

Mr. Sione Ketu'u (Appellant) v Public Service Commission (PSC)

PST Appeal No. 03 of 2016

1. This is an appeal by the Appellant seeking the following decision from the Tribunal:
 - (a) Re-consideration of the penalty imposed; and
 - (b) Re-instate the appellant.
2. The Appellant relied on the following grounds:
 - (a) The punishment imposed was too harsh considering the nature of the offence; and
 - (b) Bad leadership style and decision making process.

BACKGROUND

3. The Appellant was appointed to the position of Laboratory Assistant Grade II on 02 April 2012.
4. On 08 February 2016, Dr. Seventeen Toumoua, Medical Officer Laboratory, reported the Appellant to the Medical Superintendent based on the following reasons:
 - “1) Mr. Ketu'u has obviously failed the course (LQMS project) as decided by the Lecturer and also according to the Examination Policy of QSSN*
 - 2) This is not the first time he has made any offences in the Laboratory*
 - 3) Mr. Ketu'u has also not being punctual with his attendance*
 - 4) As per the Laboratory Personnel Manual under the section of disciplinary policies and procedures if there is a 3rd offence we will write a complaint report of staff by the Medical Officer in charge to the CEO of Health via the Medical Superintendent*
 - 5) That we will write the report to the CEO via the MS as to decide his fate but recommending termination of employment/enrollment in the Laboratory services of the Ministry of Health.*
 - 6) Mr. Ketu'u was called in to provide explanation for his action and why he did not contact the Lecturer in due time. He did agree that he was aware of the due date that they agreed upon with the Lecturer, also admits that the PMS did call him. He is aware of the Personal Manual. The reason that he did not hand in his project in due time was due to his rugby commitment. Also he did not contact back to the Lecturer and Management team was because he was afraid.*

- 7) *The reason that he provided to the meeting was not genuine reason as to why he missed out on the due dates for his project.*
5. The CEO for Health, Dr. Siale 'Akau'ola, referred the matter to the Minister for Health, Hon. Dr. Saia Piukala, on 15 February 2016 with the following recommendation:
- “That the appointment of Mr. Sione Ketu'u, Assistant Laboratory Technician Grade II be terminated on poor academic performance.”*
6. The Hon. Minister for Health approved the recommendation on 24 February 2016.
7. On 21 March 2016, the CEO for Health sent a Savingram to the CEO of the PSC to terminate the appointment of the Appellant from the Civil Service.
8. The PSC terminated the appointment of the Appellant as Assistant Laboratory Technician Grade II Trainee at the Ministry of Health on 12 July 2016 (PSC Decision No. 287).
9. On 05 October 2016, the Appellant appealed to the Public Service Tribunal against the PSC Decision No. 287.

PSC ACTION AND DECISION

10. The CEO for Health sent a Savingram to the CEO of the PSC on 21 March 2016 and sought the approval of the PSC to terminate the appointment of the Appellant from the Civil Service. Supporting documents, including the approval of the Hon. Minister for Health, were attached to the Savingram.
11. The CEO of the PSC responded on 14 April 2016 and directed the attention of the CEO for Health to Regulation 3 and 5 of the Public Service (Disciplinary Procedures) Amendment Regulations 2010. Moreover, the CEO for Health was also requested to *“submit his stance whether the report against Mr. Ketu'u is considered a serious or minor “breach of discipline” in order to assist the PSC Office with further appropriate actions.”*
12. Instead of confirming the query from the PSC, the CEO for Health provided the following recommendation in his Savingram to the CEO of the PSC on 07 June 2016:
- “To terminate Mr. Sione Ketu'u, Assistant Laboratory Technician Grade II Trainee due to poor academic performance and to be effected from the date of the PSC decision”*

13. On 12 July 2016, the PSC Office made a submission to the Commissioners' meeting regarding the Appellant's case with the following comments:

