

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

Civil  
Case No. 18/3399 SC/Civil

**BETWEEN:** Joe Ligo  
Jesse Joe Dick  
Johnson Benaru  
Morokon Alilee  
Mark Peter Bebe  
Howard Aru  
William Nasak  
Claimants

**AND:** Republic of Vanuatu  
Defendant

*Date of Hearing:* 29 April 2020  
*Before:* Justice G.A. Andrée Wiltens  
*In Attendance:* Mr D. Yahwa for the Claimants  
Mr L. Huri for the Defendant  
*Date of Decision:* 8 May 2020

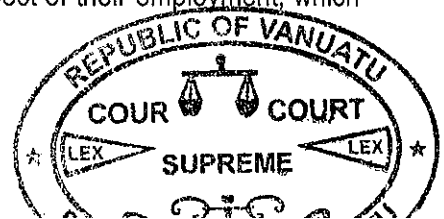
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**JUDGMENT**

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A. Introduction

1. This is an employment dispute.
2. The Claimants were employed as Directors General of various Government Departments. They seek damages for alleged failures by the State in respect of their employment, which resulted in the non-renewals of their contracts.



3. The failures by the State were submitted to merit awards of damages in the amount of VT 300 million in their favour.

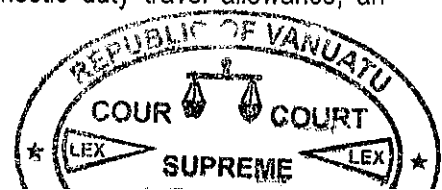
B. Background

4. On 24 November 2012, Mr Joe Ligo was employed as Director General for Lands, Mr Johnson Binaru lauma was employed as Director General for Public Works, Mr Jesse Joe Dick was employed as Director General for Education, Mr Marokon Alilee was employed as Director General for Ni-Vanuatu Business and Trade, Mr Howard Aru was employed as Director General for Agriculture, Mr William Nasak was employed as Director General for Youth and Sport, and Mr Mark Bebe Peter was employed as Director General for Justice and Community Services.
5. Those individuals are collectively the Claimants.
6. All were employed by the Prime Minister of the Government of Vanuatu on identical 4-year contracts.
7. One of the conditions of the contract, of particular relevance to the Claim, related to "Performance Agreement". That clause read:  

"23.1 The Employee shall execute a performance agreement with the Minister. The performance agreement must be executed within the time provided in Schedule B.

23.2 The Employee's performance shall be reviewed on a twelve monthly basis in accordance with Schedule B."
8. Schedule B headed "Employment Instruction" contained two sections, dealing firstly with Performance Agreement; and secondly, Performance Review. A Performance Agreement was required to be entered into within 4 weeks of the commencement of the employment. Performance Reviews were to be conducted every 12 months taking certain specified matters into account. The procedure to be followed in conducting such Performance Reviews was clearly set out.
9. The Claimants' contracts of employment were revised on 10 February 2016, without extending the term of the contract, but adding in, in particular, the following under the heading "Appointment":  

"3.3 Subject to the Employee's performance, the Employer may reappoint the Employee for only once in accordance with section 17A (1) of the Public Service Act [Cap 246]."
10. What was paragraph 23 in the initial contract of employment was identically reproduced as clause 25 in the varied contract.
11. The terms of employment, as set out in the varied contracts, can only be described as very generous. Each Director General received an annual salary of VT 6 million. Each was entitled to an overseas mission travel allowance, a domestic duty travel allowance, an



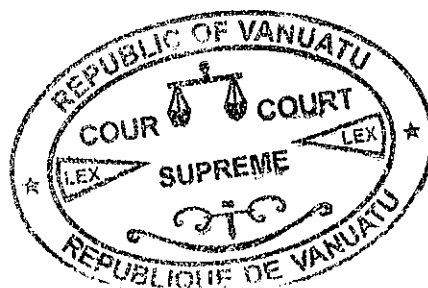
allowance for sitting on Boards and/or Committees, and a monthly fuel allowance of VT 40,000. Each was entitled to VT 20,000 per month as a telephone allowance. Each was further entitled to a Government motor vehicle for official and personal use, as well as a reasonably furnished Government house or a housing allowance of VT 100,000 per month. Each was able to claim VT 2,000 child allowance and medical insurance. The Government was obligated to pay the employee's VNPF contributions.

12. At the conclusion of the contract, each Director General was entitled to a relocation cost to move back to the employee's principal place of abode. Each was entitled to 21 days annual leave, 21 days sick leave, as well as Family Leave and Compassionate Leave.
13. Bearing these matters in mind, it is hardly surprising each of the Claimants was interested in a second term.
14. However, at the conclusion of the contract period, the Claimants' contracts were not renewed. The positions were advertised, on no less than 4 occasions, before new appointments were made in respect of the positions formerly held by these Claimants.
15. The Claimants contrast their positions with that of two other Directors General, who were appointed at the same time and on the same terms as them, but who were re-appointed for a second 4-year term.

