

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(CIVIL JURISDICTION)

CIVIL CASE NO. 24 OF 2005

BETWEEN: ABEL HIVO NAKO
Claimant

**AND: THE PUBLIC SERVICE
COMMISSION**
Defendant

Hearing: 26th August 2016
Submissions: 20th and 30th September 2016
Date of Judgment: 25th November 2016
Before: Justice Mary Sey
Appearances: Mr. Nigel Morrison for the Claimant
Mr. Sakiusa Kalsakau for the Defendant

JUDGMENT

Introduction

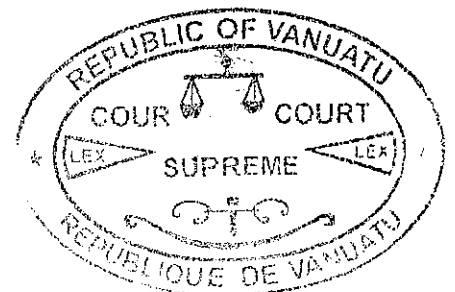
1. On or about 24 June 2002, the Claimant was appointed the Director-General of the Ministry of Education by the Defendant. At all material times the Claimant's terms and conditions of employment were pursuant to the Public Service Act 1998 No. 11 of 1998 (PSA) and in accord with the Public Service Staff Manual.
2. By letter dated 25 January 2005 the Defendant terminated the Claimant's employment for serious misconduct pursuant to section 29(1) of the PSA 1998.
3. The Claimant's dismissal letter reads as follows:

"PRIVATE AND CONFIDENTIAL

Our ref: dis.11.5
Mr. Abel Nako
C/-Ministry of Education
Port Vila
Dear Mr. Nako

25th January 2005

Re: DISMISSAL FROM THE PUBLIC SERVICE



I regret to inform you that the Public Service Commission, at its Meeting No. 1 (Minute no. 27 of 2005) held on the 21st January 2005, decided that you be dismissed from service, with effect from today Tuesday 25th January 2005, for serious misconduct pursuant to section 29(1) of the Public Service Act 1998

Further, the Public Service Commission decided to:

- 1. Consider your past performance as not exemplary (consequently no severance allowances are payable); and*
- 2. Offset any money you may owe to the Government from your accrued allowances or accrued leave.*

The Public Service Commission terminated your employment, on the following grounds;

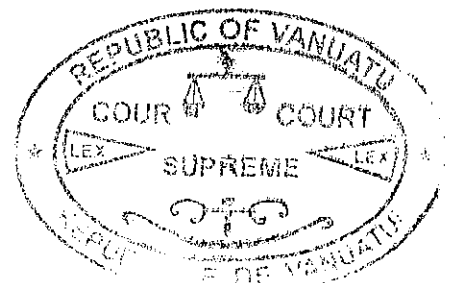
- 1. Failure to carry out the lawful instructions given by your Ministers; and*
- 2. Misuse of Government Vehicle causing serious damage to the Government Vehicle, registration number G506.*

I thank you for the services rendered to the public service and wish you all the best in your future undertakings.

Yours sincerely

*Mr. Jean Alain MAHE
CHAIRMAN
Public Service Commission"*

- 4. On 23 February 2005, the Claimant issued Supreme Court proceedings against the Public Service Commission (PSC) alleging unlawful and/or unjustified dismissal.*
- 5. The Defendant whilst admitting the Claimant's dismissal nevertheless asserted that it was done in a lawful manner. In particular, the Defendant asserted in paragraphs 2(iii), 2(iv) and 3 of the Defence as follows:*
 - "2. As to paragraph 5 of the claim, the defendant denies that the termination of the claimant was unlawful and/or unjustified and responds as follows:*
 - (i) (not relevant)*
 - (ii)(not relevant)*



(iii) *In response to paragraph 5(iii) of the claim, the defendant says the claimant had consistently failed to carry out the lawful instructions given by previous Ministers.*

(iv) *In response to paragraph 5(iv) of the claim, the defendant says the claimant while driving government vehicle G 506 was involved in a motor vehicle accident on or about 15th June 2014 thus breaching subsection 36(f) of the Act.*

3. *The defendant denies paragraph 6 of the claim and say the defendant by letter to the claimant dated 09th December 2004, gave notice to the claimant of the allegations against him and further gave 21 days for the claimant to respond to the allegations. The claimant responded by letter dated 15th December 2004."*

6. The Claimant then alleged that the ministerial complaints about his failure to carry out lawful instructions were beyond a statutorily prescribed period and therefore unable to be relied on in any event. This contention was argued by way of preliminary point.

