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Government of Tonga

Public Service Tribunal

PST Appeal No. 1 of 2018

Mr. Samuela Fakatou **Appellant**

Public Service Commission **Respondent**

PUBLIC SERVICE TRIBUNAL:

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

Mr. Timote Katoanga **Member**

Mrs. Lepolo Taunisila **Member**

REPRESENTATION:

Appellant : Mrs. Loupua Pahulu-Kuli Counsel for the Appellant
 Ms. Sisi Vaipulu Assisting
 Mr. Samuela Fakatou In attendance

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

Date of Hearing: 10, 12 & 19 July, 2018

Date of Ruling: 23 August, 2018

Mr. Samuela Fakatou (Appellant) v Public Service Commission (PSC) (Respondent)

PST Appeal No. 1 of 2018

1. This is an appeal by the Appellant seeking the following decision from the Tribunal:
 - (a) the PSC Decision No. 59 of 02 February 2018 be quashed;
 - (b) the Appellant's dismissal be declared to have been wrongful;
 - (c) the Appellant be reinstated to his job of Sub-Treasurer in Vava'u for a period of one (1) month to clear his name amongst the locals who think he had stolen money based on the disciplinary proceedings, and thereafter, be permanently transferred to Treasury main office at Nuku'alofa, Tonga;
 - (d) the Appellant be reinstated and be paid his full salary commencing from when he was on leave without pay;
 - (e) the balance of the Appellant's Annual Leave entitlement be reinstated;
 - (f) any further orders the Tribunal may consider appropriate.
2. The Appellant relied on the following grounds:
 - (i) The Public Service Commission (PSC) erred in law and fact in imposing a penalty for a serious breach of discipline (i.e. dismissal) whilst in fact it failed to consider that a penalty for a minor breach of discipline (i.e. "*transfer an employee within the Ministry*") had also been previously imposed, thus amounting to double punishment.
 - (ii) The PSC's decision to punish the Appellant for the second time (i.e. dismissal) is unconstitutional as it contravenes his constitutional right contained in clause 12 of the Constitution.
 - (iii) The PSC erred in law and fact in imposing a second penalty (i.e. dismissal) whilst in fact the matter became *res judicata* upon the imposition of the first penalty (i.e. transfer of employee within the Ministry).
 - (iv) The PSC erred in law and fact in dismissing the Appellant based on a succession of significant procedural errors and unfairness resulting from non-compliance with mandatory and procedural requirements of the Public Service Act, Public

Service (Disciplinary Procedures) Regulations, the Public Service Policy 2010, and the Public Service Policy Instructions, where relevant.

- (v) The PSC erred in law and facts in dismissing the Appellant based on defective charges, namely: disciplinary charges 1, 2 and 4.
- (vi) The PSC erred in law and facts in dismissing the Appellant based on two (2) irrelevant charges, namely: disciplinary charges 3 and 5.
- (vii) The PSC erred in law and facts in dismissing the Appellant based on grounds of discrimination.
- (viii) The whole process from the commencement of the disciplinary action against the Appellant until when the dismissal decision was made amount to an abuse of process.
- (ix) The PSC failed in law and fact in dismissing the Appellant without considering the depth of his response to the charges in relation to the established practices that were established within the Vava'u Sub-Treasury.

BACKGROUND

3. The Appellant was the Sub-Treasurer at the Sub-Treasury, Ministry of Finance & National Planning (MFNP) in Vava'u and has been working as a civil servant for more than 30 years.
4. At end of business on 27 June 2017, the normal routine of cash balancing was carried out by Ms. Lesieli Halafihi, Clerk Class 1 and also the Cashier, and Mr. Viliami Latu, Senior Accounting Officer, and was reviewed and signed by the Appellant with a surplus of \$2.91.
5. In the morning of 28 June 2017, Ms. Halafihi reported to Mr. Latu that there was shortage in the cash on hand and Mr. Latu advised Ms. Halafihi to report it to the Appellant.
6. The matter was reported to the Appellant in the morning of 28 June 2017 and he e-mailed Ms. Makeleta Siliva at the Ministry's Head Office in Nuku'alofa to report the incident. However, the exact amount of the shortage has not been confirmed at that stage.
7. Ms. Siliva informed the Appellant to report the incident to the Head of the Internal Audit Division, Mr. Maika Haupeakui, as he will be arriving in Vava'u on that day.
8. The Appellant picked up Mr. Haupeakui from the airport and informed him of the incident.

9. Mr. Haupeakui told the Appellant to carry out a cash count on the evening of 28 June 2017 to confirm the exact amount of the shortage. The result of the cash count confirmed that there was a shortage of \$68,678.10
10. The staff of the Internal Audit Division arrived in Vava'u on 29 June 2017 and carried out a cash count on the night of 30 June 2017 and confirmed that the shortage had gone up to \$71,500.42.
11. On 03 July 2017, the Appellant e-mailed the result of the cash count on 30 June 2017 to Ms. Siliva as directed by Mr. Haupeakui.
12. The CEO of the MFNP, Ms. Pilimilose Balwyn Fa'otusia, e-mailed the Appellant on 10 July 2017 to convey a direction from the Hon. Minister to report the incident to the Police.
13. The Appellant called the Auditor General on 10 July 2017 to report the incident.
14. On 11 July 2017, the CEO of MFNP sent a letter to the Auditor General together with the report of their Internal Audit Division requesting a special audit of the Vava'u Sub-Treasury.
15. The Auditor General and his team were in Vava'u from 24 to 27 July 2017 to carry out their investigation.
16. The CEO of MFNP called the Appellant on 28 July 2017 and requested him to go on leave. However, the Appellant replied by e-mail on the same day that he did not want to take leave and do nothing but preferred to be transferred back to work in Tongatapu.
17. On 28 July 2017, the CEO of MFNP sent an Internal Memo to the Appellant that he could not be transferred to Tongatapu as there was no vacant post available for him. However, the CEO of MFNP also stated that after consulting with the PSC and Solicitor General, they agreed to inform him to kindly take annual leave from 28 July 2017 until further notice.
18. The Appellant responded with an Internal Memo on 29 July 2017 and some of the contents are stated below:
 - *“ ...As far as I understand, the CEO has the authority to approve Annual Leaves, but as practice and in accordance to relevant policies and instructions, wouldn't that be subject to an application that must be lodged from me? With respect, you may have the authority, but in my view, that authority is subject to an application that I must lodge with you. Furthermore, Annual Leaves are classed as “entitlements”. An entitlement where employees have and enjoy whenever they want to invoke it. Annual Leaves wouldn't be really called entitlements if they are something that can be automatically exerted or imposed on an employee*

whenever a CEO wants. The fact that your decision is asking me to take my Annual Leave (to which in my view, I am supposed to apply for) and had already given me a date (without my application), will, with no doubt, undermine the whole intention of having Annual Leaves as entitlements...

