

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

Judicial Review
Case No. 23/140 SC/JUDR

BETWEEN: Hardison Tabi, David Narai and Alice Kalo

Claimants

AND: President of the Republic of Vanuatu

First Defendant

AND: Minister of Education and Training

Second Defendant

Date of Trial: 6 February 2023
Before: Justice V.M. Trief
In Attendance: Claimants – Mr H. Tabi
First Defendant – Mr J. Wells
Second Defendant – Mr C. Leo
Date of Decision: 17 March 2023

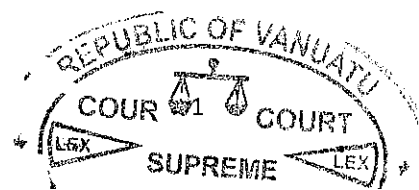
JUDGMENT

A. Introduction

1. This was a claim for judicial review of the decisions by the First Defendant H.E. the President of the Republic of Vanuatu (the 'President') to remove the Claimants Hardison Tabi, David Narai and Alice Kalo as members of the Teaching Service Commission ('TSC') and to appoint new members.

B. Facts

2. On 6 August 2020, Mr Narai and Ms Kalo were appointed as members of the TSC.
3. On 13 April 2021, Mr Tabi was appointed as a member of the TSC.



4. Mr Tabi is both a member and the Acting Chairman of the TSC.
5. There are two other positions by appointment as members of the TSC. They remained vacant.
6. By letter dated 17 January 2023, the Second Defendant the Minister of Education and Training (the 'Minister') requested the President to remove the Claimants as members of the TSC due to their being unfit to discharge the duties of the Commission (section 6(2)(d) of the *Teaching Service Act* No. 38 of 2013 (the 'Act')) and as they were not responsive to the Government (section 3(f) of the Act).
7. Also on 17 January 2023, the Minister wrote another letter to the President requesting that he appoint the following as the new members of the TSC:
 - i) Mr Reginald Garoleo as member and Chairman;
 - ii) Mrs Nanise Lapi as member;
 - iii) Mr Gideon John as member; and
 - iv) Mr Serge Lewawa as member.
8. By Order No. 6 of 2023 dated 25 January 2023, the President removed the Claimants as members of the TSC pursuant to para. 5(2)(a) of the Act and s. 21 of the *Interpretation Act* [CAP. 132].
9. By Order No. 7 of 2023 also dated 25 January 2023, the President appointed Nanise Lapi, Gedeon John and Serge Leiwawa as new members of the TSC pursuant to para. 5(2)(a) of the Act.
10. The Claimants urgently applied to the Court for restraining orders. Their application was granted. Restraining orders dated 2 February 2023 were issued.
11. The President will abide the Order of the Court as he was expected to act on the advice of the Minister. Accordingly, this matter was contested between the Claimants and the Minister.

C. The Law

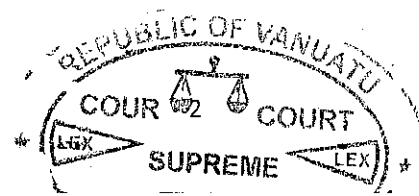
12. The long title of the Act is:

An Act to provide for the Teaching Service and Teaching Service Commission and for related matters.

13. Section 2 of the Act provides the objectives of the Act as follows:

2. *The principal objectives of this Act are:*

- (a) *to establish a Teaching Service and to provide for its effective management and leadership; and*



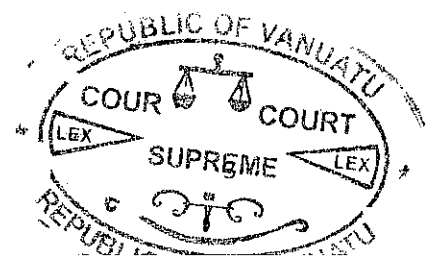
- (b) *to establish an independent Teaching Service Commission that is efficient and effective; and*
- (c) *to provide a legal framework for the employment of teachers in schools to the benefit of children, their families and the nation; and*
- (d) *to establish the rights and obligations of members of the Teaching Service so that teachers understand their prime duty is to their students; and*
- (e) *to establish a system requiring teachers in all schools to meet standards and to be licensed.*

