



Government of Tonga

# Public Service Tribunal

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PST Appeal No. 1 of 2013

Dr. Sione Vailala Matoto

**Appellant**

Public Service Commission

**Respondent**

## PUBLIC SERVICE TRIBUNAL:

Lord Tupou, KC

**Acting Chairman**

Lady 'Eseta Fusitu'a

**Member**

Mr. Timote Katoanga

**Member**

## REPRESENTATION:

**Appellant**

Mrs. 'Alisi Taumoepeau, SC

**Respondent**

Solicitor General, Attorney General's Office

Ms. Falemei Fale, Deputy Secretary,  
Public Service Commission

**Date of Hearing:**

06 November 2014

**Date of Ruling:**

12 November 2014

### ORDER

1. This is an appeal by the Appellant against a decision by the Respondent on 11 February 2013 (*PSC Decision No. 86*) terminating his contract of employment as Chief Executive Officer for the Ministry of Agriculture & Food, Forests & Fisheries with effect from 1 March 2013. The decision stated that the contract ended on 16 November 2012 and extended from 17 November 2012 to 28 February 2013, then terminated with effect from 1 March 2013. The decision also granted 3 months' salary in lieu of notice plus other entitlements for earned leave under the contract and claims for retirement benefits from the Retirement Fund Board.
2. The appeal is based on an alleged breach of contract by the Respondent in failing to carry out a performance review of the Appellant before terminating the contract and failing to provide reasons for the termination of the contract thereby denying procedural fairness to the Appellant.
3. The Respondent denies any breach of contract saying that the contract had ended its term on 16 November 2012 and there was no question of denial of procedural fairness or the giving of reason for the simple reason that the terms of the contract had ended. The contract had run its full 2 years term ending on 16 November 2012.
4. The Contract of Employment (*contract*) was entered into by the Appellant and the Respondent with effect from 16 November 2012. It is noted that for some reason not revealed in the evidence, the contract was not signed until 18 February 2011. Paragraph 1 of the contract state-

*"The term of appointment of this contract is for a period of 2 years, with an option exercisable by the Commission subject to satisfactory performance of the Appointee and the needs of the Ministry, to extend for a further 2 year period through mutual agreement."*

5. Paragraph 23 of the contract deals with the performance review of the Appointee based on the four principal goals of the Chief Executive Performance Management System set out in the paragraph:

“

- *Effective delivery of statutory functions;*
- *Prudent planning and administration of Ministry's resources;*
- *Sound staff development and performance management to ensure Ministry's service delivery standards achieved; and*
- *Performance objectives aligned to responsibilities outlined in the Public Service Act and Ministry's mandate.”*

Paragraph 23.1 goes on to say –

*“The Commission, in consultation with the responsible Minister, shall carry out a formal review of the performance of the Appointee having regard to the duties and responsibilities set out in the Appointee's Job Description, or Schedule B.”*

The Tribunal was not provided with the Appointee's Job description and Schedule B only provides the Position Title, who to report to and the name of the Ministry.

Paragraph 23.2 state-

*“The Appointee will be subject to an annual performance review as set out in the Performance Agreement, or Schedule C.”*

The Tribunal was not provided with the Performance Agreement and Schedule C is blank.

Paragraph 23.3 require the Appointee to observe the performance monitoring and reporting procedures set out in the Performance Agreement, but as noted above no performance Agreement was produced in evidence and it would appear that there was no such agreement made when the contract was made or even during the term of the contract. The sub-paragraph goes on to say that a new performance agreement will be entered at the beginning of each financial year observing the procedure set out by the Commission.



Paragraph 23.4 state that-

*"The Appointee will observe the Performance Review Process as set out in Schedule D."*

Schedule D set out key annual dates, aligned to budget timeline that activity should be carried out and who is responsible. The first activity in July, is the assessment of prior Financial Year performance against agreement and/or Ministry Annual Management Plan/Budget, and the person responsible for providing this is the CEO (*Appellant*). This is an important step which brings into play the other matters that have to be done in the year.

