

**BETWEEN: JEAN MARC PIERRE**  
*Appellant*

**AND: PUBLIC SERVICE COMMISSION**  
*Respondent*

**Coram:** *Hon. Justice John von Doussa*  
*Hon. Justice Raynor Asher*  
*Hon. Justice Oliver A. Saksak*  
*Hon. Justice Dudley Aru*  
*Hon. Justice David Chetwynd*  
*Hon. Justice Gus Andrée Wiltens*

**Counsel:** *Mr. Justin Ngwele for the Appellant*  
*Ms. Adeline Bani and Mr. L. Huri for the Respondent*

**Date of Hearing:** *19<sup>th</sup> April 2018*

**Date of Judgment:** *27<sup>th</sup> April 2018*

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## JUDGMENT

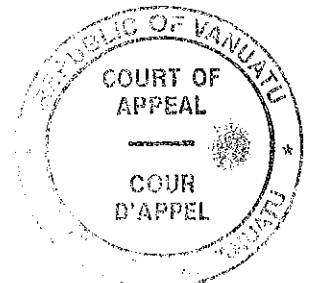
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1. This is an appeal against the judgment of the Court below dated 11 December 2017 where the trial judge dismissed the appellant's amended judicial review claim and awarded costs in favour of the respondent.

### Background

2. The appellant was first recruited into the public service as a civil servant in April 1990. In September 2006 he became the Director of the Department of Lands, Survey and Records (the Department) and has held that position since his appointment. In September 2016, Mr Pierre was then over the age of 55. There were others in the Department including the appellant who were 55 years and over. On or around 19 February to 20 June 2016 retirement packages were calculated and prepared for these members of staff including Mr Pierre. On 28 September 2016 the appellant was advised by letter of his retirement with effect from 22 December 2016. The letter reads:-

*"28 September 2016*



Mr Jean Marc Pierre  
C/Department of Lands, Survey and Registry  
Port Vila

Dear Mr Pierre

AGE RETIREMENT

I am writing to inform you that the Commission at its meeting No 19 of 2016 (Decision No.53) held on the 22 September 2016, has approved to grant your retirement with effect from 22 December 2016. The Commission also noted that you are serving your 3 months' notice commencing from 22 September 2016 to 22 December 2016.

You shall be entitled to a severance payment of two months for every year of service and pro rata amount of any period of less than 12 months.

You shall also be entitled to a cash equivalent of annual vacation leave accrued, if there's any.

The Ministry of Lands and Natural Resources will be able to provide you with the calculations of those benefits.

On behalf of the Government and the people of Vanuatu, I would like to take this opportunity to thank you for the services rendered since your appointment in the Public Service, and I wish you all the best in your future endeavour and a long healthy retirement.

Yours sincerely

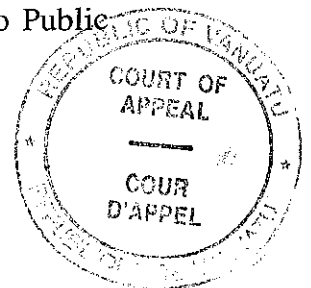
(signed)

Jacques Gideon

Acting Secretary

Office of the public Service Commission"

3. On 9 March 2017 counsel on his behalf collected his cheque for severance but then declined acceptance and returned the cheque to the State Law Office. The appellants was also informed that his cheque payment for outstanding leave was also ready for collection. Both cheques remain uncollected.
4. Having finalised Mr Pierre's retirement package, payment of his salary was ceased on 22 December 2016 on the basis that he was effectively retired. He however refused to leave office given his disagreements over his entitlements and continued to occupy the office of Director of the Department. On 22 March 2017, Mr Pierre was advised that the Public Service Commission (the PSC) was giving him until 24 March 2017 to vacate the office. Following receipt of the letter, he left the office.
5. He then filed the claim for judicial review of the PSC's decision to retire him.
6. Article 57 of the Constitution of the Republic of Vanuatu relates to Public Servants and sub articles (5) and (7) specially state:-



*“(5) For as long as their posts exist, public servants shall not be removed from their posts except in accordance with the Constitution.*

.....

*(7) Public servants shall leave the public service upon reaching retirement age or upon being dismissed by the Public Service Commission. They shall not be demoted without consultation with the Public Service Commission.*

*(emphasis added)*

7. The Public Service Act [CAP 246] (the Act) empowers the PSC to make regulations one of which is to prescribe “*conditions of retirement (including for compulsory and early retirement)*” (s43 (1) b)). The Public Service Staff Manual (the PSSM) at clause 5.1 of chapter 7 provides for the age of retirement in the following terms:-

*“5.1 Age of retirement*

*(a) The normal retiring age shall be 55 years, but in exceptional circumstances an officer or daily rated worker may apply to the Commission for approval to retire after 45 or after 55.*

*(b) A officer or daily rated worker retiring on the basis of age , regardless of what age that is , shall be eligible for the standard entitlements specified in section 4.1 of this chapter and :*

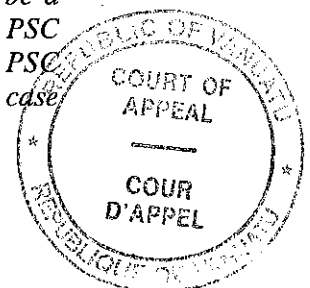
- i) a severance payment of two months’ pay per year of service (and a pro rata amount for any period less than 12 months ) ; and*
- ii) if applicable, repatriation payments as specified in section 4.2 of this chapter .”*

