

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



Civil Case No. 79 of 2005

BETWEEN: JOHN CULLWICK
Claimant

AND: PUBLIC SERVICE COMMISSION
Defendant

Coram: *Justice H. Bulu*

Counsels: *Mr. Abel Kalmet for the Claimant*
Mrs. Viran Trief and Jennifer Harders for the Defendant

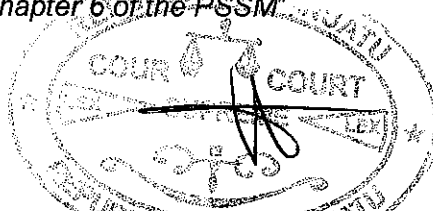
Date of Hearing: *4 March 2008*

Date of Decision: *22 July 2008*

RESERVED JUDGMENT

Background

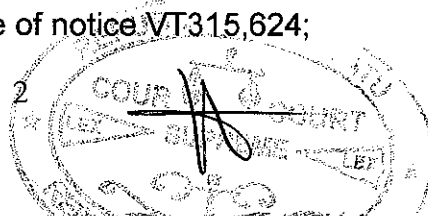
1. On or about 1 September 1998 the Defendant employed the Claimant as its Budget Manager in the Department of Finance and Economic Management (the Department). The Claimant continued in that position for about 7 years "(fulfilling) his duties faithfully and professionally."
2. On 10 September 2004 the Defendant appointed the Claimant to the "position of Director of Finance ... on an acting basis for a period of six months." Up until 17 February 2005 the Defendant performed the duties and functions of the Director of Finance.
3. On 22 March 2005, the Defendant served the Claimant with a discipline report alleging that the Claimant:-
 - (a) "On a number of occasions between 30 October 2004 and 31 January 2005 and usually after 4.30 p.m., instructed John Tom to drive him in the Government motor vehicle registration number G188 to numerous venues and places in and around Port Vila. The nature of which was unrelated to his duties as Acting Director and for which he had not sought an appropriate authority ... The action is in breach of section 29B (1) of the Public Service Act and Clause 2.10 of Chapter 6 of the PSSM"



- (b) *At about 6.00 a.m. on 3 February 2005 ... instructed O'Biran Hopman to drive him to the Whitesands Country Club in Government motor vehicle registered G188 leave him and companion at that place and instructed him to pick them up again in the afternoon.*

This nature of travel in motor vehicle G188 was unreasonable to his duties as Acting Director of Finance and was not recorded e.g. on approval in term of Clause 2.10.2 (b) of Chapter 6 of the PSSM. Such act is contrary to section 29B of the Public Service Act."

4. The Discipline report went on to say that such absence from work without leave from his superior amounts to willfully ignoring his obligations as Acting Director of Finance. This is in breach of sections 34 (1) (a), (c), (d), (f), (j), and (m) and section 36 (1), (h), (f), and (i) of the Public Service Act.
5. By letter dated 28 March 2005 to the Defendant, the Claimant partially accepted the allegations "*because I also have the privileges like any other director or director-general*". His admissions are:-
- (a) In relation to the first allegation, he says inter alia, "*I have the same privilege of using the G-plated vehicle G188 and there is no specific time allotted as to when vehicles had to stop. While I accept that I have used the car after working hours and especially to kava bar and back home and that's it.*"
- (b) In relation to the second allegation, he responded that "*it was true that Brian dropped us at Whitesands. Again, this is like all others who go for kava and came back to their house. Therefore I do not see any problem with that as I have the same privileges like any Director and Director Generals for using government vehicles.*" He went on to say "*what on earth you expecting someone who is badly brutalized to come to public office with bruise all over to get his leave signed ... I must say that I have provided my medical report to the office supervisor before I resume work.*"
6. On 15 April 2005 the Defendant dismissed the Claimant from the Public Service. It further decided that the Claimant's past service was not exemplary and therefore no severance allowances are payable.
7. On 16 May 2005 the Claimant commenced proceedings in the Supreme Court claiming that his dismissal was wrongful, unlawful and in breach of the Public Service Act and the Employment Act. He has suffered loss and damage as a result of such dismissal and is claiming:-
- (a) 3 months salary in place of notice VT315,624;



- (b) VNPF on the sum of VT315,624 VT18,937;
 - (c) Severance pay on basis of VT105,208 per month over 6 years and 8 months VT350,696;
 - (d) VT350,696 x 6 (s.56 (4) of Act) VT2,104,176;
 - (e) Interest VT19,106;
- Total VT2,789,433

Claimant's case

- 8. Mr. Kalmet, on behalf of the Claimant, submitted that the proceedings against the Defendant in this matter involves a claim for unjustified and unlawful dismissal. The termination of the Claimant's employment is contrary to the Public Service Act and the Employment Act.

Serious misconduct

- 9. The circumstances of the case clearly show that it was not open for the Defendant to summarily dismiss the Claimant for "*serious misconduct*". The evidence before the Court clearly show that the Defendant has failed to establish any legitimate basis for the decision to terminate the Claimant's employment for serious misconduct. That in fact, the evidence shows that there was nothing done by the Claimant that can be properly characterized as serious misconduct.
- 10. It is clear that the acts complained off do not amount to serious misconduct.

Act as a good employer

- 11. Mr. Kalmet, further submitted that the Defendant did not honour its obligations to act as a good employer in failing to comply with the express provisions of the Public Service Act and its regulations dealing with misconduct and discipline:-
 - (a) Chapter 6, Part 2.3.1 and 2.3.2 of the Public Service Staff Manual has not been complied with. The Director General did not take any step required under those provisions to address the concerns. This step was bypassed.



