

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(CIVIL JURISDICTION)

JUDICIAL REVIEW NO.13 OF 2013

BETWEEN: MARK BEBE

Claimant/Applicant

AND: THE REPUBLIC OF VANUATU

Defendant/Respondent

Coram: Justice Mary Sey

Counsel: Mrs Mary Grace Nari for the Claimant/Applicant
Mr Kent Ture Tari for the Defendant/Respondent

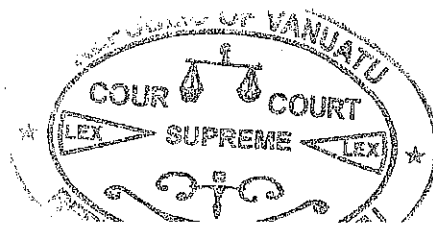
Date of Hearing: 28 August 2013

Date of Decision: 30 August 2013

RULING

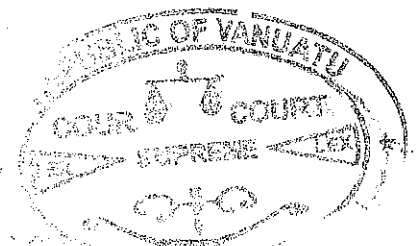
1. This is a claim brought by the Claimant, on 8 August 2013, for Judicial Review of the Prime Minister's decision of 4 June 2013 transferring him to the position of Director General of the Ministry of Lands.

2. The claim is couched in the following terms:
 - "1. The Claimant claims a declaration that the decision of the Defendant for transfer of the Claimant to the position of Director General of Ministry of Lands is of no effect;



2. A mandatory order requiring the Prime Minister and other ministers of state to observe the employment contract of the Claimant dated 24 November 2012; and
 3. A quashing order that the transfer of the Claimant to the position of Director General of Ministry of Lands is quashed.
 4. An order for costs."
3. The claim is met with a defence premised on the grounds that the Contract of Employment upon which the Prime Minister's decision is based contains an arbitration clause which requires this particular dispute to be referred to arbitration.
 4. It is timely at this juncture to set out the **chronology of events:**

- | | |
|------------------|---|
| 24 November 2012 | The Prime Minister entered into Contract of Employment for the position of Director General with the Claimant. |
| 4 June 2013 | The Prime Minister wrote a letter to the Claimant informing him of his transfer to the Ministry of Lands effective as of 1 July 2013. |
| 5 July 2013 | The Claimant wrote a letter to the Prime Minister referring to the discussions he had with the Prime Minister on 1 July 2013. |
| 5 July 2013 | The Claimant wrote a letter to the Attorney General seeking urgent advice on his transfer. |



16 July 2013

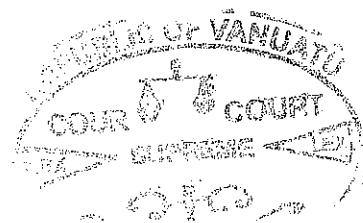
The Attorney General wrote a letter replying to the Claimant's letter of 5 July 2013 and stating that the Office of the Attorney General cannot give advice to the Claimant as it is currently representing the Prime Minister.

2 August 2013

The Acting Prime Minister wrote a letter referring to the Prime Minister's letter of 4 June 2013 instructing the Claimant to transfer immediately.

5. Claimant's submissions on the issues:

1. Was the transfer made under Article 58(2) of the Constitution valid and lawful?
 2. Was there a dispute between the employer and employee for the Claimant to invoke Clause 31 of the employment contract dated 24 November 2012?
 3. What happened to the correspondence between the parties? Why didn't the Defendant discuss the issue of transfer with the Claimant?
 4. The Prime Minister was determined that he was correct in applying Article 58(2) of the Constitution for the Claimant's transfer and the Claimant was threatened to vacate his office to allow another person into the office. Should the Claimant be waiting to invoke Clause 31.2?
 5. Is there any bar to the Claimant's right to file a claim for judicial review?
6. The Claimant's counsel contended that the Claimant has the right to seek a review of the legality of his transfer. Further, she argued that the legal question is whether the Prime Minister's decision to



transfer the Claimant under Article 58(2) is valid and she submitted that only the Supreme Court can answer the question.

