

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

Civil Case No. 131 of 2011

BETWEEN: JACOB ISAIAH
Claimant

AND: PUBLIC SERVICE COMMISSION
First Defendant

AND: GOVERNMENT OF THE REPUBLIC OF
VANUATU
Second Defendant

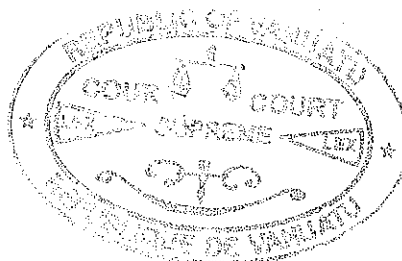
Coram: Justice Fatiaki

Counsel: Ms. C. Thyna for the Claimant
Mr. K. Tari for the Defendant

Date of Decision: 27 June 2014

JUDGMENT

1. In this claim the Claimant seeks damages for wrongful dismissal together with interests and costs.
2. The Claimant Jacob Isaiah was a long term employee in the Public Service from March 1983 to 14 July 2008. He held several senior positions including, in 1991, as Director of the Statistics Office and, finally, in 1999 when the Claimant was transferred to the position of Director of the Civil Status Department in the Ministry of Internal Affairs.
3. For a short time between July 2002 and July 2003 the Claimant was seconded to work for the National Housing Corporation. On resumption of his duties in the Civil Status Department the Claimant was appointed "***Principal Registrar General***" as the **Civil Status (Registration) Act [CAP. 61]** does not provide for a "***Director***" position.
4. By letter dated 24 July, 2004 addressed to the Director General of the Ministry of Finance & Economic Management the claimant reported on "***missing revenues***" in the amount of **VT658,854** that occurred during his predecessor's time as head of the Civil Status Department. Nothing came of the letter.



5. Instead almost a year later on 25 May 2005 the Secretary of the Public Service Commission wrote confidentially to the Director General, Finance under the **Public Finance Economic Management Act No. 6 of 1998** reporting alleged offences in the Department of Civil Status allegedly committed by the claimant. The allegations originated from a disgruntled dismissed former employee and were 2-fold:
- (1) It alleged that the claimant had "*misused*" a number of Local Purchase Orders; and
 - (2) it alleged the claimant improperly "*removed*" office equipment to his private residence;
6. The allegations were initially referred to the Public Prosecutor's office for Police investigation under cover of a letter dated 7 June 2005 but nothing came of the referral.
7. A further year later on 30 June 2006 in an Audit Report on cash collections at the Department of Civil Status submitted by the Auditor-General to the Chairman of Public Service Commission and the Director Generals of Internal Affairs and of Finance as well as the Claimant, it was revealed that between August 2003 to August 2005 cash shortages had occurred in the Civil Status Department. The Report also highlighted instances of non-compliance with Public Financial Regulations. In all there were 8 specific Findings.
8. Finding (1) related to a sum of **VT658,854** cash that had gone missing during the Claimant's predecessor's time and which the claimant had earlier reported in July 2004. In respect of this finding the Report states that:

"... the manner in which the (claimant) handled the report he received from Finance Department clearly reflect his carelessness and lack of sense of duty to minimize and prevent loss of Public money."

9. If I may say so the claimant's earlier-mentioned letter reporting on the "*missing revenue*" that had occurred in his predecessor's time (before August 2003) was entirely consistent with the claimant's obligations under **Section 47(1)** of the **Public Service Act [CAP. 246]** ("*the PS Act*") and, in the circumstances Finding (1) and the actions and behavior of the Public Service Commission thereafter should be viewed in the light of **Section 47(2)** which expressly prohibits "*the person making the allegation*" (*ie* the claimant) from being "*penalized*". The



protection of a "whistle blower" should not be so easily ignored as occurred in the claimant's case and, to his later detriment.

10. Finding (4) related to a missing amount of **VT357,258** cash which had not been deposited by the Claimant and two other officers who were responsible for the cash-takings in the Civil Status Department during the period 13 August 2003 to 19 August 2005. In respect of this Finding the Auditor General recommended that the Director General Internal Affairs and the Public Service Commission should both:

"... institute disciplinary measures against Mr. Jacob Isaiah Director of Civil Status for loss of Public Funds"; (and)

"...for not acted (sic) with care, diligence and honesty while carrying out his official responsibilities, causing loss of public money."

