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

CV 49 of 2019

BETWEEN:

PUBLIC SERVICE COMMISSION

Plaintiff

-and-

PUBLIC SERVICE TRIBUNAL

First Defendant

EILEEN FONUA

Second Defendant

Application for Judicial Review

JUDGMENT

BEFORE: LORD CHIEF JUSTICE WHITTEN

Counsel: ✓ Ms R. Kautoke of the Attorney General's Office for the Plaintiff
No appearance for the First Defendant
Mrs P. Tupou for the Second Defendant

Date of hearing: 24 July 2020

Date of judgment: 19 August 2020

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Introduction

1. In this proceeding, the Plaintiff ("**the Commission**") seeks judicial review of the First Defendant's ("**the Tribunal**") decision on 18 June 2019 in relation to the starting salary of the Second Defendant ("**Mrs Fonua**") upon her reemployment in the Public Service.
2. The proceeding raises issues of broad importance for the Tongan Public Service, in particular, the proper approach to determining the starting salary for persons who are re-employed in the Service.
3. The Tribunal did not participate in the proceeding and is taken therefore to be content to abide by the decision of the Court.

The statutory framework

4. In order to understand the background to the proceeding and the issues for determination, it is necessary to first set out the relevant provisions of the statutory framework.
5. As Paulsen LCJ observed in *Public Service Association (PSA) v Government of Tonga*, [2016] TOSC 34:

"[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..."

6. As the submissions and analyses below demonstrate, this proceeding has also required an attempted exposition of the relatively complex and, at times, uncertain, interrelationships between the various provisions, policies and instructions within the framework.

Public Service Act

7. The objects of the *Public Service Act* ("**the Act**") are defined as including the provision of a legal framework for the effective and efficient management and leadership of the Public Service and establishing the rights and obligations of Public Service employees.¹
8. The principles of the Public Service include the adoption of a merit based employment policy, making all decisions in a transparent and merit based manner and a fair system of review of decisions taken in respect of employees.²
9. Part II of the Act provides for the Public Service Commission. The Commission may set its own procedures.³ The Commission's principal functions include, relevantly, to ensure that the Public Service upholds the Public Service Principles, determine the respective designations and other terms and conditions, including remuneration, for employment for employees subject to the approval of Cabinet, and to promote, uphold and ensure adherence to the merit principle in the selection of persons as, and the promotion and transfer of, employees.⁴
10. A person who is dissatisfied with the Commission's determination of a dispute or disciplinary matter may appeal to the Public Service Tribunal.⁵ The Tribunal hears appeals from any decision by the Commission regarding an employee under the Act or any regulations made under the Act.⁶ The Tribunal may affirm,

¹ s.4B

² s.4C

³ s.5(8)

⁴ s.6(e), (g), (h).

⁵ s.21, 21C(1).

⁶ s.21A

vary, or set aside the Commission's decision.⁷ Its decisions must include its reasons and its findings on material questions of fact and reference to the evidence or other material on which those findings are based.⁸

11. Subject to the provisions of the Act, the Commission may, with the approval of Cabinet, publish in the Gazette a Public Service policy manual⁹ and issue Employment Instructions, not inconsistent with the Act, relating to the functions and powers of the Commission under the Act and the implementation of its policies.¹⁰

Public Service Policy and Manual

12. The current Public Service Policy ("***the Policy***") came into force in 2010. A separate instrument entitled Public Service Policy Manual (CAP 4.36.4) was revised in 2016 and mirrors the terms of the Policy itself. Section 1(2) provides that the Policy was to come into force on a date to be declared by the Commission. The footnote to that section provides "*No date known; Commission website purports to show numerous changes to this Manual.*"
13. In any event, Part V governs remuneration and allowances. The Principles of the Remuneration System¹¹ are said to include that remuneration shall be affordable to the Government, fair and appropriate within the national economy, job performance shall be linked with the pay of deserving employees, job evaluation shall be used to assess or re-assess the grade of any post, salary scales shall be reviewed formally at least once every three years, salary increments shall be used to give recognition to employees with a job performance that is outstanding or by the attainment of a substantive, high level, relevant qualification from a recognized tertiary institution or professional qualification.

⁷ s.21F(1)

⁸ s.21F(3)

⁹ s.23

¹⁰ s.23A

¹¹ Clause 37

14. The Policy repeats that the Commission shall issue Instructions on remuneration and allowances based on the above principles¹² and undertake a review of remuneration paid in the Public Service every three years.¹³

Public Service Policy Instructions 2010

15. The Public Service Policy Instructions ("***the Instructions***") came into force on the same date as the Policy.¹⁴ The purpose of the Instructions is to set out the procedures for implementing Public Service policies.¹⁵
16. Relevantly, Instruction 2 defines:
- (a) "band" as jobs of common nature/size grouped together for comparison purposes;
 - (b) "basic salary" as the annual basic amount paid to an individual in a band, not including any fixed bonuses or other cash benefits; and
 - (c) "total remuneration package" as the basic salary plus other benefits such as any performance pay, employer contributions to superannuation, motor vehicles, communication, housing, medical insurance, additional annual leave and any other entitlements.
17. The Instructions are to be followed unless specific approval to vary them has been obtained from the Commission.¹⁶ The Commission may vary the instructions in ways not inconsistent with the Act, Regulations or Policies.¹⁷
18. A banding model makes up the remuneration structure. All public service positions are to be remunerated in accordance with the banding model in which the job falls and level of performance of the job holder.¹⁸
19. Part V of the instructions is entitled "Remuneration and Allowances". Within that Part, Instruction 5A is entitled "Salary, Wages and Related Allowances". It

¹² Clause 38

¹³ Clause 39(1)

¹⁴ Instruction 1(2)

¹⁵ Instruction 3

¹⁶ Instruction 6

¹⁷ Instruction 7

¹⁸ Instruction 1A.5.2

provides, among other things, that the Commission, with the approval of Cabinet, is required to set scales of salary and wages for all classifications and bands.¹⁹

20. An employee taking up a new appointment or who has recently been promoted is to be paid at the minimum point of the salary scale of the post appointed to, except where the employee has qualifications and/or experience additional to the minimum requirements for the position. In that case, amounts of 3%, 6% or 9% of the minimum point of the relevant band may be granted on top of the minimum point of the relevant band or on top of the basic salary of the officer prior to being promoted.²⁰
21. Instruction 5A.5 is at the heart of this proceeding. It 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.

22. The instructions conclude that, effective 1 July 2016, all employees under the Act were to be migrated to the new Banding Salary Structure and be paid at the Salary Band and Salary range allocated and recommended by the Remuneration Authority.

