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

Civil
Case No. 15/196 SC/CIVL

BETWEEN: Christophe Muluane

Claimant

AND: The Republic of Vanuatu

Defendant

Date of Hearing	***Monday 23rd day of October, 2017***
Submissions::	***23rd October and 7th December, 2017.***
Date of Judgment:	***15th December 2017***
Before:	***James Paul Geoghegan***
Appearances:	***Gary Blake for the Claimant***
	Sammy Aron (SLO) for the Defendant

JUDGMENT

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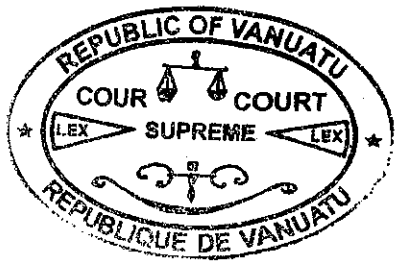
1. In these proceedings Mr Muluane claims damages in the sum of Vt 7, 623, 983 against the State arising from the termination of his employment as the Acting Secretary of the Public Service Commission, that termination having occurred on June 23rd 2015.

2. This hearing has been conducted without cross-examination of the claimant, who died shortly before the hearing was to have taken place, and Mrs Judith Melsul the Secretary of the PSC who did not appear for cross-examination despite being



required to do so. Mr Aron, for the defendant sought an adjournment of the hearing so that Mrs Melsul could attend however I dismissed that application after hearing from counsel. Reasons were given for that decision. Accordingly, the only witness who gave oral evidence at the hearing was Mr Jacques Gideon, the Secretary-General of the PSC.

3. With reference to Mr Muluane's unfortunate death, I made an order immediately prior to the hearing naming Mr Muluane's brother Jean Luc Muluane to be substituted as the Claimant in these proceedings upon Mr Muluane's undertaking that any judgment sum awarded in these proceedings will only be dealt with under and pursuant to any grant of Letters of Administration in respect to his estate.

4. Apart from the evidence of Mr Muluane and Mrs Melsul there were also sworn statements filed by Mr Kanam Wilson Naplaui, the Chairman of the Public Service Commission at the relevant times and Mr Glenn Neowenmal, the Operations Manager at Pacific Petroleum. Neither of those persons were required for cross-examination.

THE EVIDENCE

5. Mr Muluane had commenced employment with the Public Service Commission on April 19th 2010 and had acted in various roles before being appointed as the Acting Secretary of the Commission on April 27th 2015.

6. The termination of Mr Muluane's employment revolved around an incident which occurred on May 8th 2015. At that time Mr Muluane had been working with the Chairman of the Public Service Commission (*"PSC"*) on a project designed to reduce the State's expenditure on fuel to operate its fleet of vehicles. The project involved the possibility of the Government entering into an agreement with Pacific Petroleum where the State agreed to exclusive supply of all of its fuel from Pacific Petroleum in return for Pacific Petroleum reducing the cost of that fuel.

7. A meeting in respect of the project was held on May 7th 2015 and was attended by the Chairman of the PSC, Mr Muluane and various other individuals including the Operations Manager of Pacific Petroleum, Mr Glenn Naowenmal. At that meeting it was agreed that there would be an additional meeting between Mr Muluane and Mr Naowenmal on the evening of May 8th 2015.

8. On May 8th, Mr Muluane completed the project proposal and made arrangements to meet with Mr Naowenmal that evening. As he would need to use a Government vehicle he obtained the approval of the Chairman for the use of the vehicle. In addition, Mr Muluane sent an e-mail to Nettie Dick, the Acting Manager of the Compliance Service Unit ("CSU") stating:-

> *"As agreed on the phone, I will use G980 during the week-end for official duties outside working hours. The car will always station at VIPAM compound until it will come back to PS HQ on Monday before 8:30 am.*
>
> *Vehicle will be used for the follow up of yesterday's discussions/consultations as well as to meet with some other interesting group with the idea of supporting us financial for next year fiscal 2016.*
>
> *By copy of this email, Mr Chairman is informed and aware of the negotiations that will take place this week-end. I will ascertain that fuel will be properly refilled at my expense."*

9. That email was sent at 3:49 pm on Friday May 8th. At 3:54 pm Mrs Dick replied with an email stating:-

> *"Noted Acting Secretary,*
> *I have advised Jason but we are still waiting for the admin officers to get the flash drives ready and distribute to commission members before the vehicle can come down.*

I am taking off now but Jean Paul please get keys from Jason and take vehicle to VIPAM once they have distributed the flash drives.

