

BETWEEN: George Pakoa and Melton Aru
Claimants

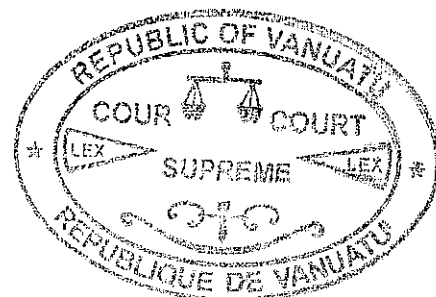
AND: The Public Service Commission
Defendant

Hearing date: 1 November 2022
Before: Justice S M Harrop
Counsel: Mr P. Fiuka for the Claimants
Mr J. Wells for the Defendant
Judgment date: 4 November 2022

RESERVED JUDGMENT ON PRELIMINARY LEGAL ISSUE

Introduction

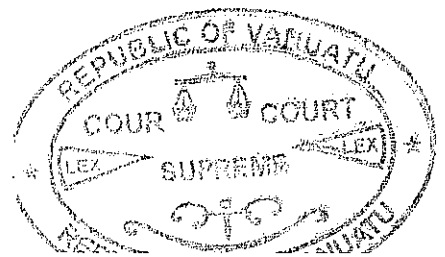
1. On 24 June 2022 the Public Service Commission ("the PSC") advertised the position of Director of Customs and Inland Revenue, with applications to be submitted by 15 July 2022.
2. The claimants George Pakoa and Melton Aru each applied and were interviewed by an independently-constituted panel appointed by the PSC under section 18 (2) of the Public Service Act [Cap.246] ("the Act").
3. On 12 September 2022 the panel provided a short list of suitable candidates to the PSC. Mr Aru was the recommended candidate and Mr Pakoa was runner-up.



4. However, the PSC did not appoint Mr Aru or Mr Pakoa, or Mr Collins Gesa, the other applicant. It did not approve of the panel's recommendations and thought that Mr Harold Tarosa, a former Director of Customs and Inland Revenue who in the PSC's view had performed outstandingly in the role, ought to be given an opportunity to apply and be considered.
5. Accordingly the PSC immediately decided to begin the recruitment process afresh and on 12 September 2022 it arranged for re-advertising of the position. The advertisement expressly noted that applicants who had already applied need not reapply but were required to email the PSC confirming they were still interested in appointment. I understand that neither of the claimants sent such an email.

This proceeding

6. Instead, on 7 October 2022, the day applications closed, the claimants applied urgently for judicial review of the PSC's decision to re-advertise.
7. They sought on an ex parte basis interlocutory orders staying the recruitment process pending final determination of their claim.
8. In my judgment of 7 October 2022 I declined to deal with the matter on an ex parte basis because the claimants themselves had not acted with urgency and because I did not consider the matter so urgent as to exclude the PSC from input into an application to stay one of its recruitment processes.
9. In subsequent conferences it became clear that there was no material dispute about the facts and that the critical question was whether the PSC decision to re-advertise was within the legitimate scope of section 18 of the Act which governs the process for appointing directors. The claimants say the PSC had no power to start the process afresh and was obliged to make an appointment from the shortlist provided by the panel. The PSC says it was entitled not to make any appointment and to start the process afresh and re-advertise as it did.
10. Accordingly by consent I arranged a Rule 12.4 hearing on 1 November 2022 for legal argument on this preliminary issue. Written submissions were filed in advance.



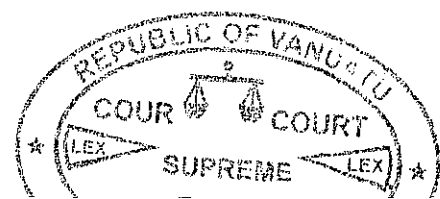
11. Pending my judgment the PSC recruitment process following the re-advertising has been stayed.
12. Although Mr Tarosa was named as an interested party, and on his behalf Mr Yawha attended the first conference on 12 October 2022, he was excused from further attendance. I did not consider Mr Tarosa's presence as a party was necessary to enable the court to make a decision on the judicial review case which of course focuses on whether a correct process was followed not on whether the outcome of the process was correct.
13. At the outset of the proceeding another applicant, Mr Gesa was one of the claimants. On his own application through Mr Fiuka on 12 October 2022 I removed him from the proceeding pursuant to Rule 3.2(3)(b).

