

BETWEEN: ABEL HIVO NAKO
Claimant

AND: THE PUBLIC SERVICE COMMISSION
Defendant

15/10/08
JH/FG

Mr Nigel Morrison for the Claimant
Mr Frederick Gilu for the Defendant

REASONS FOR ORDER OF 19 OCTOBER 2008

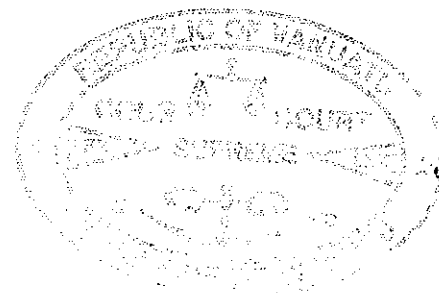
INTRODUCTION

On 19 October 2008, the Court made the following Orders:

1. The claim filed by the Claimant has a cause of action asserted on basis of unjustified and/or unlawful dismissal.
2. The Defendant submissions to the contrary are rejected. The case of Spooner v. Government of Vanuatu; CAC 04 of 2001 are not relevant and are distinguished from this case.
3. Various complaints against the Claimant from 7 August 2003, 17 November 2003, 27 February 2004, 15 June 2004, are outside the 75 day period, thus, statute-barred.
4. The Claimant is entitled to damages to be assessed and determined.
5. Written reasons be provided as soon as practical.

BACKGROUND

The Claimant is a citizen of Vanuatu and at all material times has been and continues to be employed by the Defendant. On or about 24 June 2002, the Claimant was appointed the Director-General of Education by the Defendant.



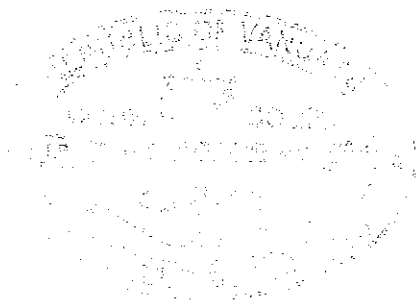
At all material times the Claimant's terms and conditions of employment were pursuant to the Public Service Act 1998 and in accord with the Public Service Staff Manual. By letter dated 25 January 2005 the Defendant terminated the Claimant's employment forthwith.

The Claimant filed a claim against the Defendant dated 18 February 2005. In his claim, the Claimant challenged the purported termination of the Claimant by the Defendant on the basis that it was unlawful and/or unjustified. The Claimant also claimed that as a result of his unlawful/unjustified dismissal, he has suffered loss and damages (as particularised at paragraph 8 of the claim). The Claimant therefore claims:

- (i) a declaration that his termination was unjustified and/or unlawful;
- (ii) re-instatement;
- (iii) damages to be assessed;
- (iv) interest at such rate and such sums for such period as the Court deems fit;
- (v) costs; and
- (vii) such other or further Orders as the Court deems just.

At paragraph 5 of the claim, the Claimant says that his purported termination by the Defendant is unlawful and/or unjustified because:

- (i) Section 19A and 19B of the Public Service Act 1998 specifically provides grounds and procedure for removal of Director Generals and there has been no or no sufficient compliance with that section by the Defendant and particularly Section 19B(2); and/or
- (ii) There has been no or no sufficient compliance by the Defendant with Section 15 of the Public Service Act 1998 which prescribes the Defendant's duty to act as a good employer; and/or
- (iii) Any "failure to carry out lawful instructions given by your Ministers", which is denied is historical not relating to any current minister's and is beyond the 75 days period prescribed in section 19B(4) of the Public Service Act 1998; and/or



2

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- (iv) "Misuse of a Government Vehicle", which is denied, is dealt with in section 29B of the Public Service Act 1998 and the sanctions provided therein do not include summary dismissal."

The Claimant filed a sworn statement on 22 March 2006 in support of his claim.

The Defendant is the Public Service Commission established under the Constitution. Its functions and powers are set out under the Constitution and the Public Service Act of 1998.