11. As to the first recommendation although not specifically referred to, **Section 34(1)(j)** of the PS Act imposes a positive duty on the claimant to "... use resources and public money in a lawful and proper manner" and the second recommendation is undoubtedly based on **paras (c) and (d) of Section 34(1)** which requires government employees to "behave honestly" and to "act with care and diligence" [see also: Section 36(1)(c)].

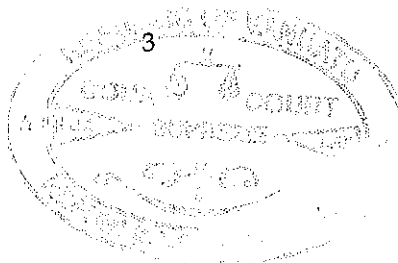
12. Finding (8) relates to non-compliance with Public Financial Regulations and with **Section 34(1)(d) and (f)** of the **PS Act** which provides:

"Every employer, Director General or Senior Administrator (as the case maybe) must in the course of his or her employment in the Public Service:

(d) act with care and diligence;

(f) observe and comply with all applicable law."

13. On or about 2 May 2008 (*ie* 23 months after the Audit Report) the Public Service Commission ("PSC") acting on the Auditor General's recommendations appointed a two-person team to investigate and report on the "allegations" raised in the Auditor General's report.



14. On 15 May 2008 the Secretary of the PSC wrote to the Claimant seeking his response to the Auditor-General's findings against him.
15. By letter dated 04 June, 2008 the claimant responded to the Chairman, PSC in the following terms:

"Dear Sir,

Subject: AUDIT REPORT – 30 November 2006

Thank you for the above report which was handed to me one week after the date of the letter. May I also give my sincere apology for what happened, in particular the missing cash.

Referring to Mrs. Taga case and the missing VT685,854. When I resumed on July 23, 2003 after my term with the National Housing Corporation end, Mrs. Taga went on leave immediately without briefing me. Mrs. Taga applied for retirement on medical ground and PSC granted her. When I learned of the missing revenue I wrote the DG of Finance what measures to take appropriate action to recover the money. Every time we raised the LPOs for Mrs. Taga's severance pay we advised the revenues Section of Dept. of Finance to hold on the cheques for the recovery of money lost under the responsibility of Mrs. Taga when she was acting Director. Revenue Section of the Department Finance only retained the last chq with the amount of VT156,556. [see: **Finding (1)**]

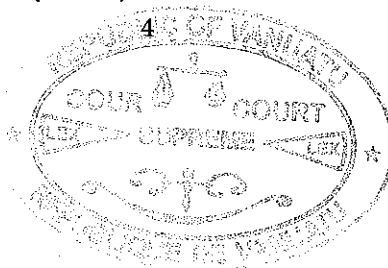
I give my apology for the missing VT357,258 as revealed in the report more than one person were handling the revenues. I have deposited VT25,000 with Finance this morning (04/06/2008) as part of the commitment. Revenues section will bill me later for automatic deduction. [see: **Finding (4)**]

Revenues collections have been strengthened as indicated no vatus lost in revenue report during 2006, 2007 and up to June 2008. The post of Administrative and Finance Officer has been resubmitted for recruitment. Once the officer is recruited the revenues program activities will be further strengthened.

Again, we apologize if we have breach any PSC rules regarding handling of revenues. I have commenced refunding of the lost revenues today (04/06/2008), if you will permit me, I will be willing to repay in full.

Yours sincerely,
Jacob Isaiah
Principal Registrar General."

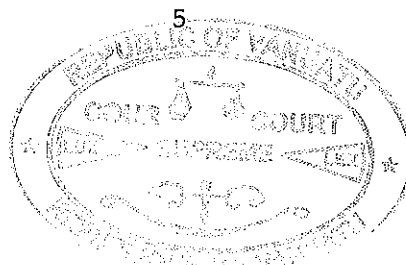
16. The two-person investigation team's report commissioned by the PSC although undated, was considered by the PSC at its meeting on 8 July 2008 (ie. a month after the Claimant's written response). The Commission decided:



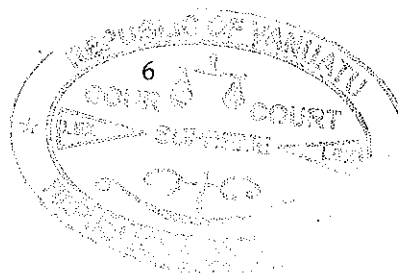
"... that Jacob Isaiah is dismissed for serious misconduct pursuant to Section 29 of the Public Service Act... the Commission further decided that Mr. Jacob is paid a severance payment conducted is calendar days after years of service and also that the department of finance service and also that the department of finance deduct an amount of VT 357, 692 from his final pay."

