

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

Civil
Case No. 22/868 SC/CIVL

BETWEEN: Louise Joanne Nasak
Claimant

AND: Republic of Vanuatu
Defendant

Date of Hearing: 26 September 2022
Before: Justice V.M. Trief
Counsel: Claimant – Mrs M.G. Nari
Defendant – Mr K.T. Tari
Date of Decision: 6 September 2023

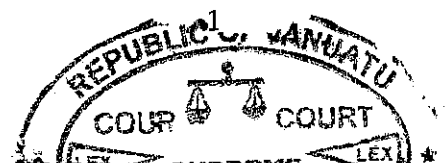
JUDGMENT

A. Introduction

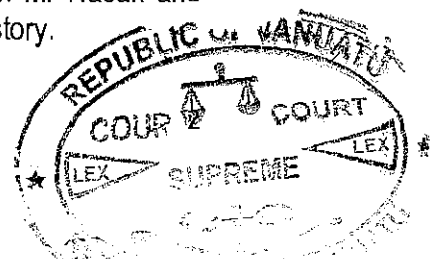
1. The Claimant Louise Joanne Nasak was employed as Manager, Corporate Services of the Public Service Commission (the 'Commission'). She is suing the Defendant State for the allegedly unjustified termination of her employment by the Commission.
2. Damages are sought including for payment in lieu of notice, loss of salaries, allowances, annual leave, severance and 3-times multiplier pursuant to subs. 56(4) of the *Employment Act* [CAP. 160] (the 'Act').
3. This matter was listed for trial. Subsequently, counsel requested that it proceed by way of submissions. Both parties then filed submissions. This is the decision.
4. If necessary, the decision will be limited to liability.

B. Background

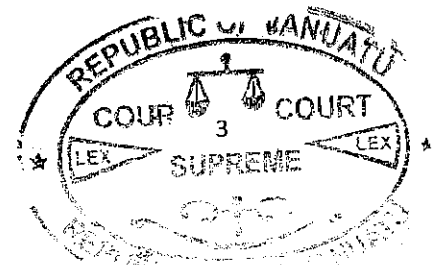
5. In October 2019, Mrs Nasak was appointed by the Commission to the position of Manager, Corporate Services within the Office of the Public Service Commission ('OPSC') as a permanent employee.



6. Mrs Nasak performed her duties and responsibilities in that role until she was suspended on 24 December 2020.
7. On 24 December 2020, the Manager of the OPSC Compliance Unit wrote a letter to Simil Johnson, the Chairman of the Commission, informing him of an incident report made by an OPSC employee alleging serious misconduct against Mrs Nasak.
8. On the same date (24 December 2020), Mr Johnson referred the matter to the Commission.
9. Later on that day, the Commission met and resolved to refer the allegations against Mrs Nasak to the OPSC Compliance Unit for investigation. It also resolved to suspend Mrs Nasak to ensure that she would not interfere with the process of investigation.
10. The PSC letter dated 24 December 2020 and delivered to Mrs Nasak that night informed her of her suspension on 2 grounds, namely:
 1. *It is alleged that on or about 23 December 2020, you were seen engaging in an unacceptable behaviour within the Office of the Public Service Commission with another employee. This action is believed to be contrary to Section 34(1)(a) of the Public Service Act.*
 2. *It is alleged that you are guilty of an improper conduct in your official capacity as the Manager, Corporate Service (PSC) either inside or outside of working hours, of any other improper conduct which is likely to affect adversely the performance of your duties or is likely to bring the Public Service into disrepute. This action is contrary to Section 36(1)(i) of the Public Service Act [CAP. 246].*
11. Mrs Nasak was surprised at the allegations made against her. She called the former Secretary of the OPSC Jean Yves Bibi only to find out that he had also received a similar letter to hers with her name mentioned in his letter.
12. Mrs Nasak then realised that the allegations in the letter related to some 'unacceptable behaviour' with Mr Bibi.
13. The next morning, on Christmas Day, Mrs Nasak saw Jane Bani, who signed the suspension letter as Acting Secretary of the Commission, at Au Bon Marche Nambatu. Mrs Nasak asked about her suspension and Ms Bani replied that the Commission's decision to suspend her was based on what Hellen Lukai John ('Mrs John', but also referred to at times as 'Mrs Lukai') reported to Mr Johnson.
14. Mid-morning that day, Mr Bibi and his wife went to Mrs John's residence and then drove her to Mrs Nasak's residence.
15. While driving to Mrs Nasak's residence and while meeting Mr and Mrs Nasak there, Mrs John was questioned about what she said to Mr Johnson regarding the incident that she reported which resulted in Mrs Nasak and Mr Bibi's suspensions. In fear that the true version of her story would likely cause marital distress as both Mr Nasak and Mrs Bibi were present, Mrs John told them a "parable" version of her story.



16. All five of them then approached Mr Johnson in front of the Air Vanuatu office. He told them that the matter was under investigation and he had nothing to tell them.
17. By then, news had already spread via Facebook about the suspensions. It is denied that the OPSC or the Commission would disseminate or authorise any person to disseminate defamatory information about Mrs Nasak on social media platforms.
18. By letter dated 31 December 2020, the Commission informed Mrs Nasak that it had appointed an investigation panel to investigate the allegations against her and gave notice that the panel would be accessing her Government emails to collect evidence where necessary.
19. By a separate letter dated 31 December 2020, the Commission warned Mrs Nasak not to interfere with any Commission witness or person involved in her discipline case, and not to attempt to influence the decision of the Commission or any Commission member as to her suspension.
20. On 6 and 7 January 2021, Mrs Nasak received invitation notices requesting an interview with the Investigation Team. The invitations were subsequently cancelled as the matter was still under investigation.
21. On 20 January 2021, Mrs Nasak was served with the signed Employee Discipline Report ('EDR') against her. The EDR contained 12 allegations against Mrs Nasak that she had to answer to.
22. On 22 January 2021, Mrs Nasak provided her response to the EDR.
23. On 3 February 2021, the PSC issued a letter that it had considered the EDR and her response, and decided that Mrs Nasak's matter be referred to the Public Service Disciplinary Board ('PSDB').
24. On 9 March 2021, Mrs Nasak was served a Notice of Offence dated 11 February 2021 setting out 9 disciplinary charges. She was asked to respond to those allegations as well as to a further 4 disciplinary charges.
25. On 17 March 2021, Mrs Nasak responded to those allegations.
26. On 7 April 2021, a solicitor's letter was sent on Mrs Nasak's behalf.
27. On 28 April 2021, the disciplinary hearing was adjourned to 6 May 2021 and Mrs Nasak was given another 7 days to respond to the Notice of Offence dated 11 February 2021.
28. The disciplinary hearing concluded on 6 May 2021.
29. The PSDB's final decision dated 14 May 2021 recommended that Mrs Nasak be reinstated back to her position as Manager, Corporate Services or transferred to another Ministry at the discretion of the Commission.