14. Section 3 of the Act provides as follows:

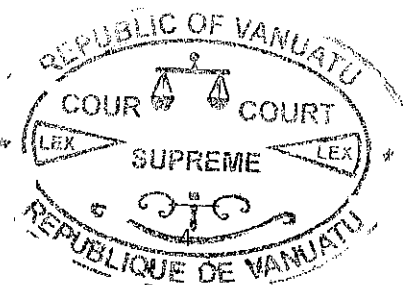
- 3. *The guiding principles of the Teaching Service and the Teaching Service Commission are:*
 - (a) *to be independent and perform their functions in a fair, impartial and professional manner without undue influence; and*
 - (b) *to make employment decisions based only on merit determined in accordance with section 19; and*
 - (c) *to provide a workplace that is free from discrimination and recognises the diverse background of employees and students; and*
 - (d) *to have the highest ethical standards; and*
 - (e) *to be accountable for their actions; and*
 - (f) *to be responsive to the Government in providing timely advice and implementing the Government's policies and programs; and*
 - (g) *to provide leadership of the highest quality; and*
 - (h) *to establish and maintain cooperative workplace relations based on consultation and communication; and*
 - (i) *to focus on achieving results and improving performance; and*
 - (j) *to observe the law; and*
 - (k) *to ensure the interests of children, both individually and collectively is the paramount consideration in all decision making. In section 4 of the Act, "Commission" is defined as "the Teaching Service Commission appointed under section 5" and "Minister" is defined as "the Minister for the time being responsible for education".*

15. Sections 5 and 6 of the Act (the latter section amended by the Statute Law (Miscellaneous Provisions) Act No. 5 of 2019) provide as follows:

- 5. (1) *The Teaching Service Commission is established.*



- (2) *The Teaching Service Commission consists of:*
- (a) *a Chairperson and subject to subsections (3) and (4), four other members appointed by the President on the recommendation of the Minister; and*
 - (b) *the Executive Officer of the Vanuatu National Training Council.*
- (3) *At least two members of the Commission must be women.*
- (4) *The Vanuatu Teachers Union is to nominate a member to the Minister for recommendation to the President.*
- (5) *A person is eligible for appointment as a member of the Commission if the person:*
- (a) *has a wide and detailed knowledge or experience in education issues, education management or education policy; and*
 - (b) *is of good standing in the community and has a good character.*
- (6) *One of the members appointed under subsection (2) must have legal or industrial training or experience.*
- (7) *The position of Chairperson must be publicly advertised and the appointment must be based on merit determined in accordance with section 19.*
- (8) *A person is not qualified to be appointed as Chairperson or a member of the Commission if he or she is:*
- (a) *a member of Parliament; or*
 - (b) *a member of an Education Authority or Provincial Education Board; or*
 - (c) *a person who exercises any position of responsibility in a political party; or*
 - (d) *a member of a Local Government Council or Municipal Council; or*
 - (e) *has been convicted of a criminal offence which has a penalty of 12 months or more imprisonment.*
6. (1) *Subject to subsection (2) the Chairperson and members of the Commission are to be appointed for a period of 4 years and may be reappointed for another term only.*
- (2) *The Chairperson or a member is no longer qualified to be the Chairperson or a member of the Commission as the case may be if he or she:*
- (a) *has been convicted of a criminal offence which has a penalty of 12 months or more imprisonment; or*
 - (b) *has become bankrupt; or*
 - (c) *is unable or unfit to discharge his or her functions; or*



- (d) *has been absent from two consecutive meetings of the Commission:*
 - (i) *in case of the Chairperson – without the consent of the majority of members; and*
 - (ii) *in case of a member – without the consent of the Chairperson.*
- (3) *The Chairperson or a member may resign by notice in writing to the Minister.*
- (4) *This section does not apply to the Executive Officer of the Vanuatu National Training Council.*
- (5) *To avoid doubt in relation to the term of office of the Chairperson and a member of the Commission who was appointed before the commencement of this Act, the Chairperson and the members are to continue to serve in office for the remaining term of their appointment.*

