

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

**Judicial Review Case
No. 16/618SC/JDR**

BETWEEN: JOB ESAU
Claimant
AND: THE POLICE SERVICE COMMISSION
First Defendant
AND: REPUBLIC OF VANUATU
Second Defendant
AND: THE PRIME MINISTER
Third Defendant
AND: THE ATTORNEY GENERAL
Fourth Defendant

Hearing: 14th August 2017

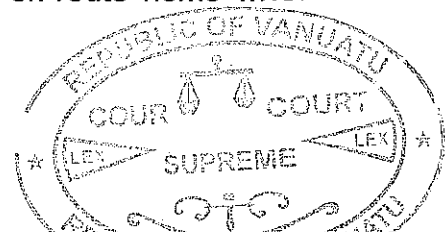
Before: Chetwynd J

**Counsel: Mr Kapapa for the Claimant
Mr Ture for the First, Second, Third and Fourth Defendants**

JUDGMENT

1. This is a claim by Mr Job Esau ("Mr Esau") for Judicial Review of decisions made by the First Defendant, the Police Service Commission ("The Commission") and the Third Defendant, the Prime Minister ("the Prime Minister"). The Second Defendant the Republic of Vanuatu ("ROV") and the Fourth Defendant the Attorney General ("the AG") are parties by reason of the Government Proceedings Act No. 9 of 2007.

2. Mr Esau was the Commander of the Vanuatu Mobile Force. Amongst his responsibilities was the supervision of honour guards for the Head of State. These were staged when, amongst other occasions, the President left the Country and when he returned. So it was on 17th September 2015 the Head of Protocol for the Department of Foreign Affairs Emailed a number of people informing them that the President, His Excellency the late Womtelo Reverend Baldwin Lonsdale, was departing Port Vila 24th September 2015 and returning on Saturday 26th. There is no real dispute that the Email was sent at about 9:15 on the morning of the 17th. There is no real dispute that the Acting Commissioner of Police Mr Daniel Vake Rakau ("Mr Rakau") acknowledged the Email. Another of the intended recipients of the Email was Mr Esau. Unfortunately Mr Esau was not in the Country at the time. He had been overseas attending a conference and was actually en-route home when the



Email was sent. He arrived back in Port Vila, via Singapore and Brisbane, on the afternoon of Saturday 19th September.

3. When he gave oral evidence at the hearing of the claim Mr Rakau confirmed he authorised Mr Esau's overseas trip and knew he was absent from the Country when he copied the Email acknowledgement to him.

4. Mr Esau gave evidence that his journey had been a long one and that he felt unwell on his return. He was suffering from the flu and his body felt stiff all over. On Monday morning 21st September he sought medical treatment. He was advised to take three days sick leave. He returned home and someone from the VMF came to his house to collect the sick note and process it at Headquarters. The upshot was he did not go into work that day and was not aware of the impending departure of the President.

5. Although he still felt unwell he did go into work on 23rd September to take part in discussions with the New Zealand Defence Attaché, a meeting which had been arranged sometime previously. After that meeting he returned home. Whilst at work no one mentioned the arrangements for the Guard of Honour on the following day.

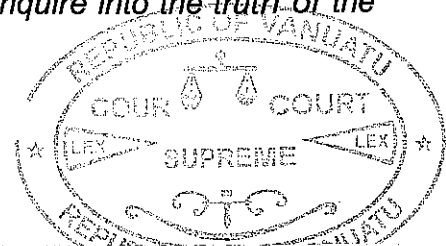
6. On 24th September Mr Esau's evidence was that he was still feeling unwell and decided to work from home. His office had been damaged in cyclone Pam (March 2015) and as repairs had not been completed it was more convenient for him to use his own resources and work from home.

7. On 25th September Mr Esau went to inspect repair work being carried out at the VMF Headquarters. As he was still feeling unwell he consulted with the VMF medical officers and they examined him. As a result he was given a further 2 days sick leave.

Mr Esau confirmed that he did not attend to command the Guard of Honour either on 24th September or 26th September. As a result on 2nd October 2015 Mr Esau was handed a letter, the letter was at page 11 of the trial book, from the then Prime Minister interdicting him from duty immediately on half pay pending an inquiry pursuant to section 67(1) of the Police Act [Cap 105]. No details of the charge were set out in the letter. Section 67(1) states:

“67. Disciplinary powers of the Commission

(1) A charge of an offence against discipline alleged to have been committed by a senior officer shall be reported by the Commissioner without unnecessary delay to the Commission which shall inquire into the truth of the charge”.



