

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

Civil Case No. 155 of 2015 SC/CIVL

BETWEEN: LIVO MELE
Claimant

AND: THE REPUBLIC OF VANUATU
Defendant

Date of Hearing: April 18th 2017

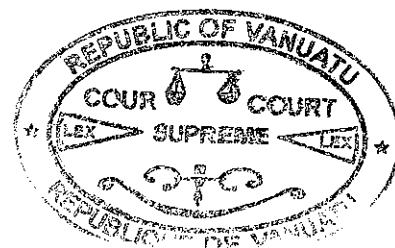
Date of Judgment: July 18th 2017

Before: Justice JP Geoghegan

*Appearances: Mrs MG Nari for the Claimant
Mrs A Bani (SLO) for the Defendant*

JUDGMENT

1. These proceedings involve a claim by Mr Mele that on January 20th 2015 his employment as the Director of Agriculture was unlawfully terminated by the Public Service Commission ("PSC"). He alleges that the defendant's conduct was in breach of sections 15 and 19 B of the Public Service Commission Act [CAP 246] although there is also broad reference to a breach of the Employment Act.
2. Mr Mele seeks total compensation of Vt 28, 920,200 consisting of a combination of notice, accumulated annual leave, severance pay and other payments.
3. His claim is opposed by the State which maintains that at all times the PSC acted properly and in accordance with his obligations as a good employer in terminating Mr Mele's employment and that his employment was terminated on the basis of serious misconduct rendering Mr Mele ineligible for the payments which he now seeks.



Background

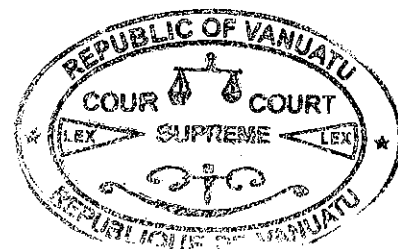
4. Mr Mele commenced employment with the defendant in March 1993 as a research assistant for the Australian Centre for International Agricultural Research Project. He subsequently became the Director of Forestry but in September 2012 was transferred by the PSC from that position to the position of Director of Agriculture.
5. Mr Mele held the position of Director of Agriculture from September 12th 2012 to January 20th 2015 when his employment was terminated for alleged serious misconduct.
6. On October 24th 2014, the then Minister for Agriculture, the Honourable David Tosul wrote the PSC under cover of a letter headed:-

"Utter Disappointment in Mr Livo Mele, Director of the Department of Agriculture and Rural Development (DRD)".

7. In his letter the Minister referred to lodging an official complaint with the PSC pursuant to sections 19 A and 19B of the PSC Act. The Minister then set out his complaints in the following way:-

"I have grave concerns that my electronic signature is already affixed to a draft Agriculture Policy that has been circulated widely in the Public Domain without my knowledge and approval. It is more disconcerting to learn that the soft copy of the said document is already in the hands of private individuals throughout this country (and possibly abroad).

Mr Mele took it upon himself to think that it is diplomatically correct to defile and degrade my signature and stamp on a document which my Cabinet has not been officially briefed on nor given its approval for. The process envisaged by my Ministry is for DARD to complete the consultation process and then brief my Cabinet upon which permission can then be sought for my approval of the document and that I officially sign the document.



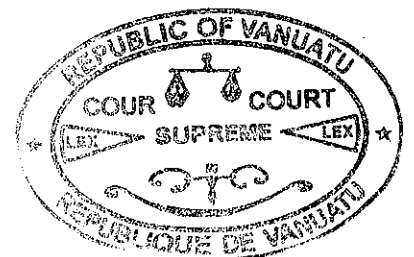
That has never happened prior to my signature (albeit in its electronic form) being affixed to the document.

As a State Minister I WILL NOT tolerate such disrespect to this important office. Any individual who defiles this office or that of any other Ministry must be dealt with appropriately and according to law.

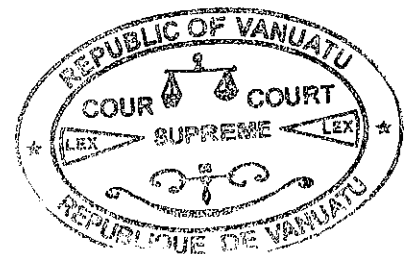
I am also aware from very reliable sources gathered over the past years since 2013 that Mr Livo Mele has committed other disciplinary offences that warrant serious disciplinary measures by the PSC as his employer. These include:-

- i) Misappropriate and fraudulent use of accountable imprest and DSA totaling (sic) VT 120,000 designated for the Director DARD's use during Shefa Com on Epi (June 2013) – instead these funds were taken to Malekula and falsely receipted for Epi;*
- ii) Questionable deal with a private individual in Sola, Vanua Lava for the renovation and extension of DARD office in Sola (Torba) for an amount of money worth about +/- 600,000 vt (July 2013);*
- iii) Renovation of DARD office(s) and staff housing in Luganville, Santo for an amount of money worth over Vt 5 million without complying with Central Tender's Board (CTB) legal procedures and requirements as per provisions of MFEN Act;*
- iv) Dubious contractual arrangement with a Tongan Financial Agent (SAM Financing) that has led to the embezzlement of Vt 1,230,159 of NZ Aid Funds designed for the allowances of 5 ni-Vanuatu students studying and Hango College, Tonga (2013); and*
- v) The unauthorized leasing of 5,000 hectares of Government land (industrial forest plantation [IFP]) on Santo to a private individual/company without the prior authorization of the council of Ministers (COM) and/or the Vanuatu Government (in our (sic) around 2006).*

For these reasons I urgently call on the Commission to deal with Mr Livo Mele accordingly."



