

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

Civil Case No. 216 of 2005

BETWEEN: THOMAS ISOM
Claimant

AND: PUBLIC SERVICE COMMISSION
First Defendant

AND DIRECTOR GENERAL OF HEALTH
Second Defendant

Counsel: Mr. Saling for the Claimant
Mr. Ngwele for the Defendant

Date of Hearing: 17 September 2009

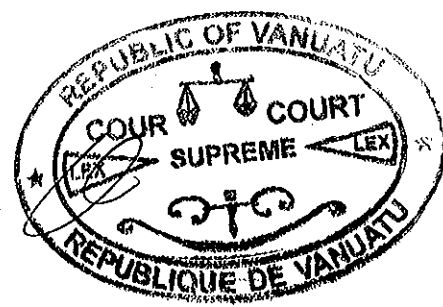
Date of Decision: 27 October 2009

DECISION

This case is about a claim for re-instatement of the Claimant to his position as the Director of the Southern Health Care Group. In addition the Claimant seeks costs.

The claim seeks orders quashing:-

1. The demotion and removal of the Claimant as the Director of Southern Health Care Group by the First and Second named Defendants in its letter dated 18 May 2005 addressed to the Claimant is invalid and therefore must be quashed. I have interpreted this to mean the decision as to the demotion and removal of the Claimant; and



2. The quashing orders as to the appointment of the new director. That in my view is not for me.

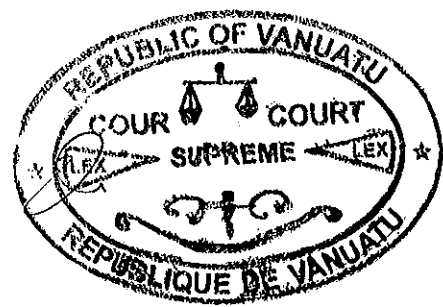
At the time of hearing of final submissions it became clear that the Claimant was now holding a different position and had other employment and that consideration for damages rather than an order quashing the decision of the First and Second Defendants was more appropriate.

In an endeavour to bring the claim to a conclusion as I had heard most of the evidence, I adjourned to give counsel the opportunity to consider amending the claim and any defence, the hearing of any further evidence and thus to achieve resolution by court order between the parties. I stress that it seemed to me to be an appropriate case for resolution by the parties themselves.

From the First and Second Defendants correspondence it became clear that the First and Second Defendants objected to this course. I gained the impression that the Defendants are of the view there is an unlimited judicial resource available.

The position in Vanuatu is covered by the overriding objective expressed in rule 1.2 of the Civil Procedure Rules No. 49 of 2002 which provides as follows:-

"1.2 (1) The overriding objective of these Rules is to enable the courts to deal with cases justly."



In addition here I emphasize 1.2 (2) particularly (2) (b) saving expense and (2) (d) ensuring that the case is dealt with speedily and fairly and (2) (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

In the event without the consent of both parties to my suggested course I now give my decision. An important aspect of this case is the attitude of the Minister of Health as reflected in his letter of 23rd November 2004 which is as follows:-

"23 November 2004
Mr. Jean Alain Mahe
Chairman
Public Service Commission

URGENT – URGENT

Dear Mr. Mahe,
Re: Disciplinary actions against the Director of Southern Health Care Group, Mr. Thomas Isom, the Manager of Assets Management of MOH, Mr. Morrison Bule and the Manager of VCH, Mrs. Leipakoa Matariki

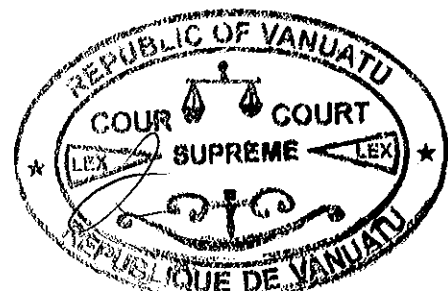
It has come to my knowledge that the abovementioned officers should be under disciplinary actions following serious allegations such as:

- Misconduct of Health policy and false declaration concerning items donated by Australian Rotary Club;
- Missappropriation of Public funds;

By way of such actions, my advise and instructions would be that Mrs. Maturine Carlot-Tary be appointed as Acting Director of Southern Health Care Group in order for the Minister to apply disciplinary measures towards Mr. Morrison Bule and Mrs. Leipakoa Matariki in accordance with the Public Service Act. Mr. Jameson Morokoe will be appointed acting to Assets Management while Dr. Edward Tabisari at the Management of VCH.

Would you please take immediate action to this matter as I forward to acknowledge your disciplinary action as soon as possible.

Yours sincerely,
Hon. Keasipai Song
Minister of Health."