¹⁹ Instruction 5A.2

²⁰ Instruction 5A.3

Remuneration Authority

23. The Remuneration Authority was established on 23 July 2010 by the *Remuneration Authority Act* (CAP.04.50). The Authority reports to the Hon. Minister for Finance and National Planning.
24. Section 13 describes the functions of the Authority as including:
- (a) to consider and make recommendations as to the remuneration and other monetary benefits of officers listed in the Schedule;²¹ and
 - (b) to carry out such other functions as may be conferred or imposed on it by this Act or any other enactment.
25. In carrying out its functions, the Authority may fix scales or ranges of remuneration, and may specify the manner in which such scales or ranges of remuneration are to be applied and may provide for remuneration to be adjusted on a specified basis against a specified index or such other adjustment mechanism as the Authority specifies.

Second Remuneration Authority Report 2016

26. On 1 July 2016, the Remuneration Authority issued an update to its second remuneration report of September 2015 ("***the Report***"). The Report was produced at the direction of Cabinet and approval of the Public Service Commission. It provided recommendations to the Commission and the Government of Tonga for the establishment of a new remuneration structure for all (then) 3,710 public servants. It included a job evaluation method for all positions, recommended salaries for each position, and the use of a performance management system to ensure that salary increases were linked to performance.
27. The Commission endorsed the updated recommendations on 1 July 2016 and Cabinet approved the recommendations on 8 July 2016. New employment

²¹ Which do not include members of the Public Service but rather positions such as the Attorney General, the Judiciary, Ministers, Nobles, etc.

contracts signed after the effective date of approval of the report were proposed to be subject to the report recommendations.

28. Once each position was evaluated and job-sized, the Authority set up a new structure with new bands (replacing the previous existing "levels"). The Authority then migrated the entire Public Service from the then remuneration structure (in use since the *Walker Report* in 1982) to the recommended new structure. The new structure was intended to 'better reflect the requirements and complexities of public service in the 21st century'.²² The recommendations were described as 'a work in progress' and 'just the beginning of a longer term process'. The new system was a significant change, which was expected to have 'transition risks and difficulties'.²³ The general policy recommendations included that the Authority would defer to the Commission if the practical implementation of the recommendations conflicted with any PSC policy. However, it was envisaged that the new proposed salary structure would 'not substantially affect the numerous and complex Public Service Commission Laws, Regulations and Policies'.²⁴
29. In this proceeding, it was common ground that the Report contained the operative bands and salary ranges for the purposes of the application of Instruction 5A.5.
30. The Authority reviewed each position in the Public Service, which was formerly ranked in a structure ranging from Level 1 down to Level 14. Each position was 'job sized'²⁵ and then placed into a new structure ranked by 19 bands ranging from band A down to band S.²⁶
31. Table 1 to the report set out the salary scale for each new band. Relevantly, the recommended salary range for positions in Band I was \$30,240 to \$45,360 and for Band K, the salary range was set at \$23,520 to \$35,280.

²² [13]

²³ [14]

²⁴ [118]

²⁵ A measurement of the 'the content and contribution of each position' by reference to the 'know-how' required to perform the job, problem solving involved with performing the job and the accountability process within which the job is performed.

²⁶ [31] and [32]

32. Table 11 set out the recommended remuneration for the Ministry of Education and Training. Relevantly, the remuneration for an Assistant Teacher Graduate (12) was recommended as:

Band	Position	2015/2016 Full Salary including 5% COLA	Current Benefits (Superannuation 10% / 20% for CEOs)	Current Total Remuneration Package (TRP)	Recommended Salary Range	Recommended Basic Salary	Recommended Benefits (Superannuation 10% / 20% for CEOs)	Recommended TRP ²⁷
K	Assistant Teacher Graduate (12)	\$28,987	\$2,899	\$31,886	\$25,320 - \$35,280	\$28,987	\$2,899	\$31,886

33. Table 13 set out the recommended remuneration for the Ministry of Fisheries. Relevantly, for the position of Principal Fisheries Officer, the recommended remuneration was:

Band	Position	2015/2016 Full Salary including 5% COLA	Current Benefits (Superannuation 10% / 20% for CEOs)	Current Total Remuneration Package (TRP)	Recommended Salary Range	Recommended Basic Salary	Recommended Benefits (Superannuation 10% / 20% for CEOs)	Recommended TRP
I	Principal Fisheries Officer	\$37,806	\$3,780	\$41,586	\$30,240 - \$45,360	\$37,806	\$3,781	\$41,587
I	Principal Fisheries Officer	\$33,736	\$3,373	\$37,109	\$30,240 - \$45,360	\$33,736	\$3,373	\$37,109

34. While the Report created salary ranges, with a minimum and maximum value, for each of the above positions (as with all 3,710 positions), it did not contain any explanation for how the 'Recommended Basic Salary' in each case was calculated as a figure within the respective salary ranges. Further, each of the positions above specified their respective full salary as at 2015/16 as the same value as the Recommended Basic Salary. However, there was no clear explanation within the Report for the recommended salary range having a minimum 'starting point' less than either the 2015/15 full salary or recommended basic salary amounts.

35. The only indication earlier in the report was that the majority of positions, representing 99% of the total wage bill, when moved into the new band (based on the job size evaluations) and new salary scale (based on all current relevant

²⁷ Total Remuneration Package

economic factors), were being paid a salary which was within the new salary scale. The Authority recommended that those positions continue at their current level of remuneration, which was why the vast majority of positions in the tables showed no change to salary.²⁸

Background

36. The only evidence filed in the proceeding was the affidavit of the Commission's Acting Chairman, Mr Simone Sefanaia, sworn 18 September 2019 ("***the Sefanaia affidavit***"), which provides the following background.
37. Mrs Fonua was first appointed to the Public Service on 1 February 1997 in the Ministry of Education and Training as a trained uncertified teacher.
38. She resigned from the Public Service on 28 September 2012.
39. From September 2012 to December 2014, she was employed as a Project Coordinator at the Ministry of Lands, Environment, Climate Change and Natural Resources.
40. 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 'Management of Marine and Coastal Biodiversity' project.
41. 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, as shown above, provided a salary range of \$30,240 to \$45,360 (plus superannuation of 10%).

Commission's determination of Mrs Fonua's salary

42. The Commission set Mrs Fonua's base salary at \$30,240 being the minimum point of the Band I range. That determination was based on the following:

²⁸ [53] and [54]

- (a) while Mrs Fonua's educational background, experience and qualities met the minimum requirements²⁹ for the position, she did not possess any of the "Desirable" qualities or experience, and therefore was ineligible for a higher entry salary;
- (b) her base exit salary was calculated as \$28,987, and not by reference to the Total Remuneration Package (TRP) referred to in the Remuneration Authority Report, which is calculated as the basic salary plus 10% superannuation, and which would result in a figure here of \$31,886; and
- (c) by Instruction 5A.5(a), her re-employment in a higher band meant that her pay was to be calculated 'under the normal rules for starting pay which is the minimum of the appropriate salary scale' which was \$30,240.

