

BETWEEN: ROBINSON TOKA

Applicant

AND: PUBLIC SERVICE COMMISSION

Respondent

Coram: Justice N. R Dawson

Counsel: Mr. Bill Bani for the Applicant
Mr. Frederick Gilu for the Defendant

Date of Hearing: 15 October, 2008

Date of Decision: 5 February 2009

JUDGMENT

The Claim

1. The Applicant has applied for a Quashing Order in respect of the decision of the Public Service Commission ("PSC") known as Decision No. 16-07-06 of 2006 dismissing the Applicant from his employment with the Public Service effective on the 13th June 2006.

Background

2. The Applicant was employed by the PSC as a Lands Officer in the Lands Department in Luganville, Santo. Following complaints about aspects of the Applicant's work performance between 2002 and 2004, the Applicant was served with Employee Disciplinary Forms (EDR's) outlining the allegations against him. On 11th June 2005, the PSC met to consider the allegations after obtaining the Applicant's response to them. A decision was made to issue a warning to the Applicant and also that he should be transferred to Port Vila to work. The PSC issued a direction to the Director General of the Ministry of Lands that he should transfer the Applicant and monitor his performance.

3. On 12th October 2005 a letter written by the PSC to the Applicant ordered him to transfer to Port Vila and gave him three months to make suitable arrangements. The Director General to the Ministry of Lands, on



instruction from the PSC, also wrote to the Applicant on 17th October 2005 informing him of the decision by the PSC to transfer to Port Vila and asked him to comply with this directive. It is alleged by the Applicant that this transfer instruction was subsequently waived by a letter from the Director General dated 23rd November 2005 appointing him to a new post. This letter does not contain any such waiver.

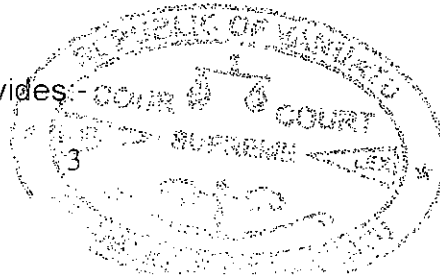
4. In a sworn statement by the Director General of the Ministry of Lands (Russell Nari) it is noted that the letter of 23rd November 2005 was not intended as a waiver of the transfer instruction but due to a restructuring taking place in the Ministry, the intention was to place the Applicant in an acting post within the new organization or structure so that the disciplinary processes already in place could continue. The Director General of the Ministry of Lands wrote to the PSC on the 15th February 2006 noting that despite the notification to the Applicant of the instruction to transfer, the Applicant had made no efforts to contact him or the Ministry to discuss the transfer arrangements, and placed the matter back into the hands of the PSC for consideration and their final decision.
5. A further letter was written by the PSC to the Applicant on 20th February 2006 asking him to justify his non compliance. The Respondent says that the Applicant responded to the PSC in a letter dated 9th January 2006 but that was received by the PSC somewhat later, variously by fax on 22nd February 2006 and by mail on 23rd February 2006. The Respondent says that this was the Applicant's only written communication to the PSC following receipt by the Applicant of the letter dated 12th October 2005.
6. Late in February 2006 the Applicant dropped by the office of the Chairman of the PSC. The Chairman called the Secretary of the PSC to join them. The issues raised in the Applicant's letter of 9th January 2006 were discussed. It is argued by the Respondent that the meeting does not constitute any excuse for the Applicant's non compliance. It is clear that the decision to transfer an employee is a power vested in the PSC only and as such only the PSC can legally vary or revisit an earlier decision.
7. On 1st March 2006 an advice from the Director General of Lands to the PSC was given to the effect that though there had been a response from the Applicant to the seven days notice, there had been no response with regards to the direction to transfer. On 25th April 2006 a further letter was written by the PSC to the Applicant giving him seven days to justify his inability to comply with the transfer directive. There was a further response by the Applicant to this letter but only to indicate that matters raised in this letter of 9th January 2006 had not been addressed. Such claim is denied by the Respondent who further notes that matters contained in the letter of 9th January 2006 were again raised in the letter from the Applicant dated 28th April 2006, in essence a copy of the earlier letter of 9th January 2006. It is further submitted by the Respondent that such letter gave no valid or sufficient reasons for the Applicant's non compliance with the decision to transfer him. It is also submitted by the Respondent that it acted as a good

employer by giving the Applicant the opportunity to give reasons why he did not comply with the directive and to be transferred to Port Vila.

