

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

Civil Case No. 21/1701 CVL

BETWEEN: Sabine Lukai
Claimant

AND: Republic of Vanuatu
Defendant

Date of Trial: 31st October 2022

Further Submissions: 2 and 16 November, 2 and 5 December 2022

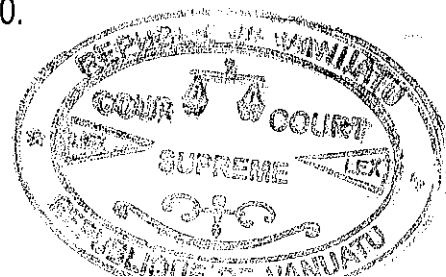
Before: Justice S M Harrop

Distribution: Ms L. Raikatalau for the Claimant
Mr T. Loughman for the Defendant

Date of Judgment: 14th December 2022

Reserved Judgment

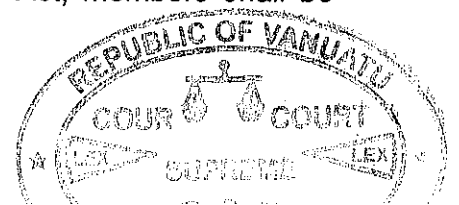
1. On 19 June 2013 Inspector Lukai Pakoa Mala died aged 48 while he was a serving police officer, bringing to an end a distinguished 27-year career.
2. The officer died of a heart attack while taking part in a designated sports day organised by the Office of the Police Commissioner. While attendance at such days is not mandatory, members are encouraged to participate to improve their fitness.
3. In 2016 the Police Commission paid the officer's widow, Sabine Lukai, entitlements totalling VT 4,614,271. Mrs Lukai however contends, in her amended claim against the Republic, that she ought to have been paid VT 24,354,920.



4. In brief she submits that she ought to have been paid a severance payment of VT 6,478,777, a gratuity of VT 6,478,783, compensation of VT 10 million for death occurring "in the line of duty" and outstanding leave of VT 1,397,360. She therefore sues for the VT19,829,527 difference.
5. In addition Mrs Lukai claims VT1 million for damages for the allegedly wrongful failure of the Republic to make the appropriate payments over many years. She also claims interest at 10% per annum from the date of the filing of the original claim on 27 May 2021 and indemnity costs.
6. The Republic submits the Police Commission has paid in full everything it is legally obliged to pay. It also counterclaimed for Vt 1,080,000 "rent" for the continued occupation by Mrs Lukai of the former police house in which Mr and Mrs Lukai lived. However, at the hearing, Mr Loughman withdrew the counterclaim after I pointed out that there had been no lease agreement, no attempt to evict Mrs Lukai and that the cause of action for "unpaid rent", assessed at the rate at which the Police Commission has had to pay to house another police officer who could otherwise have lived at the property, was questionable. I formally dismiss the counterclaim.
7. There being no dispute about the facts but a substantial dispute about whether the Police Commission has, in law, paid everything it was required to, the hearing before me on 31 October 2022 proceeded, by consent, on a Rule 12.8 basis.
8. I reserved my judgment. Subsequently detailed submissions were filed supplementing those made at the hearing. The applicable, or potentially applicable, provisions are not easy to interpret, both within themselves and as to their interaction with each other. I record my appreciation to counsel for their submissions.

The legislative framework

9. Police officers are given special treatment as employees under the law of Vanuatu. Section 76 (3) of the Employment Act provides that: "Nothing contained in this Act shall apply in relation to members of the armed forces, police force or prison service."
10. There is however the Police Act. Until it was repealed in 2010 section 8 of that Act provided: "Except where expressly provided for by this Act, members shall be



subject to the same terms and conditions of service as may apply to members of the public service.”

11. Section 28 of the Act, both before and after the 2010 Amendment Act, addressed the compulsory retirement of police officers.

12. Section 29 of the Act, prior to the Amendment Act (which repealed and replaced it), provided: *“A member retired in accordance with section 28 shall be entitled to receive from the government a severance payment calculated at the rate of one month of the annual salary payable to the member immediately before the day of retirement for each year served with the Vanuatu government since 30 July 1980 and pro rata for each uncompleted year.”*

13. The 2010 Amendment Act established the Police Service Commission and included section 10A in the Act: *“The terms and conditions of employment of the members are to be determined by the Commission.”* The inference from this is that by contrast with the old s8, police members were no longer to be subject to the same terms and conditions as public servants but rather these would be determined by the Commission.