Mrs Fonua's appeal

43. Mrs Fonua appealed the Commission's decision to the Tribunal.³⁰ She sought a decision from the Tribunal that her basic starting salary be as recommended by the Report³¹ of \$37,806 'being the closest entry point' to her then current salary on entry and be set at the recommended TRP of \$41,587.
44. The grounds upon which Mrs Fonua relied were that the Commission's decision to grant her the minimum entry point of the relevant Band:
- (a) rigidly applied the relevant policy so as to exclude the merits of her case;
 - (b) failed to have regard to relevant matters; and
 - (c) was unreasonable having regard to her qualifications, experience and salary at time of re-entry into the public service.
45. Mrs Fonua contended that her starting salary should have been \$37,480, which was equivalent to her salary under her contract of employment with the Civil

²⁹ Paragraph 12 of the Statement of Claim alleges she did not meet the minimum requirements, whereas paragraph 17 of the Sefanaia affidavit deposes that she did. I assume the former is a typographical error and that the latter statement is correct.

³⁰ As provided by s.21C of the *Public Service Act*.

³¹ At page 74.

Society Forum of Tonga (within the range of Band I), and that the Commission should have taken into account:

- (a) 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
- (b) her years of work experience in government and the private sector, not as a minimum requirement for the position, but as a factor for a higher salary point of \$37,480.

The Tribunal's decision

46. The Tribunal conducted a hearing on 21 May 2019, in which the Solicitor General appeared for the Commission and Mrs Tupou appeared for Mrs Fonua.
47. On 18 June 2019, the Tribunal delivered its ruling.³² After setting out the background and history leading to the Commission's decision, including email exchanges between Mrs Fonua and various Commission personnel, the Tribunal summarised the submissions of the parties. Mrs Fonua's submissions were described as being 'in support of her grounds of appeal' and were not repeated. The Commission's submissions were summarised as:³³

“(i) With regard to the grounds (i) and (ii), the Appellant's salary rate determined at the minimum point of \$30,240 (Band I) was justified due to her meeting the minimum requirement for the position, but lacked desirable qualities required for the position which is the factor which determines higher salary rate at entry point.

(ii) Under Instruction 5A.5 of the Public Service Policy Instructions 2010, the Appellant was re-employed in a higher band, and accordingly, her pay shall be calculated under the normal rules for starting pay, i.e. at the minimum of the appropriate salary scale.

(iii) The entry salary point for other employees in the Ministry of Fisheries (as referred to by the Appellant) were determined in accordance with their distinct positions, and job descriptions, and therefore cannot be argued to be comparable to the determination of the Appellant's position salary rate.”

³² PST Appeal No. 4 of 2018 – Ex. 6 to the Sefanaia affidavit.

³³ At [44].

48. The Tribunal then presented its findings on each of the three grounds of appeal. At paragraphs 49 and 50 of the ruling, the Tribunal held:

“49. On 28 September 2012, the Appellant exited the public service with her salary at point \$28,987 while holding the position of Assistant Teacher Graduate. According to the Remuneration Authority Report of 1 July 2016, the revised Total Remuneration Package (TRP) for that salary point is \$31,886.

50. The Appellant’s revised old scale (when she exited in 2012) overlaps with the scale of her new position. Therefore, Instruction 5A.5(c) applies upon her re-appointment. That is, her base salary should be placed on the next nearest point, which is \$32,843 (using 3% as the base variance). That point in the salary scale (\$32,843) should be the Appellant’s starting point.”

49. The Tribunal concluded by deciding that:

“... 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.”

50. The Tribunal noted³⁴ as an ‘unusual feature of the case’, the absence of evidence before it of any offer and acceptance letter prior to Mrs Fonua’s appointment, which it described as a “critical step in the appointment process” because “it would have prevented (her) from making any claim if she had already accepted the terms and conditions of employment”. For that reason, the Tribunal considered that “the case was restricted to its own facts and cannot be used as a precedent for future cases”.³⁵

Leave to apply for judicial review

51. On 17 October 2019, the Commission was granted leave pursuant to Order 39 of the Supreme Court Rules to apply for judicial review of the Tribunal’s decision in respect of the following issues:

³⁴ [56]

³⁵ [57]

- (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 Public Service Policy 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 of 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.

Pleadings

Statement of Claim

52. The Statement of Claim traverses the above history to the matter and the relevant parts of the Tribunal's decision. The Commission then alleges that:

- (a) Mrs Fonua was re-employed in a higher band, and accordingly, her pay should be calculated under the normal rules for starting pay, i.e. at the minimum of the appropriate salary scale, which is \$30,240;³⁶
- (b) the Tribunal's method of calculating the appropriate salary point was incorrect;³⁷
- (c) 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);³⁸
- (d) 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';³⁹ and
- (e) 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.⁴⁰

53. For those reasons, the Commission alleges that the Tribunal's decision:

- (a) failed to take into account relevant considerations and took into account irrelevant considerations;
- (b) was based on mistakes of fact; and
- (c) was unreasonable (in the *Wednesbury* sense⁴¹),

and thereby seeks a declaration that the decision was unlawful and invalid and an order setting it aside, with costs.

Defence

54. Mrs Fonua's pleaded defence may be summarised, relevantly, as follows:

³⁶ [19(ii)]

³⁷ [22]

³⁸ [23]

³⁹ [24]

⁴⁰ 25]

⁴¹ That the decision was so unreasonable that no reasonable tribunal could have reached it: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229–30.

- (a) the Tribunal's decision was fair and reasonable pursuant to her specific circumstances and the applicable laws and regulations;
- (b) the Tribunal was correct to have equivalated her exiting salary of \$28,987 as \$31,886 in the current scheme; and
- (c) the Tribunal's decision that she be paid \$32,843 within Band I was lawful because the Tribunal took into account her teaching experience and other attributes.

Submissions

55. Written submissions were filed on behalf of the Commission and Mrs Fonua. As will be seen below, further and somewhat more vexing issues were ventilated during oral submissions at the hearing.

Commission

56. The Commission's written submissions may be summarised as follows:

- (a) Mrs Fonua was not re-employed in her old scale, therefore Instruction 5A.5(c), which was applied by the Tribunal, did not apply;
- (b) Mrs Fonua was re-employed at a higher band, therefore Instruction 5A.5(a) applied;
- (c) that instruction required her salary to be calculated as the minimum of the appropriate salary scale;
- (d) when equivalating Mrs Fonua's exiting salary in 2012 by reference to the Remuneration Authority's Report, the Tribunal should have used the base salary figure of \$28,987, as the Commission did, and not the total remuneration package figure of \$31,886, which included other benefits such as superannuation;
- (e) Mrs Fonua's revised base salary of \$28,987 did not fall within Band I which has a minimum of \$30,240;
- (f) therefore, Instruction 5A.5(a) applied; and

(g) the Tribunal's application of sub-instruction (c) was erroneous and an irrelevant consideration.