8. There can be no question that the Minister's complaint raised very serious issues which, if established, would amount to serious misconduct.
9. Acting upon the complaint the PSC determined that an investigation panel should be appointed to investigate the allegations. A four person panel was appointed on November 5th 2014.
10. On November 17th 2014, Mr Mele was suspended pending the outcome of the investigation. The letter of suspension referred to the suspension being made pursuant to section 35 (3) of the Public Service's Act and that Mr Mele's case would be "*treated under section 19A and 19A of the Public Service Act*". The repeated reference to section 19 A is clearly an error and the second reference should be to section 19B.
11. An investigation was duly conducted and Mr Livo received an unsigned copy of an investigation report on January 7th 2015 and a signed copy of the report on January 9th 2015.
12. The investigation included an interview undertaken on December 15th, 2014 by one member of the panel, Mr Samuel Kaltak. Prior to the interview Mr Mele had been approached at Fresh Wota Park by Mr Kaltak and another member of the Panel Mr Thomas Felix. Because of the unsuitability of that venue for an interview of the kind to be conducted it was suggested by Mr Mele that the interview take place at the Korman cricket field. The interview was for approximately 40 minutes but was not attended by Mr Felix who apparently had other matters to attend to.
13. Mr Kaltak put each of the allegations to Mr Mele for his comment. It is clear that Mr Mele completely rejected each allegation. With reference to those allegations he had the following responses:-
 - i) That he had personally asked the Minister to provide his signature and photograph so that it could be used and circulated in connection with the draft policy which was being formulated. The Minister had agreed and given the signature and photograph to his secretary which was then

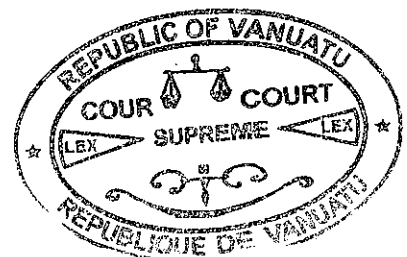


passed on electronically to a Mr Mark Vurobaravo who was the one who pasted it onto the document. Given his previous contact with the Minister Mr Mele had assumed that there was no difficulty in this regard and that it was never his intention to create any difficulties that would jeopardize his working relationship with the Minister.

- ii) When he had applied for an imprest consisting of two separate sums of Vt 70,000 and Vt 50,000 it was supposed to be for the Epi Tour. He was then informed that only the Director General and 1st PA were to attend the Council of Minister's meeting in Epi and his intention was to retire the fund (Vt 50,000) but he was then invited to a Yam Festival in Malekula by the Agricultural Field Officer there. He provided the Vt 50,000 to the accounts officer to send to Epi for use on the Minister's tour to Epi with instructions that expenses be receipted and sent to him. Upon returning from Malekula he discovered that the Accounts officer (a Mrs Simon) had never sent the money to Epi but had used it in Vila. He also stated that:-

"I have already paid this through direct deductions to prevent any allegations".

- iii) With reference to the DARD office in Torba he had chosen a Mr Smith Wona to be the person in charge of the construction because Mr Wona had a shop and materials that were needed for the construction. In selecting the contractor he took a decision as Director believing it to be within his jurisdictional power to choose any person deemed to be suitable. He acknowledged that if it had been for an amount in excess of Vt 5 million he would have been required to put the work out for tender but as it was less than that he considered that it fell under his authority to determine what was best. He added also that the funding for the project had come from AUSAID and that such funding was originally to have constructed a building at Ureparapara. Due to delay, the funding was directed to the construction of a DARD office in Sola.
- iv) With reference to the construction of the DARD office in Luganville and to whether there was any tender in place to determine the best candidate for that project, Mr Mele simply referred to *"the investigation already*



made by the Tender Board into this issue". He stated that he could not elaborate further.

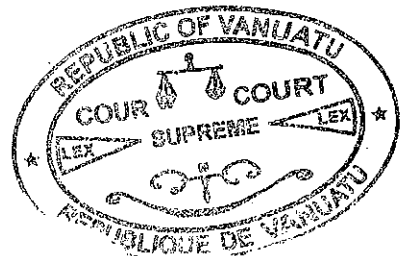
- v) With reference to the allegation concerning funding institutions in Tonga, Mr Mele advised that he was, at that time, the Director of Forestry and was managing a fund for students studying in Tonga. He advised that when he left the Department to take up his position as Director of Agriculture his successor had handled the funding and a problem arose shortly after his successor had *"presented the report"*. He understood that the students were complaining that their allowances were *"too slow"*. The New Zealand Government had enquired as to why that was the case but that essentially it was not his responsibility.
- vi) As far as the alleged unlawful leasing of land in Santo was concerned Mr Mele commented that:-

"We all know the procedural rules to leases, whether head leases or sub leases. Only the Minister signs the document, and if I had signed any, it would have been that I signed only as witness,"

14. It would have been absolutely clear from the interview undertaken that Mr Mele completely denied any of the allegations made against him. It would also have been very clear that further investigation was required in respect of the matters raised by Mr Mele.

15. At the conclusion of their investigation the investigation team produced a 32 page report with a substantial number of appendices. Under a heading *"final remarks"* the report recorded the following conclusions:-

- i) That with reference to the allegation concerning the Minister's signature Mr Mele had breached section 36 (1) of the Public Service Act 1998 and that he had *"facilitated in obtaining the Minister's signature, used it on a formal policy paper and circulated it to stakeholders without letting his Minister and the Staff know about it before he can circulate it"*.
- ii) The conduct of Mr Livo using the imprest of Epi was in breach of financial regulation 6.34 (2) which provided that *"an imprest should only be used*

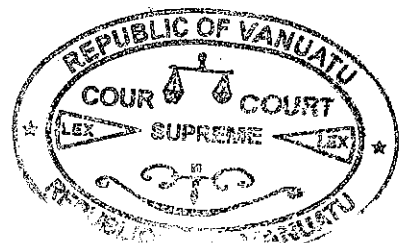


for the purpose for which it was issued". While it found that Mr Mele had not complied with the financial regulations it recorded that:-

"However, IT confirmed that the imprest in question and other DSA totaling to Vt 121,000 mismanaged by a Director were recoverable by the Department through the Department of Finance with the Director's consent".

