

BETWEEN: **TEACHING SERVICE COMMISSION**
First Appellant

AND: **REPUBLIC OF VANUATU**
Second Appellant

AND: **VANUATU TEACHERS UNION**
First Respondent

AND: **ALMANO MARA, ANDERSON HOMU, BRYENT FORAU, ELODIE LINGTAMAT, OREVA J ALI, DONALD C TOM, CLAUDIES BULE, HAMILSON BULE, JAMES WILLIAM, JEAN JOEL PAKOA, JESSYNTA BULEBAN,, MICHA OLIVER, LYNDON TAGARO TAMBE, PAUL R TABINOK, SIKAL IARUEL, ANETTE DANIEL, RHONDA L B NATAPEI, JOE PAUL STEPHEN and PRESCILLA WEIMA PAKOA**
Second Respondents

Before: *Hon. Chief Justice Vincent Lunabek
Hon. Justice Ronald Young
Hon. Justice Richard White
Hon. Justice Oliver A Saksak
Hon. Justice Viran M Trief
Hon. Justice Edwin P Goldsbrough*

Counsel: *S Aron for the Appellants
S Kalsakau for the Respondents*

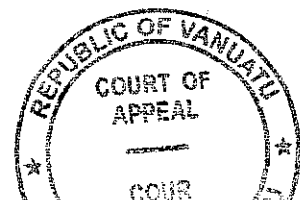
Date of Hearing: *12 February 2024*

Date of Judgment: *16 February 2024*

JUDGMENT OF THE COURT

Introduction

1. A principal function of the first appellant, the Teaching Service Commission (TSC) established under the *Teaching Service Act* (the TS Act), is to recruit and employ teachers, principals and other

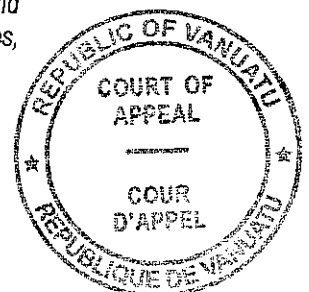


staff in government and assisted non-government schools. The persons comprising the second respondent to the appeal are or have been teachers employed by the TSC under the TS Act in the Teaching Service. They are also members of the first respondent, the Vanuatu Teachers Union (VTU), and some are, or have been, members of its National Executive Committee (the NEC).

2. On 14 April 2022, the TSC suspended each of the Second Respondents on half pay, as it considered that they were, while unauthorised, receiving "*an allowance or wages*" from the VTU in addition to their teacher's salary and that their "*involvement*" with the VTU had caused "*improper conduct which is likely to have a detrimental effect on the reputation of the Teaching Service*".
3. Subsequently, on 9 September 2022, the TSC wrote to each of the Second Respondents requiring them to resign from their respective positions in the VTU (but not as a member of the VTU) and forewarned them that a failure to resign would lead automatically to the termination of their employment.
4. The Court was told that, by reason of restraining orders issued in the Supreme Court, the foreshadowed terminations have not taken effect.
5. In the proceedings in the Supreme Court, the VTU and the Second Respondents (collectively, "*the Respondents*") impugned on numerous grounds the decisions to suspend and terminate. They contended that the TSC's assertion that they had engaged in activities in contravention of s.48 of the TS Act was wrong and that its foreshadowed actions were non-compliant with other statutory provisions and with two treaties ratified by the Republic, namely the Freedom of Association and Protection of the Right to Organise Convention and the Right to Organise and Collective Bargaining Convention. They sought orders quashing the decisions, orders for reinstatement, payment of entitlements under the Employment Act, damages and other relief.
6. Section 48 of the TS Act provides:

"48 Private employment

- (1) *Except as provided for in section 57, an employee in the Teaching Service may not engage in any paid employment or other work or operate any business outside the Teaching Service except with the prior agreement in writing of the Commission. This includes receiving additional payment from an Education Authority, school council or other person in relation to work performed at a school or elsewhere as part of or related to the employee's work in the Teaching Service.*
- (2) *The Commission must not give approval under this section where the paid employment, other work or business will interfere with the proper performance of the employee's duties in the Teaching Service.*
- (3) *This section does not apply to work undertaken for community and professional organisations which is essentially voluntary but where expenses, an honorarium or an allowance is paid."*



7. As is apparent, the agreement of the TSC pursuant to s.48 is an authority to engage in a form of work. It is not of itself an authority to be absent from the workplace during working hours. Members of the Teaching Service remain subject to the ordinary obligations of employees to be present at their workplace during working hours unless entitled to a form of leave.

The decision of the primary Judge

8. Acting on a submission from the Respondents, the Judge agreed to hear and determine as a preliminary issue *"the application of s.48 of the Teaching Service Act to service on the [NEC]"*.
9. In the judgment following the hearing (*Vanuatu Teachers Union v Teaching Service Commission* [2023] VUSC 212) the Judge identified the preliminary issue more particularly, at [4]:

"[W]hether or not being a member of a trade union executive committee (in this case the NEC of the VTU) is to be considered as "paid employment or other work" within the meaning of s.48(1) of the Teaching Service Act No. 38 of 2013, or whether a person falls within the exemption in s.48(3) from the requirements of s.48(1)."

10. The Judge concluded at [38]:

"[E]lection to and service on the National Committee of the VTU falls within the exemption in s.48(3) as work undertaken for a professional organisation which is essentially voluntary."

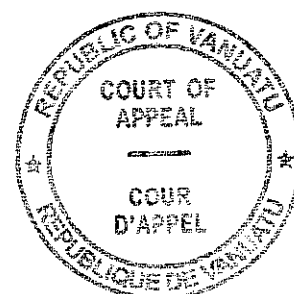
11. Apart from costs, the Judge did not make any consequential orders.
12. The TSC now appeals. The parties proceeded on the basis that the conclusion in [38] is to be understood as a declaration which can be the subject of an appeal. As is apparent, the declaration does not, in terms, address the first limb of the issue identified by the Judge at [4].

The statutory regime

13. As already noted, the TSC is established by the TS Act (s.5(1)). In addition to recruiting and employing the staff in government and assisted non-government schools (s.9(a)), the TSC's functions include:

"(b) to ensure all government schools and all assisted non-government schools are adequately staffed;

(c) to recruit and employ other staff, including early childhood education teachers and teachers in institutes and other youth and adult education environment as required;



(d) to monitor the attendance, efficiency and conduct of all employees in the Teaching Service and to take fair and firm action to maintain high standards in these areas;

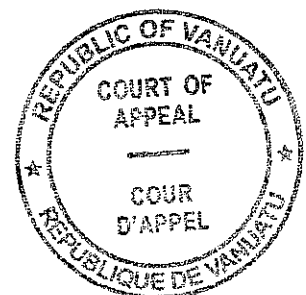
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(i) to manage the teacher's discipline."

14. The TSC must act as a good employer (s.18). It has the power, subject to the TS Act itself, to do all things that are necessary or convenient to be done for or in connection with the performance of its functions (s.10).
15. The TSC Act also establishes the Teaching Service, consisting principally of "employees engaged by the [TSC] under this Act", (s.32). All appointments, promotions, disciplinary actions and dismissals concerning members of the Teaching Service must be made in accordance with the TS Act (s.33).
16. The TS Act contains a number of provisions concerning the conduct of teachers, one of which is s.48, concerning private employment, set out above. The obvious purpose of s.48 is to preclude an employee in the Teaching Service from undertaking other work which may interfere with the proper performance of the employee's duties.
17. The VTU is a registered trade union under the Trade Union Act. Its Constitution was not in evidence before the Judge, but was included in the Appeal Books.

