



OFFICE OF THE OMBUDSMAN

PUBLIC REPORT

ON THE APPOINTMENT OF MELINDA KEN BY THE PUBLIC
SERVICE COMMISSION TO A POSITION AT THE
DEPARTMENT OF CUSTOMS AND INLAND REVENUE

Date: 17 December 2021



REPUBLIC OF VANUATU

OMB19/0007/04

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1. PURPOSE

The purpose of the Investigation is to determine whether the appointment of Melinda Ken (Ms Ken) by the Public Service Commission (PSC) to a position at the Department of Customs & Inland Revenue (DCIR) on 15 November 2018 was lawful.

2. SCOPE

The scope of the investigation is;

- a) to establish the facts about the appointment of Ms Ken to a position of Processing/Licensing officer at the DCIR;
- b) to determine whether such appointment is permissible under the law, particularly, the Public Service Act; and
- c) to determine whether the actions of Former Chairman of PSC, Martin Mahe (Mr Mahe) amounts to breaches of the Public Service Act and the Leadership Code Act.

3. ISSUE

The issue arising in the complaint is whether the appointment of Ms Ken by the PSC to the DCIR followed the proper Public Service recruitment processes as set out under the Public Service Act.

4. Background

1. The PSC at its meeting N0.21 of 15 November 2018 approved Ms Ken's contract to a position of Licensing Officer at the Rates & Tax Unit at the DCIR in Port Vila.
2. Twelve days later, the PSC issued an approval letter. In the letter, the PSC stated that Ms Ken's appointment was effective from 03 December 2018 and to end on 31st December 2019.

3. The Position was never advertised, and merit process requirements had not been met as normally done by the PSC pursuant to the Public Service Act requirements.

5. Chronology of Events

1. Around September 2018, Mr Mahe met up with Ms Ken at the Prime Minister's Office complex. Ms Ken informed Mr Mahe that she had submitted an open letter to the DCIR.
2. Following on from that meeting, Ms Ken submitted her Curriculum Vitae (CV) to Mr Mahe via his email address.
3. On 15 November 2018, the PSC, in its N0.21 meeting, approved and appointed Ms Ken to the position of a Compliance/Licensing Officer 2, within the DCIR. Members of the Commission who presided over the appointment included, Mr Mahe, Mr Glen Niowenmal, Mrs Christina T.Gesa, Mr Noel Molvis and Mr Kanam Wilson.
4. On 27th November 2018, the PSC informed Ms Ken of the offer through a letter that was personally handed to her by Mr Mahe.
5. Following the decision of the PSC to appoint Ms Ken to the DCIR, Mr Harold Tarosa, Acting PSC Secretary General then, contacted Ms Rose Malsale, Manager Human Resource Officer at DCIR to collect the CV from PSC.
6. On 3 December 2018, Melinda Ken commenced work at Rates and Taxes at DCIR.
7. On 28 December 2018, Ms Ken received an over payment to her salary, the amount of VT121, 659 by the Ministry of Finance.
8. Around May 2019, an instruction was issued to Finance Officers to make a recovery of wages over paid to Ms Ken.
9. On 18 May 2020, Mr Mahe informed the Ombudsman that before the Commission meeting on 15 May 2018, Benjamin Malas, then Director of DCIR, (Mr Malas) had approached him with Ms Ken's name to be discussed at the Commission. I will later show that this was a blatant lie by Mr Mahe.
10. On 11 June 2021, Mr Malas confirmed to the Ombudsman that during the appointment of Ms Ken, he was on compassionate leave and has no idea as to how she was appointed to a position within the DCIR that has never been advertised.
11. On 11 June 2021, Ms Rose Malsale, Human Resource Manager, confirmed that, normally she would be the one to prepare the contract package for Ms Ken, but in this matter, she did not prepare any contract agreement for her.

The PSC had issued an appointment letter to Ms Ken even before due process was followed through by the DCIR.

