

BETWEEN THE REPUBLIC OF VANUATU
Appellant

AND LOUISE NASAK
Respondent

Coram: *Hon Chief Justice V Lunabek
Hon Justice R Young
Hon Justice R White
Hon Justice Oliver Saksak
Hon Justice E Goldsborough
Hon Justice W Hastings*

Counsel: *K T Tari for the Appellant
M G Nari for the Respondent*

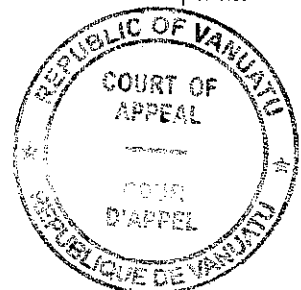
Date of Hearing: *8th February 2024*

Date of Decision: *16th February 2024*

JUDGMENT OF THE COURT

Introduction

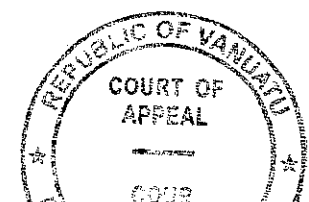
1. Mrs Nasak was employed as manager of the Corporate Services of the Public Service Commission. On 13 June 2021, she was dismissed by the Commission for what was said to be serious misconduct. The basis of the dismissal was that she had interfered with the Public Service Commission's disciplinary process that she was subject to, by contacting the Chairman of the Public Service Commission and the Public Service Commission's main witness when the disciplinary process was underway. That was said to be a breach of section 36(1) and section 46 of the Public Service Act which makes it a crime to "in any way attempt to influence the Commission or any member of the Board in respect of any disciplinary case ..." (Section 46(1) of the Public Service Act).
2. Subsequent to her dismissal, Mrs Nasak sued the Republic of Vanuatu alleging that her dismissal was unjustified. The Supreme Court found that Mrs Nasak's dismissal was unjustified. The judge made a declaration accordingly and entered judgment for liability with assessment of damages to be determined. The question of quantum of damages was to be by way of agreement or a separate hearing.



3. There are three grounds of appeal. The appellant challenges the judge's conclusion that Mrs Nasak's conduct did not amount to serious misconduct. The appellant says that her behaviour did meet that threshold and the Public Service Commission was therefore justified in dismissing her.
4. There are two other grounds of appeal that deal with peripheral issues. The respondent says that the judge erred when she struck out three paragraphs in a witness sworn statement. We will return to that issue in more detail later in this judgment.
5. And finally, the Republic says that there was actual or reasonable apprehension of bias by the judge in the Supreme Court because she had been involved as a member of this Court in a case which also dealt with some of the facts relating to Mrs Nasak's case.

Background

6. The events which led ultimately to Mrs Nasak's dismissal began shortly before Christmas on 23 December 2020. Mrs Hellen Lukai John was also an employee with the Public Service Commission. On 24 December 2020, she reported to the manager of the Public Service Commission Compliance Unit, that on 23 December she had seen Mrs Nasak and another employee of Public Service Commission, Mr Bibi, hugging and kissing. That manager sent a memorandum to the Chairperson of Public Service Commission, Mr Johnson, attaching a copy of the report about Mrs John's statement and inviting him to take whatever action may be necessary.
7. The Public Service Commission had an urgent meeting on 24 December. They decided to suspend both Mrs Nasak and Mr Bibi and conduct an investigation into their conduct. On 24 December, Mrs Nasak was served with a letter from the Public Service Commission that told her that she was seen engaging in unacceptable behaviour within the office of the Public Service Commission with another employee, and that she would therefore be suspended with a disciplinary process to follow.
8. Mrs Nasak said she was surprised by the allegation. On the morning of Christmas day Mrs Nasak saw Mrs Bani who was the Acting Secretary of the PSC. She told Mrs Nasak her suspension was based on what Mrs John had told Mr Johnson. Mrs Nasak contacted Mr Bibi. Later Christmas day, Mrs John, who had made the complaint about the behaviour, was with Mr and Mrs Bibi. Mr and Mrs Bibi decided to take Mrs John to Mrs Nasak's house to discuss the situation.
9. On the way to the residence Mrs John told Mr Bibi and later repeated it to Mrs Nasak that she had had a "vision" about their conduct that she had reported to her manager.
10. Given what Mrs John had told Mrs Nasak and Mr Bibi, they decided to approach their immediate employer Mr Johnson, to tell him that Mrs John's complaint about their conduct was based on a vision.
11. Mr Bibi, Mrs Nasak and Mrs John then found Mr Johnson in the front of the Air Vanuatu office on 25 December. They wanted a meeting with Mr Johnson. They tried to tell Mr Johnson about Mrs John's description of a vision as the basis of her complaint that triggered their suspension. Mr Johnson said