The reasons of the Primary Judge

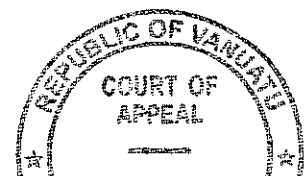
18. The Judge recorded that "no evidence was called" at the hearing. Instead, it proceeded on the basis of some brief "undisputed facts", most of which were in the nature of a recitation of the course of events commencing with the TSC's actions on 14 April 2022.
19. In reaching his conclusion about the effect of the exemption in s.48(3), the Judge reasoned as follows:
 - (a) The exemption of work undertaken for community and professional organisations which is essentially voluntary, even when expenses, an honorarium or an allowance is paid, indicates a legislative understanding that such work could otherwise have been within the ambit of s.48(1), with the consequence that the agreement of the TSC would have been required for engagement in such work, at [22], [23];
 - (b) A trade union may be a "professional organisation" for the purpose of s.48(3). This was particularly so in the case of the VTU, at [25] – [33];



- (c) Accordingly, "service" on the NEC of the VTU could be regarded as "work" undertaken for a "professional organisation" within the meaning of s.48(3), at [33];
 - (d) The submission of the TSC that "work" undertaken by the NEC members could not be regarded as voluntary because they had been elected to their respective positions by the VTU membership should not be accepted. The fact of election to the NEC did not make the work undertaken on that committee any less voluntary, at [37].
20. It is apparent that the Judge treated the identified preliminary issue as one of law, that is, as involving the construction of s.48 only. That explains why the Judge proceeded without evidence, other than the brief "undisputed facts".

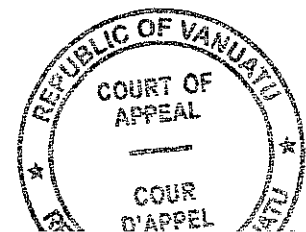
Discussion

21. The proper construction of s.48 is the appropriate starting point for a consideration of its application in a given case. In accordance with s.8 of the *Interpretation Act*, it is to be construed having regard to the evident intention of the Parliament derived from its text, context and purpose.
22. As already noted, the evident purpose of s.48 (made particularly apparent in subs.(2)) is to preclude employees from engaging in forms of activity which would interfere with the proper performance of their duties in the Teaching Service. However, it is to be noted that the subject of the s.48(1) prohibition is not activities generally, but only those activities amounting to paid employment, other work and the operation of a business.
23. That is to say, s.48(1) seems directed to engagement in remunerative activities. This is evident in the heading "*Private Employment*", in the reference to "*paid employment*", in the very use of the term "*work*" (as opposed to, say, "*activity*", with "work" having the connotation of an activity performed for reward), and in the reference to the operation of a "*business*" (with its connotation of an enterprise conducted with a view to profit). It is also evident in s.57 (which is made an exception to s.48(1)) as it expressly permits an employee who is suspended without pay to "*undertake paid employment or other work or operate a business outside the Teaching Service*" while suspended. The obvious purpose of that exception is to allow the suspended employee to have a means of earning a livelihood, ie, to engage in remunerative activity.
24. More colloquially, the Parliament has sought by s.48 to avoid a situation in which, without the approval of the TSC, a teacher may be serving two masters.
25. Having regard to these considerations, we consider that the adjective "*paid*" in s.48 also applies to the "*other work*", that is, so that it is understood as "*other paid work*", that is, paid work other than that performed as an employee under a contract of employment.
26. We are reinforced in this view by the consideration that, if the Parliament had intended any work, paid or otherwise, which may interfere with the proper discharge of a teacher's duty to require the authority of the TSC, it would have been easy to say so, and it has not. Parliament may have



thought it unnecessary to do so, as generally the engagement in activities which are inconsistent with the proper discharge of the employee's duties is regarded as a breach of the employee's implied obligation of fidelity and good faith – see Macken, McCarry and Sappideen's *"The Law of Employment"*, LBC (4th Ed) at 138-9.