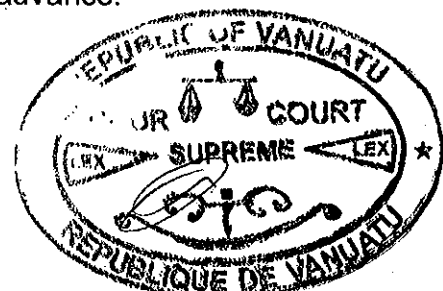


The Claimant held the position of the Director of Southern Health Care Group. He received at short notice (while at Malekula) a request (direction) from his minister to attend a conference at Fiji. He returned from Malekula on a Friday and left for Fiji on the Sunday. Insufficient time was available to obtain from his standing imprest account the necessary funds for travel and other legitimate costs. He made a request which was actioned and dealt with by others for funding from "*of friends blong VCH*". The clear intention (the process being fully documented) was to arrange funds for his travel plus expenses and within a short space of time for these funds to be repaid.

A request was made and granted. There can be no possible suggestion that there was any bad or criminal intention. This was a requested and documented payment with the clear intention of early repayment. Why did this payment attract attention? It was the delay in repayment to the Claimant and it was this delay that attracted criticism. A just criticism in my opinion. The criticism however needed to be directed to the person or persons responsible for the delay. Who was responsible for the delay? There can be no suggestion nor was it advanced nor was the Claimant cross-examined or criticized as to delay.

There was no suggestion that the sum advanced was used other than for legitimate purposes.

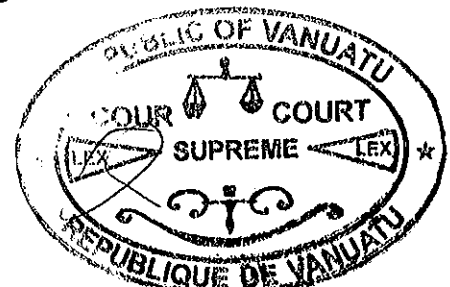
What fault (if any) is attributed to this advance. The Claimants participation is that he sought and received the advance. He did not make the advance.



The following paragraph 11 + 12 of the claimants sworn document of 22nd November sets out the crux of the claimants case.

- "11. As an employer I believed that the PSC have failed to comply with the point on the statement 2 of my report I submitted to you including the followings:-
- The PSC has acted upon what the Ministry of Health has already sorted out by the DG and the Minister of Health with the power invested on them.
 - They have acted contently from the final advise or recommendation from the Ministry of Healt before making this informed decision.
 - That resulted to the letter from the Minister of Health dated 23rd May and the letter of the DG of Health dated 27 May (see attachment No. 12).
 - The PSC informed decision made on me was not based on their interest on the letter to DG of Health as I quote on this statement. It is very discriminating to see that out of many of us involved, I'm the only one targeted by the PSC to discipline. I really find it hard to accept why only me. The PSC let free those with outstanding bills of VT600,000 for payment of private mobile phones and also set free laws breakers who damages the hospital fences which had cost Ol fren to pay extra VT350,000 but they discipline me because I have got the money for official used and had transferred the public fund from my programs back to Ol Fren in full amount.
12. Lastly they accused me for misappropriation of public fund. They did not prove me that I misused the fund. They accused me of lending the fund. The PSC and the complainants had under minded my jurisdiction that I am am as the Director I had the power to authorize the transfer, redirection and use of Public Fund for official activities within my directorate. If they refered to the Constitution of Of Fren they had made a wrong judgment according to (Article 8) (Section 8.2), they over look (Article 8), (Section 8.4) (See attachment No. 13). The money used falls within the purpose of the funds. The fund was created for the development of Vila Central Hospital. At the meeting which I attended in Fiji, we have agreed for the first released of global fund to the Vanuatu Government of which part of that fund was allocated to Vila Central Hospital for the upgrading to TB Laboratory Section which is now in use."

This was in essence a legitimate use of funds for an authorized purpose. The trip was successful and there was a clear benefit to the community as claimed by the Claimant. In attachment number 1 under the heading of "money borrowed" there is independent confirmation again as to the purpose of the borrowing. It is shown as "imprest for Fiji tour" and there is an additional comment of Fiji\$9,000 being outstanding. It was agreed at trial that the \$9,000 outstanding was an error and



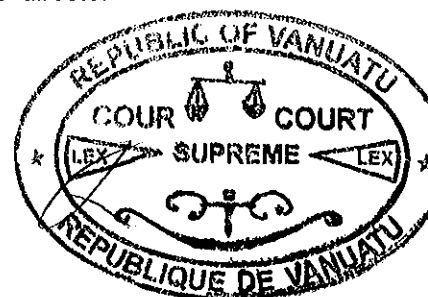
that all funds had been repaid. From this document it is clear that the money was advanced in December 2003 and repaid in March 19th and 22nd 2004. The First and Second Defendants became involved when a complaint was made known to the Claimant by a letter of 10th February 2005. The Claimant was given 21 days to respond. The Claimant's full reply is contained. In his sworn statement it is a competent and comprehensive rejection of the complaints.

