

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

Civil Case No.149 of 2012

BETWEEN: DICKINSON TEVI

Claimant

AND: MALVATUMAURI NATIONAL COUNCIL OF
CHIEFS

Defendant

Coram: Justice D. V. Fatiaki

Counsels: Mr. C. Leo for the Claimant
Ms. F. Williams for the Defendant

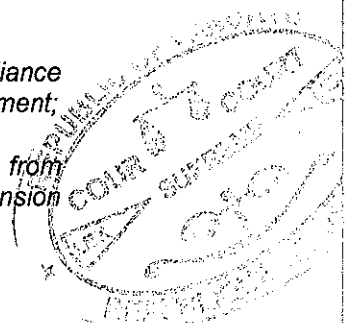
Hearing date: 22 October 2014

Judgment date: 15 December 2014

JUDGMENT

1. The "agreed facts" of this case includes:

- "On 21 October 2009 the Claimant entered into a written agreement with MNCC to coordinate the Vanuatu Kastom Governance Project Partnership Project Phase 3;
- The Project is operated within the MNCC's office and the Claimant assumed his duties on 1 November 2009;
- In the course of the operation of the Project there was a "mid- term review" of the Project carried out in 2011 by a consultant;
- In February 2012 the parties to the Project agreed that an external Audit was to be conducted;
- On or about May 2012 AUSAID engaged Law Partners, Chartered Accountants to audit the Project accounts;
- The audit of the Project was to commence in April 2012;
- In a letter dated 23 May 2012 the Director General "DG" to the Ministry of Justice wrote to the Claimant raising allegations on the use of project funds and requested a response from him ("**the allegations letter**");
- On 24 May 2012, the Claimant met with auditors and requested one month to put together the accounts of the project;
- On 30 May 2012 the Claimant responded to the allegations letter;
- On 31 May 2012 AUSAID issued a letter to the Claimant seeking his compliance with the audit requirements as specified under clause 2 of the funding agreement;
- On 5 June 2012 the "DG" of Ministry of Justice suspended the Claimant from office on allegation of misappropriation of the project fund. The suspension



occurred during the audit process being conducted by Law Partners (**"the suspension letter"**);

- On 2 July 2012 the Chief Executive Officer of the MNCC ("CEO, MNCC") issued a letter to the Claimant requesting him to surrender all assets and other information and documents of the project to the MNCC in order for the audit to be conducted;
- On 5 July 2012 the Claimant responded to the letter of CEO MNCC;
- On 19 July 2012 the CEO, MNCC issued another letter to the Claimant again requesting him to return all project assets and documentation in his possession;
- On 16 August 2012 the "CEO", MNCC terminated the Claimant's contract on grounds of serious misconduct (**"the termination letter"**).

2. In this action the claimant **Dickinson Tevi** asserts that he was wrongfully or unlawfully dismissed and he claims his entitlements under the Employment Act [CAP.160] as well as the balance of his contract.
3. His employer the **Malvatumauri National Council of Chiefs ("MNCC")** denies the claim on the basis that the claimant was dismissed for "*serious misconduct*" and therefore, is not entitled to any of the entitlements under the **Employment Act** for a terminated employee (see: Section 55).
4. In this regard **para. 8 (g)** of the defence states:

"(g) ... That on 16 August 2012 the claimant was terminated from his job for serious misconduct;

Particulars

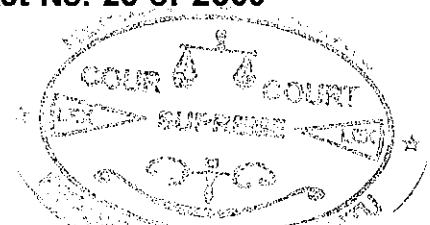
Misappropriating of the project fund; and

- (i) Copies of the statements of account from the ANZ Bank;
- (ii) The Audit Report of 2008;

Refusal to obey and respond to instruction by acting CEO of Malvatumauri."

It is clear from the above that the defendant is asserting actual (not alleged) misappropriation of project funds by the claimant. It is also common ground that no police complaint was ever lodged against the claimant nor has he been convicted of an offence of Misappropriation contrary to **Section 125** of the **Penal Code** as proof of actual misappropriation.

