



Government of Tonga

Public Service Tribunal

PST Appeal No. 2 of 2018

Mrs. Tupou'ahau Fakakovikaetau **Appellant**

Public Service Commission **Respondent**

PUBLIC SERVICE TRIBUNAL:

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

Mr. Timote Katoanga **Member**

Mrs. Lepolo Taunisila **Member**

REPRESENTATION:

Appellant : Mrs. Ane Tavo Counsel for the Appellant
 Mrs. Tupou'ahau Fakakovikaetau In attendance

Respondent: Mr. Sione Sisifa Solicitor General
 Mrs. Eunice Moala Public Service Commission

Date of Hearing: 5th February, 2019

Date of Ruling: 5th March, 2019

Mrs. Tupou'ahau Fakakovikaetau (Appellant) v Public Service Commission (Respondent)

PST Appeal No. 2 of 2018

1. This is an appeal by the Appellant seeking the following decision from the Tribunal:
 - (a) To make the appropriate directions in respect of the Public Service Commission's (PSC) letter of 22 November, 2017.
2. The Appellant relied on the following grounds, namely:
 - (i) It was not the Appellant's intention to take 'special leave without pay' when she had applied for special leave in lieu of overtime on the 29 September 2017.
 - (ii) That the PSC's decision dated 22 November 2017 was not received by the Ministry of Internal Affairs (MIA) office until 30 November 2017. The Appellant had resumed duty on the 27 October 2017 which did not give her any opportunity to respond regarding whether to continue with her leave or resume work earlier to avoid deductions in salary.
 - (iii) The Appellant had not received notification of the withholding of her salary for the first half of December 2017 and one day from the second half of December until she went to the Bank of the South Pacific (BSP) ATM in December 2017 and discovered that her salary had not been deposited by Treasury, a decision of withholding her salary which she did not consent to.

BACKGROUND

3. The Appellant is a Principal Programme Officer at the MIA.
4. On 29 September 2017, the Appellant submitted an application for 17 days special leave with pay, in lieu of overtime, to the Deputy Chief Executive Officer (DCEO) for the Women's Affairs Division (WAD), Mrs. Polotu Paunga, to commence on 04 October 2017 and end on 26 October 2017.
5. The completed Application for Leave Form from the Appellant was then signed and recommended by the DCEO WAD on 29 September 2017.
6. On 29 September 2017, the Acting Chief Executive Officer (ACEO), Ms. Kalesita Taumoepeau, approved the Appellant's special leave application.
7. The Appellant commenced her special leave on 04 October 2017.
8. The Appellant resumed duty on 27 October 2017.

9. On 15 December 2017, the Appellant found out that her salary for the first half of December 2017 has not been deposited to her BSP account.
10. In following up with the MIA Account Sections, she was told that her salary for the first half plus one day from the second half of December 2017 were withheld.
11. On 18 December 2017, the Appellant sent an email to Ms. Taumoepeau and stated:

“... Kalesita, I feel that I should have been properly informed prior to the approval of my 11 days without pay because this is not what I had applied for, I could have decided not to take the 11 days without leave.

Given the information provided, I ask that inquiry regarding the holding of my salary for the first half of December, 2017 be looked into.”
12. On 16 January 2018, Ms. ‘Emeline Tongotea, Corporate Services Division of MIA, forwarded email correspondences between the PSC and Ministry of Finance to the Appellant which stated that the reason for withholding her pay for 11 days is in accordance with the Public Finance Management Act (Treasury Instructions) 2010, *“All staff overtime shall be settled within one (1) month if paid by cash, or leave shall be taken within three (3) months if time off in lieu”*.
13. The Appellant complained to Ms. Tongotea of why she was not informed in time as she would have taken the option of returning to work rather than taking leave without pay.
14. The Appellant launched her complaint to the Public Service Tribunal (Tribunal) on 29 June 2018.

PSC ACTION AND DECISION

15. On 06 October 2017, the ACEO of MIA wrote to the CEO of the PSC to advise that the following officers have been approved for Annual Leave with pay.