*(emphasis added)*

**Judgment under appeal**

8. The sole issue before the court below was whether the decision of the PSC dated 28 September 2016 approving Mr Pierre’s retirement on the basis of his age was lawful. In his remarks , the trial judge at paragraph 30 of the judgment said:-

*“Section 43 (1) (a) of the Act is clear. The PSC by order made pursuant to S.43 (1) (a) of the Act, issued regulations setting out the terms and conditions of employment in the Public Service in Clause 5.1 (a) of the PSSM. That Clause 5.1 (a) of the PSSM is also clear and simple. It says what it meant and intended. It is not a requirement of Clause 5.1 (a) to invite a civil servant of the age of 55 or over 55 years to apply to the PSC to retire after 55 years of age. The age of retirement in the Public Service is 55 (Clause 5.1 (a)). In exceptional circumstances, an officer may apply to the PSC to retire after 45 or after 55. That is a requirement of Clause 5.1 (a). The Claimant is over 55 on 22 September 2016 when he received his notice to retire. He is qualified to retire. He did not apply to the PSC to retire after 55 (which could be a cause for consideration by the PSC). The decision solely belongs to the PSC based on the relevant part of the PSSM. That decision was taken by the PSC on 22 September 2016 to retire the Claimant in the circumstances of the case.*



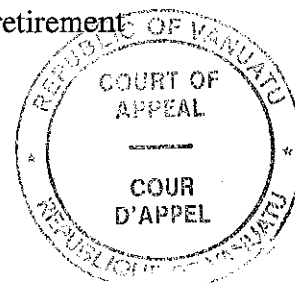
as described. The PSC through the letter of 28 September 2016 gave the Claimant three months' notice (Clause 4.1) to retire effective 22 December 2016; informed the Claimant that he shall be entitled to a severance payment of 2 months for every year of service and a pro - rate amount of any period of service less than 12 months. In addition, he shall be entitled to a cash equivalent of annual vacation leave accrued (if any) (Clause 4.1); two government cheques were issued to the Claimant for his severance payments and accrued leave entitlements (VT 8,727,022 + VT 1,454,230 = 10,181,252). The steps described and followed by the PSC in the manner the PSC dealt with the case of the Claimant, followed the conditions of cessation of employment in the Public Service set in the PSSM. To my mind, there is nothing wrong in law."

9. And at paragraph 35 concluded that:-

*"On 22 September 2016 when the PSC approved the retirement of the Claimant, notified him with the three months' notice and informed him of his entitlements according to law, and the subsequent issuance of cheques payments, the Claimant was over 55 years, was qualified to retire, and was retired according to law ..."*

#### Discussion

10. The appeal is now being pursued on two grounds which are inter-related and will be dealt with together. In summary the appellant says that the trial judge fell into error when he ruled that the PSC decision of 22 September 2016 to approve the appellant's retirement pursuant to clause 5.1 of Chapter 7 of the Public Service Staff Manual was lawful. Secondly the appellant says that the trial judge fell into error when he relied on clause 5.1 of the Public Service Staff Manual as being the prescribed conditions of retirement.
11. The appellant was over the age of 55 when the PSC approved his retirement. His first argument is that clause 5.1 of the PSSM gives him discretion to apply to the PSC to be retired. He says the PSC does not have the discretion to retire him as no regulation provides the PSC with such powers. If that were the correct construction of clause 5.1 of the PSSM, the appellant could remain as Director for as long as he desires and the Commission as his employer must wait until he applies whatever the circumstances.
12. We are of the view that the appellant has misunderstood and misconstrued the meaning and intent of the applicable laws concerning the retirement of public servants. The overarching legal framework is that the Constitution makes it mandatory that "*public servants shall leave the public service upon reaching retirement age*". The retirement age set by the PSC in clause 5.1 of the PSSM is 55. It is not disputed that the appellant was over 55 at the date of his retirement. The PSC acted within its powers to retire him and to prepare his retirement package which was and still is ready for collection.



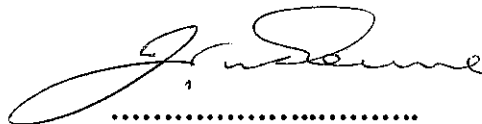
13. The second part of the appellant's argument appears to suggest that the PSSM does not provide the conditions of retirement required to be prescribed by regulation by the PSC pursuant to s.43 of the Act, therefore the PSC is not entitled to compulsorily retire him unless he applies. The appellant has not identified any other provision in relation to retirement other than clause 5.1 of the PSSM which recognises that the normal retirement age shall be 55 "*but in exceptional circumstances an officer may apply to the Commission for approval to retire after 45 or after 55*".
14. The appellant admits that he did not apply but submits that his case is an exceptional circumstance as he is over 55 years of age. We reiterate our views above that the appellant has misconstrued the intent and purpose of the PSSM. The retirement age is 55 but in exceptional circumstances a person may apply for retirement after 45 or after 55. What constitutes exceptional circumstance is a matter for the Commission to consider on each application whether to grant retirement after 45 or after 55. The issue of exceptional circumstances does not arise in this case as the appellant did not apply.

The Result

15. The appeal is therefore dismissed with no order as to costs.

**DATED at Port Vila this 27<sup>th</sup> day of April, 2018**

**BY THE COURT**



.....  
**Hon. Justice von DOUSSA**

**Judge**

