

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

Judicial Review
Case No. 17/1874 SC/JUDR

BETWEEN: ROY MICKY JOY
Applicant

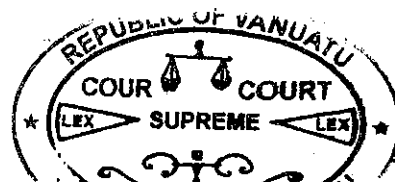
AND: MINISTER OF FOREIGN AFFAIRS,
INTERNATIONAL COOPERATION and
EXTERNAL TRADE
First Respondent

AND: FOREIGN SERVICE BOARD
Second Respondent

By: Justice J. P. Geoghegan
Date of Hearing: 2nd February 2018
Date of Judgment: 19th March 2018
Counsel: Mr. Thornburgh for the claimant
Mr. Huri (SLO) for the defendants

JUDGMENT

1. Mr Joy seeks judicial review of a decision by the first defendant (“*the Minister*”) not to re-appoint Mr Joy to his position as Ambassador Extra-Ordinary and Plenipotentiary of the Republic of Vanuatu to Belgium. The position was one which had been occupied by Mr Joy since his first appointment on September 8th, 2010.
2. In his judicial review claim Mr Joy seeks various orders the effect of which would be to re-appoint him to the position which he had previously held.
3. This judgment is to determine whether or not, pursuant to Rule 17.8 (3)(a) of the Civil Procedure Rules, Mr. Joy has an arguable case, it being conceded by the State that the other criteria under Rule 17.8(3) of the Rules have been satisfied.
4. In the event that I am not satisfied that the claimant has an arguable case then, pursuant to Rule 17.8 (5) I may decline to hear the claim and strike it out.
5. There is no dispute regarding the facts of the case.
6. Pursuant to an employment agreement dated September 7th 2007, Mr Joy was employed by the minister as Ambassador Extra-Ordinary and Plenipotentiary of the Republic of Vanuatu to



Belgium, the European Union, and the African, Caribbean and Pacific Group. The appointment was for a term of 3 years. The agreement required Mr. Joy to live in Brussels.

7. On September 8th, 2010 Mr Joy was re-appointed to the position of Ambassador to Brussels. Although there appears to be a suggestion that that appointment was for a term of 3 years the documentation which has been provided to date would suggest that the appointment was permanent. That does not however have a bearing upon this decision.
8. During the term of Mr. Joy's employment under the 2010 agreement the Foreign Services Act No. 22 of 2008 was repealed and replaced by the Foreign Services Act No. 20 of 2013.
9. The position regarding Mr Joy's appointment from September 8th, 2013 to March 9th, 2014 is somewhat unclear with the defendants maintaining that during that period Mr Joy was operating in a position of an Acting Ambassador. Whatever the position however, Mr Joy was re-appointed to the position of Ambassador on March 10th, 2014 Mr Joy for a term of 3 years. That appointment came to an end on March 9th, 2017.
10. On February 23rd, 2017 the Foreign Service Board met and made a recommendation that Mr Joy's appointment be extended for another term. Advice of that recommendation was given to Mr Joy by the Chairman of the Foreign Service Board by way of an email on February 25th, 2017. That email read:

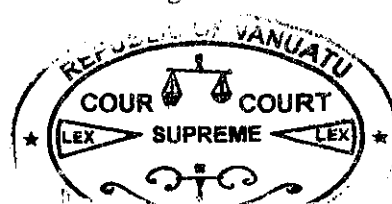
"Hi Roy,

I had convened the Foreign Services Board to consider your extension of your term. We last met on Thursday this week and making a recommendation to the Minister to extend your term. We will await the Minister's decision in a weeks time whether he will agree to your extension or not. But after he has made his decision we will formally advise you.

But if your term is extended, we will require that your signing of a performance agreement with DG Roline Tekon will be required. Other conditions will be negotiated separately.

*Kind regards,
Sumbue".*

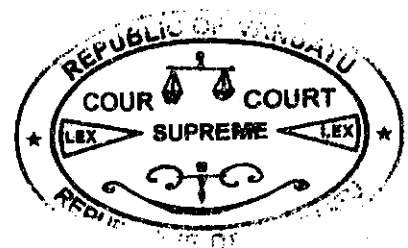
11. Upon receiving the recommendation of the Foreign Service Board the Minister decided to submit the recommendation to the Council of Ministers for approval. The reasons for this are set out in a sworn statement of the Acting Director-General for the Ministry of Foreign Affairs Roline Tekon dated October 12th, 2017. In short, the Minister had some concerns over Mr Joy's performances as the Ambassador to Brussels and in particular there was concern over use of mission funds to pay for his residential rent, Mr Joy's involvement in a project known as the "Coconut Project" which was believed to have jeopardised Vanuatu's negotiations to the



European Development Fund and Mr Joy's appointment of a Mr Pascal Saken as Deputy Ambassador without prior consultation with the Ministry.