6. DISCUSSION

12. The issue arising in the complaint is whether the appointment of Ms Ken on a 12 months contract is in line with the Public Service Act and chapter 3 of the Public Service Staff Manual (PSSM).
13. The catalyst in the events that led up to the formal appointment of Ms Ken by the PSC to DCIR, appears to be the result of the meeting between Ms Ken and Mr Mahe at the Prime Minister's Office complex.
14. When the Investigation began Mr Mahe was reluctant to provide the information sought at the earliest opportunity afforded to him (even though he knew very well that he brought Ms Ken's Curriculum Vitae (CV) himself before the Commission for endorsement).
15. During the Investigation into the matter, Mr Mahe continually avoided giving the information the Ombudsman sought. This, in my view, is not consistent with his duty as a leader under the Leadership Code Act to comply and observe the law. He blamed the Director of Customs, Mr Malas for the negotiations and submission of Melinda Ken's contract to the PSC.
During the enquiry conducted by the Ombudsman on 11 June 2021, Mr Malas revealed that during Melinda Ken's appointment, he was on compassionate leave and learned only of her appointment after he resumed duty.
16. Failure to provide the information about the appointment of Ms Ken by Mr Mahe, had cost the Office of the Ombudsman the total amount of VT81, 920 on air fares for the Ombudsman to travel to Santo to conduct an interview, and a return airfare for Ms Ken to attend the enquiry on 11 June 2021 at the Office of the Ombudsman in Vila.
17. At the enquiry on 11 June 2021, the people attended include the former Acting SG of PSC, Harold Tarosa, former Director of Customs, Mr Malas, Former Chairman of PSC, Mr Mahe, and Human Resource Manager of Customs & Inland Revenue, Ms Rose Malsale and Ms Ken. During the enquiry, Ms Ken admitted that she emailed her CV directly to Mr Mahe.
18. When asked to tell his story of the events, Mr Mahe refused to tell the truth about his involvement in Ms Ken's appointment. Mr Mahe was then summoned to appear again on the 2nd of August 2021. During that meeting, Mr Mahe stated that *"ol application we I kam long office blong mi normally mi stap referem I go bak blong oli lukluk long hem but long this fala case application blong hem wetem CV blong hem mi karem I go directly blong mifla I discussem long commission."*

19. Mr Mahe further said that *"ating long issue ia taem i bin kamaot, mifla i bin review back ol process blong mifla especially in terms of ol minutes blong Commission we fastaem i no bin capturem ol discussions we ino bin gat ol background information long hem. Ating bae mi agri wetem yu se process hemi important, unfortunately long issue ia mifla I bin discussem directly inside long Commission and hemi no folem process, and hemi wan samting tu we mifla i lan long hem long issue ia taem hemi arise and i mekem blong mifla i tightem ol process blong mifla blong avoidem ol situations we bae i arise."*
20. Ms Rose Malsale, Human Resource Manager for the DCIR confirmed on 11 June 2021, that the above appointment did not follow proper recruitment processes. The DCIR had no knowledge and/or was unaware of the employment offered and employment terms and conditions of Ms Ken. Similarly, DCIR did not receive signed Employment Contract Agreement (contract) nor have a copy of such contract. The DCIR requested the PSC to provide copy of the Employment Contract but PSC failed to provide it.
21. Rose Malsale further confirmed that contracts of employment that were processed through the right and legal processes from the DCIR Director's Office and through the Ministry of Finance and Economic Management Director General's Office were only allowed and approved by PSC for three (3-6) months period. However, the contract of employment for Ms Ken was approved for a period of more than 12 months (3rd December 2018 to 31st December 2019).
22. The former Director of Customs, Mr Malas stated on 11 June 2021, that *"Mifla i work, i gat structure blong work blong organization. Mifla i advertisem ol positions. I gat ol interested individual oli apply, mifla i short-listim mo folem process blong hem we i stap. Be mi sapraes ia se i gat direct appointment we somebody I pickimap we ino go tru long screening, checkem ol competencies blong hem, even i kam kasem Director blong i signem off. Olsem Director long that time mi harem news se somebody I kam bae yumi kivim space long hem olsem ia."*
23. Normally, the Administration staff at the PSC would prepare a list of agenda items for the PSC's deliberation before each Commission meeting convenes. In Ms Ken's case, her recruitment was not on the list of Agenda to be discussed in the meeting that was called.
24. Ms Claris Hakwa, Administration Officer of the PSC confirmed that *"mi no sca:tem wan submission blong Ms Ken long Meeting No. 21 of 15th November 2018, long Agenda No. 03."* This confirms the evidence by Mr Mahe on 2 August 2021 where Mr Mahe confirmed that he himself brought Melinda Ken's CV to the Commission meeting and introduced it into the Commission Agenda through "Other Business". This was then deliberated on and approved by the Commission.

25. For reasons outlined above, it is my considered view that Ms Ken's appointment by the PSC did not comply with the legal process under the Public Service Act. Therefore, the appointment was improper and unlawful. There was a blatant disregard for the legal processes in place.
26. I listened very carefully to Ms Ken, and believed her testimony that she contacted Mr Mahe directly for a position at the DCIR. In other areas, her demeanour suggested that she was withholding some information from the Ombudsman.
27. Mr Mahe appeared before me on the 11th of June 2021. I listened carefully to his testimony which was very brief indeed. His demeanour suggested to me that he was withholding information from the Ombudsman. This was proved, when he admitted to tabling the matter himself, when he was summoned the second time on the 2nd of August 2021.
28. I also listened very carefully to the former Director of the DCIR Mr Malas, and watched his demeanour closely. I believed his story.