“

- *The PSC Office duly noted the Ministry's request for the termination of appointment of Mr. Sione Ketu'u from the Assistant Laboratory Technician Grade II Trainee position;*
- *It is further noted that Mr. Ketuu was initially appointed to his substantive position of Assistant Laboratory Technician Grade II Trainee in accordance with PSCD No. 73 of 6 March, 2012;*
- *As per Ministry's submission above stated, Mr. Ketu'u has failed to complete the training requirements for two (2) units in his local laboratory training program (i.e. Laboratory Quality Management System Project (LQMSP) and Biochemistry).*
- *The PSC Office note from the Ministry's submission that Mr. Ketu'u was given a chance to sit for a supplementary exam and as a result, he managed to pass the Biochemistry unit and was again unsuccessful with the LQMS unit.*
- *According to the correspondence from the Ministry, Mr. Ketu'u was warned on several occasions of his poor performance which also includes other matters such as being absent from work without proper authorization and not submitting a medical certificate in a timely manner when he is away from work due to illness.*
- *Although the Laboratory management team has advised Mr. Ketu'u of project deadlines and of his repetitive poor performance, this was not adhered to by Mr. Ketu'u hence the request from the Ministry to terminate his services due to poor performance.*
- *The Ministry also re-emphasized in their submission that the CEO concerned and also the Hon. Minister for Health has approved the recommendation of the Medical Officer in charge of the Laboratory section to terminate Mr. Ketu'u's service due to poor performance provided that he has been given an opportunity to sit the supplementary exam for the two (2) units that he failed and only successfully passed just one unit. As such, the Ministry had recommended to terminate Mr. Ketu'u's services due to poor academic performance with effect from the date of Public Service Commission decision;*
- *A similar case is that of Ms. Siutiti Livai, Student Nurse, Ministry of Health. She was recommended by the Ministry of Health to terminate her appointment due to her failure to achieve the required standards of the Queen Salote School of Nursing (QSSN) which was approved by the Public Service Commission through PSC Decision No. 613 of 13 November, 2015.”*

14. The PSC approved the following recommendations in their meeting on 12 July 2016:

“That the appointment of Mr. Sione Ketu'u as Assistant Laboratory Technician Grade II Trainee, Ministry of Health be terminated with effect from date of Public Service Commission Decision;

1. *That he be paid the equivalent of his salary for any period of earned leave days;*
2. *That he submits any claims for leaving service benefits to the Retirement Fund Board.”*

15. The PSC Decision was conveyed to the CEO for Health by the CEO of the PSC on 12 July 2016.

16. On 23 August 2016, the Appellant wrote to the PSC to reconsider his case based on the following points:

- i. The punishment imposed was too harsh considering the nature of the offence.
- ii. The incident was occurred while he was on leave (annual leave).
- iii. Bad leadership style and decision making process.

17. The PSC Office made a submission to the Commissioners’ meeting on 09 September 2016 regarding the Appellant’s letter of 23 August 2016 with the following comments:

“

- *The PSC Office notes Mr. Ketu’u’s request and the supporting letter from the staff of the Laboratory division of the Ministry of Health.*
- *However, the Commission may note that the initial submission from the Ministry confirmed that the Chief Executive Officer for Health had supported the request from the Medical Officer (Laboratory, Dr. Seventeen Toumoua) which was also endorsed by the Medical Superintendent to terminate Mr. Ketu’u services due to poor academic performance.*
- *It is further noted that section IC.6 of the Public Service Policy Instructions gives the Commission the discretion to terminate an employee in which case, the matter has been submitted to the Commission and was approved by the Commission through PSCD No. 287 of 12 July, 2016 for Mr. Ketu’u’s services to be terminated on the grounds of inefficiency.*
- *Given the above, the PSC Office is of the view that Mr. Ketu’u should submit his further representation to the tribunal taking into account that Mr. Ketu’u is no longer employed by Government.*
- *Therefore, the case is submitted for the information and further consideration of the Commission.”*

18. The Commissioners in their meeting on 09 September 2016 approved the following actions to be carried out by the PSC Office:

“

1. *PSC Office to inform Mr. Ketu’u that the Commission cannot reconsider its case and that he can appeal to the Public Service Tribunal should he wished to do so.*
2. *PSC Office to refer the letter which was signed off by most of the laboratory staff to the Director of Health to deal with some of the issues raised by the employees.”*

