IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 18/580 CoA/CIVA

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

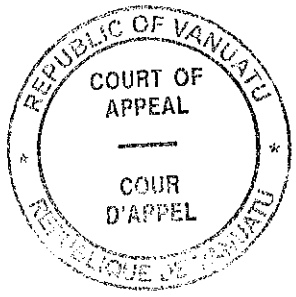
AND: **REPUBLIC OF VANUATU**
Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Raynor Asher
Hon. Justice Dudley Aru
Hon. Justice Gus Andrée Wiltens

Counsel: *D. Yawha for the Appellants*
L. Huri for the Respondent

Date of Hearing: *19th April, 2018*

Date of Judgment: *27th April, 2018*



JUDGMENT

1. This is an appeal from an order of the Supreme Court that dismissed the proceedings brought by the appellants in respect of monies they claimed were due to them for past remuneration.

2. In 2016 the appellants were seven Directors General of various Ministries. Relevant to these proceedings each appellant was employed pursuant to Section 17A of the Public Service (Amendment) Act No. 1 of 2011 under a written contract dated 24 November 2012 (the 2012 contract) which was for a term of four years.

3. Evidence was led before the Supreme Court that when the appellants signed the 2012 contracts they considered that the remuneration package set out in the

2012 contracts was inadequate. However they signed the contracts as their former contracts were about to come to an end pursuant to the 2011 amendment to the Public Service Act. The Appellants understood that the remuneration package set out in the 2012 contract would be reviewed shortly thereafter by the Prime Minister. The anticipated review was delayed. However on 10th Feburary 2016 each appellant signed a new contract governing his employment (the 2016 contract). The relevant provisions of the 2016 contract are as follows:

"2. REVOCATION OF PREVIOUS CONTRACT
2.1 The Contract of Employment between the Employer and the Employee dated 24 November 2012 is hereby rescinded.

3. APPOINTMENT
3.1 The Employer agrees to employ the Employee and the Employee agrees to serve the Government of the Republic of Vanuatu as the DIRECTOR GENERAL of the Ministry;
3.2 The Employee's term of employment is for 4 years commencing from 24 November 2012;

....

6. REMUNERATION
6.1 The Employee shall be paid an annual salary of VT6,000,000 payable in arrears in accordance with the Government payroll schedule.

....

37. ENTIRE CONTRACT
37.1 This Contract constitutes the entire agreement between the Parties. Any prior arrangement, agreements, representations or undertaking are superseded."

4. The terms of the 2016 contract also make provision for other matters such as allowances, annual leave, sick leave, and several other benefits. The rate of remuneration in paragraph 6.1 was considerably higher than the rate provided for in the 2012 contract.

5. The appellants sought payment from the respondent of the difference between the amounts that had been paid to them under the 2012 contract, and an amount calculated at the rate of VT6 million per annum from 24 November 2002. By Council of Ministers decisions numbered 221 of 2016 and 236 of 2016 the Republic refused to meet the appellants' claims.

6. The appellants commenced judicial review proceedings seeking orders quashing the two decisions of the Council of Ministers, and a mandatory order directing the Republic to release forthwith to the appellants their entitlements calculated pursuant to the provisions of the 2016 contract.

7. Whilst the proceedings were commenced by way of application for judicial review, the case was tried in the Supreme Court as if it were a straight forward claim in respect of monies due under contracts of employment. This occurred with the concurrence of the parties, and the primary judge considered the proceedings on that basis.

8. The primary judge accepted that Clause 2.1 of the 2016 contract brought to an end the 2012 contract as from 10th February 2016. However, the judge reasoned:

> *"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.*
>
> *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 10th February 2016."*

9. The primary judge further considered that if there was to be backdating of specific matters under the 2016 contract there would have been some provisions in it so stating. There was no such reference. The appellants' claim for monies due under the 2016 contract was therefore dismissed.

10. We are unable to agree with the conclusion reached by the primary judge. We consider the terms of the 2016 contract were clear. Under Clause 2.1 the 2012 contract was rescinded. In short, the 2012 had no further operation. That conclusion is confirmed by Clause 37.1. After 10 February 2016, the only operative contract between the parties as from 24th February 2012 was the 2016 contract.

11. Under the 2016 contract the employment of the appellants commenced from 24th November 2012. Their remuneration from that date is the amount provided by Clause 6.1. In our opinion the claims of the appellants were plainly correct.

12. There was no need for 2016 contract to expressly provide for backdating of the remuneration to achieve this outcome. The so-called backdating followed automatically from the provisions of Clause 3.2. They are unambiguous as to the contractual intention. If the interpretation we have placed on the 2016 contract were not correct, there would be no contractual provision for the remuneration for the appellants.

13. At trial evidence was led to establish that the parties to the 2016 contract understood that the contract would have the effect of backdating the new rate of remuneration to 24 February 2012, and the appellants argued that this was the intentions of the parties. If it were necessary to have regard to secondary evidence to assist in interpreting the 2016 contract the evidence supports the appellants' argument that the parties intended the 2016 contract to mean that their new remuneration rate would operate from 24 February 2012. However, we consider the terms of the 2016 contract are not ambiguous, and there is no need to consider secondary evidence.

14. The appeal must be allowed. The judgment in the court below, including the order against the appellants as to costs, is set aside.

15. The appellants are entitled to the orders sought in the application for judicial review quashing the Council of Ministers' Orders numbered 221 of 10th November 2016 and 236 of 24th November 2016.

16. The appellants are entitled to recover from the respondent the difference between the remuneration and other allowances calculated under the 2016 contract, and the amounts actually paid to them under the 2012 contracts before decision. The liability to pay that difference arose on 10th February 2016 and interest on the difference should run from that date. The parties are agreed that the appropriate interest rate is 5%.

17. The parties were unable to produce to this Court an agreed schedule of the amounts due to each appellant. In these circumstances this Court is unable to make final orders. The matter will have to be returned to the Supreme Court to assess the amount of these arrears if the parties are unable to reach agreement as to the amount including interest payable to each appellant.

18. The formal orders of the Court are:

(a) Appeal allowed;

(b) Orders of the Supreme Court made on 26th January 2018 are set aside;

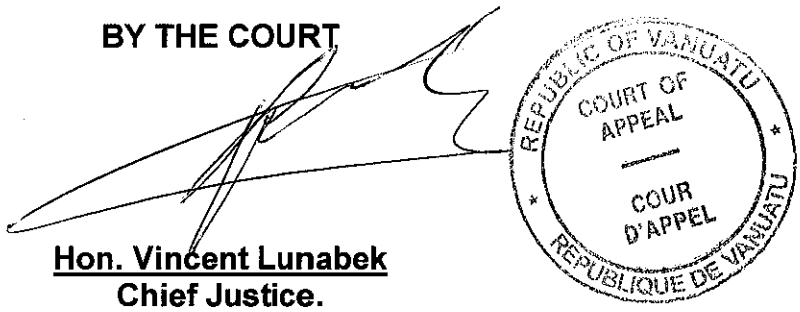
(c) Order quashing the Council of Ministers' decision numbered 221 of 10th November 2016 and 236 of 24th November 2016;

(d) Matter returned to the Supreme Court to assess monies due to each appellant under the 2016 contract together with interest at the rate of 5% from 10th February 2016;

(e) The respondent to pay the appellants' costs both in the court below and in this court.

DATED at Port Vila, this 27th day of April, 2018.

BY THE COURT



Hon. Vincent Lunabek
Chief Justice.