- *...I am humbly asking if you could kindly reconsider your decision and I pray that you would allow me to continue with employment as normal whilst investigation goes parallel with it, until a later date when the merits of this case shall be decided ...*
- *...To proceed as per your decision would not only, in my view, be classed as not procedural but may amount to an abuse of process and is definitely risking my reputation that I have built over a period of more than thirty (30) years serving as Government civil servant and a person who holds a title in Church. Obviously, investigations are ongoing and if I were to concede with your decision, wrong inferences can be drawn such as me being the suspect of this criminal matter... ”*

19. The CEO of MFNP sent an Internal Memo to the Appellant on 31 July 2017 to acknowledge the receipt of his Memo of 29 July 2017 and also to inform him that they were making arrangement for him to be permanently transferred to Nuku'alofa on 14 August 2017.

20. On 02 August 2017, the Auditor General sent the CEO of MFNP the Audit Report on the special audit that they carried out at the Sub-Treasury, Neiafu, Vava'u, with the following recommendations:

“

1. *That this case be referred to the Public Service Commission as serious breach of duties and the staff involved are Samuela Fakatou, Sub-Treasurer Vava'u, Viliami Lātā, Senior Accounting Officer Sub-Treasury Vava'u, and Lesieli Halafihi Clerk Class I Sub-Treasury Vava'u.*
2. *To note that the case has been referred to the Ministry of Police and their investigation is still in progress.*
3. *Thank you for your appropriate actions on my recommendations in my interim report Ref. No.LC213/24/17 dated 28th July 2017, which are herewith repeated.*
4. *That immediate corrective actions to strengthening the internal control system of cash balancing of each day as well as the safeguarding of cash at the Sub-Treasury Vava'u, and to all Sub-Treasuries at the Outer islands, are priorities.*
5. *That a review of the staffing needs of Sub-Treasury Vava'u (and all Sub-Treasuries) be carried out and to incorporate relieving procedures from Treasury Head Office Nuku'alofa at times of staff leaves and upon very busy occasions at each Sub-Treasury.”*

21. On 03 August 2017 the CEO of MFNP sent a Savingram to the CEO of PSC to declare that the case where the Appellant has been involved in at the Sub-Treasury in Vava'u was serious in nature.

22. The CEO of MFNP sent an Internal Memo to the Appellant on 04 August 2017 to advise him of the PSC Decision No. 400 that he had to take leave with effect from 07 August 2017.
23. On 07 August 2017, the Appellant applied for Annual Leave from 07 August 2017 to 11 August 2017.
24. On 06 September 2017, the CEO of PSC sent a letter to the Appellant informing him of the charges of serious breach of discipline made against him.
25. The Appellant acknowledged the receipt of the letter on 15 September 2017 and also requested for the documents where the letter had been referred to but were not provided.
26. On 21 September 2017, the Appellant sent his responses to the charges that were made against him.
27. On 28 September 2017, the CEO of PSC sent the documents that were requested by the Appellant and also with an Agreement to waive the previously agreed time periods.
28. The Appellant responded on 02 October 2017 that the serving of documents was not done in accordance with the law and he did not agree with the Agreement to waive the specified regulatory period.
29. On 27 October 2017, the Appellant was suspended without pay with effect from 11 September 2017 (*PSC Decision No. 552*).
30. The Appellant was dismissed from the Public Service with effect from the date of suspension of duty (*PSC Decision No. 59 of 02 February 2018*).
31. Consequently, the Appellant appealed to the Public Service Tribunal against the PSC Decision No. 59 on 16 March 2018.

PSC ACTION AND DECISION

32. On 03 August 2017, the CEO of MFNP sent a Savingram to the CEO for PSC (*Ref. No.:3G/662*) to submit the Auditor General's Report (*Ref.: SI 213/29/17*) and to continue with the disciplinary procedure for the case, which included the Appellant. The CEO of MFNP also declared the case to be serious in nature and stated:

"...Samuela Fakatou – currently working in the position of Sub Treasurer and has been informed that he would be permanently redeployed to Treasury Tongatapu on Monday 14th August 2017..."

33. The PSC Office made a submission to the Commissioners' meeting on 04 August 2017 with the following comments:

"As advised by Mrs. Fa'otusia, three employees of Ministry of Finance & National Planning were engaged in events which resulted in a serious breach of discipline. These employees are:

- *Mr. Samuela Fakatou*
- *Mr. Viliami Latu and*
- *Ms. Lesieli Halafahi ..."*

34. In the same submission, the PSC Office made the following recommendations:

“

1. *To determine whether a suspension is required for the officers implicated upon perusal of the reports provided by CEOs, Ministry of Finance & National Planning and the Auditor General,*
2. *To suspend the stated employees without pay if appropriate and refer the case to the Charge Formulation Committee for investigation.”*

35. In the Minutes of the Commissioners Special Meeting on 04 August 2017 the following recommendations were approved as amended:

“

1. *That Ms. Lesieli Halafahi, Clerk Class I, Ministry of Finance & National Planning be suspended from duty without pay with effect from 8:30am on Monday 7 August, 2017 and that the 'Procedure for serious disciplinary charges' be instituted against her.*
2. *That Mr. Samuela Fakatou, Sub-Treasurer and Mr. Viliami Latu, Senior Accounting Officer, Sub Treasury Vava'u, Ministry of Finance & Planning are to take leave (with or without pay subject to leave balance) with effect from Monday 7 August, 2017 and that the case is referred to the Charge Formulation Committee (CFC) for further action.”*

36. The above decision (PSC Decision No. 400) was conveyed on a Memorandum to the CEO of MFNP on 04 August 2017.

37. On 06 September 2017, the CEO of MFNP sent a Savingram to the CEO of PSC to request the transfer of the Appellant from the Sub-Treasurer Vava'u to be the Chief Accounting Officer, Payroll, MFNP at Nuku'alofa.

38. On 06 September 2017, the CEO for PSC sent a letter to the Appellant to inform him of the charges of serious breach of discipline against him in accordance with regulation 7(1)(b) of the Public Service (Disciplinary Procedures) Regulations 2003, as amended.

39. The details of the charges were as follows:

“Charge 1

Failure to perform functions in a competent manner, contrary to section 4(a) of the Public Service Code of Ethics and Conduct 2010.

Charge 2

Failure to comply with the Public Finance Management Act (Treasury Instructions) 2010, contrary to section 4(b) of the Public Service Code of Ethics and Conduct 2010.

Charge 3

Act in a behavior which cause distress to work colleagues, contrary to section 7(c) of the Public Service Code of Ethics and Conduct 2010.

Charge 4

Failure to act with care and diligence, contrary to section 7(g) of the Public Service Code of Ethics and Conduct 2010.

Charge 5

Consuming alcohol on government work premises or property, contrary to section 7(1) of the Public Service Code of Ethics and Conduct 2010.

