

BETWEEN: Harrison T Vaka' Matan Luen

First Claimant

AND: Allen Collins Faerua

Second Claimant

AND: The Republic of Vanuatu

Defendant

Date of HEARING: 9th day of June, 2022 at 10:00 AM

Date of Judgment: 5th day of July 2022

Before: Justice OA Saksak

In Attendance: Daniel Yawha for the Claimants

Florence Williams Samuel for the Defendant

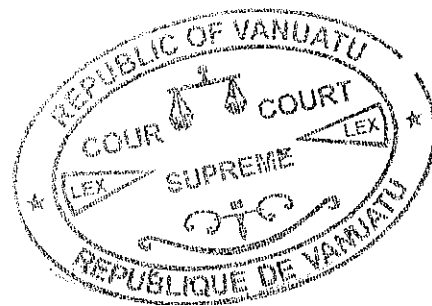
JUDGMENT

Introduction

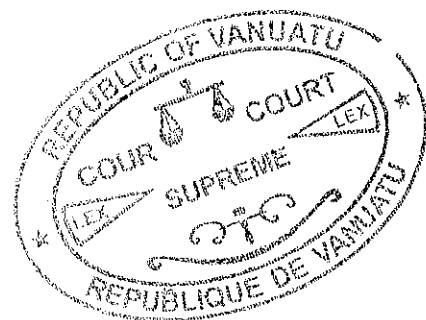
1. The Attorney General sought to invoke the inherent powers of the Supreme Court to strike out the claims of the two claimants by an application filed on 25 February 2022. The Attorney General further sought an order for costs at Vt 200,000.

Background

2. Mr Luen (First Claimant) was the former Director General (DG) and Mr Faerua (Second Claimant) was former Director within the Ministry of Infrastructure and Public Utilities.
3. Mr Luen was appointed as DG under a contract for 4 years effective from 15 November 2018. And Mr Faerua was appointed as Director for 3 years effective from 8 February 2019.



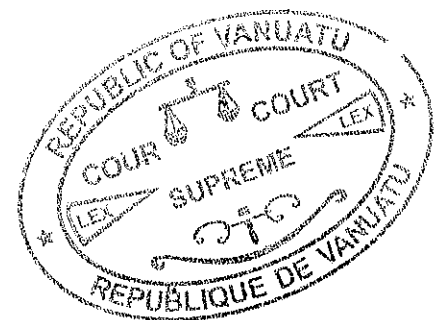
4. The Public Service Commission terminated the Claimants' contracts and employments on 29 October 2020 for serious misconduct.
5. The PSC alleged on the basis of a complaint lodged by the Minister against the claimants that both had failed to perform according to their core roles and responsibilities pursuant to Section 20 of the Public Service Act [CAP 246].
6. As a result of the Minister's complaint the PSC suspended the claimants on full salaries and appointed an Investigatory Panel to investigate the complaints raised, on 17 July 2020.
7. The Investigation Panel did its work from 21 July to 4 August 2020 and produced a report on 11 August 2020.
8. The report was attached to a letter dated 13 August 2020 to the claimants inviting them to respond to the allegations made against them.
9. Both claimants responded by letters on 20 August 2020.
10. On 3 September 2020 the PSC informed the claimants it had extended their periods of suspension.
11. By letter dated 18 September 2020 the PSC invited both claimants to address Section 50 (4) of the Employment Act [CAP 160] as to why their employments should not be terminated.
12. On 2 October 2020 Mr Abel Kalmet responded by letter on behalf of Mr Luen.
13. On 28 September 2020 Mr Faerua responded to PSC's letter in person.
14. On 9 October 2020 the PSC considered the claimants' responses in light of the allegations, previous responses, and the investigation report and decided to terminate the employments of both claimants on the basis of serious misconduct.



