

**IN THE SUPREME COURT  
OF THE REPUBLIC OF VANUATU**  
*(Civil Jurisdiction)*

**Civil**  
**Case No. 16/3495 SC/CIVL**

**BETWEEN: Anttoine Malsungai**  
*First Claimant*

**AND: Yvette Tevear**  
*Second Claimant*

**AND: Vanuatu Broadcasting and Television Corporation**  
*Defendant*

**Before: Justice Aru**  
**In Attendance: Mr. A. Godden for the First and Second Claimants**  
**Mr. D. Yawha for the Defendant**

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## **JUDGMENT**

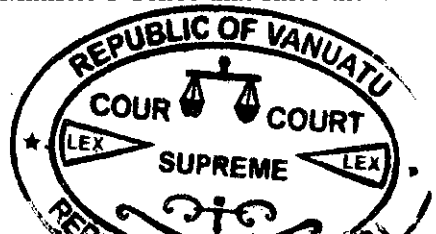
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### Introduction

1. This is a claim for unlawful termination of employment. Both claimants were employees of the Vanuatu Broadcasting and Television Corporation (VBTC). In addition to being employees they were also members of the Vanuatu National Workers Union (VNWU). The second claimant is the President of the VBTC-VNWU branch. The Vice President is the first claimant. These proceedings were issued by the claimants following their termination by the VBTC.

### Background

2. The following chronology of events are facts which are not disputed:-
  - 29 April 2005 – VBTC and VNWU entered into a Collective Bargaining Agreement (CBA'05) in relation to terms and conditions of employment of VBTC employees who are members of the VNWU;
  - 21 January 2015 – the claimants were elected to their respective positions as VBTC -VNWU representatives;
  - 8 September 2015 – the National Secretary – Treasurer of the VNWU Ephraim Kalsakau wrote to the Prime Minister's Office that since the VBTC and VNWU



were unable to reach a collective bargaining agreement they were considering commencement of industrial action. No dates were given;

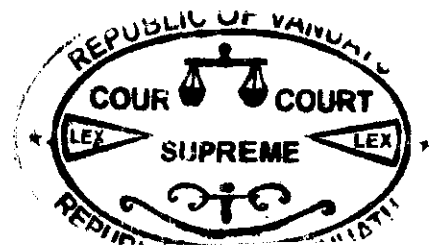
- 19 October 2015 – VBTC-VNWU signed a further Collective Bargaining Agreement (CBA'15) stating that the 8 September strike Notice had ceased to have effect;
- 10 November 2015 – the claimants and other members of the VBTC-VNWU wrote a letter and met the Director General to the Prime Minister regarding delays with their salaries;
- 11 November 2015 – the VNWU members organised an irregular industrial action which ended on 12 November;
- This irregular industrial action was instigated without formal notification to the VBTC Management and Board;
- 12 November 2015 – the Director General to the Prime Minister's Office responded to the VNWU members letter;
- 17 November 2015 – the claimants received their suspension letters; and
- 10 February 2016 – the claimants received their termination letters.

#### Claim

3. The claimants plead their claim at paragraph 17 of the claim that the irregular industrial action was done on behalf of VNWU therefore they were entitled to the immunity of a trade union under s19 of the Trade Unions Act [CAP 161] . They seek the following relief:-
  - a) A declaration that their termination of 10 February 2016 was unlawful;
  - b) An order that the claimants be paid their severance pursuant to s 56 (4) of the Employment Act [CAP 160];
  - c) Payment of outstanding arrears during their suspension to their termination;
  - d) Alternatively that all entitlements be paid.

#### Defence

4. The defendants on the other hand say that the termination was lawful and the actions of the claimants on 11 and 12 November breached the Trade Disputes Act [CAP 162]. They filed a counter claim seeking the following relief:-



- a) That the claim be dismissed;
- b) A declaration that the 11 and 12 November industrial action was lawful;
- c) A declaration that any salary or remuneration payable not later than 8 days is lawful; and
- d) An award of damages.

