



Government of Tonga

Public Service Tribunal

'Aisea H Taumoepeau, SC - Chairman

Lady 'Eseta Fusitu'a - Member

Timote Katoanga - Member

Appeal No. PST 1 of 2012

Appellant: Ms. Fanau'ifo'ou 'Akauola

Respondent: Public Service Commission

Representation:

Appellant: Ms. Fanau'ifo'ou 'Akauola - in person

Respondent: Mr. Sione Sisifa, SC - Acting Solicitor General
Ms. Selalina Prescott - Deputy Secretary,
Public Service Commission

Date of Hearing: 19th October 2012 and 23rd of October 2012

Date of Ruling: 15th November 2012

Decision on Appeal No. PST 1/2012: Fanau'ifo'ou 'Akau'ola

Preliminary Ruling

1. On 20 September 2012, we gave a Preliminary Ruling on the issues of the standing of the appellant to prosecute the appeal, and the timing of the lodging of the appeal. That Preliminary Ruling forms part of this decision and will not be repeated here.

Appeal

2. This is an appeal by the appellant, Ms Fanau'ifo'ou 'Akau'ola, the Acting Director of Tourism, Ministry of Tourism, against a decision of the Public Service Commission (hereinafter referred to as "PSC") made at its meeting on 18 April 2012, which reads as follows –

"That Public Service Commission Decision No. 133 of 5 April 2012 stands."

3. The appellant is seeking the following order from the Tribunal:

"1. That PSC Decision No. 133 of 5 April 2012 be rescinded.

2. That Miss Simata e La'a Palu, Personal Assistant to the Minister of Tourism, be laterally transferred to the post of Tourist Officer (Marketing) and be paid at the relevant point of the appropriate salary scale with effect from the date of Tribunal decision."

Background

4. On 11 November 2011, the PSC appointed Ms Simata e La'a Palu to the post of Personal Assistant to the Minister of Tourism, which required minimum qualification of –

"Education Qualification: Bachelor degree in Tourism Management or in any field relevant to Tourism. Experience and knowledge in tourism is desirable."

5. On 21 March 2012, the appellant as acting CEO of the Ministry of Tourism requested that Ms Palu be laterally transferred to the post of Tourist Officer (Marketing) within the Ministry of Tourism (after due processing as required by applicable policies/rules of the civil service).

6. On 5 April 2012, the PSC office submitted that request to PSC recommending its approval. The required qualification for the Tourist Officer (Marketing) post was –

“Academic qualification: Bachelor Degree in Tourism, Marketing or relevant field from a recognized tertiary Institution.

Work Experience and Knowledge: Work experience in tourism and prior involvement in developing/coordinating special tourism events will be an advantage.”

7. That submission included the following comments –

“Recommended Candidate: The panel unanimously agreed to recommend Ms Simata e La’a Palu for the advertised position. Ms Palu has a Bachelor of Arts degree majoring in Chinese culture and Chinese language. Ms Palu has been involved in various tourism and marketing events for Tonga including the Shanghai World Expo 2010 and the ‘Eva Mai Tonga Tourism Experience 2012. Thus her qualifications and work experience satisfy the minimum requirements. During the interview Ms Palu demonstrated her experience in carrying out marketing activities such as developing marketing brochures and updating the Ministry’s website and her commendable knowledge and understanding of emerging tourism markets. With her great personality characteristics and performance in the interview, the panel regarded her as meeting all of the minimum requirements for the post, thus she is recommended for the position.”

8. The submission also included the following –

“PSC Office Comments:

- Recruitment process was duly carried out as per policy.*
- In light of the above, the following recommendations are submitted for the consideration of the Commission please.*

Recommendation:

That Ms Simata e La’a Palu, Personal Assistant to the Minister for Tourism be laterally transferred to the position of Tourist Officer, Ministry of Tourism and be

paid at her current salary point at the level 9 salary scale with a range of \$17,277 to \$26,044 with effect from the date of Public Service Commission Decision."