7. **The Law**

The Constitution

EXCLUSION OF SECURITY OF TENURE IN RELATION TO POLITICAL ADVISERS AND TRANSFER OF PUBLIC SERVANTS.

- 58. (1)** The rule of security of tenure provided for in Article 57(5) shall not apply to the personal political advisers of the Prime Ministers and Ministers.
- (2)** Senior public servants in Ministries may be transferred by the Prime Minister to other posts of equivalent rank.

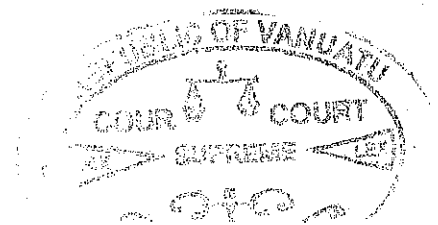
Public Service (Amendment) Act No. 1 of 2011

"17A Appointment of director-general

- (1) The Minister on the recommendation of the Commission is to appoint a person to be director-general under a contract of employment for a period of 4 years and the person may be reappointed only once.
- (2) The remuneration and allowances of a director-general is to be determined by the Minister after consultation with the commission.
- (3) The terms and conditions of appointment of a director-general are to be set out in the contract made between the Minister and the director-general.

17B Procedure for making a recommendation

The Commission, must prior to making a recommendation under subsection 17A (1), abide by the following procedure:

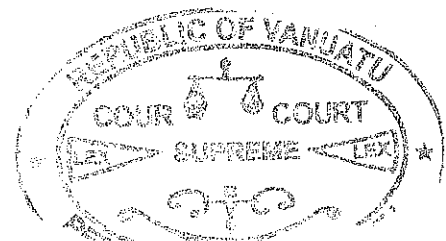


- (a) Advertise the position in a newspaper or other form of media with a wide circulation in Vanuatu, and
- (b) Ensure the advertisement allows an applicant a minimum of 2 weeks in which to make an application; and
- (c) Provide an address as to where to send the application; and
- (d) Convene a panel of 3 independent persons to interview and require the panel, having regard to section 15 (imposing a duty to act as a good employer, to recommend a short list of the most competent and suitable applicants; and
- (e) Make the recommendations to the Minister from the short list.

17C Grounds for termination of appointment of a director-general

A director-general may be terminated by the Minister on any of the following grounds:

- (a) Serious misconduct as defined in the Staff Manual; or
- (b) On account of physical or mental incapacity to carry out his or her official duties efficiently; or
- (c) Incompetence as shown in the performance appraisal carried out by the Commission; or
- (d) Neglect of duty; or
- (e) Bankruptcy; or
- (f) Becomes a member of Parliament, Local Government Council, National Counsel of Chiefs, Municipal Council, or a member of the Public Service Commission, Police Service Commission or Teaching Service Commission."



8. For its part, the sole issue arising from the Defendant's case is whether the Claimant can invoke the jurisdiction of the Court to consider the dispute without first having resort to the *Dispute Resolution Clause* as stipulated in Clause 31 of the Contract. It provides:

31. Dispute Resolution

31.1 The parties must attempt to settle any disputes arising between them in an amicable manner.

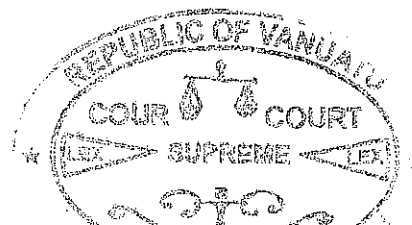
31.2 If the parties fail to settle their disputes in an amicable manner, the dispute must be referred to arbitration under the Trade Disputes Act [CAP 162].

Clause 32 of the Contract provides:

32. Governing Law

32.1 This Contract is governed by and construed in accordance with the laws of Vanuatu and the Parties agree to submit to the non-exclusive jurisdiction of the courts of Vanuatu.

9. It was submitted by defence counsel that Clause 31 should be interpreted generously in favour of arbitration and not narrowly in favour of a Court jurisdiction. Furthermore, that the parties to the dispute in the Contract should first avail themselves of the dispute resolution procedures contained in Clause 31.
10. If the parties are not able to settle the dispute through the procedures agreed upon under Clause 31, then any submissions of the dispute to the non-exclusive jurisdiction of the Courts of Vanuatu may be utilised.