#### Evidence

5. The claimants rely on the following evidence:-

- a) Sworn statement of Antoine Malsungai filed on 23 February 2017 and tendered as Exhibit "C1";
- b) Sworn statement of Yvette Tevear filed on 23 February and tendered as Exhibit "C2".

6. Evidence relied on by the defendant are:-

- a) Sworn statement of Jennifer Kausei filed on 26 May 2017 and tendered as Exhibit "D1";
- b) Sworn statement of Stevenson Liu filed on 26 May 2017 and tendered as Exhibit "D2".

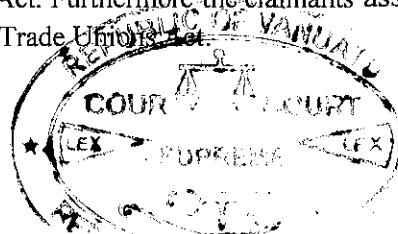
#### Issues

7. The following issues were agreed by the parties for determination by the Court:-

- a) Whether the termination was lawful;
- b) Whether the claimants breached s 33A of the Trades Disputes Act;
- c) Whether the claimants are entitled to arrears;
- d) Whether the claimants are entitled to lawful entitlements.

#### Submissions

8. The claimant's submissions in a nutshell are that the claimants were terminated because of their membership of the VNWU. Secondly it was submitted that the defendant admitted that the claimants organised an irregular industrial action and that such action did not require notice under s 33A of the Trade Disputes Act. Furthermore the claimants asserted that they were entitled to immunity under s 19 the Trade Union Act.



9. On the other hand the defendants submitted that the 11 and 12 November irregular industrial action was unlawful as it was conducted without notice as required by s33A of the Trade Disputes Act. It was submitted that the unlawful action prevented listeners accessing news by Radio Vanuatu, Television Blong Vanuatu (TBV) and FM 98. Further it was submitted that despite calls by VBTC for staff to return to work the claimants refused and prevented other staff from returning to work.
10. The defendant further submitted that there was no basis for industrial action as salaries were paid in less than 8 days as required by s 16 of the Employment Act. Finally the defendant says that the termination of the claimants was in line with the VBTC staff Manual.

#### Discussion

##### Issue 1: whether there was non-compliance with section 33A of the Trade Disputes Act

11. In their evidence, the claimants admit that on 11 November 2015 they organised and participated in an irregular industrial action which continued until 12 November. Section 33A of the Trade Disputes Act provides as follows:-

**"33A. Notice of strike or other industrial action**

*(1) Where any strike or other industrial action is contemplated by a trade union or workers the following procedure shall be followed –*

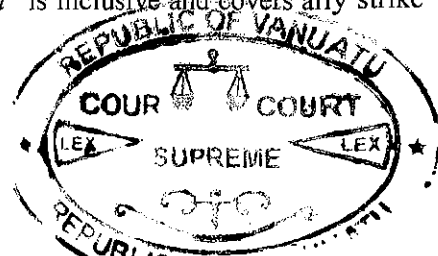
*(a) at least 30 days' notice of the proposed strike or other industrial action shall be given in writing to the Commissioner and to the employer of every worker who may be involved in the action;*

*(b) the notice shall be signed by the person or persons giving it and if given by a trade union, shall specify the name of such trade union and, if not given by a trade union, shall specify the names, addresses and employment of all persons by or on behalf of whom it is given;*

*(c) the notice shall state the date on or after which the strike or other industrial action is contemplated; and*

*(d) the notice shall be delivered by hand or by forwarding the same by registered post."*

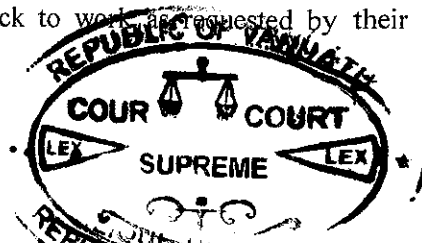
12. Where any strike or other industrial action is contemplated, the first requirement is that at least 30 days' notice must be given in writing to the Commissioner of labour and the employer. In addition the notice must be signed and a date given for the intended strike action and finally the notice must be delivered by hand or registered post.
13. Irregular industrial action is not defined. Irregular industrial action short of a strike is defined. That does not change the intention and plain reading of subsection 1) above. I am of the view that "any strike or other industrial action" is inclusive and covers any strike action or any other industrial action.