5. At the commencement of the trial claimant's counsel requested the Court to deal with case "*on the papers*" without hearing oral evidence. Although a rather unusual request, defence counsel agreed that the case could be determined on the basis of the "*agreed facts*" as most of the issues were "*legal*" in nature. The case proceeded accordingly.
6. Although the "*agreed facts*" commence from the date of the claimant's employment contract on 21 October 2009, it is common ground that the claimant's involvement with the Project started some time earlier in or about 2007 after the passing of the **National Council of Chiefs Act No. 23 of 2006** which commenced on 11 September 2006 (the "*NCC Act*").



7. The NCC Act is the implementing Act of **Article 29** of the **Constitution** and is mandated under **Article 31**. It establishes an umbrella body the National Council of Chiefs which oversees the workings of two other Councils established under the NCC Act namely, the Island and Urban Councils of Chiefs charged inter alia with the following functions:

- (a) to resolve disputes according to local custom;*
- (b) to prescribe the value of exchange of gifts for a custom marriage;*
- (c) to promote and encourage the use of custom and culture;*
- (d) to promote peace, stability and harmony;*
- (e) to promote and encourage sustainable social and economic development;*
- (f) to undertake such other functions as are conferred on them under this Act or any other Act".*

8. The Project is a tripartite partnership between "AUSAID", the Australian Centre for Peace and Conflict Studies ("ACPACS") and the **Vanuatu Malvatumauri National Council of Chiefs** ("MNCC"). It had an expected time frame of 3½ years and aimed:

"... to contribute in the long term, to the goal of strengthened governance in Vanuatu through exploring deepening understanding of and strengthening kastom governance systems contribution to contemporary Vanuatu, and supporting constructive interaction between kastom and state institutional governance."

9. **Phase 3** of the Project was financed by a Funding Agreement Deed between AUSAID and MNCC ("*Ausaid Agreement 52750*") commencing on 1 November 2009 until 31 March 2013. The Deed makes provision for, amongst other things, the keeping and maintaining of proper accounts and records (**clause 12**); the provision of monthly, quarterly and annual reports (**clause 14**) and for management and reporting arrangements including the appointment and supervision of a full-time "*Partnership Coordinator (Port Vila)*" for the duration of the Deed who shall be:

"..... responsible for their own organisation's functional management and acquittals, based on two separate budgets. The Partnership Coordinator (Port Vila) will report to and be supported by the President and CEO of the Vanuatu MNCC."

10. The MNCC budget for the Project was intended:

"(to) cover all its own expenses including cost of a Partnership Coordinator and the VKS Researcher and all costs associated with planning and delivery of workshops, including travel within Vanuatu, accommodation meals for all facilitators and participants as well as travel allowances for participants."

11. In this regard the "Notes" to the MNCC budget summary which formed a Schedule to "*Ausaid Agreement 52750*" clearly provides:

"2. Severance entitlement is payable at the end of each year or at the end of a term of a contract. The amount is determined based on 20% of the contract for



each person. This entitlement is deemed necessary since the contracts signed will be fee based and therefore will not attract other such benefits such as VNPF and other employment benefits. Current VNPF rate for employees is 8% and severance entitlements is 10%.

(my underlining)

and notes 4 and 5 read as follows:

"4 storian preparation involves travelling to the island to select venue and check out logistics

5. 3 storians will be held in year 1. The locations are Santo, Torba and Tanna."

12. Of particular significance to the claim and the claimant is **Clause 5.4** of Schedule 1 which describes the role of the "Project Co-ordinator" as being:

"... to ensure all Partnership activities are implemented in a co-operative, professional, timely and appropriate manner, paying particular regard to the interest of the local organizational and cultural context."

13. The Schedule also provided for a "mid-term review" of the Project in April 2011 which will:

"... assess progress towards the objectives of the partnership" and "VMNCC will be expected to participate in both review processes to the extent determined in the TORS agreed to by all partners"

14. By a contract dated 21 October 2009 the MNCC engaged the claimant as "Project Co-ordinator" to manage, on behalf of MNCC, "AUSAID Agreement 52750" signed on 10 November 2009. The employment contract was for "the full duration of the (project)" and could be amended "by mutual agreement between the two parties".

