

BETWEEN: TEACHING SERVICE COMMISSION
Claimant

**AND: DIRECTOR GENERAL MINISTRY OF
EDUCATION AND TRAINING, DIRECTOR
GENERAL FINANCE AND ECONOMIC
MANAGEMENT**
First Defendants

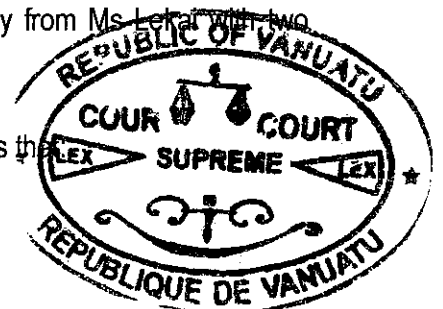
AND: PUBLIC SERVICE COMMISSION
Second Defendant

Date: 11 December 2023
Before: Justice W. K. Hastings
Distribution: Mr H. Tabi for Claimant
Mr G. Blake for the First and Second Defendants

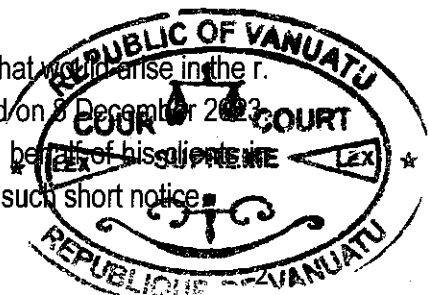
JUDGMENT
(Applications for Urgent Interlocutory Orders and Rule 17.8 Conference)

Introduction

1. On 28 November 2023, the claimant, the Teaching Service Commission (the TSC), filed an urgent claim for judicial review of the decision of the Director General of the Ministry of Education and Training (DG-MOET) and the Director General of the Ministry of Finance and Economic Management (DG-MFEM) to stop the Acting Chairperson and Acting Secretary of the TSC from committing and signing Local Purchase Orders (LPOs). The TSC also seeks a review of the decision by the DG-MOET and the DG-MFEM to permit their subordinate officers to access and commit payments from TSC funds. None of the orders sought in the claim for judicial review concerns a decision of the PSC.
2. The claim was accompanied with the sworn statement of Claudia Lekai, the Acting Secretary of the TSC, containing seven annexures, a sworn statement of urgency from Ms Lekai with two annexures, an undertaking as to damages, and draft orders.
3. Also on 28 November 2023, the TSC sought urgent interlocutory orders the



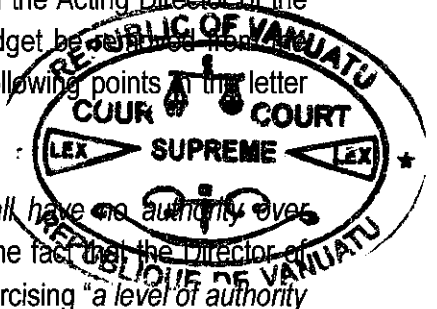
- a. The TSC be allowed to commit LPOs out of the TSC Operating Budget to keep the TSC office up and running pending the final determination of the substantive claim for judicial review; and
 - b. The Acting Chairperson and Acting Secretary of the TSC be allowed to sign off on LPOs committed out of the TSC Operating Budget pending the final determination of the substantive claim for judicial review.
4. On 1 December 2023, the TSC sought further urgent interlocutory orders that:
 - a. The instruction of the Acting Secretary of the Public Service Commission (PSC) to the Acting Secretary of the TSC to recall all TSC employees to resume duty by 1 December 2023, be stayed pending the final determination of the substantive claim for judicial review; and
 - b. The PSC as well as its employees be restrained from giving further directives to the TSC pending the final determination of the substantive claim for judicial review; and
 - c. The PSC be restrained from imposing any disciplinary offence on TSC officers pending the final determination of the substantive claim for judicial review; and
 - d. All defendants be restrained from dealing with any of the TSC officers pending the final determination of the substantive claim for judicial review.
5. The application for these orders was accompanied with a further sworn statement from Ms Lekai.
6. On 4 December 2023, the TSC again sought further urgent interlocutory orders that:
 - a. The temporary suspension of the Acting Secretary of the TSC made by the PSC on 30 November 2023 be stayed pending the final determination of the substantive claim for judicial review; and
 - b. The appointment of a new Acting Secretary of the TSC made by the PSC be stayed pending the final determination of the substantive claim for judicial review.
7. The application for these orders was accompanied with the sworn statement of David Narae, a member of the TSC. It contained six annexures.
8. On 5 December 2023, the applications for these eight orders were heard in chambers. The application for the first two orders concerns the heart of the dispute, which is the extent to which the DG-MOET can lawfully monitor and control TSC expenditure. The remaining six applications concern the manner in which the PSC can lawfully react to the closure of the TSC offices.
9. As many of the submissions from Mr Blake were also relevant to matters that would arise in the r. 17.8 hearing, the r.17.8 hearing was set down at short notice and was held on 8 December 2023. The Court is most grateful to Mr Blake for filing and serving defences on behalf of his clients in time for the r.17.8 conference, and to Mr Tabi for being able to respond at such short notice.



