

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

Civil
Case No. 23/881 SC/CIVL

BETWEEN: ANDREW NIMISSA
Claimant

AND: REPUBLIC OF VANUATU
Defendant

Date of Trial: 25 September 2024
Date of Decision: 15 November 2024
Before: Justice M A MacKenzie
Counsel: Claimant – Mr R Rongo
Defendant – Mrs J T Tari

JUDGMENT

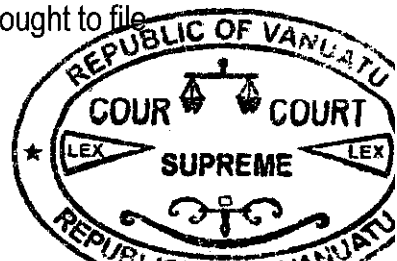
Introduction

1. Mr Nimissa is a school principal who was suspended on half pay by the Teaching Service Commission ("TSC") by a notice dated 17 February 2023 pending investigation.
2. Following an investigation, the TSC determined that Mr Nimissa had committed a breach of discipline. The penalty was a reprimand and a fine of VT 100,000. Mr Nimissa was also reinstated. He has now returned to his position as principal of Loukaru(Lounalou) Primary School.
3. Mr Nimissa believes he was unlawfully suspended by the TSC, because the allegations made against him were false. The TSC has a different view, and disputes that the suspension was unlawful.

The Claim

Original claim

4. On 7 March 2024, Hastings J issued a Minute recording that the matter was to proceed on the basis of the claim filed on 3 June 2023 as no leave was sought to file



an amended claim, and the defence was filed in response to the original unamended claim.

5. Mr Nimissa's claim is that the decision to suspend him was unlawful and baseless as there is no evidence of the false allegations that were made against him.
6. The relief claimed by Mr Nimissa is:
 - a. Payment of employment entitlements of VT 1,783,429,
 - b. Damages of VT 4,000,000 for the unlawful suspension,
 - c. Interest at 5% per annum and costs.

Application for leave to amend the claim

7. At the outset of the trial, Mr Rongo made an oral application to amend the claim. Mr Rongo sought to amend the claim to seek as relief, backdated salary from the date of suspension. This was not pleaded in the original claim.
8. Amendment of the claim was opposed by Ms Tari. The Defendant's position was that backdated salary was not pleaded in the original claim and that the decision as to salary was for the TSC.
9. After hearing argument, I declined leave to amend the claim and said I would give reasons in writing.
10. Pursuant to rule 4.11 of the Civil Procedure Rules, a statement of the case may be amended at any stage of the proceeding with the leave of the Court. Rule 4.11 says;

4.11 (1) *A party may amend a statement of the case to:*

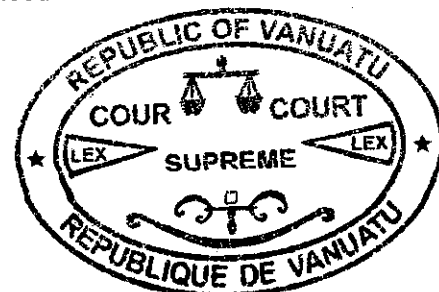
- (a) better identify the issues between the parties; or*
- (b) correct a mistake or defect; or*
- (c) provide better facts about each issue.*

(2) *The amendment may be made:*

- (a) with the leave of the court; and*
- (b) at any stage of the proceeding.*

(3) *In deciding whether to allow an amendment, the court must have regard to whether another party would be prejudiced in a way that cannot be remedied by:*

- (a) awarding costs; or*
- (b) extending the time for anything to be done; or*
- (c) adjourning the proceedings.*