14. The new section 29 provided:

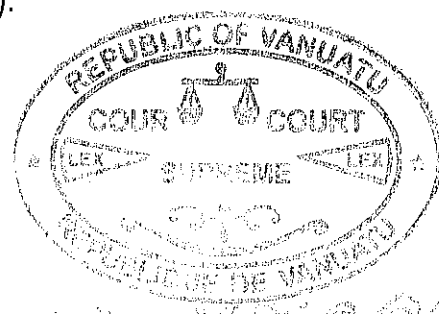
“A member who has:

- (a) retired in accordance with section 28; or*
- (b) died in service or due to a natural cause; or*
- (c) an illness and is discharged on medical ground; or*
- (d) resigned*

is to receive from the government a severance payment calculated at a rate as is determined for public servants by the Public Service Commission and pro-rata for each uncompleted year.”

15. Accordingly, despite the repeal of s8 and the enactment of s10A, this provision once again invoked an aspect of the terms and conditions of public servants.

16. It is the meaning and consequential impact of section 29 which is primarily in dispute here. There can be no doubt that Inspector Lukai was a member who both “died in service” and “due to a natural cause” under s29(b).



17. The defendant's approach has been to apply section 29 as invoking all the applicable provisions of the Public Service Staff Manual ("PSSM"), in particular clause 5.14 in which deals with "death in service" of a public servant. I did not understand there to be any dispute that, if this approach is correct, the VT 4,614,271 paid to Mrs Lukai represents her properly-calculated entitlements under clause 5.14.

18. This clause provides:

"5.14 Death in service

(a) In the event of the death of an officer or daily rated worker during the course of his or her service, the government shall pay to the officer's or daily rated worker's legally nominated beneficiary the following entitlements:

- (i) Standard entitlements specified in Section 4.1 of this chapter that the officer or daily rated worker has accrued up to the date of his or her death; and*
- (ii) A sum equivalent to six months total yearly remuneration (including any allowances the officer or daily rated worker was receiving) plus one month remuneration for every one year of service provided by the officer or daily rated worker; and*
- (iii) A pro-rata amount for any period of less than 12 months employment that the officer or daily rated worker is in continuous employment in the Public Service; and*
- (iv) In the case of citizens of Vanuatu, repatriation costs of the body back to his or her home island and place of origin.*

(b) In the event of the death of a temporary salaried employee during the course of his or her period of employment, the determination of entitlements, if any, will be at the discretion of the Commission.

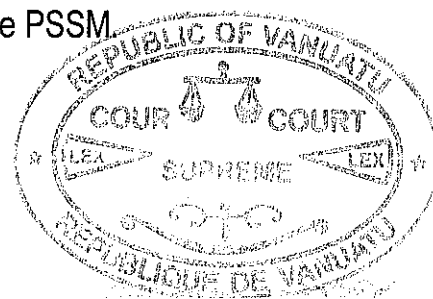
(c) In the event of the death of an expatriated contract employee during the course of his or her service, the government shall pay to the expatriate contract employee's legally nominated representative a sum equivalent to the unpaid gratuity which would have been due to him or her had they completed the whole of the contract period.

(d) All death benefits payments shall be paid from the budget of the respective department or agency wherein the deceased staff was employed.



In making payment in full under paragraph 5.14 has the Police Commission met its obligation under section 29 of the Act to make the requisite "severance payment"?

19. The fundamental issue in dispute is whether Mrs Lukai has, or has not, received the requisite "severance payment" to which she is undoubtedly entitled under section 29. She has received all of the paragraph 5.14 payments, but on proper interpretation of the relevant provisions, has she received the "severance payment" to which s 29 entitles her?
20. The Republic says clause 5.14(ii) sets out the manner of calculation of the severance sum which section 29 of the Act requires it to pay, even though it is not labelled separately as "severance". Mr Loughman submits that clause 5.14 is a form of "code" covering all payments required to be made where there is a death in service and that in making full payment pursuant to it the Republic has met its obligations.
21. The claimant's argument however is that paragraph 5.14 does not include any severance payment; rather it deals merely with other death-related benefits which are summarised as "gratuity payments" in a table at page 7-4 in the PSSM. That is by contrast with entitlements for other employees, who are still alive, where severance payments are expressly mentioned where applicable.
22. The claimant points to paragraph 4.2(a) of the PSSM which includes among additional payments due in particular cases of cessation of employment: "If applicable, severance payments calculated on the basis of two weeks or one month per year of service depending on the form of cessation, if employed for 12 continuous months or more."
23. Ms Raikatalau submits that this wording shows that severance payments are recognised as separate from the clause 5.14 benefits, that they are a standalone entitlement.
24. She goes on to submit that there is, on proper construction of the PSSM, no severance payment for public servants who die in service or due to a natural cause despite s29 indicating, in effect, that this can be found in the PSSM.