30. On 15 May 2021, the Commission quashed the PSDB's final decision and issued a Notice of Termination giving Mrs Nasak 14 days to respond to the allegation of interfering with the disciplinary process by speaking to Mrs John and approaching Mr Johnson.
31. On 27 May 2021, Mrs Nasak responded to that Notice.
32. On 13 June 2021, the Commission terminated Mrs Nasak's employment for serious misconduct pursuant to subs. 50(4) of the Act, stating as follows:

The Commission after considering your responses as per section 50(3) and section 50(4) of the Employment Act, noted that your actions to interfere with the PSC discipline process to approach the Chairman of PSC, Simil Johnson and accept to meet Helen Lukai John (PSC main witness) on 25 December 2020 when the discipline process is still underway are in breach of Section 36(1)(a) & (b) and Section 46(1) of the Public Service Act [CAP. 246]. Being a senior public servant and at the same time the manager of Corporate Services Unit of OPSC, you are fully aware of the PSC discipline procedures and your actions as mentioned above cannot be tolerated by the Commission, thus resolved to uphold its previous decision to terminate you from service.

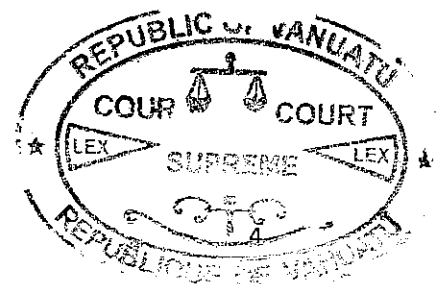
33. On 9 May 2022, the Claim was filed.

C. Pleadings

34. The Claim alleges unjustified termination of employment, particularised as follows:
 - a) On 25 December 2020, Mrs Nasak had not been served the EDR thus she could not be in breach of any process;
 - b) The Commission had already decided to terminate Mrs Nasak without considering the PSDB's full report and recommendations, and before it issued its Notice of Termination and considered Mrs Nasak's response to that notice;
 - c) The Commission contravened subs. 50(3) of the Act by dismissing Mrs Nasak, as it did not act in good faith;
 - d) The Commission failed its duty as a good employer in breach of para. 15(2)(a) of the *Public Service Act* [CAP. 246] (the 'PS Act'); and
 - e) The Commission contravened subs. 50(4) of the Act.

35. Damages are sought as follows:

| | |
|--|-------------|
| (a) 3 months' notice | VT852,075 |
| (b) Loss of salaries | VT994,089 |
| (c) Housing allowance | VT96,600 |
| (d) Child allowance | VT25,760 |
| (e) VNPF | VT29,4336 |
| (f) Outstanding leave | VT 0 |
| (g) Severance | VT3,097,169 |
| (h) Severance pay under section 56(4) of Employment Act to accommodate damages for defamation, stress & loss of employment | |



VT3,097,169 x 3

VT9,291,507

Total VT14,651,536

36. The Claim is opposed. By the Defence, it is alleged that the termination was lawful and justified as all disciplinary procedures were complied with and made in compliance with the Act and the PS Act.
37. Both parties sought costs.
38. In Reply to the Defence, Mrs Nasak alleged that she would not have spoken to Mrs John and Mr Johnson on 25 December 2020 if Mrs John had not gone to her house to speak of her 'vision'. Further, that the original disciplinary allegations were not proven however the Commission had made up its mind to terminate her employment without any basis.
39. The issues between the parties are:
- a) Is the Commission liable in defamation? **[Issue 1]**
 - b) Whether or not the matters relied on for Mrs Nasak's termination of employment constituted serious misconduct? **[Issue 2]**
 - c) If yes, whether or not the Commission contravened subs. 50(3) of the Act? **[Issue 3]**
 - d) Whether or not the Commission contravened subs. 50(4) of the Act? **[Issue 4]**
 - e) What relief, if any, is Mrs Nasak entitled to? **[Issue 5]**

D. The Law

40. Section 50 of the Act provides, relevantly, as follows:

50. (1) *In the case of a serious misconduct by an employee it shall be lawful for the employer to dismiss the employee without notice and without compensation in lieu of notice.*

...

(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.*

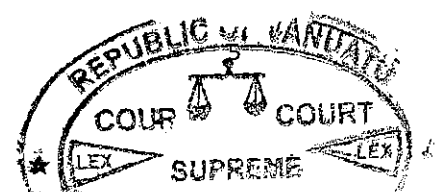
(4) *No employer shall dismiss an employee on the ground of serious misconduct unless he has given the employee an adequate opportunity to answer any charges made against him and any dismissal in contravention of this subsection shall be deemed to be an unjustified dismissal.*

...

41. Subsection 55(2) of the Act provides as follows:

55. ...

(2) *An employee shall not be entitled to severance allowance if he is dismissed for serious misconduct as provided in section 50.*



42. Subsection 56(4) of the Act provides as follows:

56. ...
(4) *The court shall, where it finds that the termination of the employment of an employee was unjustified, order that he be paid a sum up to 6 times the amount of severance allowance specified in subsection (2).*

43. Subsections 15(1) and (2) of the PS Act provide as follows:

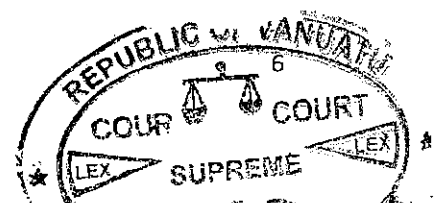
15. (1) *It shall be the duty of each member of the Commission to ensure that the Commission shall, in the performance of its functions, responsibilities and duties, be a good employer.*
- (2) *The Commission shall as a good employer:*
- (a) *ensure the fair and proper treatment of employees in all aspects of their employment; and*
 - (b) *require the selection of persons for appointments and promotion to be based upon merit; and*
 - (c) *promote good and safe working conditions; and*
 - (d) *encourage the enhancement of the abilities of individual employees; and*
 - (e) *promote and encourage an equal opportunities programme; and*
 - (f) *abide by the principles set out in section 4.*

