



Government of Tonga

## Public Service Tribunal

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PST Appeal No. 3 of 2017

Mrs. Seinimili Tu'i'onetoa Fonua      **Appellant**

Public Service Commission      **Respondent**

### PUBLIC SERVICE TRIBUNAL:

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

Mr. Timote Katoanga      **Member**

Mrs. Lepolo Taunisila      **Member**

### REPRESENTATION:

**Appellant** :      Mrs. Seinimili Tu'i'onetoa Fonua

**Respondent:**      Mr. Sione Sisifa      Solicitor General  
                         Mr. Franz Keni Tu'uhetoka      Public Service Commission  
                         Ms. Lynette Foliaki      Public Service Commission

**Date of Hearing:**      5 September 2017

**Date of Ruling:**      14 September 2017

Mrs. Seinimili Tu'i'onetoa Fonua (Appellant) v Public Service Commission (PSC)

Public Service Tribunal Appeal No. 3 of 2017

**ORDERS SOUGHT**

1. This is an appeal by the Appellant against a decision of the Respondent, PSC Decision No. 265 of 02 June 2017, and seeking the following orders from the Tribunal:
  - (a) That PSC Decision No. 265 of 02 June 2017 be set aside;
  - (b) That the policy for salary on re-employment under Policy Instruction 5A.5(a) be used as a base rate only for calculating the salary of an employee re-employed at a higher Band rather than an automatic starting point;
  - (c) That her starting salary upon re-employment be set accordingly.
2. The Appellant relied on the following grounds, namely:
  - (a) The PSC was wrong in considering the minimum salary on the basis of a "*New Appointment*" when her case is a "*Re-appointment*" and the salary should be calculated accordingly;
  - (b) The provision for Salary on "*re-appointment*" set out in Instruction No.5A.5(a) of the Policy Instructions should be applied but to be interpreted in a way so as to reflect the underpinning principles of a "*fair and equitable, flexible and transparent*" remuneration system, as required by section 4C(i) of the Public Service Act and section 37 of the Public Service Policy.

**BACKGROUND**

3. The Appellant was first appointed to the public service on 14 October 1986 as a Junior Clerk at the Ministry of Finance.
4. On 08 November 2010, the Appellant resigned from the public service while holding the position of Principal Assistant Secretary at the Ministry of Labour, Commerce & Industries, with an annual salary of \$32,140.42.
5. The Appellant applied to the vacant position of Deputy CEO for Legal and Policy Division in the Ministry of Public Enterprises and was interviewed for the post on 18 April 2017.

6. The interviewing panel unanimously agreed to offer the post to the Appellant.
7. The position of Deputy CEO for Legal and Policy Division in the Ministry of Public Enterprises is at Band H with a salary range of \$33,600 – \$50,400.
8. On 12 June 2017, the Appellant was informed by the PSC that she has been appointed to the position of Deputy CEO for Legal and Policy Division in the Ministry of Public Enterprises and will be paid at the minimum point (i.e. \$33,600) plus 6% of the minimum point of Band H, with effect from the date of assumption of duty.
9. The Appellant replied on 14 June 2017 to defer her assumption date by at least a month as she was seeking a review of the PSC's decision under section 21C of the Public Service Act and the PSC re-employment policies.
10. On 27 June 2017, the Appellant wrote to the Tribunal to extend the time for making her appeal against the PSC Decision No. 265 for another 7 days.
11. The Tribunal granted the Appellant's request on 29 June 2017.
12. On 05 July 2017, the Appellant submitted her appeal to the Tribunal.

#### **PSC ACTION AND DECISION**

13. On 03 May 2017, the CEO for Public Enterprises sent a Savingram to the CEO for PSC to inform the result of the interview and recommend the Appellant to the vacant position of Deputy CEO for Legal & Policy Division at the Ministry of Public Enterprises.
14. The PSC Office made a submission to the Commissioners' meeting on 02 June 2017 with the following comments:

- *Should Mrs. Fonua's re-appointment be approved, she should be paid at the minimum point (i.e. \$33,600 plus 6% incorporated to her salary) which is placed at 'Band H' of the Public Service salary structure;*
- *The above recommendation is based on the fact that as per Section 5A.3 of the salary on appointment policy. Given that she holds a Master's Degree with more than 25 years of relevant work experience, she is therefore recommended that 6% is added to her salary;*
- *The PSC Office notes that Mrs. Fonua was a Principal Assistant Secretary prior to her exit from Public Service in 2010;*
- *Mrs. Fonua resigned from the Public Service in 2010 (refer to PSCD No. 390 of 29 October 2010) to pursue employment opportunities with the Legislative Assembly of Tonga;*

- *The case is submitted for the consideration of the Commission, please.*

15. On a Memorandum from the Acting CEO of the Commission on 02 June 2017, the Hon. Minister of Public Enterprises was informed of the following PSC's decision (No. 265):

*"That Mrs. Seinimili Tu'i'onetoa Fonua be re-appointed to the position of Deputy CEO, Legal & Policy Division, Ministry of Public Enterprises and that she be paid at the minimum point (i.e. \$33,600) plus 6% of the minimum point of Band H with a salary range of \$33,600 to \$50,400 with effect from the date of assumption of duty."*

