

**IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU**
(Other Jurisdiction)

**Civil Appeal
Case No. 20/1293 CoA/CIVA**

BETWEEN: Tekon Timothy Tumukon and Others
Appellants

AND: The Public Service Commission
First Respondent

AND: Republic of Vanuatu
Second Respondent

Date of Hearing: *14th day of July, 2020*

Before: *Hon. Justice Bruce Robertson*

Hon. Justice John Mansfield

Hon. Justice Dudley Aru

Hon. Justice GA Andrée Wiltens

Hon. Justice Viran M. Trief

In Attendance: *Mr P Finnigan and Ms J La'au for Appellants*

Mr N Morrison for First Respondents

Mr T Loughman for Second Respondent

Date of Judgment: *17th July 2020*

JUDGMENT

INTRODUCTION

1. This is an appeal from a decision and order of the Supreme Court given on 29 April 2020, with reasons following on 5 May 2020. The Court ordered that the Constitutional Application of the Appellants made on 7 May 2019 be struck out.



2. That order was made at the First Conference held under the Constitutional Procedures Rules 2003 (the Rules), as the primary judge concluded after hearing from counsel for the Appellants (then the Applicants) that there was no reasonable cause of action founded in the Constitution of the Republic of Vanuatu and resulting in a breach of the Constitution in relation to any of the Appellants in the circumstances of the case as disclosed in the materials presented.
3. There is no dispute that the primary judge had the power to make such an order at the First Conference, under rules 2.7 and 2.8 of the Rules. As it was made at the First Conference, the strike out order was made before an order for service of the Constitutional Application had been made.
4. The issue on the appeal was as to the correctness of the strike out order.
5. Both the named respondents to the initiating application were served with the notice of appeal. The Public Service Commission (PSC) participated in the hearing of the appeal and made brief submissions. The Republic of Vanuatu also appeared, but made no submissions and indicated it would abide the decision of the Court.

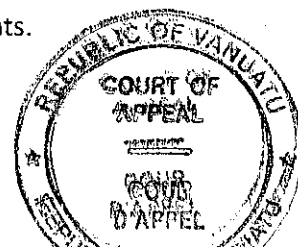
BACKGROUND FACTS

6. As would be expected in an application such as the present, the background material is not contentious.
7. The Appellants were at material times 8 Directors of different Government Departments of the Public Service of Vanuatu. They were each appointed by the PSC.
8. It is convenient to record some detail of the circumstances of Tekon Timothy Tumukon, the First Appellant, as an illustration of the relevant facts. Obviously the particular circumstances of each of the Appellants are somewhat different but not in any material respect.
9. Mr Tumukon had worked in the Public Service of Vanuatu from 1995. He was a Director of the Department of Biosecurity Vanuatu from 5 January 2015 to 27 January 2019. He was removed from that office by the PSC by notice given on 26 October 2018, that is with 3 months' notice from that date. He was paid accrued entitlements to the date that his employment ceased. At the time he was some years short of the compulsory retirement age of 55 years.
10. In December 2017, a meeting was convened by the Secretary of the PSC to inform all the Directors and Chief Operating Officers of governmental agencies that their



tenure as public servants would be terminated upon the coming into operation of the then proposed amendments to the Public Service Act [CAP 246], and then their services could be re-engaged under contractual arrangements. Some months later, on 28 September 2018, the Appellants sent a letter expressing their concerns about that proposal to the Chairman of the PSC, including suggestions that the proposed steps may well be unconstitutional. The letter also suggested that the proposed course of action could be economically detrimental to the Republic and adverse to the morale of the Public Service. The Chairman of the PSC responded on 12 November 2018, expressing concern that the Appellants were not supportive of the changes to the Act (by then in force) and disputing the assertions that the amending legislation or action taken under it might be unconstitutional or detrimental to the Republic.