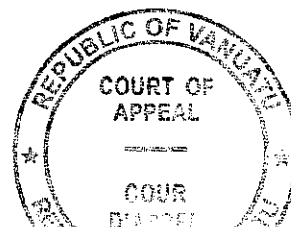


that the matter was under investigation and he couldn't tell them anything further. That was the end of their discussion with him.

12. A few days later on 31 December, the Commission wrote to Mrs Nasak telling her not to interfere with the Public Service Commission disciplinary process and to refrain from interfering with any witnesses, given the disciplinary process was underway.
13. Mrs Nasak understood that there was an investigation panel appointed to enquire into the allegations against her. By late January, she had received a discipline notice which contained 12 allegations that she was asked to answer. She provided her response. The Public Service Commission indicated it had decided to refer the matter to the Public Service Disciplinary Board by letter of 3 February 2021.
14. On 9 March, Mrs Nasak received a notice of offence from the Disciplinary Board setting out nine disciplinary charges. She was asked to respond to those allegations. She did so. The charges included allegations as to the competence of Mrs Nasak to do her job. These charges did not seem to be prosecuted and they form no part of this case. Further charges related to an inappropriate relationship between Mr Bibi and Mrs Nasak and to allegations of ignoring proper disciplinary process by transporting Mrs Johns, a witness in the disciplinary case, to Mrs Nasak's house to talk to her, and approaching the Public Service Commission Chairperson when she had been suspended by the Commission.
15. There was then a disciplinary hearing completed 6 May 2021. Eight days later on 14 May, the Public Service Commission Disciplinary Board released its final decision. It recommended that Mrs Nasak be reinstated to her position as Manager Corporate Services or be transferred to another Ministry at the discretion of the Commission. In doing so, the Board observed that "this case is not an easy case":

"The Disciplinary Board noted the written statements and submissions from parties including the witnesses, which helped the Board to make its decision. The Board also noted that the PSC process has been violated when Mrs Louise (Mrs Nasak) met the Chairman at Air Vanuatu building. Furthermore, the Board noted that charge six is the main charge in this case, yet the Board find it difficult because the main witness Hellen has conflicting statements and also confirmed during the hearing that she did mention vision".

16. The day after the Public Service Commission received the Disciplinary Board's final decision (15 May) it had a meeting regarding Mrs Nasak. It then issued a notice of termination of employment to Mrs Nasak, giving her 14 days to respond. The allegations of misconduct that the Commission considered requiring a response from Mrs Nasak, were narrowed to the circumstances under which she had met Mrs John and approached Mr Johnson. Mrs Nasak responded denying she had interfered in the disciplinary process.
17. On 13 June the Commission gave Mrs Nasak notice terminating her employment for serious misconduct under section 50(4) of the Public Service Act, The Commission said:



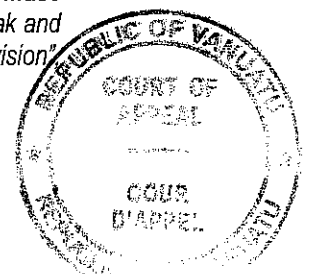
"the Commission after considering your responses as per section 50(3) and section 50(4) of the Employment Act, noted that your actions to interfere with the PSC disciplinary process to approach the Chairman of the PSC, Samuel Johnson and accept to meet Hellen Lukai John (PSC main witness) on 25 December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

18. In the pleadings, there were a number of grounds raised relating to the process by which the Commission came to consider and terminate Mrs Nasak's employment. However, in the end it came down to a narrow point, whether what Mrs Nasak had done on 25 December, in relation to Mrs John and Mr Johnson, constituted serious misconduct in that it was an attempt to interfere with the PSC disciplinary process relating to herself.

