

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU

Civil Case No.14 of 2003

(Administrative Law Jurisdiction)

BETWEEN: DR CHRISTOPHER TARI

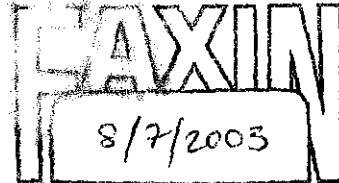
Claimant

AND: DR TIMOTHY VOCOR

Defendant

Coram: Mr Justice Oliver A. Saksak
Ms Cynthia Thomas – Clerk

Counsel: Mr Willie J. Kapalu for the Claimant
Mr Tom Joe for the Defendant



Date of Hearing: Wednesday 2nd July 2003.
Date of Judgment: Friday 4th July, 2003.

JUDGMENT

This is a reserved judgment. The claimant applies for judicial review of the Defendant's decision to terminate his appointment as Acting Medical Services Manager of the Northern District Hospital which was communicated by letter dated 25th February 2003. He had been appointed to that post by the Defendant on 14th October, 2002 after the permanent holder of the post, Dr Roy's contract had ended on 11th October, 2002. It was only an acting appointment indicating that it was a temporary appointment. The termination of the Claimant's acting appointment was made whilst he was attending a course in Western Samoa and only upon his return did he learn that he was terminated. I set out below the letters of appointment and termination in full –



"Date: 14th October, 2002.

Dr Christopher Tari
Northern District Hospital
Luganville, Santo.

Dear Dr Tari,

Subject: Acting Medical Services Manager

I write with regarding the above subject.

As you are aware, Dr Roy's contract has already end on Friday 11 October, 2002. So I have decided to appoint you on acting basis as Medical Services Manager for Northern District Hospital as of today's date.

The Hospital Manager and Nursing Manager are requested by copy of this letter to assist you where necessary for the smooth running of the Northern District Hospital.

I take this opportunity to thank you for the services you continue to provide to our nation and wish you all the best in your career.

By copy of this letter, the Human Resource and Appraisal Manager (Mrs Judith Melsul) is requested to process your acting allowance as of today's date.

Yours sincerely,

Signed: Dr Timothy Vocor
Director

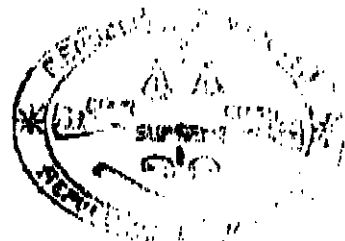
cc : Hospital Manager – Northern District Hospital
: Nursing Manager – Northern District Hospital
: Human Resource and Appraisal Manager
: All Managers – NHCG
: File"

The termination letter is worded as follows –

"Date: 25th February, 2003.

Dr Christopher Tari
Acting Medical Services Manager
Northern District Hospital
Santo

Dear Dr Christopher Tari,



Subject: Termination of Acting Appointment

With reference to the above subject I now confirm and advise that your acting appointment as Medical Services Manager for the Northern District Hospital is to be ceased with effect from 9th March, 2003.

We sincerely thank you for managing the medical services and the administration you have provided for both the Northern District Hospital and the Northern Health Group during the period of your acting appointment. We would also appreciate your continuous support and cooperation to better develop the Health sector.

You are kindly requested to make any necessary official handing over to Dr Johnson Kasso who will be taking over from then before leaving the office for the smooth running of the administration.

Thank you.

Yours sincerely,

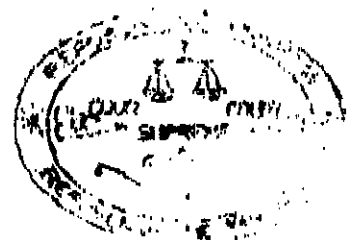
Signed: Dr Timothy Vocor
Director
NHC Directorate

Cc: Director General MOH
: All Directors MOH
: Agt. Manager NDH
: Nursing Manager NDH
: All Managers NHCG
: Judith Melsul Manager P & A
: Fuke."

The claimant alleges that no reasons were given for his termination. Further that there were no discussions between the Defendant and himself before such termination was made. He further alleges that the decision being of a public nature his status and reputation were affected by it. And he alleges that as he was overseas when the decision was made, that there was a breach of natural justice. He seeks an order of the Court quashing the decision of the Defendant.

In his Defence the Defendant admits the following –

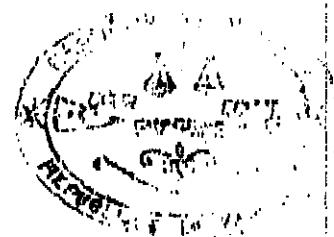
1. That the termination was made when the claimant was in Western Samoa.



2. That the letter of termination dated 25th February 2003 did not disclose any reasons for such termination but says he was not required to give reasons.
3. That the claimant was not given the opportunity to be heard and says he was not required to give such opportunity.
4. That no notice of such termination was given and says that no notice was required to be given by him.
5. That no other avenues or meetings were held to discuss the matter with the claimant before his termination except to write a letter dated 25th February 2003.

