



Government of Tonga

Public Service Tribunal

28/07/14
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Mr. 'Aisea H. Taumoepeau, SC - Chairman

Lady 'Eseta Fusitu'a - Member

Mr. Timote Katoanga - Member

PST Appeal No.03 of 2014

Appellant: Public Service Association

Respondent: Public Service Commission

Representation:

Appellant: Ms. Mele 'Amanaki
Secretary General,
Public Service Association

Respondent: Mr. James Lutui
Ms Charlotte Vuki
Acting Solicitor General
Deputy Secretary,
Public Service Commission

Date of Hearing: 17 July 2014

Date of Ruling: 28 July 2014

Public Service Association v Public Service Commission –

PST Appeal No. 3/14

1. This is an appeal by the Public Service Association (PSA) [the Appellant] against:
 - (i) The decision of the Public Service Commission (PSC) [the Respondent] on 17 February 2014 not to entertain a Notice of Employment Dispute on the COLA for the public service employees; and
 - (ii) The non-compliance by the employer with the procedural requirements of the Public Service (Grievance & Dispute Procedures) Regulations 2006, as amended.

Background

2. On 20 December 2013, Cabinet issued the following decision [CD No. 1135] –
 - “1. That a COLA of 5% be implemented during 2013/14 Budget year and effective from 1st January 2014, awarding to all Government paid salary employees.*
 - 2. That the Ministry of Finance & National Planning works on the source/s of funds within the 2013/14 Budget without interrupting the ministries’ operational allocations to cover the COLA expenditure.*
 - 3. That 5% to 10% COLA be considered in the 2014/15 Budget cycle.”*
3. By letter to the Acting CEO of PSC dated 08 January 2014, [headed *“Proposal by the Public Service Association on the 5% Cost of Living Allowance (COLA) recently approved by Cabinet on the 20th December 2013”*] the PSA recommended *inter alia* that a *“22% COLA be granted”* (and to be implemented in a particular way) and *“Cabinet be requested to consider rescinding its decision on the 20th December 2013”*.
4. On 15 January 2014 Cabinet (CD No. 14) *“confirmed that the approved 5 percent COLA with effect from 1st January 2014 will apply to all persons receiving Government remuneration (excluding diplomatic corps)”*, as well as directing how it is to be funded.
5. On 16 January 2014 the CEO of PSC wrote to PSA to convey the following –
 - “(1) The Commission is of the view that the proposal you have submitted has been considered and addressed by Cabinet in accordance with Part (3) of Cabinet Decision No. 1135 of 20 December 2013 which states “that 5% to 10% COLA be considered in the 2014/15 Budget cycle”. Cabinet’s direction on the COLA conveyed through the above Cabinet Decision is supported by the Public Service Commission in light of affordability and ongoing work directed on the matter.*

(2) Furthermore, the Commission is also of the view that opportunity should be given to the new Minister of Finance and National Planning and his Ministry, the Public Service Commission and its office and Chief Executive Officers to progress implementation of Cabinet's directions pertaining to the COLA over the coming months in accordance with Part (3) of the aforesaid Cabinet decision."

6. On 17 January 2014, a letter from the Secretary General of the PSA addressed to –

*"All Chief Executive Officers
Public Service Commission
Ministries
Government of Tonga
NUKU'ALOFA"*

was headed in the following style –

"Notice of Employment Grievance & Dispute on Cabinet Decision No. 1135 of 20th December 2013 and also the Public Service Commission Decision on our Proposal on 08th January on the Cost of Living Allowance (COLA) under Public Service (Grievance & Dispute Procedures) Regulations 2006."

The notice of employment grievance & dispute sought certain remedies including –

- 22% COLA be approved for all employees....except Cabinet Ministers;
- Payment of the 22% COLA be made in a particular way (as outlined);
- Government to increase revenue (through proposed actions).

7. On 17 February 2014, the CEO of the PSC wrote to the Secretary General of PSA informing that following *"legal advice and submission to the Commission"* the PSA's *"complaint cannot be entertained"*. The letter also informed that the *"PSA's Notice of Employment Dispute together with the legal advice received"*, will be forwarded to the Prime Minister *"for His Lordship's information and further action as appropriate"*.