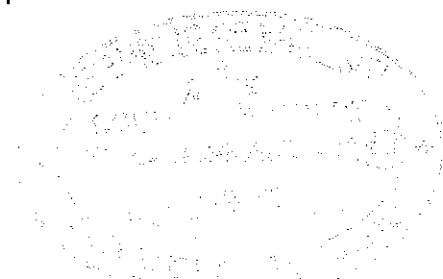
The Defendant filed a statement of Defence on 7 April 2005. The Defendant, among other matters, denies that the termination of the Claimant was unlawful and/or unjustified and responds as follows to paragraph 5 of the claim:

- (i) In response to paragraph (5)(i), the Defendant says subsections 19A & 19B of the Public Service Act No.11 of 1998 (the Act) has been complied with especially subsection 19B(2) of the Act.
- (ii) In response to paragraph 5(i), the Defendant says it has complied with Section 15 of the Act.
- (iii) In response to paragraph 5(iii) of the claim, the Defendant says the Claimant has consistently failed to carry out the lawful instructions given by previous Ministers.
- (iv) In response to paragraph 5(iv) of the claim, the Defendant says the claimant while driving Government vehicle G506, was involved in a motor vehicle accident on or about 15th June 2004 at ... thus breaching subsection 36(f) of the Act.

The Defendant also denies that the Claimant has suffered loss and damages. The Defendant further says that the Claimant is not entitled to any of the relief sought in the claim. The Defendant says the Claimant's claim should be dismissed in its entirety.

The following sworn statements were filed in support of the Defence:

- Sworn statement of Mr Mark Peter Bebe, Secretary General of the Defendant, filed on 2 May 2005.
- Sworn statement of Mr Morris Kaloran filed on 23 April 2007.
- Sworn statement of Mr Emil Mael filed on 26 April 2007.



- Sworn statement of Edward Kalura filed on 26 April 2006.

This claim was listed for hearing for the second time on 13-14 October 2008 as the previous trial dates were vacated. On 13 October 2008, the Defence questioned whether or not the claim has a cause of action. That question was considered as a preliminary question to be determined. The hearing was adjourned and relisted on 19 October 2008.

On 19 October 2008, Mr Nigel Morrison informed the Court that the Claimant will only proceed with the ground contained in paragraph 5(3) and (4) of the claim and the other grounds of the claim are abandoned. The hearing proceeded on that basis.

The Claimant says in paragraph 5(3), (4) of the claim that his purported termination by the Defendant is unlawful and/or unjustified because:

- (iii) Any "failure to carry out lawful instructions given by your Ministers", which is denied is historical not relating to any current minister's and is beyond the 75 days period prescribed in section 19B(4) of the Public Service Act 1998; and/or
- (iv) "Misuse of a Government Vehicle", which is denied, is dealt with in section 29B of the Public Service Act 1998 and the sanctions provided therein do not include summary dismissal."

The facts of this case are not disputed. They are agreed as contained in the outline of the Defendant's submissions. They are set out in a chronological order as follows:

- 24 June 2002 Claimant appointed Director General of the Ministry of the Education
- 7 August 2003 The PSC receives a complain from Honourable Jacques Sese, Minister of Education
- 17 November 2003 The PSC receives complaint from Honourable Raphael Worwor, Minister of Youth Development and Training
- 27 February 2004 The PSC receives complaint from Honourable Morkin Iatika Stephens, Minister of Youth Development and Training



4

- 15 June 2004 The Claimant is involved in a collision in a Government vehicle
- 30 June 2004 The PSC receives complaint from Kalmele Matai, Director of Vanuatu Institute of Education
- 5 July 2004 The PSC receives a complaint from Honourable Nicholas Brown, Minister of Education
- 7 July 2004 A paper is submitted to the PSC in relation to the Claimant
- 9 November 2004 Morris Kaloran and Kanam Wilson are appointed to investigate the complaints made against the Claimant
- 9 December 2004 The PSC informs the Claimant of the allegations made against him. The Claimant was given 21 days to respond to the allegations
- 15 December 2004 The Claimant responded to the allegations made against him
- 18 January 2005 The Investigation report prepared by Morris Kaloran and Kanam Wilson was submitted to The PSC
- 21 January 2005 The Defendant decided to terminate the Claimant's employment
- 25 January 2005 The Claimant's employment was terminated for serious misconduct pursuant to section 29(1) of the Public Service Act [CAP.246].

