



Government of Tonga

Public Service Tribunal

06/07/16.
Evan & uplwa

PST Appeal No. 1 of 2016

Mr. Sione Feingatau 'Iloa

Appellant

Public Service Commission

Respondent

PUBLIC SERVICE TRIBUNAL:

Mr. 'Aisea H Taumoepeau, SC

Chairman

Lady 'Eseta Fusitu'a

Member

Mr. Timote Katoanga

Member

REPRESENTATION:

Appellant: Mr. Siosifa Tu'utafaiva Legal Counsel for the Appellant

Respondent: Mr. Sione Sisifa, SC Solicitor General
Mrs. Eunice Moala Legal Officer,
Public Service Commission

Dates of Hearing: 02 June, 2016
04 June, 2016
14 June, 2016

Date of Ruling: 01 July, 2016

Sione Feingatau 'Uoa (Appellant) v. Public Service Commission (PSC)

PST Appeal No. 1 of 2016.

1. This is an appeal by the Appellant seeking the following decision from the Tribunal:
 - (a) That PSC Decision No.53 of 05 February 2016 not to extend his employment contract was invalid.
2. The Appellant relied on the following grounds, namely:
 - (i) The Appellant had a legitimate expectation that his contract will be renewed when he was informed by telephone by the Ministry of Internal Affairs (MIA) towards the end of 2015.
 - (ii) There was a breach of the principles of natural justice when the PSC decided not to extend the Appellant's contract without giving the opportunity to respond to allegations of recurring sexual misconduct.
 - (iii) The PSC'S decision, if known to the public would be defamatory as the Appellant would be considered guilty of recurring sexual misconduct.

BACKGROUND

3. The Appellant was appointed to the position of Government Representative for the Niuaotupapu District for a term of three years on 06 February 2013, under an Agreement of Service dated 06 February 2013.
4. The Agreement of Service provided *inter alia* that the terms of the contract may be varied:

“(a) The terms of the Contract may be varied at any time by agreement between the Public Service Commission, the Chief Executive Officer for Internal Affairs and the Employee.

“(b) Any variation to this Contract shall be made in writing and signed by all parties.”(Clause 5).
5. The Agreement of Service also provided under Clause 7(d) that-

“(d) If the officer is requested to and agrees to serve a further period or periods of agreement after the initial period herein specified, and proceeds on leave between such periods, provide such similar passage as in 7 (a) and (b) above.”
6. On 16 of December 2015 the Acting CEO of MIA telephoned the appellant that the Minister has approved the extension of the contract for another three years.

7. On 17 December 2015, MIA forwarded a submission to the PSC and recommended to extend the contract of employment of the Appellant for another three years with effect from 06 February 2016.
8. On 15 January 2016 the PSC met to consider a submission to extend the Appellant's contract for another three years.
9. In the PSC Meeting of 05 February 2016 it was approved not to extend the Appellant's contract and the completion of his Agreement of Service to be effective from 08 February 2016. It was also mentioned in the submission made by the PSC Office to this meeting that there was another letter of complaint against the Appellant from Mr. Patolo of Niuatoputapu for sexual harassment. This complaint has been referred to MIA for a report and PSC Office has not yet received any response so that they can proceed with further appropriate actions.

PSC ACTION AND DECISION

10. On 17 December 2015, the Acting CEO for Internal Affairs sent a Savingram to the CEO for PSC to convey the following:

“

- *You may be aware that the contract of employment between Mr Feingatau 'Iloa and the Government of Tonga ends on 5th February, 2016.*
- *The Hon. Minister of Internal Affairs has granted approval for an extension of Mr 'Iloa's contract of employment for another 3 year term effective on 6th February, 2016.*
- *The Ministry is very pleased with the performance of Mr 'Iloa rating as quite satisfactory. Although he was twice reported on sexual harassment, Mr 'Iloa was cleared on both incidences. Most important to the Ministry is his good character and integrity remain very much intact.*
- *Having conveyed the above, it is recommended that the current contract of employment of Mr 'Iloa be extended for another 3 years with effect from 6th February, 2016.”*

11. A PSC Meeting was held on 15 January 2016 and the following items were extracted from the submission made by the PSC Office:

“

- **6. Precedent Case**
Mr. Petelo Pa'anga Soakimi (aka Pita Soakimi) was initially appointed to the post of Government Representative of Niuatoputapu on 12 December 2001 on three (3) year contract. Mr. Soakimi was charged with misappropriation of funds. However, his contract agreement was extended. The agreement was

further extended for another 3 years on 12 November 2004, and 12 November 2007, and ended on 30 June 2009.