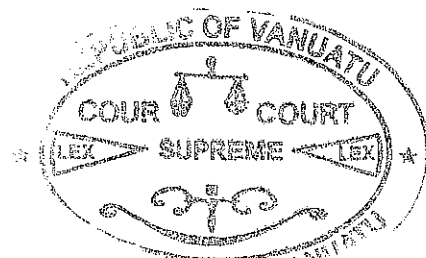
What Is a Dispute?

11. **From Black's Law Dictionary:** A dispute is a conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other.

12. A dispute being referred to as "trade dispute" under the **Trade Disputes Act [CAP.162]** means a dispute between employers and workers or between workers and workers, which is connected with one or more of the following-
 - (a) the terms and conditions of employment, or the physical conditions in which any workers are required to work;
 - (b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
 - (c) allocation of work or the duties of employment as between workers or groups of workers;
 - (d) matters of discipline;

13. At this stage, the question I pose is this: Is there in fact any dispute between the Claimant and the Prime Minister with regard to the subject matter of the action before this Court?

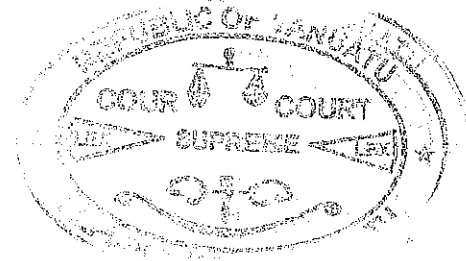
14. Whereas the Claimant's contention is that he has a specific contract to work as Director General in the Ministry of Justice for a specified period of 4 years, the Prime Minister is resolute in his assertion that



he was correct in applying Article 58(2) of the Constitution for the Claimant's transfer to the Ministry of Lands.

15. On the one hand, Mrs. Nari of counsel for the Claimant argued that there was no dispute with the Claimant as to any outstanding issues on 4 June 2013. Whereas, on the other hand, Mr. Tari's contention is that the dispute hinges on the agreement that was signed on the 24th day of November, 2012.
16. The fact that it may be possible to see that the dispute can have only one outcome does not, I think, entitle the Court to say that the dispute is not a dispute. That is what Saville J (as he then was), said in the passage in **Hayter v Nelson** [1990] 2 Lloyds Rep, 265 at 268-269.
17. Recently, when considering the issue of "disputes" in **Applied Enterprise Limited v Interisle Holdings Ltd & others** (Eastern Caribbean Supreme Court Territory of the Virgin Island - Judgment 2013: 17, 21 June), His Lordship Bannister J [Ag] used a simple illustration to demonstrate his reasoning as follows:

"In my judgment in this context neither the word "disputes" nor the word "differences" is confined to cases where it cannot then and there be determined whether one party or the other is in the right. Two men have an argument over who won the University Boat race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that the dispute did not in fact exist. Because one man can be said to be indisputably right and the other indisputably wrong does



not, in my view, entail that there was therefore never any dispute between them. In my view this ordinary meaning of the word "disputes" or the word "differences" should be given to those words in arbitration clauses."

18. I adopt His Lordship's reasoning and would apply it to this claim before me. Suffice it to say that it is unnecessary for present purposes to explore the question of "dispute" in depth. What is significant is that by the particular wording of Clause 31, as **DISPUTE RESOLUTION**, the parties have made an agreement that in place of the Courts, their dispute **must** be resolved by reference to arbitration under the Trade Disputes Act [CAP 162].
19. It needs to be mentioned that I take judicial notice of the fact that the word "must" is now being extensively used in the legislation of Vanuatu and interpreted as imperative in place of the word "shall".
20. Parties to a contract may make arbitration a condition precedent to a right of action for breach of the contract, and such a condition is valid. See **Scott v Avery** [1856] 10 E.R. 1121, where the Court held that any person may covenant that no right of action shall accrue until a third party has decided on any difference that may arise between himself and the other party to the covenant. As stated by the English Court of Appeal in **Czarnikow v Roth Schmidt and Co.** [1922] 2 K.B. 478 at 491:

*"The effect of the decision [**Scott v Avery**] is to establish that an agreement that the rights of the parties shall be determined by arbitration as a condition precedent to an action is not an agreement ousting the jurisdiction of the Court.*



There is no cause of action and therefore no jurisdiction until an award is made, and when made the Court has complete jurisdiction."