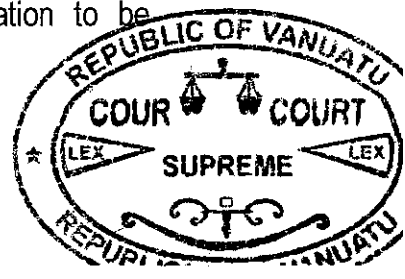
11. Whether or not to grant leave to amend a claim is a matter of discretion, which ought to be exercised having regard to the overriding objective of the Civil Procedure Rules.
12. An offer of reinstatement was made by the TSC in a letter dated 6 June 2024. Mr Nimissa accepted the offer of reinstatement to his role as the principal of Loukaru School via letter dated 18 July 2024. The claim for salary entitlements as pleaded in the original claim was therefore redundant, because it was based on termination of employment.
13. Mr Nimissa accepted reinstatement on 18 July 2024 so had ample time before the trial to seek leave to amend the claim to seek back dated salary. The application to amend the claim when the trial was about to start was prejudicial to the Defendant who had responded to the claim as pleaded. I accept that the potential prejudice could have been cured by an order for costs or an adjournment. On the other hand, as noted, there was ample time before the trial for leave to be sought to amend the claim.
14. Mr Rongo did not file a proposed draft claim, but the basis for seeking back dated salary was because Mr Nimissa had been reinstated. Pursuant to s 57(2) of the Teaching Service Act, pay while an employee is suspended is a matter of discretion. But perhaps more significantly, s57(3) suggests that back dated salary will only be paid if the TSC, a Disciplinary Appeal Board, or the Supreme Court ultimately do not find there was a breach of discipline. In that case, the suspension must be lifted, and the employee paid. Here, the TSC found a breach of discipline so the basis for seeking back dated salary is unclear.
15. In all the circumstances, I did not consider that was just and fair to grant leave to amend the claim, particularly when the Claimant has time to do so in advance of the trial, the Defendant responded to the claim as filed, and the likely outcome of granting leave would be an adjournment of the trial.

The Defence

16. The defence, as pleaded, is that Mr Nimissa's suspension was based on the complaint lodged against Mr Nimissa which led to possible breaches of his employment contract. The position had shifted by trial, as by then, Mr Nimissa had been reinstated by the TSC. The defence argued that the suspension was lawful.

The Law

17. Part 9 of the Teaching Service Act ("the Act ") deals with disciplinary issues and processes. Pursuant to s54 of the Act, if a breach of discipline is alleged or suspected and is not minor, the Commission must arrange for an investigation to be



undertaken. A written report must be prepared by the investigator for the Commission's consideration.

18. Section 57 provides for suspension of an employee if an investigation is being conducted under s54. Because it is important, I set it out in full;

57 Suspension

(1) If an investigation is being conducted under section 54 or an employee has been charged with a criminal offence which has a penalty of 12 months imprisonment or more, the Commission may suspend the employee concerned from duty. The Commission may lift the suspension at any time.

(2) The Commission may determine that all or part of a suspension is on half pay or without pay. While suspended without pay an employee is entitled to undertake paid employment or other work or operate a business outside the Teaching Service.

(3) Where an employee is suspended under this section and the Commission, a Disciplinary Appeal Board or the Supreme Court ultimately does not find there has been a breach of discipline or the employee is not convicted of an offence which has a penalty of 12 months imprisonment or more, the suspension must be immediately lifted. If all or part of the suspension was without pay or was on half pay, the employee must be paid his or her usual salary for the relevant period.

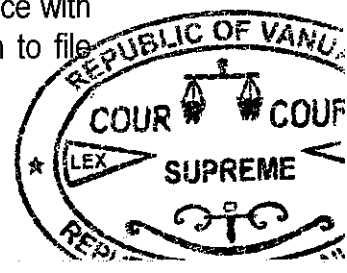
19. Mr Nimissa had a right to appeal against the suspension decision under pursuant to s 58 of the Act to the Appeal Board. There is no evidence he did so. That is surprising. Section 58 says:

58 Appeals

Subject to other provisions of this Act, an employee may appeal a decision of the Commission under subsection 35(1) (b) or (c) or sections 43, 55, 56, or 57 to the Appeal Board.

Submissions

20. Once the evidence concluded, counsel asked to file written submissions. Mr Rongo was to file submissions by 2 October 2024, and Ms Tari by 16 October 2024. While it is counsel's responsibility to ensure that submissions are filed in accordance with the timetabling directions, the Court reminded counsel about the direction to file



submissions on 16 October and again on 24 October 2024. Ms Tari filed submissions on 25 October 2024. Mr Rongo filed submissions on 5 November 2024.

