

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

Civil Case No.123 of 2006

BETWEEN: **MANASSEH TARI**

Claimant

AND: **PUBLIC SERVICE COMMISSION**

First Defendant

AND: **GOVERNMENT OF THE REPUBLIC
OF VANUATU**

Second Defendant

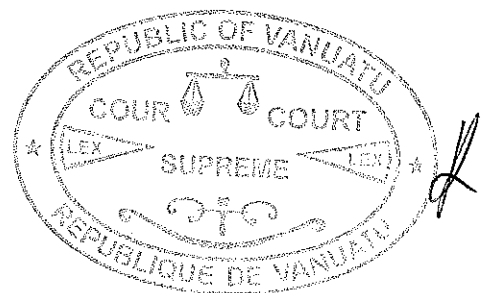
Coram: *Chief Justice Vincent Lunabek*

Counsel: *Kiel Loughman for the Claimant*
Florence Williams for the Defendant

JUDGMENT

Introduction

1. Mr. Tari brings proceedings against the Public Service Commission (PSC) alleging he was unlawfully dismissed or if the dismissal was lawful that the Commission wrongly refused to pay him a severance award.
2. Mr. Tari was at the time of his dismissal the Director General of the Ministry of Infrastructure and Public Utilities. He was dismissed in 2006 and brought these proceedings shortly after.



3. An incident occurred on an Air Vanuatu flight from New Zealand to Vanuatu. The PSC alleged that Mr. Tari behaved extremely badly on that flight and immediately afterwards at the Airport. A Minister of the Government of the Republic of Vanuatu complained about Mr. Tari's conduct to the PSC. An inquiry was instigated by the PSC. After receiving a report of the enquiry the PSC decided to dismiss Mr. Tari for serious misconduct (Section 29(1) Public Service Act CAP 246). The PSC also considered that Mr. Tari's past public service had not been exemplary and no severance allowance should be payable to him.
4. Mr. Tari in his pleadings alleges that his termination was contrary to the provisions of the Public Service Act [CAP 246] and the Employment Act [CAP 160] "and was therefore unlawful". He says that his conduct had not justified dismissal: the process by which the allegations against him were investigated was unfair: and the PSC failed to comply with their obligation as a good employer. Mr. Tari said he had an unblemished record and a severance payment should have been made.
5. The PSC in their defense referred to the investigation report as illustrating serious misconduct which they say justified Mr. Tari's dismissal. They said these events together with his past conduct meant a severance payment under the circumstances was not justified.

Background

6. Mr. Tari was one of few passengers on an Air Vanuatu flight from Auckland, New Zealand to Port-Vila in 2006. The following description of what happen on the flight and after his arrival in Vanuatu comes from the

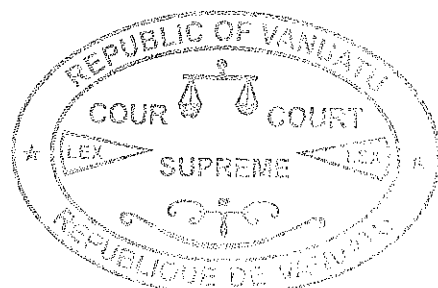


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report of the PSC Investigation Panel appointed to report pursuant to Section 19 (B) (5) of the Public Service Act.

7. Shortly after the flight began Mr. Tari together with another man shifted from their seats at the front of the plane to the rear of the plane. Mr. Tari began drinking red wine. As the flight descended towards the Bauerfield International Airport, Mr. Tari complained that the bar on the Aircraft had been closed by the flight attendant. Mr. Tari was asked by the flight attendant to take his seat and fix his seat belt for landing. He refused to do so. After the plane landed Mr. Tari became angry and abusive. He tried to open the food cart on the plane believing it held further alcohol. He then grabbed the interphone from a female flight attendant and threw the phone onto the main entry door of the plane. Mr. Tari then attempted to light a cigarette. Airport security were called. Mr. Tari was told he could not smoke.