8. On 11 March 2014 the PSA filed this appeal.

Appellant's Submission

9. The representative for the Appellant based her submission on the following grounds:

- (a) The Appellant has a right under the Public Service (Grievance and Dispute Procedures) Regulations 2006, as amended in 2010, and the Memorandum of Understanding between Cabinet and Interim Committee of the Dissatisfied Civil Servants signed on 03rd September 2005, to initiate:
 - (i) Employment dispute procedures and appeal against the Respondent on the Cost of Living Allowance;
 - (ii) Employment dispute procedures and appeal in relation to Cabinet's decision on the 20th December on the Cost of Living Allowance.
- (b) The Appellant as an "employee association" has a right to submit a Notice of employment Dispute to the Respondent against the terms and conditions of employment of public service employees.
- (c) The Respondent did not comply with the procedural requirements of the Public Service (Grievance and Dispute Procedures) Regulations 2006 as amended.
- (d) The Appellant has a right to appeal to the Public Service Tribunal against the PSC's decision not to entertain the Appellant's Notice of Employment Dispute.
- (e) The Appellant has a right under clause 7 of the Memorandum of Understanding to dispute Cabinet's decision in relation to the Cost of Living Allowance, and the Respondent is fully aware of that agreement.
- (f) That a 22% Cost of Living Allowance is just and fair for all the public servants and employees in Government.
- (g) Cost be awarded to the Appellant.

Respondent's Submission

10. The legal counsel for the Respondent made the following submission:

- (a) The Appellant has no legal standing under the Public Service (Grievance and Dispute Procedures) Regulations 2006, as amended, to initiate employment grievance or employment dispute procedures against the Respondent in relation to the decision of Cabinet on the Cost of Living Allowance.
- (b) The Appellant is not an "employee" for the purposes of the Public Service (Grievance and Dispute Procedures) Regulations 2006, as amended.
- (c) The Appellant cannot initiate employment dispute procedures against the Respondent as the decision in relation to the COLA is a decision of Cabinet and

not of the PSC or the Chief Executive Officer of PSC, who are the employers for the purposes of the relevant Regulations.

- (d) The Respondent is not legally obliged to entertain the notice of employment grievance or dispute lodged by the Appellant or comply with the procedural requirements under the Public Service (Grievance and Dispute Procedures) Regulations 2006, as amended.
- (e) Cost be awarded to the Respondent.

Tribunal findings

11. The Tribunal have carefully considered the appeal before it and have reached the following conclusions:

- (a) The Appellant is shown to have been incorporated under the Incorporated Societies Act by a certificate of registration dated 23 December 2005. Part of the Rules of the PSA was produced (pages 8-12 of appellant's documents) which shows that "*workers employed in the public service*" are eligible for membership as well as other categories of persons.
- (b) Although references were invariably made by the PSA representative to PSA members in the public service, there is no evidence to show that the PSA actually has members in the public service.
- (c) The Appellant referred to a "*Memorandum of Understanding between Cabinet and Interim Committee of the Dissatisfied Civil Servants dated 03 September 2005*". It is not necessary for the Tribunal to decide on the validity, or otherwise, of the MOU. The PSC was not a party and cannot be bound by it.
- (d) The procedures under the Public Service (Grievance and Dispute Procedures) Regulations 2006, as amended, for the resolution of an "employment grievance" are available only to an "employee" of the public service. The Appellant conceded in the hearing that it is not pursuing that course. The focus of the Appellant's case is based on the part of the regulations relating to an "employment dispute".
- (e) The proposal from the Appellant to PSC on 08 January 2014 (as described in the letter) related to "*Proposal by the Public Service Association on the 5% Cost of Living Allowance (COLA) recently approved by Cabinet on 20th December 2013*".
- (f) In paragraph 1.12 of the PSA Notice of Employment Grievances & Dispute dated 17 January 2014, the Appellant stated that PSC "*cannot re-consider any decisions*

already set by Cabinet no matter how unfair and/or injustice the decision may be to employees". This shows that the Appellant is mindful that a decision by Cabinet cannot be imputed to have been made by the PSC.

(g) The notice of employment grievance and dispute from the PSA dated 17th January 2014 clearly stated that it was a *"Notice of Employment Grievance & Dispute on Cabinet Decision No. 1135 of 20th December 2013 and also the public Service Commission Decision on our Proposal on 08th January 2014 on the Cost of Living Allowance (COLA)...."*. That is, the employment dispute lodged by PSA related to the –

- (i) Cabinet Decision;
- (ii) PSC decision on the PSA proposal.