• 8. *PSC Comments*

- *Mr. Sione 'Iloa has had two (2) sexual harassment cases issued against him in March 2014 and January 2015. However, both charges were dropped due to "lack of evidence".*
- *The Ministry finds his performance satisfactory despite being reported twice for sexual harassment.*
- *The Ministry recommends that Mr. 'Iloa's employment contract be extended for another three (3) years.*
- *This case is in line with precedent reappointment case of Petelo Soakimi (aka Pita Soakimi) who was the Government Representative for Niuatoputapu.*
- *In light of the above and the alleged allegations against Mr. 'Iloa. Submitted for the consideration of the Commission.*

• 9. *Recommendation*

The following recommendation is submitted for the consideration of the Commission please:

That the contract of service for Mr. Sione Feinga 'Iloa, Government Representative for Niuatoputapu, Ministry of Internal Affairs be extended for three (3) years as from 6 February, 2016 to 6 February 2019."

12. The following discussions were extracted from the Minutes of the PSC Meeting on 15 January 2016:

“

- *The Commission was concerned with the request for Mr. 'Iloa's contract as Government Representative for Niuatoputapu to be extended on the basis that there have been two (2) sexual harassment cases against him.*
- *The Acting CEO of the Commission informed the Commission that one of the investigations was conducted by the Office of the Commissioner for Public Relations and the other by the Ministry of Internal Affairs however; both charges were dropped due to lack of evidence.*
- *The Commissioner agreed that the case be deferred given the nature and basis of the complaints and for sexual harassment cases to be resubmitted for the Commission's information.*
- *The Commission raised that the Ministry of Internal Affairs be informed that the case is deferred and there is a possibility that the request for extension might not be approved.*
- *The Commission approved the following **RECOMMENDATION: Defer** ”*

13. The Acting CEO of the PSC sent out a Memorandum on the PSC Decision of 15 January 2016 regarding the extension of the Provisional Employment Contract of Mr. Sione

Feingatau 'Iloa, Government Representative, Niuatoputapu, Ministry of Internal Affairs. The decision was "*Recommendation is approved as amended: Defer*".

14. On 15 January 2016 the Chief Secretary and Secretary to Cabinet sent out a Savingram to the CEO for Internal Affairs and CEO for PSC regarding complaints against the Government Representative, Mr Sione Feingatau 'Iloa and requested a response by the end of the week. The three complain letters were addressed to the Hon. Prime Minister regarding alleged indecent harassment towards two women in Niuatoputapu by the Appellant.
15. With reference to the Savingram of 15 January from the Chief Secretary and Secretary to Cabinet, the Acting CEO of PSC sent out a Savingram to the Acting CEO for Internal Affairs on 21 January 2016 to request a complete report and also to state whether the complaints against Mr. 'Iloa is considered a *serious or minor "breach of discipline"* in order to assist the PSC Office with further appropriate actions.
16. PSC made a submission to the PSC Meeting of 05 February 2016 and the following comments from the PSC Office were extracted from that submission:

"PSC Office Comments

- *The Commission may note that the initial complaint against Mr. Sione Feingatau 'Iloa was received from the OIC for Commerce, Tourism and Labour, Mrs. Aloisia Lemoto on 31 March, 2014 which was based on mismanagement of public resources and funds and also sexual harassment;*
- *The case was investigated by the Office of the Commissioner for the Public Relations where the complaints against Mr. 'Iloa was later dismissed due to insufficient supporting evidence also for the reason that the complainants withdrew her complaints;*
- *It is further noted that on 1 May, 2015 a second complaint against Mr. 'Iloa on similar sexual harassment issues was again received at the PSC Office from a Mr. Hakaumotu, OIC MAFFF, Niuatoputapu.*
- *The CEO for Internal Affairs agreed that the second complaint against the Government Representative was a 'serious breach of discipline' and as a result, the PSC Office then initiated the disciplinary action by convening the Charge Formulation Committee (CFC) to consider the second complaint against Mr. 'Iloa;*
- *The CFC decided that the initial submission from the Ministry was not sufficient and as such they requested further information and agreed to defer the case until the Ministry submit the additional report to the Committee;*
- *Acting CEO for Internal Affairs then directed a Ms. Fanau'ifo'ou 'Akau'ola, Deputy Secretary to travel to Niuatoputapu to further investigate the case to provide a more thorough report to the CFC for their further appropriate recommendations.*
- *Upon receipt of the report from the investigation officer, Ms. 'Akau'ola the CFC still considers it insufficient to determine any grounds for charges. Therefore the Committee agreed that the matter is not a serious breach of discipline due to lack of sufficient evidence to substantiate the allegations made against Mr. Sione*

Feingatau 'Iloa and further directed that the matter be referred back to the Ministry to deal with internally;

