

(Civil Jurisdiction)

**BETWEEN: HENSLEY GARAE**

**Plaintiff**

**AND: THE PUBLIC SERVICE  
COMMISSION OF THE  
REPUBLIC OF VANUATU**

**Defendant**

**JUDGEMENT**

Section 29 (1) of the Public Service Act, No. 11 of 1998 states,  
“Dismissal for Cause

- (1) The Commission may dismiss an employee at any time for serious misconduct or inability but subject to its obligation to act as a good employer and subject to that employee having the right to have that decision reviewed in accordance with section 38”

Section 38 states,  
“Right of Appeal

- (1) A person who is dissatisfied with a decision of the Board may appeal to the Supreme Court.  
(2) The Supreme Court may affirm, vary or quash the decision of the Board”.

The plaintiff, Dr. Garae, is a qualified medical practitioner. He also has paediatric qualifications. He worked at Port Vila Central Hospital.

On 10<sup>th</sup> January 2000 Dr Garae was appointed temporary Specialist Paediatrician at the hospital.

By a letter dated 15<sup>th</sup> May 2000 he was given the “temporary appointment” of “National Medical Services Manager Hospitals” in the Southern Hospital Groups Directorate, (p16 agreed bundle). The appointment took effect from 22<sup>nd</sup> May.

On 8<sup>th</sup> August 2000 he was appointed Senior Paediatrician with effect from 3<sup>rd</sup> August (p17, agreed bundle).

The Interim Director of Hospital Services, Mrs. Miriam Abel went to Santo for a week. By memorandum she appointed Dr. Garae as "Officer in Charge" from 21<sup>st</sup> to 25<sup>th</sup> August (p70). This was verbally extended to 28 August.

Johnson Wabaiat was and is the Director General at the Ministry of Health. By a letter dated 25<sup>th</sup> August Johnson Wabaiat transferred Dr. Garae on "an ACTING basis on your current salary level to ..... Medical Services Manager, Vila Central Hospital... this letter replaces and supersedes all previous transfers or temporary appointment letters you may have received from the Director of Hospital or the acting Interim Director of Hospitals", (p19). That letter reached him on Monday 28<sup>th</sup> August.

This was part of a wider interim reorganisation and others received letters of transfer or appointment at the same time.

Johnson Wabaiat left on Monday 28<sup>th</sup> August to go to Pentecost. He returned on 4<sup>th</sup> September.

Dr. Garae went to the Public Service Commission on or about 28<sup>th</sup> August to enquire if the new structure had been approved. He was told it hadn't. It was approved on or about 5<sup>th</sup> September.

Dr. Garae considered the changes amounted to a demotion for him. He disagreed with the new structure and considered there were more effective and efficient alternatives. In particular he saw Mrs. Ronolea, who had previously been his subordinate, being made his immediate superior. There was animosity between them. In these circumstances Dr. Garae refused to relinquish the posts he was holding and retained the keys to two offices. The defendant alleges there were essential records, telephones and a fax machine in the offices. Access was needed for the proper running of the hospital. I accept the evidence of Johnson Wabaiat on this.

On 29<sup>th</sup> August Dr. Garae wrote to the Director-General with concerns about the proposed "Health Structure", (p 41).

On 5<sup>th</sup> September Mrs. Ronolea, the acting Chief Executive Officer circulated a memorandum calling all staff to a meeting with the Director General and the Secretary of the Public Service Commission on 7<sup>th</sup> September at 3.30pm (p21). By letter of the same date Dr. Garae asked her about the agenda, who should attend and whether the new structure had been approved. He wrote a notice on a white board concerning management events.

The Director-General returned from Pentecost on 4<sup>th</sup> September. He heard reports from Thomas Isom (the acting Director-General in his absence) and Mrs. Ronolea. He then wrote the letter dated 5<sup>th</sup> September(p23).

In that letter the Director-General stated why he considered Dr. Garae had disrupted the senior management team and his attitude had had "a serious negative impact on the

staff at VCH (Vila Central Hospital)". He was told to return the keys immediately to Mrs. Ronolea and warned of possible disciplinary charges if he failed to comply. He was given seven days in which to respond if he wished and offered a meeting if he made an appointment. Dr. Garae said he tried to make an appointment but couldn't get one.

By letter of 6<sup>th</sup> September (p16) the Director-General transferred Doctor Garae back to the post of Senior Paediatrician, Southern Health Care Group, with a Supervisor of Medical Services Manager. That letter superceded "all previous transfer or temporary appointment letters". He was reminded to return the keys if he had not already done so.