40. It was also stated in the letter from the CEO for PSC of 06 September 2017 that *“If you do dispute the charges, you should submit a written reply to these charges within 10 working days of receipt of this letter.”*
41. On 15 September 2017, the Appellant sent a Savingram to the CEO for PSC to acknowledge the receipt of her letter dated 06 September 2017 and also stated the following:
- “The letter made reference to a number of documents being enclosed, but upon review, I found that there were no enclosed documents.*
- For that reason, I write to seek if I can be served with all the documents that I am supposed to be served with.”*
42. On 21 September 2017, the Appellant wrote a letter to the CEO for PSC to state that he disputed all the five charges made against him and provide reasons for each of those charges.
43. In the Appellant’s letter of 21 September 2017, he sought the following actions to be considered by the PSC:

“

(1) That the PSC decision dated 4th August 2017 be quashed and of no effect.

- (2) That all five (5) charges brought against me be dismissed in their entirety for failure to comply with the requirements of the Act, the Disciplinary Regulations, the Policy and the PS Instructions.
- (3) That I be reinstated to my job of Sub-Treasurer in Vava'u for one (1) month to clear my name amongst the locals whom to this day thought I stole the money, and thereafter, be permanently transferred to Treasury main office at Nuku'alofa, Tonga.
- (4) That my pay be reinstated and I be paid in full salary commencing from when I was on leave without pay.
- (5) That the balance of my unapplied Annual Leave period be reinstated."

44. The CEO for PSC sent a letter to the Appellant on 28 September 2017 to acknowledge the receipt of his letter dated 21 September 2017 and also stated the following:

"...

- 2. Accordingly, we hereby enclose, with our sincere apologies, the requested documents. We also attach an agreement to waive the previously agreed time periods and request that your response to the charges laid be provided to our office within 10 working days of receipt of these documents instead. ..."

45. The Appellant responded in a letter dated 02 October 2017 and stated the following:

"...

As much as I appreciate your good office in trying to settle this matter, I respectfully submit that your action of serving me now with the documents and to proceed with an Agreement to waive regulatory timeframe, is not the correct course of action that should be taken by your good office based on the following reasons –

- (1) Section 7(2) of the Public Service (Disciplinary Procedures) Regulations (As Amended) ('Disciplinary Regulations') is clear that '[t]he charge laid against [me] shall include the [prescribed documents i.e. Reports and etc]. On the letter laying the disciplinary charges which was served on me on 6th September 2017, there were no enclosed copies of any of the above listed documents. To serve me now, is not only an abuse of process but is also unlawful.
- (2) There is no provision in the Disciplinary Regulations or the Public Service Act that gives your good office the legal basis to enter into an Agreement to waive regulatory timeframe. On that note, if I may, in the event of future cases, if you want to change or waive the regulatory timeframe, you may consider recommending to your Superiors (if they agree) to follow the normal process of Regulation making in order to insert a provision inside the Disciplinary Regulations to give you the legal basis to waive and/or re-calculate days in the event the ten (10) days currently specified under law is too rigid or cannot be met.

For the avoidance of doubt, the serving of documents now is not done in accordance to law, and I do not agree with the Agreement to waive the specified regulatory period. Even, if I agree, it is, in itself not the correct and legal way forward.

If legally right, I still expect your good office to submit my case with your CEO's recommendation (Regulation 7(1)(d)) to the Commission on or before 5th October 2017 (which is exactly ten (10) days after your receipt of my written representation). I also reserve my right to further representation through myself or through legal counsel before the Commission. ..."

46. On 05 October 2017 the CEO for PSC responded to the Appellant's letter of 02 October 2017 and stated the following:

"...

The enclosed copies of documents received by you on the 29th September, 2017 were intended to be served and attached along with the charge letter sent to you dated 6th September, 2017 as per our Disciplinary Regulations. Therefore the Public Service Commission had taken initiative to rectify this procedural error and to re-count the 10 days starting from the receipt of the subject documents provided you agreed by signing the waiver agreement. This is not an unlawful act as mentioned earlier, it was a mere failure to initially attach the documents with charges and we had conveyed to you are sincere apologies.

That the essence of the matter are the charges brought against you and that careful consideration is given in light of the documents in support of the charges to assist you in preparing and submitting your response to your charges. More time has been accorded to you and the Commission is still keeping within the 10 working days timeline as provided by the regulations commencing from the date of your receipt of the documents.

That should you still choose to remain with your initial position not to sign the waiver agreement in receipt of subject documents, the CEO of the Commission will proceed to submit the matter to the Commission along with recommendations at the expiry of the 10 working days timeline given to you. ..."

47. On 06 October 2017 the Appellant responded to the letter of the CEO for PSC, dated 05 October 2017 and stated the following:

"...

(1) In response to your paragraph (1), I respectfully submit -

(a) That for the Public Service Commission ('PSC') to take the initiative to rectify its own procedural error by way of an Agreement to waive regulatory timeframe, is in my view, still not the correct way forward. Why? Because as I have mentioned in my letter dated 2nd October 2017 there is no legal basis in your Public Service (Disciplinary Procedures) Regulations (As Amended) ('Disciplinary Regulations') that would have given your good office any right or whatsoever, to go down this path. If this was intended, I believe, the original maker of the

Disciplinary Regulations would have incorporated a provision to that effect, or even the Legislative Assembly would have amended the Disciplinary Regulations to insert a provision to that effect when they had the chance to do pursuant to section 9 of the Government Act. But they did not, which makes it difficult for me to sign the Agreement.

(b) That for the PSC to state it was a mere failure to initially attach the documents is in my view an understatement. Why? Because in my letter dated 15th September 2017 (which was well within the ten (10) days periods required under your Disciplinary Regulations for me to submit my representation after receipt of the charges) I had requested for the documents, but yet still, PSC did not provide me any. You would have acted lawfully, though arguable, if you have provided me the documents at that time which is within the timeframe. But instead, you did not. And unfortunately, I had to submit my written representation (without the documents) as I wish to remain compliant with the required time frame in the Disciplinary Regulations. If you still think that this is just a mere failure to attach the documents, then respectfully, I would suggest if you could read (if not already have) the 'Amanaki v Tu'ifua [2009] TOSC 27; CV 1139 of 2007 (27 November 2009) ('Amanaki Case'). And note that in the 'Amanaki Case, the other reason why the Supreme Court dismissed PSC's decision was the '[t]he failure to serve a copy of Head of Department's report' alongside the charge. That may provide some insight into implications of failure to attaching documents with the charges. So to term the fact that PSC had not attached the documents with the charges (while in fact, I did give PSC notice) a mere failure to attach documents, may appear an understatement. Because the truth is, it is not.

