

**BETWEEN: BAZIL WAI**

Claimant

**AND: THE REPUBLIC OF VANUATU.**

Defendants

Coram: Chief Justice Vincent Lunabek

Counsel: Mr. Colin Leo for the Claimant  
Mrs. Viran M. Trief, Solicitor General, for the Defendant

Dates of Hearing: 2 July 2014 and 10 September 2014

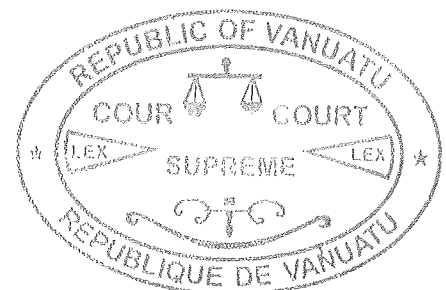
Date of Oral Decision: 10 September 2014

Date of Delivery of Judgment: 20<sup>th</sup> March 2019

## **REASONS FOR JUDGMENT**

### **Introduction**

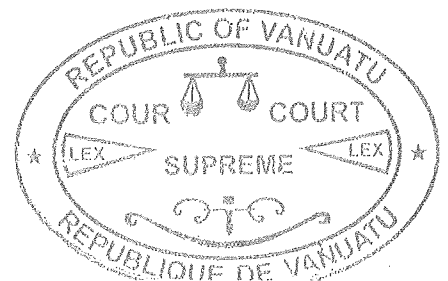
1. This is a claim for unjustified dismissal filed on 21 October 2011 against the Defendant.
2. The Claimant applied for the following relief:
  - i. Payment of three (3) month's salary in lieu of notice  $63,000 \times 3 = \text{VT}189,000$ .
  - ii. VNPF at 6% on the sum of 189,000  $\times 6\% = \text{VT } 11,340$
  - iii. Severance allowance for the period 30 May 2000 to 12 October 2010 = 10 years  $\times \text{VT}63,000 = \text{VT}630,000$ .
  - iv. Entitlement pursuant to section 56(4) of the Employment Act [CAP 160]: 6 times severance allowances  $\times 315,000 = \text{VT}1,890,000$ .



- v. Entitlement to interest under section 56(4) of the Employment Act as amended at 5% per annum. Interest commencing from the date of dismissal (12 October 2010) until payment.
3. The total claimed:
    - i. VT189,000
    - ii. VT11,340
    - iii. VT630,000
    - iv. VT1,890,000;  
VT2, 720,340 plus interests.

### **Background**

4. The Claimant is a citizen of Vanuatu. The Defendant is the Republic of Vanuatu.
5. The Claimant commenced employment with the Defendant as a Registered Nurse on or about 30 May 2000.
6. It is noted that from August 2008 and August 2010, the Claimant was subject to complaints made against him for his actions and absence from his duties. These complaints were made by the Headmaster of a primary school, Melsisi Hospital and the local chiefs.
7. Prior to his dismissal, the Claimant was provided with an Employment Disciplinary Report (EDR Report) by the Ministry of Health on or about 6 August 2010. The content of the EDR report outlined the allegations made against the Claimant and requires the Claimant to respond to those allegations.
8. The nature of these allegations put against the Claimant was that he has been continuously absconding his place of work with proper approval from his superiors.
9. On 6 August 2010, the Claimant responded to the allegations.



10. On 31 August 2010, the EDR report was forwarded to the Public Service Commission (PSC) for its deliberations on the disciplinary case of the Claimant.
11. Among the EDR report were also included the report from the Claimant in response to the allegations made against him and relevant attachments to the Claimant's responses.
12. In its decision No.15 of 2010 made on 06 October 2010, the PSC decided to dismiss the Claimant. The dismissal was conveyed to the Claimant in a letter dated 12 October 2014 which reproduces below:-

*Mr Bazil Wai  
Timburge Dispensary  
East Pentecost  
Penama Provice*

*Date: 12 October 2010*

*Re: Dismissal from Service*

*We regret to advice that the Public Service Commission at its meeting o.15 of 2010 of 6<sup>th</sup> October 2010 deliberated on the Discipline Report against you along with your response to the allegations and was satisfied your actions amounted to serious misconduct.*

