

IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

CV 49 of 2019

BETWEEN:

PUBLIC SERVICE COMMISSION

Applicant

-and-

PUBLIC SERVICE TRIBUNAL

First Respondent

EILEEN FONUA

Second Respondent

EX PARTE APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL
REVIEW

BEFORE: LORD CHIEF JUSTICE WHITTEN
To: ✓ Mr S. Sisifa, counsel for the Applicant
The First Respondent
The Second Respondent
Date of application: 18 September 2019
Date of decision: 17 October 2019

RULING

Introduction

1. By ex parte application dated and filed on 18 September 2019, the applicant (the "*Commission*") seeks leave to apply for judicial review of the following decision by the first respondent (the "*Tribunal*") made on 18 June 2019:

"The PSC Decision No. 567 of 17 November 2017 is set aside and replaced by the following:

That Mrs Eileen Elizabeth Fonua, be reappointed to the position of Principal Fisheries officer, Ministry of Fisheries and that she be paid at \$32,843 of Band I with a salary range of \$30,240 to \$45,360 with effect from the date of assumption of duty."

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2. The application is supported by an affidavit of Mr Simone Sefanaia, Acting Chairman of the Commission, sworn 18 September 2019.

Order 39

3. Order 39 of the Supreme Court Rules provides, relevantly:

O.39 Rule 1. When remedy available

This order applies to any action against an inferior Court, tribunal or public body (including an individual charged with public duties) in which the relief claimed includes an order of mandamus, prohibition or certiorari, or a declaration or injunction (in this order referred to as "judicial review").

O.39 Rule 2. Leave of Court required

(1) No application shall be made for judicial review unless the leave of the Court has been obtained in accordance with this rule.

(2) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending that period.

(3) An application for leave shall be made ex parte by filing:

(a) an application notice which is to set out concisely the relief claimed and the grounds therefore;

(b) a copy of the proposed writ and statement of claim; and

(c) an affidavit verifying the facts relied on.

O.39 Rule 3. Court's powers

(1) The Court may grant the application without a hearing, but shall not refuse it without hearing the applicant.

(2) The Court shall not grant leave unless satisfied that the applicant has a sufficient interest in the matter to which the application relates.

Relevant alleged facts

4. From the supporting affidavit and proposed Statement of Claim, the application is based on the following alleged facts.
5. The second defendant (*Mrs Fonua*) was first appointed to the Public Service on 1 February 1997 as a trained uncertified teacher in the Ministry of Education and Training.

6. She resigned from the Public Service on 28 September 2010.
7. From September 2012 to December 2014, she was employed as a Project Coordinator at the Ministry of Lands, Environment, Climate Change and Natural Resources.
8. From January 2015 to December 2017, she worked for the Ministry of Energy, Information, Disaster Management, Environment, Climate Change and Communications (MEIDECC) as a National Coordinator in a project called Management of Marine and Coastal Biodiversity.
9. On 17 November 2017, pursuant to PSC decision number 567, she was reappointed to the Public Service in the position of Principal Fisheries Officer, at the Ministry of Fisheries. The position was within Band I which provided a salary range of \$30,240 to \$45,360. Her salary was set at \$30,240 being the minimum point of the Band I range.

Commission's determination of Mrs Fonua's salary

10. The Commission's determination of Mrs Fonua's salary at the minimum entry point was based on the following:
 - (a) her educational background, experience and qualities;
 - (b) Instruction 5A.5(a) of the Public Service Policy Instructions 2010;
 - (c) while Mrs Fonua met the minimum requirements¹ for the position, she did not, it is alleged, possess any of the "Desirable" qualities or experience, and therefore was ineligible for a higher entry salary;
 - (d) as her exit salary was \$28,987, her reemployment in a higher band meant that her pay was to be calculated under the normal rules for a starting pay which is the minimum of the appropriate salary scale;
 - (e) the calculations made to the entry point for any reemployed employee in the public service are, the Commission alleges, made from the base salary scale

¹ Paragraph 12 of the proposed Statement of Claim alleges she did not meet the minimum requirements, whereas paragraph 17 of the supporting affidavit deposes that she did. I assume the former is a typographical error and that the latter statement is correct.

and not the Total Remuneration Package (TRP) referred to in the Remuneration Authority Report of 1 July 2016 which is calculated as the basic salary plus 10% superannuation, and which would result in a figure here of \$31,886.

Mrs Fonua's appeal

11. Mrs Fonua appealed the Commission's decision on her salary to the Tribunal² on the grounds that:
- (a) her starting salary should have been \$37,480, which was equivalent to her salary under her contract of employment with the Civil Society Forum of Tonga (within the range of Band I);
 - (b) the Commission should have taken into account that she had a degree with at least five years of relevant work experience at senior management level in government which was consistent with one of the requirements for the position of Principal Fisheries Officer; and
 - (c) her years of work experience in government, and private sector should have been taken into account, not as a minimum requirement for the position, but as a determining factor for a higher salary point of \$37,480.

