

BETWEEN: ALBERT NALPINI
Appellant

AND: PRESIDENT OF THE REPUBLIC OF VANUATU
First Respondent

POLICE SERVICE COMMISSION
AND: *Second Respondent*

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice John Hansen
Hon. Justice Dudley Aru
Hon. Justice Viran Molisa Trief

Counsel: Mr. Less John Napuati for the Appellant
Mr. Sammy Aron for the First and Second Respondent

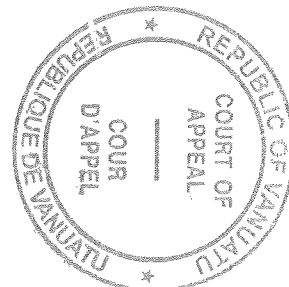
Date of Hearing: 6th November 2019

Date of Judgment: 15th November 2019

JUDGMENT OF COURT

I. Introduction

1. This is an appeal against the Judgment of the Supreme Court dated August 2nd, 2019 striking out the Appellant's claim in Judicial Review case No.19/1234 (the "Second Claim") on the basis that the Appellant had earlier discontinued JR Case No.3128 of 2018 (the "First Claim"). In the First claim he alleged a lack of knowledge of the reasons behind his suspension, and discontinued his allegation of the apprehension of bias on the part of the members of the Second Respondent or Disciplinary Committee. The primary judge held that the discontinuance prevented the Appellant bringing the Second claim which was made on the same basis.



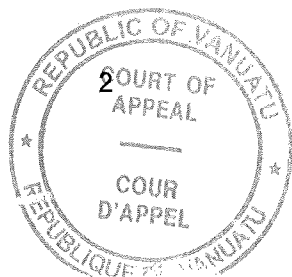
II. Backgrounds – Similarity of the challenges and sequential events

2. The Appellant, Mr Nalpini, was the duly appointed Commissioner of Police for Vanuatu as from 4 May 2017. He was suspended from office on 26 September 2018 as disciplinary charges were lodged against him.
3. During the period of his suspension, the Second Respondent appointed an investigation team to carry out investigation on the disciplinary allegations against the Appellant.

A. Judicial Review Case No. 3128 of 2018 (the First Claim)

4. On 8 November 2018, the Appellant filed the Judicial Review Case No.3128 of 2018 ("the First Claim") against the Respondent. The Appellant has sought a quashing order of the suspension made against him by the First Respondent. The basis of the First Claim was that he was not afforded natural justice because he was not notified of the allegations made against him and the reasons for his suspension.
5. On 5 December 2018, the Appellant filed an interlocutory application, among other matters, seeking an order from the Court to uplift his suspension to allow him to resume his duties as Commissioner of Police pending the hearing of his disciplinary matters.
6. On 7 December 2018, a conference was held in the First claim. During the discussion between the primary Judge and Counsel in regards to the Appellants interlocutory application, it was agreed by Counsel that the Second Respondent will serve the Appellant with the allegations (the disciplinary chargers) which was relied upon in support of the Appellant's suspension. At that conference, it was also agreed that as the Second Respondent's findings on the disciplinary proceedings against the Appellant were imminent, Counsel for the Appellant agreed to wait on the outcome of the disciplinary proceedings before the Appellant further progress his case in Judicial Review Case No. 3128 of 2018 ("the First Claim").
7. The Court made directions reflecting the discussions with Counsel by deferring the proceeding in Judicial Review Case No. 3128 of 2018 ("the First claim") until the outcome of the Disciplinary Hearing/proceeding is known. Following Directions were made by the Court on 7 December 2018:

1. *It appears that the best course to adopt is to await the outcome of the Disciplinary Hearing which is now scheduled for 20 December 2018. The applicant is to be served today with the evidence relied on.*



2. Accordingly, all matters are simply deferred until the outcome of the hearing is known."

8. On 20 December 2018, before the hearing of the Appellant's disciplinary case, by letter dated 19 December 2018, the Appellant raised the issue of apprehension of bias on the part of the members of the Second Respondent as persons acting as investigators and decision makers. The relevant parts of the Appellant's letter of 19 December 2018 is this:-

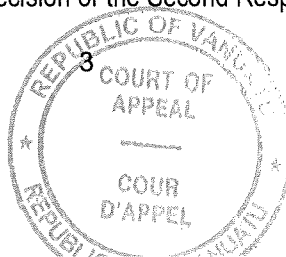
"LIKELIHOOD OF BIAS: OUR CLIENT ALBERT NALPINI

...there, our client is cautious and reasonably suspects that any decision which will be reached by the commission will be tainted with biasness..

