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

Civil Appeal
Case No.23/306 COA/CIVA

BETWEEN: **MINISTER OF EDUCATION and TRAINING**
Appellant

AND: **HARDISON TABI**
DAVID NARAI and
ALICE KALO
Respondents

AND: **PRESIDENT OF THE REPUBLIC OF VANUATU**
Interested Party

Date of hearing:	***9 August 2023***
Coram:	***Hon Chief Justice V Lunabek*** ***Hon Justice JW von Doussa*** ***Hon Justice R Asher*** ***Hon Justice OA Saksak*** ***Hon Justice D Aru*** ***Hon Justice EP Goldsbrough***
Counsel:	***C Leo for the Appellant*** ***H Tabi for the Respondent*** ***J Wells for the President***
Date of Decision:	***18 August 2023***

JUDGMENT OF THE COURT

1. This is an appeal against a Supreme Court judgment which on judicial review quashed two decisions of the President. The first decision had removed the three respondents as members of the Teaching Service Commission (TSC). The second decision had appointed three new members.

2. The TSC is established under the Teaching Services Act No. 38 of 2013 (The Act). The principal objectives of the Act are to establish a teaching service, to establish the TSC, to provide a legal framework for the employment of teachers, to establish the rights and obligations of the Teaching Service and to establish a system of standards: s.2. Section 3 sets out guiding principles of the Teaching Service and the TSC. The TSC is established under s.5. It is to consist of a chairperson and four other members appointed by the President on the recommendation of the Minister of Education and Training (the Minister): paragraph 5(2) (a). Subsections 5(3) – 5(8) set out requirements for eligibility for appointment of the chairperson and the members of the TSC. Section 6(1) provides that the chairperson and members are appointed for a term of 4 years and may be appointed for a further term. Subsection 6(2) provides:

"The Chairperson or a member is no longer qualified to be the Chairperson or a member of the Commission as the case may be if he or she:

(a) has been convicted of a criminal offence which has a penalty of 12 months or more imprisonment; or

(b) has become bankrupt; or

(c) is unable or unfit to discharge his or her functions; or

(d) has been absent from two consecutive meetings of the Commission:

(i) in case of the Chairperson – without the consent of the majority of members; and

(ii) *in case of a member – without the consent of the Chairperson."*

3. Section 9 sets out the functions of the TSC which include the recruitment and employment of teachers, the monitoring of attendance, efficiency and conduct of employees in the Teaching Service, and the management of teachers discipline.

4. The respondents, Mr Narai and Ms Kalo had been appointed members of the TSC in August 2020 and the respondent, Mr Tabi was appointed in April 2021, then becoming the chairperson. Two member positions of the TSC remained vacant.

5. During 2022 communications were exchanged between TSC and the Minister concerning disciplinary action including suspension being taken by the TSC against 20 teachers. There was disagreement between them about TSC's management of the situation.

6. By letter on 17 January 2022 the Minister requested the President to remove the respondents as members of the TSC due to them being unfit to discharge their duties (citing one of the disqualifying grounds in s.6 of the Act) and as they were not responsive to the Government (citing s.3 (f) of the Act).

7. The same day, by a further letter, the Minister requested the President to appoint four named persons as the new members of the TSC, nominating one of them to be chairman.

8. By Order No. 6 of 2023 the President removed the respondents as members of the TSC pursuant to para.5(2)(a) of the Act and s.21 of the Interpretation Act [CAP. 132].

9. Section 21 of the Interpretation Act provides:

"Where an Act of Parliament confers power on any authority to make any appointment that authority shall also have power (subject to any limitations or qualifications which affect the power of appointment) to remove, suspend, reappoint or reinstate any person appointed in the exercise of the power."

10. By Order No. 7 of 2023 also dated 25 January 2023 the President appointed three new members of the TSC, being three of the people which the Minister had requested to be appointed.

11. The respondents urgently applied to the Supreme Court for restraining orders that stayed the operations of the President's decisions. The respondents immediately commenced proceedings for judicial review of both the President's decisions. The Minister and the President were named as respondents. The three new members were not joined as parties to the proceedings.

12. An urgent conference was convened and the matters that required the Court's attention under Civil Procedure r.17.8 were considered. On 3 February 2023 the court ruled that the respondents had an arguable case and fixed 6 February 2023 as the trial date.

The Trial

13. At trial the President indicated he would abide the outcome of the proceedings and took no active part in them.

14. The Respondents argued that both the President's decisions were unlawful, null and void ab initio, and sought orders re-instating the respondents as members of the TSC.

15. The respondents alleged that their removal was unlawful as members of the TSC could only be removed in the circumstances set out in ss. 6(2) of the Act. The instrument of removal did not specify the basis on which they were removed but, even if it had done so, the respondents were never given an opportunity to be heard prior to their removal. They were denied natural justice.

