

- i) Whether or not the Claimant's termination was lawful and not in breach of his fundamental rights under the Constitution or the Emergency Powers Act (Cap 11) – Emergency Power (COVID-19) Regulation.
- ii) Whether or not SIG's COVID-19 Vaccination Policy apply to the Claimant amidst his health condition and spiritual belief.
- iii) Whether or not the PSC is required to disclose submission by the STC regarding the termination of the Claimant and its determination to the Claimant. If determined in the affirmative, whether or not the non-disclosure by the PSC denied the Claimant his right of appeal against the said determination.
- iv) Whether or not the Claimant is eligible to all and any benefits accruing from his agreement for service as Permanent Secretary despite his termination.
- v) Whether or not the Claimant is entitled to general damages for breach of contract and emotional and financial hardship and distress.

Issue (i)

5. In respect of the first issue, the Claimant's position is that at the material time, there was no order made by the Prime Minister which was gazetted as required by sections 40 and 41 of the Emergency Powers Act (Cap 11) – Emergency Powers (COVID – 19) Regulations, for him and other persons to be vaccinated. He therefore is of the view that his termination was unlawful and was in breach of his fundamental rights under the Constitution.
6. It is submitted on behalf of the Claimant that no order under the Regulations was published in the Gazette to validate the Government's 'no jab no job' policy. It is further submitted that a Government Policy could not supersede the requirements of the Regulations. The Claimant relies upon the cases of *Manele -v- Tiva (SBHC 66, Cheng -v- Tanda (1983) SBHC 38 and Kuve -v- Ragoso (2002) SBHC 90*, in support of his argument. The summary of those cases is that matters of policy are not for the courts to deal with unless they are alleged to be in breach of the constitution or the laws of the country.
7. Upon the above basis, it is the Claimant's position that his termination was unconstitutional because the Defendant has breached his rights to personal liberty, freedom of conscience and freedom of expression contrary to section 5, 11 and 12 of the Constitution.
8. On the contrary, the position of the Defendant is that during the COVID-19 period, the country was under a State Of Public Emergency (SOPE) upon a declaration made by the Governor General on the 25th March 2020 under section 16 (2) of the Constitution. Thereafter the provisions of the Emergency Powers Act (Cap 11) (EPA) were invoked and activated.

9. The Defendant says that the Governor General has invoked his powers under section 2 of the Act for the enactment of the Emergency Powers (COVID-19) (No. 2) Regulations 2021 (Regulations). The main purpose of the declaration of SOPE was to aid the Government's effort to prevent the entry of COVID-19 into the country and to protect its citizens from the pandemic. Nonetheless, COVID-19 had entered our shores.
10. In 2021, the Regulations were enacted to prevent and contain the spread of COVID-19. One of the measures taken by the Government was to get persons or class of persons vaccinated.
11. The Defendant argues that regulation 40 is not a mandatory provision because of the use of the word 'may' therein. It is argued that discretion is given to the Prime Minister to make an order under the Regulations. It is at the option of the Prime Minister to make orders. It is further argued that under Regulation 5, the Prime Minister may also give directions for carrying out operations for effecting the Government's COVID-19 preparedness and response plan. Regulation 6 (1) further provides that the Prime Minister may make orders under and in accordance with the Regulations for the public interest or for a COVID-19 related purposes.
12. Upon the above provisions, it is position of the Defendant that it is at the option of the Prime Minister to make orders. He is also able to make directions as opposed to orders. It was by his directions through a Cabinet Decision that made it mandatory for Public Servants to get COVID – 19 vaccination. That was the basis of their '*no jab no job*' policy. The Government had through its Cabinet Decisions issued Public Circulars to all Public Servants for mandatory vaccination.
13. For their argument, the Defendant relies upon General Order 206 (2). The provision requires communication of decisions on important issues including Cabinet Decisions to be by way of Public Circulars to all government employees. Such circulars are normally send out to Permanent Secretaries and other stake holders and all employees at large.
14. It was by virtue of the provision that the '*no jab no job*' policy was made known to all public servants including Permanent Secretaries. At the material time, the Claimant was the Permanent Secretary for Ministry of Culture and Tourism.
15. A number of Public Circulars were sent out by the Public Service on the policy and all public servants should have had knowledge of it. By Public Service Circular dated the 22nd September 2021, all public servants were informed that if they were not vaccinated by the 31st January 2022, they would be deemed to have committed an act of insubordination in respect of Government instructions. Consequently, they will be dealt with under Regulation 44 of the Public Service Commission Regulations for misconduct.

