

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

**Constitutional
Case No. 19/1046 SC/CNST**

BETWEEN: Tekon Timothy Tumukon
Joseph Niel
Benjamin Malas
Shedrack Welegtabit
Kalo Pakoa
Edward Kaltamat
David Gibson
Sam Namuri
Applicants

AND: The Public Service Commission
First Respondent

AND: The Republic of Vanuatu
Second Respondent

Date of First Conference Hearing: 29 April 2020 @ 2pm
Before: Chief Justice Lunabek
In Attendance: Ms Jennifer La'au for the Applicants
Mr. Tom Loughman for the Respondents

**REASONS FOR ORAL DECISION STRIKING OUT
CONSTITUTIONAL APPLICATION ON 29 APRIL 2020 AT FIRST
CONFERENCE HEARING**

Introduction

1. This is a Constitutional Application filed on 7 May 2019 – as an Urgent Constitutional Application.
2. The Applicants are eight (8) Directors of different government departments of Public Service of Vanuatu.
3. They were appointed at different times to the posts of Directors of these Public Service Departments by the Public Service Commission as Directors or Acting Director (for Shedrack Welegtabit).
4. Their employment as Directors was terminated under the application of the Public Service (Amendment) Act No. 7 of 2018 on 27 January 2019.
5. The Public Service (Amendment) Act No. 7 of 2018 amended Section 18(1) in relation to the appointment of Directors by repealing it and substitute it with the following subsection 18(1):-



"(1) The Commission may appoint a person to be a director under a contract of employment for a period of 3 years and the person may be re-appointed twice;

(1A) The Commission is to conduct performance appraisals annually for each director;

(1B) The Commission is to re-appoint a person as director only when it is satisfied with the performance of that person."

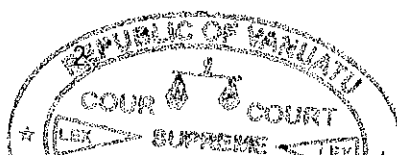
6. The Public Service (Amendment) Act No. 7 of 2018 came into force on 27 July 2018.
7. The current constitutional application was filed on 7 May 2019 as an Urgent Constitutional Application.

Declarations and Orders sought

8. The applicants apply for:
 1. A declaration that the Public Service (Amendment) Act NO. 7 of 2018 (the Public Service (Amendment) Act) is unconstitutional, as it infringes upon the rights guaranteed to the Applicants under Article 57(5) of the Constitution;
 2. A declaration that, as a further consequence, all the recruitment, by the First Respondent of directors to the Public Service, reliant on the said Public Service (Amendment) Act, made in February 2019, are null and void and of no legal effect;
 3. A declaration that, as a further consequence, all the recruitment, by the First Respondent of directors to the Public Service, reliant on the said Public Service (Amendment) Act, made in February 2019, are null and void and of no legal effect;
 4. An order, pursuant to Article 6(2) of the Constitution that the First and Second Respondents pay compensation to the Applicants, as assessed by them, or to be assessed by this Honourable Court;
 5. An order that the First and Second Respondents pay interest on the said compensation at the rate 10% per annum, from 27 January 2019, until the date the compensation is fully paid to the Applicants;
 6. An order that the First and Second Respondents pay the Applicants' costs in this proceeding on indemnity basis, or as determined by this Honourable Court;
 7. Any other orders this Honourable Court deems just.

The Application was made upon the following grounds:

9. At all material times the Applicants were employed in the Public Service of the Republic of Vanuatu, as follows:



- (a) Mr. Tekon Timothy Tumukon, as director of the Department of Biosecurity Vanuatu (DBV);
 - (b) Mr. Joseph Niel, as the director of the Civil Aviation Authority of Vanuatu (CAAV);
 - (c) Mr. Benjamin Malas, as the director of the Department of Customs and Inland Revenue (DCIR) of Vanuatu;
 - (d) Mr. Shedrack Welegtabit, as the director of the National Disaster Management Office (NDMO);
 - (e) Mr. Kalo Pakoa, as the director of the Fisheries Department (FD);
 - (f) Mr. Edward Kaltamat, as director of the Department of Local Authorities of Vanuatu (DLA);
 - (g) Mr. David Gibson, as the director of the Vanuatu Meteorology and Geohazards Department of Vanuatu (VMGD); and
 - (h) Mr. Sam Namuri, as director of the Department of Public Works of Vanuatu (PWD).
10. At all material times also, the director posts of the Applicants existed on the day of their removal, being 27 January 2019, and those posts continue to exist to this day.
11. Further, at all material times not one of the Applicants had:
- (a) reached retirement age, being 55 years old, on the day of their removal;
 - (b) requested early retirement form the First Respondent; nor
 - (c) been dismissed by the PSC.
12. In December 2017, the Applicants attended a meeting at the Prime Minister's Office organized by the PSC, and were verbally advised all Public Servant, Directors and CEO's of government entitles, tenure as Public Servants would be terminated once the said Public Service (Amendment) Act was passed by Parliament and came into force. The Applicants were further advised all Public Servant Directors, including themselves, would then be recruited under contracts of employments.
13. The Public Service (Amendment) Act was enacted by Parliament and it commenced on 27 July 2018, the day it was published in the gazette.
14. By letter dated 29 September 2018 to the PSC, the Applicants along with other directors, raised their concerns about the impending recruitment of Public Service directors and CEOs, in particular, that such recruitment, if it resulted in their removal as Public Servants, would be in breach of the provision of Article 57(5) of the Constitution.

