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

Civil Appeal Case No. 19 of 2009

BETWEEN: FRANK TABOUTI
Appellant

AND: HEALTH DEPARTMENT
Respondent

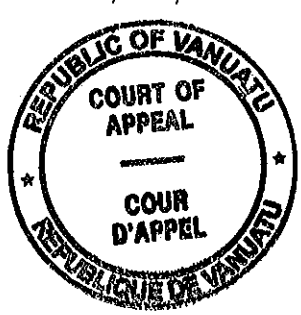
Coram:	***Hon. Chief Justice Vincent Lunabeck*** ***Hon. Justice Bruce Robertson*** ***Hon. Justice John von Doussa*** ***Hon. Justice Nevin R. Dawson*** ***Hon. Justice Daniel Fatiaki***
Counsel:	*Mr. Saling Stephens for the Appellant* *Mr. Jenshel for the Respondent*
Date of Hearing:	*22nd April 2010*
Date of Decision:	*30th April 2010*

JUDGMENT

This is an appeal against the judgment of the Supreme Court in Luganville dismissing the Appellant's entire claim for underpayment of salary and allowances for the time that he was employed as a driver in the Department of Health at the Northern District Hospital.

The Appellant's relevant employment history which extended over 19 years may be conveniently summarized as follows:-

- 1st Aug. 1985 – the Appellant commenced employment as a driver on a daily-rated basis paid as a monthly wage of VT23,620;



- 1st Nov. 1995 – Appellant was given a permanent appointment on a new salary scale P2.1 with an annual salary of VT344,544 plus a supplement of VT51,000 per annum;

- 13th May 1996 – Appellant accepted his permanent appointment;

It is common ground that despite his permanent appointment on a higher salary scale the Appellant was not paid the higher salary and continued to received his monthly wages on a daily-rated basis throughout his employment in the Department of Health.

- 10th Dec. 1999 – The Public Service Commission (PSC) unilaterally annulled the appellant's permanent appointment;

- 3rd Feb. 2000 – Appellant was informed of PSC's annulment decision. The letter contained the following significant explanation:

> *"Following an extensive inquiry by the Ombudsman in 1998 and subsequent legal advice from the Attorney General, the Public Service Commission at its meeting of 10 Dec. 1999 has reviewed your appointment to the permanent position and agrees that it was made unlawfully.*
>
> *This means that your status has not changed since 1 Nov. 1995, from being employed by the Ministry of Health on a daily-rated basis, unless you have obtained another permanent position through the normal Public Service Manual recruitment procedures since that date."*

- 31st Dec. 2004 – The Appellant was compulsorily retired upon reaching the retirement age. He was paid a severance allowance of VT382,506 calculated on the basis of his daily-rated wage and a leave allowance of VT56,688 which was due.

- 19th June 2007 – The Appellant filed his claim in the Supreme Court for loss and damages in reliance on breaches of the Employment Act, Public Service Act and Public Service Staff Manual.

- 30th September 2009 – Judgment was delivered.

In respect of the claim, the trial judge ruled that all claims for remuneration for the period from 31st August 1985 to 31st December 2003 were time-barred under section 20 of the Employment Act [CAP. 160] which provides:-

> *"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."*

We are unable to follow this finding as the commencement of a 3 year period leading up to the commencement of the proceedings would be 19 June 2004.

The other finding of the trial judge which directly impacted on the Appellant's claim was a finding *"that* (the Appellant's) *permanent appointment by the PSC on 1st November 1995 was invalid and the* (Appellant) *cannot use that appointment as the basis of his claims as he has done."*

In respect of this finding the trial judge accepted the Respondent's evidence which prominently featured a public report of the Ombudsman's Office dated 17th April 1998 entitled: *"IMPROPER APPOINTMENT AND PROMOTIONS OF HEALTH WORKERS IN NOVEMBER 1995"*. The Report highlighted numerous irregularities in the process leading up to the mass promotions and regradings by the Public Service Commission of some 237 health workers of the Department of Health in November 1995.

