

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

Civil Case No. 14/24 SC/JDR

BETWEEN: ARTHUR CAULTON EDMANLEY
Claimant

AND: PRESIDENT OF THE REPUBLIC OF VANUATU
First Respondent

AND: POLICE SERVICE COMMISSION
Second Respondent

AND: ATTORNEY GENERAL
Third Respondent

Hearing 29th August 2016
Decision Published 1st September 2016
Before: Justice Chetwynd
Counsel: Mr Ngwele for the Claimant
Mr Tabi for the Respondents

Judgment

1. The Claimant was appointed Commissioner of Police on 6th April 2013. He was suspended and then removed from office in late 2014. He filed a claim for Judicial Review on 14th October 2014 and was initially seeking a review of his suspension. An Instrument of Suspension had earlier been Gazetted on 15th September¹. Following the Gazetting of the Instrument of Removal on 22nd December² he sought, and was granted, leave to amend the Claim. His Amended Claim for Judicial was filed on 6th March 2015.

2. The Police Act [Cap 105] (as amended by the Police (Amendment) Act No. 22 of 2010) by section 7F(1) provides that:

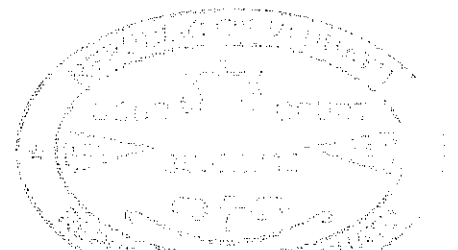
"The President is to terminate the appointment of the Commissioner on the advice of the Commission after consultation with the Minister."

As a result the President is the First Respondent and the Police Service Commission ("the Commission") the Second Respondent. The Third Respondent seems to be included because of the provisions of the Government Proceedings Act No. 9 of 2007.

3. The Instruments of suspension and removal were signed by the President following the advice of the Commission. As regards the suspension, the Commission

¹ See page 29 of the Bundle of Documents

² See page 86 *ibid*



met on 8th September 2014³ and its decision was communicated to the President by letter dated 12th September⁴ and after there had been consultation with the Prime Minister (who is the appropriate Minister under the Police Act)⁵. At a meeting of the Commission on 16th December a decision was made to advise the President to terminate the Claimant's appointment⁶. In oral evidence before the Court the Chairman of the Commission said that there had also been verbal consultations with the Prime Minister.

4. In his Amended Claim the Claimant sought a quashing order in respect of the decision by the Commission to advise the President to terminate the Claimant's appointment. The decision was made at a meeting of the Commission on 16th December 2014. The Amended Claim originally also asked for mandatory orders requiring the Claimant's re-instatement or re-appointment as Commissioner of Police. They were withdrawn by Counsel during closing submissions. Therefore the only claim before the Court relates to the decisions by the Commission to advise the President suspend and then to terminate the Claimant as Commissioner of Police.

5. In my view the, the conclusion reached by counsel and accepted by the Claimant not to pursue re-instatement was the proper and responsible one to have come to following the decisions in *Iauko v. Vanuaroroa* [2007] VUSC 6, *Air Vanuatu Ltd. v. Bong* [2015] VUCA 17, and more recently *Republic of Vanuatu v Letlet* [2016] VUCA 36; Civil Appeal Case 2289 of 2016 (22 July 2016).

6. There is no dispute the Court can review the Commission's decision. Both counsel for the Claimant and counsel for the Defendants pointed out the purpose of any review is not to substitute the decision being challenged with the Court's own but to consider whether the decision was one which could lawfully have been made.

7. The Claimant says that the lawfulness of the decision can be challenged on the grounds of illegality, unreasonableness and procedural defects.

