



Phone: (676) 26 980/26 984 or Free Call: 0800 OMB / 0800 662
Corner of Lelue Road & Mateialona Road, Nuku'alofa
Retirement Fund Building

OMBUDSMAN'S FINAL REPORT ON THE COMPLAINT BY MRS MA'UNGAKOLOA FALEVAI

CASE NO. CPR16/52

**Whether the actions of the Ministry of Education
& Training was unreasonable and had caused the
complainant to resign**

12 JUNE, 2018

TABLE OF CONTENTS

Executive Summary	3
Background	4
The Ombudsman Role	4
The EMIS System	4
The Decision to transfer Mr Takeifanga to EMIS	5
Allegations of defamation – The Internal Memo	6
Complainant continued as Acting Chief Education Officer, EMIS	6
Delayed payment Acting Allowance	7
Leave without Pay	8
The Resignation	9
The Ombudsman’s Opinions	10
Recommendations	11
Ministry’s response 15 May 2018	11

EXECUTIVE SUMMARY

1. This is a complaint from Mrs Ma'ungakoloa Falevai ("the complainant"), who joined the Ministry of Education & Training ("the Ministry") on 18 September 2008 as Senior Lecturer, Level 7 and was appointed to be Acting Chief Education Officer ("ACEdo") at the Ministry's Education Management Information System ("EMIS") in 2014.
2. While the complainant was ACEdo, the Ministry approved in June 2015 that another Ministry employee who was on special leave without pay be transferred to EMIS as ACEdo. The complainant questioned the transfer even though she continued to be the ACEdo at EMIS. She also had issues with the delay in the processing by the Ministry of her acting allowance. These issues were not resolved to the satisfaction of the complainant. She went on leave (paid and unpaid) in October 2015 and then applied to the PSC for additional leave without pay. This was not approved and she resigned on 22 February 2016.
3. I am recommending three (3) things in this Report pursuant to section 18(3) of *Ombudsman Act 2001*-

Firstly, that, the Ministry must ensure that its decisions are provided with reasons, and to be clearly communicated in a timely manner to the relevant party;

Secondly, that, the Ministry must ensure that all relevant documents and processes are completed and forwarded to relevant Ministries in a timely manner;

Lastly, that, the Ministry report to me within one month of the date of this report to provide a follow up report of the recommendations.

BACKGROUND

4. The investigation was launched on 28 September 2016.
5. I assigned the investigation to my Investigation Team who undertook the investigation into the matter.
6. The team requested information from the Ministry and the complainant.
7. There were meetings with the Ministry and the PSC to ensure all relevant information are considered, and that the views of the complainant were accurately presented.

THE ROLE OF THE OMBUDSMAN

8. Under section 11 of the *Ombudsman Act 2001*, the Ombudsman has the authority to make any such investigation either on a complaint made to the Ombudsman by any person or on his own motion relating to a matter of administration by any department or by any officer of any such department. (Section 18(1) and (2) of the *Ombudsman Act 2001*).
9. My investigation is not an appeal process. I would not generally substitute my judgment for that of the decision maker. Rather, I consider the substance of the act or decision and the procedure followed by the Ministry, and then form an opinion as to whether the act or the decision and the procedures followed by the Ministry was properly arrived at and was one that the Ministry could reasonably make.

THE COMPLAINT

10. This is a complaint from Mrs Ma'ungakolua Falevai ("the complainant"), who joined the Ministry as Senior Lecturer, Level 7 on 18 September 2008 and was appointed ACEdo at EMIS from 3 February 2014 until her resignation on 22 February 2016.
11. She was dissatisfied with the Ministry's Staff Board decision of 30 June 2015, which approved that Mr Hepeti Takeifanga, Chief Education Officer ("CEdo") be laterally transferred from the Procurement Division to head EMIS as ACEdo effective on the same day, even though he was on leave without pay and away overseas at the time of the decision. Mr. Takeifanga had previously been head of EMIS until he was transferred to the Procurement Division in 2013. The complainant was of the view that she had done a good job. She believed her placement at EMIS by the CEO (at the time) Mrs 'Emeli Pouvalu, and the Hon. Minister (at the time) Dr 'Ana Taufe'ulungaki, was not temporary. She expressed her dissatisfaction of the board's decision in a letter to the Director of Education on 21 July 2015.
12. Notwithstanding the Staff Board decision transferring Mr. Takeifanga to be head of EMIS, Claude Tupou, Acting Chief Executive Officer ("ACEO") approved the complainant's acting was to continue from 1 July through 31 December 2015. In informing the Ministry of Finance & National Planning ("the Ministry of Finance") of the complainant's acting for allowance purposes, the Ministry overlooked to include the required "Substitution Form". This failure delayed the complaint receiving the acting allowance, a failure that further frustrated the complainant. She waited 18 months before she received part of her acting allowance.