The meaning of that is unclear, however what is clear is that there was no suggestion of Mr Mele having used the funds for any purpose unrelated to his work and in that sense it could not be said that he had misappropriated the funds or fraudulently use them.

- iii) The renovation and extension of the DARD office in Sola *"was planned according to a decision made by DARD senior staffs. However, the process of the procurement used to facilitate the payment of materials was not done according to Government Financial Regulations 5.2 which states "an officer with appropriate financial delegation must approve the purchase order form for the goods or services, and two quotations must be obtained wherever possible"*. The investigation then recorded however that the Finance Officer of the Department had written a letter to the Finance Department confirming that only one quotation had been obtained.
- iv) The renovation of DARD office and staff housing in Luganville had not been undertaken in accordance with the 2012 - 2013 Planner and was undertaken based on a DARD senior officers' meeting. The report noted that the procurement for the construction was split into two contracts which had been referred to as an attempt to avoid the Government tendering process and therefore may be in breach of section 13 A (presumably of the Government Tender Act). The report concluded that with reference to the staff housing in Santo the investigation then established that that procurement did not follow due process and as the contract was valued in excess of Vt 100,000 it therefore required two quotations to be obtained as per Finance Regulations 5.2. The report also stated in relation to this allegation that:-



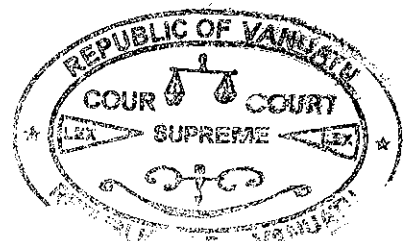
"IT was reliably informed that Edmond Hajuju Sele and David Vutilolo are from South Santo of which BOTH are closely related to Livo Mele."

- v) The engagement between Mr Mele and Sam Finance was not clear based on the information gathered and required *"deeper investigations"*.
- vi) The sublease of the 5,000 hectares of Government land (industrial forest plantation) to a private individual did not go through the Council of Ministers of get the approval of the Vanuatu Government in or around 2006. In addition the process of the sublease *"was not done accordingly to normal process of Government leases where SLO is always facilitating legal documents of such nature nature"*. In addition, the total area of the head lease was subleased contrary to the Land Leases Act, where a sublease cannot be granted over 100% of the head lease and that the Ministry of Agriculture had access to the sublease documents but not the copy of the agreements which outlined different payments to the Forestry Department. Significantly in relation to this allegation, it was reported that the signatures on the documents were not clear so it could not be established that Mr Mele's signature was on the document.

16. The penultimate paragraph of the report stated the following:-

"This investigation is highly challenging because the investigation team comprises of only two civil servants and two private individuals which made it very difficult to meet and for two weeks or one month timeframe to conduct the investigation at the end of the year (festive seasons) is really difficult since some reliable staffs were ready to go on holiday then may then to rush with their responses /answers. Some people whom we think we can rely on them to provide information needed are not cooperating to provide us with that information because they were simply afraid to be part of this report".

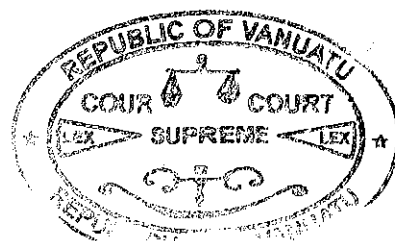
17. That paragraph should have been a red light to the PSC that the investigation team felt hurried under the timeframe given to it, that the responses and answers to questions may need to be considered further and that there might be other information which would need to be considered.



18. Mr Mele received a signed copy of the report on January 9th and responded with a nine page letter dated January 16th 2015. In that letter he once again reiterated that he disputed all of the allegations and set out at some considerable length his position in relation to them. In essence the main points raised in his letter were as follows:-

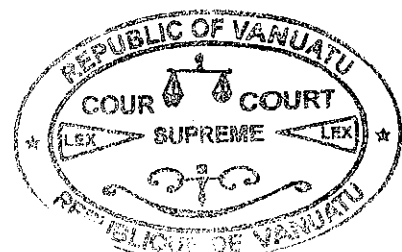
- a) That the investigation team had not complied with its own terms of reference which, inter alia, had provided that *"the investigation team needs to talk to the Director regarding his position on the above complaints and on the findings the IT team may have ascertained through the investigations"*. There had been no consultation with Mr Mele by the Investigation Team regarding its findings.
- b) That the failure to discuss matters with him meant that the investigation team did not understand the background of the events and the circumstances present when various decisions were made.
- c) That the investigation team did not interview people who were familiar with the issues but based some of their conclusions on hearsay.
- d) That the investigation team should have included an experienced Director to be part of the team because of the need for knowledge of the Government system and experience in the operations undertaken by Directors.
- e) Mr Mele also further addressed each allegation and his responses are referred to in the following paragraphs.