....

The above proviso is clear, unless a person with a right mind come to the view that there is likelihood of bias, then the test for biasness is satisfied."

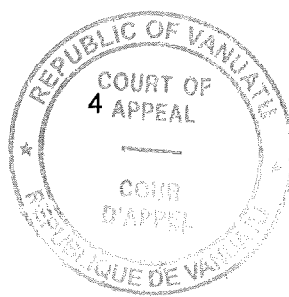
9. The disciplinary hearing was commenced on 20 December 2018 and then adjourned at the request of the Appellant to allow him more time to appraise him of the disciplinary allegations made against him. The hearing was resumed on 21 January 2019.
10. On 23 January 2019, the Court in Judicial Review Case No. 3128 made further Directions as follows:-
1. *Mr. Aron advised the Disciplinary Hearing is continuing. There is in the order of 16 witnesses to be called.*
 2. *There will be a further call over to monitor progress at 8.30am on 6 March 2019."*
11. The Disciplinary hearing was completed and parties were directed to file written submissions on 6 March 2019.
12. On the same date of 6 March 2019, a conference was held by the Court to monitor the progress of the disciplinary matter. The Court then issued the following directions:
1. *Mr. Aron advised the Disciplinary hearing will be completed today. The indication is that a decision will be published on Monday 11 March 2019.*
 2. *There will be a further call over to monitor the progress at 8.15am on 15 March 2019."*
13. On 18 March 2019, the Second Respondent delivered its written decision on the disciplinary matters against the Appellant (the "Decision of the Second Respondent").



14. On 28 March 2019, the Respondents in the (First claim) filed the sworn statement of Job Boe disclosing the outcome (Decision) of the Disciplinary Hearing of the charges that were laid against the Appellant. In that statement, Job Boe confirmed that that decision was delivered to the Appellant on 18 March 2019.
15. Paragraphs 30 and 31 of the Second Respondent decision on the Disciplinary matter stated :
 30. *We concluded that the actions of the commissioner are serious misconduct and having explored all other avenues, we are convinced that a dismissal is appropriate in the circumstances.*
 31. *For completeness, we advise the office of the President on our decision after consultation with the Honorable Minister of Internal Affairs Mr. Andrew Napuat."*
16. The Appellant was appraised with the decision of the Second Respondent dated 18 March 2018. It is noted the Appellant did not progress his claim and apply to amend his First Claim to pursue the complaint of likelihood of bias as raised in his letter of 19 December 2018.
17. On 28 March 2019, the Appellant filed a Notice of Discontinuance discontinuing the proceedings in JR Case No.3128 of 2018 (the First Claim) against the Respondents.
18. On 16 April 2019, the President of the Republic of Vanuatu (the First Respondent) dismissed the Appellant as Commissioner of Police of Vanuatu on the advice of the Second Respondent.

B. Judicial Review Case No. 19/1234 (the Second Claim)

19. This second claim was filed on 22 May 2019. The Appellant sought to quash the First Respondent's order dismissing him on the basis that the Second Respondent had not acted independently, nor had it acted in a timely manner. The Appellant also sought related orders in his Second claim.
20. In his sworn statement filed in support of this claim, the Appellant stated clearly that there was an apprehension of bias due to the chair of the commission (Second Respondent) and the chair of the Disciplinary Committee acting as complainants and investigators on the matter. The same complaint was again raised regarding the lack of information provided to the Appellant while he was suspended, and the length of time the inquires took while he was suspended.