Hear more on your consultations next week".

10. The emails were copied to the Chairman.

11. At approximately 5:30 pm on May 8th picked up Mr Naowenmal and transported him to Mr Neowenmal's home at Narpow Point with they continued discussions regarding the project until approximately 9 pm when Mr Muluane returned Mr Naowenmal to his office at Pacific Petroleum. Mr Naowenmal then asked Mr Muluane whether he could drive him to Tagabe so that Mr Naowenmal could see his children.

12. As Mr Naowenmal had arranged to fill the Government vehicle with fuel and as he was a significant figure in the proposed project, Mr Muluane agreed to take him to Tagabe. He accordingly drove him there where he was then asked by Mr Naowenmal to wait for him.

13. After approximately 10 minutes Mr Naowenmal came running towards the vehicle with a number of people chasing him. Mr Naowenmal leapt into the passenger side of the vehicle and asked Mr Muluane to drive off. As the car was leaving, the rear windscreen was shattered by a can of beer thrown by one of the pursuing crowd.

14. As it turned out, Mr Naowenmal was seeing his son and the mother of his son when the mother's husband arrived and was clearly unhappy with what he saw. As a result, Mr Naowenmal had to leave quickly for his own safety. It is clear from the evidence that Mr Muluane could have had no inkling as to the fact that there was prospective trouble and accordingly the damage which occurred to the vehicle was completely beyond his control.

15. On May 11th Mr Muluane emailed the Chairman of the PSC advising him about the accident and that he would provide the Commission with a brief report on the matter that following day.

16. On May 12th he duly provided a written report to the Chairman and Commissioner which unfortunately did not accurately depict what had occurred. In his report he advised the PSC that the damage had been caused by a group of drunken youths at the Teouma bridge. In his letter he stated:-

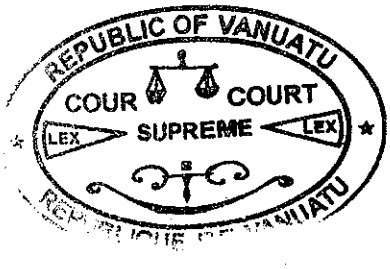
> *"At 9 pm. When we finished with everything, I left managers home to return to Independence Park. On my way near Teouma river (see side) I was stopped by a group of drunken youth. I didn't want to stop, as I cruise passed; I could see from the retro they were running behind me – they shouted, swearer and started to through flying objects. I noticed a can of beers still full, flew through the rear glass and all over sudden I saw the glasses fallen apart. I just continued running with more gaze put on the speed as didn't want to put my life in danger as well as the security of the vehicle."(sic).*

17. On May 25th Mr Naowenmal sent an email to the Chairman of the PSC setting out what had actually happened on the evening of May 8th and how the vehicle had been damaged. In that letter he stated:-

> *"I understand that Mr Muluane made a different report from the one above because he wanted to protect me. I will apologize to Mr Muluane on a traditional way but the facts above are correct and only the truth. Mr Muluane must not be blamed for this incident as he is 100% innocent and should never be involved in this problem".(sic)*

18. On May 26th, the Acting Secretary of the PSC, Mrs Judith Melsul issued a disciplinary report against Mr Muluane. It alleged the following:-

    a) *"Misuse of a Government Vehicle without appropriate authorization resulting in the accident of G Vehicle 980. This alleged offence is said to*



be contrary to section 36 (1) (c) (f) and section (29 B)(1)(2)(5) of the Public Service Act 1998."

b) *"Abuse of power as the Acting Secretary at that point of time by not filling up appropriate form to use the Government Vehicle G980. This alleged offence is said to be contrary to section 36 (1) (b)(c) of the Public Service Act 1998".*

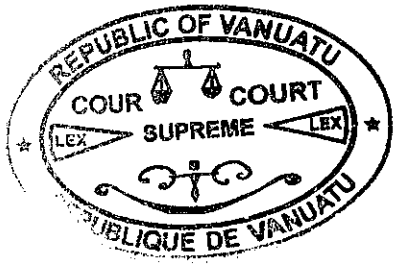
c) *"Dishonesty with first report of accident to G Vehicle 980 before the Public Service Commission. This alleged offence is said to be contrary to section 36 (1)(b) of the Public Service Act."*

19. Mr Muluane responded to the disciplinary report by advising that he had obtained appropriate authorization to use the vehicle, that the vehicle was being used at all times for official use, that the damage to the vehicle was beyond his control and that the cost of repairs would be met by he and Mr Naowenmal and that he did not abuse his power as the Acting Secretary by not filling out the appropriate form.