On 7<sup>th</sup> September Dr. Garae replied (p 27) querying why he had been given seven days to reply and then transferred one day later. He asked for clarification. Dr. Garae signed himself as "Medical Services Manager".

By letter dated 11<sup>th</sup> September Dr. Garae wrote to the Director-General of the Public Service (p28) setting out his position and stating his "intention to take on individual protest action by not following the orders issued by the Director General of Health until such time as to a meeting between the Director General and myself takes place under the Trade Disputes Act No. 3 of 1983 Part 2 and Part 6 Section 40... For the time being I will continue to function as Acting National Medical Manager and all staff under my responsibility are being informed of the situation so that there is no disruption of services..."

Bill Willie, acting secretary to the Commission replied that there was no reasonable prospect of success in a conciliation (p 30). He pointed out there was no demotion but a reappointment to an original post after a time in an acting position.

On 14 September (p 31) the Director-General suspended Dr. Garae. The reasons were set out in his letter of that date.

By letter of the same date Dr. Garae set out his position and requested a conciliation meeting. He pointed to Mrs. Ronolea as the one "making all the fuss about the office of the Director of Hospitals".

On 18 September the Director-General wrote to Dr. Garae setting out the details of the alleged disciplinary offences. Dr. Garae replied, through his lawyer on 20<sup>th</sup> October (p4-9).

By letter dated 14 September to the Chairman, Public Service Commission(p 80) the Director-General urgently requested confirmation of the suspension from duty of Dr. Garae and his termination of employment. The history was set out and he stated "more warnings are not appropriate .. as any further disruption would seriously compromise the Government's commitment to patient care and health service delivery".

The Secretariat prepared a "Submission Paper" (p 70 A) and recommended dismissal under section 29. At its meeting on 14<sup>th</sup> November 2000 the Board resolved to dismiss

Dr. Garae and found his past service was not exemplary. He was formally dismissed from 1<sup>st</sup> December (p 37).

Dr. Garae has sought "review" of that decision in accordance with section 38. His action was commenced by a "Notice of Appeal by Way of Writ of Summons". It is alleged the defendant failed to act as a good employer, did not follow the correct principles in the process and was wrong in finding serious misconduct and in the dismissal. It is also alleged the defendant should have put the allegations and their determination to the Public Service Disciplinary Board for determination. Breaches of natural justice were alleged and also wrongful or unjustified dismissal. Reinstatement lost wages and costs were claimed.

The defendant denied this. It was alleged Dr. Garae failed to comply with reasonable directions, failed to return vital keys and his dismissal was done properly under section 29 for serious misconduct.

Section 29 and Section 38 (1) Public Service Act do not sit easily together. Section 29 talks of a right to have the decision reviewed. Section 38 speaks of an appeal. The procedure to be followed is not set out. The Court raised this question before commencement of the trial. Both parties accepted a course whereby each called witnesses on all the points they wished to advance and then addressed the bench. It was only at that last stage that counsel for the defendant raised the question of procedure.

Without setting any general principles I am satisfied the course adopted has enabled both parties to air and put before the Court the points and issues they rely upon. I will look at the grounds and procedure adopted for this dismissal and decide whether it should be affirmed, varied or quashed.

The simple facts are that in May Dr. Garae's appointment as National Medical Services Manager Hospitals was temporary. The power used was section 21 (3) of the Act which permits this. His position as acting Interim Director Hospital Services was from 21<sup>st</sup> to 25 or 28<sup>th</sup> August. It was clearly within the power of the Director-General to transfer him to acting Medical Services Manager on 25<sup>th</sup> August. That letter stated it replaced and superceded all previous transfer or temporary appointment letters. It stated his supervisor was Ms Valentine Ronolea, Acting Chief Executive Officer.

It was perhaps galling for Dr. Garae to be made subordinate to someone whom he previously regarded as subordinate and with whom there was personal animosity. However, that was the position pertaining by 28<sup>th</sup> August. He should have handed over the keys and acted properly in the capacity of acting Medical Services Manager.

Over the following week Dr. Garae overtly shewed that he did not accept the new regime. The Director-General was informed of this on 4<sup>th</sup> September. It might have been better had the Director-General been in Port Vila when important changes in senior management came into effect, especially when he was aware, as he accepted in evidence, of the tensions that existed.

