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

**SOLO IKETAU AND SALESI 'IONGI**

**CASES NO. OMB 17/220 and OMB17/221**

**Whether the decision by the Ministry of Internal Affairs to deny the complainants opportunity to work for Freshfood New Zealand under the Regional Seasonal Employment Scheme in October 2017 was fair and reasonable**

**07 March 2018**

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## EXCECUTIVE SUMMARY

- 1 Solo Iketau and Salesi 'Iongi ("the complainants") have been employed in New Zealand's Regional Seasonal Employment scheme ("RSE") managed by the Ministry of Internal Affairs ("the Ministry"). They have both worked at Motueka, Nelson, New Zealand.
- 2 In August 2017, the complainants were part of a group of RSE workers who lodged a complaint with the Ombudsman claiming that the Ministry were not responding to their queries regarding superannuation and tax refunds that had been received by the Ministry from their New Zealand employers. The basis of this claim was that their RSE employers had advised them to check with the Ministry for their superannuation payments when they returned to Tonga.
- 3 There were delays in receiving the information from the Ministry to finalise this complaint. It was not until November that the relevant information was received clarifying that there was no superannuation and no tax refund due. The cases were then closed.
- 4 While the complaint about superannuation and tax were pending, the complainants had an opportunity to return on the RSE scheme for a short-term work with a New Zealand company called Freshfood. When they went to the Ministry in October 2017 to process their employment they were told by Ministry Senior Employment Officer 'Akanesi 'Otunuku ("SEO") that they would not be able to take part in this employment because of their current complaint with the Ombudsman.
- 5 The complainants immediately lodged their complaint with the Ombudsman regarding the decision by the SEO denying them employment with Freshfood.
- 6 I am recommending four (4) things in this Report pursuant to *section 18(3) of the Ombudsman Act 2001*-
  - i. That the Ministry apologize to the complainants regarding the denial of their RSE work in October 2017.
  - ii. That the Ministry put in place proper policies, procedures and sufficient resources regarding the RSE scheme to ensure transparency and fairness.
  - iii. That the Ministry ensure there is a robust grievance process in place that is accessible to all and allows for complaints to be dealt with in a timely manner before decisions are made including but not limited to employment opportunities.
  - iv. That the Ministry report back to me within 2 months of the date this report is finalised with a follow up report on these recommendations.

## **BACKGROUND**

- 7 The complaint was received on 30 October 2017.
- 8 I assigned the investigation to my Investigation Team who met with the CEO of the Ministry, 'Ana Bing Fonua and other senior officers.
- 9 The team requested and received documents from the Ministry.

## **THE OMBUDSMAN'S ROLE**

- 10 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*).
- 11 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 was and the procedures followed by the Ministry was properly arrived at and was one that Ministry could reasonably make.
- 12 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 SUPERANNUATION AND TAX REFUND COMPLAINT**

- 13 The first of the two complainants is Solo Iketau. He has been employed in the RSE since 2013. Salesi 'Iongi is the second complainant and he began working in the RSE in 2015. Both have been primarily employed by Robyn and Don Urguhart ("the employers") at Motueka, Nelson, New Zealand.
- 14 In August 2017 the complainants were part of a group of twelve (12) complainants who lodged a complaint with the Ombudsman claiming that the Ministry owed them their superannuation from their work in New Zealand which had been sent from their employers to the Ministry. In their complaint they stated that they had been advised by their employer to ask the Ministry about their superannuation and tax refund when they returned to Tonga<sup>1</sup>.

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<sup>1</sup> Complaint forms dated 1/8/17 and 10/8/17

- 15 We investigated the complaint by sending a referral to the Ministry on 10 August 2017<sup>2</sup> with the response due on 24 August 2017. The Ministry responded on the 23 August 2017<sup>3</sup> which stated that tax is deducted but not superannuation according to New Zealand law. The letter also stated that a query had been sent to the New Zealand Ministry of Business, Innovation and Employment (MBIE) and the RSE liaison officer in New Zealand and replies would be forwarded once received
- 16 There was a delay in completing this investigation. This was caused by delays in the responses from the Ministry who were in turn waiting for responses from their counterparts in New Zealand. On 25 September 2017<sup>4</sup> the Ministry advised that the MBIE had now confirmed that superannuation was not deducted from the workers' salaries. However, the response from the employers had not been received and was finally received on 6 November 2017. The employers confirmed the MBIE position<sup>5</sup> -

*"Thank you for our meeting on the 26 October in Tonga with our workers. I hope after explaining to the boys our tax system they all left happy. We have a different tax system than Australia and don't have a super fund that they pay into. We abide by the NZ government rule regarding RSE workers of which they get a very favourable rate. Thanks Robyn"*

- 17 Having now received all the relevant information from the Ministry I concluded that the complainants had been mistaken in that there was no tax refund or superannuation payments owing to them from the Ministry. I closed the complaints on 20 November 2017<sup>6</sup>.

