VACCINE CASE: GOVERNMENT'S STANCE VINDICATED

BY

UNITY LABOUR PARTY

THE ISSUE

On February 12, 2025, the three-member Court of Appeal, in a majority decision, overturned the decision of the High Court Judge in the COVID-19 Vaccine Case and ruled in favour of the government of SVG. The Presiding Judge of the panel of judges, Eddy Ventose, in a brilliant and incisive judgment which befits his status as one of the leading experts in constitutional and administrative law in the Caribbean, dissected clinically and overturned the underwhelming judgment of the High Court judge Esco Henry who had ruled in favour of the public servants. The highly-esteemed, learned, and experienced Justice of Appeal Paul Webster concurred with the judgment of Justice of Appeal Eddy Ventose. The dissenting judgement, of far less persuasiveness and authority, was delivered by Justice of Appeal Gerhard Wallbank, a sound judge whose special expertise is the field of commercial law.

The conclusion of Justice Webster's concurring judgement is telling. In straightforward language he wrote:

> "*My overall conclusion is that it is unfortunate that the actions of the employees resulted in their deemed resignations from their employment. However, the Government was faced with a drastic crisis of unprecedented proportions that was causing significant health issues and loss of life. Measures had to be taken to address the situation. In the circumstances that were prevailing during the pandemic the measures that were taken were not disproportionate, unconstitutional, ultra vires, or procedurally unfair. Those who chose to not comply, no matter how conscientious their objections, had to deal with the consequences of their non-compliance.*"

Most reasonable persons, including the vast majority of Vincentians, agree with Justice Webster's conclusion. In victory, the government is not gloating; its response has been measured, conciliatory, and all-embracing.

Plainly, the position of the government has been vindicated. Throughout the COVID public health emergency, the government acted sensibly, maturely, wisely, and in a balanced manner to protect health, lives, and livelihoods. The public sector unions have indicated their intention to appeal the decision, as is their right, to the Judicial Committee of the Privy Council.

GOVERNMENT'S REASONABLENESS AND WISDOM

From the very beginning of the COVID pandemic (2020-2021), the careful, wise, balanced, and nuanced approach of the ULP government was evident in its management of the risks. In these respects, and more, the Court of Appeal lauded the government for its efforts. It is to be remembered that the government, unlike others in the Caribbean, never declared a State of Emergency under the Constitution which would have deprived people of their fundamental rights and freedoms; the government never closed the country's borders; and we never locked the country down. Indeed, it was the NDP opposition which demanded, hysterically, in Parliament in April 2020, that the government employ "draconian Chinese methods"; they charged, falsely, that Ralph was more interested in saving the economy than in saving lives.

Most of the persons who were in the forefront of opposing the use of masks or refusing to be tested for the virus because the test was allegedly too invasive, are the very ones who later opposed the taking of the vaccine.

As the hospitalisations piled up, the deaths increased, and the variants of the virus became more dangerous, the government introduced sensible, balanced, lawful, and constitutional measures to require frontline workers (health workers, teachers, police, immigration, airport and port workers) in the public sector to take the vaccine on pain of being deemed to abandon their posts after ten days absence without leave, unless the Public Service/Police Service Commission determined otherwise; this "abandonment rule" was in place since 1969. What was the government to do? Allow the virus to rip, injure health, and kill people willy-nilly? It had to take "special measures" in all the circumstances.

Overwhelmingly, the vast majority of the front-line workers took the vaccine. Except for the teachers, almost 100 percent of all persons in the other categories of frontline workers took the vaccine; some 95 percent of the teachers took it. The government and people of SVG are satisfied that the "special measures" protected health and saved lives and livelihoods.

WERE THE MEASURES "DRACONIAN"? NO!

The "special measures" for the frontline workers were decidedly not draconian. What the opposition NDP was asking for in April 2020 and the immediately succeeding months would have been "draconian", "Chinese-style".

Justice of Appeal Eddy Ventose addressed this matter of the "special measures" being "draconian" as alleged by the public sector unions and the jurist Wallbank, and concluded that they were not; he demolished their reasoning exquisitely in a thorough examination of Rule 8 of the Special Measures. This rule reads as follows:

> *"8(1) An employee who without reasonable excuse fails to comply with rule 4 or 5 (presentation of negative COVID test result and proof of vaccination) must not enter the workplace and is to be treated as being absent from duty without leave.*
>
> *"8(2) Regulation 31 of the Public Service Commission (PSC) Regulations applies to a public officer who is absent from duty without leave under subrule (1)".*

Regulation 31 of the PSC Regulations states under the rubric "Abandonment of Office", states that:

> *"An officer who is absent from duty without leave for a continuous period of ten working days, unless declared otherwise by the Commission, shall be deemed to have resigned his office, and thereupon the office becomes vacant and the officers cease to be an officer."*