12. On April 11th, 2017 the Council of Ministers wrote to the Minister for Foreign Affairs advising of various decision which it made in relation to a number of diplomatic posts including that occupied by Mr Joy. It included the following decisions:
- (a) To instruct the Department of Finance to deduct a housing allowance from the entitlements of Mr Joy;
 - (b) To agree to grant a 3 month extension of diplomatic post holders in Noumea, Canberra and Brussels;
 - (c) To take note of legal and financial implications of the decision to advertise the positions of Head of Mission in overseas posts;
 - (d) To endorse and instruct the Minister of Foreign Affairs to advertise the positions of Head of Mission of Brussels, Canberra, New Caledonia and Guangzhou, China.
13. Clearly there was a further meeting of the Council of Ministers regarding Mr Joy's appointment and on June 15th, 2017 the Acting Secretary for the Council of Ministers sent a letter to the Minister for Foreign Affairs advising that on June 15th the Council had met and agreed on the following decisions:
- (a) Not to renew the contract for Mr Joy as Ambassador to the European Union;
 - (b) To give Mr Joy a new post as Special Envoy to West Papua;
 - (c) "That the MOA between the ULMWP and VANGOV be signed immediately to provide for this travelling costs in this new post";
 - (d) That Mr Joy's first job would be to participate in an early July meeting with Belize.
14. The evidence establishes that the Minister had acted earlier on the April advice from the Council of Ministers that the position for the Ambassador of Belgium should be advertised, as advertisements calling for applications in respect of the position were placed in the Daily Post newspaper and on the government internet. The advertisement placed on the government internet called for all applications to be submitted by 5pm on Friday May 19th, 2017¹. Accordingly, well before the decision of the Council of Ministers of June 15th Mr Joy's position had been re-advertised.
15. Mr Joy was advised by the Minister of the decision to advertise the post of Head of Mission in Brussels by letter dated April 21st, 2017, which stated ;

¹ See exhibit RLT10 sworn statement of Roline Tekon dated October 12th, 2017



"Dear Ambassador

Re; Employment status as Ambassador Extraordinary & Plenipotentiary to the European Union, Brussels, Kingdom of Belgium.

The Ministry would like to inform you that in its decision Number 49 of 2017 (as appended), the Council of Ministers have advised that the post of Head of Mission in Brussels, Belgium is to be advertised.

In complying with the Council of Minister's decision, the Ministry is requesting that you liaise directly with the Corporate Services unit with regards to your repatriation by end of May 2017. The Ministry is cognizant of all of your entitlements during the course of your appointment as Ambassador Extraordinary & Plenipotentiary to the European Union in Brussels, Belgium.

The Ministry is working closely with the Ministry of Finance to ensure your contracts, severance and other benefits are made to you accordingly.

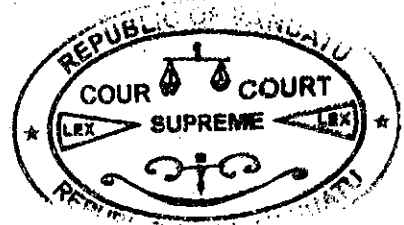
With my highest consideration,

Hon. Bruno Leingkone TAU

Minister for Foreign Affairs, International Cooperation and External Trade'.

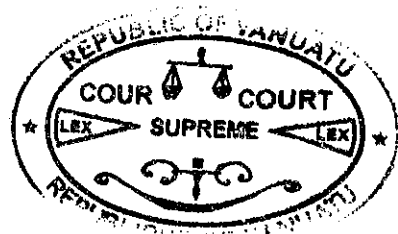
16. While the letter would certainly suggest that any application by Mr Joy to apply for the position might have slim prospects of success and while he was not invited by the Minister to file an application, it would or should have been abundantly clear to Mr Joy that he was entitled to do so. Mr Joy's own evidence confirms that he was aware that his position was advertised on May 12th, 2017².
17. Mr Joy did not apply for re-appointment. Only three applications were received. In a meeting of the Foreign Service Board held on July 3rd, 2017 those applications were considered and Mr John Leicht was recommended for appointment as Ambassador. The Council of Ministers endorsed that appointment at a meeting on July 13th, 2017.
18. In the interim, Mr Joy was advised by the Minister by letter dated June 26th, 2017 of Mr Joy's appointment as Special Envoy of the Republic of Vanuatu on Decolonisation Issues with Special Focus on the issue of West Papua. Mr Joy was advised that his term as special envoy would be for a period of 2 years. With reference to that appointment Mr Joy's position is that he has not accepted the appointment pending the determination of these proceedings.

² See sworn statement of claimant dated July 20th 2017, paragraph 12.

