondent requested any information from the complainant as to the basis of his allegations;
 - c) The Respondent sought any information from the Audit Department or Parliament.
74. Had the Respondent requested information from the Audit Department and Parliament, they would have been provide with:
- a) A57-A143 - a report compiled by the Appellant for the Auditors in August, 2012.
 - b) A146-A150 - A request for a Resolution by Parliament by the Minister of Education and Training of that day for the People's Representative No. 1 (the current Minister of Education and Training) to offer certain apologies as a result of the false allegations he had made against the Minister of Education and Training. The relevance to this case is that these are the allegations from which the reprimand featured against the Appellant arose.

- c) A151-A173 - being the minutes of Parliament sitting on 3rd October, 2012 where Mr. 'Akilisi Pohiva refused to apologise unless the Hon. Minister answered his queries at A175-A178.
- d) A181 - A189, being a copy of the Privilege Committees report which accepted the Hon. Minister's request for a resolution and recommended that Mr. 'Akilisi Pohiva:
 - i) Write and apologise to the Minister of Education and Training and the Ministry of Education and Training for the false allegations he had made against them to New Zealand's Minister for Foreign Affairs and the Ministers from the New Zealand Parliament;
 - ii) Apologise to the New Zealand Minister of Foreign Affairs and the New Zealand and Australian High Commissioners for the false allegations;
 - iii) Apologise to the people of Tonga here and abroad on the radio and television for the misrepresentations he had made;
 - iv) Be ordered to restrain from making similar false allegations to avoid damaging the reputation of the country, inflicting damage to the trust and relationship with its international partners and the role and obligations for the Ministry and its staff.
- e) A194 - A200, minutes of the Parliamentary session on 28th August, 2014, where the above report was submitted and dealt with and where the Hon. Minister did not pursue her position but Mr 'Akilisi Pohiva did apologise at A200.

75. Had the Respondent acted properly and in requesting answers from the Appellant, they would have paid proper considerations to his responses and have acted properly to obtain all the necessary information relevant to their queries prior to making a decision.

76. Even if they considered the materials that were provided to them at R1 18-R130 they would have discovered that the content of those documents would reveal that there was no wrong doing by any of the officers at CDU including the Appellant.

77. As a result of the above, it is submitted that the Respondent was in its actions breaching the principles of natural justice.

B. Mistaken Facts

78. The Appellant submits that the Respondent's decision was made on the basis of mistaken facts.
79. According to the submissions made on behalf of the Respondent, its decision was based *"on the outcome of assessing of all relevant issues and those were the Appellant's position, the Minister's position, the complaint and criticism of the recruitment process"*.
80. The Appellant addressed the elements named in the above submissions one at time:
- (a) The Appellant's position: the only known evidence of what the Respondent's view of the Appellant was that they had unanimously recommended him for the position of CEO for the Ministry of Education and Training.
 - (b) The Minister's position as known to the Respondent:
 - (i) It is evident that the Minister disregarded the results of the interview panel and the Commission's recommendation by putting the appointment on hold by his letter of 16th June, 2015;
 - (ii) It is evident that he directed the Chair not to be overly concerned about the results of the interview but to have regard to the background of the Appellant;
 - (iii) It is evident that he focused on the reprimand of the Appellant (which the Chair stated in an interview that this is how the Minister clarified his objection to the appointment of the Appellant);
 - (iv) It is evident that the Minister's position was not to appoint the Appellant and to have the post re-advertised and expressed it to the Chair many times commencing from July, 2015 (R71);
 - (v) It is submitted that the Appellant has provided enough information in his affidavit and by submissions to establish that these concerns were mistaken facts.

(c) The complaint:

- (i) The complaint focused on serious allegations against the Appellant as;
- (ii) Having misused funds by making deposits into his personal accounts (R1 16);
- (iii) Being renowned for dishonesty in financial matters;
- (iv) Unfit for a CEO position;
- (v) Similarly under this head, it is submitted that the allegations made by Dr. Fasi are not only mistaken but damaging and defamatory in every sense.

(d) The complaint regarding the recruitment process by Dr. Fasi was that:

- The interview panel were unfit to constitute an interview panel for the post of CEO because two of them were merely principals of church schools;
- That Rev. 'Atiola was biased towards the Appellant because they went to the same school;
- That Dr. Fua was one of Mrs. Pouvalu's referees;
- Fr. Vaisima was alleged to have leaked information that Dr. Fua marked Mrs. Pouvalu the highest, then the Appellant and he was last, and that he was on the view that the complainant had an attitude problem and therefore should not be CEO.