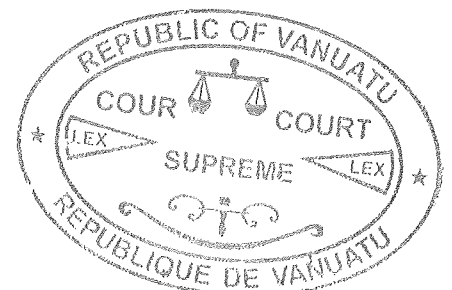
*The Commission has thereby decided to dismiss you from service under section 29 of the Public Service Act for serious misconduct, without benefit and with immediate effect.*

*By copy of this letter, all authorities concerned are hereby notified for appropriate action.*

*The commission wishes to thank you for the services rendered to the Vanuatu Government and wishing you the best in your future career.*

*Yours faithfully,*

*Sumbe Antas  
Secretary  
Office of the Public Service Commission*

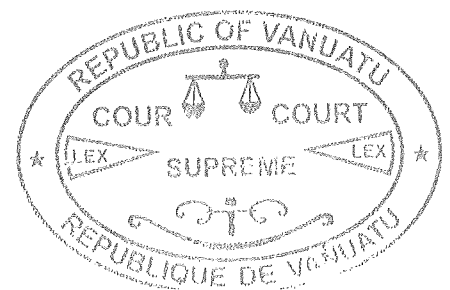


## Issues

13. The parties through their Counsel agree on the following issues to be determined by the Court:
- I. If an opportunity was given to the Claimant, whether the Defendant considers section 50(3) of the Employment Act [Cap 160] (as amended) prior to effecting the dismissal of the Claimant?
  - II. Alternatively, when effecting the dismissal of the Claimant, whether the Defendant acted as a good employer for the purposes of section 29 of the Public Services Act (as amended)?
  - III. Whether the Claimant was entitled to his employment entitlements?

## Evidence

14. The Claimant filed a sworn statement on 26 July 2013 in support of the claim.
15. The Acting Secretary of the PSC, Laurent Rep filed a sworn statement on 28 November 2013 in response to the claim and in support of the defence.
16. The trial in this proceeding was listed on 2 July 2014. Before the trial began, Mr. Leo on behalf of the Claimant informed the Court and the Defence Counsel, that the Claimant conceded to the Defendant's brief facts filed on 1 July 2014. This was about the only factual dispute between the parties. Because of the concession of the Claimant to the effect that he was given opportunity to respond to the complaints made against him and the PSC considered the Claimant's response in its deliberation and decision to dismiss him on 12 October 2010, there was no longer a factual dispute between the parties. The Court directed the parties to file submissions (The Minutes and Court Orders made on 2 July 2014, illustrated what was agreed between the parties and the way forward).
17. Both Counsel filed submissions and the Court heard both Counsel's final submissions on the issues in this case on 9 September 2014.



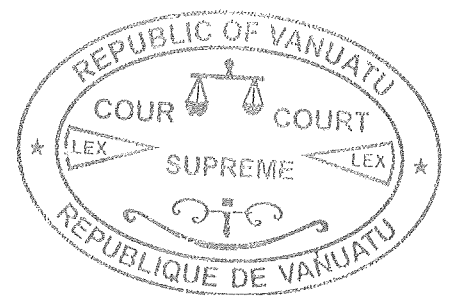
18. On 9 September 2014, the Court came to the conclusion that judgment will be entered in favour of the Claimant based on the concession of the Defendant that the Claimant had 7 years of unblemished record which was not taken into consideration as a course to take under section 50 (3) of the Employment Act when dismissing the Claimant on 12 October 2010. The period is from 2000-2007. The Defendant failed to invite the Claimant to make submissions on section 50 (3) of the Employment Act which resulted in this unjustified dismissal. That decision was orally made on 9 September 2014 and that the written reasoning will be provided.
19. The reasons are now provided when I consider the three issues this Court is asked to determine in this case. I will deal with each of them in turn. I start with the first issue.

