

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

Civil Case No. 216 of 2005

BETWEEN: J
Claimant

AND: PUBLIC SERVICE COMMISSION
First Defendant

AND ATTORNEY GENERAL
Second Defendant

Coram: Justice Clapham

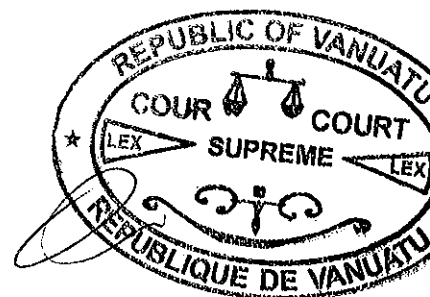
Counsels: Mr. Saling for the Claimant
Mr. Ngwele for the Defendant

Date of Hearing: 15 September 2009

Date of Decision: 23 October 2009

DECISION

- 1- This is a claim for wrongful dismissal brought by the Claimant against the Public Service Commission, First Defendant and the Attorney General, Second Defendant. There is a preliminary issue as to payment of the Court hearing fees which I will deal with at the conclusion of this decision.
- 2- The brief facts about which there is a little or no dispute are that the complainant whilst in the employ of a government department and carrying out the duties of a senior land officer received the sum of VT100.000 from a member of the public. He accepts he retained that sum.
- 3- "JMP4" "MM4" is the letter from the Director of Land of 10/11/04 to the claimant and the content is as follows:



"JMP4"

"Billiam Jeiok

*Senior Land Officer
Lands Department
PMB 090
Port Vila*

Dear Sir,

Subject: LAND TITLE 11OG33/181 FRESWOTA

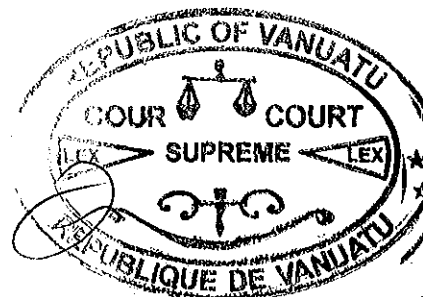
As per our formal discussion on the above issue, I would like to acknowledge the fact that the allegation made against you was discussed on the 10th of November 2004 in our office and that you have confirmed the following allegations as follows:

- 1- That the amount of 200,000 vatu for the part payment of the land titles 11/OG33/181 was deposited to the Department of Finance on the 10th of January 2000, Receipt Number 01100153.*
- 2- That 100,000 Vatu for the part payment of this title was deposited to you and a proper receipt was not provided. The money was at your disposal and never deposited to the Finance Department.*
- 3- That you did not received part payment of 50,000 Vatu.*

That the total payment of this land was 350,000 vat and the sales price of this land was 523,000 vatu

Please, can you confirm the above in writing by the 12th of November 2004".

Please treat this matter as confidential and for any further discussion, please see me.



Thank you for your cooperation and hope to hear from you soon.

*Michel Mangawai
Director of Lands*

4- The reply in "JMP5" "MM5" it is as follows:

"JMP5" & "MM5"

*"Director of Land
PMB 9090,
Port-Vila*

10th November 2004

Dear Sir,

Re: Lease Title 11/OG33/181

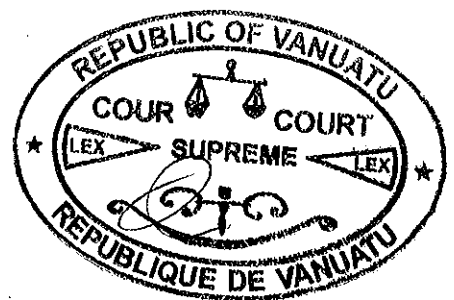
Thank you for your letter dated 10th November 2004 confirming our conversation of the same on the same days.

I wish to confirm that an amount of VT 200,000 was deposited to the department of Finance as you rightly stated. Also wish to confirm that we have receipted this money only as well because the above mentioned lease title is under the National Housing corporation and not the Department of Lands.

I also wish to confirm that Mr. Tatamat Tarip had give me vt 100,000 and it was at my disposal and Mr. Tarip had known this we had arranged to settle this privately which he had agreed to.

A part from that the vt50, 000 which was alleged was not received by me.

I thank you for your understanding.



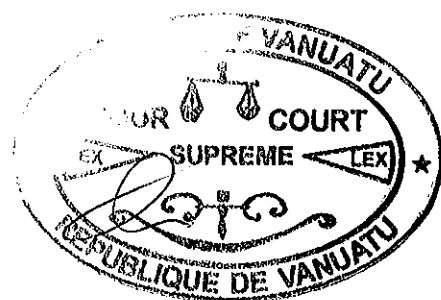
You're sincerely

William Jeiock "

- 5- I acknowledge the helpful submissions filed by both counsel and their closing submissions. The Claimant submissions in effect identify the issue whether the dismissal was justified and was it serious misconduct. The submission relating to unfair dismissal is highlighted in the written submission.