- *As such the Ministry was requested to consider issuing a written warning to Mr. 'Iloa and such written warning shall be kept in the employee's personal file;*
- *However, we noted that another complaint against Mr. 'Iloa was later received at the PSC Office from a Mikaele Patolo on yet similar sexual harassment issues;*
- *However, it was noted and was considered that the submission be submitted to the Chief Executive for Internal Affairs to provide her report on the matter before PSC proceed with further appropriate actions noting herein that we have yet to receive a respond to date”*

17. With reference to the PSC Meeting on 05 February 2016, the following discussions were extracted from the Minutes:

“

- *The Acting CEO of the Commission informed the panel members that work is currently in progress regarding the last complaint made regarding Mr. 'Iloa. However, the PSC Office has submitted a savingram to the Ministry of Internal Affairs recommending that someone acts in the position given that the case is pending subject to Commission's decision.*
- *The Acting CEO further informed the Commission that the first two (2) complaints made against Mr. 'Iloa had no grounds as per the CFC's finding however, the Charge Formulation Committee had referred the matter back to the Ministry with a recommendation to warn the officer for unprofessional behaviour.*
- *The Commission also note that the Officer's contact has completed hence the Commission did not approve the request for extension and therefore directed the PSC Office to proceed and inform the Ministry of Internal Affairs to advertise the position.”*

18. The Acting CEO of PSC sent a Savingram to the CEO for Internal Affairs on 12 February 2016 to convey the decision of the PSC Meeting No. 3 on 05 February 2016 and stated the following:

“The Public Service Commission has noted that there have been several complaints from other public servants against the Government Representative due to recurring sexual misconduct. These submissions raised a concern with the Commission even though it was considered insufficient to determine any grounds for charges. However, work is still in progress regarding the last complaint.

*As such, the Public Service Commission did **not** approve the request for the Agreement of Service of Mr. Sione Feingatau 'Iloa, Government Representative, Niuatoputapu District to be extended for another period of three (3) years with the effect from 6 February, 2016 to 6 February, 2019 (through PSC Decision No. 53 of 5 February 2016) and further directed that the completion of his Agreement of Service be noted with effect from **8 February, 2016. ...”***

19. The Acting CEO for Internal Affairs sent a letter on 29 February 2016 to the Appellant to convey the PSC Decision No. 53 of 5 February 2016:

..

1. *That the request for the Agreement of Service for Mr. Sione Feingatau 'Iloa, Government Representative, Niuatoputapu, Ministry of Internal Affairs to be extended for another period of three (3) years with effect from 6 February, 2016 to 6 February, 2019 be not approved;*
2. *That the completion of his Agreement of Service be noted with effect from 8 February, 2016.*
3. *That he be paid the equivalent of his salary for any period of earned leave days*
4. *That he submit any claims for leaving service benefits to the Retirement Fund Board."*

20. On 01 March 2016, the Acting CEO for Internal Affairs sent a Savingram to the Acting CEO for PSC to forward a letter from the residents of Niuatoputapu District in support of the former Government Representative, Mr. Sione Feingatau 'Iloa in connection with letter of complaint recently received from the District.

21. Again 01 March 2016, the Chief Secretary & Secretary to Cabinet sent a Savingram to the CEO of PSC and stated the following:

"I forward herewith a copy of a letter from the District Officer and Town Officers of Niuatoputapu dated 19th February 2016 regarding a request to reinstate Mr. Sione Feingatau 'Iloa, former Government Representative for Niuatoputapu, and extend his term for another three (3) years for your necessary action, please."

APPELLANT'S SUBMISSION

22. The Appellant is appealing against the Decision No. 53 of PSC, dated 5 February 2016 to, among other things, not approve the extension of the Appellants' Agreement of Service (page 57 of the bundle of documents).
23. The reasons for the said decision are not clear (page 58 of documents, minutes of PSC meeting No. 1/2016).
24. The grounds for the appeal are set out in:
 - (a) The Appellant's letter dated 18 February 2016 (pages 76 – 78 of documents)
 - (b) Counsels letter dated 01 March 2016 (pages 71-73 of documents), and
 - (c) The petition from the people of Niuatoputapu dated 19 February 2016 (pages 60-68 of documents)
25. It is respectfully submitted that the following facts are relevant to this appeal. Furthermore, they appear not to be in dispute:

- (a) Paragraphs 4 and 12 of the Agreement of Service refer to extension of the Agreement. There is no procedure set out in the Agreement for such an extension.
 - (b) On 17 December 2015 the CEO for the PSC was informed by the Acting CEO for Internal Affairs that the Minister for Internal Affairs has granted approval, for an extension of the Appellant's contract (page 47 of documents).
 - (c) In the briefing papers from the CEO of PSC for its meeting on 15 January 2016 it was recommended to extend the Appellant's contract (pages 48-50 of documents).
 - (d) In its Decision No.12 on 15 January 2016 the PSC decided that the Recommendation is approved and defer the matter (page 51 of documents)
 - (e) The Appellant was not informed of this decision by the PSC to defer the matter. More importantly, the Appellant was not informed of the reasons for the decision and/or given the opportunity to make submissions for PSC to consider.
 - (f) On 5 January 2016 and 12 January 2016 there were three letters of complaints from Mikaele Patolo to the Prime Minister (pages 53-55 of documents).
 - (g) No notice of the complaints by Mr. Patolo was given to the Appellant. Furthermore, he was not given the opportunity to reply to the said complaints.
 - (h) On 21 January 2016 Acting CEO of PSC wrote to Acting CEO for Internal Affairs requesting, among other things, an opinion whether the complaint against the Appellant is considered a serious or minor breach of discipline (page 56 of documents).
 - (i) There is no record of any response from the Acting CEO for Internal Affairs to the request by the Acting CEO PSC.
 - (j) On 5 February 2016 the PSC decided, *inter alia*, not to approve the request to extend the Appellant's contract. (page 57 of documents).
26. As noted above, the Acting CEO for Internal Affairs wrote to the CEO of PSC on 17 December 2015 (page 47 of documents) that the Minister of Internal Affairs had granted approval for the extension of the Appellant's contract. It is important, in my submission, to note the third paragraph of the Savingram:

"The Ministry is very pleased with the performance of Mr 'Iloa rating as quite satisfactory. Although he was twice reported on sexual harassment, Mr 'Iloa was cleared on both incidences.

Most important to the Ministry is his good character and integrity remain very much intact”.

27. In the briefing papers for the meeting of the PSC on 15 January 2016 (pages 48 to 50 of documents), there was a reference to a precedent case. It was recommended for the PSC to extend the Appellant’s contract.

28. On 15 January 2016 the PSC’s Decision No. 12 recorded (page 51):

*“Recommendation is approved as amended:
Defer”.*

29. On the face of it, it would appear that the PSC approved the “*Recommendation*” in the briefing papers (page 58) to approve the extension of the Appellant’s contract.

30. In the Minutes of the said meeting it is recorded:

“The Commissioner agreed that the case be deferred given the nature and basis of the complaints and for the sexual harassment cases to be resubmitted for the Commission’s information.

The Commission raised that the Ministry of Internal Affairs be informed that the case is deferred and there is a possibility that the request for extension might not be approved”.

31. It is submitted that there are two aspects of the PSC’s Decision which are relevant to this appeal:

(i) In the Decision itself it is recorded that the Recommendation is approved as amended. However, in the Minutes it is recorded that the request for extension might not be approved, which suggests that the Recommendation to extend the contract was not approved by the PSC.

(ii) Under the “*Action Item*” heading it is said:

“PSC office to resubmit allegations of sexual harassment case by Mr Feingatau ‘Iloa for the Commission to reconsider the request for extension of service”.

Does this mean that the PSC did not accept the outcome of the investigations carried out by the Office of the Commissioner for Public Relations and the Ministry of

Internal Affairs? If the answer is yes then it is submitted that the Appellant should have been given an opportunity by the PSC to be heard when the matter was resubmitted to the PSC for reconsideration. The reason being that, on not accepting the outcomes of those two investigations the PSC must have had issues of concern to the said two investigators, and the appellant should have his say on those issues of concern to the PSC.

32. Prior to the Decision No.53 of the PSC dated 05 February 2016 not to approve the request for extension of the Appellant's contract, the following matters arose/took place:

- (i) There were three letters of complaints by Mikaele Patolo (pages 55 to 57) against the Appellant. It is important for the purpose of this appeal to note that the Appellant was not notified of those complaints. Furthermore, he was not given any opportunity to reply to those allegations. Nothing is recorded in the documents before the Tribunal for this failure/omission.
- (ii) On 21 January 2016 the Acting CEO for Internal Affairs wrote to the Acting CEO of PSC (page 56 of documents) requesting the CEO to submit a complete report, on Mr Patolo's complaints, to the CEO of PSC and also state whether the complaints against Mr 'Iloa is considered a serious or minor breach of actions. However, there is no record of any response to this Savingram. The important point to note is the request to state whether the complaints against Mr 'Iloa is considered a serious or minor breach of discipline. This tends to suggest that the Acting CEO for PSC already held the view, before hearing from the CEO for Internal Affairs and the Appellant, that there was already a breach of discipline.
- (iii) There is no record of the briefing papers (if any) from the CEO of PSC for its meeting No. 53 on 5 February 2016 which took place about 14 days from the said letter from Acting CEO for PSC to the Acting CEO for Internal Affairs (page 6). It is submitted that it is important for the purpose of this appeal to know what the recommendation from CEO of PSC was, which recommendation was approved by the Commission in its meeting.

