

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

**Civil
Case No. 17/1636 SC/CIVL**

BETWEEN: JOHN ENOCH WARE

Claimant

AND: CHARLOT SALWAI (Prime Minister)

First Defendant

AND: PUBLIC SERVICE COMMISSION

Second Defendant

AND: THE REPUBLIC OF VANUATU

Third Defendant

Coram: Justice Oliver A. Saksak

*Counsel: Mary Grace Nari for the Claimant
Jelinda Toa for the Defendants*

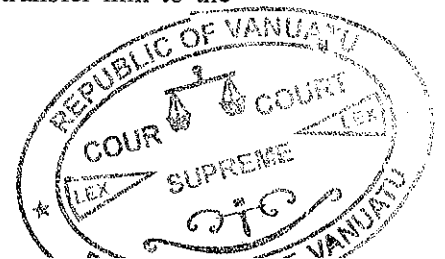
Date of Hearing: 17th March 2020

Date of Judgment: 8th May 2020

JUDGMENT

Introduction

1. The Claimant is seeking damages against the defendants in the sum of VT8,673,000 together with interest at 5% and costs.
2. He alleges that the contents of the letter dated 22 July 2016 were defamatory and that as a result of the letter the Second Defendant took a decision to transfer him to the Department of Tourism.



3. He further alleges that the transfer was made without his knowledge and is contrary to the First Defendant's duty to act as a good employer.

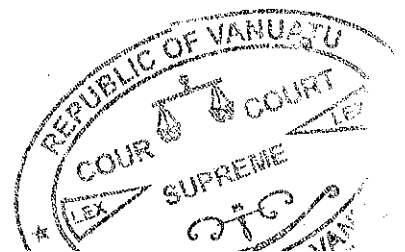
Defence

4. The defendants in its amended defence admits the letter of 22 July 2016 was written by the First Defendant in his position then as Prime Minister, but denied the contents were defamatory. Further the defendants says the transfer was made in good faith, and denied there was any duty to notify the Claimant of its intention prior to causing the transfer.

Facts

5. The circumstances leading up to the ultimate transfer of the claimant started on 4th March 2016. The Prime Minister (as he then was) wrote a letter to the claimant requesting him to report to the Principal Immigration Officer and to cancel the licenses of agents dealing with citizens residing in the Middle East Countries. The claimant did not do so and wrote a responding letter on 4th April 2016.
6. Then on 19th July 2016 the claimant wrote to the Prime Minister and requested the reasons and justification for withholding the release of supplementary budget for the Citizenship Commission. The claimant occupied the position of Secretary to the Citizenship Commission at the relevant time.
7. The Prime Minister responded on 22nd July 2016. Part of the letter read –

“And your deliberate decision to continue to ignore my instructions on the issue of granting Honorary Citizenship to people coming from the Middle East is serious misconduct because you are jeopardizing the Vanuatu Rehabilitation Program and you expose our country to terrorism.”
8. The letter was copied to the Director General of the Prime Minister, Director of Finance, Chairman of Citizenship Commission and to the Chairman and Secretary of the Public Service Commission.



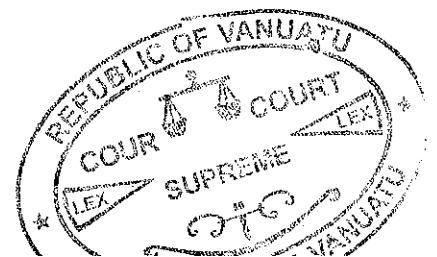
9. On 8th August 2016 the Public Service Commission transferred the claimant to the Department of Tourism as Principal Product Development Officer.
10. The Claimant resigned from this position on 30th August 2016.

