

BETWEEN: Joe Warsal
Claimant

AND: Republic of Vanuatu
Defendant

Date: 15th September 2022
Before: Justice C.N. Tuohy
Counsel: Mr S. Kalsakau for the Claimant
Mr L. Huri and Mr F. Bong for the Defendant

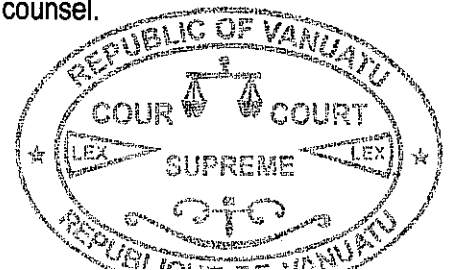
Judgment

Introduction

1. Dr Warsal currently holds the position of Junior Consultant in radiology at the Vila Central Hospital (the VCH). He was formally appointed to that position on 17 July 2020.
2. He has been working as the sole radiologist in charge of the radiology department at the Hospital since 28 August 2018 following his return after completion of his studies in radiology overseas.
3. Since 14 July 2020, he has been paid the salary of a Junior Consultant (VT 132,480 per fortnight). Prior to that he was paid at the rate of a Senior Registrar (VT 113,299 per fortnight).
4. He claims that he should have been paid at the rate of a Junior Consultant from the date he started work at the hospital, 28 August 2018. The difference is VT 1,016,593, the sum which he claims in this proceeding.

Facts

5. There is no material dispute about the facts relevant to the claim. The dispute is about whether those facts give Dr Warsal a legal entitlement to the difference in salary which he claims. Because the facts are not in dispute, counsel agreed that oral evidence was unnecessary and that the case should be decided on the papers after written legal submissions had been filed. Succinct and cogent submissions have now been received from both counsel.



6. The following narrative of the relevant facts is largely based on the careful chronology set out in the defendant's submissions for which I am grateful.
7. Dr Warsal graduated MB ChB from Fiji School of Medicine in 2003. He subsequently held various positions at Vila Central Hospital and with the Ministry of Health in Vanuatu until undertaking further studies in radiology at the University of Papua New Guinea between 2014 and 2018.
8. He returned to Vanuatu in August 2018 shortly after completing the requirements for the degree of Master of Medicine in Medical Imagery. However, there was the usual time gap between completing the requirements of the degree and the award of the degree on graduation. Dr Warsal graduated on 26 April 2019.
9. On 21 August 2018, the then Director of Curative and Hospital Services, Dr. Willie Tokon, emailed the Dr Warsal¹ in response to an email from him querying why his registration as a Radiologist was for one year and not permanent. In his email Dr Tokon stated:
 1. *You are registered as a Specialist Radiologist. This is for one year. You will get a two Year Registration after your graduation next year. The VHPB is giving out two Year Registrations to everybody.*
 2. *You will be appointed to post of Junior Consultant Radiologist for two years. Your salary should reflect the post of Junior Consultant.*
10. On 28 August 2018, the Dr Warsal was issued with a Certificate of Registration from the Vanuatu Practitioners Board (the VHPB) as a Specialist Radiologist expiring on 30 September 2019².
11. On 19 December 2018, the Public Service Commission (the PSC) advised Dr Warsal of his appointment to the post of Senior Registrar Radiologist³ at an annual salary of VT3,029,600. The placement to the position and the salary were stated to be effective from 1 January 2018. Back-pay was paid to cover the increase in his existing salary which this appointment gave him.
12. On 26 April 2019, the Dr Warsal was awarded a Master of Medicine (Medical Imaging) by the University of Papua New Guinea⁴ at his graduation.
13. On 30 September 2019, the Dr Warsal was issued with a Certificate of Registration as a Specialist Radiologist expiring on 30 September 2021⁵.
14. On 3 March 2020, Acting Medical Superintendent Dr Tony Harry, wrote a letter to Gerald Botleng, the Human Resources Officer at the VCH at that time⁶:

¹ See paragraph 8 and 9 and attachment marked "JW2" in the Sworn Statement of Joe Warsal filed on 29 October 2021.