(2) In response to paragraph (2), I respectfully submit that your good office have not already kept up with the ten (10) days requirement required under your Disciplinary Regulations. Why are you saying you are still keeping up with the ten (10) days requirement, obviously, you are not. In fact, you have missed it. Now that you are proposing for another additional ten (10) days via Agreement to waive and to state that the ten (10) days will commence from when the date the documents were received, is, in my view, not procedural in light of your Disciplinary Regulations and is adding to the already abuse of process that I have alluded to in my first representation dated 21st September 2017. The intention in Disciplinary Regulations was for the counting to start from when the charge was served (regulation 7(1)(c)) because it was intended that the documents should have been served with the charge (regulations 7(2)). Note that the word used in regulation 7(2) was "shall" which indicates that IF IS A MUST that the charge be served with the documents in order to fulfil the intention of the Disciplinary Regulations. There is no provision that the charge and the documents be served separately and/or the counting should start from when the documents are served. Out of curiosity, that keeps me wondering about the consistency and the compatibility of your proposed Agreement to waive within the context of the Disciplinary Regulations. It appears that we may be rewriting the law here, which, we should not. Hence, unlawful.

(3) In response to paragraph (3), I respectfully submit that the unsigned Agreement has no legal effect because I did not sign it, meaning, I am not privy to it, therefore, not bound by it. If you are to proceed with the proposed additional ten (10) days on your own motion, that will be your own undertaking and not mine, which yet adds to the already existing abuse of process.

.... For avoidance of doubt, I still maintain my initial position that the CEO for PSC should submit my case with her recommendations to the Commission (Reg. 7(1)(d)). And I assume, she had already submitted my documents to the Commission yesterday (i.e. 5th October 2017). As I made it very clear in my letter dated 2nd October 2017 that I do not agree with the Agreement. ...”

48. The CEO for PSC responded to the Appellant’s letter dated 06 October 2017 on 12 October 2017 and stated the following:

“... We acknowledge your letter to us dated 6th October, 2017 and note and respect your position of not acknowledging documents and proposed waiver agreement.

Given that situation, we have therefore progressed your case and submitted it to Commission on Tuesday the 10th of October with the CEO’s recommendation as per Regulation 7(d) of the Public Service (Disciplinary Procedures) (Amendment) Regulations 2010. The Commission on the same day had noted and approved the CEO’s recommendation which was as follows:

- i) That Mr. Samuela Fakatou be requested to provide evidence that has not already been provided in this process and to be submitted to the PSC Office within 10 working days of receipt of this letter.*

In conjunction with the CEO’s recommendation, under the subject Regulations, you may also indicate to the Commission as per Regulations 7(e) whether you would like to make further representation in writing or orally to the Commission. ...”

49. On 16 October 2017, the Appellant responded to the letter of the CEO for PSC dated 12 October 2017 and stated the following:

“ ...

- 1. First, I have submitted my written representation to regulation 7(1)(c) of the Public Service (Disciplinary Procedures) Regulations (As Amended) (‘Disciplinary Regulations’) on the 21st September 2017. Within ten (10) working days of your receipt [which should be before or on the 5th October 2017], your good CEO should have submitted my matter with her recommendations to the Commission pursuant to regulation 7(1)(d), and not regulation 7(d) as you referenced in the letter]. Regulation 7(1)(d) makes it mandatory that your CEO has to submit the matter within the timeframe. Note the word “shall’ used in regulation 7(1)(d). However, I assume, this did not happen as your letter just confirmed that your good CEO just submitted her recommendations to the*

Commission on Tuesday 10th October 2017 (3 days well after the deadline i.e. 5th October 2017). There is no provision in the Disciplinary Regulations or the Public Service Act 2002 (As Amended) for extension of this deadline. Therefore, with respect, your CEO's recommendation is invalid. And for the Commission to approve such an out of time recommendation may also appear invalid.

- 2. Second, to recommend for me to give further evidence that are not already provided appear a bit funny because it amounts to making further representation. Please note, to make further representation is my right under regulation 7(1)(e) and can only be exercised in my discretion. So, the fact that your CEO recommends me to give additional evidence is a breach of my abovementioned right.*
 - 3. And in exercise of that right, I intend not to make further representation as I believe my written representation on 21st September 2017 covered everything on my side.*
 - 4. If you are wondering of why I am so certain, then please, read regulation 7(1)(d), (e) & (f) ...*
 - 5. Regulations 7(1)(e) makes it discretionary of whether I would want to make further representation to the Commission. Note the word "may" used in regulation 7(1)(e). If I intend to make representation, then I would do so within the next ten (10) working days commencing from the date of receipt of your CEO's recommendation. If I intend not to, which is the pathway I am taking, then it is also my discretion.*
 - 6. And since I intend not to make further representation, the Commission is mandatorily required to decide on my case anytime from now. ...*
 - 7. In light of the above, and as confirmed in your letter that my case has been submitted to the Commission on Tuesday 10th October 2017, I now await the decision of the Commission within the next few days as required under law. ..."*
50. The PSC Office made a submission to the Commissioners meeting on 27 October 2017 with the following comments:

"...

- The PSC Office views that most of Mr. Fakatou's written representation are legal arguments on the validity of charges or an error of law or process without addressing the crux of the charges.*
 - ❖ It is therefore in the discretion of the Commission to focus on the elements of the charges for Mr. Fakatou and to look at the Auditor's report along with all the relevant evidence (summary under annex 4) in support of each charge. And to weigh these evidence with the evidence provided by Mr.*

Fakatou and then to arrive at a conclusion of whether to Mr. Fakatou should be convicted.

- ❖ *The appropriate sanction imposed should be determined by its own merits and not on other similar precedent cases...*

It is up to Commission to decide an appropriate penalty taking these factors into account. Where the aggravating factors outweigh the mitigating factors then this calls for a harsh penalty, where mitigating factors outweigh the aggravating factors then this means a lenient sanction. The Commission should identify all aggravating and mitigating factors concerning Mr. Fakatou and make a thorough assessment of each.

However, according to the PSC Office, Mr. Fakatou deserves a harsh sanction. Nowhere in his statements does he show remorse for what has happened, not to mention the large amount of missing monies. He was in the most senior position and his decisions or omission of decisions greatly affected the internal control system and in turn put Lesieli as well as the rest of the staff in a vulnerable or opportunistic position. There were no other circumstances to show that Mr. Fakatou was undergoing illness or stress or emotional problems, however we may need to confirm whether he is the sole breadwinner. But the tipping of the scale towards aggravating factors obvious based on the evidence as a whole.

The legislation does not stipulate any time frame of when to issue a decision or impose a penalty, however it is expected that the Commission decide the case after receiving all relevant information and after hearing further from the employee where the employee so chooses to give further oral and written representation. However in this case Mr. Fakatou has expressed in this final letter to the PSC that he is awaiting the outcome of his case and will not make any further representation. ...”

