

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Civil Appellate Jurisdiction)

Civil Appeal Case No. 2482 of 2017

BETWEEN: REPUBLIC OF VANUATU
Appellant

AND: LIVO MELE
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Oliver A. Saksak
Hon. Justice Ronald Young
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd*

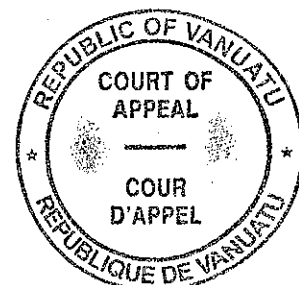
Counsel: *Adeline Bani for the Appellant
Mary Grace Nari for the Respondent*

Date of Hearing: *6th November 2017*

Date of Judgment: *17th November 2017*

JUDGMENT

1. Mr Mele was the Director of Agriculture for Vanuatu when, in January 2015, he was dismissed by the Public Service Commission (PSC). In the Supreme Court he alleged his dismissal was unlawful. The Judge agreed and ordered total compensation of VT 28.820.200.
2. On 11th September, 25 days after the appeal period had expired the Republic of Vanuatu sought an extension of time for filing the appeal.



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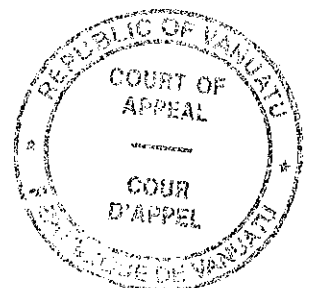
Counsel: *Adeline Bani for the Appellant
Mary Grace Nari for the Respondent*

Date of Hearing: *5th November 2017*

Date of Judgment: *17th November 2017*

JUDGMENT

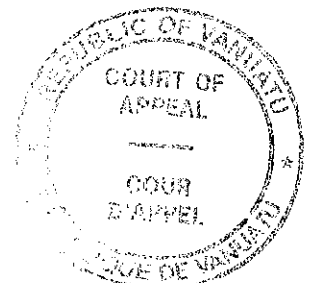
1. Mr Mele was the Director of Agriculture for Vanuatu when, in January 2015, he was dismissed by the Public Service Commission (PSC). In the Supreme Court he alleged his dismissal was unlawful. The Judge agreed and ordered total compensation of VT 28.820.200.
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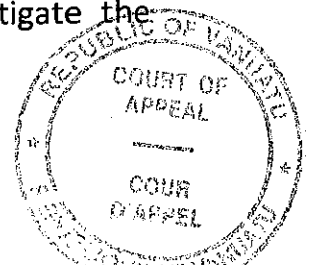
3. The Republic filed its notice of appeal on 29th September 2017. In the circumstances we grant leave to extend time to file the appeal until 29th September 2017.
4. There are two grounds of appeal. First the Republic claims that the Judge in error required the PSC at trial to prove the misconduct alleged against Mr Mele which formed the basis of his dismissal.
5. This approach, the Republic claims, was not based on Mr Mele's pleadings in the Supreme Court and was therefore unfair to the Republic. The Republic was not in a position to call such evidence at trial and the Judge should not have decided the case based on his assessment of the merits of the allegations of misconduct by Mr Mele.
6. The second ground of appeal, if the first was unsuccessful, was that the Judge had no evidence on which to base his assessment that a multiplier of 2 (pursuant to Section 56 (4) of the Employment Act) was justified in relation to the order for severance pay.

Background Facts

7. Mr Mele was appointed Director of Agriculture in September 2012. The process which ultimately resulted in his dismissal began in October 2014 with a letter from the Minister of Agriculture to the PSC. The Minister told the PSC he was making a formal complaint about Mr Mele's conduct. Six issues were identified by him.

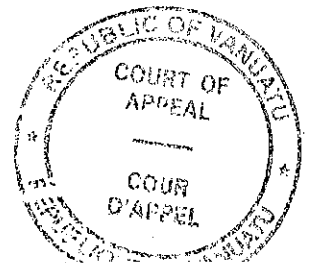


8. First the Minister complained that Mr Mele had affixed an electronic copy of the Minister's signature to a draft agriculture policy which had then been widely distributed. The Minister said he had not authorised such a use of his signature. (Allegation 1)
9. Secondly Mr Mele had misappropriated and fraudulently used funds in an imprest account (VT 120.000). (Allegation 2)
10. Thirdly he had, on behalf of the Ministry of Agriculture, undertaken a "questionable deal" with a person for the extension and renovation of an Agriculture Ministry office in Torba. (Allegation 3)
11. Fourthly he had not complied with Government requirements relating to building contracts worth over VT 5 million.(Allegation 4)
12. Fifthly there was a "dubious" arrangement with a Tongan Financial agent which resulted in an embezzlement of NZ Aid funds. (Allegation 5)
13. Sixthly there had been an unauthorised lease of 5000 hectares of Government Land. (Allegation 6)
14. Section 19B of the Public Service Act (CAP 246) sets out the process for consideration of the removal of a Director of the Public Service. Section 19 A sets out the grounds for such removal.
15. In this case once the complaint from the Minister was received (Section 19B (1)) the PSC was obliged to appoint a person to investigate the



