

BETWEEN: ANTHEA ARUKOLE FAY

Claimant

**AND: THE TOWN PLANNING COMMITTEE OF THE
PORT VILA CITY COUNCIL (Represented by
the Chairperson of the Committee and the
Lord Mayor)**

First Defendant

AND: THE PORT VILA CITY COUNCIL

Second Defendant

Date: 30th August 2023

Before: Justice W.K. Hastings

Counsel: Mr K.T. Ture for the Claimant

Mr E Nalyal for the First Defendant

Mr S Kalsakau for the Second Defendant

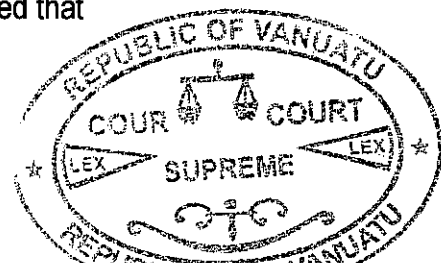
JUDGMENT

1. On 28 July 2023, Ms Arukole Fay filed a claim for judicial review seeking:

1. An order declaring the decision of the first defendant, the Town Planning Committee of the Port Vila City Council, made in May 2023, replacing the claimant as an appointed member of that committee, be quashed as being unjustified, unreasonable, unlawful and declared to be null and void and of no effect;
2. An order to reinstate her to her previous position as a member of the Town Planning Committee;
3. Costs.

2. In its defence filed 25 August 2023, the Port Vila City Council stated it was not aware of any decision made by the Town Planning Committee or the Council to remove and replace the claimant.

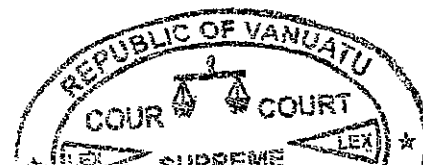
3. In order for this claim to be heard, r.17.8(3) requires the judge to be satisfied that



1. The claimant has an arguable case;
2. The claimant is directly affected by the enactment or decision;
3. There has been no undue delay in making the claim; and
4. There is no other remedy that resolves the matter fully and directly.

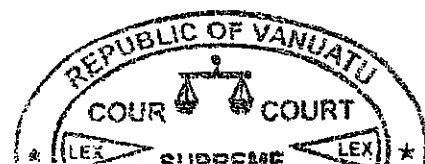
If the judge is not satisfied about any of these matters, then the judge is required by r.17.8(5) to decline to hear the claim and must strike it out.

4. I consider first whether the claimant has an arguable case.
5. Section 18A of the Municipalities Act [cap. 126] as amended by the Municipalities (Amendment) Act 2013 states that the town planning committee consists of 5 councillors who are appointed by Council for a term determined by Council. The quorum for a meeting of the committee is 3 members.
6. In this case, the claimant was appointed a member of the committee on 1 September 2022 for a term of one year. This is recorded in Minute No 1 of the First Ordinary Council Sitting 2022. The claimant was notified by letter dated 24 February 2023 of a meeting of the Town Planning Committee scheduled for 28 February 2023. She attended that meeting, and from the minutes of that meeting, appears to have been an active participant. The minutes of that meeting record the next meeting of the committee was scheduled for 30 May 2023 to complete consideration of the agenda.
7. There is no evidence of a town planning committee meeting on 30 May 2023, but there is evidence of such a meeting on 23 May 2023. Item 1 of the agenda records a welcome to Councillor Alfred Namas who is recorded as replacing Councillor Anthea Fay Arukole. The claimant stated in her sworn statement that she was not notified of this meeting. She stated "I was removed from being a member of the Town Planning Committee and was replaced by Councillor Alfred Namas."
8. In his sworn statement dated 25 August 2023, the Deputy Town Clerk, Mr Avio Roberts, stated there is no record of a decision of the Council or of the town planning committee removing the claimant from the committee. He stated that he recalls her being ejected from one meeting "in Feb/May" because "she continued to ask questions that the Lord Mayor considered was disturbing Council meeting." He also stated that there is no record of a decision made by Council to replace the claimant with another councillor.
9. In the hearing, the claim shifted somewhat. Mr Tari said the claimant did not challenge her removal but did challenge the lack of communication of this decision. I agree that natural justice requires a decision-maker to give a person adversely affected by the decision notice of the decision about to be made and the opportunity to address it.
10. The absence of a formal record of a decision does not mean the decision was not made, but without such a record, other evidence will be required to prove the decision was made. In this case, there is a



minute of the town planning committee meeting of 23 May 2023 that refers to Councillor Namas replacing the claimant. An inference can be drawn that someone took a decision to replace the claimant and did not tell her. I have no evidence that the Council delegated its power of appointment to the Chair of the town planning committee. Indeed, at the Council meeting of 1 September 2022, the Council exercised its power to appoint the members of all the committees, including the claimant as a member of the town planning committee. Section 21 of the Interpretation Act [cap. 132] provides that the power to appoint includes the power to remove. Having recorded its decision to appoint the claimant to the committee, one would have expected the Council to have recorded a decision to remove her, but there is no such record. If it was the Chair of the town planning committee who decided to remove the claimant, he had no authority to do so in the absence of an instrument of Council delegating that power to him under s 17(2) of the Municipalities Act.