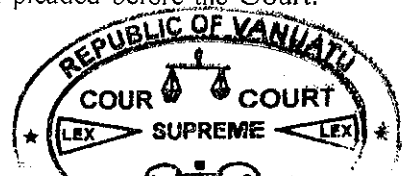


19. The essence of Mr Joy's claim is set out in paragraphs 6 – 13 of his application for judicial review filed on July 20th, 2017. In that judicial review application Mr Joy alleges that the Minister's compliance with the decision of the Council of Ministers recorded in decision 49 of 2017, was beyond the Minister's powers under the Foreign Services Act No. 20 of 2013 because the Minister instead of making the appointment of Mr Joy as Ambassador under Section 14 of the Foreign Services Act, had taken into account irrelevant factors namely the decision of the Council of Ministers. It is alleged by Mr Joy that the Council of Ministers' decision could not bind Mr Joy as he had been recommended for appointment to the post by the Foreign Services Board which is entrusted by the Foreign Services Act to make recommendations for appointment. It is not the function of the Council of Ministers. Accordingly the Minister had taken into account an irrelevant matter.
20. Appointments to positions such as that previously held by Mr Joy are governed by the Foreign Services Act No. 20 of 2013 the purpose of which is *"to provide for the management and administration of the foreign services of Vanuatu and for related purposes"*.
21. Section 13 of the Act provides that:
- "(1) The Minister on the approval of the Council is to appoint by order a person to be a Head of a Mission in a State."*
22. The term of such an appointment is prescribed by section 14 to be for a period of 3 years and pursuant to section 14, a Head of Mission is eligible for re-appointment only once by the Minister on the recommendation of the Foreign Service Board. There is no dispute that Mr Joy, as an Ambassador is a *"Head of Mission"* as defined by the Act.
23. No other guidance is provided by the Act as to how the re-appointment of a Head of Mission is to occur.
24. The Foreign Service Board is established pursuant to Section 7 of the Act and the functions of the Board are described in Section 9. Two of those functions are:

- "(a) To carry out the recruitment process referred to under Section 6;*
(b) To submit to the Minister the names of the recommended candidate and 2 eligible candidates to the minister for Council's approval;"



25. The "*Council*" referred to is the Council of Ministers referred to in Article 40 of the Constitution of the Republic of Vanuatu.
26. Accordingly the Act specifically contemplates that the Council of Ministers will approve appointments to diplomatic offices under the Foreign Services Act. That is not surprising given the particular roles involved.
27. Section 13 of the Act also refers to the approval of the Council of Ministers of any appointment of a Head of Mission and provides that "*the Minister on the approval of the Council is to appoint by order a person to be a Head of a Mission in a State*".
28. Mr Joy says that there is a significant difference between a Head of Mission "initial" appointment and a re-appointment. A re-appointment, which is referred to in section 14 may occur without the approval of the Council of Ministers. That is because section 14 provides that a Head of Mission may be eligible for re-appointment "*only once by the Minister on the recommendation of the Board*".
29. For the State, Mr Huri submitted that the Minister was merely exercising his discretion in an appropriate fashion and that the recommendation of the Board pursuant to Section 14 was not binding upon him and did not have the effect of creating a situation where the Minister was required to appoint Mr Joy.
30. For Mr Joy, Mr Thornburgh simply submitted that there is a clear difference between sections 13 and 14 of the Foreign Services Act and that under Section 14 which refers to re-appointment the Council of Ministers has no input. Mr Thornburgh submitted that the effect of Section 14 is that the making of a recommendation by the Foreign Services Board binds the Minister and that once a recommendation is made the Minister is bound to implement it and effectively has no discretion in the matter.
31. Mr Thornburgh also endeavoured to advance a ground which did not appear in Mr Joy's application for judicial review. Mr Thornburgh argued that if a vacancy had become available in respect of the appointment of an Ambassador to Brussels then, by virtue of section 13 the recommendation received by the Minister was a binding one. That is because pursuant to Section 9(b) of the Act the Foreign Service Board was required to provide to the Minister the names of the recommended candidate and 2 eligible candidates for the Council of Ministers' approval. In this case only one candidate had been nominated and therefore the Council of Ministers had no discretion in the matter.
32. This "*alternative*" argument may be disregarded for two reasons. Firstly, it is not included in the application for judicial review. The court cannot be expected to determine an application such as this on the basis of a cause of action which has not been pleaded before the Court.



Secondly however, it simply could not be argued that the recommendations of the Foreign Service Board could be binding upon either the Minister or the Council of Ministers. If such was the case there would simply be no point in the referral of a recommendation to the Minister or to the Council of Ministers as the power of appointment would effectively vest with the Foreign Service Board. That is clearly not the intention of the Act and the Act could not be interpreted in such a way. When one looks at the provisions of the Act final approval rests with the Council of Ministers. While that approval may be binding on the Minister a recommendation of the Foreign Service Board is not. The Minister or Council of Ministers (depending on whether the appointment was new or a re-appointment) would be entirely within their rights to reject all recommendations if they wish to do so.