(h) The PSC decision on the PSA proposal related also to the Cabinet Decision on the 5% COLA. Thus, both matters to which the notice of employment dispute were concerned, related to the Cabinet Decision on the 5% COLA.

(i) Under the Public Service (Grievance and Dispute Procedures) Regulations 2006, as amended, an association may initiate an employment dispute. However, such an association must be "an employee association registered according to law".

(j) Under the Public Service (Grievance and Dispute Procedures) Regulations 2006, as amended, an employment dispute is a dispute between an employee association and the employer. The employer is defined as the Commission (PSC) or the CEO of PSC.

(k) The 5% COLA which was disputed by the Appellant was set by Cabinet, not by PSC or the CEO of PSC.

Grounds of Appeal

12. The decision of PSC on 17 February 2014 not to entertain a notice of Employment Dispute on the COLA for the public service employees:

(a) The Appellant claims that it has legal right to initiate an employment dispute against the Respondent under the Public Service (Grievance and Dispute Procedures) Regulations 2006, as amended, with regard to the 5% COLA granted by Cabinet on 20 December 2013. Thus, the decision by the Respondent not to entertain the notice of employment dispute on the COLA was wrong.

(b) An employment dispute must be initiated by an *"employee association registered according to law"*.

- (c) The Appellant needs to establish –
 - (i) that the association (PSA) is made up of public service employees;
 - (ii) that PSA is registered according to law.
- (d) Other than verbal assertions by the representative of the Appellant that PSA has members in every Government Ministry/Department, there is no evidence before the Tribunal to show that there are in fact public service employees in PSA'S current membership. This requirement (employee association) is essential to establish a right to initiate an employment dispute. The appellant has failed to establish that it is an "employee association".
- (e) Likewise, "registered according to law" is also an essential requirement for such an association. A certificate of registration is provided. That certificate however, only goes to show that back in 2005, the association was registered. It does not ascertain that it is currently registered. The Appellant has failed to establish that it is currently "registered according to law".
- (f) The granting of the 5% COLA was made by Cabinet on 20 December 2013 [CD No. 1135]. The Appellant's proposal of 8 January 2014, and the Notice of Employment Dispute of 17 January 2014, were both directed at the Cabinet Decision granting the 5% COLA.
- (g) Under the Public Service (Grievance and Dispute Procedures) Regulations 2006, as amended, an employment dispute may only be initiated against a decision of the PSC or the CEO of PSC.
- (h) The Appellant has failed to show that it has a legal right to initiate the employment dispute dated 17 January 2014.
- (i) This ground of appeal fails.

13. The non-compliance by the employer with the procedural requirements of the Public Service (Grievance and Dispute Procedures) Regulations 2006, as amended, was wrong.


- (a) For the purposes of the Public Service (Grievance and Dispute Procedures) Regulations 2006, as amended, the "employer" is the PSC or the CEO of PSC.
- (b) The proposal by the Appellant dated 8 January 2014 concerned the 5% COLA and Cabinet Decision No. 1135 of 20 December 2013. It was not to do with a decision of the PSC or the CEO of PSC.

- (c) The Appellant's notice of an employment dispute dated 17 January 2014 related to the same subject.
- (d) The provisions of the Public Service (Grievance and Dispute Procedures) Regulations 2006, as amended, requires that an employment dispute may only be initiated if the subject relates to a decision of the employer [PSC or the CEO of PSC].
- (e) The purported dispute initiated by the Appellant on 17 January 2014 was not an "employment dispute" in terms of the Public Service (Grievance and Dispute Procedures) Regulations 2006, as amended. The "employment dispute" procedures set out in the Regulations did not apply.
- (f) This ground of appeal fails.

Order of the Tribunal

14. Under Regulation 22 of the Public Service (Grievance and Dispute Procedures) Regulations 2006, as amended, this Tribunal may –
- (a) maintain the status quo;
 - (b) make appropriate recommendations concerning future behaviour or actions of the parties; or
 - (c) give any other appropriate remedy.
15. The tribunal makes the following orders:
- (a) The appeal is dismissed;
 - (b) Costs be awarded to the Respondent.

'Aisea H Taumoepeau



Lady 'Eseta Fusitu'a



Timote Katoanga