33. The Minutes of the PSC meeting No. 53 held on 5 February 2016 do not show the reasons for the PSC's decision not to approve the request to extend the Appellant's contract.

34. In the letter (savingram) dated 12 February 2016 (page 58 of documents), from the Acting CEO of PSC to the CEO for Internal affairs, it is said in the second paragraph:

“The Public Service has noted that there have been several complaints from other public servants and the public against the Government Representative due to recurring sexual misconduct. These submissions raised a concern with the Commission even though it was considered insufficient to determine any grounds for charges. However, work is still in progress regarding the last complaint.”

35. This Savingram suggests that at the time of the Decision No. 53:

- a) Work on the last complaint, whatever that might have been, was not finalized. Therefore the Appellant was, and still is, in my submission, innocent.
- b) It is not clear why the PSC was still concerned when it was already considered that there were insufficient grounds to charge the Appellant.

RESPONDENT'S SUBMISSIONS

36. The Appellant is appealing to the Public Service Tribunal against the PSC Decision No. 53 of 5 February 2016 which states as follows:

- i. That the request for the Agreement of Service for Mr Sione Feingatau 'Iloa, Government Representative, Niuaotupapu, Ministry of Internal Affairs to be extended for another period of three (3) years with effect from 8 February, 2016 to 6 February, 2019 be not approved;
- ii. That the completion of his Agreement of Service be noted with effect from 8 February, 2016;
- iii. That he be paid the equivalent of his salary for any period of earned leave days;
- iv. That he submits any claims for leaving service benefits to the Retirement Fund Board.

37. As far as Counsel can determine from the Appellant's Amended Notice of Appeal, the Appellant is appealing the alleged decision on the following grounds:

- i. The Appellant had a legitimate expectation that his contract will be renewed when he was informed by telephone by the Ministry of Internal Affairs towards the end of 2015.
- ii. There was a breach of the principles of natural justice when the PSC decides not to extend the Appellant's contract without giving the opportunity to respond to allegation of recurring sexual misconduct.
- iii. The PSC's decision, if known by the public would be defamatory as he would be considered guilty of recurring sexual misconduct.

38. A summary of the Respondent's submissions is as follows:

- i. The Appellant did not have any legitimate expectation that his contract will be renewed because Policy 9 of the Public Service Policy 2010 has not been fulfilled;
- ii. Clause 5(a) of the contract requires all parties to agree to vary the contract, obviously, the PSC did not want extend the contract by variation.
- iii. The contract had lapsed on 08 February 2016, and therefore cannot be subjected to a review.

39. The Respondent makes the following submissions:

A. The Appellant did not have any legitimate expectation that his contract will be renewed because Policy 9 of the Public Service Policy 2010 has not been fulfilled.

- i. Under Policy 9 of the Public Service Policy 2010, provides that contracted employees are to be appointed for a fixed term on an individual contract.
- ii. It is provided under the same policy that such appointment under contract has to be approved by the PSC before any remuneration.
- iii. Instructions 1A.3.2(1) and (2) of the Public Service Policy Instructions 2010 further provides that contracted employees are appointed for a fixed term on an individual contract, and those appointments are to be made or processed by the PSC.
- iv. An extension of the Appellant's contract would require the approval of the PSC under Policy 9 before the Appellant is remunerated.

- v. The PSC had not considered whether to extend the Appellant's contract when he was contacted by the office of the Ministry of Internal Affairs in December 2015.
- vi. As such, the Appellant did not have any legitimate expectation that his contract will be extended.

B. In order for the contract to be extended, it is required under Clause 5(a) for the PSC, CEO for Internal Affairs, and the Appellant to agree that the contract will be extended.

- i. An extension of the contract is required to be finalized before the contract expires.
- ii. The contract will have to be varied under Clause 5 for the purpose of an extension.
- iii. Clause 5 (a) of the contract provides that the contract may be varied at any time by agreement between the PSC, the Chief Executive Officer for Internal Affairs, and the employee.
- iv. A variation of the contract is required under Clause 5 (b) to be made in writing and signed by all parties.
- v. Obviously, the PSC did not agree for the contract to be extended, and therefore the contract was not varied to be extended accordingly.
- vi. There was no agreement between the parties under Clause 5 (a) and (b), and therefore, there was no agreement for the contract to be extended.