Section 70 reads:

"70. Interdiction from duty of senior officers

(1) *The Minister may, on the recommendation of the Commissioner and at any time, interdict from duty any senior officer pending –*

(a) *an inquiry under section 67(1) into any disciplinary offence of which he is charged; or*

(b) *a trial or inquiry into any offence under this or any other Act for the time being in force of which he is charged before a court.*

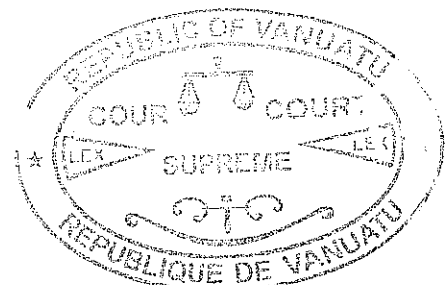
(2) *A senior officer who is interdicted shall, for the period of such interdiction, cease to exercise the powers, privileges and benefits of his office but shall continue subject to the same responsibilities, discipline and penalties and to the same authority as if he had not been interdicted.*

(3) *A senior officer who is interdicted shall receive such proportion of his pay not being less than half as the Minister may decide. Upon termination of the interdiction, such outstanding proportion shall be –*

(a) *paid in full to the member if he is found not to have committed the offence for which he was interdicted, or any other offence arising out of the same set of facts; or*

(b) *paid in full or part to the member or otherwise disposed of at the discretion of the Minister if such member was found to have committed the offence for which he was interdicted or any other offence arising out of the same set of facts."*

8. On 6th November Mr Esau says he was given a copy of the charges against him. There were two. They are set out at pages 12 and 13 of the trial book. The evidence on behalf of the Commission is that Mr Esau was given a copy of the charges at his home at 6 pm on 20th October 2015. It is likely that that is what happened. In any event Mr Esau was made aware of the charges. The First charge alleges that he, without reasonable cause, failed to appear for duty. The details state that he failed to appear as Commander of the Vanuatu Mobile Force at a Guard of Honour for the departing Head of State on 17th September 2015. That offence was contrary to section 19(g) of the Police Act. In fact the offence is set out at section 19(g) of the Police Rules rather than the Act. The second charge states that Mr Esau did an act likely to bring discredit upon the Force. The details allege he failed to turn up at the departure of the Head of State on 17th September. That was said to be contrary to section 19(z) of the Police Rules. These are both offences against discipline under the Act and the Rules.



9. At this time I remind myself that this is a judicial review of the decisions of the Commission and the Prime Minister. I am not entitled to substitute my decision for that or those being challenged. The purpose of the review is to examine the lawfulness of the decisions. I mention that at this stage because clearly the charges as set in the document given to Mr Esau on 2nd October were not correct. The temptation is to say the correct decision should have as the relevant dates either 24th or 26th September. However, as I say I am not looking at the decisions with a view to making a "more correct one" I am looking at whether the decisions could have, lawfully, been made. Having said that the dates will need to be mentioned again later in this judgment.

10. At pages 96 and 97 of the trial book is a copy of the charges that the Commission say were given to Mr Esau on 20th October. Mr Esau attended the Commission on 6th November. What happened on that day is set out in a Minute which appears at page 101 of the trial book.

"The first defaulter was marched in by two senior Police officers. He is Mr Job Esau, Commander Vanuatu Mobile Force (VMF).

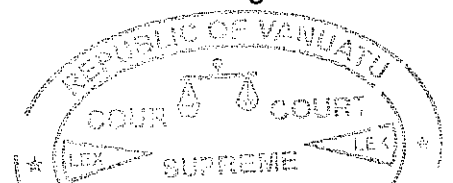
The charge was read to him and he was asked if he had anything to say in defence"

The minute then sets out Mr Esau's response. In precis he told the Commission he was overseas and did not have "...knowledge of communications by the Acting Commissioner". He went on to say he was busy compiling his reports on the overseas trip and that he was working from home. He provided his medical certificate for 19th to 23rd September. He did not attend the Presidents departure because he had no knowledge of it and only found out when he received his letter of suspension. The Minute also says he was not present at the airport when the President returned on 26th September. He had arranged for Mr. Wesley to take his place. (This is a reference to Major Wesley Wango who at the relevant time was the Acting Second in Command of the VMF.) The Minute continues that the PSC understood that the sick leave was provided after the period he was sick and that this certificate was provided only after he was asked of his absence.