10. I note that Mr Tabi is both Acting Chairperson of, and appeared as counsel for, the claimant. This put him in the position of potentially giving evidence as a witness and making submissions as counsel. He acknowledged the conflict and undertook to instruct counsel should this matter proceed any further.

Background

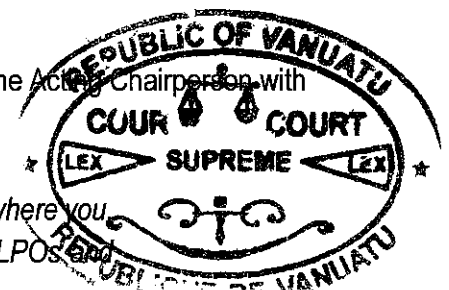
11. The following facts are taken from the two sworn statements of Claudia Lekai and the sworn statement of David Narae. Mr Tari has been Acting Chairperson of the TSC throughout this chronology.
12. On 10 November 2022, the TSC Board resolved to approve the nomination of Ms Lekai as Acting Secretary of the TSC until a Secretary was appointed.
13. On 22 November 2022, the Acting Chairperson wrote to the Attorney General for advice on:
 - a. Whether it is legal for the TSC secretariat to be under the Director General in the MOET structure;
 - b. The employment status of the Secretary and staff of the TSC;
 - c. Whether the Acting Chairperson of the TSC can advertise the position of the Chairperson;
 - d. Whether the TSC can appoint an Acting Secretary until a Secretary is appointed in accordance with s 15 of the TSC Act.
14. On 6 December 2022, the Attorney General replied. His advice was that the PSC has the power of appointment as well as the power of removal, of the Secretary and other staff of the TSC, but that they are employed by the TSC. He said *"it is the PSC that will have to appoint the Acting Secretary of the TSC."* With respect to both the positions of Chair and secretary, he said that *"after the TSC has advertised for the position of the Chairperson and the secretary of the TSC, and the candidates are shortlisted ... then the names of the shortlisted candidates can be forwarded to the relevant authorities to make the appointments for the two mentioned positions."*
15. On 15 December 2022, the Acting Chairperson informed the PSC that the TSC had resolved to appoint Ms Lekai as Acting Secretary of the TSC.
16. On 21 April 2023, the Acting Chairperson wrote to the DG-MFEM and the Acting Director of the Department of Finance requesting that the payroll and incidental budget be approved for the Director of Education Services. The Acting Chairperson made the following points in the letter which form the basis of the claim and these applications:
 - a. Article 60(3) of the Constitution states that the PSC *"shall have no authority over members of ... the teaching services."* He submitted that the fact that the Director of Education Services is *"PSC staff"* means that the PSC is exercising *"a level of authority*



over the teaching service” which is “a clear infringement of Article 60(3) of the Constitution.”