- (b) Chapter 6 Clause 2.3 of the Manual has not been complied with. The conduct complained off occurred when the Claimant was Acting Director of Finance. Paragraph (a) of this clause requires that if a director has committed a serious disciplinary offence the Director General must immediately suspend him or her on full pay, and the matter must be dealt with under sections 19A and 19B of the Public Service Act. This did not happen.

Section 50 (4) of the Employment Act

12. Mr. Kalmet submitted further that the only ground featured in the letter notifying the Claimant of his termination is that the Defendant has decided the "*past service (of the Claimant is) not exemplary*". Mr. Kalmet continued that the Defendant failed to give an opportunity to the Claimant to be heard on that issue. Further that, there is no evidence before the Court that the performance of the Claimant's duties in the past was poor and that despite steps undertaken to improve he has not improved his performance in any area complained off.

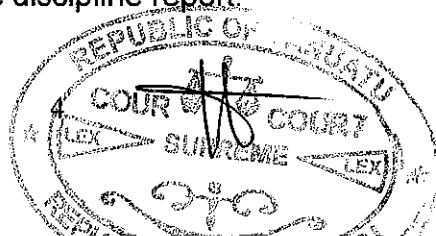
Defendant's Case

Nature of claim

13. Mrs. Trief, on behalf of the Defendant, submitted that insofar as the claim comprises allegations that the Defendant did not follow procedures, is incompetent.

Application of section 19B

14. Mrs. Trief, again on behalf of the Defendant, submitted that section 19B of the Public Service Act did not apply to the circumstances of this case:-
- (a) That section sets out the procedure for the removal from office of Directors and Directors-General.
 - (b) The Claimant was appointed Acting Director for a period of 6 months on 10 September 2004 but was re-instituted as Budget Manager on 18 February 2005.
 - (c) The Claimant, on cross-examination, admitted having seen the letter dated 17 February 2005 re-instating him to the office of Budget Manager.
 - (d) The Claimant admitted that he was no longer the Acting Director when he received the discipline report.



- (e) To apply section 19B in the circumstances produces an absurd result. Had Parliament intended section 19B of the Act to apply to the removal of employees who had held, but no longer hold, positions as directors, it would have specifically done so.

Serious misconduct

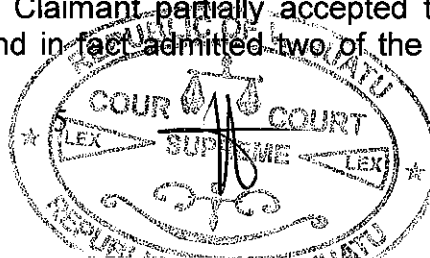
15. Mrs. Trief further submitted, on behalf of the Defendant that, it dismissed the Claimant pursuant to section 29 (1) of the Act after fulfilling its obligations as a good employer. It was open to the Defendant to consider, and it did consider, that the Claimant's actions amounted to serious misconduct warranting a summary dismissal pursuant to section 29 (1) of the Act:-

- (a) The Claimant conceded he regularly used a Government vehicle without obtaining the required approval of the Defendant and for purposes unrelated to his work;
- (b) The Claimant conceded he often used a Government vehicle for the purpose of having kava after hours;
- (c) He took a day off without obtaining leave;
- (d) The unauthorized use of a Government vehicle is a disciplinary offence that may include dismissal for cause if the Commission considers that it constitutes serious misconduct.

Opportunity to be heard

16. Mrs. Trief further submitted that the Claimant was dismissed under section 29 (1) of the Public Service Act. Accordingly, the Defendant was not required to refer the matter to the Disciplinary Board for hearing and determination. Further because:-

- (a) The Defendant issued a Disciplinary Report to the Claimant on 22 March 2005 and gave the Claimant opportunity to respond within 7 days.
- (b) The Claimant responded accordingly with a 5 page written response on 28 March 2005.
- (c) On cross-examination the Claimant confirmed the 5 pages response to be his "*fully completed response*" to the allegations leveled at him.
- (d) In his response, the Claimant partially accepted the allegations made against him and in fact admitted two of the allegations. In



the circumstances, it was not necessary for the Defendant to hear the Claimant further.

- (e) The Claimant's written response was considered by the Defendant in making its decisions that the Claimant's actions constituted serious misconduct such that summary dismissal was warranted.

Good Employer

- 17. Mrs. Trief continued, in relation to this heading, that the Defendant treated the Claimant fairly and properly in that the allegations made against him were investigated by two officers and a Discipline Report was issued to him outlining the alleged offences and attaching a number of documents including the results of the investigation.
- 18. The Claimant provided a 5-page written response in which he partially accepted the allegations made against him.
- 19. The Defendant considered the allegations and the Claimant's response, and decided to immediately dismiss him with cause pursuant to section 29 (1) of the Act.
- 20. Mrs. Trief concluded that the Defendant dealt with the Claimant's matter within its powers and in compliance with its duty to act as a good employer.

Severance payment

- 21. In relation to this head, Mrs. Trief submitted that:-
 - (a) The Claimant was dismissed for serious misconduct and is not entitled to severance allowance;
 - (b) The Defendant had received the Claimant's past performance and found that it was not exemplary.