19. As to allegation (i), Mr Mele set out at length the steps involved in the development of the National Agriculture Policy which was at the heart of the Minister's allegation. Mr Mele referred to five steps in the development of the policy the final step being preparation of a final draft of the policy ready for endorsement by the Council of Ministers. Mr Mele stated that the policy had not yet been finalized so an allegation that the policy had been finalized without the Minister's consent was simply not true. He stated that after the necessary provincial consultations the consultant engaged in developing the policy developed a draft policy with the intention of obtaining the views of stake holders as to its format and layout. It was at that point that Mr Mele



approached the Minister for his signature and photo to be used in the policy. He reiterated that the Minister agreed to the idea and assured Mr Mele that his Secretary would send it over to DARD. The photo and signature was sent to DARD's officer responsible for editing the policy and the officer inserted the photo and signature to the relevant page. The draft policy was then sent out to stakeholders for further comments. A copy of the draft was sent to the Minister, the Director General and the political advisors for comments. Mr Mele referred to the fact that the Minister's comment on the draft policy was a "congratulatory one". Mr Mele referred to the fact that after all comments had been received the final editing would be done and the Council of Minister's paper would be drafted for the Director General and Minister to table the policy in Parliament. Mr Mele stated that while he was waiting for the Director General and Minister to call him to the Ministry to discuss the policy paper he was suspended and alleged to have used the Minister's signature without his consent. Mr Mele maintained that what he had done was in accordance with the "normal process of policy development and the practice that the Minister's photo and signatures appears on the policy document as normal". Mr Mele stated that any allegation that the document was a formal policy paper was unfounded and incorrect. Mr Mele's explanation directly conflicted with the Minister's assertion that his signature and photograph had been used without his knowledge and approval.

20. A perusal of the documents in Annexure One of the report would appear to establish that on August 21st 2014, the 1st Secretary Typist of the Ministry of Agriculture received a telephone call from Mr Livo's secretary advising that Mr Livo had asked her to liaise with the 1st Secretary to obtain the Minister's signature and his photo to be put on the Agriculture Policy Paper. The 1st Secretary then went to the Minister's office and informed him about that and it appears that the Minister had provided his signature. A request for a photo had been made and the Minister advised that he would have his photo taken on the afternoon of that day. It was subsequently forwarded by email to Mr Livo's secretary.

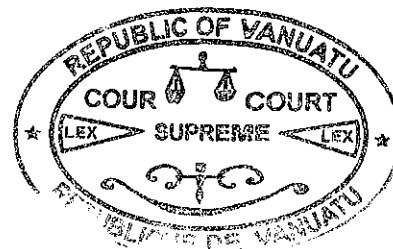


21. Looking at the contents of the report the problem appears to have been not that the signature and photograph were obtained but that they were attached to a document which was then circulated in Word format rather than PDF. The significance of that error was that it appears that if the document was circulated in Word format it could be easily edited or copied and therefore used for another unauthorized purpose. This clearly created a degree of consternation which was summarized by an email on October 14th 2014 from the Acting Minister the Honourable Ralph Regenvanu to his personal assistant which stated:-

"It is very bad practice to be circulating an electronic copy of the signature of the Minister and the Ministerial stamp like this. Anyone could use the signature and stamp and affix it to any document as a forgery. Only PDF'ed documents should carry the Minister's signature and stamp".

22. Accordingly the real issue appears to have been not the fact that the Director had used the Minister's signature and photo without authority but the electronic format which had been used to circulate the signature and photograph. On the information collected by the investigation team there would have to be some doubt regarding the correctness of the Minister's claim that his electronic signature had been affixed to a draft Agricultural Policy that had been circulated widely in the public domain without his knowledge and approval. In such circumstances it would have been prudent for the investigation team to have clarified matters both with the Minister and Mr Livo before finally reporting. While concern regarding the format which was used to circulate the draft policy is entirely understandable it is a rather different matter from that originally complained of by the Minister.

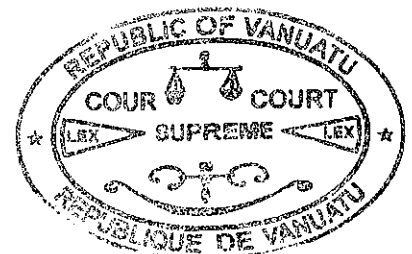
- As to the issue of the imprest for the Epi tour, Mr Livo reiterated his earlier explanation and expanded upon it. Mr Livo again reiterated that the Director General had instructed the Finance Department to deduct the equivalent fund from his salary, a course which in all the circumstances, appears unusual when there appears to have been no suggestion that the Vt 120,000 in question was used for any purpose other than the execution of Mr Livo's duties as a Director. That is not disputed. Mr Livo regarded it as the utilization of



funds which were completely within his role as a Director. In addition Mr Livo referred to the fact that the use of the imprest for a purpose other than Epi was something that was undertaken by the Financial Officer. Mr Livo stated that:-

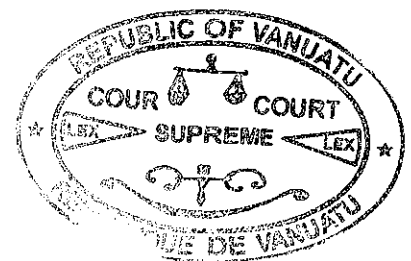
"Again, this practice of using for other government services if there is an urgent need and the time does not allow for the return imprest and the application of a new imprest is normally done by lots of Departments and Directors. As long as the imprest is used for official duties, the decision normally rest with Directors".

23. The investigation report does not make any reference to Mr Mele's explanation that the use of the funds were in his proper province as a Director. There also appears to have been no enquiry made of the Finance Officer regarding Mr Livo's assertion that the allegation of some expenses to Vila rather than to Epi were the responsibility of the Finance Officer.
24. In addition, the Minister's reference to misappropriation and fraud would appear to have no proper basis, something which does not appear to have been considered by the PSC.
25. As to the allegation of *"questionable deals"* regarding the renovation and extension of the DARD office in Sola, Mr Livo stated that most of the funds received by the Department of Agriculture were released in November when the financial year was about to end. The instruction to all Departments was that either the funds should be used or lost to the Finance Department. Accordingly, most departments used whatever was available at the end of the financial year to fund new vehicles, renovate buildings and so forth. That was the situation which presented itself to DARD in the 2012-2013 financial year. Given that obtaining materials from suppliers can be very difficult in the more remote islands a decision was made to obtain a quote from Wilco which was able to provide all of the necessary supplies required. Mr Warner was chosen to complete the building project as he had a construction company and the materials available to construct the building within the constrained timeframe which had allegedly been given to DARD by the SPC. Mr Livo contended that the decision that was taken to complete the building project within the timeframe provided resulted in the SPC being able to



