

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

**Civil**  
**Case No. 24/927 SC/CIVL**

**BETWEEN:** NANISE LAPI  
FELICITY NILWO  
HENRY JIMMY  
Claimants

**AND:** DIRECTOR GENERAL TO THE MINISTRY OF  
EDUCATION AND TRAINING  
First Defendant

**AND:** THE PUBLIC SERVICE COMMISSION  
Second Defendant

***Dates of Hearing:*** 11 October 2024 and 22 November 2024

***Before:*** Hon. Justice Oliver A. Saksak

***Counsel:*** Justin Ngwele for the Claimants  
Freddie Bong for the First and Second Defendants

***Date of Judgment:*** 17 March 2025

---

## JUDGMENT OF THE COURT

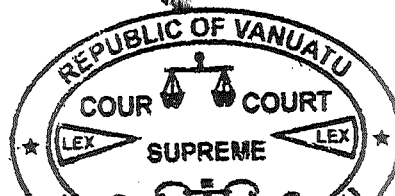
---

### Introduction

1. By this Application the three claimants challenge the decision of the First Defendant made on 15 February 2024 suspending all three of them from their official duties on half salaries, alleging negligence, carelessness, indolence, inefficiency or incompetency against each of the three Claimants pursuant to Section 36(1)(c) of the Public Service Act [CAP. 246] (the Act).

### Background

2. The suspensions resulted from the concerns raised by the Prime Minister and the social media over high failure rate of Year 13 students failing their mathematics exams in 2023/2024 periods.



3. On 30 January 2024 the then Prime Minister wrote a letter to the Secretary General of the Teaching Service Commission and the Director-General of the Ministry of Education (First Defendant) raising the concerns and demanding a report in the following terms:

"... I would like to see a report on the reasoning behind the drop in results. It is important that an inquiry be launched into those allegations, as these are accounts from students to parents, and who are in turn voicing their concerns publicly. Education is the key to ensuring our development goals are realized, and therefore the future of all our children must be maintained as a priority. The report should also include recommendation on remedial and where relevant, disciplinary actions.

Please have the report available to me well before the end of February. I also expect an explanation in person of the contents of the report".

(emphasis added)

4. By letters dated 15 February 2024 the First Defendant wrote to the three claimants a standard letter in this format:

"Notice of Suspension

*This letter is to inform you that you are suspended on half pay effective 16<sup>th</sup> of February 2024.*

*I am taking this action because it is alleged that you have committed the following disciplinary offence under Section 36(1)(c) of the Public Service Act.*

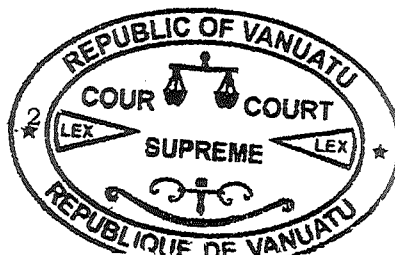
*36(1) An employee commits a disciplinary offence who –  
(c) is negligent, careless, indolent, inefficient or incompetent in the discharge of his or her duties. The office of the Director General received report stating high failure rate in national examination for anglophone students. It has been brought to my attention that the examination papers were not verified by the Curriculum Unit before sending out to schools. This is a negligence under your directorate and under your leadership which contradicts Section 36(1)(c) of the Public Service Act.*

*Your suspension will be referred to the office of the Public Service Commission to appoint an investigation team to conduct assessment on allegations raised against you and to produce a report which will be submitted to the Commission for further consideration.*

*Therefore, your suspension on half pay is effective as of 16<sup>th</sup> February 2024 until such time the Disciplinary process is complete.*

*If you wish to discuss this matter, you may make an appointment to see me. I thank you for your kind understanding and cooperation on the matter.*

*Yours sincerely,  
Bergsman Iati (signed)  
Director General  
Ministry of Education and Training."*



### The Claims

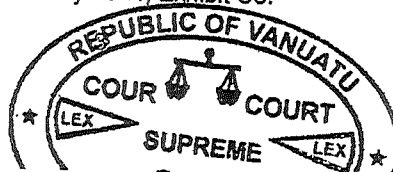
5. The claimants assert and claim that (a) the decision by the First Defendant to suspend them from duties was illegal and was ultra vires the Act; (b) there was a breach of natural justice when the First Defendant did not provide a copy of the report on which he relied and that no opportunity was given for them to respond to the report; (c) that the decision by the First Defendant was irrational and unreasonable, and (d) that the decision taken against them caused financial strains and emotional pain and sufferings to the claimants and their respective families.