15. Specifically, the Claimant's terms of engagement were three-fold, he was:

- *"..... required to perform the services required as the Project Coordinator (with office assistance provided by MNCC)."*
- *"..... required to take all measures necessary to protect the interest of the project at all times whenever he perceives that there is a risk to the project and its assets"; and*
- *".....may provide other services other than that of the Project Coordinator as required which he may charge for separately."*

16. Interestingly, the employment contract also contained an unusual Clause that provided that the claimant:

"...will be given due respect for this high level responsibility and no demands or pressure will be imposed on him by anyone in the performance of his functions. MNCC will be fully responsible for the redress of any pressure or undue influence imposed on Mr Dickinson Tevi"

Significant by its absence is any termination clause or any reference to the provisions of the Employment Act in the claimant's contract.

17. Both counsels referred and relied upon various sworn statements filed in the case. The claimant deposed and filed five (5) sworn statements and the defendant a similar number from **Alicta Vanua** ("the Acting CEO, MNCC") (2); **Mark Bebe** ("the DG, Justice") (1); **Alipate La'au** ("Audit Manager of Law Partners Chartered Accountances and Business Adviersers")(1) and **Georgina Faerua** (1). None of the deponents were called to give evidence as agreed, and a belated application by defence counsel to cross-examine the claimant for a limited purpose was withdrawn after the claimant conceded that he was the project coordinator of the interim phase of the Project in 2008 when the "2008 Audit Report" was issued.

18. "The fees" (not salary or remuneration) which the Claimant was to receive under his contract was a monthly sum of VT 250,000 payable in two installments. Additionally:

"At the end of every 12 months from the commencement of this contract, Mr. Dickinson Tevi is entitled to a lump sum payment equivalent to 20% of the total amount that is due to him as the Project Co-ordinator for the 12 month period. This entitlement is apportioned accordingly in 2013 when the final period will be less than 12 months. Dickinson Tevi may claim other fees as necessary for additional services performed." (cf. "Note 2" to Schedule of 'Ausaid Agreement 52750' set out in para. 11 above).

19. I turn next to the "agreed issues" which are:

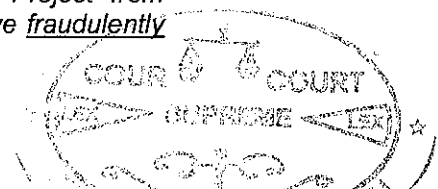
- (1) Whether the claimant's actions constituted "serious misconduct"?
- (2) Whether the defendant afforded the claimant an adequate opportunity to respond to the allegations of "serious misconduct" made against the claimant prior to terminating the claimant? (the "section 50 (4) issue");
- (3) Whether in effecting termination of the claimant the defendant complied with Section 50 (3) of the Employment Act? (the "section 50(3) issue");
- (4) Whether the claimant is entitled to his unpaid fees and severance allowance under Section 56 (4) of the Act.

20. As to **issue (1)** of "serious misconduct", claimant's counsel submits that the defendant is bound by the terms of the claimant's "termination letter" which reads:

"Dear sir,

SUBJECT: TERMINATION OF YOUR CONTRACT

Following your uncooperative behavior in not providing financial information to the Appointed Auditors of the Kastom Governance Project, and despite our various attempt to get the information, and retrieve the assets of the Project from yourself, without success, we are of the opinion that, you may have fraudulently



misused the project fund from the period, November 2009 to December 2011. We believe that, you are hiding information which may lead to an issue of gross misconduct in the use of the project funds and assets for your own personal use.

As a result of your behavior the Auditors were not able to complete the Auditing to explain/justify the use of funds from November 2009 to December 2011. There is a significant amounts of money involved, and the Vanuatu Government is unable to report to the Donors on the spending of the fund hence it may lead to future discontinue of the funding for the project. This will in effect affect the implementation of the Kastom Governance Program. It is also very shameful to try and explain the use of fund, to AUSAID, and the Australian Government, on the misuse of the fund. I am surprise that, as an accountant, you have behave in such an unethical manner, by either not adhering to the procurement process and by not keeping the records and or hiding these information from the Auditors.

I also note in our previous correspondences with you that, you have not responded well to the allegations made against you, and in particular, to the breach in the Laws of Vanuatu by not paying the VNPF contributions of those employees employed by the project, including yourself, and thereby creating another potential liability on the government.

