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

Civil Appeal
Case No. 22/1931 CoA/CIVA

BETWEEN: HARRISON T VAKA MATAN LUEN
First Appellant

AND: ALLEN COLLINS FAERUA
Second Appellant

AND: THE REPUBLIC OF VANUATU
Respondent

Date of Hearing:	***9th November 2022***
Before:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice Ronald Young*** ***Hon. Justice Richard White*** ***Hon. Justice Dudley Aru*** ***Hon. Justice Edwin Goldsbrough***
Counsel:	***Mr. D. Yawha for the Appellant*** ***Mr. F. W. Samuel for the Respondent***
Date of Decision:	***18th November 2022***

JUDGMENT OF THE COURT

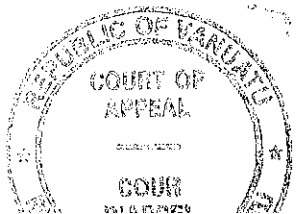
Introduction

1. This is an appeal against a decision of the Supreme Court striking out the appellants' claims for unjustified termination.

Background

2. The background to the proceedings is set out in the judgment under appeal and we adopt it below.

3. Mr Luen was the former Director General of the Ministry of Infrastructure and Public Utilities (MIPU). He was appointed under contract for a term of 4 years effective from 15



November 2018. Mr Faerua was a former Director within MIPU and he was appointed for a period of 3 years effective from 8 February 2019.

4. The Public Service Commission (PSC) terminated their contracts of employment on 29 October 2020 on the grounds of serious misconduct.

5. The PSC alleged on the basis of a complaint lodged by the Minister responsible for MIPU against Mr Luen and Mr Faerua that both had failed to perform their duties according to their core roles and responsibilities pursuant to s 20 of the Public Service Act [CAP 246]. As a result of the complaint the appellants were suspended on full salary and the PSC appointed a Panel to investigate the matter. The investigation proceeded and a report was produced on 11 August 2020.

6. By letter of 13 August 2020, the PSC sent a copy of the report to each appellant requesting their response to the allegations against them. On 20 August 2020 each of the appellants responded. Later on 3 September 2020 the PSC informed them that their suspensions were extended.

7. On 18 September 2020 the PSC invited the appellants to address s 50 (4) of the Employment Act [CAP 160] as to why their employment should not be terminated. Mr Faerua responded on 28 September 2020. Mr Kalmet of Hurley Lawyers responded on behalf of Mr Luen on 2 October 2020.

8. On 9 October 2020 the PSC considered the appellants' response then decided to terminate their employment. The PSC alleged that the appellants had by-passed the procurement process to award two government contracts to Prime Works Ltd with a value of both contracts exceeding VT 5,000,000 for the same work at the same location and distance and for the same period. This amounted to contract splitting contrary to s 13A of the Government Contracts and Tenders Act.

9. The contracts were No 597/19 and 598/19 for which it was alleged Mr Luen as DG was largely responsible. Mr Faerua was terminated because he had failed to carry out due diligence checks on the recommendations put forward by the Technical Evaluation Panel, contrary to s 34 (1) of the Public Service Act.

Judgment under appeal

10. The application to strike out the claim was granted by the Supreme Court Judge. The respondent asserted in the application that the claim did not disclose a reasonable cause of action for unjustified dismissal.

11. In determining the application, the approach taken by the primary judge is set out at paragraph 33 of the judgment where he said: -

> " *For the Court to use its unlimited and inherent jurisdiction in s 28 and 65 of the Judicial Services and Courts Act, on an application to strike out the claimants' claims summarily as it were, the Court must not limit itself determination to the only issue of whether or not the claimants have established a cause of action in the pleadings and claims but it must extend to the overall claims of whether on their facts and evidence their claims are clearly untenable that they cannot possibly succeed. See Ala v VNPF and Noel v Champagne Beach.*"

12. The primary judge then noted that the appellants had not pleaded s 50 3) and 4) of the Employment Act in their claim, describing this as a *'serious omission'* on their part. Furthermore, he considered that the appellants could have challenged the decision to dismiss them by filing judicial review proceedings (which are now out of time) rather than a civil claim. It was noted that the PSC afforded the appellants the opportunity to answer the allegations which they did before the PSC dismissed them on the grounds of serious misconduct.

13. The primary judge at paragraph 48 said: -

> "*Those reasons should be sufficient to allow the defendant's application for strike out. But the Court has to go further to consider the whole claims of the claimants to say whether they are so clearly untenable that they cannot possibly succeed.*"

14. The primary judge then considered the substance of the complaints against the appellants in relation to contract splitting, their response and the findings of the PSC before concluding that '*the claimants have no cause of action to base their claims for damages'*.

The Appeal

15. The appeal in brief is pursued on a number of grounds. First, the appellants say that the primary judge fell into error by taking into account irrelevant matters or by disregarding relevant matters and misconstrued the law and the evidence in making his findings. Secondly, the appellants assert that the primary judge was wrong to rely on the respondent's evidence that the appellants had breached their employment contracts without hearing any evidence from the parties.