### The Defence

6. The Defendants filed a joint defence on 2 May 2024 asserting the First Defendant had authority to suspend the claimants on half salaries for serious misconduct based on a preliminary assessment report conducted on 19 March 2024. Further they assert that as the matter was pending before a disciplinary process as an internal matter, the proceeding filed is pre-mature and that the Court has no jurisdiction to step in and assume the employer's role, but to await the outcome of the disciplinary process. Finally they assert the claims are misconceived and should be dismissed with costs.

### The Evidence

7. The three claimants deposed to three sworn statements each on which they were each cross-examined by defence counsel and which were tendered into evidence as Exhibits as follows –
  - (a) Nanise Lapi, statements filed on 25 March 2024 as Exhibit C1, of 5 July 2024 as Exhibit C2 and of 28 August 2024 as Exhibit C3;
  - (b) Felicity Nilwo, statements filed on 25 March 2024 as Exhibit C4, of 5 July 2024 as Exhibit C5 and of 28 August 2024 as Exhibit C6;
  - (c) Jimmy Henry, statements of 25 March 2024 as Exhibit C7, of 8 July 2024 as Exhibit C8 and of 28 August 2024 as Exhibit C9.
8. Of relevance is the Response Report annexed as NL5 to the sworn statement of Nanise Lapi (Exhibit C2), the Minutes of Meeting held on 29 December 2023 which noted the poor performance of Year 13 students in Maths under Agenda 3 and proposed 2 options and approving Option 2 for Years 12 and 13, annexed as "FN – 2" to the sworn statement of Felicity Nilwo dated 15 July 2024 (Exhibit C5), and the confirmation by Henry Jimmy that Mrs Lapi had communicated these options to the First Defendant by telephone on 28 December 2023 and that the First Defendant had accepted Option 2. See sworn statement dated 8 July 2024, Exhibit C8.



### Defendants' Evidence

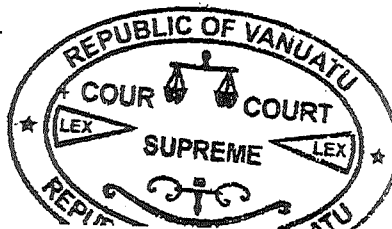
9. The Defendants presented evidence from Yan Dapang, the Executive Officer of the Ministry of Education and Training who confirmed his sworn statement dated 13 September 2024, tendered as Exhibit D1 after cross-examination.
10. Mr Bergmans Iati, First Defendant and Director General of the Ministry of Education and Training deposed to two sworn statements dated 23 August 2024 tendered as Exhibit D2 and of 13 September 2024 tendered as Exhibit D3. He was cross-examined on his evidence.
11. Of relevance are the letters of suspension dated 15 February 2024 to each of the claimants annexed as "B14", "B15" and "B16" and the Prime Minister's letter dated 30 January 2024 annexed as "B110" to the sworn statement dated 23 August 2024, Exhibit D2 and the Social Media reports annexed as "B111" and the Response Report annexed as B12(ii) in Exhibit D3.

### Agreed Facts

12. The parties have agreed the following facts by a Memorandum filed on 27 August 2024 that:
  - (a) The claimant Nanise Lapi is the Director of the Department of Education Services within the Ministry of Education;
  - (b) The Claimant Henry Jimmy is the Principal Education Officer within the Vanuatu Examinations and Assessment Unit;
  - (c) The Claimant Felicity Nilwo is the Principal Education Officer with the Curriculum Development Unit;
  - (d) By the letters dated 15 February 2024 the First Defendant suspended the three claimants from their duties on half salaries;
  - (e) The suspensions were made under Section 36(1)(c) of the Public Service Act [CAP. 246] dealing with disciplinary offences of negligence, indolence, inefficiency or incompetence in the discharge of their duties.

### Factual Issues

13. The factual issues raised are whether –



- (a) The claimants were given the opportunity to resolve the issues internally within the Ministry before their suspensions?
- (b) The claimants were given the opportunity to respond to the allegations made against them before the decision to suspend them was made?
- (c) The decision to suspend the claimants was irrational and unreasonable in light of their distinct responsibilities and the external factors affecting the academic year?