The meaning of Section 18 of the Act

14. In its latest incarnation i.e. following the most recent amendment which took effect on 20 June 2022, Section 18 of the Act provides:

"18. Appointments of directors of departments

- (1) The Commission may appoint a person to be a director or appoint a person to a position equivalent to the position of a director.*
- (2) The Commission must prior to appointing or promoting a person to the position of director-general or director of a department follow the procedure set out hereunder –*
- (a) advertise the position in a newspaper with a wide circulation in Vanuatu; and*
 - (b) ensure the advertisement allows an applicant a minimum of 2 weeks in which to make an application; and*
 - (c) provide an address as to where to send the application; and*
 - (d) convene a panel of 3 independent persons to interview and require the panel, having regard to section 15 (imposing a duty to act as a good employer), to recommend a short list of the most competent and suitable applicants; and*

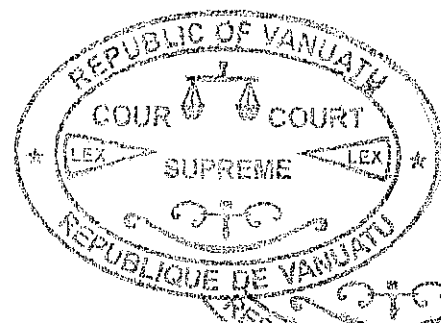


(e) make the appointment from the short list.

15. The respective submissions about the meaning of section 18 are straightforward. The essential submission for the claimants is that once the PSC embarks on the process under section 18 (2) it must, as s18(e) says, appoint somebody from the shortlist provided to it by the recruitment panel. At that point of the process the PSC has no choice to decline to make an appointment from the shortlist. In particular it cannot start the process afresh if it does not like the candidate(s) recommended by the panel.
16. The PSC emphasises that section 18(1) is critical to understanding the effect of the section as a whole. The word "may" clearly indicates that the PSC is expressly given a discretion whether - or not - to appoint a person to be a director (or to a position equivalent to the position of a director).
17. Although there is a clear independent process under section 18(2) which the PSC must follow prior to **making** any appointment, that does not derogate from its ultimate ability, if it chooses, **not** to make an appointment after consideration of the shortlist. The PSC accepts that it may not, on receipt of the shortlist, appoint someone who is not on the shortlist, but contends it is not required to appoint a person from the shortlist if it decides not to make any appointment. It is perfectly entitled to start the s 18(2) process afresh but again, at the end of that process, any appointment made may only be from the panel's shortlist. In summary: the PSC submits that, on receipt of the shortlist, it has the choice of (a) appointing somebody from the panel's shortlist **or** (b) declining to make any appointment at all, at that time.
18. Here, the PSC says it legitimately chose the latter option and immediately began the process afresh, offering the opportunity to earlier applicants to be considered without having to re-apply.

Discussion

19. I accept Mr Wells' submission that the interpretation of section 18(2) of the Act must be determined in light of the section as a whole and against the background of the Constitution, the supreme law of the Republic of Vanuatu.



20. Articles 60 (1) and (4) of the Constitution provide:

“60. Functions of Public Service Commission

(1) The Public Service Commission shall be responsible for the appointment and promotion of public servants, and the selection of those to undergo training courses in Vanuatu or overseas. For such purposes it may organise competitive examinations.

(2)

(3)

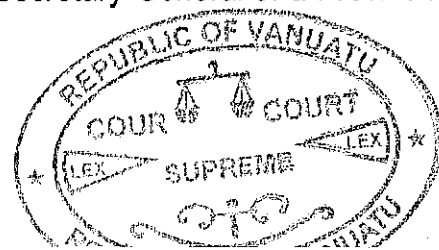
(4) The Commission shall not be subject to the direction or control of any other person or body in the exercise of its functions.”

21. Accordingly, it is the PSC and only the PSC, which has the power to appoint public servants, including, obviously, a director of a government department. Its decisions about appointment are not subject to the direction or control of any other person or body, except by inference on judicial review by the Supreme Court. The PSC does not suggest there is no jurisdiction for this judicial review application.

22. Section 18 (1) clearly provides the PSC with the power to appoint a director (or a person to a position equivalent to the position of a director).

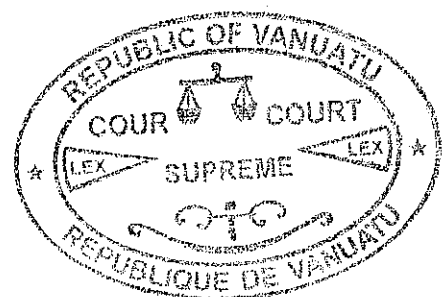
23. I accept Mr Wells' submission that the obvious implication from the use of the word “may” in section 18 (1) is that the PSC's power of appointment includes the power to decide *not* to make an appointment. That view is supported by the contrast apparent from the recent amendment history of section 18(1). Before the June 2022 amendment it provided: “An appointment or promotion to the position of director-general or director, regardless of the title or designation, *must* be made by the Commission” (emphasis added)

