

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

Judicial Review Case No. 24 of 2013

**BETWEEN:** HENSLEY HUDSON GARAE,  
LEN TARIVONDA and  
RUSSEL TAVIRI TAMATA  
Claimants

**AND:** ATTORNEY GENERAL  
First Defendant

**AND:** SANTUS WARI  
Second Defendant

**AND:** PUBLIC SERVICE  
COMMISSION  
Third Defendant

Claimants: Mr. S. C. Hakwa  
Defendants: Mr. F. Gilu

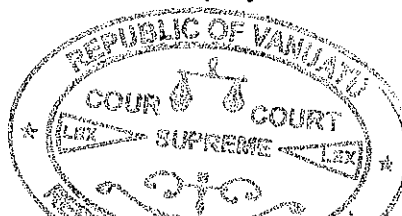
**REASONS FOR DECISION**

1. On 2 May 2014 this Court entered judgment in this case after discussions with both counsels indicated that there was no need for a trial as State counsel was conceding the claim. Accordingly, the court made:

*"a declaration that the decision to suspend the claimants on 30 August 2013 was illegal, null and void ab initio".*

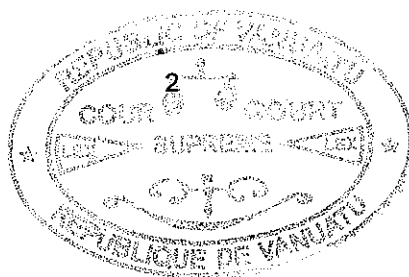
The claimants were also awarded costs to be taxed if not agreed. The court also indicated that it would give fuller reasons later which I now do.

2. This case concerns a joint claim for judicial review by the three named claimants challenging the decision of the Acting Director-General of the Ministry of Health to suspend them without warning from their respective positions and duties in the Ministry of Health on 30 August 2013 (*"the suspension decision"*).
3. The suspension decision was challenged on several grounds including bad faith; breach of relevant Rules and Regulations; ultra vires; and breach of natural justice. The claimants essentially sought the quashing of the suspension decision and their immediate reinstatement to their respective positions in the Ministry of Health.
4. The first-named claimant is a qualified medical doctor with a Masters Degree in Child Health. He had been employed in various positions in the



Ministry of Health since 1988 and was the **Director of Hospitals and Clinical Services** at the time of his suspension. The second and third named claimants although not qualified medical doctors, nevertheless, held post-graduate Masters degrees in Public Health from overseas universities. They held senior positions of **Director of Public Health** and **Director of Planning Policy and Corporate Services**, respectively, in the Ministry of Health.

5. In brief, other than the Director-General of the Ministry of Health, the claimants were the senior-most public servants within the Ministry of Health at the time of their suspension.
6. On 30<sup>th</sup> November 2013, the suspension decision was further extended for an indefinite period by the Acting Director-General in a letter to the claimants.
7. For completeness, mention should also be made of the Council of Ministers decision taken in May 2013 to adopt a new organizational structure for the Ministry of Health which would see the removal of all Director positions in the Ministry based at the head office in Port Vila and the creation and transfer of the Directors' powers and responsibilities to six (6) new Chief Medical Officers (CMO) based at and heading each of the six (6) administrative provinces throughout the country.
8. The wisdom of the restructure of the Ministry of Health is not a matter that directly concerns this Court in this case, other than, as a factor in the Court's consideration of the appropriate remedy to grant to the claimants in the event that they are successful in their claim for judicial review. Plainly, if the claimants' positions no longer exists within the restructured Ministry it would be futile to order their reinstatement, now, to non-existent positions.
9. This claim was originally filed on **11 October 2013** and over the past several months this Court has had extensive and detailed discussions with both counsels with a view to clarifying matters as well as broaching the possibility of resolving the claim without the need for a trial.
10. In particular, the Court had noted that given the completed restructure of the Ministry and the abolishing of the claimants' substantive posts since their suspension, the defendant might consider offering the claimants "*redundancy*" as a less confrontational alternative approach with a view to reaching an amicable and acceptable resolution of the matter. Unfortunately this did not eventuate and the matter was fixed for trial.
11. At a pre-trial hearing in chambers State Counsel indicated that after careful consideration he had come to accept that the requirements of **Section 19B** of the **Public Service Act** [CAP. 246] which applied to the claimants had not been fully complied with.



12. State Counsel also accepted that the singular reason given for each claimant's suspension viz:

*"you are not qualified and not capable of carrying out your duties as specified under the responsibility vested in me"*

did not constitute a valid or sustainable reason for their suspension and or eventual removal.

13. I agree with counsel's concessions and briefly state my reasons.
14. **Sections 19A and 19B of the Public Service Act** were introduced by the **Public Service (Amendment) Act No. 37 of 2000** and establishes a special and exclusive regime for the removal of Director-Generals and Directors in the Public Service. In particular **Section 19A** provides the four (4) disjunctive grounds for removal and **Section 19B**, sets out the procedures which must be followed to lawfully effect the removal. In this latter regard Section 19B (2) and (4) sets out time limits within which certain processes should be undertaken including when a removal decision "*must*" be made by the Public Service Commission.
15. I accept that the Court of Appeal in **PSC v. Nako [2009] VUCA** did not consider the time frames under the section as "*... operating in an absolute way like a time limit under a limitation of actions Act ...*", nevertheless, the Court observed:

*"It does not follow from our conclusion that delays by the Commission in the decision-making process required by s.19B may not have relevance. Bodies exercising statutory power which affect the right of individuals are under an important duty to act fairly in the exercise of those powers: see de Smith's Judicial Review of Administrative Action, 4<sup>th</sup> Ed, a pp. 238-240. The duty to ensure procedural fairness is particularly important. Delay which is unreasonable, or is tainted with a lack of good faith, or which prejudices the ability of a person to make proper answer to a charge against him may, depending on the circumstances of the case, breach the duty to act fairly."*

16. In the present case, the claimants were all suspended on 30 August 2013 for 3 months "*on half salary*". Almost 2 months later and after the claimants had issued court proceedings they were advised of the appointment of a 2-man panel to investigate the allegations against them and each was given 21 days to respond to the allegations. In my view given the absence of any details or particulars in this second letter of how it is alleged the claimants were "*not qualified*" and "*not capable*" of carrying out their duties, the giving of 21 days was an empty gesture and mere purported compliance with the requirements of **Section 19B(2)(c)** of the Act.