### Legal Issues

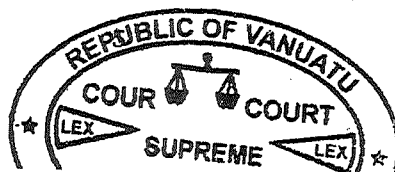
14. Three legal issues raised for determination are –
  - (a) Did the First Defendant act beyond the powers conferred on him by the Act and the Public Service Staff Manual in suspending the claimants on half salaries?
  - (b) Did the First Defendant breach rules of natural justice by not providing the claimants with a copy of the report and the opportunity to respond to the allegations against them prior to suspension?
  - (c) Was the suspension irrational and unreasonable in the claimants' specific circumstances?

### Submissions

15. At the completion of the trial hearing on 11 October 2024, the Court directed that the Claimants file written submissions within 7 days by 27 November 2024 and that the defendant to file their written submissions within 21 days thereafter.
16. No written submissions were filed in compliance with these directions. After some email reminders the claimants filed their legal submissions on 10 January 2025. The Defendant have not filed any submissions despite reminders by emails from the clerk of the court on 7 February 2025 of 9:23am and Mr Bong responding at 9:39am that day requesting a further 21 days to file their submissions. The 21 days lapsed on 27 February 2025 by which date there still were no submissions filed and the Court will dispense with the Defendants' submissions.

### The Law

17. Part 6 of the Public Service Act provides for Dispute and Disciplinary Procedure as follows –



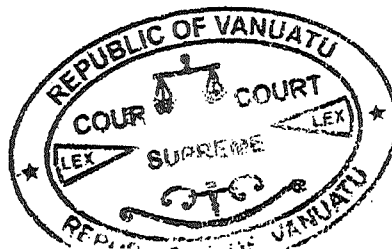
"35. Dispute resolution

- (1) Where a dispute arises between employees or an employee and a person having authority over him or her then that dispute is to be referred to the director-general of the ministry in which each employee or that person is employed.
- (2) The director-general must make a genuine attempt to resolve the dispute within the ministry. However, if the dispute cannot be resolved within the ministry, the dispute is to be dealt with as provided for under this Act and the regulations.
- (3) An employee can be suspended only by a director-general or a director in accordance with the provisions of this Act and the regulations.
- (4) To avoid doubt, disciplinary action may be taken against an employee whether or not the employee has been suspended.

(my emphasis)

18. Section 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.

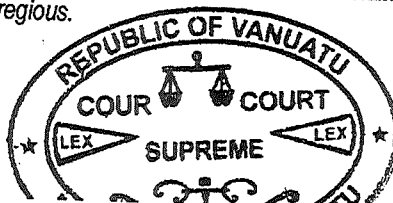
19. Section 2.2 of the Public Service Staff Regulation Manual provides:

- (a) "If an officer commits a serious misconduct the Director of the Department where the officer works, may suspend the officer on half pay and immediately inform him or her Director-General of the suspension who shall confirm or vary the Director's decision within 24 hours;
- (b) the Director-General must then refer the matter to the Commission in accordance with the next section (2.3). Where the Officer is not suspended but the disciplinary offence committed is deemed to amount to serious misconduct then the Director-General must refer the matter to the Commission in accordance with Section 2.3 of this Manual for consideration;
- (c) In the case of a Director who has committed a serious misconduct, his or her Director-General may immediately suspend the officer on half pay and immediately inform the Secretary of the Commission. In such cases, the matter is to be dealt with in accordance with Section 19A and 19B of the Public Service Act;
- (d) Suspension can only be applied in exceptional circumstances where an officer is alleged to have committed a serious misconduct and the officer's presence in office is seen to be a threat to other officers, documents assets and properties;
- (e) Where upon determination of the Disciplinary offences by the Public Service Commission or Public Service Disciplinary Board the officer is found to be not guilty the balance of his salaries will be reimbursed".

(my emphasis)

20. Section 2.4.5 of the Staff Regulation Manual provides for immediate suspension for serious misconduct cases as follows –

- "(1) No prior written warnings or verbal counselling may be given if a staff member commits serious misconduct requiring immediate suspension;
- (2) Serious misconduct is defined to included an unethical and unreasonable behaviour or action that consists of three (3) standards outlined below:
  - (a) Breach of trust between employer and a staff member; and
  - (b) A continuous behaviour of a staff member that cannot be rehabilitated; and
  - (c) Circumstance is as egregious.