15. Specifically, the PSC alleged the claimants had by-passed the procurement process to award 2 Government Contracts to Prime Road Works Ltd with a value of both contracts exceeding VT 5,000,000 to the same company, for the same nature of work, at the same location, distance and period of contract. This amounted to contract splitting contrary to Section 13A of the Contracts Act.
16. The Contracts were No 597/19 and 598/19 for which it is alleged Mr Luen as DG was largely responsible.
17. Mr Faerua was terminated because he had failed to carry out due diligence check on the recommendations put forward by the Technical Evaluation Panel contrary to Sections 34(1) of the Public Service Act.

The Claims

18. The claimants filed their claims on 14 October 2021, claiming substantial amounts as damages for unjustified terminations. Mr Luen claims VT 77,994,864 with interest at 5% from 9 October 2020 and costs. Mr Faerua claims VT 23,053,504 with interest of 5% from 9 October 2020 and also costs.
19. Both claimants alleged that their terminations were unjustified and therefore they are entitled to damages under different heads such as –
 - Value of their contracts
 - 3 months notice
 - Severance
 - Multiplier
 - Annual leave
 - Overseas travelling allowances
 - Domestic travelling allowances
 - Housing allowances
 - Economic losses
 - Defamation
 - Stress, etc.



Defence

20. The defendants filed a defence on 25 February 2022 denying unjustified terminations. Based on the defence the defendants sought orders to strike out the claims of the claimants.
21. The gist of the defendant's arguments was that the claimants have not established any cause of action against the defendants to justify their claims for unjustified terminations.

Opposition to the application

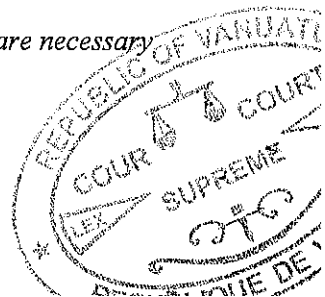
22. Mr Yawha filed a response to the application on 17 March 2022 opposing same.
23. The claimants reinforced their opposition by relying on paragraphs 8, 9 and 10 of their claims, alleging the PSC's findings of facts and law for serious breaches of their employments was an error, unfounded and/or unjustified both in fact and law.
24. They submitted they have established a cause of action entitling them to severance and other employment benefits and a multiplier. They relied on cases such as Banque Indosuez Ltd v. Marie Nolle Ferrieux CAC 1 of 1990, Government v. Mathias [2006] VUCA 7 and Nako v. PSC [2016] VUSC 156.
25. The claimants as respondents also opposed the strike out application on the basis of the Court of Appeal rulings in Cynthia Kammy Ala v. VNPF CAC 21/516 and Noel v. Champagne Beach Working Committee [2006] VUCA 18 and submitted that the Court should exercise its inherent jurisdiction sparingly "*and only in clear cases when the Court is satisfied it has the requisite material*" and only when a "*claim is so clearly untenable that it cannot possibly succeed*".
26. The claimants also relied on Gouras v. NACA Ltd [2006] VUCA 83 to submit that where there are disputed issues of facts, the exercise of the jurisdiction should not occur.

The Law

27. Section 65 of the Judicial Services and Courts Act [CAP 270] states-

"Inherent powers of Supreme Court and Court of Appeal:-

- (1) *The Supreme Court and the Court of Appeal have such inherent powers as are necessary to carry out their functions. The powers are subject to:*



- (a) *the Constitution; and*
- (b) *any other written law; and*
- (c) *the limitations of each court's jurisdiction....”*

28. Section 28 of the Act states –

“Unlimited jurisdiction throughout Vanuatu-

(1) The Supreme Court has:

- (a) unlimited jurisdiction throughout Vanuatu to hear and determine any civil or criminal proceedings in Vanuatu, including matters of custom; and*
- (b) all jurisdiction that is necessary for the administration of justice in Vanuatu....”*

29. Section 13A of the Contracts Act Cap. 245 states:

“13A. Contract splitting

(1) A person who enters into more than one contract or arrangement in relation to the same or substantially similar subject matter for the purpose of avoiding the requirements of the tender process provided for by this Act or the regulations commits an offence and is punishable on conviction by:

- (a) a fine not exceeding VT 1,000,000 or imprisonment for a term not exceeding 1 year, or both; or*
 - (b) a fine not exceeding VT 5,000,000 if the person is not an individual (e.g. a company).*
- (2) For the purposes of prosecuting an offence against subsection (1), a contract or arrangement entered into by a company is deemed to be entered into by each director and officer of the company.*

(3) Any contract or arrangement entered into in respect of which a person is convicted of an offence against subsection (1) is void. However, any moneys paid to the Government of the Republic of Vanuatu under the contract or arrangement are not repayable despite any provision to the contrary in the contract or arrangement.”

30. Section 29(1) of the Public Service Act states:

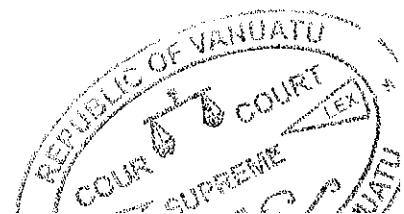
“29. Dismissal for cause

(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.”

31. Section 34 of the Public Service Act states:

34. Employees' obligations

(1) Every employee, director-general, director or senior administrator (as the case may be), must in the course of his or her employment in the Public Service: –



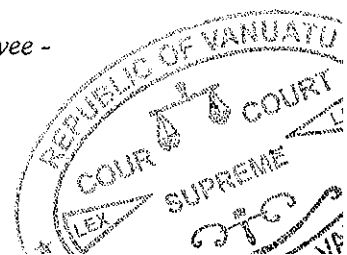
- (a) *comply with generally accepted behaviour in the conduct of his or her employment; and*
- (b) *comply with any reasonable direction given by a director-general, director or the Commission; and*
- (c) *behave honestly and with integrity; and*
- (d) *act with care and diligence; and*
- (e) *treat everyone with respect and courtesy and without coercion or harassment of any kind; and*
- (f) *observe and comply with all applicable laws;*
- (g) *comply with all lawful and reasonable directions given by someone employed in the ministry for which the employee works and who has authority to give the direction; and*
- (h) *maintain confidentiality about dealings that the employee has with any minister or members of staff of a ministry; and*
- (i) *disclose and take reasonable steps to avoid any conflict of interest (real or apparent) in connection with his or her employment; and*
- (j) *use resources and public money in a lawful and proper manner; and*
- (k) *not provide false or misleading information in response to a request for information; and*
- (l) *not make improper use of information or his or her duty, status, power or authority in order to gain or seek to gain a benefit or advantage for himself or herself or for any other person, and*
- (m) *comply with any other requirements imposed by this or any other Act, regulation or instruction."*

32. Section 50 of the Employment Act [CAP 160] states:

"MISCONDUCT OF EMPLOYEE

50.

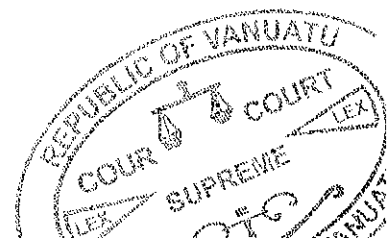
- (1) *In the case of a serious misconduct by an employee it shall be lawful for the employer to dismiss the employee without notice and without compensation in lieu of notice.*
- (2) *None of the following acts shall be deemed to constitute misconduct by an employee -*



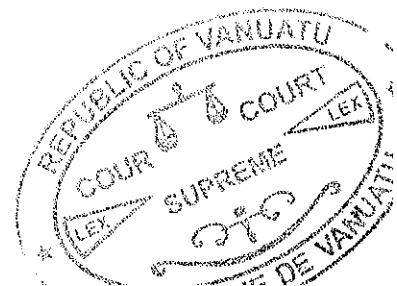
- (a) *trade union membership or participation in trade union activities outside working hours, or, with the employer's consent, during the working hours;*
- (b) *seeking office as, or acting in the capacity of, an employees' representative;*
- (c) *the making in good faith of a complaint or taking part in any proceedings against 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 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.*
- (5) *An employer shall be deemed to have waived his right 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”*

