IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal Case No. 23 of 2008

BETWEEN: PUBLIC SERVICE COMMISSION
Appellant

AND: JOHN CULLWICK TARI
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabeck*** ***Hon. Justice John W. von Doussa*** ***Hon. Justice Ronald Young*** ***Hon. Justice Oliver A. Saksak***
Counsels:	*Mr. Ishmael A. Kalsakau for the Appellant* *Mr. Abel S. Kalmet for the Respondent*
Date of Hearing:	*28 November 2008*
Date of Decision:	*4 December 2008*

JUDGMENT

Introduction

On 24 September 2004 the Respondent was appointed Acting Director of Finance in the Department of Finance and Economic Management for six months. On 15 April 2005 he was dismissed from the public service without severance allowances. Justice Bulu concluded the dismissal was unjustified through procedural error and awarded Mr. Tari three months salary, severance allowance and reimbursement of his National Provident Fund contributions.

The Appellant says it used the proper procedure for the dismissal of the Respondent. In those circumstances it says the Respondent was not entitled to any severance pay. The Respondent's cross-appeal alleges the judge should have ordered interest on the severance and back-pay from the date of his unlawful dismissal.

Facts

In September 1998 Mr. Tari was employed as the Budget Manager in the Department of Finance and Economic Management. On 10 September 2004 he was appointed the Acting Director of Finance for six months. On 18 February 2005 Mr. Tari returned to the position of Budget Manager in the Department some 20 days before his 6 months appointment was due to expire.

On 22 March 2005 the Appellant served on Mr. Tari a disciplinary report (pursuant to s.36 of the Public Service Act [CAP. 246]). Two grounds of misconduct were alleged:-

(a) Misuse of a government vehicle; and
(b) Taking a days leave without permission.

The disciplinary report detailed how the Respondent had, on a number of occasions between 30 October 2004 and 31 January 2005, instructed his driver to drive him in his government car, after work, to various kava bars and later to drive him home. The report also alleged the Respondent, on 3 February 2005, had his government driver drive him to a country club early in the morning and return him late in the afternoon. This travel did not arise from his employment. The Appellant alleged Mr. Tari had taken this day off without leave.

On 28 March 2005 Mr. Tari responded to these allegations. He accepted he had used the car to go to the kava bars and home as alleged. However he said a director had no specific time when he could not use his government vehicle. He also said that other directors had used government cars in similar circumstances without censure. He accepted his driver had dropped him at the country club on 3 February but he saw nothing wrong with this.

As to the unapproved day off he said when he arrived at the resort he had been assaulted and therefore he was too unwell to "*get his leave signed*" the next day.

He said it was common for senior public servants to have their leave approved retrospectively.

On 15 April 2005 the Commission wrote to Mr. Tari dismissing him from the Public Service. They said his past service had not been exemplary and thus no severance allowance would be paid to him.

At trial the Respondent claimed that the Appellant was obliged to use the procedures designed for the dismissal of a Director or a Director General in his case. The Respondent said the Appellant had not used this procedure and therefore his dismissal was unlawful.

The judge concluded that the procedures set out in s.19A and s.19B of the Public Service Act [CAP. 246] applied to Mr. Tari's situation and he could only be dismissed if that procedure was followed. The judge said s.19A and section 19B procedure had not been followed in this case.

The judge concluded the Respondent's conduct did amount to serious misconduct. However, he said the Appellant had failed to give the Respondent adequate opportunity to respond to the allegations. The judge also found that the Commission had failed to explain its decision to dismiss the Respondent or give reasons for rejecting the Respondent's case. The judge said that the Commission had not identified why another penalty could not appropriately have been imposed on the Respondent for the misconduct: s.50 (3), Employment Act [CAP.160].

Does section 19A and section 19B apply to the Respondent's dismissal?

Section 19A describes the grounds for removing a director. It includes misconduct: ss.(1) (b). Section 19B describes the procedure for the removal of a director. A complaint can be received only from nominated persons: ss. (1). An investigation is then undertaken by the Commission: ss. (2) (a). The complaint is

referred to the Director who can respond: ss (2) (b) and (c). Written notice of the Commission's decision and its reasons must be given: ss. (6).

