

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**

(Appellate Jurisdiction)

CIVIL APPEAL CASE No.29 OF 2008

BETWEEN: THE PUBLIC SERVICE COMMISSION
First Appellant

AND: VANUATU GOVERNMENT
Second Appellant

AND: ARNOLD ANTOINE, NASSE CARLO, JACK
NAFEALI, JOSEPH ALICK, BEN JOSEPH,
CHRISTIAN BASIL, ALEXINE BOAR, BEN
ASMUS, LENCY ISAIHA, CLENTIN RONSON,
MARIE OUNGTON, PEGGY ALLANSON,
MAGARETH KEHMA, MAEL SOLOMON and
TASO
Respondents

Coram: Chief Justice Vincent Lunabek

Justice John von Doussa

Justice Oliver Saksak

Justice Ronald Young

Counsel: Mr Ari Jenshel & Ms Florence Williams for the First & Second Appellants

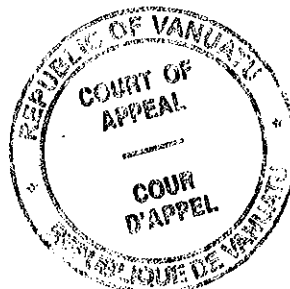
Mr George Boar for the Respondents

Date of hearing: 28th November 2008

Date of Judgment: 5th December 2008

REASONS FOR JUDGMENT

As a result of the Public Service "right sizing exercise" in 1998 the respondents were transferred from positions they had previously held as permanently appointed public servants within the Department of Cooperatives & Rural Business Development to positions in a newly structured Department of Cooperatives and Business Development Services. In 2005 they commenced



proceedings against their employer, the Public Service Commission (the Commission) alleging they had been underpaid in their new positions.

In Reasons for Judgment finally published and sealed on 26 September 2008 Bulu J held that:

- (a) The transfer of the claimants from positions in the old structure to positions in the new structure amount to acting appointment in the new structure.
- (b) The claimants are entitled to acting allowances.
- (c) The Commission failed to act as a good employer when dealing with the claimants' grievances.

The Court made the following Orders to give effect to its conclusions:

- “(a) The defendants to pay to the claimants ... the sum of Vatu 5,964,390 as has been subsequently agreed to by the parties following the judgment delivered orally on 14 July 2008.*
- (b) The Commission to meet within 30 days of receipt of a copy of this written Judgment to determine the appointments of the claimants pursuant to s.25(3) & (4) of the Public Service Act.*
- (c) The defendants to pay the costs and incidental to this action.”*

Essentially the trial Judge based his reasoning on Chapter 4, clause 4.5 of the Public Service Staff Manual (the Manual) which provides for the payment of an acting allowance where an employee is appointed to act in another position and the other position is remunerated at a higher level than the employee's position, and on s.15 of the Public Service Act [CAP.246] which he held placed a duty on the Commission to act as a good employer.

The appellants appeal against the whole of the judgment and contend that the respondents' claim should have been dismissed as the claimants were not underpaid.

To understand the issues raised by the parties it is necessary to consider the legislation and the context in which the Commission must operate, and the facts surrounding the transfer of the respondents.



The Commission is established by Chapter 9 of the Constitution of the Republic of Vanuatu. By Article 60, the Commission shall be responsible for the appointment and promotion of public servants who comprise the Public Service. By Article 57(3) no appointment shall be made to a post in the Public Service that has not been created in accordance with a law. The Act is the law relevant to this claim which details how posts are created in the Public Service, and generally how the Commission is to carry out its constitutional functions. The objects of the Act are set out in s.3 including "to provide a legal framework for the effective and fair employment, management and leadership of employees". Section 4 sets out Guiding Principles of the Public Service which apply both to public servants and to the Commission. The guiding principles include:

- (b) make employment decisions based on merit;
- (d) have the highest ethical standards;
- (k) observe the law.