27. When s.48(1) is understood in this way, the Parliamentary intention in s.48(3) is plain. Parliament has recognised that teachers may undertake voluntary activities in the nature of work for a community organisation or for a professional organisation for which they may receive some form of limited recompense. It did not intend that TSC's approval should be required for engagement in activities of that kind. Accordingly, s.48(3) provides, in effect, that work for a community or professional organisation of a voluntary kind will not be within s.48(1) even if the employee receives some payment in respect of that work, provided that the payment is in the nature of reimbursement of expenses, an honorarium or an allowance.
28. The term "*honorarium*" seems to be a reference to a gratuitous payment made in recognition of the provision of some service by a person who has no entitlement to the payment – see Macquarie Dictionary (4th Ed).
29. The term "*allowance*" used in s.48(3) is recognised as being capable of a variety of meanings. Relevantly for present purposes, it can mean a payment (usually of a limited kind) made in recognition of the provision of a service or a payment made to cover costs likely to be incurred by the recipient, without that person having to show that the expenses were in fact incurred, or the amount incurred. We are inclined to think that both of those meanings may be apt in the context of s.48(3).
30. What can be said is that the term "*allowance*" does not seem apt to include a salary or wage for services provided.
31. We do not wish to be understood as expressing concluded views about the meaning of the terms "*honorarium*" and "*allowance*" in s.48(3). That is because we did not receive submissions from the parties about the way in which they are to be understood, and a decision about their meaning is not necessary for the determination of the appeal. We are referring to these meanings only for the purpose of indicating that, in determining the application of s.48(3), some view has to be formed about the correct understanding of the terms in order to determine whether payments made to the employees in question had the character of "*expenses, an honorarium, or an allowance*".
32. On the understanding of s.48 set out above, the determination of its application to the activities of the individual respondents as members of the NEC required consideration of two principal issues. The first was whether the activities of those respondents, as members of the NEC, should be characterised as paid employment, other paid work or the operation of a business for the purposes of s.48(1)? If they did not, the prohibition in s.48(1) could have no application, and there would be no need to proceed to a consideration of subs. (3).

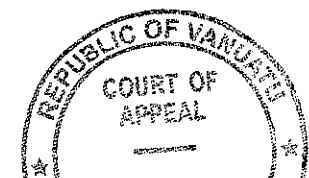


33. As is apparent, the resolution of the first issue required consideration, at the least, of the nature of the activities undertaken by the NEC members, the arrangements pursuant to which the activities are undertaken, the obligations of the members and the capacity in which they performed those activities. It may also have required consideration of the payments made to the NEC members, including their amount and relationship with the activities. These are very much factual enquiries.
34. At first blush, the issue concerning the application of s.48(1) probably reduces to that of whether the activities of the individual respondents on the NEC should be characterised as "*other paid work*". That is because it would be surprising if the attendance of an executive committee member at, say, a monthly or quarterly meeting of a trade union could be characterised as engagement in "paid employment". Likewise, one would not ordinarily expect those attendances to have the character of "*paid work*".
35. But the issue may be more complex than that if only because of provisions in the VTU Constitution specifying the duties of several NEC members (the three Vice Presidents, the five Assistant General Secretaries and the National Treasurer) and, in some cases, specifying that the member is expected to carry out his/her "*work*" in the VTU office and in accordance with its Staff Manual. That indicates that the position may not be as straightforward as one might at first think. There was no indication at the hearing in the Supreme Court as to whether any of the individual respondents did occupy a position of Vice-President, Assistant General Secretary or National Treasurer.
36. There is another difficulty to which the primary Judge may not have been alerted. It emerged on the hearing of the appeal that, despite the basis on which the hearing at first instance appears to have been conducted, not all of the individual respondents are members of the NEC. In fact, counsel identified only five of the 19 individual respondents as being NEC members. The remaining individual respondents were said to serve on other Boards and Committees having some unidentified relationship with the VTU. It is unclear whether any of those who do serve on the NEC also serve on those other Boards and Committees. Account would have to be taken of all the activities of NEC members, including service on the other Boards and Committees before making a determination about the application of s.48(1) in their circumstances.
37. If the prohibition in s.48(1) was found to be applicable, it would then be necessary to address the second principal issue, that is, the applicability of the exemption in s.48(3). That would include consideration of whether the activities should properly be characterised as work undertaken for a "*professional organisation*" and, if so, whether it was "*essentially voluntary*" in nature, even though payments in the nature of expenses, an honorarium or an allowance were made in respect of it.
38. None of these questions is a pure question of law. Their resolution requires evidence. They require, at the least, findings of fact as to the activities undertaken by the individual respondents as members of the NE or other body, the arrangements pursuant to which those activities are undertaken, the control or direction (if any) to which they are subject in undertaking those