8. Mr. Tari was then escorted from the plane to the VIP lounge at the airport. He then became abusive to security staff. He tore a guard's identification card from around his neck and damaged the guard's shirt. He threatened the security officer with termination of his employment. Mr. Tari then left the airport and as he did so he kicked a Minister of the Republic of Vanuatu's official car. He remonstrated with another man and then punched the man on the head. The man's ear began to bleed. Security officers finally took Mr. Tari, forcibly, to his car and drove him home. It was clear to all who had contact with Mr. Tari that he was drunk. A significant number of members of public at least saw part of Mr. Tari's action.

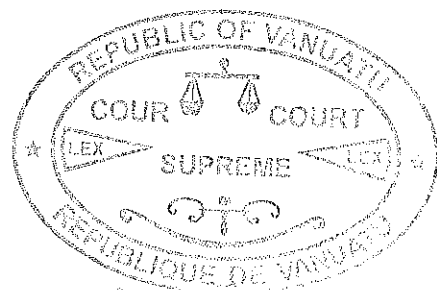


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9. The PSC investigation report identified the fact that: Mr. Tari had probably breached section 125(6) of the Aviation Act when he tried to light the cigarette: probably breached section 107(a) of the Penal Code CAP 135 with respect to the assault: swore and threatened aviation staff: was drunk and disorderly. Mr. Tari in his response to the complaint in a letter to the Investigation Panel said that after changing seats to the rear of the plane he could remember nothing of the incident until sometime after his arrival in Vanuatu. In his letter he said he could therefore neither agree or disagree with the reports of his conduct. He said if they were accurate he was sorry for his actions and asked for another chance.

10. The Investigation Panel concluded that in addition to the several possible breaches of criminal or quasi criminal statutes Mr. Tari would probably breach Section 27 of the Leadership Code Act (2/1998) if he was subsequently convicted of any crime. They also concluded that he may have breached Section 36(1) (i) of the Public Service Act by bringing the Public Service into disrepute by his conduct. This was especially concerning given the Government Department he was responsible for had oversight of civil aviation of Vanuatu. Finally the investigation report noted that members of the public had seen much of Mr. Tari's objectionable conduct. This was relevant in assessing whether he had brought the Public Service into disrepute. The panel noted that most of the factual findings that they had made relating to Mr. Tari's conduct arose from observations by a number of people and were therefore corroborated.

11. The panel suggested that the PSC had two options: dismissal or demotion. It accepted there were grounds for dismissal but favoured demotion with respect to Mr. Tari.



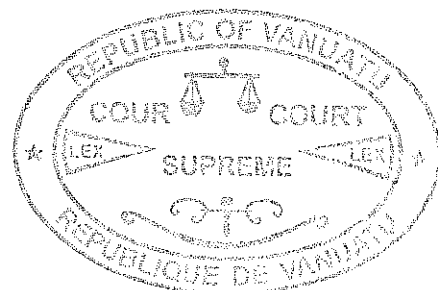
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12. The PSC decided that Mr. Tari should be dismissed. They wrote to him saying that they had decided to dismiss him for serious misconduct. The grounds of the dismissal were (a) he behaved in a violent and disorderly manner under the influence of alcohol, inflicted damage to the Minister's official vehicle and used abusive language; and (b) he attempted to light a cigarette on the plane, he commandeered a bottle of wine from the flight attendant, he attempted to break into the food cart looking for liquor, he disobeyed the direction of the flight attendants, refused to comply with the seat belt sign, and physically assaulted and injured an Air Vanuatu employee. The PSC said given Mr. Tari's past conduct, which it did not specify, no severance payment would be made.

The Law

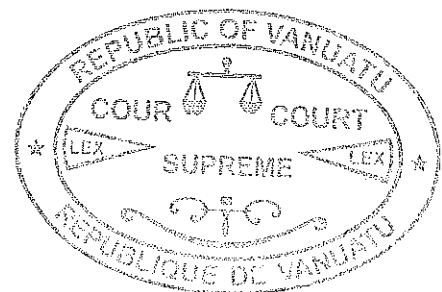
13. There are special rules for the removal of Director Generals in the Public Service. Section 19 (A) allows removal by the PSC for serious misconduct. Serious misconduct includes a serious disciplinary offence under Section 36. As relevant section 36 (1)(e) provides: " an employee commits a disciplinary offence who uses intoxicating liquors or drugs to excess or in such manner as to affect adversely the performance of his/her duties".

