



Ombudsman
TONGA

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OMBUDSMAN FINAL REPORT ON THE COMPLAINT BY

TALITA HELU

CASE NO. OMB 17/202

**Whether the process of the suspension and dismissal of Talita Helu by the
Waste Authority Limited in October 2016 was fair and reasonable**

17th April 2018

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EXECUTIVE SUMMARY

1. This is a report on the complaint by Mrs. Talita Helu (“complainant”) regarding her dismissal from the Waste Authority Limited (“WAL”) on the 20 October 2016.
2. The complainant was employed at WAL as a permanent employee but was not part of management. All management staff are contracted staff. The complainant worked in the Community and Human Resources divisions.
3. The dismissal stemmed from allegations brought by the WAL’s Chief Executive Officer (CEO), Mr. Malakai Lomu Sika that the complainant had leaked confidential information to third parties.
4. An investigation by WAL ensued and the complainant was suspended on the 25 August 2016 before subsequently being notified of the WAL decision to dismiss her on 19 October 2016.
5. The complainant was unsatisfied with the WAL decision of dismissal and WAL’s investigative processes and lodged a complaint with our Office for a review of the decision.
6. Information was received from the complainant and WAL regarding the complaint.
7. I am recommending two (2) things in this Report pursuant to section 18(3) of *Ombudsman Act 2001*-
 1. That WAL revises the WAL handbook to explicitly define WAL processes regarding disciplinary processes and procedures; and
 2. That WAL report back to within 2 months of the date of this report based on a follow up of the recommendations.

BACKGROUND

8. The investigation was launched on 20 October 2017.
9. I assigned the investigation to my Investigation Team who undertook the investigation into the matter.
10. As part of the investigation, the team requested and received written correspondences and documents from the CEO and complainant.

THE OMBUDSMAN ROLE

11. 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*).
12. 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 WAL, and then form an opinion as to whether the act or the decision and the procedures followed by WAL was properly arrived at and was one that WAL could reasonably make.

REVIEW OF WAL INVESTIGATION

13. The complainant first lodged this complaint with our Office on 1 September 2016 regarding her dissatisfaction with the allegations put forward by CEO. The complainant was suspended from work at the time. On 9 September 2016¹, in accordance with our procedures, the complainant was informed that the WAL investigation was still ongoing and that we cannot interfere until the investigation is complete.
14. The complainant was dismissed on 19 October 2016 with effect on 20 October 2016 from WAL before re-lodging her complaint with our Office on 4 October 2017. According to the complainant, she was seeking ongoing legal advice from her legal counsel before deciding to re-lodge her complaint with the Office.
15. Upon receiving her complaint in October 2017, the investigation focused on reviewing the disciplinary processes followed by WAL regarding the complainant including whether the process was fair and reasonable. The events and actions taken by WAL is set out below in chronological order.
16. WAL became very suspicious that the complainant was responsible for leaking information and decided to access her work computer. WAL discovered emails which confirmed their suspicions and therefore required prompt action accordingly.
17. On 25 August 2016, CEO informed the complainant in writing² of the allegation made against her of disseminating confidential information to third parties without WAL's permission. Emails retrieved from her work computer was attached also.

¹ Letter to Talita Helu from CPR 9 September 2016 "launga felave'i mo e Fakamalolo Fakataimi Koe mei he Ngaue'anga Waste Authority Limited (WAL) CPR16/48

² Letter to Talita Helu from Malakai Lomu Sika dated 25 August 2016

18. The complainant was suspended with pay and an opportunity was given to her to provide a written explanation by 9 September 2016³. The reason behind the suspension with pay was to remove the complainant from the WAL site while a thorough investigation into the allegations commenced.
19. A response⁴ was sent to WAL by the complainant on 9 September 2016 denying the allegations and providing an explanation to the letter dated 25 August 2016. Also, the complainant alleges WAL had breached her privacy by accessing her personal emails and personal data stored on her work computer that WAL had seized without permission.
20. On 20 September 2016, CEO considered the complainant's response and responded to the complainant providing more detail regarding the allegations including new allegations regarding video files found on the complainant's computer⁵. Furthermore, the response referred to the Terms of Employment, WAL Telephone and Computer Use Policy, Confidential Policy and Breach Policies. A further opportunity was given to the complainant to respond by 27 September 2016.
21. A response letter⁶ from the complainant was received by WAL on 27 September 2016 stating that she did want to comment on the new issues raised by WAL but continued to deny the allegations in accordance with her first response letter.
22. On 4 October 2016, CEO wrote to the complainant⁷ and recapped all the correspondences so far between the complainant and himself and reasserted WAL's policies that the complainant was in breach of. The CEO stated that he was ready to proceed with his recommendations to the WAL Board but would like to meet the complainant on 5 October 2016 to discuss the matter first. The complainant attended this meeting and was informed of the CEO intention and recommendations to be made to the Board.
23. On 19 October 2016, CEO communicated to the complainant⁸ of the decision of the WAL Board to dismiss her from WAL. It was only at this point that the complainant's salary ceased.

³ Letter to Talita Helu from Malakai Lomu Sika dated 25 August 2016

⁴ Letter to WAL from Talita Helu dated 9 September 2016

⁵ Letter to Talita Helu from WAL CEO dated 20 September 2016

⁶ Letter to WAL CEO by Talita Helu dated 27 September 2016

⁷ Letter to Talita Helu from WAL CEO dated 4 October 2016.