25. Accordingly Mrs Raikatalau submits there is a “lacuna” created by s29 and that one must instead look elsewhere for the severance entitlement. She submits the Police General Orders of 2012 (“PGO”) is the place to look, to fill the lacuna. I will set out the relevant provisions of the PGO later in the course of discussing their potential application.

The meaning of section 29 - is there a lacuna?

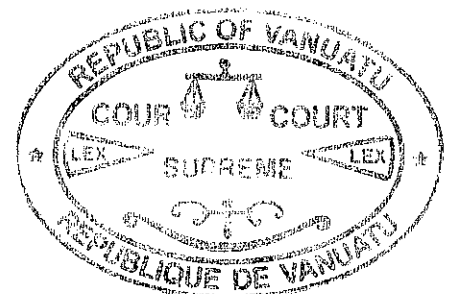
26. The critical words in section 29 are: “... a severance payment calculated at a rate as is determined for public servants by the Public Service Commission and pro rata for each uncompleted year”.

27. I read this provision as (a) directing that the member is to receive a severance payment; and (b) the calculation of the rate at which that severance payment is to be paid, is that which for the time being is determined for public servants by the Public Service Commission.

28. Accordingly, when considering the PSSM, which I accept (as did counsel) contains the relevant provisions relating to public servants as determined by the Public Service Commission, what one is looking for is not, or at least not necessarily, a PSSM severance provision, but rather a provision setting out the **rate** at which the **section 29 severance payment** is to be calculated.

29. Contrary to the claimant’s submission, I consider that that rate is found in clause 5.14 (ii) of the PSSM: “a sum equivalent to 6 months total yearly remuneration (including any allowances the officer or daily rated worker was receiving) plus one month remuneration for every one year of service provided by the officer or daily rated worker”.

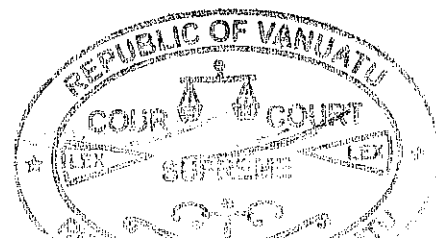
30. I note this rate is consistent with what s29 provided before the 2010 Amendment Act. I infer the amendment may well have been to ensure that if there was, from time to time, a change in the applicable rate for public servants, police officers should be treated the same without there needing to be a consequential amendment to the Police Act. Of course, the amendment also had the effect of improving the payment due to police officers because public servants also receive the sum equivalent to 6 months total yearly remuneration, on top of the one month’s salary per year of service.



31. I therefore do not accept the claimant's key submission that the absence of an expressly labelled severance provision in the PSSM means there is a "lacuna".
32. I also uphold the defendant's submission that, in substance, the payment due under clause 5.4 (ii) is a severance payment. It is worded consistently with the way in which severance payments are referred to elsewhere in the law in Vanuatu, most notably in s 56 of the Employment Act (and under the old s29). If a further severance payment were now made to Mrs Lukai she would be receiving two severance payments, whereas s29 contemplates only one. She would receive more than the widows of public servants, yet the apparent purpose of s29 is that police officers (or their estates) are to receive a severance payment at the same rate as public servants do.
33. However, I do not accept Mr Loughman's submission that clause 5.14 is a code which governs the payments to be made to the estate of a police member. Section 29 refers only to a "severance payment". There may well be other death benefits which are payable yet nothing in the Police Act suggests these are to be found among the terms and conditions for public servants; on the contrary given the legislative history (the repeal of s8) one must look to the Police Commission determinations under s10A. I enquired of counsel whether there had been any such determination but they were not aware of any. That really would seem to be a "lacuna".
34. Nevertheless, although the Police Commission itself may have made no determinations under s10A, the Police Commissioner did in 2012 issue PGOs, purporting to act under the authority of s6(1)(b) of the Act to make Force Orders. These orders do purport to make provision for the terms and conditions of service of police members. Their existence may be the reason why the Police Commission has not yet itself made any determination under s10A.
35. I therefore accept Ms Raikatalau's submission that the PGO are potentially applicable and reject that of Mr Loughman that somehow s29 overrides them; as Ms Raikatalau submitted, there is no overlap between the s29 severance payment and the other benefits payable on the death of a police member.

