

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Civil Case No. 182 of 2006

BETWEEN: TIMOTHY QUAI
Claimant

AND: THE GOVERNMENT OF THE REPUBLIC OF
VANUATU
Defendant

Coram: *Justice N. R. Dawson*

Counsel: *Mr. James Tari for the Claimant
Ms. Harders & Mr. Stephens for Defendant.*

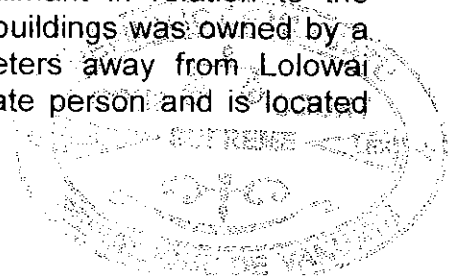
Date of Hearing: *9th September 2008*

Date of Decision: *16th October 2008*

DECISION

Background

1. The Claimant in this case, Timothy Quai, was employed by the Public Service Commission as Provincial Health Manager at Lolowai Hospital, East Ambae in the Republic of Vanuatu. During the course of that employment he made applications to AusAID and to the Government of the Republic of Vanuatu for funds to undertake renovations to two dwelling on Ambae. At some stage funds were made available and were used to upgrade the two dwellings. Neither of the two dwellings were within the curtilage of Lolowai Hospital. Neither of the houses concerned belonged to the Government they belonged to separate private persons. One house was used to house a health worker employed by the Ministry and the other house was the place of residence of the Claimant.
2. In January 2004 Jack Obed who was then a Senior Finance Officer with the Ministry of Health was requested by the Director General of the Ministry to conduct an Internal Audit Report concerning the two buildings and to investigate allegations against the Claimant in relation to the misuse of Government owned fuel. One of the buildings was owned by a private person and is about one hundred meters away from Lolowai Hospital, the other was owned by another private person and is located



three to four kilometers away from Lolowai Hospital. On 15th June 2004, Jack Obed produced the Internal Audit Report which he submitted to the Director General of the Ministry. That report came to the conclusion that the Claimant had breached the Public Finance and Economic Management Act No. 6 of 1998 Subsection (64) (2) which states that a person commits an offence against the Act who –

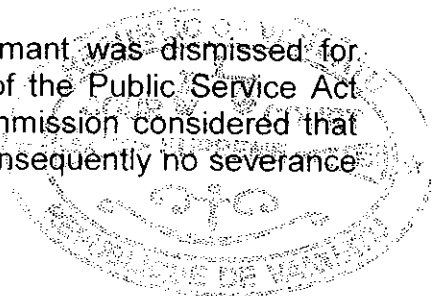
- (d) does any act for the purpose of procuring for that person or for any other person or organization:
 - (i) The improper payment of any public money or;
 - (ii) The improper use of any public resources.

The Report found, that the Claimant was responsible for the misuse of funds, and as a Manager he was bound to comply with all government policies, procedures, and regulations. The report recommended the immediate discipline of the Claimant for misappropriation of public funds under his authority. It was also found that the Claimant had misused fuel for Lolowai Hospital by using some of it for the running his own private generator to produce electricity for the dwelling in which he lived.

3. The Director General of Health issued a written Notice of Suspension dated 27th June 2005 to the Claimant. The Notice of Suspension listed the following disciplinary offences:-

- (a) A misappropriation of funds to the value of VT670,220 (AusAID Grant) and VT163,642 (recurrent Budget), for the renovation of a private dwelling stating that this facility was a staff house;
- (b) Failed to advise the Director Northern Health Care Group that the funds were used on a dwelling outside the premises of Lolowai Hospital owned by a private citizen;
- (c) Breached the guidelines between the Minister of Health and AusAID regarding the use of these funds;
- (d) Misappropriated public funds, in excess of VT1,459,740 to furnish a private residence (which was that occupied by the Claimant);
- (e) Inappropriately used your position to obtain 184 liters of fuel for the use of the private generator.

4. In a letter dated 9th September 2005, the Claimant was dismissed for serious misconduct pursuant to section 29 (1) of the Public Service Act 1998 and it advised that the Public Service Commission considered that his past performance was not exemplary, and consequently no severance



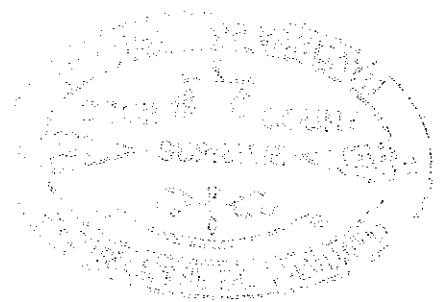
allowances were payable and that the Public Service Commission had decided to offset any money the Claimant might owe to the Government from his accrued allowances or accrued leave.