Issues

- 22. The issues arising for determination in this matter are:-
 - (a) Should the Claimant's dismissal have been made in accordance with section 19B of the Public Service Act No. 11 of 1998?



- (b) Did the Claimant's conduct constitute a serious misconduct thereby justifying his dismissal without payment of severance allowance in accordance with the Employment Act?
- (c) Was the Claimant entitled to a severance payment upon dismissal?
- (d) Was the Claimant given an adequate opportunity to be heard under section 50 (4) of the Employment Act?

Law

23. The relevant provisions of the Public Service Act are set out below:-

"4. Guiding principles of Public Service

The guiding principles of the Public Service and the Public Service Commission are to:-

(k) observe the law; and

(l) ensure transparency in the performance of their functions.

15. *Duty to act as a good employer*

(1) It shall be the duty of each member of the Commission to ensure that the Commission shall, in the performance of its functions, responsibilities and duties, be a good employer.

(2) The Commission shall as a good employer:-

- (a) ensure the fair and proper treatment of employees in all aspects of their employment; and*
- (b) abide by the principle set out in section 4.*

19A *Grounds for removing Directors General and Directors*

(1) The Commission may remove a director general or director:-

- (a) because his or her performance is unsatisfactory; or*
- (b) because of misconduct on his or her part; or*
- (c) because of physical or mental incapacity; or*
- (d) if he or she becomes bankrupt.*

(2) For the purpose of subsection (1), a director general's or director's performance is unsatisfactory if:-

- (a) he or she has not undertaken all or any of his or her principal responsibilities as set out in subsection 20 (1) or (2) for a significant period of time; or*
- (b) there has been a serious breach of his or her performance agreement;*

(3) For the purposes of subsection (1), an act by a director general or director that would be a serious disciplinary offence under section 36 amounts to misconduct.



- (4) A director general or director cannot be removed unless the procedure for removal set out in section 19B is followed.

19B Procedure for removal of directors general and directors

- (1) The Commission must not 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 Auditor General:-
- (a) alleging that there is a ground or are grounds for his or her removal under subsection 19A (1); and
 - (b) setting out the evidence in support of the allegations.
- (2) The Commission must:-
- (a) appoint one or more persons to investigate the complaint; and
 - (b) send the director general or director a copy of the complaint; and
 - (c) give the director general or director 21 days within which to respond in writing to the allegations.
- (3) The Commission may:-
- (a) dismiss the complaint if the Commission is satisfied that it is frivolous or vexatious;
 - (b) request additional information from the complainant if the complaint does not contain sufficient information.
- (4) The Commission must decide whether or not to remove the director general or the director:-
- (a) within 75 days after receiving the complaint; or
 - (b) if additional information has been requested under paragraph (3) (b) within 75 days after receiving that additional information .
- (5) The person or persons appointed to investigate the complaint must provide a report on the investigation to the Commission. The Commission must take into account the report and any responses made under paragraph 2 (c) in deciding whether to remove a director general or director.
- (6) The Commission must give the director-general or director and complainant written notice of the Commission's decision and the reasons for the decision.
- (7) A decision by the Commission to remove a director general or director takes effect on the day on which the decision is made.



29 Dismissal for cause

(1) *The Commission may dismiss an employee at any time for serious misconduct or inability but subject to its obligations to act as a good employer.*

(1A) *If the Commission dismisses an employee under subsection (1), the matter is not to be referred to the Board for hearing and determination under section 37.*

(2) *The Commission may where the past performance of the employee has been exemplary provide to the employee a redundancy payment as if his or her employment had been terminated under the Employment Act."*

24. Chapter 6.2.9 of the Staff Manual provides that the "process relating to the removal from the office of a director general or director be in accordance with sections 19A and 19B of the Public Service Act."

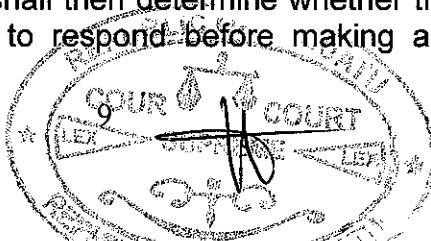
25. Chapter 6.7.10 provides that the "use of government vehicles without appropriate authority be dealt with in accordance with section 2.10 of this chapter of the Manual."

26. After the general principles contained in the introductory section of part 1 of the chapter 6 referred to above, the rest of that chapter also contained provisions which are relevant to the considerations in the claim in the present case. These are set out below:-

2.3.1 (a). In all alleged disciplinary offences, the Director General, shall refer the matter formally to the Commission in writing, providing a fully completed Disciplinary Report (PSC Form 6-1) of the offence and what steps have been taken by the Ministry to resolve the matter. Copies of the "first" and "second" warning letters/or the "Notice of Suspension" letter are also to be provided to the Commission with the report.

2.3.1 (b). Before submitting the report to the Commission, it shall be provided by the Director to the officer, who shall be given seven (7) days to submit a written response to the allegations made in the Director's report. The officers response shall be forwarded in full to the Commission with the Director's report and copies of the warning and/or suspension letters.

2.3.1 (c). If the officer fails to make a written response within the seven (7) calendar days, the Discipline Report and copies of the warning and/or suspension are to be provided to the Commission immediately together with details of any action taken to obtain a written response from the officer. The Commission shall then determine whether the officer shall be given a final opportunity to respond before making a decision on the alleged offence.



2.10.2 (a) Government vehicles must be used only for official duties.