Police General Orders (PGO)

36. I now set out the death-related provisions in Chapter 9 of the PGO, which is headed "Managing Cessation of Employment":



“9.1 When the employment of a Member of the VPF ceases, it must be done in an appropriate and fair handed manner. To ensure that this obligation is fulfilled, the following processes concerning cessation entitlements shall apply.

Natural Death in Service

9.2 In the event of the death of a Member (other than one on temporary appointment) during the course of his/her service, the Government shall pay to his/her legal personal representative the following entitlements:

- (a) Standard entitlements that the Member has accrued up to the date of his/her death; and
- (b) A sum equivalent to 6 months total yearly remuneration (including any allowances the Member was receiving) plus one month remuneration for every one year of service provided by the Member; and
- (c) A pro-rata amount for any period less than 12 months employment that the Member has been in continuous employment in the VPF; and
- (d) In the case of citizens of Vanuatu, repatriation costs of the Member's body back to his/her Home Island and place of origin.

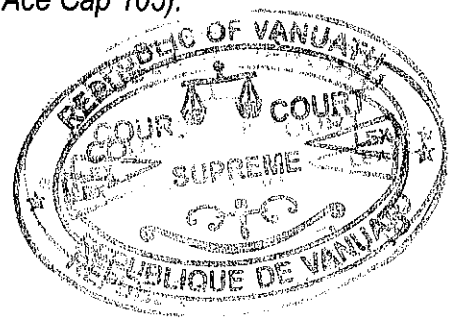
9.3 Before payment can be effected, the COP shall provide to the Director of Finance with a copy of the Death Certificate and a statement certifying that the Member was a serving member of the VPF at the time of his/her death.

Police Officers Injured or Killed on Duty

9.4 A Member's formation commander shall immediately report to the COP whenever a Member is injured in the performance of his/her duties and it is likely that any incapacity resulting from such injury may subsequently lead to a claim for gratuity or workers compensation, under the Workers Compensation Act.

9.5 A Member shall be eligible for compensation before reaching aged fifty five (55), if the Member dies in the cause (sic) of his/her duty (by authority of Ministerial order gazette under the Police Act Cap 105).

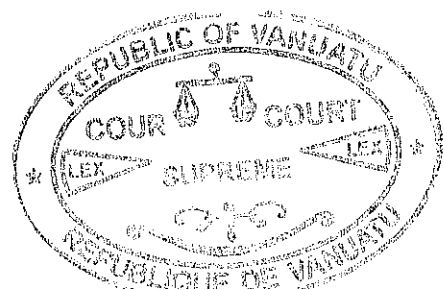
9.6 A Member shall be eligible for compensation where before reaching the age of 55, the Member is injured permanently in the cause of his/her duty (by authority of Ministerial order gazetted order under the Police Ace Cap 105).



9.7 *The reporting officer shall provide full details of the circumstances in which the death, injury, wound or sickness occurred, together with all medical reports and, if applicable, a copy of the death certificate be submitted.*

9.8 *The death benefits of Member shall include a severance payment at a rate as determined for public servants by the Public Service Commission (see section twenty nine (29) of the Police Act Cap 105)."*