13. On 26 October 2015, the complainant applied for special leave without pay, which the Ministry approved for 20 days. On 17 December 2015, she requested a further 12-month special leave without pay but this was not approved by the Public Service Commission (“PSC”). She tendered her resignation on the 22 February 2016 the day she received the PSC decision of 5 February 2016.

The Decision to transfer Mr Takeifanga to EMIS

14. Mr. Takeifanga’s lateral transfer was discussed and approved by the Ministry’s Senior Management at a Staff Board meeting on the 30 June 2015. This was requested by the Deputy CEO Finance Division, that Mr. Takeifanga be moved from the Procurement Division to EMIS so that the Procurement post can be vacant allowing it to be advertised for recruitment. Mr Takeifanga was on special leave during this time (since 11 April 2015 to January 2016) and the complainant was ACEdo at EMIS at the time of the decision.
15. The complainant in a letter of 21 July 2015¹ to the Director (ACEO) expressed her dissatisfaction with the Staff Board’s decision. In her view the Ministry cannot appoint Mr Takeifanga to head EMIS whilst he is not at post. She was concerned that the transfer of Mr. Takeifanga to EMIS would effectively deprive her of the recognition and compensation for her efforts as ACEdo at EMIS but this was not the case because she continued to be ACEdo at EMIS while Mr. Takeifanga was on leave.

The Ministry’s response on 17 February 2017 said:

“The decision to move Mr Takeifanga back to EMIS was a collective decision of the Senior Management team of the Ministry on the 30 June 2015 after the Deputy CEO for Finance requested the return of the CEdo Procurement post held by Mr Takeifanga. The only available position then in his line of training that he could be laterally transferred to was the CEdo post for EMIS. As such the Ministry submitted a recommendation to the Board to transfer Mr Takeifanga back to the post of CEdo EMIS, and this was approved by through Decision No. 2015/25 of 30 June 2015.”²

“The Management felt that he had been trained in Paris, France along this area and should be returned to the post.”³

16. Public Service Policy Instructions 2010, 1D Acting Appointment provides:

¹ Complainant letter of Dissatisfaction dated 21 July 2015

² Internal Memo from Deputy CEO Mafi to ACEO, dated 13 August 2015

³ Ministry’s response to Ombudsman referral re: issues complaint about, dated 8 February 2017

(1) *Acting appointment occurs when an employee is designated to carry out the full range of duties of another employee in a higher grade in the Public Service who is –*
 (a) *absent on vacation leave, special leave, study leave, sick leave, secondment or maternity leave*

(2) *An employee on acting appointment shall take all the terms and conditions of the higher grade.*

(3) *When an employee is appointed to act in a higher post that employee is expected to also perform the duties of his substantive post...*"

17. Notwithstanding the Ministry justification for moving Mr. Takeifanga back to EMIS, the complainant was of the view that her placement with EMIS was not temporary.

"The decision was made very clear to me by the CEO ('Emeli Pouvalu) that I do the work, and it wasn't temporary." ("Na'e mahino lelei kiate au e tu'utu'uni ko 'eni 'i hono fakahoko mai 'e he Talekita ('Emeli Pouvalu) ke u 'alu 'o fai e ngaue, na'e 'ikai ko e fakataimi pe.")⁴

"I was called into the office of the Director (CEO) 'Emeli Pouvalu on the first week of February 2014, and was informed that she and the Hon. Minister Dr 'Ana Maui Tause'ulungaki had agreed to put me in-charge of EMIS ...".⁵

The Ministry pointed out:

"It should be noted that acting in a higher position cannot guarantee promotion of the acting person to the post, in case Mrs Falevai had assumed such." ⁶

Allegations of defamation – The Internal Memo

18. The complainant also claimed to have been defamed by an Internal Memo provided by Deputy CEO Mafi on 13 August 2015 for the necessary information of ACEO in regarding to the issues she complained about. ⁷