24. I also accept Mr Wells' submission that this interpretation is reinforced by the contrast with an aspect of sections 18A to 18F which were included in the Act by the Public Service (Amendment) Act No. 7 of 2018. Section 18A relates to the PSC's appointment of a Secretary General of a Provincial

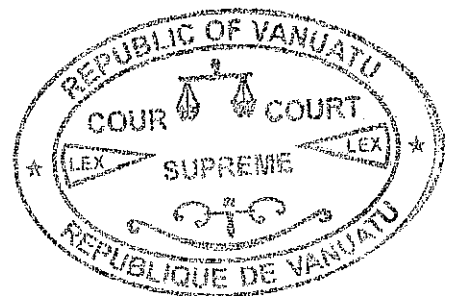


Government Council and section 18 D to the appointment of a Clerk of a Municipal Council. Each of these sections commences: "The Commission *is* to appoint a person to be..." (emphasis added)

25. Against that background, I turn to consider the meaning of section 18 (2). It sets out a mandatory statutory process which the PSC must follow before appointing or promoting a person to the position of director of a department. Arguably this provision is contrary to Article 60(4), in that it is a direction by Parliament, in ordinary legislation, as to how the PSC should exercise the exclusive appointment function vested in it by Article 60 (1). However, the PSC does not dispute that it is obliged to follow the section 18 (2) procedure; indeed it accepts that there are good reasons for it, to avoid or at least minimise the risk of improper influences impacting on the process of making such a significant appointment as that of a director.
26. Although Section 18 (2) (d) requires the PSC, in effect, to delegate the interviewing of applicants and the recommendation of a short list of the most competent and suitable applicants to an independent panel, overall the PSC clearly plays an active supervisory role. It is required to undertake the public advertising, to provide an address where applications are to be sent, to convene the independent panel and subsection (e) reaffirms that the power to make the appointment from the shortlist resides in the PSC, not the panel.
27. I note there is a clear implication from section 18 (2) (d) that the shortlist cannot or at least need not include all of the applicants; otherwise it would not be a shortlist but a full list. The panel's obligation is to filter the total number of applicants down to a shortlist of "the most competent and suitable applicants". Whether that is only one or more than one person is entirely a matter for the panel.
28. In summary, the process begins with the PSC, is diverted for a limited but important purpose to the panel, and then reverts to the PSC to (decide whether to) make an appointment.
29. The critical question is whether the plain wording of section 18(2)(e) "make the appointment from the shortlist" means the final step in the mandatory procedure is that the PSC has no choice other than to make the appointment from the panel's shortlist.

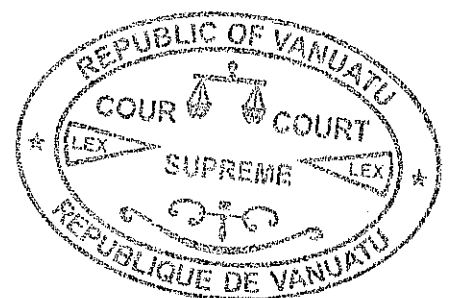


30. At first blush that is what is required of the PSC. But on reflection I do not accept that initial impression is correct.
31. Section 18 (2) does not mandate an appointment, but rather a procedure to be followed prior to any appointment being made. No appointment may be made until after the PSC has carefully followed the steps set out in s18(2). If the PSC decides to make an appointment to the position in question then it must make that appointment from the shortlist provided by the panel.
32. However I consider that at the end of the mandatory process, as s18 (1) and Articles 60 (1) and (4) confirm, the PSC has the authority *not* to exercise its power of appointment at that time. It follows that the PSC has the power, if and when it wishes, to start the mandatory process again by re-advertising and convening a further independent panel to interview the applicants who respond to the advertisement. Again, at the end of such a repeated process it is a matter for the PSC whether or not to make an appointment, but any appointment made must be from the shortlist.
33. I consider the PSC must retain the overall power to decide whether or not to appoint a particular person included in the shortlist recommended by the independent panel. The panel is required to form a shortlist of "the most competent and suitable applicants". But surely the PSC must retain the ability to decide that the process has not thrown up any sufficiently competent and suitable candidate.
34. This is simply common sense; the number and quality of the applicants considered by the panel is entirely dependent on who decides to apply to a given advertisement.
35. The mandatory procedure might attract only one applicant who, even in the panel's view, is thoroughly unqualified for appointment. In that event the panel would still be obliged to recommend and shortlist that person as "the most competent and suitable applicant". If the argument for the claimants is correct the PSC would then be obliged to appoint that incompetent and unsuitable person.