The Report recommended the immediate revocation of the *'improper'* promotions of 44 officers as well as the permanent status granted to 193 employees including the Appellant. In its reference to the RELEVANT LAW the Report includes the following paragraph which reads:-

> *"6.3 Daily-rated appointments are made pursuant to the provisions of the Casual Employees Manual designed to allow Department Heads to recruit for low-paying positions such as drivers and cleaners without the* ***need for going through the PSD and PSC. There is no***

mechanism for daily rated employees to become permanent, other than utilizing the recruitment procedures for permanent appointment *set out in the Public Service Staff Manual (and summarized here in Appendix A). This point was confirmed by former Attorney General Oliver Saksak."*

(our underlining for emphasis)

The Appellant urges 6 grounds in support of his appeal. They assert that the trial judge erred in law and or of mixed fact and law as follows:-

1. he failed to disclose to the parties in court that the Appellant's revocation of permanent appointment made on 1st November, 1995 by the Respondent was based on his advice as the then Attorney General in 1995 to the Public Service Commission, thus the cause for ombudsman Report.

2. misguided himself into judging his own cause; when he should have transferred the matter to a different and neutral judge.

   (It is common ground that the above 2 grounds are the first ever mention or suggestion of bias made by the appellant against the trial judge).

3. failed to adequately address the issues pleaded in paragraphs 6, 7, 8 and 9 of the statement of claim; thus shift his focus onto the compulsory retirement issue in an attempt to qualify his answers to negate issues raised insofar as the revocation of the claimant's appointment is concerned.

4. erred in making a finding that because the appellants daily-rated employment was more than the maximum of 6 months period without a termination, his appointment would automatically be deem permanent.

5. the whole finding of the trial judge in respect of an employer/employee relationship was uncommon and do not accord to the principles of employment contracts.

6.. Further or other grounds as may be advanced by counsel.

Grounds (1) and (2) may be conveniently dealt with together. Counsel submits that the evidence raises a real doubt over the impartiality of the trial judge as a

result of a possible conflict of interest because the trial judge had, counsel submits, a "*direct interest in the matter contested in the proceedings*". The particular, "*interest*" concerned the revocation of the Appellant's permanent appointment which counsel submits "*was based on* (the trial judge's) *advice as the then Attorney General in 1995 to the Public Service Commission*".

It is unfortunate that the matters now raised in support of Grounds (1) and (2) above, were not drawn to the trial judge's attention either before or during the course of the trial or in counsel's closing submissions. In the result, the trial judge is now '*functus officio*' and this Court is necessarily hampered by a lack of explanation from him about his involvement in relevant matters whilst he was Attorney General or assisted by a reasoned ruling by the trial judge on the asserted disqualifying event.

In some common law jurisdictions these significant failures on the Appellant's part would have immediately raised questions of acquiescence and waiver, but where the position is dealt with by statute, the consequences of such a failure on the part of a litigant are not necessarily fatal.

State counsel has helpfully provided to the Court the relevant Official Gazette and appointment letter of the trial judge as Attorney General of the Republic of Vanuatu with effect from 3rd February 1996 which clearly pre-dates the Ombudsman's Public Report. Counsel further submits, without contradiction, that the trial judge was appointed to the Supreme Court in 1997 and, accordingly, had long ceased to be the Attorney General at the time of the purported annulment of the Appellant's permanent appointment in December 1999.

With reference to the contents of paragraph 6.3 of the Report (op. cit) counsel submits that the evidence is "*equivocal*" and "*tangential*" and counsel sought to confine and limit the Attorney General's confirmation to the absence of a mechanism for making daily-rated employees permanent employees other than as set out in the Public Service Staff Manual.

The Ombudsman's Report notes that its recommendation for the revocation of the permanent status of the daily-rated employees was based on the former Director of Health's impropriety in recommending the promotions and appointments which includes the failure to adopt the relevant applicable procedure for making such appointments under the Public Service Staff Manual. (*see:* Finding No. 2 read with Recommendation No. 1).

