

BETWEEN: Crem Mandavah
Appellant

AND: Republic of Vanuatu
Respondent

Date of Hearing: 16 November 2021

Coram: Chief Justice V. Lunabek
Justice J. von Doussa
Justice R. Asher
Justice O. Saksak
Justice G. Andrée Wiltens
Justice Viran Molisa Trief

Counsel: Mr J. Tari with Mr R. Bule for the Appellant
Mr S. Aron for the Respondent

Date of Decision: 19 November 2021

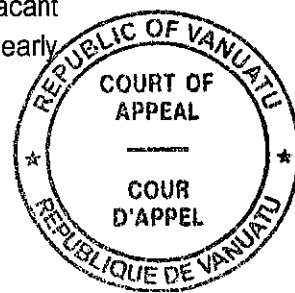
JUDGMENT

A. Introduction

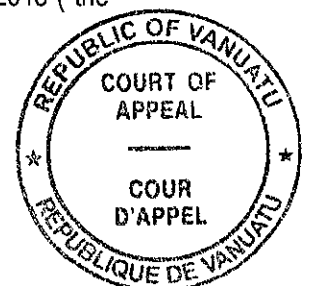
1. This is an appeal against a Supreme Court decision to deny a claim for judicial review.
2. The Civil Procedure Rules (see Rule 17.8) provide for an early conference to be held where judicial review is sought, to ensure the subject matter of the claim is properly before the Court. Sub-rule 17.8 (3) provides that the judge will not hear the claim unless satisfied of 4 prescribed matters.
3. In this case, the only prescribed matter in issue was whether the claimant "...had an arguable case". The other 3 criteria the Claimant was required to satisfy to enable the case to proceed were accepted as having been met. Having considered the material provided, the primary judge concluded the claimant did not have an arguable case and struck out the claim, with costs. This appeal challenges that determination.

B. Background

4. On 22 May 2020, the Teaching Service Commission ("the TSC") determined to advertise 52 vacant positions for Principals of schools throughout Vanuatu. The advertisement was published in early September 2020 with a closing date of 1 October 2020.



5. A number of incremental decisions were taken by the TSC in October and November 2020, as follows.
6. On 23 October 2020, the TSC resolved that the criteria for any appointment was that the applicant hold an MA or BA in Education, as specified in the advertised job description.
7. On 4 November 2020, having received the selection panel's recommendations, the TSC resolved that all eligible and short-listed candidates with an MA or BA in Education were to be put on a stand-by list and considered for appointment to (i) positions for which certificate and diploma holders were recommended, and (ii) positions which were recommended to be re-advertised.
8. As well, the TSC tasked the Secretariat of the Commission to identify suitably qualified applicants, who were not short-listed for interviews, for consideration by the Board. In addition, the Secretariat was to identify Certificate and Diploma holders, who were recommended, eligible and short-listed, to also be placed on a stand-by list for further consideration.
9. The TSC further determined that candidates with only a Diploma in Education, who were nevertheless appointed to a school principal position, would be required to upgrade their qualifications to BA or MA level within their 4-year contracts.
10. The appellant, Mr Mandavah, applied for the position of Principal of Ecole Centreville. He had been acting in that position for some 9 months prior to his application. He was interviewed for the post on 9 October 2020, and was recommended for appointment ahead of two other short-listed applicants. This despite the fact that he only had a Diploma in Secondary Education, and did not have a Bachelors or Masters degree in Education.
11. On 4 November 2020, Ms Ilaisa was appointed as Principal of Ecole Centreville by the TSC. Mrs Ilaisa had applied for 2 other positions, but was not recommended for appointment. However, she was an eligible candidate for all the Principal positions as she had attained a Masters degree in Education. She was put on the stand-by list due to her qualifications, in conformity with the TSC's resolutions and subsequently appointed.
12. On 8 December 2020, the TSC finalised the 52 appointments and further resolved that all the applicants who had been appointed or recommended for appointment, and who had lower qualifications than that required, were to be recommended for scholarships to urgently upgrade their qualifications.
13. Mr Mandavah was one of the candidates so recommended for a scholarship.
14. It was accepted that the TSC was the only entity with authority to make the appointment – the interview panel could make recommendations, but no more. It was further accepted that any such recommendation, as set out in Section 34 (1) of the Teaching Service Act No. 38 of 2013 ("the Act"), could not be binding on the TSC.

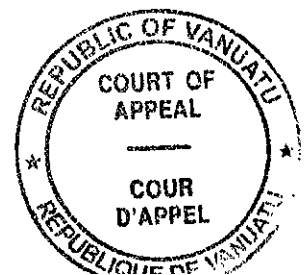


C. Claim for Judicial Review

15. Mr Mandavah challenged the TSC decision to appoint Ms Ilaisa.
16. It was his claim that she had not applied, let alone been interviewed, for the post; whereas he had been interviewed and been recommended by the interview panel ahead of the two other short-listed applicants.
17. Irregularities in the appointments process, although not particularized, were alleged.
18. The appointment of Ms Ilaisa was said to be contrary to the TSC's selection criteria as well as the Act – again without any specifics.
19. Mr Mandavah had written to the TSC with his concerns in November 2020, but he did not receive the courtesy of a response. Accordingly, he filed the claim for judicial review.
20. Mr Mandavah sought specific remedies, as follows:
 - a declaration that the decision to appoint Ms Ilaisa was made contrary to sections 18 (to be a good employer), 19 (requirement to consider applicant's merits) and 20 (permitting the setting of minimum qualifications) of the Act
 - a mandatory order requiring the TSC to meet, reconsider the appointment and instead appoint Mr Mandavah, as the person recommended by the Panel on 9 October 2020; and
 - an order quashing the appointment of Ms Ilaisa, pursuant to s2 (b), s 9 (a), s10, s 18, s 19 and s 20 of the Act.