16. Paragraphs 9(a), (d) and (i) of the Act provide as follows:

- 9. *The functions of the Commission are:*
 - (a) *to recruit and employ teachers, principals and associated staff in all government and assisted non-government schools; and*
 -
 - (d) *to monitor the attendance, efficiency and conduct of all employees in the Teaching Service and to take fair and firm action to maintain high standards in these areas;*
 - ...
 - (i) *to manage the teacher's discipline; ...*

17. Section 10 of the Act provides as follows:

- 10. *Subject to this Act, the Commission has power to do all things that are necessary or convenient to be done for or in connection with the performance of its functions.*

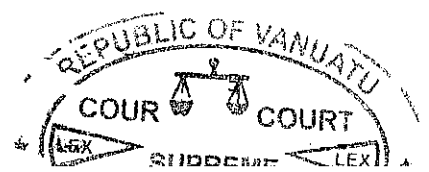
18. Section 21 of the *Interpretation Act* provides as follows:

- 21. *Where an Act of Parliament confers power on any authority to make any appointment that authority shall also have power (subject to any limitations or qualifications which affect the power of appointment) to remove, suspend, reappoint or reinstate any person appointed in the exercise of the power.*

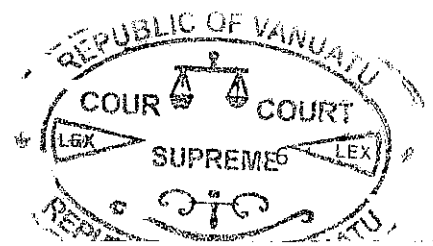
D. Pleadings

19. By Amended Urgent Judicial Review Claim, the Claimants seek the following orders:

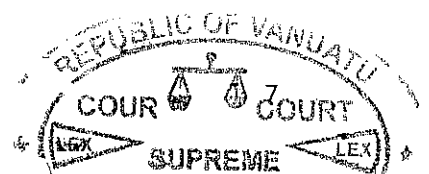
- 1. *The Decision of the President to remove the Claimants as members of the TSC dated 25 January 2023 is unlawful, without basis, null and void or void ab initio;*
- 2. *The appointments of the new members of the TSC namely Nanise Lapi, Gedeon John and Serge Leiwawa are unlawful, null and void or void ab initio;*



3. *The Claimants be re-instated as members of the TSC;*
 4. *Costs; and*
 5. *Any other orders this Court deems fit.*
20. The Claimants allege in the Amended Claim and in the Reply to Second Defendant's Defence that their removal pursuant to para. 5(2)(a) of the Act and s. 21 of the *Interpretation Act* was unlawful as the Chairperson or a member of the TSC can only be removed in the circumstances set out in paras 6(2)(a)-(d) of the Act. The instrument of removal does not specify the basis on which they were removed but even if it did, the Claimants were never given an opportunity to be heard prior to their removal therefore were denied natural justice.
21. The Claimants also allege that the new members of the TSC were appointed in breach of subss 5(3), (4) and (6) of the Act as there are not two women members of the TSC, the Vanuatu Teachers Union (the 'VTU') has not nominated a member and one of the members must have legal or industrial training or experience therefore their appointments too are unlawful. It is alleged that the appointment of the new members is without legal basis and breaches the independence of the TSC under para. 3(a) and subs. 34(2) of the Act.
22. The Minister's case is that the President's power to remove members of the TSC is not limited to the circumstances set out in subs. 6(2) of the Act. It was submitted that subs. 6(2) of the Act sets out the circumstances where a member of the TSC is no longer qualified to be a member and is related to their appointment but not removal. It is alleged that the Minister did offer the Claimants an opportunity to be heard (by letter dated 11 January 2023) but that they did not avail themselves of the opportunity. Further, that the new members of the TSC were lawfully appointed.
- E. Discussion
23. The President has the power to appoint the Chairperson and 4 other members of the TSC pursuant to subs. 5(2)(a) of the Act.
24. The President does not have an express power to remove a sitting member or Chairperson of the TSC however he has the power to do under s. 21 of the *Interpretation Act* which provides that where an Act of Parliament confers power on any authority to make any appointment, that authority shall also have power "(subject to any limitations or qualifications which affect the power of appointment)" to remove any person appointed in the exercise of the power.
25. The terms of s. 21 of the *Interpretation Act* mean that the President's power to remove a TSC Chairperson or member is subject to the limitations or qualifications which affect the power of appointment. Accordingly, it is not an unfettered power as submitted for the Minister. It is a qualified power.
26. The following are limitations or qualifications which affect the President's power of appointment:

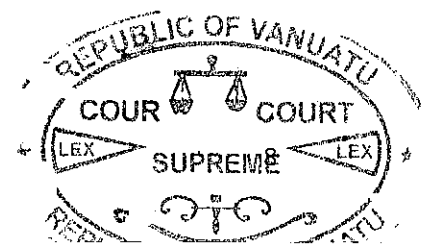


- By the terms of subs. 5(2)(a) of the Act, the President's power to appoint 4 other members of the TSC (besides the Chairperson) is "subject to subsections (3) and (4)" of the Act. These require that at least 2 of the TSC members appointed by the President TSC must be women and that the VTU is to nominate a member to the Minister for recommendation to the President.
 - Subsection 5(5) of the Act provides criteria for the eligibility of a person to be appointed as a member of the TSC. These are qualifications affecting the President's power of appointment.
 - Subsection 5(6) provides that one of the members appointed under subs. (2) must have legal or industrial training or experience. This is another qualification which affects the President's power of appointment.
 - Subsection 5(8) of the Act sets out the circumstances in which a person is not qualified to be appointed as Chairperson or member of the TSC including, amongst other things, that they are a member of Parliament, a person who exercises a position of responsibility in a political party, or is a member of a Local Government or Municipal Council. These too are limitations or qualifications which affect the President's power of appointment.
 - Finally, subs. 6(2) of the Act sets out the circumstances in which a sitting TSC Chairperson or member is no longer qualified to be the Chairperson or a member as the case may be. The circumstances include that he or she has been convicted of a criminal offence which has a penalty of 12 months or more imprisonment (para. 6(2)(a)); has become bankrupt (para. 6(2)(b)); is unable or unfit to discharge his or her functions (para. 6(2)(c)); or has been absent from two consecutive meetings of the TSC without the requisite consent (para. 6(2)(d)). The circumstances provided in subs. 6(2) of the Act are also limitations or qualifications which affect the President's power of appointment.
27. Mr Leo submitted that subs. 6(2) of the Act did not constitute a limitation or qualification on the President's power of appointment. However, that subsection by its terms states that the Chairperson or a member "is no longer qualified to be the Chairperson or a member of the Commission as the case may be" in the circumstances prescribed therefore these squarely constitute qualifications which affect the President's power of appointment. Accordingly, I reject Mr Leo's submission.
28. The instrument of removal of the Claimants as members of the TSC (published as Order No. 6 of 2023) did not refer to any of the limitations or qualifications which affect the President's power of appointment. However, as set out above, the President's power to remove a sitting Chairperson or member may only be exercised where one or more of those limitations or qualifications existed. As none were referred to in the instrument of removal, it must be assumed that no such circumstances existed and therefore the President's removal of the Claimants as TSC members was unlawful.
29. By letter dated 17 January 2023 to the President, the Minister requested the removal of the Claimants as TSC members [annexure "CM1" to the Sworn statement of Clarence Marae, Principal Private Secretary to the President]. The two reasons given in the letter for the Claimants' removal were that they were unfit to discharge the duties of the TSC



(incorrectly citing section 6(2)(d) of the Act) and that they were not responsive to the Government (para. 3(f) of the Act).