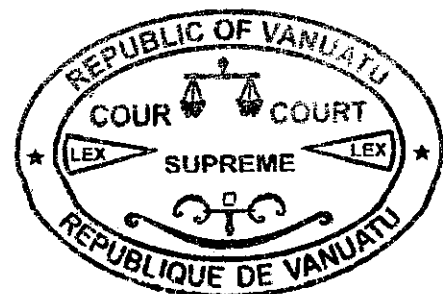
21. In his written submissions, Mr Rongo submitted that there are five legal issues:
- a. Whether or not the allegations made by the TSC against Mr Nimissa are true or false allegations.
 - b. Whether or not Claudia Lekai has witnessed the events leading to the allegations.
 - c. Whether or not Mr Nimissa should pay VT 100,000 fine for the allegations made against him.
 - d. Whether or not the TSC has to backpay Mr Nimissa.
 - e. Is Mr Nimissa entitled to the damages sought in the prayer for relief for his unlawful suspension.
22. The TSC submitted that the suspension was not unlawful because the TSC followed the process required under the Teaching Service Act.

The Issues

23. For reasons which will be explained, I do not agree with Mr Rongo's assessment of the issues to be decided. The first issue to be decided is whether the suspension was unlawful as claimed by Mr Nimissa? That turns on whether the TSC followed the statutory process, and not the truthfulness or otherwise of the alleged discipline breaches. Only if the suspension was unlawful, will the Court consider damages.
24. The issue of the fine arising from the discipline process is not a matter for the Court to consider. First, it was not pleaded. Second, the fine is a completely separate issue to the issue of whether the suspension was unlawful. It was imposed by the TSC because they found that Mr Nimissa committed a breach of discipline. He was afforded an opportunity to make submissions as to the appropriate penalty but did not.

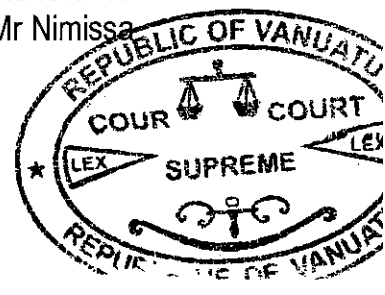
Discussion

25. The first issue to consider is whether the suspension was unlawful, as asserted by Mr Nimissa?



26. On 6 December 2021, Mr Nimissa was appointed as the Principal of Loukaru Primary School. The contract was for a 4-year period between 6 December 2021 - 1 December 2025.
27. On 2 February 2023, the chairperson of the Naluken School wrote a letter to the Director General of the Ministry of Education advising that Mr Nimissa was interfering with the affairs of Naluken School. Then, on 15 February 2023, the TSC received a complaint from the chairperson of the Naluken School alleging that Mr Nimissa was interfering with the affairs of the school. As a result of the complaint, the TSC suspended Mr Nimissa and appointed an investigator to look into the allegations.
28. Mr Nimissa was issued with a notice of suspension dated 17 February 2023. He was suspended on half pay. The notice of suspension set out the details of the allegations.¹ The allegations and complaint related to Mr Nimissa's interference in Naluken School matters, leading to possible breach of clauses D1.6 and D2.5 of his employment contract and breach of discipline under ss 50(a) and (b) and 51(b) and (c) of the Act. Specifically:
- a. Mr Nimissa was well aware he is the principal at Loukaru School but took the liberty to teach at Naluken School without prior approval of his superior.
 - b. A request from Naluken School for Mr Nimissa to teach at the school was made to the PEO Tafea was not approved, but despite that it was alleged that he did so and received payment of VT 15,000 fortnightly.
 - c. Misuse of school property, such as school vehicle.
29. Mr Nimissa could have appealed against his suspension to the Appeal Board. There is no evidence to suggest he did so. An investigation was conducted by Commissioner Alice Kaloran who prepared an Investigation Report, annexed as CL 5 to Claudia Lekai's sworn statement filed on 30 April 2024. The report was issued on 12 April 2023, and Mr Nimissa was asked to respond. He did so by letter dated 9 May 2023 advising that the allegations made against him were false.
30. The findings of the report are that the allegations that Mr Nimissa abandoned his post at principal of Loukaru School and was interfering with Nakulen School, that he misused Nakulen School property and was teaching at Naluken School were false. However, the report concluded that Mr Nimissa bluntly refuses and always disagrees to comply with the directives and instructions given by the educational authorities and the school council of Nakulen JSS.
31. The TSC found that Mr Nimissa did commit a breach of discipline by his interference at Naluken School. The TSC issued a letter on 1 August 2023 advising Mr Nimissa