20. The PSC met in respect of the disciplinary report on June 16th 2015. Mr Muluane attended that meeting and he again reiterated that his incorrect initial report was motivated by the fact that Mr Naowenmal was a very significant figure in terms of the proposed fuel project and that Mr Muluane wished to preserve the relationship between the State and Mr Naowenmal and accordingly wished to avoid any reference to him.

21. Prior to its meeting on June 16th the Commission had been provided with a submission paper in respect of the incident, that submission paper having been signed by Mrs Melsul. The report runs to some 13 pages and covers the facts behind each allegation. At page 12 of the report Mrs Melsul referred to the various options open to the Commission pursuant to Chapter 6 of the Public Service Staff Manual, those options being:-

"(I) *Dismiss the matter; or*



(II) *Immediately dismiss the officer with cause [Public Service Act, Section 29]; or*

(III) *Refer the matter to the Police for criminal charges to be laid;*

(IV) *Refer the matter to Public Service Disciplinary Board."*

22. At the conclusion of the report, Mrs Melsul wrote the following:-

"RECOMMENDATION

Considering all the documentation submitted by the office of the Public Service Commission and the response from the officer himself, it is recommended that the Commission considered the following options:-

1) *Should the Commission is of the view that the conduct of Mr Muluane Christophe amounted to serious misconduct when misusing the said vehicle resulted in the damage of rear gear: the Commission is to dismiss Mr Muluane Christophe pursuant to section 29 of the Public Service Act 1998; and/or*

2) *Ban Mr Muluane Christophe from driving any Government Vehicle for a period of 12 months if satisfied that his conduct does not amount to serious misconduct which should not warrant a direct dismissal; and/or*

3) *Deduct Vt 10,000 (by lump sum) in his salary pursuant to section 29 B of the Public Service (Amendment) Act No. 1 of 2011; and/or*

4) *Give a final warning to Mr Muluane in relation to misuse of Government Vehicle after official hours; and/or*

5) *Take any other measures as deemed appropriate".*

23. Advice of Mr Muluane's termination was communicated to him by way of a letter dated June 23rd 2015. The letter advised Mr Muluane that his employment was being terminated on the basis of his serious misconduct. The relevant part of the letter states as follows:-

"1. *Firstly, there is evidence before the Commission that you did actually use PSC Administrative vehicle G 980 for your personal interest resulting in the damage of rear glass on the night of 8/05/2015 (around 11 pm) towards early hours of 09/05/2015 (around 12 am onwards) at Tagabe bridge. Note that this vehicle was under your custody at that particular time: hence you should have taken care of it but not using it to satisfy your personal interest.*

2. *Secondly, there is evidence before Commission that you abuse your power as the then Acting Secretary at that point of time to use the said vehicle for your private gain and you did not fill up the PSC FORM 9-1 for authorization to use Government vehicle after official hours.*

3. *Finally, there is evidence that you lied to the Commission (as your employer) when submitting a false report concerning the accident involving G 980. You submitted the report on Tuesday 12th 2015, and mentioned that the damage to rear glass of G980 actually took place in Teouma, but in fact it was not real. The incident actually occurred at Tagabe bridge according to finding of an investigation team.*

The Commission was really disappointed over your conduct because you were the then Acting Secretary of PSC at that particular time and should uphold Public Service Rules in relation to management of Public Service Assets. Not to forget that as custodians of PSC Rule, you should have shown example to other public service servants in regards to better management of Public Service assets.

The Commission then considers the above conducts as improper conduct which can bring the Public Service into disrepute. Hence those conduct amount to serious misconduct resulted in your dismissal from service".

24. The letter of termination also referred to the fact that Mr Muluane's past service had been exemplary and therefore the decision was made to terminate him with benefits

and that his entitlement would accordingly consist of a severance payment of two week's pay per year of service plus any standard payments that the Government owed to him at the date of termination of service.

25. The letter of termination did not refer to section 50 (3) of the Employment Act which provides that:-

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

26. Although the letter of termination referred to its disappointment over Mr Muluane's conduct and the fact that Mr Muluane should have shown an example to other public servants it did not provide any reasons as to why the Commission could not, in good faith, have been expected to take any other cause.