8. It is argued by the Applicant that before the PSC may dismiss an employee the Director General must refer the matter formally to the PSC, providing a fully completed Discipline Report and subsequent "First" and "Second" warning letters as required by the Public Service Staff Manual.
9. It is therefore asserted by the Applicant that the Respondent did not act as a good employer for the purposes of the transfer.
10. It is however submitted by the Respondent that the Director General is not required to issue further Disciplinary Reports before dismissal in this case. The decision to transfer the Applicant to Port Vila was the result of a full disciplinary process against the Applicant on 11th June 2005. It is further argued by the Respondent that a reading of the relevant wording of section 26 (2) of the Act "*forthwith be dismissed ...*" does not suggest that the dismissal of an employee for failing to comply with a directive requires it to be preceded by a further EDR.
11. On 13th June 2006 the Applicant was dismissed from the service of the Respondent. In the claim before the Court the Applicant seeks a Judicial Review of his dismissal and seeks an order quashing the decision of the PSC effective from the 13th June 2006 to dismiss him from the employment of the PSC.

The Law

12. The relevant law is contained in the Public Service Act 1998 ("*the Act*").
13. Section 15 of the Act provides:
 - (1) *It shall be the duty of each member of the Commission to ensure that the Commission shall, in the performance of its functions, responsibilities and duties, be a good employer.*
 - (2) *The Commission shall as a good employer:*
 - (a) *ensure the fair and proper treatment of employees in all aspects of their employment; and*
 - (b) *require the selection of persons for appointments and promotion to be based upon merit; and*
 - (c) *promote good and safe working conditions, and*
 - (d) *encourage the enhancement of the abilities of individual employees; and*
 - (e) *promote and encourage an equal opportunities programme; and*
 - (f) *abide by the principles set out in section 4.*
14. Section 23 (1) of the Act provides:-



"Any appointment to or within the Public Service is to be made by the Commission."

15. Section 26 of the Act provides:-

"(1) The Commission may direct that a director general, director or an employee transfer or take a posting from one position or locality to another within the Public Service but subject to the Commission's obligations to act as a good employer.

(2) Any employee who fails to comply with a direction of the commission requiring him or her to transfer or accept a posting may forthwith be dismissed or demoted with a consequent reduction in remuneration unless, in the opinion of the commission, the employee justifies the non-compliance by adducing some valid and sufficient reason for it."

16. Section 29 (1) provides:

"The commission may dismiss an employee at any time for serious misconduct or inability but subject to its obligation to act as good employer."

Reasons

17. It is necessary to first consider the issue of whether the Applicant's failure to comply with the Respondent's direction to transfer amounts to serious misconduct sufficient to warrant dismissal. The decision of the PSC to direct the transfer of the Applicant from Santo to Port Vila was clearly within the powers given by section 26 (1). Section 26 (2) of the Act gives the PSC power to dismiss an employee who fails to comply with such a direction, unless in the opinion of the PSC, the employee is able to indicate a clear and sufficient reason for non compliance. Equally, section 29 (1) gives the PSC power to dismiss an employee at any time for serious misconduct subject only to its obligation to act as a good employer. It is clear that the PSC was acting within its authority given by section 26 (1) when by their letter dated 12th October 2005, following the service of an Employee Disciplinary Report on the Applicant and considering his response, they conveyed to the Applicant the decision that he transfer from Santo to Port Vila. The Applicant was asked to comply with this directive. The reasons for this directive were clear to the Applicant and at this point the Applicant failed over subsequent months to comply with this directive and could be dismissed by the PSC in terms of section 26 (2), there being no justification by the Applicant for non compliance.

18. Failure to comply with a clear and an ^{un}ambiguous direction can equally be said to amount to serious misconduct on the part of an employee and provide the PSC with legal grounds for dismissal in terms of section 29 (1). The PSC gave the Applicant a clear direction in its letter dated 12th October 2005, that he was to transfer to Port Vila. That direction remained

unchanged and was reinforced by the letter from the PSC to the Applicant dated 20th February, 2006.