7. RESPONSES BY THOSE WITH FINDINGS AGAINST THEM

29. Before starting this Investigation, the Ombudsman notified all people or bodies complained of and gave them the right to reply. Also, a working paper was provided prior to preparation of this Public Report to give the individuals mentioned in this report another opportunity to respond.
30. Firstly, I say thank you to Mr Mahe for his responses to the Working Paper.
31. Mr Mahe disputed Finding 1. He stated that the process of appointing Ms Ken was made according to PSC Act and Public Service Staff Manual. He said that contract employees, temporary employees and daily rated employees are the same according to his understanding. He continued as follows –
 “Finding number 1. Bae mi no agri wetem. Defence we bai mi tekem, yumi go bak lo PSC Act, section 30 we hemi tokbaot temporary salary and contract employee. Lo section blo Act ia hemi usim toktok ia “and” blo seperetem tufala different types blo security spos yu stap lo contract, temporary salary or contract employees. Lo understanding blo mi, mi tekem se tufala I semak. That’s why oli usim toktok ia “and”between lo tufala. Spos umi lukluk lo PSSM , lo point namba 7 we I tok baot recruitment of temporary employees. Spos yu luk I kam taon lo namba 8, blo yu engagem contract employees, hemi no olsem recruitment of temporary salaries we under lo section 30 tufala tuketa I regard as the same.
 Spos yu luk lo recruitment section blo PS Act 7(a) hemi recruitmen blong wan staff hemi kam taon blong talem se it is not necessary to apply the formal process to apply in this manual, it is not a formal requirement to advertise.

Mi wantem emphasisem nomo se taem umi meet wetem ombudsman lo ples ia, hemi bin talem se mi bin consult wetem Director Benjamin Malas at that time, be hemi talem se no spos mi remember correctly. The question is hu i sendem Rose blong kam antap long PSC from mi no save long Rose, and spos we Rose I contact tru long Direction blong Benjamin blo kam collectem CV then intention is hemi mekem complaint in bad faith long Ombudsman from consultation I bin made vinis and I aware lo issue ia. Lo time ia mifala I bin go tru long retirement blong ol staff and I gat shortage blo man power, and everi request we I kam long office blong PSC mifala I traem everi best as much as possible blo oli go inside long work. Mi wantem blo umi clear nomo se hemia hemi no I permanent appointment be hemi I contract, and contract hemi gat specification blo hem I stap lo PSSM. Ating finding namba 1, lo report we mi risivim hemi no clear from ufla I no clear blong pointem se I gat breach lo wanem exactly”

32 My response to Mr Mahe is as follows:

- (a) The Public Service Commission appointed Ms Ken under a contract for a term of 12 months and 25 days (3 December 2018 – 31 December 2019).

Clearly she was not appointed to the post in DCIR on a permanent basis as the procedures regarding such recruitment was not complied with. Such procedure is required by section 15 of the Public Service Act and the detailed process is set out in Chapter 3 of the Public Service Staff Manual. That the selection of persons for appointments and promotion to be based on merit and that is to be determined by assessing their –

- I. Skills and ability to perform the duties and responsibilities of the post;
- II. Standard and efficiency of work performance;
- III. Formal qualifications and training;
- IV. Personal qualities including conduct.

Chapter 3 paragraph 2.4 of the Public Service Staff Manual provides for a selection panel to be established to assess in a fair and equitable manner the eligibility and suitability of applicants.

The Public Service Commission opted to appoint Ms Ken on a contract instead. It based its decision on the CV that was provided to Mr Mahe and Mr Mahe's words.

- (b) Section 30 of the Public Service Act provides for temporary and contract employees. Subsection (2) provides that “temporary salaried employees may be employed for a period not exceeding 6 months...”.

The Public Service Commission however, engaged Ms Ken on contract for a period of over 6 months. In fact the term was over 12 months as referred to above.

That in my view is contrary to the specific requirement of section 30 (2) of the Public Service Act.

Chapter 3 paragraph 8 of the Public Service Staff Manual is concerned with the engagement of contract employees. Set out below are relevant parts of paragraphs (a) and (b) regarding the process to be followed in engaging contract employees –

- (a) “Contract Employees may be engaged for up to a period of six (6) months where, due to the nature of the work to be performed (such as short term specialist services with specific Terms of Reference)...”
- (b) “All requests to engage contract employees are to be submitted to the Commission for approval on the *Request to Employ... a contract employee Form* (PSC FORM 3-7) and be supported by a job application.

