

REPUBLIC OF VANUATU
OFFICE OF THE OMBUDSMAN

PUBLIC REPORT

ON THE
APPOINTMENT OF MAURICE MICHEL
TO THE
PUBLIC SERVICE
AND TO THE POSITION OF
AUDITOR GENERAL

6 March 1997

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**ADDITIONAL PUBLIC REPORT
ON THE
APPOINTMENT OF MAURICE MICHEL
TO THE
PUBLIC SERVICE AND TO THE POSITION OF AUDITOR GENERAL**

11.03.97

On or about 28th of January, I issued and circulated a preliminary report containing the complaint to the Leader of Opposition Maxime Carlot Korman.

On 12th of February 1997, the Leader of Opposition forwarded the Office of the Ombudsman (see Annex "A").

In his answer the Leader of Opposition did not bring any new evidence to lead us to review our findings of wrong conduct and our recommendations.

Leader of Opposition Maxime C. KORMAN stated that:

"the permanent appointment of Mr M Michel into the post of Principal Management Officer was legal considering that he was recommended by his Head of Department".

His statement only includes half of the requirement to appoint a permanent public servant.

Cl 3 6 (a) of the Public Service Manual states that the probationary period must be 2 years and that the candidate must have the recommendation of his Head of Department.

Mr Michel might have had Mr Lesines' recommendation but he had not fulfilled the 2 years probation requirement, he only worked 11 months before his permanent appointment instead of 24 months as required.

The Leader of Opposition stated that the Government recommended Mr Michel to be Auditor General. Even if it were true that the former Prime Minister Maxime Carlot Korman was not the only one to recommend this appointment, it just extends the finding of wrong doing to the whole as the government has got no right to try to influence the Public Service Commission. However we did not find any evidence confirming this statement.

The Constitution states in article 60:

"The Commission shall not be subject to the direction or control of any other person or body in the exercise of its functions"

The former Prime Minister Maxime Carlot Korman stated that:

"M Michel is competent for his post."

His statement is contrary to our findings. We found that he had the level of a book keeper not of an auditor general.

Finally M.P. Korman stated:

"You pointed out that Mr M Michel was convicted and imprisoned and this would have hindered him from occupying this post. However I think this is an issue that could only perhaps be settled by the Court."

This issue is clearly dealt with the Public Service Manual (clause 2.3(b)) and does not need the Court to decide upon it. It was the responsibility of the former Prime Minister to be aware of the rules of the Public Service Manual.

The Office of the Ombudsman only states that the former Prime Minister should have followed the existing rules which he ignored by recommending a former criminal who had been "convicted for a period of not less than 4 years".

Furthermore it appears that common sense could have guided the choice of the former Prime Minister. He recommended a man who had already broken the law, and gone to Prison for it.

The position of Auditor General is a very demanding position a high level of integrity, honesty, and respect of the law as his functions are to expose the financial wrong doings in the Public Service.

All our findings of wrong conduct and our recommendation remain as they are in our original public report of 07.03.97.

A handwritten signature in black ink, appearing to read "M. Noëlle", with a large, sweeping flourish extending to the right.

MARIE-NOËLLE FERRIEUX PATTERSON
OMBUDSMAN OF THE REPUBLIC OF VANUATU.

Maxime, Korman, CARLOT
Député de Port Vila
Chef de l'Opposition

Le 10 Février 1997

FAXIN
R. 2.97

A Madame M. N. E. PATTERSON
Médiatrice de la République
Port Vila, VANUATU

Objet: Rapport sur la nomination de Maurice
MICHEL comme Contrôleur général des
Comptes.

