



Government of Tonga

## Public Service Tribunal

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PST Appeal No. 2 of 2019

Mr. Sioape Kupu

**Appellant**

Public Service Commission

**Respondent**

### PUBLIC SERVICE TRIBUNAL:

Mr. 'Aisea Taumoepeau, SC

**Chairman**

Mr. Timote Katoanga

**Member**

Mrs. Lepolo Taunisila

**Member**

### REPRESENTATION:

**Appellant** : Mr. Sioape Kupu      In Attendance

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

**Date of Hearing:** 08 October, 2019

**Date of Ruling:** 31 October, 2019

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**Sioape Kupu (Appellant) v Public Service Commission (PSC) (Respondent)**

**PST Appeal No. 2 of 2019**

**Preliminary**

1. This is an appeal by the Appellant against PSCD No. 324 of 22 June 2018, where another person, Mr. Semisi Fukofuka was appointed to the position of Director of Corporate Services in the Ministry of Health.
2. The Appellant had applied, but he did not meet the minimum requirements, and he was not considered for the position.
3. The grounds of appeal as set out in the appeal document are:

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- (i) *Why was no official letter or e-mail sent to notify me of the reasons behind my ineligibility for the Director of Corporate Services post-advertisement? Similar cases can be applied to other applicants.*
- (ii) *Why were certain exceptions made to the other Deputy Director posts? For example the Deputy Director of ICT did not meet the requirements yet he was eligible for the interview?*
- (iii) *What reasons were there for the DCS to travel to the aforementioned overseas meetings during probationary period and had nothing to do with it? Based on the scoring system of the PSC on Qualification, Years of Experience and Knowledge and Skills I do not see how an individual who has no background or knowledge on healthcare outrank an individual who does.*
- (iv) *What were the reasons behind the individual being selected as the Director of Corporate Services over the other candidates? Were the Panelist chosen fit for the interview given? Are the panelists within the capacity and knowledge of the post? What were their comments on how the other participant was not fit compared to him? Taking into consideration the following factors:*
  - *He only has 5 years left before his resignation – where is the sustainability in this?*
  - *He has not worked in the Public Service at all.*
  - *He has not worked in the Ministry of Health Tonga or any Ministry outside of Tonga so there is a huge gap in technical understanding which will take 5 years to understand.*
  - *Has a Bachelor degree in Commerce and Accounting with no management background or knowledge.*

- (v) *What was the overwhelming determinant that outweighed all the aforementioned factors in relation to the selection process?*
- (vi) *What is the Ministry's plan for my return after my Master's Degree? Will I still remain in Band L with my Masters and 5 years of working experience? It is extremely unfair that the Ministry had approved to send me for a Scholarship only to return to no promotion at all! It has been a year and half since my return and still no mention of moving forward."*

### **Appellant's grievance actions**

4. In accordance with the Public Service (Grievance & Dispute Procedures) Regulations 2006, as amended, the Appellant lodged an employment grievance in a letter to the Chief Executive Officer (CEO) for Health on 01 November 2018. The CEO for Health responded to this matter with a letter to the Appellant on 15 November 2018, with full explanations to the six grounds raised by the Appellant (the six grounds were the same as the grounds in this appeal).
5. The Appellant was not satisfied. He then lodged a complaint to the Ombudsman. He was advised that the Ombudsman did not have jurisdiction in his case because he had the legal recourse under the provisions of the Public Service legislation.
6. The Appellant then filed this appeal.
7. It must be noted here that the Tribunal have examined the processes taken by the Appellant in addressing his employment grievances to the CEO for Health. The Tribunal is of the view that in the circumstances of the matter, that was the proper avenue for the Appellant. The Tribunal is also of the view that the CEO for Health had dealt with the matter properly and adequately, as shown in his letter dated 15 November 2018.

