

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

Civil
Case No. 19/718 SC/Civil

**BETWEEN: Robert George, Stuart Willau and
Others**

Claimants

AND: Teaching Service Commission

First Defendant

Republic of Vanuatu

Second Defendant

Date of Hearing: 23 April 2020
Before: Justice G.A. Andrée Wiltens
Counsel: Mr J. Tari for the Claimants
Mr L. Huri for the Defendants
Date of Decision: 24 April 2020

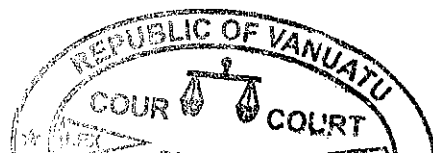
JUDGMENT

A. Introduction

1. Nineteen senior secondary teachers allege they have not been appropriately paid for their services, since as far back as 1 January 2006. The Defendants accept that, but plead that section 20 of the Employment Act [Cap 160] ("the Act") entitles the teachers to their back-pay only for the period of 3 years from the date of their Claim.

B. Background

2. The teachers claim that the Government Remuneration Tribunal Determination of 2005 ("GRTD") set their pay rates at VT 55,000 per fortnight, yet they were paid only VT 46,000 per fortnight. Accordingly each claimed the shortfall for the period from 1 January 2006 to 1



January 2018, the latter date being the commencement of the 2017 GRTD. There is no dispute about the rate at which the Claimants are currently paid following the 2017 GRTD. Nor is it disputed that the GRTDs are binding on the Government.

3. The defence to the claim is not that the allegation is unfounded – indeed the entire shortfall is admitted. The defence relies on the fact that the Claim was filed in the Supreme Court on 29 March 2019, and it is therefore submitted that the Claimants are only able to claim the shortfall as from 29 March 2016 due to the effect of section 20 of the Act.

C. Law

4. Section 20 of the Act reads as follows:

"20. Period of limitation

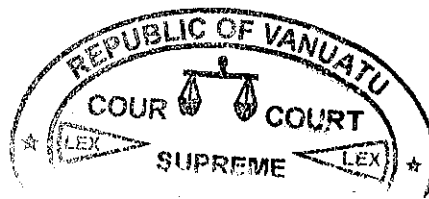
No proceedings may be instituted by an employee for the recovery of remuneration after the expiry of 3 years from the end of the period to which the remuneration relates."

5. The Court of Appeal has considered this provision in *National Bank of Vanuatu v Cullwick* [2002] VUCA 39. My reading of that decision is that the term "remuneration" is to be read as "salary only" and does not relate to other employment benefits. A secondary, although no less important, statement by the Court was to the effect that the time limit was not discretionary but operated in a mandatory fashion. The third point I take from the decision is stated thus: "Section 20 operates as a bar to instituting proceedings.... It does not operate so as to extinguish the underlying legal right to receive the remuneration."
6. The Court of Appeal again considered section 20 of the Act in *Tabouti v Health Department* [2010] VUCA 7. In that case, Mr Tabouti was compulsorily retired due to his age in December 2004. His claim against his former employer was only filed in June 2007 – this despite the fact that the true cause of his action stemmed from events in December 1999. The Court held that, due to the operation of section 20, only the remuneration not properly paid as from June 2004 was claimable.
7. The Supreme Court, faced with a similar factual background as this present case, ruled in the case of *Saltukro v TSC* [2019] VUSC 71:

"...that 1 January 2006 to 31 December 2017 is "...the period to which their remuneration [claim] relates".
8. That decision was held to be premature by the Court of Appeal, in *TSC v Saltukro and Others* [2019] VUCA 1. The reason for that, as I apprehend it, is that at the time of the Supreme Court decision, there was no determination that a shortfall of remuneration had indeed occurred. Only when a shortfall was established could there be a determination as to the period of remuneration.

D. Discussion

9. In this case, the State's concession of the shortfall results in the decision the Court of Appeal considered premature in *TSC v Saltukro* not being applicable in relation to this present case.

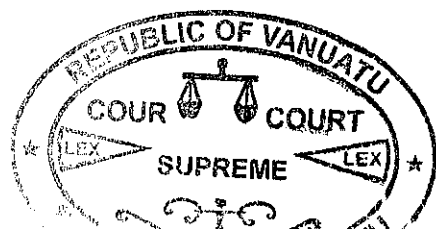


What is significant, in my view, is that the Court of Appeal in *Saltukro v TSC* did not hold the Supreme Court's interpretation of the period of remuneration to be incorrect.

