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

Civil Case No.204 of 2013

BETWEEN: STEVEN METO VUTILOLO
Claimant

AND: GOVERNMENT OF THE REPUBLIC OF VANUATU
Defendant

Coram: ***Justice D. V. Fatiaki***

Counsel: *Mr. G. Blake for the Claimant*
Ms. J. Bulesa for the Defendant

Date of Judgment: *23 October 2015.*

JUDGMENT

1. In this claim under the Employment Act the claimant seeks payment of the following:

   (1) 3 months notice;
   (2) Severance allowance;
   (3) Penalty severance;
   (4) Interest on all the above sums;
   (5) Costs.

   on the basis that he was wrongfully terminated from his employment for serious misconduct.

2. A brief chronology of the claimant's employment history may be summarized as follows:

   - 4 September 2007 – Claimant appointed Shift Supervisor (Port Vila) in the Correctional Services Department;
   - 15 November 2010 – Claimant appointed Manager, Management Services on a salary of VT2,081,520 per annum;
   - 30 March 2012 – Director Correctional Services wrote to the claimant requesting his response within 7 days to six (6) allegations of disciplinary offences;

- 02 April 2012 – A DISCIPLINE REPORT ("*the Report*") setting out four (4) disciplinary offences was provided to the claimant for his response also within 7 days. The offences were:

  "(1) Negligent, careless, indolent, inefficient or incompetent in the discharge of his or her duties;

  (2) Improperly uses or removes property … in his or her control, or fails to take reasonable care of any such property. … this allegation related to Mr. Meto's misuse of a government vehicle **(G708)**;

  (3) 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 – ie. Mr. Meto conducted business relating to his private security firm (**Karaiboro Multi Security Services**) during working hours without authorization;

  (4) *Is guilty of 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* – including, borrowing money from prison detainees; not paying personal debts; establishing a security firm without authorization and having extra-marital affairs.

Specific details of the various allegations was set out in an Attachment A to the Report which allegedly covered the period "*… from November 2010 through until February 2011*".

3. In Section 4 of the Report set aside for the staff member's response to the allegations, after ticking the box indicating his partial acceptance of the allegations the claimant writes on 10 April 2012:

"*I partially not accept that allegations on allegations No. 6, in which this person Advisor Chris is doing and other allegation on my family business, with due respect to your high office I need to verbally explain the reasons why this resort owner is so mad of me, and trying all his best to destroy my life and family business and also TA Chris (see attachment)*".

4. Plainly the claimant's reference to "*Allegation No. 6*" refers to the Director's letter of 30 March 2012 and **NOT** to the allegations in the Report which were only four in number. Unfortunately and perhaps through an oversight, the claimant was not cross-examined on his partial acceptance. As a result, what allegations(s) the claimant partly accepted remains unclear and equivocal. What is clear however, is that the claimant denied "*allegation No. 6*" as well as the allegation relating to his "*family* (security) *business*".

- 4 April 2012 – The claimant responded in writing to the Director's letter of 30 March 2012 basically denying the allegations and complaining about being "*by-passed*" by his staff and the role of the TA in undermining him;

- 19 April 2012 – The Director sent the Report to the DG Ministry of Justice for his consideration later certified by the DG on 24 April 2012;

- Late April 2012 – The Director referred the Report to the Acting Secretary PSC with a recommendation that the PSC:

  "*... give careful consideration to not only the current allegations but also to the number and types of conduct and performance issues that have occurred during Mr. Meto's employment. Below is a list of issues dating back to 2007 that I have noted as being recorded on Mr. Meto's personal file: ...*".

5. The past "*issues*" included – in 2007 a failure on the claimant's part to transport ex-British detainees to court; in 2008 the suspension of the claimant for his part in a prisoner escape that occurred in September; in 2009 being absent from duty on 3rd April and being drunk on duty on 10th April; in 2010 reference to an unsubmitted discipline report against the claimant which related to 5 allegations that arose between 6 February and 23 August 2010.

6. It is unfortunate that the Director's referral letter was not copied to the claimant especially as it referred to events and issues that preceded the claimant's appointment on promotion as Manager, Management of the Correctional Services Department by 2 and 3 years. Whatsmore it is partly referred to in the subsequent Board submission Paper under the heading "*Prior Discipline Issues*".