**Issue 1: If an opportunity was given to the Claimant, whether the Defendant considered section 50 (3) of the Employment Act?**

20. Although subsection (3) of section 50 of the Employment Act is the relevant provision for consideration, it is appropriate to refer to all subsections of section 50. Section 50 provides as follow:

*"50. Misconduct of Employee*

- (1) *In the case of a serious misconduct by an employee it shall be lawful for the employer to dismiss the employee without notice and without compensation in lieu of notice.*
- (2) *None of the following acts shall be deemed to constitute misconduct by an employee –*
- (a) *trade union membership or participation in trade union activities outside working hours, or with the employer's consent, during the working hours;*
  - (b) *seeking office as, or acting in the capacity of, an employees' representative;*
  - (c) *the making in good faith of a complaint or taking part in any proceedings against an employer.*



- (3) *Dismissal for serious misconduct may take place only in cases where the employer cannot in good faith be expected to take any other course.*
- (4) *No employer shall dismiss an employee on the ground of serious misconduct unless he has given the employee an adequate opportunity to answer any charges made against him and any dismissal in contravention of this subsection shall be deemed to be an unjustified dismissal.*
- (5) *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.”*

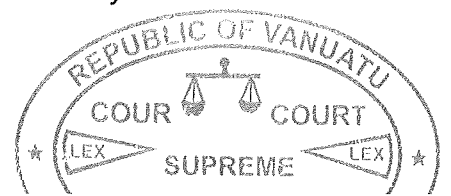
### **Submissions on Issue 1**

21. The Defendant's submissions placed emphasis on the facts which are agreed and not in dispute. The allegations made against the Claimant was that he has continuously absconded his place of work as reflected by various reports made against him by:

- Melsisis Health Centre to the Penama Provincial Health Manager (dated 12/09/08) and;
- A letter from the Headmaster of Bingwege Primary School (dated 22/09/08); and
- The report from Penama Provincial Health Manager (dated 15 July 2010) highlighted the fact that the Claimant was away from his post for 3 months despite repetitive demands that he returned to his place of work.

22. The Defendant submitted that those absences from work and the continuous disregard to comply with the direction from the Penama Provincial Health Manager, constitutes serious misconduct in that his actions (absences) had breached the essence of his employment which is to be available at his posting to provide health service to the population of that community in the Penama Province. The Defendant relied on the **Australian case of Adam –v Maison de Luxe Ltd [1924] HCA 45 (1924) 35 CLR 143 (19 November 1924)** which stated the following:

*Now it may well be – and the cases and the books suggest the conclusion – that where it is a condition of the contract that the servant shall obey all lawful orders of*



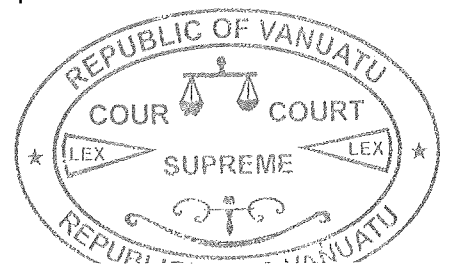
*the master, then a willful or deliberate and intentional disobedience of any of those orders is tantamount to a refusal to be bound by the terms of the contract, entitling the other party to treat it as at an end, and to dismiss the servant (Turner v. Mason [29]; Pease and Latter's Law of Contract, 1<sup>st</sup> ed., p. 218). But it is unnecessary to pursue this topic, and therefore most undesirable that this Court should say anything to weaken the authority of Turner v. Mason, for facts of the plaintiff here did amount to a distinct refusal to be bound by the terms of his contract, and his failure to obey instructions was such as to go to the foundation and root of the whole contract between the parties.*

