

MR. TUKUA'I'UTUTAU TONGA v PUBLIC SERVICE COMMISSION (PSC)

PST Appeal No. 06/2014

1. This is an appeal by Mr Tukua'i'ututau Tonga, Director of SPMU, Ministry of Lands and Natural Resources, (the Appellant), against the decisions of the PSC, namely PSCD No. 2 of 4 January 2013; and PSC Decision on 9 September 2013 *"that PSCD No.2 of 4 January 2013 stands"*.

2. For ease of reference, those decisions were as follows:

(i) PSC No. 2 of 4 January 2013 -

" 1. That a FINAL EXTENTION of the deadline for the utilization of outstanding calendar leave entitlements be 30 June 2013.

2. Any outstanding calendar leave entitlements as of 30 June 2013 SHALL BE FORFEITED.

3. Chief Executive Officers who still have staff with outstanding calendar leave entitlements:

(a) Submit their outstanding leave plan for the period 01 January 2013 – 30 June 2013 to the Public Service Commission by 11 January 2013;

(b) Be reminded that it is their role to ensure clearance of all outstanding calendar leave by the above deadline. This will be part of their Chief Executive Officer's performance measures for the period January 2013 – June 2013."

(ii) PSC Decision on 9 September 2013 -

"PSC Office to write to Ministries who were unable to clear all calendar leave entitlements by 30 June 2013 to confirm that PSCD No. 2 of 4 January 2013 stands and that all calendar leave entitlements are forfeited if it was not utilised by 30 June 2013."

3. Under the relevant policy (**Public Service Policy Instructions 2B.1**) leave entitlement was changed as from 01 January 2010 to an annual leave of 20 working days which cannot be accumulated.

4. **Public Service Policy Instructions (PSPI) 2B.9** provides –

"The Chief Executive Officer has the discretion to:

(a) Approve for an employee to take annual leave within the 12 months calendar year;

(b) Approve for the old leave approval to cease at the end of December 2009 to carry forward to 30 June 2011, and the new leave policy takes effect from January 2010;

(c) Chief Executive Officer must ensure that all employees utilise their full year's annual leave by end of December annually."

5. It is important to note that *paragraph (b)* of the above provision vests the discretion in the Chief Executive Officer of the relevant Ministry to approve the carry forward of old leave approval from December 2009 to 30 June 2011.
6. Under **PSCD No. 222 of 11 May 2012**, the deadline under PSPI 2B.9 (b) was extended from 30 June 2011 to 31 December 2012.
7. Under **PSCD No. 02 of 04 January 2013**, that deadline was again extended (and clearly for the **FINAL TIME**) to 30 June 2013.
8. On 20 December 2012, the A/CEO of the Ministry of Lands and Natural Resources submitted for the encashment of the equivalent of the Appellant's 20 working days is paid out in lieu of his 2012 annual leave, due to the exigencies of the service, and that *it was unlikely that the Appellant will be able to take leave in the future*. The request was approved under **PSC Decision on 08 February 2013**.
9. It is noted that in the above submission, there was no mention of the outstanding calendar leave.
10. It was not until 11 June 2013 that the CEO of the Ministry submitted a request to PSC that the calendar leave for the Appellant (and 3 other officers) *"be retained to be undertaken in an appropriate time"*.
11. At that stage, the deadline was nearly up (at 30 June 2013) after a *"grace period"* that commenced from 01 January 2010.
12. The Appellant and the CEO of the Ministry have failed to carry out their respective responsibilities under PSPI 2B.9 (b). There is no evidence to show that the Appellant had requested, and the CEO therefore had not approved, the carrying over of any of the Appellant's calendar leave since December 2009. Consequently, there was no approval or refusal of calendar leave by PSC as there was no relevant application to PSC by the Appellant (or on his behalf).
13. It is unreasonable to expect the PSC to keep on extending the deadline when the Appellant and the CEO had failed to comply with the policy under PSPI 2B.9 (b).
14. The A/CEO's submission on 20 December 2012 indicated that the Appellant was *"likely not to be able to take leave in the future"*. There was no point in extending the deadline.
15. The CEO's submission on 11 June 2013, shortly before the specified deadline, requested that the calendar leave for the Appellant *"be retained to be taken in an appropriate time"*. That request was contrary to policy.
16. On 30 June 2013, any outstanding leave would have been forfeited in accordance with PSPI 2B.9 and as specified in PSCD No. 02 of 04 January 2013 paragraph 2.