9. Amongst the supporting documents accompanying the recommendation (above) was a Savingram dated 21 March 2012 to the Secretary for PSC, from the Acting Director of Tourism, endorsed by the interviewing panellists, as follows –

"Subject: Interview of Tourist Officer (Marketing) 23 March 2012

I am pleased to advise the panelists' decision regarding the interview of the post of Tourist Officer (Marketing) for Ministry of Tourism on Friday 23rd March 2012. The panellists recommended Ms Simata e La'a Palu for the post of Tourist Officer. The following are key strengths and comments resulted from the interview.

- 1. Ms Palu possesses wide range of tourism knowledge and experiences and some of her past experiences directly involved with tourism related programs.*
- 2. She is passionate about tourism and wants to take part in development of this very lucrative economic sector in Tonga.*
- 3. She is knowledgeable of the duties required of a Tourist Officer and has been given good recommendations of some of the work she has undertaken.*
- 4. The panellist unanimously agreed that the Bachelor of Arts (Chinese Culture and Chinese Language) is relevant giving that China is one of the tourism emerging markets.*
- 5. She is very confident and has good command of both English and Chinese which is very important.*

10. However, on 5 April 2012, the PSC decided (Decision No. 133 of 5 April 2012) -

"That the request of the Ministry of Tourism for Ms Simata e La'a Palu, Personal Assistant to the Minister of Tourism be laterally transferred to the position of Tourist Officer, Ministry of Tourism with effect from the date of Public Service Commission Decision is not approved."

11. The minutes of PSC meeting on 5 April 2012 showed the following:

"DISCUSSION:

- *The Commission concurred that Ms Simata Palu does not meet the minimum requirements for the position of Tourist Officer as her Bachelor Degree majors are Chinese Culture and Chinese Language, which are not "a relevant field" compared to Tourism and Marketing (given by the advertised job description).*
- *The comment was raised that Ms Palu's current position as Personal Assistant to the Minister of Tourism will end soon since there will be no such portfolio as "Minister of Tourism" as of 1 July 2012. However the decision of the Commission to not approve the lateral transfer is due to her not meeting the minimum requirements for the position."*

12. Upon receipt of PSC Decision No. 133 of 5 April 2012, the Appellant wrote back to PSC office pointing out what she thought were flaws in that decision,

13. In the re-submission of the matter to PSC on 18 April 2012, the submission contained –

"PSC Comments:

- *Given that the Ministry of Tourism will merge with the Ministry of Labour, Commerce and Industries to form the Ministry of Commerce and Tourism, the PSC Office is of the view that the opinion of the CEO for Commerce and Tourism be sought regarding the matter.*
- *Thus this matter is submitted for the Commission's information and further direction please."*

14. Instead of PSC taking heed of above advice, PSC Decision on 18 April 2012 was –

"That Public Service Commission Decision No 133 of 5 April 2012 stands."

15. The PSC also directed that PSC office write a Savingram to the Ministry of Tourism In reply to their Savingram to advise that the decision of the PSC stands, and that in line with the current Government Structure Reform in which Tourism will merge with part of the Ministry

of Labour, Commerce and Industries (MCLI) as the Ministry of Commerce and Tourism, it is appropriate for the view of the CEO of Labour, Commerce and Industries to be sought prior to any further recruitment of Tourism.

16. On the same meeting in which the PSC rejected the recommendation for Ms Palu's lateral transfer (5 April 2012), the PSC approved the appointment of one Ms 'Ete'aki to a similar post of Tourist Officer (Development) in the Ministry of Tourism without specifying any requirement for consultation with the CEO of the proposed Ministry of Commerce and Tourism or any mention of the proposed merge of the two ministries.
17. It is noted however that the direction by PSC referring to consultation with the CEO of the Ministry of Commerce and Tourism was specific to "any further recruitment of Tourism".

