

BETWEEN: JEAN MARC PIERRE
Claimant

AND: PUBLIC SERVICE COMMISSION
Respondent

Coram: Vincent Lunabek Chief Justice

Counsel: Mr Justin Ngwele for the Claimant
Ms Adeline Bani for the Defendant

Date of Hearing: 21 November 2017

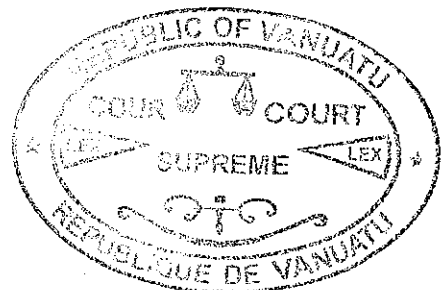
Date of Judgment: 11 December 2017

JUDGMENT

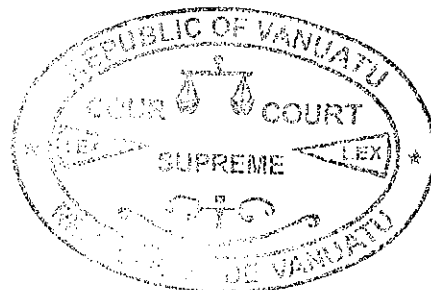
1. This is an Amended Judicial Review Claim. The Claimant seeks Order to quash the decision of the Public Service Commission (PSC) dated 22 September 2016 approving the retirement of the Claimant with effect on 22nd December 2016; his costs of and incidental to the proceedings and such further or other orders the Court considers necessary.

The background events

2. The Claimant was recruited in the Public Service in April 1990.
3. On September 2016, he was the Director to the Department of Lands, Survey and Records ("the Department"). He has held this position since his appointment in 2006.
4. On September 2016, the Claimant was over 55 years of age.
5. On or about 19 February 2016– 20 June 2016, the Corporate Service Unit of the Department prepared draft calculations of the retirement packages for officers of the Department including the Claimant
6. After the preparation of the said draft calculations, a copy of the same was sent to the Executive Committee which includes Director Generals and Directors including the Claimant as the Director of the Department at that time.



7. On 22nd September 2016, the PSC held a meeting No.19 of 2016 and made a decision (Decision no.53) and approved the Claimant's retirement on the basis of age. The Claimant's retirement was approved with effect from 22 December 2016.
8. By way of letter dated 28 September 2016, the Acting Secretary of the Commission gave 3 months' notice of retirement to the Claimant commencing 22 September 2016 to 22 December 2016. In that letter (of 28 September), the Acting Secretary of the Commission further informed the Claimant that he 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 twelve months and to a cash equivalent of annual vacation leave accrued (if any).
9. On 22nd December 2016, the Claimant's salaries ceased. Since that date, the Claimant did not receive his retirement package which includes his severance payment and other benefits. They were not ready or paid to them.
10. The Claimant took the stand that the retirement process had not been completed and that the retirement process will be completed once his severance and benefits have been paid to him. The Claimant then continues to attend to his place of employment and undertakes his normal tasks as the Director of the Department.
11. On 14 February 2017, the Claimant filed this judicial review proceeding, seeking among other relief, orders to quash the PSC decision dated 22 September 2016 to retire him. The judicial review claim was later amended on 10 May 2017.
12. On 28 February 2017, the Claimant's severance and other entitlements are determined. On 3 March 2017, the Department issued a government cheque (No.2309147) for the Claimant's severance payment in the amount of VT8, 727, 022 and another government cheque (No.2309375) was issued on 9 March 2017 for the Claimant's accrued leave payment in the amount of VT1, 454, 230.
13. On 8 March 2017, the Acting Solicitor General ("A/SG") wrote to Mr Justin Ngwele ("Mr Ngwele") informing him of the said cheque and advising him to come and collect the said cheque for the Claimant from the State Law Office ("SLO").