activities, and findings about the payments made to them, ie, their nature, the manner of their calculation, and their relationship with the services or activities of the individual respondents. Findings of these kinds are necessary for an assessment of the character of the payments.

39. The resolution of the second principal issue would also require a determination of the activities and functions of the VTU so that a decision as to whether it is a "*professional organisation*" can be made. It would not be surprising if it could be characterised in that way but some evidence would be required.
40. Likewise, there would need to be findings of fact about the character of the NEC members' participation, for example, whether the prospect of receipt of payment meant that their participation was not voluntary (ie. not done as volunteers) but instead undertaken for the remuneration. These issues cannot be resolved as abstract questions of law.
41. We return to the declaration of the Judge in [38] against which the appellants appeal. There are two related difficulties with it. First, despite the Judge treating the preliminary issue as one of law only, the application of s.48 to the circumstances of the individual respondents required findings of fact as well as the proper construction of the section. The Judge did not make those findings and then consider how the section operated, if at all, in the light of those found facts. The second is that, while purporting to answer a question of construction, [38] is expressed as a conclusion of combined law and fact. Even if the construction of s.48 adopted by the Judge was correct, he could, with respect, have said no more than that service on the NEC "*may*", not "*does*", fall within the s.48 exemption.
42. Accordingly, the appeal must be allowed.
43. As we have noted, the hearing at first instance took place without the parties tendering any evidence and proceeded on the basis of some brief agreed facts. This has the consequence that there have been no findings of fact which would enable this Court to make its own assessment.
44. Counsel for the Appellants submitted, relying on Rule 11.7(1) of the Civil Procedure Rules, that the parties' sworn statements were in evidence at the hearing before the Judge. However, that is not supported by the Judge's statement, noted earlier, that "*no evidence was called*" and that the parties had relied instead on "*undisputed facts*". Those "*undisputed facts*" were insufficient to allow a determination of the application of s.48 to be made.
45. Accordingly, the matter will have to be remitted to the Supreme Court for further hearing.
46. Before leaving the matter, we note that this case is another illustration of the long experience of the courts that the benefits of hearing and determining some issues in a proceeding in advance of others are often more illusory than real. It is not uncommon in litigation in which this course has been adopted for it to be found that other issues arise which were not anticipated, that the court does not have all the necessary evidence, or that there is an overlap with other issues not then being tried. Another disadvantage is the fragmentation of the litigious process, including



while appeals are pursued. This is not to deny that there may be cases in which the determination of one or more issues in the litigation in advance of others will be appropriate, but considerable care is required before that course is adopted.

Conclusion

- 47. For the reasons given above, we allow the appeal and set aside the judgment at first instance. The proceedings are remitted to the Supreme Court for hearing and determination by another Judge.

- 48. Having regard to the encouragement of both parties to the Judge to proceed in the way he did, each party is to bear its, his or her own costs.

Dated at Port Vila this 16th day of February 2024

BY THE COURT



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Hon. Chief Justice Vincent Lunabek