The Tribunal's decision

12. In its decision dated 18 June 2019,³ the Tribunal found, relevantly and in summary:
- (a) it upheld the Commission's decision that Mrs Fonau's 15 years teaching experience was not relevant to the position of Principal Fisheries Officer;
 - (b) her work experience as Project Coordinator was already factored into her attaining the minimum requirement and was not to be taken into account again for extra points in salary;
 - (c) in 2012, she exited the public service with a salary at \$28,987;

² As provided by s.21C of the *Public Service Act*.

³ PST Appeal No. 4 of 2018 – Ex. 6 to the supporting affidavit.

- (d) according to the Remuneration Authority Report of 1 July 2016, the revised Total Remuneration Package for that salary was therefore \$31,886;
- (e) her revised old scale (when she exited in 2012) overlapped with the scale of her new position;
- (f) therefore, Instruction 5A.5(c)⁴ applied upon her reappointment; and
- (g) Mrs Fonua's base salary, or starting point, should be placed on the next nearest point which was \$32,843 (using 3% as the base variance).

Grounds alleged for review

13. The Commission alleges that the Tribunal's method of calculating the appropriate salary point was incorrect. It says that the Tribunal's use of the TRP revised salary point of \$31,886 has led to the incorrect application and interpretation of Instruction 5A.5(c). It says further⁵ that Mrs Fonua was "reemployed in her old scale", and therefore according to Instruction 5A.5(c), the correct base salary was \$28,987 and not \$32,843.
14. I pause here to note that at paragraph 19(ii) of the proposed Statement of Claim, as recited by the Tribunal in its reasons for decision at paragraph 44(ii), the Commission stated that "*Mrs Fonua was re-employed in a higher band, and accordingly, the pay should be calculated under the normal rules for starting pay, i.e. at the minimum of the appropriate salary scale*". It is not immediately clear from the material before me whether the statements "re-employed in her old scale" and "re-employed in a higher band" are inconsistent.
15. It further alleges that the Tribunal's application of the incorrect method will have financial implications in relation to the calculation of base salary for employees of the public service as a whole.
16. The Commission seeks a declaration that the Tribunal's decision was unlawful and therefore invalid and an order setting the decision aside, on the grounds that:

⁴ Compare (a) applied by the Commission.

⁵ Paragraph 24 of the proposed Statement of Claim.

- (a) the Tribunal failed to take into account that Mrs Fonua was re-employed in her old scale as per Instruction 5A.5(c) and that therefore the correct base salary was \$28,987;
- (b) the Tribunal took into account an irrelevant consideration in that the method it used based on the TRP revised salary point of \$31,886 led it to an incorrect application and interpretation of Instruction 5A.5(c);
- (c) the Tribunal's decision that Mrs Fonua was re-employed in her old scale thereby purportedly engaging Instruction 5A.5(c) to produce an entry salary point of \$31,886, was based on a mistake of fact; and
- (d) the Tribunal's decision was in all the circumstances so unreasonable that no reasonable Tribunal would make it, that it was flawed and therefore unlawful.

The Act, Policy and Instructions

17. As Paulsen LCJ observed in *Public Service Association (PSA) v Government of Tonga*, supra:

“[29] Section 6(g) of the Public Service Act (as amended in 2010) provides that it is a principal function of the Public Service Commission to:

determine the respective designations and other terms and conditions of employment, including the remuneration, for employment for employees subject to the approval of Cabinet.

[30] The Public Service Act does not set out any specific process or procedures to be followed by the Public Service Commission in assessing public service employees' remuneration or terms of employment or by Cabinet in deciding whether to grant its approval to them. There is however the Public Service Policy 2010, made pursuant to section 23 of the Public Service Act by the Public Service Commission with the approval of Cabinet, which provides some guidance on what the Public Service Commission must consider... ”

18. His Honour went on to refer to certain of the policies in place at the time of that decision. Here, the Tribunal' decision was made on 18 June 2019 on appeal from the Commission's decision dated 17 November 2017. There have been a number of amendments to the Policy and the Public Service Policy Instructions. I have not been able to source the Policy or the amendments to either it or the

Instructions as at November 2017.⁶ I do not know if anything turns on them for the present application. I have been able to view the Public Service Policy and Instructions 2010 as amended as at 10 December 2018, which provide, relevantly:

- (a) the purpose of the Instructions is to set out the procedures for implementing the policies stated in the Public Service Policy 2010 [3];
- (b) the Instructions apply to all permanent employees, daily paid labourers, casual employees and contract employees, of the Public Service as defined in the Public Service Act 2002 [4];
- (c) Instructions issued by the Commission shall be followed unless specific approval from the Commission has been obtained to vary the Instructions [6]; and
- (d) the Commission may vary Instructions in ways not inconsistent with the Act, Regulations or Policies [7].