44. Section 29 of the PS Act provides as follows:

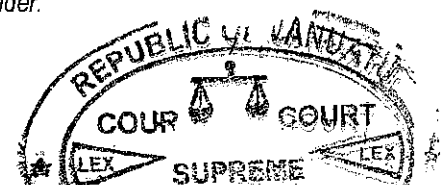
29. (1) *The Commission may dismiss an employee at any time for serious misconduct or inability but subject to its obligations to act as a good employer.*
- (1A) *If the Commission dismisses an employee under subsection (1), the matter is not to be referred to the Board for hearing and determined under section 37.*
- (2) *The Commission may where the past performance of the employee has been exemplary provide to the employee a redundancy payment as if his or her employment had been terminated under the Employment Act [Cap. 160].*

45. Sections 36 and 37 of the PS Act provide as follows:

36. (1) *An employee commits a disciplinary offence who –*
- (a) *by any wilful act or omission fails to comply with the requirements of this Act or of any order hereunder or of any official instrument made under the authority of the Commission or of the director-general of the ministry in which the employee is employed;*
 - (b) *in the course of his or her duties disobeys, disregards or makes wilful default in carrying out any lawful order or instruction given by any person having authority to give the order or instruction or by word or conduct displays insubordination;*
 - (c) *is negligent, careless, indolent, inefficient, or incompetent in the discharge of his or her duties;*



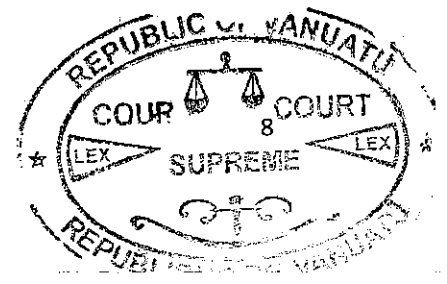
- (d) *behaves in a manner calculated to cause unreasonable distress to other employees or to affect adversely the performance of their duties;*
 - (e) *uses intoxicating liquors or drugs (including for the avoidance of doubt, kava) to excess or in such manner as to affect adversely the performance of his or her duties;*
 - (f) *improperly uses or removes property, stores, monies, stamps, securities or negotiable instruments for the time being in his or her official custody or under his or her control, or fails to take reasonable care of any such property, stores, monies, stamps, securities or negotiable instruments;*
 - (g) *otherwise than in the proper discharge of his or her duties directly or indirectly discloses or for private purposes uses any information acquired by him or her either in the course of his or her duties or in his capacity as an employee;*
 - (h) *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;*
 - (i) *is guilty of any 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;*
 - (j) *is guilty of any other offence prescribed from time to time by regulations made under this Act.*
37. (1) *There is established a Disciplinary Board which shall be responsible for hearing and determining, subject to subsections 26(2) and 29(1A), disciplinary offences, and which Board shall comprise:*
- (a) *a member of the Commission appointed by the Commission for 3 years;*
 - (b) *a member of the public service appointed by the Public Service Staff Association or in the case when no staff association exists, appointed by the Judicial Services Commission for 3 years;*
 - (c) *a director appointed by the Judicial Services Commission for 3 years.*
- (2) *A member of the Board shall include an employee, director or member of the Commission (as the case may be) who is nominated by a member of the Board to fill that member's place, during any absence from the Board of that member.*
- (3) *A member of the Board who has an interest over and above the interest of other members in any proceedings before the Board shall disqualify himself or herself from participating in the conduct of those proceedings, in which event, there will be appointed by the Commission or the Judicial Services Commission (as the case may be) for the purposes of those proceedings a person in the place of the disqualified member.*
- (4) *Each member will be paid a sitting allowance and such other allowances as may be prescribed by the Minister subject to an enactment providing for the manner in which those allowances shall be determined.*
- (5) *Every proceeding before the Board shall be commenced by notice of offence in the form prescribed and containing particulars of the offence as will fully and fairly inform the offender of the offence and date of hearing which shall be not less than 28 days from the date of service of the notice on the offender.*



- (6) *The procedure at the hearing will be as the Board may determine.*
- (7) *Notwithstanding anything in this section, the Board may, if in its opinion a case involves matters of a professional, technical or specialised nature, appoint a person who in its opinion has expert knowledge of such matters to be an assessor for purposes of the case, and the assessor shall sit with the Board for the hearing and determination of the case, except that he or she will not participate in the Board's deliberations and will have no vote in the determination of the case.*
- (8) *At the hearing a director-general (or representative), and/or the employee will be entitled to be present and may be represented and assisted by an advocate or any other person.*
- (9) *The Board in considering a disciplinary matter before it may:*
 - (a) *dismiss the notice; or*
 - (b) *issue a warning or reprimand to the offender; or*
 - (c) *demote the employee; or*
 - (d) *suspend the offender from the Public Service without pay, or*
 - (e) *order compulsory retirement; or*
 - (f) *dismiss the offender from the Public Service.*
- (10) *Proceedings before the Board shall not be bad for want of form.*
- (11) *Unless an appeal has been lodged in accordance with section 38, all decisions of the Board shall be subject to confirmation by the Commission not later than 45 days after they have been published or notified to the employee concerned.*
- (12) *The Commission may confirm decisions of the Board, vary such decisions or quash them.*
- (13) *If the Commission fails to confirm, vary or quash a decision of the Board within the time provided in subsection (11), it shall be considered to have quashed the decision.*
- (14) *The member or the Commission who sits on the Board must not participate nor confer with other members of the Commission when the Commission is exercising its functions under subsections (11), (12) and (13).*

46. Section 46 of the PS Act provides as follows:

- 46. (1) *Except as provided in subsection (3) no person shall in any way attempt to influence the Commission, or any member of the Board in respect of any disciplinary case, or influence the Commission or any member of the Commission or the Board in the exercise of its or his or her functions, powers and duties.*
- (2) *A person who acts in Contravention of the provisions of this section commits an offence and is liable on conviction to a fine not exceeding VT 500,000 or a term of imprisonment not exceeding 1 year or both, and where applicable the person found to be in breach, will be in breach of the Leadership Code [Cap. 240] and that person is liable to be dealt with under the Leadership Code in addition to any penalty imposed under this section.*