The Defendant denies the following -

1. That the claimant's status and reputation were lowered.
2. That the decision had affected the Claimant in that he had legitimate expectation that he would be terminated in an appropriate manner.
3. The Defendant contents that he had the administrative and legislative power to appoint and terminate the claimant and that he exercised that power in an appropriate manner.
4. The Defendant does not admit that the acting appointment is of a public nature.
5. The Defendant contents that the Court cannot grant the relief sought by the claimant. That his appropriate remedy is a claim for damages for breach of a contract of employment.
6. The Defendant contents that the Court does not have the power to quash the decision of the defendant since to do so would amount to a reinstatement.
7. The Defendant is not the employer of the claimant and therefore cannot be ordered to reinstate him.



The Claimant's claim is supported by his sworn affidavit dated 8th May 2003. He gave oral evidence on oath and was cross-examined by Mr Joe.

The Defendant also supported his defence by a sworn affidavit dated 2nd July, 2003. He gave oral evidence and was cross-examined by Mr Kapalu. He called oral evidence also from Mr Koko Karae, the Acting Manager, Northern District Hospital and Mrs Rachel Kalmos, Nursing Manager. Both witnesses were cross-examined by Mr Kapalu. In the light of the evidence before me and the oral submissions made by counsels, I now deal with the following issues –

1. Were the Acting Appointments and Termination of Acting Appointments of the Claimant acts of a public nature?

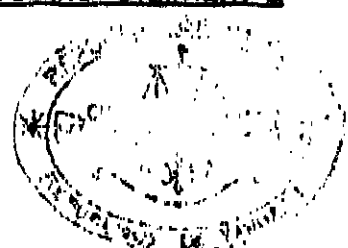
The Defendant denies that they were, whilst at the same time in evidence by affidavit and orally, the Defendant said he exercised his discretion to appoint and terminate the claimant pursuant to his powers under sections 4, 15 and 21 of the Public Service Act No.11 of 1998. It is clear by that that where powers are exercised pursuant to statutory provisions that action is of a public nature.

2. Whether the Court has the power to review the decision of the Defendant? The answer to the first issue being in the affirmative it follows therefore that the decision of the Defendant is reviewable under Part 17 of the Civil Procedure Rules No.49 of 2002. Under this Part this Court has powers to entertain the claimant's claim for judicial review.

3. Whether the Defendant was required to give reasons for his decision to terminate the Claimant's Acting Appointment?

The Claimant alleged that no reasons had been disclosed for his termination in the letter dated 25th February, 2003. That is not quite true because paragraph three of the letter provides the reason being "for the smooth running of the administration."

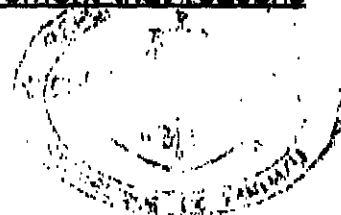
4. Whether the Defendant was required to give the Claimant a right to be heard?



From the evidence it is clear that the action of the Defendant though acts of a public nature, were administrative and internal acts. It is clear from the legislation that the Defendant had both the administrative and legislative power to appoint and to terminate. He has general powers also under section 21 of the Interpretation Act [CAP.132]. But the statute does not say that as a decision-maker the Defendant is required to give reasons for his decisions or that he is required to give the claimant the opportunity to be heard or that he be afforded his right to natural justice. The evidence is that this was not a disciplinary matter to require that the rules of natural justice be observed. But the common law position is that the rule of natural justice is of "universal application and is founded on the plainest principles of justice" per Willes, J. at page 190. At page 194 Byles, J said that "although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature." See the case of Cooper v. Wardsworth Board of Works [1863] 14 CBNS, 180.

The position in Vanuatu is perhaps stated in the Vanuatu Case of The Attorney General v. Frederick K. Timakata Appeal Case No.1 of 1993 2VLR 679 at page 684 where the Court of Appeal made a qualification to the right to protection of the law in Article 5(1)(d) of the Constitution by saying:-

"It is therefore not possible to hold that the rules of natural justice require that reasons should be given for an administrative decision and still less possible to hold that there is a fundamental rule of the kind. The fact that the giving of reasons may be regarded by a citizen as increasing the protection that the law provides does not mean that a failure to give reasons is a denial of the protection guaranteed by article 5(1)(d). That article does not entitle the citizens to every form of assistance that the law might conceivably provide or to every procedural right that may be available at any particular time. The article entitles the citizen to the observance of those principles of natural justice which may be regarded as fundamental and not to other principles which may be valuable but which are not fundamental. The requirement that reasons

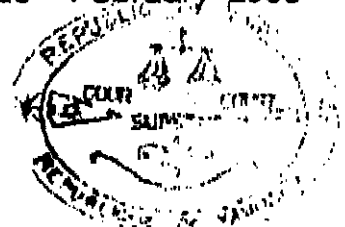


be given for an administrative decision is not a fundamental principle of natural justice. (emphasis added).

In this case the decision was an administrative decision. The appointment was temporary although it is not clear for how long it was to run for. Based on the decision of the Court of Appeal above it was not a fundamental requirement that reasons for his decision be given. Further it was not a fundamental requirement that the claimant be required to be heard. It was valuable only that natural justice be observed but that it was not afforded to him was no breach of his fundamental right to the protection of the law.