81. In response, it was submitted that Fr. Vaisima had formerly held the position of Director of Education for the Catholic Schools. Rev. 'Atiola was the former President of the Education for the Free Wesleyan Church Schools of Tonga and Dr. Fua is the current Directors for the Institute of Education at the University of the South Pacific Campus at 'Atele, Tonga. All very highly qualified and competent to constitute the interview panel for CEO of the Ministry of Education and Training.

82. According to the markings awarded by Rev. 'Atiola, the top three candidates were given equal marks of 90. There is no evidence of bias in his marking towards the Appellant as alleged by Dr. Fasi.
83. According to the markings awarded by Dr. Fua, Mrs Pouvalu was awarded lower mark to the Appellant. There is no evidence of bias in her marking of the candidates as alleged by Dr. Fasi.
84. According to the markings awarded by Fr. Vaisima, his ranking of the top candidates was consistent to the ranking awarded by Dr. Fua.
85. In addition, the candidates had made sufficient disclosures declaring their interest prior the process.
86. The allegations raised with regard to information leaked by Fr. Vaisima are inaccurate and false. In Fr. Vaisima's response to the Respondent (R53) he indicated that the only person he spoke to regarding the interview was the Appellant.
87. The Appellant at paragraphs 6-11 of his affidavit states the content of his discussion with Fr. Vaisima. He states that none of the allegations made by Dr. Fasi was part of their conversation.
88. It was evident that it was unfair, unreasonable, unethical and unprofessional that the Respondent absorbed the complaint lodged by Dr. Fasi and launched into an enquiry of the individuals accused by Dr. Fasi but chose not to obtain proof from Dr. Fasi to substantiate his allegations.

C. Breach of the Appellant's legitimate expectations

89. A legitimate expectation can arise from previously expressed assurances, promises or statements of intent by the decision-maker.
90. In a Canterbury Law Review on Legitimate Expectation and Applications it is stated that in general legitimate expectation can arise in four key situations:
 - i) Where assurances or promises are given by a decision maker, whether express or implied;
 - ii) Where statements of intent are made by a decision maker, like in policy manifestos;

- iii) Where a regular practice gives rise to the reasonable implication that the practice will continue;
- iv) and from the creation of machinery for a hearing process.

91. The principle being that where a public authority makes an undertaking or an assurance, they must honour it, provided it does not conflict with any statutory duty and there is no "satisfactory reason" not to do so.
92. In the case of *R v North and East Devon Health Authority, exp Coughlan* [2001] OB 213: Miss Coughlan had a statutory right to accommodation in a nursing home. To encourage her to move into a particular home, the Health Authority promised here that she would be able to stay there for life, but they later proposed to move her to another home on the ground that her home had become unsuitable for the health service and unaffordable. The Court of Appeal upheld an order quashing the decision to close the home. The Court held that it is unlawful to frustrate a substantive legitimate expectation if doing so *'is so unfair that to take a new and different course will amount to an abuse of power'* or *'is so unfair as to be a misuse of the authority's power'*.
93. The Hon. Minister's position as expressed to the Appellant is revealed to have been the opposite to his position as expressed to the Respondent.
94. It is submitted that in this case the assurance given by the Hon. Minister of Education and Training to the Appellant at paragraph 15 of his affidavit, the frequent apologies made to the Appellant in private and in the presence of others and up to his television program on the 31st August, 2015 where the Hon. Minister declared to the public that the decision is still with the Respondent and that the Respondent had not passed it onto him, his assurance to the Appellant that he would order the Respondent to issue the letter of appointment is more than sufficient to establish grounds for the Appellant to hold legitimate expectation that the Hon. Minister's (who is also the Prime Minister) assurances would be honoured.
95. His assurances were on the basis of the recommendation made by the Commissioners after having received the results of the interview from the panel.
96. The Minister, is an important component of the decision-making authority provided for by law and had the authority to make the assurance. He went as far as endorsing the assurance given there were no complaints received.