21. There was a great deal of duplication in the grounds for both claims, although the subject of the decision was different, the First claim relating to the Appellant's suspension, the second claim relating to the Appellant's removal (dismissal).
22. The First Respondent (President) was involved in both claims, as he was responsible for acting on the advice made to him. He was not and could not be criticised for so acting. It was the actions of the Second Respondent and the Disciplinary Committee that were at the heart of the Appellant's allegations.

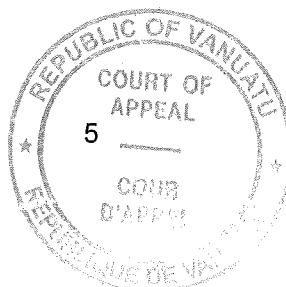
C. The Respondents' application to strike out the proceedings in JR Case No. 19/1234 (the Second claim)

23. The Respondents filed their application to strike out the proceedings in the Second Claim on 4 June 2019.
24. The application to strike out the Second Claim was advanced on the following foundations:-

- a) The Appellant was precluded from bringing his current action due to the principle of res judicata principle as set out in **Henderson –v- Menderson (1843) 3 Hare 100**: namely, that a party is not permitted to raise in subsequent proceedings claims that ought to have been advanced in previous litigation.
- b) It was also relied on what is termed Anshun Estoppel, which set out similar statements of the relevant law.
- c) These statements of principle have been accepted as having applicability in Vanuatu. The case of **Family Kalmet –v- Kalmet [2017] VUCA 20** wherein the Court of Appeal stated:

"Firstly, res judicata is normally applicable in circumstances where there has been a final determination of the substantive issues before the court. Given the determination of those issues the application of res judicata operates to prevent those issues from being litigated again and also extend to arguments or issues which should properly have been determined at that time."

- d) It was also pointed out that the Appellant's alleged lack of knowledge regarding the reasons for his suspension was in issue in Civil Case No. 18/3128; as was the allegation of apprehension of bias on the part of the Second Respondent and that the very same issues were again advanced in support of Civil Case No. 19/1234, albeit the relief sought is different again.



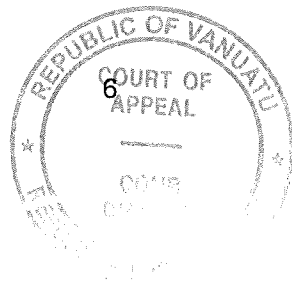
25. The Appellant in his response to the application to strike out his second claim sought to distinguish between the two claims on the basis of the remedies sought being to quash a suspension and subsequently to quash a dismissal. He made his point that the remedy of dismissal was not sought as it was not an issue when the First claim was filed.
26. The Applicant further advanced that a Notice of Discontinuance had been filed, there had been no final determination of the issues raised in JR Case No.18/3128, and therefore, there was no application of Anshun Estoppel or res judicata.

III. Decision of the Court appealed from

27. The primary Judge referred to the Civil Procedure Rule 9.9 (4) (a) which provides that where a claimant discontinues his claim, the claimant may not revive the claim. The litigation was at an end. The issues raised in the litigation were no longer issues requiring determination, as they have been abandoned.
28. The Judge in the court below also referred and relied on the principle of Anshun Estoppel or res judicata as having applicability in this jurisdiction. Having considered and assessed the factual circumstances of the proceedings before him on the basis of similarity of the challenges in the two claims, he struck out the Appellant's second claim on 2nd August 2019, which is now the subject of this appeal.
29. The relevant part of his Lordship's decision is as follows:

"D. Decision

23. *By filing his Notice of Discontinuance in Civil Case No.18/3128, Mr. Nalpini has discontinued his claims of lack of knowledge of the reasons behind his suspension, and discontinued his allegation of the apprehension of bias on the part of members of the Commission and/or Disciplinary Committee.*
24. *He is accordingly prevented from bringing further action (reviving the claims) on the same basis – if he had wanted to pursue the matter he could and should have simply amended his pleadings to reflect the change of circumstance.*
25. *Civil Case No.19/1234 is founded on the very same allegations. By discontinuing those allegations in his first claim, Mr. Nalpini is now prevented from raising them again in the subsequent proceedings.*
26. *Accordingly, Civil Case No.19/1234 is struck out in its entirety.*