C. The Claim

16. The Claim alleged a duty on the State to recommend re-appointment to the Minister.
17. The Claim further alleged that the Claimants' employment contracts required performance appraisals every 12 months, pursuant to clause 25 of the varied contracts. It was alleged that the failure to so appraise, despite requests by the Claimants for this to be done, was causal in the decisions to not re-appoint them for a further term.
18. It was contended that the State had, in that way, not acted as a good employer; and that it had thereby been negligent.
19. The Claim went on to allege an obligation on the State to provide for job security for these Claimants.
20. Finally, the Claim additionally relied on section 17A(1) of the Public Service (Amendment) Act 2011, which sets out as follows:

"The Minister, on the recommendation of the Commission, is to appoint a person to be a director-general under a contract of employment for a period of 4 years and the person may be reappointed only once."

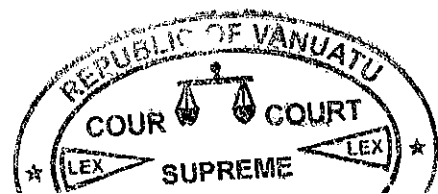


D. Defence

21. The defence to the Claim relied on the right to reappointment not being automatic and being reliant on the employer's discretion.
22. Section 48 of the Employment Act [Cap 160] was cited in support of the defence.
23. As well, it was submitted that the Public Service Act had no relevance to this case, and that the Claimants' remedy lay with Judicial Review rather than in breach of contract
24. It was contended that there was no proper cause of action disclosed, and that the terms of the Claimant's contract required them to take the matter to arbitration. Accordingly it was submitted the Claim should be dismissed.

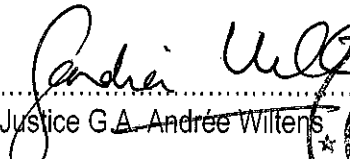
E. Discussion

25. The only aspect of the Claim deserving of discussion relates to the annual performance appraisal aspect, which I will come to. There is clearly no obligation, in a contractual situation, for the State to provide job security to employees beyond the existence of the contract. Equally, there is no obligation on the State to mandatorily recommend to Ministers that individual Director Generals be reappointed – that is clearly a discretionary matter, depending on the employee's performance, conduct and also how the individual fits with other employees. It may well be the situation that the need for such a position has changed or evaporated.
26. I note that the reappointment clause was not in the initial contract of employment. It was added in by the variation of 10 February 2016. Following that variation, there was only some nine months of the contract to run. Therefore, the time for the next performance appraisals to have taken place could well have fallen after the expiration of the contract. It is illogical to assume the lack of performance appraisal in the short time left for the contract to run could have determined whether or not reappointment was to occur. However, despite that, this Claim could be saved by the provisions of section 17A(1) of the Public Service (Amendment) Act 2011, which provides for the same possible extension of contract, save that there is no qualification regarding personal performance appraisals.
27. The initial and varied contracts of employment quite clearly stated that annual performance appraisals were to be conducted in respect of the Claimants. It is accepted by the State that in the case of each of the Claimants that was not done. That is somewhat galling, considering the Claimants themselves asked for that to occur. It is all the more galling, that such appraisals were conducted in respect of Mr August Letlet and Ms Cherol Ala, both of whom were at the end of 2016 re-appointed as Directors General at the conclusion of their similar terms.
28. As a good employer it is clear the State should have arranged for the Claimants' annual performance appraisals. However, the issue for the Court to determine is what is the legal effect of that? Does the failure to appraise give rise to any legal repercussions?



29. In my view, it does not logically follow that even if annual performance appraisals had been done and reported excellence on the part of a particular employee, that would necessarily result in the automatic reappointment of that employee at the conclusion of the contract. That is what the Claimants case is based on. It follows that, in my view, the Claim is based on an incorrect proposition.
30. The annual performance appraisals could have been poor, which would have enabled the State to take disciplinary action or even to dismiss. If the appraisals were mediocre, such that disciplinary action or dismissal was not warranted, what then would the appraisal permit to occur? The answer must be that the contract be allowed to run its unsatisfactory course. If the appraisal were good or excellent, the consequence would be the same – the contract would run its course.
31. However, a good or excellent appraisal for one year, or even for all 4 years of the contract term, cannot mean reappointment becomes automatic or mandatory. That is because the State has a discretion to reappoint, as evidenced by the use of the word "may" in both clause 3.3 of the varied contract and in section 17A(1) of the Public Service (Amendment) Act 2011.
32. The failure by the State, to conduct annual performance appraisals in respect of the Claimants, is simply not actionable in the way this Claim is formulated.
33. There is merit in the suggestion by Mr Huri that the Claimants could/should have availed themselves of judicial review of the appointments of the new Directors general. Whether that would have succeeded is not possible to tell, but that may have presented a better opportunity than the basis for the present Claim.
34. Result
35. The claim fails and is dismissed.
36. The State is entitled to costs on the standard party/party basis to be agreed between counsel or taxed by the Master. Once settled the costs are to be paid within 21 days.

Dated at Port Vila this 8th day of May 2020  
BY THE COURT

  
Justice G.A. Andrée Wilfens