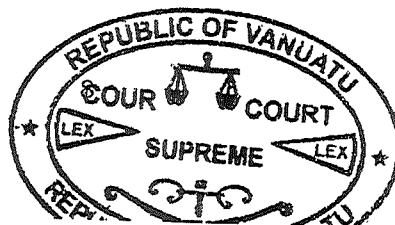


- (3) *In deciding to issue a suspension letter or conclude an act of serious misconduct, the person having authority must act in good faith, resolving the matter fairly, without malice and without prejudice, based on grounds of serious misconduct;*
- (4) *if a staff member commits a serious misconduct as listed in Appendix C, the Director-General or the Director or equivalent must consult each other before referring the staff members discipline report to the Office of the Public Service Commission;*
- (5) *A staff member may be suspended for an act of serious misconduct listed under Appendix C after the finding of the preliminary assessment concluded by the relevant Ministry or Department."*

(my emphasis)

### Discussion

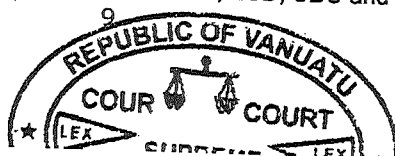
21. The starting point is perhaps the letter of 30 January 2024 by the then Prime Minister set out in parts in paragraph 3 of this judgment. The maker of the letter did not depose to any sworn statement as evidence for the defendants. But reading the letter carefully as emphasized by underlining, it calls for "a report on the reasoning behind the drop results". The report should "include recommendations on remedial and where relevant disciplinary actions". And the report was to have been submitted at the end of February with an explanation in person of the content of the report.
22. There is no doubt the letter was communicated to the Claimants who are Heads of their sections or units and are administrative officers. And there is clear evidence from the sworn statements of the claimants tendered as Exhibits that they got together and compiled the report to comply with the Prime Minister's request. This report is annexed as B12(ii) to the sworn statement of Mr Iati dated 13 September 2024 as Exhibit D3. It is the same Report annexed by Mrs Lapi as Annexure NL – 5 to her sworn statement dated 5 July 2024, Exhibit C2.
23. The Report is headed as "Response Report" and is dated 16 February 2024, that is some 13 days to 29 February 2024 being the end of that month.
24. However despite compliance with the Prime Minister's instructions, the First Defendant issued a letter dated 15 February 2024 suspending each of the claimants and alleging negligence, indolence, inefficiency and incompetence using Section 36(1) of the Public Service Act as the basis of the suspensions. The letter is set out in full in paragraph 4 of this judgment for ease of reference.
25. The Report is very extensive. It has up to 33 pages including the Appendix, it has a total of 58 plus pages. It starts with an introduction – page 4 and ends with Recommendations, page 30 and the Conclusion, page 33.
26. The conclusion on page 33 states in part:





"Mathematics and chemistry are problematic subject for VNSC qualifications while Mathematics and Economics are problematic subjects for CNES qualified from 2020 to 2023. ... Mathematics is analyzed to be a subject of concern for VUEC due to the implementation of the combined content of Calculus and Statistics in one Mathematics syllabus. Assessment designed examined the content of the Curriculum proven by Year 13 Mathematics paper. Factors contributing to poor performance: absenteeism, teach unknowledgeable of content and Solo Taxonomy approaches, inaccurate support by schools, occurrence of natural disasters and national events, incompleteness of syllabus delivery, lack of teach preparation and professional development. Quality assurance processes such as quality technical checks, workshops, verification and accreditation by EAU enhances the quality of assessments. (my emphasis)

27. That conclusion contained the reasons and the factors behind the drop in results including the proposed remedial actions in the Recommendations, exactly what the then Prime Minister had instructed and requested.
28. The claimants had complied with the Prime Minister's directives by completing the Comprehensive Response Report. Unfortunately they were suspended on 15 February 2024 with effect from 16 February 2024 the same date of the Report, earlier than 29 February 2024 when the report was to be due.
29. It was therefore not a case of neglect of duty, indolence, inefficiency or incompetence. The extensive Report speaks for itself. It could not have been possible for an incompetent, inefficient officer to compile such an extensive report within a short time, a period of 15 days from the date of the Prime Minister's letter.
30. Further, the Social Media posts annexed as BI11 to Exhibit D2. One is dated 23 January 2024 and the others are dated 20 February 2024. These are post the Prime Minister's letter of 30 January 2024 and they could not have been the basis of the purported suspensions of the three claimants as they were all posted after their suspensions on 16 February 2024.
31. Next, there was a misunderstanding of the Prime Minister's letter which directed a report which included "recommendations or remedial and where relevant, disciplinary actions". This was encumbered on the makers of the report to do in their conclusions and did not mean the First Defendant could take disciplinary steps against the claimants as he did. What he did on 15 February 2024 was pre-mature. He could have waited until the end of February 2024 to take the steps that he took.
32. Next it appears to me from the evidence of the claimants that the concerns of the high failure rate was around since December 2023. This is evident from Annexure FN – 2 to Mrs Nilwo's sworn statement of 5 July 2024, Exhibit C5 where she annexes the Minute of Meeting of the National Curriculum and Assessment Board held on 29 December 2023. Agenda 3 records the approval by the Board of Years 12 and 13 Aggregates. It records that Mrs Nanise had briefed the Board Members about her visit to the examination marking site with PEO, ESD, CDU and EAU. It records "the critical