97. It is submitted that under the circumstances and facts surrounding this case there is no statutory duty and no satisfactory reason for the respondent and the Minister not to honour the assurances he had given to the Appellant.
98. It is further submitted that the assurances made by the Hon. Minister to the Appellant amount to a decision on appointment only short of the communication being presented in writing. The Hon. Minister well understood that the appointment was to be issued in writing and had assured the Appellant that the letter would come. As a result it is my respectful submissions that all the surrounding elements of the decision and recommendation of the Respondent and the assurances of the Hon. Minister meet the elements of an appointment.
99. The simple fact that the statute provides that the appointment must be in writing does not lower the force of the assurances made by the Hon. Minister which indicated clearly that the Appellant should expect that the letter of appointment would be issued to him.
100. Accordingly, it was submitted that administrative bodies are expected to act in a way that is procedurally fair. Under the circumstances and facts of this case it was submitted that to mislead the Appellant and the public to believe one thing giving rise to legitimate expectation and then to take a different course amounts to an abuse of power at the highest level especially when the administrative body making those assurances is not only the Minister of Education and Training but also the Hon. Prime Minister of the Government of Tonga.
101. If the words and assurances of the Prime Minister of any country cannot be relied on "*it is woe*" to the country both locally and internationally.

D. Taking into account irrelevant consideration and failing to take into account relevant considerations

102. The Respondent in making its decision took into account the following irrelevant considerations:
- (i) The false allegations made by Dr. Fasi's complaint;
 - (ii) Dictations from the Hon. Minister.
103. The Respondent failed to consider the following relevant considerations:
- (i) Results and recommendation of the interview panel;
 - (ii) Their own recommendations;

- (iii) The truths behind the allegations made by Dr. Fasi regarding bias as the mark allocation by the panel was before them;
- (iv) The truths behind the allegations regarding the Appellant by not undertaking sufficient enquiries to obtain proof from the complainant or from third parties as suggested by the Appellant;
- (v) That there were never any reasonable grounds upon which a reasonable Commission would form a decision not to appoint the Appellant and to re-advertise the position.

E. The Decision was unreasonable and unfair

- 104. The Appellant was not furnished with the complaint by Dr. Fasi and therefore unable to properly address the allegations against him.
- 105. The Respondent presumed the complainant's allegations to be true and correct.
- 106. The Respondent failed to undertake sufficient enquiry into the allegations made by the complainant.
- 107. The Respondent failed to make sufficient enquiry as to the true position of the Hon. Minister's input by accepting whatever the Chair said to be the position of the Minister.
- 108. The Respondent purported to have made the decision when the facts clearly show that they abdicated their responsibility to make the decision and allowed the Hon. Minister to make the decision for them.
- 109. That without obtaining the full facts of the issues that was before them, they proceeded to make a decision that a fair and a reasonable Commission in their position would not have done *prior* to making a full investigation and obtaining the answers to any allegations raised.
- 110. That the facts that have now been seen and heard by this Tribunal would and should have been easily available or been in the possession of the Respondent and the Honourable Minister as the evidence show that the Honourable Minister was the one leading the charge against the Minister of Education and Training and the Appellant and Ministry in 2012, the current Chief Secretary and Secretary to Cabinet and Acting CEO of the Respondent were involved at the time also with regard to request from the Privileges Committee regarding the reprimands of the officers at the CDU unit.

111. It is grossly unfair that an unsubstantiated reprimand in the full knowledge of the Hon. Minister for which " *he apologized in August last year in Parliament* " has been produced by him to the Respondent as a basis for not approving the appointment of the Appellant.

112. The action of the Hon. Minister is unreasonable, unfair and improper and it is respectfully submitted that any reasonable Minister and Prime Minister in his position would not act in such a manner to the detriment of a successful candidate recommended by an interview panel and the decision-maker upon which the law has vested the powers to make the appointment.

RESPONDENT'S SUBMISSION

113. As far as Counsel can determine from the Appellant's Amended Notice of Appeal, the Appellant is appealing the alleged decision on the following grounds:

- (i) The decision not to appoint the appellant and to re-advertise the position of CEO for Education and Training is in breach of the principle of natural justice;
- (ii) The decision not to appoint the appellant and to re-advertise the position of CEO for Education and Training was based on mistaken facts;
- (iii) The decision not to appoint the appellant and to re-advertise the position of CEO for Education and Training is in breach of the legitimate expectations of the appellant;
- (iv) The PSC took into account irrelevant considerations in their decision not to appoint the appellant and to re-advertise the position of CEO for Education and Training; and
- (v) The decision not to appoint the appellant and to re-advertise advertise the position of CEO for Education and Training is unreasonable and unfair.