Section 8 specifies the major functions of the Commission including the appointment and promotion of employees on merit. Section 15 in particular has been relied upon by the respondents and by the trial Judge. The first two subsections of section 15 provide:

"15. Duty to act as a good employer

- (1) *It shall be the duty of each member of the Commission to ensure that the Commission shall, in the performance of its functions, responsibilities and duties, be a good employer.*
- (2) *The Commission shall as a good employer:*
 - (a) *ensure the fair and proper treatment of employees in all aspects of their employment; and*
 - (b) *require the selection of persons for appointments and promotion to be based upon merit; and*
 - (c) *promote good and safe working conditions; and*
 - (d) *encourage the enhancement of the abilities of individual employees; and*
 - (e) *promote and encourage an equal opportunity programme; and*



(f) *abide by the principles set out in section 4.*"

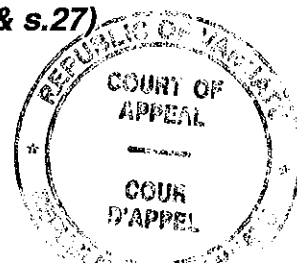
Part 4 of the Act comprising sections 17 to 31 concerns the establishment and day to day administration of the Public Service and promotion. Section 17 provides that all appointments and promotions in the Public Service must be in accordance with the Act. Section 25 deals in particular with promotion and salary increments including for the situation of an employee who has been in an acting position. Sections 26 and 27 make provision for the transfer of public servants from one post or locality to another, and for redundancy in the particular circumstance that the Commission finds that a greater number of persons are employed than is necessary or, by reason of Government policy or economic necessity, restructuring of a department is necessary.

Section 43 empowers the Commission to make regulations, but it is not suggested that there is any relevant regulation which has application to the present case. Section 44 empowers the Commission to publish a Public Service Staff Manual (the Manual) which makes specific provisions for a wide range of conditions of employment. Of particular relevance, the Manual contains provisions specifying the entitlement of public servants appointed to acting positions. As a general observation, it is necessary to remember that the provisions of the Manual must be read subject to the provisions of the Act itself.

In September 1998, the Commission considered an organisational employment structure which proposed new posts, with corresponding salary levels and incremental points, by reference to Schedule 1 of the Manual for the establishment of the Department of Cooperatives and Business Development Services. The Commission approved the structure.

Each of the respondents received a standard form letter dated 31st December 1998 advising them of their transfer to a new position in the new structure. Subject to the name of the staff member, the position title, and the position number, being specific to each respondent, the letter read:

"Notice of Transfer (Public Service Act 1998 s.26 & s.27)



I am writing to inform you that the Public Service Commission at meeting number 39 on 1 December 1998 has confirmed that you be transferred at your current salary to:

*Position:
Post No.:
Location:*

This transfer takes effect from 1 January 1999 or as directed by the Director-General. If the transfer is to an Acting Post at higher grade, the post must be advertised internally and externally and filled after a merit selection process.

The Public Service Commission after receiving the views of your Director-General has made this decision.

On behalf of the Commission and the Vanuatu Government I wish to take this opportunity (to) thank you for the services in your previous post and wish you every success in your new post.

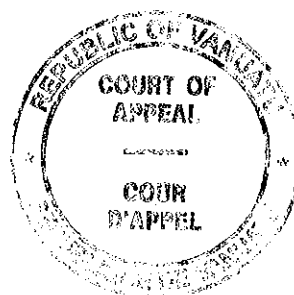
This letter is co-signed by the Secretary of the Public Service Commission and your Director-General. The Ministry of Finance and Economic Management is advised by copy of this letter to arrange for your payroll details.

I wish you every success in your future and as part of the new Public Service.

*Job Boe
Secretary
Public Service Commission*

*Roy Mickey Joy
A/Director-General
Ministry of Trade & Business Development."*

Each of the respondents gave evidence before the trial Judge that in their new positions they are doing much more than in the former structure under which they worked due to their new job descriptions. This evidence was not contested by the Commission.