11. In the meantime, the Public Service (Amendment) Act, Act No. 7 of 2018, (the Amending Act) had been gazetted and thereby had come into force on 27 July 2018.
12. Also, on 26 October 2018, each of the Appellants had received a letter notifying them that, following the commencement of the Amending Act, and as prescribed in the transitional provision section 18 of the Schedule to the Amending Act, their employment would terminate 6 months from the commencement of the Amending Act, namely 26 January 2019. That is, of course, the same date as the date fixed in the letter of 26 October 2019.
13. Each of the Appellants was given the opportunity to re-apply for the position of Director of the relevant Department under the Public Service Act as amended by the Amending Act, and after each position was publicly advertised, each of them did so. None of them were appointed to the position for which they had applied, although each was interviewed by a Panel of the PSC before the appointment of the new Director was made.
14. The Appellants by their Constitutional Application sought a declaration that the Amending Act is unconstitutional as it infringes upon the rights guaranteed to them under Article 57(5) of the Constitution. They sought consequential declarations that their removal as Directors in the Public Service on 27 January 2019 was made in breach of Articles 57(5) and (7) of the Constitution, and is of no legal effect, and also consequently that the appointment of other persons as Directors in their place made by the PSC in February 2019 relying on the Amending Act were also invalid and of no effect. They also sought orders under Article 6(2) of the Constitution for compensation for the loss of their positions; obviously the amounts of those claims varied depending on the age and personal circumstances of the Appellants.



THE LEGISLATION

15. The critical Article of the Constitution is Article 57. It provides:

“57. Public servants

- (1) Public servants owe their allegiance to the Constitution and to the people of Vanuatu.*
- (2) Only citizens of Vanuatu shall be appointed to public office. The Public Service Commission shall determine other qualifications for appointment to the public service.*
- (3) No appointment shall be made to a post that has not been created in accordance with a law.*
- (4) The Prime Minister or the chairman of a Local Government Council may, exceptionally, make provision for the recruitment of staff for a specified period to meet unforeseen needs.*
In urgent cases, the Public Service Commission may, after consulting the Ministers responsible for finance and public administration, make such a decision instead of the Prime Minister.
- (5) For as long as their posts exist, public servants shall not be removed from their posts except in accordance with the Constitution.*
- (6) Public servants shall be given increments in their salary in accordance with the law.*
- (7) Public servants shall leave the public service upon reaching retirement age or upon being dismissed by the Public Service Commission. They shall not be demoted without consultation with the Public Service Commission.*
- (8) The security of tenure of public servants provided for in subarticle (5) shall not prevent such compulsory early retirement as may be decided by law in order to ensure the renewal of holders of public offices.”*

16. In the course of submissions, reference was also made to Articles 5, 6, 53 and 60 of the Constitution.

17. Article 5 provides the Fundamental rights and freedoms of the individual. Although counsel for the Appellants sought to rely on it in the hearing before the primary judge, on the appeal it was not put forward as advancing their claims in their Application.

18. Article 6 prescribes the right of any person to apply to the Supreme Court to enforce a right guaranteed under the Constitution. It does not otherwise establish rights, and again was not relied on in the hearing of the appeal except as a procedural entitlement in respect of any Constitutionally guaranteed rights to be found elsewhere in the Constitution.

19. Article 53, as the primary judge pointed out, provides the avenue for enforcement of protection from infringement of any provision of the Constitution. It was accepted



by the Appellants that, although not referred to in their Application, it provided the foundation for their Application. We note in passing that Article 50 requires Parliament to provide for appeals to the Court of Appeal from the original jurisdiction of the Supreme Court.

20. Article 60 provides that the PSC shall be responsible for the appointment and promotion of public servants, and their discipline, and shall be independent of the direction and control of any other person or body in the performance of its functions.

21. Articles 57 to 60 of the Constitution are found in Chapter 9, headed Administration, and in Part 1 of that Chapter headed The Public Service. Article 58 deals with the exclusion of security of tenure in relation to political advisers and transfer of public servants, and Article 59 with the membership of the PSC.

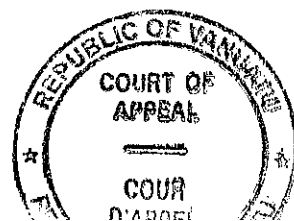
22. The Public Service Act is obviously significant to the claim, including the amendments effected by the Amending Act. It is also of note that sections 17A, 17B and 17C and consequential amendments were introduced into the Public Service Act in 2011 by the Public Service (Amendment) Act 2011 Act No. 1 of 2011. That is noted because it was those provisions which affected the status and tenure of those holding office as Directors-General of departments within the Public Service. They are similar to, but not identical with, with the provisions concerning the status and tenure of Directors addressed in the Amending Act.