7. On 20 April 2009, the Chief Justice gave reasons for his Order of 19 October 2008 in which he had stated that the various complaints against the Claimant from 7 August 2003, 17 November 2003, 27 February 2004 and 15 June 2004 were outside the 75 day period and thus statute-barred.

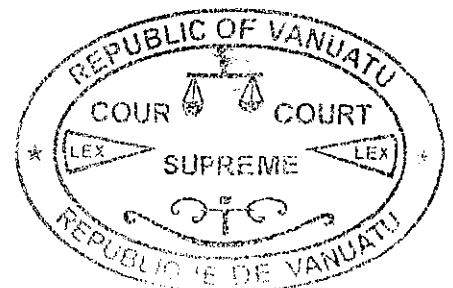
8. On 30 April 2009, the Court of Appeal overturned that ruling and returned the matter to the Supreme Court for decision whether the dismissal was justified. This is the outstanding matter before this Court

9. The **chronology** of events can be summarised as follows:

Between 7 August 2003 and 5 July 2004: The PSC received complaints against the Claimant from various Ministers and personnel of the Ministry of Education.

15 June 2004: The Claimant was involved in a collision in a Government vehicle G 506.

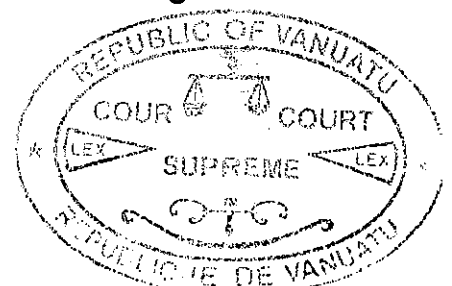
30 June 2004: The PSC received a complaint from Kalmele Matai, Director of the Vanuatu Institute of Education.



- 5 July 2004: The PSC received a complaint from Minister Nicholas Brown of the Ministry of Education.
- 7 July 2004: A paper is submitted to the PSC in relation to the Claimant.
- 9 November 2004: Morris Kaloran and Kanam Wilson are appointed to investigate the complaints made against the Claimant
- 9 December 2004: The PSC informed the Claimant of the allegations made against him. He was given 21 days to respond to the allegations.
- 15 December 2004: The Claimant responded to the allegations made against him.
- 18 January 2005: The Investigation Report prepared by Morris Kaloran and Kanan Wilson was submitted to the PSC.
- 21 January 2005: The Defendant decided to terminate the Claimant's employment.
- 25 January 2005: The Claimant's employment was terminated for serious misconduct pursuant to section 29 (1) of the PSA.

Issues

10. As in any case where dismissal from employment for serious misconduct occurs, the primary issue for the Court's determination is **whether the facts before the employer (in this case the PSC) justified dismissal for serious misconduct.**
11. In addition, both counsel have identified the following issues in their written submissions:
1. **Did the Claimant fail to carry out lawful instructions given by Ministers?**
 2. **Did the Claimant misuse a Government vehicle?**
 3. **If serious misconduct is proved, did the employer in good faith have another course available other than dismissal for serious misconduct?**
 4. **If the Claimant was unlawfully terminated, what are his damages?**



12. When the trial commenced on 26 August 2016, Mr. Morrison applied to include S.50 (3) of the Employment Act [Cap.160] by way of amendment of the Supreme Court Claim. The application was premised on the basis that s.50 (3) of the Employment Act [Cap.160] dovetails with s.29 (2) of the Public Service Act No. 11 of 1998. Counsel placed reliance on the case of Public Service Commission v Tari [2008] VUCA 27; Civil Appeal Case 23 of 2008 (4 December 2008).
13. The application to amend was granted even though Mr. Kalsakau had objected on the basis that the amendment should have been done earlier.
14. It is timely to mention the decision of **Government of Vanuatu v Mathias** [2006] VUCA 7, where the Court of Appeal had provided brief remarks on the meaning, effect and relationship between section 29 of the Public Service Act and section 50 of the Employment Act as follows:

“ Section 29 (1) of the Public Service Act No. 11 of 1998 whilst empowering the PSC to **“dismiss an employee at any time for serious misconduct or inability”** does not, in our view, preclude the application of the protective provisions of section 50 of the Employment Act [Cap. 160] to the exercise of the power;

▪ The protective provisions of section 50 of the Employment Act [Cap. 160] namely:

“(2) None of the following acts shall be deemed to constitute misconduct by an employee -

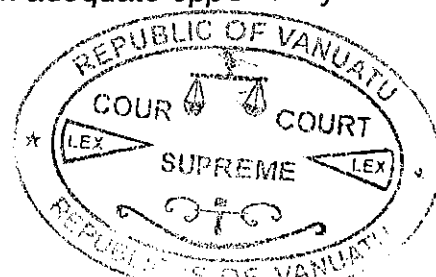
(a) trade union membership or participation in trade union activities outside working hours, or with the employer's consent, during the working hours;

(b) seeking office as, or acting in the capacity of, an employee's representative;

(c) the making in good faith of a complaint or taking part in any proceedings against an employer.