The processing of Miss Palu's application up to 5 April 2012

18. The post was advertised internally within government, in circulations from the Acting Director Tourism to the CEOs of government ministries, dated 22 February 2012 and advising that applications must reach the head office of the Ministry of Tourism by 9 March 2012.
19. The basic requirements for the applicants were:
 - a. Bachelor degree in tourism, marketing or relevant field from a recognised tertiary institution;
 - b. Work experience in tourism and prior involvement in developing/coordinating special tourism events will be an advantage;
 - c. The required skills were –
 - i. Excellent in the English language both spoken and written;
 - ii. A team worker;
 - iii. Coordinating/organisation skills (of events/special activities);
 - iv. Computer/internet knowledge and skills;
 - v. Ability to relate to other cultures of emerging markets for tourism.
20. Ms Palu, then the Personal Assistant to the Minister for Tourism, lodged her application for the advertised post on 5 March 2012. The records of her academic, employment and other related qualification were attached. Ms Palu's application, accompanying references and

documentation, show clearly that she possesses, and in abundance, the very qualifications as well as the personal aptitude, which the advertisement required.

21. Under the leadership, coordination and authorisation by the PSC, the interviewing panel were:

- i. Ms Falemei Fale, PSC (Chair);
- ii. Ms Sandra Fifita, Ministry of Tourism;
- iii. Mr Villiami Fakalolo, Ministry of MAFFF.

22. The panel interviewed Ms Palu on 23 March 2012: Her results were 34/40, 37/40 and 38/40. In their letter to the Secretary of the PSC dated 21 March 2012 (the date of "21 March" is probably wrong), they highly recommended and fully endorsed that Ms Palu be appointed to the post of Tourist Officer (Marketing).

In their five point basis for their recommendations, the panel praised Ms Palu's tourism "knowledge and experiences"; her passion about the development of the very lucrative economic sector which is tourism; her already good performance of the duties of a Tourist Officer (Marketing); and her very high command of English.

They also stressed to the PSC one of their most important advice, namely, that they "unanimously agreed that the Bachelor of Arts (Chinese Culture and Chinese Language) is relevant, given that China is "one of the (tourism) emerging tourist markets."

23. Consequently, the PSC office in their submission (ref: WPF/STF. 4/2/20/2) to the PSC meeting on 5 April 2012 recommended that the request by the Ministry of Tourism for Ms Simata e La'a Palu, Personal Assistant to the Minister of Tourism to be laterally transferred to the post of Tourist Officer in the same ministry be approved. This was in item No. 133 of the agenda for that meeting.

24. Very clearly, from the publicising of the advertisement of the said post, 12 March 2012, to the interview panel's report forwarded by the Acting Director of Tourism to the Secretary of the PSC dated 21 March 2012, and the PSC Office's recommendation to the PSC meeting on 5 April 2012, the appropriate procedures and criteria were properly observed.

25. In fact, the Solicitor General in the hearing of the appeal, informed that the Respondent agree that the processing of the application to the PSC complied with all procedural requirements.

The processing of Ms Palu's application from 5 April 2012 onwards

26. The PSC met on 5 April 2012. The recommendation from the interview panel to appoint Ms Palu to the Tourist Officer (Marketing) post was in the submission, ref: WPF/STF. 4/2/20/2. Ms Palu's application, academic and work records, as well as the interview panel's records and their recommendation to approve Ms Palu's appointment, were all submitted and made available to the PSC.

27. The PSC decision on this matter, namely Decision No. 133 of 5 April 2012 was:

"That the request by the Ministry of Tourism for Ms Simata e La'a Palu, Personal Assistant to the Minister of Tourism to be laterally transferred to the post of Tourist Officer in the same Ministry is not approved."

28. That decision was conveyed to the Acting Director of Tourism on 11 April 2012, who responded by writing back to the PSC office (on 13 March 2012) pointing out what she thought were flaws in that decision, including:

- (a) Procedural requirements were followed;
- (b) Selection of the candidate was made on merit;
- (c) The selection panellists unanimously agreed without the slightest hesitation that the candidate qualifies for the position;
- (d) The Ministry was not given the opportunity to clarify or respond to any queries that the office of PSC may have had regarding aspect(s) of the selection process at which the Ministry was believed to have failed.