27. *Mr. Nalpini is to pay the costs of this action to the State Law Office. Those costs are to agreed between counsel, or taxed by the Master."*

IV. The grounds of appeal

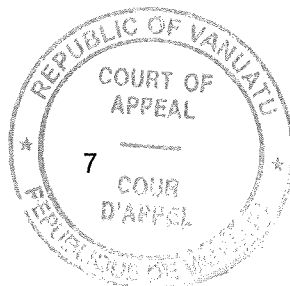
30. The appeal against the judgment of the Supreme Court dated 2 August 2019, was made on two following grounds:-

1. That the Supreme Court Judge erred in law and facts in wrongly applying the principle of the res judicata as affirmed in **Kalmet –v- Kalmet [2017] 20** to the circumstances of this case.
2. That the Supreme Court Judge erred in law and fact in wrongly applying Rule 9.9 (4) (a) of the Civil Procedure Rules as Civil Case No. relates to suspension and Civil Case No.19/1234 relates to termination.

V. Submissions on the appeal.

A. Appellant's submissions

31. The Appellant submitted to the following effect. The Court below applied the principle of res judicata as set out in **Henderson –v- Henderson (1843) 3 Hare and Family Kalmet –v- Kalmet [2017] VUCA 20**, wrongly in the circumstance of this case.
32. The Appellant accepted that the Court below clearly summarised both Civil Case No.18/3128 and Civil Case No.19/1234. It is submitted that what the Court failed to disclose is that in Civil Case No.19/1234 the Claimant also pleaded section 50(3) and 50(4) of the Employment Act. It is also said that in Civil Case No. 18/3128 apprehension of bias was not even pleaded in the First claim.
33. The Appellant referred the Court to a New South Wales case of **Shrador –v- Owners Strata Plan No. 12449 [2008] NSWC 117** wherein the Court said (at page 21) that for a party to establish that res judicata prevents litigation of a matter, the party must show:
 - A final judgment
 - A competent tribunal
 - Identity of the parties; and
 - Identity of subject matter.



34. The Appellant said that on the first issue of final judgment the Appellant did not dispute the fact that Civil Case No.18/3128 which related to suspension has been discontinued and cannot be revived. However, the Appellant submitted that the Civil Case No.19/1234 (the Second claim) which primarily dealt with termination of the Appellant is yet to be tried and determined on its merits. There was no final judgment issued yet.

35. The Appellant agreed that the Supreme Court is the competent court. As to the identity of the parties in Civil Case No.18/3128 (the First Claim), the parties were the Appellant, the President of the Republic of Vanuatu and the Republic of Vanuatu while in Civil Case No.19/1234 (the Second Claim), the parties were the Appellant, the President and the Police Service Commission. There were different parties involved in those two claims.

36. As to the identity of the subject matter, the Appellant submitted that Civil Case No.18/1328, the subject-matter was suspension of the Appellant and in Civil Case No. 19/1234 the subject matter was termination based not only on bias but also section 50(3) of the Employment Act as held by the Court in **Public Service Commission [2008] VUCA** is that:

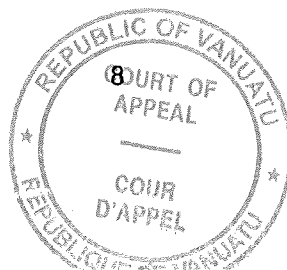
"Section 29 (1) entitled the commission to dismiss an employee for serious misconduct or inability. This subject to compliance with section 50(3) of the Employment Act which governs all employment Public and Private (Government of Vanuatu v. Mathias [2006] VUCA 7).

37. The Appellant submitted that in view of the above section 50(3) of the Employment Act, it does apply to his contract of employment and that no opportunity was given by the Second Respondent (Police Service Commission) and the First Respondent (President of the Republic) to answer the allegations made against him before the Appellant was terminated.

38. The Appellant submitted that the court below erred in law and fact in applying the principle of res judicata to the circumstances of this case.