37. Ms Raikatalau relies on clause 9.2, which I accept is applicable. Clauses 9.4-9.8, under the heading referring to officers "killed on duty" (though clause 9.5 appears to be wider than that) do not apply to Inspector Lukai, who suffered a "natural death". Compensation under clauses 9.4-9.8 may only be granted by Ministerial authority.
38. It is difficult to assess its significance but I note that clause 9.8 expressly refers to s29 and says that severance payment must be included in the Member's death benefits. It is at least arguable that the reason this is not mentioned in clause 9.2 is because clause 9.2(b) represents such a payment, so there was no need for the Commissioner to refer to the s29 severance payment in clause 9.2.
39. A comparison of clause 9.2 with clause 5.14 from the PSSM shows they are materially identical. Reading these two provisions together with s29 of the Act, I am satisfied that the obligation of the government on the death of a police member is to pay the section 29 severance payment at the rate set out in clause 5.14(ii) and then to pay the other payments required under clause 9.2 (a),(c) and (d), but not 9.2(b), because that "severance-style" payment has already been paid under clause 5.14(ii). It surely cannot have been intended that a police member's estate would receive two separate "severance-style" payments calculated in exactly the same manner whereas, for example, the estate of a public servant who has died in office would receive only one such payment.
40. On this basis I am satisfied that the government has made to Mrs Lukai the correct payments overall, despite purporting to make some of them under clause 5.14 of the PSSM rather than clause 9.2 of the PGO.
41. Ms Raikatalau submitted that because the PGO applies (which I accept), there are additional payments on those set out in clause 9.2. She refers to one of the 38 Annexes to the PGO, 16.37, which is headed Benefits Scale.



42. This Annex is of uncertain status since, as far as I can tell, it is not referred to at all in the body of the PGO.

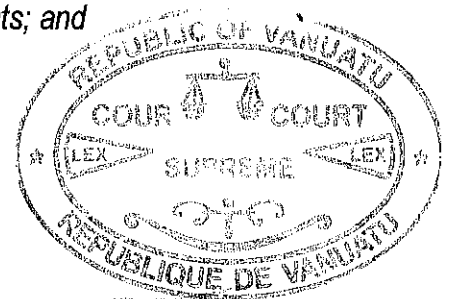
43. The section of Annex 16.37 on which the claimant relies for further entitlements is headed "Schedule of Salary and Benefit". Immediately underneath it the following appears: "(to be determined by a Minister responsible for police in reference to 105, section 82 by way of gazette)"

44. Section 82 of the Act provides:

82. Regulations

The Minister may by Order make such rules and regulations as may seem to him necessary for the good order and government of the Force and for carrying into effect any of the purposes or provisions of this Act and, without derogation from the generality of the foregoing, for any of the following purposes –

- (a) *the conditions of service of the Force and the various grades, ranks and appointments therein;*
- (b) *the establishment of pension and provident funds for members and their dependents;*
- (c) *the granting of gratuities in accordance with section 31(4);*
- (ca) *the rates of and eligibility of members and other persons to compensation, pension or gratuity under section 32A;*
- (d) *the duties to be performed by members, and where necessary, the fees to be charged for special duties performed and for their guidance in the discharge of such duties;*
- (e) *the pay, retirement benefits and allowances of members;*
- (f) *the description and issue of arms, ammunition, accoutrements, uniforms and necessaries to be supplied under this Act;*
- (g) *the disposal of any unclaimed property;*
- (h) *the discipline of members;*
- (ha) *the pay, allowances, benefits and compensation of members of overseas contingents;*
- (hb) *the discipline of members of overseas contingents; and*



(i) all other matters which are by this Act required to be provided or prescribed.

45. Just as the Police Service Commission appears not to have made any determination under s10A, so it appears the Minister has not made under s82 any relevant rules or regulations approving or bringing into effect the benefits set out in Annex 37, or otherwise.

46. Accordingly, I reject the claimant's claims to any of the entitlements set out in Annex 16.37. This means in particular the claimant is not entitled to those she seeks which are set out in Class C, which includes (on the face of it for a member who leaves the police other than as a result of death) a severance payment at the higher rate of two months' salary together with a gratuity and several other benefits, or set out in Class K which includes compensation for death occurring in the line of duty: a one-off payment, if an officer dies before reaching 55, of VT 10 million.