The obligation or duty to act as a good employer is set out in section 15 of the Public Service Act. The overriding conditions here one would think are those of section 15 (2) (c) "*promote good and safe working condition*" and (d) encourage the enhancement of the abilities of individual employees, and to particularly abide by the principles set out in section 4.

There are specific provisions for the removal of directors/general and directors. These are contained within section 19B of the Public Service Act. That is set out as follows:-

"19B. Procedure for removal of directors-general and directors

- (1) *The Commission must not remove a director-general or director from office unless the Commission has received a complaint in writing from the Prime Minister, a Minister, the Ombudsman or the Auditor-General:*
 - (a) *alleging that there is a ground or are grounds for his or her removal under subsection 19A(1); and*
 - (b) *setting out the evidence in support of the allegations.*
- (2) *The Commission must:*
 - (a) *appoint one or more persons to investigate the complaint; and*
 - (b) *send the director-general or director a copy of the complaint; and*
 - (c) *give the director-general or director 21 days within which to respond in writing to the allegations.*
- (3) *The Commission may:*
 - (a) *dismiss the complaint if the Commission is satisfied that it is frivolous or vexatious;*
 - (b) *request additional information from the complainant if the complaint does not contain sufficient information.*
- (4) *The Commission must decide whether or not to remove the director-general or the director:*
 - (a) *within 75 days after receiving the complaint; or*



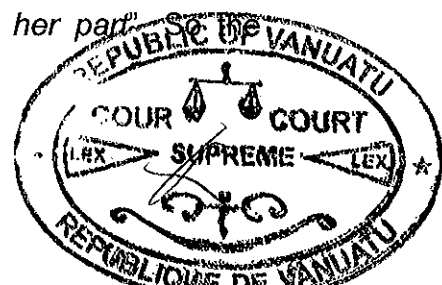
- (b) *If additional information has been requested under paragraph (3)(b) – within 75 days after receiving that additional information.*
- (5) *The person or persons appointed to investigate the complaint must provide a report on the investigation to the Commission. The Commission must take into account the report and any responses made under paragraph (2)(c) in deciding whether to remove a director-general or director.*
- (6) *The Commission must give the director-general or director and complainant written notice of the Commission's decision and the reasons for the decision.*
- (7) *A decision by the Commission to remove a director-general or director takes effect on the day on which the decision is made."*

In addition there are the provisions of chapter 6 of the Public Service Staff Manual.

The procedure to be followed where there is consideration for the removal of directors general and directors is covered by the above section 19B. It requires that the Commission must not remove a person in that category unless the Commission has received a complaint in writing from the Prime Minister, a Minister the Ombudsman or the Attorney General. There must be an allegation that there is a ground or are grounds for his or her removal under subsection 19A (1).

In summary 19A (1) provides the Commission with a discretion to remove a director general or director, (a) because his or her performance is unsatisfactory or (b) because of misconduct on his or her part or (c) because of physical or mental incapacity or (d) if he or she becomes bankrupt.

The applicable provision that the First and Second Defendant rely upon would seem to be 19A (1) (b) "*because of misconduct on his or her part*"



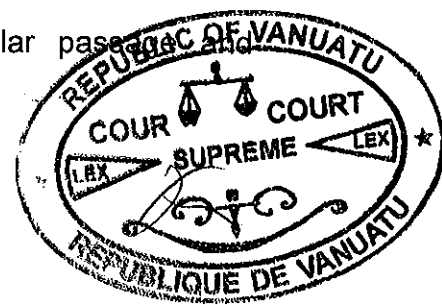
complaint to comply with section 19B must set out the allegation, in this instance an allegation relating to misconduct and set out the evidence in support of the allegation.

As I mentioned at the beginning of this decision the relevance of the letter of the 20th November 2004 now becomes apparent. Does this letter meet the requirements of section 19B (1) (a) and (b). In my view, it clearly does not.

One would think some care would be taken with a letter of this nature. The allegation made in the letter is that the officers referred to in the heading should be under disciplinary action. The letter proceeds further to say that there are following serious allegations relating to the misconduct of health policy and false declaration concerning items donated by the Australia Rotary Club and misappropriation of public fund. The letter then proceeds in my view on the basis that the allegations are established and the letter writer advises that his advice and instructions would be in respect of the appointment of the people nominated to acting these positions. The letter concludes that the request for immediate action to be taken and it looks forward to acknowledging the disciplinary action as soon as possible. This letter clearly makes allegations but proceeds on the basis that they are established and does not set out the evidence in support of the allegations. So clearly the procedure is faulty.