39. In his additional submission, the Appellant requested the court to treat the Appellant's case as a special circumstance case on the same basis as submitted earlier, namely:-

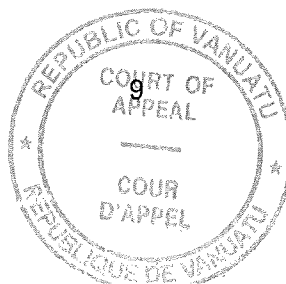
- a) The issue of bias by the Second Respondent (Police Service Commission) was not pleaded in JR Case No. 18/3128.
- b) The Judge was wrong in striking out the Appellant's JR claim No.19/1234 when the issue of bias was not pleaded in JR Case No.18/3128.



- c) The JR Case No.18/1328 was a clear case for suspension of the Appellant and JR Case No.18/3128.
 - d) The issue of bias was now pleaded in JR Case No.19/1234.
 - e) The issue of section 50(4) and particularly subsection (3) of the Employment Act was not pleaded in JR Case No.18/3128 but it was clearly pleaded in JR Case No.19/1234.
40. The Appellant further submitted that the Appellant did not intend to abandon his claim of bias against the Second Respondent (Police Service Commission) when he filed his Notice of Discontinuance in JR Case No.18/3128 but to pursue it in JR Case No.19/1234 (the Second claim) and there has been no adjudication on the merits of the second claim.
41. The Appellant finally submitted this appeal be allowed with costs against the Respondents.

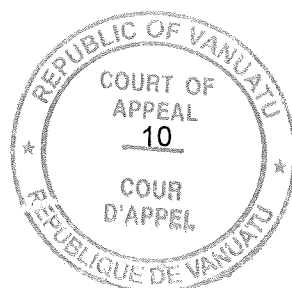
B. Respondents' submissions

42. The Respondents submitted in essence to the following effect. The Application for strike out was pursued on the basis that Rule 9.9 (4) (a) of the Civil Procedure Rules precludes the Appellant from bringing the matter in JR Case No.1234 of 2019 by raising the similar factual issues that were raised and later discontinued in JR Case No.3128 of 2018.
43. In the alternative, the Respondents said that the application was pursued in accord to the principle of Anshun Estoppel established in **Henderson –v- Henderson (1843) 67 ER. 319**, on the basis that matters or issues which were again raised in JR Case No.1234 of 2019 were matters belonging or relevant to the subject matter of litigation in the former proceeding JR Case No.3128 of 2018.
44. The Respondents submitted that in the application of the extended version of res judicata established by the rule in **Henderson –v- Henderson (1843) 67 ER. 319** which is also known as Anshun Estoppel, the Appellant could or he should put forward every point that properly belonged to the subject of the proceeding in JR Case No.3128 of 2018 such as the Appellant's complaint about the likelihood of bias on the part of the Second Respondents as raised in the Appellant's letter dated 19 December 2018.
45. The Respondents contended that the complaint about the likelihood of bias on the part of the Second Respondent in the manner of the investigation as well as the Decision of the Disciplinary matter dated 18 March 2018 were matters properly belonging to proceeding in JR Case No. 3128 of 2018 which the Appellant should have put forward by way of amending his claim to keep his



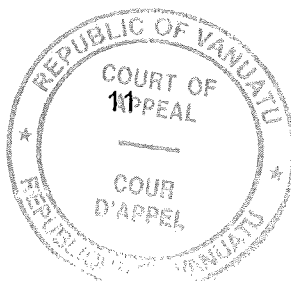
action on foot. However, the Appellant decided not to put forward these said matters and discontinued that proceeding.