17. By letter dated 14 July 2008 the decision of the PSC was formally conveyed to the Claimant.
18. Three (3) years later on 7 July 2011 the Claimant issued proceedings in the Supreme Court. In his claim the Claimant alleges breaches of **Section 19** of the **PS Act** [CAP. 246] and **Section 50(3)** of the **Employment Act** [CAP. 160] and a denial of "*natural justice*" by the PSC in invoking Section 29 of the PS Act in dismissing the Claimant.
19. The PSC denies the claim and asserts that the Claimant "*was never appointed by the Public Service Commission to the position of Director General or Director*" and further says "*that the offence of loss of revenue under the responsibility of (the Claimant) amounted to serious misconduct.*"
20. At trial, the Claimant produced three (3) sworn statements and was cross-examined. The defence for its part called two (2) witnesses **Lucie Molgos** and **Laurent Rep** the Acting Principal secretary in the PSC. At the close of the case the Court, at the request of both counsels, ordered written submissions on the issues as agreed in a document dated 16 May 2012 and signed by both counsels as follow:

1. *Whether the Claimant was appointed to the position of "Director" of the Statistics Office?*
2. *Whether the Claimant was appointed to the position of "Director" of the Civil Status Department?*
3. *Whether the Defendant failed to comply with sections 19A and 19B of the Public Service Act [CAP. 246] when dismissing the Claimant?*
4. *Whether the Claimant's actions amounted to "serious misconduct" within the meaning of sections 29 and 36 (1) of the Public Service Act [CAP. 246]?*



5. *Whether the Auditor General's Audit Report was a "complaint" within the meaning of section 19B (1) (a) of the Public Service Act [CAP. 246]?*
 6. *Whether the Claimant's termination of employment was valid?*
 7. *Whether the Defendant failed to comply with section 50(3) of the Employment Act [CAP. 146]?*
 8. *Whether the Claimant is entitled to the damages sought?*
 9. *Whether the Claimant was denied natural justice?"*
21. After the Claimant's counsel had filed written submissions and orally addressed the Court, State counsel properly conceded **Issues (1) and (2)** (above) which relates to the question of whether or not the Claimant was a "*Director*" for the purposes of **Section 19A and 19B** of the PS Act.
 22. I turn then to consider **Issues (3), (4), and (5)**. The Claimant was dismissed under **Section 29** of the **PS Act**: "... for conduct contrary to Section 36 (1) of the Public Service Act and breaches of (undisclosed) Financial Regulations."
 23. **Section 29** of the PS Act provides that an employee may be dismissed "... at any time for serious misconduct or inability but subject to its obligations to act as a good employer" without the involvement of the Disciplinary Board. **Section 29(2)** authorizes a "redundancy payment" where the past performance of the dismissed employee has been "exemplary".
 24. **Section 15 (2)** sets out what the PSC must do "as a good employer" and **Section 4** enumerates "guiding principles" of the Public Service and the PSC including observing the law.
 25. It may be immediately noted that **Section 29** draws a distinction between "serious misconduct" and "inability" and although both are grounds for dismissal, they are in terms, different in nature and kind. Furthermore the exclusion of a Disciplinary Board under **Section 37** from the operation of **Section 39(1)** does not necessarily mean that "disciplinary offences" under **Section 36** are excluded from the Public Service Commission's considerations under **Section 29(1)** [see: in this regard Section 19A (3)].