(3) Dismissal for serious misconduct may take place only in cases where the employer cannot in good faith be expected to take any other course.

(4) No employer shall dismiss an employee on the ground of serious misconduct unless he had given the employee an adequate opportunity



to answer any charges made against him and any dismissal in contravention of this subsection shall be deemed to be an unjustified dismissal.

(5) An employer shall be deemed to have waived his rights to dismiss an employee for serious misconduct if such action has not been taken within a reasonable time after he has become aware of the serious misconduct."

are entirely consistent with the PSC's obligation in section 29, "to act as a good employer";

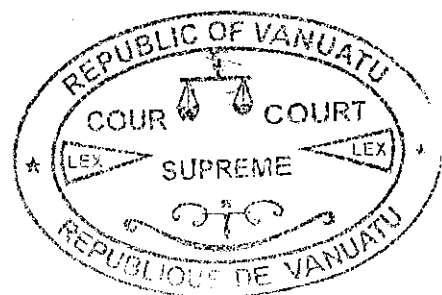
- The burden of establishing "**serious misconduct**" under section 29 of the Public Service Act and section 50 (1) of the Employment Act rests fairly and squarely on the employer to establish on a balance of probabilities. The Appellant's defence to the claim failed in this case because no admissible evidence was led by the employer to prove that its employee had been guilty of "serious misconduct";

- We affirm the decision of this Court in **Ben Garae v PSC [2005] VUCA 20**; Civil Appeal Case no. 03 of 2005:

"... that section 50 (4) does not, in terms, require an oral hearing to be given to an employee before a dismissal for serious misconduct."

- Furthermore what process or procedure will satisfy the statutory requirement in section 50 (4) of "**an adequate opportunity to answer any charges made against**" (an employee) will depend on all the circumstances of the particular case and no generalizations can be or ought to be made or laid down; and

- Given the Respondent's prior employment record of 15 years of unblemished and dedicated service to the Appellant and given the discretionary nature of the power under section 29 (1) and the clear ameliorating provisions of section 29 (2) of the Public Service Act, it is unlikely in our view, that the PSC complied with the requirements of section 50 (3) of the Employment Act, in considering a less draconian course than outright dismissal without benefits".



Evidence

15. The Claimant's evidence was essentially contained in the following documents which he confirmed as his sworn statements in his examination-in-chief and which were admitted in evidence as follows:

Exhibit C1 – sworn statement dated 22 March 2006 with annexure "AB1."

Exhibit C2 – Further sworn Statement of Abel Nako dated 13 July 2015.

The Claimant also relied on the sworn statement of Mr. Nicholas Brown who was not available to give evidence. Counsel asked the Court to determine what weight to give to his sworn statement.

The Defendant had filed "notice of objections" to parts of the sworn statements of Abel Nako and Nicholas Brown pursuant to Rule 11.4(2) of the Civil Procedure Rules. Some of these objections were sustained and expunged by the Court.

16. The evidence adduced by the Defendant was contained in the following documents:

Exhibit D1 – sworn statement of Emil Mael dated 26 April 2006 with annexure "EM1."

Exhibit D2 – sworn statement of Edward Kalura dated 26 April 2006 with annexure "EK1".

Exhibit D3 – sworn statement of Mark Peter Bebe 2 May 2007 with annexures "MPB1 – MPB11".

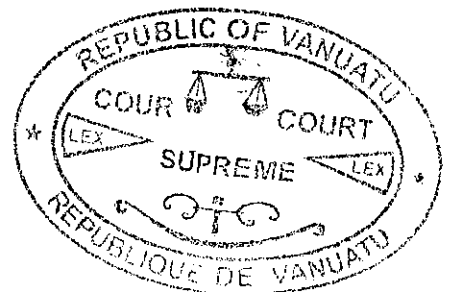
Exhibit D4 – sworn statement of Morris Kaloran dated 20 April 2007 with annexure "MK1".