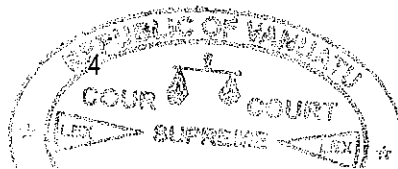


15. In early October 2018, the PSC proceeded to advertise the Applicants' positions. Some of those positions were advertised twice, with no reasons given as to why a second advertisement.
16. In about mid October 2019, the Applicants, except Mr. Welegtabit, applied for their positions as advertised.
17. By letter dated 26 October 2018, the PSC gave to each of the Applicants, 3 months notice of termination of their employment in the Public Service which would be effective on 27 January 2019.
18. By letter dated 12 November 2018, the PSC responded to the Applicants' letter dated 29 September 2018 stating, inter alia, that the PSC was disappointed that the Applicants were questioning the PSC's implementation of the Public Service Amendment Act, and government policy directions, and that the Applicants cannot invoke Article 57(5) of the Constitution to argue their case.
19. In early January 2019, each of the Applicants were interviewed, by panels set up by the PSC.
20. To date, the PSC has never advised, in writing or otherwise, each of the Applicants about the outcome of their interviews.
21. On 27 January 2019, the Applicants were removed from their director posts in the Public Service.
22. On 1 February 2019, the Applicants attended a ceremony at the PM's Office, where the Prime Minister, Minister of Finance and the PSC handed over to the Applicants' their severance pay packages.
23. Also in early February 2019, some of the Applicants saw on social media the names of the persons who the PSC had recruited as directors to replace them – this was before the PSC officially announced the recruitments.
24. The removal of the Applicants as Public Servants from the Public Service is in breach of Article 57(5) of the Constitution.
25. Article 57(5) states:

"(5) For as long as their posts exist, public servants shall not be removed from their posts except in accordance with the Constitution".
26. The removal of the Applicants from their director posts, was in breach of Article 57(7) of the Constitution. Article 57(7) states:

"57. Public servants

(7) Public servants shall leave the public service upon reaching retirement age or upon being dismissed by the Public Service Commission. They shall not be demoted without consultation with the Public Service Commission".



27. The Applicants said removal was not for early retirement, as contemplated by Article 57(8) of the Constitution.
28. Article 57(8) states:
- "(8) The security of tenure of public servants provided for in sub-article (5) shall not prevent such compulsory early retirement as may be decided by law in order to ensure the renewal of holders of public offices"*.
29. The Public Service (Amendment) Act was and continues to be subject to the Constitution, as the Constitution is the Supreme law of the Republic of Vanuatu by virtue of Article 2 of the Constitution.
30. The Public Service (Amendment) Act did not remove the security of tenure provided to public servants, including the Applicants, under the Article 57(5) of the Constitution.
31. The process of recruitment by the PSC was biased, unfair, and tainted by discrimination, conflict of interest, and political motivation. The applicants provided the particulars in the application.
32. For the reasons set out in paragraph 23 above, the Applicants' fundamental rights to equal treatment under the law or administrative action under Article 5(1)(k) of the Constitution, have been infringed.
33. Article 5(1) states:

5. Fundamental rights and freedoms of the individual

- (1) *The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health –*
- (a) *life;*
 - (b) *liberty;*
 - (c) *security of the person;*
 - (d) *protection of the law;*
 - (e) *freedom from inhuman treatment and forced labour;*
 - (f) *freedom of conscience and worship;*
 - (g) *freedom of expression;*
 - (h) *freedom of assembly and association;*
 - (i) *freedom of movement;*
 - (j) *protection for the privacy of the home and other property and from unjust deprivation of property;*
 - (k) *equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.*