26. Having said that and given State counsel's earlier mentioned concession, the overarching nature of **Section 19A(4)** makes it clear that in the exercise of its power under **Section 29(1)** the PSC is bound to follow: "...the procedure for removal set out in Section 19B".
27. **Section 19B** of the **Public Service (Amendment) Act No. 37** of 2000 which came into force on 16 October 2000 provides:

"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."*

28. In brief, the procedure outlined in **Section 19B** may be summarized as follows:

Step 1: Public Service Commission receives a "complaint" from the Prime Minister, a Minister, the Ombudsman or the Auditor General;

Step 2: Public Service Commission may summarily dismiss the "complaint" or request additional information from the Complainant;

Step 3: Public Service Commission appoints "one or more persons" to investigate the "complaint" and requires the officer complained against to respond in writing to the allegations in the "complaint" within 21 days;

Step 4: The investigation team provides a report to the Public Service Commission which it must consider along with the officers response in Steps 3 (above) before deciding to remove the officer;

Step 5: Public Service Commission must advise the officer concerned and the complainant of its decision and the reason(s) for it.

29. The PSC is required in terms of **subsection (4)** to make a determination 75 days after receiving the complaint or any requested additional information whichever is later. The "75 day time limit" also applies in my view, to the investigation team report in so far as it must be considered by PSC in deciding to remove the officer concerned. There is however, no requirement that the officer concerned be provided with the investigation report commissioned by the PSC at Step 2 (above).

30. Having said that in Public Service Commission v. Nako [2009] VUCA7 the Court of Appeal considered the 75 day time limit in Section 19B(4) and said:

"In our opinion the purpose of the time limit in both Section 19B(2)(c) and section 19B(4) is to stress the importance of reaching an expeditious conclusion to the investigation and decision on a complaint, not to impose an absolute bar to further considering a complaint or response if a time limit expires".



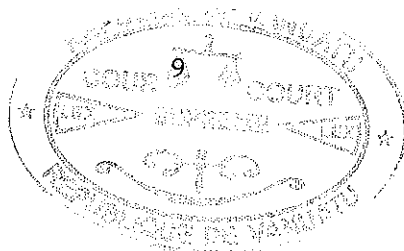
31. If I may say so there is some tension between the "75 day time limit" mentioned in subsection (4) and the absence of any clearly expressed time frame within which the PSC commissioned investigation report under subsection (2)(a) is required to be completed. This is particularly so because the PSC's removal decision is required in terms of subsection (5), "to take into account" the commissioned report.
32. In my view, consistent with the observations of the Court of Appeal in Nako's case, the "75 day time limit" must be subjected to and construed consistent with the requirements of subsection (5).
33. In light of the foregoing I am satisfied from the undisputed sequence of events earlier outlined in paragraphs 13 to 17, that there has been substantial compliance with the requirements of sections 19A and 19B in the dismissal of the claimant.
34. In saying that, I have not overlooked the apparent non-compliance with the "75 day time limit" envisaged by subsection (4), rather, I read the subsection as extending to include the report commissioned under subsection (2) within the "additional information" in paragraph (b).
35. **Issue 3** is accordingly answered in the negative.
36. In Public Service Commission v. Tari [2008] VUCA 27 the Court of Appeal in dealing with Section 19A or 19B relevantly observed:

"A complaint can be received only from nominated persons: ss (1)."

Subsection (1) lists the nominated persons as:

"... the Prime Minister, a Minister, the Ombudsman or the Auditor-General."

37. Although a "complaint" is not defined in the Act, I am satisfied in the present case, that the Auditor-General's report constitutes a "complaint" for the purposes of Section 19B(1). I accept that the Audit Report does not specifically mention Section 19A or 19B but there can be no doubting that the Report contains allegations, findings, supporting evidence and recommendations for "disciplinary measures" to be taken against the claimant. I answer **Issue (5)** in the affirmative.



38. **Issue (4)** deals with the question of “*serious misconduct*”. In this regard although the PS Act nowhere defines “*misconduct*” subsection 3 of section 19A provides a clue when it states:

“.... A serious disciplinary offence under Section 36 amounts to misconduct”.

It may be noted that Section 29 speaks of “*serious misconduct*” whereas section 19A(1)(b) refers to “*misconduct*”. However nothing turns on that difference. In my view in the absence of a definition, what amounts to “*serious misconduct*” in any given case must be determined on the facts and on the evidence in each individual case.