19. The CEO of the PSC sent a Savingram to the CEO for Health on 12 September 2016 to convey the decision of the PSC on Mr. Ketu'u's request to reconsider his case and also stated the following:

"It was further noted that attached to Mr. Ketu'u's submission to the Public Service Commission was a letter signed by eighteen (18) of the Laboratory staff which was addressed to the Hon. Minister of Health in support of Mr. Ketu'u case (Annex 1 REFERS). It is important for the CEO concerned to note the above noted matter, therefore the Commission wishes to refer the letter of signatories back to the CEO for Health for his information and further appropriate actions."

20. A letter was also sent from the CEO of the PSC to the Appellant on 12 September 2016 in response to his letter of 23 August 2016 and stated the following:

"... The Commission duly noted your letter and wishes to advise herein that the Commission still maintains their stance regarding your case.

In light of the above, you may submit further representation to the Tribunal against the decision of the Commission should they wish to do so as per part (8) of the Public Service Disciplinary Procedures) (Amendment) Regulations 2010. Details regarding appealing to the Tribunal could be obtained from the Secretary of the Tribunal at the Prime Minister's Office."

21. On 29 September 2016, the CEO for Health sent a Savingram to the CEO of the PSC in response to her Savingram of 12 September 2016 and stated the following:

"Report from the Laboratory section that they dealt with the mentioned case through better communication to staff on reason Mr. Ketu'u was recommended to be terminated. Further clarifications was given to staffs of the Laboratory that lab, management had done all they could do through counseling, opportunity given to provide late submission of assignments by Sione Ketu'u and several written warning letters with possible poor performance over 2 years now.

Staff now satisfied with the decision made by managers and they are not to pursue a petition in future".

APPELLANT'S SUBMISSION

22. The Appellant believes that the penalty imposed on him was too harsh in comparison to the weight and seriousness of the event that took place. There was no loss of life resulting from any mistake on his part, or the loss of any equipment from the laboratory. It was simply a little project that was not completed on time, but was completed later.

23. The Appellant also asserted that the reason he did not complete the project on time was because he was on annual leave, and was involved in a rugby tournament at the time.
24. The Appellant stated that his project was supervised by one Telesia Apikotoa from Quality Management Section. She should have consulted with the appellant or at least warned him. It was usual to do that, but when the Appellant's project was late, they simply made a decision without warning him. The Appellant believes he should have been given a copy of the letter conveying the decision so that he was aware of it. When Dr. Seventeen Toumoua left for Fiji on study leave, Latu Soakai was acting in his place as head of the laboratory staff. Latu Soakai should have responded to the further inquiries from PSC, but instead, she referred the matter to Dr. Toumoua while he was away on study leave.
25. The Appellant believes that if Latu Soakai had made the response and not refer the matter to Dr. Toumoua, it would have been a different result and in his favour. He points to the fact that he was awarded the best worker for the month in the following month, January 2016. His co-workers also wrote a letter to the Minister of Health objecting to the recommendation to terminate the Appellant's employment.
26. The Appellant is at a loss to understand why he was awarded the best staff member for January 2016 while in the same month it was recommended that his employment be terminated. The Appellant asserts that this amounted to bad leadership on the part of his superiors.
27. The Appellant also tendered additional grounds:
 - i. The Appellant avers that he never knew that the Laboratory adopted the QSSN TRAINING POLICY (QSSN Policy), and there was no explanation from the lecturers that the QSSN Policy are being used for the training he was undertaking. He stated that he was only aware of this in this hearing. He does not understand why the QSSN Training Policy was adopted to apply in their laboratory training because QSSN Training Policy is for nurses who are full time students in the class room all day but he and his fellow trainees were part time students who work at the bench and study at the same time. He further says that he was appointed to the job to work, and the study was only an addition to it but the major purpose was to work.
 - ii. The Appellant also submits that the two warning letters were about his failure to hand in a medical certificate within 48 hours on 09 December 2014, and away from work on 11 December 2014. Those were only minor offences. Further, his working performance should have been judged by the person in charge of the laboratory not the lecturer.