23. The Defendant submitted the actions of the Claimant in this proceeding for being absent from duty goes to the essence of his employment which is the requirement to be available to provide health care service to the community of East Pentecost. Those actions are serious misconduct capable for dismissal pursuant to section 29 of the Public Service Act.
24. The Defendant further submitted that since the PSC has considered the factual background of the Claimant's case, it tantamount to the consideration of subsections 50 (3) of the Employment Act and that therefore, the dismissal of the Claimant was justified.
25. The Claimant submitted that the Defendant failed to consider section 50(3) of the Employment Act when it dismissed the Claimant on 12 October 2010. The Claimant referred and relied on the case of **Public Service Commission –v- Tari [2008] VUCA 27 Civil Appeal Case No.23 of 2008 (4 December 2008)** where the Court of Appeal held at page 3 of the judgment:

*"We are satisfied the process used to dismiss Mr. Tari was according to law save for compliance with s.50 (3) of the Employment Act.."*

### **Consideration on Issue 1**

26. It is noted that the PSC based on the reports provided to it, considered that the absences of the Claimant from duty goes to the essence of the Claimant's employment and that the non-compliance by the Claimant of the directions of his superior is tantamount to a refusal to be bound by the terms of the contract of employment, constituting serious misconduct leading up to his dismissal.

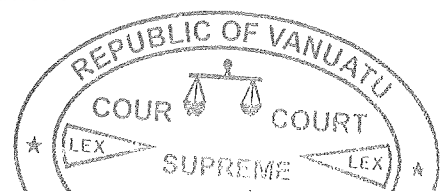


27. The question is whether or not the PSC before dismissing the Claimant in its decision of 12 October 2010, invited the Claimant to make submissions pursuant to section 50(3) or say anything relating to section 50(3) bearing in mind that the Claimant was employed by the PSC for a period of 10 years (May 2000 to October 2010) and that the actions of the Claimant the subject of the disciplinary proceeding started only in 2008 to 2010. There was no question of seven (7) years period from 2000 – 2007 which was exemplary.
28. The PSC, as a good employer, was duty bound to give an opportunity to the Claimant to make submissions pursuant to section 50(3) of the Employment Act after the PSC was provided with the EDR report against the Claimant and the PSC was provisionally of the view that the Claimant was likely to be dismissed. It is obvious that the PSC failed to do that in this case.
29. I do not accept the Defendant's submission that given it has considered the factual background of the Claimant's case it tantamount to the consideration of subsection 50(3) of the Employment Act and it must fail. The circumstances of this case may justify dismissal, however, the process of dismissal is to be made in accordance with the law (ss.29 of the Public Service Act and ss.50 (3) of the Employment Act [Cap 160]).
30. I accept the submissions of the Claimant relying on the case of the **Public Service Commission –v- Tari [2008] VUCA 23**, when the Court of Appeal held:

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

*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**).

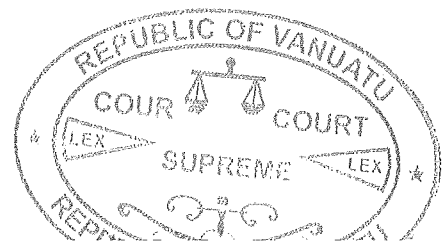
Consistent with this obligation the Commission should invite those whom it has concluded may have been guilty of serious misconduct to address ss.(3). This should be done before a decision on the employees' future is reached. When communicating its decision on dismissal (or otherwise) the Commission 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."

31. In the present case, the Claimant submitted that on the face of the Claimant's purported dismissal of 12 October 2010, the Defendant failed its obligation to address section 50 (3) of the Act in that:

- i. It failed to invite the Claimant to address section 50(3) of the Act in the Claimant's Disciplinary Report;
- ii. It failed (when communicating the Claimant's purported termination letter dated 12 October 2010) to identify in the Claimant's termination letter that it had complied or considered section 50 (3) of the Act;
- iii. It failed to identify in the Claimant's dismissal letter dated 12 October 2010 that it had considered section 50(3) of that Act and then concluded, in good faith that dismissal is warranted and it cannot be expected to take any other course.

32. I accept the Claimant's submissions made above. There was no reference or any mention in the Defendant's dismissal letter dated 12 October 2010 that the Defendant had considered other course under section 50 (3) of the Act prior to effecting the Claimant's dismissal and/or that the Defendant had considered section 50(3) of the Employment Act prior to effecting the Claimant's dismissal at all.