THE ISSUES

27. The issues as agreed between counsel for determination by the Court in these proceedings are the following:-

a) Whether the allegations proven amount to *"serious misconduct"*?

b) Whether the termination of Mr Muluane's employment was made in accordance with the employer's legal obligations?

c) Whether the payment made on Mr Muluane on his termination of employment was in accordance with the employer's legal obligations and Mr Muluane's legal entitlements?

d) Whether Mr Muluane is entitled to damages (and if so how much)?

28. Section 36 (1) of the Public Service Act makes provision for disciplinary offences and provides as follows:-

> ***"36. Disciplinary matters***

(1) An employee commits a disciplinary offence who –

(a) by any wilful act or omission fails to comply with the requirements of this Act or of any order hereunder or of any official instrument made under the authority of the Commission or of the director-general of the ministry in which the employee is employed;

(b) in the course of his or her duties disobeys, disregards or makes wilful default in carrying out any lawful order or instruction given by any person having authority to give the order or instruction or by word or conduct displays insubordination;

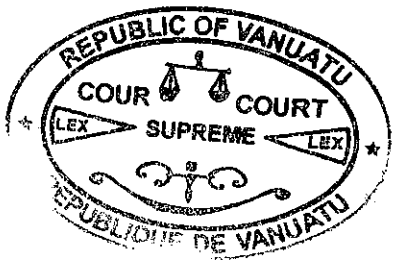
(c) is negligent, careless, indolent, inefficient, or incompetent in the discharge of his or her duties;

(d) behaves in a manner calculated to cause unreasonable distress to other employees or to affect adversely the performance of their duties;

(e) uses intoxicating liquors or drugs (including for the avoidance of doubt, kava) to excess or in such manner as to affect adversely the performance of his or her duties;

(f) improperly uses or removes property, stores, monies, stamps, securities or negotiable instruments for the time being in his or her official custody or under his or her control, or fails to take reasonable care of any such property, stores, monies, stamps, securities or negotiable instruments;

(g) otherwise than in the proper discharge of his or her duties directly or indirectly discloses or for private purposes uses any information acquired by him or her either in the course of his or her duties or in his capacity as an employee;



(h) absents himself or herself from his or her office or from the official duties during hours of duty without leave or valid excuse, or is habitually irregular in the time of his or her arrival or departure from his or her place of employment;

(i) is guilty of any improper conduct in his or her official capacity, either inside or outside of working hours, or of any other improper conduct which is likely to affect adversely the performance of his or her duties or is likely to bring the Public Service into disrepute;

(j) is guilty of any other offence prescribed from time to time by regulations made under this Act."

29. Section 29 (b) of the Public Service Act makes specific provision for the unauthorized use of motor vehicles and provides as follows:-

"29 (b) On the spot fines for unauthorized use of motor vehicles:-

(1) An employee must not use a vehicle belonging to the Government without appropriate authority.

(2) An employee who has found to have used a Government Vehicle without appropriate authority is to have Vt 10,000 deducted (by lump sum) from his/her remuneration.

(3) An employee's remuneration may be reimbursed if he/she conferred a proof to the satisfaction of the Commission that he/she has had the appropriate authority to use the Government Vehicle.

(4) A person who is found to have used a Government Vehicle without appropriate authority on three occasions, is deemed to have committed a serious misconduct and may be dismissed by the Commission under section 29.

(5) The use of a vehicle belonging to the Government without appropriate authority by an employee is taken to be a disciplinary offence for the purposes of the Act and the regulations. Nothing in this section is to be

construed so as to prevent disciplinary action being taken against the employee in accordance with Part 6."

30. What is significant about those provisions is that the legislation contemplates three occasions of unauthorized use of a vehicle before such use could be considered to be serious misconduct.

31. The legislation does not define *"appropriate authority"*.

32. For the Commission, Mr Jacques Gideon the acting Secretary of the Public Service Commission deposed that pursuant to clause 4.2 (b) of Chapter 9 of the Public Service Manual an officer (including a Director and Director General) who wishes to use a Government vehicle for official duties outside usual working hours is to apply through his or her Director and Director General, to the Secretary of the Commission, for permission using the prescribed form *"use of government vehicle during non-official hours"*. That form is known as PSC Form 9-1.

33. Mr Gideon deposed that the claimant had not applied to use the Government vehicle in accordance with the provisions of the manual and indeed there was no dispute about that. Mr Muluane acknowledges not having done so.