10. Mr Tari submitted that the relevant period of remuneration was the entire span of the 2005 GRTD. Mr Huri submitted that as the Claimants were paid fortnightly, the relevant period of remuneration was the final 3 years prior to the Claim being filed.
11. I note that although the Claimants are paid fortnightly, each GRTD relates to setting the appropriate annual salary for each of the teaching levels.
12. Without any definition within the legislation as to what is meant by "...the period of remuneration" it may be helpful to try and understand why section 20 was incorporated into the legislation. On one view, it is to achieve some finality of commercial relations – so that when an employee retires, resigns or is dismissed there is a 3 year time limit for the finalisation of the parties' relations. Were section 20 not there, it is possible for actions to be commenced very much longer into the future, and possibly when records and memories were lost or impaired.
13. That interpretation does not preclude an action being commenced outside the 3-year period by current employees, as is the case here. All the Claimants continue to be employed and to provide their services to the Defendants. That interpretation is also consistent with the result in the *Tabouti* case.

E. Findings

14. Only the sufficiency of the salary paid is relevant when considering section 20 of the Act.
15. There is no discretion whereby the Court can extend time.
16. Regardless of the provisions of section 20 of the Act, if there has been underpayment of salary, the teachers' legal entitlement to redress has not been extinguished.
17. The shortfall of salary is admitted. It is iniquitous, for the State as good employers, to effectively ignore the 2005 GRTD and underpay these highly skilled and valued senior secondary teachers for 11 years, and to then maintain that the Claimants are only entitled to 3 years back-pay pursuant section 20 of the Act, all because they commenced their action too late. To allow such conduct to result in the wrongful retention of part of the Claimants' salaries is tantamount to an inducement for the State to not properly fulfil its duties and obligations towards its employees. As a matter of public policy that cannot be condoned.
18. For these reasons, it is appropriate in my view, to interpret the wording of section 20 in as favourable a manner as possible to the Claimants.
19. Throughout the period from 1 January 2006 (or when they commenced to serve) to 31 December 2017, these Claimants were entitled to be remunerated as per the 2005 GRT determination for teachers.



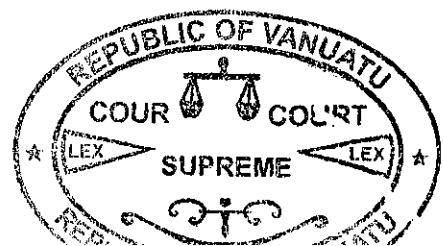
20. As the Claimants employment by the Defendants is on-going, the 3 years restriction provided for in section 20 cannot be calculated as commencing from when any of these teachers were dismissed, or when they resigned or retired. The only remaining relevant point of time is when the terms of their remuneration were altered, namely the further GRT determination for teachers in 2017, which set the new annual remuneration rates as from 1 January 2018.
21. Therefore, I hold that 1 January 2006 to 31 December 2017 is "...the period to which their remuneration [claim] relates". Three years from the end of that period is the cut-off point that section 20 relates to.

F. Result

22. This Claim originally involved 52 Claimants. The Claims of 35 of them were settled between counsel, and 2 further Claimants were added subsequently. Mr Tari was directed to file Discontinuances in respect of the 35 Claimants no longer involved in the dispute, but to date that appears to not have been attended to. Accordingly, it is not possible for the Court to list the Claimants and their awards.
23. Mr Tari will need to advise the position as to the remaining Claimants.
24. I take comfort from the fact that Mr Huri's memorandum admitting the shortfall has made it clear that there is no dispute regarding the amounts owing to the individuals and that payment will be forthcoming once this judgment is published.
25. For the avoidance of doubt, each of the Claimants remaining as part of the Claim has succeeded in their claims for the shortfalls between 1 January 2006 and 31 December 2017.
26. The Defendants are to pay each of those Claimants the amounts of the shortfalls within 21 days from the date of this decision.
27. Pursuant to Rule 14.5(1), I now schedule a Conference at 1.30pm on 14 May 2020, to ensure the judgment has been executed or for the State to explain how and when it is intended to pay the judgment debts. For that purpose, this judgment must be served on the State Law Office.


G. Costs

28. Mr Tari sought costs on the indemnity basis. Mr Huri submitted that the standard basis was a fairer measure.
29. For costs on the indemnity basis to be appropriate, the Court in *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson* [2002] EWCA Civ 829, held: "... there must be something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs."
30. Galling though the State's attitude towards this Claim has been, the manner in which the case has been conducted is not one which comes within the above definition.



31. Accordingly costs on the standard basis are assessed against the Defendants. If they cannot be agreed between counsel, they are to be taxed. Once settled, the costs are to be paid within 21 days.

Dated at Port Vila this 24th day of April 2020
BY THE COURT


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Justice G.A. Andrée Wiltens

