

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

Civil Appeal Case No. 756 of 2015

BETWEEN: REPUBLIC OF VANUATU
Appellant

AND: STEVEN VUTILOLO
Respondent

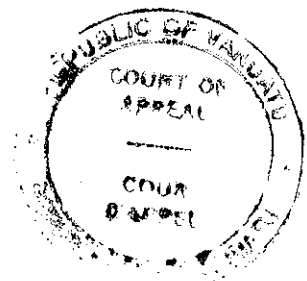
Coram: *Hon. Justice John von Doussa*
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Dudley Aru
Hon. Justice Paul Geoghegan
Hon. Justice Mary Sey
Hon. Justice David Chetwynd

Counsel: *Mr Hardison Tabi (SLO) for the Appellant*
Mr Garry Blake for the Respondent

Date of Hearing: *Tuesday 5th April 2016 at 2:00 pm*
Date of Judgment: *Friday 15th April 2016 at 4:00 pm*

JUDGMENT

1. This is an appeal by the State from a Supreme Court decision issued on October 23rd 2015 which upheld Mr Vutilolo's claim that the termination of his employment as a manager in the Department of Correctional Services was unlawful. Judgment was entered against the appellant in the sum of Vt 3,718,008 which consisted of a payment of three months' notice, together with severance and interest.



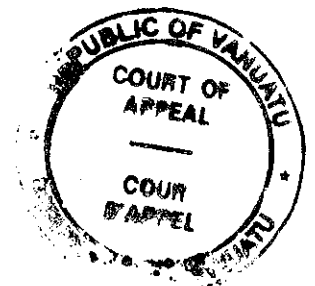
2. The appeal is based on a number of grounds as follows:

- a) The Judge erred in fact and law in finding that various allegations against Mr Vutilolo in relation to incidents which had occurred between 2007 and 2010 were part of a disciplinary report in April 2012 which led directly to the respondent's termination of employment;
- b) The Judge erred in fact and law in finding that Mr Vutilolo was not provided with the allegations in relation to the alleged incidents in 2007 to 2010 which had in turn resulted in him not being given an adequate opportunity to respond to all allegations against him;
- c) Because of the errors referred to, the Judge was not entitled to award the sums awarded to the respondent.

3. Subsequent to the hearing of the appeal and in the course of considering the outcome the Court considered section 76 (3) of the Employment Act which provides as follows:

"76. Application of the Act to public service

- (1) *Except as provided in subsection (3) the provisions of this Act shall apply in relation to public servants and to the Government and any other public authority in Vanuatu subject to the modifications set out in subsection (2).*
- (2) *The modifications mentioned in subsection (1) are as follows –*
 - (a) *the references in this Act to the Minister shall be taken as references to the Minister responsible for matters relating to the public service;*
 - (b) *the functions of the Labour Advisory Board shall be exercised by the Public Service Commission;*
 - (c) *except in section 65, the powers and duties of the Commissioner of Labour shall vest in the Director of Public Service Department;*
 - (d) *the powers and duties of a labour officer shall vest in the Director of Public Service Department or an officer appointed by him for that purpose;*
 - (e) *sections 67, 72, 73, and 74 shall not apply.*



(3) Nothing contained in this Act shall apply in relation to members of the armed forces, police force or prison service.”

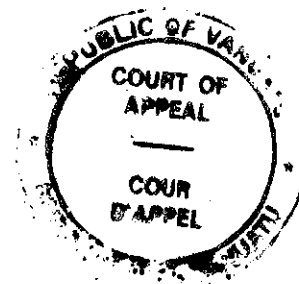
4. Accordingly on the face of it, section 76 (3) might exclude the provisions of section 50 of the Employment Act which was central to the decision of the Court below. As the effect of section 76 (3) had not been argued counsel were invited to file, and did file, submissions in respect of it. That is discussed later in this judgment.

BACKGROUND

5. Mr Vutilolo commenced employment as a shift supervisor in Port Vila in the Correctional Services Department in September 2007. On 15th November 2010 he received a promotion, being appointed to a Manager, in Management Services with the Department.
6. Prior to 2012, there had been a number of issues raised by his employer regarding Mr Vutilolo’s conduct in his employment. In 2007, there had been an alleged failure on his part to transfer ex-British detainees to Court. In 2008, he was suspended following the escape of a prisoner in September that year. In 2009, concerns were raised by his employer regarding his being absent from duty on April 3rd and being intoxicated while on duty on April 10th.
7. The Supreme Court judgment also refers to an unsubmitted discipline report against Mr Vutilolo in 2010 which related to *“five allegations that arose between 6 February and 23 August 2010”*.