I consider these allegations as an issue of serious misconduct and therefore in my capacity as the acting Executive Officer responsible for Malvatumauri, have no other choice but to terminate your contract forthwith with the Malvatumauri as the Project Coordinator for the Vanuatu Kastom Governance Partnership Project. This letter is effective as of this date and because of the seriousness of the issue, you will not be paid any termination payments, including any outstanding leave. If however, if there is any, legal entitlements, it will be offsetted (sic) against any liabilities incurred."

(my underlining)

21. In summary, the "conduct" identified in the termination letter includes:

- (1) "uncooperative behavior in not providing financial information to the Appointed Auditors of the Kastom Governance Project despite several unsuccessful attempts ...";
- (2) Suspected "fraudulently misused the project funds ...";
- (3) "Hiding information;
- (4) "gross misconduct in the use of the project funds and assets for your own personal use ...";
- (5) "... misuse of the fund ...";
- (6) Unprofessional and unethical behavior in "not adhering to the procurement process and by not keeping the records and or hiding these information from the Auditor ...";
- (7) "not responded well to the allegations made against you;
- (8) not paying the VNPF contributions of those employees employed by the project ...";

If I may say so the above "conduct" is significantly more numerous and different to the particulars provided in the pleaded defence



22. As for the "previous correspondence" mentioned in **para. 3** of the termination letter, defence counsel submits it refers to – the "allegations letter"; the claimant's response of 30 May 2012; and the "suspension letter".
23. The "allegations letter" reads:

"Dear Dickinson,

Alleged misappropriation of program funds.

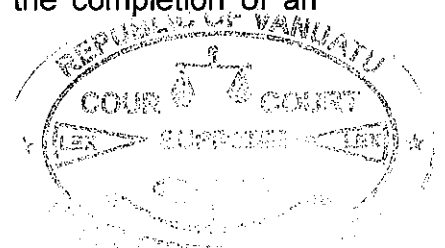
I write to advise that, I have received, an alleged report of misappropriation of the Vanuatu Kastom Governance Program by yourself as the Coordinator of the Program. These are some of the allegations raised against you:-

- (a) *In December 2011, you took a trip to Luganville, spent four days in Santo to prepare a Presentation, for Ministry of Justice summit in Mele. You could have prepared the papers in Vila. This is considered unnecessary, and waste of funding, in accommodation and allowances paid;*
- (b) *You took unwarranted trips to Pentecost, which in the view of the management was not planned for and was considered personal trips rather than, official visits. There were evidence of excessive transport cost and allowances paid for these trips;*
- (c) *You deducted the salaries of the staff of the Customs governance, which are considered to be illegal;*
- (d) *Non payment of VNPF of Staff including yourself, although this was raised in previous Audit report;*
- (e) *Transparent operations of the Funds. The procurement processes of goods and services are not done through a transparent processes, hence raising questions, on (i) legality of the expenditures, according to the programs budgeted for, and (ii) justifications for the expenditure;*
- (f) *No quarterly report to Malvatumauri, CEO or Chairman of Malvatumauri Council of Chiefs although the formal reporting mechanism was suppose to be done through CEO of Malvatumauri.*

In view of these allegations, I request that, you response to this allegations within seven days of the date of this letter to enable me to determine our next level of appropriate response to these allegations.

*Yours sincerely,
Mark P. Bebe"*

24. The "allegations letter" in turn, purports to be based on a "report of misappropriation" which unfortunately was not attached to the letter nor was it provided to the Court as it should have been. This prompted the claimant's "response" letter which only answered allegation (a) and sought details and explanations about the remaining five allegations (b) to (f). The seeming inadequacy of the claimant's response drew a curt response from DG, Justice in the "suspension letter" directing the claimant to "... stay away from the office ..." and "... return the keys to the office" as well as "... the current hired car you are using to the owners forthwith immediately" pending the completion of an external audit of the Project.