Discussion

17. The onus of proof of these allegations against the Claimant rests fairly and squarely on the employer to establish on a balance of probabilities.

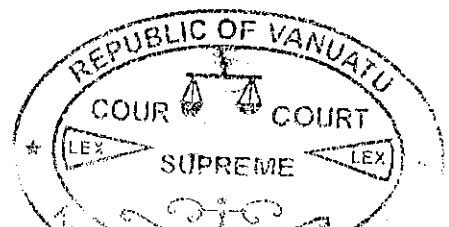
Did the Claimant fail to carry out lawful instructions given by Ministers?

18. This was one of the two reasons given for the dismissal of the Claimant by the Defendant in their letter of dismissal (annexure **MPB11**). The complaints made against the Claimant were that he failed to carry out lawful instructions of certain Ministers who had occupied the position of Minister of Education between August 2003 and July 2004.



19. The Claimant gave evidence. He said the allegations were not made known to him and he only became aware of them in a letter from the Commission dated 9 December 2004. After he received the letter, the PSC invited him to respond to all the allegations within 21 working days. He gave his response on 15 December 2004 as shown in annexure **MPB8**. He said his dismissal from the Public service was on 25 January 2005. During cross-examination, the Claimant said he was surprised and shocked upon receiving the dismissal letter because there are set guidelines as to how DGs and other staff members should be removed from office. He said he was very instrumental and familiar with those policies.
20. The Defendant relied on the evidence of Mr. Morris Kaloran and Mr. Mark Bebe. Mr. Kaloran said he and Mr. Kanam Wilson were appointed pursuant to section 19B (2)(a) of the Public Service Act to investigate the complaints against the Claimant. He said that on 18th January 2005, the investigation team produced a 20 page report. *At page 9 of the report under the heading "what specific instructions given by the Ministers did he fail to comply with", the team states as follows: "In this instance, the investigation divulges that the allegation made against the DG is true. That he never carry out the instruction of the Minister. For example making transfer of funds to other heads without consulting the Minister."* The report also states that the *"DG never delegates instruction. He has an attitude of ignoring the instructions and sometimes he thinks that he is much higher than the Minister."* Furthermore, the report makes reference to certain instances where the Claimant during his tenure as DG had failed to carry out lawful instructions by Ministers including failing to properly advise the Ministers which created a strenuous working relationship.
21. The Defendant submits that the complaint made against the Claimant for failing to carry out lawful instructions was established, and that the Claimant's failure to comply with the instructions of several Ministries within the period of August 2003 to July 2004 and/or ignore them without excuse amounted to serious misconduct justifying his summary dismissal.
22. Be that as it may, the admissibility of the Report was objected to other than on the limited basis provided for in **Government of Vanuatu v Mathias** (supra). In that case, the Court of Appeal said:

"We consider that the special investigation report was both relevant and admissible as providing the contextual setting in which the Respondent provided his written response to the various allegations made against him. To that limited extent and for that sole purpose the special investigation report should have been admitted by the trial judge.



Having said that however, we are also firmly of the view that the truth of the contents of the special investigation report and its annexures constituted inadmissible hearsay incapable of being testified to and/or identified and/or produced by George Pakoasongi."

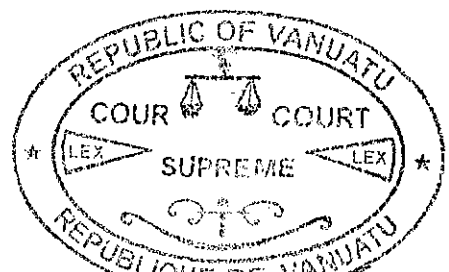
23. In this present case, the Report prepared by Mr. Kaloran and his investigation team is attached to **Exhibit D4** as annexure "MK1." At the time Mr. Kaloran made the Report, he was working as the Ag. Director at the Department of Women's Affairs. He spoke to a number of persons but he had no personal knowledge of the matters he referred to in the Report. It is clear to me that the contents of the Report were derived by the investigation team from persons not called to testify. I find that such matters constitute inadmissible hearsay incapable of being testified to and/or produced by Mr. Kaloran. See Government of Vanuatu v Mathias (supra). Moreover, during cross examination, Mr. Kaloran admitted that the Claimant was not interviewed by the investigation team prior to compilation of the Report. I find this untenable considering that the Report provided "the contextual setting" in which the Defendant premised the Claimant's dismissal. In any event, the objection to the admissibility of the Report was upheld during the trial.
24. The evidence of Mark Bebe was that he is currently the DG of the Ministry of Justice but he was the Secretary General of the Public Service Commission at the time of the Claimant's dismissal. Mr. Bebe's sworn statement dated 2nd day of May 2007 was admitted as **Exhibit D3**. It consisted of tendering a number of documents the Commission held as records with respect to the disciplinary case of Mr. Nako as follows:

"MPB1" - true copy of the letter from the Minister of Education Honourable Jacques SESE to Chairman of the Public Service Commission dated 7 August 2003.