57. The same essential integers informed the Commission's further submissions that the Tribunal's decision so unreasonable that no reasonable tribunal could have reached it. Some criticism was also levelled at the Tribunal's lack of expertise and capacity in being able to 'follow through all the procedures set out under the Public Service Policy Instructions 2010 in determining the appropriate calculation of remuneration' for Mrs Fonua, which it contended, should be left to the Commission.

Mrs Fonua

58. In her written submissions, Mrs Tupou contended, in summary:

- (a) (Somewhat presciently) the scenarios provided by sub-instructions 5A.5(a), (b) and (c) are not clear in the sense that, if read literally, they can become confusing because in order to decide whether a person is re-employed at a higher or lower band, the deciding factor is that person's salary rate at point of exit and how that is accommodated in the new scheme of the Public Service.
- (b) The difference in analysis between the Commission and the Tribunal lies in their respective interpretations of the phrase "re-employed in her old scale". The Commission based its analysis on the literal exit point of \$28,987 and compared that to the lowest point in the salary range for her new Band I position of \$30,240, and therefore concluded that sub-instruction (a) applied, resulting in a salary of \$30,240. The Tribunal "*started at sub-instruction (c) and calculated (Mrs Fonua's) entry point by drawing the parallel equivalent of her old scale of \$28,987 to the new and current scheme being \$31,886 and decided that (Mrs Fonua) was in fact being re-employed at a lower minimum entry point of \$30,245 and found therefore that the applicable sub-instruction was(b)...*"⁴²

⁴² Paragraph 3(e).

- (c) The word “normally” in the chapeau to Instruction 5A.5 refers to the old scheme and that any re-employment must be calculated to align with the new scheme as the only fair and equitable way the new scheme and policy would have been intended.
- (d) The Tribunal was entitled to add the ‘3% variance’ to take Mrs Fonua’s salary ‘up to the closest point at which she left and/or as an added percentage to reflect its finding at paragraph 47 of its Ruling and the relevant authority appearing at the top of page 6 of the Ruling’.
- (e) The Tribunal was correct to find that the Commission’s application of the policy was rigid and ignored the merits of Mrs Fonua’s individual circumstances and aligned with s.4C(b) of the Public Service Act which requires the adoption of a merits based employment policy and Public Service Policy IB.1.2 which requires that all appointments and promotions be based on the merit principle.

Oral submissions during the hearing

- 59. After consideration and discussion of the parties’ written submissions, a number of other issues arose during the course of oral submissions at the hearing. The following is a summary of the more pertinent issues.
- 60. The use of the revised term and concept of ‘band’ in the Instructions and the Report is not readily reconcilable with the term or concept of ‘old scale’ used in Instruction 5A.5(c), because:
 - (a) a ‘band’, under the revised classification system, is a single letter denoting a group of positions within a certain salary range level;
 - (b) other terms such as ‘salary band’ are seemingly used interchangeably with ‘salary scale’;
 - (c) the term ‘scale’ also appears to be used interchangeably with ‘salary range’;
 - (d) as both involve a span of salary values from minimum to maximum amounts, neither can be compared with a single salary amount unless one

imports a rule of interpretation that, relevantly, an exiting salary amount is to be compared with the minimum salary within the new position (and band) salary range; and

- (e) in the present case, there was no evidence of what 'old scale' (or 'band' equivalent) Mrs Fonua exited from, but only her revised base salary of \$28,987.

61. The Commission's determination of Mrs Fonua's starting salary in her new position was stated to be based on Instruction 5A.5(a), but it in fact was not (and arguably could not be) a comparison of Mrs Fonua's exiting 'band' against her new appointment 'band' but only a comparison of her revised exiting base salary and the minimum starting salary within the range for her new position within Band I. That is, it did not compare bands but pa'anga; and, within the latter, it purported to compare a single amount with a range of amounts.
62. The Commission's criticism of the Tribunal's use of the TRP when equivalating Mrs Fonua's exit salary was not based on any specified requirement within the statutory framework including the Instructions. It was founded simply on the asserted basis that the Commission's practice was not to use the TRP when comparing exiting salaries with a range for new starting salaries.⁴³ Ms Kautoke sought to support that assertion by relying on s.6 of the Act which she described as the Commission's 'mandate' in relation to determining remuneration.
63. When faced with the difficulty of trying to compare the new band level for Mrs Fonua's new position with what her exiting position band may have been (if one in fact ever existed in 2012), both counsel (understandably) urged the court to divert its focus from a comparison between band levels in the Report for Mrs Fonua's exiting position and the new position, and more on her exit salary amount and the starting amount in the salary range for her new position. As will be seen below, that approach, as logical as it may have appeared, in fact compounded some of the problems encountered in interpreting and applying the two Instructions under consideration.

⁴³ Sefanaia affidavit at [21].

64. The 'normal rules for starting pay i.e. at the minimum of the appropriate salary scale' do not appear anywhere within the Act or the Policy but are only stated as a 'rule' within Instruction 5A.5(a) itself. If there be such a rule, neither the Instructions nor the Report explain how it is to be reconciled with the Remuneration Authority's 'Recommended Basic Salary' for each position, which in a number of Bands, including Band I, is an amount higher than the start of the range.

Consideration

65. 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. 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].⁴⁴
66. A decision maker must understand correctly the law that regulates his/her decision-making power and must give effect to it": *Pekipaki v Fifita*, supra. 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 those respects is an error of law: *Tafa v Viau* [2006] Tonga LR 125 at [62]; *Kautoke v Public Service Commission* [2019] TOCA 9 at [43], [44].
67. It is not the function of the Court to re-visit facts unless it can be properly contended that findings of fact lack probative evidence such that an error of law has occurred⁴⁵ or if it appears either that the tribunal has misunderstood the statutory language or that the tribunal has made a finding for which there is no evidence or which is inconsistent with the evidence and contradictory to it: *Butler v Removal Review Authority* [1998] NZAR 409 at 420-421 (HC).⁴⁶

⁴⁴ Referring to Lord Diplock in *Council of Civil Service Unions v The Minister for the Civil Service* [1985] AC 374, 410.

⁴⁵ *Edwards v Bairstow* [1956] AC 14

⁴⁶ Citing *Tiumalu v Removal Review Authority* (High Court, Auckland, HC 67/96, 2 October 1996, unreported) at page 7, adopting *Inland Revenue v Fraser* (1942) SC 493, 497.

68. Here, the Commission's complaints that the Tribunal's decision failed to take into account relevant considerations, took into account irrelevant considerations, was infected by mistakes of fact and was unreasonable all revolve around the Tribunal's interpretation and application of Instruction 5A.5 to the method it adopted for determining Mrs Fonua's starting salary.
69. The Tribunal's findings at paragraph 49 of its decision, namely, that the revised TRP for Mrs Fonua's exit salary of \$28,987 was, pursuant to the Report, \$31,886, were perfectly accurate. However, it is what the Tribunal purportedly did with those facts in paragraph 50 of its decision which is at the heart of the present controversy.