25. Remarkably, by a letter dated 24 May 2012 (*ie*: the day after the "*allegations letter*") from the Acting CEO, MNCC to the appointed Auditors of the Project, the auditors were informed that "(the claimant) *will be the main contact person for this audit process*".
26. I say "*remarkably*" advisedly because it appears that at the same time as the DG, Justice was writing to the claimant suspending him, the claimant's immediate supervisor the Acting CEO, MNCC was also writing to the appointed auditors nominating the claimant as "*the main contact person*". Needless to say the claimant's subsequent suspension by DG, Justice and his replacement by Georgina Faerua as the audit contact person does not appear to have been copied to the Acting CEO MNCC whose earlier advice to the auditors was clearly being countermanded.
27. Despite the growing "*confusion*" demonstrated by the above letters defence counsel relies on the allegations and suspension letters and the sworn statement of **Alipate La'au** the Audit Manager who expressed the view that:

"There are insufficient documents provided to properly complete the audit report from the period 2009 when the project started to 2012 when the project ended and thus it is likely that the project funds are not properly used."

28. In particular, the private and confidential audit report letter to AUSAID which pre-dated the claimant's dismissal, highlighted numerous shortcomings in the information provided to the auditors including:

(a) *There was no documentation (ie. procedures manual) available to outline the internal controls and procedures that were in place with regards to authorization of payments. He had planned to discuss this matter with Dickinson however this meeting did not eventuate following his suspension ..."*

(b) The detailed listing of expenditure transactions covering the period 1 November 2010 to 1 March 2012 provided by Dickinson "... *did not identify budget lines against actual expenditure ...*";

- *A review of payment vouchers (with attached receipts/invoices where available) which was provided to us by Dickinson (noted) "not all supporting documentation was provided";*
- *"There was insufficient information available to conduct a detailed review of the program coordinators travel expenses to Pentecost in September 2011 as well as travel expenses to Santo ... in January 2012";*
- *"We were unable to obtain any information regarding the history and use of car rental expenses prior to and up to the time Dickinson was suspended";*
- *"We were not provided with a list of transaction for expenses covering the period of 1 November 2009 to 31 October 2010 ... Dickinson did not cooperate with providing us information in a timely basis as requested prior to his suspension";*

(c) We were unable to document the process of cash imprest ..., petty cash and acquittals prior to and up to the time Dickinson was suspended;

(e) A lump sum payment calculated at 20% of annual salary was paid out in December 2010 and November 2011 to all staff ... No specific reference of this entitlement is made in the staff contract. We note however that the description on the payment voucher referred to this payment as severance allowance ...;

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- (j) VNPF contributions have not been paid to VNPF ...;
 - (k) We are unable to document the process regarding staff being fined and salary withheld over long periods of time by (the claimant);"

29. In response to the Audit Manager's sworn statement the claimant deposed that he was suspended soon after the audit commenced and had: "... *no opportunity to prepare the files and accounting records ... before the report was released*". However displaying a particular knowledge of the auditing process, the claimant deposed (at **para. 10**):

"Normal audit process requires that the audit findings and issues must be raised with the person responsible, followed by the issue of an official management letter issued by the auditor, followed by an official management response Followed by the issue of a draft audit report for management to provide any response, followed by the final issue of the audit report."

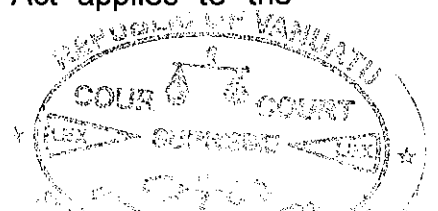
Given those circumstances, only Malvatumauri is responsible for negligently making a bad management decision in removing the former CEO and illegally removing the claimant".

30. If I may say so the claimant's responses to the allegations letter and to the Audit Manager's "*findings*" are evasive, argumentative, and unacceptable for a qualified accountant who would be familiar with the requirements of keeping and maintaining basic accounting records and acquittal documentation. This was not an isolated failure to maintain accounting records by a new-comer to the project but a continuing default by an experienced professional over 3 years for which the claimant personally bears full responsibility. The claimant's serious "*misconduct*" is not constituted by proven misuse or misappropriation of Project funds but, rather, in his deliberate failure to keep and maintain proper accounting records and supporting documentation for the Project expenditures in a transparent and readily accessible form. **Issue (1)** is determined in the defendant's favour.