19. It is alleged by the Applicant that the letter of 23rd November 2005 constituted a waiver of the earlier PSC decision as to transfer. The evidence adduced by the Director General of the Ministry of Lands and a reading of that letter makes it clear that this was not the intention. It was regarded by all as part of a temporary arrangement to retain all officers on the government payroll until the PSC was able to make decisions as to the permanency or otherwise of their appointments. It was also necessary in the case of the Applicant in order to pursue a disciplinary process already commenced against him. There could not have been any real doubt in the Applicant's mind as to the intent of the letter of 23rd November 2005, given that there was no reference in it to other communications with the PSC. Greater clarity as to the intention of the PSC and a clear indication to the Applicant that the letter did not affect the decision to transfer would have been desirable, but there was nothing in that letter that could reasonably lead the Applicant to infer that the transfer directive had been rescinded.
20. The meetings between the Applicant and Mr. Mangawai then the Acting Director of the Department of Lands in December, 2005 and 12th February, 2006 and various other correspondence served only to create a degree of unnecessary confusion and contributed to the lack of clarity in communication. It was most unwise of Mr. Mangawai to have allowed himself to become involved. He had no authority from the PSC to conduct any negotiations with the Applicant and nor did he advise the PSC of their discussions. Independently of those two discussions and after them, the PSC had written to the Applicant in which it was clear that the direction for him to transfer still stood. Only the PSC itself may revoke or vary an earlier decision of the PSC. This being the case it was misconceived at best for the Applicant to rely on any discussions with the Acting Director of Lands. It can also be said that the Applicant initiated and sought to take advantage of these mis-communications and did not respond immediately to correspondence from the Respondent and he did not seek clarification or provide any excuse for non compliance with the direction given. It is clear that the Applicant did indeed fail to comply with the directions to transfer without justification. The PSC was therefore acting within its power provided by section 26 (1) and (2) in dismissing the Applicant from its employment. The non compliance of the Applicant also provided grounds for dismissal of the Applicant by the PSC for serious misconduct pursuant to section 29 (1).
21. The second issue before the Court is whether in all the circumstances the Respondent has failed to act as a good employer as required by section 26 (1). In respect of the Applicant's assertion that the Respondent did not act as a good employer the Respondent submits that *Bebe v. Prime Minister Civil Case No. 03 of 2002* states that section 15 (2) Public Service Act 1998 is to be considered in determining whether an employer acted as a good employer for the purposes of transfer. The conduct of the PSC


would on the face of it seem to have met all the legislative provisions set out in section 15 (2) and the Applicant has failed to particularize the legislative provision which it considers the Respondent to have breached.

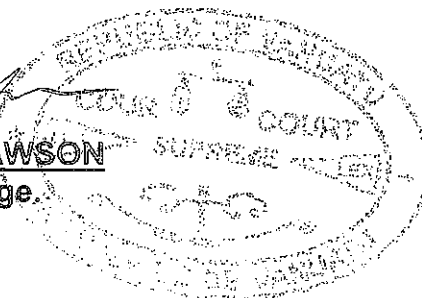
22. It is suggested by the Applicant that the failure of the Respondent to comply with the relevant provisions of the PSC Staff Manual as to further disciplinary procedures in respect of the Applicant's non compliance was a breach of the Respondent's statutory obligation to act as a good employer. The words of section 26 (2) in particular those stating that "*an employee may forthwith be dismissed ...*" are clear. The decision in *Public Service Commission v. Manuake Civil Appeal Case No. 23 of 2003* stated that "*the words of a statute must be construed as to give them a sensible meaning ...*" and also that "*the words used in a statute must be read in their context*".
23. The wording of section 26 (2) contemplates instant dismissal without the need for further disciplinary processes. Also the decision to direct the transfer of the Applicant was a result of a full disciplinary process and the Applicant had ample opportunity to communicate with the Respondent and to justify his non compliance by adducing some valid reasons for non compliance but he did not do so.

Decision

24. The Application for Judicial Review seeking a Quashing Order in respect of the decision of the PSC known as Decision No. 16-07-06 of 2006 is dismissed.
25. Costs are awarded to the Respondent as agreed by the parties or fixed by the Court.

DATED at Port Vila, this 5th day of February, 2009.


N. R. DAWSON
Judge.



The seal of the Supreme Court of Vanuatu is circular and contains the text "SUPREME COURT" and "VANUATU" around the perimeter. In the center, there is a coat of arms featuring a palm tree and a traditional Vanuatu symbol.