114. A summary of the Respondent's submissions is as follows:

- (i) The decision was not in breach of the principle of natural justice;
- (ii) The decision was not based on mistaken facts;
- (iii) The decision was not in breach of the legitimate expectations of the appellant;
- (iv) The Respondent took into account relevant considerations in making its decision; and
- (v) The decision was reasonable and fair.

A. The decision was not in breach of the principle of natural justice

117. The respondent respectfully submits that it had consulted the appellant.
118. On the 28 July 2015, the appellant was also informed and requested to provide documentations regarding his disciplinary action.
119. On 18 August 2015, the Appellant disclosed documents in relation to his disciplinary action and explained in detail why he was reprimanded.
120. On 28 August 2015, the Commission considered all the circumstances of the case and decided not to make an appointment and to re-advertise the position.
121. There was no breach of natural justice as the Appellant knew that the inquiry made by the Commission was in respect of his disciplinary action.
122. The Appellant had responded in detail by denying the allegations against him.
123. The commission then considered the Appellant's position, the Minister's position, the complainant and the criticism of the recruitment process, and then made the decision not to appoint and re-advertise the position.
124. It should be noted that the Minutes of the Commission meeting of 28 August 2015 suggests that decision was not based on the Appellant's disciplinary action or allegation of mishandling of funds.
125. The Minutes suggest that neither the Appellant's disciplinary action nor the allegation against mishandling of funds had any implications on his application.
126. The Minutes does not in any shape or form suggest that the Respondent had placed much weight on the Appellant's disciplinary action nor the allegation against mishandling of funds.
127. In fact, the Minutes clearly demonstrate that the Respondent was still in favour of appointing the Appellant, *"A comment was raised that the PSC remains with its initial recommendation to appoint Mr Claude Tupou"*.

128. The decision not to appoint and to re-advertise the position was based on the outcome of assessing of all relevant issues and those were the Appellant's position, the Minister's position, the complaint and the criticism of the recruitment process.
129. The decision was fair in all circumstances.
130. There is no requirement for the Commission to disclose the reasons for its findings or decision.
131. In the Public Service Tribunal Ruling in the case of Tuputupu v PSC, PST No. 07/13, the Tribunal in page 10 paragraph xiv stated as follows:

"It is trite law that there had never been a principle of natural justice that an administrative authority is required to provide reasons for its decisions [refer Wade on Administrative Law 5th ed page 46]. The Tribunal accepts the submission tendered by the solicitor General that this position can only be negated by express statutory provision to do so, and there is no such statutory provision. "
132. The Tribunal in that case ruled accordingly that in the event that there was no statutory provision, the ground of appeal for no reason for decision given failed and therefore dismissed.
133. As such, the respondent submits that the same ruling does apply to this instant case.
134. There was no breach of the principle of natural justice.

B. The decision was not based on mistaken facts.

135. The Respondent respectfully submitted that the decision was not based on the mistaken facts but was based on the outcome of assessing of all relevant issues and those were the Appellant's position, the Minister's position, the complaint and the criticism of the recruitment process.
136. The Minutes of 28 August 2015 suggest that neither the Appellant's disciplinary action nor the allegation against mishandling of funds had any implications on his application.
137. The Minutes does not in any shape or form suggested that the Respondent had placed much weight on the Appellant's disciplinary action nor the allegation against mishandling of funds.

138. In fact, the Minutes clearly demonstrate that the Respondent was still in favour of appointing the Appellant, *"A comment was raised that the PSC remains with its initial recommendation to appoint Mr Claude Tupou"*.
139. The Respondent's decision was not based on mistaken facts.

C. The decision was not in breach of the legitimate expectations of the appellant

140. The Respondent is the appointing authority under section 13 of the Public Service Act.
141. Being shortlisted or being recommended by the Recruitment Panel does not mean that the Appellant is going to be appointed.
142. The appointment is a decision entirely for the Respondent.
143. Any indication or assurance that the Appellant has either been appointed or is the most favourable candidate to be appointed by either the Minister, a Commissioner, a member of the Recruitment panel or anyone else prior to the actual appointment made by the Commission does not afford the Appellant a valid legitimate expectation.
144. This is because the Commission as the appointing authority has not made an appointment.
145. The Minister is not the appointing authority.
146. The respondent respectfully submitted that the Respondent's decision was not in breach of the legitimate expectations of the Appellant.