29. The CEO of PSC wrote to the Acting Director of Tourism on 26 April 2012 advising that the response from the Acting Director of Tourism had been submitted to the PSC meeting on 18 April 2012, that all issues raised had been considered, and that decision No. 133 of 5 April 2012 is to stand. Two reasons given were:

- (a) That the above decision was taken in light of the current government reform whereby the Ministry of Tourism will merge with part of the Ministry of Labour,

Commerce and Industries to form the Ministry of Commerce and Tourism on 1 July 2012.

(b) In the interest of the successful implementation of the government restructure and given that the Secretary of Labour, Commerce and Industries will be the Chief Executive Officer of the new Ministry of Commerce and Tourism as of 1 July 2012, it is appropriate and imperative that the views of the current CEO be sought on all staffing recruitments for the current financial year.

30. Both reasons given above were not part of the criteria specified in the advertisement for the post, nor in the background criteria discussed by the Ministry of Tourism and the PSC office, nor in any briefing for the interviewing panel to be mindful of. As such they cannot form any of the grounds for the approval or non-approval of the appointment.
31. It must be noted also that what was conveyed was not the same as that directed by the PSC at the meeting. The PSC direction was to carry out consultation between the ministries on "any further recruitment".
32. Turning to the actual requirements for appointment, as spelled out in the advertisement, and as certified by the PSC approved interviewing panel and duly recommended to the PSC office, Ms Palu is quite clearly a most suitable qualified applicant.
33. One of the special skills the application asked for from the applicants was fluency in the language and knowledge of especially emerging tourist markets. One of the biggest emerging markets is clearly China, therefore, the advertisement was in fact specifically asking for proficiency in the Chinese language or that of another emerging market, and knowledge of their culture. That is what the advertisement required, and that was what the applicant (Ms Palu) gave them. For the PSC to then decide that Ms Palu's command of the Chinese language and culture was in fact a disqualification against the appointment to the post was quite clearly wrong.
34. The PSC was inconsistent with its decision on Ms Palu's qualification. On 11 November 2011, the PSC approved that Ms Palu's degree was relevant to tourism, but on 5 April 2012, the same degree was considered irrelevant.

Appellant's submission

35. The appellant during the hearing of the appeal raised further submissions including grounds that the PSC decision was inconsistent, based on assumption, and that PSC had pre-conceived intention not to approve the recommendation.
36. Inconsistency
The appellant pointed to the PSC having previously appointed Ms Palu to the post of Personal Assistant which stipulated similar requirements, and yet declined to recognise the adequacy of those qualifications for the Tourist Officer (Marketing) post.
37. Assumption
The minutes of the PSC meeting of 5 April 2012 showed that the PSC had assumed that Ms Palu was only trying to get a permanent posting. There was nothing in the briefing/submission to that effect.
38. Pre-conceived intention
Again from the said minutes, the PSC seemed to be determined not to appoint Ms Palu and have referred to "her Bachelor Degree majors are Chinese Culture and Chinese Language, which are not a relevant field" compared to the advertised job description. There was also mention in the minutes of the PSC meeting on 18 April 2012 that "if Ms Simata Palu's qualification is accepted as 'relevant' to Tourism or Marketing, there will be wide ranging precedent implications in future similar (i.e. appointment/promotion, etc) cases". That clearly showed that the PSC decision was not based on the merit of the case.

Respondent's submission

39. The Solicitor General for the respondent based his submissions on the following broad grounds –
- (a) That the PSC is not bound to approve any submission, but can form its own decision;
 - (b) The proposed reform including the merging of the ministries of Tourism and Labour & Commerce was an important consideration in this matter, and consultations between those ministries were necessary in order to expedite the reform.
 - (c) That the PSC was justified in deciding that Ms Palu's qualifications did not meet the minimum requirements for the job.