33. I accept that, on the basis of the material evidence before the Court, the Defendant failed to consider section 50 (3) of the Act which in effect, rendered the Claimant's dismissal unlawful and unjustified. I then consider issue 2.

**Issue 2: Alternatively, when effecting the dismissal of the Claimant, did the Defendant acted as a good employer for the purposes of section 29 of the Public Service Act (as amended).**

34. Section 29 of the Public Service Act provides:

*"The Commission may dismiss an employee at any time for serious misconduct or inability but subject to its obligations to act as a good employer."*

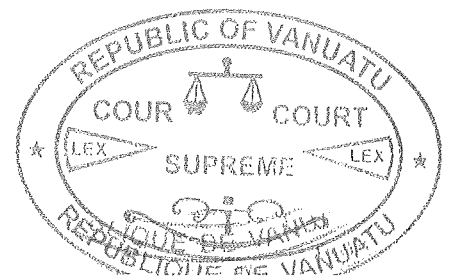
35. The Defendant submitted the PSC has afforded the Claimant with an opportunity to answer the allegation made against him. The Defendant, therefore, maintained that it had acted as a good employer for the purposes of section 29 of the Public Service Act.

36. I do not accept the Defendant's submission on the second issue and I reject it for the following reasons:

(i) The Court of Appeal in **Public Service Commission –v- Tari [2008] VUCA 23** at (page 6) held:

*"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 Act which governs all employment, public and private (**Government of Vanuatu v. Mathias [2006] VUCA7**)"*

(ii) The facts of this case show that the Defendant gave an opportunity to the Claimant to respond to the allegation made against him, as a good employer, pursuant to section 29 of the Public Service Act.



(iii) The facts also show that the responses of the Claimant were included in the EDR report put before the PSC for deliberation and decisions, as a good employer, pursuant to s.29 of the Public Service Act.

(iv) The facts further show that the PSC deliberated and considered the EDR report and decided to dismiss the Claimant on 06 October 2010.

(v) The facts finally show that the PSC failed to invite the Claimant to make submissions in relation to s.50 (3) of the Employment Act before dismissing him. Although it is sufficient to dispose of this issue, in deference to the State's submissions at the hearing the meaning, effect and relationship between section 29 of the Public Service Act and section 50 of the Employment Act [Cap 160] set by **the Court of Appeal in Government of Vanuatu v. Mathias [2006] VUCA7; CAC 10-06 (1 June 2006)**, had to be reminded when the Court held (at pp 6-7):

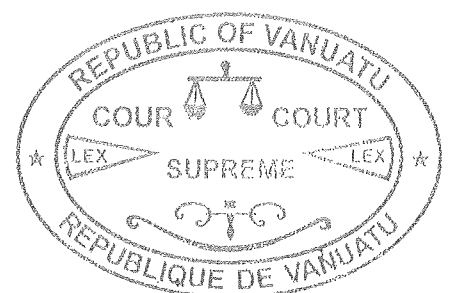
- "Section 29 (1) of the Public Service Act No. 11 of 1998 whilst empowering the PSC to " *dismiss an employee at any time for serious misconduct or inability*" does not, in our view, preclude the application of the protective provisions of section 50 of the Employment Act [Cap. 160] to the exercise of the power;
- The protective provisions of section 50 of the Employment Act [Cap. 160] namely:

*"(2) None of the following acts shall be deemed to constitute misconduct by an employee -*

*(a) trade union membership or participation in trade union activities outside working hours, or with the employer's consent, during the working hours;*

*(b) seeking office as, or acting in the capacity of, an employee's representative;*

*(c) the making in good faith of a complaint or taking part in any proceedings against an employer;*