16. It is therefore the Defendant's case that in refusing to take the vaccination, it would amount to a misconduct. The Claimant had acknowledged by his email to the STC that Article 24 (j) of his Agreement of Service was applicable and relevant in his case because the situation was created by a change of government policy.
17. In view of the above discussion by the Defendant, it is their case that the Claimant's termination was lawful. It was based on the Claimant's act of insubordination to the Cabinet Decision. It amounts to misconduct under Regulation 44 of the PSC Regulations. The Claimant had acknowledged that fact by his email to STC dated 19th January 2022.

Issue (ii)

18. The Claimant argues that his constitutional rights under section 5 and 11 of the Constitution has been infringed by the Defendant. He says he has his rights to personal liberty and protection of freedom of conscience. He says he has a prevalent medical condition. He also has a spiritual conviction not to be vaccinated. He disclosed his reasons to the STC and the SPM.
19. The Claimant is also of the view that the Policy is not law unless such policy is reduced into law and applied as part of the law. The case of Beia -v- Public Service (2007) SBHC 74 was cited in support. In that case this court discussed the effect of inconsistency between the General Orders and the law. In any conflict between the provisions of the General Orders and the law, the law shall prevail. It is therefore his case that even if the policy was there, the Claimant was not strictly bound by it as if it was a law per se.
20. In response to the Claimant's position and specific to his health condition, the Defendant says that the evidence of Dr Baerodo (his own witness) in court, would point to the fact that the Claimant did not have serious health issues during the COVID-19 vaccination roll-out. He did not suffer any heart attack. His cholesterol level was within the normal range. His chest pain was likely to be a typical pneumonia and no acute myocardial infection.
21. In relation to an application for exemption from vaccination, the Defendant relies upon the evidence of Dr Neemia Bainivalu, the Incident Controller. Applications for exemption under the Regulations are addressed to the Incident Controller. Dr Bainivalu told the court that he did not receive any application from the Claimant requesting exemption from being vaccinated.
22. He confirmed receiving an application from the Claimant for his wife's exemption on medical grounds because she was breastfeeding their baby. There was no such application made by the Claimant to him and his Committee.

23. In relation to the alleged breach of sections 5 and 11 of the Constitution, the Defendant relies upon the provision of section 16 (7) of the same. They say that pursuant to the subsection, sections 5 and 11 of the Constitution can be restricted so long as the reasons are reasonably justifiable in the circumstances. The Defendant therefore says that the government's vaccination policy does not inflict upon the Claimant's rights under sections 5 and 11 of the Constitution.

Issue (iii)

24. In relation to this issue, the Claimant's position is that the Claimant has a right to be heard and the PSC should have disclosed to him a copy of the submission made against him by the STC. The right to be heard was discussed by the Court of Appeal in the case of Carey -v- South Pacific Oil (2015) SBCA 17.
25. In relying upon the decision of the Court of Appeal, the Claimant submits that he was deprived of his right to respond and or appeal.
26. On the other hand, the Defendant argues that the reason for the Claimant's termination was merely based on the 'no jab no job' policy by the government. It was a mandatory requirement that all public servants were to be vaccinated. The end date was the 31st January 2022. By that date, the Claimant had yet to be vaccinated as required.
27. That reason was disclosed to the Claimant on the 22nd February 2022 in his letter of termination. The only appeal process against a decision of the PSC is to this court. That process was facilitated upon the filing of this claim before this court. The Defendant relies upon the decision of this court in the case of Konia -v- Public Service Commission (2015) SBHC 88; HCSI - CC 493 of 2011 whereby it was held that if the aggrieved party was unable to appeal the decision of the PSC, he could file a claim for judicial review in the High Court.
28. In effect therefore, the Defendant says that the Claimant has never been deprived of his right to challenge his termination. He has utilised the remedy available to him by the filing of his claim in this proceeding. They say that the Claimant has been informed of the reason of his termination by letter dated 22nd February 2022. It was from the contents of the letter that the Claimant had filed his claim in this court. The Claimant was not deprived of his right to be heard.