"Collective personal and unnecessary issues on my effort to pursue study which were beyond my control and have nothing to do with my performance are being brought up for my judgment on this post instead of my performance." ⁸

⁴ Complainant's letter to Investigation Officer, dated 7 April 2017

⁵ Complainant's letter to Ombudsman Office, dated 7 April 2017

⁶ Ministry's response to Ombudsman referral re: issues complaint about, dated 8 February 2017

⁷ Complainant's letter of complaint to Ombudsman dated 8 September 2016

⁸ Letter from complainant to ACEO, dated 26 August 2015

“I herewith lodged this complaint against a defamatory letter which tarnished my good reputation and as well my family, that is indiscreet (letter), injustice, malicious, and discriminatory made by the Ministry’s Staff Board through Mrs Lucy Moala Mafi, Deputy CEO, Human Resource.”⁹

The Ministry responded:

“The comments made by DCEO (Deputy CEO Mafi) HR to the CEO (ACEO) on 13 August 2015 did not intend to attack, defame or ridicule the complainant. It was the situation known to the DCEO HR at that point in time and presented to the CEO as background information.”¹⁰

The Complainant continued as Acting Chief Education Officer, EMIS

19. Despite the Ministry Staff Board decision of 30 June 2015, the complainant continued as ACEdo, at EMIS because Mr Takeifanga’s continued to be on leave without pay. On 24 July 2015 ACEO Tupou advised CEO MFNP¹¹ of the extension of the complainant’s acting appointment.

“Further to my Savingram Ref. 17/1/15 dated 1 April, 2015 regarding the above-mentioned acting appointments in the last Financial Year 2014/15, be advised that the following acting appointments are to continue in the new Financial Year with effect from 1 July, 2015 until December, 2015 or unless earlier terminated”.

An explanatory note accompanied the Savingram read:

“Hepeti Takeifanga was transferred back to this post on 30 June, 2015 but is currently on special leave without pay until Dec. 2015.”

20. On 28 July 2015 another savingram was sent from the Ministry to the CEO Finance and informed that the complainant is acting Chief Education Officer of EMIS until 31 December 2015.

Ref: P.1105: “The substitution is to take place from 1/7/2015 to 31/12/2015 or unless earlier terminated, and to receive full allowance.”¹²

Delayed Payment of Acting Allowance

⁹ Complainant’s letter of complaint to Ombudsman, dated 8 September 2016

¹⁰ Internal Memo, from Deputy CEO Mafi to ACEO, dated 13 August 2015

¹¹ Claude Tupou, Savingram 17/1/5, 24 July 2015

¹² CEO, Claude Tupou, Savingram to CEO, Finance re: Substitution (Acting) Appointment, 28 July 2015

21. Notwithstanding the correspondence with the Ministry of Finance, the complainant's payment of acting allowance was slow due to the failure of the Ministry to submit the prescribed "Substitution Form" when the CEO at the time, Mrs. Pouvalu made the initial advice to the Ministry of Finance on the 17 January 2014. A second Savingram to regularize the same was submitted on 5 March, 2015, and a third on 13 March 2015¹³. This was to seek special consideration for the payment of acting allowance to the complainant with effect from 3 February 2014 (to 13 March 2015).

*"She had continued to act as the ACEdo EMIS from 3 February 2014 until 18 November 2015. To the Ministry's knowledge, she was paid acting allowance for the time she was acting, thus she was recognized for the work she did on the higher position. She had been advised that if no acting allowance was paid to her bank account, that she advises the ACEO accordingly, but there had been no work from her to this effect."*¹⁴

22. On the 26 of August 2015 the complainant responded to the ACEO's letter of 14 August:

"Thank you for taking your time to respond to me which I received on the 17 August 2015. I appreciate the opportunity that you clarify what I am dissatisfied with. Knowing you have committed to act upon my dissatisfaction has given so much relief and sense of self-worth.