51. In the same submission, the PSC Office made the following recommendations:

“

- i) *That the CEO recommendations regarding Ms. Lesieli Halafihī and Mr. Viliami Latu is dismissal from duty effective from the date of suspension or leave without pay;*
- ii) *That the Commission consider all evidence provided on the whole regarding Mr. Samuela Fakatou and to decide the case and make appropriate sanction.*
- iii) *That Commission makes a decision to suspend Mr. Samuela Fakatou and Mr. Viliami Latu without pay until conclusion of the matter. (Both officers are currently on a leave without pay).”*

52. The Commissioners approved the following recommendation in their meeting on 27 October 2017:

“

1. *That Mr. Samuela Fakatou, Sub-treasurer, Sub-Treasury Vava'u, Ministry of Finance & National Planning be suspended from duty without pay with effect from 8:30am on Monday, the 11th of September 2017.*
 2. *That Mr. Viliami Latu, Senior Accounting Officer, Sub-Treasury Vava'u, Ministry of Finance & National Planning be suspended from duty without pay with effect from 8:30am on Thursday, the 7th of September, 2017."*
53. The CEO for PSC sent a letter to the Appellant on 10 November 2017 to inform him of PSC Decision No. 552 of 27th October 2017 that he has been *"suspended from duty without pay with effect from 8:30am on Monday the 11th of September, 2017 until the final decision for this matter is made by the Commission"*.
54. On 13 November 2017, Eunice from the PSC Office sent an e-mail to the Solicitor General and stated *"On another note, regarding Samuela Fakatou's charges, charge 2 states that he failed to comply with the Public Finance Management Act (Treasury Instructions) 2010 but does not say which part of the Public Finance Management Act he failed to comply with. Or do I refer to the applicable provisions from the Treasury Instructions?"*
55. The Solicitor General responded on 14 November 2017 that *"It's the PFMA, Treasury Instructions 2010 that is relevant, and this was particularised in the statement of the Offence."*
56. On 15 November 2017, Eunice sent another e-mail to the Solicitor General and stated that:
- "Yes, I am referring to the Treasury Instructions but the particulars under the subject charge does not mention the necessary clause as follows"*
- Charge 2
"Samuela Fakatou, Sub Treasurer, on or about the month of June 2017, at Neiafu, Vava'u, you failed to comply with the Public Finance Management Act (Treasury Instructions) 2010 whilst working as a Sub-Treasurer at the Neiafu, Vava'u Sub-Treasury of the Ministry of Finance and National Planning, when you failed to closely supervise the staff,...resulting in the cash shortage of \$71,500.42 at the end of 20016-17 financial year, 20 June 2017"
- I'm just thinking how we can prove this charge If clause of the relevant act is not specified."*
57. It was followed by another e-mail from Eunice on the same day *"Sorry I mean the relevant clause under the PFMA is not specified under the charge"*.
58. The CEO for PSC sent an e-mail on 16 November 2017 to support Eunice's e-mail by saying *"Yes, do agree, that the charge should be more specific – given that it is on the same areas, can we make it more specific SG?"*

59. The Solicitor General responded by e-mail on the same day and stated the following:

“As I stated before, charge 2 could be amended to be more specific.

However, the downside to that is that the charges will have to be re-issued again to Mr Fakatou, which means the disciplinary process will recommence again, and not to mention the current case complications to the case.

I have explained to Eunice that I am of the view the particularization of charge 2 in the statement of the offence is sufficient and supported by evidence for the Commission to consider and make a decision.”

60. The PSC Office made a submission to the Commissioners meeting on 02 February 2018 with the following comments:

“... In light of factors above, and the complete summary of evidence provided in relation to the elements of the case, the PSC Office has reason to believe that there is a high probability that Mr. Fakatou was the responsible and accountable officer for the subject shortage of monies and that there is sufficient evidence to prove all the charges made against Mr. Fakatou. His job description attached as annex 6 clearly demonstrates that he did not carry out his function as sub-treasurer carefully and diligently.

In the case of Busby Kautoke v Public Service Commission PST 2/2012, the Tribunal’s view was that guilt or acquittal of the employee be found on the charge or charges with which he is charged and the charges must be based on the relevant law which must be specified in the charges; and the evidence produced by the Respondent must prove the charges made. ...”

61. In the same submission, the PSC Office provided the following options:

“Option1

Samuela Fakatou, Viliami Latu and Lesieli Halafihī to be

- a) on probation for a period of 1 year, i.e. if they commit another breach, they are subject to a dismissal*
- b) During that one year to be transferred to another post or locality*
- c) MOFNP and PSC to work together to impose the appropriate surcharge as per section 111 of Treasury Instructions.*

Option 2

- However if the Commission decide that the evidence provided under each charge are sufficient with regard to the charges made under the relevant laws, taking into consideration the mitigating and aggravating factors for each employee and are fully convinced that the subject officers should be convicted then a dismissal is recommended.”*

62. According to the Minutes of the Commissioners meeting on 02 February 2018, the following points were raised about the Appellant:

“ ...

- *According to Mr. Fakatou's job description, he is required to perform the checking of the daily balance of cashier. However, the audit report shows that checking was not conducted in a competent manner, shown by surpluses on the 26th and 27th June 2017 and then the sudden deficit on the 28th June.*
- *In addition, his job description also requires him to manage internal control mechanism. His failure to ensure that the established practice was running smoothly or even to ensure the Cashier was rotating, according to the Audit Report where the shortage did not just occur on Wednesday 28th June but was accumulated over time are all evidence that Fakatou did not properly manage internal control mechanism thereby resulting in the loss of cash, hence failed to perform his duties in a competent manner. Although Mr. Fakatou had claimed in his defence that there was an established practice, however it was never monitored on a regular basis, nor did he sit in the cash counts to ensure that the practice was effective and strictly observed.*
- *Mr. Fakatou's defense is held contrary to what is provided in the audit report as well as the evidence provided by the other employees. He mentioned that cash was stored in a safe and secure place where employees were not allowed in, however the audit report proves otherwise.*
- *It was further raised that Mr. Fakatou did not show any sign of remorse nor did he apologize for the missing monies.*
- *Hence, the Commission raised that it was clear and evident that Mr. Fakatou did not perform his duties as a Sub Treasurer effectively hence in accordance to the evidence provided to each charge, resulting in the shortage/mishandling of public funds. In addition, as a Sub Treasurer, he is responsible for ensuring that the Ministry's internal control mechanisms are carried out in an effective manner. All evidence in its entirety reflects that Mr. Fakatou was not competent as a Sub Treasurer for the Vava'u Sub Treasury.”*

63. On the same Commissioners meeting, the following recommendations were approved:

“

- 1 *That Mr. Samuela Fakatou, Sub-Treasurer, Ministry of Finance & National Planning Vava'u be dismissed from the Public Service with effect from the date of suspension of duty i.e. 11th of September, 2017.*
- 2 *That Mr Viliami Latu, Senior Accountant, Sub-Treasury Vava'u be dismissed from the Public Service with effect from the date of suspension of duty i.e. 7th of September, 2017.*
- 3 *That Ms. Lesieli Halafihī, Clerk Class I, Ministry of Finance & National Planning Vava'u Sub Treasury be dismissed from the Public Service with effect from the date of suspension of duty, i.e. 7th of August 2017.*

2. *That they be paid the equivalent of their salary for any period of earned leave days;*
3. *That they submit any claims for leaving of service benefits to the Retirement Fund Board.”*

64. The CEO for PSC sent a letter to the Appellant on 22 February 2018 to inform him of the decision (No. 59) made by the PSC on 02 February 2018:

“That Mr. Samuela Fakatou, Sub-Treasurer, Ministry of Finance & National Planning Vava’u be dismissed from the Public Service with effect from the date of suspension of duty i.e. 11th of September 2017.”

