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Government of Tonga

Public Service Tribunal

PST Appeal No. 1 of 2019

Mr. Penitiketo Tafi 'Uhatafe **Appellant**

Public Service Commission **Respondent**

PUBLIC SERVICE TRIBUNAL:

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

Mr. Timote Katoanga **Member**

Mrs. Lepolo Taunisila **Member**

REPRESENTATION:

Appellant : Ms Loupua Sefo Kuli Counsel for the Appellant
 Ms Sisi Vaipulu In Attendance
 Mr. Penitiketo Tafi 'Uhatafe Attendance

Respondent: Mr. Sione Sisifa Solicitor General
 Ms. Mokaleini Fifita Public Service Commission

Date of Hearing: 23 July 2019

Date of Ruling: 06 August 2019

Penitiketo Tafi 'Uhatafe (Appellant) v Public Service Commission (PSC) (Respondent)
Appeal No. 1 of 2019

Preliminary

1. The hearing of this appeal commenced on 23 July 2019. From the outset, the counsel for the Respondent put forward the proposition that the Appellant lacks *locus standi* to bring this appeal to the Tribunal.
2. With the consent of the parties, the Tribunal proceeded to hear submissions on the preliminary issue of whether the Appellant has *locus standi*.

The relevant facts

3. The position of Deputy Secretary (Corporate Services) in the Ministry of Finance was vacant and a recruitment process was initiated.
4. The position was advertised on 29 April 2018, without compliance with Policy Instruction 1B.1.3(1)(ii) of the *Public Service Policy Instructions 2010*, which provides:

“(1) Prior to advertising a vacant position, the recruiting Ministry shall:

...
(ii) submit the job description(s) of the vacant position(s) to the Chief Executive Officer of the Commission for endorsement.”

5. In response to that advertisement, the Appellant applied for the vacant position.
6. The position was subsequently re-advertised on 06 August 2018, after compliance with Policy Instruction 1B.1.3(1)(ii).
7. The Appellant did not apply to the re-advertisement.
8. He was however short-listed for interview, and was interviewed, but was unsuccessful, as someone else was appointed by the PSC to the position (PSCD No. 16 of 18 January 2019).
9. The Appellant now appeals to the Tribunal against that decision by PSC.

The submissions

10. Counsel for the Respondent put forward the following submissions:
 - (a) The Appellant was an applicant to the initial advertisement of the position on 29 April 2018.

- (b) He did not apply, and therefore not an applicant, to the re-advertisement of the position on 06 August 2018.
 - (c) The Appellant is challenging the validity of the first advertisement based on non-compliance with Policy Instruction 1B.1.3(1)(ii). By doing that he cannot, on the other hand, assert to base his standing on his application to that advertisement. If the first advertisement is unlawful, the whole process, so far as it related to him, was flawed.
 - (d) His inclusion in the selection process was unlawful.
 - (e) He has no standing to bring this appeal.
11. Counsel for the Appellant submitted as follows:
- (a) Agreed that the first advertisement (29 April 2018) was unlawful for non-compliance with Policy Instruction 1B.1.3(1)(ii). But despite that unlawful status, the Appellant intentionally took part in the process.
 - (b) Compliance with statutory requirements is mandatory.
 - (c) The Appellant was a public servant and could have applied as the position was advertised within the public service.
 - (d) When the Appellant was short-listed to be interviewed, he became an interested person and acquired *locus standi*.

Tribunal's finding

- 12. It is agreed by both parties that the first advertisement (29 April 2018) was unlawful for non-compliance with Policy Instruction 1B.1.3(1)(ii).
- 13. The Tribunal agrees with counsel for the Appellant that statutory requirements are mandatory, and must be followed.
- 14. It is also agreed that the Appellant applied to the vacant position in response to the first advertisement. He did not apply when the re-advertisement was made on 06 August 2018.
- 15. When the Appellant applied to the first advertisement, he was responding to an unlawful act. That unlawfulness cannot be remedied or become lawful by any action of the Appellant. It remained unlawful even though the Appellant had chosen to become a part of it, namely by participating in the interview process.
- 16. The Tribunal finds that the Appellant's application was in response to an unlawful advertisement, and his participation in the process was flawed. He was not a lawful applicant and had participated in the whole process unlawfully.
- 17. The appellant has no *locus standi* to bring an appeal.
- 18. There is therefore no need to proceed further with this matter.

Order of the Tribunal

19. The Tribunal makes the following orders:

- (i) The Appellant has no *locus standi* to bring this appeal;
- (ii) The appeal is dismissed.



Mr 'Aisea Taumoepeau SC



Mr Timote Katoanga



Mrs Lepolo Taunisila