Issue (iv) and issue (v)

29. In relation to issues (iv) and (v), it is the Claimant's position is that if his challenge on his termination is granted by this court, he is entitled to any benefits accruing from his Agreement of Service as a Permanent Sectary. He will also be entitled to general damages for breach of contract. He says that the accrued entitlements are provided for under clause 25 of the agreement. He is also entitled to receive gratuity under clause 10 therein and general damages for breach of contract.

30. The Defendant's position is similar to that of the Claimant. Both issues will depend on the court's decision. In any event, it is the Defendant's case, that the Claimant had received his termination entitlements pursuant to his termination. In that regard, if the court decides in the Claimant's favour, the amount paid should be deducted from any claim of entitlements.

Discussion

31. It is uncontested that the Claimant's employment with SIG was terminated by the Defendant on the 22nd February 2022. The Claimant then was the Permanent Secretary to the Ministry of Culture and Tourism.
32. It is also uncontested that on the 25th March 2020, a SOPE was declared by the Governor General. The declaration was made as a consequence of a confirmation by the Director General of the World Health Organisation that COVID-19 was a pandemic. When the SOPE declaration was pronounced, the provisions of the Emergency Powers Act (Cap11) (EPA) were invoked and activated. Pursuant to section 4, a number of regulations were enacted to put into effect and to deal with the subject matter raised in the declaration.
33. It was through that provision that a number of regulations were enacted to deal with the situation at hand. It is noted at this juncture that the COVID-19 period was an unprecedented period of time in the country's history.
34. The regulation which is the issue in this proceeding is the Emergency Powers (COVID-19) (No. 2) Regulations 2021 (Regulations). Regulation 5 gives power to the Prime Minister to give directions to carry out operations for effecting the government's COVID-19 preparedness and response plans. Regulation 40 provides that the Prime Minister may by order, require a person or class of persons to be vaccinated against COVID-19. Regulation 41 (2 (c) provides that during SOPE period, an employee can be terminated by his employer if he has not been vaccinated regardless of the terms under which the employee is employed.
35. When the Ministry of Health and Medical Services rolled out the vaccination in about March 2021, there was resistance from the general public including public servants to take it. That had caused serious concerns by the government.
36. The whole public servants were employees of the government. By a Public Service Joint Circular Memorandum No. 08/21 dated the 6th August 2021, all Permanent Secretaries and equivalent Provincial Secretaries were advised that the Cabinet has approved and made it mandatory for Public Servants including Provincial employees and State-Owned Enterprises to get COVID-19 vaccinations. The due date for completion of the process was fixed for the 30th November and vaccination certificates were to be produced. A timetable was also provided in the circular.

