

**BETWEEN:** DAVID GIBSON  
Claimant

**AND:** PUBLIC SERVICE COMMISSION  
Defendant

**Coram:** *Mr. Justice Oliver A. Saksak*

**Counsel:** *Frederick Loughman for the Claimant  
Jelinda Toa for the Defendant*

**Date of Hearing:** *27<sup>th</sup> February 2019*

**Date of Verdict:** *1<sup>st</sup> April 2019*

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## **JUDGMENT**

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### **Introduction**

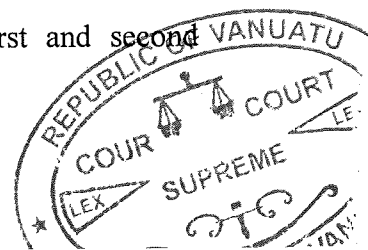
1. This is a judicial review claim. The claimant seeks judicial review of the decision of the Public Service Commission (the PSC) made on 8<sup>th</sup> February 2018 whereby the claimant was transferred temporarily out of the Department of Meteorology as director to the Department of Energy maintaining the same position of director.
2. The Claimant claims that he was not consulted prior to the transfer taking place. And he challenges the PSC's power to cause such a temporary transfer.

### **Defendant's Case**

3. The defendant says there was no need for consultation to take place prior to the transfer and says the PSC has the power to cause such a transfer. The PSC counter-claims against the defendant for the sum of VT 1,817,560 being salaries paid to the defendant during the period he occupied the temporary position of Director of Energy. The defendant claims that the claimant absented himself and was not at his work place at the time of his temporary appointment.

### **The Evidence**

4. The sworn statement of Harold Tarosa filed on 28<sup>th</sup> September 2018 discloses the relevant letter of 31<sup>st</sup> January 2018 annexed as "HT4". The first and second



paragraph of the letter have no relevance to the issue for determination. The relevant paragraphs are in paragraphs 3 and 4 which states as follows-

*“Secondly, the commission also approves to transfer you on temporary basis out from VMGD to the Department of Energy effective from 8<sup>th</sup> February 2018. This transfer is based on the fact that the Director of Energy Department Mr Anthony Garae will be going on study leave on 8<sup>th</sup> February 2018 until November 2018. For this period and during Mr Anthony’s absence you will perform the duties and responsibilities of the Director for the Department of Energy until such time he completed his training and return to Vanuatu.*

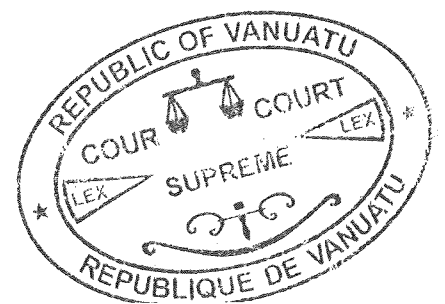
*Do note that your temporary transfer is effective from 8<sup>th</sup> February 2018 and it is a transfer at level, meaning that your salary scale ( the new GRT determination) will not be affected and the terms and conditions of your employment remain the same”.*

### **Discussion**

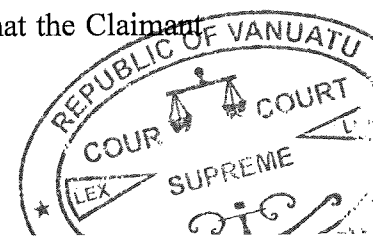
5. The Claimant was already appointed as Director of Meteorology Department. As such section 23 of the Public Service Act [ CAP. 246] has no relevance. The relevant issue is one of transfer. And section 26 of the Act states:

*“ Failure to comply with a direction to transfer or posting*

- 1. The commission may direct that a director or an employee transfer or take a posting from one position or locality to another within the Public Service but subject to the Commission’s obligation to act as a good employer.*
  
- 2. Any employee who fails to comply with a direction of the Commission requiring him or her to transfer or accept a posting may forthwith be dismissed or demoted with a consequent reduction in remuneration unless, in the opinion of the Commission, the employee justifies the non-compliance by adducing some valid and sufficient reason for it.”*



6. The Court of Appeal in the case of PSC.v. Arnold Antoine and Others [2008] VUCA 25 held that the PSC has such power but subject to the Commission's obligation to act as a good employer.
7. In the claimants case the transfer was made at the same level meaning the claimant's salaries remained the same salaries he received as the director of Meteorology. And it was made a temporary transfer for a period of 10 months for 8<sup>th</sup> February 2018 to November 2018. The claimant did not lose any of his salaries or benefits during this period. Therefore his posting on a temporary basis in the absence of Mr Anthony Garae was valid and the PSC had done its duty as a good employer. The argument by the Claimant that the PSC did not act as a good employer is therefore rejected.
8. Similarly the Claimant's argument that the PSC must or should have first consulted him prior to making the decision is a nonsensical argument and is rejected. This argument is based on section 23 (2) of the Act. But I have held earlier that this was not an appointment but a transfer and section 23 is not applicable.
9. The Court therefore answers the issues raised as follows:-
  - a) Whether the Claimant should be consulted first before his transfer, the answer is "no"
  - b) Whether the PSC has power to transfer the claimant to another director position, the answer is "Yes"
  - c) Whether the PSC had acted as a good employer in transferring the claimant, the answer is "Yes"
10. Finally on the defendant's counter-claim and whether the claimant should refund the salaries paid to him in the 10 months period from 8<sup>th</sup> February to November 2018?
11. I have two views. First it is not appropriate to make a counter-claim of this nature in a judicial review claim. Second, even if it was a valid counter-claim the PSC had failed its obligation as a good employer to dismiss the claimant "forthwith" or demote under section 26 (2). They waited 10 months. They allowed him to be paid his salaries when they knew or ought to have reasonably known as a good employer that the Claimant



was not at post. And there is no evidence showing what steps the PSC took showing what steps the PSC took to ensure the claimant occupied his position and worked.

**Conclusions**

12. For those reasons it is not reasonable to counter-claim for salaries paid and their recovery. The counter-claim is therefore dismissed. And the claim of the claimant is also dismissed.

13. In the circumstances of the case, there will be no order as to costs. Each party will bear their own costs.

**DATED at Port Vila this 1<sup>st</sup> day of April 2019**

**BY THE COURT**

**OLIVER.A.SAKSAK**

**Judge**