“

 1. *Tupou’ahau Fakakovikaetau, Principal Programme Officer, 17 days – Lieu off overtime – (04/10/2017 – 27/10/2017)*
 2. ... ”
16. The ACEO of MIA sent a Savingram to the CEO of the PSC on 30 October 2017 to advise that *“Mrs. Tupou’ahau Fakakovikaetau, Principal Programme Officer resumed duty on 27th October 2017 from her 17 days Lieu off overtime as from 04th October to 26th October 2017.”*

17. On 22 November 2017, the CEO of the PSC sent a Savingram to the ACEO for MIA to advise that approval has been given to Mrs. Fakakovikaetau "... to be granted 17 days leave (i.e. working days off in lieu of overtime (overtime on Mar & April, '17 and Jun & Jul,17) plus 11 working days special leave without pay) with effect from 4 October, 2017.

For your information and further necessary action, please."

18. On an email that was sent by ACEO, Ms. Taumoepeau on 18 December 2017, she raised the following question to Falemei Fale and Malia Pome'e of the PSC:

"Falemei/Malia – If "Leave" requested by the officer was specifically to be taken in lieu of "Overtime" hrs she had worked, why had PSC recorded 11 days of those days be recorded as Special Leave Without Pay without the officer's consent, or that of MIA's CEO?"

19. Lisimeili Loloa of the PSC sent an email to Melisa Pulu of the Ministry of Finance on 10 January 2018 to check if they would accept Tupou'ahau Fakakovikaetau's hours of overtime from 2014 – 2016 to cover her leave without pay or they will still have to stick to the Treasury Instructions 2010.

20. Melisa Pulu responded that it is quite clear from the Public Finance Management Act (Treasury Instructions) 2010, section 40(9) and quoted:

"All staff overtime shall be settled within one (1) month if paid by cash, or leave shall be taken within three (3) months if time off in lieu".

Melisa also emphasized that they work under the Instructions to be fair to everyone.

21. Lisimeili Loloa noted the advice and position of the Ministry of Finance.
22. The email correspondence of Lisimeili and Melisa were referred to Tupou'ahau Fakakovikaetau by 'Emeline Tongotea of MIA on 16 January, 2018.
23. On 19 January, 2018, Lisimeili Loloa of the PSC emailed Melisa Pulu of the Ministry of Finance conveying that Tupou'ahau Fakakovikaetau continues to dispute the decision of the Ministry of Finance to withhold her salary for 11 days of leave and sought for this to be returned to her.

In her email, Lisimeili sought Melisa's views and raised that Tupou Fakakovikaetau has 19.5 days in lieu of overtime from 2014 and 2015 and that she had utilized all her days in lieu of overtime for 2016 and 2017.

24. Melisa on the same day replied to Lisimeili's email and stated that she consulted her Supervisor and confirmed the Ministry of Finance's position that overtime when paid, must be paid one month after the overtime and for days in lieu of overtime, it must be taken within three months.

25. On 13 April, 2018 the Appellant emailed the ACEO of the MIA, raising her concerns over the delay involved in notifying her of the decision as this would have provided her an opportunity to decide whether to take special leave without pay or return to work.

The Appellant emphasized that she found out that her salary for December 2017 were being withheld when she received no salary.

26. On 07 June, 2018 Leinolo Lakai of MIA emailed Falemei Fale of PSC to request an explanation for why the PSC failed to advise the MIA in a timelier manner, as this would have avoided withholding the officer's salary.

27. Consequently, the Appellant appealed to the Tribunal against the content of the letter from the CEO of the PSC to ACEO of MIA on 22 November, 2017, as if that was a decision of the PSC.

SUBMISSIONS

28. Both parties submitted written submissions, and the Tribunal is appreciative to both counsels, Mrs. Ane Tavo (on behalf of the Appellant) and the Solicitor General (on behalf of the Respondent). Parties further supported their written submissions with helpful oral elaboration and clarification.

29. The Appellant's submissions were focused on the grounds of appeal stated in paragraph 2 above, and will not be repeated here.