14. Section 36 (1)(i) provides an employee also commits a disciplinary offence who " is guilty of any improper conduct in his/her official capacity either inside or outside of working hours or any other improper conduct which is likely to affect adversely the performance of his/her duties or his likely to bring the public service into disrepute."



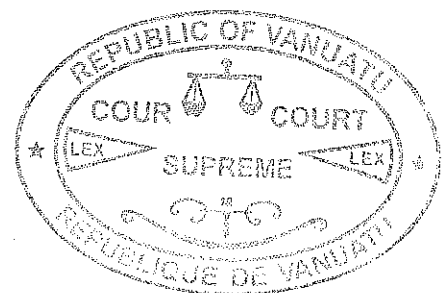
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15. Section 19 sets out the process for the removal of a Director General. First there must be a complaint in writing by a Minister of the Republic of Vanuatu. In this case that condition was fulfilled. A Minister did complain. Then the PSC is to appoint one or more persons to investigate the allegations. (Subsection 2(a)). The PSC appointed two persons to investigate the circumstances of the complaint with respect to Mr. Tari in this case. The copy of the complaint by the Minister is to be sent to the Director who is asked to respond. (Section 19 subsection 2(a)(b) and (c)). This occurred here, Mr. Tari was sent the Minister's complaint and he responded to it.
16. The PSC received the investigation report. The PSC must take that report and the response by the Director General into account when deciding whether to dismiss the Director General (Section 19 (5)). Finally written notice of the decision and the reasons for the decision must be given to the Director General. The decisions and the reasons for dismissal were provided to Mr. Tari.
17. The Employment Act is also relevant. Section 50 authorizes dismissal without notice and without compensation for serious misconduct. Section 50 (3) provides that dismissal for serious misconduct can only take place where the employer cannot in good faith be expected to take any other course. Subsection 4 provides no employer shall dismiss an employee on the grounds of serious misconduct unless he has given the employee an adequate opportunity to answer any charges made against him. Any dismissal in contravention of subsection (4) is to be deemed to be an unjustified dismissal.



The Claimant's case and Discussion

18. The Claimant's first challenge to the PSC's decision relates broadly to a complaint by Mr. Tari that he was not given adequate opportunity to respond to the case against him. Mr. Tari says that contrary to section 50 (4) of the Employment Act he was not given an adequate opportunity to answer the charges made against him because he was not provided with relevant information relating to the allegations and therefore could not adequately answer the charges. In particular Mr. Tari says that he did not receive a copy of the report of the investigative panel.
19. Mr. Tari's evidence was that he was initially provided with the Minister's complaint about his conduct and some of the witness statements obtained by the investigative panel. Since his dismissal he has been provided with a copy of the investigation panel's report and further witness statements. These further witness statements were from both new witnesses and additions to existing witness statements. The report also contained a detailed analysis of how Mr. Tari's conduct might be serious misconduct and other disciplinary options.
20. Mr. Tari said, without dispute by the PSC, that he had not received any of this additional material before he was dismissed. The evidence establishes that a number of witness statements were obtained shortly after the incident by the investigation panel. These statements and the Minister's complaint to the PSC were provided to Mr. Tari on the 25th of April. Three days later on 28th April Mr. Tari responded to these witness statements and the letter of complaint.



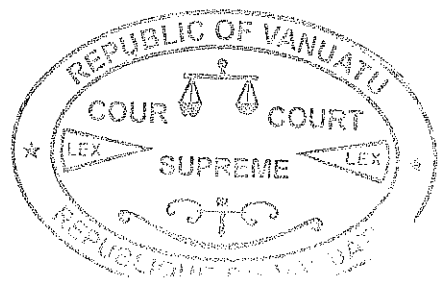
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21. However on the 28th of April a number of witnesses were re-interviewed by the investigative panel and still others in May. Further new witness statements were also obtained as to Mr. Tari's actions. Other witnesses appeared to have been interviewed for the first time in May well after Mr. Tari have been asked to respond to the allegations. None of the statements obtained after 25th April were sent to Mr. Tari for comment.