14. There is no evidence that before the irregular industrial action took place, a 30 days written notice was given to the Commissioner of labour and VBTC notifying them of the intended action on those dates.
15. The irregular industrial action was therefore carried out in breach of section 33A.

Issue 2: Whether the termination was lawful

16. Essentially the claimants assert that their employment was terminated because they were members of the VNWU who led other staff to stage the irregular industrial action. They allege that the action was done on behalf of the VNWU therefore they enjoyed immunity under s 19 of the Trade Unions Act. This is denied by the defendant as it says the claimants' actions were unlawful and amounted to serious misconduct.
17. Under the Employment Act [CAP 160] "*participation in trade union activities outside working hours, or with the employer's consent, during the working hours*" is not deemed to constitute misconduct (s 50 (2) (a)). The assumption being that such activities must be sanctioned under the Trade Unions Act and the Trade Disputes Act.
18. Under CBA'05 the VBTC recognised the involvement of the VNWU for collective bargaining purposes concerning wages and overtime. The agreement does not provide for its duration. Reading various terms of the agreement, it appears that the intention of the parties was for the agreement to continue to apply unless earlier terminated. There is no evidence that it has been terminated by either party. CBA'05 sets out a number of steps in Schedule A for "*Employment Relationship Problem Resolution Procedure*". The first step being to raise the problem with VBTC.
19. On 8 September 2015 a strike notice was issued by the National Secretary Treasurer of the VNWU to the Prime Minister's Office. VBTC is a corporate entity but no issue was taken with that as the matter was resolved through a second collective bargaining agreement CBA'15 entered into by the VBTC and VNWU on 19 October. Under the agreement the parties established a committee to review staff redundancy packages and funding. The parties also agreed that the 8 September strike notice had ceased to be effective and the committee will cease to be effective upon a negotiated deal with the Prime Minister's office. There is no evidence that a negotiated deal with the Prime Minister's office was reached before the 11 and 12 November irregular industrial action occurred. Similarly there is no evidence that CBA'15 covered payment of salaries on time.
20. Following the signing of CBA'15, the claimants raised the issue of delayed salary on 10 November 2015 in writing to the Prime Minister's Office not the VBTC as the employer in line with accepted practice outlined in CBA'05.
21. The evidence of Stevenson Liu is that staff salaries were paid in less than 8 days and despite VBTC's request for the claimants to return to work they refused and persisted with their action and also prevented other staff from going back to work as requested by their



employer. This led to a break down in the services provided by VBTC being radio Vanuatu, TBV and FM 98 on the two days.

22. The claimants were suspended and given an opportunity to answer to the allegations against them as evident in their letters of suspensions. By letter of 10 February 2016 to the claimants, it is noted that they presented their response to allegations against them before the VBTC Board on 16 December 2015. There is no evidence that the defendants dispute that. Having afforded the claimants an opportunity to be heard, the VBTC was well within its powers to effect immediate termination of the claimant's employment on the grounds of serious misconduct.
23. In relation to the remaining two issues, the claimants are not entitled to arrears of salary following the suspension as I have found that the termination was lawful. Likewise no severance or notice is payable as the termination is made on the grounds of serious misconduct (s 50 and 55 of the Employment Act).

#### Conclusion

24. The claim is therefore dismissed. The counterclaim is allowed however I make no order for damages sought against the claimants as no evidence was led to show what damage if any was suffered.
25. Given the circumstances of this case I make no orders as to costs as well.

DATED at Port Vila, this 21<sup>st</sup> day of September, 2018

BY THE COURT

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D. Aru  
Judge