39. Depending on the nature and frequency of the alleged misbehavior and its duration or the amount involved, a single instance may be sufficient to constitute “*serious misconduct*” and justify the removal of the officer concerned or it may be established by a combination of lesser infractions over a period of time.
40. For example in **J. v. Public Service Commission** [2009] VUSC 128 where the claimant a senior land officer had received and kept VT100,000 on a single occasion. **Clapham J.** in upholding the dismissal said:

“I am unable to imagine a circumstance where he would receive funds from a member of the public and not be directed to issue a receipt or return the funds.

and later:

“Clearly this conduct is serious misconduct. The sum involved is well in excess of his monthly salary ... The sum itself is in my view relevant but it is immaterial when one considers whether the receipt of funds by public official in these circumstances is not serious misconduct.”

41. And in **Taris’** case (op.cit) the Court of Appeal observed:

“By itself being absent without leave for one day and the misuse of the government car on that single day would be unlikely to be sufficient. However, in combination with the constant misuse of the government vehicle over three months we are satisfied it was open to both the Commission and the Supreme Court to conclude this was serious misconduct.”



42. State Counsel relying on Section 19A(3) highlights the provisions of Section 36 (1)(f) which provides:

"(1) an employee commits a disciplinary offence who –

(f) improperly uses or removes property, stores, monies.....for the time being in his or her official custody or his or her control or fails to take reasonable care of any such property, stores, monies..."

and counsel submits: *"Theft and misappropriation of funds is considered a disciplinary offence, therefore no prior warning or counselling needs to be given where an officer had committed such an offence"*.

43. Likewise the Court's attention was drawn to Regulation 8.5 of the Financial Regulations which provides:

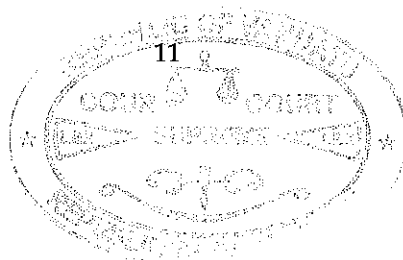
"An officer who is not a designated revenue collector:

(a) must not, under any circumstances, accept government revenue from any person for any reason."

and Regulation 1.3 defines a revenue collector as: *"any person authorized in writing by the Director General of Finance to accept money on behalf of the Government of Vanuatu"*.

44. It is common ground that *(i)* during all relevant times, there was no authorized "revenue collector" in the Civil Status Department; *(ii)* that the claimant as officer in charge had authorized unqualified officers to receipt and collect cash from members of the public; *(iii)* that the claimant received the days takings at the end of each day without conducting any reconciliation of the cash and receipts issued; *(iv)* that the claimant had taken cash home because there was no secure facility for safekeeping of cash in the office; *(v)* that the claimant has not always deposited the cash takings on the same day that it was received; and *(vi)* that during the period between 13 August 2003 to 19 August 2005 there was a cash shortfall of VT354,692 in the claimant's cash receipts and deposits. **However**, there is no conviction of theft or other fraudulent activity on the claimant's part in his handling of the shortfall.

45. It is also undisputed that the Civil Status Department and the Department of Finance were located in the same building ("*5 minutes walk apart*") and daily cash

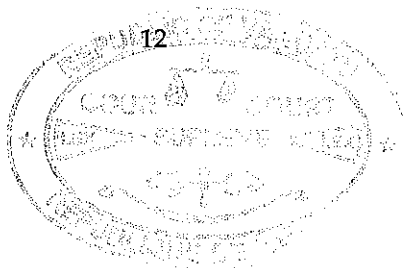


deposits were easily achievable but did not occur. The claimant also had ready access to an official vehicle.

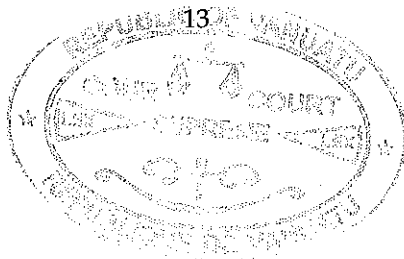
46. In light of the foregoing, State counsel submits "... it is open to the (PSC) to conclude that the claimant's behavior constituted serious misconduct".
47. Claimant's counsel on the other hand refers to:
 - The absence of any disciplinary action or criminal prosecution for theft;
 - The PSC's apparent reliance on the claimant's offer to repay the missing money; and
 - The PSC's decision to pay him a severance payment despite his dismissal for "serious misconduct".

as indicating that the allegations against the claimant did not constitute "serious misconduct". I cannot agree.