37. On the 8th August, a follow-up Joint Circular No. 09/2021 was further dispatched by the government to the same addresses requesting submissions of all Ministries focal points for COVID-19 contact tracing. On the 22nd September, a Public Service Circular Memorandum No. 10/2021 was also dispatched to the very same addresses to provide advice on extended grace period for mandatory COVID-19 vaccination for unvaccinated Public Service employees under the national and provincial governments. The grace period given was until the 31st January 2022.
38. On the 28th October 2021, another Public Service Circular Memorandum No. 11/2021 was further dispatched to Permanent Secretaries, equivalent Deputy Secretaries, Provincial Secretaries, Chief Executive Officers, Heads of Department and Human Resources Managers regarding instructions to manage their own ministries. They were further advised to sent updated data of employees on their second COVID-19 doses by the 8th November.
39. By email dated the 3rd November 2021, the STC enquired of the Claimant whether or not he has submitted his COVID-19 vaccination details. By his response email dated the 4th November, the Claimant responded that he had decided not to take any job despite clear mandatory vaccination requirement by the government. He stated his reasons of his decision. The reasons as stated relate to his health condition as well as his Christian beliefs. He further stated that his decision may appear as insubordination to the Cabinet decision. He was thereafter terminated on the 22nd February 2022.
40. Having discussed the above circumstances which the court considers relevant in this proceeding, it is the court's view that the main issue that would further deal with this proceeding is 'whether or not the Claimant's termination of employment is lawful'. Subsequent to the determination of that issue, the issues raised by parties will ordinarily fall into place. I now intend to discuss the issue.
41. The Claimant argues that his termination was unlawful. His view is based upon the wordings of Regulations 40 and 41 of the Regulations. He says that the 'no job no pay' policy is a mere policy decision. There is no force of law behind it. He further says that the Prime Minister did not make any order that was gazetted to enable the policy become effective in law. It therefore follows that in the absence of an order being gazetted to that effect, the policy is of no effect. Consequently, the Defendant's decision to terminate the Claimant was unlawful and is a breach of his constitutional rights under the Constitution.
42. The Defendant's position is that the provisions of Regulation 40 is not mandatory in respect of the Prime Minister's duties under the Regulations because of the use of the word 'may'. Further that by virtue of Regulation 5, the Prime Minister could also give directions for carrying out operations for effecting the Government's COVID-19 preparedness and response plan. It is therefore at the Prime Minister's option to make an order and or make a direction.

43. It is also the Defendant's position that the Claimant being employed as a Permanent Secretary was fully aware of the policy. He knew of the mandatory nature of the policy. He knew of the consequences. He submitted to the policy's operation within the public service. He used the exemption process for his wife's benefit. It is therefore their case that the Claimant's termination was not unlawful.
44. The Defendant also say that the ground for termination was the non-compliance by the Claimant of the policy. The non-compliance had resulted to an act of insubordination. He was terminated pursuant to clause 24.0 (j) of his Agreement of Service executed on the 2nd July 2020.
45. It is further their position that since the Claimant was a public officer, he is subjected to the Public Service Commission Regulations. Pursuant to Regulation 44, a misconduct by a public officer is thereby defined. Amongst other disciplinary acts and conducts are acts of insubordination to responsible officers directives or Public Service and Cabinet directives. The Claimant had decided not to be vaccinated contrary to the directive and instruction of the Cabunet and relevant ministries.
46. The court has noted that the policy was a cabinet decision. That decision was conveyed to the responsible authorities to implement. Under Regulation 5 of the Regulations, the Prime Minister could also give directions for carrying out operations for effecting the Government's COVID-19 preparedness and response plan. Having said that, it is common knowledge that the Prime Minister is the head of the Cabinet. The policy was a result of a cabinet decision. That decision was channelled through the normal public service process by circulation of public service circulars to the whole public service through the Permanent Secretaries and other responsible officers.
47. The court has noted that the initial circular on the policy dated the 6th August 2021 was a joint circular memorandum by the Ministry of Public Service and the Ministry of Health and Medical Services. The circular stated that by cabinet decision, it was mandatory for all public servants including Provincial employees and staff of State-Owned Enterprises to get COVID-19 vaccination. Other subsequent circulars on the issues were sent out by the Public Service.
48. Under section 116 (1) of the Constitution, the Public Service Commission is the employing authority for all public servants. The Ministry of Public Service serves as the administrative and policy arm, supporting the Commission. As the administrative and policy arm of the Commission, the Ministry has authority to send out circulars as it did in this proceeding. That position in my considered view was the purpose of the inclusion of Regulation 5 of the Regulations. The Prime Minister during a cabinet meeting discussed the policy and gave direction to implement it. The implementation came into existence by virtue of the Public Service Joint Circular Memorandum No. 08/2021 dated the 6th August 2021.
49. The Claimant admitted receipt of the circular and other subsequent circulars on the issue. By his own words in his emails to the STC dated the 4th November 2021 (page 46 of court book) and the one dated the 19th January 2022 (page 82 of the court book) he submitted to the full operation and implementation of the policy.

