

P.O. Box 847, Cnr of Lelue Road & Mateialona Road, 2<sup>nd</sup> Floor Retirement Fund Building, Nuku'alofa  
Phone : (676) 26 980; (676) 26984: Fax (676) 26 982

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

**CASE NO. CPR 16/95**

**Whether the Ministry of Commerce, Consumer, Trade and  
Innovation & Labor has the authority to withhold the adding of  
additional locations to existing retail businesses in Tonga**

**13 July 2017**

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## EXCECUTIVE SUMMARY

1. Mr. Zigao Wang (“the Complainant”) operates W & F Enterprise Limited. W & F Enterprise Limited (“W & F”) is a registered company incorporated on 15<sup>th</sup> July 2003 to carry out retail and import business activity in Tonga. To date, W & F is currently operating at four (4) locations (Fatai, Ha’akame & Pea) with Ma’ufanga being the principal place of business. The Complainant became a naturalized Tongan in 2014.
2. The Complainant lodged a complaint (“the complaint”) with our office against the Ministry of Commerce, Consumer Trade and Innovation and Labor (“the Ministry”) on the 13<sup>th</sup> December 2016. In substance, Complainant was complaining about decisions by the Ministry in refusing his application for relocation of his shop in Pahu (old) to Puke (new) in mid-2016 (“relocation application”) and subsequently cancelling his entire business license to operate W & F (“business license cancellation”) in late 2016.
3. On 26<sup>th</sup> January 2017, the complaint was approved by the Ombudsman for investigation and a referral letter was sent to the Ministry for a response.
4. The Ministry in its response letter on 6<sup>th</sup> February 2017, referred to a policy direction (“Policy direction”) in 2014 given by the Minister at the time (Dr. Viliami Latu), to freeze all existing retail businesses in Tonga from adding additional locations. This was amongst the reasons for refusing the Complainant’s request for relocation. The Ministry also confirmed that the relocation was not possible as the old location, Pahu has closed down and ceased to operate. As such, because of the policy direction not to add new locations, the addition of Puke as a location to his business license was not approved.
5. Following email correspondence with Ms. Distaquaine Tu’ihalamaka, the Companies Registrar and Deputy Chief Executive Officer at the Ministry (“the Registrar”) regarding the business license cancellation, the Registrar admitted that it was due to a statutory breach by the Complainant to file a notice of continued business activity in May 2016 and even after the three (3) months grace period.
6. A meeting was called with the Registrar on 24<sup>th</sup> March 2017 to clarify some of the issues raised in their initial responses in paragraph 4 & 5 above. The Registrar admitted that the Policy direction 2014 was verbally communicated by the Minister to her after he had had a meeting with some of the retail sector members. It was the Minister’s instruction to have the policy direction effective immediately. Since 2014, the Ministry has enforced the policy direction. The Registrar informed us that the intention was also to formalize the policy direction but this was not done.

7. The Registrar in this meeting further confirmed receiving from the Complainant, a late filing of his notice of continued business activity for W & F in September 2016. The cancellation notice of W & F issued by the Ministry to the Complainant on 2<sup>nd</sup> September 2016 was also disclosed. It was discovered from its content that the Ministry failed to inform the Complainant of his right to appeal pursuant to the statutory requirement in the Business License Regulations 2012 (“the Regulations”). The Registrar conceded to expediting the reinstatement of W & F business license which was completed on the 6<sup>th</sup> April 2017.
8. With the reinstatement of the complainant’s business license in April 2017, this part of the complainant’s complaint was resolved leaving the complaint regarding the addition of Puke as an additional location to his business license outstanding.
9. It should also be noted that the Complainant has been and is still incurring losses due to the enforcement of the policy direction 2014. The Complainant had built a shop at Puke in March 2017.
10. On that note, I am recommending four (4) things in this Report pursuant to section 18(3) of the Ombudsman Act 2001 –
  - 1) That the Ministry recognises that this matter is a legal issue to be determined between the Ministry and the Attorney General’s Office to ascertain whether the Ministry had the authority to freeze the addition of new locations to the retail/wholesale business license in 2014.
  - 2) The Ministry must inform the complainant of a way forward regarding this matter.
  - 3) That the Ministry, complies with its statutory obligations in terms of informing the licensees of their rights to appeal when a business license cancellation notice is issued.
  - 4) That the Ministry reports back to me within **one month** of the date this report is finalized to provide a follow up report on the recommendations.

## **BACKGROUND**

11. The complaint was received on the 19<sup>th</sup> December 2016.
12. I assigned the investigation to my Investigation Team who undertook the investigation and corresponded with the complainant and the Ministry including meetings.
13. The team requested, received and reviewed documents from the Ministry relating to the complainant's application.

## **THE OMBUDSMAN'S ROLE**

14. 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 Ministry which is an organization under the Act. (Section 18(1) and (2) of the *Ombudsman Act 2001*).
15. My investigation is not an appeal process nor am I conducting a judicial proceeding. 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. I then form an opinion as to whether the act or decision was one the Ministry could reasonably make or that the procedures followed by Ministry was properly followed.
16. My role is to consider the administrative conduct and decisions of the Ministry and to form an independent opinion on whether that conduct was fair and reasonable.