complaint. Here a committee of three persons was appointed. (Section 19(2) (a)). In addition, complying with Section 19 (B) 2 (b) and (c) Mr Mele was sent a copy of the complaint and invited to respond.

16. The PSC are obliged to take the report into account when reaching decision (Section 19 B (5)) as they are the responses of the Director (Section 19 (B) (5)).
17. Finally the PSC must give reasons for its decision (Section 19 (B) (6))
18. The investigative committee began its work on 5th November 2014. The committee interviewed Mr Mele (or at least one of the committee did so). Mr Mele provided a written response to the allegations essentially denying any wrong-doing or explaining that any failures were minor and administrative.
19. The investigative committee provided their report to the PSC and it sent the report to Mr Mele. He gave an extensive written response.
20. As to allegation (1) the investigative committee concluded that when the Minister provided his electronic signature to Mr Mele the Minister did not know that it would be used to sign the draft policy.
21. As to allegation (2), which claimed misappropriation and fraud, the investigative committee concluded that money obtained by Mr Mele for a particular Departmental purpose had been used for another



Departmental purpose. This was in breach of financial regulations. There was no mention of misappropriation or fraud.

22. As to allegation (3) and the alleged "questionable deal" the report does not mention any such "deal". The concern of the committee was that only one quote for the work was obtained when two were required. However the investigative committee discovered a letter from the Financial Controller which said that there was only one contractor in the area who could supply the necessary materials.
23. In allegation (4) the investigative committee found that the contract for the Departmental office was not in accordance with Government procurement. They said the contract had not achieved value for money.
24. As to allegation (5) the investigative committee said it had not had sufficient time to adequately investigate the concern.
25. Finally as to allegation (6) the committee expressed concern about the circumstances of the lease. But there was nothing in the report which involved Mr Mele in the lease.
26. The report was sent to the PSC early in January 2015. The Commission then wrote to Mr Mele advising he was dismissed.
27. They said they found each of the six allegations proved essentially following the wording and conclusions of the investigative committee. No

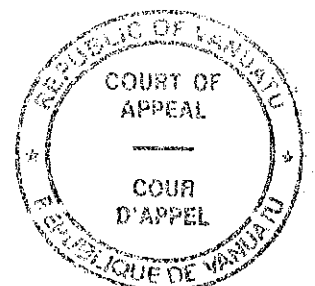


mention was made of Mr Mele's response to the investigative committee report.

28. At trial the parties agreed that no cross-examination of the witnesses was required. The Judge was told that none of the facts were disputed. The Judge had extensive sworn statements from Mr Mele relating to the allegations of misconduct. The only evidence from the Republic was the investigative report and the letter of dismissal.

The Judgment appealed from

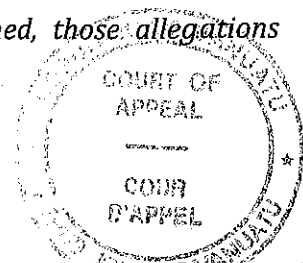
29. The Judge concluded that with respect to allegation (1) the evidence before the investigative committee did not establish a "*wilful or deliberate disregard of the Minister's authority or a wilful or deliberate misuse of the Minister's signature*". He considered the PSC had not recognised the difference between what the Minister originally complained about and the evidence before the investigative committee.
30. As to allegation (2) the Judge noted the allegation was fraud and misappropriation and the investigative committee did not find fraud or misappropriation.
31. Allegations (3) and (4) were, the Judge noted, subject to a Tender Board enquiry but the investigative committee had not sought information from the Tender Board.