11. That is the extent of the Minute in respect of the "disciplinary hearing" involving Mr Esau. The penultimate paragraph of the Minute records that all three defaulters reappeared in the afternoon and were each told they were found guilty of the charges laid against them.

12. There is an earlier Minute which is relevant and that concerns a meeting of the Commission on 2nd October. That records;

"However, the meeting finally heard that because of the findings and irregularities, the investigation concerning the guard of honour during the



Head of State's departure and return on his latest Official Overseas trip could not be completed and the PSC has decided that the Deputy Chairman Job Boe and Member George Boar should take up the role to complete (sic) the investigation as it involves the Acting Commissioner of Police."

Later the 2nd October Minute records:

The Police Service Commission has decided to appoint Mr Job Boe and Mr George Boar as the Panel to carry out another investigation into the allegation of mismanagement that led to the absence of the guard of honour on the departure and arrival of the Head of State during his latest official overseas mission. That the investigation report be finalised and submitted to the Police service Commission."

13. The report which Mr Boe and Mr Boar compiled is to be found starting at page 88 of the trial book. It extends over 3 pages and has 6 annexures being 6 statements by various officers from the VMF who were involved in the Guard of Honour, the Head of Protocol for the Department of Foreign Affairs and the Acting Commissioner of Police.

14. In his evidence before the Court Mr Boe (as Secretary to the Commission) confirmed that neither the report nor the statements annexed were made available to Mr Esau either at or before the disciplinary proceedings.

15. In my view the disciplinary process was seriously flawed. The Police Act states quite clearly:

"68. Rights of defaulter

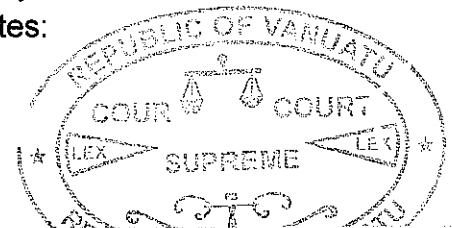
A senior officer charged with an offence against discipline under the provisions of section 67 shall have the rights prescribed by section 60."

Referring to section 60 describes a clear process to be followed:

"60. Rights of defaulter

A defaulter shall not be found to have committed an offence against discipline under the provisions of section 59 unless the charge has been read to him, and the hearings made in his presence and he has been given sufficient opportunity to cross examine the witnesses called against him, to give evidence or make a statement himself and to call witnesses on his behalf."

16. In addition, where senior officers are concerned, the Police (Senior Officers) Disciplinary Procedure Rules are relevant. These Rules are "To provide for rules of procedure under which disciplinary matters are dealt with by the Police Service Commission, and for matters connected therewith." Rule 6 states:



“6. Procedure of hearings

(1) Subject to section 60 of the Police Act, Cap. 105 and any other law for the time being in force, the proceedings before the Commission shall be conducted in accordance with procedures determined by the Commission.

(2) The law of evidence relating to hearsay evidence shall not apply to such proceedings.”

17. Moving on to Rule 7:

“7. Service of copy of charge or statements on relevant parties

The Commissioner shall cause to be served on the chairman and every party due to appear before the Commission at least 14 days before the hearing a copy of the charge and copies of all written statements relevant to the charge and hearing.”

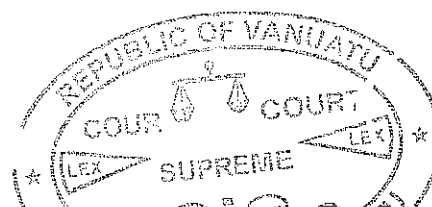
18. It is very important that Rule 7 is complied with because of the provisions of Rule 10:

“10. Notice by senior officer

(1) If a senior officer charged with a disciplinary offence requires the attendance of a witness or witnesses whose written statement has been served on him in accordance with rule 7, he shall give notice thereof to the Commissioner not less than 7 days before the proposed date of hearing, otherwise such written statements may be tendered in evidence at the hearing.”