33. This is a case where, given the agreed factual background and the fact that all relevant documents appear to be before the Court it is actually possible to determine the matter conclusively.
34. In dealing with the matter I refer to the judgment of the Court of Appeal in Loparu v. Sope³. At page 5 the court stated:

“Under Rule 17.8(4) the judge is not required to hear the claimant’s evidence at the first conference but may consider the papers filed in the proceedings and hear argument from the parties”.

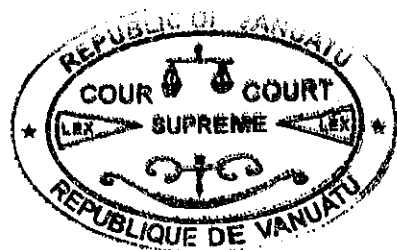
35. I refer also to the judgment of the Supreme Court in Botleng v. Veriondali Land Tribunal⁴ where at paragraph 12 Fatiaki J. stated :

“ [Rule 17.8] clearly places a persuasive burden on the claimant to satisfy the court that they have “an arguable case” sufficient to require the defendants to respond to the case on its merits. It is not unlike an application for leave to issue judicial review proceeding under the “old” Civil Procedure Rules and is to be approached on the basis of the materials and any opposition that may be made to the application. At this preliminary stage the court need not be satisfied, that the claim is fully justified, only, that there is a “prima facie” raised on the materials worthy of “further consideration at a hearing”.

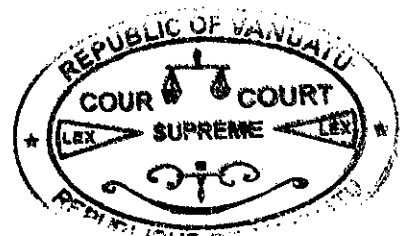
36. I respectfully agree with that analysis.

³ [2005] VUCA 4

⁴ [2013] VUSC 133



37. In this case I am not satisfied that Mr Joy has an arguable case worthy of further consideration.
38. First and foremost, it would be completely contrary to the intention of the provisions of the Act to read section 13 as creating a situation where the recommendation of the Foreign Service Board is binding on the Minister. It is clear from the provisions of section 9 of the Act that the Board has an advisory capacity only and does not have the ability to make binding executive decisions regarding the appointment of a Head of Mission. Clearly, the final decision regarding the appointment of a Head of Mission rests with the Council of Ministers or arguably on a re-appointment, with the Minister. The argument that the recommendation of the Foreign Service Board is binding on the Minister simply has no merit.
39. A further difficulty regarding Mr Joy's application relates to decision 49 of 2017 of the Council of Ministers. It is clear from that decision that the Council had determined that the ambassadorial posts in Brussels, Canberra and Noumea would be advertised. That is a decision completely within the authority of the Council of Ministers. It is a decision regarding significant diplomatic postings which one would expect the Council of Ministers to make. It is clear that the Council of Ministers intended that the positions of the ambassadors in Brussels, Canberra and Noumea would simply be extended for 3 months pending the advertising process. The decision of the Council, while having a potential impact upon the possibility of Mr Joy's re-appointment, was not a decision regarding his re-appointment.
40. The position was then advertised. Mr Joy was aware of the decision to advertise the position and was aware of the need to make an application. It is clear that he made no such application and in such circumstances the earlier recommendation by the Foreign Service Board on February 25th, 2017 had been rendered redundant by virtue of the need for a fresh recruitment process.
41. Apart from the fact that Mr Joy did not make any application for appointment under the new process there is no evidence that he made any effort to notify either the Minister or the Foreign Service Board that he wished to be considered for appointment. In such circumstances it is therefore unsurprising that the recruitment process went ahead and considered the applications which had been made pursuant to the advertisement for such applications. In that context, decision 24 of 2017 by the Council of Ministers made on June 15th, 2017 where it was agreed not to renew the contract for Mr Joy was completely unnecessary as the position had been re-advertised and Mr Joy had made no application.
42. I consider, in the light of that background, a factual background in respect of which there is no dispute, that there is no judicially reviewable decision in respect of the matter. The recommendation upon which Mr Joy bases his case was spent and the Minister did no more



than to implement a completely justifiable executive decision regarding the re-advertising of diplomatic posts by the Council of Ministers.

43. For these reasons I find that Mr Joy has no arguable case and his application for judicial review is dismissed accordingly.
44. In such circumstances the first and second defendants are entitled to costs and costs are awarded on a standard basis to be agreed within 21 days failing which they are to be taxed.

Dated at Port Vila, this 19th day of March, 2018.

BY THE COURT

JP GEOCHIE

Judge.