6. It appears to be accepted by both parties that there was no performance agreement in place when the agreement of 16 November 2010 was signed. Indeed, no performance review was carried out for the first year of the contract 2010/2011. For the second year it appears that the Appellant did not have a performance agreement in place (*refer page 18 of Respondent's documents*). For ease of reference the Respondent's documents and page numbers will be used unless otherwise stated.
7. Reference should also be made here to paragraph 3 of the contract that provide a timeline before the contract expires, that certain things must be done. In 3.1 the Commission shall before October 2012, (*6 months before the contract expires*), if it wishes to renew the contract, shall discuss the renewal with the Appointee. In 3.2 the Commission shall by December 2012 (*4 months before the contract expires*), advise the Appointee in writing whether or not his contract will be renewed. In 3.3, if the contract is to be renewed, a new contract shall be prepared and signed by February 2013 (*1 month before the contract expires*). There is an obvious conflict between the dates and timeline set out in paragraph 3 having the expiry date as March 2013 and the statement at the beginning of the contract that it entered into effect on 16 November 2010 and the term in paragraph 1 is for a period of 2 years, making the expiry date the bi-annual anniversary of the contract, namely 16 November 2012.

8. It is important at this stage to put together the events, as revealed from the evidence that eventually led to the decision made by the Respondent on 11 February 2013 to terminate the contract on 1 March 2013.
9. It appears that there were discussions between the Appellant and the Chairperson of the Respondent sometime in August 2012 and possibly even prior, with regard to what are required to enable a performance review to be made as required by the contract. The first indication we have is the email date 27 August 2012 from the Appellant to the Chairperson (*page 9*) saying that since the last time they discussed the work to be done to complete his assessment, he was waiting for the specifics required. A month later, in a letter dated 26 September 2012 to the Appellant (*page 10*), the Chairperson gave details of what are required and the need for the Appellant to provide a self-assessment which the Respondent will review to determine whether there has been satisfactory performance to allow a renewal of the contract for another 2 years. The Attorney General's office and Ministry of Finance will also be requested to give their assessments. It is important to note here that in giving the timeline for the performance review process the Chairperson says that the Appellant *"will be given an opportunity to respond to the feedback and assessment of the Public Service Commission"* and that this discussion is expected to be held by the end of October (*page 11*) providing the self-assessment by the Appellant and the response from the relevant agencies are received by 15 October.
10. On 8 October 2012 (*page 13*) the Chairperson sent the Appellant a template of what is required for the self-assessment. On 7 November 2012, the Chairperson emailed the Appellant (*page 14*) thanking for the report and template of self-assessment saying that it was fine but one issue was missing, namely the actual Objectives.
11. In his affidavit made on 3 July 2013 in support of the appeal, the Appellant says in paragraph 17 that on 13 November 2012 (*page 32*) he met the Chairperson in her office, after requesting a face to face meeting, to discuss the Performance Review. *"She said she received the AMP document*



*emailed and she confirmed that what was provided was sufficient for the Commission's review and she will inform me of the outcome when it is done.*" This presumably is the self-assessment required under Schedule D of the contract.

12. In a letter dated 7 December 2012 from the Solicitor General to the Chairperson (*page 15*), he concludes that his office has no serious concerns regarding the delivery of statutory functions by the Appellant.
13. In an email to the Chairperson dated 30 January 2013 (*page 17*), the Solicitor General attached a restructured advice which is included in the summary in pages 18 and 19. He says that the contract is for 2 years only, that technically the parties have effectively agreed to extend the contract beyond 16 November 2012 to await the outcome of the performance review of the Appellant and the exigencies of the Ministry. He also made certain suggestions to regularize the de facto extension of the contract beyond 16 November 2012.
14. We note that in the summary in pages 18 and 19 referred to in the previous paragraph, that the review of the performance of the Appellant has taken place and there are a few things the Commission is not overly happy with, at the same time recognizing that the need of different skills for the CEO requiring less technical but more administrator skills given their oversight of both fisheries and agriculture, to ensure that both core functions are managed properly. We also see the advice given by the Solicitor General who as part of regularizing the informal extension of the contract beyond the ending date of 16 November 2012, suggested that the Appellant be informed that his performance evaluation was not satisfactory, and that the Ministry no longer requires his services.
15. Paragraph 32 of the Second Submissions of Counsel for the Respondent (*page 84*) describes the various meetings, particularly a meeting of the Respondent on 28 January 2013 described in sub-paragraph (11) showing the concern of the Respondent over the performance of the Appellant in that-