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

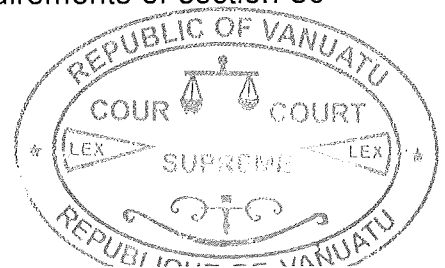
(4) *No employer shall dismiss an employee on the ground of serious misconduct unless he had given the employee an adequate opportunity to answer any charges made against him and any dismissal in contravention of this subsection shall be deemed to be an unjustified dismissal.*

(5) *An employer shall be deemed to have waived his rights 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*

are entirely consistent with the PSC's obligation in section 29, **"to act as a good employer"**;

- The burden of establishing "serious misconduct" under section 29 of the Public Service Act and section 50 (1) of the Employment Act rests fairly and squarely on the employer to establish on a balance of probabilities....
- Given the Respondent's prior employment record of 15 years of unblemished and dedicated service to the Appellant and given the discretionary nature of the power under section 29 (1) and the clear ameliorating provisions of section 29(2) of the Public Service Act, it is unlikely in our view, that the PSC complied with the requirements of section 50 (3) of the Employment Act, in considering a less draconian course than outright dismissal without benefits."

37. This is also what had happened in the case. The Claimant had prior record of 7 years from (2000 to 2007) of unblemished and dedicated service to the Defendant. The Disciplinary allegation covered the period 2008 to 2010 (2 years). It is unlikely that the PSC complied with the requirements of section 50



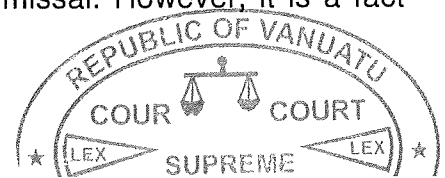
(3) of the Employment Act, in considering a less draconian course than outright dismissal without benefits. I consider issue 3.

**Issue 3: Whether the Claimant was entitled to his employment entitlements.**

38. The Defendant submitted that it was lawful for the Commission not to award any entitlement to the Claimant as section 50 of the Employment Act envisages and as expressed under section 29 of the Public Service Act.
39. The Defendant submitted also that should the Court be persuaded that the Claimant is entitled to certain employment benefits, the relevant period in which the Claimant's performance may have been exemplary and thus may be awarded with certain benefits would be for the period from 2000 to year 2007.
40. The Claimant submitted that given the Claimant's dismissal was unlawful and unjustified, the Claimant is entitled to the employment entitlements sought in the claim:-
- i. Payment of three (3) month's salary in lieu of notice  $63,000 \times 3 = \text{VT}189,000$ .
  - ii. VNPF at 6% on the sum of 189,000  $\times 6\% = \text{VT } 11,340$
  - iii. Severance allowance for the period 30 May 2000 to 12 October 2010 = 10 years  $\times 63,000$  divided by 2 =  $\text{VT}315,000$ . (Calculation made according to the repeal Employment Act). According to the amendment of the Employment Act, the severance allowance of the Claimant would be  $\text{VT}63,000 \times 10$  years =  $\text{VT}630,000$ .

**Considerations on Issue 3**

41. In the circumstances of this case, the submission of the Defendant that it was lawful for the PSC not to award any entitlement to the Claimant as section 50 of the Employment Act envisages and as expressed under section 29 of the Public Service Act, is not accepted and it is rejected as unsubstantiated.
42. In this case, the Defendant conceded through their submission orally in Court that before the PSC made its decision to dismiss the Claimant, there was no reference made to the past good performance of the Claimant and there is not even mentioned in the letter of the Claimant's dismissal. However, it is a fact



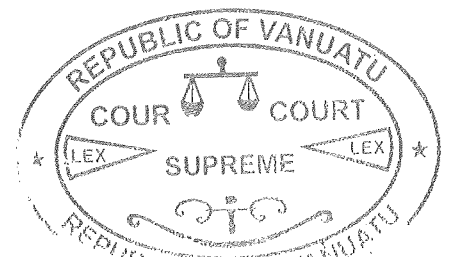
that from 2008 to 2010, there were complaints made against the Claimant of his absence from the place of his work. Should the Court find on the material evidence of the past good performance it will be from 2000 to 2007 (a period of 7 years). The Claimant may be entitled to a severance pay of 7 years x 63,000 (1 month salary) = 441, 000 Vatu.