"MPB2" - copy of the letter from the Minister of Youth Development and Training, Honourable Rapheal WORWOR to the Public Service Commission dated 17 November 2003.

"MPB3" - copy of the letter from Minister Mokin Iatika Stephens, Ministry of Youth Development and Training to Mr. Amos Titongoa, Chairman of Public Service Commission dated 27 February 2004.

"MPB4" - copy of the letter from Kalmele Matai, Director of Vanuatu Institute of Education to Mr. Bill Willy, Assistant Secretary of Public Service Commission dated 30 June 2004



"MPB5" - copy of the letter from the Minister of Education, Honourable Nicholas Brown to Mr. George Pakoasongi dated 5 July 2004.

"MPB6" - copy of the Public Service Commission paper submitted to the PSC on July 7 2004.

"MPB7" - copy of a letter from Mr. George Pakoasongi from the Public Service Commission to Mr. Abel Nako dated 9 December 2004 asking Mr. Nako to respond to the allegations made against him.

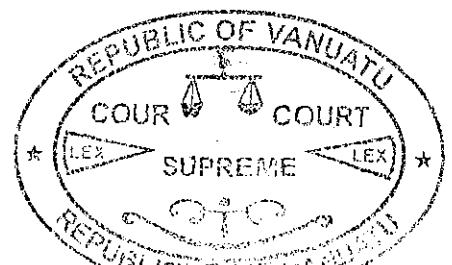
"MPB8" - copy of the response from Mr. Abel Nako dated 15 December 2005 to George Pakoasongi, Secretary of the Public Service Commission.

"MPB9" - copy of the Investigation Report compiled by Mr. Morris Kaloran and Mr. Kanam Wilson that was submitted to the PSC on the 18th of January 2005.

"MPB10" - copy of the submission paper to the Public Service Commission for its determination on the disciplinary case against Mr. Abel Nako.

"MPB11" - copy of the letter from George Pakoasongi to Mr. Abel Nako dated 25 January 2005."

25. During cross examination, Mr. Bebe admitted that he did not speak to Mr. Nako at all at any time before making his Report. Even though he said that he had talked to all those people he had listed down as the people from whom he got the materials which he used to make his Report, he had no personal involvement other than as Secretary General of the Commission. Again his evidence was objected to. It was hearsay. Besides, no author of any complaint came forward to give evidence in support of any such complaint. In the absence of the author of the complaint it could be given no weight. The Claimant disputed all complaints and all the allegations made against him in the Report. The objection was upheld.
26. As was observed by Fatiaki J. in **Vutilolo v Government of the Republic of Vanuatu** [2015] VUSC 186; Civil Case 204 of 2013 (23 October 2015), *"despite that ruling and the claimant's sworn denials, State counsel did not see fit to call any of the authors of the admitted documents as it was obliged to do if the documents were to be relied upon for the truth of their contents."* I am inclined to agree with the submissions of the Claimant's counsel that there was simply no evidence to sustain this ground of dismissal.
27. Mr. Nako's evidence is that for the two and half year period between June 2002 and 25 January 2005, he had worked with nine different Ministers in two Ministries. He said most of them stayed in their positions less than a year and

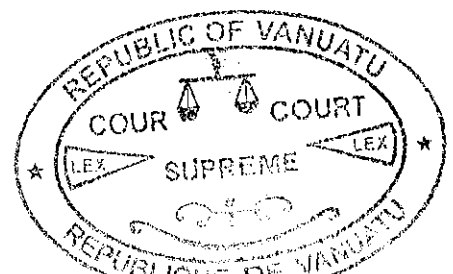


that *"it was a very politically unstable period."* At paragraph 21 of his further sworn statement (i.e. **Exhibit C2**) he stated: *"I deny allegations that I failed to comply with Ministers. All legal instructions were complied with. All those not within proper requests were explained as not possible as not lawful."*(sic) Earlier on at paragraph 3, Mr. Nako had stated that his response to an intention to investigate was that *"these allegations were not substantive and that they were fabricated, fictitious and selective."* During cross-examination defence counsel asked the Claimant whether he still maintained this response and he said he did.