46. Accordingly, the Respondents said under Rule 9.9 (4) (a) of the Civil Procedure Rules, the Appellant is precluded to raise issues that were part of the case in JR Case No.3128 of 2018 again in JR Case No.1234 of 2019. It is also submitted that the Appellant was precluded from bringing his second claim in JR Case No.1234 of 2019 pursuant to the extended version of res judicata as set out in **Henderson –v- Henderson** that a party is not permitted to raise in subsequent litigation claims that ought to have been advanced in the previous litigation.
47. The Respondents also submitted that there were no special circumstances on the case of the Appellant as the Appellant was aware and had knowledge that the Second Respondent will advise the First Respondent on its decision to remove (dismiss) the Appellant.
48. It is also said that at the time the Second Respondent delivered its decision, the proceeding in JR Case No.3128 of 2018 was still on foot. The Appellant did not challenge the Second Respondent's decision and the allegation of likelihood of bias. He instead discontinued that First claim. It is submitted that there is not a special circumstance for the Appellant to pursue the subsequent claim on the same set of facts which ought to be pursued in the First claim.
49. The Respondents further submitted that the Employment Act is not applicable to members of armed forces and police officers, pursuant to subsection 73(3) of the Employment Act as the Appellant is a member of the Vanuatu Police Force and he is the Commissioner of Police.
50. The Respondents finally submitted that the Appellant as a current member of the Police Force cannot avail himself to the protection of section 50(3) and (4) of the Employment Act in the light of subsections 76(1) and (3) of the Employment Act.
51. The relevant law applicable to the Appellant are sections 7A(1) and (2), 67 and 69 of the Police Act [CAP 105]. It is contended that the Appellant did not challenge the Decision of the Second Respondent and he did not appeal that decision to the Minister pursuant to section 69 of the Police Act.
52. The Appellant's allegation of the application of subsection 50(3) and (4) of the Employment Act has no basis and is misconceived. The appeal, therefore, must be dismissed with costs.



VI. Considerations

53. We consider the two grounds of appeal jointly and together.
54. At the hearing of this appeal, Mr. Napuati submitted that the Appellant Mr. Nalpini is not a police officer. We consider that it is an outrageous submission that the commissioner of police is not a police officer. We reject it.
55. From the facts of this case, we consider and agree with the submissions of the Respondents that the Appellant is precluded to raise the issues or matters that he could and ought to have raised them in his first claim in JR Case No.3128 of 2018 for the following reasons:-
1. The appellant was subject to disciplinary proceedings instituted against him. He was suspended by the First Respondent (the President) from office on 26 September 2018. He filed the JR Case No.3128 of 2018 (the First claim) on 8 November 2018 against the Respondents alleging lack of knowledge regarding the reasons for his suspension.
 2. In the development of his case in JR Case No.3128 of 2018, the Appellant had raised the allegations of apprehension of bias on the part of the Second Respondent as stated in his letter of 19 December 2018.
 3. In the course of the proceedings in JR Case No.3128 of 2018, the Appellant also had knowledge of the Second Respondent's decision of the disciplinary matter dated 18 March 2018.
 4. The apprehension of bias and the Second Respondent's decision properly belonged to or could become part of the subject matter of litigation in JR Case No.3128 of 2018, in which pursuant to the principle outlined in **Henderson –v- Henderson**, the Appellant should and ought rightly to have been included and pursued them in that matter so that all aspects of it may be finally decided once and for all.
 5. The Appellant should and ought to have done so by amending his JR Case No.3128 of 2018 instead, he filed a Notice of Discontinuance in JR Case No.3128 of 2018 on 28 March 2019.
 6. The effect of the Notice of Discontinuance under Rule 9.9 (4) (a) of the Civil Procedure Rules means that the Appellant had discontinued all matters that belonged to the subject of litigation in JR Case No.3128 of 2018 which includes the allegation of likelihood of bias against the Second Respondent.
 7. In applying the test as held in the case of Anshun, the causes of action of likelihood of bias in the subsequent litigation matter in JR Case No.1234 2019 is so relevant to the subject matter of the First claim in JR Case No.3128 of 2018 and it was unreasonable not to rely upon it.