   - 12 June 2012 – The Director wrote to the claimant suspending him on half salary and advising him that the Report had been referred to PSC for its consideration;

   - 19 June 2012 – Claimant wrote to DG Justice protesting his suspension and responding to the 3 disciplinary offences referred to in the Director's suspension letter;

   - 21 June 2012 – A BOARD SUBMISSION PAPER was sent to the PSC concerning the claimant's disciplinary case for its consideration and determination;

   - 25 June 2012 – The Acting Secretary – (PSC) conveyed to the claimant, the PSC's decision "*... to dismiss him with cause under Section 29 of the Public Service Act 1998. Commission further considered that your past service has not been exemplary*".

7. At the trial the claimant was extensively cross-examined on his sworn statements as well as on the various allegations contained in the unsubmitted disciplinary report that was placed before the PSC including an unsigned adverse probationary report covering the initial 12 months of the claimant's

appointment as Manager, Management Services. In summary, the claimant denied all the allegations made against him in the Report as well as the contents of the unsigned adverse probationary report; attending his family's private security business during office hours; and using an official vehicle to do so. He also denied borrowing money from a detainee as well as his partial acceptance of the allegations in Section 4 of the Report because he was confused at the time.

8. After the claimant's evidence, his counsel took various objections to the sworn statements of **Johnny Marango** the Director of the Department of Correctional Services and **Laurent Rep** the secretary of the Public Service Commission filed on behalf of the defendant including the truth of the numerous annexures and attachments to the Report such as the email exchanges with Aquana Resort; the detainee complaint form of Daniel Gideon and Ruben Kalo alleging borrowings of money by the claimant; and a letter from an unpaid creditor of the claimant (Patricia Tari).

9. Although the court admitted the documents objected to as part of the office records maintained by the Corrections Department the weight (if any) that would be attached to them was a matter for the Court to consider and determine. Despite that ruling and the claimant's sworn denials, State counsel did not see fit to call any of the authors of the admitted documents as it was obliged to do if the documents were to be relied upon for the truth of their contents.

10. As was relevantly observed by the Court of Appeal in Government of Vanuatu v. Ephraim Mathias [2006] VUCA 7 in dismissing the State's appeal in that case:

"*The burden of establishing serious misconduct under Section 29 of the Public Service Act and Section 50(1) of the Employment Act rests fairly and squarely on the employer to establish on a balance of probabilities. The appellant's defence to the claim failed because no admissible evidence was led by the employer to prove that its employee had been guilty of serious misconduct.*"

Earlier in its judgment the Court of Appeal said of the special investigation report in that case (compare with the Disciplinary Report in the present case):

"*We consider that the special investigation report was both relevant and admissible in providing the contextual setting in which the respondent provided his written response to the various allegation made against him. To that limited extent and for the sole purpose the special investigation report should have been admitted by the trial judge.*

Having said that however, we are firmly of the view that the truth of the contents of the special investigation report and its annexures constituted inadmissible hearsay incapable of being testified to and/or identified and/or produced by George Pakoasongi (the then secretary of the PSC compare with the position of Laurent Rep in the present case)."

11. The Government in denying the claim seeks to justify the claimant's dismissal on the basis that his alleged actions amounted to "*serious misconduct*" and such termination does not warrant payment of 3 month notice or any severance allowance.

12. The agreed issues in the case are:

    (1) Whether the claimant's actions justified dismissal on the grounds of "*serious misconduct*" within the meaning of the term in the Employment Act (sic)?

    (2) Whether or not the process to dismiss the claimant on the grounds of "*serious misconduct*" was complied with by the defendant?

    (3) Whether the claimant was required to be present before the Commission during the consideration of the allegations made against him?

13. The wording of Issue (3) is unfortunate in so far as it is not specifically pleaded in the claim or clearly distinguished or excluded from Issue (2), nor has it been clearly and separately addressed in claimant's counsel's submissions other than a bare sentence in **para. 16** that: "*... the claimant was (not) given an opportunity to be heard in person by the Commission*" and a brief denial in the defence at **para.6(b)**: "*... that termination pursuant to Section 29(1) does not require any hearing whereby the claimant can be present to be heard as per Section 37 of the Act*". On the evidence at no time was the claimant invited or required to appear before the Commission.