The Director-General issued his letter of 5<sup>th</sup> September having consulted with Mr. Isom, who acted in his absence, and Mrs. Ronolea. Again, it might have been better had he consulted only with Mr. Isom or with Mr. Isom, Mrs. Ronolea and Dr. Garae before issuing the letter. However, given the circumstances the Director-General had little option but to issue the letter. The accepted circumstances are that Dr. Garae refused to accept the new hierarchy and withheld important keys from the person who should have had them. If there were mistakes in the new structure or it had not as then been formally approved that was a matter for the Director-General.

In the letter of 5<sup>th</sup> September Dr. Garae was directed "to immediately return the office keys to the Acting Chief Executive Officer, Mrs. Valentine Ronolea". He was warned that failure to do so would leave the Director General with "no options but to commence formal disciplinary charges". Dr. Garae did not hand over the keys on that day (the letter is marked Received 16.45p.m.) or for a further week.

Johnson Wabaiat, the Director General says he reassessed the position and by letter dated 6<sup>th</sup> September returned Dr. Garae to purely medical work and removed all his management functions. He was again told "to return the hospital keys immediately to the Acting Chief Executive Officer". He failed to do this.

There was nothing beyond his powers in the Director-General's letters of 5<sup>th</sup> and 6<sup>th</sup> September, although it is understandable why Dr. Garae was surprised when the transfer of position came only one day after the letter of 5<sup>th</sup>. It necessarily raised or reinforced the perception of Dr. Garae that there was "a motive behind these appointments", (his letter of 14 September, p 35, paragraph 2). It was still open to provide a written response to the matters raised in 5<sup>th</sup> September letter within seven days.

However, having notified Dr. Garae of alleged shortcomings in his performance as acting Medical Services Manager and given him seven days to respond the Director-General should have waited for the response, if any, weighed it together with all the other matters, and then made a decision as to Dr. Garae's continuation in that post. The course adopted by the Director-General raises the suggestion of pre-judgment.

Dr. Garae sought clarification in his letter of 7<sup>th</sup> September. None was forthcoming. On 11<sup>th</sup> September he sought intervention from the Director-General of the Public Service, announced his intention not to follow the orders of the Director General, sought clarification as to which Health Structure was in operation and copied the letter widely throughout the hospital. The width of circulation Dr. Garae gave for that letter supports the Director-General's contention that his actions disrupted the functioning of senior management and the operation of the hospital. Whilst the circulation does not in itself prove there was disruption it told everyone of the stance being taken by a member of senior management. Mr. Isom described the attendance at 7<sup>th</sup> September meeting as poor.

It must be noted that the Director-General's warning letter of 5 September to Dr. Garae was copied widely. It must be questioned whether such a wide circulation was really necessary. Conflicts over management and personnel should not degenerate into battle by copy letter.

Given the contents of Dr. Garae's letter of 11<sup>th</sup> September his continued refusal to hand over the keys, his continued refusal to obey the directions of the Director-General and his behaviour generally I am satisfied the Director-General had no alternative but to suspend him. This he did by letter of 14 September.

I also find this was serious misconduct. The repeated refusal of a senior manager to obey instructions from the person in charge of the whole organisation is in itself serious misconduct. Dr. Garae's actions necessarily spread the knowledge of that insubordination widely within the organisation. The debilitating effect of that was potentially large. I have no direct evidence of its extent but I do accept there was some effect. The refusal to hand over keys to two important offices, despite repeated requests to do so, in my judgment, was serious misconduct. Had they been ordinary offices, or the refusal only lasted for a day or so that would only have amounted to misconduct.

The Director-General says he offered and was always available to meet and discuss the problem with Dr. Garae. Dr. Garae says he sought meetings but couldn't get one. He sought conciliation under the Trade Disputes Act. That was refused by Bill Willie, the Acting Secretary to the Public Service Commission in his capacity as the designated labour officer under Section 40 (2) (d) of that Act. Section 40 deals with the application of the Act to the public service.

Section 4 states

*"when a request [for conciliation] is made to a labour officer, and the labour officer considers that he can act upon such request with a reasonable prospect of success, it shall be his duty without delay to endeavour to promote a settlement of the dispute without its being determined by a Court"*.

Bill Willie stated "I do not consider there is a reasonable prospect of success in conducting a conciliation". That letter was apparently received by Dr. Garae on 14<sup>th</sup> September, the same day as the suspension letter and its reference to the Public Service Commission.

