

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

Civil Appeal
Case No. 20/1406 CoA/CIVA

**BETWEEN: Joe Ligo Johnson Binaru lauma, Jesse Dick Joe,
Marokon Alilee, Mark Peter Bebe, Howard Aru, William
Nasak**
Appellants

AND: Republic of Vanuatu
Respondent

Coram: *Hon. Chief Justice V. Lunabek
Hon. Justice B. Robertson
Hon. Justice O. Saksak
Hon. Justice J. Mansfield
Hon. Justice D. Aru
Hon. Justice V. M. Trief*

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

Date of Hearing: *9th July 2020*

Date of Judgment: *17th July 2020*

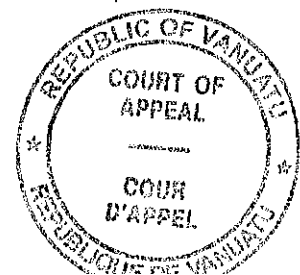
JUDGMENT

Introduction

1. This is an appeal from a judgment of the Supreme Court dealing with an employment dispute. The judgment was delivered on 8 May 2020 dismissing the claim hence this appeal.

Background

2. The appellants are all former director generals in various Government Ministries.
3. On 24 November 2012 each appellant entered into an employment contract for the director general's position. The contracts were for a term of 4 years. Clause 23 of the contract provided for a performance agreement in the following terms:-



"23.1 The employee shall execute a performance agreement with the Minister, The performance agreement must be executed within the time provided in schedule B.

23.2 The employees performance shall be reviewed on a twelve monthly basis in accordance with schedule B."

4. This clause remained the same in the reviewed contract and was renumbered clause 25 (1) and (2).
5. On 10 February 2016 the appellants' contracts were amended without extending their terms. The salaries were increased with additional benefits. Secondly , a new clause 3.3 was inserted in their contracts which provides that:-

"Subject to the employee's performance, the employer may reappoint the employee for only once in accordance with section 17A (1) of the Pubic Service Act (as amended) [CAP 246] (the Act)."

6. Section 17A (1) provides:-

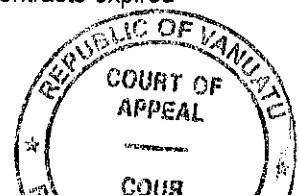
"17A Appointment of a director-general

(1) The Minister on the recommendation of the Commission, is to appoint a person to be a director-general under a contract of employment for a period of 4 years and the person may be reappointed only once."

7. On 24 November 2016 the appellants' contracts came to an end and were not renewed. The positions were readvertised and new appointments were made to the appellants' former positions.
8. The appellants filed their claim basically alleging that they all reapplied for their positions but the respondent failed to consider their reappointment due to its failure to procure their performance appraisals. As a result the relief sought was for an amount of VT 300,000,000 for economic loss as a result of the respondent's negligence and breach of contract.

Judgment under Appeal

9. The primary judge observed that the main issue related to the annual performance appraisal as the respondent accepted that no appraisals were done for each of the appellants although it was part of the contracts of employment. The primary judge was correct in our view to observe that the respondent was not obliged in a contractual situation to provide job security to employees beyond their terms and was also not obliged to recommend to the Minister the reappointment of the appellants as director generals when their terms came to an end.
10. The main issue before the primary judge was what was the legal effect of the failure by the respondent to arrange performance appraisals of the appellants before their contracts expired



and does that failure lead to any legal consequences. The primary judge said at paragraphs 29, 30 and 31 of the judgment that:-

"29. In my view, it does not logically follow that even if annual performance appraisals had been done and reported excellence on the part of a particular employee that would necessarily result in the automatic reappointment of that employee at the conclusion of the contract. That is what the Claimants case is based on. It follows that, in my view, the Claim is based on an incorrect proposition.

30. The annual performance appraisals could have been poor, which would have enabled the State to take disciplinary action or even to dismiss. If the appraisals were mediocre, such that disciplinary action or dismissal was not warranted, what then would the appraisal permit to occur? The answer must be that the contract be allowed to run its unsatisfactory course. If the appraisal were good or excellent, the consequence would be the same – the contract would run its course.

31. However, a good or excellent appraisal for one year, or even for all 4 years of the contract term, cannot mean reappointment becomes automatic or mandatory. That is because the State has a discretion to reappoint, as evidenced by the use of the word "may" in both clause 3.3 of the varied contract and in section 17A(1) of the Public Service (Amendment) Act 2011."

11. The primary judge concluded that:-

"32. The failure by the State, to conduct annual performance appraisals in respect of the Claimants, is simply not actionable in the way this Claim is formulated."

Considerations of the Appeal

12. The notice of appeal sets out four grounds. In summary, the main complaint is that the respondent breached the appellants' contracts by not executing their performance appraisals in line with clause 25. It is argued that when the primary judge found that clause 25 was not complied with he failed to award the appellants any relief and dismissed the claim when he should have awarded up to 60% of the amount claimed. The appellants say that there was no basis for the dismissal of their claim.
13. The starting point of consideration is when the appellants' contracts came to an end on 24 November 2016 all their entitlements were paid in full as confirmed by the Secretary of the Public Service Commission, Mr Jean Yves Bibi.
14. Their positions were readvertised and the appellants reapplied but were not reappointed. Mr Yahwa's submissions ignore the fact that there is no provision for mandatory reappointment after his clients contracts came to an end. He could not identify any to us. Clause 3.3 of the contracts and s.17A(1) of the Act make it clear that any reappointment is not automatic. A discretion rests with the respondent even if the performance appraisals were done and were all good. The breach of the contract which the primary judge found might nevertheless have given rise to an

entitlement to damages. However, as was common ground, the onus lay on the appellants to prove that loss. The primary judge did not find any evidence to support the proposition that, by reason of the breach of contract, the appellants suffered loss. The suggestion that the absence of a performance assessment that they had little or no chance of being re-appointed is not made out. As was said, it is not known at all what the performance appraisals might have said. Secondly, it is not shown whether the assessment of the applications of the appellants by the Public Service Board assumed that their performance was unsatisfactory, or whether there were other means by which their performance was taken into account. No doubt their applications themselves put forward the quality of their past performance. Third, nothing is known about the quality of other applicants for their positions. So, although there may have been a lessening of their prospects of re-appointment by reason of the breach of contract, there was really no evidence upon which the primary judge noted, the real proposition on which the appellants' cases were presented was that, but for the breach of contract, they would have been re-appointed.

15. As the primary judge found the appraisals should have been done but he correctly concluded that failure did not mean that the appointment process was invalid.
16. We are not persuaded that the appeal should be allowed. There is no breach of contract from which damage was shown to have resulted. Indeed to a degree, as was pointed out by the respondent in submissions, the establishment of the structure for the performance assessment might well have been done by each of the appellants in their particular circumstances, and then the assessments would of course have had to have been made. The primary judge correctly identified the issues and we agree with his findings and decision to dismiss the claim.

Result

17. The appeal is hereby dismissed and the respondents are entitled to costs on a standard basis to be agreed or taxed.

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

BY THE COURT

**Hon. Chief Justice
Vincent Lunabek**