5. That brings me to the next issue of whether the claimant had a legitimate expectation of termination in an appropriate manner? It is admitted that his termination was made when the claimant was on a course in Western Samoa. In his letter of appointment to the post the claimant was not told or informed of how long the appointment was expected to last for. That in my view would have been a helpful information. The letter of appointment however informed of the reason being that Dr Roy's contract had expired. Implied in that fact is that the claimant may have expected that he would hold the post until the position was advertised and filled by a proper person. With that implication the claimant in my view had a legitimate expectation that that process would be followed and he would willingly accede office to a properly appointed person. Clause 5.3 of the Public Service Staff manual places the time for temporary appointments at not exceeding six months. That therefore in my view is the period the claimant might legitimately expect to hold office.

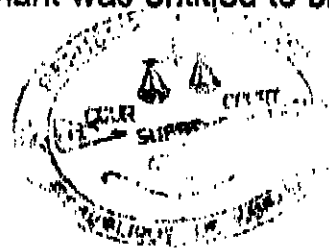
The evidence of the Defendant was that the replacement was necessary to give other young doctors the opportunity to exercise their skills so that the management could ascertain who was to fill the position when the post was advertised and applications were received. If that was the correct explanation then it was expedient to have the change made immediately before the claimant left for his three weeks overseas course. But it happened quite to the contrary, on 25th February 2003



when the claimant was still overseas. The termination was not faxed to him. In evidence he only saw it on his desk on Monday after he returned and went to his office. That was unfair to the claimant. The term "fairness" and "natural justice" are two expressions that carry different connotations. In the case of Durayappah v. Fernando (1967) 2 AC 337 at 349 the Privy Council held that fairness deals with 'lesser requirements' which do not necessarily deal with a hearing.

Adopting this principle it would have been proper for the Defendant to either make the termination before Dr Christopher left the Country or await his return. To terminate him in his absence was unfair to him and can only imply that there was some ulterior motive behind his termination. I am satisfied that on this issue of fairness or procedural impropriety the claimant had legitimate expectations that he would be terminated properly.

6. Whether the Claimant's status and reputation was lowered?
His evidence is that he has never been demoted or promoted during his six years of service with Health Department. The Defendant confirms that in his evidence. The Defendant denies that allegation. However defamation in the form of libel is actionable per se without proof of actual damage. The evidence shows that the Claimant's letter of Acting Appointment was copied only to those Managers within the Northern District Hospital. The termination letter was copied to a lot more people who did not receive the appointment letter in the first place. It was copied to those in the Ministry of Health in Vila. That is enough to lower the status and reputation of the Claimant in my view.
7. Whether the matter has been resolved?
There is evidence that a meeting was held on 4th April 2003 and that the matter was resolved. Despite that fact the Claimant chose to bring his claim to the Court. Under the provision of Article 6(1) of the Constitution the claimant was entitled to bring his claim to this Court for redress.



8. Whether Notice was required to be given and whether such Notice was given?

Clause 5.3 of the Public Service Staff Manual requires that where an officer has been appointed on a temporary basis of not exceeding six months a minimum of one week notice is required to be given.

In this case such notice was given in the letter of termination dated 25th February 2003. From this date until 9th March when the termination was to take effect there was a total of thirteen days. That in my view was sufficient notice.

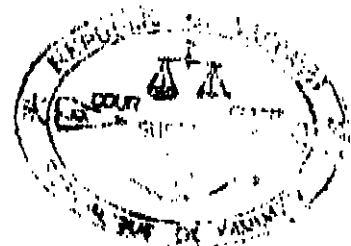
Summary and Conclusion

Under the circumstances as I have dealt with above, I find that there was no fundamental breach of the Claimant's right to natural justice. However I have found that there was procedural impropriety and unfairness done to him whilst he was still on an overseas course that he was terminated. Further I have found that as a result of the unfair procedural steps taken in respect of his termination that his status and reputation have been lowered. He prays that the Court quash the decision of the Defendant. In evidence Dr Kasso now holds the position of Acting Medical Services Manager. The Court will not quash that decision and reinstate the claimant. However it is my view that the claimant is clearly entitled to receive nominal damages for legitimate expectations and for his status and reputation being lowered as a result of his unexpected termination. Under Article 6(2) the Court can order that the Claimant be paid compensation for vindication of rights.

Accordingly I now assess the nominal damages at large to be paid by the Defendant to the Claimant as follows:-

(a) For unfairness and procedural impropriety	-	VT40.000
(b) For loss of reputation	-	VT40.000

Total	-	VT80.000
		=====



The Defendant is hereby Ordered to pay the sum of VT80.000 as damages to the Claimant within 28 days from the date of this judgement.

Costs

In this matter the Claimant is partly successful in his claim and the Defendant is also partly successful in his defence. In the circumstances there will be no order as to costs. Each party will have to pay their own costs.

DATED at Luganville this 4th day of July, 2003.

BY THE COURT



OLVIER A. SAKSAK
Judge