The Supreme Court decision

19. The judge in the Supreme Court noted that Mr Johnson in his evidence, explained why the Commission had decided to dismiss Mrs Nasak. He said that the Commission took the view that Mrs Nasak's actions on Christmas Day had occurred despite a warning not to interfere with Commission's witnesses. As the judge pointed out the warning by letter to Mrs Nasak not to interfere with Commission witnesses was dated 31 December 2020, 6 days after the events of Christmas Day which gave rise to the dismissal.
20. The judge went on to consider the decision of 13 June 2021 dismissing Mrs Nasak. The judge noted that the Commission had given no reason as to why it had rejected Mrs Nasak's evidence or why it had effectively rejected the decision of the Public Service Disciplinary Board which had not recommended dismissal.
21. Mrs Nasak had told the Commission that Mrs John had voluntarily come to her house. Mrs John had told her that the description of the events regarding her and Mr Bibi were a "vision". Mrs Nasak had gone to see Mr Johnson because he was her immediate employer and what Mrs John had said to her was highly relevant to the complaint about her alleged conduct and her suspension. Mrs Nasak and Mr Bibi wanted to arrange a meeting with Mr Johnson however when he said that was not appropriate that had been the end of the discussion.
22. The Judge said at [93]

"I accept Mrs Nasak's evidence as to why she spoke to Mrs John, who she did not invite but arrived at her house on Christmas morning and subsequently approached Mr Johnson. He is the Chairman of the Commission, the head of the body which had made the decision to suspend her. It makes sense that after Mrs Johns told Mrs Nasak and others on Christmas morning that what she had seen on 23 December was a "vision"



that they wanted to ask Mr Johnson for a meeting about her and Mr Bibi's suspension, given that explanation given to them that morning by Mrs John. At that point Mrs Nasak did not know that Mrs Johns 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 Mrs Bani's permission and that she had to hand over all properties belonging to the Commission".

23. And further the Judge said [94]

"In the circumstances, asking Mr Johnson on Christmas morning for a meeting because Mrs John told them what she saw on 23 December 2020, was a "vision", was reasonable and could not be misconduct in any shape or form".

Discussion

24. Section 36(1) (a) and (b) and S 46(1) of the Public Service Act were said to be the relevant statutory provisions by the Commission when it dismissed Mrs Nasak.

25. Section 36 provides;

(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 under, or any official instrument made under the authority of the Commission, or of the Director-General of the Ministry of which the employee is employed.*

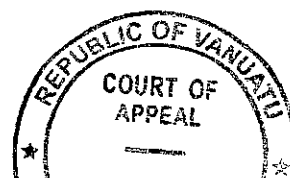
b) *In the course of his or her duties, displays disregard to make wilful default in carrying out any lawful order instruction, given by any person having authority to give the order of instruction or by word or contact displays insubordination.*

26. Section 46(1) of the Public Service Act provides;

"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 in any Member of the Commission or the Board in the exercise of its, his or her functions, powers and duties."

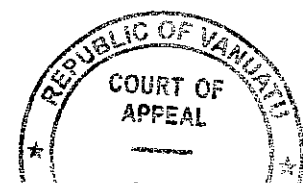
27. Subsection (2) provides that acting in contravention of subsection (1) brings criminal penalty.

28. We agree with the analysis of the facts undertaken by the judge. We agree that there was insufficient evidence upon which the Commission could have been satisfied that by her actions Mrs Nasak had interfered in the Commission's disciplinary process by approaching the Chairman and agreeing to



meet Mrs John when the disciplinary process was underway.