These provisions therefore describe in detail the procedure for the removal of an individual from the post of Director General or Director within the Public Service. On 22 March 2005, the date of the disciplinary notice from the Commission to the Respondent, Mr. Tari was no longer a Director. He was a Budget Manager. There was therefore no longer any reason to remove him from an office that he was not occupying. The fact the alleged misconduct arose while Mr. Tari was Acting Director does not support the Respondent's claim that s.19A and s.19B procedure had to be used. As we have said these sections are designed for those who are at the time of the disciplinary process a Director General or Director. The process is designed to focus on the removal of persons who hold those offices.

A public service employee who is not a Director General or Director at the time of the institution of the disciplinary process will not be subject to s.19A and s.19B process. The judge was therefore wrong when he concluded that this procedure applied to Mr. Tari.

Was the removal process according to law?

We are satisfied the process used to dismiss Mr. Tari was according to law save for compliance with s.50 (3) of the Employment Act. We deal with this provision later in this judgment. The Public Service Manual is intended to give guidance to Managers, the Public Service Commission and the Disciplinary Board in (amongst other matters) staff discipline. The manual anticipates that where serious disciplinary allegations are made (as here) the matter should be referred to the Commission: chap. 6:2.3.

A disciplinary report is prepared and referred to the employee for response: chap. 6:2.3. In addition at 2.10 the Manual sets out the procedures to be used

where misuse of government vehicles occurs. Approval from a Director General or Director must be obtained for the use of a government vehicle outside official duties: chap.6:2.10.2 (b). Part 2.10.3.1 describes what action the Commission may take if a vehicle is used outside the rules. This includes dismissal for cause if it is seen as serious misconduct: 2.2.3.2.

This disciplinary procedure was followed by the Commission in Mr. Tari's case. A disciplinary report was served on the Respondent by his departmental Director General. The report included details of the allegations against him, and relevant witness statements. A response was invited. The referral letter identified that this had been served in accordance with s.36 (1) of the Public Service Act.

Mr. Tari responded in detail to the Commission. The Commission considered the evidence and his response. They decided that the proper course was immediate dismissal. This was the disciplinary process anticipated by law and properly undertaken by the Commission.

Was this serious misconduct?

We now turn to the question as to whether the Appellant's conduct constituted serious misconduct justifying immediate dismissal. The facts were not essentially in dispute. Mr. Tari had, virtually on a daily basis during the working week for a period of approximately three months, misused his government car by using it for personal purposes. He had also done so in early February 2005 when he used the car during an unauthorized leave day. This was therefore misuse of a government car on numerous occasions.

As we have observed the Manual provides that misuse of a government car is a disciplinary offence: chapter 6: 2.10.3.1 (b). The Manual anticipates monetary penalties may be imposed especially for first and second offences: 2.10.3.2. It anticipates further disciplinary action if three or more offences are committed: 2.10.3.2. Dismissal for cause is one of the disciplinary options then open.

As to absence without leave Appendix A, 4.1 (h) of the Manual provides that it is a disciplinary offence for an employee to be absent without "*leave or excuse*".

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 day 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 shown.

Reasons for the Commission's decision and s.50 (3) of the Employment Act

The judge, concluded that the Commission must (at [58]):-

> "*(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 relied upon;*
> *(d) explain its reasons why it could not "in good faith" impose another penalty.*"

The judge said the Commission had failed to address any of these requirements. He said therefore the dismissal was unjustified and the Respondent's entitlement flowed from these failures.

The failures in (a) to (c) above are essentially a requirement that the Commission give reasons for its decision. If it has an obligation to give reasons then it would no doubt be appropriate to identify what evidence it relied upon in reaching its decision.