32. The Judge noted the investigative committee said allegation (5) required further enquiry yet the Public Service Commission had found Mr Mele "guilty" of this allegation without any such further inquiry.
33. Finally the Judge said there was simply no evidence for the Public Service Commission to find Mr Livo "guilty" of the allegation relating to the lease.
34. These conclusions meant, the Judge said "*... It should have been obvious to the Public Service Commission that the most serious allegations were not established....*"

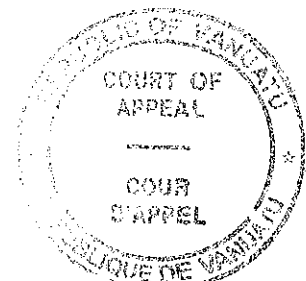
35. The Judge said:-

57. *"A good and fair employer would have weighed up whether, on the basis of what was then established, dismissal was still an option. It did not do so. Instead, there appears to simply be a wholesale acceptance of the conclusions reached by the investigating team. There is no doubt, that if all six allegations had been established then such a conclusion would have been open to the Commission. But they were not. Neither does the Commission appears to have taken into account that some of the complaints made were in respect of alleged wrongful conduct many years prior to the complaint and, with reference to the issue of the "Tongan Agent" and the unauthorized subleasing of land, in respect of actions when Mr Mele was a Director of a different Government Department. A good and fair employer would have taken those matters into account and provided reasons as to why the most serious disciplinary action was warranted.*
58. *It is implicit from the letter of dismissal that the PSC determined that the allegations amounted to serious misconduct. While there is no question that had allegations of fraudulent conduct been established, those allegations*



would, in themselves have amounted to serious misconduct, the fact that there was no proper basis upon which the PSC could be satisfied of any fraudulent behavior raises serious questions as to whether or not the remaining concerns could be said to amount to serious misconduct such as to justify immediate dismissal.

59. *In addition, the Employment Act is also a relevant factor in this case. Section 50 of that Act authorizes dismissal without notice and without compensation for serious misconduct. That is what has occurred here. However section 50 (3) provides that dismissal for serious misconduct can only take place where the employer cannot in good faith be expected to take any other cause. In this case no reasons have been provided by the PSC, even on the basis of being satisfied as to the six allegations, that the PSC could not in good faith be expected to take any other course. Relevant to this is the fact that these allegations are in respect of events which occurred over a significant period of time. It is incumbent on the PSC to consider this issue and yet there is absolutely no evidence that it did so.*
60. *It will apparent from the foregoing that I have reached the view that the PSC was not entitled to dismiss the claimant for serious misconduct."*
36. The Judge then made orders for damages. The State did not dispute the accuracy of the following orders.
- a) Three months' notice VT 635.040
 - b) Annual Leave VT 243.000
 - c) Severance Pay VT 9.313.920
37. In addition the Judge concluded that there should be a two times multiplier of the severance pay pursuant to Section 56 (4) Employment Act. This added VT 18.267.040 to the damages.

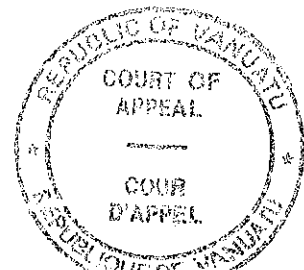


This Appeal

38. The essence of the Republic's case on appeal relating to liability was that the Judge did not decide the case based on Mr Mele's pleadings.
39. Mr Mele's pleadings were not a complaint that the PSC's conclusions about the six allegations were wrong but that there was a failure of fair and proper process resulting in an unlawful dismissal.
40. Because Mr Mele had not denied the allegations of misconduct in his pleadings the Republic did not call any evidence at trial to prove these allegations. And so the Republic submitted it was not open for the trial Judge to make findings on whether the allegations were true. When he did so he fell into error. It was therefore wrong for the Judge to base his conclusions on this evidence.

Discussion

41. We are satisfied the Judge correctly undertook the task required of him as to liability.
42. We are satisfied that it should have been clear to both parties that evidence about the allegations of misconduct relating to Mr Mele would need to be before the Court at trial.
43. The Judge recognised such evidence would likely be required when in directions to counsel before trial he said:-



“6. One of the issues that I have been considering is the fact that in this case the State will need to prove the allegations that it made against Mr Mele. That will of course involve direct evidence from persons who are in a position to give evidence as to the allegations which are made. I am uncertain as to whether Mr Mele accepts certain allegations and denies other or denies all of the allegations, however it would be very helpful for the Court to know which allegations are accepted and therefore do not need to be the subject of proof and which allegations are denied. That is a matter which will have to be addressed at the next conference”

44. Mr Mele, in his sworn statements, set out in detail why the conclusions of the investigative committee and the Public Service Commission were wrong.

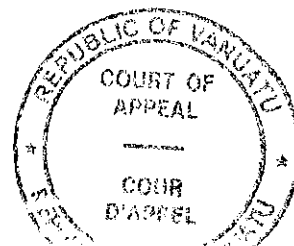
45. Mr Mele’s pleadings in part said:-

“12. In so far as the termination of the claimant’s employment was unlawful: the defendant’s conduct was in breach of section 15 and Section 19 (B) of the Public Service Act

Particulars

“The PSC failed, ignore (sic) and did not take into consideration the claimant’s response to the allegations.”

