

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

**CIVIL CASE NO. 194 OF 2012**

**BETWEEN: JEAN MARC PIERRE**  
Claimant

**AND: REPUBLIC OF VANUATU**  
First Defendant

**AND: JOE WILSON LIGO**  
Second Defendant

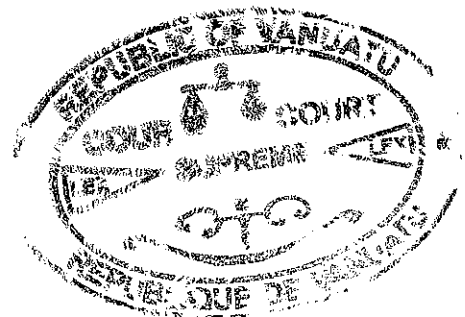
Coram: Justice Mary Sey

Counsel: Mary Grace Nari for the Claimant  
Florence Williams for the Defendant

Date of Judgment: 13 June 2014

**JUDGMENT**

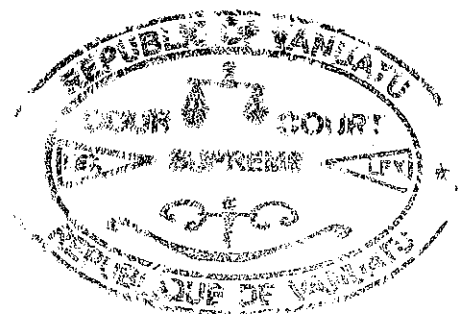
1. The Claimant challenges the process of his suspension and alleges that the Defendants breached his employment agreement by failing to ensure that all processes and conditions of the Public Service Act [CAP 246] (the Act) and the Public Service Staff Manual (the Staff Manual ) applied in his disciplinary proceeding.
2. The Claimant seeks damages in the amount of VT 2,540,160 for the negligence of PSC by breaching the conditions of his employment agreement with respect to the disciplinary matter and also VT 750,000 for damages for distress and humiliation. His claim also includes damages from the Second Defendant for defamation in the amount of VT 2,000,000 on the grounds that the Second Defendant had published a press statement



regarding his suspension that was defamatory in nature whilst the disciplinary matter was before the PSC.

### **Background**

3. The Claimant commenced employment with the First Defendant on 28 August 2006 as Director of Lands, Survey and Records. He was appointed to the salary level equivalent to VT 2,540,160 per annum. On 19 September 2011, the Second Defendant suspended him on grounds of incompetence and the letter of suspension stated that he would be on suspension until the Public Service Commission (PSC) makes a decision about the suspension. The sequence of events leading to this claim is set out in the Claimant's sworn statements as follows:
  - 3.1 Following his suspension, the Claimant vacated the Director's office and on 22 September 2011 he replied to the allegations made against him by the Second Defendant.
  - 3.2 On 5 December 2011, the formal complaint of the Minister against the Claimant was lodged.
  - 3.3 On 26 January 2012, PSC referred the matter to the Public Service Disciplinary Board (PSDB) and on 1 February 2012 the Claimant was advised that the matter was before the Board.
  - 3.4 The PSC then recommended the appointment of an investigation panel and on 12 April 2012, the Claimant was advised that an investigation panel had been appointed and he was invited to make a response to the Minister's complaint.
  - 3.5 On 20 August 2012, the Second Defendant released a press statement about the competence of the Claimant.
  - 3.6 On 21 August 2012, the investigation panel submitted its report recommending the dismissal of the Minister's complaint.
  - 3.7 On 14 September 2012, PSC made the decision to dismiss the complaint against the Claimant and to reinstate him.
  - 3.8 On 19 September 2012 the Claimant was advised of the decision of PSC to resume duty while awaiting the outcome of the Employee Disciplinary Report (EDR) case pending against him.



- 3.9 On 23 September 2012, PSDB re-constituted and called the hearing of the matter. The Second Defendant withdrew the charges.
  - 3.10 On 4 October 2012, the PSC sent a second letter stating that the complaint by the Minister was dismissed and the Claimant was to be reinstated but the EDR was yet to be completed.
  - 3.11 On 4 December 2012, the PSC wrote to the Claimant that the decision of PSDB was yet to be confirmed.
  - 3.12 On 24 December 2012, the PSC confirmed the decision of the PSDB and on 18 March 2013 the Claimant was notified about the PSC's decision.
4. During the trial, both counsel agreed that no witnesses would be called for cross examination. The evidence is essentially contained in the sworn statements of Jean Marc Pierre filed on 17 May 2013, 12 July 2013 and 4 December 2013 respectively in support of the claim and that of Laurent Rep dated 7 June 2013 on behalf of the Defendants.
  5. Much of the evidence dealt with the background facts set out above and the issues posed for the Court's determination were identified by counsel in their written submissions.