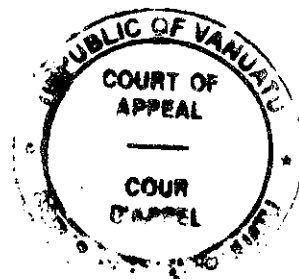
8. Of some significance in terms of the eventual decision made by his employer to terminate Mr Vutilolo's employment is the fact that there had been concern expressed regarding allegations made by prison inmates that Mr Vutilolo had borrowed money from them. The allegations appear to relate to complaints from inmates in November 2010.
9. On March 30th 2012, Mr Vutilolo received a letter from the Director of Correctional Services alleging that he had committed six disciplinary offences as follows:
- a) He was negligent and incompetent to discharge his duties as a Manager responsible for Human Resource and Finance;
 - b) Improper use of his government supplied motor vehicle;
 - c) He had been conducting his own private business as owner of a security company and that he was using his work vehicle to conduct his private office during work hours;
 - d) He did not disclose his involvement in another private security business as required by section 32 of the Public Service Act;
 - e) The time allegedly spent by him in managing his private business had affected his performance as Manager in the Department of Correctional Services;
 - f) His conduct in his official capacity as Manager of the Human Resources and Finance either inside or outside of working hours had affected his performance and "caused the Public Service into disrepute".
10. No specific details of Mr Vutilolo's alleged negligence and incompetence in the discharge of his duties or in respect of his alleged operation of a private business during working hours, were provided. He was invited to respond to the allegations within seven days of the date of the letter.



11. On April 2nd 2012, a discipline report, prepared by the employer, was provided to Mr Vutilolo. That document raised the same issues as the letter of March 30th but also added additional matters. It claimed that Mr Vutilolo was “*indolent*” and “*inefficient*” in the discharge of his duties, that he had improperly used or removed property or had failed to take reasonable care of such property and that he was “*habitually*” irregular in the time of his arrival to or departure from his work place. The report then annexed substantial documentation detailing the various allegations made. A relatively large number of claims were contained within those details including that he had deliberately damaged the number plates of his government vehicle to disguise that it was a Government vehicle, that he had received complaints from members of the public with regard to him not paying his personal debt, and that there had been “*issues relating to [Mr Vutilolo’s] affairs with women resulting in angry and violent altercations in the Department’s main office that frightened female staff*”.

12. Various documents were attached to the disciplinary report in apparent support of the claims which were being made.

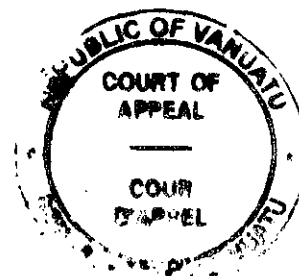
13. The disciplinary report contained a section which was clearly provided for the purposes of enabling Mr Vutilolo to respond to the allegations which had been made. Three tick box responses were provided for, the first tick box being acceptance of the allegations made against the employee, the second being a partial acceptance of the allegations and the third being a denial of the allegations. The respondent partially accepted the allegations although that itself is not entirely clear because of the way that the reply was worded. The respondent’s reply was as follows:



"I partially not accept that allegations, on allegations number 6, in which this person, advisor Chris is doing and other allegations on my family business, with due respect to your high office, I need to verbally explain, the reasons why this resort owner is so mad of me, and trying all his best to destroy my life and family business and also TA Chris. (see attachment)."

14. The attachment referred to was a letter written by the respondent to the Director of Correctional Services dated April 4th 2012. It refers to responses to allegations 1-6 and it is clear from that response that Mr Vutilolo did not accept many of the allegations being made against him although some specific allegations were also not addressed.
15. When the discipline report was returned to his employer by Mr Vutilolo it was on the basis that he denied many of the allegations being made against him and sought an opportunity to verbally explain his position particularly in respect of the allegation that he had operated his private business in work hours.
16. As found by the Judge, the disciplinary report was forwarded to the Director General of the Ministry of Justice and subsequently to the Acting Secretary of the Public Service Commission ("PSC") for consideration as to outcome. The letter to the Acting Secretary contained following paragraph:

"I would recommend that the committee give careful consideration not only to current allegations but also to the number and types of conduct and performance issues that have occurred during Mr Meto's employment. Below is a list of issues dating back to 2007 that I have noted as being recorded on Mr Meto's personal file."
17. The letter then went on to refer to various specific incidents.



18. No issue is taken with the fact that a copy of that letter was not forwarded to Mr Vutilolo who took no further part in the disciplinary process.