16. The respondents also argued that the appointment of the new members was unlawful as they, as a group, did not fulfil the requirements for appointment set out in ss. 5(3)(4) and (6) of the Act, and would breach the independence of the TSC.

17. The Minister opposed the orders sought. He argued that the President's power to remove members of the TSC was not limited to the circumstances set out in the ss.6(2). Further the Minister had offered the respondents an opportunity to be heard as his concerns about the handling of the teachers disciplinary matter had been raised with them in a letter dated 11 January 2023 but they did not avail themselves of the opportunity. The Minister contended that the new members were lawfully appointed.

18. The trial judge held that the removal of the respondents was unlawful for a number of reasons. First, by the terms of s.21 of the Interpretation Act the President's power to remove the TSC chairperson and members was "*subject to any limitations or qualifications which affect the power of appointment*". The trial judge construed these words to encapsulate all the conditions for appointment and for disqualification for membership under s.5 and s. 6 of the Act. Thus the President's power to remove a sitting member could only be exercised when one of those conditions or limitations existed. As none of them were referred to in the instrument of removal, the trial judge said it must be assumed that no such circumstances existed and therefore the President's removal of the respondents was unlawful.

19. Secondly, the Minister's letter to the President gave two reasons for the request to remove the respondents, namely that they were unfit to discharge their duties or functions (in substance relying on a paragraph in ss. 6(2) of the Act, although the wrong paragraph was identified) and that they were not responsive to the Government (referring to s. 3(f) of the Act). The evidence before the court failed to show that the respondents were unfit to discharge their duties and functions, or were not responsive to government policy.

20. Thirdly, the instrument of removal did not state the reason for the respondents' removal. Further, the letter of 11 January 2023 relied on by the Minister did not deal with the two grounds put

forward by the Minister in his recommendation to the President, but dealt with the discipline actions against the group of 20 teachers. The letter would not have alerted the respondents to the possibility of their removal. They were never given an opportunity to respond to grounds for their removal. Natural justice required that the respondents be given the opportunity to answer the allegations against them.

21. As the removal of the respondents was unlawful the trial judge ordered that the President's decision be quashed. As the respondents had been unlawfully removed the judge held that it followed that the new appointments must also be quashed.

The Appeal

22. The Minister argues that both quashing orders in the court below should be set aside, and the validity of the President's two decisions upheld.

23. The President has again indicated that he will abide the outcome of the appeal.

24. As we understand the Minister's grounds of appeal they advanced three broad contentions. First that the trial judge was in error in holding that the President's powers under s.21 of the Interpretation Act required the instrument of removal to identify one of the conditions or limitations arising under s.5 and s.6 of the Act and to state the reason for removal. And in any event the letter of 11 January 2023 had already informed the respondents of the reasons for their removal. (Grounds 1, 2, 3 and 7).

25. Secondly, that the trial judge erred in reinstating the respondents even at the interim stage of the proceedings when there had been a severance and deterioration of the relationship between the government and the TSC. (Grounds 4, 5 and 6).

26. Thirdly, that the trial judge erred in quashing the appointment of the new members when they were not parties to the proceedings and had not been given an opportunity to respond. (Ground 6).

Discussion

27. We differ from the trial judge as to the meaning of the words "*subject to any limitations or qualifications which affect the power of appointment*" in s.21 of the Interpretation Act. In our opinion those words qualify the grant of the power, and cover situations where the grant of power is subject to a condition precedent before it can be enlivened. The present case provides an example. The President's power of appointment under the Act was conditional on a prior recommendation from the Minister. Once that recommendation had been given to the President, that enlivened the power of the President to make an appointment or removal. Once the power was enlivened, then its exercise could be limited or conditioned by specific provisions arising in the statutory framework in which the appointment or removal was to operate, in this case within the framework of s.5 and s.6. However, it is difficult to see how any of those provisions would have relevance in the case of a decision to remove the chairperson or a member. Rather they are provisions relevant to an appointment.

28. However this difference of interpretation of s. 21 of the Interpretation Act does not have any consequence in the outcome here. Nor is the outcome in these proceedings dependent on whether or not, as a matter of fact, the respondents were or were not unfit to discharge their functions, or were not responsive to government policy. The Respondents' case advanced in the Supreme Court, and before this court, is one of procedural unfairness. They claimed the decision

for their removal was unlawful because they were not told of the reason or reasons, and were not given any opportunity to respond.

29. The Minister asserts that there were legitimate reasons within the scope of the Act for the removal of the respondents. Whether these reasons were justified does not fall to be considered in the present proceedings. The merit of his assertions would arise only after reasons had been made known to the respondents, and the respondents had been given an opportunity to be heard. If then the President removed them, notwithstanding their answers, the factual correctness or otherwise of the reasons could then be the subject of the judicial adjudication. That is not the case that was before the Supreme Court.