8. In order to understand the Claimant's arguments it is necessary to look at some history of the matter. A detailed history would take far too long to relate and, in any event, has been better told in other cases⁷. What is necessary to appreciate is that there was a period in 2011 and 2012 of apparent fractured and difficult relationships at the head of the police force. When complaints were made about the poor leadership of the then Commissioner there followed allegations of mutiny and arrests of senior officers on charges of mutiny. Indeed, at one point the Claimant had been arrested on the apparent orders of the then Commissioner. There were extensive political efforts made to repair the damage caused by the internal divisions in the force and the Claimant's appointment as first the Acting Commissioner and then as Commissioner followed such efforts. The political expectations were that he would mend the damage done.

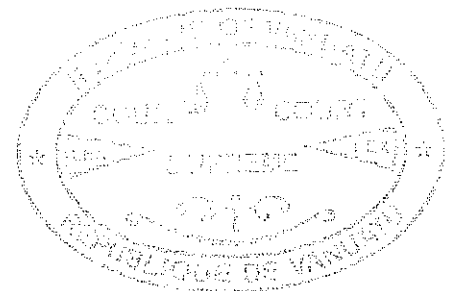
³ See annexure SDA4 to the sworn statement of Sam Dan Avock filed on 21st May 2015

⁴ See annexure SDA6 *ibid*

⁵ See annexure SDA5 *ibid*

⁶ See annexure sda26 *ibid*

⁷ See for example the statement of Claim in Civil Case 74 of 2014 starting at page 10 of the bundle.



9. It should not be thought that this was unwarranted and unlawful political interference. There is provision in the Police Act for political direction and influence. At section 6 the Act reads:

General powers of Commissioner

(1) *The Commissioner shall have the command, superintendence and direction of the Force and, subject to the provisions of this Act and to the general directions of the Minister may –*

(a) *make such appointments, promotions and reductions in rank in respect of all subordinate officers as he may consider fit; and*

(b) *make Force Orders for the general government of members in relation to their enlistment, discharge, training, arms, clothing, equipment and other appointments and particular services as well as their distribution and inspection and other such orders as he may deem expedient for preventing neglect and for promoting the efficiency and discipline of all members.*

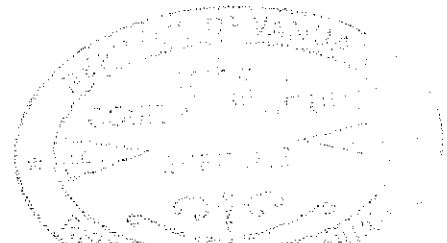
The Commissioner of Police is therefore subject to the “general directions” of the Minister responsible for the Vanuatu Police Force and that Minister is the Prime Minister. The amendments to the Police Act passed in 2010 made the Commission responsible for some of the detail of the running of the Vanuatu Police Force but did not remove the provision relating to Ministerial “general directions”.

10. When he was appointed Commissioner there was apparently a criminal investigation underway about the “2012 Mutiny case” as it is referred to in submissions. There seems to have been a political decision made not to pursue some charges. The former Commissioner had failed in attempts through the Courts to challenge his suspension and removal and perhaps that had a bearing on the political thinking and motivation. In any event, it is clear from the Email of 14th August 2014 from the Prime Minister’s 1st Political Adviser ⁸ that there had been discussions between the Claimant and the Prime Minister. The Prime Minister apparently gave “clear instructions on the way forward to resolve once and for all the issues of alleged division within VPF”. The Chairman of the Police Service Commission had been copied into the Email.

11. In September the Commission met and as set out in the Minutes (they can be seen in annexure SDA4 to the sworn statement referred of Sam Dan Avock referred to earlier) resolved to advise the President to suspend the Claimant. The Chairman of the Commission wrote to the Claimant ⁹ and outlined four matters which concerned the Commission. On 24th September 2014 the Chairman appointed Mr Wari (a member of the Commission) to be Chairman of an investigating team. The terms of reference for the investigating team are missing from the letter at page 27 of the bundle but they can be seen as part of annexure SDA21 to Mr Avock’s sworn statement. As part of the investigation Mr Wari wrote to the Claimant on 18th

⁸ See page 25 of the bundle of documents

⁹ See page 27 *ibid*



November with a comprehensive questionnaire ¹⁰. On 3rd December lawyers on behalf of the Claimant wrote to Mr Wari with a detailed response ¹¹. The letter contained requests for further information. The Chairman of the Commission replied to the lawyer's letter on 15th December saying that the Commission was expecting a response in person from the Commissioner and that it could not respond to the questions raised. The Commission, as indicated in paragraph 3 above, met on 16th December and reached the decision now challenged.