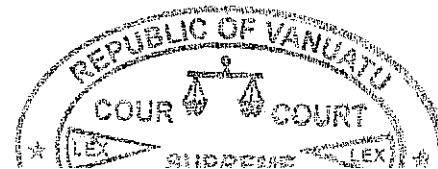
² See paragraph 10 and attachment marked "JW3" in the Sworn Statement of Joe Warsal filed on 29 October 2021.

³ See paragraph 4 and attachment marked "PM1" in the Sworn Statement of Paul Makikon filed on 5 August 2021.

⁴ See paragraph 8 and attachment marked "PM4" in the Sworn Statement of Paul Makikon filed on 5 August 2021.

⁵ See paragraph 9 and attachment marked "PM5" in the Sworn Statement of Paul Makikon filed on 5 August 2021.

⁶ See paragraph 5 and attachment marked "JW1" in the Sworn Statement of Joe Warsal filed on 10 August 2021.



Re: Dr Joe Warsal for the Post of Junior Consultant – Radiology

I am writing to let you know that Dr Joe Warsal has been working as a Junior Consultant in Radiology at Vila Central Hospital upon his return from studies since Tue 28th August 2018. His formal graduation at UPNG was on 26th April 2019.

Normally, when a medical doctor has passed all his requirements in the Master's program, he is automatically entitled to being put on Junior Consultant post. Dr Warsal has passed all his Masters requirements and is therefore entitled to being put on the post of Junior Consultant – Radiology.

Dr Joe Warsal is currently on a Senior Registrar position, a post that is normally occupied when you are working towards your Master's program. Dr Warsal has gone past that stage already.

This letter is therefore to advise you to put Dr Joe Warsal on the post of Junior Consultant – Radiology at VCH and facilitate his back pay to the time he started working as a Junior Consultant here at VCH.

Thank you so much for your cooperation and understanding.

15. On 7 May 2020, Dr Warsal was issued with a Certificate of Registration as a Junior Consultant Radiology⁷.
16. On 17 July 2020, the PSC appointed Dr Warsal to the post of Junior Consultant (Radiologist) with an annual salary of VT 3, 408, 300, with effect from 14 July 2020⁸.
17. On 17 August 2020, Mr. Gerald Botleng, by email, requested senior management of the VCH to amend the PSC appointment letter by changing the commencement date to 28 August 2018⁹. There is no evidence of a response to that but the filing of this claim indicates that if there was one, it was negative.
18. On 23 September 2020, Dr Warsal's lawyer wrote a letter to the PSC and the Office of the Attorney General demanding that the PSC review its decision and backdate the effective date of his appointment from 14 July 2020 to 28 August 2018, and pay back-pay for that period. On 21 May 2021, Dr Warsal filed this claim.

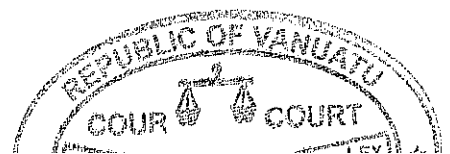
Claimant's Submissions

19. Dr Warsal's case, put very simply, is that as he was doing the work of a Junior Consultant during the relevant period he was entitled to be paid the salary of a Junior Consultant. In support of that submission, counsel cited the case of *Robertson v Luganville Municipal Council [2021] VUCA 14* for the proposition that in a contract of employment it is the service that earns the remuneration or salary.
20. For the factual basis of that submission, Dr Warsal pointed to his own evidence that from August 2018, he performed the duties and functions of a Junior Consultant and the letter to that effect written by Dr Tony Harry dated 3 March 2020.
21. Dr Warsal says that it was also the understanding between himself and Dr Willie Tokon, the Director of Curative and Hospital Services, that he would be paid at the rate of a Junior

⁷ See paragraph 13 and attachment marked "JW6" in the Sworn Statement of Joe Warsal filed on 29 October 2021.