34. Under cross examination by Mr Blake, Mr Gideon confirmed his view that the only possible way of obtaining proper legal authority was through the completion of Form 9-1. Mr Gideon says he was unaware of any circumstances where that form had not been used and that he himself had never used a government vehicle after hours. If he wished to do so he would apply to the Chairman of the PSC. When asked by Mr Blake whether he was aware that Mr Muluane had sought approval from the Chairman in 2015, Mr Gideon said that he was unaware of that. When asked whether that would have been sufficient for Mr Gideon, Mr Gideon replied

that it would be. He then retreated from that position by saying that if the authority was verbal only then that would not constitute appropriate authority.

35. The Court did not have the benefit of having the staff manual produced in evidence.

36. What is clear is that it could not be said that Mr Muluane's failure to complete Form 9-1 could remotely be described as an act of serious misconduct. When one stands back and considers what occurred it appears that Mr Muluane was acting within a very constricted time period on a Friday afternoon. The unchallenged evidence of the Chairman of the PSC Mr Kanam Naplaui was that he had authorized Mr Muluane to use the vehicle and had told Mr Muluane to inform the Manager of Corporate Services, Netty Dick accordingly. That is exactly what Mr Muluane did.

37. While there is some reference in the disciplinary report prepared by Mrs Melsul that Mrs Dick asked Mr Muluane if he could fill out Form 9-1 and that he replied that he did not need to fill out the form because he was entitled to use the vehicle in his capacity as the Acting Secretary, there has been no evidence in this hearing from Mrs Dick as to that conversation. In any event, the express authority of the Chairman was sufficient in my assessment to provide Mr Muluane with *"appropriate authority"* and a fair and reasonable employer would have accepted that. Instead the PSC has placed form over substance and has reached a conclusion in respect of Mr Muluane's actions that I do not consider was open to it.

38. While there can be no question that the completion of forms authorizing the use of government vehicles is both necessary and appropriate so that there are clear records of authority and accountability that was exactly what the PSC had in this case. Mr Muluane had the authority of the Chairman and the reasons for the use of the vehicle were perfectly clear to all. In such circumstances it would be difficult to see how the PSC could justify the imposition of a fine on Mr Muluane, let alone dismissal.

39. I would also add that the alleged disciplinary offence communicated to Mr Muluane was *"misuse of government vehicle without appropriate authorization resulting in the accident of G vehicle 980".* The first observation is that it was not the use of the vehicle without appropriate authorization which resulted in the accident. The two could not be linked. Secondly, however Mr Muluane's letter of termination refers to the use of the vehicle for Mr Muluane's *"personal interest".* That is an entirely different matter. The original complaint against Mr Muluane was not one of using the vehicle for his personal interests. It was one of using the vehicle without proper authorization. Putting that to one side however there is absolutely no evidence which would support the conclusion that Mr Muluane was using the vehicle for his own personal interests. In all of the circumstances, Mr Muluane's decision to accede to Mr Niowenmal's request to take him to Tagabe could be regarded as a reasonable one taken during the course of using the vehicle for business purposes. A fair and reasonable employer when faced with the unequivocal evidence on this issue would not have come to the conclusion that Mr Muluane was using the vehicle for his personal interests.

40. As to the issue of the alleged abuse of power that alleged disciplinary offence is really a rehash of the first alleged offence. I do not consider that it was open to the PSC to make a finding that Mr Muluane was guilty of an abuse of power. If Mr Muluane had simply taken the vehicle without any authority whatsoever that would certainly be an abuse of power. But that was not the evidence. Mr Muluane had sought the authority of the Chairman and that authority had been given. Mr Muluane had notified the Acting Manager of Corporate Services. There was no abuse of power and it was wrong for the PSC to conclude that there had been.

41. That then leaves the allegation of dishonesty. There is no doubt that Mr Muluane was dishonest. However, I accept the submission of Mr Blake that not every act of dishonesty is one which gives rise to dismissal. In this case the act of dishonesty consisted of Mr Muluane misleading his employer as to the reasons for the damage to the vehicle. However a consideration of the undisputed evidence establishes that

this was not done for any personal gain on the part of Mr Muluane but to protect Mr Naowenmal from potential embarrassment at a time of important negotiations regarding a project with potentially significant benefits for the government. While it could clearly be said that as the Acting Secretary of the Public Service Commission, Mr Muluane has to be kept to the highest of standards that does not exclude a responsibility on the part of his employers to stand back and consider, in an objective manner, the circumstances around the statement made by Mr Muluane.