28. I have had the opportunity of seeing the Claimant and listening to his evidence. I must say that I accept his denial of allegations that he had failed to comply with Ministers' instructions. I believe him and I find his evidence credible on the balance of probabilities particularly since nobody who made any such complaint of the Claimant was called to give evidence.

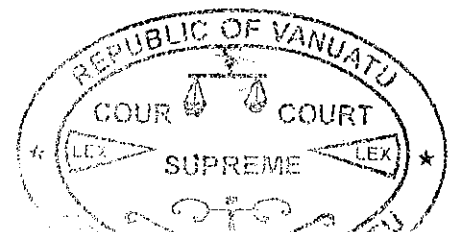
Did The Claimant Misuse A Government Vehicle?

29. Another complaint against the Claimant was "misuse of Government Vehicle causing serious damage to the Government vehicle, registration number G506." The defence produced two witnesses, namely, Mr. Emil Mael who was at the scene of the accident and Mr. Edward Kalura who was the police officer who arrived at the scene sometime after the accident. Mr. Mael said the Claimant caused the accident by overtaking his vehicle despite the fact that there were 3 to 5 vehicles coming from the opposite direction. He said that shortly after the accident the Claimant was assaulted by the taxi driver whose vehicle he had hit and that the Claimant then fled the scene of the accident and went home. Mr. Mael went on to say that the Claimant was not present at the scene when police officers arrived to make an assessment of the accident. He tendered a report he had provided to Mr Kaloran's investigation.
30. Under cross-examination, Mr Mael said he could clearly see that there were 3 to 5 other vehicles coming from the opposite direction because he had his headlights at "high beam". However, it was determined that Mr. Mael was unable to comment on the Claimant's sobriety. The witness was some distance from the accident and moved his vehicle immediately after the accident and during events. He saw the Claimant get out of his car, inspect damage and use his phone; he saw the Claimant get beaten at the scene by other persons including the driver of the other vehicle; he saw the Claimant flee the scene for his safety. It is submitted by the Claimant's counsel that as it was at night, on a



curve in the road, this claim was dubious at best and that Mr.Mael's evidence must be regarded as unreliable. I agree.

31. The Second witness on this issue was Mr.Edward Kalura, a Police Officer who attended the scene. He said he remembered that on 15th June 2004, he and some police officers working at the Road Traffic branch went to the accident scene at the Teuoma Road next to the entrance of Joy Bible Institute. He said he made his report (annexure "EK1") in which he mentioned that when he arrived at the scene the Claimant had already fled the scene of the accident. The information he gathered about the accident was gained from the taxi driver who was involved in the beating of the Claimant at the scene. Mr. Kalura said that an hour later he and several police officers arrived at the Claimant's house and he saw that the Claimant was "fully drunk" and he "could still smell alcohol on his breath." It is noteworthy that Mr. Kalura did not enter the Claimant's home. He spoke to him from some distance in the yard.
32. The Defendant submits that the Claimant was at all material times driving a Government vehicle under the influence of alcohol and that he was driving at reckless speed and/or recklessly that he caused an accident resulting in the damage of a Government vehicle. Furthermore, the Defendant submits that such conduct by a high ranking senior public servant as the Claimant amounted to serious misconduct justifying his summary dismissal. Of significance is the fact that even though this was a complaint made by former Minister Nicholas Brown, he gave no evidence for the Defendant. In fact, he deposed a sworn statement for the Claimant but he was unable to attend for cross examination.
33. The Claimant during re-examination had said that he only saw two officers and that they stood some 15 or so meters away from him so he could not see how they could have smelt alcohol on him. In any event, the Claimant does not deny that he had taken alcohol. His evidence is that he had gone to see Minister Morkin Stevens at Club 21 earlier that evening and he had drunk some beers.
34. Even if Mr. Kalura did believe he smelt alcohol on the breath of Mr. Nako, I find that further inquiry was required before forming a view that "he was under the influence of alcohol" at an accident more than 1 hour previous. No such inquiries were made. The smell of alcohol did not mean the Claimant was drunk. To be satisfied that the Claimant was drunk or driving under the influence, would require much more compelling evidence than given by these two witnesses. In my considered view, any evidence as to alcohol consumption was unreliable and unacceptable. There was an onus on the Defendant to



prove the allegations made against the Claimant on the issue of "misuse of Government vehicle." Judging from the evidence adduced by Mr. Mael and Mr. Kalura, I find that these allegations were not properly established.