43. In this case the Claimant is entitled to the following employment benefits:

- a) Payment of three (3) month's salary in lieu of notice  $63,000 \times 3 = \text{VT}189,000$ ;
- b) VNPF at 6% on the sum of 189,000  $\times 6\% = \text{VT } 11,340$
- c) The Defendant's concession illustrated the fact that the Claimant had from the year 2000 to 2007 unblemished record (a period of 7 years). That was not considered by the Defendant when it dismissed the Claimant on 12 October 2010. The Defendant, as a good employer, failed to invite the Claimant to make submissions pursuant to section 50 (3) of the Employment Act so that the PSC could relevantly consider as a course to take instead of dismissal without benefits. Here, the process of the dismissal of the Claimant was unlawful and therefore unjustified. The Claimant is entitled to his full severance allowance benefits which are  $10 \text{ years} \times 63,000 = 630,000\text{VT}$
- d) The Claimant is entitled to a multiplier of 3 under section 56 (4) of the Employment Act to reflect the gravity of the Defendant's failure to consider section 50 (3) of the Employment Act. The calculation is  $3 \times \text{VT}630,000 = 1,890,000 \text{ Vatu}$ .

44. The total employment benefits of the Claimant is VT2,720,340 with interest at 5% per annum on the total amount from the date of dismissal (12 October 2010) to the date of payment.

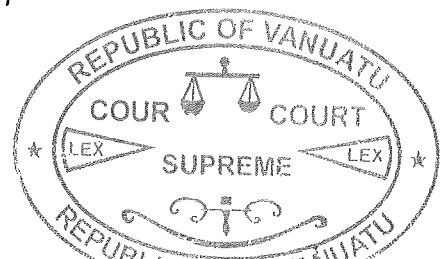
45. At the time of the submission, an additional issue was raised and it was this: If dismissed for serious misconduct, is the Claimant entitled to any benefits? I treat it as issue 4 and I now deal with it.



**Issue 4: If dismissed for serious misconduct, is the Claimant entitled to any benefit?**

46. The Defendant submitted that section 29 of the Public Service Act tends to provide a discretionally power to the PSC whether or not to award an employee with any benefits if dismissed pursuant to section 29. Furthermore, such discretion is exercised upon consideration of the past good performance of an employee, and here, the Claimant.
47. In this case, the Defendant argued that the Claimant failed to specifically allege that the PSC has exercised that discretion reasonably. It may be open to suggest that the PSC may have considered the past performance of the Claimant for the purposes of subsection 29 (2) of the Public Service Act. The relevant period in which the Claimant's performance may have been exemplary thus may be awarded with certain benefits would be a period from year 2000 to year 2007.
48. The Defendant's argument that the Claimant failed to specifically allege in the pleadings that the PSC has exercised its discretion under section 29 of the Public Service Act reasonably, is wrong, in the circumstances of this case and it is rejected.
49. The reason being that the Claimant's purported dismissal for serious misconduct is subject to the Defendant's compliance with section 50 (3) of the Employment Act. Again relevantly I repeat what the **Court of Appeal said in Public Service Commission –v- Tari [2008] VUCA 27** in the following:


*“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 Act 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 power whether to make a redundancy payment...*



*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."*

50. In the present case also, no such opportunity was given to Mr. Wai. It should have been. The PSC could then have taken Mr. Wai's submissions into account when they reached a view about a redundancy payment.
51. Because I have concluded the Claimant's dismissal was unlawful and unjustified, the PSC's error in failing to invite submissions on redundancy payments under section 29 (2) reflected in the judgment in favour of the Claimant. The severance allowances as a consequence of the PSC's error, must cover all period of employment: 10 years from 2000 – 2010.
52. The Claimant is entitled to costs against the Defendant. Such costs are standard to be agreed or determined on the normal.

**Dated at Port-Vila, this 20<sup>th</sup> March 2019  
BY THE COURT**



**Vincent LUNABEK  
Chief Justice**

