

(Civil Jurisdiction)

BETWEEN: LAMAI WARE

Claimant

AND: THE REPUBLIC OF VANUATU

Defendant

AG. 15/129/08

JH - JN

Mr Justice Oliver A. Saksak
Mrs Anita Vinabit – Clerk

Mr Saling N. Stephens for the Claimant
Mr Justin Ngwele for the Defendant

Date of Hearing and Oral Decision: 8th September 2009
Date of Judgment: 9th September 2009

REASONS FOR ORAL DECISION

1. Yesterday, the Court announced orally after hearing final and closing submissions from Counsels that –
 - (a) The Court was not satisfied that the Claimant's termination by the Public Service Commission (the PSC) on 10th October 2006 was unjustified.
 - (b) As a result, the claims of the Claimant failed and were dismissed with costs to the Defendant fixed at VT100.000.
 - (c) The Defendant succeeded in his counter-claim and set-off.

(d) As a result, the PSC was entitled to recover up to half of the estimated damage given at VT2.834.097, that is VT1.417.048. These would be recovered from the benefits payable to be claimant but excluding amounts due as severance payment.

2. This judgment provides reasons for those oral decisions.

3.1. The Claimant was employed as an Assistant District Labour Officer in charge of the District Labour Office in Luganville commencing on 2 August 1993.

3.2. Prior to his dismissal on 16th October 2006, the Claimant was appointed as Acting District Labour Officer effective as from 18th April 2006 to 18th July 2006.

3.3. On 10th August 2006, the acting appointment of the Claimant was terminated for reasons of allegations made against him in an Employee Disciplinary Report (EDR) which were that he –

(a) Had disobeyed and disregarded the lawful instruction of his superior as per the requirement of Section 36(1)(b) of the Public Service Act;

(b) Had improperly used government property (G681) outside official hours of work without obtaining proper authorization pursuant to Section 36(1)(f) of the Public Service Act; and

(c) Was guilty of improper conduct inside and outside official working hours that was likely to bring the Public Service into disrepute.

- 3.4. The disciplinary offences alleged in (a) and (b) above were alleged to have occurred on 17th June 2006. And the allegations in (c) above were alleged to have occurred on 24th June 2006.
- 4.1. The EDR Form containing the above allegations were served on the Claimant on 11th August 2006 and completed and returned by him on 17th August 2006.
- 4.2. Under Section 4 of the EDR, the Claimant was required to certify and respond to the three allegations made against him. Under Section 4.3 the Claimant indicated he did not accept the allegations as true. He provided the details of his response in Bislama as follows:

“(1) & (2). I tru nomo mifala I bin usum trak long time ia. From se Mr Watsu hemi firstime blong hem I wantem luk “bule water” long Matevulu. Mo next ting, ino mifala nomo mifala istap misusum Government Vehicle. Long saed blong mi mi harem nomo se hemi wantaem nomo we mifala I visitem blu hole mo hemi first time mifala I misusem Government Vehicle.

(3). Mi givim key long time ia blong washem trak blong Minister iusum next day long hem afta go putum back trak long haus but ino blong go long Turtle Bay, hemi plan blong tufala nomo.”

- 4.3. On 14th August 2006, the Labour Commissioner Mr Lionel Kaluat certified Section 5 of the EDR that –

- (a) the allegations contained were true; and

(b) that the EDR was provided to the Claimant who was given 7 days to respond.

4.4. On 12th September 2006, the Director General Mr Johnson Wabaiat certified Section 6 of the EDR on similar terms as the Commissioner.

5.1. On 26th June 2006, the Claimant made a Report to the Commissioner of Labour about the accident on 24th June 2006.

5.2. On 27th June 2006, Mr Joseph Watsu made a Report of the accident on 24th June 2006 to the Commissioner of Labour.

5.3. On 27th June 2006, the Police made an abstract report on the accident of 24th June.

6.1. On 1st August 2005, the Claimant was issued with a first warning by the Commissioner of Labour about continued absences and failure to comply with instructions.

6.2. On 18th August 2006, about 1 year later the Claimant was issued the Second warning about failing to disclose information on misuse of funds and failing to comply with instructions not to allow civilians to drive vehicle G.681.

7.1. On 7th September 2006, the Claimant served on the Public Service his letter of resignation by giving three months notice effective from 11th September 2006 to 11th December 2006.

7.2. On 27th September 2006, the Acting Secretary to PSC replied to the Claimant acknowledging receipt of his resignation letter and

advised that the resignation was not done in good faith in view of the pending disciplinary action against him. Further he was advised that despite his resignation, the PSC would still proceed to consider the allegations made against the Claimant and would inform him accordingly of any decisions made.

- 7.3. On 10th October 2006, the Secretary to PSC submitted the EDR to PSC for consideration.
 - 7.4. The PSC met on 10th October to consider the EDR of the Claimant and decided he was to be terminated but with his benefits.
 - 7.5. On 12th October 2006, the Secretary wrote to the Claimant informing him of the PSC decision of 10th October.
8. The Claimant sued the PSC and the State alleging –
- (a) That he was not served with any notice and/or charges against him. Further, that he was not given any notice to require his personal attendance at the hearing on 10th October 2006.
 - (b) That his termination for misconduct was contrary to Sections 49 and 50 of the Employment Act Cap. 160.
 - (c) That his general and professional reputations were harmed entitling him to damages.
 - (d) That the Defendant had acted in continuous disregard for the Claimant's rights.