14. In answering Issue 3, I am content to rely on the judgment of the Court of Appeal in the Mathias case (ibid) where the Court affirmed its earlier decision in Ben Garae v. PSC [2005] VUCA 20:

    "*... that Section 50(4) of the Employment Act does not, in terms, require an oral hearing to be given to an employee before a dismissal for serious misconduct*"

    and where the Court added:

    "*... what process or procedure will satisfy the statutory, requirement in Section 50(4) will depend on all the circumstances of the particular case and no generalizations can or ought to be made or laid down*".

    Issue 3 is accordingly struck out as not raising any live issue for determination.

15. Issue 2 is also somewhat cryptic in so far as it makes no reference to the claimants' adverse employment history record or the Employment Act, in

particular, Section 50 which is entitled "***Misconduct of employee***" and which relevantly provides in subsection 3; 4 and 5 as follows:

> "*(3) Dismissal for serious misconduct may take place only in cases where the employer cannot in good faith be expected to take any other course;*
>
> *(4) No employer shall dismiss an employee on the ground of serious misconduct unless he has given the employee an adequate opportunity to answer any charges made against him and any dismissal in contravention of this subsection shall be deemed to be an unjustified dismissal;*
>
> *(5) An employer shall be deemed to have waived his right to dismiss an employee for serious misconduct if such action has not been taken within a reasonable time after he has become aware of the serious misconduct.*"

16. These provisions are also not referred to in the claim as they should have been [***see:*** Rule 4.2(1) of the Civil Procedure Rules] and are only clearly referred to in counsel's closing submissions.

17. Be that as it may it is common ground that the Public Service Commission was given a list of previous misconduct by the claimant dating back to 2007 as part of the papers it was invited to consider in arriving at its decision on the claimant's disciplinary Report of April 2012.

18. In this latter regard also, claimant's counsel highlights the confusing variations in the number of allegations made in quick succession, against the claimant in the correspondence ***viz***. the six (6) alleged offences in the Director's letter of 30 March 2012; the four (4) alleged disciplinary offences referred to in the Disciplinary Report dated 02 April 2012; the three (3) disciplinary offences referred to in the claimant's suspension letter of 12 June 2012, and finally, the Director's referral letter of late April 2012 to the PSC detailing the claimant's adverse "*employment history*".

19. As to the additional adverse employment history record counsel submits:

> "*... the material placed before the Commission without the claimant being invited to respond clearly means that he was not given an adequate opportunity by the Commission, who chose to dismiss him, to have them consider his responses. The fact that irrelevant material was before the Commission unrelated to the serious misconduct allegations, is enough to establish a breach of section 50(4). Failure to provide an "adequate opportunity" results in the dismissal being deemed "unjustified"*".

20. State counsel in an attempt to downplay the difference in the number of allegations being made against the claimant, referred to the similarity in the allegations and the several written responses that the claimant made to each of the letters as well as in the Report itself. No attempt was made however to deny or refute the Director's referral letter which set out in detail the claimant's

adverse "*employment history*" dating back to 2007 and which the Commission was being urged "*to give careful consideration to*" in addition to the "*current allegations*" and which the Director claims:

"*indicate that Mr. Meto's performance and conduct have been a problem for a number of years*" and further that "*... a number of approaches have been used to try and address Mr. Meto's poor conduct and performance but they have been unsuccessful*".

21. In all the circumstances I am satisfied and find that the claimant was not given any opportunity to answer or explain his adverse employment record dating back to 2007 that was drawn to the Commission's attention and which is neither denied in the evidence or expressly excluded by the Commission in terminating the claimant's employment "*with cause*".

22. Alternatively, and in the likely event that the Commission's decision was influenced by the claimant's adverse employment record, I have no hesitation in finding that such past "*conduct and performance*" of the claimant had been effectively waived by the inaction of the claimant's immediate superiors at the relevant time in not referring the incidents to the Commission for disciplinary action [***see***: Section 50(4) of the Employment Act]. Needless to say the claimant's subsequent promotion in November 2010 is perhaps the clearest evidence of that waiver.