- b. As the TSC is the employer of teachers, he submitted it is the TSC that should control the payroll and incidental budget, not the Director of Education Services.
 - c. The TSC as a statutory entity headed by a Chairperson in terms of s 2 of the Public Finance & Economic Management Act [Cap 244] (PFEM Act). The Ministry of Education is headed by the DG-MOET. Both heads report to the Minister. Mr Tabi submitted that since both heads report to the Minister, the Director of Education Services in the Ministry of Education should not have control of the TSC’s payroll and incidental budget.
17. In September 2023, the Acting Chairperson and “a few” of the TSC officers were on the Island of Maewo signing contracts with early childhood and care education teachers. While there, the Acting Secretary informed the Acting Chairperson that the cheque to pay for the chartered flight from Port Vila to Maewo was stopped because the DG-MOET had not approved the expenditure.
18. On 18 October 2023, the Acting Chairperson of the TSC wrote to the Attorney-General for advice on:
- a. The appropriate head of agency for the TSC;
 - b. Whether or not the specimen of the signatories required an approval from the DG-MOET;
 - c. Whether or not the Acting Chairperson and Acting Secretary can sign cheques;
 - d. Whether or not the withholding of the cheques is lawful since activities have already been carried out.
19. On 7 November 2023, the Attorney General advised
- a. The TSC is a statutory entity the head of which is currently the Acting Chairperson;
 - b. The specimen of its signatories does not require approval from the DG-MOET;
 - c. Mr Tabi and Ms Lekai were appointed to these positions in acting capacities, therefore they have the power to carry out all their duties in accordance with the Teaching Service Act, including executing cheques;
 - d. The cheques should not be withheld and the monies owing for activities already executed should be released.
20. On 9 November 2023, the Minister of Education and Training emailed the Acting Chairperson with the following concern:

The point of contention, as discussed, is the current practice where you, as the Chairman, hold the dual responsibility of committing LPOs



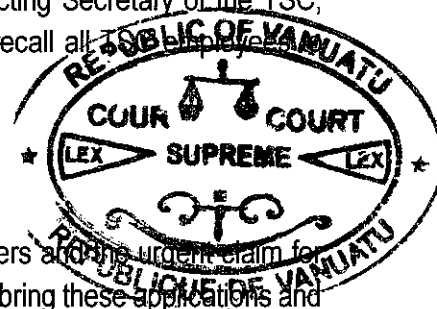
being a signatory. This raises potential conflict-of-interest issues that need addressing to ensure transparency and compliance with best practices. Another significant issue highlighted was the change in signatory authority, which was reportedly done without the knowledge or approval of the Director-General (DG). This action raises procedural questions and warrants a thorough review to align with our organizational protocols and governance standards.

The Minister then proposed obtaining a second legal opinion, and that during the review period and until resolution is reached, “the existing process of expenses approval – where expenditures MUST be requested and approved by the DG – should continue.”

21. More emails followed between the Minister and the Acting Chairperson. On 12 November 2023, the Acting Chairperson counter-proposed that the procedure in which the TSC Finance Officer commits the LPO and the Acting Chairperson and Acting Secretary are signatories to it, should be in place. He said it was the Finance Officer, not the Acting Chairperson, who commits the LPOs. He also said if the counter-proposal could not be agreed *“then another option would be for closure of TSC Office until further advices are given.”* On 13 November 2023, the Minister emailed back and said *“While Article 60(3) of the Constitution delineates the independence of various commissions, including the TSC, consistent and transparent financial protocols across all governmental bodies are also crucial.”* On 15 November 2023, the Minister emailed to *“reiterate my surprise and concern regarding the suggestion to potentially close the TSC Office (Option 2). Such a drastic measure seems misaligned with the need to address what appears to be procedural and administrative challenges in financial management.”* Both parties repeatedly expressed their willingness to engage in a constructive manner.
22. On 24 November 2023 the TSC Board met and resolved to file this urgent judicial review claim and *“to temporarily close the TSC Office effective as of the 28th November 2023, pending the settlement of the TSC Finance access issues.”* The TSC Board decision was issued on 27 November 2023.
23. A sign dated 27 November 2023 was placed on the TSC office building that it would be *“temporarily closed starting from the 28th November 2023 due to financial restrictions which causes the shortfall in funds that could sustain the TSC operations. The Office will resume its duties once these restrictions are cleared.”*
24. On 30 November 2023, the PSC suspended the Acting Secretary of the TSC on half salary for three months. It alleged that failing to inform the PSC that the TSC office would be closed was insubordination amounting to a potential disciplinary matter under s 36(1)(b), (c) and (d) of the Public Service Act. On the same day, the PSC appointed a new Acting Secretary of the TSC, Samuel Katipa, for a period of three months and instructed him to recall all TSC employees and resume duty by 1 December 2023.