22. Most of these additional statements were about the incident on the plane and at the Airport. One statement was from the Director of Civil Aviation. He made a number of comments about Mr. Tari's conduct although he did not himself observe Mr. Tari that day. However generally the Director of Civil Aviation was supportive of Mr. Tari's public service and strongly suggested that Mr. Tari could be discipline rather than dismissed.

23. Finally Mr Tari did not receive a copy of that part of the investigation panel's report that related to the Panel's view about penalty should the PSC find he was guilty of serious misconduct. The panel discussed in detail in its report whether Mr. Tari should be demoted and disciplined or dismissed.

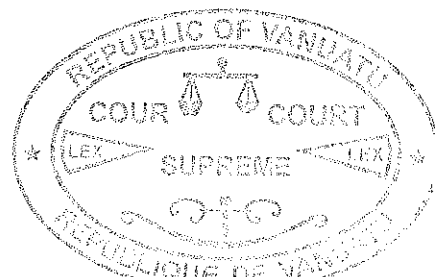
24. Ensuring an employee has full knowledge of any allegations of misconduct against him/her is fundamental to a fair employment relationship. Section 15 (2) of the Public Service Act notes the PSC as a good employer must ensure the fair and proper treatment of employees in all aspects of their employment. An employer's decision regarding alleged employment misconduct can only be fair where an employee knows and can respond to what is said about or what is alleged about their conduct. Here Mr. Tari was not provided with a number of witness statements relating directly to the alleged facts of his misconduct.



25. In addition he did not know about the current analysis of possible penalties the panel raised with the PSC. At one level it could be said that what he didn't know would not have really mattered in this case. Mr. Tari said he could not recall any of the facts and so how would it help his case if he had further witness statements about his actions that day? And the other witness statements and the investigation report (which he did not see) were supportive of a penalty that did not involve Mr. Tari's dismissal. And so it could be argued that even if Mr. Tari had this additional material and he had responded the result was likely to be the same.

26. I consider this is not the correct approach as it leads to the PSC failures of disclosure. It cannot be known what advantage Mr. Tari could have made of the further information that he did not have relating to his employment case. The Public Service Act and the Employment Act are concerned with a vigorous and fair process before an employee can be dismissed. Dismissal can only occur "in good faith" and where "no other course can be expected". It cannot be said that the lack of opportunity given to Mr. Tari to comment on this further information could not possibly have swung the PSC at least toward demotion rather than dismissal.

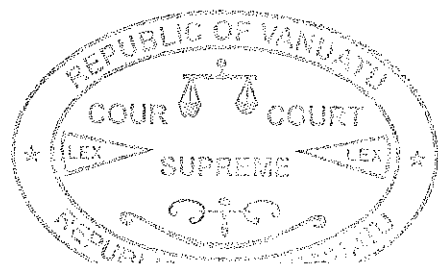
27. I am satisfied therefore that the dismissal was unlawful. Mr. Tari did not have an adequate opportunity to respond to the charges against him. He was not provided with the opportunity to answer the relevant material gathered in relation to the charges and the penalty he might suffer. In those circumstances Section 54 of the Employment Act provides that without an adequate opportunity to answer the charges a dismissal will be "deemed to be an unjustified dismissal". I am satisfied therefore that Mr. Tari's dismissal was unjustified.



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Resolution

28. Mr. Tari was dismissed in 2006 now some 8 years ago. The next section of this Judgment is concerned with how Mr. Tari's situation might now be resolved given my findings.
29. I assume the facts found by the investigation panel as to the complaints about Mr. Tari's actions are accurate (and I note that the essence of the complaints were corroborated by number of witnesses who are present). Mr. Tari is not in a position to deny any of the allegations. In those circumstances there is evidence on which the PSC could have removed Mr. Tari for serious misconduct. As the investigation panel identified however there was another option: that of demotion and other disciplinary measures. My conclusion as to the failure of the PSC to give Mr. Tari notice of all allegations and evidence against him has special relevance to this question. Given Mr. Tari's conduct on this occasion and his past record in the Public Service, what was the correct disciplinary measure?
30. Given my conclusion that Mr. Tari's dismissal was unjustified the PSC may be able to begin the Section 19B process again. Errors made by the PSC regarding inadequate notice of the allegations could be fixed. Mr. Tari's penalty whether demotion or dismissal could be reconsidered.
31. However it is now 8 years since his dismissal, reinstatement may no longer be an option. I suggest that the parties should now negotiate a financial settlement based on this Court's finding. However if they are unable to do so then they may have to return to Court with further evidence regarding Mr. Tari's claim for damages.