RESPONDENT'S SUBMISSION

28. The lecturer had given repeated warnings to the Appellant on his performance:
- i. Two written letters warning the Appellant were already given to him, the first on 31 March 2014 and the second on 12 December 2014;
 - ii. The appellant had failed to submit his medical certificates within 48 hours on 09 December 2014;
 - iii. The Appellant was away from official duties in the afternoon of 11 December 2014;
 - iv. The appellant was given written notice on 12 December 2014 that a third offence would warrant the Medical Officer's complaint to the Minister of Health regarding his behavior;
 - v. At the end of the 2014 local Laboratory Training, the Appellant did not pass two units namely Biochemistry and Laboratory Quality Management System Project. In 2015, he was then given another opportunity to sit a supplementary test for the two units he failed. The Appellant again failed the Laboratory Quality Management System Project.
 - vi. The Appellant failed to meet the deadline for the project by which he was supposed to submit to the Laboratory staff for which he will be marked on his presentation quality and also timely submission of his written project. The Lecturer had repeatedly reminded the Appellant to submit his project assessment by 16 December 2015;
 - vii. The Lecturer had given more than sufficient notices to the Appellant on the status of his performance, and the need to submit his project on time.
29. The termination of appointment was warranted due to the Appellant's unsatisfactory performance:
- i. The Appellant had been warned on numerous occasions (verbal and written) on the status of his overall performance;
 - ii. The Appellant was warned on 12 December 2014 that a third offence would warrant the Medical officer's complaint to the Minister of Health regarding his performance;
 - iii. It should be noted that a third offence was considered serious and therefore warranted the medical officer's recommendation for termination of employment due to unsatisfactory performance;
 - iv. Termination of employment was due to the following:
 - (a) The record of continuous unsatisfactory performance of over the period of 2015 for which he was given another opportunity to take a supplementary test;
 - (b) The repeated notices that were given to the Appellant on the status of his overall performance from 2014 to 2015;

- (c) The repeated offending by the Appellant from 2014 to 2015 despite verbal and written warnings;
- (d) Pursuance to the Laboratory Personnel Manual and disciplinary policies and procedures a third offence would be considered serious and thereby warrant recommendation to the Chief Executive Officer for Health;
- (e) The Appellant was well aware of the Laboratory Personnel Manual and disciplinary policies and procedures and the consequences of his unsatisfactory performance;
- (f) The Appellant was given an opportunity to explain himself for failing to submit his project assessment on time, and the Laboratory Management Team was of the opinion that the Appellant's rugby commitment was more important to him than submitting his project assessment on time;
- (g) The Appellant did not attempt to ask the lecturer or the Laboratory Management Team for an extension of time for submitting his project assessment.

30. The decision to terminate was appropriate considering the circumstances of the Appellant's overall performance:

- (i) Under section 6(f) of the Public Service Act 2002 as amended, one of the Respondent's principal functions is to dismiss employees in the Public Service;
- (ii) Policy 21(1) of the Public Service Policy Instructions 2010 also provides that the respondent may terminate the employment of permanent employees;
- (iii) Furthermore, under Public Service policy Instructions 2010:
 - (a) Instruction 3A.4.4 provides that failure to improve job performance shall be considered sufficient ground for termination;
 - (b) Instruction 4F.1 provides that compulsory termination of service shall occur when an employee has been judged no longer able to discharge his duties efficiently;
 - (c) Instruction 4F.2 provides that the grounds for termination may be unacceptable standard of performance.
- (iv) In reference to the public service legal framework as cited above, there was authority for the Respondent to terminate the Appellant's appointment due to unacceptable standard of performance;
- (v) Despite repeated warnings, the Appellant failed to improve his job performance and therefore considered sufficient grounds for termination under instruction 3A.4.4;

- (vi) The Appellant was considered by the Ministry of Health, Laboratory Management Team to be no longer discharging his duties efficiently, and had recommended that his appointment be terminated;
- (vii) This was recommended to the Respondent who had considered and was satisfied that the Appellant's appointment should be terminated because he was no longer discharged his duties efficiently under Instruction 4F.1, and unacceptable standard of performance under Instruction 4F.2, and was appropriate under the circumstances of the Appellant's overall performance.

