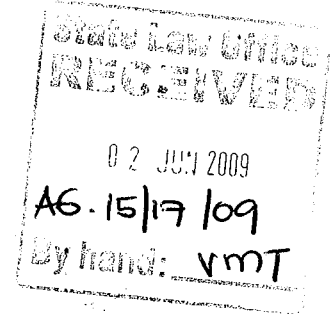


BETWEEN: THE PRESIDENT
Referral Authority

AND: THE SPEAKER
Respondent

Mr Bill Bani for the Referral Authority
Mrs Viran Trief for the Respondent



JUDGMENT

This is an application by the Respondent to strike out a Constitutional Referral by the President of the Republic of Vanuatu.

Sometime in 2008, Parliament of Vanuatu enacted the Bill for the Employment (Amendment) Act No.31 of 2008.

The said Bill is reproduced below for ease of reference:

EMPLOYMENT (AMENDMENT) ACT No.31 OF 2008

An Act to amend the Employment Act.

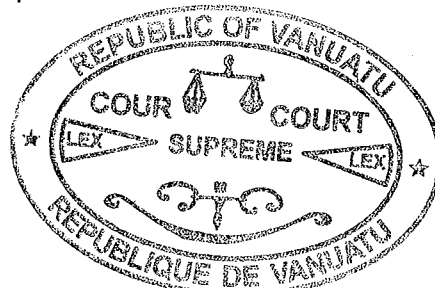
Be it enacted by the President and Parliament as follows-

1. Amendment

The Employment Act [CAP.160] is amended as set out in the Schedule.

2. Commencement

This Act commences on the day on which it is published in the Gazette.



SCHEDULE

AMENDMENTS OF EMPLOYMENT ACT [CAP.160]

1. Subsection 29(1)

Delete "1", substitute "1.75"

2. Subsection 29(2)

Delete "2", substitute "3"

3. Subsection 34(1)

Delete "12", substitute "6"

4. Subsection 36(1)

After

"confinement", insert "and 6 weeks after her confinement"

5. Subsection 36(2)

Delete "not less than half of the", substitute "full"

6. Subsection 36(2)

Insert

"(2A) If a woman continues to work during the pre-confinement period, she must produce to her employer, a medical certificate certifying that she is fit to work during that period.

(2B) If there is more than one employer from whom the woman would be entitled to claim wages under this section, the Commissioner of labour, labour officer or labour inspector must determine the amount of wages that must be paid by each employer if she has worked for 4 or more days for the same employer."

7. Subsection 36(3)

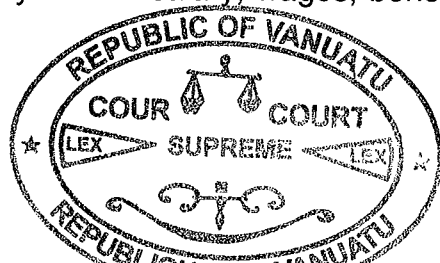
Delete "half an hour", substitute "1 hour"

8. At the end of section 36

Add

"(4) A woman who returns to her employment after maternity leave:

(a) must return to the same or equivalent position held prior to proceeding on maternity leave, without any loss of salary, wages, benefits or seniority; or



(b) may be appointed to a higher position.”

9. At the end of Section 49

Add

“(5) If an employee fails to give to the employer appropriate notice under this section, the employer may deduct from the employee’s entitlements the sum required for the period of notice.”

10. Paragraph 54(1)(d)

Delete “Where the employee has been in continuous employment with the same employer for a continuous period of not less than 10 consecutive years,”

11. Subparagraphs 56(2)(a)(i) and (ii)

Repeal the subparagraphs

12. Paragraph 56(2)(a)

After “12 months-“ insert “2 months remuneration;”

The Bill was then placed before the President for his assent on it.

On 4 February 2009, the President considers the following section of the Bill are inconsistent with Article 16(1) of the Constitution of Vanuatu and refers them to the Supreme Court for its opinion pursuant to Article 16(4) of the Constitution:

Section 1;

Section 2;

Section 5;

Section 10;

Section 11; and

Section 12.

The President states that Article 16(1) of the Constitution provides for that Parliament shall make laws for the “peace, order and good government of Vanuatu”. The President considers those provisions are inconsistent with Article 16(1) of the Constitution because:

- (1) In order to fully perform its role as the legislature in making laws for the peace, order and good government of Vanuatu, it is required in certain situations such as for this bill which dramatically changes the law, that there be prior meaningful consultations with appropriate stakeholders.



However, there was insufficient or no proper consultation prior to the passing of this bill.

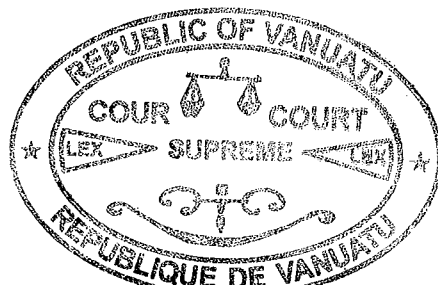
- (2) Due to increased overheads in relation to severance payments, a consequence of this bill would be that employers will be forced to lay off their employees thus contributing to increased unemployment and disorder in Vanuatu.
- (3) It defeats the purpose of Parliament making laws for the “good government” of Vanuatu when business which will be mostly affected are Ni-Vanuatu owned who account for the majority of businesses in Vanuatu.