Adequacy of reasons

70. In *Tuputupu v Public Service Commission*,⁴⁷ the Tribunal opined that the Commission, in that case, was not obliged to provide reasons for its decision. That finding was based on a reference to the text by Wade on *Administrative Law*,⁴⁸ as authority for the proposition that:

"It is trite law that there had never been a principle of natural justice that an administrative authority is required to provide reasons for its decisions."

71. However, the Tribunal accepted that that position can only be negated by express statutory provision.
72. As noted above, s.21F(3) of the *Public Service Act* requires the Tribunal to provide reasons for its decision and its findings on material questions of fact and reference to the evidence or other material on which those findings are based. A requirement to provide reasons may also arise where the nature and impact of the decision itself is such that reasons be given as a routine aspect of procedural fairness: *R v Higher Education Funding Council. ex parte Institute of Dental Surgery* [1994] 1 All ER 651. In a statutory context, the common law principle of fairness often provides the basis for the duty applying as the giving of reasons is

⁴⁷ [2014] TOPST 2; PST Appeal No. 7 of 2013 (13 March 2014) at [32]. See also *Kaitapu v Public Service Commission* [2014] TOPST 7.

⁴⁸ 5th edition, page 46.

essential to allow effective supervision by the courts: *R (on the application of CPR Kent) v Dover District* [2018] 2 All ER 121.⁴⁹

73. During oral submissions, both counsel concurred in concerns about the adequacy of the Tribunal's reasons in paragraph 50 of its decision. However, neither advanced any principles or authorities by which the adequacy of an administrative tribunal's reasons are to be measured.
74. The following principles have been held to apply in construing the nature and content of a statutory obligation on an administrative tribunal to provide reasons for its decisions:
- (a) A statutory requirement to state reasons is a requirement to say "why". To answer that "why", the relevant tribunal must identify the applicable law, ascertain the relevant facts, and then determine in light of that law and those facts the results which follow.⁵⁰
 - (b) Reasons are a 'sound administrative safeguard' which are required to:
 - (i) inform the public and parties with an immediate interest in the outcome of the proceedings of the manner in which the tribunal's conclusions were arrived at;
 - (ii) enable the question whether legal error has been made by the tribunal to be more readily perceived than otherwise might be the case;
 - (iii) engender confidence in the community that the tribunal has gone about its task appropriately and fairly;
 - (iv) avoid exposure to the suggestion that the tribunal has not given the matter close enough attention or that it has allowed extraneous matters to cloud its consideration; and

⁴⁹ Per Lord Carnwath with whom Baroness Hale, Lord Wilson, Lady Black and Lord Lloyd Jones JJSC agreed.

⁵⁰ *Ansett Transport Industry (Operators) Pty Ltd v Wraith* (1993) 48 ALR 500 at 50, cited in *Ronberg v Chief Executive, Department of Labour* [1995] NZAR 509 at 520-521.

- (v) impose upon the decision-maker an intellectual discipline.⁵¹
- (c) The primary function of reasons is to allow an appeal court to determine whether the decision involved appellable error and to provide procedural fairness to the litigants who are entitled to know why they have been successful or unsuccessful.⁵²
- (d) The statement of reasons must explain the actual path of reasoning in sufficient detail to enable a court to see whether the decision is vitiated by error.⁵³
- (e) Reasons need not be lengthy and elaborate, nor do they require a reference to all of the evidence led or to every submission advanced by the parties.⁵⁴
- (f) There is no mechanical formula which can be applied to determine whether reasons are adequate in any particular case — much will depend upon the particular circumstances of any individual case.⁵⁵
- (g) Usually, it will be necessary to look at the reasons as a whole, viewed in the context of the evidence given and the manner in which the hearing was conducted before the Tribunal.⁵⁶
- (h) Where one set of evidence is accepted over a conflicting set of significant evidence the decision maker must set out his or her findings as to how it is that one has been accepted over the other.⁵⁷
- (i) Reasons must be adequate and intelligible and must set out the conclusions on the principal important controversial points at issue indicating how any issue of fact and law was resolved. Parties to the proceedings and the courts should be able to see what matters have been taken into

⁵¹ *Australian Postal Commission v Wallace* (1996) 41 ALD 455.

⁵² *Centex Australasia Pty Ltd v Commissioner for Consumer Protection* [2017] WASCA 79, in which the relevant statutory requirement for reasons was in similar terms to s.21F(3), citing *SNF (Australia) Pty Ltd v Jones* [2008] WASCA 121 [32]; and *Manonai v Burns* [2011] WASCA 165 [53] and the other decisions in footnotes 53 to 59.

⁵³ *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 [55].

⁵⁴ *Mount Lawley Pty Ltd v Western Australian Planning Commission* (2004) 29 WAR 273.

⁵⁵ *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430.

⁵⁶ *Garrett v Nicholson* (1999) 21 WAR 226.

⁵⁷ *Beale v Government Insurance Office (NSW); Riley v Western Australia* (2005) 30 WAR 525.

consideration and what view has been formed by the tribunal on the points of fact and law which arise.⁵⁸

- (j) When a court undertakes judicial review of an administrative tribunal's decision, the reasons for the decision are not to be construed minutely and finely with an eye keenly attuned to the perception of error. The above principles are not to be applied semantically or pedantically, but by reference to substance rather than form.⁵⁹
- (k) Where adequate reasons are required but are not given, a court may regard that as an error which vitiates the decision and may grant a quashing order and remit the matter for a fresh decision.⁶⁰ However, inadequate reasons do not necessarily amount to appellable error. An appeal (or reviewing) court will only intervene when the inadequacy is such as to give rise to a miscarriage of justice.⁶¹ Appellable error arising from inadequate reasons does not necessarily result in a new trial. In an appropriate case, the appeal court may itself determine the matter.⁶²

75. When the Tribunal's decision is read in its entirety, only paragraph 50 purports to explain how the Tribunal interpreted the Instructions and applied the facts it deduced in paragraph 49 to arrive at its ultimate determination that Mrs Fonua's starting salary should be \$32,843. Notably, that was an outcome which neither the Commission nor Mrs Fonua contended for during the hearing of the appeal.
76. However, by application of the above principles, the Tribunal's decision did not reveal a number of aspects of its apparent reasoning process, such as:
- (a) whether it in fact considered Instruction (a), or if it did, the basis upon which it must inferentially have decided that Instruction did not apply;
 - (b) why the Commission's approach was wrong;

⁵⁸ *South Buckinghamshire District Council v Secretary of State for Transport, Local Government and the Regions* [2004] 4 All ER 775.

⁵⁹ *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50 [59].