Submission

5. The Claimant submits that the reasons given by the Public Service Commission did not warrant the termination of his employment. He further says that the Defendant was well aware of the two projects and points out that in the application to AusAID it was made clear that those funds would be used upon a private dwelling. The Claimant also says that Public Service Commission was required to conduct a hearing at which the Claimant would have the right to appear, before the Public Service Commission made its decision as to whether or not it should terminate his employment.
6. On behalf of the Defendant it is submitted that the evidence before the Court from the Defendant's witnesses supports its claim that the conduct of the Claimant constituted serious misconduct and that he was properly dismissed. The Defendant claims to have acted as a good employer in compliance with the Employment Act. It submits that the gravity of the offences of the Claimant was such that the Defendant could not have taken any other option. It also submits that the Claimant had every opportunity to respond to their employer's concern and he took those opportunities and provided comprehensive responses through his lawyer. The Defendant says that in terminating the Claimant's employment the Defendant properly used its statutory power pursuant to section 29 of the Public Service Act. The Defendant also submits that the Claimant has a duty to mitigate his loss and points to the Claimant's evidence in cross-examination that he was re-employed in October 2006 and therefore even if he was successful in his claim he is not entitled to the relief that he claims.

Issues

7. Issues to be decided by this Court are as follows:-
 - (a) Did the Defendant follow the correct procedures as an employer with regard to the termination of the employment of the Claimant?
 - (b) If the background circumstances justify the termination of the employment of the Claimant does his behavior amount to "*serious misconduct*" so as to disentitle him from receiving a severance allowance?



- (c) If the Claimant is successful in his claim what is the appropriate amount of damages and does he have a duty to mitigate his losses?

The Law

8. The Claimant was dismissed under section 29 of the Public Service Act:-

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.*
- (1A) *If the Commission dismisses an employee under subsection (1), the matter is not to be referred to the Board for hearing and determined under section 37.*
- (2) *The Commission may where the past performance of the employee has been exemplary provide to the employee a redundancy payment as if his or her employment had been terminated under the Employment Act [CAP. 160].*

9. Section 36 of the Public Service Act describes what is a disciplinary offence for an employee. The relevant parts of that section are as follows:-

36. Disciplinary matters

- (1) *An employee commits a disciplinary offence who –*
- (a) *by any willful act or omission fails to comply with the requirements of this Act or of any order hereunder or of any official instrument made under the authority of the Commission or of the director-general of the ministry in which the employee is employed;*
- (f) *improperly uses or removes property, for the time being in his or her official custody or under his or her control, or fails to take reasonable care of any such property*

10. Section 50 of the Employment Act [CAP. 160] is also of relevance in these circumstances. It says as follows:-

50. Misconduct of employee



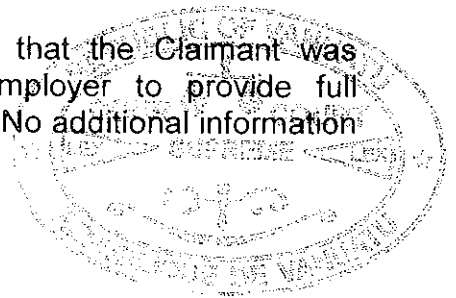
- (1) *In the case of a serious misconduct by an employee it shall be lawful for the employer to dismiss the employee without notice and without compensation in lieu of notice.*
- (3) *Dismissal for serious misconduct may take place only in cases where the employer cannot in good faith be expected to 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.*