We are satisfied that there is no obligation on the Commission to give reasons for its decision to dismiss a public service employee below the rank of Director or Director General. The rules of natural justice do not require, as of course, reasons be given by administrative tribunals: *R v. Gaming Board for Great Britain ex part Benaim and Khaida [1970] 2QB 417; R v. Northumberland Compensation Appeal Tribunal, ex part Shaw [1952] 1KB 338.*

In our view the statutory context does not suggest reasons are required to be given by the Commission for decisions as to dismissal for cause under section 50 (1) of the Employment Act or section 29 (2) of the Public Service Act. An employee is protected by the Commission's obligation to give the employee an opportunity to respond to the allegations made against him or her before a decision is made. Of importance is the fact the employee can challenge the merits of the Commission's decision in the Supreme Court by alleging unjustified dismissal.

This case demonstrates the point. Here the Respondent challenged the Commission's decision as constituting unlawful dismissal. Further there is no express statutory obligation on the Commission to give reasons for its decision. This can be contrasted with the position when a Director or Director General is vulnerable to dismissal. In that case, the Commission is obliged to give "*reasons for the decision*": s.19B (6). For other dismissals (as here) there is no statutory obligation to give reasons: s. 29.

We are satisfied therefore the judge was wrong to conclude the dismissal was not justified because the Commission failed to give reasons. We are satisfied there is no general obligation on the Commission to give reasons.

We take a different view as to the obligations of the Commission relating to section 50 (3) of the Employment Act. Section 50 (3) provides as relevant as follows:-

"Dismissal for serious misconduct may take place only in cases where the employer cannot in good faith be expected to take any other course."

No mention was made of ss.(3) by the Commission when it invited Mr. Tari's submissions in response to the disciplinary report and accompanying letter. It did not mention s.50 (3) when it dismissed him. The terms of ss.(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 demotion or transfer to another government department. These are also serious responses to misconduct by an employee. (see Government of Vanuatu v. Mathias [2006] VUCA7).

Consistent with this obligation the Commission should invite those whom it has concluded may have been guilty of serious misconduct to address ss.(3). This should be done before a decision on the employees' future is reached. When communicating its decision on dismissal (or otherwise) the Commission will need to identify it has considered s.50 (3) and (if appropriate) concluded (in good faith) that it cannot take any course other than dismissal.

In this case the Commission did not invite Mr. Tari to address ss.(3) nor is there anything to illustrate it turned its mind to this fundamental obligation. Given this positive obligation and the Commission's failure to establish that it had undertaken the analysis demanded by s.50 (3) we conclude the Respondent could not have been lawfully dismissed and his dismissal was therefore unjustified. In reaching this conclusion therefore we agree with the concern of the Supreme Court judge.

Section 54 (1) of the Employment Act identifies when an employee is entitled to a severance allowance. Mr. Tari qualified for a severance allowance by virtue of this section. The Court may order the employer to pay up to six times the severance allowance if the dismissal in unjustified: s.56 (4).

The Commission made no severance allowance payment to Mr. Tari because they dismissed him for serious misconduct. If an employee is lawfully dismissed for serious misconduct a severance payment is prohibited: s.55 (2).

We have concluded the dismissal was unjustified in that it failed to address section 50 (3). In those circumstances a severance allowance was payable and the multiplier provision in s.56 (4) was triggered. The judge in his judgment set the multiplier factor at 3. There was no challenge to this assessment. We therefore confirm the judge's assessment.

Cross appeal interest

A severance allowance is to be paid "*on termination of the employment*": s.56 (5). Section 56 (6) empowers a Court to order an employer to pay interest of up to 12% from the date of termination of the employment on the severance allowance. The judge appeared to overlook this provision. We consider interest should be payable at 5% on the severance payment ordered by the judge from the date of termination of the Respondent's employment. The interest payment should not be compounding.

s.29 (2) of the Public Service Act.

For completeness we consider s.29(2) of the Public Service Act and it's relevance to this case. Section 29 (1) entitles the Commission to dismiss an employee for serious misconduct or inability. This is subject to compliance with s.50 (3) of the Employment which governs all employment, public and private (Government of Vanuatu v. Mathias [2006] VUCA7). Section 29 (2) permits the Commission to make a redundancy payment where an employee has been dismissed for cause or inability and the employee's past performance has been

exemplary. Section 29 (2) is empowering and not mandatory. It gives the Commission a wide discretion whether to make a redundancy payment.

