From:	raphael
To:	FOI
Subject:	Freedom of Information request - Documents relating to sanctions for breaches of Code of Conduct
Date:	Tuesday, 14 June 2022 1:18:38 PM

Dear Australian Public Service Commission,

CONTEXT OF REQUEST

I refer to an article published in The Australian on 8 February 2022. The name of article was Untried lawyers score key positions.

In that article, it was noted that Kate McMullan of the APSC had conducted an investigation and found that:

a) admission as a legal practitioner had been listed as an essential requirement for a registrar role in the Federal Court;

b) a selection committee had not considered this essential requirement when it hired a female candidate to fill the registrar role;

c) the female candidate "was selected over a field of candidates all of whom did have this work related quality."

It has since come to light that:

a) the role in question was an NCF Registrar role in the Federal Court (https://www.righttoknow.org.au/request/untried_lawyers_score_key_positi_2#incoming-25203);

b) the role was advertised in Public Service Gazette PS38 of 2016 with a vacancy number of NN10690165 (https://www.righttoknow.org.au/request/untried_lawyers_score_key_positi_2#incoming-25203);

c) the candidate selected was Caitlin Wu (https://www.righttoknow.org.au/request/untried_lawyers_score_key_positi_2#incoming-25203);

d) Ms Wu's promotion notice was published in Public Service Gazette PS49 of 2016 with a promotion number of NN10698155 (https://www.righttoknow.org.au/request/untried_lawyers_score_key_positi_2#incoming-25203);

e) Ms Wu was promoted from an APS4 position into an Executive Level 1 position (https://www.righttoknow.org.au/request/untried_lawyers_score_key_positi_2#incoming-25203);

f) the selection panel consisted of Sia Lagos, David Pringle and Andrea Jarratt (https://www.righttoknow.org.au/request/untried_lawyers_score_key_positi_2#incoming-25814);

g) Sia Lagos, the current CEO and Principal Registrar of the Federal Court, was the chairperson of the selection panel (https://www.righttoknow.org.au/request/untried_lawyers_score_key_positi_2#incoming-25814);

h) Sia Lagos was the Agency Head's delegate for the selection process

(https://www.righttoknow.org.au/request/untried_lawyers_score_key_positi_2#incoming-25814); and

i) Sia Lagos endorsed the recommendation of the selection panel in her capacity as the Agency Head's delegate on 2 December 2016 (https://www.righttoknow.org.au/request/untried_lawyers_score_key_positi_2#incoming-25814).

A public interest disclosure was made, among other things, about the selection process that saw Ms Wu promoted to the NCF Registrar role to the Commonwealth Ombudsman in 2020. On 11 May 2020 the Commonwealth Ombudsman allocated the public interest disclosure to the Australian Public Service Commission (https://www.righttoknow.org.au/request/request_for_correspondence_issue#incoming-25017). In the allocation letter, which had a reference of PID-2020-400006, and which was addressed to Peter Woolcott, the Australian Public Service Commissioner, the author of the letter stated:

"It is the responsibility of your agency to determine how this matter will be handled from this point. However we note that this allocation decision has been made with reference to the broad powers available to consider the matter by virtue of an allocation under the PID Act and under the Public Service Act 1999 (PS Act) (in particular s 41(2)(o))." (https://www.righttoknow.org.au/request/request_for_correspondence_issue#incoming-25017).

Section 41(2)(o) of the Public Service Act 1999 provides:

the Commissioner's functions include the following:

(o) to inquire, subject to the regulations, into public interest disclosures (within the meaning of the Public Interest Disclosure Act 2013), to the extent that the disclosures relate to alleged breaches of the Code of Conduct.

The disclosure related to alleged breaches of the Code of Conduct. The Office of the Commonwealth Ombudsman thought the public interest disclosure was of such a nature that it needed to be allocated to an agency other than the home agency, the Federal Court. That is an extraordinary allocation because when deciding to allocate a public interest disclosure to an agency, the authorised officer who has received the disclosure must have regard to the principle that an agency should not handle the disclosure unless some or all of the disclosable conduct with which the information may be concerned relates to the agency (PID Act, s 43(3)(a)(i)).