12. In his submissions the Claimant says the decision can be challenged on the grounds of illegality. First he says the Commission was acting *ultra vires*. The contention is that the advice to the President was not within the "*ambit and scope of Subsection 7F(2) of the Police (Amendment) Act 2010*". It is argued that the Commission was, "*on a witch hunt*" on the basis that the allegations were old allegations.

13. The argument about the age of the allegations is rejected. Whilst some of the matters raised by the Commission had origins in 2012 the consequences of those matters were more contemporary. For example there is no doubt the Claimant was involved in the "investigations" into the mutiny case as late as August 2014. It was that involvement which triggered the whole process. The allegations are not dealing with old matters they can better and more accurately be described as queries about ongoing matters of concern.

14. Similarly the argument that the Commission acted *ultra vires* is of no help to the Claimant. The reference to section 7F(2) was explained by counsel as saying the President could only terminate the Claimant's appointment by reference to the matters set out in the section and only after following the procedure described as well. The relevant part of the section reads as follows:

7F. Termination of Appointment of the Commissioner

(1) The President is to terminate the appointment of the Commissioner on the advice of the Commission after consultation with the Minister, if the Commissioner;

(a) is physically or mentally incapacitated; or

(b) is convicted of a criminal offence; or

(c) becomes bankrupt; or

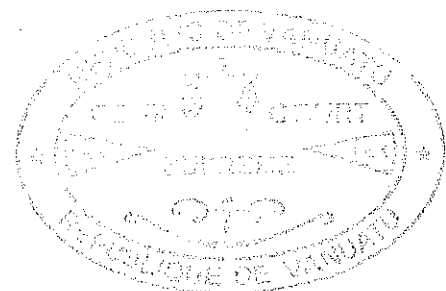
(d) neglects his or her duty as the Commissioner; or

(e) is incompetent to perform the functions of the Commissioner.

(2) The Commission must before advising the President to terminate the appointment of the Commissioner, investigate the grounds for the proposed termination of the Commissioner under subsection (1).

¹⁰ See pages 55 to 63 *ibid*

¹¹ See pages 64 to 81 *ibid*.



(3) If the Commission is satisfied after investigating that the Commissioner has contravene paragraph 1(a), (b),(c) (d) or (e), the Commission must advise the President to terminate the appointment of the Commissioner.

The Defendants' Counsel in reply point to the letter of 15th September and say that the Claimant was being accused of neglect of duty and incompetence. The Defendants also say, and the evidence clearly shows, there was an investigation team appointed. It investigated and reported to the Commission. The Chairman of the Commission gave evidence he consulted with the Prime Minister. The Commission then advised the President. In passing I did enquire of counsel whether there was any guidance on whether the President is to consult the Minister or whether it is the Commission. On a first reading of the section it could mean either. I was told there is no precedent. In fact, in the decision by Spear J in the case involving Mr Bong ¹² (at paragraph 58) His Lordship says;

"58. The way that s.7A (1) is drafted suggests that the President is required to make the appointment in accordance with the advice of the Commission but only after the President also consults with the Minister. That is surely not what was intended by Parliament. It could provide a conflict between the advice of the Commission and the views of the Minister as to the appointment. That would not have been the intention of Parliament who would not wish to place the burden on the President of having to address such a conflict. The intention would surely have been for the Commission to consult with the Minister prior to advising the President on the appointment."

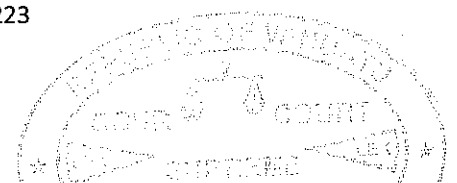
Whilst that was said about the appointment of a Commissioner, there is no good reason why it should not apply to the termination provisions in section 7F(1) as well.