35. Furthermore, allegations of misuse of motor vehicle do not seem to fall under section 36 (1) (f) of the Public Service Act. This section which deals with Disciplinary matters states:

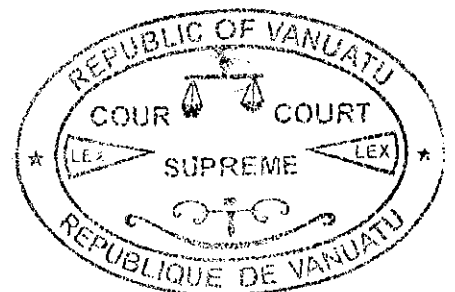
"(1) An employee commits a disciplinary offence who –

- (f) improperly uses or removes property, stores, monies, stamps, securities or negotiable instruments for the time being in his or her official custody or under his or her control, or fails to take reasonable care of any such property, stores, monies, stamps, securities or negotiable instruments.

36. The complaint does not allege that Mr. Nako "improperly" used or removed property or that he failed to "take reasonable care of any such property." What is alleged is "*misuse of Government vehicle causing serious damage to the Government vehicle, registration number G506.*" Mr. Kalura said in his Report that "vehicle G506 sustained severe damage at its front hand side." The Claimant responded to the allegations promptly and addressed them in his response made on 22 June 2004 to complaint of 21st June 2004 re accident of 15 June 2004. During the trial, the Claimant gave evidence that he noticed the damage to the car and that he had paid about VT200.000 for the repairs.

37. It is noteworthy that, apart from this piece of evidence from the Claimant about the cost of repairs to the vehicle, there is no evidentiary basis from the Defendant for Mr. Kalura's assessment of "serious damage." There are no photos or repair cost details which is what a Court would normally expect to see. The onus is on the Defendant. Without any evidentiary basis, this allegation of damage is rejected and I find that serious damage to the Government vehicle registration number G506 is not proved. Suffice to say that I accept that there was an accident. However, misuse causing serious damage to the Government vehicle is not proved. Mr. Morrison submits that any accident involves a degree of misjudgment on behalf of one party and often two and if the Claimant misjudged his overtaking manoeuvre that does not amount to "misuse". I agree.

Whether The Claimant's Dismissal Was Unjustified and/or Unlawful? And Did The Employer In Good Faith Have Another Course Available Other Than Dismissal For Serious Misconduct?



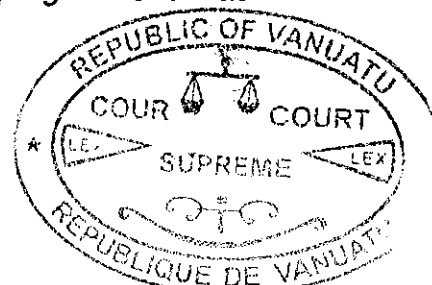
38. Mr. Kalsakau submits that the PSC's decision to dismiss the Claimant was lawful and justified. Furthermore, counsel submits that the fact that the decision of the Commission dated 25 January 2005 states that "*the Public Service Commission decided to consider your past performance as not exemplary*" indicates that the Commission did turn its mind to consider whether there was another course available other than dismissal.
39. On the other hand, Mr. Morrison submits that the Claimant relied on his good record and contribution as evidenced. He had been an outstanding Director General. He had made himself unpopular by pursuing corruption in his department. He had no previous recorded motor vehicle accident and that with his history surely there were other better and more appropriate ways to deal with this matter. Counsel further submits that the Defendant clearly failed to take account of relevant consideration and was plainly wrong and that they were on a witch hunt and determined to pursue and dismiss the Claimant.
40. In Public Service Commission v Tari (supra), the Court of Appeal considered section 50 (3) of the Employment Act which provides that "*dismissal for serious misconduct may take place only in cases where the employer cannot in good faith be expected to take any other course.*"

The Court of Appeal said:

"No mention was made of ss. (3) by the Commission when it invited Mr. Tari's submissions in response to the disciplinary report and accompanying letter. It did not mention s.50 (3) when it dismissed him. The terms of ss.(3) impose a positive duty on the Commission. It is only permitted to dismiss an employee if it cannot in good faith be expected to take another course. Other "course(s)" may include demotion or transfer to another government department. These are also serious responses to misconduct by an employee. (See Government of Vanuatu v. Mathias [2006] VUCA 7).