30. The central question for decision in this appeal is whether the President was under an obligation to give a reason or reasons for the removal of the respondents, and an opportunity for them to respond. An opportunity to respond meaningfully cannot be given without the reason for the proposed removal being made known.

31. It is now widely recognised in the field of public administration, and employment that procedural fairness, often referred to as natural justice, requires that a reason and an opportunity to be heard be given before a decision affecting personal rights is made. The obligation is recognised by statute in Vanuatu in the Employment Act [CAP. 160] (s.53) and in the Public Service Act [CAP. 246] s.19B, to give two examples. Unless a statute specifically provides otherwise procedural fairness now requires that an opportunity be given to be heard. The extent of that requirement will depend on all the circumstances of the case: *Michel v President of the Republic and Others* [2015] VUCA 14 [25] – [26].

32. Counsel for the Minister before this Court acknowledged this general requirement, but argued that this case presented a unique situation under the Teaching Service Act because of the overriding need for the government to be able to oversee the performance of the TSC and to ensure government policy was implemented. We reject this submission. Differences of opinion between Ministers and government agencies are not uncommon. Good administration requires that differences be resolved by fair processes. There is nothing unique about a teaching service to justify departing from the recognised principles of administrative fairness.

33. The Minister's alternative argument that the respondents were in any event given an adequate opportunity to respond by the Minister's letter of 11 January 2023 cannot be accepted, for the reasons given by the trial judge. The letter did not deal with the topic of the possible removal of the Respondents.

34. The consequences that should follow the findings of unlawfulness then arise. The trial judge quashed the respondents' removal as it was unlawful, and quashed the appointment of the new members as that appointment was a direct consequence of the quashing of the removal. We infer this was said to follow because once the respondents were returned there were insufficient vacancies in the Commission to permit the President to appoint, as a group, three more members.

35. We do not accept the argument advanced on the Minister's behalf that the discretion to quash the instrument of removal was wrong because it effectively reinstated the respondents in circumstances where the relationship between the Government and the respondent had broken down. The quashing order did not impose on the Minister any long term relationship with the respondents. It is open to the Minister to again recommend to the President that the respondents be removed if he considered that to be appropriate, following next time the correct procedures to ensure that the President acts lawfully.

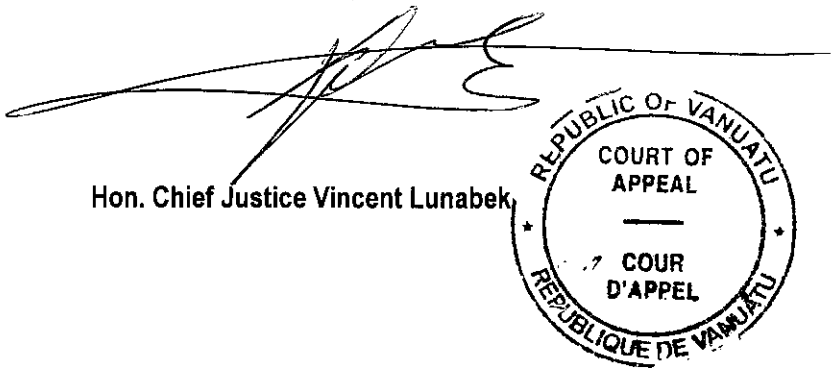
36. The grounds of appeal make reference to the new appointees not being heard before their appointments were quashed. This issue was not developed in the argument. As we noted at the outset, the new appointees were not joined as parties. As they could potentially have been affected, they should have been joined, but in the very unusual circumstances of this case we do not think their non-joinder affects the outcome. Those unusual circumstances are that restraining orders were made in respect of both the instruments of removal and the instrument of appointment before any action was taken to put them into effect. Both instruments were to come into effect at the same time. The stay orders were put in place before either instrument was acted upon, and there was nothing before the trial judge to suggest that the new appointees could suffer any personal prejudice by having their appointments quashed.

37. We were informed by both sides that the new appointees had not taken up the tentative new positions and were still employed in other government jobs. We consider the quashing of the new appointments was justified on the basis that the quashing of the respondents' removal meant that there were insufficient vacancies in the TSC to allow the appointment of three new members as a group. Such appointment was not possible and the instrument of appointment was therefore a nullity. For this reason, and because they had not taken up the new positions or we understand suffered any detriment, there was no need for the three putative new members to be consulted on the outcome of the review proceedings or on the making of the quashing order. It is significant that those putative new members have taken no steps.

38. For these reasons the appeal will be dismissed with costs to be agreed or taxed.

DATED at Port Vila, this 18th day of August 2023

BY THE COURT



Hon. Chief Justice Vincent Lunabek