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- (a) The Appellant was unable to sufficiently supervise the Agriculture and Fisheries Departments conjointly, and so one of the Departments was underperforming;*
- (b) The number of fisheries prosecutions were noted;*
- (c) There was concern about the performance of the Ministry against the corporate plan;*
- (d) There were also concerns about human resources deficiencies, based on submissions to the Respondent;*
- (e) There was concern about the amount of overseas travel taken by the Appellant. “*

The Solicitor General's advice was then given that the Appellant be informed that after the review by the respondent, his performance was not satisfactory and that his services were no longer required.

16. The Chairperson held meetings with the Appellant on 12 and 15 February 2013 and a summary of what was discussed appears in pages 21 and 22 of the Respondent's documents. We note on the Background information it stated that *“after deliberation on the information at hand (in particular the legal advice from Crown Law) the Commission resolved the following-*

- That the end contract date of 16 November 2012 is accepted (hence the performance review is discontinued);*
- That the contract be ended on 28 February 2012; and*
- Given the short period of notice, that 3 months pay in lieu of notice be paid.”*

A minute of the Respondent meeting is in page 96 and the action decided was for the Chairperson to consult the Minister and advise the Appellant of the Commission's decision, and the PSC office to issue a Commission decision after the Minister has been consulted.



This meeting resulted in the decision of the Respondent made on the same day, 11 February 2013, terminating the contract of the Appellant that has given rise to this appeal.

17. On 12 February 2013 the Chairperson had a meeting with the Appellant (*page 21*) and advised him of the PSC decision made the previous day. The Appellant was surprised at the outcome as he was of the understanding that the review would inform whether the contract be continued or not. The Appellant was informed that the decision was based on the legal advice received which was that the contract ended on 16 November 2012 and therefore did not finalize the performance review as it did not consider continuing the contract.

18. On 15 February 2013 a follow up meeting was held between the Chairperson and the Appellant at the request of the Appellant (*page 22*). The Appellant was again advised that-

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- *The commission did commence a performance review. However legal advice clarified that the contract ended on 16 November 2012.*
- *The Commission accepted the legal advice and therefore decided not to finalize the review as the contract was not being extended.*
- *The decision of the Commission was therefore, to regularize the period worked past the 16 November 2012 and end the contract thereafter with salary paid in lieu of notice.”*

The Appellant accepted the explanation and was informed that the post would be advertised and that he was free to apply.

19. The post for the CEO was advertised (*page 23*) and closing date for application was 13 May 2013. The applicants were shortlisted to five



including the Appellant. They were interviewed by an independent Assessment Panel who selected Mrs. Losaline Ma'asi for the post.

20. On 19 April 2013 Counsel for the Appellant wrote to the Secretariat seeking an extension of time for the Appeal of 14 days from the date of the letter indicating that the Appeal be filed by 03 May 2013.
21. On 30 April 2013 the Secretariat acknowledged receipt saying that the application be deferred until the appointment of the new chairman.
22. On 27 May 2013 the Secretariat again wrote to the Counsel for the Appellant requesting more information regarding the application and the decision from which the Appeal was made.
23. On 29 May 2013 the Counsel for the Appellant responded giving the PSC decision of the Respondent on 11 February 2013.
24. On 19 June 2013 the Secretariat advised the Appellant of the new Chairman and approved the extension for the Appeal for 14 days to be filed by 03 July 2013.
25. On 3 July 2013 Counsel for the Appellant lodged the appeal against the decision of the Respondent made on 11 February 2013 terminating the contract of the Appellant (page 26) for breach of contract and denial of procedural fairness.
26. The breach of contract that is alleged by the Appellant, is that the Respondent failed to carry out a performance review required by the contract, from which it could make the assessment whether the performance of the Appellant is satisfactory to allow the renewal of the contract. The performance review is alleged to be a fundamental part of the contract which the Respondent failed to carry out, before terminating the contract on 1 March 2013.