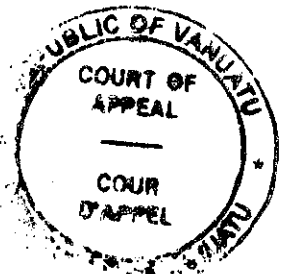
19. On June 25th 2012, the Acting Secretary of the PSC wrote to Mr Vutilolo terminating his employment. The letter referred specifically to the four allegations contained in the disciplinary report but then also contained the following paragraphs:

“The commission was satisfied that the evidence submitted were sufficient – adequate to sustain all the allegations against you. The commission finds all four allegations proved and that they amounted to serious misconduct particularly the fourth allegation where there was evidence that you borrowed money from the detainees amounting to improper conduct contrary to section 36 (1)(i) of the Public Service Act No. 11 of 1998.

The commissioner therefore decides to dismiss you with cause under section 29 of the Public Service Act 1998. The commission further consider that your past service is not been exemplary”.

20. At the Supreme Court hearing, Mr Vutilolo denied on oath all allegations made against him. He was not cross examined in respect of what appeared to be his partial acceptance of some allegations and there was no independent evidence of any of the allegations made against him. The State approached the Supreme Court hearing on the basis that it had no obligation to prove any of the allegations made against Mr Vutilolo. The Judge did not find the principal allegations made by his employer against Mr Vutilolo to be proven.

21. The Judge found in favour of Mr Vutilolo. He held that the process to dismiss him on the grounds of “*serious misconduct*” was not complied with by his employer. The reason for that was that he was not provided any opportunity to answer or explain his adverse employment record dating back to 2007 which the Judge held had been brought to the attention of the PSC, The Judge held, alternatively, that he had “*no hesitation*” in finding that such past conduct



and performance of Mr Vutilolo had been effectively waived by the inaction of his immediate superiors at the relevant time in not referring the incidents to the Commission for disciplinary action. The Judge relied upon section 50 (4) of the Employment Act which 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 sub section shall be deemed to be an unjustified dismissal.”

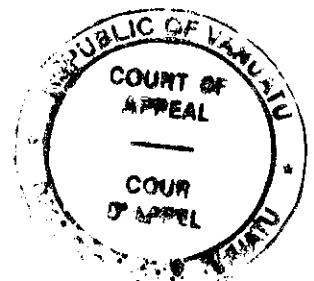
22. The effect of Section 76 (3) of the Employment Act was not argued by either party at the Supreme Court hearing.

23. During the course of the Supreme Court hearing there was an onus on the Republic to prove the allegations made against Mr Vutilolo. In the absence of any specific admission by an employee of a complaint by an employer the onus is on the employer to prove that complaint.

That was clearly not done in this case, hence the observation of the Judge that:

“In the present case there is no doubt in my mind that, properly established, misuse of a government vehicle; unauthorized absenteeism; and, in the context of a discipline service, failing to pay one’s just debts in borrowing money from a prison detainee would “in combination” constitute “serious misconducts” by the employee concerned.....” (emphasis added).

24. The allegations were not properly established. Mr Vutilolo, in his evidence, denied essential parts of the allegation that he had been conducting his private business and using his work vehicle for that purpose during office hours. He also denied the allegations that he had borrowed money from inmates, an allegation specifically mentioned by the employer in it’s reasons for terminating Mr Vutilolo’s employment. No evidence to establish these important matters was led by the employer at trial.



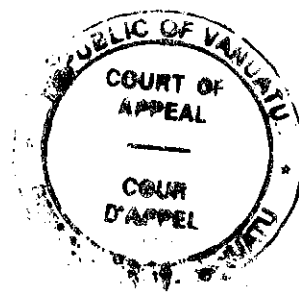
25. We do not consider that the Judge was wrong in finding that Mr Vutilolo was not provided with an adequate opportunity to respond to all matters which were put to the Commission and which the Commission took into account in reaching its decision to terminate the respondent's employment. The process adopted by the employer was rather unfortunate and it should have been clear to it, when it received Mr Vutilolo's "*partial admission*" and request for a further opportunity to "*verbally explain*", that steps should have been taken to provide the respondent with that opportunity and to seek absolute clarification in respect of those allegations which were accepted by Mr Vutilolo and those which were not. The employer clearly failed to do so. Additionally, the employer then asked the Commission to "*consider*" matters which had not been included in the disciplinary report. The employer's process was fundamentally flawed.

Does Section 76 (3) make a difference to this outcome?

26. Mr Blake invites the Court to simply consider that section 76 (3) no longer can have any sensible application to the Correctional Services or prison officers on the basis that to exclude such officers would be to treat them unequally as compared to other public servants. While that may be so, we cannot simply ignore a statutory provision.

27. Counsel for the State submits that section 76 (3) excludes Mr Vutilolo from the payments awarded in the Supreme Court.