C. The PSC's decision was not in breach of the principle of natural justice.

- i. The PSC's decision was not in relation to a termination of the Appellant's contract.
- ii. It was a decision whether extend the contract of the Appellant's contract.
- iii. In respect of its reasons for its decision, the PSC had acknowledged that there was insufficient evidence to charge the Appellant in respect of the complaints.
- iv. The fact that there were complaints against the Appellant was sufficient for the PSC to make a decision not to extend.
- v. There is no onus on the PSC to require further explanation from the Appellant in respect of whether to extend the contract.
- vi. If the decision was in respect of termination of contract, then the Appellant is required to be given an opportunity to be heard.
- vii. The decision not to extend is a matter entirely for the PSC to determine, because the Appellant's contract was fixed for 3 years.
- viii. The PSC had wanted the Appellant's contract to complete naturally without further extension.
- ix. The PSC's decision was not in breach of natural justice.

D. The Appellant's contract had lapse and therefore cannot be revisited

- i. The Appellant's contract was fixed for a term of 3 years commencing from 6 February 2013.
- ii. The Appellant's contract had lapsed naturally and completed on 8 February 2016.
- iii. Since the Appellant's contract had lapsed, his contract is therefore deemed to be terminated by way of expiration.
- iv. The Appellant cannot now argue that his contract should be extended.

In conclusion, the Respondent respectfully invite the Tribunal to:

- i) Accept the submissions advanced on behalf of the Respondent.
- ii) Dismiss the appeal, with costs to the Respondent.

40. In response to questions from the Tribunal, Counsel conceded that by operation of law the Appellant's contract did not expire on 5th February, 2016 but continued to operate beyond that date until at the latest 29th February 2016 (the date on which the Appellant was formally informed of the PSC decision.)

TRIBUNAL'S FINDINGS

41. On 4 March 2014 and 20 January 2015, complaints were received by the authorities from Mrs 'Aloisia Lemoto and Mr Taniela Hakaumotu respectively, making certain allegations against the Appellant.
42. Both those complaints were duly dealt with and found to be groundless. That is, the Appellant was exonerated on both cases. As such, those allegations should never have been raised against the Appellant because he was already cleared of them.
43. In particular, one case was withdrawn by the accuser, and the other, after due investigation, was found to have insufficient evidence to substantiate the allegation. In the latter case, the PSC Office had referred the matter back to MIA with a suggestion "*... to consider issuing a written warning to Mr 'Iloa*".
44. It must be noted here that the suggestion to consider issuing a warning to the Appellant was groundless since the allegation/complaint was found to have "*insufficient evidence*".
45. MIA informed the CEO of PSC on 17 December 2015 that –

- * the Appellant's contract will end on 5 February 2016;
 - * the Minister of MIA has approved an extension for another 3 years;
 - * MIA is very pleased with the Appellant's performance (and he was cleared of the complaints made against him);
 - * recommended that Appellant's contract be extended for another 3 years.
46. It is also noted that MIA also informed the Appellant that the Minister has approved another 3 years extension of his contract.
47. On a submission from CEO of PSC to the PSC meeting on 15 January 2016, the following are noted –
- * two allegations of sexual harassment were made against the Appellant, but both were "*dropped due to lack of evidence*",
 - * MIA recommended that the Appellant's contract be extended for another 3 years;
 - * Appellant's case in line with Pita Soakimi's case;
 - * recommended that the Appellant's contract be extended another 3 years.
48. PSC on its meeting of 15 January 2016 noted the following –
- * the PSC was concerned with the request to extend the Appellant's contract on the basis that there have been two sexual harassment cases against him;
 - * PSC was informed by Acting CEO of PSC that both cases were "*dropped for lack of evidence*";
 - * PSC agreed that Appellant's case be deferred on the basis of the complaints and for the sexual harassment cases to be resubmitted for PSC's information;
 - * MIA to be informed that case is deferred and there is a possibility that request for extension may not be approved.
49. The Tribunal finds that PSC erred in making its decision to defer the matter based on the "sexual harassment" cases against the Appellant. The briefing paper was thorough and it was also noted in the minutes of the meeting (15 January 2016) that the Acting CEO explained that the two cases against the Appellant were dropped for lack of evidence. Despite those assurances, the PSC considered that those matters were relevant and therefore deferred the Appellant's extension request. That in itself made that decision

bad. The two “sexual harassment” cases were no longer exist and should not form the basis for the PSC’s decision.