Furthermore, the Ombudsman's Report records that the relevant matters and facts that were considered in compiling the report covered the period from 30 October 1995 to the publication of the Report on 17 April 1998. This period commences before and extends beyond the time when the trial judge was Attorney General, but the Report does make reference to correspondence with several government departments and the Public Service Commission in 1996 and 1997, during which time the trial judge was the Attorney General and, as such, the principal legal adviser to Government (*see:* Section 10 of the State Law Offices Act [CAP. 242]).

Section 38 of the Judicial Services and Courts Act [CAP. 270] under the heading "Disqualification" provides:-

> "*(1) If:*
> *(a) a judge has a personal interest in any proceeding; or*
> *(b) there is actual bias or an apprehension of bias by the judge in the proceedings;*
>
> *he or she shall disqualify himself or herself from hearing the proceedings and direct that the proceedings be heard by another judge.*
>
> *(2) A party to any proceedings may apply to a judge to disqualify himself or herself from hearing the proceedings;*
>
> *(3) If a judge rejects an application for disqualification, the applicant may appeal to the Court of Appeal against the rejection. If an appeal is made, the judge must adjourn the proceedings until the appeal has been heard and determined.*
>
> *(4) A judge who rejects an application for disqualification must give written reasons for the rejection to the applicant."*

Section 38 provides a comprehensive procedure for the disqualification of a judge from hearing a proceeding in which he "*has a personal interest*" or where "*there is actual bias or an apprehension of bias*" on the part of the judge.

In the appeal there is no suggestion of a '*personal interest*' or '*actual bias*' by the trial judge, so those may be put to one side. The appellant's submission of apparent bias is framed on the basis of a failure on the trial judge's part to disclose to the parties in Court, that the revocation of the appellant's permanent appointment '*was based on his advice as the then Attorney General in 1995 to the Public Service Commission thus the cause of the Ombudsman Report*'.

As a matter of established fact the trial judge was not the Attorney-General in 1995. And of more significance the letter received by Mr. Tabouti from the PSC on 3 February 2000 advising him that his appointment to a permanent position had been annulled stated the reason for that action as follows:-

> "*Following an extensive inquiry by the Ombudsman in 1998 and subsequent legal advice from the Attorney-General, the Public Service Commission at its meeting of 10 December 1999 has reviewed your appointment to the permanent positin and agrees that it was made unlawfully.*"

The evidence also shows that it was the absence of a budget allocation to pay the wages of the new appointees that played a major part in the PSC decision to annul the appointments.

In 1998 the trial judge was no longer the Attorney-General, and had not been so for some time.

On the evidence before the Court the advice from the Attorney-General which directly contributed to the annulment of the Appellant's permanent position was not advise given by the trial judge. The advice which the trial judge gave according to paragraph 6.3 of the Ombudsman's Report was simply very general

advise, which was plainly correct on any reading of the PSC Manuals, that there is no mechanism for daily rated employees to become permanent other than by utilizing the recruitment procedures for permanent appointment.

It is impossible to say how such uncontentious and peripheral advice had any real bearing on the issues in the Appellant's case, or any connection with the reasons which ultimately led to the decision to annul the Appellant's appointment.

The test for apparent bias is succinctly enunciated in the judgment of this Court in *Picchi v. Public Prosecutor [1996] VUCA 9* where the Court identified the relevant test as being:-

> "*..... whether there would be a reasonable apprehension on the part of an informed and fair-minded observer of the absence of an impartial objective and independent tribunal. Although there are some differences in the language used, the concept is clear. It is discussed in the House of Lords in R. v. Gough (1993) 2 All ER 74, by the High Court of Australia in R. v. Webb (1994) 181 CLR 41 and by the Court of Appeal in New Zealand in Auckland Casino Ltd. v. Auckland Control Authority (1995) 1 NZLR 142*".

The High Court of Australia in *Ebner v. Official Trustee in Bankruptcy and Clenae Pty Ltd. v. ANZ (2000) 176 ALR 644* relevantly observed at p. 648:-

> "*The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision-making is articulated. Only then can the reasonableness of the apprehension of bias be assessed.*"
> (our underlining for emphasis).