*"But I wish it would have been more prompt if you would like to retain goodwill at the earliest in your fellow employee. Thank you for addressing and formalizing the acting position and allowance which I believe "A stitch in time would have saved nine."*¹⁵

23. Following the correspondence to normalize the complainant's acting allowance, the first payment was made on 6 April 2015 to the complainant. The sum of \$1,413. 72 for the period of 1 July 2014 to 23 March 2015. The outstanding for the period of 3 February 2014 to 30 June 2014 was paid to the same bank account on 11 August 2015.¹⁶ The acting allowance from 24 March 2015 to 18 November 2015 was paid as normal.¹⁷

"The Ministry wishes to thank you for all the assistance ... allowing the payment of acting allowance from 1 July 2014 to date. Further to the above the Ministry ...seek your kind consideration for the payment of acting allowance incurred in the last financial year from 3 February to 30 June 2014, which amount to

¹³ Emeli Pouvalu, Savingram P.1105 Substitution (Acting) Appointment, 5 March 2015

¹⁴ ACEO letter to Mrs Falevai, dated 14 August 2015

¹⁵ Complainant's letter to ACEO dated 26 August 2015

¹⁶ Ministry of Finance & National Planning Salary payment record

¹⁷ Email from Kaivei Hoeft, Ministry of Finance, dated 7 March 2018

*\$991.38. The Ministry deeply apologizes for all its short-coming in the handling of this case, especially for failing to attach a Substitution Form to its Savingram Ref. 21/15/1 dated 17 January 2014.*¹⁸

Leave without Pay

24. The complainant's acting duty ended when she went on leave without pay from 19 to 24 November 2015 to attend the wedding of her son in Hawai'i, USA.¹⁹ She was granted another leave without pay from 25 November until 21 December. She applied on the 21 December 2015 for a one year special leave without pay, to be effective from 4 January 2016 to 22 December 2016²⁰. ACEO Raelyn 'Esau on the 22 December 2015 only approved 20 days leave without pay (within her authority) while the remaining days would have to be submitted to the Public Service Commission. The complainant was informed the same day.²¹

*"My children need a baby sitter for their children for they work and study."*²²

The Resignation

25. On the 18 January 2016 the Ministry's ACEO forwarded a submission received by the PSC Office on 20 January 2016 requesting the approval of one (1) year additional leave without pay on compassionate grounds for the complainant. PSC Decision No. 50 dated 5 February 2016 was issued refusing the request of the complainant since she was already on a leave without pay that commenced in November to December 2015, and that her absence for the period of 4 January 2016 to 29 February 2016 was regularized through granting of special leave without pay. The complainant was required by PSC to resume duty by the 1 of March 2016.²³ The Ministry did not convey the PSC decision of 5 February 2016 to the complainant until the 22 February 2016 which is when the PSC Decision was located at the desk of the Minister's Personal Assistant.

PSC Decision No. 50 5 February 2016:

"That the request from Mrs Ma'ungakoloa Falevai, Senior Lecturer, Ministry of Education and Training for one (1) year special leave without pay on compassionate grounds be not

¹⁸ Lucy Moala Mafi Savingram to CEO, Ministry of Finance and National Planning, dated 16 June 2015: re: Acting Appointment and Acting Allowance Mrs Ma'ungakoloa Falevai, Acting Chief Education Officer (EMIS)

¹⁹ Application for leave, dated 26 October 2015

²⁰ Application for leave, dated 21 December 2015

²¹ Ministry's response to Ombudsman, dated 8 February 2017

²² Application for leave (Leave Form), date 21 December 2015

²³ Letter from PSC to the Ombudsman , dated 21 February 2018

approved.” PSC Decision No. 50.²⁴

26. The complainant upon receiving from the Ministry of the decision by the PSC denying her request for extended leave without pay, tendered her resignation on the same day (22 February 2016).

Excerpt from the complainant’s resignation letter addressed to Mr. Claude Tupou, Chief Executive Officer

“I am informing you that I wish to resign from my current position as a Senior Lecturer at your Ministry. I received your email today of the PSC of my leave without pay request; however, if at all possible, I would very much appreciate you releasing me from employment with the Ministry as soon as possible.

“Thank you for the opportunities for professional and personal development that you have provided me during the last eight years. It was a pleasure and have enjoyed working and appreciate the support provided me during my tenure with the Ministry.

This was not an easy decision to make and involved a lot of family discussions and considerations, particularly with respect to my family situation and their future plan.”²⁵

27. The complainant’s resignation was approved on 14 October 2016 (PSC Decision No. 10) after the complainant paid \$1,796. 46 on 6 October 2016 for the 14 days she was short of the resignation notice period. The notice together with the requirement to pay for the 14 days shortfall of the notice was communicated by PSC to the complainant on 28 April 2016, and again on 5 August 2016.