The public interest disclosure was investigated by Kate McMullan, the Acting Assistant Commissioner, Integrity, Performance and Employment Policy in the Australian Public Service Commission, and the Australian Public Service Commissioner's delegate under the PID Act (https://www.righttoknow.org.au/request/outcome_of_apsc_investigation_co#incoming-24488). Ms McMullan finalised her report on 9 December 2020 (https://www.righttoknow.org.au/request/outcome_of_apsc_investigation_co#incoming-24488).

According to her PID report, Ms McMullan made the following findings:

a) "on the balance of probabilities that the recruitment process that ultimately led to the FCSA promoting Ms Wu into this position did not comply with the APS Employment Principles under subsection 10A(2) of the PS Act ..." (https://www.righttoknow.org.au/request/whether_kate_mcmullan_provided_p#outgoing-17784); and

b) "the relevant employment practices of the FCSA were therefore in contravention of section 10A of the PS Act, and that disclosable conduct, within the meaning of item 1 of the table in subsection 29(1) of the PID Act, has therefore been engaged ... on the basis that the relevant employment practice in relation to the engagement of Ms Wu was conducted in contravention of the PS Act, being a Commonwealth law." (https://www.righttoknow.org.au/request/whether_kate_mcmullan_provided_p#outgoing-17784).

Despite making those findings, Ms McMullan though that the most appropriate response to Sia Lagos, David Pringle and Andrea Jarratt deliberately selecting an unmeritorious candidate ahead of meritorious candidates who met the essential selection criteria for the role was:

"I recommend that FCSA staff be provided with guidance and/or training about the APS Employment Principles prior to undertaking any recruitment action, to prevent further incidents of this nature.

I also recommend that relevant FCSA staff familiarise themselves with the APS Code of Conduct, and in particular subparagraph 13(11)(a) of the Public Service Act 1999, which states, relevantly, that employees must at all times behave in a way that upholds the APS Employment Principles."

Marco Spaccavento, the Assistant Commissioner, Workplace Relations at the Australian Public Service Commission has established that Ms McMullan did not comply with procedures established under subsection 15(3) of the Public Service Act 1999 when conducting the investigation into the alleged breaches of the Code of Conduct, even though that is an essential requirement of conducting investigations relating to alleged breaches of the Code of Conduct under paragraph 53(5)(b) of the PID Act (the reason the Commonwealth Ombudsman allocated the PID to the APSC was that the allegations related to contraventions of the Code of Conduct).

The following propositions apply in relation to the Code of Conduct and Code of Conduct investigations:

I) the test for establishing whether an employee has breached the Code of Conduct is an objective one (https://www.mpc.gov.au/case-summaries/apply-objective-test);

II) the propriety of the actions of a public servant should be assessed by reference to the standard of conduct expected of a public servant, having regard principally to the expectations of the public (Bercove v Hermes (No 3) (1983) 51 ALR 109, 117 - 120);

III) that senior executive service (SES) employees model and promote the APS Values, the APS Employment Principles and compliance with the Code (Public Service Act 1999 s 35(5);

IV) the appropriate sanction in any case will be the sanction that the decision-maker considers meets the object of imposing a misconduct sanction, which is not to punish or exact retribution but to maintain and protect the integrity and reputation of the APS and ensure adherence to proper standards of conduct (Commissioner of Taxation v Day (2008) 236 CLR 163 at [34]–[35]; McManus v Scott-Charlton (1996) 70 FCR 16 at 24–25);

V) Members of the Australian Public Service are enjoined by the Public Service Act (s 13) to act with care and diligence and to behave with honesty and integrity. This is indicative of what throughout the whole period of the public administration of the laws of the Commonwealth has been the ethos of an apolitical public service

which is skilled and efficient in serving the national interest (Commissioner of Taxation v Futuris Corp Ltd (2008) 237 CLR 146 at [55]);