SUBMISSIONS

65. Both parties submitted written submissions, and the Tribunal is grateful to both counsels, Mrs. Loupua Pahulu-Kuli (on behalf of the Appellant) and the Solicitor General (on behalf of the Respondent). They also backed up their respective written submissions with helpful oral elaboration and clarification.
66. The Appellant’s submissions were in support of the grounds of appeal as enumerated in paragraph 2 above, and will not be repeated here.
67. The Respondent’s submissions may be summarized as follows:
- (i) The Appellant was not disciplined and sanctioned twice under the Public Service disciplinary procedures;
 - (ii) The Appellant’s constitutional right under clause 12 of the Constitution was not contravened as the Appellant was not prosecuted twice for a criminal offence;
 - (iii) The principle of *res judicata* does not apply to serious disciplinary proceedings under Regulation 3(1) and 5 of the Public Service (Disciplinary Procedures) Regulations 2010;
 - (iv) Allegations of non-compliance with procedural requirements under the Public Service legal framework:
 - (a) The Appellant was invited by the CEO for MFNP to take his annual leave, and the Appellant refused to take leave as invited, so instruction 2B.4 of the Public Service Policy Instructions was not contravened;

- (b) Despite the PSCD No. 400 of 04 August 2017 that the Appellant takes leave, the Appellant had conceded that he should take leave by filling out and completing the application leave form from 7 to 11 August 2017 and then continued to take leave without an approved application form until 11 September 2017;
- (c) The decision to permanently transfer the Appellant to Tongatapu did not amount to a disciplinary proceeding for minor breach under Regulation 3(1) and sanction under Regulation 3 of the Public Service (Disciplinary Proceedings) Regulations 2010;
- (d) The outcomes of the MFNP's internal audit, and the Auditor General's investigations had addressed all the criteria specified under Regulation 5 so there was no need for further enquiry into the matter but to refer to PSC;
- (e) Regulation 7(1)(b) did not apply in the circumstances because the Appellant had conceded that he takes annual leave from 07 of August, 2017;
- (f) Although there was non-compliance with Regulation 7(1)(d), the PSC had attempted to rectify the process by offering the opportunity to the Appellant to consider the whole of the charge together with supporting documents, and provide a complete answer to his charges.
- (v) The disciplinary charges 1, 2, and 4 were not defective;
- (vi) The disciplinary charges 3 and 5 were supported by evidence to justify a sanction of dismissal;
- (vii) The Respondent did not dismiss the Appellant upon discrimination;
- (viii) The disciplinary process initiated against the Appellant did not amount to abuse of process; and
- (ix) The Respondent had considered all the representations from the Appellant before its decision to dismiss.

TRIBUNAL'S FINDINGS

First ground of appeal:

68. The first ground of appeal is an assertion that the PSC failed to consider that a penalty for a minor breach of discipline (*i.e. transfer an employee within a Ministry*) had already been

imposed on the Appellant, which resulted in his dismissal, amounting to double punishment.

69. There was no evidence of any proceedings for a minor breach of discipline against the Appellant. It was clear that the only disciplinary proceedings against the Appellant was for a major breach [as declared in the letter from CEO MFNP to CEO PSC dated 03 August, 2017 – page 43 Common Bundle of Documents (CBD)].

70. The transfer of the Appellant to the Head Office in Tongatapu was not the culmination of any disciplinary process for a minor breach of discipline.

71. Although a transfer of an employee within the Ministry may be a form of sanction for a minor breach of discipline [Reg 4(1)(e) of the Public Service (Disciplinary Procedures) Regulations], it does not necessarily follow that an employee cannot be so transferred or deployed as may be required for the exigency of the Ministry.

72. There was no double punishment involved.

73. This ground fails.

Second ground of appeal:

74. The second ground of appeal is that the PSC decision to punish the Appellant for a second time (i.e. dismissal), is unconstitutional as it contravened the Appellant's constitutional right contained in Clause 12 of the Constitution.

75. As can be gauged from the result of the first ground of appeal (above), the Appellant was not punished twice.

76. In any event, Clause 12 of the Constitution applies to a criminal offence which had been tried in a Court. It does not apply to the circumstances of the Appellant's disciplinary proceedings.

77. This ground fails.

Third ground of appeal:

78. The third ground of appeal also relates to the assertion that the Appellant was penalised twice, thus invoking the applicability of the principle of *res judicata*. If the Appellant was penalised twice as alleged, it may have been appropriate to invoke this common law doctrine. However, as explained above in the context of the first and second grounds of appeal, that was not the case, and therefore the principle of *res judicata* cannot apply.

79. This ground fails.

Seventh ground of appeal:

80. This ground of appeal asserted that the Appellant was dismissed based on grounds of discrimination.
81. The Tribunal have found no aspects of discriminating consideration towards the Appellant as indicated by the instances he relied on to support his assertion.
82. This ground fails.

Eighth ground of appeal:

83. The eighth ground of appeal asserts that the whole disciplinary process resulting in his dismissal was an abuse of process.
84. No supporting explanation was given other than making the general statement that the whole process from the commencement of the disciplinary action against the Appellant until his dismissal decision was made amounts to an abuse of process.
85. The Tribunal finds that this overriding allegation has not been proven (other than the matters specifically discussed in the fourth, fifth and sixth grounds of appeal).
86. This ground fails.

Ninth ground of appeal:

87. The ninth ground of appeal asserts that the PSC failed to sufficiently consider matters relating to the established practices that were established within the Vava'u Sub-Treasury.
88. The briefing paper for the PSC meeting of 02 February 2018 (the meeting resulting in PSD No.59 which dismissed the Appellant) included and clearly showed that the Appellant had given explanation about an established practice, and the particulars thereof, in the Vava'u Sub-Treasury (page 139 CBD). The same briefing paper also included and clearly showed (also on page 139 CBD) the following comment –

“Although Mr. Fakatou claims that there was an established practice, this was not practiced, as supported by the evidence provided by Viliami Latu, Sepesitiano Mikaele, Lilikoi Blake, Siosifa Fe'iloakitau, and Loseli Unga”.