42. Mr Muluane had authority to use the vehicle, he was using the vehicle for business purposes and he could have had no inkling of the difficulties that subsequently arose as a result of Mr Naowenmal's ill-advised actions. Mr Muluane was not responsible for the damage which occurred to the vehicle and a fair and reasonable employer would have considered in all of the circumstances, that Mr Muluane's *"dishonesty"* was a misguided attempt to protect Mr Naowenmal and to further the interest of the PSC.

43. Given those circumstances, I do not consider that it was open for the PSC to dismiss Mr Muluane. It was left with one act of misguided dishonesty on the part of a long standing employee who had an exemplary record of employment.

44. In addition, there is no evidence that the PSC met the obligations imposed by section 50 (3) of the Employment Act. In Public Service Commission v. Tari[1] the Court of Appeal stated:-

> *"No mention was made of ss. (3) by the Commission whether it invited Mr Tari's submissions in response to the disciplinary report and accompanying letter. It did not mention section 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*

[1] [2008] VUCA 27

department. These are also serious responses to misconduct by an employee (see Government of Vanuatu v. Mathias [2006] VUCA 7".

45. A similar situation exists here. No mention of section 50 (3) is made in the letter to Mr Muluane dated May 26th 2015 advising him of the alleged disciplinary offences. No mention of section 50 (3) is made in the letter of termination dated June 23rd 2015 and the reference by the Commission in that letter to being *"really disappointed"* regarding Mr Muluane's conduct and the fact that as Acting Secretary he should *"uphold Public Service Rules in relation to management of Public Service assets"* and to the need to have *"show an example to other public servants"* is an inadequate explanation as to why the Commission could not in good faith be expected to have taken any other course.

46. It is disappointing that despite the fact that there have been a number of cases before the Court of Appeal and the Supreme Court in respect of this matter the Public Service Commission still does not appear to have grasped its responsibilities in this area.

47. In her sworn statement dated September 29th 2016 Mrs Melsul stated:-

"On 10 June 2015, I submitted my submissions on to the defendant for their consideration and in that submission, I address (sic) other courses and options that the defendant may consider is required under subsection 50 (3) of the Employment Act. A true copy of the submissions is attached and marked as "JM 1".

48. Mrs Melsul was not present as required for cross examination. I attach no weight to her assertions regarding the sub section 50 (3) of the Employment Act. There is simply no evidence that the Commission considered its obligations under section 50 (3) and while there is a reference to section 50 (3) at page 10 of Mrs Melsul's submissions to the Commission one would have expected more emphasis to have been placed on the fact that dismissal must be seen as a last resort. In the Minutes

of its meeting of June 16th 2015, in which the decision to terminate Mr Muluane's employment is made, there is simply no reference to the obligations of the Commission under section 50 (3) and to the Commission having considered that obligation.

49. For these reasons I find that the decision to terminate Mr Muluane's employment was unlawful.

50. In addition to his claim that he had been unlawfully dismissed by his employer Mr Muluane claimed that the Commission had made a number of unauthorized and unlawful deductions from his severance payment those deductions amounting to Vt 472, 790. That sum was comprised as follows:-

a) A sum of Vt 146, 780 which Mr Muluane claims was allegedly for unpaid water and electricity bills incurred by Mr Muluane in the name of the Commission.

b) The sum of Vt 126, 010 being an alleged over payment of salary and over payment of NPFG.

c) The sum of Vt 200,000 allegedly being funds used by Mr Muluane for the Vanuatu Institute Public Administration Management (*"VIPAM"*) graduations of public servants.

51. In his sworn statement of April 29th 2016, Mr Muluane deposed that when he moved into the Government house which he was occupying there was no arrangement between the Commission and he to change the electricity meter at the property and hence he was unaware that he was supposed to change the electricity meter to his name. No evidence was given regarding the water.

52. There is no dispute that these sums were deducted from Mr Muluane's final payment. In its statement of defence the PSC alleged that it had installed the electric meter box to the government house occupied by Mr Muluane and that the PSC was meeting the electricity bill. It pleaded that the arrangement between the PSC and

Mr Muluane was for Mr Muluane to occupy the house and to change the electric meter to his name in order to pay his own electricity bill. Mr Muluane failed to do so.

53. After Mr Muluane's employment was terminated UNELCO then issued the PSC with an outstanding electricity bill in the sum of Vt 146, 780.

54. With reference to the other deductions the PSC simply denied the allegations by Mr Muluane. I am satisfied that the evidence establishes that the sums referred to were indeed deducted from Mr Muluane's severance payment.