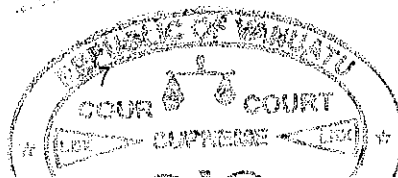
34. By letter dated 6 March 2019, the Applicants' lawyers wrote to the PSC and the Attorney General raising, inter alia, that the Applicants' removal from the Public Service is unconstitutional, and requested a meeting with the PSC to resolve the issue, however, the PSC and the Attorney General have not responded.
35. In addition, the Applicants were terminated unlawfully because they were not paid their employment entitlements, in particular, the PSC's unilateral reduction of their severance pay rate from 2 months per year of services, to 1 month and paying, as severance pay, the Applicants only 1 month's salary per year of service.
36. This Constitutional Application is supported by the sworn statement of following deponents:
- (i) Tekon Timothy Tumukon filed 7th May 2019;
 - (ii) Joseph Niel filed 7th May 2019;
 - (iii) Kalo Pakoa filed 14th May 2019;
 - (iv) David Gibson filed 14th May 2019;
 - (v) John Tasso filed 15th May 2019;
 - (vi) Shedrack Welegtabit filed 3rd October 2019; and
 - (vii) Edward Kaltamat filed 23rd October 2019.
37. The application is listed for first conference hearing on 29 April 2020 at 2pm in the afternoon.

First Conference Hearing on 29 April 2020 at 2pm

38. I have read the Constitutional Application filed 7 May 2019 and the sworn statements filed in support. I heard Mr. Edward Nalyal on behalf of the Applicants at the first conference hearing on 29 April 2020 pursuant to Rule 2.8 of the Constitutional Rules of 2003.
39. The purpose of the first conference hearing is for the Applicants by their Counsel to satisfy me as the judge that this case has a good foundation that is based in the Constitution so that I can direct or order the Constitutional Application and the sworn statements filed in support to be served on the Respondent(s) and order the Respondents to file responses with supporting sworn statements and set a date and time to hear this application.
40. I did a preliminary enquiry into this Constitutional Application. I proceed on the assumption that the Public Service (Amendment) Act No. 7 of 2018 was asserted to by the President on 6 July 2018 and it was enforced on 27 July 2018. It is, thus, constitutional unless the Applicants would prove otherwise.
41. I have asked Mr. Nalyal to confirm to me that on the face of the Application, the challenge to the constitutionality of the Public Service (Amendment) Act No. 7 of 2018 was the principal declaratory relief sought in this application. Mr. Nalyal confirmed it was. This simply means that if the applicants were to be successful with this first declaration, the other declaratory relief and orders sought in the application will also be granted as a consequence of the first declaratory relief made as drafted and intended in the application itself. Mr. Nalyal also confirmed that.



42. I then asked and expect that Mr. Nalyal showed me what provisions or sections of the Public Service (Amendment) Act No. 7 of 2018 is or are in contravention of the fundamental rights and freedoms of the Applicants which is or are spelt out in the application with some evidence in support.
43. I have also asked and expected Mr. Nalyal to indicate the basis and how the Public Service (Amendment) Act No. 7 of 2018 was in contravention of the fundamental rights and freedoms of the Applicants. Mr. Nalyal failed to show me this.
44. My reading of the applications and the principal relief sought in the First declaration was that: "... *the Public Service (Amendment) Act is unconstitutional as it infringes upon the rights guaranteed to the Applicants under Article 57(5) of the Constitution*". If my reading of the application is right, then, the Applicants do not have any claim or allegations to seek the assistance of the Supreme Court in its constitutional jurisdiction pursuant to Article 6 of the Constitution.
45. The only recourse for the Appellants is Article 53 of the Constitution, although no relief was specifically sought on this basis in the relief sought in the application. I assume this for this preliminary enquiry in this case as shown in the application itself. However, how the Public Service (Amendment) Act No. 7 of 2018 was infringing the rights of the Applicants as Directors is to be shown with some evidence to satisfy me as the Judge at this stage. I enquire further.
46. The application and the material statements filed show that in December 2017, the Public Service Commission organized a meeting at the Prime Minister's Office. The meeting was attended by all public servants including the Applicants as Directors. The Applicants and other public servants were informed of the legislative policy that all public service Directors, including the Applicants would then be recruited under contracts of employment once the Public Service (Amendment) Act will be enacted and come into force.
47. The Public Service (Amendment) Act No. 7 of 2018 was enacted by Parliament and it commenced on 27 July 2018, the day it was published in the gazette.
48. In early October 2018, the Public Service Commission proceeded to advertise the Applicants' positions on the basis of the Public Service (Amendment) Act. In about mid October 2019, the Applicants (except Mr. Welegtabit) applied for their positions as advertised.
49. By letter dated 26 October 2018, the PSC gave to each of the Applicants, 3 months' notice of termination of their employment in the Public Service which would be effective on 27 January 2019.
50. In early January 2019, each of the Applicants were interviewed by Panel set up by the Public Service Commission.
51. On 27 January 2019, the Applicants were terminated from their posts in the Public Service (ie. Under the old regime so that the new regime under the Public Service (Amendment) Act No. 7 of 2018 be implemented.