56. We note that the rule in **Henderson –v- Henderson** is in regards to claims which ought to have been pursued as this court observed in **Family Farm Development Ltd v. Nichols [2014] VUCA** and we also noted in that case (Nichols) it is accepted that the Anshun principle applies in this jurisdiction.
57. We consider the facts of this case, do not give rise to a special circumstance for the Appellant to pursue the subsequent claim in JRC No.1234 of 2019 and the allegation of apprehension of bias on the same set of facts which ought to be pursued in the first claim. We reject the Appellant's submission on this point.
58. We note the submission of the Appellant to the effect that he sought to distinguish between the two claims on the basis of the remedies sought being to quash a suspension and subsequently to quash a dismissal. However, they are part of the same causes or action of the Second Respondent which are at the heart of this case. The First Respondent (President) acted on the recommendations and advice of the Second Respondent. The distinction based on the remedies sought in the two claims is unhelpful to the Appellant and does not advance his case.
59. The Appellant referred and relied on sections 50(3) (4) of the Employment Act. Although, it was not considered by the primary Judge, we consider and accept the submissions of the Respondents to the effect that the Employment Act is not applicable to members of armed forces and police officers pursuant to section 76(3) of the said Act as the Appellant is a member of the Vanuatu Police Force and he is the commissioner of police.
60. The case of **Public Service Commission –v Tari [2008]** does not and cannot assist the Appellant and his case in the light of the provisions of sections 76(1) (3) of the Employment Act.
61. Section 76 (1) (2) (3) of the Employment Act provides:

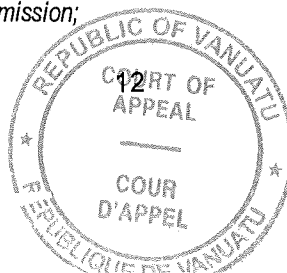
“APPLICATION OF THE ACT TO PUBLIC SERVICE

76. (1) *Except as provided in subsection (3) the provisions of this Act shall apply in relation to public servants and to the Government and any other public authority in Vanuatu subject to the modifications set out in subsection (2).*

(2) The modifications mentioned in subsection (1) are as follows-

(a) the references in this Act to the Minister shall be taken as references to the Minister responsible for matters relating to the public service;

(b) the functions of the Labour Advisory Board shall be exercised by the Public Service Commission;



(c) except in section 65, the powers and duties of the Commissioner of Labour shall vest in the Director of Public Service Department;

(d) the powers and duties of a labour officer shall vest in the Director of Public Service Department or an officer appointed by him for that purpose;

(e) sections 67, 72, 73 and 74 shall not apply.

(3) Nothing contained in this Act shall apply in relation to members of the armed forces, police force or prison service."

62. We note and consider the fact that the Second Respondent had found the Appellant guilty of the disciplinary charges laid against him and advised his removal (dismissal) from the Police Force to the First Respondent (the President), pursuant to subsections 67(1)(2) and 7A (1) and (2) of the Police Act and section 21 of the Interpretation Act [CAP 132].
63. We also note that the Appellant did not appeal the decision of the Second Respondent to the Minister pursuant section 69 of the Police Act.
64. The relevant law applicable to the Appellant are sections 7A (1) and (2), 67 and 69 of the Police Act [CAP 105] and section 21 of the Interpretation Act [CAP 132] which state:-

"7A. Appointment of Commissioner

(1) The President is to appoint a person in writing as the Commissioner of Police on the advice of the Commission after consultation with the Minister for a period of 5 years and the person is eligible for reappointment.

(1A) The Commission must consult the Minister before an advice can be made by it to the President under subsection (1).

67. Disciplinary powers of the Commission

(1) A charge of an offence against discipline alleged to have been committed by a senior officer shall be reported by the Commissioner without unnecessary delay to the Commission which shall inquire into the truth of the charge.

(2) The Commission, if it finds the charge proved, may impose on the defaulter 1 of the following punishments-

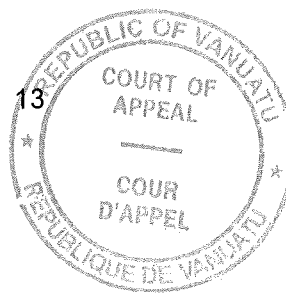
(a) dismissal from the Force;

(b) reduction in rank;

(c) loss of seniority;

(d) a fine not exceeding 15 days; or

(e) a reprimand.



65. We consider that the Appellant's allegations of the application subsection 50(3) and (4) of the Employment Act has no basis and is misconceived.

66. We dismiss the appeal on both grounds.

Result

1. The appeal is dismissed.
2. The Respondents are entitled to costs assessed at 50, 000 VT to be paid within 28 days.

DATED at Port Vila this 15th day of November, 2019.

BY THE COURT

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Vincent Lunabek
Chief Justice