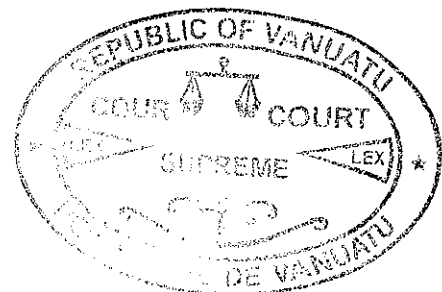


14. On 9 March 2017, Mr Ngwele collected the cheque for the Claimant from the SLO. On the same date, Mr Ngwele wrote to the A/SG acknowledging the cheque for severance and the other cheque of leave allowance of VT 1, 454,230 which was still under process at that time. Mr Ngwele further stated that the two cheques do not equate to the sum of VT10, 503,550 which was claimed by the Claimant.
15. On 9 March 2017, Mr Ngwele declined to accept the severance cheque for the Claimant and returned the said cheque to the SLO. The cheque for leave allowance was also ready for collection on the same date. Mr Ngwele was informed of it. Both cheques for the Claimant's severance and leave allowance are ready and are yet to be collected by the Claimant from the SLO.
16. The result of all this is that despite the Commission alleged retiring the Claimant based on his age and the Department of Finance ceasing his salary since 22 December 2016, the Claimant refuses to leave office and continues to hold office as the Director of the Department.
17. On 22nd March 2017, a letter was issued to the Claimant by the Acting Secretary of the PSC advising the Claimant that the PSC gave him until 24 March 2017 to vacate the office of the Director of the Department. She confirmed that the Claimant has left the office of the Director of the Department after he received the commission's letter dated 22 March 2017.
18. The Claimant still wishes to pursue with his judicial review claim.

The issue:

19. The issue to be determined by this Court in this:

Whether the decision of the Public Service Commission dated 22 September 2016 approving the retirement of the Claimant from the Public Service on the basis of his age, was lawful.



The Law

20. Section 43 (1)(b) of the Public Service Act [CAP 246] (“the Act”) and Clause 5.1 of Chapter 7 of the PSSM are the relevant legal provisions for consideration in this case.

21. Section 43(1)(b) of the Act [CAP 246] provides:

“43. Regulations

(1) The commission may from time to time, by order, make regulations so as to give effect to all or any of the purposes of this Act, including regulations for all or any of the following-

(a)

(b) Prescribing conditions of retirement (including for compulsory and early retirement)....”

22. Clause 5.1 of Chapter 7 of the PSSM provide:

“5.1 Age retirement

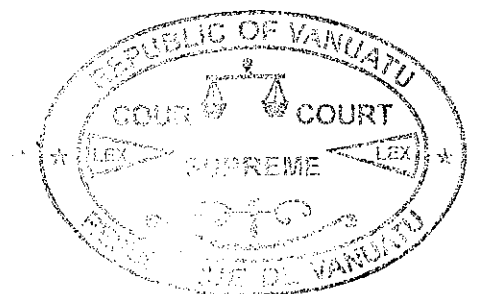
(a) The normal retiring age shall be 55 years, but in exceptional circumstances an officer or daily rated worker may apply to the Commission for approval to retire after 45 or after 55.

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

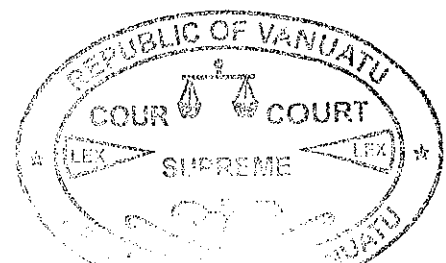
(i) A severance payments of two month’s pay per year or service (and a pro-rate amount for any period less than 12 months); and

(ii) If applicable, severance payment as specified in Section 4.2 (c) of this chapter.

The grounds of the application, submissions, considerations and application of law