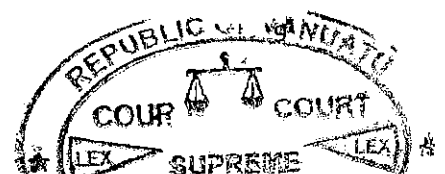


- (3) *Nothing in this section shall be so construed as to prohibit any person from giving or making representations in respect of any case or appeal at the request or invitation of the Commission or the Board or as a witness or as a defendant or appellant or the representative of a director-general, director or employee appearing at a hearing before the Commission or Board or providing a reference or acting as a referee in any employment application.*

E. The Evidence

Claimant's evidence

47. **William Nasak**, Mrs Nasak's husband, deposed in his Sworn statement filed on 11 July 2022 [**Exhibit C1**] that his wife received her letter of suspension on 24 December 2020 at 9.27pm whilst their family was celebrating Christmas Eve.
48. At 10am the following morning, Mr Bibi and his wife came to their residence with Mrs John. He and Mrs Nasak had not invited Mrs John to their house that morning. They were shown a copy of a Facebook post on Vanuatu Spearhead 2020 & Beyond page alleging inappropriate conduct between Mr Bibi and Mrs Nasak. This was defamatory and untrue and his wife and family have suffered shame and humiliation as a result of allegations which were not proven in the end.
49. Mrs John informed them that she has a gift as a spiritual medium where she sees and explains a 'vision' in relation to a person. He now understood from the Defence that Mrs John was speaking in 'parable' to conceal the story that she told Mr Johnson on 24 December 2020 (alleging 'an unacceptable behaviour'). After listening to Mrs John's explanation, they then went with Mr Bibi and Mrs John to attempt to speak with Mr Johnson firstly at his home then subsequently outside the Air Vanuatu office in Port Vila. They asked Mr Johnson to call an urgent meeting and to discuss the allegations with Mr Bibi and Mrs Nasak. His response was that the matter was under investigation so he could not do anything more.
50. The Commission's investigations started in early January 2021 then there was a PSDB hearing. The PSDB in its decision recommended either reinstatement or transfer to another Ministry at the Commission's discretion. The Commission quashed that decision and terminated his wife's employment on the grounds that she accepted Mrs John at their house on 25 December 2020 and also spoke with Mr Johnson on the same day.
51. Whether or not the Commission is liable for allegedly defamatory Facebook messages is a matter for the Court to determine therefore I will disregard that part of Mr Nasak's evidence. I consider that he was otherwise a witness of truth and accept the rest of his evidence.
52. **Nelly Naviti Bibi**, wife of former Secretary of the OPSC Jean Yves Bibi, deposed in her Sworn statement filed on 11 July 2022 [**Exhibit C2**] that her husband received his letter of suspension at night on 24 December 2020. She also read the letter and questioned him and was cross with him. She wanted to go and ask Mrs John directly about the allegation she had made concerning her husband and Mrs Nasak. That same night she and Mr Bibi went to look for Mrs John but did not find her because they went to the wrong yard.



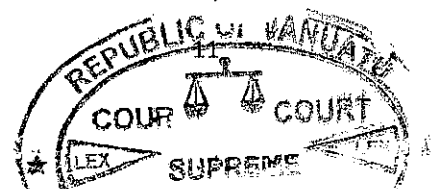
53. The next morning, after she saw posts denigrating her husband on Facebook, they went to Mrs John's house. They spoke with her and she gave them an explanation involving a vision that she saw. They then asked Mrs John to go with them to the Nasak's residence. She did. There, she repeated the same story that she had told them at her (Mrs John's) house. Then they all went to see Mr Johnson. They found him at Air Vanuatu and he said as the case was now under investigation, he could not do anything. The Commission's investigations started in January 2021.
54. I consider that Mrs Bibi endeavoured to assist the Court with the truth and accept her evidence.
55. **Mrs Nasak** deposed in her Sworn statement filed on 13 July 2022 [**Exhibit C3**] that she was appointed by the Commission in October 2019 to the position of Manager, Corporate Services as a permanent employee. At 9.27pm on 24 December 2020, she received her letter of suspension and was required to hand over her office keys. She read the letter in the presence of her husband and children and was surprised at the allegations.
56. She called Mr Bibi about the letter only to find out that he had also received a similar letter with her name mentioned in his letter. It was then that she realized that the words, "some unacceptable behaviour" in her letter related to Mr Bibi. Mr Bibi told her that he would approach Mrs John to find out exactly what she saw and reported.
57. On Christmas morning, she went to Au Bon Marche and saw Jane Bani, Acting Secretary of the Commission, who had signed the suspension letter. She told Ms Bani that she was disappointed as the allegations against her were false and defamatory. Ms Bani said that the Commission made the decision to suspend her based on what Mrs John mentioned to the Chairman Mr Johnson.
58. Sometime after 10am on Christmas morning, Mr Bibi, his wife and Mrs John arrived at her (Mrs Nasak's) house. She did not invite Mrs John to her house. Mrs John gave an account of her story which was totally different to what was reported to the Commission. Mrs Nasak was also shown Facebook posts concerning Mr Bibi and Mrs Nasak, and she and her family have suffered shame and humiliation as a result of these defamatory posts.
59. After listening to Mrs John's version of the story, they decided to approach Mr Johnson. After first trying his house, they found Mr Johnson at Air Vanuatu. They asked for a meeting with him but he said the matter was now under investigation and he had nothing to say.
60. On 30 December 2020, the Commission gave information to Radio Vanuatu about the suspension. The news was also aired on Television blong Vanuatu ('TBV').
61. Mrs Nasak then outlined that she retained Mrs Nari who wrote a letter to Mr Johnson dated 30 December 2020. She received letters dated 31 December 2020 informing her that the Commission's investigation would access her Government emails to collect evidence and warning her not to interfere with any Commission witness or person

involved in her discipline case, and not to attempt to influence the decision of the Commission or any Commission member as to her suspension.