Both Counsel agree on the fact the requirements of 75 day period under Section 19 B (4) of the Act were not met. However, they differ as to how they affect the claim.

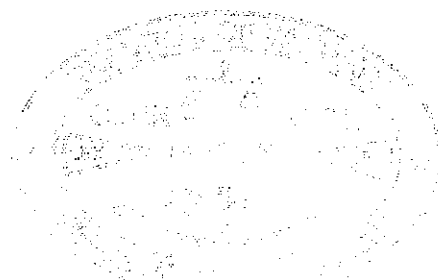
THE LAW AND ITS APPLICATION

Sections 19A; 19B; 29(1); 29B(1) (2) (3) (4) (5) of the Public Service Act are the relevant provisions. They provide as follows:

"19A.(1) The Commission may 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.*

(2) For the purposes of subsection (1), a director general or a directors performance is unsatisfactory if:



- (a) he or she has not undertaken all or any of his or her principal responsibilities as set out in subsection 20(1) or (2) for a significant period of time; or
- (3) For the purposes of subsection (1), an act by a director general or director that would be a serious disciplinary offence under section 36 amounts to serious misconduct.
- (4) A director general or a director cannot be removed unless the procedure for removal set out in section 19B is followed.”
- 19B. (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 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 person 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; and
- (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 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



6

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 the complainant written notice of the Commission's decision and the reason 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."*

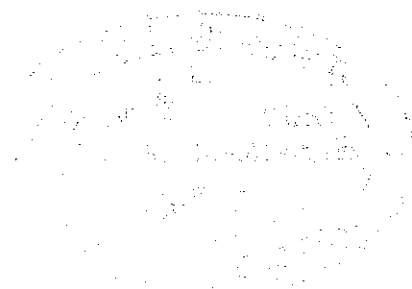
"DISMISSAL FOR CAUSE

29. (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."

"29B.(1) An employee must not use a vehicle belonging to the Government without appropriate authority.

- (2) A person who contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding VT20,000.*
- (3) If the Commission is satisfied that an employee has contravened subsection (1), the Commission may issue the person with a penalty notice.*
- (4) A penalty notice is a notice to the effect that, if the person does not wish to have the matter determined by a Court, he or she must, within 7 days after receiving the notice pay to the Commission the amount specified in the notice which must not exceed VT20,000."*

The Claimant asserts that he was unlawfully dismissed by the Defendant on 25 January 2005. The Claimant pointed to Section 19B(4) of the Act. The facts are not disputed. On December 2004, the Defendant gave him 21 days to respond to the complaints received by the Defendant. The Claimant says he responded to each and all allegations made against the Claimant on 15 December 2004. The most recent allegations made against him was on 5 July 2004. He said it was 140 days old. All allegations made against him were outside 75 days period requirement of Section 19B(4)(a) of the Act. The Claimant says he had never failed to follow the instructions of the different Ministers he had served. It is submitted the non-compliance with the requirements of Section 19B(4)(a) of the Act affects his dismissal. He said these allegations relied upon by the Defendant are statute barred.



He said the Defendant had no complaint nor allegation within the 75 day period when he was dismissed. He finally said that the cause of action in his claim is not the 75 days requirement period under s.19B(4)(a) of the Act as the Defendant cannot rely on any fact asserted when he was dismissed.