Standing

25. Before proceeding to consider the urgent applications for interim orders and the urgent claim for judicial review, Mr Blake queried whether the claimant has standing to bring these applications and

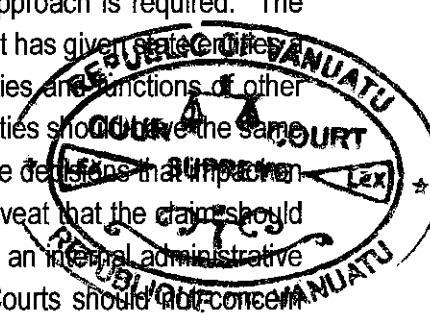


this claim. He submitted the claimant, as a government entity, is claiming against other government entities, and that there is authority for the proposition that one arm of government cannot claim against another arm of government.

26. Mr Blake relied on *Vanuatu Maritime Authority v Athy* [2006] VUSC 110, in which Treston J held that the VMA was “an arm of government” and therefore did not have standing to seek to review an officer (Mr Athy was Director General of Finance and Economic Management) in another area of the same government. He reasoned that even though the VMA was a body corporate and could sue and be sued in its corporate name, it was still an arm of government and as “a matter of common sense” it could not sue any officer of the government. He also held that the defendant was not exercising a public power, but “an internal function of government which should not be subject to judicial review.” Although the VMA filed an appeal against Treston J’s decision (*Vanuatu Maritime Authority v Athy, Director General of Finance* [2006] VUCA 12), the Court of Appeal did not grant the necessary leave to appeal and for that reason disposed of it. The Court of Appeal said nothing about this particular issue.

27. One of the purposes of judicial review is to check the lawfulness of the process by which an official made a decision. Part 17 of the Civil Procedure Rules defines a decision as “a decision, an action or a failure to act in relation to the exercise of a public function or a non-public function,” a “decision-maker” as “a person who made a decision” and “judicial review” as “a review of the lawfulness of an enactment or a decision.” It does not proscribe who can bring an action for judicial review. Further, there are examples where courts have heard claims for judicial review brought by one government entity against another. The House of Lords for example allowed the Equal Opportunities Commission to sue the Secretary of State for Employment for a declaration that certain redundancy legislation within the Minister’s portfolio breached the EU Equal Treatment Directive in *R v Secretary of State for Employment; Ex parte Equal Opportunities Commission* [1995] 1 AC 1. The EOC’s standing derived from its statutory mandate “to work towards the elimination of discrimination” and “to promote equality of opportunity between men and women generally.” The Vanuatu Court of Appeal in *Department of Lands Staff v Transparency Vanuatu Committee and Minister of Lands and Director of Lands* [2017] VUCA 4 ordered the Attorney General to become the claimant instead of Transparency, a non-governmental organisation, which had ceased to prosecute its claim against the Department of Lands Staff. The Court of Appeal said that there was no need to alter the existing defendants, the Minister and Director of Lands with the result that the Attorney General ended up prosecuting a claim against a Minister and a senior public servant. The Attorney General’s standing derived from the need to determine if leases granted by the Minister to staff should be cancelled and the leaseholders entitled to compensation.

28. It is no longer sufficient to say that one arm of the government cannot seek to judicially review another arm of government and leave it at that. A more nuanced approach is required. The executive branch has grown significantly over the years, and Parliament has given state entities a broad range of duties and functions, some of which will affect the duties and functions of other state entities. State entities affected by the decisions of other state entities should have the same standing accorded to private claimants to ask the Courts to review those decisions that impact on the performance of their public functions and duties. I would add a caveat that the claim should be justiciable. It should concern a matter of public interest rather than an internal administrative issue capable of being resolved within the executive branch. The Courts should not concern



themselves with administrative, political or managerial matters more appropriately dealt with internally within the executive branch.