## **THE MINISTERIAL POLICY DIRECTION 2014 & ITS ENFORCEMENT**

17. Complainant approached the Ministry with his plan to relocate his old store in Pahu to Puke in early 2016. According to the complainant he was advised that this was possible. He went on to close down Pahu & entered into a lease agreement with a landowner at Puke where he intended to build the new store. He approached the Ministry again when work was completed about his relocation and this was refused by the Registrar. In early September 2017, complainant alleged that the entire business license for W & F was cancelled.
18. Complainant resorted to our office with his complaint on the 12<sup>th</sup> December 2017<sup>1</sup>. An investigation was carried out by my office and matter was referred to the Ministry for response on 26<sup>th</sup> January 2016<sup>2</sup>.

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<sup>1</sup> Zigao Wang, 'Launga Fekau'aki mo hono Kaniseli e Laiseni Pisinisi 'a Zigao Wang', 19<sup>th</sup> December 2016

<sup>2</sup> Aisea Taumoepeau SC, Ombudsman of Tonga, 'Complaint by Mr Zigao Wang – Case No. CPR 16/95 (Ref No. 'AHT.10/2017 CPR/A.4/1)', 26<sup>th</sup> January 2017

19. On the 6<sup>th</sup> February 2017<sup>3</sup>, a response letter from the Ministry was received at our office. In their response, the Ministry admitted to the refusal which was made on two grounds. Firstly, this was made in pursuant to a policy direction 2014 by the former Minister (Dr. Viliami Latu) –

*“not to allow existing retail store businesses to amend their business license to add additional locations to existing number of locations they currently have. Secondly, “the Ministry’s records showed and confirmed that the location at Pahu has been cancelled and Complainant was advised that he cannot relocate a non-existing location”<sup>4</sup>.*

20. On 24<sup>th</sup> March 2017<sup>5</sup>, a meeting was called with the Business Registrar at the Ministry Conference Room. In respect to the relocation application, Registrar confirmed the relocation issue was just a verbal discussion with the Complainant which he never submitted a proper application. The Complainant was also advised of the policy direction by the former Minister in 2014.

21. In respect to the policy direction in 2014, the Registrar further verified that it was just a verbal direction by the Minister after a meeting with the retail sector. He instructed the Registrar to enforce it immediately and freeze adding business locations to the retail and wholesale business license. Since then, the policy direction 2014 was enforced by the Ministry with an intention to have it regularized as part of its policies. However, the policy was never formalized in accordance with section 23 of the Business License Act 2002<sup>6</sup> (“the Act”) which provided that *“the Minister may with the consent of Cabinet make regulations for the proper and efficient administration of the Act”*.

22. Moreover, with regards to the issue of W & F business license cancellation, the Registrar at this meeting provided the removal notice<sup>7</sup>, which failed to inform the Complainant of his right to appeal pursuant to section 9(b) of the Regulations<sup>8</sup>. Section 9(b) stipulated –

*“Where the Registrar cancels, a Business License the Registrar shall notify the licensee ... and the notice shall inform the licensee of its right to appeal”*.

23. Under section 23 of the Act as amended, it stipulates clearly the authority of the Minister with the consent of Cabinet, to make regulations for the proper and efficient administration of the Act. There is no provision under the Act that prohibits the addition of business locations to the business license for retail and wholesale.

<sup>3</sup>Kolotia Fotu, Acting CEO, MCCTIL, Complaint by Mr Zigao Wang – Case No. CPR 16/95 (Ref No. 'AHT.10/2017 CPR/A.4/1)', 6<sup>th</sup> February 2017

<sup>4</sup> Above, No 3.

<sup>5</sup> Meeting with Distaquaine Tu'ihalamaka, Registrar of Business, MCCTIL (MCCTIL Conference Room, 24<sup>th</sup> March 2017)

<sup>6</sup> Business License Act 2002

<sup>7</sup> Ms Distaquaine Tu'ihalamaka, Registrar of Business, MCCTIL ' Removal Notice W & F Enterprises Ltd', 2<sup>nd</sup> September 2016

<sup>8</sup> Business License Regulations 2012

## RECOMMENDATIONS


24. I am recommending four (4) things in this Report pursuant to section 18(3) of the Ombudsman Act 2001 –


- 1) That the Ministry recognises that this matter is a legal issue to be determined between the Ministry and the Attorney General's Office to ascertain whether the Ministry had the authority to freeze the addition of new locations to the retail/wholesale business license in 2014.
- 2) The Ministry must inform the complainant of a way forward regarding this matter.
- 3) That the Ministry complies with its statutory obligations in terms of informing the licensees of their rights to appeal when a business license cancellation notice is issued.
- 4) That the Ministry reports back to me within **one month** of the date this report is finalized to provide a follow up report on the recommendations.

## MINISTRY'S RESPONSE JUNE 2017

25. On the 14<sup>th</sup> June 2017, I delivered my Provisional Report to the Ministry setting out my findings, opinions and recommendations. On the 27<sup>th</sup> June 2017<sup>9</sup>, I received a letter from the Ministry accepting the recommendations of this Report and listing the action items the Ministry has undertaken. As required under section 18(5) of the Ombudsman Act 2001, a copy of this letter is attached to this Report as Annex 1. A summary of the response is as follows –

- 1) *Ceased enforcement of the 2014 Policy Direction; and*
- 2) *Permitted the relocation and addition of new locations for retail/wholesale businesses in Tonga.*

  
**Aisea H. Taumoepeau, SC**  
**Ombudsman**



13<sup>th</sup> July 2017

<sup>9</sup> Ministry of Commerce, Consumer, Trade, Innovation & Labour, 'Provisional Report under the Ombudsman's Act Complaint by Zigao Wang against the Ministry of Commerce, Consumer, Trade, Innovation & Labour', 27<sup>th</sup> June 2017