#### **DENIED RSE WORK**

- 18 While the first complaint about superannuation was pending, the complainants were chosen by Setaleki Tu'ineau their RSE team supervisor to take part in another short-term RSE work opportunity for Freshfood in October 2017. When they went to the Ministry on 30 October 2017 to process their employment, they were advised verbally by the SEO that because they had a current complaint against the Ministry with the Ombudsman, they would not be taking part in the Freshfood recruitment. On receiving this information, the complainants came directly to the Ombudsman office and lodged their complaint.
- 19 As soon as we received the complaint it was clear that urgent action was required especially given possibility of employment with Freshfood. To that end, our Director of Investigations and another Investigation Officer requested on 30 October 2017 to meet with the Ministry management to discuss the complaint. The Acting Chief Executive Officer, Kalesita Taumoepeau advised that they would be available on 1 November 2017.

<sup>2</sup> Referral Letter to Ana Bing Fonua, CEO of the Ministry dated 10 August 2017

<sup>3</sup> Letter from Ana Bing Fonua, CEO of the Ministry to the Ombudsman dated 23 August 2017

<sup>4</sup> Email from Ana Bing Fonua Monday, 25 September 2017

<sup>5</sup> Email from Don Urquart to 'Akanesi 'Otunuku dated 6 November 2017

<sup>6</sup> Letter to the complainants dated 20 November 2017

## THE MEETING WITH THE MINISTRY 1 NOVEMBER 2017

- 20 The meeting on 1 November 2017<sup>7</sup>, was attended by Acting CEO Kalesita Taumoepeau, Deputy CEO – Employment Fanau’ifo’ou Akauola and the SEO for the Ministry. For the Ombudsman was Director of Investigations Lepaola Vaea and Investigation Officer, ‘Elisiva Lui. At this meeting the SEO admitted freely that she had unilaterally denied the complainants the opportunity to work in New Zealand as this was in her view the most reasonable (“fakakaukau fakapotopoto taha”) course of action since the complainants had a current unresolved complaint with the Ombudsman Office about the Ministry. The SEO was concerned that if the complainants were allowed to return to New Zealand they would spread this misinformation with the other RSE workers. It was the SEO’s view that the superannuation and tax situation in New Zealand had been explained clearly to the RSE workers during their orientation before going to New Zealand and there should be no misunderstanding.
- 21 The Acting CEO also stated that they were aware there were issues regarding the RSE scheme primarily because –
- i. They are woefully short staffed (only SEO for the RSE and ‘Akosita Polota for the Australian work program – the RSE sends about 1,800 workers ever year and more than that number to Australia)
  - ii. There are no written policies regarding RSE work although there have been efforts to do so
- 22 We were also informed that there was some criteria that would result in denial of travel both from the New Zealand and Tonga requirements including age and the existence of a criminal record.
- 23 The SEO also advised at this meeting that there was no opportunity for the complainants to be re-considered for the short-term RSE work because she had already replaced them with men from the Ministry work pool.

## THE MINISTRY RESPONSE 10 NOVEMBER 2017

- 24 After the meeting of 1 November 2017, it was now clear that the complainants would not be able to take part in the Freshfood work. A referral of the complaint was sent to the Ministry on the 3 of November 2017 and the Ministry response dated 10 November 2017 was received on 14 November.

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<sup>7</sup> Meeting notes by Lepaola Vaea dated 1 November 2017

25 In their response<sup>8</sup>, the Ministry restated the information from the first complaint regarding superannuation and the tax refunds. In addition, the response also referred to the 1 November meeting stating that the SEO had told the complainants they could not participate in the short-term RSE contract.