2.10.2. (b) Any officer (including a Director or Director General) who wishes to use a Government vehicle for official duties outside of his or her usual working hours must seek the approval of the Secretary, OPSC, through his or her Director General and Director using the prescribed form "Use of Government vehicle during non-official hours" (PSC Form 4-9)."

Discussions

27. This is a claim for unjustified and unlawful dismissal. It is the Claimant's case that the Defendant's actions in terminating his employment were unlawful and contrary to the Public Service Act and the Employment Act.

Does section 19B of the Public Service Act applies

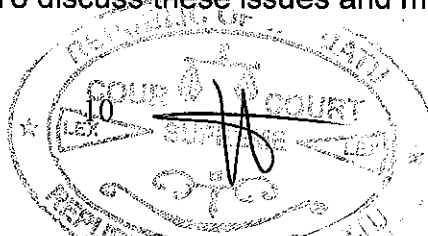
28. Section 19B provides that "*The Commission must not remove a director general or director from office unless the Commission has received a complaint in writing from the Prime Minister, a Minister, the Ombudsman or the Auditor General;*

(a) *alleging that there is a ground or are grounds for his or her removal under subsection 19A (1); and*

(b) *setting out the evidence in support of the allegations".*

29. The language of that provision, in my view, is clear. Before removing a director general or director a complaint must first have been made by any of the persons identified in section 19B (1). When that occurs, it then kick start the process envisaged in section 19B (2), investigation of the complaint to be commenced. This naturally assumes the position that on the day the complaint is made the person occupying the office of the director-general or director is in office. It follows on naturally for the second major step in the process to begin, the investigation of the complaint. This further and naturally, in my view, assumes the position and rightly that the person is still in office at that point in time. That, in my view, is the law.

30. In this case, when the investigation began was the Claimant in office as the Director of Finance in an acting position? If the answer is yes, was a complaint made pursuant to section 19B (1)? A further issue arises which is necessary to consider and make a finding on it is, whether section 19B process applies only to a person who is actually in the office on the day the Commission makes a decision and it is the decision to terminate his employment immediately. To discuss these issues and make my findings it



is, in my view, helpful and necessary to start by setting out the chronology of events leading to the dismissal of the Claimant.

31. The chronology is as follows:-

1 September 1998 Defendant employed Claimant as its Budget Manager.

10 September 2004 Defendant appointed the Claimant to the "*position of Director of Finance ... on an acting basis for a period of 6 months*".

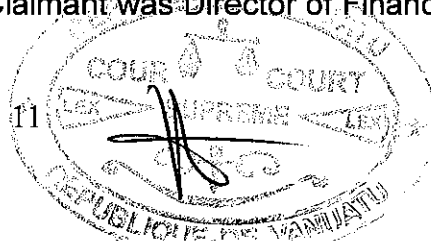
First week February 2005 Director General of Finance mandated Erick Csiba to lead an investigation into an "*allegation of misuse of government vehicle by the Claimant, Mr. John Colwick Tar*". Investigation Team consisted of Mr. Csiba and Hillary Sogari.

18 February 2005 Director General of Finance appointed Dorothy Erickson take charge of the role and responsibilities of the Director of Finance on an acting basis for the next 20 days and moved the Claimant back to the position of Budget Manager. Exhibit "D1".

30 Oct. 1984 – 31 Jan. 2005 and 3 Feb. 2005 Periods during which it is alleged Claimant used Government vehicle registered number G188 to go to numerous places during unofficial hours for purposes unrelated to his official duties. Secondly, on 3 February 2005 Claimant instructed his driver to drop him and companion off at Whitesands Country Club in Government registered vehicle number G188 trip unrelated to his official duties and he did not obtain prior permission to take the day off.

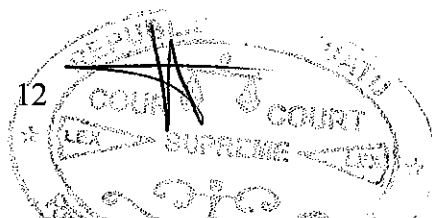
32. The period under the microscope is from 30 October 2004 to 31 January 2005, a period of 3 months, and 3 February to 2005 (relevant period). The evidence before the Court clearly showed that during the relevant period the Claimant was in office and employed by the Defendant as its Director of Finance in an acting capacity for a period of 6 months. The 6 months period would naturally expire on or about 10 March 2005.

33. The Director General of Finance, Mr. Simeon Athy on a date during the first week of February 2005, made a decision for an investigation to take place, to investigate the conduct of the Claimant, particularly his use of the Government vehicle registration No. G188 during the relevant period. During the relevant period the Claimant was Director of Finance for a term



of 6 months. On the date taken for the investigation to proceed the Claimant was the Director of Finance.