62. From 6 January 2021 onwards, the invitations for interview by the investigation panel issued, followed by receipt of a signed EDR, notices of offences and further allegations which Mrs Nasak responded to then a PSDB disciplinary hearing was held and its decision issued. Subsequently the Commission issued a Notice of Termination which she responded to. Then she received her letter of termination.
63. She claims a 3- times multiplier because the initial charges against her were not proven but the allegations were defamatory towards her personally and professionally. She suffered stress and humiliation for something that was untrue. She lost her job because of false allegations.
64. She stated that the termination letter did not state why the Commission rejected her response and there was no explanation for terminating her employment instead of taking another course. If it were not for the false allegations, she would not have spoken to Mrs John who voluntarily came to her house on Christmas morning and she also would not have gone to see Mr Johnson who she had no knowledge was a witness in the case.
65. Whether or not the allegations against Mrs Nasak were false is a matter for the Court to determine therefore I have no regard to those parts of Mrs Nasak's evidence setting out conclusions of law or legal submission. Otherwise I considered that Mrs Nasak endeavoured to assist the Court with the truth as to what happened and accept her evidence.

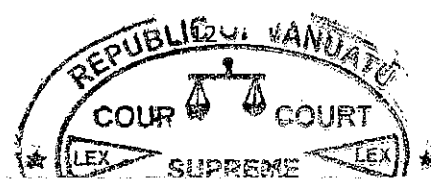
Defendant's evidence

66. **James Melteres**, current Secretary of the OPSC, deposed in his Sworn statement filed on 28 July 2022 [**Exhibit D1**] that in October 2019, Mrs Nasak was permanently appointed as OPSC Manager, Corporate Services. He attached copies of documents from the Commission's records beginning with Mrs John's incident report dated 24 December 2020 which was forwarded to Mr Johnson through to Mrs Nasak's termination letter dated 13 June 2021. He confirmed that the Commission complied with the disciplinary process in Chapter 6 of the Public Service Staff Manual ('PSSM') in terminating Mrs Nasak's employment.
67. Mr Melteres assisted the Court with the truth in adducing into evidence copies of relevant documents from the Commission's records. Those documents speak for themselves. However, whether or not the Commission complied with its internal disciplinary process and/or the PS Act is a matter for the Court to determine and so I have no regard to that aspect of his evidence.
68. **Helen John**, a Cleaner at the Commission, gave evidence in her Sworn statement filed on 28 July 2022 [**Exhibit D2**].
69. Objection was taken to parts of Mrs John's sworn statement by way of the Claimant's Application filed on 1 August 2022 to Strike out parts of Mrs John's sworn statement,



supported by the Sworn statement of Mrs Nasak. Paragraphs 3-5 of Mrs John's sworn statement were objected to for relevance as the sole ground for Mrs Nasak's termination of employment was interference with the Commission's witnesses whereas those paragraphs relate to the disciplinary case that was heard and determined by the PSDB. Mrs Nari submitted that the Commission did not terminate Mrs Nasak for 'unacceptable behaviour' so those paragraphs were irrelevant and should be ruled inadmissible.

70. In response, Mr Tari submitted that those paragraphs were relevant as they set out what Mrs John saw which she reported and led to Mrs Nasak's termination for interfering with the Commission's witnesses.
71. It is difficult to understand the basis of Mr Tari's submission. The issues between the parties are whether or not Mrs Nasak's employment was unjustifiably terminated on the ground of serious misconduct and whether or not the Commission contravened subs 50(3) and (4) of the Act. In the circumstances, the matters set out in paras 3-5 of Mrs John's sworn statement are not relevant and accordingly, are ruled **inadmissible**. Paragraphs 3-5 are therefore struck out from that statement.
72. Mrs John's evidence in the remaining parts of **Exhibit D1** was that on 24 December 2020, she reported the incident concerning Mr Bibi and Mrs Nasak to Ms Bani, Manager of the OPSC Compliance Unit. The next day, Mr and Mrs Bibi came to her house and questioned her about what she told the Chairman which resulted in Mr Bibi and Mrs Nasak's suspensions. She could tell they were very angry with her. It was against her will to go with them to the Nasak's house. She told them a 'parable' version of her story to avoid being disrespectful to Mr Bibi and Mrs Nasak out of fear that the true version of her story would likely destroy their homes as their spouses Mrs Bibi and Mr Nasak were all present. After that, they approached Mr Johnson who told them that the matter was under investigation and he had nothing to tell them at that stage.
73. I consider that Mrs John has conceded that she told conflicting versions of her story to Mr Johnson on 24 December 2020 and after that to Mr and Mrs Bibi and Mr and Mrs Nasak on Christmas Day. She has explained why. However, I need not decide in the present matter which version of her story was true therefore disregard her evidence as to the true version of her story. Mrs John's evidence as to what happened on Christmas Day is similar to that of the other witnesses and I accept that part of her evidence. I do not accept her evidence that she went against her will to Mrs Nasak's house as that statement was unsupported by other evidence.
74. **Simil Johnson**, Chairman of the Commission, deposed in his Sworn statement filed on 16 August 2022 [**Exhibit D3**] that Mrs Nasak's disciplinary matter began with the incident reported to him on 24 December 2020, she was suspended and then there was an investigation. He confirmed that Mrs Nasak was warned during the process of the investigation not to interfere with Commission witnesses yet she disregarded the warning and did the actions narrated at paras 7-14 of Mrs John's sworn statement.
75. When he met Mr and Mrs Bibi and Mr and Mrs Nasak on Christmas Day, Mr Bibi asked him to remove his (Mr Bibi's) suspension and Mrs Nasak's suspension or they would file suit or something like that. He told them that it was the Commission's decision and not his own, and that the matter was under investigation so he could not do anything.