D. The Respondent took into account relevant considerations in making its decision.

147. The Respondent again respectfully submitted that the decision was based on the outcome of assessing of all relevant considerations and those were the Appellant's position, the Minister's position, the complaint and the criticism of the recruitment process.
148. The Minutes of 28 August 2015 suggest that neither the Appellant's disciplinary action nor the allegation against mishandling of funds had any implications on his application.
149. The Minutes does not in any shape or form suggest that the Respondent had placed much weight on the Appellant's disciplinary action nor the allegation against mishandling of funds.

150. In fact, the Minutes clearly demonstrate that the Respondent was still in favour of appointing the Appellant, *"A comment was raised that the PSC remains with its initial recommendation to appoint Mr. Claude Tupou."*
151. The decision was based on the outcome of assessing of all relevant consideration and those were the Appellant's position, the Minister's position, the complaint and the criticism of the recruitment process.

E. The decision was reasonable and fair.

152. The Respondent again respectfully submitted that the decision was based on the outcome of assessing of all relevant considerations and those were the Appellant's position, the Minister's position, the complaint and the criticism of the recruitment process.
153. The Minutes of 28 August 2015 suggest that neither the Appellant's disciplinary action nor the allegation against mishandling of funds had any implications on his application.
154. The Minutes does not in any shape or form suggest that the Respondent had placed much weight on neither the Appellant's disciplinary action nor the allegation against mishandling of funds.
155. In fact, the Minutes clearly demonstrate that the Respondent was still in favour of appointing the Appellant, *"A comment was raised that the PSC remains with its initial recommendation to appoint Mr. Claude Tupou"*.
156. The decision was based on the outcome of assessing of all relevant considerations and those were the Appellant's position, the Minister's position, the complaint and the criticism of recruitment process.
157. The decision was reasonable and fair in all circumstances.

TRIBUNAL'S FINDINGS

158. The Tribunal has carefully examined all aspects of this appeal and has reached conclusions including the following:

- (i) The relevant statutory provisions to the appointment of a CEO for the Ministry of Education and Training are contained in section 8 of the Education Act 2013, and section 13(2) of the Public Service Act 2002:

Section 8(1) of the Education Act 2013:

"The Public Service Commission, in consultation with the Minister, shall appoint a Chief Executive Officer for the Ministry. "

Section 13(2) of the Public Service Act 2002:

"The Commission shall after consultation with the relevant Minister, appoint in writing, a person to be the Chief Executive Officer of the Ministry. "

- (ii) Essentially, the appointment is required to be made:
- by the PSC;
 - after consultation with the Minister of Education and Training;
 - in writing.
- (iii) It is undisputed that the position of CEO for the Ministry of Education and Training became vacant, it was advertised and applicants were interviewed.
- (iv) It is also undisputed that as the result of the interview, the interviewing panel had ranked the Appellant as the top candidate, and recommended him to the PSC for appointment to the vacant CEO position.
- (v) It is also undisputed that the consultation requirements with the Minister were although complied with, the correspondences purported to have come from the Prime Minister only should not be taken into account. It must be noted that the required consultation should be with the Minister, not the Prime Minister.
- (vi) Before an appointment was made, the process somehow was leaked out, which prompted one of the candidates (Dr. Fasi) to lodge a complaint to the Chief Secretary & Secretary to Cabinet and PSC alleging *inter alia* that the members of the interviewing panel were inappropriate to carry out their duties, and that the Appellant was not worthy to be appointed as CEO because he was previously reprimanded over some financial mismanagement in the Ministry.

- (xiii) This ground of appeal was tendered with regard to the circumstances surrounding the purported investigation by PSC of the complaint by Dr. Fasi.
- (xiv) The Tribunal agrees and adopts the submissions tendered by the Appellant (and the reasons thereof) under this ground including the followings:
 - (a) The Appellant was denied access by the Respondent to the allegations made against him and therefore could not answer them directly;
 - (b) The relevant material relied upon by the Respondent and the Minister which was the complaint from Dr. Fasi (in its entirety) was withheld from the Appellant;
 - (c) There was no notice of the Respondent's proposed findings or risk of likelihood of adverse findings;
 - (d) The Appellant was advised that the post would be re-advertised after the Respondent had made its decision, he was not afforded the opportunity to be heard on the charges made against him by the complainant;
 - (e) The representations that the Appellant did make were not given due and proper considerations by the Respondent;
 - (f) The notion that the requests made of the Appellant by the Respondent to be "*a test of his integrity*" was a violation of the appellant's dignity and that no reasonable body of decision-makers entrusted with powers to make decisions on appointments of heads of departments would likely conduct themselves in that manner. It was also a draconian approach by the PSC which was completely unnecessary and unwarranted.
- (xv) In any case, the subject matters of allegations contained in the complaint from Dr. Fasi relating to both the members of the interviewing panel and the purported reprimand of the Appellant were factually false, and should not have been taken into consideration in the final decision-making process.
- (xvi) Consequently, the decision-making process was flawed because the principles of natural justice were breached.
- (xvii) This ground succeeds.