D. Decision

21. The primary judge recognised Mr Mandavah's obvious concerns. However, as a result of the material provided in opposition to the claim, the process involved in the appointments process became more transparent and demonstrated that the claim had been commenced by Mr Mandavah without full knowledge of the relevant facts.
22. The primary judge concluded that as Mr Mandavah had not been aware of and accordingly not challenged any of the TSC resolutions set out earlier in paragraphs 6 – 9, which formed the basis for appointing Mrs Ilaisa, there was no arguable case established as alleged in the claim.
23. The primary judge further adopted a fallback position that even if an arguable case were made out, the claim would have had to be struck out as it did not join Ms Ilaisa as an interested party, she clearly being affected if the claim were successful.

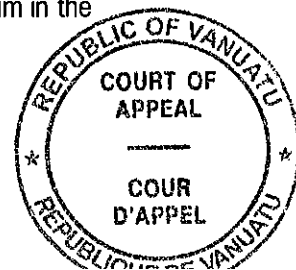


E. Appeal

24. There were a number of grounds of appeal advanced. Firstly, it was contended that the primary judge had erred in holding that a lack of standing was a factor to be considered at a Rule 17.8 conference. Secondly, the failure to not join Ms Ilaisa was submitted to not be fatal to the claim. Thirdly, it was submitted that the TSC was not a good employer, as evidenced by the appointment of Ms Ilaisa when she had not applied for the post; as well as the discriminatory practice of appointing other applicants with the same qualifications as Mr Mandavah. Lastly, there was complaint in unfairness in that the Court permitted the late filing of the Defence and a supporting sworn statement with insufficient time allowed for a response to be made.
25. Mr Aron relied on the extensive written submissions filed in opposition to the appeal, which the Court considered most helpful.

F. Discussion

26. When challenged as to where the alleged basis for the decision of lack of standing was recorded in the judgment, Mr Tari was unable to do so and sought refuge in the setting of criteria set for appointments. In fact, the only mention of standing to bring the claim occurred when the primary judge was discussing the submissions made before him. It is not set out as a reason for coming to the final decision. We reject this ground of appeal.
27. As previously explained, the primary judge concluded the claim did not disclose an arguable case. His secondary reasoning, namely the fact that Ms Ilaisa was not named as a party to the litigation, need not be considered by this Court unless the primary conclusion is shown to be an error. Accordingly, we make no comment on this ground of appeal.
28. In our view, the material provided to the Court demonstrates the TSC appointment process in this instance to be fair. We see no injustice in Ms Ilaisa being appointed for this particular post even though she did not apply for the post and was not interviewed specifically in relation to this vacancy. Ms Ilaisa had a Masters degree in Education, and was therefore, on the face of things, a better candidate than Mr Mandavah. The evidence is that all the short-listed applicants were interviewed on the same basis using a pre-set series of questions to achieve consistency. The TSC had a very large number of applicants for a large number of vacancies, and the processes adopted were designed to best fit the applicants to the vacancies and to raise the standard of education available throughout Vanuatu. We note, as the primary judge commented, that Mr Mandavah did not challenge any of the TSC decisions made, save for the appointment of Ms Ilaisa.
29. For the same reason we consider that the fact that others were appointed with insufficient qualifications to meet the set criteria does not demonstrate discrimination against Mr Mandavah. We note also that Ms Ilaisa had been recommended to be appointed to Freshwota School, but that recommendation was not followed by the Board. Further, the recommending of Mr Mandavah for a scholarship to improve his qualifications and employability indicates the TSC treated him in the same manner as others.



30. We note the complaint regarding late filing did not cause counsel to seek an adjournment in the Court below. As well, Mr Tari was unable to explain what further material could have been provided had additional time been given. We reject this ground of appeal.
31. This Court would like to make it clear that the primary judge was not required, or indeed able, to make final determinations of fact. The issue before the primary judge was whether the claim was properly before the Court; whether Mr Mandavah had an arguable case. The material provided, for and against the claim, was sufficient for the primary judge, without making any findings of fact as they were not disputed, to conclude that the Claimant did not have even an arguable case. The law accordingly required the primary judge to strike out the case, which is what occurred.

G. Result

32. The appeal is dismissed as having no merit.
33. Costs are to follow the event. We fix them at VT 50,000, and they are to be paid within 21 days.

Dated at Port Vila this 19th day of November 2021

BY THE COURT



Chief Justice V. Lunabek