The Evidence

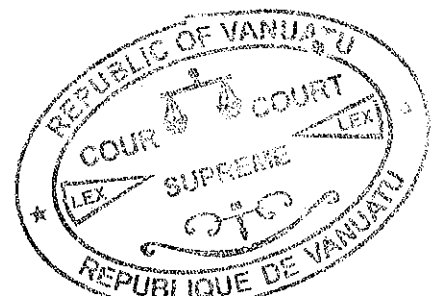
11. The Claimant's evidence in support of his claims are contained in his sworn statement filed on 13th May 2019 in which he annexes his curriculum vitae, his appointment as Secretary to Citizenship Commission dated 29th September 2012, and 27th January 2015, letters of 4th March 2016, 4th April 2016, 19th July 2016, 22nd July 2016, 27th July 2016, 10th August 2016 and 30th August 2016.
12. The defendants' evidence in support of their amended defence are contained in the sworn statements of Jean Yves Bibi filed on 16th August 2019 and of Charlot Salwai Tabimasmamas (the then Prime Minister) filed on 3rd September 2019.

Discussion

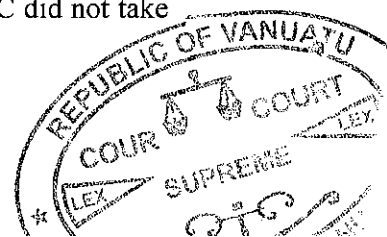
13. The facts are not in dispute. There are legal issues raised for consideration by the Court. The Claimant has not clearly identified these legal issues in his written submissions but the defendant has and the Court is grateful. I will adopt those issues raised as follows –
 - (a) Whether or not the Public Service Commission has power to permanently transfer the claimant to another position?
 - (b) Whether the claimant should be notified before his transfer?
 - (c) Whether or not the claimant is entitled to further salary after his resignation on 30th August 2016?
 - (d) Whether or not the Prime Minister defamed the claimant by his letter of 22 July 2016?



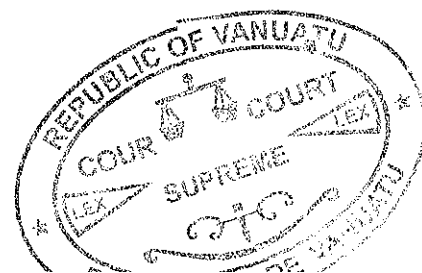
- (e) Whether or not the Prime Minister can use the defence of absolute privilege (official communication), truth and qualified privilege?
- (f) Whether or not the claimant is entitled to damages for his transfer and defamation?
14. The first and second issues in (a) and (b) are considered together. Mrs Nari relied on sections 15 and 20 of the Public Service Act to plead that the Public Service Commission (the PSC) did not act as a good employer when it transferred the claimant on 8th August 2016 without notice and without reasons. Mrs Nari relied on the case of Republic v. Mele [2017] VUCA 39 the PSC had acted as a good employer by transferring the claimant to another position but with the same salary and as an internal transfer.
15. Section 15(1) of the Act places a clear duty on the PSC to act as a good employer. Subsection (2) states that **“the Commission shall as a good employer: (a) ensure that fair and proper treatment of employees in all respects of their employment, and**”. The other requirements in (b) to (f) inclusive are not relevant.
16. Section 26(1) of the Act gives power to the PSC amongst others, to transfer a public servant from one position or locality to another within the Public Service **“but subject to the Commissions’ obligations to act as a good employer,”** pursuant to section 15(1). The case of PSC v. Antoine [2008] VUCA 25 is the authority for this grant of power and obligation.
17. The case of Republic v. Mele is distinguishable from the claimant’s case in that that was a dismissal case. The claimant in this case was transferred as a result of prior events or incidents arising out of the claimant’s non compliance with the Prime Minister’s letter of 4th March 2016. Had he complied, none of these would have arisen. But the claimant wrote back to the Prime Minister on 19th July 2016 seeking reasons and justification for withholding funds, this being totally unrelated to the subject matter of the letter of 4th March 2016.