The investigation itself is capable of receiving considerable adverse criticism. It makes a number of findings which the Commission itself was unable to sustain.

The Claimant's response is recorded in full. The particular passage of



described as a finding at 4.2 contains no substance to the allegation as to suspicion of a double amount of approximately VT80,000.

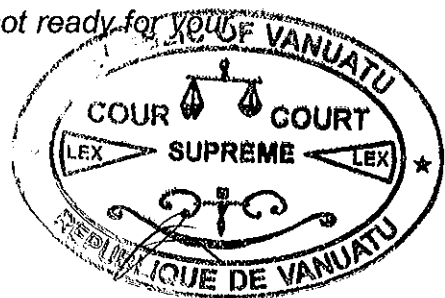
This attitude and the detail refuting the claims of the investigator is summarized in the conclusion under the heading of conclusion at FT5 page 4 –

“Conclusion

In conclusion, I wish to register my grave dissatisfaction on how the former Hon. Minister of Health, Mr Keasipai Song had contemplate on handing the matter to this level without seeking my explanation on purported stories raised by people concern. I think that as an employer, he should have the other side of my story before he made his decision to send you the allegations that has no basis at all and misleading. I believed that their move taken was only to spoil my name and reputation”

That letter reflects a growing concern by the Claimant that no matter what he said that the explanation tendered were not being considered, of particular interest is the ruling by the Public Service Commission in its letter of 20th May. The various allegations have now been reduced to a claim as to:-

- 1) unlawful borrowing contrary to the Constitution Rules;
- 2) the reasons for the refund requiring request on a number of occasions;
and
- 3) a finding that those actions were a misuse, a highlight of this particular case is the finding of paragraph 2 in letter of 10th May 2005 by the investigators *“outlining show that you borrowed VT79,000 long ol fren blong VCH fund because your accountable imprest was not ready for perusal.”*



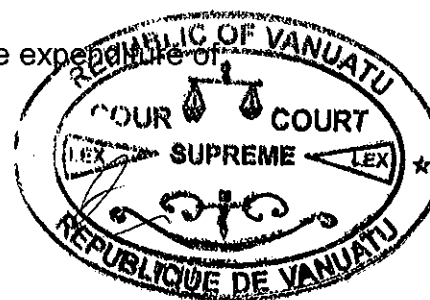
So the position claimed by the Claimant throughout is accepted by the investigators in their report. They then request information from him in respect of paragraph 3 *"I kindly requested you could provide the following information: (1) date in which you applied for the imprest; (2) date which the imprest was paid to you; (3) the date in which you received the imprest cheque."* There are other matters incidental to the inquiry.

This question goes to the crux of the complaint, in my view it is the complaint about delay in making the refund. Surely the thrust of the inquiry should have been who was responsible for the delay in the making of the refund. The complaint emanated from the fund because of delay and one where in the evidence adduced before me has there been any consideration given nor identification of the person responsible or the reasons for the delay.

In these circumstances in my view one considers the obligations of a good employer which surely should be at the very least:-

- (a) to provide a system under the subsection to which I previously referred for directors or director generals to be able to respond to minister's request and have funds supplied. Under the other subsection to which I have referred directors or director generals should be able to exercise their discretion to achieve a particular end result.

In this instance confronted with the request, the unavailability of the funds from the imprest account, the requirement to attend the conference, the expenditure of



funds which was legitimate and the achievement of the purpose in obtaining funds for the health system in Vanuatu. I find that the Commission in reaching its decision clearly was in error.

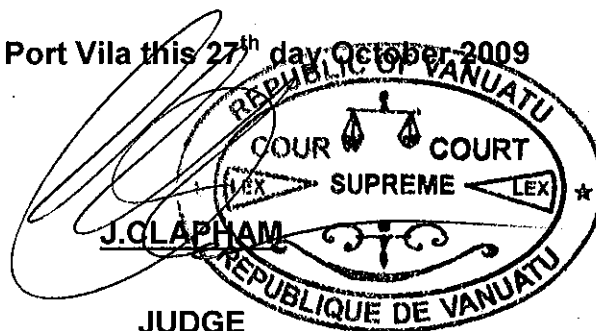
It was an error in respect of its initial complaint and the assumptions contained in the Minister's letter, it was further demonstrated to be an error by its own reports, its own reporters accepted the explanation given as to the borrowing of the VT79,000. The borrowing of the VT79,000 was documented. In my view, there is no evidence before me that establishes that the fund from which the money was borrowed is a public account and finally the overall impression that one gets from the evidence is that there were political matters in the background.

Accordingly I grant the claimants application quashing the decision removing him as Director and demoting him.

Cost follow the event and should be on the basis his costs are paid in full on solicitor client basis to reflect the strength of his case.

I Order if the amount is not agreed it is to be fixed by the master.

DATED at Port Vila this 27th day October 2009



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