29. For these reasons, I consider the TSC has standing as a claimant to bring a claim for judicial review against the Directors General and the PSC. That does not mean to say its claim is justiciable. Justiciability will be determined by considering whether there is a “*serious question to be tried*” in terms of r.7.5, and whether the claimant has “*an arguable case*” in terms of r. 17.8.
30. I will consider the urgent applications for interim orders first.

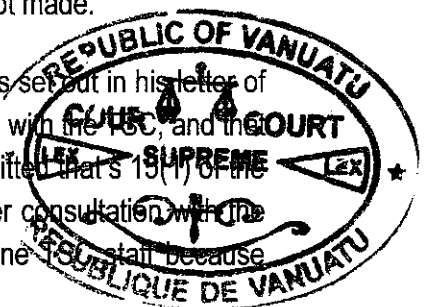
The urgent applications for interim orders

Urgency

31. Whether there is urgency depends on what is sought. The sworn statement of urgency from Ms Lekai pleads urgency because “*there is no legal basis for approval [of LPOs] to be made*” by the DG-MOET. This does not go to urgency because that policy has been in place since before the Acting Chairperson’s letter of 21 April 2023 seeking to change it. She deposes that this matter must be dealt with on an urgent basis because the defendants “*are now having access to TSC funds and there is a fear that if the matter is delayed, they will use up all of the funds and there are still some TSC activities which those funds are appropriated for.*” There is no evidence of this annexed to her sworn statement. Ms Lekai also states that because the operation budget is being restricted, “*the Office of the TSC no longer has funds to function and there are massive works yet to be done before the year is being completed.*” There is no evidence that the TSC office has no funds to continue operating, (and indeed this is contradicted by Mr Tabi), nor is there evidence of what the “*massive works*” are that will be compromised.
32. For these reasons, I do not consider the applicant has demonstrated urgency.

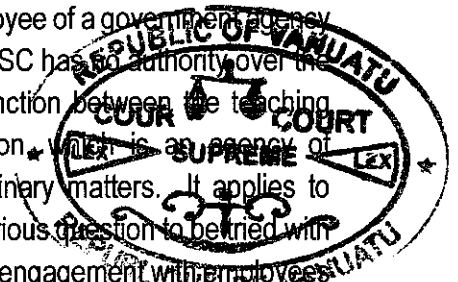
Rule 7.5

33. Although the claim for judicial review and the first application for interim orders were filed at the same time, for the reasons discussed in *Letlet v Prime Minister* (Judicial Review Case No. 23/3203 SC/JUDR, 11 December 2023), I will consider the applications under r.7.5. That rule requires the Court to be satisfied that
- The applicant has a serious question to be tried; and,
 - If the evidence brought by the applicant remains as it is, the applicant is likely to succeed; and
 - The applicant would be seriously disadvantaged if the order is not made.
34. Mr Tabi submitted there are serious questions to be tried. For the reasons set out in his letter of 21 April 2023, he submitted the operating budget of the TSC should remain with the TSC, and that if the evidence remains as it is, the claimant is likely to succeed. He submitted that s 19(1) of the Teaching Service Act states that the Secretary can only be removed after consultation with the TSC, and this was not done. He submitted that the PSC cannot discipline staff because



discipline is a function of employment, not appointment or removal. He submitted the DG-MOET has assumed authority over TSC expenditure without any legal basis.