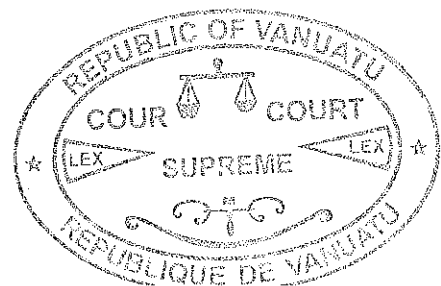
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Was this Serious Misconduct

32. I now turn to other grounds of challenge to Mr. Tari's dismissal. I consider these alternative grounds in case I am wrong in my conclusion as to the failure by the PSC to give Mr. Tari adequate notice of the case against him and wrong in my conclusion that he was therefore unlawfully dismissed.

33. Mr. Tari submitted that given the facts found by the Commission there was no sufficient grounds for his removal as Director General. He said this was not a case where in good faith the PSC could not be expected to take any other course other than dismissal.

34. As I have noted the Director General can be removed for serious misconduct keeping in mind that the PSC has obligations as an employer to act in good faith. I consider there is little doubt that Mr. Tari's proven conduct at the end of Air Vanuatu flight and at Bauerfeild Airport was serious misconduct. High standards of conduct are expected of senior public servants. Mr. Tari was representing the Government of the Republic of Vanuatu on that flight that day. He was intoxicated and abusive to Air Vanuatu staff and to security staff. If his conduct had ended there it could perhaps be argued that dismissal for serious misconduct was not required. However his conduct continued at the airport and deteriorated. His attempt to smoke and obtain more alcohol on the plane was reprehensible. He acted arrogantly toward the flight attendant. He was given every opportunity to behave and apologize at the terminal. But his behaviour worsened. He was threatening, disorderly, and violent. Much of his conduct was seen by members of the public. The findings of the panel illustrate that his conduct was without question serious misconduct.

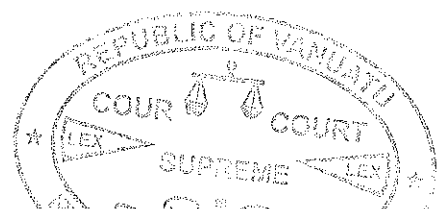


35. Acting in good faith the PSC would have been more than justified in dismissing Mr. Tari for this conduct. This of course does not mean they were obliged to do so. Other factors relating to personal circumstances may have reduced the penalty. I therefore reject this ground of claim.

Admissible Evidence

36. Mr. Tari submitted that the PSC had not established by calling admissible evidence the facts of his conduct of that day at the airport and therefore they did not have evidence of serious misconduct to support their defense. He said that the evidence of his conduct in the investigation panel's report was only a report of what those present at the airport had seen and heard. The panel recorded the evidence and witness statements. The panel's report was produced by the PSC to establish what happen at Bauerfeild Airport. However in these proceedings, the PSC did not call any witnesses who were actually present at Bauerfeild Airport that day. In these proceedings they only called an official from PSC to produce a copy of the report. For the purpose of establishing the truth of what happen at the Bauerfeild Airport that day, the report by PSC was not admissible evidence the claimant submitted. As to the observations of those at the airport contained in the investigation report this was hearsay. Those who had actually observed Mr. Tari's conduct had not been called to give evidence. What they said to others as recorded in the report was not admissible evidence the claimant said.