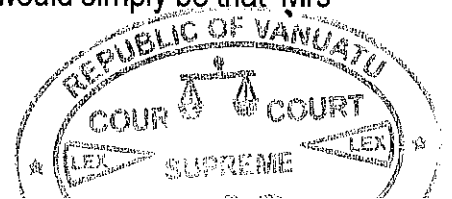
Other issues

47. In light of these conclusions there is no need to traverse most of the other very detailed submissions advanced by the claimant. For completeness, and in deference to the comprehensiveness of her submissions, I will however briefly address some of the other points advanced

48. I do not see the reference to "gratuity payments" and the absence of reference to "severance" in the table at page 7-5 of the PSSM as having any impact on my conclusions. I have held that labels ("gratuity", "severance") are not what matter; what does it is the rate of calculation contained in the PSSM and the fact that clause 5.14(ii) is, in substance, a severance payment. I have also held that, aside from clause 5.14(ii), it is the PGO not the PSSM which governs the entitlements in these circumstances.

49. I do not accept that s6 of the Employment Act has any impact on this case. It provides: "*Nothing in this Act shall affect the operation of any law, custom, award or agreement which ensures more favourable conditions in respect to the employees concerned than those provided for in this Act.*"

50. Arguably s76(3) of that Act makes s6 inapplicable anyway (because it provides that: "*Nothing in this Act shall apply in relation to members of the armed forces, police force or prison service*"), but even if s6 does apply, for the reasons extensively submitted by Ms Raikatalau, the effect of that would simply be that Mrs



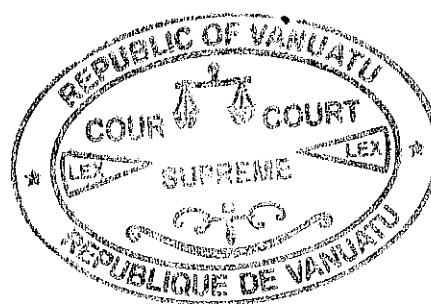
Lukai must not end up worse off than she would have been had the provisions of the Employment Act applied. In receiving the severance payment under s29 she is better off because under the Employment Act death is not one of the qualifying events for a severance allowance to be paid¹.

51. The largest portion of the claim is the VT 10 million sought as allegedly due under Class K of Annex 16.37 to the PGO: "*Compensation while death occurring in the line of duty. In such scenario, if an officer dies before he/she reaches 55 years, he/she shall be compensated at VT 10 million as a one-off payment only.*"
52. I have already held that Annex 16.37 is currently of no effect, not having been approved by the Minister.
53. However, even if the Annex did apply, I do not accept that Inspector Lukai died "in the line of duty". He certainly died while (effectively) at work and in the course of his service as a police officer and is undoubtedly entitled to all the other benefits which Mrs Lukai has received. However, the wording dying "in the line of duty" strongly indicates that the circumstances in which a police officer has died involved putting him or herself in harm's way, for example confronting an armed offender.
54. Many aspects of a police officer's daily duties such as administration or paperwork are similar to those of other workers; what is different about police officers is that from time to time they literally put their lives on the line in the interests of the community. I consider that dying "in the line of duty" should be taken to mean dying while undertaking those special aspects of police officers' duties.
55. The substantial size of the one-off payment corroborates this interpretation; it surely cannot have been intended that the estate of a police officer who for example dies at work of a heart attack while sitting behind a desk, just as any other public servant might, would receive such a large payment.

Result

56. I dismiss the amended claim filed on 4 August 2022, seeking further payments from the defendant of VT 19,829,527, in its entirety. It follows that I also reject the claim for VT 1 million for general damages for the defendant's failure to treat Mrs Lukai and her claims appropriately.

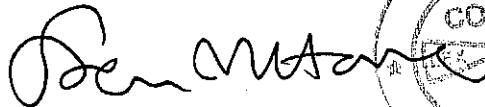
¹ s54(1) of the Employment Act



57. The defendant is entitled to costs against the claimant on the dismissed claim, which are to be taxed if they cannot be agreed. To the extent the defendant finds this judgment helpful in dealing with other cases of deceased police officers, it may be grateful that Mrs Lukai took this case. If so, I suggest it ought to take into account when considering its claim for costs.
58. The claimant is entitled to costs on the counterclaim which was withdrawn at the hearing and formally dismissed in this judgment. These are also to be taxed if they cannot be agreed but I suggest in practical terms they should be treated as an offset against the defendant's costs on the claim.
59. Finally, I emphasise to Mrs Lukai that the dismissal of her claims for additional benefits has nothing to do with and is no reflection on the qualities of her late husband as a distinguished police officer throughout his 27 year career.

Dated at Port Vila this 14th day of December 2022

BY THE COURT



Justice S M Harrop