34. The process established in section 19B clearly is targeted towards a person whose conduct is complained of while employed in the office as a director general or director. That, in my view, is the pre-requisite to invoke that process. I fail to see how the clear intention in that provision can be avoided. The legal framework established by the Public Service Act and its Staff Manual portrays a distinct approach, one for removal of other employees and another for the directors general and directors. In my view, the intention is clear. If at the end of the process and the person is still in the office of a director-general or director, then the process moves naturally to its finality to determine whether he or she should be terminated from that office.
35. Mrs. Trief, on behalf of the State, has submitted that section 19B applies only where the person, at the date of termination of employment, was actually in employment as a director general or director. That proposition, in my view, is misconceived. Such a proposition would cause more problems and would not achieve the fundamental role of the Public Service Commission to act as a good employer. Further it would cause the PSC to be in breach of its obligations:-
- (a) to observe the law as is mandated to do by section 4 (k) of the PSA;
 - (b) to ensure transparency under section 4 (i);
 - (c) to ensure the fair and proper treatment of employees in all aspects of their employment under section 15 (2) (a);
 - (d) to have the highest ethical standards under section 4 (d)
36. The term of employment of a director whether permanently or on a temporary basis, as is in this case, if such a director is to be terminated before the due date for a misconduct then, section 19B applies. That, in my view, is the proper construction to be given to the legal frame work established by the Public Service Act. If the person leaves the office of director-general or director before the process is completed then, the process to remove the person as an employee of the Public Service naturally, may apply. The process ensures that the Commission adheres to the law.
37. For reasons given above it is my view that section 19B applies.



Did the Claimant's misconduct amount to serious misconduct thereby justifying his dismissal?

38. There are two charges that were laid against the Claimant by the Commission and were put to him in the form of a Discipline Report for his views and comments. The first charge is as follows:-

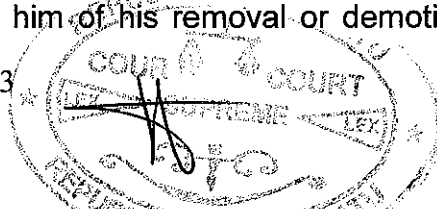
*"1. On a number of occasions between 10 Oct. 2004 to 31 Jan. 2005 and usually after 4.30 p.m., John Cullwick Tari, Acting Director of Finance Department instructed John Tom (ex-driver) to drive him in government motor vehicle register No. G188 to numerous venues and places in and around Port Vila. The nature of which was unrelated to his duties as Acting Director and for which he had not sought an appropriate authority.
- term of clause 2.10.2 (b) of Chapter 6 of PSSM. The action is in breach of section 29B (1) of the Public Service Act and Clause 2.10.1 of Chapter 6 of the PSSM."*

39. Mr. Simeon M. Athy, Director General of the Ministry of Finance in a letter dated 22 March 2005 attached a copy of the Disciplinary Report and advised the Claimant to respond to the allegation by 28 March 2005. In his reply the Claimant:-

(a) partially accepted the allegation. In his defence he said that he has the same *"privilege of using the G-plated vehicle G188 and there is no specific time allotted as to when vehicles had to stop. While I accept that I have used the car after working hours and especially to kava bar and back home and that's it ... All Directors and Directors-General have been using government vehicles after working hours to kava nakamal and other related activities and functions and nothing has been done ..."*.

40. On examination in chief the Claimant gave evidence that:-

- (a) Upon receiving the Discipline Report he responded in a 5 page letter.
- (b) The response was enough for the purpose.
- (c) He was appointed to be the Director of Finance for 6 months from 10 September, 2004 which appointment should expire on 10 March 2005.
- (d) Denied he received any other letter terminating his appointment as Director.
- (e) When shown the letter from his Director General dated 17 February 2005 informing him of his removal or demotion to the



position of Budget Manager, he conceded that he did receive the letter. However, he continued that he expected something from the Commission, not the Director General to that effect.

- (f) He conceded that when his employment was terminated by the Commission he was employed as Budget Manager.
- (g) Between 30 October 2004 and 31 January 2005 the driver had driven him to various places in Port Vila usually after 4.30 p.m.
- (h) Such trips after official hours did not relate to his duties as Acting Director.
- (i) The use of G188 after official hours for kava was not part of his official duties.
- (j) He knew the vehicle G188 was a public asset.
- (k) He knew public funds had been used with the vehicle.
- (l) He did not refund any fuel he had used.
- (m) He is familiar with the PSSM.
- (n) He knew that before he could use a government car after hours he must obtain permission from the Commission.
- (o) It is not right to continue to breach the Public Service rules.

41. The Claimant, at the relevant time, was Director of the Department of Finance, a very senior position within the Public Service. He did not misuse the vehicle once or twice or three times. He did so on numerous occasions between 30 October 2004 to 31 January 2005, that is a period of approximately 3 months. He gave evidence that he is familiar with the PSSM and he knew that it is wrong and against the PSSM to use the vehicle after hours in the manner that he did. Further that he knew that if he were to use the vehicle after 4.30 for official duties he must seek and obtain permission of the Commission prior to using the vehicle for such purpose. He knew that the vehicle must not be used for duties which do not relate to his official duties after 4.30 p.m. on work days.

42. In his response to the Discipline Report and also on examination he maintained his position that he used G188 after 4.30 p.m. for use unrelated to his official duties because:-

- (a) other Director Generals do exactly the same thing; and



(b) he believed it is a privilege he is entitled to as a Director of a government department.

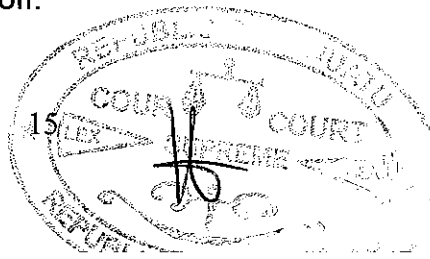
43. The response is maintained despite his concessions that he knew the use of the vehicle was in breach of the PSSM and the PS Act. The Claimant as director at the relevant time, in my view,, has breached his duty under section 34 of the Public Service Act to "*behave honestly and with integrity*" and to "*act with care and diligence*" and to "*observe and comply with all applicable laws*" and "*use resources and public money in a lawful and proper manner.*"
44. This is someone who was employed in one of the most senior positions in government. His written response to the Disciplinary Report displays, in my view, a no-care attitude. Why discipline him when other directors general and directors do the same thing and they are not disciplined. His oral evidence in Court during the hearing showed that he was familiar with the Public Service Staff Manual. That includes the Act under which the Staff Manual is produced.
45. The second charge is as follows:-

"At about 6.00 a.m. on 3 February 2005, John Cullwick Tari, Acting Director of Finance Department instructed O'Brian Hopman (current driver) to drive him to the Whitesands Country Club in Government motor vehicle registration G188 leave him and companion at that place and instructed him to pick them up again in the afternoon.