37. I reject this argument. The present case is quite different to the authority relied upon by counsel for Mr. Tari, **Government of Vanuatu -V- Ephraim Mathias [2006] VUCA 7; CAC 10-2006 (1 June 2006)**. In that case serious allegations were made against Mr. Mathias. Mr. Mathias denied



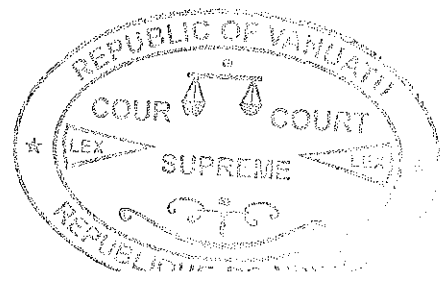
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the allegations but was dismissed. He then issued Supreme Court proceedings alleging he had been unjustifiably dismissed. The fundamental issue at Mr. Mathias trial was whether or not the events which were said to justify his dismissal actually occurred. None of those who had observed the critical events which gave rise to his dismissal gave evidence at trial. The Court of Appeal concluded that those who had given evidence of the misconduct had done so on second or third hand. Their evidence was hearsay and therefore inadmissible. The Appellant therefore could not prove that Mr. Mathias had been guilty of serious misconduct.

38. In Mr. Tari's case his claim of unlawful dismissal was not challenged on the basis of the facts as found by the inquiry panel. Mr. Tari said he could not dispute any of the witness accounts given to the panel. His case before this Court was not a challenge to whether the events occurred at Bauerfield Airport as described in the panel's report but his case is whether the process by the PSC was fair and its conclusions regarding the consequences of Mr. Tari's conduct was properly demotion or dismissal. Whether Mr. Tari had behaved in the way various witnesses before the panel described was not an issue in the claim. In those circumstances the PSC did not have to prove Mr. Tari's behaviour at Bauerfield before this Court. His conduct was not disputed. I reject this ground of challenge.

Severance Pay

39. Finally I consider the issue of severance allowance. Severance pay only arises if, contrary to my conclusion Mr. Tari was legally dismissed from his employment. If Mr. Tari's dismissal was lawful then he challenges the decision by the PSC to refuse to award him any severance pay.



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40. Section 54 of the Employment Act sets out the circumstances under which an employee who is dismissed is entitled to a severance allowance. If the employee qualifies for a severance allowance then section 56 sets out the basis on which allowance is to be calculated.

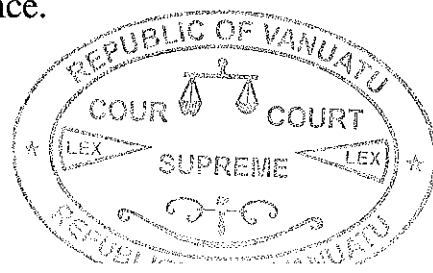
41. Section 55 is concerned with the circumstances where a severance allowance is not payable. Section 55 (2) is a particular relevance here. It provides,

“an employee shall not be entitled to a severance allowance if he is dismissed for serious misconduct as provided in Section 50.”

42. Section 50(1) empowers employers to dismiss an employee without notice and without compensation in lieu of notice for serious misconduct. Such a dismissal may only occur “where the employer cannot in good faith be expected to take any other course”.

43. In this case Mr. Tari was dismissed for serious misconduct. Assuming as I have for this aspect of the judgment that the PSC were entitled to dismiss Mr. Tari for serious misconduct and that they complied with all procedural requirements then the prohibition in section 55 (2) appears absolute. The employee in such a circumstance is not entitled to a severance allowance. Past exemplary conduct by the employee dismissed for serious misconduct will not be relevant as to whether severance pay is payable.

44. Assuming as I have in this part of the judgment there was justified dismissal for serious misconduct then Mr. Tari’s claim for severance allowance must fail as it is prohibited by section 55(2) of the Employment Act. I now make one final observation on the severance allowance.



45. I have concluded Mr. Tari's dismissal did not comply with the Public Service Act and the Employment Act regarding adequate opportunity to respond to the allegations against him. If the parties now accept that to be the position as I have said a negotiated settlement involving damages payment to Mr. Tari is the preferable course. In those circumstances Mr. Tari will be likely to be entitled to negotiate some level of a severance allowance.

Costs

Mr. Tari is entitled to costs against the defendant. He should file a memorandum as to costs within 14 days from the date of this judgment and the defendant has 14 days in which to reply.

DATED in Port Vila this 10th day of December 2014

BY THE COURT


Vincent Lunabek
Chief Justice