55. There was simply no lawful basis upon which the PSC could have deducted any payments from Mr Muluane's final payment in the absence of his consent or an express contractual entitlement to do so. I was not referred to any statutory authority for any such deduction by Mr Aron who, in his closing submissions accepted there was no agreement between the parties for such deductions or any lawful basis for those deductions.

56. Indeed section 57 of the Employment Act specifically provides circumstances where an employer may make deductions from an employee's severance payments. None of those circumstances apply to the sums deducted in this case.

57. Accordingly I find that the deductions made by the defendant were unlawful.

58. The appropriate course for the PSC to have taken would be to have sought the express agreement of Mr Muluane for the deductions to be made. In the absence of any such agreement or in the event of Mr Muluane refusing to pay then the PSC would be required to issue proceedings to recover the relevant sums. It will now be for the PSC to negotiate with the administrator of Mr Muluane's estate in the first instance to see whether or not agreement can be reached on payment of the

outstanding sums failing which the PSC would be entitled to issue legal proceedings against the Estate. One would hope that a reasonable compromise could be reached.

59. As to the issue of damages the claimant seeks the following:-

a)	Three months' notice at Vt 188, 160 per month	Vt 564, 480
b)	Severance pay – Vt 188, 160 x 5 years and 7 days less the sum paid to Mr Muluane at termination of employment (Vt 240,660)	
	Total	Vt 734, 679
c)	Payment pursuant to section 56 (4) Vt 975, 339 x 6 =	Vt 5, 852, 034
d)	Unauthorized deductions made by the defendant for payments made:	
	1) Electricity and water bill –	Vt 146, 780
	2) Over payment of salary and NPGFG -	Vt 126, 010
	3) Alleged payment for the VIPAM graduation -	Vt 200,000
	Total	Vt 472, 790
	Grand Total	**Vt 7, 623, 983**

60. The evidence of Mr Gideon[2] was that the Mr Muluane's severance allowance was the sum of Vt 713, 450 but that what was paid to him was the sum of Vt 566, 670 because of the deduction of Vt 146, 780 being the outstanding electricity bill. Mr Gideon was not cross examined in respect of these figures although what is clear is that he was not employed as the Acting Secretary of the Public Service Commission at that time.

61. The evidence of Mr Muluane is that on or about July 21st 2015 he received a cheque for Vt 240,660. That cheque was annexed as an exhibit to his sworn statement[3]. Mr Muluane produced a local purchase order which records a severance pay out of Vt

[2] Sworn statement dated July 2016 (paragraph 19 and 20)
[3] Sworn statement Christophe Muluane dated April 29th 2016 – Exhibit CM22

566, 670. That would support the assertion that Mr Muluane's calculated severance allowance was Vt 713, 450 but a decision was made to deduct the alleged electricity debt of Vt 146, 780. However, the payment advice produced by Mr Muluane refers to a further deduction of Vt 326, 010 which is described in the payment advice as *"over pay salary LPO 190/007657"*. I find that this sum constitutes the alleged over payment of salary and NPGF of Vt 126,000 and the alleged deduction for the VIPAM graduation Vt 200,000 both deductions having been unauthorized.

62. No issue has been taken by the defendant with the calculation of severance pay and a spreadsheet produced by the defendant in evidence confirmed that Mr Muluane's annual salary at the time of termination was VT 2,257,920. Pursuant to the provisions of the Employment (Amendment) Act No. 33 of 2009 severance is payable at the rate of one month per year of service.

63. It is clear that pursuant to section 49 (3) (a) of the Employment Act, Mr Muluane is entitled to payment of three months' notice.

64. As to Mr Muluane's claim for Vt 472, 790, being the amounts deducted from his final payment I am not prepared to grant judgment for that sum. The reason for that is that the severance pay to be awarded to Mr Muluane already takes into account the unauthorized payments and it would accordingly be wrong to make further allowance for them.

65. As to the application of section 56 (4) Mr Blake submits the following factors as needing to be taken into account and is justifying the application of a multiplier of 6:-

a) Mr Muluane had been an exemplary public servant throughout his employment.

b) He had made financial commitments on the basis of the salary which he was receiving and had a legitimate expectation that that would continue.

c) There was a delay in receiving payment from his employer and unauthorized deductions were made from his payment adding to his financial difficulties.

d) The termination had significant personal consequences for Mr Muluane and his family. Mr Muluane was the only bread winner of his family and found it difficult to support his partner and three children. It took him 10 months to find a new job at a lower salary and that job was relatively short lived, his position having been terminated as a result of his employer's financial situation.

e) His inability to service his borrowings from the bank have caused him stress and embarrassment.

f) He was given seven days to vacate the government house that the family had been occupying.