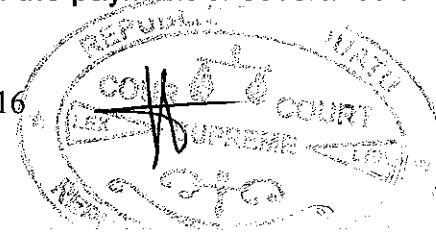
This nature of travel in motor vehicle G188 was unreasonable to his duties as Acting Director of Finance and was not recorded e.g. on approval in terms of Clause 2.10.2 (b) of Chapter 6 of the PSSM. Such Act is contrary to section 29B of the Public Service Act.

... John Colwick was absent without authorized leave by his supervisor and willfully ignoring his obligations as an Acting Director. This nature of absence was unreasonable to his duties and were willful actions in breach of sections 34 (1) (a), (c), (d), (f), (i) and (m) of the Public Service Act and section 36 (1) (h), (f) and (i) of the Public Service Act."

46. In his written response, the Claimant conceded that the Report was true. He was dropped off in the morning with his companion at the Whitesands Country Club. The driver picked him up later at the end of the day. In his oral evidence before the Court he conceded that he had intended not to work that day yet had not applied for leave. He gave evidence that he was assaulted after he had been dropped off. That was the reason he could not seek leave to take the day off.



47. I find the reason for not obtaining leave from work that day most incredible. Prior to being assaulted he was dropped off at the Whitesands Country Club with instructions to his driver to pick him up and his companion at the end of the day. That is a clear intention not to work that day. The assault occurred after the drop off.
48. The misuse of vehicle started on or about 30 October 2004 and continued up to 31 January 2005, a period of about 3 months. He knew what he was doing was wrong but continued on the assumption that it was part of a director's privilege. No evidence at all was adduced before the Court to show that the use of a government vehicle at the disposal of a director can be used after working hours for purposes unrelated to the director's official duties as a privilege accorded to such a position. It is my view that the Claimant's misconduct, taken separately is a disciplinary offence, but when account is taken of the fact that it has been going on for about 3 months and also that he knew that what he was doing was wrong and in breach of the PSSM and the Act, amounted to a serious misconduct.
49. What I have expressed above is from evidence that has been adduced before the Court. The Commission however, is the body that is vested with the power to ascertain from evidence in the first place and determine whether the Claimant's misconduct amounted to serious misconduct justifying the Claimant's immediate dismissal.
50. What is the evidence that the Discipline Report, Claimant's response, the investigating Committee's report, other relevant documents and the Claimants file was submitted to the Commission and the Commission considered those documents to reach its decision. There is none.
51. The onus is on the Commission to show by reasons of what it has taken into account in reaching a decision that the Claimant's misconduct has amounted to serious misconduct. This is done on the balance of probabilities. This is the very heart of the claim in this matter. The Claimant is basically saying that there is no evidence at all to show that his case was treated properly and he was treated fairly. When the decision of the Commission is challenged before the Courts, the Claimant is asking in effect for the Court to revisit the process followed by the Commission, reconsider the matters taken into account and the conclusion reached.
52. In the Claimant's case, such vital information is lacking. Mrs. Trief, on behalf of the Defendant, made submissions which amounted to assumptions of what occurred. The letter to the Claimant informing him of his dismissal fails to inform the Claimant of the process followed, what was taken into account, decision reached and reasons for the decision.
53. It is, in my view, proper for the Commission when having decided to terminate an employee immediately consider his past services whether it was exemplary for the purpose of the payment of severance allowance he



may still be entitled to. Any misconduct recorded in the file would have been considered at the point of termination of employment.

Was the Claimant given adequate opportunity to be heard?

54. The Claimant was given a copy of the Discipline Report and was given 7 days to respond to the allegations made against him. He responded within time with a five page response in which:-
- (a) he partially conceded to the allegations; and
 - (b) he defended his actions as right because other directors general and directors use the vehicles in the same manner as well; and
 - (c) that it was part of his privilege as a director.
55. The Commission, in my view, failed to provide the Claimant with an adequate opportunity to be heard on his defence, the privilege as a director on the charges laid against him. The Claimant had provided a defence. He did not fully admit that what he did during the relevant period was entirely wrong. In that situation it is my view that the Commission should have afforded the Claimant an opportunity to hear him out on his defence. I go on to discuss this aspect further under the next issue.

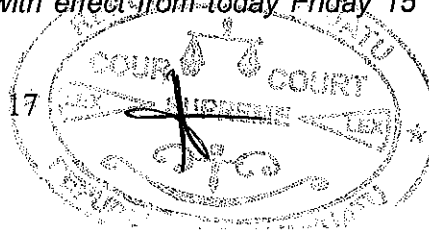
Did the Commission comply with its obligation to act as a good employer?