50. In the meantime, on 15 January 2016, three (3) new complaints against the Appellant were received. The Acting CEO of PSC forwarded those complaints to MIA on 21 January 2016 and requested a “*complete report and also to state whether the complaints against Mr Iloa is considered a serious or minor breach of discipline in order to assist the PSC Office with further appropriate action*”.
51. PSC met on 5 February 2016. The submission on the Appellant’s extension request included the followings –
 - * detailed explanation of the original 2 complaints against the Appellant with emphasis that they have been dealt with;
 - * that new complaints were received against the Appellant from one Mikaele Patolo on “similar sexual harassment issues”;
 - * the new complaints were being referred to CEO of MIA “*to provide her report on the matter before PSC proceed with further appropriate actions*”;
 - * that PSC have yet to receive a response to date.
52. It must be noted that the Acting CEO for PSC had clearly informed PSC in her submission that new complaints were forwarded to MIA to provide report on the matter “*before PSC proceed with further appropriate action*”. Further, PSC was clearly informed that such report have not yet been received.
53. The minutes of that meeting (5 February 2016) clearly show that –
 - * PSC was informed that work is currently in progress regarding the last complaints made against the Appellant;
 - * the first 2 complaints against the Appellant had no grounds;
 - * the PSC noted the Appellant’s contract has completed and did not approve the extension.
54. Clearly, PSC had considered in its meeting on 5 February 2016, the two initial complaints against the Appellant because it had directed the Acting CEO for PSC to provide them with the details (in the meeting of 15 January 2016). Those details were highlighted in the briefing paper (submission) and noted in the minutes.

55. It is also clear that PSC was informed of the new complaints and that they were still “*work in progress*” before the matter will be reported back to PSC for “*further appropriate action*”.

56. The situation as on 5 February 2016 may be described as follows --

- * it was the last day specified in the Appellant’s Agreement of Service;
- * the Appellant had been informed by MIA previously that the Minister had approved the extension for another 3 years.
- * MIA had requested PSC to approve another 3 years extension for the Appellant because he had a clear record and his performance was satisfactory;
- * PSC, despite the above, and its CEO’s assurances, deferred the matter from its meeting of 15 January 2016, and requested details of unproved allegations that the Appellant had been cleared of;
- * new (three) complaints arose (on the 15 January 2016) of which PSC was informed that it was “*work in progress*” before reporting to PSC for further appropriate action.

57. In addition, the following are noted by the Tribunal --

- * PSC left it to the last day (5 February 2016) to make a decision that an extension is not approved.
- * PSC had unilaterally given a purported extension to the 8 February 2016 [refer the PSC Decision No. 53 of 5 February 2016 paragraph 2 – Respondent’s Documents (RD) page 57].
- * MIA was not informed of that decision until 12 February 2016 (refer letter in RD p. 58).
- * Appellant was informed by phone by MIA on 16 February 2016.
- * Appellant lodged this appeal on 18 February 2016.
- * Appellant was not formally informed of the PSC decision until 29 February 2016, by MIA, which included the following --

“The above decision was accompanied by a letter from the Office of the PSC signed by Mele H Moala of which part is reproduced below for ease of reference:

“The Public Service Commission has noted that there have been several complaints from other public servants and the public against the Government Representative due to recurring sexual misconduct. These submissions raised a concern with the Commission even though it was considered insufficient to determine any grounds for charges. However, work is still in progress regarding the last complaint.”

As such Public Service Commission did not approve the request for the Agreement of Service of Mr Sione Feingatau 'Iloa, Government Representative, Niutopotapu District to be extended for another period of three (3) years with effect from 6 February 2016 to 6 February 2019 (through PSC Decision No. 53 of 5 February 2016) and further directed that the completion of his Agreement of Service be noted with effect from 8 February 2016 ...” – RD p.69

58. Under those circumstances, the PSC Decision No. 53 of 5 February 2016 was flawed for the following reasons:

- * consideration of an extension to the Agreement of Service was being carried out by all relevant parties, the Appellant, MIA and the PSC, well before the specified expiry date in the Agreement of Service;
- * those actions were carried out pursuant to Clause 5 (a) of the Agreement of Service, which required agreement between PSC, MIA and Appellant to complete any variation to the Agreement of Service such as the requested extension for further 3 years;
- * on the specified expiry date (5 February 2016) all parties were still carrying out the required processes eg. PSC was informed that work was still in progress on the latest 3 complaints against the Appellant;
- * the PSC should not have considered irrelevant matters like the 2 groundless complaints against the Appellant (PSC had deferred the matter on 15 January 2016 and called for details of those irrelevant matters);
- * the work on the latest 3 complaints were still in progress and PSC was in no position to make a decision on the extension request on 5 February 2016 (PSC was duty bound to await completion of that process);
- * on 5 February 2016 the Agreement of Service had not expired because under those circumstances, the Agreement of Service continued by operation of law;
- * it appears that PSC in fact had considered that possibility by (although unilaterally) deciding that the Agreement of Service to expire on 8 February 2016 (and not 5 February 2016);

- * the Appellant had no knowledge of this until he was verbally informed on 16 February 2016 and officially on 29 February 2016;
- * the Appellant continued to be paid until 16 February 2016;
- * by operation of law, the Agreement of Service continues until the work in progress relating to the last 3 complaints against the Appellant are completed. Only then will the PSC can make a valid decision on the extension issue.