FINDINGS OF THE TRIBUNAL

- 31. The hearing of this appeal commenced on 17 January 2017. It was apparent at the hearing that there were certain documents pertaining to the matter that were not made available to the Tribunal. The hearing was thus adjourned pending filing of those documents. The hearing continued on 31 January 2017, and some of the newly filed documents proved to be significant. .
- 32. It emanated that the Appellant was appointed to the position of "*Laboratory Assistant Grade II, Ministry of Health*" under PSC Decision No. 73 of 06 March 2012. That appointment was to be **effective from the date of assumption of duty** (which was 02 April 2012 as shown in the Offer Letter).
- 33. An Offer Letter was given to, and accepted by, the Appellant on the 06 July 2012, which included the followings:

*"I wish to inform you that approval has been given by the Government for your appointment to the post of **Laboratory Grade 2** at the commencement salary **T\$5,705 p.a.** in the salary scale **T\$5,705 – T\$7, 531** as from **02 April, 2012**.*

*Your appointment will be initially for a probationary period of **six months** as from the date of your assumption of duty. While on probation, your appointment may be terminated by the giving of **one year** notice on either side, or by payment of **one month** salary in lieu of notice, unless it is terminated on disciplinary grounds when the giving of notice, will not operate. On satisfactory completion of your probationary service, which may be extended if the Government sees fit, you will be confirmed in your appointment.*

You will be subject to provisions of the Policy Instructions, Act and Regulations etc., as amended from time to time, relating to the Civil Service. ..."

34. The Tribunal noted that the nature of the offer letter indicated that the processing of this appointment was not carried out properly and may have been carelessly made, for reasons including the followings:
- It was not made until more than three (3) months after the Appellant resumed his duties;
 - it gave a “one year” notice of termination requirement when the law only allows “one month” (1C.6);
 - it described the position as “*Laboratory Grade II*”, when it should have been “*Laboratory Technician Grade II*”.
35. Under the Public Service Policy Instructions 1C.1, a probation period shall be six (6) months. That period may be extended only once for an additional three (3) months (1C.3). The Appellant had been employed for more than four (4) years; therefore it is clear that he was no longer on probation.
36. However, even if the Appellant was still under probation, the process of terminating his appointment would still be required to be given “one year notice or pay in lieu of notice” in accordance with the Offer Letter, and carried out “in accordance with the principles of natural justice” (1C.4).
37. It was evident that the Appellant was treated as a “student” or “trainee” whereby he was “subjected to the QSSN Policy and students are likely to be terminated due to academic failure or poor conduct” (refer Respondent’s Supplementary Bundle of Documents, page 6).
38. In addition, when the Appellant was appointed, his position was “*Laboratory Assistant Grade II*”. That was mistakenly referred to in the offer letter of 06 July 2012 as “*Laboratory Grade 2*”. In the correspondences within the Ministry of Health as well as with the PSC regarding the Appellant’s termination from his employment, his position was referred to as “*Assistant Laboratory Technician Grade II*”. Also, the PSC termination decision, PSC Decision No. 287 of 12 July 2016, referred to the position as “*Assistance Laboratory Technician Grade II Trainee*”, which was not the position the Appellant was appointed to.
39. The process of termination was not consistent with the requirements of the public service rules. The Medical Officer, Laboratory, had recommended the termination of the Appellant’s employment in his report on 08 January 2016 (RD p.4). That contravened Policy Instruction 1C.4, because there was no indication that the Appellant was given the

opportunity to comment/explain as to why his employment should not be terminated, as required by the principles of “natural justice”.