⁸ Refer to paragraph 10 and attachment marked "PM6" of the Sworn Statement of Paul Makikon filed on 5 August 2021.

⁹ See paragraph 8 and the attachment marked "JW3" in the Sworn Statement of Joe Warsal filed on 10 August 2021.



Consultant from the time he started work at the hospital and that he relied upon that understanding in good faith while performing that role.

22. Dr Warsal states that the lack of formal appointment to that position does not provide a defence to the claim and that it would be unjust to refuse to pay him accordingly.

Defendant's Submissions

23. The defendant submits that the law applicable to the claim is to be found in the Public Service Act, specifically in Part 4, ss17, 23(1) and (2) and 24. It submits that the effect of these sections is that all appointments within the Public Service must be made by the PSC and in accordance with the process mandated by those sections.
24. It follows that an appointment to a Public Service position cannot be lawfully made in any other way. The only lawful appointment of Dr Warsal to the position of Junior Consultant was that made by PSC on 17 July 2020. Dr Willie Tokon, as a Director, did not have the power to make such an appointment.
25. Since the only lawful appointment of Dr Warsal as a Junior Consultant is that made by the PSC on 17 July 2020, he is only entitled to the salary of a Junior Consultant from the effective date of that appointment, 14 July 2020.
26. Dr Warsal cannot rely upon the principle of legitimate expectation based on his communications with Dr Willie Tokon and Dr Tony Harry because he must have been well aware, from his long experience in the Public Service, that only the PSC can make an appointment to a position in the Public Service.
27. In any event, Dr Warsal was not qualified for the position of Junior Consultant as at August 2018 because he did not become the holder of a Master's degree in medical imagery until he was awarded his degree on graduation on 26 April 2019.
28. It was further submitted that the case of *Robertson v. Luganville Municipal Council* is distinguishable because in that case Dr Warsal had no prior employment relationship with the employer.

Discussion

29. The employment relationship is based on a contract between employer and employee. In the case of employment in the Public Service, Parliament has modified the contractual relationship by the terms of the Public Service Act. The provisions directly relevant to this claim are ss 17 and 23 which are set out below:

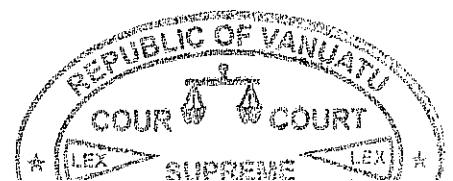
17. Application to Public Service

All appointments, promotions, disciplinary matters, and terminations in respect of the Public Service must be made in accordance with this Act.

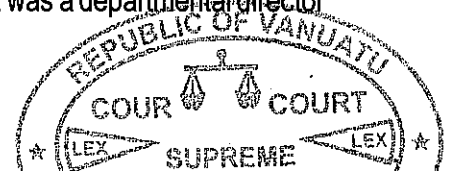
23. Appointments to the Public Service

(1) *Any appointment to or within the Public Service is to be made by the Commission.*

(2) *The Commission must prior to making an appointment consult with and take into consideration the views and requirements of a director-general affected by the appointment. The director-general must consult with and take into account the views and requirements of a director affected.*