23. **The first ground** of the Amended Judicial Review Application is that the decision of the PSC on 22 September 2016 was wrong as it was in breach of s. 43(2)(b) of the Act and Clause 5.1 of the PSSM. It was therefore unlawful.
24. The Claimant submits that the decision of the Respondent to retire the Claimant is in breach of section 43(1)(b) of the Act and Clause 5.1 of Chapter 7 of the PSSM. The Claimant did not apply for retirement. The decision of 22 September 2016 was in respect to civil servants reaching the age of 55 and qualified to retire. The Claimant was over 55 and the Commission has never made a decision in relation to him. Given he is over 55, he should have applied to the Commission for retirement. He had never done so. The decision of 22 September 2016 was wrong because it should relate only to civil servants reaching the age of 55 at that time in accordance with the first limb of Clause 5.1 (a).
25. The Respondents submit in response that they rely on section 43 (1)(b) of the Act [CAP 246] and Clause 5.1 of the PSSM. They say that Clause 5.1 (a) of the PSSM clearly provides that the normal retiring age is 55 years but in exceptional circumstances an officer may apply to the Commission for approval to retire at 45 or after the age of 55. Relevantly, the Claimant is over 55 on 22 September 2016. The Claimant, in this case, did not apply to the Commission for approval to retire after 55 years. The Claimant concedes that fact. The Respondents submit that the allegation that the Claimant did not apply for retirement, and, therefore, the decision of the Commission in retiring him is in breach of section 43 (1) (b) of the Act and Clause 5.1 (a) (b) of the PSSM is misconceived.
26. On perusal of the provisions of section 43(1)(b) of the Act and Clause 5.1 (a) and (b) of the PSSM (Chapter 7), I accept the Respondents' submissions on this point as good law and reject the submissions made for and on behalf of the Claimant. The PSC has the power to set the terms and conditions of the employment in the Public Service by order in accordance with section 43(1) (a)(b). The PSC by order issued regulations setting out the terms and conditions of employment in the Public Service in the PSSM. Pursuant to Clause 5.1 (a) and (b) of the PSSM, the normal age of retirement in the Public Service is 55 years, but in exceptional circumstances an officer may apply to the Commission for approval to retire after the age of 55. The Claimant was over the age of 55 when the

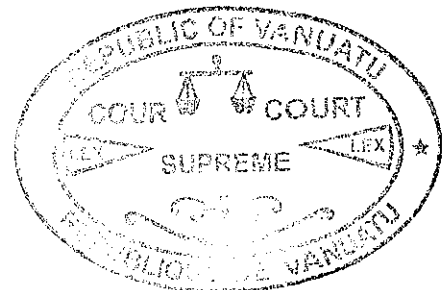


Commission took its decision on 22 September 2016 to retire him. The Respondents' letter dated 28 September 2016 gave the Claimant three months' notice to retire him from the Public Service effective from 22 December 2016 in compliance with Clause 4.1 of the PSSM. The decision approving the Claimant's retirement was based on the Claimant's age. The Claimant was over the age of 55 when he received his notice of retirement effective from 22 December 2016. At the age of 55 or over 55, the Claimant is qualified to be retired. Clause 5.1 (a) provides clearly that in exceptional circumstances an officer may apply to the PSC to retire after 55 years. The Claimant, in this case, had never applied to the PSC at the age of 55 or after reaching 55 years with evidence to the satisfaction of the Commission of the existence of exceptional circumstances justifying such a course. The PSC's decision of 22 September 2016 to approve the retirement of the Claimant on the basis of age pursuant to Clause 5.1(a) of the PSSM was lawful as made in accordance with the law. I reject the submissions made on behalf of the Claimant as baseless. The first ground of the application is dismissed.

27. The Claimant says, **in the second ground of the application** , that in reaching their decision to retire him, giving him 3 months' notice commencing 22nd September to 22nd December 2016, the Respondent have taken into account irrelevant considerations in that:

- The Claimant did not apply for retirement; and
- The decision of the Respondent to retire the Claimant was not made based on prescribed conditions of retirement. There are no prescribed conditions of retirement. There are no prescribed conditions of retirement as set out in Section 43 (1)(b) of the Public Service Act [CAP 246]. \

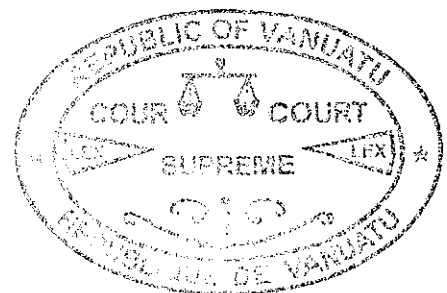
28. The Claimant says that the PSC can make a decision as it did on 22 September 2016; however, it should invite the Claimant to apply pursuant to Clause 5.1 (a) of the PSSM failing which the decision of 22 September 2016 was erroneous in law. The Claimant further advanced that the decision of the PSC of 22 September 2016 was wrong because s.43 (1) (b) of the Act empowers the PSC to prescribe terms and conditions of



retirement (including compulsory and early retirement) but there were none made pursuant to s. 43 (1) (a).