⁶⁰ *R v Westminster City Council, ex p Ermakov* [1996] 2 All ER 302.

⁶¹ *SNF (Australia) Pty Ltd v Jones*, *ibid*, [34].

⁶² *Mount Lawley Pty Ltd v Western Australian Planning Commission*, *ibid*, [29].

- (c) why it sought to compare the equivalent of Mrs Fonua's exiting salary on a TRP basis (i.e. base salary plus benefits such as 10% superannuation contributions) against only the base starting salary in the range for her new position (i.e. excluding superannuation);
 - (d) how the asserted fact that Mrs Fonua's exiting salary 'overlapped with the scale of her new position' led the Tribunal to find that sub-instruction (c) applied when, by its terms, that Instruction only applied if Mrs Fonua was re-employed 'in her old scale';
 - (e) assuming sub-instruction (c) could apply, what on the evidence before it was Mrs Fonua's 'old scale' given the term 'scale' used elsewhere in the Instructions and Report appears to mean salary range;
 - (f) assuming the Tribunal purportedly applied sub-instruction (c), how it proceeded to find that Mrs Fonua's base salary 'should be placed on the next nearest point' (language closer to that used in sub-instruction (b)) when (c) actually provided that Mrs Fonua was to 're-enter the band equivalent to that of her old scale at the point at which she left it, and be paid at the new rate for that point of the scale'; and
 - (g) whether the Tribunal actually considered the above terms of sub-instruction (c), and if it did, how and why it adopted a method of calculation which bore little resemblance to the terms of that instruction.
77. Further, during oral submissions, both counsel agreed that the Tribunal's reasons failed to elucidate:
- (a) the basis for its decision to increase Mrs Fonua's base salary (as the Tribunal found it) of \$31,886 to the 'next nearest point' which it identified as being \$32,843;
 - (b) what the Tribunal meant by a 'point' having regard to the Instructions and the Report;
 - (c) the basis for its apparent uplift of 3% which it described as 'the base variance'; or

(d) what it meant by 'base variance' having regard to the differential salary ranges in the Report.

78. For those reasons, and to adopt an assessment similar to that expressed in the *Centex Australasia* decision,⁶³ I am of the view that the Tribunal's reasons are devoid of any elucidation or enunciation of any process of reasoning or evaluation which explained how it arrived at the decision that sub-instruction (c) applied to Mrs Fonua's case or how its ultimate decision was a product of a correct interpretation and application of the terms of that instruction. Rather, the Tribunal's reasons are largely a summary of the evidence followed by an expression of its conclusion. Reasons cast in those terms fall manifestly short of the obligation to inform the parties of the reasons why they were successful or unsuccessful as the case may be on a significant issue in the case. Nor do they enable this court to determine whether the process of reasoning which led to the Tribunal's conclusion was vitiated by error.
79. It follows, in my respectful opinion, that the reasons given by the Tribunal are inadequate. As such, they fall short of the requirements for procedural fairness and do not fulfil the statutory obligation in s.21F(3) of the Act. They have given rise to a miscarriage of justice. That error alone is sufficient to vitiate the decision and remit the matter for a fresh decision.

The Tribunal's approach

80. In the event the above decision to quash the Tribunal's decision and remit the matter might elsewhere be considered incorrect, then I turn to whether there are other reviewable errors in the Tribunal's approach, and whether it misdirected itself on the correct interpretation and application of Instruction 5A.5 in conjunction with the relevant parts of the Report.
81. Alternatively, if the above decision is considered correct, then the following observations are offered as assistance to the parties and the Tribunal upon any rehearing of Mrs Fonua's appeal.

⁶³ At [116].

82. It was common ground that the Tribunal's task on the appeal was to consider Mrs Fonua's grounds of appeal and relief sought together with the available evidence and submissions by the Commission in interpreting and applying the relevant statutory requirements, including, most importantly, the Instructions and the Report, to determine whether the Commission had erred in calculating Mrs Fonua's starting salary. As Mrs Fonua did not seek judicial review of any other part of the Tribunal's decision on her appeal, that is the only issue with which this Court is presently concerned.
83. Instruction 5A.5 provides, in terms, that a person who is re-employed in the Public Service shall normally be paid at his/her exiting rate of pay, subject to four exceptions. The Instructions do explain what is meant by 'normally'. Instruction 5A.3 provides for increases to the minimum point of the relevant band (or scale) of 3%, 6% or 9%, depending on the extent to which an employee's qualifications and/or years of relevant work experience exceed the minimum requirements for the relevant position. However, the chapeau to that Instruction provides that it applies where an employee is taking up a new appointment or has recently been promoted. By its terms, Instruction 5A.5, which deals with salary on re-employment, does not import or seek to adopt the salary uplift provisions of Instruction 5A.3. It is unclear whether the two are mutually exclusive or whether the Commission treats a re-employed person who possesses greater qualifications and experience than the minimum requirements similar to a new appointment. For instance, at paragraph 25 of its decision, the Tribunal recounted that on 14 December 2017, Vilimo Fakalolo of the Ministry of Fisheries forwarded to Mrs Fonua an email from Maryanne Nakao of the Commission regarding Mrs Fonua's request that her starting salary be reconsidered in light of her previous experience and the salary she was receiving at her previous job. In her response, Ms Fakalolo referred to Instruction 5A.3(A) part II.
84. In any event, each of the four exceptions calls for a comparison of the employee's exiting position, in terms of band or scale, with that applicable to the position in which he or she is to be reemployed. However, as will be developed further below, with the exception of (d), such comparisons are not possible without evidence (which assumes the existence) of the employee's exiting band or scale.

85. Sub-instruction (d) provides that if an employee was previously dismissed, his starting pay shall be at the minimum point of the appropriate salary scale (presumably for the position in which he is to be re-employed). That is plain on its face and has no application to the instant case.

86. Similarly, sub-instruction (b), which provides that if the employee is reemployed in a lower band, he shall re-enter at the point closest to that at which he left, was never raised by Mrs Fonua during her exchanges with the Commission or during the course of her appeal before the Tribunal, nor was it pleaded in this proceeding. Notwithstanding, during the course of submissions,⁶⁴ Mrs Tupou sought to rely on (b) as a means of explaining how the Tribunal purported to increase its calculation of Mrs Fonua's revised exiting TRP salary of \$31,886 to the "next nearest point" by adding 3% of that sum to arrive at \$32,843. In the absence of any exposed reasoning by the Tribunal, Mrs Tupou interpolated that because Mrs Fonua's revised exiting TRP salary was \$31,386 and the starting point in the salary range for her new position as Principal Fisheries Officer within Band I was only \$30,240, she was therefore being reemployed 'in a lower band' and therefore sub-instruction (b) applied. No doubt the attraction of that submission was an attempt to explain why the Tribunal increased the exiting TRP salary to the "next nearest point" when, in the previous sentence of its decision, it had already determined that sub-instruction (c) applied. Sub-instruction (c) does not contain any reference to increasing a base salary to "the next nearest point". Apart from the obvious and insurmountable obstacles to Mrs Tupou's valiant, hoped-for reliance on sub-instruction (b), as described above, she was unable to explain:

- (a) what the "next nearest point" was or, for that matter, what a "point" was;
- (b) why the Tribunal chose 3%; or
- (c) why it described that percentage as 'the base variance'.