56. In his response to the Disciplinary Report the Claimant defended his actions by submitting that driving after hours to kava bars for kava and then returning home was part of his privileges as a director. This view was compounded by the fact that directors general and directors were doing the same thing and the Commission has not disciplined them.
57. The Commission had met on 13 April 2005 and decided to dismiss the Claimant from the Public Service with immediate effect. The Commission's decision was conveyed to the Claimant in a letter by the Secretary to the Commission dated 15 April 2005. The letter reads:-

*"John Colwick Tari
Finance Department
Ministry of Finance & Economic Management
Port Vila.*

Subject: Dismissal from office

I write formally to advise that the Commission at its meeting No. 04 of 2005 held on the 13th April 2005 (decision No. 05) decided to dismiss you from service, with effect from today Friday 15th April



2005 pursuant to section 29 (1) of the Public Service Act No. 11 of 1998.

Further, the Public Service Commission decided to:-

- (i) consider your past service not exemplary (consequently no severance allowances are payable).
- (ii) Offsetting any debts owed to the government by deducting from any final pay due to you.

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

Yours sincerely,

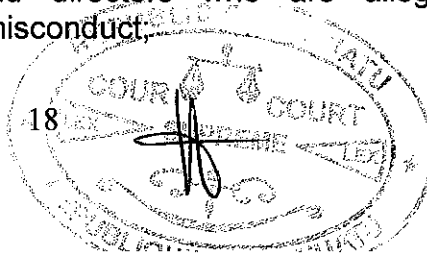
George Pakoasongi
Secretary, OPSC."

58. Section 15 (2) of the Act requires that the Commission act as a good employer in the performance of its functions, responsibilities and duties. Amongst its responsibilities, is the duty to discipline members of the Public Service whose conduct amounts to a disciplinary offence or serious misconduct. In doing so the Commission must be seen to be fair and that it treats all its employees properly in all aspects of their employment. Even though the Commission is not a Court it is vested with powers that can affect a fundamental aspect of its employees, the termination of their employment and the cessation of an income that can have a drastic effect on the employee. As such, it is required to be fair and to treat its employees in a proper manner. Where it decides that in all the circumstances of a case, the misconduct amounts to a serious misconduct, it must:-

- (a) set out its reasons for the decision;
- (b) set out the factors relevant to the case that it took into account;
- (c) set out the evidence it relied on;
- (d) explain its reasons why it could not "in good faith" impose another penalty.

59. All these is missing in the letter dated 15 April 2005 that the Claimant received from the Commission through its Secretary. There is nothing in evidence before the Court to show what documents were placed before the Commission and which the Commission considered to arrive at its decision. There is nothing in evidence before the Court showing:-

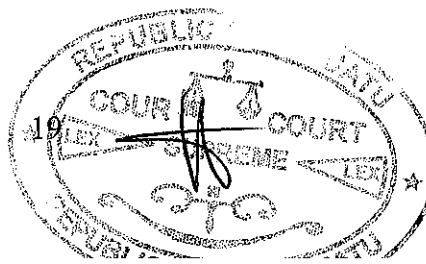
- (a) how the Commission explained why it has not dealt with other directors general and directors who are alleged to have committed the same misconduct.



- (b) how the Commission dealt with the defence that it is part of a director's privilege to use a G. plated car allocated to him or her to stop at the nakamal or shop on the way home.

60. Counsel on behalf of the Defendant Commission submitted that the use of the Government car is strictly for official duties. Stopping at a shop or anywhere else on the way home is not an official duty she continued. That may be so. It is important that the Commission addressed this in its decision as the Claimant had raised it as a defence. Are there privileges accorded to such officers at all. If so, what are they, if any.
61. The alleged misconduct of the Claimant occurred when he was Director of the Department of Finance. I have earlier expressed my views on the proper construction of section 19B and I do not need to repeat it here.
62. On 17 February 2005, the Director-general of Finance wrote to the Claimant advising him that he has decided to move the Claimant back to the position of Budget Manager because he has appointed Dorothy Erickson "on the basis of PSSM4 section 4, subsection 4.5 (c) to take charge of the role and responsibilities of the Director of Finance on an acting basis as of tomorrow 18 February 2005 and for the next 20 days". Section 4.5 (c) states:-
- "Any continuous period of acting appointments of at least 10 days and up to the maximum period of six months or 20 days in the case of a director or director-general may be approved by the Director of the Department or Director General of the Ministry in which the staff member is located".*
63. That provision in my view is concerned with acting appointments. Not removal of a staff member to make way for an acting appointment as has occurred in this case. This view is strengthened by sections 19A and 19B which concerns the removal of the Director-General and Directors. On 18 February 2005, the Claimant was the Director of Finance for a specified term. His removal as Director could only have occurred pursuant to section 19B. Not otherwise.
64. The Commission has failed to apply the law in the removal of the Claimant as Director of Finance before his term is up. The Commission has failed to sanction or correct the actions taken by the Director General of Finance in removing the Claimant as director of Finance in violation of section 19B of the Act and section 4.5 (c) of the PSSM.
65. For those reasons it is my view that the Commission has failed to comply with its obligations to act as a good employer.