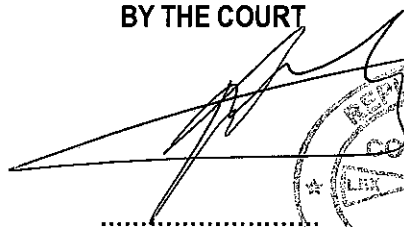
52. On 1 February 2019, the Applicants attended a ceremony at the PM's Office the Republic Service Commission (in the presence of the Prime Minister and Minister of Finance) handed over to the Applicants their severance pay packages.
53. I note Section 11 of the Public Service (Amendment) Act No. 7 of 2018 repealed subsection (1) of Section 18 as follows:
11. **Subsection 18(1)**
Repeal the subsection, substitute:
- "(1) The Commission may appoint a person to be a director under a contract of employment for a period of 3 years and the person may be reappointed twice.
- (1A) The Commission is to conduct performance appraisals annually for each director.
- (1B) The Commission is to re-appoint a person as director only when it is satisfied with the performance of that person."
54. I note also Section 18 of the Amended Act which deals with the Transitional provisions for directors as follows:
1. **Transitional provision for directors**
- (1) A person who occupied the position of director immediately before the commencement of this Act is to continue to be employed as a director for a period of 6 months commencing from the date on which this Act comes into force.
- (2) A director's employment is deemed to be terminated by the Public Service Commission on the expiry of the period provided under subsection (1).
- (3) A director on the expiry of the period provided under subsection (1), is to be paid by the Commission any severance, redundancy or other entitlements under this Act or any other Act.
55. On perusal of the provisions of Sections 11 and 18 of the Amended Act, I understand that the series of events described in the Constitutional Application and the sworn statements in support after the enactment and coming into force of the said Amended Act were in compliance with Section 18 of the Public Service (Amendment) Act No. 7 of 2018.
56. Mr. Nalyal failed to show how the Public Service (Amendment) Act No. 7 of 2018 violates Article 57(5) of the Constitution in relation to the Applicants. It is known that Parliament has the power subject to the Constitution to take away or modify rights but while a right exists the citizen may apply to the Courts to protect it.
57. Mr. Nalyal failed to show and demonstrate whether Parliament does or does not have the power to provide by law what it did in Sections 11 and 18 of the Public Service (Amendment) Act No. 7 of 2018 in the Constitutional Application.
58. It is noted that the complaint that the process of recruitment by the Public Service Commission was biased, unfair, and tainted by discrimination, conflict of interest, and political motivation do

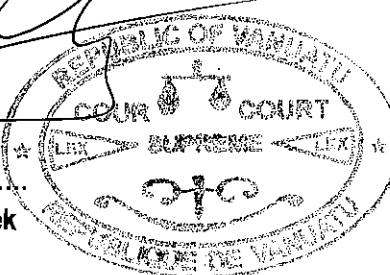
not constitute good grounds of a challenge of the constitutional validity of an Act of Parliament such as in this case. This may be achieved by the Applicants under Judicial Review process but 6 months has passed since.

59. Further the complaint that the Applicants were terminated unlawfully because they were not paid their employment entitlements, in particular, the Public Service Commission's unilateral reduction of their severance pay rate from 2 months per year of service, to 1 month and paying as severance pay, the Applicants only 1 month salary per year of service, cannot be raised or do not constitute a ground of a challenge of the constitutionality of an Act of Parliament such as in this case. The Applicants could achieve this through a normal employment claim.
60. There is therefore no reasonable cause of action which is founded in the Constitution resulting in a breach of a provision of the Constitution in relation to the Applicants in the circumstances of this case. I informed Mr. Nalyal of the decision of the Supreme Court in the case of the **President of the Republic of Vanuatu v Speaker of Parliament** Constitutional Case 11- 11 [2012] VUSC 183 (10 August 2012) dealing with the same issue involving the Director – Generals.
61. These are the reasons for the oral decision of the Court on 29 April 2020 striking out this Constitutional Application.
62. There was no orders as to costs.

DATED at Port Vila this 5th day of May, 2020.

BY THE COURT


.....
Vincent Lunabek
Chief Justice.



The seal of the Supreme Court of Vanuatu is circular. It features a central emblem with a scale of justice and a book. The text 'REPUBLIC OF VANUATU' is written along the top inner edge, and 'REPUBLIQUE DE VANUATU' along the bottom inner edge. In the center, 'COURT SUPREME' is written, with 'COURT' on either side of the emblem. The words 'LEI' and 'LEI' are written on the left and right sides of the emblem respectively.