28. There was agreement between counsel that until 2006 the administration and manning of prisons was covered by the Prison's (Administrations) Act [Cap. 20] and the Police Act [Cap. 105]. Both acts had the effect of regulating the duties of police officers who were involved in



the prison service and other members of the prison service who were not police officers.

Section 4 of the Prison's (Administration) Act provides a definition of "prison officers" as:

"Prison officers shall include the superintendent, any members of the police force charge with prison duties as wardens, and any other persons appointed to perform prison duties."

29. The Employment Act came into force on May 30th 1983. At that time the administration of prisons was regulated by the Prisons (Administration) Act [Cap. 20].

30. The Prisons (Administration) Act defined the term "prison officers" at section 4 as:

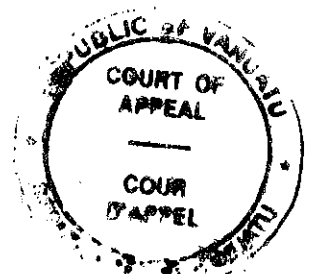
"Prison officers shall include the superintendent, any members of the police force charged with prison duties as wardens, and any other persons appointed to perform prison duties".

31. Pursuant to section 81 of the Police Act [Cap. 105] each police officer in charge of police in a district was designated as the prison officer responsible for the prisons in that district for the purposes of the Prisons (Administration) Act [Cap. 20]. That police officer was empowered to charge members under his command with prison duties as wardens for the purposes of that Act. Accordingly, at the time the Employment Act came into force prisons were administered by the police and prison officers were made up, largely, of members of the police force.

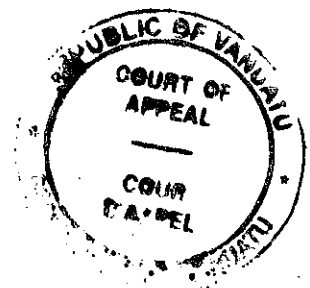
32. The Prison's (Administration) Act [Cap. 20] was repealed in 2006 and replaced with the Correctional Services Act No. 10 of 2006.

33. As submitted by Mr Blake, section 64 of the Correctional Services Act provides that:

"The provisions of the Public Service Act No. 11 of 1998 applies to the Director and other officers employed by the Public Service Commission under this Act".



34. The administration of prisons fundamentally changed with the commencement of the Correctional Services Act 2006. That Act provides, among other things, for the establishment, maintenance and operation of "*Correctional Centers*". A director of the Department of Correctional Services was appointed to head the Department. Pursuant to section 7 of the Act, the prisons in Port Vila and Luganville were deemed to be "*Correctional Centers*". The term "*Correctional Officers*" was introduced. Their functions were, in part, to "*ensure the safe custody and welfare of a detainee under his or her control*" (section 14).
35. The fundamental change in the administration of what were formerly referred to as prison officers is also recognized in the Police (Amendment) Act 2006, which repealed section 81 of the Police Act. Section 83 of the Police (Amendment) Act 2006, provides that on the commencement of the Act (August 28 2006), the Police Commissioner was to transfer to the Department of Correctional Services for a period of 6 months such members of the police force who, prior to the commencement of the Police (Amendment) Act 2006, had been undertaking prison services. This was to enable the Department to assume the administration and maintenance of prisons.
36. At the end of that 6 month period that officer was to continue with his employment as a member of the police force, if he or she had not been given permanent employment at the Department of Correctional Services.
37. In other words, the former prison service which existed under the Prison's (Administration) Act and which was in existence at the time that the Employment Act came into force was disestablished and replaced by an entirely new Correctional Service.



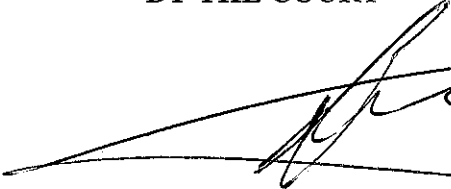
38. Section 76 (3) refers to the "*prison service*" it does not refer to "*Correctional Centers*" or "*Correctional Offices*". It could not have been intended to apply to a correctional service which at that time the Employment Act came into force, did not exist, and which is fundamentally different from the "*prison service*" referred to in section 76 (3).

39. For these reasons section 76 (3) has no application to this appeal.

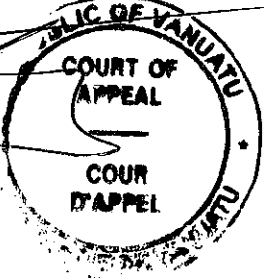
40. The appeal is dismissed. The State will pay the costs of this appeal to Mr Vutilolo on the standard basis.

DATED at Port Vila this Friday 15th day of April, 2016

BY THE COURT



Vincent LUNABEK
Chief Justice


REPUBLIC OF VANUATU
COURT OF APPEAL
COUR D'APPEL
REPUBLIC OF VANUATU