He considers those provisions are severable.

On 24 February 2009, the Attorney-General filed an Application to strike out the Presidential Referral on the following grounds:

1. The Referral discloses no arguable inconsistency between the Bill and article 16 of the Constitution:
 - (a) The Parliament is granted plenary powers by article 16(1) which are not subject to either:
 - (i) “duties” of consultation; or
 - (ii) merits review by the Supreme Court.

Article 21(5), Constitution
In re the Constitution, Timakata v. Attorney General [1992] VUSC 9; [1980-1994] Van LR 575 at p.587.
 - (b) The Bill is within Parliament’s legislative-making power pursuant to article 16(1) to amend the Employment Act.
In re the President’s Referral, President of the Republic of Vanuatu v. Speaker of Parliament [2000] VUSC 43.
 - (c) The reference to “peace, order and good government of Vanuatu” does not limit the legislative power contained in article 16(1).
 - (d) The practical consequences of the Bill, such as the alleged laying off of employees, are not relevant to the question of the constitutional validity of the Bill.



The thrust of the referral is that there was no consultation by Parliament in relation to this Bill. It is submitted for the President that Article 16(1) of the Constitution contains an implied provision for consultation by Parliament in relation to a bill, if and when the circumstances dictate. It is said on behalf of the President a Bill of this nature warrants such prior consultation i.e. of a bill dramatically affecting the economic section of Vanuatu.

Article 16 of the Constitution is the relevant Article. It provides:

“POWER TO MAKE LAWS

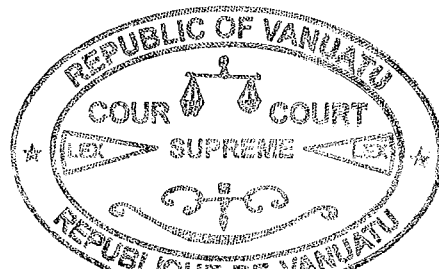
- 16(1) *Parliament may make laws for the peace, order and good government of Vanuatu.*
- (2) *Parliament shall make laws by passing bills introduced either by one or more members or by the Prime Minister or a Minister.*
- (3) *When a bill has been passed by Parliament it shall be presented to the President of the Republic who shall assent to it within 2 weeks.*
- (4) *If the President considers that the bill is inconsistent with a provision of the Constitution he shall refer it to the Supreme Court for its opinion. The bill shall not be promulgated if the Supreme Court considers it inconsistent with a provision of the Constitution.”*

By perusing the language of Article 16(1) of the Constitution, I fail to see a duty requirement for Parliament to consult before it enacted a bill.

It is true Article 30(2) of the Constitution provides that:

“the Council may be consulted on any question, particularly any question relating to tradition and custom, in connection with any bill before Parliament.”

However, this does not mean that by implication, in its discretion to make laws for the “peace, order and good government of Vanuatu”, Parliament must consult.



A handwritten signature in black ink, appearing to be a stylized 'J' or similar character, located at the bottom right of the page.

I agree with the Respondent's submissions that the Referral discloses no arguable inconsistency between the Bill and Article 16 of the Constitution for the following reasons:

- (a) The Parliament is granted plenary power by article 16(1) which are not subject to either:
- (i) "duties" consultation; or
 - (ii) merits review by the Supreme Court.

Timakata v. Attorney General [1992]

President of Vanuatu v. Attorney General [1998]

- (b) The Bill is within Parliament's legislative-making power pursuant to Article 16(1) to amend the Employment Act.

President of Vanuatu v. Speaker of Parliament [2000]

- (c) The reference to "peace, order and good government of Vanuatu" does not limit the legislative-making power contained in Article 16(1) of the Constitution.

Jean Paul Virelala v. The Ombudsman [1997]

- (d) The practical consequences of the Bill, such as the alleged laying off of the employees, are not relevant to the question of the constitutional validity of the Bill.

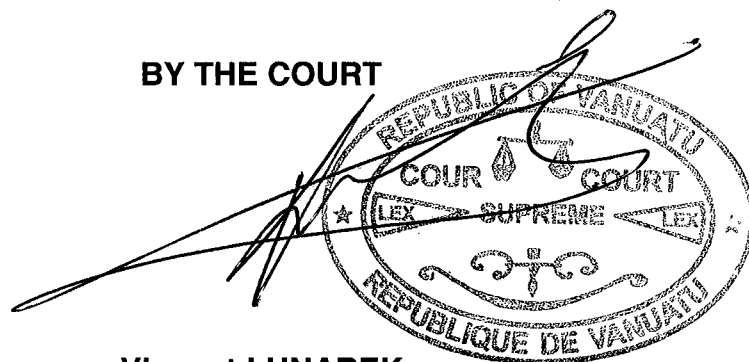
President of Vanuatu v. Speaker of Parliament [2000]

As a result of the above considerations, the Referral filed 4 February 2009 is hereby struck out.

There is no order as to costs.

DATED at Port-Vila this 19th day of May 2009

BY THE COURT



**Vincent LUNABEK
Chief Justice**