36. It surely cannot have been Parliament's intention, nor that of the drafters of the Constitution, that the PSC could ever be forced to appoint, to such a significant position as that of director, a person with which it is dissatisfied, whatever the reason may be.
37. For completeness I deal briefly with an argument which initially appeared to be in favour of the claimants' interpretation of section 18. I myself raised this in my Minute of 24 October 2022 for counsel's consideration.
38. I earlier mentioned the 2018 insertion into the Act of sections 18A to 18F. Sections 18B and 18E replicate and mandate the pre-appointment section 18(2) procedure, but subsection (e) provides: *"to make the appointment from the shortlist or decide for re-advertisement of the present position if the Commissioner is not satisfied with the recruitment process"* (emphasis added).
39. On the face of this additional wording one might conclude that re-advertisement is not permitted in relation to section 18 appointments of a director and that if it had been intended Parliament could easily have amended section 18 itself at the same time. However, I accept Mr Wells' submission that, for the reasons set out above, the PSC does already have the power to decide not to make a section 18 director's appointment and to begin the process again i.e. to re-advertise so there was no need for Parliament to provide that power to it in s 18(2). The reason for the contrast with appointments of directors and those of Secretary for a Provincial Government Council or Municipal Clerk for a Municipal Council arises from the mandatory nature of those appointments ("is to") compared with the discretionary ("may") appointment of a director.
40. I conclude it is open to the PSC to decide not to make an appointment after the section 18 (2) procedure has been followed and to, for example, continue for such period as it thinks fit with a person holding an acting director position. Or, as happened here, it may decide immediately to start the process again.

Result



41. I therefore uphold the PSC's submission about the correct interpretation of section 18. I reject the claimants' argument that the PSC's decision to re-advertise was unlawful and outside the scope of section 18 of the Act.

The way forward

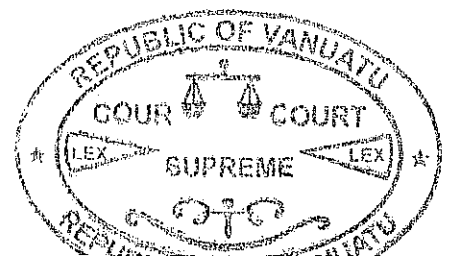
42. The claimants will need to consider their position in light of this judgment on the preliminary issue. I consider it means that their claim, as currently framed, cannot succeed. The centrality of the preliminary issue is indeed why the Rule 12.4 procedure was appropriate here.

43. Currently sought, in the judicial review claim filed on 7 October 2022, are orders (a) quashing the re-advertising decision and (b) requiring the PSC to complete the existing process and to make an appointment from the shortlist provided by the panel on 12 September 2022. For the reasons in this judgment I will decline to make those orders if the judicial review application is pursued.

44. I revoke the interim restraining order which I made on 12 October 2022.

45. As I pointed out to Mr Fiuka at the hearing, the claimants have not yet suffered an adverse decision from the PSC. They were given an express opportunity to be involved in the further process, without having to reapply, by simply confirming their interest by email. I understand they chose not to take that opportunity. It seems to me they could easily have decided to send the appropriate email explicitly without prejudice to their judicial review claim, in order to preserve their position. Having not done so, arguably they now lack standing to challenge any subsequent appointment or anything the PSC now does or fails to do. Their non-consideration for appointment as a result of the further process which I have now unlocked will be the result of their own decisions not to send those emails, rather than the result of any judicially reviewable conduct of the PSC.

46. It would be ironic indeed if Mr Tarosa decided not to apply in response to the re-advertisement (as appears was his decision as to the initial one, assuming he was aware if it as one would expect he was) or if he was not shortlisted by the further panel. In that event the claimants, who might well again have been recommended by the panel, would not be eligible for appointment because, having



decided not to confirm their interest by email as offered by the PSC, they cannot be interviewed and end up on the further panel's shortlist.

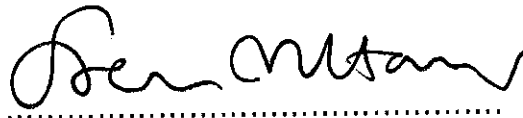
47. If Mr Tarosa does apply, the PSC must remain scrupulously independent of the panel's deliberations and vice versa. Despite the PSC's clearly stated view (in the PSC Secretary Mr Melterres' sworn statement of 18 October 2022) of the outstanding qualities of Mr Tarosa, the panel may and is fully entitled to take a different view about him.

48. Having succeeded on the disputed preliminary issue the PSC is entitled to costs. If these cannot be agreed they are to be taxed.

49. There will be a conference to discuss the future course of the case **at 8.30am on Thursday 1 December 2022.**

Dated at Port Vila this 4th day of November 2022

BY THE COURT



Justice S M Harrop