16. On 19 June 2017, the CEO of Public Enterprises sent a Savingram to the CEO for Public Service Commission and stated the following:

*"Reference is made to PSC Decision No. 265 date 2<sup>nd</sup> June 2017, regarding the Commission's approval of appointing Mrs. Seinimili Fonua as our new Deputy CEO for our Legal Division at the Ministry of Public Enterprises.*

*Upon informing Mrs. Fonua of her appointment and PSC's decision of her salary range, we have received a reply requesting her assumption date be delayed for at least a month pending review."*

#### APPELLANT'S STANDING

17. The Respondent submitted that the Appellant has no standing in law, to appeal to the Tribunal, based on the following –
- (a) The Appellant has not been appointed to the relevant position, because she has not assumed duty as anticipated by PSC Decision No. 265 of 02 June 2017;
  - (b) The Appellant is not an employee under the Public Service Act as she is excluded by section 2(2) as a person listed under Schedule II;
  - (c) The words "any person" referred to in section 21C should be interpreted in the context of section 2 and 3 to apply only to an "employee" employed under the Public Service Act.
18. Clearly, the Appellant has not assumed duty pursuant to PSC Decision No. 265 of 02 June 2017.
19. As such, the Appellant is not an employee under the Public Service Act as she is excluded by section 2(2) [a person listed in Schedule II].
20. The application of section 2 is to prohibit an appeal to the Tribunal, for example, by the Appellant relating to a matter in her employment by the Legislative Assembly or by any other person listed under Schedule II with regard to their place of employment.

21. The Tribunal believes that under section 21C, the words "*any person*" is not necessarily a person currently employed under the Public Service Act. Section 21C (1) provides;
- "Any person who is dissatisfied with a decision of the Commission [PSC] may appeal to the Tribunal."*
22. The Tribunal believes that a person who is dissatisfied with such a decision should be able to take the matter to the Tribunal (which has been given the appropriate mandate) for review. Such a person needs not be employed under the Public Service Act. The test is that the person is dissatisfied with a decision of PSC, and that the person has the necessary connection to the decision so as to give that person the required legal standing to do so.
23. In the present case, the Appellant is not appealing against any matter relating to her employment by the Legislative Assembly. Therefore, the applicability of section 2(2) and Schedule II is not relevant. Furthermore, the fact that the Appellant has not assumed duty is also not relevant, as the relevant PSC decision is specifically about her and has the potential of affecting her in the future (upon assuming duty with the Ministry of Public Enterprises).
24. The Tribunal's view is supported by the following:
- (i) Section 21C (1) does not use the words "*any employee*", but rather, it specifically uses the words "*any person*";
  - (ii) The right of appeal to the Tribunal is not restricted only to employees under the Public Service Act.
25. If the legislature had intended that only employees can appeal to the Tribunal, it would have used the words "*any employee*" in section 21C (1), so as to be consistent and aligned to the definition of the word "*employee*" in sections 2 and 3. The legislature chose not to do that and referred to a different category in the form of "*any person*". That clearly shows that the word "*person*" is not to be interpreted as to mean an "*employee*".
26. The word "*person*" is not defined in the Public Service Act. Therefore, it can only be interpreted in the meaning given to it under section 2 of the Interpretation Act, which provides that it "*includes any body of persons corporate or unincorporate*". That must mean that the words "*any person*" referred to in section 21C (1) can either be a natural person or a group of people (as a company or unincorporated body). A company or unincorporated body cannot be employees under the Public Service Act. Therefore, the right of appeal to the Tribunal as enunciated in section 21C (1) is not restricted to employees only.
27. Furthermore, under the Public Service (Grievance and Dispute Procedures) Regulations 2006, as amended, in Regulation 19 an "*association*" is given the right of appeal to the

Tribunal. Although that right of appeal relates to a specific situation (employment dispute), it nevertheless illustrates the fact that the ability to appeal to the Tribunal is not restricted only to an employee.

28. The Tribunal therefore rejects the Respondent's contention that the Appellant lacks legal standing to bring this appeal.

## GROUNDS OF APPEAL

29. The first ground of appeal relates to the question of whether the intended recruitment of the Appellant is on the basis of a new appointment or a re-appointment. At the hearing, it was common ground between the parties that the recruitment of the Appellant is being made on the basis of a re-appointment, the Appellant having been employed in the public service previously.
30. It was also noted that the PSC Decision No. 265 of 02 June 2017 actually referred to the Appellant to "*be re-appointed to the position*". The corresponding salary should therefore be calculated accordingly.
31. The second ground of appeal is against the nominated salary to be paid to the Appellant upon assuming duty [*minimum point (i.e. \$33,600) plus 6% of the minimum point of Band H with salary range of \$33,600 to \$50,400*].
32. The Appellant asserts that the provision for salary set out in Policy Instruction 5A.5(a) should be applied in a way so as to reflect the underpinning principles of a "*fair and equitable, flexible and transparent*" remuneration system, as required by section 4C(i) of the Public Service Act and section 37 of the Public Service Policy.
33. There are three fundamental principles that are important to the calculation of the appropriate salary for the re-appointment of the Appellant.