Discussion

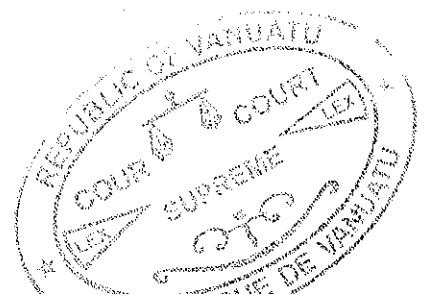
33. For the Court to use its unlimited and inherent jurisdiction in Sections 28 and 65 of the Judicial Services and Courts Act, on an application to strike out the claimants' claims summarily as it were, the Court must not limit its determination to the only issue of whether or not the claimant have established a cause of action in the pleadings and claims, but it must extend to the overall claims of whether on their facts and evidence their claims are clearly untenable that they cannot possibly succeed. See Ala v. VNPF and Noel v. Champagne Beach.
34. First I consider the argument that the claimants have not established any cause of action. I simply examine their pleadings in their claim. By paragraph 1, 9 and 10 the claimants plead unjustified terminations but have not pleaded Sections 50(3) and (4) of the Employment Act. That is serious omission on the part of the claimants.
35. At paragraph 8 the claimants plead the defendants were misled and in error to terminate their employment on the facts set out in the particulars in paragraph 8 of their Claims.
36. This is not a judicial review claim. The claimants could have filed for judicial review to challenge the decisions of the PSC of 29 October 2020 terminating their employments or their suspensions in September 2020.
37. The claimants were terminated on 29 October 2020 and filed their claims only on 14 October 2021, a year later.



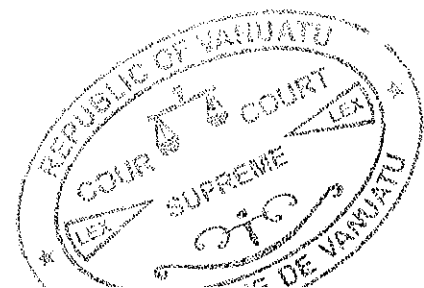
38. In paragraph 4 of their Response filed on 17 March 2022 the claimants submitted the PSC was in error to terminate their employment on the basis of the particulars 1-5 of paragraph 8. That is judicial review in disguise but the decision is well outside the 6 months required under Rule 17.5 (1) of the Civil Procedure Rules.
39. The claimants should have sought a review of these decisions to establish whether or not they were lawful before filing their claims for damages. They have failed to do that.
40. The reason the claimants have not pleaded Section 50 (3), and (4) of the Employment Act may be presumed to be evident.
41. The sworn statement of Mr Simil Johnson filed on 25 February 2022 in support of the defence shows clearly the PSC gave the claimants the opportunity to address Section 50(3) and (4) of the Employment Act. That was available in the letter of 18 September 2020 to both claimants.
42. Indeed the claimants do not deny that fact. Mr Faerua responded in person by letter dated 29 September 2020. Mr Kalmet Abel responded on behalf of Mr Luen on 2 October 2020.
43. Despite those responses, the PSC concluded Mr Luen had failed his duties under Section 20 of the Employment Act amounting to serious misconduct and Mr Faerua had failed his due diligence duties under Section 34 of the Act.
44. The PSC concluded as a good employer there was no other course of action to take but to terminate the claimants' employments in compliance with Section 50(3) of the Employment Act and section 29 of the Public Service Act.
45. Those evidence weigh heavily against the claimants. They cannot deny that the PSC afforded them the opportunities to respond to the various charges against them in compliance with Section 50(4) of the Act.



