

**BETWEEN: VANUATU TEACHERS UNION**

First Claimant

**AND: ALMANO MARA, ANDERSON HOMU,  
BRYENT FORAU, ELODIE  
LINGTAMA, OREVA J ALI, DONALD C  
TOM, CLAUDIE BULE, HAMILSON  
BULE, JAMES WILLIAM, JEAN NOEL  
PAKOA, JESSYNTA BULEBAN,  
MICHA OLIVER, LYNDON TAGARO  
TAMBE, PAUL R TABINOK, SIKAL  
IARUEL, ANNETTE DANIEL, RHONDA  
L.B NATAPEI, JOE PAUL STEPHEN,  
PRESCILLA WEIMA PAKOA, &  
SEBASTIEN YARAPIA**

Second Claimants

**AND: TEACHING SERVICE COMMISSION**

First Defendant

**AND: REPUBLIC OF VANUATU**

Second Defendant

**AND: DAVID NARAI & WILLIE ABIUT**

Third Defendant

*Date:* 31<sup>st</sup> October 2023

*Before:* Justice W.K. Hastings

*Counsel:* Mr S. Kalsakau for the Claimants

Mr S. Aron for the First and Second Defendants

No step taken by the Third Defendants

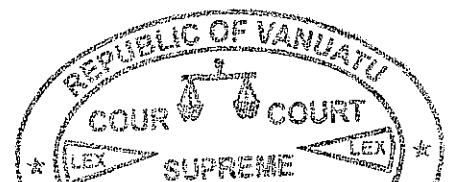
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## JUDGMENT

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### Introduction

1. The first claimant, the Vanuatu Teachers' Union (VTU) is a registered union under the Trade Unions Act [cap. 161]. The second claimants are teachers who are members of



the VTU. For the purpose of this hearing, the teachers also serve on the National Executive Council (NEC) of the VTU.

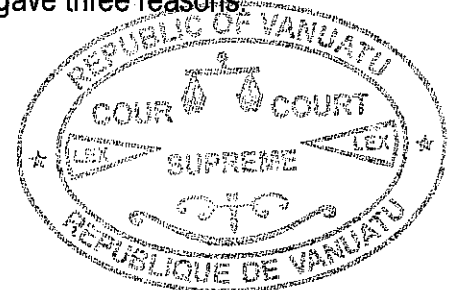
2. The teachers are employed by the first defendant, the Teaching Service Commission (TSC or Commission).
3. The claimants seek orders quashing the decision of the TSC to suspend or terminate the claimants' employment on the ground that the decision was unlawful, unreasonable and irrational. They also seek orders reinstating them, reimbursing their salary not paid during the period of their suspension with 5 percent interest, and costs. As well, they seek general and punitive damages, orders for payment of employment entitlements and a 6 times multiplier under s 56(4) of the Employment Act.
4. This hearing, however, was for the purpose of determining a preliminary point, which was whether or not being a member of a trade union executive committee (in this case the NEC of the VTU) is to be considered as "paid employment or other work" within the meaning of s 48(1) of the Teaching Service Act No 38 of 2013, or whether such a person falls within the exemption in s 48(3) from the requirements of s 48(1).
5. Section 48 provides as follows:

**"48 Private employment**

- (1) *Except as provided for in section 57, an employee in the Teaching Service may not engage in any paid employment or other work or operate any business outside the Teaching Service except with the prior agreement in writing from the Commission. This includes receiving additional payment from an Education Authority, school council or other person in relation to work performed at a school or elsewhere as part of or related to the employee's work in the Teaching Service.*
- (2) *The Commission must not give approval under this section where the paid employment, other work or business will interfere with the proper performance of the employee's duties in the Teaching Service.*
- (3) *This section does not apply to work undertaken for the community and professional organisations which is essentially voluntary but where expenses, an honorarium or an allowance is paid."*

Background

6. No evidence was called. Instead, Mr Kalsakau set out "undisputed" facts which Mr Aron agreed were undisputed. They are as follows.
7. In November 2019, the second claimants were elected as members of the NEC of the VTU.
8. On 14 April 2022, the TSC suspended the second claimants by letter alleging their membership of the NEC of the VTU breached s 48. The letter gave three reasons:



- (a) They did not seek prior written approval before their engagement with the VTU.
  - (b) They were receiving an allowance or wages from the VTU on top of their teaching salary.
  - (c) Their involvement with the VTU was improper conduct likely to have a detrimental effect on the reputation of the Teaching Service.
9. The TSC initiated disciplinary proceedings and investigated the second claimants' actions. In July 2022, the second claimants responded to the investigation report:
- (a) They did not deny they were engaged by the VTU.
  - (b) They did not deny they received a sitting allowance.
  - (c) They disputed that their engagement was "private employment" in terms of s 48(1) (the phrase is in the heading, and is not in the actual provision), and in any event, said their engagement fell within the exception for "community and professional organisations" in s 48(3).
10. On 8 August 2022, the TSC decided the second claimants had breached s 48 because:
- (a) The positions they occupied were not "voluntary" because they were elected to them.
  - (b) An approval from the TSC was necessary and was not obtained.
  - (c) Section 48(3) did not apply because they were elected and occupied positions without approval.
11. On 9 September 2022, the TSC told the second claimants it would terminate their employment unless they resigned from their posts on the NEC of the VTU within seven days.

### Submissions

12. Mr Kalsakau submitted the TSC has not taken into account the wider context of the trade union movement in Vanuatu. Vanuatu is a signatory to two International Labour Organisation Conventions. The Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) was given the force of law in Vanuatu by the Freedom of Association and Protection of the Right to Organise Convention (Ratification) Act (No. 8 of 2006), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) was enacted by the Right to Organize and Collective Bargaining Convention (Ratification) Act (No. 6 of 2006).
13. Mr Kalsakau submitted that the Trade Union Act [cap. 161] provides for the "formation, registration and regulation of trade unions and matters incidental thereto." It provides for trade unions to have their own rules and for elections of trade union officials. It also

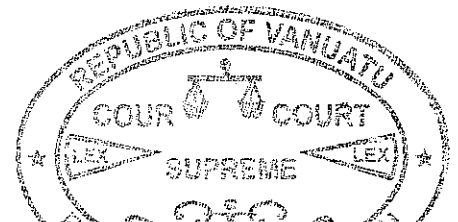


provides that union funds may be used for the payment of salaries and allowances. He submitted that the VTU is a professional organisation whose membership is voluntary. He submitted that it is entitled by law to run its affairs under its own rules, to elect members to its executive offices, and to receive salaries and allowances.

14. Mr Kalsakau also submitted the TSC has an obligation under s 18 of the Teaching Service Act (No. 38 of 2013) to ensure that all "aspects of the management of its employees is carried out without discrimination on the basis of ... trade union membership or activity ...". The VTU also has an obligation under s 5(4) of the Act to nominate a member to the Minister who recommends to the President his or her appointment to the TSC.
15. Finally, Mr Kalsakau submitted it is not a question of deciding whether a later statute overrides an earlier statute, or whether general legislation is overridden by specific legislation. He submitted the question is whether service on the executive committee of the VTU is protected by s 48, and that must be determined by reconciling the various applicable statutory provisions.
16. Mr Aron submitted the second claimants are not protected by s 48(3) because the work they undertake for the VTU is not essentially voluntary. They did not volunteer for executive office in the VTU, they were elected to, and paid in, those positions. As their work was not voluntary, they needed to obtain prior written agreement from the TSC under s 48(1). They did not obtain that agreement in writing.
17. Mr Aron also submitted that the legislation enacting the ILO Conventions in 2006 is general legislation which is overridden by subsequent specific legislation, in this case, s 48 of the Teaching Service Act 2013.
18. He submitted that "being part of the Vanuatu Teachers' Union executive is to be considered as private employment within the meaning of s 48 of the TSC Act and they should have obtained approval from the TSC."

### Discussion

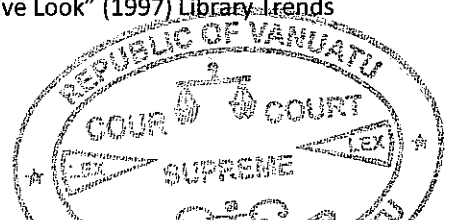
19. In order to resolve the issue of how s 48 applies to service on the executive committee of the VTU, I will first consider the structure of s 48, and then the meaning of various phrases within the section in light of the purpose of the Act.
20. Section 48(1) prohibits a teacher from engaging in any paid employment, other work, or operating any business outside the Teaching Service without written from the Commission. Included in these types of work is paid work performed at a school of elsewhere as part of or related to the teacher's work in the Teaching service from an Education Authority, a school council or other person. The inclusion clarifies what is included in the prohibition.
21. Section 48(2) then imposes an obligation on the Commission not to approve any of the paid employment, other work or business specified in subsection (1) if it would interfere with the proper performance of the teacher's duties in the Teaching Service. This was the provision used by the Commission not to approve the teachers' service on the NEC.