26 The response from the Ministry was assessed and a request for more information was sent to the Ministry via email<sup>9</sup> on 15 November 2017 for the following –

1. *“MIA criteria/policies which disqualifies/qualifies a Tongan national from participating in RSE work*
2. *The process by which RSE applications are declined by MIA whether for established criteria or otherwise*
3. *The job description for the SEO*
4. *The appeal process for Tongan nationals regarding RSE related decisions by MIA*
5. *MIA position regarding the decision by the SEO in denying the complainants’ opportunity for RSE work*
6. *Precedents of MIA denying Tongan nationals opportunity to RSE work including circumstances, process followed, decisions etc*
7. *Copies of RSE (any/all) policies*
8. *Any other information you consider relevant to this investigation”*

#### **THE MINISTRY RESPONSE 14 DECEMBER 2017**

27 On 14 December 2017 the response<sup>10</sup> from the Ministry was received signed by the Acting CEO at that time – ‘Onetoto ‘Anisi. Again, the Ministry reiterated their position regarding the first complaint however this time alleging the complainants were not truthful in the first complaint. Firstly that the Ministry doubted the employers would have advised the RSE workers to claim superannuation when they returned to Tonga. Secondly, that the complainants had not spoken to anyone at the Ministry because if they had done so, *“they would or must have been provided with clarification of the 2 different entitlements under the 2 schemes”*<sup>11</sup> (meaning the New Zealand seasonal workers scheme and the Australian seasonal workers scheme, the latter includes superannuation).

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<sup>8</sup> Letter from Kalesita Taumoepeau, Acting CEO dated 10 November 2017

<sup>9</sup> Email from Lepaola Vaea to Kalesita Taumoepeau dated 15 November 2017

<sup>10</sup> Letter from ‘Onetoto ‘Anisi, Acting CEO of the Ministry dated the 15 of December 2017

<sup>11</sup> Ibid at paragraph 4

**28** The letter also confirmed that when the complainants had been nominated for the Freshfood work by Setaleki Tu'ineau, the SEO "*without consultation and after due consideration declined to include Salesi 'Iongi and Solo Iketau*"<sup>12</sup> in the work. The following reasons were provided –

1. *That the complainants were not truthful about their employer and about having complained to the Ministry*<sup>13</sup>
2. *The misinformation that the complainants had about superannuation "could cause disappointments and may have adverse effects on the work relationship with the employer"*<sup>14</sup>
3. *Based on these reasons the SEO "therefore considered it imperative that they remain behind and have the complaint resolved. To let them travel on Freshfood offer before the superannuation issues is cleared, brings high and unnecessary risks. There would be increased misinformation of other RSE workers (i.e that they are entitled to Superannuation" and secondly, the credibility as well as the reputation of the approved employer Don Urquart could be affected."*<sup>15</sup>

**29** The Ministry stated that any person with a grievance can meet with senior officers including the CEO but noted that its Complaint Handling Committee needed reviving and was part of the work plan for the current year.

**30** The SEO function including making decisions on who can participate in the RSE work without consultation for grounds such as convictions, family issues and misbehavior.<sup>16</sup> The SEO's job description was provided and the Ministry stood by her decision given her experience in the RSE program since 2012 and her good working relationships with the stakeholders –

*"the Ministry of Internal Affairs, as far as the decision made by 'Akanesi to deny Salesi 'Iongi and Solo Iketau involvement in Freshfood employment, after due consideration, holds the view that the action taken by the officer is in the interest of the Ministry and the seasonal employment program rather than personal interest. In particular potential risks are involved which could affect the integrity of the program. However, admittedly, Employment division should create consultation process for the complicated and the controversies."*<sup>17</sup>

**31** Also provided with the Ministry response was the Ministry Guidelines for Recruitment of Seasonal Workers<sup>18</sup>. This sets out the way recruitment is carried out with options for recruitment from the work pool and from direct recruitment by Approved Employer.

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<sup>12</sup> Letter from 'Onetoto 'Anisi, Acting CEO of the Ministry dated the 15 of December 2017 paragraph 10

<sup>13</sup> Ibid at paragraph 11

<sup>14</sup> Ibid at paragraph 12

<sup>15</sup> Ibid at paragraph 13

<sup>16</sup> Ibid at paragraph 17

<sup>17</sup> Ibid at paragraph 21

<sup>18</sup> Ministry Guidelines for Recruitment of Seasonal Workers



The current complaint related to recruitment from the work pool and the process includes selection from the pool and an interview. The eligibility criteria is set out and includes age, police record, health, character, family support and community endorsement.