35. Mr Blake submitted there are no serious questions to be tried. He submitted Article 60(3) of the Constitution refers to the PSC having no authority over the *“teaching services,”* i.e. the teachers themselves, not the TSC, the Secretary of which is appointed by the PSC, the Chair of which is appointed by the President on the recommendation of the Minister. Ms Lekai holds the position on an acting basis and was not appointed in accordance with statute. He submitted that the TSC budget is sent to the Ministry of Finance by the DG-MOET. That budget includes the TSC's budget. He submitted that the DG-MOET has always had oversight of the TSC budget, and there is no evidence that the requirement of the DG-MOET to approve payroll and incidental expenditure has inhibited the TSC's operations. He submitted the claimant has no right to unscrutinised expenditure of public funds, that the claim is not likely to succeed for that reason, and that the only disadvantage the claimant has identified is that there is a requirement for prior approval of expenditure by the DG-MOET. Mr Blake submitted that it was reasonable for the DG-MOET to be concerned about the expenditure of public funds by the Acting Chair and Acting Secretary, both of whom have been acting in their positions for over a year, neither of whom have been appointed in accordance with the Teaching Service Commission Act.
36. To my mind, the application does not involve a serious question to be tried. One of the functions of the Chairperson of the TSC set out in s 13(a) is *“to oversee the effective operation, management and performance of the functions of the Commission.”* Under s 15(2), the Secretary is *“responsible for the efficient and professional administration of the office of the Commission.”* On the evidence before me, the requirement for the DG-MOET to sign off payroll and incidental expenditure existed before the Acting Chair wrote the letter of 21 April 2023 asking that the requirement be changed, and before the Maewo trip in September. The applications do not disclose when the decision was made to locate that requirement with the DG-MOET, but it appears the decision taken with respect to Maewo trip was consistent with that protocol. It could be that the complaint is that the DG-MOET should not have this authority because it infringes the right of the TSC to govern and manage itself, but this ignores the DG-MOET's responsibility to the Minister to ensure that public funds are spent responsibly. I do not see this as infringing the TSC's independence; I see it as merely adding another layer of oversight that does not prevent the Commission from performing *“its functions efficiently, effectively and professionally”* in terms of s 16 of the Teaching Service Act. For these reasons, I do not think the applicant is likely to succeed if the evidence remains as it is.
37. In respect of the second and third applications, s 5 of the Public Service Act defines *“employee”* as *“a person employed in the Public Service on a permanent basis”* and s 2 defines the *“Public Service”* as *“those persons employed in the ministries, departments, State appointed offices, agencies and instruments of the Government of Vanuatu as are designated by the Prime Minister pursuant to an enactment.”* In other words, by virtue of being an employee of a government agency one is also a person employed in the public service. By saying the PSC has no authority over the *“teaching services,”* Article 60(3) of the Constitution makes a distinction between the teaching services, i.e. the teachers, and the Teaching Service Commission, which is an agency of government. Section 36 of the Public Service Act defines disciplinary matters. It applies to employees as defined in s 5. I do not therefore consider there is a serious question to be tried with respect to the second and third applications which concern the PSC's engagement with employees as defined in the Public Service Act.



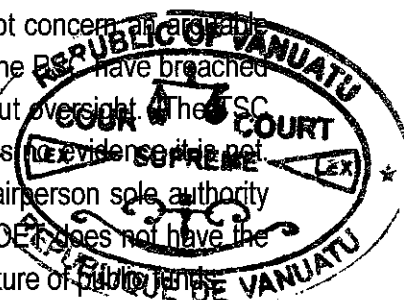
38. Further, Mr Tabi conceded there are sufficient funds for the office to open. In terms of r.7.5, the applicant would not be seriously disadvantaged if the orders are not made. It was the TSC's decision to close the office when it had funds to keep it open, because it objected to the DG-MOET's policy. By closing the office when funds were available for it to operate, and by stating earlier that the office would be closed unless the DG-MOET's oversight was removed, the applicant does not come to Court with clean hands. This is not a case of the PSC exercising authority over a member of the teaching service contrary to the Constitution; it is a case of the PSC exercising authority over a TSC office-holder under provisions of the Public Service Act. In those circumstances, it would not be inappropriate to step into the PSC's disciplinary process in these proceedings.
39. I am not satisfied the applicant has a serious question to be tried, I am not satisfied that if the evidence remains as it is the applicant is likely to succeed, and I am not satisfied that that applicant would be seriously disadvantaged if the orders were not made. Taking these matters into account, the balance of convenience lies with the defendants. I therefore decline to grant the interim orders requested.
40. I turn now to the r.17.8 matters.