- 6- In essence there is a challenge claiming that the conduct was not serious misconduct, that the procedural matters were not followed correctly and it was emphasised that he should have been entitled to be present at the hearing by the Commission.

- 7- In support the Claimant relied upon the case of the Public Service Commission and John Cullwick Tari [2008] VUCA27 Civil Appeal 23 of 2008 (4 December 2008). Emphasis passage under the heading "*Was this serious misconduct*" and counsel emphasis the Court's approach "*in this case the proper approach was to consider the respondent's actions overall and decide whether they were sufficiently serious to constitute serious misconduct. By itself being absent without leave for one and the misuse of the government car on that single day would be unlikely to be sufficient. However in combination with the constant misuse of the government vehicle over three months we are satisfied it was open to both the Commission and the Supreme Court to conclude this was serious misconduct. No error in this approach has been challenged.*"



8- In addition later paragraph it was quoted and which provides as follows
"no mention was made of subsection (3) by the Commission when it invited Mr. Tari's submissions in response to the disciplinary report and the accompanying letter. It did no mention Section 50 (3) when it dismissed him. The terms of subsection (3) impose a positive duty on the Commission. It is only permitted to dismiss an employee if it cannot in good faith be expected to take another course. Other "course(s)" may include the motion or transfer to another government department. These are also serious responses to misconduct by an employee (see Government of Vanuatu v. Mathias [2006] VUCA7). In that case the Appellate Court found that the respondent was unlawfully dismissed and dismissed the appeal. On the cross-appeal interest was awarded as well together with costs following the event. (See paragraph 21)

9- For the first and second defendant It was submitted that he was dismissed with effect from 20th May for serious misconduct pursuant to section 29 (1) and section 36 (1) (f) of the Public Service Act and section 50 (1) of the Employment Act.

10-These sections provide as follows:

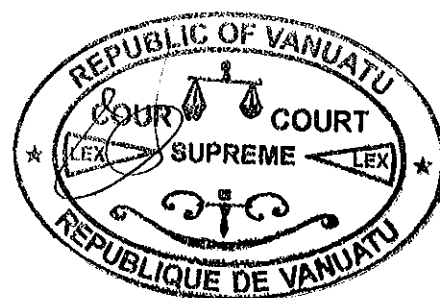
1- S.29(1):

"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".

2- S.36(1) (f):

"Improperly uses or removes property, stores, monies, stamps, securities or negotiable instruments for the time being in his or her official custody or under his or her control, or fails to take reasonable care of any such property, stores, monies, stamps, securities or negotiable instruments"

3- S. 50 (1):



“Misconduct of employee (1) In the case of a serious misconduct by an employee it shall be lawful for the employer to dismiss the employee without notice and without compensation in lieu of notice”.

11-Submissions were then made as to serious misconduct the manner in which that's assessed and identifying the features as set out in the submission evidencing the seriousness of the misconduct. My attention was drawn to the authorities of *Bani v. Public Service Commisison* 117 of 2007. *William Bani v. The Government of the Republic of Vanuatu* 214 of 2005. *Timothy Quai v. The Government of Vanuatu* 182 of 2008 and *Ben Garae v. The Public Service Commission* 03 of 2005.

12-As it is of importance I set out the letter from the Public Service Commission to Billiam Jeiock of 20th May 2005. It is attached as MM11 to the sworn statement of Michael Mangawai.

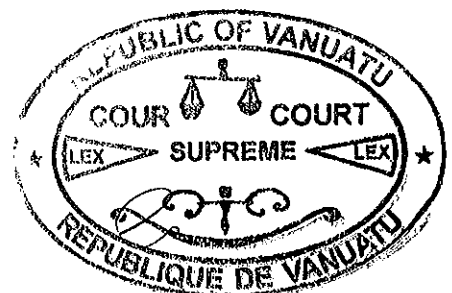
“PRIVATE AND CONFIDENTIAL

Our ref dis115

*Mr. Billiam Jeiock
Department of Lands
Port-Vila*

Dear Mr. Jeiock

Re: DISMISSAL FROM THE PUBLIC SERVICE



I regret to inform you that the Public Service Commission, at its Meeting N° 6 May 2005 decided that you dismissed from service, with effect from today Friday 20th May 2005, for serious misconduct pursuant to section 29(1) of the Public Service Act 1998

Further, the Public Service Commission decided to

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

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

- 1- Improper use of government money (i.e. 100,000) for the time being held in your official custody or control.*

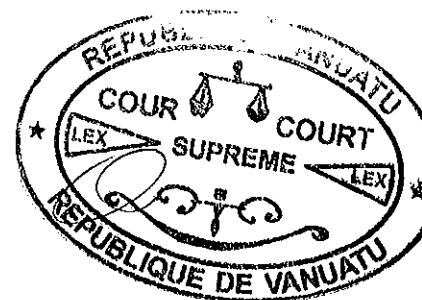
You are required to return all Public Service Property and government vehicle in your possession, including all office keys to your superior immediately.