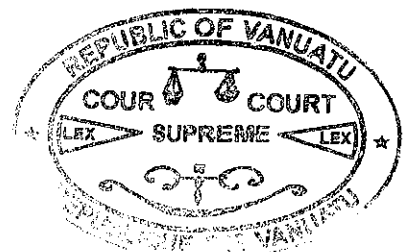
undertake a food security project in Torba worth more than Vt 20 million. It is clear from Mr Livo's explanation that he felt that he had the appropriate authority to undertake this work in the way that it was undertaken. The difficulty with the investigation team's conclusions is that they refer to a suspected breach of 5.2 of the Finance Regulations. That suspected breach related to the obtaining of quotations namely, that there was a failure to provide a supporting letter or justification as to why only one quote was obtained and not two. At the same time however the investigators acknowledged that they had found a letter from the Finance Officer of Agriculture providing a clarification as to why only one supplier had been approached. Given that regulation 5.1 of the Financial Regulations Order 27 of 2000 provides that for purchases between Vt 1 and Vt 5 million three written quotations must be obtained "*wherever possible*", there appears to have been little or no consideration of Mr Livo's explanation.

26. The essential allegation in relation to the renovation of DARD offices and staff housing in Luganville was that the requirements of the Government Contracts and Tenders Act 1998 had not been complied with as the project involved expenditure of over Vt 5 million. Mr Livo again repeated his complaint that one of the difficulties faced by DARD and all other Government Departments is the allocation of funds towards the end of a financial year with the associated risk that if the funds are not spent then they are lost. Mr Mele submitted that the approach he took was consistent with the approach of all other Departments. While it was contended that the contract was a split contract and that the purpose of a split contract was to avoid being required to undertake the processes set out in the Government Contracts and Tenders Act 1998 Mr Livo presented an explanation for the contract which related to the inability of the original contractor who had quoted just over Vt 4 million to undertake the contract due to having suffered an accident. It was subsequently discovered that further work was required which increased cost. Accordingly it appears to be Mr Livo's explanation that at no time did the requirements of the Government Contracts and Tenders Act 1998 come into play. Significantly however, it is apparent from Mr Livo's initial interview that there was an investigation already undertaken in respect of this issue by the Tender Board. Despite Mr Mele's reference to that, there is no corresponding reference by the investigation team to the Tender Board enquiry which one would have thought was



directly relevant to the matter being investigated by the PSC. One would think that that might be an obvious and significant document for the investigators to obtain.

27. As to the *"dubious contractual arrangement with the Tongan Financial Agent (SAM Financing) that has led to the embezzlement of Vt 1, 230, 159 of New Zealand Aid Funds"* Mr Livo repeated much of what he had said earlier to the investigation team although elaborated on it slightly. It appears that Mr Mele considered it important to have an agent *"on the ground"* in Tonga to assist with matters relating to the students there and he referred to the assistance provided to the students by the agent *"in terms of graduation, clothing (gown), food for graduation, gifts for the school and many other assistances that were not in the budget."* What is abundantly clear from the investigation report is that it considered that further investigation was required and that it had not had time to obtain the necessary information to form a view as to the allegation. On that basis alone it could not have been said that the contractual arrangement with the agent was *"dubious or that there had been any embezzlement of New Zealand Aid Funds in the sum of Vt 1, 230,159 or any other sum"*. There was simply no conclusion in respect of the matter and an implied request for further time.
28. As to the allegation that Mr Livo had been responsible for the unauthorized leasing of 5,000 hectares of Government land on Santo without the prior authorization of the Council of Ministers and/or the Vanuatu Government (in or around 2006), the first matter of note is that the complaint appears to relate to an alleged incident which had occurred some seven or eight years previously when Mr Mele was the Director of Forestry. Mr Mele responded however by stating that the leasing of land was under the jurisdiction of the Minister of Lands and that the then Acting Minister of Land was the Honourable Marcellino Pipite. Mr Mele also referred to the fact that the land had originally been subleased in 2000 or 2001 with that sublease having been approved by the Council of Ministers but that it had then been cancelled and that a new sublease was awarded to TRB1 and TRB2 (presumably some kind of legal entities). He stated that the State Law Office and the Ministry of Lands were part of that process. Mr Mele simply made the point that he could not have subleased the land as was suggested and that the



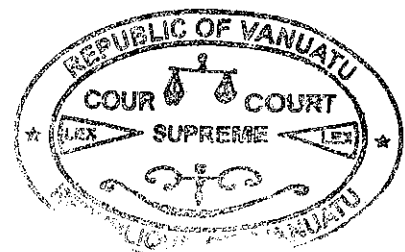
investigation team had not undertaken a thorough enough investigation to locate the files which might have clarified the position.

29. In any event, while the investigating team had apparently established that the subleasing of 5,000 hectares did not go through the Council of Ministers or get the approval of the Vanuatu Government in or around 2006 it could not determine that Mr Mele was responsible for that state of affairs. No clear conclusion was reached in relation to the allegation and it is clear that further investigation would be required.
30. On January 19th 2015 the PSC met and found Mr Mele "guilty" of each allegation. This was communicated to Mr Mele in a letter dated January 20th 2015. That letter makes no reference to Mr Mele's lengthy letter of January 16th and does not address the references in the investigation team's conclusions to a lack of clarity around certain documentation and the need in some respects for further investigation.