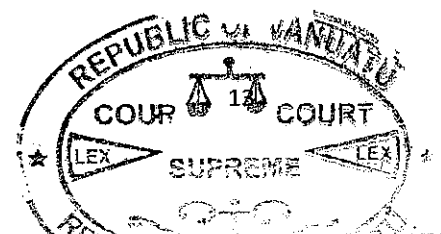
76. Once the Investigation Panel completed its report, the EDR was prepared, then a PSDB hearing occurred. The PSDB's decision was subject to confirmation by the Commission pursuant to subs. 37(12) of the PS Act.
77. By letter dated 15 May 2021, the Commission considered the PSDB decision and given Mrs Nasak's act of interfering with Commission witnesses despite the warning not to interfere with such witnesses and in exercise of its power under subs. 37(12) of the PS Act, it quashed the PSDB decision and gave her 14 days' notice to provide her response why the Commission should not terminate her employment. Mrs Nasak provided her response.
78. Mr Johnson confirmed that the Commission considered Mrs Nasak's response but was not satisfied with it and by its 13 June 2021 letter, terminated her employment for serious misconduct. Further, that the Commission complied with the disciplinary procedures set out in Chapter 6 of the PSSM and subs. 37(12) of the PS Act in terminating Mrs Nasak's employment.
79. Whether or not the Commission complied with its internal disciplinary process and/or the PS Act is a matter for the Court to determine and so I disregard that aspect of Mr Johnson's evidence.
80. Mr Johnson stated in his evidence that Mrs Nasak was warned not to interfere with Commission witnesses yet did the actions narrated at paras 7-14 of Mrs John's sworn statement. The matters at paras 7-14 of Mrs John's sworn statement related solely to the events on Christmas Day 2020. The only warning in the evidence not to interfere with witnesses was dated 31 December 2020 [**Annexure "LJN6", Exhibit C3**]. There is no such warning in the evidence which was issued prior to 31 December 2020. Accordingly, the Commission's view leading to its 15 May 2021 letter that Mrs Nasak's actions on Christmas Day were made despite a warning not to interfere with Commission witnesses is factually incorrect.
81. Mr Johnson's evidence otherwise as to the events on Christmas Day itself is consistent with that of the other witnesses.

F. Issue 1: Is the Commission liable in defamation?

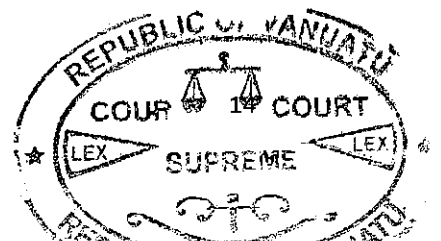
82. Clearly, messages insinuating inappropriate conduct between Mrs Nasak and Mr Bibi went viral on Facebook. However, there is simply no evidence that the Commission published these messages. Nor is there any evidence that the Commission authorised third parties to publish those messages. Accordingly, I answer **Issue 1, "No."**

G. Issue 2: Whether or not the matters relied on for Mrs Nasak's termination of employment constituted serious misconduct?

83. In the case of serious misconduct, the employer may dismiss the employee with immediate effect pursuant to subs. 50(1) of the *Employment Act* and subs. 29(1) of the PS Act.



84. Where the finding of misconduct is challenged, the Courts are obligated to consider whether the facts alleged in the disciplinary proceedings amounted to serious misconduct: Court of Appeal in *Republic of Vanuatu v Watson* [2023] VUCA 31 at [17]:
17. ... [*Republic of Vanuatu v Mele* [2017] VUCA 39] does not support the principle that, in an appropriate case such as this where the finding of misconduct is indeed challenged, neither the trial Court nor this Court on appeal can look at the decision on serious misconduct. Both the trial Court and this Court on appeal were entitled to consider whether the facts alleged in the disciplinary proceedings amounted to serious misconduct. Indeed, the Courts were obligated to do so.
85. The employer PSC bears the onus of proving the allegations of serious misconduct: *Government of Vanuatu v Mathias* [2006] VUCA 7.
86. Mr Tari submitted for the Commission that the 2 grounds set out in Mrs Nasak's termination letter constituted serious misconduct. That is, that Mrs Nasak on 25 December 2020 approaching Mr Johnson and accepting to meet Mrs John (the Commission's main witness) when the discipline process was still underway was an action to interfere with the PSC discipline process and therefore serious misconduct.
87. On the other hand, Mrs Nari submitted that on 25 December 2020, Mrs Nasak had not been served the EDR thus she could not be in breach of any process. She also submitted that the Commission's 13 June 2021 termination of Mrs Nasak's employment was made contrary to the PSDB's decision and Mrs Nasak's responses yet no explanation was given as to why her responses were rejected or reasons given for why it quashed the PSDB decision. Finally, the onus was on the Commission to prove that speaking to Mr Johnson who was Mr Bibi and Mrs Nasak's immediate supervisor to request a meeting regarding 'a second version' of the story leading to their suspensions amounted to serious misconduct warranting dismissal (which the Commission had not proved).
88. The 13 June 2021 termination letter [**Annexure "LJN18", Exhibit C3**] does not set out why Mrs Nasak's responses were rejected nor reasons why the Commission quashed the PSDB decision.
89. However, Mr Johnson in his evidence [**Exhibit D3**] explained why the Commission quashed the PSDB decision. He deposed that when the Commission considered the PSDB decision, it took the view that Mrs Nasak's actions on Christmas Day were made despite a warning not to interfere with Commission witnesses. As set out above, the only warning not to interfere with Commission witnesses was dated 31 December 2020, 6 days after Christmas Day. There was accordingly no factual basis for the Commission's view that Mrs Nasak's actions on that Christmas Day constituted serious misconduct.
90. As it was, having formed that view, the Commission quashed the PSDB decision and decided to dismiss Mrs Nasak from service. It notified her of this in its 15 May 2021 letter [**Annexure "LJN16", Exhibit C3**] and asked for her response within 14 days as to why the Commission should not terminate her employment. The letter stated as follows:



The Commission made this decision to dismiss you from service because of the following reasons:

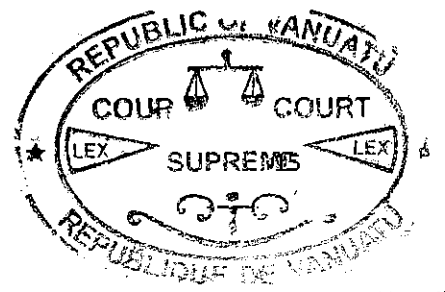
- (a) You have partially agreed or admitted to charge 2 – You stated that the main reason why you went to see Mr Simil Johnson was following Helen John's visit. You confirmed that Helen came to your house on 25th of December 2020 and that time Helen told you about the vision. In addition, you confirmed to the PSDB that when you approached Mr Simil Johnson, you were not aware at that time that he was also a PSC witness. Mr Simil Johnson confirms that you and Mr Jean Yves met him on 25 December 2020 at the Air Vanuatu Building trying to challenge the decision of the Commission to take disciplinary action against both of you. You rebutted by saying that your intention at that time was solely to find out how PSC could suspend you based on a vision given the story from Helen.
- (b) You have partially agreed or admitted to charge 3 – You confirmed to the Disciplinary Board that you did talk to Helen because Helen talked to you first. You also confirmed that the purpose of seeing Chairman on that date was because of the vision. That was the main reason you decided to talk to the Chairman of PSC.