The Director-General informed the Commission that in his opinion warnings were not appropriate as further disruption would compromise commitment to patient care and health service delivery. Again I have no direct evidence of the extent of the actual disruption that was occurring, but it is a reasonable inference that Dr. Garae's activities were disruptive and the longer they continued, the more disruption would occur.

On 18<sup>th</sup> September the Director General issued "Details of Alleged offences" to Dr. Garae. He replied through a letter of his lawyer on 20<sup>th</sup> October, (Annexure A and B to the affidavit of Dr. Garae)

Dr. Garae stated in evidence he thought the next stage would be a hearing before the Public Service Disciplinary Board. He saw that as his opportunity to put his side of the matter. Instead, he says, the matter was determined without further input from him. He was surprised to receive the letter of dismissal dated 1<sup>st</sup> December.

I do not have a copy of any letter that accompanied the "Details of Alleged Offences" The prescribed form which should accompany Annexe A, Employee Disciplinary Report, is Form 6-1, (p 56).

The relevant section of the Public Service Staff Manual, section 2.4, is set out below. It is stated that immediate dismissal with cause under section 29 is a course the Commission may take. The Commission used that power, (p78).

Did the Commission give Dr. Garae the opportunity to put his side of the case? It is accepted he did by his reply to attachment A. Did the Commission find its decision on undisputed fact? Should there have been a hearing? The analysis of this question is found in the Board Submission Paper (p 70 A) drawn upon by the Commission's secretariat. That paper reviewed the documents, discussed the allegations and came to the conclusion Dr. Garae "at worst.. purposefully withheld the keys to two offices necessary for the running of the hospital... disrupted a meeting organised by the MOH and ...deliberately disobeyed his superiors". Whilst there might be some factual dispute with some points in the "Discussion" section the central and pertinent conclusions are founded on accepted fact. There was no need for a hearing by the Disciplinary Board.

Dr. Garae was legally represented from about 15<sup>th</sup> September (p63). The reply to the allegations came via his lawyer. A "hearing was" requested in the letter of 15<sup>th</sup> September, but it did not stipulate whether that was a hearing by the Commission or a request the matter be referred to the Board. Nowhere on the correspondence before me is there a request for an oral hearing before the Board. The Board certainly had the power under paragraph 2.4. d to refer the matter for hearing before the Disciplinary Board; they chose not to do that.

There is nothing inherently wrong on the face of the evidence before me in the conclusion that the conduct amounted to serious misconduct, and that conduct in itself, given its seriousness, justified dismissal. This last conclusion is subject to one matter I will discuss later.

There is one further factor I should consider before concluding. The Director General, on his own evidence stated he spoke to the Chairman of the Public Service Commission before the Commission's hearing. Apparently no record was made of that conversation nor its contents relayed to Dr. Garae. Johnson Wabaiat stated it was to tell the Chairman of the seriousness of Dr. Garae's actions. That was an error. It raises questions as to what actually was said, what influence if any it had on the Commission's decision and the fact that Dr. Garae neither knew nor had the opportunity to comment thereon.

Such actions necessarily open up the whole procedure to suggestions of unfairness or being fixed. I do not say that is what happened, however such a possibility should not be allowed to occur. Any representation to or conversation with a member of the Commission concerning a disciplinary case before them should have been recorded and presented to the officer for his comment. The better course is for all representations to go in Attachment A. (letter of 14 to Chair)

Complaint is made that reasons for his dismissal were not relayed to Doctor Garae. The allegations were clear. The dismissal letter of 6<sup>th</sup> December 2000 stated dismissal was under Section 29. It would appear that the Commission accepted the Submission Paper ( p 70 A) and acted under that. I do not know when that Paper nor the Commissions minutes came into the possession of Dr. Garae. However, it was apparently some time after his letter of dismissal. There is a right of appeal under section 29 and 38 to the Supreme Court. For both the potential exercise of that right and for fairness sake the dismissal letter should have contained a brief statement of the reasons for the dismissal or information as to where and how they could be obtained quickly. On the face of the parts of the Manual copied to me, there does not appear to be a provision to this effect. There should be.

Paragraph 2.4 of the Public Service Manual states

- (a) The Commission shall consider the report provided and the employee's response and make a decision as to whether to
  - (i) dismiss the matter;
  - (ii) immediately dismiss the employee with cause [Public Service Act, section 29];
  - (iii) refer the matter to the Police for criminal charges to be laid; or
  - (iv) refer the matter to the Public Service Disciplinary Board.