23. In broad terms, it is clear that Chapter 9 Part 1 of the Constitution is intended to secure political neutrality on the part of public servants in the carrying out of their duties, and as a complement to that to secure their protection from political interference. So much was said by the Court of Appeal in Public Service Commission v Willie [1993] VUCA 1 and those comments have not been qualified since. That was reinforced by what was said in Republic of Vanuatu v Bebe [2014] VUCA 29 at [25], a decision concerning Article 58(2) of the Constitution.

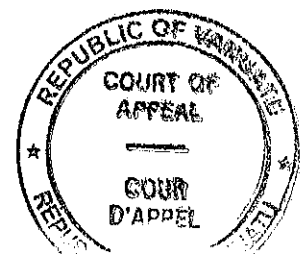
24. In broad terms too, it can be said that the Public Service Act sets out to achieve those objectives in prescribing the composition of the PSC and changes in its composition, and in describing its powers and responsibilities.

THE AMENDING ACT

25. The Amending Act by its Schedule amended the Public Service Act. It commenced on 27 July 2018, as that was the date it was published in the Gazette.

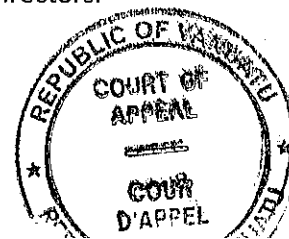


26. Relevantly to the present appeal, it repealed the former section 18(1) and substituted the following:
- “(1) The Commission may appoint a person to be a director under a contract of employment for a period of 3 years and the person may be appointed twice.”*
27. Section 18(2) requires the PSC to conduct performance appraisals annually for each director, and section 18(3) permits the PSC to re-appoint a person as a director only when it is satisfied with the performance of that person.
28. Clause 11 of the Schedule of the Amending Act deleting the former section 18(1) and substituting section 18(1) as set out above 18(1) is said to be unconstitutional.
29. The repealed provision simply provided for appointments to, and promotions to, the position of directors must be made by the PSC. So it ensured that PSC independently appointed directors. The Appellants say that such appointments were tenured for the working life of the appointees (to age 55, subject to health and satisfactory performance). They further say that appointments of directors for a fixed renewable term with limited re-appointment to a maximum of 9 years is unconstitutional, as it is inconsistent with the security of tenure which (they argue) is guaranteed under Article 57 of the Constitution.
30. Clause 18 of the Schedule of the Amending Act provides for the transitional provision for directors, upon the coming into effect of the amendments to the Public service Act.
31. It provides the a person who holds the position of director at the time of commencement of the Amending Act is to continue in that position for 6 months, and secondly that the employment of that person is deemed to be terminated on the expiry of that period of 6 months, with payment of any outstanding entitlements at that time. It is argued that that transitional provision is also contrary to the Constitution because it terminates the employment of the Appellants when they had tenure for their working lives under the Constitution.
32. That transitional provision is what the PSC then gave effect to by its letter of 26 October 2018, confirming the termination of the Appellants’ employment at 27 January 2019. There was a payment made on that later date apparently to pay out any existing entitlements. There is some dispute about the correctness of the amounts then paid, but that does not give rise to a dispute about the constitutional validity of the provisions of the Amending Act which are challenged.



CONSIDERATION

33. Counsel for the appellants made it clear that his primary argument was that the Amending Act, by introducing fixed term contracts for directors with limited opportunities for re-appointment was not consistent with the security of tenure which (it was said) Article 57 guaranteed. He accepted that his argument, if correct, would mean that the appointments made in February 2019 by the PSC of directors to the various departments was invalid, and also that the 2011 amendments to the Public Service Act affecting the positions of Directors-General were also invalid for the same reasons.
34. There is a decision of the Chief Justice in President of the Republic of Vanuatu v Speaker of Parliament [2012] VUSC 183 (Kaniapnin) in which that contention is rejected, in relation to the 2011 amendments, albeit as we have noted those amendments do not precisely parallel the Amending Act.
35. Article 57 requires close attention. Article 57(5) says that, so long as their posts exist, public servants shall not be removed from their posts except in accordance with the Constitution. In Kaniapnin, the Chief Justice concluded that the effect of the 2011 amendments was to abolish the posts of Director-General. That is a clear qualification within Article 57(5). In our view, subject to considering the primary proposition of the Appellants, that conclusion is clearly correct.
36. Counsel for the Appellants, in our view unsuccessfully, sought to identify any provision in the Constitution which would preclude the Parliament from enacting a law which enabled senior public servants to be placed on contract. It is not found in Article 57(5) itself because the words *'except in accordance with the Constitution'* do not themselves prescribe conditions for removal.
37. Article 57(7) directs when public servants shall leave the public service, including *'upon being dismissed by the'* PSC. It may be observed that it does not prescribe the retirement age. That is left to the Parliament. It is not exhaustive of the circumstances that public servants should leave the public service. It simply does not say that. Part 4 of the Public Service Act contains provisions for the engagement and removal of, public servants as well as the responsibilities of public servants. It contains the specific provisions relating to directors-general and directors (as amended in 2011 and by the Amending Act). The Amending Act which substituted section 18(1) as set out above does limit the term on which directors may be employed. Section 19A and section 19B respectively set out the grounds for removing, and the procedure for removing, directors-general and directors.