29. Mrs Nasak had no reason to suppose that Mr Johnson was a witness in any disciplinary case that may be brought. She knew him as the head of the Public Service Commission and her immediate employer. Given what she had heard from Mrs John about her "vision" it was hardly surprising that she turned to him to try to set up a meeting. When he said he couldn't meet, that was accepted. We asked counsel to identify any evidence from which we could infer an intention to interfere in the disciplinary process by Mrs Nasak. He accepted he could not do so.
30. Secondly, as far as Mrs John is concerned, we accept the evidence established that Mrs John was at Mr Bibi's house. When Mrs John began talking to Mr Bibi and telling him that her evidence of an inappropriate relationship between Mr Bibi and Mrs Nasak was based on a vision, she was taken to Mrs Nasak's house. Mrs Nasak did not invite Mrs John to her house and although Mrs John said she felt obliged to go, there was no suggestion that there was any obligation on her to do so, or any physical threat or force for her to go to Mrs Nasak 's house.
31. There is no evidence that at Mrs Nasak's house, Mrs Nasak did anything other than listen to what Mrs John had to say about the alleged misconduct and her "vision" and then suggest they all went to see Mr Johnson. The purpose of that seems relatively clear. Mrs Nasak had been surprised by what she had been told about the allegations against her. Her accuser had come to her house and told her that her complaint of misbehaviour had been based on a "vision" of the events. In those circumstances it was hardly surprising that she wanted to turn to her immediate employer to provide him with evidence of what Mrs John was now saying.
32. There was no evidence before the Commission which suggested that Mrs Nasak was trying to improperly prevent or influence what Mrs John told her. She did not try and talk Mrs John out of giving evidence before the Commission. She did not try and convince Mrs John to change her statement.
33. In their final determination of 13 June, the Commission said that the agreement by Mrs Nasak to meet Mrs John was the objectionable conduct. Two points can be made in response. Mrs Nasak did not invite Mrs John to come to her house. There is no evidence Mrs John was coerced to do so by Mrs Nasak. Mrs John appeared to come to the house of her own free will. It is difficult therefore to understand how the act of meeting Mrs John was an attempt to influence what she was to say. The 31 December advice from the Commission to Mrs Nasak to "... *maintain your distance and refrain from interfering with any PSC witness...*" postdates the meeting with Mrs John.
34. The other point is that in a civil case (as here), neither party has any exclusive entitlement to access to a witness. Mrs Nasak was entitled to ask Mrs John what she had to say about the events that gave rise to the disciplinary proceedings. As we have observed Mrs Nasak did not try to improperly interfere with Mrs John's description of the events when discussing the events of 23 December. Mrs Nasak was free to talk to Mrs John. And so, by itself talking to Mrs John was not in terms of the Commission decision interfering with the disciplinary process.
35. The Commission's conclusion that Mrs Nasak had committed a serious disciplinary offence by talking



to Mrs John when the disciplinary process was underway was in error.

36. We have therefore concluded that the Judge in the Supreme Court was correct. Mrs Nasak had not committed a serious disciplinary offence when she talked to Mr Johnson or with respect to her actions in relation to Mrs John.
37. There were two further grounds of appeal which were abandoned by counsel.
38. The first alleged the judge was wrong to have ruled as admissible, three paragraphs in Mrs Johns sworn statement regarding what Mrs John saw of the conduct of Mr Bibi and Mrs Nasak. Counsel agreed that content of those three paragraphs was in any event, before the trial court.
39. The final ground of appeal, raised for the first time on the appeal, asserted that the trial judge should have disqualified herself for actual or apprehended bias. This was said to be because the judge had sat on an appeal relating to Mr Bibi's litigation regarding his dismissal from the Public Service. Counsel accepted the issues in the Bibi case had no effective crossover with this case. The issue resolved by the Court of Appeal in the Bibi case was unique to that case. On that ground there could be no proper allegation of bias
40. We also pointed out to counsel that the Bibi appeal case was decided before this case was heard in the Supreme Court. The time to raise bias was therefore when this case was tried in the Supreme Court. We consider there was no basis to allege actual or apprehended bias by the judge.
41. Counsel withdrew this ground of appeal.
42. The appeal is dismissed there will be costs in favour of the respondent as sought of VT50,000.

DATED at Port Vila, this 16th day of February, 2024

BY THE COURT



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Hon. Chief Justice Vincent LUNABEK