27. The second ground for appeal is that the Appellant was not given the reason for termination of his contract and therefore denied the right to be heard before a decision was made to terminate the contract.
28. In her response to the Respondent's submissions filed on 30 September 2014 Counsel for the Appellant pleaded another ground for appeal, namely, that the Respondent was in breach of the terms of Clause 27 of the Contract of Employment. This ground of appeal has been made well out of time and we consider it too late in the proceedings to allow it to be considered in this appeal.
29. For the Respondent, Counsel submitted that the contract had come to an end on 16 November 2012 based on the clear wording of the contract that it had a term of 2 years with effect from 16 November 2010. Under paragraph 1 of the contract, the Commission had an option to renew the contract for another 2 years subject to satisfactory performance of the Appellant and the needs of the Ministry. Even though other things were happening with regard to the performance review from August 2012 to February 2013, the Commission had not extended the contract before it expired on 16 November 2012. There was therefore no breach of contract as it had come to a natural end and there was no termination as such to attract reasons to be given and the right to be heard before deciding to terminate the contract.
30. The difficulty with the expiry date of 16 November 2012 is that the contract itself states a different expiry date of 1 March 2013 in clause 3. Counsel for the Respondent in his Second Submissions in paragraph 9 that *"Clause 3 provides the process and timeline for the Respondent to exercise the option to renew the Appellant's contract. Such option for renewal was not exercised before the end of the 2 year period, the employment contract was therefore deemed to have expired on 16 November 2012."* In the Respondent's Third Submissions by a different counsel, he says that the dates in clause 3 were typing errors. However, the counsel for the Respondent withdrew this statement during the Hearing and stated that the mistake was due to the delay in signing the contract as the dates in



clause 3 were worked out from the date of when the contract was signed by both parties (18 February 2011).

31. Counsel for the Appellant in her response to the Respondents submissions says that *"Clause 3 is part of a process for stipulating a procedure for performance review which is a fundamental condition of the contract."* She goes on to say that Clause 3 should be interpreted by its intention, which is that 4 months before the contract should expire, the Commission shall advise the Appointee in writing whether or not his contract will be renewed.
32. In fact, because of delays in lodging his appeal, the lack of proper documentations in the Schedules to the Contract, delay in the Appellant lodging his self-assessment, and delays in reviewing the performance of the Appellant, the performance review by the Respondent was not completed before 16 November 2012. The contract continued on an informal basis principally for the completion of the performance review. In fact, as we see from the minute of the meeting of the Respondent of 28 January 2013 (page 95), there was dissatisfaction with the performance of the Appellant. There are other instances shown in previous paragraphs of this Order where the performance of the Appellant was questioned.
33. On 11 February 2013 the Respondent made the decision to terminate the contract of the Appellant on 1 March 2013 on the basis that the term of the contract had ended on 16 November 2012, and to discontinue the performance review as it was no longer required.
34. One of the principal functions of the Respondent set out in *section 6 of the Public Service (Amendment) Act 2010* is paragraph (s) to *"assess or undertake, in consultation with the relevant Minister, an annual performance review of the Chief Executive Officers."* This complements clause 23 of the contract regarding performance review. The Respondent failed to carry this out because it deemed the contract ended on 16 November 2012.