observation of maths papers with poor performance from students had brought the ESD team to discuss on the different options of processing students marks to be presented to the Board with 2 options as follows:

"Option 1 (Intention for VUEC and VAN GOV Scholarship)

- English/French and Maths + 2 Best subjects.

Option 2 (currently applied in SPFSC

- English/French + 3 best subjects"

(emphasis added)

33. The Minute records further that:

"- Director ESD had presented the 2 options to DG MOET and he has opted for Option 2 while informing director ESD that the charges will also be applied to the VanGov Scholarship requirements:

- *Chairman is also in favour of Option 2 for not penalizing students who wish to pursue their tertiary education.*"

It records the Board's decision that "Option 2 will be applied to all Year 12 and 13 aggregates".

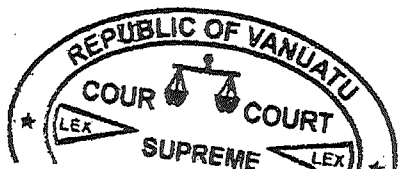
(emphasis added)

34. This evidence shows the claimants did not turn a blind eye to the concerns but took active steps to deal appropriately with it by coming up with 2 options as a remedial actions to the concerns. Surely they could not have been negligent in their duties as alleged by the First Defendant. He himself was involved after having been informed and having opted for Option 2. After all his involvement, he could not then turn around and suspend the claimants for neglect of duties, that was an irrational act on his part.

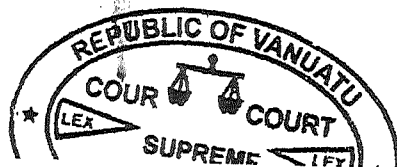
35. Next, if the concerns had given rise to any dispute between the claimants as Senior Administrators and the First Defendant as their Director-General, Section 36(1) of the Public Service Act requires that the dispute goes first hand to the Director-General. Sub-section (2) places a mandatory obligation on the Director-General in this case, the First Defendant to "make a genuine attempt to resolve the dispute within the Ministry, only if the dispute could not be resolved within the Ministry, then it would be referred to another level to be dealt with according to the Act and the Regulations.

36. I find no evidence by the Defendants that Section 35(1) and (2) of the Act was first complied with before the decision to suspend the claimants and rely on Section 36(1)(c) of the Act.

37. Next, any decision to immediately suspend an officer for serious misconduct must be done in compliance with Section 2.2 and Section 2.4.5 of the Public Service Staff Regulation Manual.