16. Thirdly, the appellants contend that the primary judge fell into error by summarily dismissing the claim by relying on the cases of *Cynthia Ala, Noel* and *Gouras,* when these cases did not assist the respondent. Finally, it was contended that the primary judge was wrong to conclude that the appellants' claim for unjustified dismissal had no basis because they had failed to plead s 50 3) and 4) of the Employment Act.

17. The respondent submitted that it was plain that the appellants could not establish that their dismissals were unjustified because they had not pleaded any non-compliance with s 50 3) and 4) and accepted that they had had an adequate opportunity to answer the charges, as required by s 50 4). As we explain below, this submission rested on a misunderstanding of the basis of the appellant's claims and of the effect of s 50 4).

Discussions

18. Considering the various grounds of appeal, we deal with them together. We are of the view that the primary judge misunderstood the appellants' claim, either in the manner the claim was pleaded or in the manner in which submissions were put to him.

19. This was an action for unjustified dismissal seeking damages for the wrongful termination of employment. It was not a judicial review action complaining about inadequate process, such as non-compliance with s 50 4).

20. Contrary to the belief of the respondent, s 50 4) does not exclude other means by which a dismissed employee may prove that the dismissal was wrongful. Even when proper procedures have been followed, a dismissal may be wrongful because, for example, the dismissed employee did not breach his or her contract of employment.

21. The appellants accepted the manner in which the PSC dealt with the allegations against them. They were given the opportunity to respond to the allegations of contract splitting and they did so before the decision was taken to terminate their employment. So they did not allege a breach of s 50 4). Instead, their case was that there had been no contract splitting and therefore the basis on which they had been dismissed was factually wrong.

22. A hearing on an application to strike out is limited to it being an interlocutory process. This Court has said on more than one occasion that the power to strike out a claim in the exercise of inherent jurisdiction must be exercised sparingly. In **Noel v Champagne Beach Working Committee** [2006] VUCA 18 the Court of Appeal said: -

> *"Although, as this Court pointed out in* ***Kalses v Le Manganese de Vate Ltd*** *[2005] VUCA 2, Civil Appeal Case 34 pf 2003 (3 May 2005), there is no specific provision in the Civil Procedure Rules to strike out a proceeding on the grounds*

*that there is no reasonable cause of action or that it is frivolous, vexatious or an abuse of process, it was not disputed that such a power exists. Jurisdiction can be found within the broad terms of ss.28 (1) (b) and 65 (1) of the Judicial Services and Courts Act No. 54 of 2000 and the Civil Procedure Rules themselves provide in Rules 1.2 and 1.7 a basis for exercising the jurisdiction. In practice the existence of such an inherent jurisdiction has been assumed by the Supreme Court: see e.g. the judgments of Treston J in **Naflak Teufi v Kalsakau** [2004] VUSC 94; Civil Case 102 of 2002 (6 May 2004) and **Kalomtak Wiwi Family v Minister of Lands** [2004] VUSC 47, Civil Case 14 of 2004 (2 September 2004).*

*However it has always been recognised that the jurisdiction should be exercised sparingly and only in a clear case where the Court is satisfied it has the requisite material; the claimant's case must be so clearly untenable that it cannot possibly succeed: **Electricity Corp Ltd v Geotherm Energy Ltd** [1992] 2 NZLR 641."*

23. Again in **Gouras v Naka Ltd** [2020] VUCA 53 the Court in its observations about strike out applications said: -

> *"The outcome of interlocutory applications such as the present will rarely be successful when there are matters of disputed fact. The admissibility of certain evidence and the weight to be given to certain evidence are matters for trial. Parties and counsel cannot expect the Court on such applications to hear a 'mini-trial' or to make a decision based on contested factual material. So care should be taken to ensure that any such applications are meaningful and cost effective. That observation is not intended to be critical of counsel or the parties in this particular matter."*

24. These same sentiments were expressed by the Court in **Ala v Vanuatu National Provident Fund** [2021] VUCA 34 when the Court said:-

> *"The Court will strike out a claim in the exercise of the inherent jurisdiction only when the claim is "so clearly untenable that it cannot possibly succeed". The Court's insistence that the inherent power be exercised only in such clear cases indicates that the jurisdiction should not be exercised if the resolution of disputed issues of fact is required: Gouras v NACA Ltd [2020] VUCA 53 at [22]."*

25. We are satisfied this appeal should be allowed. The primary judge did not appear to appreciate that the appellants' case was a simple civil action alleging wrongful dismissal. If he had done so he would have appreciated that concerns about compliance with s 50 of the Employment Act and adequate notice of alleged misconduct had no relevance to the cause of action pleaded.

26. As to the judge's factual findings, given that this was an interlocutory hearing of a civil action the judge should not have embarked on an assessment of the facts relating to the dismissal. He was not in a position to do so. The hearing was not a trial. The appellants

were entitled to call oral evidence at a trial and have the opportunity to cross examine the witnesses for the respondent. They were not given this opportunity. We are of the view that there are disputed facts which require a proper trial for the evidence to be tested.

27. A proper application of what this Court has said in the above cases would have led to the dismissal of the strike out application.

Result

28. The appeal is allowed. The matter is to be returned to the Supreme Court for trial before another Judge. The defendants are entitled to costs fixed at VT 100,000.

DATED at Port Vila this 18th day of November, 2022

BY THE COURT

.....

Hon. Vincent Lunabek
Chief Justice