46. This pleading inevitably required a factual analysis of the Republic’s decisions to dismiss Mr Mele and his responses to the allegations against him. Section 19 (B) specifically required the Public Service Commission to give reasons for its decision. Mr Mele’s pleading was a complaint that the



Public Service Commission had not done so. To adequately consider this allegation the Judge had to identify the relevant facts.

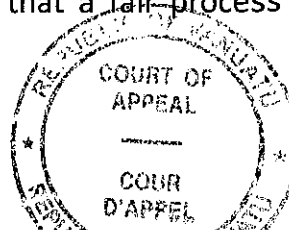
47. As the Judge said:

33. *"Ms Bani on behalf of the State referred to the claimant's statement of claim and submitted that it had never been part of the claimant's case that the allegations made against him were untrue. Rather, the claimant's case is based upon process.*

34. *When considering previous memoranda of counsel identifying issues to be determined by the Court it appears that neither party anticipated the need for the State to prove that the allegations against Mr Mele had been established. For that reason I intend to focus on the procedural issues which have been identified by counsel as opposed to the truth or otherwise of the allegations.*

35. *For reasons that may already be clear however, I am of the view that consideration will need to be given to the issue as to whether the PSC was entitled to take the view that all of the allegations had been established in circumstances where its own investigative report does not appear to have justified such a conclusion."*

48. The obligation on the Public Service Commission to give reasons for its decision to dismiss a Director of the Public Service is an important one. It protects the Director. He or she can see that in its decision the Public Service Commission has identified all the relevant evidence, where there is a conflict it has given a rational reason for rejecting or accepting evidence and, there is rational credible evidence to support the conclusion. And so the Director can be satisfied that a fair process has

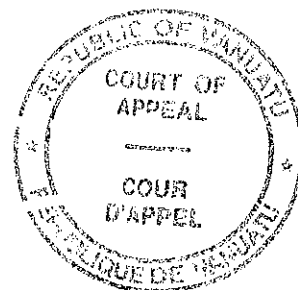


been held. Those obligations also protect the State, the citizens of Vanuatu and the wider, Public Service.

49. When the obligations we have set out above are met then there will be a fair process which complies with the statutory obligations. Once these standards are met and the PSC decision is given, it will not be for the Courts to redecide whether or not the circumstances justify dismissal.
50. We agree with the Judge's approach and conclusions. In its decision to dismiss Mr Mele the PSC made no mention of Mr Mele's extensive evidence and submissions. There was no evidence of any dishonest conduct by him. One of the allegations required further inquiry but none was ordered. At best the use of the Minister's signature was a misunderstanding. There was evidence to say the Minister did agreed to the use of his signature. If the PSC was to reject that evidence, coherent reasons had to be given. They were not. Finally there was no evidence to suggest Mr Mele was involved in the lease of the 5000 hectares.
51. The Judge was correct therefore to conclude that Mr Mele's dismissal was unjustified. We dismiss this ground of appeal.

Severance Payment

52. S56 of the Employment Act provides for severance allowances for employees at the end of their employment. Severance pay is calculated on the basis of half a month's remuneration for every 12 months of service.



53. However 56(4) provides -

"The court shall, where it finds that the termination of the employment of an employee was unjustified, order that he be paid a sum up to 6 times the amount of severance allowance specified in subsection (2)."

54. At trial Mr Mele sought two times the amount of the severance allowance under S 56(4). The Judge agreed. He said:

63. In Quarani v. Airports Vanuatu Ltd¹, I referred to Malere & Ors. v. Vanuatu Broadcasting and Television Corporation² where Dawson J set out relevant factors which the Court should consider in any application of the multiplier including:-

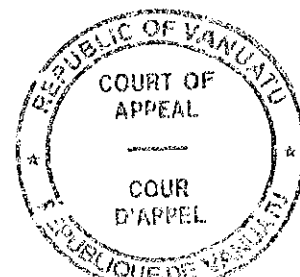
- a) that the employee has a good work record.
- b) whether the employee been given any previous warnings.
- c) was the unjustified dismissal a result of inept handling of the issue by the employer at the lower end or high ended arrogance of the high end of the scale.
- d) was the employee subjected to physical or verbal abuse by the employer at the time of the termination.