¹ This is required by s54(2) of the Act



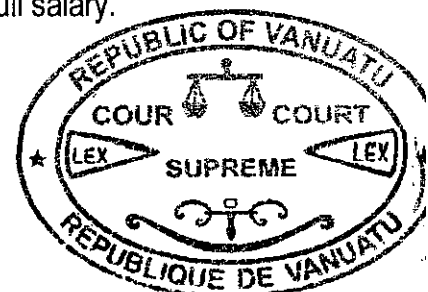
of this and seeking his submission as to the penalty to be imposed. The salient part of the letter said;

“..On 6 July 2023, the Teaching Service Commission deliberated on the produced Investigation Report on the allegations against you and your response to such Investigation Report dated 9 May 2023 and resolved that the alleged offence or breach of discipline which you were suspected of is part established and thus in breached of subsections 50 (a) and (b) and 51 (b) and (c) of the Teaching Service Act No. 38 of 2013 (“Teaching Service Act”).

In other words, the Commission has ruled that you have committed a breach of discipline by your interference at Naluken School.

Therefore, in accordance with section 56(1) of the Teaching Service Act, you are given the opportunity to make submission in relation to the penalty which is to be imposed on you.”

32. Mr Nimissa responded to the request by letter dated 8 August 2023. He did not address the question of penalty but rather continued to maintain that it *“must be either misunderstanding and or false accusation made against me by those accusers.”* He said that he had already answered the allegations against him, supported by letters from the school chairman denying these allegations.
33. Matters seem to have stalled. In her sworn statement filed on 30 April 2024, Ms Lekai said that she talked to Mr Nimissa via the phone about what the TSC sought from him in their letter of 1 August 2023 and that he had to make a submission as to penalty. Mr Nimissa wrote to the TSC on 6 February 2024, but did not address the issue of penalty. In addition, Ms Lekai met Mr Nimissa and his wife at the TSC office and again explained that the TSC had made a decision that he had been found to have breached a provision of the Act and as such must make a submission as to the penalty to be imposed. Mr Nimissa and his wife told Ms Lekai they would work on the submission and drop it off at the office but no submission was provided by Mr Nimissa.
34. The TSC met through a *“flying minute”* to deliberate on the penalty to be imposed. The TSC unanimously resolved;
 - a. To impose a fine of VT 100,000 and issue a final reprimand to Mr Nimissa for the breach of discipline.
 - b. To reinstate Mr Nimissa as principal at Loukaru School with full salary.



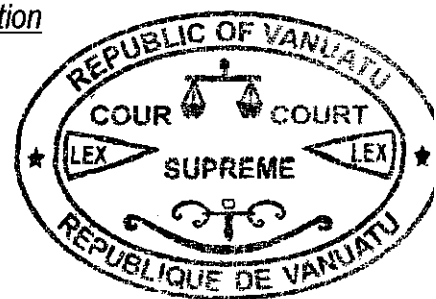
35. The outcome was communicated to Mr Nimissa via a letter dated 6 June 2024. It was served on his wife on 26 June 2024. By letter dated 18 July 2024 from counsel, Mr Nimissa agreed to resume his duties as principal of Loukaru School, and has done so.
36. Mr Nimissa's position in relation to the suspension is that it had no basis and was without foundation, because the allegations are false. That is what he said in his sworn statement filed on 7 June 2023 and in his responses to the TSC. The sworn statements of Paute Nimissa, Harry Muleck and Erick Kalang support Mr Nimissa's view that the allegations against him were false.² They are all involved in one way or another with the Nauluken School, so were in a position to know whether Mr Nimissa acted as alleged in the complaint.
37. It is not seriously in dispute that the main allegations against Mr Nimissa were not substantiated following the investigation. The Investigation Report confirms that the main allegations were false. However, the result of the investigation was that the TSC found that there was a breach of discipline by Mr Nimissa, and he was sanctioned accordingly.
38. The issue of whether the suspension was unlawful or not does not depend on the truth or otherwise of the allegations. Mr Nimissa's focus on the truthfulness or otherwise of the allegations is misconceived.
39. Whether or not the suspension was unlawful hinges on whether the TSC had grounds to suspend Mr Nimissa and followed the processes laid down in the Act. Logically, when a complaint is received the TSC have no way of knowing whether the allegations will be true or false. That is the function of an investigation.
40. The TSC has a discretion to suspend an employee if an investigation is being conducted under s 54. In accordance with s 54(1) the TSC must arrange for an investigation to be undertaken if a breach of discipline that is not minor is alleged or suspected.
41. What constitutes a breach of discipline is defined in s51 which says;

