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**OMBUDSMAN'S FINAL REPORT ON THE
COMPLAINT BY**

Tevita Tu'akipulotu Ma'u

CASE NO. OMB 17/08

**Whether the post he was appointed to by the Ministry
of Internal Affairs in January 2016 was fair and
reasonable given that he had successfully obtained a
Bachelor of Arts degree and had been a scholar
sponsored by the Ministry**

1st August 2017

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EXCECUTIVE SUMMARY

- 1 The complainant Tevita Tu'ipulotu Ma'u was awarded a Tonga Government Funded Scholarship Award in 2013 to study for a Bachelor of Arts in Cultural Anthropology in New Zealand. The scholarship was sponsored by the Ministry of Internal Affairs ("MIA"). It was a condition of the award that he would work for MIA upon completion of his studies.
- 2 In January 2016, the complainant completed his studies and returned to work for MIA. MIA did not have a post for him but he started working in the Ministry on the 8th of January. In May 2016 he was appointed to the post of Employment Officer a level 9 position with a starting salary lower than the usual graduate starting rate in the Public Service.
- 3 The complainant complained about his situation with senior officers in MIA but nothing eventuated. He then lodged a complaint with my office in February 2017 after over a year of employment by MIA where he worked at Assistant Secretary level (level 9) and yet was paid at the lower level 9 salary.
- 4 I am recommending six things in this Report pursuant to section 18(3) of the Ombudsman Act 2001-

Firstly – that MIA accepts that the complainant was a scholar sponsored by it and it had an obligation to employ the complainant (having returned with a Bachelor of Arts) at level 9.

Secondly – that MIA accepts that the decision to employ the complainant as an Employment Officer at level 9, was unfair on the complainant and it was unreasonable of MIA to so appoint him.

Thirdly – that MIA accepts that it was unreasonable to continue to employ the complainant at the lower paying post, in addition, the long delay in remedial action to rectify the complainant's position was unreasonable and caused financial and emotional hardship on the complainant.

Fourthly – that MIA take immediate action to ensure the complainant is employed at a level 9 (or the equivalent band) graduate position given the new Public Service Commission ("PSC") salary structure.

Fifthly – that MIA consider compensating the complainant for the balance of the salary that he should have received had he been appointed to level 9 in January 2016 - until he is appointed to an appropriate position commiserate to his level of training.

Lastly – that the MIA report back to me within 3 months of the date this report is finalised to provide a follow up report on the recommendations.

BACKGROUND

- 5 The complaint was received on the 15th of February 2017.
- 6 I assigned the investigation to my Investigation Team who undertook the investigation and met with the CEO of MIA, ‘Ana Bing Fonua.
- 7 The team requested and received documents from the complainant in addition to documents from MIA, the Ministry of Education and Training (“MET”) and the PSC.

THE OMBUDSMAN’S ROLE

- 8 Under section 11 of the *Ombudsman Act 2001*, the Ombudsman has the authority to investigate the administrative acts, decision, omissions and recommendations of an officer of an organization in his capacity as an officer of that organization. This applies to the MIA which is an organization under the Act. (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 MIA, and then form an opinion as to whether the act or the decision and the procedures followed by MIA was properly arrived at and was one that MIA could reasonably make.
- 10 My role is to consider the administrative conduct and decisions of MIA and to form an independent opinion on whether that conduct was fair and reasonable.

THE SCHOLARSHIP AWARD

- 11 On the 13th of February 2013 the complainant was advised in writing by the MET that he had been awarded a scholarship to study cultural anthropology at Victoria University, Wellington, New Zealand¹. The letter advised him that he was a MIA sponsored scholar and would be expected to return and work for MIA when he completed his studies.
- 12 On the 4th of March 2013, the MET sent a savingram² to MIA advising the Ministry of two sponsored scholars which included the complainant. The savingram included the duration of his study and that he was expected to complete his studies at the end of 2015.

¹ Letter from MET to Tevita Tu’akipulotu Ma’u dated 13 February 2013

² Savingram from Director of MET to Secretary MIA Ref 21/15/1 dated 4th March 2015

- 13 The complainant completed his studies as expected in December 2015 having completed the requirements for a Bachelor Degree in cultural anthropology from Victoria University³.