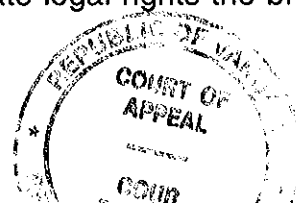


The trial Judge held that s. 26 of the Act authorised the transfer of the respondents to their new positions, but as they were doing more in those positions their transfer amounted to acting appointments governed by Chapter 4, clause 4.5 of the Manual. He held that each respondent was therefore entitled to receive an acting allowance calculated under clause 4.5 on top of his former (“existing”) salary. As the appointments were to acting positions, the trial Judge held that the Commission was required to meet to determine whether each respondent should be appointed to the position permanently.

The Commission’s case throughout has been that the respondents were not appointed to acting positions. Their transfer was at their existing salaries as s.15(2)(b) required that they could not be appointed outright to the new post without going through a merit selection process. The Commission’s position was summarised by Mr Thomas Felix, the Manager, Executive Services of the Commission, in paragraph 5 of his affidavit evidence:

“5. I have reason to believe that the claimants were not appointed on an acting basis as indicated in their claim. The transfers of the claimants were to higher graded positions. As such, the positions must be advertised in accordance with the provisions of s.15(2) of the Public Service Act requiring the Commission as a good employer to select persons for appointment and promotion based upon merit.”

We consider the first issue to be addressed is the purpose and operation of the Guiding Principles of the Public Service contained in s.4 and the “good employer” provisions in s.15 of the Act. In our opinion the purpose of these provisions has been misunderstood by the learned trial Judge and by the case of the appellants. These provisions are in the nature of aspirational guidelines intended to assist the Public Service Commissioners in carrying their duties to ensure an efficient, effective and smooth running Public Service. Section 4 applies both to the members of the Public Service and to the Commission. While s.15 is headed “Duty of Commission to act as a good employer” the duty created by s.15(1) is a duty placed on each individual Commissioner, not directly on Commission itself in its capacity as the employer of the Public Service. The provisions in ss.4 & 15, standing alone, are not intended to create private legal rights the breach of which



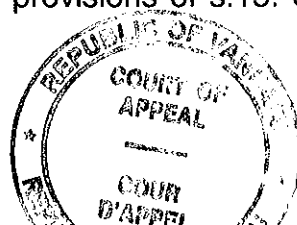
can be enforced as a term of the contract of employment. Similar statutory provisions were considered by the Court of Appeal in New Zealand in the **Queen v. Wood** [NZCA 251]. There, s.56(1) of the State Sector Act 1988 (NZ) provided that the Chief Executive of a Department shall operate a personnel policy that complies with the principle of being a good employer, and s.56(2) provides that for the purposes of the section a “good employer” is one who operates a personnel policy that includes provisions requiring, among other features, “an equal opportunity program”. Section 58(3) provides that an equal opportunity program means a program that is aimed at the identification and elimination of institutional barriers tending to cause inequality. The Court of Appeal, in considering these sections, said at [14]-[15]:

“What a Chief Executive in the position of the Commissioner is obliged to do under s.58 is to endeavour to achieve, through an appropriate program, the identification and elimination of barriers which may cause or perpetuate inequality. But, even once that is achieved, differences in status, qualifications, skill and experience will naturally remain and will justify an appropriate differential in the treatment of employees...”

We are satisfied that it was not intended by Parliament that a private claim for damages could be directly made on the basis of ss.56 & 58 alleging a breach of duty on the part of the Chief Executive in failing to be a good employer or in failing to implement or maintain appropriate EEO policy.”

The functions of the Commission, by its determinations, is to establish the terms and conditions for the employment of public servants, for example, as in this case, by setting up a departmental management structure which includes from top to bottom positions of graduated responsibility with each position having a job description and a corresponding salary point within the Public Service structure; and applying to that structure the administrative procedures provided for in the Manual.

In making determinations which set the terms and conditions, each member of the Commission is to be guided by the object and provisions of the Act, including the Guiding Principles in s.8 and the “good employer” provisions of s.15. Section 15



gives individual Commissioners additional guidance about the criteria which constitute a "good employer" but these criteria are all general in nature, and in their application to a particular case will have to take into account all the circumstances of the situation.