#### **Claimant's Position**

6. The Claimant submits that on 19 September 2012, after the investigation and dismissal of the complaint lodged by the Minister, he should have been reinstated to his position but the matter continued until the Second Defendant withdrew the charges on 23 September 2012.
7. The Claimant also contends that, even though he was advised of the decision of PSC to resume duty, the letters dated 19 September 2012 and 4 October 2012 stated that the EDR case that was pending against him was yet to be completed. He further contends that the second process used in the case was incorrect and unlawful and that there was no evidence to substantiate any further claims against him.
8. It is further submitted by the Claimant that in making the decision to dismiss the complaint against him and to reinstate him almost 1 year after his suspension, the Defendants had breached the provisions of the Act which specifically state that a director-general or



director's disciplinary case must be investigated within 75 days after receipt of a complaint.

9. Mrs. Nari referred the Court to **Sections 19A and 19B** of the **Public Service (Amendment) Act No. 37 of 2000** and she submitted that the correct procedure which should have been used in dealing with the Claimant is provided for under **Section 19B** of the Act but that this procedure was not complied with.
10. **Sections 19A and 19B** of the **Public Service (Amendment) Act No. 37 of 2000** (the Act) deal exclusively with the grounds and procedures for the removal from office of director-generals and directors in the public service. They provide as follows:-

***Grounds for removing director-generals and directors***

*19A (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 purposes of subsection (1), a director-general's or a 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 a director cannot be removed unless the procedure for removal set out in section 19B is followed.*



### ***Procedure for removal of director-generals and directors***

19B (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; and*

(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. ...."*

### **Defendants' Position**

11. The Defendants, for their part, argue that the employer by right of statute has a power to suspend the Claimant and, if in the process of investigation there are no findings on the



allegations, then it has the power to reinstate the Claimant. They further contend that during his suspension the Claimant received his full salary and all employment benefits and therefore he has not suffered any financial disadvantage and that when he was reinstated he received a promotion from being the Director of Lands to the Acting Director General of Lands and that the Claimant continues to hold that position.

12. In her submissions on behalf of the Defendants, Ms. Williams argued that the vital issue the Court must determine is whether the Act gives the Claimant a private law right of action sounding in damages when there is a breach of the Act. Counsel referred the Court to case authorities such as **R v Deputy Governor of Parkhurst Prison, ex p. Hague**, [1991] 3 ALL ER 733, where the House of Lords stated that the primary question in relation to an action for breach of statutory duty is always whether the legislation intended to create a civil remedy for aggrieved individuals.
13. The Defendants further submit that the Claimant has not shown by way of evidence that Parliament intended that such protection be enabled by resort to civil remedies for breach of statutory duty and that neither the Act nor any evidence available shows that Parliament intended that the provisions confer on the Claimant a private law right of action sounding in damages.

### Issues

14. Issues to be decided by this Court are as follows:-
  - (a) Whether the Defendants followed the correct procedure with regard to the suspension of the Claimant on 19 September 2011 on grounds of incompetence?
  - (b) Whether the Act gives the Claimant a private law right of action sounding in damages when there is a breach of the Act?

I deal with each of these questions in turn.



**Q1. Whether the First Defendant followed the Correct Procedure**

15. Although sections 19A and 19B do not contain express provisions relating to the suspension of a director-general or director pending an inquiry into a complaint or as a disciplinary measure, reference can be made to the Staff Manual Chapter 6 entitled: "*Managing Staff Discipline*." Clause 2.2 (d) provides:

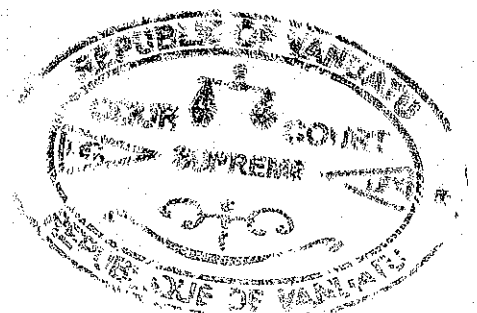
*"In the case of a director who has committed a serious disciplinary offence his or her director-general must immediately suspend the officer on full pay and immediately inform the Secretary of the Commission. In such cases, the matter is to be dealt with in accordance with Sections 19A and 19B of the Public Service Act."*

16. The Staff Manual gives examples of "a serious disciplinary offence" as: "*theft; fraud; misappropriation of public funds; assault; or sexual harassment.*"
17. In the present case, it cannot be said that the Claimant had committed a serious disciplinary offence. The reason given for his suspension is incompetence as clearly stated in the letter written by the Second Defendant on 19<sup>th</sup> September 2011 entitled:

**"RE: YOUR IMMEDIATE SUSPENSION FROM OFFICIAL DUTIES FOR INCOMPETENCE."**

18. The dictionary meaning of 'suspended' is '*to debar usually, for a time, from any privilege, from the execution of an office or from the enjoyment of an income.*'
19. Even though by reason of suspension the person suspended does not lose his office, he ceases to exercise the powers and to discharge the duties of the office for the time being. As Megarry J. remarked in **John v. Rees** [1970] Ch.D 345 at 397):