51 Breach of discipline

An employee who:

- (a) *is guilty of misconduct; or*
- (b) *has failed to comply with the Code of Conduct; or*
- (c) *has failed to comply with this Act or regulations or the Education Act [CAP 272] or regulations; or*

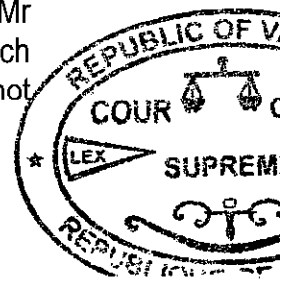
² These three witnesses were not required for cross examination at trial



- (d) *is negligent, inefficient, incompetent or unfit or unable to perform his or her duties;*
- (e) *owes any person or a business owner any monies and fails to make appropriate payments as agreed upon by the employee and the person or business owner,*

commits a breach of discipline.

42. In the suspension letter, the TSC specifically recorded that the complaints and allegations received related to interference into Naluken School matters leading to a possible breach under his employment contract and breach of discipline under ss 50(a) and (b) and 51(b) and (c).
43. Section 50 deals with employee obligations. Sections 50(a) and (b) say that employees of the Teaching Service must at all relevant times:
- (a) Comply with generally accepted community standards of behaviour.
 - (b) Obey any lawful direction given by a person in authority or the Commission, including a direction to transfer.
44. The suspension letter clearly set out the asserted interference into Naluken School matters constituting possible breach of discipline. This was teaching at Naluken School and misuse of school property. The TSC considered there had been an alleged or suspected breach of discipline. It is a breach of discipline to fail to comply with the Code of Conduct or the Act. The Code of Conduct does not form part of the evidence, but Mr Nimissa was subject to a lawful direction to be the principal of Loukaru School, so allegedly teaching at another school or misusing their property would constitute a breach of the Act and therefore an alleged or suspected breach of discipline, which is not minor. The concerns of the TSC were borne out because ultimately there was a finding that Mr Nimissa had committed a breach of discipline.
45. Therefore, where a breach of discipline is alleged or suspected, an investigation must be undertaken. While an investigation is being conducted, an employee may be suspended. The breach of discipline does not have to be proved or established before an employee is suspended. The breach of discipline must be *alleged* or *suspected*.
46. The TSC received a complaint, assessed there to be an alleged or suspected breach of discipline and so was required to arrange for an investigation to be undertaken. In such circumstances there was a discretion to suspend Mr Nimissa. That is precisely what happened. The suspension was lawful because grounds to suspend Mr Nimissa existed. Suspension did not turn on the truth or falsity of the alleged breach of discipline. There was an alleged or suspected breach of discipline that was not



minor. Therefore, the TSC was required to arrange an investigation to be undertaken. The evidence confirms that the appropriate steps were taken in terms of the statutory process.

47. Relevantly, Mr Nimissa was in fact found to have committed a breach of discipline and a penalty has been imposed. It is difficult to see how Mr Nimissa could possibly suggest then that the suspension was unlawful.
48. While not relevant to the issue of the lawfulness of the suspension, Mr Nimissa had the right to appeal against the suspension to the Appeal Board by virtue of s 58 of the Act and for whatever reason did not do so.
49. Mr Nimissa has not proved on the balance of probabilities that he was unlawfully suspended, and therefore the claim fails.

Employment entitlements

50. The Defendant has addressed employment entitlements in the written submissions. This can be dealt with shortly. Mr Nimissa's employment has not been terminated. So, he is not entitled to a severance payment under s54 of the Employment Act or any termination payment under s49 of the Act. Further, Mr Nimissa's annual leave entitlements continue. He is not entitled to any payment for severance, termination or annual leave.

Result

51. The claim is dismissed, for the reasons set out above.
52. There is an award of costs in favour of the First and Second Defendants, as either agreed or taxed.

**DATED at Port Vila this 15th day of November 2024
BY THE COURT**

none

Justice M A MacKenzie