VI) consistent with the significance of the APS as a constituent part of the system of representative and responsible government, the APS Code of Conduct regime is properly directed to maintaining and protecting an apolitical and professional public service that is skilled and efficient in serving the national interest (Comcare v Banerji (2019) 267 CLR 373 generally);

VII) The APS Code of Conduct regime is in the nature of a civil penalty regime directed at deterring conduct in breach of the Code and thus maintaining and protecting the public and constitutional purposes served by the APS (Comcare v Banerji (2019) 267 CLR 373 at [40]-[44]);

VIII) the purpose of the misconduct regime under the PS Act is protective (rather than punitive) – that is, the regime is intended to protect the public, maintain proper standards of conduct by APS employees and protect the reputation of the APS (Bragg v Secretary, Department of Employment, Education and Training [1996] FCA 476);

IX) in assessing the appropriate sanction (if any), it is necessary to consider the nature and gravity of the misconduct, the need for both specific and general deterrence (to deter any future misconduct by the specific employee and by employees generally) and the personal circumstances of the employee (Comcare v Banerji (2019) 267 CLR 373 at [40]-[45]);

X) As a matter of law, that discretion must be exercised reasonably and, therefore, according to the nature and gravity of the subject contravention. As with other civil penalties, the essence of the task is to put a price on the contravention sufficiently high to deter repetition by the contravenor and others who might be tempted to contravene, but bearing in mind that a penalty of dismissal must not be “harsh, unjust or unreasonable”. Unquestionably, there are cases of breach of s 13(11) that are so serious in the damage done to the integrity and good reputation of the APS that the only appropriate penalty is termination of employment … (Comcare v Banerji (2019) 267 CLR 373 at [40]);

It has been established that Sia Lagos, David Pringle and Andrea Jarratt also constituted the selection committee that selected Murray Belcher as the SES 1 National Judicial Registrar & District Registrar - QLD (https://www.righttoknow.org.au/request/documents_relating_to_the_recrui#incoming-26028), even though he was not allocated an SES1 classification pursuant to rule 6 of the Public Service Classification Rules (https://www.righttoknow.org.au/request/materials_relating_to_the_select#outgoing-17803), and even though Justice Greenwood went on the record in The Australian to criticise Warwick Soden and Sia Lagos for their roles in denying Mr Belcher lawful promotion to the senior executive service of the APS (Top judge warned of registrar overhaul, published on page 7 of the The Australian on 10 February 2022; https://www.reddit.com/r/auslaw/comments/sox6ls/australian_top_judge_intervened_in_row_on_federal/).

The evidence tends to suggest that Sia Lagos, David Pringle and Andrea Jarratt are repeat offenders when it comes to misconduct relating to employment decisions. It is clear that Kate McMullan considered the allegations relating to Murray Belcher's selection (https://www.righttoknow.org.au/request/request_for_documents_relating_t#outgoing-17862), which is also under a cloud.

So Sia Lagos, David Pringle, and Andrea Jarratt select an unmeritorious candidate for a Registrar position in the Federal Court, Sia Lagos approves the selection committee's recommendation that this unmeritorious candidate be selected ahead of other candidates, all of whom had met essential requirement of having been admitted to the Supreme Court of a State or Territory, and the appropriate response was a training exercise for the staff of the Federal Court Statutory Agency.

How can Ms McMullan's response to the findings of fact that she made be considered adequate in the light of I -

X above?

FOI REQUEST

Under the FOI Act I request access to any and all documents relating to sanction decisions for contraventions of the Code of Conduct set out in the Public Service Act 1999 (Cth).

You may send the documents to me by return email.

Yours faithfully,

raphael

Please use this email address for all replies to this request:

foi+request-9018-8620cdc5@righttoknow.org.au

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