17. Consequently, as of 30 June 2013, all calendar leave for all employees, including the Appellant, had been forfeited.

Other consideration

18. This case clearly demonstrated an alarming situation where an employee may appear to have been punished for something which is beyond his control. In this case the Ministry did not allow the Appellant to take his calendar leave because of shortages of staff and/or projects needed to be completed. The PSC had no choice but to enforce the relevant policy whereby earned calendar leave was forfeited after a specified date. The employee apparently was not at fault.

19. The circumstances of this case were further complicated by the following (*refer Appellant's affidavit dated 6th March 2015*) –

- (a) the Appellant is the only qualified and certified town planner in the Kingdom;
- (b) other than his normal duties in the Ministry, he was mandated by Cabinet to carry out many other projects/tasks; and
- (c) the senior staff members allocated to assist him either retired or passed away, leaving his Unit (SPMU) under-staffed for most of the duration of the projects/tasks undertaken.

20. The forfeiture of leave is not in itself a bad thing, because under the current leave policy, any leave not used during the year can be forfeited. The notion of an employee being required by the Ministry not to take leave and as a direct consequence his earned leave is allowed to lapse (and without any compensation) appears to be unjust.

21. As discussed above, all calendar leave (including those of the Appellant) had been forfeited as of 30 June 2013. However, the Tribunal suggests that the seemingly unfairness of such situation, ought to be re-assessed by the Ministry and PSC, with regard to deserving employees on the merit of each case.

22. The current leave policy is provided under Policy 29 of the Public Service Policy 2010 as follows –

"29 Leave

(1) *Public servants shall have the following leave entitlements:*

Leave type	Entitlement
<i>Annual leave</i>	<i>20 working days</i>
<i>Sick leave (outpatient)</i>	<i>15 working days</i>
<i>Sick leave (inpatient)</i>	<i>30 working days</i>
<i>Maternity leave</i>	<i>3 months (calendar days)</i>
<i>Paternity leave</i>	<i>5 working days</i>
<i>Leave without pay</i>	<i>20 working days</i>
<i>Casual leave</i>	<i>7 working days</i>

(2) Annual leave shall not be carried forward to the next year.

(3) The Commission shall have the authority to grant leave other than those specified in sub-policy (1)."

23. Sub-policy 29(3) empowers the PSC to grant leave other than those specified in Sub-policy (1). That is, the PSC is authorised to grant leave other than the normal type of leave that employees are entitled to.

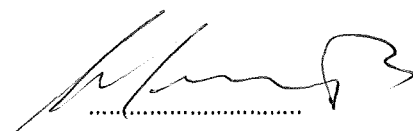
24. The Ministry and the PSC may consider applying sub-policy 29(3) to grant some type of compensatory leave (or monetary compensation) to the Appellant if his case is considered to be deserving of such an action.


Tribunal's ruling

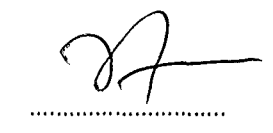
25. Section 21F of the Public Service Act 2002, as amended, provides that the Tribunal may make an order to affirm, vary, or set aside the PSC decision.

26. For the reasons shown above, the Tribunal makes the following ruling:

- (i) The appeal is dismissed;
- (ii) The Ministry of Lands and Natural Resources, and PSC, are urged to consider applying sub-policy 29(3) of the Public Service Policy 2010 to grant appropriate leave (or another equivalent form) to the Appellant;
- (iii) No order as to costs.


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Mr. 'Aiseā H Taumoepeau


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Lady Eseta Fusitu'a


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Mr. Timote Katoanga