Chapter 3 paragraph 8 (b) referred to above provides that all “request to engage contract employees are to be submitted to the Commission for approval on the Request (Form)” prescribed by that paragraph. This is consistent with the principle in the PSC Act regarding appointment on merit. It follows that the Department makes the request pursuant to some assessment done by it to determine the suitability of the person to be appointed on contract to the relevant post.

I have gone through “PSC FORM 7” and as a minimum it requires, inter alia, the following to be provided –

- (a) reason why it is necessary to employ the additional staff;
- (b) how was the proposed employee selected?
- (c) is the person to be employed as a contract employee?
- (d) the Director of the relevant department signs off the request; and
- (e) the Director General signs the Form to show that he supports the request.

I do agree that section 30 (4) of the PSC Act gives the Commission a power to appoint a person on contract on terms that may be outside the requirements of the Public Service Act. Further, not to follow the process required by section 15 of the P S Act.

However, it is also my view that section 30 (4) does not exclude the Commission from upholding its guiding principles as set out in section 4 of the Public Service Act to “make employment decisions based on merit” (s4(b)). This argument is supported, in my view, in the guideline found in the Public Service Staff Manual Chapter 3 paragraph 8 (b) and is illustrated in the prescribed requirements in “PSC FORM 7” as discussed above. This is agreed to by Mr Mahe in his response as follows-

“Mi wantem blo umi clear nomo se hemia hemi no I permanent appointment be hemi I contract, and contract hemi gat specification blo hem I stap lo PSSM.”

Some form of assessment of the applicant must be carried out to determine eligibility and suitability of the applicant for the position.

Mr Mahe has failed to provide any evidence that the “specification”... I stap lo PSSM” was complied with.

His admission before the Ombudsman was that he took the CV personally into the Meeting of the Commission and was added to the business of the Commission that day. And that the Commission considered the CV and made its decision on it. Nothing went from the DCIR in line with the PSSM to the Commission.

The process for the appointment of temporary and contract employees are found in section 30 of the Public Service Act. The process for the appointment of other employees into the Public Service structure is found in section 15. The processes are not the same.

For reasons outlined above, I have found no reason upon which I am satisfied to change my decision in Finding 1.

Finding 2. “Lo Leadership code lo andastanding blo mi spos mi raet, hemi I section we I kam afta spos I gat pruf lo proper court of law se I gat breach lo PSC Act then LCA bae I jes kam in”.

33. My response to Mr Mahe is as follows:

First, the response to finding should be “Finding 3” and not “Finding 2” of the Working Paper.

Article 63 (2) of the Constitution empowers the Ombudsman to make a finding following the completion of an inquiry into a complaint received. If the Ombudsman finds in his enquiry that the “conduct was contrary to law”, to say so in his report. And then it is up to the relevant authority to consider the findings and take appropriate action.

Sections 13 and 14 of the Leadership Code Act are set out below -

“13. Duties of leaders

- (1) A leader must:
 - (a) comply with and observe the law;

- (b) comply with and observe the fundamental principles of leadership contained in Article 66 of the Constitution;
- (c) comply with and observe the duties, obligations and responsibilities established by this Code or any other enactment that affects the leader; and
- (d) not influence or attempt to influence or exert pressure on or threaten or abuse persons carrying out their lawful duty.

14. Appointing people on merit

A leader must:

- (a) act fairly in appointing people to offices and positions for which he or she has responsibility, so that people are appointed impartially and on merit; and
- (b) do his or her best to encourage participation in government by men and women according to their abilities; and
- (c) not interfere or attempt to interfere in the Public Service Commission in breach of the Public Service Act [Cap. 246]."

The duty to "comply with and observe the law" and to ensure that "that people are appointed impartially and on merit" under sections 13 and 14 of the Leadership Code Act is very clear. As a leader Mr Mahit and other members of the Commission are obliged to follow the requirements of the Public Service Act as is demanded of them in the Leadership Code Act provisions cited above.

In my view, the response by Mr Mahe reflects a misunderstanding of the law on point. It is the normal thing to do in investigations in line with Article 63 (2) of the Constitution to make such a finding based on evidence.

"Finding 3. Mi luk ufla I quorem section 15 (2) (b) requires appointment of person to be based upon merit. Bae umi go bak lo section blo temporary contract ia. Ufla I bin considerem ol specification we I stap lo

Act we I tokbaot contract. Lo ples ia I talem se commission may engaged a temporary salary. Mi ridim nomo be ufla I go luk section 30 (2) (a) wetem 4 blo PSC Act.