The Commission chose course (ii) under section 29 which empowers the Commission to "dismiss an employee at any time for serious misconduct".

The wording is clear and the power the Commission acted under is statutory. Did the Public Service and the Commission comply with their obligations to act as a good employer? The plaintiff says they did not. The guiding principles are set out in section 4. Breaches of the following obligations are alleged:-

- (a) be independent and perform their functions in an impartial and professional manner;
- (c) [was abandoned]
- (d) have the highest ethical standards,
- (k) observe the law
- (i) ensure transparency in the performance of their functions.

On the face of the evidence the only ways in which it can be said there was a failure were



- (i) the consulting of Mr. Isom and Mrs. Ronolea and not Dr. Garae before issuing the letter of suspension
- (ii) the failure to allow the seven days for an explanation to expire before taking further action (letter of 5<sup>th</sup> September, p 23).
- (iii) the overly wide copying of letters by the Director-General,
- (iv) the speaking by the Director-General to the chairman of the Commission, the content of which was not recorded nor relayed to Dr. Garae,
- (v) the failure to give Dr. Garae reasons for the Commission's decisions or how access could be gained thereto.

In all the circumstances I cannot say that had there not been these failures the outcome would have been any different. In my judgment the Commission's findings would still have been the same.

This Court is required to review the Commission's decision on an appeal in which I may affirm, vary or quash the decision (of the Board-Commission). There is one aspect of this case which does not appear to have been addressed. Dr. Garae is a medically qualified practitioner with a paediatric speciality. All the matters in this case arise out of his behaviour whilst acting in or purporting to act in a managerial capacity. There has not been the slightest hint of any problems whilst acting as a doctor. Dr. Garae's actions in that managerial capacity clearly arose out of what he saw as confusion and mismanagement by those in very senior positions, to the detriment of the provision of healthcare. This view was necessarily tainted with the animosity that existed between him and Mrs. Ronolea and his view that she was one moment his subordinate and the next his superior.

There is substance on the face of the evidence adduced before to suggest that a series of fundamental reorganisations of the Health Service were occurring one after another, there was confusion as to hierarchy, function and job title, changes were occurring which the medical staff felt they had not been properly consulted upon, given sufficient warning of and which failed to deliver the best service possible. Whether or not that was so Dr. Garae should not, particularly as a manager, have acted in the way he did.

I find that on purely factual matters all witnesses were doing their best to tell the truth. There are some disputes on fact, for example over meetings and discussions but these do not affect my overall assessment of the evidence.

In reviewing the decision of the Commission and deciding whether to affirm, vary or quash decision I find in all the circumstances another course was open to them which recognised the serious misconduct, the reasons for it, and the capacity in which it occurred. The Commission shall not "hear, determine or arbitrate on the discipline matter", (paragraph 2.4.b). It may refer the matter to the Board. The Board has power under section 37 (9) to suspend an offender without pay or impose other sanctions or dismiss the matter. The Commission then may confirm decisions of the Board, vary such

decisions or quash them, (s37(12)). My power is to review the decision of the Commission and affirm, vary or quash the decision of the Board, (Commission).

I therefore vary the Commission's order (whether under section 29 or after hearing by the Board) by suspending Dr. Garae from the 1<sup>st</sup> December 2000 to 31<sup>st</sup> December 2001 inclusive, without pay. This recognises the seriousness of his actions and the fact that had his functions been purely managerial then dismissal was a reasonable course. Dr. Garae is reinstated as from 1<sup>st</sup> January 2002 as Senior Paediatrician. This is on the basis of loss of all entitlement for the period, e.g. pay, holiday leave, other allowances, seniority etc. He must understand that it is unlikely he will be placed in a managerial position in the near or middle-term future, that he must obey the reasonable directions of his superiors managerial or medical, and that any proven misconduct in that or any other medical post which is of the same or similar character to that in this case could well result in his dismissal from any medical post he holds. By the same token management should provide the circumstances and climate in which his medical skills can be used to their full for the benefit of the community and, as far as possible, any potential antagonism with management avoided.

Dr. Garae must inform the Director-General by 3.00pm on Friday 16<sup>th</sup> November as to whether he wishes to recommence work on 1<sup>st</sup> January 2002 as Senior Paediatrician.

I consider that each party should pay its own costs, but will hear argument if there is any disagreement with this Order.

**DATED AT PORT VILA, this 30th day of October 2001**

**BY THE COURT**



**R. J. Coventry**  
Judge