87. For those reasons and based on Mrs Fonua's grounds of appeal and the evidence and arguments presented before the Tribunal, it was not open to the

⁶⁴ Paragraph 3(e) of her written submissions and at transcript 19.7 and 23.3.

Tribunal to apply sub-instruction (b). It follows that the Tribunal erred when it purportedly applied sub-instruction (c) by placing Mrs Fonua's base salary "on the next nearest point", as such an uplift did not form part of sub-instruction (c).

88. That therefore leaves sub-instructions (a) and (c), which were raised and considered before the Tribunal and which attracted most of the focus in this proceeding.

Sub-instruction 5A.5(a)

89. As noted above, there is no indication from its reasons for decision as to whether the Tribunal turned its mind to whether sub-instruction (a) applied in Mrs Fonua's case, and if it did not, why not. The Commission's primary position and submissions were based on, in its view, sub-instruction (a) applying. The Tribunal's apparent failure to have considered that position and submissions therefore amounts to a failure to take into account relevant considerations.
90. The 2010 Instructions underwent a second amendment effective 10 December 2018. By reason of Special Instruction 8A.2 that from 1 July 2016, all employees were to be migrated to the new Banding Salary Structure and be paid at the Salary Band and Salary range allocated and recommended by the Remuneration Authority, it is reasonable to assume that the 2018 version of the Instructions took into consideration, or were intended to take into consideration, the new banding salary structure and salary ranges recommended by the Remuneration Authority in the tables to the Report.
91. Unfortunately, in my view, the wording of Instruction 5A.5 gives rise to some doubt as to whether the above-mentioned assumption is well-founded or that the Report recommendations were given effect in the present case of salary calculations on reemployment.
92. In order to determine whether sub-instruction (a) might apply, the Commission (or the Tribunal on appeal as the case may be) was first required to determine whether Mrs Fonua was being reemployed in a 'higher band'. Given the definition of 'band' in the Instructions, this sub-instruction does not call for a comparison of exiting and reemployment salary amounts. Therefore, in my view, the

comparison task required by the instruction is susceptible to (at least) two interpretations.

93. The first is to compare the Mrs Fonua's reemployment band with her exiting band. Mrs Fonua's reemployed position as Principal Fisheries Officer is within Band I. There was no evidence before the Tribunal (or this court) as to the band of Mrs Fonua's exiting position as an Assistant Teaching Graduate in 2012. During the hearing, both counsel agreed (but without tendering any evidence in support) that Mrs Fonua exited the public service at a time before the new alphabetical banding system came into force. When she exited, levels of positions within the public service were apparently grouped according to certain numbers or levels. There was no evidence by which any comparison could have been made between Mrs Fonua's exiting level and Band I under the revised system. That potentially leaves the instruction unworkable in cases where employees exited the public service before the inception of the alphabetical banding system.
94. However, in order to at least attempt to give effect to sub-instruction (a), an alternative approach may be to compare Mrs Fonua's exiting position, in terms of the band within which the Remuneration Authority placed it within the Report, with her reemployment position within Band I. According to the Report,⁶⁵ the position of Assistant Teacher Graduate (12) is within Band K. Band I is higher than Band K. Therefore, on that interpretation, Mrs Fonua was reemployed in a higher band and therefore, as the Commission contended, sub-instruction (a) would apply. As such, and according to the balance of that instruction, her starting base salary was prescribed as the "minimum of the appropriate salary scale" which in this case was \$30,240.
95. I pause here to note that as shown in the above excerpts from the Report, there were two line entries for the position of Principal Fisheries Officer. Whilst they both have the same recommended salary range under the new classification system, the salary for one as at 2015/16 was \$37,806 whereas the other was \$33,736. The Remuneration Authority also recommended the basic salary for each of those positions under the new system remain at those amounts. No issue

⁶⁵ Page 61.

95. I pause here to note that as shown above in the excerpt from the Report, there were two line entries for the position of Principal Fisheries Officer. Whilst they both have the same recommended salary range under the new classification system, the salary for one as at 2015/16 was \$37,806 whereas the other was \$33,736. The Remuneration Authority also recommended the basic salary for each of those positions under the new system at those amounts. No issue was raised, and therefore no explanation was proffered, during this proceeding for the difference in those salary levels or the circumstances in which an employee might be granted the higher salary. Similarly, and apart from the evidence about the Commission, and in turn the Tribunal, not accepting Mrs Fonua's submission that her previous teaching experience ought to have been taken into consideration in determining a higher starting salary, there was no mention as to whether the Commission considered whether Mrs Fonua's starting salary should have been determined in accordance with one or other of those higher salary levels. It is sufficiently clear from the Commission's position that it simply applied sub-instruction (a) to arrive at the starting salary of \$30,240, which is lower than either of the 2015/16 salaries for the two levels of Principal Fisheries Officer and the Remuneration Authority's recommended basic salary for either of those positions.
96. If that be a correct analysis of what has occurred, then having regard to the recommended salaries in the Report, it would appear that the Commission's approach could have the result that:
- (a) a person currently employed as a Principal Fisheries Officer as at 2015/16 would be paid a base salary of (at least) \$33,736 (or \$37,806);
 - (b) a person who had never been employed in the public service before who was newly appointed or promoted to the position of a Principal Fisheries Officer would also be paid a base salary of (at least) \$33,736 (or \$37,806);
 - (c) but that a former public servant who is reemployed a Principal Fisheries Officer (and assuming that is a higher band than his/her previous band) would only be paid a base salary of \$30,240.

97. All other things being equal, such as each of the employees in the scenarios above possessing only the minimum qualifications and experience for the position, any rationale for the difference in outcomes is difficult to fathom. It is also not easy to see that that would be an outcome intended by the Remuneration Authority.

Sub-instruction 5A.5(c)

98. Turning then to sub-instruction (c), I am compelled to say, and with all due respect, that on a plain reading of the terms of the instruction, the Tribunal's purported interpretation and application of that instruction in paragraph 50 of its reasons is perplexing.

99. In order for sub-instruction (c) to apply, Mrs Fonua had to have been reemployed in her "old scale". Why the Instructions departed here from the use of the term "band" found in (a) and (b) is also difficult to understand unless, of course, the instruction is aimed at cases where at the time of exit, the employee's position predated the advent of the banding system.