So, in paragraph 90 of his judgement on this issue, Justice of Appeal Ventose, states:

> *"It is not whether in all the circumstances Rule 8 was "too draconian", for that question does not first establish how Rule 8 is "draconian" and reaches a conclusion on Rule 8 before the completion of the four-pronged proportionality test. Nowhere in the jurisprudence applied by the Judicial Committee [of the Privy Council] is there any reference to whether or not a law is "draconian" as a threshold test in the proportionality analysis."*

Thus, before anyone goes off to say "draconian", let us apply the proportionality test. The "four-pronged proportionality test" referred to by JA Ventose is derived from the Privy Council judgement in De Freitas v Permanent Secretary of Ministry of Agriculture (1998) and buttressed by that final court's judgement in Suraj v AG of Trinidad and Tobago (2023). This test involves four elements: "Whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; (iii) the means used to impair the right or freedom are no more than necessary to accomplish the objective (whether less intrusive measures could have been used); and (iv) whether having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individuals and the interests of the community."

On the analysis of the law and the facts, the majority of the Court of Appeal held the "special measures" to be proportionate. As applied to the issue of any alleged loss of pension benefit, the issue arises not from Rule 8 and the application of Rule 31, but from the pensions law itself. Thus, on the pensions matter, "the issue of the payment to the respondents of adequate compensation within a reasonable time does not arise." As JA Ventose puts it: "The pension benefits to which they are entitled exist and do not magically disappear." The answer to this is to be found in the Pensions Act itself.

MAIN FINDINGS OF THE COURT OF APPEAL

The main determinations of the Court of Appeal were as follows:

1. *"The factual finding by the trial judge that Minister of Health acted ultra vires in that he did act on the advice of the Chief Medical Officer (CMO) in making Rule 8, was 'plainly wrong'. This was a huge take-down of Justice Esco Henry.*
2. *"Those rules that were not made on the advice of the CMO, the Minister had the lawful power to make them under the relevant section of the Public Health Act."*

3. *"Rule 8 does not usurp any of the functions of the PSC and the trial judge erred in finding that it did."*

4. *"The fact that a person may fall generally under a category of persons who are not entitled to a pension under the pensions law, assuming this to be true, cannot be a basis for a finding that the law is unconstitutional for creating the circumstance within which a person may fall that would disentitle them to a pension."*

5. *"There was no evidence that <u>any</u> of the respondents [the civil servants] had earned the right to a pension that is protected under Section 88 of the Constitution of SVG.*

6. *"Rule 8 was plainly a proportionate means of protecting the public health interest in the circumstances of a dangerous COVID-19 virus. For these reasons, the respondents' claim for constitutional relief falls 'in limine' and should have been rejected by the trial judge."*

7. *"The issue in question is whether Regulation 31 satisfies the requirements of fairness ------- Having not availed themselves of the option of seeking from the Commission a modification of the communication concerning their abandonment of their offices, the respondents cannot now argue that there was a breach of natural justice."*

8. *"It cannot be said that either the Commissioner of Police or the Commission acted on the authority of the Minister of Health in applying Regulation 31 which was only triggered by non-compliance with Rule 8 by the officers to which it was applicable ------ The learned trial judge was wrong to conclude that the letters issued to the respondents for breaching Regulation 31, for failing to comply with Rule 8, contravened sections 77(12), 77(13), 84(6), and 84(7) of the Constitution."*

9. *"The learned trial judge was wrong to hold that the Amendments Act was unlawful for contravening the separation of powers doctrine [under the Constitution]."*

PM ADVISES THE PUBLIC EMPLOYEES TO RETURN TO WORK

Immediately following the Court of Appel judgment, our Prime Minister again reiterated his plea to the public employees who had abandoned their jobs to return to work without any loss of pension benefits under the pension law. Comrade Ralph has been urging this from day one. Now, the public sector unions and lawyers are urging the public employees to follow that advice. You can return to work and continue your case to the Privy Council, if you wish.

Meanwhile, the opposition NDP is floundering for a position. Is it the NDP asking for the public employees to get their full salaries, retroactive, for the period after the employees had abandoned their jobs? If that is the NDP's position, it would come at a cost to the government of over $30 million in back salaries alone. Are the rest of the working people to suffer because of the failure/refusal of 250 employees to comply with lawful regulations? Is that the position of the opportunistic NDP?

And what has become of the leaders of the public service trade unions who had urged their members not to return to work? Remember their advice: Do not take the bait of returning to work: No bait, reinstate! Silly politics by the union leaders and bad advice to them by the NDP and others have put the affected workers in a bind. Fortunately, Comrade Ralph is offering them a way out. Will they take it? We'll see.

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