38. Article 57(8) refers to *'the security of tenure of public servants provided in sub-article (5)'*. It preserves to the Parliament such compulsory early retirement as may be decided by law in order to ensure the renewal of holders of public offices. It does not thereby prescribe the condition of tenure to retirement age.
39. There were no other Articles in the Constitution which counsel for the Appellants drew upon to support the contention that it prescribed the tenure of appointment of directors (or directors-general) as being the retirement age.
40. In our view, apart from ensuring the independence of public servants from political influence in their appointment and removal, and requiring political neutrality from public servants, it can be seen that the Constitution allows for legislation to address a range of topics relating to the employment of public servants. That includes all the matters addressed in the Public Service Act. It is not suggested that the circumstances in which, and the procedures under which, public servants may be employed or dismissed are not properly included in that Act. Nor could it be suggested that that Act could not prescribe the retirement age. It could not be suggested that it is beyond power for that Act to address redundancies from the public service, as it does in section 27. It could not be suggested that the prescription in section 28 of the Public Service Act about termination of public servants generally, including the period of notice and the benefits payable on termination are beyond power, or are somehow inconsistent with the Constitution.
41. Moreover, the specific power preserved to the Parliament to ensure the renewal of holders of public offices itself leaves to the Parliament the role and responsibility as a matter of policy to determine how that is to be achieved. It is not for the Court to form such policy judgments or to second-guess the Parliament when it forms such judgments. Indeed, it was not part of the submission for the Appellants that the terms of the Amending Act could not rationally or reasonably reflect such a political judgment.
42. Consequently, we are of the view that section 18(1) as amended by the Amending Act is not inconsistent with the Constitution and is valid. It deals with a topic in a manner which is not inconsistent with the Constitution.
43. It is appropriate to separately consider the status of clause 18 of the Schedule of the Amending Act, that is, the transitional provision. It provides a period of notice of 6 months, effective from the commencement of the Amending Act, for the termination of the employment of the Appellants and presumably other directors.
44. For similar reasons to those expressed in Kaniapnin, we do not consider that the transitional provision itself is unconstitutional. That conclusion almost follows from



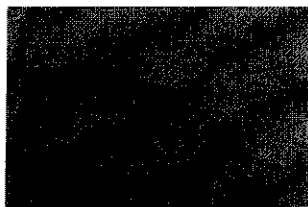
the reasons for concluding that the Constitution did not guarantee employment until retirement age. Absent any such constitutional entitlement, the engagement must have been terminable in accordance with the Public Service Act as it then stood, or as amended. The period of employment of the Appellants was governed by the Public Service Act, as there are no other terms of any contract they had entered into. There is nothing in the Constitution which, in our view, impedes the amendment of the Public Service Act to enable specific and limited terms to be adopted in the employment of directors. The term of the engagement of the directors was not expressed, but for the reasons already given there was no constitutionally enshrined automatic entitlement to hold those positions until retirement age, subject to health and satisfactory conduct. Once that step is taken, so that the positions are terminable, there is nothing to suggest that a period of notice is not consistent with their existing entitlements or somehow abridges what they may otherwise have been entitled to upon termination. Their posts were terminated on what would appear to be reasonable notice, and independent of any suggestion of improper political influence. The new contractual posts, limited to three year terms, subject to re-appointment for up to two further periods, remained open for them to apply for such positions.

CONCLUSION

45. For those reasons, the appeal is dismissed. The Appellants must pay to the PSC its costs fixed at VT 50,000. There is no order for costs in favour of the Republic, as it chose simply to abide the order of the Court.

DATED at Port Vila this 17th day of July, 2020

BY THE COURT



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Justice B. Robertson