46. The claimants could therefore not challenge the unlawfulness of those decisions in a judicial review. They have come instead seeking damages for unjustified terminations. But they have no evidence to rely on to say no such opportunities were afforded.
47. I therefore accept the defendant's arguments that the claimants have no cause of action and that their claims are frivolous and vexatious and should be dismissed or struck out summarily, as they cannot possibly succeed if the Court allows their claims to be tried.
48. Those reasons should be sufficient to allow the defendant's application for a strike out. But the Court has to go further to consider the whole claims of the claimants to say whether they are so clearly untenable that they cannot possibly succeed.
49. Next the claimants allege the PSC was wrong to conclude the contracts were split contrary to Section 13A of the Contracts Act.
50. From the evidence there were 2 contracts No. 597/19 and No. 598/19.
51. Contract No. 597/19 was for Stockpiling of Graveling Material (3800m³) between Sele and Miraymiray quarry site. Work was to commence on 25 November 2019 and completed by 30 January 2020. It was for an amount of VT 3,910,000 in total. It was signed on 17 December 2019 by Mr Luen and Mr Wilson, see Annexure HL 11 A.
52. Section C of the Schedule provides for Introduction of Works as Road Clearance requiring a Bulldozer Excavator.
53. Section D shows the schedule of Rates and Prices for Road Clearance charged VT 400,000 the total price was VT 3,200,000. The total including other charges was VT 3,910,000.
54. Contract No. 598/19 (Annexure HL 11 B) is headed: Stockpiling of Graveling Material (3800m³) between Sele and Miraymiray quarry site. It was to commence on 25 November 2019 and completed by 30 January 2020.



55. Section C of the Schedule is what differentiates it from the first contract No. 597/19. The Introduction reads:
“Stockpiling of Graveling is to be carried out at a quarry site location between Sele and Miraymiray....”
56. Section D provides for schedules of rates and prices, the total including other rates amounted to VT 4,163,000. It was signed on the same date 17 December 2019 by Mr Luen and Mr Keith Wilson of Prime Road Works.
57. The total amount of contract price for both contracts was VT 4,163,000 + VT 3,910,000 = VT 8,073,000.
58. The PSC found it was a splitting contract contrary to Section 13A of the Contracts Act. It should have been tendered out as the amount exceeded VT 5,000,000.
59. The PSC found the Contracts were awarded by mistake and that mistake was attributed to Mr Luen as DG and Mr Faerua as Director. Of all other officers, the claimants bore the ultimate responsibilities to check and ensure there was no mistake. When they failed to spot the mistake on the front pages of the Contracts to rectify same, the claimants stood accountable for those mistakes. That is trite principle of law.
60. By paragraph 8 of their claim the claimants deny contract splitting and yet under particulars 4 they assert:
“4. Therefore the front page of Contract no. 597/19 was a typo error and or omission to correct the template by the Draft of Officer and thereby was MISLEADING ON ITS FRONT OR COVERPAGE”.
61. The claimants appear to shift the blame on to the Drafting Officer but ultimately it was Mr Luen who signed the Contracts with the mistakes on the front and cover pages, which could have been so easily detected, had due diligence checks been made by Mr Luen and/or Mr Faerua. Both had failed their duties and PSC held their acts or omissions to be serious misconduct warranting no other course but terminations of employments.



62. That was the end of the matter. The claimants have no cause of actions to base their claims for damages on.

63. The cases of Indosuez Bank v. Marie Noelle does not give them any course of action. Similarly the cases of Cynthia Ala, Mathias, Noel or Gouras do not assist the claimants.

The Result

64. The application by the defendants is allowed.

65. The Claims of the Claimants are struck out.

66. The claimants have put the defendants to unnecessary costs and the defendants are entitled to their costs which I set at VT 200,000. These costs shall be paid by 29 July 2022.

DATED at Port Vila this 5th day of July, 2022

BY THE COURT

.....


Oliver Saksak

Judge