B. Mistaken facts

- (xviii) The Respondent had concurred with the recommendation of the interviewing panel that the Appellant be appointed. The completion of the appointment process was at that point frustrated by the complaint from Dr. Fasi.
- (xix) At that point, the PSC saw fit to undertake " *a test of his integrity*" exercise. That was uncalled for in the circumstances and as submitted by the Appellant was rather "*juvenile*", and was a distraction from the proper process. At that time, it (PSC) already had in its possession the relevant documents that explained the reality of the allegation.
- (xx) The Minister seemed preoccupied with the allegation of the Appellant's reprimand when he should have known of its reality from its previous explanation when he raised it in the Legislative Assembly. The allegation should have been discarded as it had no merit.
- (xxi) The allegations relating to the members of the interviewing panel was proven to be factually wrong.
- (xxii) The Respondent says that the matters taken in consideration for the decision to re-advertise were "*the Appellant's position, the Minister's position, the complaint and the criticism of the recruiting process*".
- (xxiii) The purported complaint and the criticism of the recruiting process, were based on mistaken facts and should not have been taken into consideration in the final analysis.
- (xxiv) This ground succeeds.

C. Breach of legitimate expectations

- (xxv) The submissions of the Appellant regarding this ground of appeal relate to the Minister's assurance to the Appellant that he (the Appellant) will be appointed to the CEO position and he (the Minister) "*would order the Respondent to issue the letter of appointment*".
- (xxvi) The Tribunal agrees with the Respondent that the authority to make the appointment is vested on the Respondent. Although there is an obligation

to consult the Minister, the Minister is clearly not in the position to pre-empt the appointment process.

(xxvii) If the Minister is given the power to make good any assurance as in the circumstances of this case, it would mean that the Respondent abdicates its authority. This is clearly not the intention of the legislation (Education Act and the Public Service Act).

(xxviii) This ground fails.

D. Failure to take into account relevant considerations, and taking into account irrelevant considerations

(xxix) The Respondent had taken into account the following irrelevant considerations:

- (a) The false allegations made by Dr. Fasi;
- (b) It had acted under the dictation of the Minister who had been obsessed by the "reprimand" incident even though there was no merit in that allegation.

(xxx) It is clear from the facts that the decision to re-advertise the position was not made by the Respondent freely but because the Minister demanded it (as conveyed by Chairman to PSC).

(xxxi) The Respondent failed to consider the followings:

- (a) Results and recommendation of the interview panel;
- (b) Their own recommendation that the Appellant was the best candidate;
- (c) The truths behind the allegations made by Dr. Fasi regarding bias as the marks allocation by the panel was before them;
- (d) The truths behind the allegation regarding the Appellant's reprimand as shown by documents in their possession.

(xxxii) This ground succeeds.

E. Unreasonableness and unfairness

- (xxxiii) The Respondent had endeavoured to undertake a test of the Appellant's integrity without informing him of such exercise.
- (xxxiv) The Respondent failed to make sufficient enquiry as to the true position of the Minister's input. They accepted the position of the Minister as conveyed by the Chairman, rather than clarifying the relevant correspondences relating to their written consultative process.
- (xxxv) It was clear that the correspondence to "*hold*" the matter referred to a different matter as indicated by the reference to the date of the letter being responded to, 28 May 2015. The letter on that date related to the composition of the panel.
- (xxxvi) The facts show that the Respondent abdicated their responsibility to make the decision and allowed the Minister to make the decision for them.
- (xxxvii) It is unreasonable and unfair that an unsubstantiated reprimand in the full knowledge of the Minister for which he apologised in August 2014 in the Legislative Assembly had been produced by him to the Respondent as a basis for not appointing the Appellant.
- (xxxviii) The actions of the Respondent and the Minister are unreasonable and unfair that a reasonable person in their position would not act in such a manner to the detriment of a successful candidate recommended by an interview panel and the decision-maker upon which the law has vested the powers to make the appointment.
- (xxxix) This ground succeeds.