Bae umi luk 15 (2) (b) ia from umi statem se I gat breach be mi wantem umi review bagegen from 2 (b) hemi no complete from toktok ia se selection I mas based upon merit, lo ples ia spos yu luk lo same section ia, bae I gat definition lo part 3 blo hem. Bae yu go long 15 (3) hemi talem, to determine persons merit, of appointments to the post required must be at (a-e), bae umi mas considerem 15 (4) blo PSC Act, Ating lo finding 3 ia, lo andastanding blo mi bifo yu kam talem se I gat breach lo 15 (2) umi mas kam prufum long 15 (3) (A-E) I NO GAT CLASSIFICATION LO Merit ia blo hemi save qualifyem allegations blo 15 (2) (b)."

For reasons outlined above, I have found no reason upon which I am satisfied to change my decision in Finding 3.

34. Mr Mahe further added that before the Ombudsman can say that there is a breach of Section 15 (2) (b) of the Public Service Act, he must proof the conditions stated in section 15 (3) (a-d), and to consider Section 30 of the same Act.

My response: Section 15 (2) (b) places an obligation on the Commission to recruit employees to the Public Service on merit. On reading the provisions of the Public Service Act (plus the Public Service Staff Manual) it is clear in my view that the obligation applies to decisions made to appoint a person on contract as well. A merit assessment must be carried out to satisfy the PSC that the applicant can perform the duties of the post.

The argument by Mr Mahe cannot stand for the following reason. Part of the merit process is that contained in Chapter 3 paragraph 8 of the Staff Manual that requires the initiative to engage a person on contract to commence from the relevant department and go to the Commission for approval. In this case, the DCIR did not request the Commission to make the appointment. The Public Service Commission, without informing the DCIR, went ahead and made the appointment.

35. The discussions on the responses from Mr Mahe makes it very clear that the appointment of Ms Ken by the Public Service Commission to a post in DCIR was made in contravention of the Public Service Act. I see no reasons to change my findings and recommendations.

9. FINDINGS

Finding 1: Appointment of Ms Ken by the Public Service Commission was not made in accordance with the Public Service Act and the Public Service Staff Manual.

By not following the proper legal processes, the appointment of Ms Ken was improper and unlawful. The Public Service Commission erred in not giving regard to proper documentation and legal processes.

Finding 2: The Public Service Commission has not acted fairly as a good employer when making Ms Ken's appointment outside of the Public Service Act and the Public Service Staff Manual.

Because the PSC had failed to give regard to appoint Ms Ken on merit according to section 15(2) (b) of the Public Service Act, the actions of the Commission members are contrary to that of a good employer.

Finding 3: Public Service Commission members have breached sections 13 and 14 of the Leadership Code Act

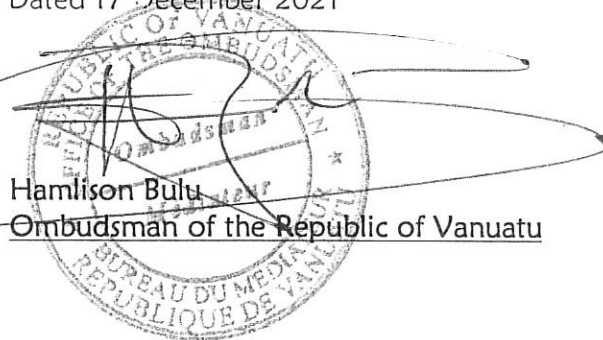
By disregarding the proper legal processes, the members had placed themselves in a questionable position and thus their actions were in breach of sections 13 and 14 of the Leadership Code Act.

10. RECOMMENDATIONS.

I make the following recommendations:

1. The Public Service Commission strengthens its processes and ensure there is accountability and transparency maintained when it comes to special cases of recruitment such as daily rated, temporary salaried and contract, employees.
2. Members of the Public Service Commission as “good employer(s)” must acquaint themselves properly with the Public Service Act especially in relation to appointment rules prescribed by that Act to ensure they carry out their duties lawfully each time they are called to do so.
- 3 The leaders implicated in the appointment of Ken should be held accountable for their decision and step aside from performing roles in the public service.
3. Mr Mahe to be prosecuted for his conduct as the principal player in ensuring the appointment of Ms Ken to a position within the DCIR in breach of the Public Service Act and the Leadership Code Act.

Dated 17 December 2021



Hamlison Bulu
Ombudsman of the Republic of Vanuatu