19. Part V of the instructions is entitled “Remuneration and Allowances”. Within that Part, Instruction 5A is entitled “Salary, Wages and Related Allowances”. Instruction 5A.5, which is at the heart of this application provides:

5A.5 Salary on re-employment

A re-employed employee shall normally be paid at the rate of pay he was receiving when he exited the service except –

(a) if the employee is re-employed in a higher band, his pay shall be calculated under the normal rules for starting pay, i.e. at the minimum of the appropriate salary scale;

(b) if the employee is re-employed in a lower band, he shall re-enter at the point closest to that at which he left;

(c) if the employee is re-employed in his old scale, he shall re-enter the band equivalent to that of his old scale at the point at which he left it, and be paid at the new rate for that point of the scale;

(d) if the employee was previously dismissed his starting pay shall be at the minimum point of the appropriate salary scale.

⁶ The amendments to the Policy and the Instructions are listed on the PSC website - <https://psc.gov.to/legislations-policies/> - but the content of each amendment document was not available to download as at the date of this decision.

Consideration

20. Judicial review allows the court to exercise a supervisory role over, inter alia, public bodies and tribunals: *Touliki Trading Ltd v Fakafanua* [1995] Tonga LR 8.
21. The grounds upon which administrative action is subject to judicial review have been conveniently classified as ‘illegality’, ‘irrationality’ and ‘procedural impropriety’: *Pekipaki v Fifita* [2018] TOCA 19 at [29].⁷
22. Sufficient interest is the first and foremost consideration in relation to an application for leave to apply for judicial review, which is a broad flexible concept. The Court must be satisfied that there is an arguable case for review. The burden upon the applicant in that regard is not onerous. No in-depth analysis by the court is required. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, grant leave to apply for that relief: *Flyniu Airlines Ltd v Faletau* [2004] TOLawRp 72; [2006] Tonga LR 1; *Public Service Association (PSA) v Government of Tonga* [2016] TOSC 34 at [9].⁸
23. A decision maker must understand correctly the law that regulates his decision-making power and must give effect to it”: *Pekipaki v Fifita*, supra.
24. Material mistake as to an established fact is an accepted ground of review. The decision-maker, in making its evaluation and drawing its conclusions, must proceed upon a correct interpretation of relevant law and must have taken account of relevant considerations and ignored irrelevant considerations. To fail in any of these respects is an error of law. Where, for instance, the information the decision-maker acted upon was clearly incorrect, or where there is a ‘misunderstanding or ignorance’ of an established and relevant fact, the decision may be susceptible to being set aside when those conclusions are so clearly insupportable as to amount

⁷ Referring to Lord Diplock in *Council of Civil Service Unions v The Minister for the Civil Service* [1985] AC 374, 410.

⁸ Citing *Moala v Public Service Commission* [2012] TOCA 14 and *Inland Revenue Commissioner v National Federation of Self-Employed and Small Businesses Limited* [1981] 2 All ER 93, 106.

to an error of law: *Tafa v Viau* [2006] Tonga LR 125 at [62], *Kautoke v Public Service Commission* [2019] TOCA 9 at [43], [44].

25. I accept that the determination of the issues raised by the Commission are likely to have wide-reaching implications for all employees within the Public Service, particularly those re-entering it.
26. I am satisfied on the material before me that the Applicant for leave has presented an arguable case for review in relation to:
 - (a) whether the Tribunal failed to take into account that Mrs Fonua was re-employed in her old scale;
 - (b) alternatively, whether the Tribunal proceeded on a material mistake of fact in relation to Mrs Fonua being re-employed in her old scale;
 - (c) in either event, whether the Tribunal incorrectly interpreted and applied Instruction 5A.5, including as to whether subparagraph (a) or (c) ought to have been applied in Mrs Fonua's case;
 - (d) further, whether the Tribunal;
 - (i) took into account an irrelevant consideration;
 - (ii) alternatively, proceeded on a mistake as to law or fact,

in applying the Total Remuneration Package referred to in the Remuneration Authority Report of 1 July 2016 to calculate Mrs Fonua's starting salary point; and
 - (e) whether the Tribunal's calculation and determination that Mrs Fonua be paid at the salary rate of \$32,843 was:
 - (i) infected by the said errors of law;
 - (ii) alternatively, so unreasonable that no reasonable Tribunal could have reached that decision.

Orders

27. The Applicant is granted leave to apply for judicial review in respect of the matters referred to in paragraph 26 above.
28. The Applicant/Plaintiff is to file and serve the following documents within 14 days hereof:
 - (a) the ex-parte application for leave;
 - (b) the affidavit in support;
 - (c) the Writ;
 - (d) the Statement of Claim; and
 - (e) this Ruling.
29. Costs of this application shall be costs in the cause.



NUKU'ALOFA
17 October 2019

A handwritten signature in blue ink, appearing to read "M.H. Whitten", with a long horizontal flourish extending to the right.

M.H. Whitten QC
LORD CHIEF JUSTICE