⁸ Letter to Talita Helu from WAL CEO dated 19 October 2016.

WAL EMPLOYEE HANDBOOK

24. WAL has a more updated Employee Handbook issued in June 2017 that they currently use and makes available to its employees. However, for this investigation, the WAL Employee Handbook (*Conditions of Employment*) issued prior to the June 2017 edition was the Handbook effective during the complainant's time at WAL.
25. The WAL handbook does not show any clauses that specifically identifies the disciplinary process and procedures that WAL management shall undertake prior to arriving at a decision to suspend or dismiss an employee.
26. Reference is made within the WAL handbook to section 6.8 covering disciplinary action. However, there is no section 6.8 in the WAL handbook. CEO confirmed that section 6.8 in this version was a type error⁹.
27. Ultimately the complainant was dismissed in accordance with section 19 – Confidentiality Policy of the WAL handbook. Failure to comply with this section can lead to termination.
28. According to the CEO, the Human Resources division at WAL has been lacking in establishing efficient systems of record keeping which includes keeping records of WAL and includes a failure to provide the employee with a copy of the WAL handbook. CEO confirms that although there was no formal system of having access to the WAL handbook prior to his time as CEO, all WAL employees are now given a copy of it and are expected to read and understand its content.

OPINION

29. That the complainant was afforded every opportunity to comment and was heard at every stage of the WAL investigation which included an opportunity to be heard directly by the CEO prior to the CEO making his recommendations to the WAL Board.
30. Although there is no disciplinary process in the WAL handbook, WAL applied fairness in the process by affording the complainant with opportunities to comment during every stage of the process.
31. The WAL handbook should cover procedural clauses which provides the process that employees shall take when they are subjected to disciplinary action. Despite the absence of such clauses, the CEO diligently applied due process when dealing with the.

⁹ Email from Malakai Lomu to Roman Vaihu dated 12 January 2018

32. The absence of specific provisions such as section 6.8 in the WAL Handbook relating to the processes and procedures of termination of employment does not mean that WAL cannot terminate an employee.
33. However, WAL must ensure to revise their Handbook to include specific provisions relating to termination. Having such provisions would contribute to WAL being transparent in providing its employees a clear process that all will understand to follow. This will act as WAL's safeguard for following due process.
34. Although there is no disciplinary process in the WAL handbook, WAL applied fairness in the process by affording the complainant with opportunities to be heard during every stage of the process before a final decision was made by the CEO.
35. Given the processes and procedures undertaken by WAL to the complaint of the complainant; I have formed an opinion pursuant to section 18(3) of the *Ombudsman Act 2001* that the decision to dismiss the complainant was properly arrived at by WAL and it was a decision that WAL could reasonably make.
36. It is understood that WAL is in the process of implementing systems of record keeping. This is vital considering the nature of complaints thus far against WAL and for future complaints.

RECOMMENDATIONS

I am recommending two (2) things in this Report pursuant to section 18(3) of *Ombudsman Act 2001*-

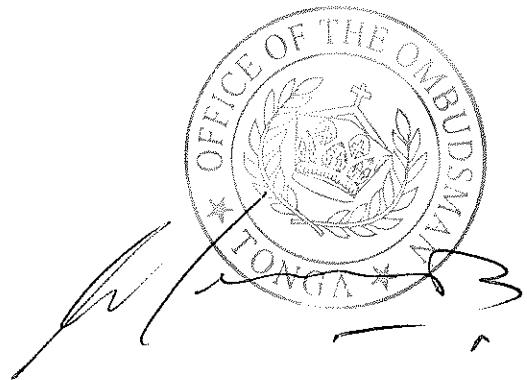
Firstly, that WAL revises the WAL handbook to explicitly define WAL processes regarding disciplinary processes and procedures; and

Lastly, that WAL report back to me within **two months** of the date of this report is finalized with a follow up report on recommendation 1.

RESPONSE FROM WAL

37. On 15 March 2018, I delivered my Provisional Report to WAL setting out the facts, opinions and recommendations. On 29 March 2018, I received a response from WAL accepting all the recommendations in the Provisional Report including the fact that WAL had already adopted a new Administration Policy Manual which covers all human resource matters and address the recommendation in the report.

38. A copy of the WAL response is attached pursuant to section 18(5) of the *Ombudsman Act 2001*.



'Aisea H. Taumoepeau, (SC)
Ombudsman

17th April 2018

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29 March, 2018

Mr. 'Aisea H. Taumoepeau, SC
Ombudsman
Ombudsman Tonga Office
Nuku'alofa

Dear Sir

Re: Provisional Report on Talita Helu complaint against Waste Authority Limited (WAL), Case No. OMB 17/202

I refer you letter dated 15 March 2018 attaching the above report for our comments and how we take steps to address your recommendations in the report.

Firstly, we thank you for carrying out the investigation in a professional manner. We have reviewed the report and have no further comments. All matters discussed are well covered in the report.

As for implementation of the recommendation, please note that WAL has already adopted a new Administration Policy Manual which covers all human resource matters and address the recommendation in the draft report. We can send you a copy the manual if you require.

Yours sincerely,

Malakai Lomu Sika
Chief Executive Officer



Copy to : Mr. Carl Sanft
Chairman of Board of Directors
Waste Authority Limited
Nuku'alofa