The Ombudsman’s Opinion

- 1) That the decision of the Ministry to laterally transfer Mr Takeifanga to Head EMIS was reasonable. It was aimed at freeing the CEdo post at Procurement to be advertised and was not a disadvantage to the complainant because she was receiving the acting allowance (though delayed) as she was still Acting at that post given that Mr. Takeifanga was on special leave.
- 2) That the complainant is a senior staff of the public service. She had the option of contacting the Ministry or the Public Service Commission to enquire regarding the decision before deciding to resign.

²⁴ PSC Decision No. 50, 5 February 2016

²⁵ Resignation letter, dated 22 February 2016

- 3) That the Ministry with good intentions regulated the complainant's acting appointment early on (17 January 2014), but had overlooked to include a prescribed Substitution Appointment Form, resulting in the long delays before receipt of the acting allowance. However, the complainant had received the whole of the acting allowance she was entitled to (from 3 February 2014 to 18 November 2015).
- 4) That, clear communication processes was lacking in the Ministry regarding the delivery of decisions and correspondences to the complainant.

RECOMMENDATIONS

28. I am recommending three (3) things in this Report pursuant to section 18(3) of *Ombudsman Act 2001*-


Firstly, that, the Ministry must ensure that its decisions are provided with reasons, and to be clearly communicated in a timely manner to the relevant party;

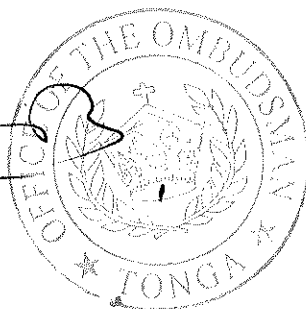
Secondly, that, the Ministry must ensure that all relevant documents and processes are completed and forwarded to relevant Ministries in a timely manner;

Lastly, that, the Ministry report to me within two months of the date of this report to provide a follow up report of the recommendations.

MINISTRY'S RESPONSE 15 MAY 2018

29. On 17 April 2018, I delivered my Provisional Report to the Ministry setting out my findings, opinions and recommendations. On 15 May 2018²⁶, I received a response from the Chief Executive Officer in a letter accepting the recommendations of this Report and committing to implement the recommendations within 2 months. As required under section 18(5) of the *Ombudsman Act 2001*, a copy of this email response is attached to this Report as Annex 1.


Aisea H. Taumoepeau, SC
Ombudsman



²⁶ Email response from GM dated 19 April 2018



RECEIVED

Apr 21/18

MINISTRY OF EDUCATION AND TRAINING

P. O. Box 61, Nuku'alofa, TONGA
Tel: (676) 23 511; Facsimile (676) 23 596; Email: claudetupou@gmail.com
(Please address all replies to the Chief Executive Officer)

JNA
23/05/18

Ref: 26/1/47

'Aisea H. Taumoepeau
Ombudsman
Office of the Ombudsman
Nuku'alofa
TONGA

15 May, 2018

Dear 'Aisea,

DoI
Fyi
JNA
24/5-SS
to final
Report.

**Subject: Provisional Report on the Case of Mrs. Ma'ungakoloa Falevai
No.CPR 16/52.**

Thank you for your letter dated 05 April, 2018 on the report mentioned above. This is to kindly advise your office as to how the recommendations proposed in the report will be addressed.

The recommendations are, "... that the Ministry must ensure that its decisions are provided with reasons, and to be clearly communicated in a timely manner to the relevant party; and must ensure that all relevant documents and processes are completed and forwarded to relevant Ministries in a timely manner."

The Ministry wishes to ensure your office that efforts to improve the processes and communication to relevant parties are in progress. This is with regard to the restructuring exercises of the Ministry in which Phase 2 is now underway where the staffs are being upgraded to higher positions. This is a follow-up exercise from the first phase last year which saw vacant posts being filled and upward mobility of teachers. Similarly, the same is being done with the senior positions and it is anticipated that this shift will improve our overall performance and processes.

Furthermore, Phase 3 of the restructuring exercise will focus on the Alignment of programs and supporting activities reciprocal to the Ministry's Structural Transition. It will focus on the aligning of the divisions and units similar to MET's re-structure transition and especially to support the transition with the necessary resources namely, the required posts.

This is submitted for your information, please.


Claude Tupou
Chief Executive Officer, Education and Training

