

BETWEEN: DOMINIQUE MOLSIR
Appellant

AND: THE TEACHING SERVICE COMMISSION
First Respondent

AND: THE REPUBLIC OF VANUATU
Second Respondent

Dates of Hearing: 9 August 2024

Coram: *Hon. Chief Justice V. Lunabek*
Hon. Justice J. Mansfield
Hon. Justice R. Young
Hon. Justice D. Aru
Hon. Justice E. P. Goldsbrough

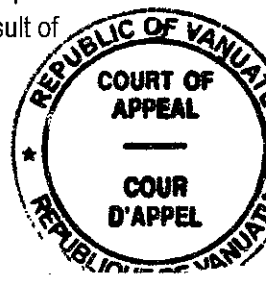
Counsel: *E. Moibaleh for the Appellant*
F. Bong for the First and Second Respondents

Date of Decision: 16 August 2024

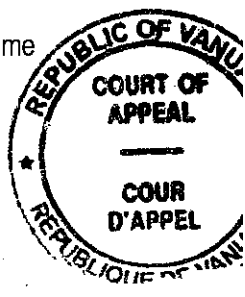
JUDGMENT OF THE COURT

Introduction

1. Mr Molsir has been a teacher in Vanuatu for over 30 years. In 2022 he issued proceedings against the Teaching Service Commission (TSC) and the Republic, alleging that the TSC and the Republic were negligent in failing to approve salary increments for him between 2006 and 2017.
2. The judge in the Supreme Court dismissed his claim. He concluded that any increments in salary were at the discretion of the TSC and were not an entitlement. He also concluded that the claim for salary increments was res judicata based on the decision of the Supreme Court in *Rolland v Teaching Service Commission*, [2018] VUSC 42.
3. The appellant's case on appeal was that the Teaching Service Act (section 38) required principals of schools to file annual appraisal reports of the conduct of every teacher. The reports were to be filed with the TSC and the TSC were then obliged to consider those reports and decide if any increment in salary was justified. In Mr Molsir's case no such annual appraisals were completed by the principals of the schools that he had worked for and so no appraisals were ever sent to the TSC. As a result of this failure Mr Molsir was not considered for any increase in salary by the TSC.



4. Mr Molsir claimed that the failures by the principals to provide the assessments and by the TSC in failing to consider increments were negligent and thereby deprived him of an increase in salary.
5. In this appeal he said the judge in the Supreme Court erred in not finding both the school principals as agents of the Republic and employed by the TSC, as well as the TSC, were negligent in their failures.
6. As to the question of res judicata Mr Molsir said that when the case of *Rolland v TSC and the Republic* came to the Court of Appeal, counsel for the appellants advised the court that the question of increments in salary at the discretion of the TSC, would be a "*matter for another day*". And so, it was submitted the appellant was entitled now to raise this issue in the Supreme Court without an assertion that this claim was prevented by res judicata.
7. The appellant faced two impediments to his claim and therefore in this appeal.
8. First, accepting for this purpose that Mr Molsir could establish liability of his claim, counsel for Mr Molsir accepted that there was no way in which any damages could be assessed. To establish loss the appellant would need to prove that he was entitled to an increase in salary, individualised to each year of his claim, between 2006 and 2017. It was accepted that he could not now possibly do so. To be considered for an increase in salary, Mr Molsir's principal in the school at which he taught in each year, needed to file his annual appraisal with the TSC. Only on receipt of such an assessment could the TSC consider an increase. Whether in fact such an increase was given in any year, was at the discretion of the TSC (Section 38 Teaching Services Act No. 38 of 2013). No principal assessment reports relating to Mr Molsir were ever filed with the TSC and therefore the TSC made no decision on the merits of any increase in salary.
9. In those circumstances, there could be no assessment of what each principal of the schools where Mr Molsir taught between 2006 and 2017, may have said about Mr Molsir's teaching performance. Nor is it possible to know what the TSC may have decided in terms of an increase in salary or otherwise, if they had received any such an assessment from the principal of a school. Mr Molsir accepted that this proposition was fatal to his claim for damages.
10. The second impediment to Mr Molsir's claim relates to the principle of res judicata as raised by the defendants in the Supreme Court in 2017 and the Respondents in this court. In 2017 the Supreme Court heard a case brought by Mr Molsir and others against the TSC, the Republic and a particular School Council (*Rolland v Teaching Service Commission [2018] VUSA 42*) and subsequently considered by this court in appeal case *879/2018*, Court of Appeal.
11. There were two parts to Mr Rolland's claim before the Supreme Court in the 2017 case. First was a claim that teachers were paid on an incorrect salary scale. This part of the claim was successful. The second part of the claim related to increments arising from required assessments by principals of the relevant schools which employed the claimant teachers and in turn the TSC assessment of any increment.
12. We are satisfied that this aspect of the 2017 claim was identical to the claim before the Supreme Court and this court in these proceedings.



13. The complaint in the 2017 claim was that principal assessment reports relating to teachers performance each year, were not filed with the TSC. The TSC therefore had awarded no increments given no assessments were received.