89. In the minutes of that meeting (02 February 2018) the following is recorded –

"Although Mr. Fakatou had claimed in his defence that there was an established practice, however it was never monitored on a regular basis, nor did he sit in the cash counts to ensure that the practice was effective and strictly observed" (page 159 CBD).

90. The matter was sufficiently considered as shown above.

91. This ground fails.

Fourth ground of appeal:

92. The fourth ground of appeal is that the Appellant's dismissal was based on a succession of significant procedural errors of substantive law and unfairness resulting from non-compliance with mandatory and procedural requirements of the Public Service Act (the "Act"), the Public Service (Disciplinary Procedures) Regulations (the "Disciplinary Regulations"), the Public Service Policy 2010 (the "Policy"), and the Public Service Policy Instructions (the "PS Instructions").

93. The gravamen of the Appellant's submissions in respect of this ground of appeal is that the procedural requirement under Reg 7(2) of the Disciplinary Regulations was not complied with, and the nexus of that failure with the balance of the disciplinary process that followed constituted a matter of significant breach of substantive law and procedural unfairness.

94. Reg 7 of the Disciplinary Regulations states: -

"7. Procedures for serious disciplinary charges

(1) A report of serious breach of discipline or repeated minor breaches of discipline shall be dealt with as follows –

(a) within 10 working days of receipt of the report, the Chief Executive Officer of the Commission shall convene the Charge Formulation Committee, to hear the presentation of the report from the relevant Chief Executive Officer or his representative;

(b) within 15 working days of receipt of the report, the Charge Formulation Committee shall charge the officer.

Provided that if the Charge Formulation Committee requires further information to clarify aspects of the report, the employee shall be charged within 10 working days from receipt of that further information.

The Charge Formulation Committee shall also recommend to the Commission whether the employee should be suspended from duty without pay. If the Commission decides for the employee to be suspended, the employee shall be informed in writing of his suspension by the same deadline as for the charging of the employee (afore-stated in paragraph 1 and 2 of this same sub-regulation).

- (c) *within 10 working days of receiving the charge, the employee may submit a written representation to the Commission in response to the charges, and either:*
 - (i) *admit the charge, and include mitigation; or*
 - (ii) *dispute the charge and make submissions as to why he disputes the charges, and may provide other evidence.*
- (d) *within 10 working days of receipt of the representation from the employee, the Chief Executive Officer of the Commission shall submit the matter to the Commission along with his recommendations;*
- (e) *within 10 working days of receipt of the recommendations of the Chief Executive Officer of the Commission by the employee, the employee may make further representation in writing or orally to the Commission;*
- (f) *after receipt of the case under paragraph (d) or hearing further from the employee under paragraph (e) the Commission shall decide the case, and if the employee is found to have committed a serious breach of discipline, the Commission shall impose the appropriate sanctions as set out under these regulations.*
- (2) *The charge laid against the employee shall include the following:*
 - (a) *A copy of the report from the Chief Executive officer;*
 - (b) *A copy of the report of the Auditor-General, if any;*
 - (c) *Information about the time within which a written reply may be made; and*
 - (d) *A copy of the Code of ethics and Conduct and these Regulations.*
- (3) *Where the employee does not reply within the specified time under this Regulation, the Chief Executive Officer of the Commission shall proceed with the matter as if the reply has been received.*
- (4) *The Chief Executive Officer of the Commission may extend the time required for a reply but such extension shall not exceed one month."*

95. The charges laid against the Appellant were delivered to the Appellant in the letter from the CEO of the Commission dated 06 September 2017, and received by the Appellant on the same day (pages 78-80 CBD).

96. Paragraph 3 of that letter contains a list of documents as follows –

"3. Enclosed in support of the charges are copies of the following documents:

- a) Savingram from CEO for Finance and National Planning to CEO for PSC, dated: 3 August 2017;*
- b) Auditor General's Report on Special Audit Sub-Treasury, Neiafu, Vava'u, dated 2 August 2017;*
- c) Letter from Viliami Latu to the Acting Head of Neiafu Sub-Treasury, dated 17 July 2017;*

- d) *Letter from Lilikoi Blake to the Acting Head of Neiafu Sub-Treasury, dated 17 July 2017;*
- e) *Letter from Samuela Fakatou to the Acting Head of Neiafu Sub-Treasury, dated 17 July 2017;*
- f) *Letter from Lesieli Halafihī to the Acting Head of Neiafu Sub-Treasury, dated 17 July 2017;*
- g) *Letter from Fine Kale to the Acting Head of Neiafu Sub-Treasury, dated 17 July 2017;*
- h) *Letter from Sepesitiano Mikaele to the Acting Head of Neiafu Sub-Treasury, dated 17 July 2017;*
- i) *Email from Siosifa Lauti Fe'iloakitau to the CEO for Finance and National Planning, dated 18 July 2017;*
- j) *Ministry of Finance and National Planning, Internal Audit Division, report by Taumafa Tangata'iloa, dated 21 July 2017;*
- k) *Letter from Mr Samuela Fakatou to the Auditor General, dated 26 July 2017;*
- l) *Letter from Mr Viliami Latu to the Auditor General, dated 26 July 2017;*
- m) *Letter from Mr Loseli 'Unga to the Auditor General, dated 26 July 2017;*
- n) *Letter from Mr Sepesitiano Mikaele to the Auditor General, dated 26 July 2017;*
- o) *Letter from Mr Lilikoi Blake to the Auditor General, dated 26 July 2017;*
- p) *Letter from Mr Samuela Fakatou to the Auditor General, dated 26 July 2017;*
- q) *Voluntary Recorded Interview of Ms Lesieli Halafihī, dated 18 August 2017;*
- r) *Voluntary Recorded Interview of Mr Samuela Fakatou by Mr Siosifa Fe'iloakitau, dated 18 August 2017;*
- s) *Letter from Saimone 'Otuafi to CEO for Finance and National Planning, dated 29 August 2017;*
- t) *Letter from Lilikoi Blake to CEO for Finance and National Planning, dated 29 August 2017;*
- u) *Letter from Fine Kale to CEO for Finance and National Planning, dated 29 August 2017;*
- v) *Letter from Sepesitiano Mikaele to CEO for Finance and National Planning, dated 29 August 2017;*
- w) *Letter from Loseli 'Unga to CEO for Finance and National planning, dated 29 August 2017;*
- x) *Letter from Suliasi Lavemaau to CEO for Finance and National Planning, dated 30 August 2017;*
- y) *Letter from Viliami Taumoefolau Latu to CEO for Finance and National Planning, dated 30 August 2017;and*
- z) *Letter by Samuela Fakatou to CEO for Finance and National Planning, dated 30 August 2017."*