EMPLOYED AT MIA

- 14 On the 7th of January 2016, the MET scholarship officer sent MIA a savingram introducing the complainant and advising that he had completed his studies⁴.
- 15 On the 8th of January 2016, the complainant presented himself at MIA and he was put to work in the Culture Division.
- 16 In March 2016 correspondence is exchanged between MIA and the PSC regarding a post for the complainant. The first is a savingram dated the 4th of March from MIA to PSC⁵ that referred to the complainant, their sponsored scholar who had started with MIA on the 8th of January 2016. MIA requested that the complainant be appointed to an existing vacancy of Employment officer (level 9 which had additional points including a lower minimum than level 9 which is the graduate entry level) but at a higher point (\$17,277) rather than the minimum (\$16,247). The savingram noted that he has been working without pay since January but there was no financial provision in the current budget as the MIA was only informed of his return in January 2016.
- 17 The reply from the PSC is dated the 14th of March 2016⁶. They advised that the minimum point of the employment officer post is lower than the graduate starting level of \$17,277. The PSC suggested options regarding the appointment of the complainant to “maintain consistency with other graduate level 9 positions” 1. The training and employment officer which starts at the minimum of \$17,277 or 2. Abolish the employment officer post and reallocate funds to create a new assistant secretary position for the complainant
- 18 On the 18th of March 2016 MIA sent another savingram⁷ to PSC that the options provided in their 14th March 2016 savingram were new positions. Their view was that if they chose this option, the appointment would start from the date of the PSC decision but did not address the fact that the complainant had been unpaid since January. MIA submitted that the complainant be appointed to the Employment Officer post but not to start at the minimum point but at \$17,277 which was the graduate starting salary. MIA suggested that there was precedent for the higher starting point.

³ BA Degree Certificate from Victoria University for Tevita Tua Ki Pulotu Mau 19 May 2016

⁴ Savingram from the A/CEO MET to CEO MIA Ref 21/15/1 dated the 7th January 2016

⁵ Savingram from the A/CEO MIA to the CEO PSC Ref STF.2/1/v3 dated the 4 March 2016

⁶ Savingram from the A/CEO MIA to the CEO PSC Ref STF.4/2/41/2V.4 dated the 14th March 2016

⁷ Savingram from A/CEO MIA to the CEO PSC Ref STF.2/1/v4 dated the 18 March 2016

19 In reply to the savingram from MIA to PSC of the 18th March⁸, PSC responded on the 31st March 2016 and quoted the Public Service Policy Instructions, section 5A.3 that new appointments must start at the minimum point unless additional qualifications are held. In their view, because the complainant did not hold any additional qualifications, the start at the higher point was not justified.

20 On the 12th of April 2016⁹ MIA wrote to the PSC and acknowledged the advice of the 31st March 2016. It agreed to appoint the complainant to the employment officer position with a starting salary of \$16,247. The complainant is appointed by Public Service Commissioner Decision No. 186 of 13 May 2016 –

“That Mr. Tevita Tu’akipulotu Ma’u, New Scholar be appointed to the position of Employment Officer, Ministry of Internal Affairs and that he be paid at the minimum point (i.e. \$16,247) plus 5% of the Level 9 salary scale with a salary range of \$16,247 to \$27,606 plus 5% COLA with effect from 8 January 2016 (i.e. the date of resumption of duty)”¹⁰

21 Since his appointment to Employment Officer the complainant has raised his concerns with the Head of his Division, Pulpaki Ika and Kalesita Taumoepeau, the MIA Corporate Division Head regarding his lower starting salary compared to other new scholars with Bachelor degrees in the Public Service. The response was that MIA was working on it. Frustrated with the lack of progress to remedy his employment situation, the complainant lodged his complaint with my office in February 2017.

THE MIA RESPONSE

22 The complaint was sent to the CEO of MIA on the 2nd of March 2017 and a reply was received from the CEO of MIA on the 10th of April 2017¹¹ which stated the following –

1. That MET had advised MIA in January 2016 about the return of the complainant a MIA sponsored scholar “*but no budget allocation was transferred to MIA to cover the returning scholar position*”
2. Because there was no returning scholar position, the offer was to appoint him to their vacant position of Employment Officer “*to fulfil the obligation by Government to offer a job to a returning scholar; and for Mr. Ma’u to be paid as he had been working for several months already*”

⁸ Savingram from CEO PSC to the CEO MIA Ref STF.4/2/41/2v5 dated the 31 March 2016

⁹ Savingram from CEO MIA to the CEO PSC Ref STF.2/f dated the 12 April 2016

¹⁰ Savingram the A/CEO PSC to the Ombudsman Ref STF4/2/41/2&PF 13337 dated the 17 March 2017

¹¹ Reply from MIA CEO to the Ombudsman dated the 17 March 2017

3. *"MIA has fulfilled Government's obligation of offering Mr. Ma'u a job as a returning scholar (regardless of the position)" and has sought PSC's... "special consideration in the case of Mr. Ma'u being appointed to the position of Assistant Secretary (as the returning scholar position) to compensate him at the pay grade he deserves, and the match the relevancy of this university degree"*
4. *"A new position of Assistant Secretary in Culture Division has been established specifically for Mr. Ma'u...however...MIA has been advised by PSC that Mr. Ma'u has to apply for the position as he is currently an employment officer"*