The responsibility of the Commissioners is to create a set of terms and conditions that reflect and balance the Guiding Principles as the circumstances permit. The Commissioners should establish terms and conditions that are clear, precise, and capable of ready application. In doing so, the Commissioners must make difficult judgments. If a determination reached by the Commissioners is thought by one or more public servants not to reflect the guiding principles, for example if they contend that terms and conditions fixed do not meet the standard of a good employer, the remedy, and the only remedy, is through judicial review of the Commissioners' decision. The determination of the Commissioners can be challenged in a Court on public law grounds. In particular, a challenge could be mounted that the individual Commissioners failed to properly exercise their statutory functions because they failed to take into account relevant matters or took into account irrelevant matters. However, so long as the determination ultimately made, when looked at as an overall package, can fairly be said to reasonably balance all relevant considerations, and does take into account the relevant matters, the determination will be upheld as valid.

On the other hand, if the Court on judicial review holds that relevant matters were not taken into account, or irrelevant matters influenced the decision, or that the result disregards the Guiding Principles of ss.4 & 15, the Court would set aside the decision of the Commissioners and send the matter back to them to be decided according to correct principles of law. What the Court is not empowered to do and cannot do is to re-write the terms and conditions fixed by the Commissioners in a determination so that terms and conditions reflect the Court's notion of what is required of a good employer.

Once the Commission has determined the terms and conditions for employment, as it has done through the promulgation of the Manual, in so far as it deals with the terms and conditions on which public servants are engaged, and through the



establishment of the new structure for the Department of Cooperative and Business Development Services, those terms and conditions must be applied according to their terms. Once the Commissioners have set the terms and conditions the guiding principles in ss.4 & 15 no longer have direct application. Those sections cannot be called in aid by a member of the Public Service to modify or change the terms and conditions which the Commissioners have fixed.

In this case there has been no challenge to the decision of the Commission which approved the new structure in 1998, and it is now years too late for such a challenge to be made.

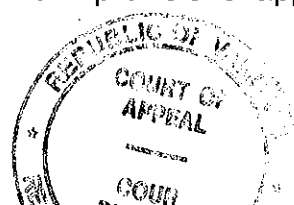
In our opinion the approach of the appellants to the operation of s.15(2)(b) of the Act as stated by Mr Felix in his affidavit quoted above was mistaken, as was the reliance which the trial Judge placed on s.15. Section 15 was relevant when the Commissioners were exercising their functions in determining the provisions of the Manual, and the new structure. However, thereafter the rights and obligations of public servants appointed to positions within the new structure must be determined according to the actual terms and conditions set by the Commission.

The first question arising under the terms and conditions is whether the respondents were appointed to an acting position as provided in Chapter 4, clause 4.5 of the Manual. Relevantly, that clause, by its terms, operates only in the circumstances described in sub-clause 4.5(a) which provides:

“4.5 Acting allowance

(a) Using the prescribed Acting Allowance Form (PSC FORM 4-2) a Director (or in the case of a Director-level position, a Director-General), may recommend to the Commission that an employee appointed to act in another position be paid an acting allowance, if the other position is remunerated at a higher level than the employee’s substantive position.”

At no stage was an Acting Allowance Form completed for any of the respondents, and at no time did the Director recommend to the Commission that the respondents be paid an acting allowance. When the PSC Form 4-2 is considered, its terms make it clear that the acting appointment provisions apply when a



permanent appointee is temporarily absent but expected soon to return to resume the duties of the position. That was not the situation of any of the respondents. As the appellants have maintained throughout, the provisions of Chapter 4, clause 4.5 have no application in this case.

The letters of appointment given to each of the respondents do not by their terms transfer any of the respondents to an acting position. The standard form of letter includes the sentence:

“If the transfer is to an Acting Post at higher grade, the post must be advertised internally and externally and filled after a merit selection process.”

That sentence however only applies to someone transferred to an Acting Post. On a reading of each of the letters to the respondents, the sentence had no relevance as the appointment was not to an acting post.