40. The CEO for Health subsequently recommended to PSC (RD p.2) that the Appellant’s employment be terminated for “*failure in his local laboratory training program*”, as well as “*repeatedly warned for poor attitude towards work, including absent without authorization and not hand in his sick leave within 48 hours*”. There was no indication that the principles of natural justice was accorded to the Appellant prior to that stage.
41. The Appellant submitted that he did not know that the QSSN Policy was made applicable to his training program. He stated that he (and his fellow trainees) were not informed of that situation, and the first time he knew about that was at the hearing of his appeal, when counsel for the Respondent made references to it. Even had the QSSN Policy been legitimately applied to the Appellant, the principles of natural justice were not accorded to him. Furthermore, the Appellant was not given one (1) months’ notice or pay in lieu of notice as required under Policy Instruction 1C.6. For those reasons, the termination of the Appellant’s employment was wrong.
42. It is noted that the report from the CEO for Health to the PSC for the Appellant’s employment to be terminated was based on failure of training program, and also repeated minor offences. Under the regulations, three (3) minor offences amounted to a major offence. The Appellant had allegedly committed three minor offences. That required the invocation of the disciplinary processes under the Public Service (Disciplinary Procedures) Regulations 2003, as amended.
43. The PSC office had recognised that situation when the CEO for PSC wrote to CEO for Health on 14 April 2016 for clarification whether he considered the case as a serious or minor breach of discipline (RD p.11). Unfortunately, the response from CEO for Health did not address that issue, but chose to emphasize the failure of the Appellant in the training requirement “*hence the request for his termination from work*”.
44. Sadly, PSC continued to process the “*recommendation*” from Health to terminate the employment of the Appellant. In doing so, the PSC had failed to follow its own procedures as set down in the regulations. The matter was not referred to the Charge Formulation Committee and as a result, the Appellant was not given the opportunity to be given the charges or the opportunity to respond thereto. That was a fundamental failure on the part of PSC, which rendered the ensuing decision bad.
45. The Tribunal noted that the Appellant had since been allowed to complete his Training, on which he succeeded.

GROUNDS OF APPEAL

46. The first ground of appeal is that the punishment was manifestly too harsh. Given the legal situation as alluded to above, it is clear that the process applied in this matter was flawed, and therefore the Appellant should not have been punished at all.
47. The second ground of appeal is that there was bad leadership at the workplace, and the decision making process was flawed. As have been discussed above, it is clear that the disciplinary process employed was wrong, and therefore flawed.
48. The termination process that was applied was flawed because the Appellant was not a nurse, and it did not comply with the required principles of natural justice.
49. The grounds of appeal succeed, and the Appellant's employment should not have been terminated without the proper disciplinary processes being complied with.

CONCLUSION

50. The Appellant conceded that he had committed three minor offences which he had been properly warned about by the employer. He also conceded that he failed to complete the training program at the laboratory. However, the disciplinary process used by both the Ministry of Health and PSC were wrong.
51. The Appellant was treated like a nurse and the QSSN Policy was taken to apply to him, however, the Appellant was not an employee in the Nursing Profession.
52. When the matter was referred to PSC, the required process should have involved the Charge Formulation Committee as provided under regulations 7 and 7A of the Public Service (Disciplinary Procedures) Regulations 2003, as amended.
53. The Appellant's employment should not have been terminated, and therefore PSC Decision No. 287 of 12 July 2016 was wrong.

ORDER OF THE TRIBUNAL

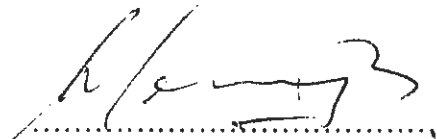
54. Section 21F of the Public Service Act 2002, as amended, provides that the Tribunal may make an order to affirm, vary, or set aside the PSC's decision.

55. The Tribunal makes the following order:

(a) The appeal by the Appellant is allowed;

(b) The PSC Decision No. 287 of 12 July 2016 is set aside;

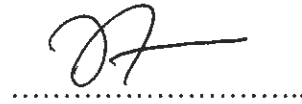
(c) The Appellant returns to his position as if PSC Decision No. 287 of 12 July 2016 was never made.



Aisea H. Taumoepeau
Honourable Chairman



Lady 'Eseta Fusitu'a
Honourable Member



Timote Katoanga
Honourable Member