THE PSC RESPONSE

- 23 The matter was also referred to the PSC and a reply was received on behalf of the CEO dated the 17th of March 2017¹². PSC stated that the request from MIA in March 2016 to appoint the complainant to the Employment Officer post but at a higher starting point was not in accordance with policy and other options were offered (*refer to paragraph 17 above*). These options would have ensured that the complainant had started at the *"exact same salary scale and salary level in the classification of position as other graduate positions placed at Level 9 (i.e. a minimum of \$17,277)"*. Notwithstanding these options MIA requested that PSC appoint the complainant to the Employment Officer position (*the lower minimum salary starting post*).
- 24 Further queries were made to the PSC regarding the treatment of persons who had been on Government sponsored scholarships and resumed duty in the Public Service. The PSC stated the following¹³ –
1. That the Employment Office position had a lower minimum point hence *"the – officer will be disadvantaged given the current practice to appoint all new scholars at a graduate position which usually has a starting salary of \$17,277"*
 2. That if MIA had created the Training and Employment Officer ("TEO") post *"as per our advice, Mr Ma'u would have been appointed to the TEO post and he will receive the minimum point which is \$17,277. Since Mr. Ma'u is a new scholar, his appointment will be made effective from the date he assume duty at MIA (i.e. 8 January, 2016) and not the date of the PSC decision"*.
 3. Government is obligated to create a position for a new Scholar following the completion of their studies section 6E.1 Public Service Policy Instructions 2010 but it does not *"specify the position for the recruitment of Government scholars"*.

¹² Savingram the A/CEO PSC to the Ombudsman Ref STF4/2/41/2&PF 13337 dated the 17 March 2017

¹³ Email from Mele Haifine Moala (PSC) to Lepaola Vaea (Omb) dated the 24 April 2017

4. *"In most cases, scholars are often appointed to graduate level 9 positions like Assistant Secretary. So there has not been a case where scholars were recruited in the same manner as that of the case of Mr. Ma'u".*
5. The PSC office had provided options to MIA for the appointment of the complainant but it is *"not within the authority of PSC to dictate to a CEO as to what position should be created given that all budget matters are under the CEO of the Ministry. As such the PSC still processed the recruitment given that it is the recommendation of the Ministry"*.
6. There were 2 options for MIA to resolve the complaint –
 - a) MIA to seek funding to create an Assistant Secretary position to which the complainant can apply.
 - b) MIA to resubmit to PSC a request to amend the complainant's appointment as Employment Officer to Training and Employment Officer with Ministry of Finance and National Planning approval for salary purposes.

OPINIONS

- 25 That MIA was informed that the complainant was studying under a MIA sponsored scholarship from the beginning of his scholarship award.
- 26 That MIA knowingly failed to ensure that the complaint was appointed to an appropriate post given his training.
- 27 That PSC with its function of appointing employees to the Public Service should have ensured that the complainant was appointed to a relevant position given his training and uphold the Public Service Principles for consistency and fairness. That the PSC would have known (and admitted) that there was no *"appointment similar to that of Mr. Ma'u's case."*¹⁴
- 28 That the complainant has been unfairly disadvantaged since he started at MIA in January 2016 because of the lower paying position he was appointed to and continues to be employed in.
- 29 That the delay in MIA taking appropriate action to rectify the complainant's employment situation was unreasonable.

¹⁴ Email from Mele Halfine Moala (PSC) to Lepaola Vaea (Omb) dated the 24 April 2017

RECOMMENDATIONS

30 Firstly – that MIA accepts that the complainant was a scholar sponsored by MIA and MIA had an obligation to employ the complainant (having returned with a Bachelor of Arts) at the graduate level 9;

Secondly – that MIA accepts that the decision to employ the complainant as an Employment Officer at level 9, was unfair on the complainant and it was unreasonable of MIA to so appoint him.

Thirdly – that MIA accepts that it was unreasonable to continue to employ the complainant at the lower paying post, in addition, the long delay in remedial action to rectify the complainant's position was unreasonable and caused financial and emotional hardship on the complainant.

Fourthly – that MIA take immediate action to ensure the complainant is employed at a level 9 (or the equivalent band) graduate position given the new PSC salary structure.

Fifthly – that MIA consider compensating the complainant for the balance of the salary that he should have received had he been appointed to level 9 in January 2016 - until he is appointed to an appropriate position commiserate to his level of training.

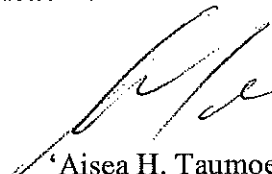
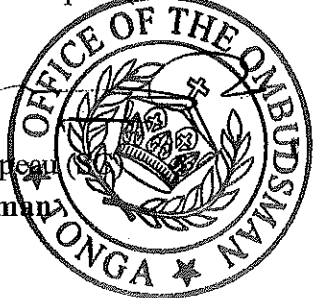
Lastly – that the MIA report back to me within 3 months of the date this report is finalised to provide a follow up report on the recommendations.