64. In this case Mr Mele had been given no previous warnings and had, to that point, a good work record. There were however matters raised in the investigation which would rightly have concerned any employer but would, in my assessment, have fallen short of serious misconduct. The actions of the PSC could not be said to be at the higher end of the scale and I consider the decision of the PSC to have been one which simply did not involve sufficient critical analysis of the report provided by the investigation team.

65. As for the impact of the loss of employment of Mr Mele there was reference to that in his sworn statement of July 8th 2016 where he referred to having been

¹ [2017] VUSC 27

² [2009] VUSC 164



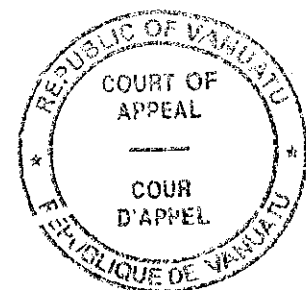
required to pay an outstanding loan to the National Bank of Vanuatu and being unable to pay for his sons education at the University of the South Pacific in Port Vila in 2015. In addition his wife was required to leave the couples' home in Port Vila with the younger son in in order in go back to Papua New Guinea for employment purposes because of their financial situation. Because of Mr Mele's position the decision to dismiss him drew some public attention and was reported in the local newspaper. The evidence of Mr Mele was uncontested.

55. The Republic submitted that there was no justification for any multiplier under S 56(4). The Republic said that two factors were potentially relevant in assessing whether there should be a multiplier based on this Courts' observations in Vanuatu Broadcasting and Television Corporation v Joseph Malere [2008]VUCA 2.

56. This Court in that case said:

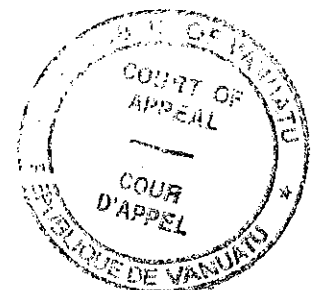
"There are two possibilities with regard to the meaning of Section 56(4). In some cases it has been treated as a reflection of the circumstances which lead to the dismissal and in others it has been treated more as compensatory for a person who is unable to obtain work. Whether in this case it matters which of the approaches is adopted we do not know and, it is possible that under either approach a good case could be advanced, but we have no option but to allow the appeal on this ground and the issue will have to go to trial if there is no agreement reached."

57. The Republic said the PSC had followed proper procedures in dismissing Mr Mele. Further Mr Mele had been re-employed elsewhere outside the Public Service shortly after the termination of his employment.



Discussion

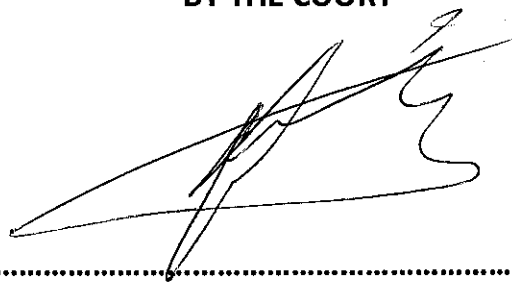
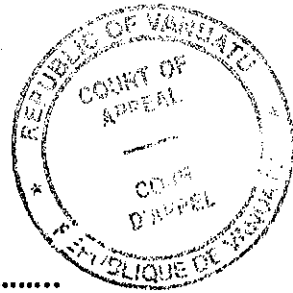
58. Section 56 is primarily concerned with severance payments for employees who have ended their employment. The payments are essentially for length of service.
59. However S 56(4) is quite different. It is for compensation for unjustified dismissal. While it uses severance pay as a basis for the multiplier this is simply a formula for calculating the compensation due, if any, for unlawful dismissal.
60. Compensation for unlawful dismissal, beyond the entitlement of all employees (e.g. notice/annual leave) will be for the dismissal itself and for the consequences of the unlawful dismissal and the loss of the job.
61. Here the failures of the PSC in dismissing Mr Mele were serious. As we have noted the PSC effectively set aside Mr Mele's explanations as to the allegations against him. When faced with concern expressed by the investigating committee that they had insufficient time to investigate some allegations the PSC gave no additional time but found those allegations proved. The PSC reached conclusions which simply had no factual basis. And finally the PSC gave no effective reasons for their conclusions.
62. As to Mr Mele's future the unlawful dismissal removed him from a very significant job in the Public Service. His loss of future employment opportunities and income would inevitably be significant. These factors easily justify an uplift of 2 times.



63. The appeal is dismissed. The respondent is entitled to costs on a standard basis as fixed.

DATED at Port Vila this 17th day of November, 2017.

BY THE COURT

A handwritten signature in black ink, appearing to be 'Vincent Lunabek', written over a horizontal dotted line.

Hon. Chief Justice Vincent LUNABEK