Based on evidences [sic] from PSDB, Order on determination of charges which shows that you have partially agreed to charges 2 and 3, the Commission is satisfied that your actions are contrary to sections 36(1)(a) and (b) and section 46(1) of the Public Service Act [CAP. 246].

Therefore, pursuant to subsections 50(3) and (4) of the Employment Act [CAP. 160], the Commission decided to give you 14 days' notice as an adequate opportunity to give reasons as to why the Commission should not terminate you from service.

91. In her response to that letter, Mrs Nasak set out as follows her reasons for seeing and speaking to Mrs John and Mr Johnson on Christmas morning including that she did not know that Mr Johnson too was a witness in the case until she received a copy of his signed witness statement with her EDR [Annexure "LJN17", Exhibit C3]:

- In your letter (bullet points 'a' and 'b') you quoted that I partially agreed to charges 2 and 3 which are contrary to sections 36(1)(a) and (b) and section 46(1) of the Public Service Act [CAP 246] hence the justification for my termination.
 - I believe I was very clear with my response in my EDR response and again during my disciplinary hearing of how I pleaded when read these 2 charges (charge 2 & 3 as per your letter), and that is, I did not agree with the charges especially the wilful nature of how the charges were structured or written but I did admit that I saw and spoke with both Mr. Simil Johnson and Mrs. Helen John Lukai on the morning of 25th December 2020 for a reason and only after Mrs. Lukai had come to me with information of a vision (source: my own written notes of the hearing).
 - I have also clarified my reasons for seeing and speaking to these 2 people as:
 - 1) Apparently, Helen John Lukai had come to my home to clarify to me and my husband on the morning of 25th December 2020 that what she had seen was in fact a vision however staff whom she communicated her vision to misinterpreted her story and reported it otherwise. I did not force Mrs. Lukai to come to my house or to speak to me that morning however she came to my residential home and spoke to me first at her own free will.

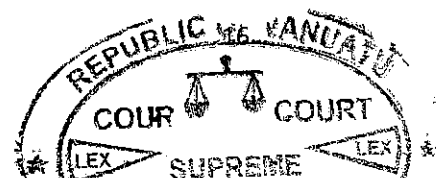


- 2) I believed that Mr. Simil Johnson as the overall head of the OPSC and as my boss, should know this information of Mrs. Lukai's vision if he was not yet aware, particularly since my suspension was based on what has now been communicated and confirmed to me by the witness herself (Mrs. Lukai) as a vision and also since the matter was already circulating and getting defamatory comments on Facebook. I was not aware that Mr. Johnson was also a witness in the matter until the time I received my EDR and saw a copy of his signed witness statement.

(source: my own written notes of the hearing).

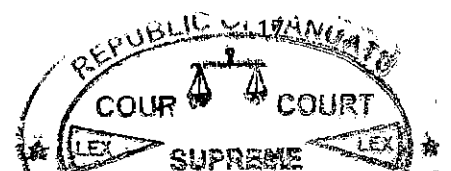
- I did not challenge the Commission's decision on the morning of 25 December 2020 for taking a disciplinary action against me or speak words to that effect to influence its decision which I have defended in my EDR and again during my disciplinary hearing. Rather, I believed that it was important for my boss Mr. Johnson, to be informed that the same allegation that the Commission had suspended me for, had just been clarified and communicated to me and my husband by Mrs. Helen John Lukai as a vision. I had no idea that Mr. Johnson had previously spoken with Mrs. Lukai before convening a meeting on the afternoon of 24th December 2020 to discuss the alleged unacceptable behaviour by me, with the rest of the Commission members whereby the PSC made a decision to suspend me from duties immediately. I only became aware that Mrs. Lukai had provided an account of her story to the Chairman via the copy of Mr. Johnson's witness statement which I received with my EDR.
 - Therefore, I believe my actions for seeing and speaking to Mr. Johnson and Mrs. Lukai on the 25th of December were done in good faith and intentions especially for informing Mr. Johnson, my boss, that the allegation I was suspended for, was based on a vision. It was the only story I was made aware of then, being in the dark about the full details of the allegation after being served my suspension letter on the night before i.e. 24 December 2020 at 9:27pm. The main witness herself had come to my home to inform me of her vision on the morning of 25th December 2020. In no way did I mean any disrespect to the disciplinary process, the Chairman, or to insubordinate him and the Commission.
 - I offer my apology to the Chairman and his Commission and especially the Chairman, if my actions on the morning of 25 December 2020 were perceived by him as insubordination however, I also ask if he and the Commission can look beyond these actions to see me as a staff member, trying to explain to my boss, and to safeguard my professional reputation and good standing in society. This is especially so because I had reason to believe after hearing Mrs. Lukai's statement of the 25th of December 2020, that the allegations against me are untrue and unsubstantiated as they were based on Mrs. Lukai's vision. I believe anyone would have tried their best to inform their boss if faced with a similar situation.
- ...
- I seek the Commission's consideration that if this false allegation had not been made, or if Mrs. Lukai had not come to my home on the 25th of December 2020 to tell me that this was all a vision and a misinterpretation of this vision by some staff who reported the matter to the Chairman, I would have no reason whatsoever to see or speak with Mr. Johnson or the PSC main witness Mrs. Lukai.

92. Mrs Nasak was clear in her evidence that if it were not for the allegations made against her, she would not have spoken to Mrs John who voluntarily came to her house on Christmas morning and she also would not have gone to see Mr Johnson who she had no knowledge (at that point in time) was a witness in the case [para. 38, **Exhibit C3**].
93. I accept Mrs Nasak's evidence as to why she spoke with Mrs John who she did not invite but arrived at her house on Christmas morning, and subsequently approached Mr Johnson. He as the Chairman of the Commission was the head of the body which had made the decision to suspend her. It makes sense that after Mrs John told Mrs Nasak and the others on Christmas morning that what she had seen on



23 December 2020 was a 'vision', that they wanted to ask Mr Johnson for a meeting about her and Mr Bibi's suspensions given that explanation given to them that morning by Mrs John. At that point, Mrs Nasak did not know that Mrs John's incident report given to Mr Johnson was in different terms which did not involve any reference to a 'vision'. Also, this was happening only the morning after what would have been a tremendous shock of being told late on Christmas Eve night that she was immediately suspended from duties on allegations of 'unacceptable behaviour' involving another employee and that she must not enter any premises of the Commission except with Ms Bani's permission and that she had to hand over all properties belonging to the Commission.