### Policy Instructions

34. The Respondent informs that the salary allotted to the Appellant under the PSC Decision No. 265 of 02 June 2017 is in accordance with Policy Instruction 5A.5(a).
35. Policy Instructions are made under section 23A of the Public Service Act, as amended, by *notice in the Gazette*.
36. To date, no Policy Instructions have been notified in the Gazette. Therefore, the provision purported to be Policy Instructions 5A.5(a) is not binding *per se*. At best, it can only be considered as guidelines, and must be read in conjunction with the relevant laws.

#### **Section 4C: Public Service Act**

37. Section 4C sets out the broad principles to apply to the public service. In particular, paragraph (i) requires the provision of a *“fair, flexible, safe and rewarding workplace that is free from discrimination and recognizes the diverse background of employees”*.
38. The Appellant submits that it is not fair to give her a salary less than the equivalent point of where she was paid when she previously left the public service.

#### **Section 37: Public Service Policy**

39. The specific principles for the remuneration of the public service are set out in section 37 of the Public Service Policy. According to paragraph (a) the remuneration must be *“fair and equitable, flexible and transparent”*.
40. The Appellant submits that the salary allotted under the PSC Decision No. 265 of 02 June 2017 is not in accordance with this principle.

#### **Salary upon re-appointment**

41. The salary given under PSC Decision No. 265 of 02 June 2017 is said by the Respondent to be in accordance with Policy Instruction 5A.5(a) which provides as follows-

*“A re-employed employee shall normally be paid at the rate of pay he was receiving when he exited the service except - (a) if the employee is re-employed in a higher Band, his pay shall be calculated under the normal rules for starting pay, i.e. At the minimum of the appropriate salary scale”*. (Tribunal’s emphasis)

42. As mentioned above, the Policy Instructions have not been notified in the Gazette, and therefore not binding, and the Tribunal believes that at best the Policy Instructions may only be resorted to as guidelines (the Respondent conceded as much).
43. It is noted however, that even if the Policy Instructions are binding, Instruction 5A.5(a) provides that it is to be applied only in the *“normal”* circumstances. It is not intended to be strictly applied to all circumstances. The circumstances of the Appellant is not *“normal”* because if the minimum salary point of the higher post is used, that will be lower than the current equivalent of the salary paid when the Appellant exited the public service, and therefore not in accordance with being *“fair and equitable, flexible and transparent”*.

44. Whether Instruction 5A.5(a) is binding or used only as a guideline, the logical action is to adjust the entry point at the relevant scale (Band H) to make it fair and equitable for the potential employee.

## CONCLUSION

45. The Tribunal believes that, in accordance with section 4C of the Public Service Act, as amended, and section 37 of the Public Service Policy, the salary given under the PSC Decision No. 265 of 02 June 2017 is not "*fair, equitable, flexible and transparent*" to the Appellant.
46. The salary point the Appellant was paid when she exited the public service was (at current value) \$35,772. The entry point that should have been given the Appellant ought not to be lower than that amount.
47. The Tribunal is informed that since the Appellant exited the public service, there had been several general salary adjustments, and Cost of Living Allowance (COLA) awards which fixed the equivalent of the Appellant's exit point (in today's value) at \$35,772. The next point up in that scale is \$37,809; therefore the Appellant should be given at least a base salary no less than that amount in the Band H salary scale.
48. In view of the above, and the number of years of service of the Appellant in the public sector, the Tribunal believes that the Appellant should be given an entry point of \$40,320, the maximum point in Band J, which is still within the range of Band H.
49. In recognition of the Appellant's relevant qualification and experience, she is also entitled for the addition of 6% to her salary.
50. The Tribunal believes that the appropriate salary for the Appellant upon re-appointment should be at \$40,320 in the salary range of \$33,600 to \$50,400 (Band H), plus 6% of that amount.



**ORDER OF THE TRIBUNAL**

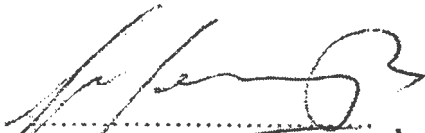
51. Section 21F (1) of the Public Service Act, as amended, provides that the Tribunal may make an order to affirm, vary, or set aside the PSC's decision.

52. The Tribunal makes the following orders:

(a) The appeal by the Appellant is allowed;

(b) The PSC Decision No. 265 of 02 June, 2017 is varied to read as follows:

**“That Mrs. Seinimili Tu’i’onetoa Fonua be re-appointed to the position of Deputy CEO, Legal & Policy Division, Ministry of Public Enterprises, and that she be paid at \$40,320 plus 6% of that amount per annum in the salary range of \$33,600 - \$50,400 (Band H) with effect from the date of assumption of duty.”**



Aisea H Taumoepeau, SC



Timote Katoanga



Lepolo Taunisila