By copy this letter, the Salary Section of the Department of Finance instructed to cease any further payment and deduct any amount you own to government from you accrued salary or outstanding leave.

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

Yours sincerely

Mr. George Pakoasongi
SECRETARY
Public Service Commission

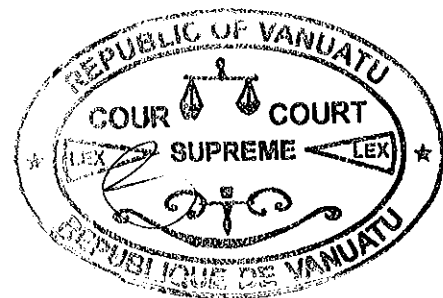


Cc Hon Minister-Ministry of Lands
Acting DG-MOL
Director-Department of Lands
Martin S-MOL
PLPO-ESU
Salary Section-Department of Finance
PF/DF
Chrono
File”

13- The major issue in this hearing is what is serious misconduct? , I pressed counsel for the Defendants on this point when he opened his response (which I found helpful) and his reply is contained in his closing submission. By way of example he referred me to the definition of serious from Strouds Judicial Dictionary 5th Edition (1986), the point is better captured in paragraph 4 of his outline submissions as follows:

“What amounts to serious misconduct? Legislation does not define “serious misconduct”. There has been no judicial consideration of the issue in Vanuatu. It is submitted however that the term is well-understood in the context of employment law within Commonwealth jurisdictions. In Johnson –v- Marshall [1906] AC 415 the House of Lords Said:

“What amount to serious misconduct in any given case is a question of fact to be determined by the judge of first instance on the facts of that case; and the function of the Court of Appeal and this House is confined to deciding the question of the law whether there was any evidence to sustain this finding.”



14-The cases referred to me by both counsel seemed to indicate that approach and the cases are simply examples of factual findings as to whether or not the conduct complained about meets the test of serious misconduct.

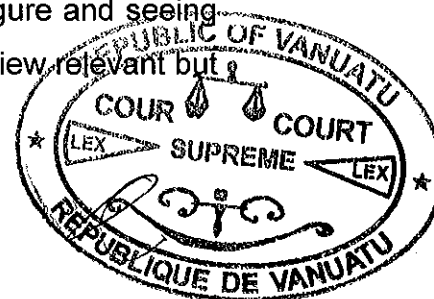
15-I pressed counsel for the claimant as to what circumstances would indicate that the receipt of money by a public officer from a member of the public without accounting for it would not amount to misconduct serious or otherwise. This pressure placed on the counsel for the claimant was met with the advancement of the claimant's reply in response to the enquiry by the Commission. In my view the explanation given by the claimant shows a complete lack of understanding of his obligation to both his employer and the wider community he serves.

16-It is clear his obligation is at the very least to advise of the receipt of such funds and seek direction from a senior officer. I am unable to imagine a circumstance where he would receive funds from a member of the public and not be directed to issue a receipt or return the funds.

17-There was no reason advanced before me as to the necessity for the Claimant to receive the funds. Why he felt obliged to take the funds remains a mystery.

18-His first obligation is to his employer. He has in my view completely misconstrued his position with his explanation. I refrain from commenting further. I record my surprise that other proceedings against him in a different jurisdiction have not occurred.

19-Clearly this conduct is serious misconduct, the sum involved is well in excess of his monthly salary as a way of balancing the figure and seeing the VT100, 000 in its perspective. The sum itself is in my view relevant but



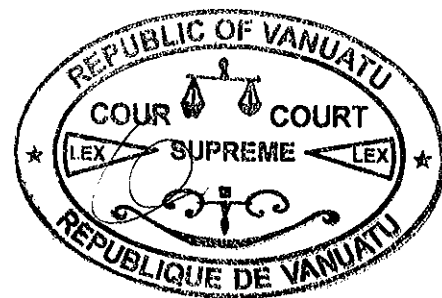
it is immaterial when one considers whether the receipt of funds by public official in these circumstances is not serious misconduct. The fact that it is approximately one fifth of the suggested price of VT537, 000. Keeps it in perspective and aggravates this situation.

20-The Claimant was clearly fixed with notice of the complaint against him. His answers by way explanation have been recorded and considered. He was given an adequate opportunity to answer the charge made against him.

21-Of considerable importance in the context of this litigation is the following extract from "Government of Vanuatu –v- Mathias [2006] VUCA 7; CAC 10-06 (1 June 2006)".