66. There can be no question that the loss of Mr Muluane's employment would have been stressful for him. His evidence refers to the impact of the termination upon he and his family. In his submissions Mr Blake described the termination as a *"shocking and very sad outcome which could have been avoided"* and submitted that the *"heaviest hand of the law must be brought to bear when one considers the various judicial statements about the award of the 56 (4) multiplier"*. In this regard Mr Blake referred me the authorities of Mann v. Air Vanuatu Ltd[4] where a multiplier of 5 was applied, Berukilukilu v. Republic of Vanuatu[5] where a multiplier of 4 was applied and Nakou v. Public Service Commission[6] where a multiplier of 6 was applied.

67. In Joseph Malere & Ors. v. VBTC[7] Dawson J referred to a number of very helpful factors which the Court might take into account when considering an award under section 56 (4). Those factors were referred to as:-

a) Did the employee have a good work record.

[4] [2010] VUSC 168
[5] [2016] VUSC 94
[6] [2016] VUSC 156
[7] [2009] VUSC 164

b) Had the employee been given any previous warnings.

c) Was the unjustified dismissal a result of inept handling of the issue by the employer at the lower end or high handed arrogance of the higher end of the scale.

d) Was the employee subjected to physical or verbal abuse by the employer at the time of the termination?

68. Dawson J also referred to factors subsequent to the dismissal of the employee which could also be taken into account when assessing the amount to be imposed and at what level. He referred to these factors as factors personal to the employee and which are reasonably foreseeable to the employer as potential difficulties an employee might face following the loss of employment. Those factors are:-

a) The efforts the employee has made to mitigate his or her loss by looking for new employment.

b) The age, qualifications, skills and health of the employee with those factors relevant to his or her re-employment prospects.

c) If the employee has found new employment, is his or her new salary package better or worse than that which he/she has lost?

d) Is his or her health or that of the immediate family of the x employee suffered as a result of the unjustified termination?

e) Have educational opportunities for the x employee's immediate family being lost as a result of the unjustified termination?

69. In this case Mr Muluane had been an exemplary employee working in a position of considerable responsibility. There had been no previous warnings or disciplinary proceedings. There can be no question that the termination of his employment had a significant effect upon his health and that it also affected his family. It could not be said however that the handling of the matter by his employee constituted high handed arrogance. In this regard, I consider that the Court is entitled to take into account the fact that Mr Muluane, by his own admission, was untruthful to his employer and that that dishonesty, while not ultimately justifying dismissal,

certainly justified a disciplinary procedure. Given that Mr Muluane occupied a possession of seniority and responsibility it was entirely appropriate for his employer to initiate disciplinary proceedings in all of the circumstances.

70. The case of Berukilukilu involved an employee of some 20 years exemplary service who was not given any notice of details of the allegations of serious misconduct resulting in the unilateral summary termination of her employment. In Mann the claimant was summarily terminated without warning or notice and, as stated by Fatiaki J, purportedly for a reason or default which was entirely his employer's responsibility to fulfil. In Nauko there was no specific analysis of the factors which justified the application of a multiplication factor of 6.

71. The multiplier of six is a multiplier which, I would suggest, be reserved for the worst cases. Despite Mr Blake's submissions to the contrary I do not consider this case to be in that category. Given the circumstances this is a situation which justifies the application of a multiplier less than 6 and I consider that an appropriate multiplier would be 4.

72. Accordingly judgment is granted in favour of the claimant in respect of the following:-

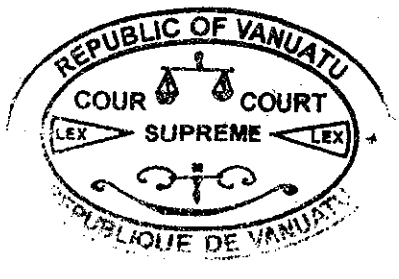
a) Three months' notice – VT 564,480

b) Severance pay represented by the appropriate annual sum of severance multiplied by 5 years and 67 days less the sum of Vt 240, 660 paid at termination of employment – VT 735,710

c) Penalty severance of 4 times severance – VT 3,905,480

d) Interest on the judgment sum at the rate of 5% per annum calculated at the date of termination of employment namely 16 June 2015.

e) Costs on a standard basis to be agreed between the parties within 21 days failing which they are to be taxed.



DATED at Port Vila this 15th day of December, 2017

BY THE COURT

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James Paul Geoghegan

Judge