## FINDINGS

35. This appeal is made under *section 21C of the Public Service (Amendment) Act 2010* by the Appellant who is dissatisfied with the decision of the Respondent. Subsection (2)(b) requires the appeal to be filed with the Secretariat of the Tribunal within 14 days after the person making the appeal has been served with written notice of the Commission's decision. The Commission's written notice of its decision was given to the Appellant on 28 February 2013, even though he was informed verbally of the terms of the decision on 12 February 2013 by the Chairperson. The appeal should have been lodged by 15 March 2013 at the latest.
36. The appeal was lodged on 3 July 2013, almost 4 months after the legal time allowed. In the meantime the CEO post had been advertised, the Appellant was one of the applicants, and an appointment has been made to the post, and the new CEO has held and performed her duties under this post for over a year now. If the Appellant had lodged his appeal within the legal time limit and was successful, other consequences could have resulted. There is very good reason for the 14 day time limit for filing an appeal for the proper and efficient functioning of the public service. We recommend that this time limit be more strongly adhered to in future.
37. The contract was for a term of 2 years beginning 16 November 2010 with an option to the Respondent to extend for a further 2 years depending on satisfactory performance of the Appointee and the needs of the Ministry. This clearly puts the expiry date of the 2 year contract on 16 November 2012. However, paragraph 3 of the contract speaks of other expiry dates ending on 1 March 2013 and the parties continued the employment beyond that date.



38. To assess the performance of the Appellant, the contract includes a process in paragraph 23 for a performance review to take place. Such a review is also required under *section 6(s) of the Public Service (Amendment) Act 2010*.
39. The performance review is started with a self-assessment by the Appointee (*Appellant*). This was started in August 2012 and by 13 November 2013, was completed as far as the Appellant was concerned as he had given the information required for the review and was told by the Chairperson that what was provided was sufficient for the review and she will inform him of the outcome (*page 32 Appellant's affidavit paragraph 17*). It was then for the Respondent to perform the review to assess whether there has been satisfactory performance by the Appellant and if so, it still had the option to renew the contract or not.
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 both 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.

42. We hold that the Respondent has breached the contract in not carrying out the performance review required by the contract and by *section 6(s) of the Public Service (Amendment) Act 2010*.
43. We also find that the long delay in filing the appeal allowed the CEO post to be advertised, the Appellant to apply and interviewed with 4 other applicants, and the appointment to the post of the successful applicant. It would not be reasonable or just or indeed within our jurisdiction to upset the appointment that has been made. It is not known what the Respondent would have decided if the assessment of the performance of the Appellant was completed. We cannot say that the Respondent would exercise its option to renew the contract or not. An assessment, however, had to be done as required by the contract and the law.
44. The Appellant is entitled to be compensated for loss that has resulted because of the breach of contract by the respondent, bearing in mind all that has happened in this case. The circumstances of this case, including the lateness of the appeal made after all the formalities including advertisement and the application by the Appellant for the same position, interview by an independent body resulting in the appointment of another person, puts it beyond reasonableness and justice to order the renewal of the contract of the Appellant. The best that can be done is to compensate the Appellant in the manner stated in the contract following a valid termination of the contract without any fault of the Appellant.



**ORDER**

45. The following orders are made:

- (i) Appeal is allowed
- (ii) That the decision No. 86 of the Respondent made on 11 February 2013 is varied in the manner herein set out
- (iii) That the Appellant be paid the equivalent of three (3) months' salary in lieu of period of notice.
- (iv) That the Appellant be paid the equivalent of his salary for any period of earned leave or sick leave days in accordance with Clause 7.4 and 8.2 of his contract.
- (v) That the Appellant be given any leaving service benefits from the Retirement Fund Board that are due to him.
- (vi) That the Appellant be paid a gratuity of 40% of his per annum base salary earned during the final year of contract in accordance with Clause 15.1 of his contract.
- (vii) That costs of the Appellant in this appeal be paid by the Respondent to be taxed if not agreed.

DATED the 12<sup>th</sup> day of November

2014



Lord Tupou, KC  
Acting Chairman



Lady 'Eseta Fusitu'a  
Member



Timote Katoanga  
Member