97. That list of documents was quite substantial and would not have been possible to be simply overlooked when the charge letter was delivered.
98. As can be seen, the above list included the documents required by Reg 7(2) of the Disciplinary Regulations to be part of the charges laid against the Appellant. Namely, the Report from the CEO of MFNP (Savingsgram dated 03 August 2017 – page 43 CBD) and the Auditor General’s Report. However, the documents listed did not accompany the letter, and were not received by the Appellant (despite his specific request for them – page 81 CBD) until after he submitted his response under Reg 7(1)(c).
99. After requesting the documents from the CEO of PSC, the evidence showed that the Appellant waited for another 6 days but still the documents were not supplied. He therefore made his response to the charges. The documents were the supporting evidences to the matters charged. Those documents were not available, and the charges were incomplete.
100. Also contained in the “charge letter” of 06 September 2017 was a list (in paragraph 3) of the relevant legislation, as required by Reg 7(2)(d). Those were also not provided to the Appellant.
101. After the Appellant’s response was made (on 21 September 2017, pages 82-97 CBD), another week (7 days) went by before the Appellant received a letter from the CEO of PSC (28 September 2017 – page 98 CBD) enclosing the “requested documents”, and requesting that the Appellant –
- (i) sign an enclosed agreement to waive the “previously agreed time period”; and
 - (ii) the Appellant’s *“response to the charges laid be provided to our office within 10 working days of receipt of these documents instead”*.
102. The Appellant refused to sign the “agreement” and did not respond to the charges again. Instead, he informed the CEO of PSC that those matters were not *“the correct and legal way forward”*.
103. The Tribunal considered that by attempting to sign an agreement with the Appellant to waive the time frame, showed that timing was an essential element of the disciplinary process (to the PSC). The refusal of the Appellant to put such an agreement in place frustrated the disciplinary process and that the faulty actions (including the incomplete laying of charges) remained and continued. The process did not start afresh and it was already flawed.
104. The attempt to start the process afresh by seemingly counting the time frame from the 28 September 2017, did not happen as the agreement to set that in motion did not eventuate.

105. This was a significant event in the disciplinary process of the Appellant. The process was already flawed, and the subsequent attempted actions did not remedy that situation.

106. The Appellant had tried to respond to the charges, but it was seemingly unfair on him because he was not given the evidence upon which those charges were framed.

107. If the documents were provided to the Appellant when he requested them on 15 September 2017, there would not be any breach of regulatory timeframe.

108. Those events were different from what took place in the case *Tuputupu v PSC [2014] PST Appeal No. 7 of 2013 (13 March 2014)*. In that case the PSC decided to await the result of a prosecution in the Courts, and the Mr. Tuputupu acquiesced, and the prescribed timeframe was not considered in the final analysis. The Tribunal had emphasized that the ruling in that case applied only to its own facts.

109. In the present case, Mr. Fakatou had objected and in fact refused to agree to a new timeframe proposed in the proceedings, with the result that all actions purported to be part of those proceedings subsequently, were flawed.

110. In *Mishka Tu'ifua et al v PST & Busby Kautoke (8 April 2016) SC (unreported, at page 18)*, Paulsen CJ, stated "*The distinction between substantive and procedural is not always easy to make and whether a statutory provision is regarded as substantive or procedural will always depend on the facts of the instant case*".

111. In Thurman Arnold's article "The role of Substantive Law and Procedure in the Legal Process" 45 Harv. L. Rev. 617 1931-1932 at page 643, the author wrote:

"The difference between procedure and substantive law is a movable dividing line which may be placed whenever an objective examination of our judicial institutions indicates is necessary".

112. The Tribunal is required to make that distinction in the present case, and in view of the circumstances, there was substantive breach in the failure to comply with the mandatory requirements of the legislation.

113. Furthermore, the obligation under Reg 7(1)(e) to send the recommendations of the CEO of PSC to the Appellant for his "*further representation in writing or orally to the Commission*", was not carried out. However, it mattered little on the outcome of the disciplinary process because it was already flawed. Even if that obligation was carried out, it could not have remedied the situation.

114. In any case, the Tribunal also finds that the benchmark of unfairness established in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 was reached in the disciplinary proceedings of the Appellant, and that the proceedings was so unreasonable that no reasonable authority could have made the decision to dismiss the Appellant. The flawed aspects in the circumstances as described above were so significant that the PSC decision should not stand.

115. The Tribunal finds that the disciplinary proceedings against the Appellant was flawed and constituted a significant breach of substantive law, as well as procedural unfairness, to such an extent that renders the decision to dismiss the Appellant void and of no effect.

116. This ground succeeds.

Fifth and Sixth grounds of appeal:

117. The documents listed in the letter dated 06 September 2017 from the CEO of PSC to the Appellant setting out the charges against him, contained the evidence to support the charges made. Without those documents, the charges were non-sensible and meaningless, as the Appellant would not know the exact circumstances of the allegations of what he was alleged to have done wrong.

118. There is a legal obligation under Reg 7(2) of the Public Service (Disciplinary Procedures) Regulations to provide those matters together with the charges to the Appellant. Failure to deliver those documents together and as part of the letter dated 06 September 2017, i.e. the charge letter, rendered the charges defective.

119. The situation was exacerbated by the fact that the Appellant, when he realized that the documents were not delivered, had specifically asked the CEO of PSC (letter dated 15 September 2017 – page 81 CBD) for those documents, but by the time he made his response, on 21 September 2017, he was still not served with those documents.

120. Although the CEO of PSC made an unsuccessful attempt to waive the timeframe of the process relevant to the Appellant's required response, the charges made and responded to by the Appellant were defective.

121. These grounds succeed.

ACKNOWLEDGEMENT

122. 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

123. 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.

124. The Tribunal makes the following orders:

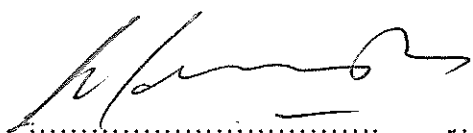
(a) The PSC Decision No. 59 of 02 February 2018, item 1 is varied as follows:

“1. (i) That Mr. Samuela Fakatou, Sub-Treasurer, Ministry of Finance and National Planning Vava’u be reinstated to the public service as from the date of his suspension i.e. 11 September 2017.

(ii) That Mr. Samuela Fakatou to resume his former post or any other comparable position as may be decided by the PSC upon consultation with the Ministry of Finance and National Planning.

(iii) That Mr. Samuela Fakatou to receive his normal salary and other entitlements as if he was not suspended or dismissed.”


(b) The parties are at liberty to apply.



Mr. Aisea Taumoepeau SC



Mr. Timote Katoanga



Mrs. Lepolo Taunisila