100. At any rate, having regard to the comparison exercise required by (a) - a higher band - and (b) - a lower band - it is reasonable to interpret (c), in my view, as intended to mean that it would apply if the salary range for Mrs Fonua's reemployment position was the same or equivalent to her exiting salary range. That does not naturally result in a comparison of her single value exiting salary of \$28,987 with her reemployment salary range of \$30,240 to \$45,360 without some explicit instruction as to what dollar value within the range is to be adopted for the comparison purpose. In that regard, the Instructions are silent.

101. There was no evidence as to Mrs Fonua's exiting salary range. It appears to have been accepted by all parties that the value within the Report tables of \$28,987, being the 2015/16 full salary (including 5% cost of living allowance) for an Assistant Teacher Graduate (12), represented the equivalent of her exiting salary under the new classification system.

102. Again, in order to endeavour to give effect to sub-instruction (c), despite some of the difficulties with its wording, a workable interpretation may be that it would

apply if Mrs Fonua's equivalent exiting salary fell within her reemployment salary range. That appears to accord with the first step in the approach taken by the Tribunal.

103. However, it is the next step the Tribunal took which attracted criticism from the Commission. In my view, that criticism was well-founded.
104. The Report tables start with what is effectively a base salary amount as at 2015/16, to which "Current Benefits" (being superannuation of 10% or 20% for CEOs) are added resulting in a "Current Total Remuneration Package (TRP)". In Mrs Fonua's case, the Tribunal calculated her equivalent exiting TRP as an Assistant Teacher Graduate by taking the base salary of \$28,987 plus benefits such as superannuation of \$2,899 making a total TRP of \$31,886.
105. However, its finding in the first sentence of paragraph 50 of its decision that that figure "overlaps with the scale of her new position" could only have been arrived at by comparing the revised exiting TRP with only the base salary amount of the minimum or starting value within the salary range for Principal Fisheries Officer which was \$30,240. By that method, the Tribunal appears to have found that as \$31,886 was within \$30,240 to \$45,360, Mrs Fonua was being reemployed within her old salary range or 'scale' and therefore sub-instruction (c) applied.
106. In my opinion, that approach was erroneous. The balance of the columns in the Report tables, specifically for the two Principal Fisheries Officer positions, provided the Recommended Salary range (referred to above), the Recommended Basic Salary (also referred to above) and then also provided for the addition of Recommended Benefits such as superannuation of 10% (for employees other than CEOs) resulting in a recommended TRP for each of the Principal Fisheries Officer positions of \$41,587 or \$37,109 respectively.
107. In my view, the Tribunal should have compared Mrs Fonua's revised equivalent exiting TRP amount with the recommended TRP amount for her reemployment position. Superannuation is a constant within the Remuneration Authority tables. That is consistent with the provisions of the *Retirement Fund Act* and *Retirement Fund (Administration) Regulations*.

108. Alternatively, the comparison should have been made between the revised exiting *base* salary amount and the *base* minimum or starting value within the reemployment salary range, i.e. \$28,987 versus \$30,240.
109. The heterogeneous comparison exercise undertaken by the Tribunal of exiting TRP against only the reemployment minimum base salary:
- (a) was not supported by any provision of the statutory framework;
 - (b) was an erroneous and unreasonable interpretation of the requirements of sub-instruction (c); and
 - (c) constituted a failure to have regard to a relevant consideration (the reemployment TRP amount).
110. In both cases, Mrs Fonua's exiting salary was less than the minimum value of her reemployment salary range. Therefore, her exiting salary was not within nor did it 'overlap' with her reemployment salary range. On that basis, sub-instruction (c) could not apply.
111. But even if (c) could apply, there was no basis for the Tribunal's next and final step of effectively increasing the revised exiting TRP of \$31,886 by 3% to arrive at a starting salary of \$32,843. On a plain reading, the instruction did not provide for the revised exiting TRP to be "placed on the next nearest point" by 3% or any so-called "base variance", or at all. The proper interpretation and application of the balance of sub-instruction (c) would simply mean that Mrs Fonua would re-enter the band equivalent to her old scale at the point at which she left it and be paid at the new rate for that point of the scale. By transposing the word 'salary' for the word 'scale' used, Mrs Fonua would have been regarded as re-entering the public service within Band K and be paid a TRP of \$31,886 representing the new rate or salary (plus benefits) for what was her exiting salary as an Assistant Teacher Graduate. That, of course, is unlikely to be the case here because she has been reemployed in a position which has been placed by the Remuneration Authority within the higher Band I.

112. Mrs Tupou submitted⁶⁶ that the Tribunal increased, and was entitled to increase, Mrs Fonua's revised exiting TRP by 3% to take it "up to the closest point at which she left" and/or to reflect its findings in paragraph 47 of its decision and by the reference to Instruction 5A.3 at page 6 of its decision.
113. The first limb to the submission is without merit and was not pursued with any vigour, or at all, during the hearing. As noted above, it was common ground that according to the Remuneration Authority tables, Mrs Fonua's exiting base salary was revised or equivalated to \$28,987 which, plus benefits, resulted in a TRP of \$31,886 under the then new scheme.
114. The second limb misreads paragraph 47 of the Tribunal's decision. When read with paragraphs 46 and 48, it is clear that the Tribunal agreed with the Commission that Mrs Fonua had met the minimum requirements for the position of Principal Fisheries Officer of a BA and five years relevant work experience as a Project Coordinator, but that her previous 15 years' work experience as a teacher should not be taken into account to justify extra salary. Further, in paragraph 51 of its decision, the Tribunal considered that Instruction 5A.3 (referred to by the Tribunal at page 6 of its decision) was not relevant and did not apply to Mrs Fonua. That aspect of the Tribunal's decision has not been challenged by Mrs Fonua by way of any application for judicial review.

Result

115. For those reasons, I find that the Tribunal:
- (a) provided inadequate reasons for its decision;
 - (b) failed to take into account relevant considerations; and
 - (c) misdirected itself on the proper interpretation and application of Instruction 5A.5 of the *Public Service Policy and Instructions 2010* as amended.
116. Accordingly, I order that:

⁶⁶ Paragraph 3(f) of her written submissions and at transcript 17-18 and 25.

- (a) the decision of the Public Service Tribunal in PST Appeal No. 4 of 2018 dated 18 June 2019 be quashed; and
- (b) the said appeal be remitted to the Public Service Tribunal for further consideration and determination in accordance with law and these reasons for judgment.

118. The prayer for relief in the Statement of Claim includes an order for costs. However, in light of my reasons, which have little to do with the manner in which Mrs Fonua conducted her appeal before the Tribunal or how she participated as a Defendant in this proceeding, but rather with the manner in which the Tribunal decided the appeal below, my preliminary view is that each party should bear its own costs. Notwithstanding, I reserve liberty to any party to file any application for a different costs order within 14 days of the date hereof.

NUKU'ALOFA
19 August 2020



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

M.H. Whitten QC
LORD CHIEF JUSTICE