- 32 The SEO's job description<sup>19</sup> sets out the duties and responsibilities. The first Key Result Area is to –

*“Oversee and manage the interviewing, vetting and recruitment of workers for approved overseas employers”*

The Performance Indicators for this Key Result Area includes –

*“selection and recruitment in accordance with division's policies and procedures, transparent and in a fair manner”*

### OPINIONS

- 33 The circumstances of this complaint was the first of its kind and highly unusual. It was the first time that a Ministry has taken the position that because a person had a current unresolved complaint with my Office, that person would not be considered for employment opportunities.
- 34 That the first complaint regarding superannuation (lodged on 10 August 2017 and closed on 20 November 2017) could have been resolved in a timelier manner if the responses from the Ministry had been forthcoming.
- 35 I do not accept that any person exercising their right to lodge a complaint with this Office, is sufficient grounds to unilaterally take away a person's opportunity for employment and livelihood.
- 36 That I accept that the complainants had a genuine query regarding superannuation for their RSE work and had every right to inquire if any money was due to them and can see no other motive for the complaint other than the possibility of receiving money. I note the Ministry response that there were pre-departure training covering this issue, but clearly, there was still some confusion. I also accept that the complainants may have inquired with the Ministry but even if they had not, this does not invalidate their right to complain to me.
- 37 That the reasons given by the SEO and supported by the Ministry are noted but the SEO responsibility as per her job description was to vet workers in accordance with Policy and the Ministry Guidelines for Recruitment of Seasonal Workers. This Policy does not have any criteria relating to complaints about the Ministry, nor any process for when there are matters that may be grounds but are not covered by policy. The SEO's job description also states that she acts in a transparent and fair manner. Her decision not to allow the complainants' employment was unilateral without reference to her supervisor.

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<sup>19</sup> Job Description, Senior Employment Officer, Band K, Ministry of Internal Affairs

I do not consider this action transparent or fair especially as it was a final decision with no possibility of review but had real financial implications for the complainants.

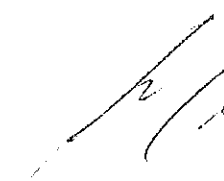
- 38 That whatever the concerns of the possibility of the spreading of misinformation had on the RSE program the basic failure by the SEO was the failure to consult before the decision was made to deny the complainants work with Freshfood.


### RECOMMENDATIONS

- 39
- i. That the Ministry apologize to the complainants regarding the denial of their RSE work in October 2017.
  - ii. That the Ministry put in place proper policies, procedures and sufficient resources regarding the RSE scheme to ensure transparency and fairness.
  - iii. That the Ministry ensure there is a robust grievance process in place that is accessible to all and allows for complaints to be dealt with in a timely manner before decisions are made including but not limited to employment opportunities.
  - iv. That the Ministry report back to me within 2 months of the date this report is finalised with a follow up report on these recommendations.

### MINISTRY'S RESPONSE FEBRUARY 2018

- 40 On 2 February 2018, I delivered my Provisional Report to the Ministry setting out my findings, opinions and recommendations. On 22 February 2018<sup>20</sup>, I received a letter from the Ministry 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 letter is attached to this Report as Annex 1.

  
Aisea H. Taumoepeau, SC  
Ombudsman



<sup>20</sup> Letter from the Ministry dated 21 February 2018 and signed by Kalesita Taumoepeau for Acting CEO



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23/2

The Ombudsman,  
Ombudsman Office,  
Nuku'alofa

21 February, 2018

Dear Sir,

**RE: Ombudsman's Provisional Report on the Complaint by Solo Iketau and Salesi 'ongi.**

I acknowledge the receipt of the above document dated 2<sup>nd</sup> February 2018 with the accompanying letter dated 2<sup>nd</sup> January, 2018 by the Ministry of Internal Affairs on the 6<sup>th</sup> February, 2018.

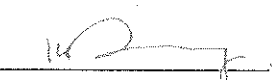
I hope that your good office has begun the resilient path to normalcy as we do too in the Ministry here.

With no further comments to the above document, I wish to thank you and your good office for the diligent effort put into this Provisional Report and the attempt to achieve good governance and transparency in Tonga.

According to Recommendation 4 of the Provisional Report, we will come back with the follow up report on the Report's Recommendations within the next 2 months as of today, considering the one week break from the impact of TC Gita.

Respectfully,



  
Kalesita Taumoepeau  
for Acting CEO  
Ministry of Internal Affairs