Discussion

31. Although these proceedings were set down for a two day trial the Court was informed at the outset of the hearing that no witnesses would be required for cross examination. The Court was advised that none of the facts were disputed and the matter could be dealt with on the basis of submissions.
32. It was clear also that the State approached the case on the basis that it did not have to prove any of the allegations against Mr Mele notwithstanding the fact that he had disputed them from the outset. This was despite the fact that in a Minute issued on August 5th 2016 I made the following observations:-

"One of the issues that I had 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



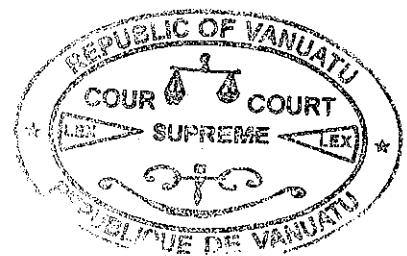
therefore do not need to be the subject of proof in which allegations are denied. This is a matter which will have to be addressed at the next conference."

33. Ms Bani on behalf of the State referred to the claimants statement of claim and submitted that it had never been part of the claimants 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.
36. Pursuant to section 15 of the Public Service Act [Cap 246] the PSC has a duty to *"ensure the fair and proper treatment of employees in all aspects of their employment"*¹.
37. There is a specific provision in section 19B for the removal of Directors-General and Directors. The relevant parts of that section refer to the following requirements:-
- a) The Commission cannot remove a Director-General or Director from office unless the Commission has received a complaint in writing from the *"Prime Minister, a Minister, the Ombudsman or the Attorney General"*².
 - b) The complaint must allege the grounds for removal under section 19A (1) and set out the evidence in support of the allegations³.
 - c) The Commission is required to appoint one or more persons to investigate the complaint, must send a copy of the complaint to the

¹ Section 15 (2) (a) Public Service Act

² Section 19B (1)

³ Section 19B (1)(a) and (b)



subject of the complaint and must give that person 21 days to respond in writing to the allegations⁴.

- d) The Commission must decide whether or not to remove the Director-General or Director within 75 days after receiving the complaint or, if additional information has been requested within 75 days after receiving the additional information⁵.
- e) The person or persons investigating the complaint must provide a report on the investigation to the Commission and the Commission must take into account the report and any responses to it from the subject person in deciding on removal⁶.
- f) The Commission must give the subject person and the complainant written notice of the Commission's decision "*and the reasons for the decision*"⁷

38. In her submissions Mrs Nari referred to the following issues arising from the report furnished to the PSC:-

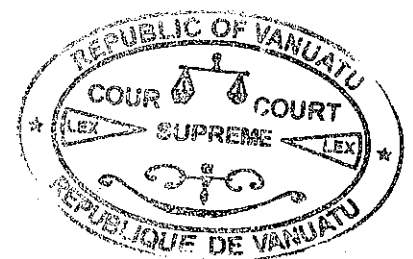
- a) There was no proof of obtaining the Minister's signature without his consent and no proof of forgery of his signature.
- b) There was no proof that Mr Mele had misappropriated or otherwise fraudulently used an imprest account in respect of the Shefa Tour in June 2013.
- c) The renovation of DARD offices and staff housing in Luganville amounted to only Vt 845,000 and therefore was not a project which was required to go through a tender process (something which would apply for a project in excess of Vt 5 million).
- d) There was no "*questionable deal with a private individual in Sola*" for the renovation and extension of the DARD office there.
- e) There was no proof of any "*dubious contractual arrangements*" with a Tongan Financial Agent that led to the "*embezzlement*" of Vt 1,230,159 of

⁴ Section 19B (2)

⁵ Section 19B (4)

⁶ Section 19B (5)

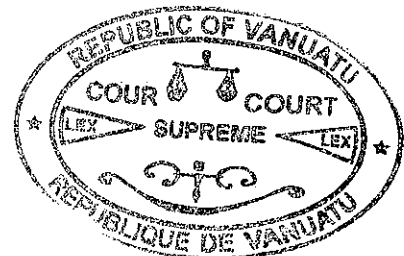
⁷ Section 19B (6)



New Zealand Aid. Mr Mele had been transferred out of the relevant Department engaged in that particular matter in September 2012 and no interviews were conducted in respect of the matter.

- f) There was no proof of an *“unauthorized leasing of 5,000 hectares of Government land”*. No interviews were conducted and Mr Mele could not have been responsible for such a lease.

39. It was submitted by Mrs Nari that the investigating team was required to prove all allegations against the claimant through an investigation. I do not accept that that is a requirement of the Public Service Act. Section 19B (5) simply requires the person or persons appointed to investigate the complaint and to provide a report on the investigation to the Commission. It is for the Commission to determine whether or not the complaint is established. The Act does not contain any specific provisions as to how the investigation should be undertaken.
40. For the same reason I reject Mrs Nari’s submission that the interviews were conducted by just one investigating team member and cannot be relied on by the PSC. Again, the Act does not prescribe how an investigation should be undertaken and even though the investigating team may comprise of more than one person it is for the investigating team to conduct an investigation in whatever way it wishes, mindful of course, that such an investigation must be thorough and fair. There is nothing to the submission that simply because an interview was undertaken by one only of the investigating team it cannot be relied upon by the PSC.
41. The question however is whether or not the Commission could be said to have given Mr Mele a fair hearing and whether it could be said that the PSC had given proper reasons for its decision to remove Mr Mele.
42. That issue must be considered against the background of the conclusions reached by the investigating team and which was the only information, along with Mr Mele’s comments, which could have provided the PSC with a basis for its decision to remove Mr Mele.