" Although the above is sufficient to dispose of the appeal, in deference to the State's submissions at the appeal hearing we provide brief remarks on the meaning, effect and relationship between section 29 of the Public Service Act No. 11 of 1998 and section 50 of the Employment Act [Cap.160] as follows:

- Section 29 (1) of the Public Service Act No. 11 of 1998 whilst empowering the PSC to "**dismiss an employee at any time for serious misconduct or inability**" does not, in our view, preclude the application of the protective provisions of section 50 of the Employment Act [Cap. 160] to the exercise of the power;
- The protective provisions of section 50 of the Employment Act [Cap. 160] namely:
"(2) None of the following acts shall be deemed to constitute misconduct by an employee -
 - (a) trade union membership or participation in trade union activities outside working hours, or with the employer's consent, during the working hours;**
 - (b) seeking office as, or acting in the capacity of, an employee's representative;**



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

- (3) Dismissal for serious misconduct may take place only in cases where the employer cannot in good faith be expected to take any other course.**
- (4) No employer shall dismiss an employee on the ground of serious misconduct unless he had given the employee an adequate opportunity to answer any charges made against him and any dismissal in contravention of this subsection shall be deemed to be an unjustified dismissal.**
- (5) An employer shall be deemed to have waived his rights to dismiss an employee for serious misconduct if such action has not been taken within a reasonable time after he has become aware of the serious misconduct."**

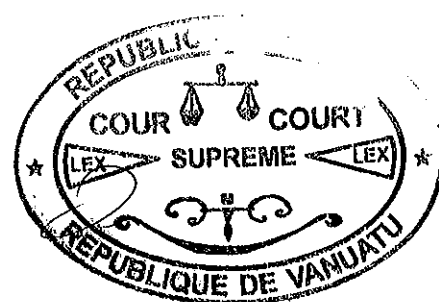
are entirely consistent with the PSC's obligation in section 29, "to act as a good employer";

- The burden of establishing "**serious misconduct**" under section 29 of the Public Service Act and section 50 (1) of the Employment Act rests fairly and squarely on the employer to establish on a balance of probabilities. The Appellants' defence to the claim failed in this case because no admissible evidence was led by the employer to prove that its employee had been guilty of "serious misconduct";
- We affirm the decision of this Court in **Ben Garae v PSC [2005] VUCA 20**; Civil Appeal Case no. 03 of 2005:

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

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

22-It is clear from the above decision of (Government of Vanuatu –v- Mathias) (CAC 10/2006)



That:

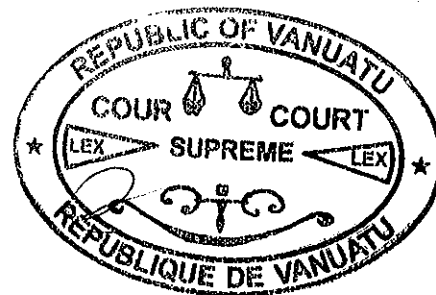
- (1) It is not essential that the Claimant be physically present at the hearing.
- (2) The standard of proof is on the balance of probabilities.
- (3) And the burden of establishing serious misconduct lies fairly and squarely on the employer.

23-A matter of concern to me concerning the procedure was the decision made by the Commission where it referred to his prior conduct not being exemplary. No evidence was called by the Claimant on this issue. No evidence was led by the Claimant on this issue and there was no cross-examination directed at the Defendants' witnesses on this point.

24-I record that I considered asking questions to clarify this issue but quite clearly this is an area for counsel as they from their disclosure and preparation would have greater knowledge of the background (if any) than myself. It is because of that view that I did not pursue that issue. In my view there being no challenge it was proper for the commission to consider all the matters placed before it and in the exercise of its discretion to give them what weight was necessary.

25-With the exception above the procedure followed is in accord with the relevant statutory provisions. The tests provided in section 50 (1) and (3) are clearly met. The first defendant could not in good faith have been expected to take any other course.

26-Having regard to the central feature that this is a gross and flagrant breach of the duties of a public servant. It could hardly be said that the



Commission has erred in his dismissal and the exercise of its discretion in refusing to make any further payment. (S 29 (2))

27-There is Judgment for the first and second defendants.

28-Costs are to follow the event. To be fixed by agreement or to be fixed by the Master.

29-The issue as to the hearing fees I direct that the Registrar set the correct figure for the hearing fees which varied between counsel and I make an order that the Registrar shall seek recovery as part of this Court's order of the Claimant's portion of the hearing fee.

30-I am advised by counsel (9/10/09) the claimant is deceased (see S 17 of the rules) I make an order permanently suppressing the name of the claimant. He is now to be referred to by the initial "J" 3.9

DATED at Port Vila this 23th day October 2009

