

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

**Judicial Review Case No.4004 of 2016**

**BETWEEN: JOE LIGO  
JOHNSON BINARU IAUMA  
JESSE DICK JOE  
MAROKON ALILEE  
MARK PETER BEBE  
HOWARD ARU  
WILLIAM NASAK  
Claimants**

**AND: REPUBLIC OF VANUATU  
Defendant**

*Hearing: 22<sup>nd</sup> November 2017  
Before: Justice Chetwynd  
Counsel: Mr Yawah for the Claimants  
Mr Huri for the Defendant*

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### **Judgment**

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1. This case started out as a Judicial Review of certain decisions by the Council of Ministers but has ended up as straight forward claim in respect of contracts of employment signed by the claimants in February 2016. In particular what is in dispute is whether the 2016 contracts of employment provided for back dated salary increases.

2. The history of the claim is this. In 2012 all the claimants were employed as Director Generals of various Ministries. This was pursuant to the provisions of the Public Service (Amendment) Act No.1 of 2011:

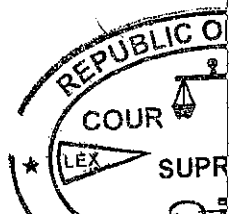
#### **17A Appointment of a director-general**

(1) The Minister on the recommendation of the Commission, is to appoint a person to be a director-general under a contract of employment for a period of 4 years and the person may be reappointed only once.

(2) The remuneration and allowances of a director-general is to be determined by the Minister after consultation with the Commission.

(3) The terms and conditions of appointment of a director-general are to be set out in the contract made between the Minister and the director-general.

3. Contracts were signed on 24<sup>th</sup> November 2012 ("the 2012 contracts"). It is averred that before signing there were discussions and agreements reached that the remuneration package would be reviewed by the Prime Minister. The evidence from



the claimants is they thought the remuneration package set out in the contract was inadequate. One might wonder why contracts were signed without the review provisions being inserted. In that regard the suggested reasoning is that because the amendment Act of 2011 came into operation on 23<sup>rd</sup> August 2012 there was no time for the review and all the claimants signed the contracts expecting changes. The provisions of the amendment Act meant any existing contracts came to an end:

#### **50A Transitional provision for director-general**

(1) This section applies to any person who was employed as a director-general immediately before the commencement of this Act.

(2) A person who occupied the position of director-general before the commencement of this Act is to continue to be employed as a director-general for a period of 3 months commencing from the date on which this Act comes into force.

(3) A director-general's employment is deemed to be terminated by the Public Service Commission on the expiry of the period provided under subsection (2).

4. There was an election in the offing and, in Mr Bebe's words <sup>1</sup> the then Prime Minister wanted to ensure that leadership and continuation of services was maintained during and after the election. Thus contracts were signed on the clear understanding that the remuneration would be reviewed within 12 months. This did not happen and the reviewed terms and conditions were only signed on 10<sup>th</sup> February 2016 ("the 2016 contracts").

5. The claimants' argument is that the 2016 contracts ended the 2012 contracts one and all the terms and conditions were backdated. They rely on clauses 2.1 and 3.2 of the 2016 contracts. Clause 2.1 reads:

"The Contract of Employment between the Employer and the Employee dated 24 November is hereby rescinded."

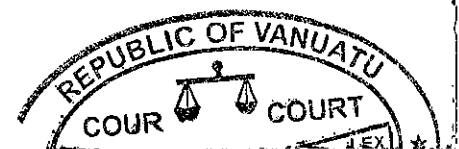
Clause 3.2 reads:

"The Employee's term of employment is for 4 years commencing on 24 November 2012."

6. There is little doubt about the meaning of clause 2.1. It brought to an end the contract signed by the claimants in November 2012. All the provisions of that contract came to an end as at 10<sup>th</sup> February 2016.

7. However, that would have rendered the Government liable for breach of contract because the 2012 contracts were for a term of 4 years. That is plain from clause 2.2 of the 2012 contracts. To preserve the claimants' rights to a 4 year term the term of years for the 2016 contracts was backdated to the commencement date of the 2012 contracts.

<sup>1</sup> Sworn Statement of Mark Peter Bebe filed 21<sup>st</sup> December 2016 at paragraph 4



8. The difficulty the claimants have is that nowhere in the 2016 contracts is there a provision which says all the terms and conditions of the contracts are backdated. Clause 3.2 merely preserves the length of employment. The remuneration, allowances and end of term provisions are as set out in the 2016 contracts but only as from 10<sup>th</sup> February 2016. If any of the new provisions are worse than those in the 2012 contracts then the claimants are entitled to be paid the difference. As far as I can see the only allowance which is less in the 2016 contracts is the housing allowance.

9. I would also point to clause 33.1 of the 2012 contracts. That says;

“The terms and conditions of this contract may be amended by the parties by an agreement in writing between them.”

That must be read in conjunction with clause 34.1:

“This Contract constitutes the entire agreement between the Parties. Any prior arrangement, agreements, representations or undertakings are superseded.”

Those provisions are repeated in the 2016 contracts in exactly the same words at clauses 36.1 and 37.1.

10. There have been no agreements amending the 2012 contracts. In any event the 2012 contracts were brought to an end by clause 2.1 as set out above (see paragraph 5 above). There has been no agreement amending the 2016 contracts. Any promises i.e. agreements, representations or undertakings, have been superseded by the signing of the contracts.


11. The upshot is that the claim must fail. The claimants' argument that the remuneration in the 2016 contracts can be backdated are not accepted. If there was to be a backdating of specific matters there would be a provision in the contract so stating. The only such reference is to the term of years.

12. There is no counterclaim by the Republic. Presumably they therefore accept that if there has been an overpayment it is not recoverable from the claimants. As there is no counterclaim I have no need to make any orders in that regard.

13. As the claim has failed the defendant is entitled to recover its costs and those costs will be taxed on a standard basis if not agreed.

Dated this 26<sup>th</sup> January 2018 at Port Vila

BY THE COURT

  
David Chetwynd  
Judge