48. If I may say so, the existence of Section 29A of the PSC Act which specifically authorizes the dismissal of an employee who is convicted of a criminal offence clearly differentiates a criminal conviction as a ground for dismissal from "serious misconduct" under Section 29.
49. Furthermore, the claimant's offer to repay the missing money whilst part of his written response to the Auditor-General's Report findings and referred to in the claimant's dismissal letter (albeit adversely), was nevertheless based on an interview record of the claimant on 3 June 2008 and was strictly correct at the time in that the claimant's first repayment of VT25,000 commenced on 4 June 2008, and, in my view, did not influence the PSC's determination of "serious misconduct".
50. Lastly, the decision to award the claimant a "severance payment" despite his dismissal for "serious misconduct" is plainly authorized by Section 29(2) and is based on the claimant's "past performance". It has nothing to do with the allegations of "serious misconduct" which was confined to a 2 year period in a career that commenced in 1983 and lasted for over 25 years.
51. I am satisfied that the evidence before the PSC including the Auditor General's Report; the claimant's written response; and the report of the investigation panel commissioned by the PSC provided sufficient evidence and grounds to support the PSC's conclusion of "serious misconduct" against the claimant.



52. **Issue (4)** is answered in the affirmative.
53. I turn next to consider the remaining substantive issue namely **Issue (7)** which refers to **Section 50(3)** of the **Employment Act** [CAP. 146] which provides:
- "Dismissal for serious misconduct may take place only in cases where the employer cannot in good faith be expected to take any other course".*
54. If I may say so this issue raises a different question to whether or not the dismissed officer's conduct constitutes "*serious misconduct*" or whether or not there has been a breach of the removal process mandated by the Section 19B. In this regard counsel for the claimant submits that the PSC failed to exhaust all the avenues suggested by the Audit Report and the Investigation Report it commissioned before issuing the termination letter. Again I cannot agree.
55. I accept that **Section 37(9)(a) to (f)** gives the Disciplinary Board a range of penalties that the Board can impose in a disciplinary matter short of dismissal but that Section has no application to the exercise by the PSC of its power under **Section 29** when it is considering "*serious misconduct*" [see: esp. Subsection (1A)].
56. Having said that I accept that the words of **Section 50(3)** are clear and applies to the present case. State counsel referred to the "*guiding principles*" and "*objectives*" of the PSC as well as its duty to act as a "*good employer*" and counsel forcefully submits "*the higher the position, the higher the standard and expectation*" and presumably the fewer the options available to PSC.
57. Was this a case where a lesser penalty should have been imposed short of dismissal?
58. Claimant's counsel equally forcefully submits that the Audit Report had, amongst others, recommended recovery of the missing VT354,692 from the claimant as he had offered to do in his response and which had commenced before his termination letter. There had been no suspension; no warning letter or reprimand; nor does it appear that the PSC had considered a transfer, demotion or compulsory retirement as a possible less draconian "*course*".
59. In this regard, the Court of Appeal in **Tari's** case (op. cit) in allowing his cross appeal relevantly said:



"We take a different view as to the obligations of the Commission relating to Section 50 (3) of the Employment Act. Section 50 (3) provides as relevant as follows:-

"Dismissal for serious misconduct may take place only in cases where the employer cannot in good faith be expected to take any other course."

No mention was made of ss.(3) by the Commission when it invited Mr. Tari's submissions in response to the disciplinary report and accompanying letter. It did not mention s.50 (3) when it dismissed him. The terms of ss.(3) impose a positive duty on the Commission. It is only permitted to dismiss an employee if it cannot in good faith be expected to take another course. Other "course(s)" may include demotion or transfer to another government department. These are also serious responses to misconduct by an employee. (see *Government of Vanuatu v. Mathias [2006] VUCA7*).

Consistent with this obligation the Commission should invite those whom it has concluded may have been guilty of serious misconduct to address ss.(3). This should be done before a decision on the employees' future is reached. When communicating its decision on dismissal (or otherwise) the Commission will need to identify it has considered s.50 (3) and (if appropriate) concluded (in good faith) that it cannot take any course other than dismissal.