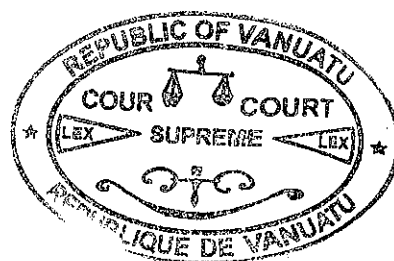


43. As to the Minister's rather intemperate complaint regarding the use of his electronic signature the investigating team concluded that Mr Mele had breached section 36 (1) of the Public Service Act 1998. In fact, section 36 of the Public Service Act refers to a range of disciplinary matters and section 36 (1) (a) to (j) sets out various matters which constitute a "disciplinary offence". Accordingly, the broad reference to section 36 (1) is rather unhelpful. Having considered that particular section it would appear that Mr Mele's actions could possibly be seen as falling under section 36 (1) (c) or (i) which provide as follows:-

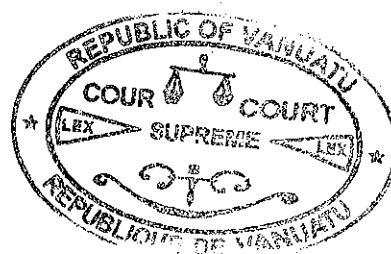
"(c) is negligent, careless, indolent, inefficient, or incompetent in the discharge of his or her duties:-

i) is guilty of any improper conduct in his or her official capacity, either inside or outside of working hours, or of any other improper conduct which is likely to affect adversely the performance of his or duties or is likely to bring the Public Service to disrepute".

44. Standing back and looking at what had occurred there appears to be supporting evidence for Mr Mele's suggestion that the Minister's photograph and signature had been requested and provided by him or through his office and accordingly with his consent. The real issue of concern appears to be that his signature has been placed in an electronic format which might possibly enable an unscrupulous individual to use that signature for another purpose. While the Minister was correct to be concerned about such an outcome, the position as established by the investigating team did not reveal a situation as serious as that set out by the Minister in his complaint. It did not appear to involve a willful or deliberate disregard of the Minister's authority or a willful or deliberate misuse of the Minister's signature. There is no evidence that the PSC considered the difference between the matters originally complained of by the Minister and what the investigating team had established. While the deliberate and unauthorized use of the Minister's signature would have established serious misconduct which would probably have justified dismissal in itself, that was not what the investigating team reported.



45. As to the alleged misappropriation and fraudulent use of an accountable imprest, that complaint was not established at all. While the funds were used for the purposes of a visit to Malekula rather than Epi it could not possibly be said that they were misappropriated or fraudulently used. In addition, the PSC appears to have given absolutely no consideration to the issue of whether or not the reallocation of funds was within the appropriate authority of the Director. In addition it did not consider the issue raised by the investigating team that the money had actually been repaid by Mr Mele personally and that accordingly this complaint effectively amounted to an issue of double jeopardy for Mr Mele.
46. In addition, while the Commission found Mr Mele "guilty" of breach of financial regulation "6.34 (2)" the original allegation was one of fraud and misappropriation. I have been unable to locate financial regulation 6.34 (2) but assume that the PSC was referring to regulation 6.4 (2) of the Financial Regulations Amendment (4 to 27 of 2000) which provides that:-
- "An imprest holder must ensure that the imprest is used only for the purpose for which it was issued".*
47. While the PSC was no doubt entitled to consider the breach of regulation 6.4(2) and while it appears, on the face of it that that regulation was indeed breached the Commission appears to have taken no account of the fact that the Minister's rather extravagant claims of misappropriation and fraud could not be established, the fact that the alleged "offence" occurred more than 18 months prior to the undertaking of the investigation or of Mr Mele's explanation.
48. With reference to allegations 3 and 4 regarding the construction of DARD offices it is clear that Mr Mele referred to an investigation made by the Tender Board. It would appear that the investigating team have simply ignored or have failed to access what one might think would have been a very helpful if not crucial investigation. It is not referred to at all by the investigating team in its conclusions. Details of the investigation and its conclusions should have been obtained. While the PSC would not



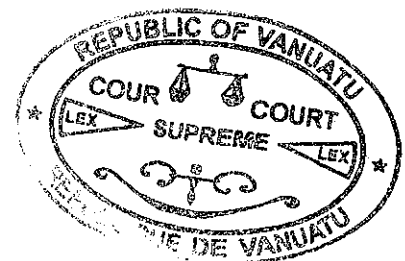
necessarily be bound by such conclusions it was a relevant piece of information which simply seems to have been ignored.

49. As to the allegation regarding the *"dubious contractual arrangement with a Tongan Financial Agent"* and the *"embezzlement of Vt 1, 230,159"*, the investigating teams report did not remotely establish that such a thing had occurred and in fact the reporting team advised that the engagement between Mr Mele and Sam Finance was *"not clear"* and required *"deeper investigations"*. Nonetheless the PSC found Mr Mele *"guilty"* of this particular allegation because there was evidence that he had made arrangements with Sam Finance and there was no agreement between Mr Mele, NZ Aid and the Director-General for such an arrangement. Accordingly while the allegation against Mr Mele was an extremely serious one of embezzlement and a *"dubious"* arrangement, the PSC appears to have come to the conclusion that there was no proper paper work. This is despite the fact that its very own investigating team requested that the matter required further investigation.

50. I consider that on the basis of the information which the PSC had been provided with it was not open to the PSC to reach the conclusion which it did and which was a fundamentally different matter from the complaint of fraud which was made by the Minister.

51. As to allegation 6 it is completely unclear to me how the PSC could have reached a conclusion that:-

"Commission find you guilty for this particular allegation because there is evidence that you did not follow the proper procedures in the subleasing of 5,000 hectares of Government Land to a private individual. The process of the sublease was not done according to the normal process of Government leases where the State Law Office always facilitates all the legal documents for such matter. Commission further decided that this allegation be referred to Police Fraud Unit for further investigation to be made".