30. The Respondent's submissions may be summarized as follows:

- (i) That the issue complained of by the Appellant cannot be dealt with as an appeal under section 21A(2) of the Public Service Act due to the following:
 - a. That a time off leave in lieu of overtime should be distinguished from a leave that may be granted by a CEO;
 - b. That the authority to approve time off in lieu of overtime payment is a decision for the CEO for the MIA, and not the PSC;
 - c. That the CEO for MIA is obliged under the Public Finance Management Act (Treasury Instructions) 2010 to observe the instructions, and the number of days for which the Appellant may take in lieu of overtime before consenting to the application by the Appellant to take time in lieu of overtime; and
 - d. That the action of the PSC in issuing the letter of 22 November 2017 amounts to an advice, rather than a decision that can be appealed under

section 21A(2) of the Public Service Act or any regulations made under the Act.

- (ii) That the issue complained of by the Appellant should have appropriately been dealt with under the Public Service (Grievance and Dispute Procedures) Regulations 2010.

31. In response, the Appellant's submission is summarized as follows:

- (i) That the Appellant has been a victim of unfair treatment as a result of the decision of the PSC dated 22 November, 2017 due to the following:
 - a. That the response from the PSC to the notification of the Appellant's application for special leave in lieu of overtime sent in on 06 October, 2017 was unreasonably delayed.
 - b. That the unreasonable delay has caused significant unfairness to the Appellant.
- (ii) That the Appellant has in fact exhausted the grievance procedure available under the Public Service (Grievance & Dispute Procedures) Regulations 2010.

TRIBUNAL'S FINDINGS

- 32. The Appellant's ground of appeal is an assertion that the PSC's failure to provide timely advice on approval of the Appellant's leave has disadvantaged the Appellant, who did not intend to take 'special leave without pay' at the time she applied for leave.
- 33. It remains unclear why the PSC took so long to advise the MIA that the Appellant has been approved 11 days special leave without pay.
- 34. Evidence was provided that it was the Ministry of Finance's decision to withhold the Appellant's salary for 11 days and not PSC. The decision was made in accordance with the Public Finance Management Act (Treasury Instructions) 2010, section 40(9).
- 35. The Tribunal notes that the Appellant followed the proper channels when applying for leave and obtained the approval of the ACEO for MIA.
- 36. In considering both written and oral submissions there is an assertion that this shortfall was on the part of the ACEO for MIA who is in a position to know the Treasury Instructions and ensure compliance. And therefore it would be more practical to discipline the ACEO by deducting the sum of the Appellant's salary for 11 days from the ACEO and reimbursing the Appellant.

37. However as a matter of natural justice, it would be quite unfair to impose any disciplinary penalty on the ACEO who is not a party to this appeal and is unable to present her arguments.

38. Furthermore, the onus is also on the Appellant to be aware of the relevant Treasury Instructions relating to the process of the conversion of overtime into leave days as provided under the Public Finance Management Act (Treasury Instructions) 2010, section 40(9) which reads as follows:

“All staff overtime shall be settled within one (1) month if paid by cash, or leave shall be taken within three (3) months if time off in lieu”.

39. It must be noted that the relevant legislation as quoted above form part of the conditions of employment of public employees including the Appellant.

40. The Tribunal also notes that there is no Public Service Commission decision.

41. Matters highlighted in this case include the importance of timeliness of informing of employees of situations that may affect them, and the relevant authorities should be encouraged to act accordingly.

ACKNOWLEDGEMENT

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

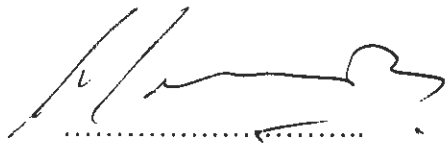
ORDER OF THE TRIBUNAL

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

44. **The tribunal makes the following orders:**

(a) For the reasons given above, this appeal is dismissed.


(b) The parties are at liberty to apply.



Mr. 'Aisea Taumoepeau SC



Mr. Timote Katoanga



Mrs. Lepolo Taunisila