CONCLUSION

159. The PSC has undertaken the recruiting process in the proper manner up to the point that the Appellant was considered to be the top candidate, and consultation with the Minister. From that point onwards, the due process was marred by the following events:
- (i) The complaint by Dr. Fasi: the contents of which were proven to be wrong, should not have had any bearing on the decision;

- (ii) The Minister: who had known, or ought to have known, that the Appellant was cleared of any wrong doing relating to the purported reprimand, should not have taken that factor into account in the consultation process;
 - (iii) The PSC: by following the direction of the Minister to re-advertise the position abdicated its role as the decision maker.
- 160. It will be prudent for the PSC to disregard the irrelevant matters and to complete the appointment process without any consideration of those matters.
- 161. The following steps were properly taken in the recruiting process and should stand:
 - (i) An interviewing panel was properly set up;
 - (ii) The panel had conducted their role properly (the allegations against them were proven to be wrong);
 - (iii) The panel recommended the Appellant as the top candidate for the position;
 - (iv) The PSC had agreed that the Appellant was the best candidate for the position;
 - (v) The required consultation with the Minister was carried out (the direction by the Minister to re-advertise the position was inappropriate and was based on irrelevant consideration i.e. the purported reprimand of the Appellant).
- 162. The PSC, in following the direction of the Minister to re-advertise the position, amounted to its abdication of its statutory decision making role, which rendered that decision void.
- 163. The outstanding steps that remain to be carried out by the PSC are:
 - (i) To disregard the irrelevant matters that marred the previous process and to formally make an independent decision in accordance with the established facts; and
 - (ii) To inform the successful applicant in writing.

ACKNOWLEDGEMENT

- 164. The Tribunal acknowledges the efforts of both parties in providing the necessary documentation and the capable manner in which both counsels conducted this case.

- (ii) The Minister: who had known, or ought to have known, that the Appellant was cleared of any wrong doing relating to the purported reprimand, should not have taken that factor into account in the consultation process;
 - (iii) The PSC: by following the direction of the Minister to re-advertise the position abdicated its role as the decision maker.
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 - (iv) The PSC had agreed that the Appellant was the best candidate for the position;
 - (v) The required consultation with the Minister was carried out (the direction by the Minister to re-advertise the position was inappropriate and was based on irrelevant consideration i.e. the purported reprimand of the Appellant).
- 162. The PSC, in following the direction of the Minister to re-advertise the position, amounted to its abdication of its statutory decision making role, which rendered that decision void.
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ACKNOWLEDGEMENT

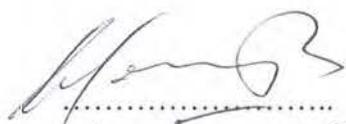
- 164. The Tribunal acknowledges the efforts of both parties in providing the necessary documentation and the capable manner in which both counsels conducted this case.

ORDER OF THE TRIBUNAL

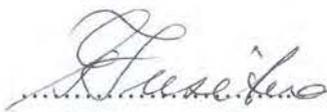
165. Under section 21F of the Public Service Act 2002 (as amended) the Tribunal may make an order to affirm, vary, or set aside the Public Service Commission's decision.

166. The Tribunal makes the following orders:

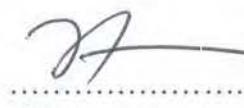
- (i) The decision of the PSC to re-advertise the position of the CEO of the Ministry of Education and Training on 28 August 2015 is set aside.
- (ii) The PSC having complied with due process in conducting part of the recruiting requirements, and being of the view that the Appellant is the most appropriate person to be appointed, and having consulted the Minister, must continue with the outstanding steps of the recruiting process in order to complete the appointment to the position of CEO of the Ministry of Education and Training, such consideration to be carried out:
 - (a) without taking into account the allegations made by Dr. Fasi, especially with regard to the criticism of the recruiting panel, and the purported reprimand of the Appellant;
 - (b) disregarding any direction given by the Minister to the PSC with regard to the conduct of the recruiting process, as the PSC is the proper decision maker.
- (iii) Any of the parties is at liberty to apply.



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'Aisea H Taumoepeau
Honourable Chairman



.....
Lady 'Eseta Fusitu'a
Honourable Member



.....
Timote Katoanga
Honourable Member