He finally said that no defence was raised on the fact that the facts alleged against him which were relied upon by the Defendant to dismiss him on 25 January 2005 fell outside 75 period requirement. The Claimant was dismissed without cause and he suffered loss and damages as a result. He claimed to have been dismissed unlawfully by the Defendant.

The Defendant says the claim has no cause of action. The Defendant submitted the Claimant tends to rely on a procedural issue for a dismissal claim. The Defendant says, the nature of the claim confer a cause of action in judicial review proceedings. Counsel for the Defendant refers the Court to the various cases including **Spooner v. The Government of Vanuatu** (2000) VUSC 81; CC 154 of 1997; **Spooner v. Government of Vanuatu** (2001) VUCA 19 CAC 01 of 2001.

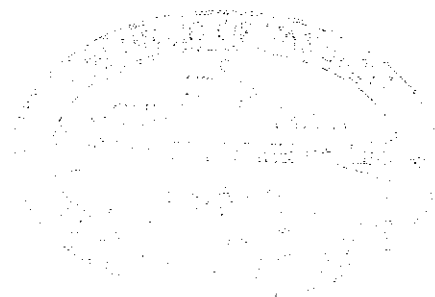
I accept the legal principles applied in these cases. However, they are not applicable in the present case and I reject the submissions made by the Defendant.

In the present case, the cause of action is an action for unlawful dismissal. There was no commission of serious misconduct that has been denied in the claim because there is none.

The Claimant provided answers to the allegations filed in Court. The factual matters that the Defendant sought to put before the Court in defence of the claim are all statute-barred.

The allegation of "Misuse of a Government Vehicle", which is denied by the Claimant, is dealt with in Section 29B of the Public Service Act 1998 and the sanctions provided therein do not include summary dismissal.

The Claimant was dismissed by the Defendant on 25 January 2005 without cause under Section 29(1) of the Public Service Act of 1998.



The Defendant had acted in breach of its statutory duty. The Claimant suffered loss and damages as a result of such a breach. I look at the Public Service Act of 1998. Among other provisions, Section 29(1) provides that 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. Section 29(1A) provides that if the Commission dismisses an employee under subsection (1), the matter is not to be referred to the Board for hearing and determination under Section 37. Section 37 provides for Disciplinary Board to hear and determine offences. Section 38 provides for a right of appeal to a person dealt with under Section 37. The present case is not such a case.

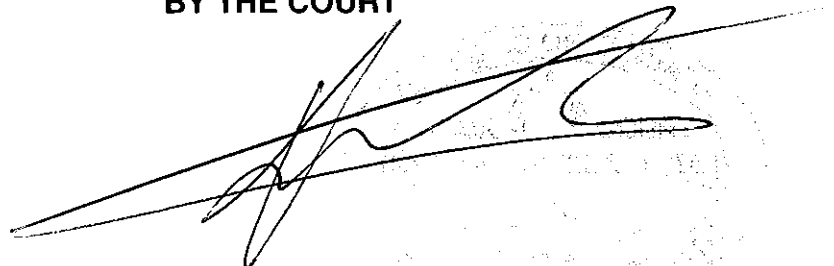
If under Section 29(1A) of the Act, the matter is not to be referred to the Board for hearing and determination under Section 37, the intention must be that the requirements of notice under Section 28 have been complied with failing which, the employee is entitled to claim for his unlawful dismissal and/or unjustified dismissal. This is what the circumstance of this case amounted to.

If the provisions of the Public Service Act do not confer a private cause of action, then, I do not see why, a person, in the situation of the Claimant could not have recourse to the provisions of the Employment Act [CAP.160] as a general law as oppose to the provisions of the Public Service Act which are more specific, if the context otherwise requires in the application of the Public Service Act of 1998 (Section 6 of the Public Service Act of 1998).

These are the reasons of the Orders made on 19 October 2008.

DATED at Port-Vila this 20th day of April 2009

BY THE COURT

A handwritten signature in black ink, appearing to be 'Vincent Lunabek', written over a faint circular stamp or seal.

**Vincent LUNABEK
Chief Justice**