### **The appeal**

8. The Appellant, although he put in an application in response to the advertisement for the vacant position of "*Director of Corporate Services, Ministry of Health*", did not meet the minimum requirements and was not considered an applicant for the position. In law, he was not a party to the process, and therefore he has no *locus standi* to bring an appeal in this matter.
9. This means that his appeal can be dismissed on that ground alone. However, in view of the nature of the appeal, the Tribunal will consider the grounds of appeal tendered by the Appellant.

### **Grounds of appeal**

10. This appeal was lodged and based on six grounds of appeal (refer to paragraph 3 above for order of listing).
11. In the hearing of this appeal, it was conceded by the Appellant that there is no basis for the first, second, and sixth grounds of appeal, and they were withdrawn.

### **Third ground of appeal**

12. The third ground of appeal is –

*“What reasons were there for the DCS to travel to the aforementioned overseas meetings during probationary period and had nothing to do with it? Based on the scoring system of the PSC on Qualification, Years of Experience and Knowledge and Skills I do not see how an individual who has no background or knowledge on healthcare outrank an individual who does.”*

13. In reviewing the evidence and the applicable law, the Tribunal believe that:

- (i) The job description of the position requires the holder to attend all NHDC and committee meetings, representing the Ministry of Health at local and regional events as required;
- (ii) The public service legal framework does not prohibit an employee under probation from travelling overseas on official duties to attend meetings;
- (iii) The CEO for the Ministry of Health who is vested with the requisite authority, does not have any legal obligation to inform and give reasons to the Appellant for any decision or approval requiring the Director of Corporate Services to travel overseas on official duties to attend events or meetings.

14. This ground of appeal fails.

### **Fourth ground of appeal**

15. The fourth ground of appeal is –

*“What were the reasons behind the individual being selected as the Director of Corporate Services over the other candidates? Were the Panelist chosen fit for the interview given? Are the panelists within the capacity and knowledge of the post? What were their comments on how the other participant was not fit compared to him? Taking into consideration the following factors:*

- *He only has 5 years left before his resignation – where is the sustainability in this?*
- *He has not worked in the Public Service at all.*
- *He has not worked in the Ministry of Health Tonga or any Ministry outside of Tonga so there is a huge gap in technical understanding which will take 5 years to understand.*
- *Has a Bachelor degree in Commerce and Accounting with no management background or knowledge.”*

16. The Tribunal makes the following findings –

- (i) There is no legal requirement under the PSC’s legal framework to give reasons for its decision as to why Mr. Semisi Fukofuka was appointed under PSCD No. 324 of 22 June 2018;
- (ii) The chosen panelists were fit for the recruitment process and were selected under Policy Instruction 1B.1.3(6) and (7);
- (iii) The recruitment panel does not have any legal obligation to disclose their reason for their decision to the Appellant;
- (iv) Mr. Semisi Fukofuka was appropriately recommended for the relevant position.

17. This ground fails.

#### **Fifth ground of appeal**

18. The fifth ground of appeal is -

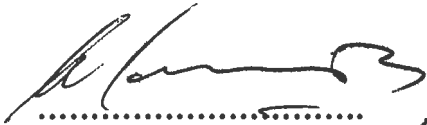
*“What was the overwhelming determinant that outweighed all the aforementioned factors in relation to the selection process”*

19. As can be seen, all the above grounds fail. In addition, the Tribunal believe that the Interview Assessment Forms, Interview Panel Report, Memorandum from Senior Public Health Administrator to CEO for Health, and the Submissions to the PSC, provided ample justifications for the appointment of Mr. Semisi Fukofuka to the position under PSCD No. 324 of 22 June 2018.

20. This ground fails.

**Order of the Tribunal**

21. Section 21F(1) of the Public Service Act 2002, as amended, provides that the Tribunal may make an order to affirm, vary or set aside the PSC's decision.
22. For the reasons set out above, the Tribunal makes the following orders:
- (i) The PSCD No.324 of 22 June 2018, is affirmed;
  - (ii) The appeal by the Appellant is dismissed.



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**Aisea Taumoepeau S.C**



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**Timote Katoanga**



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**Lepolo Taunisila**