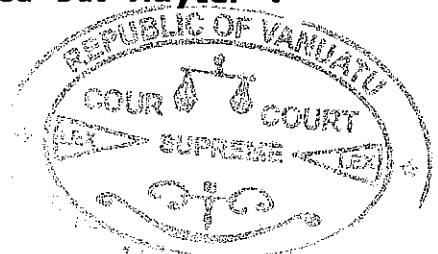
21. In **SPIE-EGC LTD v FIFA** [2003] VUCA 11, the Court of Appeal of Vanuatu noted that the parties' contract appeared to contain an arbitration clause (it was in French). The Court of Appeal stated:

"There is no dispute there has been no arbitration. The question whether or not the dispute should have been referred to arbitration before any relief was sought before a Court was not, apparently, argued before the Chief Justice."

The orders made at first instance were set aside (on other grounds) and in the penultimate paragraph of the Judgment, the Court of Appeal stated thus:

"Accordingly we must set aside the Chief Justice's Order of 16th December 2002 and remit the matter for the Chief Justice to consider Article 10, "the arbitration clause" and the other relief sought in the Originating Summons. FIFA will have to decide whether to continue with these proceedings or take some other course."

22. In this present case, it is clear to me that the Claimant and the Prime Minister have chosen to substitute an alternative form of dispute resolution as per Clause 31 of the Contract of Employment dated the 24th day of November, 2012.
23. That bargain remains and so it must be even assuming that the tribunal is likely to be slower or otherwise less efficient than the Courts. See **Applied Enterprise Limited v Interisle Holdings Ltd & others** (supra) in which **Channel Tunnel Group Ltd v Balfour Beatty** (1993) 1 All ER was considered but **Hayter v**



Nelson (1990) 2 Lloyds Rep 265 was followed. See also **EXAPL Limited v Pact Group (NZ) Limited** (2011) NZHC.

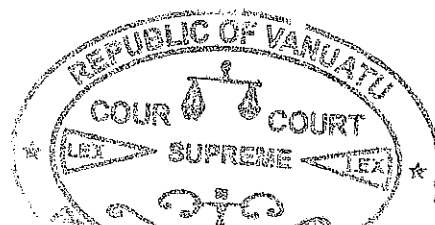
24. Whatever the position in the past when the Courts tended to view arbitration clauses as ousting their jurisdiction, the modern view (in line with the basic principles of the English law of freedom of contract) is now more relaxed. There is no good reason why the Courts should strive to take matters out of the hands of the tribunal into which the parties themselves have by agreement undertaken to place them.

Conclusion

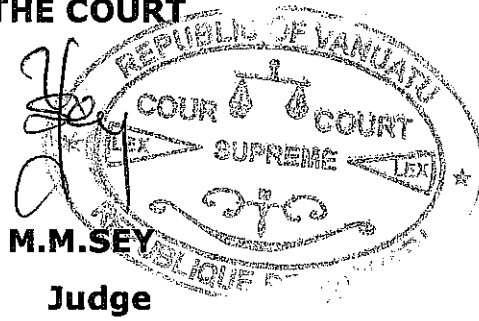
25. I conclude, therefore, that the question posed in paragraph 13 above should be answered in the **affirmative** as it appears to me that there is a dispute pertaining to the Claimant's Contract of Employment, which he entered into with his employer on the 24th day of November 2012, for the position of Director General in the Ministry of Justice.
26. For these reasons, it seems to me that this Court has no alternative but to decline jurisdiction to hear the Claimant's claim for Judicial Review of the Prime Minister's decision of 4 June 2013 transferring him to the position of Director General of the Ministry of Lands.

It is hereby so ordered accordingly.

DATED at Port Vila, this 30th day of August, 2013.



BY THE COURT



M.M. SEY

Judge