Conclusion

41. In this present case, I find that the Defendant breached its duty under section 50(3) of the Employment Act and that there was another course which the employer in good faith could have taken. In fact, one of the recommendations suggested by Mr. Morris Kaloran and the investigation team at page 20 of their Report was "*Transferring DG to manage specific program such as TVET.*"



Undoubtedly, this was another course available other than dismissal for serious misconduct. Nonetheless, the Defendant paid scant regard to section 50(3) and made no real or proper consideration of that section. I consider that outright dismissal of Mr. Nako was unnecessarily harsh and appeared to be a predetermined intention of the disciplinary process. His dismissal was unjustified and he is entitled to judgment in the circumstances.

42. Attached to Mr. Nako's sworn statement dated 22nd day of March 2006 (i.e. **Exhibit C1 at annexure "AB1"**) is a breakdown of his claims which he said he made himself. Even though he was not cross examined upon this, I find that he is not entitled to some of the claims and consequently they have been discounted.

Is the Claimant entitled to be paid his severance allowance?

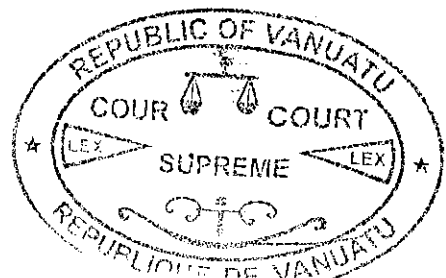
43. The evidence before the Court is that the Claimant was appointed by the Defendant in April 1998 as the Acting DG of the Ministry of Agriculture and in March 1999 his appointment was confirmed on a permanent basis. He continued as the DG of Agriculture until June 2002 when he was appointed as the DG of Education and he retained that position until his dismissal on 25 January 2005. The claim in this proceeding was filed on 23 February 2005.

In the circumstances, **severance allowance for 6 years 8 months** is to be paid to the Claimant as he was in continuous employment with the Defendant for a continuous period of not less than 6 consecutive years pursuant to section 54(1)(d) of the **Employment Act**. The remuneration which shall be taken into account in calculating the severance allowance shall be the monthly remuneration of **VT157,827** payable to the Claimant at the time of his dismissal on 25 January 2005. Therefore he is entitled to be paid the sum of **VT526,090** as severance allowance.

Furthermore, I am of the view that the circumstances of the Claimant's dismissal should give rise to a multiplier of 6 times under section 56(4) which provides that:

"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)."

I therefore make an award for **severance with multiplier x 6** amounting to **VT3,156,540**. It is timely to mention that in the intervening period severance allowance was doubled by legislation.



Is the Claimant entitled to be paid 3 months' notice?

44. Section 28 of the Public Service Act provides:

"28. Notice of termination of employment and resignation

(1) Subject to the express provisions of any written contract of employment, every employee who is not a temporary salaried employee, probationer, or daily rated worker, shall be deemed to be a permanent employee and his or her employment must be terminated in the following manner:

(a) in respect of an employee who has served less than 12 months continuous employment, he or she shall be given 2 weeks' notice;

(b) in respect of an employee who has served not less than 12 months continuous employment, but not more than 2 years continuous employment, he or she shall be given 1 month's notice;

(c) in respect of an employee who has served continuously for not less than 2 years but not more than 3 years, he or she shall be given 2 months' notice;

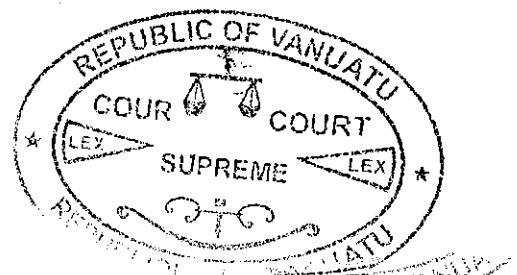
(d) in respect of an employee who has served continuously for 3 years or more, he or she shall be given 3 months' notice."

To succeed in his claim for payment in lieu of notice all that the Claimant is obliged to establish as a matter of fact is:

- (a) that he has been in continuous employment with the Defendant for over three (3) years; and
- (b) that he has not received any notice of any kind of the termination of his employment.

I am satisfied that the Claimant has provided sufficient evidence confirming these pre-conditions and he is therefore entitled to receive from the Defendant the sum of **VT473,481** as 3 months' salary in lieu of notice.

45. Accordingly, judgment is entered for the Claimant in the sum of **VT4,156,111** with interest of 5% per annum calculated from the date of dismissal and continuing until the judgment sum is fully paid up. The Claimant is also entitled to outstanding accrued annual leave payments and VNPF contribution entitlement as well as costs of this proceeding to be taxed if not agreed.



DATED at Port Vila, this 25th day of November, 2016.

BY THE COURT



M. M. SEY
Judge