Reasons

11. The dismissal of the Claimant was founded upon the report of Jack Obed called the Internal Audit Report. He stated at the conclusion that the Claimant had breached the Public Finance and Economic Management Act No. 6 of 1998 section 64 (2) (b) (see paragraph 2 herein). That report was produced on 15 June 2004. On 27 June 2005 the Claimant was suspended on full pay and provided with a copy of an Employee Disciplinary Report and was given seven days to respond. The Claimant through his lawyer provided a response on 1 July 2005. On 19 July 2005 the Defendant provided the Claimant with a copy of the Audit Report and the Employee Disciplinary Report and gave the Claimant a further seven days to provide a further response after considering the Audit Report. On 25 July 2005 the Claimant through his lawyer provide a response. On 8 September 2005 the Claimant was dismissed pursuant to section 29 (1) of the Public Service Act and as the Public Service Commission did not consider his past performance to be exemplary no severance payment was made to the Claimant.
12. In *Garae v. Public Service Commission (2005) VUCA 20* page 6 the Court of Appeal said "*Given the admissions in his written response, the primary judge concluded that he had been afforded natural justice and was not necessary for the Respondent Commission to hear the Appellant any further. We agree and would only add section 50 (4) did not, in terms, require an oral hearing to be given to an employee before a dismissal for serious misconduct.*"
13. In *Government of Vanuatu v. Mathias (2006) VUCA 7* at page 6 the Court of Appeal said "*We affirm the decision of this Court in Ben Garae v. PSC (2995) VUCA 20, Civil Appeal Case No. 03 of 2005. ... that section 50 (4) does not, in terms, require an oral hearing to be given to an employee before a dismissal for serious misconduct.*" Further more what process of

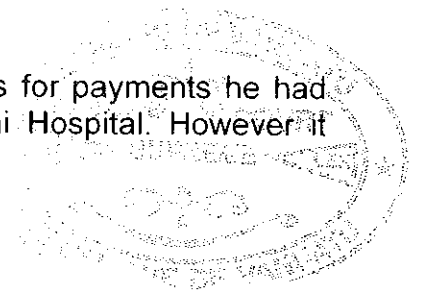
procedure will satisfy the statutory requirement in section 50 (4) of "an adequate opportunity to answer any charges made against (an employee)" will depend on all the circumstances of the particular case and no generalizations can be or ought to be made or laid down;"

14. The question to be answered on the facts of this case is whether the Claimant as the employee of the Defendant did have "adequate opportunity to answer any charges made against" him.
15. The Claimant was given a complete copy of the Internal Audit Report and also a complete copy of the Employer's Disciplinary Report and on each occasion he was given time to respond to any matters raised in either of those reports that he wished to respond to. It is clear that the Claimant discussed both of those reports with his lawyer and a full response was provided on each occasion by the Claimant through his lawyer.
16. The Claimant has submitted that the Defendant should have conducted an oral hearing with the Claimant present prior to coming to a decision to dismiss the Claimant from his employment. The Claimant submitted that this was a fundamental right under Chapter 2 Part 1 (1) of the Constitution of the Republic of Vanuatu.
17. That part of the Constitution referred to by the Claimant contains statements of the fundamental rights and freedoms of the individual as a citizen of the Republic of Vanuatu. Nowhere it doesn't state an express right from which it could be inferred that an employee is guaranteed by the Constitution to a right to an oral hearing with the employer prior to a decision being made by the employer to dismiss the employee.
18. Section 50 (1) of the Employment Act allows an employee to be dismissed without notice and without compensation in lieu of notice for serious misconduct. Section 50 (4) goes on to say that an employee must have an adequate opportunity to answer any charges made against him or any dismissal would be deemed to be an unjustified dismissal.
19. The Claimant submits that had his employer conducted an oral hearing at which he had been present he could have advanced further reasons or information for the employer to consider and take into account prior to reaching a decision to dismiss him from his employment. During cross-examination he was asked what further information he had to convey to his employer. He was not able to suggest or point to any further information that he could have provided at such an oral hearing and he accepted that the responses that he had made to his employer through his lawyer were full responses.
20. The circumstances of this particular case are that the Claimant was offered and accepted the offers from his employer to provide full responses to the matters raised by the employer. No additional information



or evidence has been pointed to that could have been placed before the employer before the Defendant made its decision to dismiss the Claimant from his employment. I am satisfied that the test set out in the *Government of Vanuatu v. Mathias* has been satisfactorily complied with by the employer and accordingly the employer was entitled to dismiss the Claimant.