50. Notwithstanding his submission to and admission of the mandatory nature and consequential effect of non-compliance with the policy, he chose not to get vaccinated. He argues that he had expressed the reasons for not getting vaccinated to the STC and the SPM. He said his reasons were not taken into account before his termination was effected.
51. During the existence of the Regulations, there was a process under which a person may apply for an exemption from the mandatory requirement of the policy. The application is made to the Oversight Committee to be dealt with. Dr Neemia Bainivalu's sworn statement contained in pages 89 to 93 provides insight into the issue of exemption. He was then the Health Incident Controller of the Ministry of Health and Medical Services. He oversees and provide health direction and advice to the whole of the Government COVID-19 response. He also deals with persons who submitted their request on medical grounds for possible exemptions from the COVID-10 vaccination.
52. On that point he stated that he received an email from the Claimant dated the 11th November 2021 requesting an exemption for his wife. Apart from that request, he did not receive any such request from the Claimant for possible exemption for himself. Dr Bainivalu was called to give evidence in court. He was not cross-examined on that piece of evidence. The court can therefore take it that the evidence is unchallenged by the Claimant.
53. The court has noted that the Claimant made representations to the STC and the SPM about his reasons for not taking the vaccination. I can say with confidence that what he did is of no assistance to him. There is a process in existence that must be followed to get an exemption. He had knowledge about the process and had utilised it on his wife's behalf. He had chosen and opted not to follow the same process for himself. He is now complaining that he was not exempted. As the saying goes 'you can't have your cake and eat it too". In the same way, having full knowledge of the mandatory requirement and the consequence of the policy and having utilised it for his wife, the Claimant cannot now come to court and complain that his termination was unlawful.
54. It is also of essence in this discussion what is provided for under section 4 (2) of the Emergency Powers Act (Cap 11). The section provides:-
s.4 (2) Any regulation made under section 2, or any rule or order must thereunder, shall have effect notwithstanding anything inconsistent therewith in any law, and, to the extent of the inconsistency, the law shall have no effect so long as the regulation, rule or order remains in force.
55. It is further essential to state the provision of section 16 (7) of the Constitution which provides as follows:-
Section 16 (7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in controvention of section 5, 6 (2), 9, 11, 12, 13, 14 or 15 of this constitution to the extent that the law in question makes in relation to any period of public emergency provision, or authorises the doing during any such period of any thing, that is reasonably justifiable in the circumstances of any situation arising or existing during the period for the purpose of dealing with that situation.

56. The Claimant says that his termination was unconstitutional because the act of terminating his employment by the Defendant breached his constitutional rights under sections 5, 11 and 12 of the Constitution. It is uncontested that the period under which the Claimant's employment was termination was during the existence of a SOPE. The provisions of the EPA were invoked and activated and were current then. The relevant Regulations under dispute in this proceeding was enacted pursuant to the EPA. The situation in the country was no longer normal so to speak.
57. Having perused section 4 of the EPA and section 16 (7) of the Constitution, they have a double effect upon the Claimant's complaint. The effect is unequivocal. The Claimant's rights under sections 5, 11 and 12 of the Constitution as pleaded were temporary restricted under the provisions. It was an unprecedented time in our country's history and SOPE was existing.
58. It follows then that the policy was a direction by the Prime Minister and transmitted through the normal channel of transmitting information to the whole public service. The Claimant accepted the policy as it was. He utilised the provision to request for an exemption for his wife. He did not make any request for exemption for himself. His argument therefore does not hold water. It is self-defeating and runs contrary to his claim.
59. Having discussed all of the above circumstances, I am of the considered view that the Claimant's termination of employment by the Defendant is not unlawful. I hereby refuse to grant the orders sought in paragraphs 1, 2, 3, 4 and 5 of the reliefs claimed. The claim of the Claimant is hereby dismissed with cost.
60. The orders of the court are as follows:-
- i) The Claimant's termination of appointment and Agreement of Service as Permanent Secretary dated the 22nd February 2022 is not unlawful.
 - ii) The Claimant's claim is hereby dismissed in its entirety.
 - iii) Cost against the Claimant.