9. The Claimant's evidence in support of his claims are contained in his sworn statement (Exhibit C1) dated 29th September 2008. He confirmed this on oath and was cross-examined by Mr Ngwele. He did not call any other independent witnesses.

10. The Defendant produced evidence from Mr Kanam Wilson who deposed to a sworn statement on 14th May 2009 and confirmed it on oath and was cross-examined by Mr Stephens. His statement contained letters referred to earlier in this judgment in the chronology of events marked as KW1, KW2, KW3, KW4, KW5, KW6, KW7, KW8, KW9, KW10, KW11 and KW12. KW7 is a repair estimation by Asco Motors on the cost of repairs to the vehicle G.681 showing a total of VT2.834.097.

11. Dealing now with the allegations made by the Claimant at paragraph 8 of this judgment –

(a) That there was no notice and charges.

The EDR (KW4) clearly specify the three charges laid against the Claimant. The EDR was certified by both the Commissioner of Labour (Section 5) and by the Director General (Section 6). The Claimant was given 7 days to respond (Section 4). He responded under Section 4 of the EDR. He made admissions of misuse and improper conduct for which he had been served two previous warnings. As such, he was not required to personally attend the PSC hearing on 10th October 2006. The Cases of **Ben Garae v. PSC** CC Appeal Case No. 3 of 2005 and of the **Government v. Mathias** (2006) VUCA7 lend support to this ruling.

(b) That the PSC's action was contrary to section 49 and 50 of the Employment Act.

Ben Garae's and Mathias' Cases as cited in Timothy Quai's Case CC No. 182 of 2006 are clear that Section 50(4) does not in terms require an oral hearing to be given before a dismissal for serious misconduct.

These allegations are untenable.

(c) The allegations that the Claimant's general and professional reputation were damaged. There simply was no evidence by the Claimant to support those allegations. The contrary would be true. He was given two warnings in a space of one year apart. In addition, he made admissions to the allegations made against him in the EDR quite contrary to what he indicated that he did not accept the allegations. These bear much on his general and professional reputation. His claims under those heads of damages were proven to the contrary and as such he could not possibly be entitled to the damages he claimed.

(c) That the Defendant had acted in continuous disregard for the Claimants' rights. The Claimant had no evidence to prove this allegation. Indeed, the reverse is true. The PSC could have terminated him for serious misconduct and deny him his benefits and entitlements. But that did not happen. The PSC as a good employer decided instead to terminate the Claimant with his entitlements. He was informed about that decision on 12th October 2006 (KW11). He was informed that those benefits would be offset against the cost of damage to the vehicle. Unless he made some arrangement about the payment of those damage, his benefits would not be released. The Claimant has not shown any evidence about any such arrangement. He cannot therefore complain that his rights were continuously disregarded by PSC. That claim must fail.

12. It was submitted by Mr Stephens that the allegations made against the Claimant were not serious enough to amount to misconduct to warrant a dismissal. That submission is not tenable in light of two previous warnings given to his client. The Claimant had made admissions about misuse of vehicle. Clearly, he did not show he had any authority to use the vehicle on a weekend (Saturday). He had failed to comply with instructions of his superior at least twice. Surely, the PSC was entitled to reach the conclusion that these series of repetitive actions by the Claimant amounted to serious misconduct.

13.1. It was submitted by Mr Ngwele that the Claimant became the joint tortfeasor with Joseph Watsu by handing him the key and then failing to supervise or instruct him adequately about the use of the vehicle. The Court agreed with Mr Ngwele's submission. As a result, the Court formed the view that the Claimant should be liable to make good half of the cost of damage as assessed by Asco Motors. This is the sum of VT1.417.048.5. The other half should be the liability of Joseph Watsu or Joelly Akoteau but these persons were not sued or joined as parties.

13.2. This amount must be offset against any entitlements of the Claimant in respect to –

- (a) Notice;
- (b) Annual Leave;
- (c) Repatriation Costs;and
- (d) Unpaid Salaries.

Any amounts due to him as severance payment should not and cannot be withheld but must be paid in accordance with the decision of PSC as contained in their letter of 12th October 2006 (KW11).

- 14.1. The Claimant had resigned for personal reasons. The decision by PSC to terminate his employment was made in line with or in pursuant of that decision to resign. That resignation was effective from 11th September 2006. That being so, there was no reason to sue for unjustified dismissal. But having done so, his action could be seen as frivolous and vexatious. It only warrants a dismissal and with costs.
- 14.2. Costs were claimed at VT100.000 by Mr Ngwele. The Court accepted and fixed the costs against the Claimant at VT100.000.
15. Those are the reasons for the oral decisions of the Court.

DATED at Luganville this 9th day of September 2009.

BY THE COURT



OLIVER A. SAKSAK

Judge