11. There is no record of a formal decision of Council removing the claimant from the town planning committee. It may be that the Chair of the town planning committee took a decision to remove the claimant without authorisation, but the only evidence of her removal is found in the minutes of the town planning committee meeting of 23 May 2023. That minute does not however say who made the decision to remove and replace the claimant.
12. On the evidence before me, the claimant remains a member of the town planning committee until her term expires on Friday 1 September 2023. As such, she had a right to be notified of committee meetings and a right to be notified of and address any decision to remove her from the committee.
13. Rule 17.4 requires, for an order about a decision, identification of "the person who made or should have made the decision." The claimant has not been able to identify who made the decision to remove her from the town planning committee and who made the decision not to notify her of her removal. As this concerns the power to appoint, remove and notify decisions made in the exercise of that power, it is the Council "who should have made the decision" in terms of r.17.4(2)(b).
14. I find therefore that the claimant has an arguable case, and that the issues of her alleged removal from the town planning committee, and the lack of notice of her removal, should not be decided against her at this preliminary conference without much fuller opportunity for argument. I am therefore satisfied of the first matter in r.17.8(3)(a).
15. I turn now to consider whether the claimant is directly affected in terms of r.17.8(3)(b). She obviously is. The minutes of the town planning committee meeting of 23 May 2023 welcome Councillor Namas as the claimant's replacement on that committee.
16. I now consider whether there has been undue delay in making this claim in terms of r.17.8(3)(c). Mr Tari submitted that as long as the claim has been brought within 6 months of the decision under r.17.5, then there has been no "undue delay" under r.17.8(3)(c). I disagree. Rule 17.5 imposes an outer limit on when a claim may be brought. The "undue delay" referred to in r.17.8 is a separate time frame. If a claim is brought more than 6 months after the relevant decision was made, requiring an extension of time under r.17.5(2), then depending on the factual circumstances, it is more likely to be considered "undue

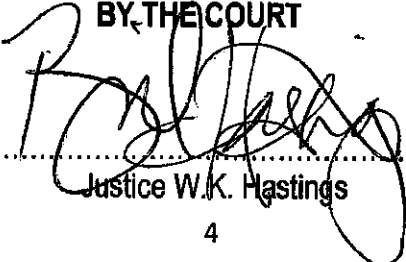


delay" in terms of r.17.8: *Kalsakau v Wells* [2006] VUSC 79. If, as in this case, a claim is brought within 6 months of the relevant decision, r.17.8(3)(c) still requires the Court to be satisfied there has been no undue delay in making this claim. The factual context of each case is important in making this assessment.

17. In this case, the claimant was appointed to the town planning committee for one year. She would cease to be a member of the committee unless she was reappointed (and there can be no expectation of reappointment) on 1 September 2023. Although she would have been aware that the next committee meeting was supposed to be on 30 May 2023 from the minutes of the February meeting she attended, she would likely not have known before 23 May 2023 that it was to be held on 23 May 2023. She confirmed in her sworn statement that she was removed "in or about May 2023." I have no evidence of when she became aware of her purported removal, but she confirmed the decision she is challenging was made in May 2023. The claim was filed over 2 months after the decision was made, on 28 July 2023, in the knowledge that the claimant's term would expire just over 4 weeks from then, on 1 September 2023.
18. The claimant's window of opportunity in which to make her claim was 3 months – June, July and August 2023. On 1 September 2023 she would no longer be a member of the committee in any event, yet the claim was not filed until 28 July 2023. I have no evidence or explanation for the delay of 2 months when the claimant knew the window of opportunity for filing a claim before it became moot was closing. Although the claim was filed within 6 months of the challenged decision in terms of r.7.5, I am nevertheless not satisfied that there has been no undue delay in making the claim. I am also satisfied that the delay has made the claimed remedy of little practical use.
19. As my finding in relation to r.17.8(3)(c) determines the matter, there is no need to go on to consider r.17.8(3)(d). That rule does not impose an obligation on the defendant to propose a remedy that better resolves the matter fully and directly (although addressing the matter would be helpful and assist in a fuller consideration); it is for the claimant to make her case. I would observe in this case that the claimant has merely asserted that no other remedy would resolve the matter fully and directly, and that the defendant has not proposed any other such remedy, relying instead on imminent mootness.
20. In light of my finding in respect of r.17.8(3)(c), r.17.8(5) requires me to decline to hear the claim and strike it out and I do so.
21. The defendants are entitled to costs which are to be taxed if they cannot be agreed. It may be however that the defendants will not seek costs given my finding that the claimant had an arguable case.

Dated at Port Vila this 30th day of August 2023

BY THE COURT


Justice W.K. Hastings