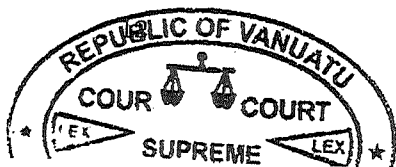
38. Section 2.2(a) and (b) provide for the process to be taken where the First Defendant suspends an officer. Mr Jimmy and Mrs Nilwo fell in this category. The First Defendant in compliance with Section 2.2 (b) referred the case of Mr Jimmy and Mrs Nilwo to the Public Service Commission on 16 May 2024 but that was about 3 months after their suspensions on 15 February 2024. Section 2.2(c) concerns Mrs Lapi in her position as Director. She was also suspended on half pay on 15 February 2024 along with the other two named claimants for serious misconduct but her name is not included in the submissions dated 16 May 2024 to the Secretary of the Public Service Commission. The duty to inform the Secretary under Section 2.2(c) is "*immediately*". It appears to me the First Defendant had failed to comply with these "*immediate*" requirements.
39. Section 2.4.5 of the Public Service Staff Regulation Manual is another relevant legal provisions for consideration where suspension is immediate for serious misconducts. No prior written warning or verbal counselling are required – sub-section (1).
40. Sub-section (2) defines serious misconduct "*to include an unethical and unreasonable behaviour or action that consists of three (3) standards –*
- (a) Breach of trust between employer and a staff member; and
  - (b) A continuous behaviour of a staff member that cannot be rehabilitated; and
  - (c) Circumstance is as egregious (or outstandingly bad).
41. From the evidence, both by the claimants and the defendant and their witnesses, the actions alleged against them as neglect of duty etc, did not fall within the three standards included in the definition of "*serious misconduct*" in Section 2.4.5(2).
42. Section 2.4.5(3) places the legal and mandatory obligation on the First Defendant in his decision to suspend the three claimants to "*act in good faith, resolving the matter fairly, without malice, and without prejudice ...*".
43. From the evidence before me it appears to me the First Defendant acted in haste to suspend the three senior officers and administrators. As such he did not act in good faith. He failed to resolve the dispute first hand internally and fairly but took the matter to the next level of disciplinary process. He did so with malice and with prejudice. His actions were unreasonable and ultra vires the powers he has under the Act and the Regulations.
44. Section 2.4.5(4) places a mandatory legal obligation on the First Defendant to "*consult*" before referring the staff members discipline report to the Office of the Public Service Commission. There is no evidence of such a consultation being made by the First Defendant.



45. Finally, Section 2.4.5(5) places a discretionary power of suspension on the First Defendant for an act of serious misconduct under Appendix C but only "after the findings of the preliminary assessment conducted ...".
46. The evidence is clear that suspension were made on 15 February 2024, a day earlier than the Response Report dated 16 February 2024 by the three claimants. The First Defendant's action was in contravention of the requirement in Section 2.4.5(5) of the Public Service Staff Regulation Manual.

### Findings

47. Having analyzed all the evidence and considering the submissions by the claimants and applying the law to the facts, I find as follows:
1. On the factual issues –
    - (a) The claimants were not given the opportunity for an internal resolution of the dispute within the Ministry first before their suspensions were made;
    - (b) The claimants were not given the opportunity to respond individually or collectively to the allegations made against them prior to their suspensions;
    - (c) The decision by the First Defendant to suspend the three claimants was irresponsible, irrational and unreasonable.
  2. On the legal issues –
    - (a) The First Defendant acted beyond the powers conferred on him by the Act and the Staff Regulation Manual in suspending the three claimants on half salaries;
    - (b) The First Defendant breached rules of natural justice by not providing the claimants with a copy of the report relied on and by not giving them any opportunity to respond to any allegations made against them. It is trite law that public servants must be afforded due process, which includes the giving of notice and a hearing before suspensions and/or termination and failure to comply render such actions invalid. See Willie v PSC [1993] VLR 5. And in Vanuatu Rowing Association (Inc) v Ministry of Lands [2015] VUSC 96 the Court said that one of the fundamental assumptions underlying the law of judicial review is that it is the duty of superior courts of general jurisdiction is to ensure that public power is exercised according to law;
    - (c) The suspension of the three claimants by the First Defendant was irrational and unreasonable in the circumstances. The conclusion on page 33 of the Response



Report could not be clearer as to the contributing factors of the high failure rate that fell outside of the responsibilities of the three claimants. It is a well-established principle of law in Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223 that administrative decisions must not be unreasonable in the sense that no reasonable authority could ever come to it. The First Defendant's action in suspending the three claimants was pre-mature, irrational and unreasonable in the circumstances it was made. No reasonable person could have come to such an irrational and unreasonable decision.

**The Result**

48. From the findings made and the reasons provided, I find for the three claimants and enter judgment in their favour.
49. The formal orders and declarations issued in their favour are –
- (a) A Declaration that the suspensions made on 15 February 2024 effective on 16 February 2024 were and are unlawful, void and of no legal effect;
  - (b) Those suspensions are hereby quashed;
  - (c) A order requiring the immediate reinstatement of the claimants to their respective positions;
  - (d) That all their half salaries withheld from 16 February 2024 to date be paid immediately;
  - (e) The claimants be paid their costs of the proceeding on an indemnity basis as agreed or taxed, and disbursement costs of VT58,160.

DATED at Port Vila, this 17<sup>th</sup> day of March, 2025.

BY THE COURT

  
Hon. Justice Oliver A. SAKSAK