17. By letter dated 26 November 2013 the claimants' suspensions "... were extended until further notice", ostensibly, to allow further time for the panel to complete its investigations. By 2 May 2014 (*ie.* 7 months after its appointment) the panel had still not completed its investigations and no report has yet been submitted to the Public Service Commission for its consideration.
18. Nowhere in **Section 19A** is there to be found a ground for the removal of a Director because of an absence of a qualification (which would normally be of concern at the time of appointment not many years after), and, although incapacity to carry out one's duties might be considered under the ground of unsatisfactory performance, subsection (2) requires such non-performance of duties to have extended "... for a significant period of time".
19. Furthermore although not raised in the pleadings or evidence, Section (1) appears to confine the possible complainants where the removal of a Director-General or Director is being sought, to: "... the Prime Minister, a Minister, the Ombudsman or the Auditor-General". (*see:* the observations of the Court of Appeal in **PSC v. Tari** [2008] VUCA 27 in dealing with section 19A).
20. From the foregoing it is abundantly clear that the time limit of: "... 75 days after receiving the complaint ...", within which a removal decision should have been made by the Public Service Commission has long expired, and, I am left with the distinctly unfavourable impression about the bona fides of the claimants' suspensions and with the investigative process being undertaken with a view to the removal of the claimants which has not even been completed after 7 months.
21. No employee should have to suffer or endure 8 months of uncertainty without having his situation finalized or determined even if his suspension is on full pay. The fact that the claimants would have been 3 of the most highly paid employees of the Ministry of Health is further reason for a speedy resolution of their employment status within the Ministry. The citizens of Vanuatu can ill-afford such wastage of limited Government resources and finances.
22. The Court of Appeal further observed in the **Nako case** (op. cit.):

*"In a case where a statutory obligation as to time is so outrageously and flagrantly ignored or defied, ... a decision will have no legal consequence. The decision will be rendered void by the gross failure to respect the time frame directed by the statute."*
23. Although there are no express provisions in Sections 19A and 19B of the Public Service Act for the suspension of a Director-General or Director either pending an inquiry into a complaint or as a disciplinary measure,



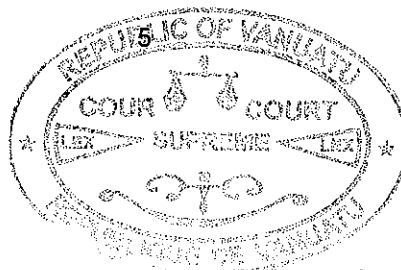
**Section 21** of the **Interpretation Act** provides that any statutory authority with power to appoint "... shall also have power ... to remove, suspend ... any person appointed ..." by it (my underlining). Accordingly a power to suspend a Director-General or Director is vested in the Public Service Commission as the appointing authority.

24. Having said that, I accept that **Section 35 (3)** of the **Public Service Act** gives power to a Director-General to suspend an "employee" (defined as a person employed in the Public Service on a permanent basis which would include the claimants) in accordance with the provisions of the Act and the regulations.
25. In this latter regard **Section 44** provides for the publication of a **Public Service Staff Manual** by the Public Service Commission which according to its Foreword; "... sets out the terms and conditions of employment of permanent officers, temporary salaried employees and daily rated workers".
26. For present purposes it is only necessary to refer to **Chapter 6** entitled: "Managing Staff Discipline", and in particular **Clause 2.2 (d)** which provides:

*"In the case of a Director who has committed a serious disciplinary offence his or her Director-General must immediately suspend the officer on full pay and immediately inform the Secretary of the Commission. In such cases, the matter is to be dealt with in accordance with Sections 19A and 19B of the Public Service Act".*

(my underlining)

27. Plainly the Acting Director-General of the Ministry of Health had the necessary power to suspend the claimants but only upon being satisfied that the Director concerned "... has committed (past tense) a serious disciplinary offence". Such an offence is exemplified in the Manual as: "theft; fraud; misappropriation of public funds; assault; or sexual harassment".
28. There is not the slightest doubt in my mind that the reason(s) given in the claimants' suspension letters falls well short of being: "... a serious disciplinary offence" and, in so far as the suspension of each claimant was "... on half salary", it was in clear breach of **Clause 2.2 (d)** (ibid).
29. I am also mindful that it has been said that: "suspension is merely expulsion pro tanto. Each is penal, and each deprives the (employee) concerned of the enjoyment of his rights of (employment) or office" (per Megarry J. in **John v. Rees** [1970] ch D 345 at 397). In the context of the claimants, even whilst on full pay, given their relatively senior positions within the Ministry of Health, there is also the inevitable "stigma" that any summary suspension brings, without having being told of the specific allegations made against



them and without being given the opportunity of being heard before the decision to suspend was taken.

30. Although I have not ordered the reinstatement of the claimants, it is to be hoped that good sense will prevail in the eventual resolution of this case so as to avoid further litigation and allow the parties to either part with the minimum of acrimony or continue to work together for the betterment of the nation.

DATED at Port Vila, this 7<sup>th</sup> day of May, 2014.

BY THE COURT



**D. V. FATIAKI**  
Judge.