30. Section 6 of the Act was amended by way of the *Statute Law (Miscellaneous Provisions) Act* No. 5 of 2019. Paragraph 6(2)(c) of the Act (as amended) relates to a member being unable or unfit to discharge his or her functions. Paragraph 6(2)(d) of the Act (as amended) relates to absence from two consecutive TSC meetings.
31. There is no evidence that the Claimants were absent from two consecutive TSC meetings. There is also no evidence that one or other of the Claimants were unfit to discharge his or her functions. The Claimants' evidence [**4 sworn statements of David Narai**] and the Minister's evidence [**Sworn statement of Hon. Bruno Leingkone Tau, MP**] referred to the circumstances of the suspension and termination of some 20 teachers who are members of the VTU which has resulted in Civil Case No. 751 of 2022 which is currently on foot in the Supreme Court. Those circumstances are *sub judice* therefore I cannot comment further but will say only that the circumstances referred to do not constitute any evidence that the Claimants were unfit to discharge their functions.
32. As to second reason set out in the Minister's letter dated 17 January 2023, para. 3(f) of the Act provides that a guiding principle of the TSC is to be responsive to the Government in providing timely advice and implementing the Government's policies and programs. The Minister's letters to Mr Tabi, the Acting Chairperson of the TSC in relation to the disciplinary matter of some 20 teachers' suspension does not relate to the implementation of any Government policy or program, nor does it constitute a request for advice. Accordingly, there is also no evidence that the Claimants were not responsive to the Government in providing timely advice implementing the Government's policies and programs.
33. For the reasons given, the President's decision to remove the Claimants as members of the TSC was unlawful and I will so order.
34. That is sufficient to dispose of this aspect of the Claim but in deference to the other submissions made, I set out my view briefly.
35. The Claimants also alleged that even if the instrument of removal specified the basis on which they were removed (which it did not), the Claimants were never given an opportunity to be heard prior to their removal therefore they were denied natural justice. In defence, it was alleged for the Minister that he did offer the Claimants an opportunity to be heard (by letter dated 11 January 2023) but that they did not avail themselves of the opportunity.
36. Copies of the Minister's 11 January 2023 letter are annexures "**BLT3**" and "**BLT4**" to the Minister's sworn statement. Those letters related to the disciplinary matter of the 20 teachers' suspension; they did not set out circumstances relating to the removal of the Claimants as TSC members therefore I consider that the Claimants were not given an opportunity to be heard prior to their removal as members of the TSC.



37. The Claimants were unlawfully removed as members of the TSC. It follows that any new appointments made to replace them must also be quashed as the Claimants still hold office as members of the TSC.
38. It was also alleged that the new members of the TSC were appointed in breach of subs 5(3), (4) and (6) of the Act as there are not two women members of the TSC, the Vanuatu Teachers Union (the 'VTU') has not nominated a member and one of the members must have legal or industrial training or experience therefore their appointments too are unlawful. I have already held that the 3 new appointments must be quashed but I would note that as there were still 2 vacancies for appointment by the President on the recommendation of the Minister, that there would still be opportunity to ensure that at least 2 members of the TSC were women, to appoint a member nominated by the VTU and to ensure that one of the TSC members is a person with legal or industrial training or experience.

F. Result and Decision

39. For the reasons given, the decision by the First Defendant in Order No. 6 of 2023 dated 25 January 2023 to remove the Claimants as members of the Teaching Service Commission is unlawful and **quashed**.
40. The appointments of the new members of the Teaching Service Commission namely Nanise Lapi, Gedion John and Serge Leiwawa by the First Defendant in Order No. 7 of 2023 dated 25 January 2023 are unlawful and **quashed**.
41. Costs shall follow the event. The Defendants are to pay costs to the Claimants as agreed or taxed by the Master. Once settled, the costs are to be paid within 21 days.

DATED at Port Vila this 17th day of March 2023
BY THE COURT


Justice Viran Molisa Trief