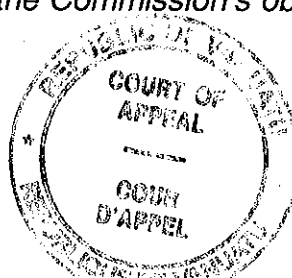
What then is the situation? Putting aside the acting appointment provisions, a transfer to a position is equivalent to an appointment to that position. An appointment to a position, unless expressly qualified, will be an appointment to the substantive position. It is necessary therefore to consider whether the letter of appointment or any other provisions of the Act or Manual qualifies the absolute nature of the appointment by transfer to the substantive position described in each letter of appointment.

It will be noted that the letters of appointment are headed “Notice of transfer (Public Service Act 1998, s.26 & s.27)”.

The terms of ss.26 & 27 are therefore the important sections, not s.25 on which the trial Judge placed importance. Section 26 provides:

“26. Failure to comply with a direction to transfer or posting

- (1) *The Commission may direct that a Director-General, Director or an employee transfer or take a posting from one position or locality to another within the Public Service but subject to the Commission’s obligations to act as a good employer.*



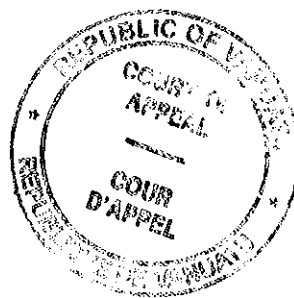
- (2) *Any employee who fails to comply with a direction of the Commission requiring him or her to transfer or accept a posting may forthwith be dismissed or demoted with a consequent reduction in remuneration unless, in the opinion of the Commission, the employee justifies the non-compliance by adducing some valid and sufficient reason for it."*

The Commission undoubtedly had the power to transfer a permanent public servant from one position to another, but under s.26(1) the power is subject to the Commission's obligations to act "as a good employer." Again, that is a condition on the exercise of the power of transfer which must be reflected in the terms and conditions determined by the Commission pursuant to which transfers are to be made. Once fixed by the Commission, the terms and conditions must be applied according the terms of the relevant Commission's determinations.

Section 27 relevantly provides:

"27. Redundancy

- (1) *If at any time the Commission finds a greater number of persons are employed in a ministry than is considered necessary for the efficient working of a ministry then the Commission may, subject to the Employment Act [CAP.160], declare a person or persons as the case may be, redundant and terminate his or her or their employment accordingly.*
- (2) *Where by reason of Government policy or economic necessity the number of persons employed in the Public Service generally or a ministry, department, agency or instrument of Government is to be significantly reduced or where significant changes in the role or functions of a ministry, department, agency or instrument of Government make it desirable to review the staff in particular positions, the Commission may-*
- (a) *issue an information memorandum advising of the pending reduction or review of positions; and*
 - (b) *as soon as practicable establish those positions that will be available and to which appointments are to be made.*



- (3) *A person who is employed in the Public Service and who is unsuccessful in being appointed to a position under subsection 2(b) will be given a notice of termination of employment in accordance with section 28.*
- (4) ...
- (5) ...
- (6) ...
- (7) ...”

Section 27(2) operates in the particular circumstances described so as to modify general provisions, including those as to security of tenure, that would otherwise apply under the Manual. The “right sizing exercise” enlivened the Commissioners’ powers under s.27(2)

Section 27 does not detail the process by which appointments will be made in the particular circumstances anticipated by s.27(2)(b). However there are provisions in the Manual which throw light on the processes open to the Commission.

Chapter 2

“2.6 Implementing an approved structure and establishing new position

- (a) *A Director-General must implement any approved restructure or the establishment of new or regarded positions in the form that they have been approved by the Commission.”*

Chapter 3

Chapter 3 deals with recruiting and staff selection and notes the general requirement of s.15(2)(b) of the Act. However the Introduction to Chapter 3 goes on to say that the principles of merit selection set out in Chapter 3 “must be used in all cases of standard promotional recruitment”. In our view the transfer of the respondents was not a case of standard promotional recruitment.