14. In his decision giving judgement for the THC and the Republic in the *Rolland* case , Geoghegan J said at [61]:

"It is clear therefore that the award of any salary increment lies with the Commission and is completely discretionary although the Commission must "consult with and take into consideration the views of the immediate supervisor of the employee concerned". It is clearly open therefore for the Teaching Service Commission to refuse to accede to a salary increment although such a decision would obviously be susceptible to an application for judicial review".

15. and further at [69]:

"In order to find for the claimants in this matter I would need to be satisfied the defendants had breached some legal duty to the claimants".

16. and [70]:

"I do not consider that the claimants have established such a breach. The evidence, such as it is, suggests, as I said, a very poorly monitored system of confidential reporting and I'm not satisfied that the claimants have established that the first defendant received the required reports and that the process for undertaking salary increments were thereby triggered. The evidence in that regard is completely confusing and the lack of any documentary evidence at all is extremely concerning..."

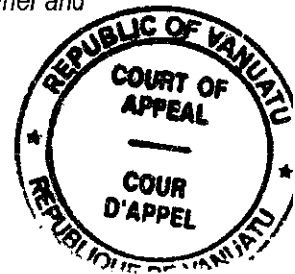
17. The Court of Appeal in considering Geoghegan J's judgement said at [2]:

"Justice Geoghegan correctly in our view determined that the process for increments in salary required a number of steps to occur before a discretionary decision was made – and he fully set out the steps in his judgement. On the basis that the final decision was discretionary there is no obligation on the part of the Teaching Service Commission or the state to acquiesce to any such application for an increment in salary to be awarded; and the claimant's had not established a breach of any legal duty owed to them."

18. The Court of Appeal recorded (at [5]) that *"Mr Molbaleh was content to deal with the issue of any increments on another day"*, Irrespective of Mr Molbaleh's comment about dealing with the increments on another occasion, the fact is the increment claims were dealt with and rejected in the Supreme Court and in the Court of Appeal (see 17 above). Mr Molbaleh's attempt to delay the issue in the Court of Appeal were therefore of no effect. We reject this ground of challenge.

19. We consider that rather than *res judicata*, the decision of the Judge in the Supreme Court confirmed in the Court of Appeal in *Rolland* created an issue estoppel in this case.

20. The preconditions typically required for an issue estoppel are; (see *Carl Zeiss Stiftung v Rayner and Keeler Limited* [1966] 2 All E.R. 536



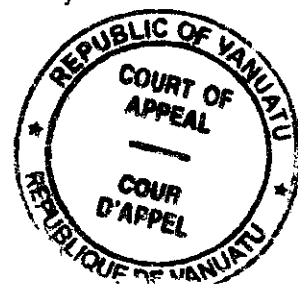
1. The decision was final. In this case the decision of the Court of Appeal confirming the Supreme Court's decision illustrates the finality of the claim.
 2. The same question was decided. We have identified that the questions decided in the *Rolland* case were identical to those questions in these proceedings.
 3. The same parties. Mr Molsir was a party in both proceedings in *Rolland*, as well as these proceedings, as was the TSC and the Republic.
21. We are therefore satisfied an issue estoppel operates.
22. While the judge identified the connection between the two cases as *res judicata*, we consider it is more accurately described as an issue estoppel. However, the effect of those conclusions is the same. The claim cannot succeed because the appellant is estopped from bringing this claim in these proceedings having brought and having had resolved the same issue in the *Rolland* case.

Result

23. We are therefore satisfied for the reasons given firstly, that no damages are capable of assessment in this case and secondly, that an issue estoppel operates and that the judge was correct to dismiss the claim.
24. The appeal will be dismissed.
25. We wish to add this. We endorse the comments made by Judge Geoghegan back in March 2018 when he said at [74]:

"While the claimants have not been successful, the evidence in this case has revealed what I consider to be a very poorly monitored and supervised system regarding the filing of confidential reports necessary to trigger salary increments. I consider that it is incumbent upon the Teaching Service Commission as a good and responsible employer, to attend to a review of the situation as a matter of priority to ensure that teachers' salary increments are dealt with efficiently in the future."

26. We would add that there appears to be statutory obligations on both principals to complete assessment reports each year on relevant senior teachers covered by the legislation and file them with the TSC and in turn for the Teaching Service Commission to undertake appropriate assessments as to the justification for a salary increase for each particular qualifying teacher once these assessment reports are received.
27. Six years have gone by since Judge Geoghegan's words and yet as we understand it, nothing further has been advanced either by principals filing relevant assessment reports on the quality of the teaching of individual teachers, and no assessments of relevant salary increases undertaken by the Teacher Services Commission.

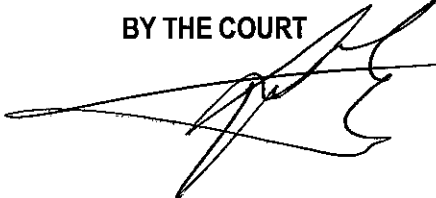


Costs

28. No costs were sought by the Republic. In the circumstances that was an appropriate approach.

DATED at Port Vila, this 16th day of August, 2024

BY THE COURT



Hon. Chief Justice Vincent Lunabek