31. I turn next to consider the **Employment Act** issues namely issues (2) and (3) and I begin by setting out the provisions of **Section 50(3)** of the Employment Act as follows:

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

32. As already pointed out, the claimant's contract nowhere refers to the Employment Act and despite reference being made to "*Ausaid Agreement 52750*" which contains a Note(2) earlier referred to in **para. 11** (above) which appears to deny the applicability of the severance provisions of the Employment Act to the claimant and other persons hired to work on the Project, both counsels agree and accept that the Employment Act applies to the claimant.



33. With that assumption, I turn to consider the "section 50(3) issue". The competing arguments may be simply stated. Defence counsel refers to para. 5 of the claimant's termination letter which reads:

"I consider these allegations as an issue of serious misconduct and therefore in my capacity as the acting Executive Officer responsible for the Malvatumauri, have no other choice but to terminate your contract forthwith ... as the Project Coordinator for the Vanuatu Kastom Governance Partnership Project ..."

(my underlining for emphasis)

Plainly, on the face of the letter it may be reasonably inferred that the claimant's employer had considered other lesser ways of dealing with the claimant but had concluded that there was "... *no other choice* ..." than immediate termination.

34. Additionally, defence counsel submits that the claimant was the senior-most officer in the Project; was an experienced, professionally qualified accountant and auditor and only had a handful of permanent staff to oversee. He also apparently kept all the relevant files at his home and denied his staff accounting information about the Project.
35. Claimant counsel's contrary submission is that there had been no attempt to comply with the dictum of the Court of Appeal in Public Service Commission v. Tari [2008] VUCA 27 where it said of the requirements of Section 50(3) (at p. 5):

"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 ..."

Consistent with this obligation the Commission should invite those whom it has concluded may have been guilty to serious misconduct to address ss (3). This should be done before a decision on the employee's future is reached. When communicating its decision on dismissal (or otherwise) the Commission will need to identify it has considered Section 50(3) and (if appropriate) concluded (in good faith) that it cannot take any other course other than dismissal".

36. When pressed about what other reasonable option was available to the claimant's employer, counsel suggested that the claimant "*should have been demoted*" (in the absence of a clear clause allowing it) or his contract could have been amended "... *to reduce the claimant's functions to only deal with the (on-going) audit process*" and, presumably, if there was a satisfactory outcome to the audit, then, the claimant would be reinstated to his full duties as Project Coordinator.
37. In the present case although there was no invitation to the claimant to address **Section 50(3)** before his dismissal for "*serious misconduct*", I am more than satisfied from the course of correspondence; the nature and duration of the allegations; and the claimant's contractual engagement that dismissal was the only reasonable option available to the claimant's employer once a determination of "*serious misconduct*" was made against him.
38. After careful consideration of the nature and terms of the claimant's contract I reject the submission that invoking the amendment clause was either a viable

or reasonable option in all the circumstances where "serious misconduct" is involved. Issue (2) is determined in the defendant's favour.

39. Finally I turn to the "Section 50(4) issue" which refers to the adequacy of the claimant's opportunity to answer any charges of misconduct leveled against him. In this regard, the DG's "allegations letter" is pivotal. It enumerates six (6) allegations and ends with a request to the claimant "to response (sic) to this allegations within seven days of the date of the letter". The allegations defence counsel orally submits are based on an undated document "**MB3**" attached to the sworn statement of **Mark Bebe** despite an acting CEO, MNCC having been already appointed on 20 March 2012.
40. The origin, authorship, and source of the allegations in "**MB3**" is nowhere disclosed in the "allegations letter" or in the sworn statement and remains an unresolved mystery even after defence counsel's submissions. It is also common ground that "**MB3**" was never provided to the claimant to respond to, as it should have been, especially as it had six (6) sets of supporting documents attached to it including, the claimant's personal bank statements as well as those of a close female associate of the claimant who was allegedly employed in the Project; the Project account bank statements for the period November 2009 to June 2012 showing a credit balance of VT2,261,252; and an incomplete copy of an auditors report on the Project for the period ending 31 March 2008 which was missing 4 pages ("the 2008 Audit Report").
41. Although the incomplete "**2008 Audit Report**" records serious budget over-runs to the tune of VT4,305,300, the auditor was able to proffer an opinion that: "... the expenditures and transactions have been properly authorized and recorded in the accounting system for the period 1 January 2007 to 31 March 2008".
42. Significantly, the "**2008 Audit Report**" notes the following under the heading Documentation Supporting Expenditure:

"It is completely desirable to have a complete set of invoices and/or receipts to support all expenditures however, realistically considering, say, land or boat transport in the outer islands, such receipts are frequently unavailable, so the auditor has needed to be flexible and realistic in assessing the validity of such claims".
43. I can say at once that given the above-mentioned shortcomings in "**MB3**" and in the "**2008 Audit Report**" neither of which was actually provided to the claimant to respond to and both of which were crucial to the defence and which it was the defendant's duty to explain fully and provide complete copies to the Court, little reliance can be placed on them in support of the "allegations letter". Furthermore, the relevance of the "**2008 Audit Report**" (even if complete) and which pre-dates the claimant's relevant contract of engagement, is doubtful at best and presumably, did not deter or impede the claimant's subsequent appointment as Project Co-ordinator.
44. In the absence of "**MB3**" and the "**2008 Audit Report**", the claimant replied to the "allegations letter" on 30 May 2012 with what might be described as "obfuscation". To four of the six allegations, he sought explanations ("please explain"), specifications ("please specify"), and advice ("please advise").

45. Not surprisingly, the claimant's response was not well received *viz.* "... You have answered some of the allegations with another question, (when) all I needed was a direct response to the allegations made ..." and the claimant was immediately suspended pending the completion of an on-going audit and replaced by Georgina Faerua.
46. Needless to say the majority of the "allegations" remained unanswered and unresolved.
47. If I may say so the allegations which dates back several months (to December 2011) and refers to "... an alleged report of misappropriation of the Vanuatu Kastom Governance Program by (the claimant) as the coordinator of the Program" is unhelpfully generalized and short on detail. They contain no dates, names, or amounts where they could and should have been provided nor was a copy of the "alleged report" attached, as it should have been, in fairness. Indeed the "allegations letter" appears to have been drafted on the assumption that the claimant would, as Program Coordinator, be fully conversant with the necessary details of each "allegation" however vaguely drawn up.

48. **Section 50 (4)** of the **Employment Act** provides:

"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".

49. Plainly the subsection imposes a positive duty on an employer to give an employee "an adequate opportunity" (not just, an opportunity) and the adequacy of the opportunity must be gauged according to the seriousness and ambit of the charges as well as their comprehensibility; the availability of material(s) necessary to answer them; and the length of the time given to the employee to provide an answer. Furthermore, the seriousness of a failure to comply with the requirements of the subsection is reflected in the deeming of the dismissal "*unjustified*" however sustainable or meritorious the dismissal might be.
50. In Mouton v. Selb Pacific Ltd. (Judgment 3) [1998] VUCA 8 the Court of Appeal said of subsection 4 of Section 50 of the Employment Act:

"... the subsection states, in the present tense, that the employer "shall" not dismiss an employee on the ground of serious misconduct unless, in the past tense, the employee "has been given" an adequate opportunity to answer any charges."

51. In the present case it is common ground that the claimant was given an opportunity to answer the allegations made against him ("7 days"), but the real question or issue, is whether, in all the circumstances, the opportunity was "adequate".



52. After careful consideration of the chronology and agreed facts in the case including the suspension of the claimant before any of the requested details or explanations of the allegations were provided to him and mindful of the serious shortage of details in the allegations provided to the claimant (which was the duty of his employer to provide), I find that there has been a contravention of Section 50 (4) with the result that, in spite of my earlier determination of issue 1 in the defendant's favour, the claimant's dismissal is "*deemed to be an unjustified dismissal*" and judgment is accordingly entered on the claim.

53. The defendant is ordered to pay the claimant:

	VT
(i) Unpaid earnings during suspension	125,000
(ii) Damages for breach of contract	850,000
(iii) Compensation in lieu of 3 Months Notice [s. 49 (4)]	750,000
(iv) Severance under Section 56(4) of the Employment Act (x2)	<u>740,000</u>
TOTAL	2,465,000
(v) Interest of 5% p.a. on the above sum with effect from 16 Aug. 2012	241,000
	<u>2,706,000</u>

54. The claimant having succeeded is also awarded standard costs to be taxed if not agreed.

DATED at Port Vila, this 15th day of December, 2014.

BY THE COURT



D. V. FATIAKI
Judge.