- Uta'atu v Commodities Board [1990] TLR 92

- Matoto v PSC (PST Appeal no. 1/13 Decision dated 12 November, 2014)

59. In 'Uta'atu's case, the court ruled that an employee's service cannot be terminated even in accordance with the terms of the contract of service (termination upon notice), once allegations of misconduct are raised. The disciplinary processes must be completed before action is taken.
60. In Matoto's case, a ruling of this Tribunal, it was adjudged that the circumstances may allow a contract to operate beyond the specified expiry date. The Tribunal in that case stated-

" 40. The continuing of the employment of the Appellant after 16 November 2012 was, not only because the review had not been completed, but also because of paragraph 3 of the contract allowing an expiry date of 1 March 2013. As far as the Appellant was concerned, he was waiting for the result of the review of his performance by the Respondent to determine the renewal of his contract. There was an expectation by the parties that the review would take place. Indeed the review had at least started and possibly on the verge of completion, but stopped by the Respondent on the basis of the legal advice that the contract had ended on 16 November 2012. This led to the decision by the Respondent on 11 February 2013 to terminate the contract without completing the performance review required by the contract and the law.

41. We find that there were valid and legal reasons, accepted by both parties, for the continuance of the contract beyond 16 November 2012 for the specific purpose of completing the review of the performance of the Appellant and for other administrative purposes. The decision of 11 February 2013 terminating the contract of the Appellant was premature and should have been done after the completion and consideration of the performance review."

61. The Appellant's Agreement of Service, in Clause 7 (d) clearly anticipates the possibility of a further extension. Any extension will be a variance to the Agreement of Service. Clause

5 provides that such agreement should be made between the PSC, CEO for MIA and the Appellant.

62. It is clear that a process for extension of service had commenced. That process cannot be frustrated simply by PSC saying that the contract had expired.

CONCLUSION

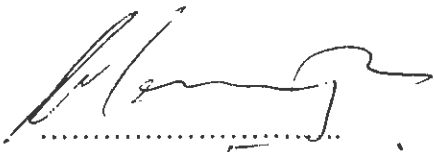
63. Counsel for the Respondent conceded that the Appellant's Contract of Service continued after 05 February 2016 by operation of law, for the reasons given above. However, counsel submitted that the Agreement of Service ended at the latest on 29 February 2016 (the date the Appellant was formally informed that the extension was not approved by PSC).
64. The Tribunal is of the view that the PSC Decision No.53 of 05 February 2016 was invalid and therefore the expiry of the Agreement of Service did not depend on bringing the attention of the Appellant to that decision. The decision was *void ab initio* and cannot be made better by its conveyance to the other parties.
65. The Tribunal finds that the Agreement of Service continued until the completion of the work in progress (i.e the disciplinary processes relating to the last 3 complaints against the Appellant) that is still outstanding.
66. The situation is further complicated by the fact that someone else has been appointed to the Appellant's position in an acting capacity. In that case, the Appellant may be deemed to have been on leave with full pay.
67. Upon completion of the "*work in progress*" referred to above, the relevant parties should endeavor to make a definite decision on the issue of extension of the Appellant's services.

ORDER OF THE TRIBUNAL

68. Pursuant to section 21F of the Public Service Act 2002, the Tribunal may make an order to affirm, vary, or set aside the PSC's decision.
69. The Tribunal makes the following orders:
- (i) The PSC Decision No. 53 of 05 February 2016 is set aside.
 - (ii) The Appellant's employment shall be deemed to have continued beyond 05 February 2016, and the Appellant restored to his position subject to (iv) below.

- (iii) The disciplinary processes against the Appellant with regard to the outstanding allegations made against him [three (3) from Mikaele Patolo] to be carried out in the normal manner.
- (iv) At the completion of the disciplinary processes, the PSC shall consult the other relevant parties (the relevant Ministry and the Appellant) before making a decision on the Appellant's employment situation.
- (v) That the Appellant may be considered to be on leave with pay during any period in which someone was acting in the relevant position.

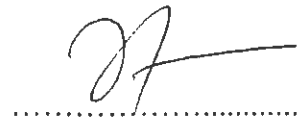
70. Parties to agree on costs but are at liberty to apply and file memoranda within 28 days.



'Aisea H Taumoepeau, SC



Lady 'Eseta Fusitu'a



Timote Katoanga