Rule 17.8

41. Rule 17.8(3) prohibits the judge from hearing the claim unless the judge is satisfied that:

- (a) The claimant has an arguable case; and
- (b) The claimant is directly affected by the enactment or decision; and
- (c) There has been no undue delay in making the claim; and
- (d) There is no other remedy that resolves the matter fully and directly.

42. As has become apparent in the discussion of whether there is a serious question to be tried, I do not consider the claimant has an arguable case. The policy sought to be reviewed existed before the claimant wrote the letter of 21 April 2023 – the purpose of the letter was to change it. The claim does not say when this policy decision was made. The DG-MOET's decision to decline expenditure for the Maewo trip in September was done pursuant to that policy. The subsequent emails between the Acting Chairperson and the Minister attempting to resolve the impasse by threatening to close the TSC office unless the policy was changed reveal little more than an ongoing intra-governmental dispute between the Acting Chairperson and the DG-MOET which concerns the responsible expenditure of public funds, and which does not concern an arguable case that the Constitution has been breached or that the DG-MOET and the PSC have breached any right of the TSC to administer its payroll and incidental budget without oversight. The TSC budget is sufficient in terms of s 16 of the Teaching Service Act. There is no evidence that the Chairperson must approve a budget, but that does not give the Chairperson sole authority over expenditure. There is nothing in the legislation that says the DG-MOET does not have the authority to add a layer of authorisation to ensure the responsible expenditure of public funds.



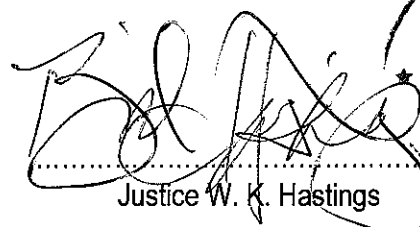
43. Turning to r.17.8(3)(b), I accept the claimant is directly affected by one or more decisions of the DG-MOET. It was affected by the decision taken before April 2023 to require the DG-MOET to authorise expenditure from the payroll and incidental budget. It was affected by the decision in September 2023 not to authorise expenditure for the Maewo trip.
44. The claim seeks an order that the decision not to authorise expenditure on the Maewo trip in September was unlawful, but that decision was taken pursuant to a much earlier decision to locate that authorisation within the DG-MOET. The claim also seeks orders that the earlier decision to locate authorisation of expenditure from the TSC payroll and incidental budget in the DG-MOET was unlawful, but the only evidence of when that decision was made is that it was made before Mr Tabi wrote the 21 April 2023 letter seeking its reversal.
45. The next criterion to consider is whether there has been undue delay by the claimant in bringing the claim. Mr Tabi submitted there was no undue delay because the claim was filed within six months of the decision. The six month time limit in r.17.5 does not define what is undue delay in r.17.8(3)(c). The latter depends on the nature of the claim and the remedy sought. The six month time limit in r.17.5 is very much a procedural outer limit within which any “undue delay” in r.17.8(3)(c) must be found. As the heart of the matter seems to be the decision to locate authorisation of expenditure of the TSC payroll and incidental budget in the DG-MOET, I consider there has been undue delay in making the claim.
46. Finally, there is another remedy that resolves this matter fully and directly. It is one that Mr Tabi had been pursuing. The remedy is a constructive dialogue, which may take some time, between the TSC and the DG-MOET to agree to a policy that both ensures the TSC’s independence in performing its functions as set out in s 9 of the Teaching Service Act and that acknowledges the DG-MOET’s obligation to ensure the responsible expenditure of public funds. As earlier mentioned, the Courts should not concern themselves with administrative, political or managerial matters more appropriately dealt with internally within the executive branch.
47. Having not been satisfied of the matters in r.17.8(3), I decline to hear the claim and strike it out under r.17.8(5).

Result

48. The applications for urgent interim orders are declined.
49. The claim for judicial review is struck out.
50. Costs are awarded to the defendants, to be taxed if they are not agreed.

DATED at Port Vila this 11th day of December 2023

BY THE COURT


Justice W. K. Hastings