18. In my view the claimant's letter of 19th July 2016 was in direct defiance of the lawful instruction by the Prime Minister. It amounted to an act of insubordination that warranted a disciplinary action leading to a dismissal. But fortunately, the PSC did not choose to take that course. Instead they chose to proceed by way of an internal transfer with the same salary so as to ensure the claimant did not lose his employment to his disadvantage and detriment of himself and his family. Could that action not be seen as an action of a good employer ensuring a fair and proper treatment of the claimant? In my view it is, and sections 15(1) and 26 were complied with by the PSC.
19. Furthermore Section 34 of the Act provides for employees' obligations. The obligations in (a) – (b) are also relevant but the most relevant is the obligation in (g) which requires all public servants (the claimant included) to **“comply with all lawful and reasonable directions given by someone employed in the Ministry for which the employee works and who has authority to give the directions.”**
20. The claimant cannot dispute the fact he was the Secretary General to the Citizenship Commission in 2016 when all these had happened and that the Citizenship Commission and himself were directly under the Portfolio of the Prime Minister. The Prime Minister was the boss and he had the authority to give the direction he gave in his letter of 4th March 2016. The claimant had obligations to comply pursuant to section 34 (g) of the Act but he did not.
21. Section 26(1) of the Act by the word **“direct”** does not require prior notification or the giving of reasons as it does in the case of a disciplinary proceeding leading to dismissal. In the claimant's case the events arising from his non-compliance with the directions of the Prime Minister in the 4th March 2016 letter were well-known to him, so the reasons for his transfer on 8th August 2016 could not have been a mystery to him. And not giving him those reasons or the omission thereof by the PSC could not be a ground for questioning his lawful transfer.
22. Furthermore Section 36 of the Act provides for disciplinary matters. Subsection 1(a), (b) and (c) provide for actions for which a person can be charged. From the facts, the claimant's actions fall under this subsection but as stated earlier the PSC did not take that route to the advantage and benefit of the claimant.



23. Having said all that, the issue in (a) in paragraph 13 above is answered in the positive as “Yes”, and the issue in (b) is answered in the negative as “No”.
24. The Third issue concerns the future salary of the claimant after his resignation on 30th August 2016. Mrs Nari submitted in paragraph 29 of her written submissions that first the claimant was stressed, humiliated and discouraged being the reason from his resignation. Second, that the letter of 22 July 2016 portrayed him as disobedient, incompetent and a criminal. The defendant relying on “No work, no pay” in Robertson v. LMC [2001] VUCA14 and “No unfairness” in Warrington v. Silver Pacific Autumn Hotel Ltd [2014] VUSC 96 to submit that the claimant is not entitled to those salaries.
25. I agree and accept the defence submissions. The claimant chose to resign. It was his decision and he must live with its consequences. There was no unfairness. And finally, the claimant has no evidence in support of his stress and humiliation. Further the letter of 22 July 2016 does not mention the words “disobedient”, “incompetent” and “criminal”. Those are counsel’s or the claimant’s words, not the Prime Minister’s words.
26. For those reasons issue (c) in paragraph 13 above is answered in the negative as “No”.
27. Next, the issue of whether the Prime Minister defamed the claimant by his letter of 22 July 2016? The full text of the letter is set out in paragraph 68 of the defendant’s submissions. It is not necessary to restate it.
28. An ordinary reader reading the words of that letter would take the view that the claimant had defied the instructions of the Prime Minister and that he did so deliberately. There was no suspicion involved as was in the case of Ahelmhalahlah v. Republic [2018] VUSC 24. That was the truth of the matter. The claimant did not follow the Prime Minister’s instructions contained in his earlier letter of 4th March 2016. Therefore, I agree and accept the defendant’s submissions that there was nothing defamatory in the letter of 22 July 2016.



29. The answer to the issue in (d) in paragraph 13 is therefore answered in the negative as “No”.
30. Next is the issue of whether the Prime Minister can use the defence of absolute privilege? I agree and accept the defendant’s submissions on this issue from paragraphs 104 and therefore answer this issue in (e) in the positive as “Yes”.
31. Finally, the issue of whether the claimant is entitled to damages for his transfer and defamation? For the reasons provided earlier in this judgment the answer to this issue is “No”.

The Result

32. The claimant’s claims fail in its entirety and are hereby dismissed.
33. The defendant sought costs but in the circumstances of the case it is appropriate that each party bears their own costs.

DATED at Port Vila this 8th day of May, 2020.

BY THE COURT


OLIVER A. SAKSAK

Judge