Findings

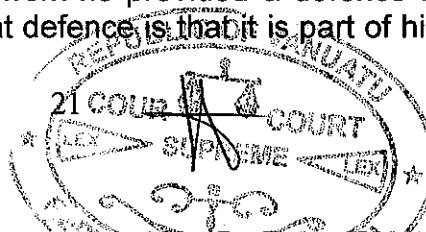


66. For various reasons I have given I make the following findings:-

- (a) Section 19B of the Public Service Act is the relevant section. It applies in the circumstances of the Claimant's case at least the complaint and investigation stage of the process when the Claimant was still the Director of Finance.
- (b) The removal of the Claimant by the Director General is contrary to sections 19A and 19B and section 4.5 (c) of the PSSM. Section 4.5 (c) of the PSSM authorizes the Director General to appoint an employee to an acting position with a higher grade and which position is vacant on the date of such acting appointment. It does not authorize the Director General to demote or remove another employee occupying such a post in a permanent or acting capacity.
- (c) The Claimant's misconduct amounted to serious misconduct justifying his dismissal from the Public Service. The Commission in dismissing the Claimant arrived at that conclusion. However, it failed to:-
 - Inform the Claimant of matters it took into account;
 - Inform the Claimant of reasons for its decision;
 - Inform the Claimant of reasons why it could not "*in good faith*" impose another penalty.
- (d) Section 50 (4) of the Employment Act provides that no employer shall dismiss an employee on the ground of serious misconduct unless he has 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. The Commission had failed to provide adequate opportunity for the Claimant to have his day in putting his defence, "*privilege of a director*", before the Commission before it made its decision.
- (e) The Commission has failed to comply with its obligations as a good employer:-
 - In failing to comply with section 19A and 19B of the Act;
 - In permitting the Director General of Finance to remove the Claimant as Director of Finance without complying with section 19A and 19B of the Act;
 - In failing to provide adequate opportunity to the Claimant to answer to the charges put against him, his defence of '*privilege of director*'.



- (f) The dismissal of the Claimant was made against section 50 (4) of the Employment Act and is therefore an unjustified dismissal.
67. The Claimant is entitled to 3 months salary in place of notice. The salary the Claimant was receiving as Budget Manager is VT105,208 per month multiply by 3 = VT315,624.
68. The Claimant is entitled to his VNPF contribution at VT18,937.
69. The Claimant is entitled to severance allowance under section 56 (2) of the Employment Act. The issue is whether he is entitled under section 56 (2) (a) or (b). he is remunerated at fortnightly intervals, every alternative Fridays of each month.
70. In *Banque Indosuez Vanuatu Ltd. v. MN Ferrieux*, Appeal case No. 1 of 1990, the Court of Appeal after considering the meaning of "remuneration" held that "remuneration for the purpose of section 56 (2) means salary only".
71. *Public Service Commission v. R. Manuake*, Civil Appeal 23 of 2003, the Court of Appeal, after considering the issue whether severance allowance is payable under section 56 (2) (a) or (b) held that "15 days remuneration" (in s. 56 (2) (b)) meant the remuneration received for 15 consecutive calendar days, or broadly speaking, half one month". Mr. Manuake was being remunerated at alternative Fridays. He was therefore entitled to severance allowance under section 56 (2) (b).
72. The Claimant in this case received his salaries on alternative Fridays also. In my view, the severance allowance payable to the Claimant must therefore come under section 56 (2) (b). The basic salary is VT49,269 each fortnight multiplied by 6 years equals VT295,614. For the period of less than 12 months, he is entitled to a sum equal to one-twelfth of VT49,269 which comes to VT4,105.75 multiplied by 7 months equals VT28,740. The total severance allowance is VT295,614 plus VT28,740 = VT324,354.
73. Is the Claimant entitled to any multiplier under section 56 (4) which provides that where the Court "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 have already made a finding that the Commission did not provide adequate opportunity to the Claimant to be heard on the charges laid against him. He partially conceded to the charges laid against him. He agreed that he did not obtain permission prior to not attending work on 3 February 2005. For the use of the vehicle to kava bars and other places before returning home after work he provided a defence for such use of the G-plated vehicle. And that defence is that it is part of his privilege as a



director of a government department within the Public Service. Upon receipt of that defence, the onus is on the Commission to provide him with an opportunity to particularize his defence before the Commission made its decision whether to terminate his employment in the manner it did or to punish him in some other way. The Commission could have:-

- (a) requested him to provide further evidence in writing of such privilege he claims to be accorded to the office of the Director; or
- (b) request him to appear before the Commission for such purpose.

74. The Budget Manager post attracts a salary lower than that of Director post. He was demoted back to the post of Budget Manager contrary to sections 19A and 19B of the Act and section 4.5 (c) of the PSSM prior to the expiration of his term as the Director of Finance in an acting capacity. That, in my view, entitles the Claimant to some compensation under section 56 (4) of the Employment Act. His unlawful demotion to the Budget Manager position occurred towards the end of his term as Acting Director of Finance. In that circumstances, it is in my view that the Claimant is entitled to a multiplier of 3 under section 56 (4). That means that the amount of severance allowance under section 56 (2) (b) is to be multiplied by 3. Thus $VT324,354 \times 3 = VT973,062$.

Orders

75. The orders of the Court are:-

- (a) the dismissal of the Claimant is unjustified;
- (b) the Defendant must pay the Claimant:-
 - 3 months salary in place of notice at VT315,624;
 - Vanuatu National Provident Fund at VT18,937;
 - Severance allowance at the rate of VT973,062.
- (c) The Defendant must pay the Claimant's costs of and incidental to this proceeding.

DATED at Port Vila, this 22 July, 2008.

BY THE COURT

