

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Judicial Review
Case No. 19/1910 SC/JUDR

BETWEEN: **Silas Robson Tigona**
Claimant

AND: **Director of Meteorology and Geo-Hazard
Department (VMGD)**
First Defendant

AND: **Republic of Vanuatu**
Second Defendant

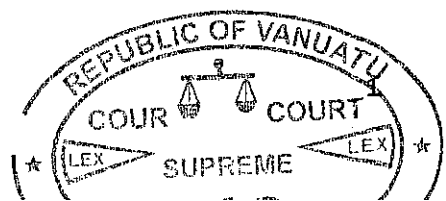
AND: **Allan Rarai**
Interested Party

Date: 23 December 2019
Before: Justice V.M. Trief
In attendance: Claimant – Mr C. Leo
Defendants – Mr S. Kalsakau
Interested Party in person

JUDGMENT AS TO RULE 17.8 MATTERS

A. Introduction

1. This is a claim for judicial review of the Public Service Commission's decision on 18 June 2019 to appoint the Interested Party as the Manager Climate Division. At the hearing today the parties argued the r. 17.8, *Civil Procedure Rules* ('CPR') matters. This judgment determines those matters.



B. Factual background

2. Both the Claimant and Interested Party applied for the vacant Public Service position of Manager Climate Division.
3. As a consequence of the recruitment process by the Public Service Commission ('PSC'), on 18 June 2019 it decided that the Interested Party be appointed to the position.
4. On 19 June 2019, the PSC informed the Interested Party that it was the successful candidate. Shortly after that, the Interested Party entered into a contract with the State and commenced serving in the position.
5. Subsequently in July 2019, the Claimant filed this claim for judicial review.

C. Issues

6. Rule 17.8(3) of the CPR provides that the judge will not hear the claim unless he or she is satisfied as to the four matters set out in that rule. If the judge is not satisfied about those matters, he or she must decline to hear the claim and strike it out (r. 17.8(5)).
7. The Defendants do not dispute that the Claimants are directly affected by the Defendant's decision (r. 17.8(3)(b)) and that there is no other remedy that resolves the matter fully and directly (r. 17.8(3)(d)).
8. Accordingly, the remaining issues for determination are:
 - (1) Does the Claimant have an arguable case?
 - (2) Has there been undue delay in making the claim?

D. Issue (1): Does the Claimant have an arguable case?

9. The Claimant seeks orders on the grounds set out in the claim that:
 - 9.1 The Defendants took into account irrelevant considerations which had no basis in the selection criteria or required qualifications for the position;
 - 9.2 The composition of the selection panel was contrary to the Public Service Staff Manual (the 'PSSM');
 - 9.3 The First Defendant had a direct conflict of interest and acted in a biased manner towards the Claimant; and
 - 9.4 Bad faith by the Defendants.
10. The Defendants' defence states that the selection panel was selected in accordance with cl. 2.4 of Chapter 3 of the PSSM, each candidate was assessed fairly and without prejudice, and that the panel recommended the Interested Party for appointment and the Claimant as the next eligible candidate. Further, that the panel's recommendation was forwarded to the PSC who then made its own decision as to who was to be appointed.

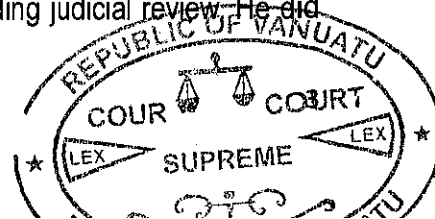


The Defendants deny any conflict of interest or bias by the First Defendant. The Interested Party's appointment was made lawfully based on merit and in accordance with the selection criteria. Finally, that the claim does not disclose an arguable case and must be struck out.

11. Mr Leo's submissions that the Defendants took into account irrelevant considerations which had no basis in the selection criteria or required qualifications for the position essentially invited the Court to decide between the Claimant and the Interested Party as to who best fit the selection criteria for the position. He submitted that the Claimant has been a longer-term employee in the Climate Division than the Interested Party, that he has all the required skills and qualifications that met the selection criteria, and has more management skills than the Interested Party. Mr Kalsakau submitted that s. 23 of the *Public Service Act* requires the PSC to consult with the Director and Director General affected before it makes an appointment. The PSC did so and so it has fulfilled the legislative requirements and did not take into account any irrelevant considerations. The Court of course cannot embark on the exercise sought by the Claimant so as to substitute its decision for the PSC's. Accordingly, this is not a valid ground for judicial review.
12. Mr Leo also submitted that the selection panel was not constituted contrary to the PSSM in that panel member Mr Worwor was of a lower position than the position advertised. Mr Kalsakau submitted that the selection panel was selected in accordance with cl. 2.4 of Chapter 3 of the PSSM which provides that members should be at least equivalent level to the position advertised which all members including Mr Worwor were. Mr Jean Yves Bibi gives evidence of this in his sworn statement. I am satisfied there is no arguable case in relation to the composition of the selection panel.
13. Finally, Mr Kalsakau asserted that there is no evidence of bad faith or bias on the part of any Defendant. I agree.
14. In the circumstances, my answer to the question, "Does the Claimant have an arguable case?" is, "No".

E. Issue (2): Has there been undue delay in making the claim?

15. Mr Leo submitted that the Claimant filed his claim in July 2019, well within the six months provided by the CPR and so there has not been any undue delay in making the claim.
16. Mr Kalsakau submitted that the Court must look not just at the time taken to file the claim but also at the prejudice or hardship to the persons affected. This includes the Interested Party with his legally binding contract. The State too would be prejudiced and face substantial hardship as it would have to redo the recruitment process, this would take time and it would possibly face further litigation for breach of contract.
17. I accept the Defendants' submission. The State and the Interested Party have concluded a legally binding employment contract. The Claimant could have taken earlier steps such as obtaining interlocutory orders to protect his position pending judicial review. He did



not. On the facts of this case, my answer to the question, "Has there been undue delay in making the claim?" is "Yes".

F. Result and Decision

18. In conclusion, I answer each of the issues as follows:

16.1 Does the Claimant have an arguable case? "No."

16.2 Has there been undue delay in making the claim? "Yes."

19. Accordingly, I am not satisfied about the matters in subrule 17.8(3) and so I must decline to hear the claim and hereby strike it out.

20. Costs follow the event. The Claimant is to pay costs to the Defendants which failing agreement are to be taxed by the Master.

DATED at Port Vila this 23rd day of December 2019
BY THE COURT


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V.M. Trief
Judge