15. The Claimant also alleges that the decision reached was irrational or "Wednesbury unreasonable", the latter being a reference to the English case of *Wednesbury* ¹³. In that case Lord Greene said

"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay

¹² *Bong v President of the Republic of Vanuatu* [2012] VUSC 157; J R Case 14 of 2012 (10 August 2012)

¹³ *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223



within the powers of the authority. Warrington LJ in Short v Poole Corporation [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

In his submissions the Claimant then quotes the later description by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*¹⁴ when he described an unreasonable decision as one which was;

"So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it"

As is clear from Lord Greene's comments above, the test applies to the three limbs as set out in *Wednesbury*. The issues are whether in making the decision the defendant took into account factors that ought not to have been taken into account, or whether the defendant failed to take into account factors that ought to have been taken into account, or was the decision so unreasonable that no reasonable decision maker would ever consider imposing it.

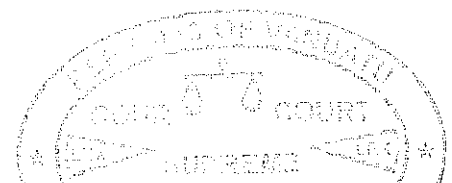
16. The Claimant in his Claim refers to "irrelevant" considerations. The Commission were concerned about the Claimant's neglect of duty and his competence to lead the Vanuatu Police Force. When considering these matters the first ground they looked at was set out in the 15th September letter. The Commission considered the Claimant's actions in dealing with the investigation into the "Mutiny case". As set out in the letter (and as amplified by some 26 questions in the questionnaire of 18th November) the Commission alleged :

"Your recent and current involvement using your position to conduct another investigation to claim against the State on the same mutiny case....which deemed to be a conflict of interest."

It was not unreasonable to conclude the Claimant's determination to continue the criminal investigation was likely to lead to a serious conflict of interest. He had already commenced civil proceedings and was using police resources to further his civil claim. Even he seems to have realised the possibility because he says so in his statement of the case (paragraph 9.4). His involvement, on the evidence, appears to have been quite hands on. This was not an irrelevant consideration.

17. The second ground considered by the Commission in reaching their decision revolved around the arrest of several officers in 2012, their release and their subsequent claim against the republic of Vanuatu for false imprisonment. These

¹⁴ *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6 410, [1984] 3 All ER 935, [1984] 3 WLR 1174, [1985] ICR 14, [1985] AC 374



clearly were not new matters but were part of the Commission's ongoing concerns about financial implications of the Claimant's continued employment and the effectiveness of his ability to re-unite the force. The 15th September letter referred to financial concerns and said:

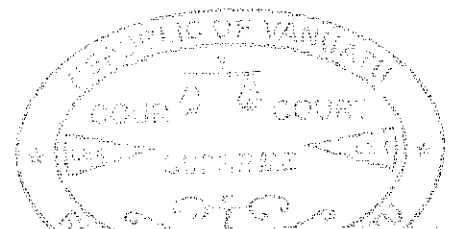
"The consent judgment made against you on the Mutiny civil case No. 242 of 2012 describing you as abusing your powers when you authorised the illegal arrest of 10 Police Officers...."

This is a reference to comments made Spear J in his Reasons for Consent Judgment. His Lordship said:

"There was absolutely no need for Commissioner Caulton to direct the arrest of any of the claimants. At that time, no complaint of criminal conduct had been made against any of the claimants and so there was no legitimate police investigation underway. The arrests and the detention of the claimants were determined actions clearly designed to punish the claimants and without any legitimate justification. Indeed, it can be observed that the claimants were, indeed, only carrying out orders from superior officers when they undertook the arrests on 29 September 2012. As such, it was reprehensible conduct on the part of a Commissioner of Police to attempt to punish police officers in this way and a contumelious abuse of his authority."