The Introduction to Chapter 3 continues:



“In some circumstances the best person may be selected without the need for the usual competitive process. Section 4 of this Chapter identifies cases where the full recruitment procedures may not apply...”

Section 4 of Chapter 3 relevantly provides:

“4. Special cases of recruitment

(a) Unless otherwise determined by the Commission from time to time, in the following special cases of recruitment, subject to any merit requirements of the Public Service Act, this policy does not need to be applied in full to the following categories of employee:

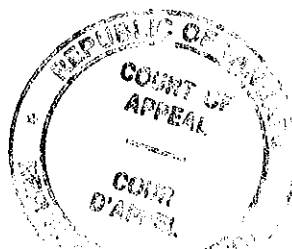
...

- (vi) A transfer authorised under section 26 of the Public Service Act where the position is at a lower or approximate same salary level as the position occupied by the person being transferred.*
- (vii) An employee appointed to another position under section 27(2)(a) of the Public Service Act .”*

No argument has been addressed to us whether subparagraph (vi) could apply here on the basis that the respondents were appointed to positions at approximately the same salary level. However there is no need to further explore that as it seems clear to us that subparagraph (vii) does apply.

We consider the reference to s.27(2)(a) of the Public Service Act in subparagraph (vii) is a plain error. Section 27(2)(a) does not make provision for appointment to a position. It relates to the issue of information about any reduction or review of positions. It is s.27(2)(b) that relates to appointments. We think it is clear that unless the Commission has otherwise determined subparagraph (vii) can exempt an employee appointed to another position under s.27(2)(b) of the Act from selection processes that would otherwise apply.

In this case there is no evidence that the Commission has otherwise determined. In our view the proper conclusion on the material before the Court is that the appointment processes required to be made by the Director General under



Chapter 2, clause 2.6 of the Manual to implement the new structure did not require appointment by merit selection.

When the letter of appointment is considered, its terms make a straight forward transfer (that is, appointment) of each respondent to a specific substantive position. The positions carried a specific level of remuneration. As the transfers were not appointments to an acting post, each respondent from the date of transfer was entitled to be paid the prescribed salary point.

The attempt to limit the appointment to "the existing salary" or to make the appointment a temporary one conditional upon a selection process based on merit was contrary to the terms of the letters of appointment and, in our opinion, was contrary of the requirements of the Act and the Manual. What the Manual required in the circumstances is set out in Chapter 4, clause 2.1:

"2.1 Salary payments

(a) Each employee will be entitled to the salary set out in the Salary Schedule that corresponds to the position they that have been permanently appointed to [Schedule 1]."

In our opinion therefore the Commission was obliged to pay the respondents the salary the Commission had identified was payable to the particular position the employee was appointed to in the new structure.

In our opinion the respondents were entitled to the monies claimed by them, although not on the primary ground they alleged, and which the trial Judge accepted.

The appeal against Order (a) which awarded the respondents an aggregate total of Vatu 5,964,390 according to an agreed calculation between the parties should be dismissed. The monetary judgment must stand. The appeal against the order for costs should also be dismissed.

However the appeal against Order (b) that directed the Commission to meet pursuant to s.25(3) & (4) should be allowed, and that Order set aside. The



respondents were effectively appointed to their substantive positions by the letters of appointment, and no further decision of the Commission is required.

Formal Orders of the Court are therefore:

1. Appeal against Orders (a) and (c) of the Judgment of the Supreme Court of Vanuatu effected and sealed on 26 September 2008 is dismissed.
2. The appeal against Order (b) of the said Judgment is allowed and Order (b) is set aside.
3. Order that the appellants pay the costs of the respondents their costs of the appeal to be agreed or taxed.

DATED at Port-Vila this 5th day of December 2008

BY THE COURT


.....
Hon. Vincent LUNABEK CJ


.....
Hon. John von DOUSSA J


.....
Hon. Oliver A. SAKSAK J


.....
Hon. Ronald YOUNG J