30. Section 23(1) provides that an appointment to or within the Public Service must be made by the PSC. While s23(2) requires the PSC to consult with and take into consideration the views of an affected director-general who must himself or herself take into account the views and requirements of any affected director, this only confirms that it is the PSC and not any director-general or director who must make the appointment. Thus, any purported appointment by a director is of no legal effect. The communications between Dr Tokon and Dr Warsal in August 2018 could not in law create an employment contract.
31. The PSC appointed Dr Warsal to two positions during the period relevant to this claim. First, on 19 December 2018, he was appointed to the position of Senior Registrar, Radiologist. This was effective as from 1 January 2018, that is prior to commencement of his employment in August 2018. The second appointment was to the position of Junior Consultant on 17 July 2020.
32. The first appointment was the only appointment of Dr Warsal to a position in the Public Service which was effective throughout the period covered by this claim. Dr Warsal accepted it by continuing to work until his appointment as a Junior Consultant.
33. The communications between Dr Willie Tokon and Dr Warsal in August 2018 were, in effect, ratified by the decision of the PSC conveyed in a letter to Dr Warsal on 19 December 2018, but only on the terms contained in that letter.
34. Dr Warsal continued to work under those conditions and received the salary indicated without complaint at that time. He must have been aware at that time that he did not possess the qualifications required for appointment as a Junior Consultant.
35. Although he did possess those qualifications from the date of his graduation on 26 April 2019, the second appointment was not made until 17 July 2020 and was effective only from 14 July 2020. The PSC could have made it effective from the date when Dr Warsal obtained the necessary qualification but it did not do so.
36. While the PSC could have back-dated the effective date of the second appointment, at least to the date Dr Warsal acquired the necessary qualification for the Junior Consultant position, it was not legally required to do so. It was open to Dr Warsal to request the effective date to be back-dated and, through Mr Gerald Botleng, that request was made. However, it did not receive a positive response
37. Nor does it make any difference that Dr Warsal was in fact carrying out the functions and duties of a Junior Consultant prior to his appointment as such. An employee who is employed to carry out certain duties at a particular salary cannot unilaterally impose a higher salary on his employer simply by carrying out the duties of a more highly paid position. While he would have a strong moral case for asking for a pay rise, the employer is not bound to agree to it. Even less is employer bound to pay the higher rate against its will.
38. A final point relates to the concept of legitimate expectations which was referred to in the submissions for Dr Warsal and responded to in those of the Attorney General. The principle of legitimate expectations has developed in the context of the law relating to judicial review of administrative action. It can apply where a decision maker has led someone affected by a decision to believe that he or she would receive some benefit which is not then granted.
39. However, there is an insurmountable hurdle to its application in Dr Warsal's case. It was not the PSC which made any representation to Dr Warsal about his salary. It was a departmental director



whose statements could not, as a matter of law, bind the PSC (or the Government) for the reasons set out above.

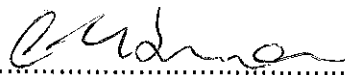
40. Looked at through the lens of law of agency, an agent (Dr Tokon or Dr Tony Harry) cannot bind his principal (the Government) by exceeding his own authority if that authority is circumscribed by statute¹⁰.
41. The observations of the Court of Appeal in *Robertson v. Luganville Municipal Council* have no relevance to this case. The case itself was about whether a "political" appointee could be dismissed without cause or notice. The comment of the Court of Appeal relied upon in the submissions related to the point that, unlike other contracts, if a contract of employment is wrongfully terminated by an employer, wages and salary are no longer payable even if the employee remains willing to work.

Result

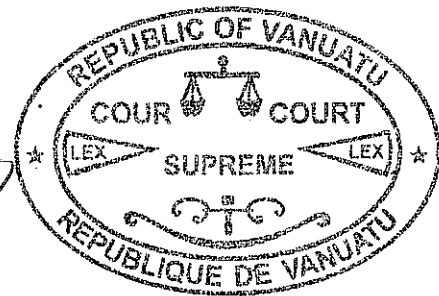
42. The defendant is not liable for the back pay claimed by Dr Warsal and the claim for it is dismissed.
43. As the successful party, the Republic is entitled to costs. If the parties are unable to agree the process under Rule 15.7 is to be undertaken.

Dated at Port Vila this 15th day of September 2022

BY THE COURT



Justice C.N. Tuohy



¹⁰ See De Smith's Principles of Judicial Review (2nd ed 2020) at 12-067.