23. In this regard too it is noteworthy that in its finding that the claimant's conduct constituted "*serious misconduct*" the Commission singled out "*the fourth allegation where there was evidence that you borrowed money from the detainees ...*". The evidence in support of this allegation namely, the Detainee Request/Complaint Forms is dated 11 November 2010 which is 4 days before the claimant's promotion as Manager, Management Services and 20 months before any official action was taken to discipline the claimant for the alleged borrowing by its inclusion in Attachment A to the Report.

24. The alleged borrowings occurred on 30 September 2010 and was not formally reported until November 2010, and, although the claimant was clearly named as the borrower, no official action whatsoever was taken at the time. The claimant denied the borrowing allegation in cross-examination and the complainant detainees were neither deposed nor called to give oral evidence in support of the alleged misconduct as the defendant was obliged to do in order to discharge its burden of proof.

25. Issue 2 is determined in the claimant's favour. His termination is accordingly "*deemed to be an unjustified dismissal*".

26. In light of the above the remaining Issue 1 concerning the Commission's finding or determination of "*serious misconduct*" against the claimant is academic, but,

in deference to counsel's submissions I set out briefly my reasons for determining the Issue in the defendant's favour.

27. The claimant's submission on this Issue 1 is to the effect that none of the allegations considered individually, constitutes "*serious misconduct*" and given that the allegations refer to different types of misconduct "*... they cannot be read together as a whole to somehow satisfy the test for serious misconduct*". Repeated instances of the same misconduct but unrelated instances of different types of misconduct cannot be read together. I disagree with the submission which seeks to isolate and confine misconduct into mutually exclusive types or categories.

28. "*Misconduct*" is not defined in the legislation nor is it a term of art. It is an ordinary English word which simply means: "*unacceptable or improper behavior especially by an employee or professional person*". Likewise the adjective "*serious*" means grave or severe not trifling or trivial. As was said by this Court in Isaiah v. Public Service Commission [2014] VUSC 77:

> "*... what amounts to serious misconduct in any given case much be determined on the facts and on the evidence in each individual case. depending on the nature and frequency of the alleged misbehaviour and its duration or the amount involved, a single instance may be sufficient to constitute serious misconduct and justify the removal of the officer concerned or it may be established by a combination of* ***lesser infractions over a period of time***".
>
> (my emphasis)

For example, in J v. Public Service Commission [2009] VUSC 128 where a single act of not receipting VT100,000 was considered "*serious misconduct*" and in Public Service Commission v. Tari [2008] VUCA 27 where the Court of Appeal said:

> "*By itself being absent without leave for one day and the misuse of the government car on that single day would be unlikely to be sufficient. However, in combination with the constant misuse of the government vehicle over three months we are satisfied it was open to both the Commission and the Supreme Court to conclude this was "serious misconduct"*".

29. Plainly the Court of Appeal considered that "*serious misconduct*" could be comprised of different types of inappropriate conduct ***viz.*** absenteeism and misuse of government property considered "*in combination*". Even in Isaiah's case the "*serious misconduct*" of the employee was a combination of his mishandling of government revenue; misuse of Local Purchase Orders and improper removal of office equipment covering a period of 2 years.

30. In the present case there is no doubt in my mind that, properly established, misuse of a government vehicle; unauthorized absenteeism; and, in the context of a disciplined service, failing to pay one's just debts and borrowing money

from a prison detainee would "*in combination*" constitute "*serious misconduct*" by the employee concerned and I reject the claimant's contrary submission.

31. The claimant having succeeded on Issue 2 is entitled to the following awards:

			VT
(1)	3 months notice under Section 49 of the Employment Act (VT177,048 x 3)	=	531,144
(2)	Severance under Section 56(1) of the Employment Act	=	885,240
(3)	Additional severance under Section 56(4) of the Employment Act (VT885,240 x 2)	=	1,770,480
	TOTAL	=	VT3,186,864
(4)	Interest of 5% pa under Section 56(6) of the Employment Act with effect from 25 June 2012 until fully paid up	=	VT531,144

32. Judgment is entered in the sum of **VT3,718,008** with standard costs to be taxed if not agreed.

33. By way of further directions the matter is listed for an enforcement conference on **5 November 2015 at 10.00 a.m.**

DATED at Port Vila, this 23rd day of October, 2015.

BY THE COURT

D. V. FATIAKI
Judge.