We are not satisfied that the Appellant has discharged the burden of establishing that a fair-minded observer knowing of all the facts and circumstances in the case, would conclude that the trial judge would not decide the Appellant's case impartially and in an unbiased manner. The relevant circumstances in the case include the following:-

- the relevant dates of appointment of the trial judge as Attorney General and then later as a Supreme Court judge;
- the limited nature and context of the trial judge's prior involvement with the Ombudsman's Report;
- the time between the alleged disqualifying event occurring (sometime before 1997) and when the trial judge was allocated to hear the trial, a period well over 10 years. It is extremely unlikely that any general views held by the trial judge so long ago would continue to influence his consideration of the issues raised by the competing cases of the parties;

For the foregoing reasons we reject grounds 1 and 2 of the Appellant's appeal and we turn to consider the remaining 4 grounds of appeal which collectively relate to the merits of the Appellant's substantive claim before the trial judge. After consideration of the evidence in the case and counsels' written and oral submissions the appeal should succeed in part.

We are satisfied that although the purported annulment of the appellants' permanent appointment was unlawfully effected without proper notice and in breach of the Public Service Staff Manual, nevertheless, by section 20 of the Employment Act [CAP. 160] any claim for the unpaid difference in salary between the Appellant's daily-rated wage and his entitlement as a permanent employee is necessarily limited to the 3 years preceding the 19 June 2007 when recovery proceedings were first instituted by the appellant.

In this regard the appellant is entitled to claim the difference in unpaid salary for the period 19 June 2004 – 31 Dec. 2004 ie 6 ½ months @ VT61,104/12 = VT32,998.

With regard to the Appellant's severance allowance which was paid to him in terms of section 54 (1) (c) of the Employment Act [CAP. 160] and calculated on the basis of his daily-rated wages, the formula set out in section 56 (2) reads (so far as relevant for present purposes):-

> "*(2) Subject to subsection (4) the amount of severance allowance payable to an employee shall be –*
> *(a) for every 12 months -*
> *(i) half a month's remuneration, where the employee is remunerated at intervals of not less than 1 month;*
>
> *(ii)* .....(not relevant)
>
> *(b) for every period less than 12 months, a sum equal to one-twelfth of the appropriate sum calculated under paragraph (a) multiplied by the number of months during which the employee was in continuous employment.*"

In the PSC letter compulsorily retiring the appellant dated 24th December 2004 the PSC agreed to pay the appellant "*.....a severance payment calculated at the rate of four weeks of your current salary for each year served with the government since your appointment in the Public Service.*"

The relevant calculation can be found at p.31 of the Appeal Book paragraph 20 (d) of the judgment and is made up of the following 2 components::-

- Period worked (from 1 Aug. 1985 – 31 Dec. 2004) = 19 years 5 months;
- Calculation rate based on the appellants daily-rated wage of C02.2

This gave a total severance allowance of VT382,508 which was paid to the appellant.

The appellants uncontraverted evidence is that his monthly wages as a daily-rated employee was VT23,620 giving an annual figure of VT283,440 and the annual salary of his permanent appointment (which he should have received but

was not paid to him) was VT344,544 (ie a monthly salary of VT28,712). This latter figure is the correct multiplier to be used in calculating the appellant's severance since the annulment of his permanent appointment by PSC was contrary to the applicable provisions of the Employment Act [CAP. 160] and the Public Service Staff Manual.

Accordingly, the appellant's severance allowance is recalculated under section 56 (2) of the Employment Act as follows:-

- under paragraph (a) (i):
  19 years @ VT14,356 = VT272,764;
- under paragraph (b):
  5 months x 1/12 x VT14,356 = VT5,696;

Making a total of VT (272,764 + 5,696) = VT278,460.

The appeal is allowed on that basis. Judgment is entered in favour of the appellant in the sum of (VT278,460 + VT32,998) = VT311,458. The appellant is also awarded costs of his appeal.

DATED at Port Vila, this 30th day of April, 2010.

BY THE COURT

.....
Chief Justice Vincent Lunabek

.....
Justice J. Bruce Roberston

.....
Justice John von Doussa

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

.....
Justice Nevin R. Dawson

.....
Justice Daniel Fatiaki