For reasons we have previously given the Commission is not required to give reasons for this decision. However it is obliged to give an employee who is or may be dismissed for cause an opportunity to identify relevant factors they wish to be taken into account when the Commission decides whether or not a redundancy payment should be made.

In this case no such opportunity was given to Mr. Tari. It should have been. The Commission could then have taken Mr. Tari's submissions into account when they reached a view about a redundancy payment.

Because we have concluded the Respondent's dismissal was not justified the Commission's error in failing to invite submissions on redundancy payments under section 29 (2) is of no consequence in this case.

Good employer

Finally the judge mentioned in his reasons for judgment the Commission's statutory obligation to act as a good employer: s.15. By itself we do not see the duty of the Commission to act as a good employer will generally give rise to an independent cause of action for damages.

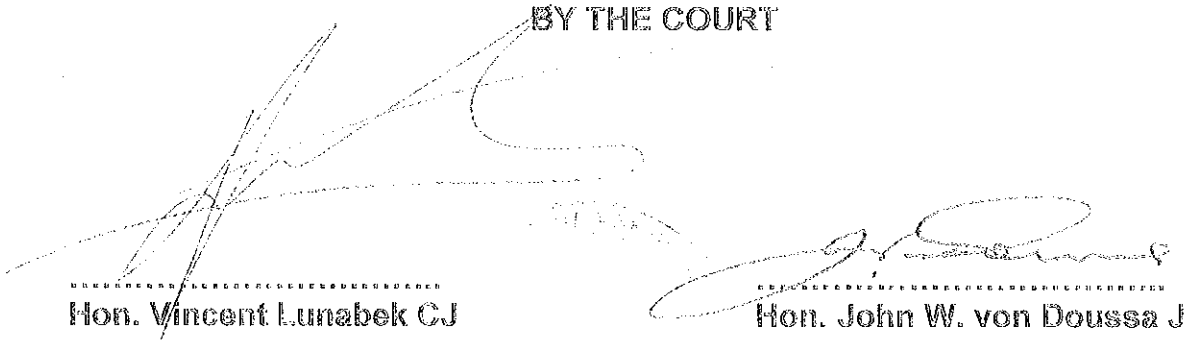
Conclusion

We have reached a similar result to the Supreme Court judge although for somewhat different reasons. We are satisfied the Respondent' was unlawfully dismissed. There was no challenge to the quantum of the judge's award by the Appellant as to payment in lieu of notice, severance allowance, or National Provident Fund reimbursement. The appeal is therefore dismissed.

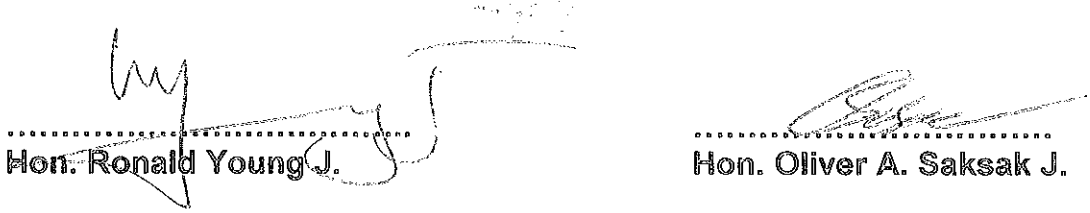
The cross-appeal is allowed. Interest is awarded on the severance payment at 5% p.a. from the date of Mr. Tari's dismissal (15 April 2005) until payment. The Appellant will pay costs to the Respondent on the appeal and cross-appeal to be either agreed or taxed.

DATED at Port Vila, this 4th day of December, 2008.

BY THE COURT



Hon. Vincent Lunabek CJ **Hon. John W. von Doussa J.**



Hon. Ronald Young J. **Hon. Oliver A. Saksak J.**