20. It is clear from the written and oral evidence before the Court that section 60 of the Police Act was ignored. Mr Esau was not given any opportunity to cross examine the witnesses from whom statements were taken. The wording of section 60 is unequivocal. A defaulter shall not be found to have committed an offence against discipline unless the charge has been read to him and he has been given sufficient opportunity to cross examine the witnesses called against him. According to the decision at page 104 witnesses were called, Major Wesley Wango and Force Sergeant Major Collin Williams. Mr Esau should have been given the opportunity to cross examine those witnesses and any others who had made statements. The problem was that he did not know any written statements had been made because he was not served with copies of the statements being relied on or even the “report” compiled by Mr Boe and Mr Boar. That was in breach of the provisions of Rule 7.

21. In addition the process was tainted by failure to comply with Rule 13:



“13. Amendment of charge

(1) Subject to subrule (2), if at any stage of the hearing the Commission considers that the charge ought to be amended, or added to, or replaced by some other charge, the Commission may permit such amendment, addition or replacement.

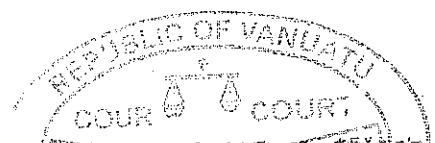
(2) Where in its opinion, any amendment, addition or replacement as specified in subrule (1) is likely to take any party by surprise or may be prejudicial to the conduct of any person's case, the Commission shall grant an adjournment of the hearing.”

22. At paragraph 10 I referred to dates in the charge. The document handed to Mr Esau accused him of an offence which was said to have taken place on 17th September. The document which the Commission has in its files is the same except that the dates of the offences have been altered by hand to read 24th and possibly 26th. The dates are important because it transforms the charges from two offences on the same day to two offences, with each one on a different day. Such a change was undoubtedly prejudicial to Mr Esau's defence. This is especially so when you consider the written decision of the Commission which refers to yet another date, the 29th September.

23. There is no doubt in my mind that the serious flaws in the disciplinary process must mean the decision of the Commission finding Mr Esau had committed offences against discipline has to be set aside. The failure to adhere to the process set out in the Police Act and the Police (Senior Officers) Disciplinary Procedure Rules must mean the Commission's decisions cannot be lawful. The decision is quashed. That leads to the inevitable conclusion that the decision on punishment must also be set aside.

24. What remains is what to do concerning the decisions of the Prime Minister. The two decisions challenged are the one which followed Mr Esau's appeal under section 69 of the Police Act and the decision to interdict under section 70. The decision to, in effect uphold the Commission's findings, must be set aside and is hereby quashed. The decision to interdict is much less susceptible to challenge. There is no doubt Mr Esau was facing disciplinary proceedings and there was a recommendation to the Prime Minister (as the responsible Minister) by the Commissioner of Police. The decision to interdict was therefore lawful.

25. The claim, as filed, sought damages. It was accepted by counsel for Mr Esau that such relief was not available to him. However, the effect of this judgment is that Mr Esau was never dismissed from the Force. He is put into the position he was in at 20th October 2015. He was interdicted on half salary from 2nd October to 20th October 2015. After that he is entitled to have his full salary (see section 70(3)(a) of the Police Act set out earlier) and all or any other entitlements reinstated. No orders reinstating him to the position of Commander of the VMF are required. Mr Esau's evidence that he was to retire in June 2016 and that date has passed. He would be

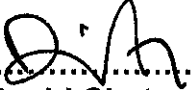


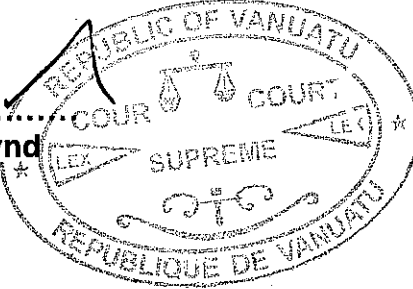
entitled to his salary and other benefits up to the date of his retirement which was presumably tied to his birthday. He would then be entitled to all other rights which had accrued to him as a retiring but serving Police officer.

26. Having succeeded in his claim Mr Esau is entitled to his costs. The 1st to 4th Defendants shall jointly and severally be liable to pay Mr Esau's costs and such costs shall be taxed on a standard basis if not agreed.

Dated at Port Vila this 18th day of August, 2017.

BY THE COURT


.....
David Chetwynd
Judge



The seal is circular with the text "REPUBLIC OF VANUATU" at the top and "REPUBLIQUE DE VANUATU" at the bottom. In the center, it says "COUR SUPREME" and "COURT OF APPEALS". There is a scale of justice symbol in the center.