In this case the Commission did not invite Mr. Tari to address ss.(3) nor is there anything to illustrate it turned its mind to this fundamental obligation. Given this positive obligation and the Commission's failure to establish that it had undertaken the analysis demanded by s.50 (3) we conclude the Respondent could not have been lawfully dismissed and his dismissal was therefore unjustified. In reaching this conclusion therefore we agree with the concern of the Supreme Court judge."

and later, in dealing with **Section 29(2)** of the **PS Act** the Court of Appeal observed:

*"For completeness we consider s .29(2) of the Public Service Act and it's relevance to this case. Section 29 (1) entitles the Commission to dismiss an employee for serious misconduct or inability. This is subject to compliance with s.50 (3) of the Employment which governs all employment, public and private (*Government of Vanuatu v. Mathias [2006] VUCA7*). Section 29 (2) permits the Commission to make a redundancy payment where an employee has been dismissed for cause or inability and the employee's past performance has been exemplary. Section 29 (2) is empowering and not mandatory. It gives the Commission a wide discretion whether to make a redundancy payment.*

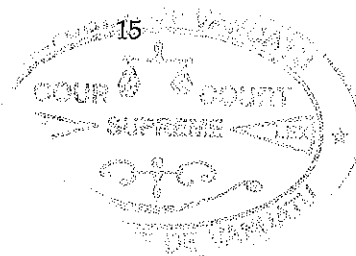
For reasons we have previously given the Commission is not required to give reasons for this decision. However it is obliged to give an employee



who is or may be dismissed for cause an opportunity to identify relevant factors they wish to be taken into account when the Commission decides whether or not a redundancy payment should be made.

In this case no such opportunity was given to Mr. Tari. It should have been. The Commission could then have taken Mr. Tari's submissions into account when they reached a view about a redundancy payment."

60. I am satisfied that similar "omissions" and "failures" by the PSC occurred in regard to the claimant's dismissal. Indeed it appears that the PSC did not consider at all the applicability or significance of **Section 50(3)** and accordingly, the claimant's dismissal must be considered "*unjustified*".
61. Alternatively, if the claimant's dismissal was the only course that the PSC could have adopted "*in good faith*" consistent with its objective "... to provide a service to the Government and Vanuatu people of the highest professional standard" then, in my view, the claimant's dismissal falls foul of **Section 50(4)** of the **Employment Act** which provides:
- "An employer shall be deemed to have waived his right to dismiss an employee for serious misconduct if such action has not been taken within a reasonable time after he has become aware of the serious misconduct."*
62. On the undisputed evidence the PSC received the Auditor-General's report on 30 June 2006 "*... for urgent consideration and appropriate action ...*" and the claimant was terminated by letter dated 14 July 2008 (*ie.* 20 odd months later). Was that "a reasonable time"?
63. In my opinion given the importance of reaching an expeditious decision under Section 19B and given the fact that most of the "20 odd months" was taken up by the PSC trying to find out if other persons or authorities were minded to or were addressing the concerns raised in the Audit Report, such as the Director Generals of Finance and of Internal Affairs and the Public Prosecutor's Office, I am satisfied that the time wasted on such irrelevant enquiries by the PSC is such that its eventual decision dismissing the claimant could not be said to have "*been taken within a reasonable time after it had become aware of the serious misconduct*".
64. I am fortified by the observations of the Court of Appeal in Public Service Commission v. Nako [2009] VUCA where it observed:



"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".

65. Needless to say I do not consider that the investigation report commissioned by the PSC added anything material to the Audit Report and if the claimant was taken up on his offer to repay the missing money in the Auditor General's Report at the rate of VT25,000 per pay day the missing money would have been fully recovered long before proceedings for his removal were commenced in May 2008.
66. The failure of the PSC to act expeditiously on the Auditor General's complaint constitutes in my view, a breach of its "*function*" under **Section 8(3)** and of its duty "*to act as a good employer*" in terms of Section 15(2)(a) of the PS Act.
67. In light of the Court's finding that the claimant's dismissal was "*unjustified*", the claimant is entitled to receive his full severance allowance calculated in accordance with **Section 56** of the **Employment Act** with interest of **5% per annum** calculated from 14 July 2008. The claimant is also awarded standard costs to be taxed if not agreed.
68. Claimant's counsel is directed to prepare a Memorandum of any outstanding payments due to the claimant (including costs) as a result of this judgment to be filed and served on defence counsel by 3 July 2014 for his response by 10 July 2014.
69. This case is adjourned to 11 July 2014 at 8.30 a.m. for final orders.

DATED at Port Vila, this 27th day of June, 2014.

BY THE COURT


D. V. FATIAKI
Judge.