21. There is no definition in the Employment Act of what amounts to "*serious misconduct by an employee*". During the course of this claim the Claimant has submitted that the money he applied for from AusAID and the Government to upgrade two private dwellings was known to his superior in the Health Department. That is denied by the Defendant. The Claimant then points to the evidence of the application form to AusAID where it was clear that the funds being obtained from AusAID would be used on a private dwelling. No evidence was produced of the same admission of the use of the funds for private dwelling in the application from the Government of Vanuatu.
22. The reasoning of the Claimant essentially is that he did not hide from the Defendant the intended purpose for the funds for which applications had been made. That submission cannot be open to doubt with respect to the application to AusAID but is not clear in respect to the application of funds from the Government of Vanuatu. The reasoning of the Claimant essentially is that he didn't hide the purpose of the funds and if his superiors did not know about it or that information slipped through the system without being noticed then this was not his responsibility. If anyone was responsible, then it was his superiors.
23. The Claimant was employed as the Provincial Health Manager on East Ambae. He was the senior manager for the Department of Health on that island. His superior in the Department of Health was situated on a separate island. It is implicit that the Claimant was responsible for all matters taking place under his control on East Ambae. It is not disputed on behalf of the Claimant that he is subject to section 54 (2) of the Public Finance and Economic Management Act No. 6 of 1998. The Claimant's applications for aid from AusAID and the Government of Vanuatu and the use of the funds are all in breach of that section. As the senior health officer on East Ambae it was his responsibility to comply with the Public Finance and Economic Management Act. If he considered that he was in the position where there were circumstances that would justify spending of public money on private persons then he should quite clearly and specifically set this out in writing, advised his superior, and explicitly obtained the consent of the superior before proceeding any further. He did not do so and as a manager responsible for all matters of the Health Department in East Ambae he should not have gone ahead as he did without explicit permission.
24. During the hearing the Claimant produced receipts for payments he had made for the use of petrol obtained from Lolowai Hospital. However if



quickly become apparent that those receipts related to the benzene used by him over a later period of time than the use of the 184 liters of fuel he was accused of using for private purposes without making any payment.

25. I am satisfied in the circumstances of this case that the Claimant was the Provincial Health Manager on East Ambae and he was responsible for the misuse of public funds and the wrong use of fuel. The sums of money were substantial. He personally benefited from the misuse of some of those funds and fuel and in these circumstances his behavior does amount to "*serious misconduct*". In the circumstances the Defendant was entitled to decide not to pay a severance allowance to the Claimant at the time of the dismissal on his employment with the Defendant.
26. It was submitted for the Claimant that pursuant to section 50 (5) of the Employment Act, the Defendant was deemed to have waived its right to dismiss him for serious misconduct due to such action not having been taken within a reasonable time. Section 50 (5) says:-
- (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.
27. The Defendant produced its Internal Audit Report by 15 June 2004 and the Claimant was not suspended on full pay until the 27 June 2005, some twelve months later.
28. On the face of it a delay of twelve months requires this Court to consider section 50 (5) of the Employment Act and in considering such a delay then all the circumstances of this particular case need to be considered and taken into account. Evidence was heard during the course of the hearing that during this period the Claimant had suffered a death in his family for which he had some time off from his employment. The Defendant cannot be criticized for not pursuing the allegations against the Claimant during a time of personal tragedy for the Claimant and at the time when it would be understandable that he might not be devoting full attention to his employment issues. In these circumstances it cannot be said that the Defendant has not acted within a reasonable time after becoming aware of the misconduct of the Claimant.
29. With respect to damages claimed by the Claimant, it is clear that he has a duty to mitigate his losses. During the hearing he admitted to being in new employment, details of which had not been provided to the Defendant or the Court prior to that time. *Automatic Fire Sprinklers Pty Ltd v. Watson* [1946] HCA 25 page 4 states "*The general rule is, in my opinion, as there stated, namely that its servant who has been wrongfully dismissed cannot wait until the determination of the period for which he was hired and then sue for the whole of his wages ... he cannot remain either, even though he truly alleges readiness and willingness to do the work, and claim wages or salary as if he has done the work. The rule that a dismissed servant is*

bound to mitigate his damages by obtaining other suitable employment, as available, is inconsistent with the view that he is entitled to do nothing and sue for his full wages as that he had earned."

Decision

30. The findings of this Court are:-

- (a) In the circumstances of this matter the Defendant did follow the correct procedures as an employer with regards to termination of employment of the Claimant;
- (b) The behavior of Claimant did amount to serious misconduct and the Defendant was entitled not to pay him a severance allowance;
- (c) Had the Claimant being entitled to damages then he would have had a duty to mitigate his losses. Due to the decisions in paragraphs (a) and (b) above there is no need to quantify the amount of damages had the Claimant been successful.

DATED at Port Vila, this 16th day of October 2008.

BY THE COURT


N. R. DAWSON
Judge