MINISTRY OF INTERNAL AFFAIRS RESPONSE JULY 2017

31 On the 14th of June 2017, I delivered my Provisional Report to the Ministry setting out my findings, opinions and recommendations. On the 10th of July 2017, I received a letter from the Ministry accepting the recommendations of this Report. A copy of this letter is attached to this Report (section 18(5) of the Ombudsman Act 2001).

PUBLIC SERVICE COMMISSION RESPONSE JULY 2017

32 On the 14th of June 2017, I delivered my Provisional Report to the PSC setting out my findings, opinions and recommendations. On the 6th of July 2017, I received a letter from the PSC with minor comments. A copy of this letter is attached to this Report (*section 18(5) of the Ombudsman Act 2001*).


Aisea H. Taumoepeau
Ombudsman


1st August 2017



7/10/17

Ministry of Internal Affairs, P.O Box 2395, Nuku'alofa, Kingdom of Tonga. Telephone: (+676) 28977 / 28976 Fax: (+676) 2300.

'Aisea H. Taumoepeau, SC
Ombudsman
Office of the Ombudsman
Retirement Fund Building
Cnr of Lelue Rd and Mateialona Rd
Nuku'alofa, TONGA

10 July 2017

Dear Sir,

SUBJECT: Provisional Report for the Complaint by Tevita Tu'akipulotu Ma'u – Case No. OMB17/08

I respectfully make reference to the abovementioned case and your letter dated 13 June 2017 regarding the subject matter.

After reviewing the provisional report, the following updates are submitted for consideration in the final report;

1. A new position of Assistant Secretary – Culture Division has been created, advertised and selection will be finalised within the next week.
2. Mr Ma'u could not be assessed in the Ministry's Performance Management System (PMS) due to the tasks he fulfilled in the Ministry (in the Culture Division) did not match his job description (of the Employment Division).
3. Culture Division effective 1 July 2017 has been transferred to the Ministry of Tourism, as such Mr Ma'u's position remains in MIA as it is an Employment Division position.
4. MIA will continue to take the necessary steps to complete the recruitment process of the Assistance Secretary for Culture Division and ensure fair compensation to Mr Ma'u as per recommendation no.5 of the provisional report.

I submit the above information for your information and please do not hesitate to contact me on (676) 24 586 should you need further clarifications.

Respectfully,

'Ana Bing Fonua
Chief Executive Officer
Ministry of Internal Affairs





OFFICE OF THE PUBLIC SERVICE COMMISSION
 NUKU'ALOFA, TONGA

06 July, 2017

Ref: PF. 13337

Ombudsman
 Office of the Ombudsman
 Retirement Fund Building
 NUKU'ALOFA

Dear Sir,

Re: Appeal by Mr. Tevita Tu'akipulotu Ma'u, Employment Officer, Ministry of Internal Affairs

Reference is made to letter dated 13 June 2017 (received on 14 June 2017) requesting PSC comments on the Provisional Report regarding the complaint from Mr. Tevita Tu'akipulotu Ma'u against the Ministry of Internal Affairs.

We have gone through the report of which the following minor comments are provided below for consideration please:

Provisional Report	PSC Comments		
<ul style="list-style-type: none"> ▪ Page 6, section 20 Employed At MIA, line 3 ▪ Page 7, section 21 Employed At MIA, line 5 	The salary scale of the positions concerned are referred to in the report as Salary Band instead of <i>Salary Level</i> which was applicable at the time of Mr Mau's appointment at MIA in 2016 as detailed below:		
	Positions	Before 1st July, 2016 New Salary Structure for the Tonga Public Service	After 1st July, 2016 New Salary Structure for the Tonga Public Service
	<ul style="list-style-type: none"> ▪ Assistant Secretary ▪ Employment Officer 	<ul style="list-style-type: none"> ▪ Salary Level 9 (i.e. \$17,277 - \$26,044) ▪ Salary Level 9 (i.e. \$16,247 - \$27,606) 	<ul style="list-style-type: none"> ▪ Salary Band L (i.e. \$19,490 - \$29,230) ▪ Salary Band M (i.e. \$15,120 - \$22,680)
<ul style="list-style-type: none"> ▪ Page 9, section 26 The PSC Response under paragraph 5, line 3 	To replace the word "budge" to read as " <i>budget</i> "		

Should you wish to further clarify the above comment, please feel free to contact our office at 25 770

Apologies for this delayed response as we had overlooked the query.

Respectfully,

(Handwritten signature)

Dr. Lia Maka
 Chief Executive Officer of the Commission