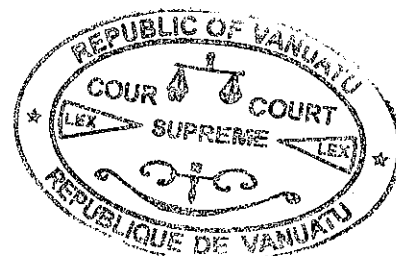
52. The first thing that needs to be noted is that this is a complaint in respect of the alleged actions of Mr Mele which had occurred some eight years prior to the complaint being made. Accordingly, one might have thought that it would always be difficult for the investigation team to interview relevant individuals and to obtain information. The difficulty with the conclusion of the investigating report however is that it does not shed any light at all on Mr Mele's role in the alleged unauthorized lease. While there is a sublease between the Government of Vanuatu and Tropical Rainforest Plantations Ltd dated September 22nd 2006 and while it appears that Mr Mele's signature is on that document he has signed as a witness to the signature of the Minister. It would appear from other documents that that Minister was the then Minister of Agriculture, Marcelino Pipite.

53. It is clear that advice had been sought by the Acting Director-General of the Ministry of Agriculture, Mr Howard Aru on the legality of the sublease from the State Law Office as, within the investigation report there is a letter from the State Law Office to Mr Aru dated October 25th 2013. That letter refers to advice having been sought on the following issues:-

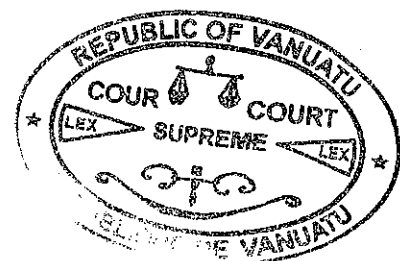
- a) To confirm if the subleasing process was done illegally.
- b) How to regaining (sic) full access to control over IFP land; and
- c) How the Former Director of Forestry (now director of Agriculture) should be disciplined for any illegal dealings leading on to the subleasing options.

54. As to issue (a) State Law sought further instructions from the Acting Director General as to how Tropical Rainforest Plantations Ltd became the sublease at which point they would provide their "complete advice". As to issue (b) advice was given. As to issue (c) the advice from State Law was that:-

"The sub lessor of the subleases is the Government of Vanuatu. We note that sublease 001(b) was executed by someone for the Minister of Agriculture. Furthermore, it is not clear why Livo Mele signed the subleases as witness when the address of the Government on the first page of the subleases is care of the Department of Rural Land. Hence, we ask that you provide your instructions on the above mentioned matters".



55. It does not appear that further instructions were ever given in respect of this matter and the investigating report does not refer to any final advice from State Law Office. Accordingly it is completely unclear as to what part Mr Mele played in the transaction other than apparently appearing as a witness to a sublease. In such circumstances, it was not open to the PSC to find Mr Mele "guilty".
56. Given these conclusions, I am of the view that it should have been obvious to the PSC that the most serious allegations were not established and that what it was left with were circumstances which required careful and thorough analysis to ascertain whether there was still a proper basis upon which to terminate Mr Mele's employment.
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 appear 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.

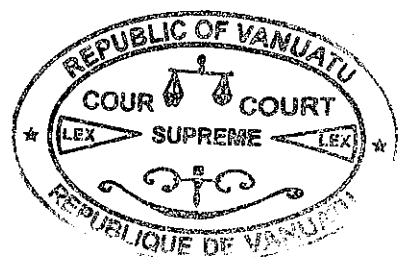
60. It will appear from the foregoing that I have reached the view that the PSC was not entitled to dismiss the claimant for serious misconduct.

61. Accordingly, pursuant to section 54 of the Employment Act, Mr Mele would be entitled to a severance allowance calculated in accordance with that section. He would also be entitled to three months' notice and annual leave. In this regard the figures provided by Mrs Nari were not disputed by the State and accordingly Mr Mele is entitled to the following sums:-

- a) Three months' notice - Vt 635,040
- b) Annual Leave - Vt 243,400
- c) Severance Pay - Vt 9,313,920

62. Mr Mele also applies for the application of a multiplier of 2 pursuant to section 56 (4) which provides that:-

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



63. In Quarani v. Airports Vanuatu Ltd⁸, I referred to Malere & Ors. v. Vanuatu Broadcasting and Television Corporation⁹ 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.

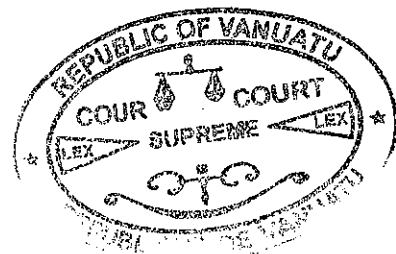
64. In this case Mr Mele had been given no previous warnings and had, to that point, a good work record. There were however matters raised in the investigation which would rightly have concerned any employer but would, in my assessment, have fallen short of serious misconduct. The actions of the PSC 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 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.

66. In all of the circumstances the application of a multiplier of two as submitted by Mrs Nari appears appropriate.

⁸ [2017] VUSC 27

⁹ [2009] VUSC 164



67. As to the claim for common law damages of Vt 100,000 I am not prepared to award damages as I consider that the application of the multiplier is designed to deal with such matters and it would be inappropriate to make a second award in respect of effectively the same matters. In addition while Mr Mele referred to the fact that his dismissal had tarnished his reputation as a "resourced person in Vanuatu" and that would adversely affect his prospects of finding alternative employment, there was no evidence to support such assertions.

68. Accordingly judgment is granted in favour of the claimant for the following sums:-

- a) Three months' notice - VT 653,040
- b) Annual Leave - VT 243,400
- c) Severance Pay - VT 9,313,920
- d) Multiplier - VT 18,267,840
- TOTAL: - VT 28,820,200

69. Interest of 5% is to apply on the judgment sum or such sum as is outstanding from time to time at the rate of 5% from the date of filing of the proceedings.

70. Costs are granted in favour of the claimant on a standard basis to be agreed or taxed.

Dated at Port Vila, this 18th day of July 2017

BY THE COURT