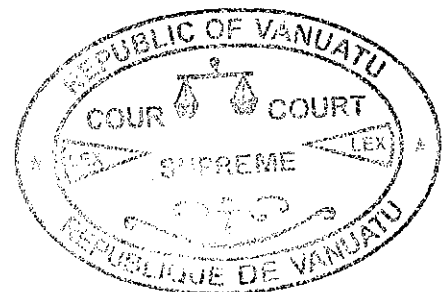
29. The Respondents submit in response that they rely on section 43 (1)(b) of the Act [CAP 246] and Clause 5.1 of the PSSM. They say that Clauses 5.1 (a) of the PSSM clearly provides that the normal retiring age is 55 years but in exceptional circumstances an officer may apply to the commission for approval to retire after the age of 45 or 55. Section 43 (1)(b) of the Act empowers the PSC to set terms and conditions of employment in the Public Service and those terms and conditions were set in the PSSM and they were followed by the Respondents in this case. The decision of the Respondents on 22 September 2016 was lawfully made.

30. 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.

31. I think the submissions of the Respondents are correct in law on this ground of the application also. I accept them when I consider and apply the law to the facts of this case and I reject the submissions made on behalf of the Claimant as unsound.
32. I am informed during the submissions by both Counsel that the Claimant challenged the total amount of his retirement entitlements package. That is part of the Claimant's right. But it is a separate issue and must be dealt with separately. That is what the Claimant did by filing a separate claim on his retirement entitlements and its quantum [Civil Case No. 1836 of 2017]. The second ground of the application is dismissed also.
33. **The third and last ground of the Application** is that the process of retiring the Claimant did not fulfil the retirement policies set up by the Respondents. The retirement process will be completed once the retirement payment package is paid out to the retirees. There are still many retirees who have not yet received their retirement payment package, which includes the Claimant. The current retirement program of the Respondents in that people reaching the age of retirement or whom will be retired are classed in 4 distinct groups. The Claimant is in group 4. The Claimant says while the Respondents were still dealing with group 1, then, the Respondents decided to hand pick him in group 4 and issued him retirement notice. The Claimant says the actions of the Respondents are regarded as double standard towards him. The Claimant submits finally that his retirement is a violation of current and existing legislation.
34. The Respondents say the following in response. Two government cheques were issued to the Claimant for his severance payments and his accrued leave entitlements. They admit that there are still many retirees who have not yet received their retirement payment package and that the Government is currently allocating a funding to sort out such issues. The current retirement program is to oversee the backlogs of the previous years and that it can also consider some civil servants who are currently performing but have already reached the retirement age. They admit that there are still some civil servants within the Department, who are aged almost 60 but still employed. The



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decision to retire any employee or civil servant on the age basis rests on the PSC. The Claimant was retired on the basis of age. He was given his retirement package but did not accept it. The Claimant's retirement package is readily available to be paid to him. The Claimant is not entitled to the relief he is seeking in this case.

35. I think the third ground of the review application does not raise or involve a legal issue or legal question warranting for a legal answer. 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 as I have ruled earlier on. The issues or matters raised in the third ground, are matters of policies of the PSC and for the PSC alone to plan (as it did here), allocate funding (as it did here), set a program of execution of the issues of the previous and current retirees cessation of employment in the Public Service (as it did here). This is part of the package management plan of cessation of employment of previous and current retirees of the Public Service. These policies, plans and programs are management issues. They are not legal issues affecting rights of qualified retirees of the Public Service. I do not see how they affect the rights of any qualified retiree of the Public Service including the Claimant. This third ground of the application is also dismissed.

36. My answer to the issue is as follows: Yes, the decision of the Public Service Commission dated 22 September 2016 approving the retirement of the Claimant from the Public Service on the basis of age was lawful.

37. The Amended judicial Review Claim is dismissed. The Respondents are entitled to costs against the Claimant. Such costs shall be on the standard basis.

Dated at Port-Vila, this 11 day of December 2017

BY THE COURT



Vincent LUNABEK
Chief Justice