22. Section 48(3) then states that the whole section, that is the work prohibited in subsection (1), and the obligation imposed on the Commission in subsection (2), does not apply to work undertaken for the community and professional organisations which is “essentially voluntary” but where an allowance might be paid. Excluding such work from the ambit of subsection (1) implies that but for the exclusion, it would otherwise have been included. This lends a broad interpretation to the work that is prohibited in subsection (1). If essentially voluntary work for the community and professional organisations had not been excluded, it would have been necessary to obtain the prior approval of the Commission to do it.
23. Had the structure of the section not lent itself to a broad interpretation of “paid employment or other work or operate any business” in subsection (1), the heading “Private employment” might have pointed in the opposite direction, limiting the prohibition in subsection (1) to private paid work. If that were the case, the teachers would not have needed prior written approval of the Commission to serve on the executive committee of the VTU. Although headings can be used to interpret words in a statutory provision, they are not part of the provision, and must give way to the meaning Parliament intended the words to have in light of their ordinary meaning, statutory context, and the purpose of the statute itself. It is evident from the structure of s 48 that essentially voluntary work for the community and professional organisations would have been included in subsection (1) despite the heading, were it not excluded by subsection (3).
24. The issue then comes down to whether or not the exemption in s 48(3) applies to service on the executive committee of the VTU. To resolve the issue, it is necessary to define what Parliament intended “professional organisation” and “essentially voluntary” to mean. I will consider the meaning of “professional organisation” first.
25. “Professional organisation” is not defined in the Teaching Service Act. The ordinary meaning of the phrase would include an organization of people with particular professional qualifications. There is nothing inherent in that meaning that would exclude a union, the membership of which included people with particular professional qualifications such as teachers. A professional organisation exists to advance a particular profession, support the interests of people working in that profession and serve the public good. A professional organisation typically requires member dues, has an elected leadership body and includes a range of subcommittees. Indeed, in her article “Professional Associations or Unions? A Comparative Look,” Tina Hoverkamp states
- “In recent years, unions, in recognition of the special interests of professional workers, have expanded the scope of negotiations beyond the federally mandatory topics of wages, benefits, and work conditions. Organizations such as the National Education Association (NEA) and the American Federation of Teachers (AFT) have been involved in educational reform, school restructuring, and other measures designed to enhance teaching and learning.”<sup>1</sup>*
26. There is increasingly little to distinguish a professional organisation from a union, and increasingly less reason to draw a distinction. The VTU is registered as a trade union.

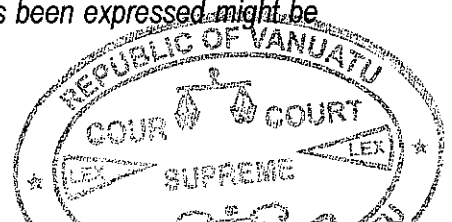
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<sup>1</sup>Tina Maragou Hoverkamp, “Professional Associations or Unions? A Comparative Look” (1997) *Library Trends* 232 at



- Its members are teachers, a single distinct profession, which means it has the characteristics of both a professional organisation and a trade union as ordinarily defined.
27. There are other indications in the statute that Parliament intended the phrase “professional organisation” to include a union, in this case, the VTU. One is the objective of the Act; the other are the references in the Act to the VTU itself.
  28. Section 8 of the Interpretation Act [cap. 132] requires a statute to receive “such fair and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.” Section 2 of the Teaching Service Act sets out five principal objectives. One of them is “to provide a legal framework for the employment of teachers in schools to the benefit of children, their families and the nation.” Section 48 is therefore to be interpreted in light of those objectives.
  29. Part of the legal framework for the employment of teachers is the VTU. The Teaching Service Act recognises the role of the VTU in s 5(4), and it prohibits the TSC from discriminating amongst its employees on the basis of trade union membership. Section 18(2)(e) imposes an obligation on the TSC as a good employer to “actively encourage the professional development of its employees, both individually and collectively.” Collective professional development can be achieved in many ways, and nothing in the Act would seem to exclude collective professional development carried out by a union or professional organisation, particularly as the Act specifically refers to the VTU. Section 18(2) imposes an obligation on the TSC to ensure the “fair and proper treatment of its employees in all aspects of their employment” of which union membership is a part. “Professional organisation” therefore must be interpreted in light of the scheme of the Act which recognises collective professional development, trade unions generally and the VTU specifically. Given the references to trade unionism in s 18(2) and the reference to the VTU itself in s 5, the VTU forms part of the legal framework for the employment of teachers.
  30. The Teaching Service Act was passed in 2013, seven years after the two ILO Conventions were given the force of law within Vanuatu. There is nothing in either Convention that directly affects the interpretation of “professional organisation,” but there is little doubt that both Conventions reflect Vanuatu’s commitment to workers’ organisations, the ability of those organisations to elect their representatives “in full freedom,” and to organise their activities, without public authorities restricting those rights. Parliament passed s 48 in the knowledge of Vanuatu’s obligations under those Conventions.
  31. It is a well-established principle of statutory interpretation that Parliament is presumed not to legislate in breach of its international obligations. Where a word in a statute is capable of holding more than one meaning, international instruments can be used give the word a meaning that is consistent with Vanuatu’s international obligations. In *Minister for Immigration and Ethnic Affairs v Teoh*, (1995) 183 CLR 273, the High Court of Australia said at 287:

*“It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law. The form in which this principle has been expressed might be*

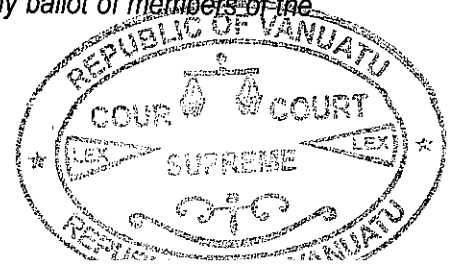


*thought to lend support to the view that the proposition enunciated in the preceding paragraph [that ambiguous statutes should be interpreted in accordance with Australia's international obligations] should be stated so as to require courts to favour a construction, as far as the language of the legislation permits, that is in conformity and not in conflict with Australia's international obligations. That is indeed how we would regard the proposition as stated in the preceding paragraph. In this context, there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail. So expressed, the principle is no more than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligations."*

32. Reference may also be made to a treaty to interpret a statute that does not give direct effect to it. Courts are increasingly willing to consider a treaty in that situation because they impute to Parliament an intention to legislate consistently with its international obligations. (*Tavita v Minister of Immigration* [1994] 2 NZLR 257, 266 New Zealand Court of Appeal.) Courts take this approach in particular when the treaty, especially a human rights treaty, is intended to control state action.
33. It would be peculiar if the term "professional organisation", found in a statute that recognises unions, professional development, and the VTU itself, which applies to a single profession, and which was passed in the knowledge of Vanuatu's international labour commitments, were to be given an interpretation that prohibited teachers' service on the national committee of the VTU unless they first obtained their employer's permission to do so. In my view, and for these reasons, service on the executive committee of the VTU includes work undertaken for a professional organisation in terms of s 48(3).
34. I turn now to consider the meaning of "essentially voluntary". The gist of Mr Aron's submission is that work undertaken on the executive committee of the VTU by a member of the VTU is not voluntary because the member is elected to office. The two concepts are not mutually exclusive. People often offer themselves for election to many voluntary positions. Standing for election as the chair of a body corporate is essentially voluntary work that may or may not come with an allowance. Standing for election to the board of a charity is also essentially voluntary work. The mechanism by which one becomes chair or a member of a board or committee is determined by the organisation itself and does not affect the characterisation of the work as "essentially voluntary."
35. This interpretation is supported by other domestic statutes in the same field. Section 23(4) of the Trade Unions Act [cap. 161] anticipates that members of a trade union may be elected to office:

*"(4) No member of a registered trade union [such as the VTU] shall, by way of any arbitrary or unreasonable discrimination, be excluded from –*

- (a) being a candidate for, or holding any office in, the trade union;*
- (b) nominating candidates for any such office;*
- (c) voting in any election for any such office or in any ballot of members of the trade union;*



*(d) attending and taking part in meetings of the trade union."*

36. Article 3 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) to which Vanuatu is a party, provides that

1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

37. Vanuatu's domestic legislation and its international obligations emphasise that it is up to the organisations themselves to determine their constitution, rules, administration, activities and significantly, the election of their representatives "in full freedom." Convention No 87 imposes an obligation on public authorities such as the Commission to refrain from any interference which would restrict those rights. Being elected to the national committee of the VTU does not make the work undertaken on that committee any less voluntary.

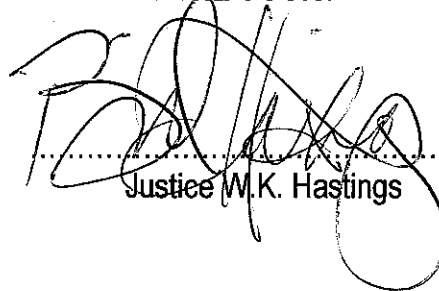
Conclusion

38. For the reasons above, election to and service on the national committee of the VTU falls within the exemption in s 48(3) as work undertaken for a professional organisation which is essentially voluntary.

39. The costs of this application are awarded to the claimants and will be taxed if they cannot be agreed.

**Dated at Port Vila this 31<sup>st</sup> day of October 2023**

**BY THE COURT**

  
Justice W.K. Hastings