Tribunal's finding

40. The Tribunal have carefully examined all aspects of this case and have reached conclusions including the following:
- (a) The PSC has the authority to form its own decision which may be different from a recommendation made to it. However, it is of utmost importance that such a decision is reached on the basis of reasonable and/or rational grounds. It is not a reasonable and/or rational ground to make a decision in a form to be inconsistent with other decisions previously made. Nor to base such a decision on assumed factors or on a pre-conceived intention that cannot be supported by the relevant facts.
 - (b) The Tribunal do not believe that the decision of PSC made on 18 April 2012 or on 5 April 2012 were made upon reasonable grounds. The facts upon which the submission to the meeting of 5 April 2012 clearly established the adequacy of Ms Palu for the Tourist Officer (Marketing) post. There was no reasonable ground known from the pertinent facts to show that the PSC decision was based on reasonable and/or rational grounds. The technical expertises from the recruiting process and the PSC office have recommended Ms Palu to be a fit person for the job. Yet, the PSC had a different conclusion which was not based on any reasonable or apparent rational ground.
 - (c) The proposed Government reform was not raised in the meeting of 5 April 2012. It cannot be used as a ground for rejecting Ms Palu's application. It was raised in the meeting of 18 April 2012, but only in the context for "any further recruitment for Tourism". This is shown in the minutes of that meeting. Unfortunately, the conveying of that matter by the PSC office to the Ministry of Tourism was erroneous. It purported to make it relevant to Ms. Palu's case when the PSC directed that it was for "further recruitments".
 - (d) China is one of the emerging and important tourist markets for Tonga. Hence, one of the primary duties of the Tourist Officer (Marketing) was to assist in coordinating and communicating on regular basis with both key markets and emerging markets for tourism and also have the necessary skills to relate to those markets. Therefore, the Tribunal believe that the PSC Decision No. 407 of 11 November 2011 (appointing Ms Palu as Personal Assistant) and the assessment of the interviewing panellists that Ms Palu's Bachelor of Arts (Chinese Culture and Language) to be relevant to tourism were correct.
41. The Tribunal find that the decision by PSC on 18 April 2012 for "PSC Decision No. 133 to stand" was erroneous and that PSC Decision No. 133 itself was erroneous.
42. It is trite law that a public authority is required to act reasonably. If not, its actions may constitute an abuse of public office. It is also trite law that an abuse of public office may also

amount to "misfeasance of office". Although this Tribunal is not called upon to adjudicate the existence of such possibilities, it is relevant for the purposes of this appeal to allude to the very serious implications of such actions. Especially if malice or intentional wrong-doing may be involved.

Acknowledgement

43. The Tribunal is indebted to both parties for the assistance accorded during the processes of this appeal, especially with the provision of the relevant documents.
44. The Tribunal would like to acknowledge the efforts of the appellant. Although she had no legal representation she had prosecuted her case very well. We would also commend her efforts in advocating not only the right and welfare of an employee under her responsibility, but also her stand for the proper execution of public processes.
45. The Tribunal also acknowledge the role of the Solicitor General in representing the respondent and his helpful submissions, and also for the PSC office for supplying the necessary documents and their support during the processing of this appeal.

Order of the Tribunal

46. Under section 21F of the Public Service Act 2002 (as amended), the Tribunal may make an order to affirm, vary, or set aside the PSC's decision.
47. For the reasons given above, the Tribunal hereby Order that the decision of the PSC made on 18 April 2012, namely, *"That Public Service Commission Decision No. 133 of 5 April 2012 stands"* be varied as follows –

"That Public Service Commission Decision No. 133 of 5 April 2012 be replaced as follows – 'That Ms Simata e La'a Palu, Personal Assistant to the Minister for Tourism be laterally transferred to the position of Tourism Officer (Marketing), Ministry of Tourism and be paid at her current salary point at level 9 salary scale with a range of \$17,277 to \$26,044 with effect from 5 April 2012."

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