*"A suspension can have very severe effects on an employee's reputation. In essence suspension is merely expulsion pro tanto. Each is penal, and each deprives the member concerned of his enjoyments of membership or office. Accordingly, in my judgment the rules of natural justice prima facie apply to any process of suspension in the same way they apply to*



*expulsion. In my view therefore, it is clear that the suspension of the Applicant is justiciable."*

20. The Defendants contend that during his suspension the Claimant received his full salary and all employment benefits and therefore he has not suffered any financial disadvantage. That, in my considered view, is not the point. The reason given by the Second Defendant for the suspension of the Claimant is not one of those listed in the Staff Manual as "a serious disciplinary offence." As such, I find that the Claimant's suspension was not in accord with the Staff Manual and was in clear breach of Clause 2.2 (d) thereof.
21. Furthermore, I accept the Claimant's contention that, by taking over 1 year to deal with his matter, the Defendants had breached the provisions of the Act which specifically state that a director-general or director's disciplinary case must be investigated within 75 days after receipt of a complaint. It is clear that the Commission must decide whether or not to remove the director-general or the director within that specified period.
22. I find that no satisfactory explanation was given by Laurent Rep in his sworn statement for the defendants for the failure to investigate the Claimant's case within the specified period of 75 days. The delay was unreasonable and the Defendants had failed in their duty to ensure procedural fairness in the matter. As the Court of Appeal observed in **PSC v Nako** [2009] VUCA:

*"It does not follow from our conclusion that delays by the Commission in the decision-making process required by s.19B may not have relevance. Bodies exercising statutory power which affect the right of individuals are under an important duty to act fairly in the exercise of those powers: see de Smith's Judicial Review of Administrative Action, 4th Ed, at pp. 238-240. The duty to ensure procedural fairness is particularly important. Delay which is unreasonable, or is tainted with a lack of good faith, or which prejudices the ability of a person to make proper answer to a charge against him may, depending on the circumstances of the case, breach the duty to act fairly."*





23. I therefore find in answer to the first question posed for determination that the Defendants did not follow the correct procedure with regard to the suspension of the Claimant on 19 September 2011 on grounds of incompetence?

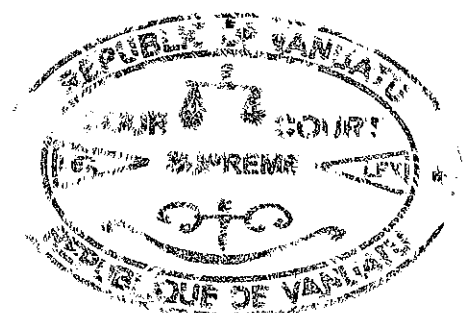
I shall now proceed to deal with the next question:-

**Q2. Whether the Act gives the Claimant a private law right of action sounding in damages when there is a breach of the Act?**

24. The Courts have invariably held that it is not enough to give rise to an action for breach of statutory duty that the plaintiff show that the relevant provision was designed in general terms to protect a class of individuals to which he belongs. He must establish that Parliament intended that that provision should confer a private law right of action “sounding in damages.” In **M. v Newham L.B.C.** [1991] ALL ER 602 at 625 the Court held that:

*“The fact that a particular provision was intended to protect certain individuals is not of itself sufficient to create a private law right of action upon them, something more is required to show that the legislature intended such conferment.”*

25. In **R v Deputy Governor of Parkhurst Prison, ex p. Hague**, [1991] 3 ALL ER 733, the House of Lords reiterated that the primary question in relation to an action for breach of statutory duty is always whether the legislation intended to create a civil remedy for aggrieved individuals.
26. In this case, whether the breach does or does not give such right of action must depend upon the object and language of the Act. When one reads the provisions of sections 19A and 19B, it can be inferred that neither the Act nor any evidence available before this Court shows that Parliament intended that the provisions should confer on the Claimant a private law right of action sounding in damages. Furthermore, that inference is reinforced by the availability of other remedies, including judicial review under Rule 17 (Civil Procedure Rules), to the Claimant.



26. I therefore find that the mere fact that there was a breach of the provisions of sections 19A and 19B of the Act does not vest a right of action in the Claimant against the Defendants. In the circumstances, I would make no award for damages for breach of employment condition and for distress and humiliation as claimed by the Claimant.
27. The Supreme Court claim also includes damages from the Second Defendant for defamation in the amount of VT 2,000,000 on the grounds that the Second Defendant had published a press statement regarding his suspension that was defamatory in nature whilst the disciplinary matter was before the PSC.
28. I have carefully perused the press statement (which is too lengthy to reproduce here) and it is clear to me that it was written in response to the Articles run by Transparency Vanuatu Office in the Daily Post Newspaper on the subject of the Claimant's suspension. To my mind, I do not find the press statement defamatory in any way. I accordingly make no award to the Claimant for damages as prayed for.
29. There would be no Order as to costs.

**DATED at Port Vila, this 13th day of June, 2014.**

**BY THE COURT**

  
**M.M. SEY**

**Judge**