94. In the circumstances, asking Mr Johnson on Christmas morning for a meeting because Mrs John told them that what she saw on 23 December 2020 was a 'vision' was reasonable and could not be misconduct in any shape or form.
95. There is another point to be made about the Commission witnesses concerned, namely Mr Johnson and Mrs John, who both appeared at the PSDB disciplinary hearing. Ms Bani told Mrs Nasak on Christmas morning that her suspension was based on what Mrs John reported to Mr Johnson. There could be no question from that point on that Mrs John would be the main witness for the Commission. However, it could not have been clear on any view that Mr Johnson himself would also be a Commission witness. I accept Mrs Nasak's evidence that she approached him on Christmas morning as Chairman for the reasons that she put forward but did not know that he would also be a witness for the Commission until she received his signed statement with her EDR (on 20 January 2021).
96. For the reasons given, I find that the facts, matters and circumstances giving rise to the Commission's decision to terminate Mrs Nasak's employment did not constitute serious misconduct and answer **Issue 2**, "No."
97. Accordingly, the Commission has failed to discharge its onus to prove that Mrs Nasak was guilty of serious misconduct.
98. It follows that Mrs Nasak's termination of employment on the ground of serious misconduct was unjustified. She has proved the Claim with respect to liability on the balance of probabilities.
- H. Issue 3: If yes, whether or not the Commission contravened subs. 50(3) of the Act?
99. As there was no serious misconduct, **Issue 3** does not arise for consideration.
100. However, if I am wrong on that and there was serious misconduct, on the Commission's own evidence, there was other courses open to it as was recommended in its own PSDB decision namely for Mrs Nasak to be reinstated or to transferred to another Ministry [**Annexure "LJN15", Exhibit C3**]. The PSDB did not recommend dismissal.
101. There was no evidence that Mrs Nasak could not be reinstated or transferred to another position. The evidence was that the Commission quashed the PSDB decision and did not take up either course recommended as it took the view (incorrectly) that Mrs Nasak's



actions on Christmas morning were carried out despite a warning not to interfere with Commission witnesses.

102. If I had to give an answer to **Issue 3**, for the reasons given, it would be that, “**Yes**, the Commission contravened subs. 50(3) of the *Employment Act* as it could have and should have taken another course than to terminate Mrs Nasak’s employment”.

I. Issue 4: Whether or not the Commission contravened subs. 50(4) of the Act?

103. Subsection 50(4) of the Act is enlivened where an employee has been dismissed on the ground of serious misconduct, regardless of whether or not the facts alleged in the charges constituted serious misconduct. This subsection requires the Court to consider whether or not the employee was given an adequate opportunity to answer any charges against him or her, and if it is found that he or she was not, then the dismissal will be deemed to be an unjustified dismissal.

104. Mrs Nari submitted that notwithstanding Mrs Nasak’s response to the Commission’s 15 May 2021 letter, the Commission went ahead with terminating Mrs Nasak’s employment by its letter dated 13 June 2021 on the basis of the 2 charges put and that by its words, “*thus resolved to uphold its previous decision to terminate you from service*”, it had already previously decided to terminate her and thus did not actually give her an adequate opportunity to answer the charges against her.

105. However, there is no question on the evidence that the Commission followed an exhaustive process in setting out disciplinary charges against Mrs Nasak, requesting her response and that Mrs Nasak took the opportunities given to respond to the charges against her. I consider therefore that the Commission dismissed Mrs Nasak for serious misconduct (albeit incorrectly) after it had given her an adequate opportunity to answer the charges made against her and answer Issue 4, “**No.**”

J. Issue 5: What relief, if any, is Mrs Nasak entitled to?

106. At the hearing, Mrs Nari requested judgment as to liability and if the Claimant was successful, for the Court to issue directions after that as to the assessment of quantum of damages.

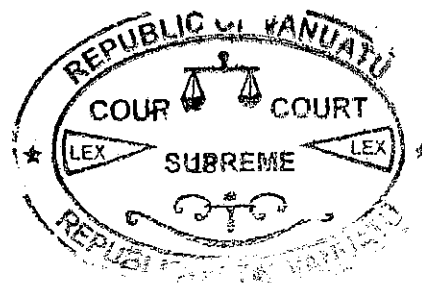
107. Neither party’s evidence addresses the question of damages nor quantum therefore this judgment is necessarily limited to liability. Separate Orders will issue as to the filing of sworn statements and submissions as to quantum of damages.

K. Result and Decision

108. Paragraphs 3-5 of Mrs John’s sworn statement [**Exhibit D2**] are ruled **inadmissible** and struck out from that statement.

109. In summary, I answered the issues as follows:

a) **Issue 1:** Is the Commission liable in defamation? “**No.**”



- b) **Issue 2:** Whether or not the matters relied on for Mrs Nasak's termination of employment constituted serious misconduct? "**No.**"
 - c) **Issue 3:** If yes, whether or not the Commission contravened subs. 50(3) of the Act? "As there was no serious misconduct, **Issue 3** does not arise for consideration."
 - d) **Issue 4:** Whether or not the Commission contravened subs. 50(4) of the Act? "**No.**"
 - e) **Issue 5:** What relief, if any, is Mrs Nasak entitled to? "Separate Orders will issue as to the filing of sworn statements and submissions as to quantum of damages."
110. For the reasons given, judgment is entered for the Claimant for an amount to be determined.
111. Costs must follow the event. The Defendant is to pay the Claimant's costs as agreed or taxed by the Master. Once set, the costs are to be paid within 28 days.
112. Separate Orders will issue as to the filing of sworn statements and submissions as to quantum of damages.

**DATED at Port Vila this 6th day of September 2023
BY THE COURT**


Justice Viran Molisa Trief