The Commission's concerns were further amplified in the questionnaire by 7 questions which also referred to divisions in the force. Rather than address the Commission's concerns the Claimant says the claim was against the Police Commissioner rather than him as an individual, that he "was in no way responsible for ordering the arrests" and generally the judge was wrong. It was entirely proper for the Commission to consider the findings of Justice Spear and whilst the judge's comments were made the year before they were relevant.

18. It was also entirely proper for the Commission to investigate the circumstances which led to the arrest of two officers for forgery, which is the third ground. The questionnaire adds 7 questions about the issue. The Claimant accused two officers of forging his signature to obtain promotions. This was in relation to a letter dated 20th August 2013 recommending two officers for promotion. The Commission considered the letter and, albeit some time later, promoted the two. The Claimant said his signature on the letter was a forgery. Charges were laid against the officer but after some 2 months or so they were discharged for want of prosecution by the Chief Magistrate. It was right for the Commission to look at the circumstances surrounding the laying of the charges. The Commission was entitled to consider the possibility of civil claims being made by the two officers. The Commission was also entitled to examine the all the circumstances surrounding the incident, not least because apparently the Claimant asked the fraud squad to investigate the Commission.



19. The Commission also expressed apprehension about the Claimant's "*Failure to comply with section 10(1) of the Police Act for appointment of Senior Officers and your failure to submit before the Commission disciplinary cases of senior VPF officers*" Those issues were expanded on in the 17 or so questions posed in the questionnaire. These were obviously issues dealing with the Claimant's competency and well within the Commission's remit to investigate.

20. The Claimant says that there procedural improprieties in the way the Commission arrived at its decisions. He complains that not all the allegations were put to him. It is difficult to understand this line of attack because of the detailed letter and the questionnaire sent to him. The grounds for the Commission advising suspension and termination are amply set out in the letter and the questionnaire. The Claimant argues that if not all of the Commission's concerns were put to him he was somehow disadvantaged. I do not understand this argument. The letter of 15th September put 4 allegations to the Claimant. The questionnaire of 18th November raised other concerns. It refers to 9 allegations. The Chairman's letter of 22nd December confirming the advice to the President to terminate the Claimant's appointment refers to the additional "allegations" contained in the questionnaire. It does seem quite obvious that the Commission considered every "allegation" put to the Claimant.

21. Given the evidence before it, it cannot be said that by any stretch of imagination that the Commission's decisions to advise the President to first suspend and then terminate the Claimant's appointment were irrational or unreasonable.

22. The Claimant says through his lawyers that what was put to him were purported statements of fact rather than allegations. That response was, quite frankly, counter-productive. What was put to the Claimant in the correspondence and questionnaire were statements of fact but they were comprehensive statements of fact detailing the concerns of the Investigation team and the Commission. They clearly set out what the Commission expected the Claimant to explain or answer. The way they were put to the Claimant cannot be said to have prevented or hindered his right and ability to respond. In fact he did respond through his lawyers with an eighteen page letter. Whilst it is accepted that his lawyers asked for further information, it has to be said the requests for further information were totally unhelpful and did not advance the Claimant's interests one bit.

23. The Claimant also says in his Statement of Claim that the allegations against him are baseless and without justification. It is not clear whether the Claimant is amplifying his contention about the Wednesbury unreasonableness of the decisions or whether he is asking this Court to substitute its decision for that of the Commission. As was mentioned earlier, in a judicial review the Court is concerned only with the lawfulness of the decision and will not replace the decision challenged with its own.

24. The onus is on the Claimant to show the decisions made by the Commission to advise the President to suspend the Claimant and then later terminate him were not lawful. He has not done so. There is no claim against the Third Defendant and



the Claimant is not challenging His Excellency's decisions to act on the Commission's advice. As he has not established that the advice from the Commission was unlawful in any way the claim must be dismissed. I see no reason to depart from the usual practice so far as costs are concerned and the Claimant will pay the Defendants' costs, such costs to be taxed on a standard basis if not agreed.

DATED at Port Vila this 1st day of September 2016

BY THE COURT


DAVID CHETWYND

Judge