Références: Notre lettre OMR/313/97-01/02

Madame,
A mon avis Monsieur M. MICHEL a été nommé
en permanence légalement au poste de Principal
Management Officer par son chef de Service.
Si ma mémoire est bonne il y a eu deux
candidats qui ont postulé pour le poste de
Contrôleur général des Comptes Il y a eu Monsieur
P. TOSOU et Monsieur M. MICHEL à la fin du contrat
de M. P. Tosou je crois. Je confirme que le
Gouvernement a recommandé Monsieur M. MICHEL et
la C.F.I. a retenu sa candidature pour le poste.
Monsieur M. MICHEL est très capable et est
compétent pour ce poste de Contrôleur des Comptes.
Vous signalez que Monsieur M. MICHEL a été condamné et
a fait de la prison et ceci devrait l'empêcher d'occuper
ce poste. Je pense que c'est un point qui ne peut
être tranché que par un Tribunal.
Je vous remercie. Maxime

**APPOINTMENT OF
MAURICE MICHEL TO THE
PUBLIC SERVICE AND
TO THE POSITION OF AUDITOR GENERAL:**

1. HIS APPOINTMENT AS PRINCIPAL MANAGEMENT OFFICER IN THE PUBLIC SERVICE DEPARTMENT BY THE FORMER PRIME MINISTER HON M KORMAN IN 1992 AND THE PUBLIC SERVICE COMMISSION IN 1993
2. HIS APPOINTMENT AS AUDITOR GENERAL BY THE PUBLIC SERVICE COMMISSION IN 1995
3. THE WRONGFUL RECEIPT OF SEVERANCE PAYMENT IN 1996

PREAMBLE

"Mischief shall come upon mischief and rumour shall be upon rumour; then shall they seek a vision to the prophet; but the law shall perish from the priest; and counsel from ancients" Ezekiel 7 v 26

The quotation which begins this report summed up the reaction of the prophet EZEKIEL as he contemplated the moral decline and fall of the nation as a result of the failure of the leaders of the people to set a high example and to teach what was right.

Each successive investigation by the Ombudsman's Office is revealing a network of dishonesty and corruption among those who aspire to leadership. The public's money is misappropriated, power is misused, assets are ruined, and the country brought to poverty and confusion.

Favouritism to friends and relatives is rife, and promotion is given as a reward to those with no apparent ability or experience either in business or responsibility! The public look to the leaders of Church or State to put an end to the decline before it is too late.

Complaints pour into this Office about guilty men going unprosecuted, no sign of repentance or shame and a consequent increase in lawlessness.

There is little point in the public paying for the work of an Ombudsman if all that happens is a piling up of paper reports and no effective action to recover money swindled, or assets acquired dishonestly.

It is the right and the duty of the public to put pressure on their representatives to safeguard their rights, and to remedy the wrongs that are taking place before it is too late.

From the Government own figures the economy state of the country is growing worse with less prospects and opportunities for the young. Vigilance and actions are needed urgently to put the country on the right road.

It is not more Committees or Commissions or expensive foreign travel or speeches that are required but honest and conscientious attention to duty by the elected leaders closely supervised by an alert public, supported by an effective legal Leadership Code to safeguard the public's rights.

1 INTRODUCTION

1.1 On 24 May 1995, on my own initiative, I commenced an enquiry into the conduct of and the Public Service Commission ("**PS Commission**") over its appointment of Mr Maurice Michel ("**Mr Michel**") as Auditor General. I proceeded with this enquiry because the Audit Office is an important Constitutional Office and the Auditor General must be a person capable of holding that Office. I was concerned that the PS Commission had acted illegally in appointing Mr Michel because:

- it had not followed the procedures required by law for recruitment;
- Mr Michel did not hold the necessary qualifications or experience to be Auditor General;
- Mr Michel had a recent criminal conviction which automatically prevented him from holding office in the service of the people of Vanuatu.

1.2 In the course of the investigation I learnt that in January and August 1992 the former Prime Minister, Hon Maxime Carlot Korman ("**Mr Korman**") and former acting Prime Minister, Hon Sethy Regenvanu acted illegally in appointing Mr Michel on a temporary basis as the Principal Management Officer in the Public Service Department ("**PS Dept**"). Mr Korman's appointment of Mr Michel was against the Constitution, the Public Service Act ("**PS Act**") and the Public Service Manual ("**Manual**").

1.3 Furthermore, the PS Department Director, Mrs Maria Crowby and the Public Service Commission, under the Chairmanship of Mr William Mael acted illegally in:

- making Mr Michel's appointment as Principal Management Officer permanent in September 1993;
- confirming Mr Michel's permanent appointment in July 1994.

- 1.4 Amongst these unlawful aspects of Mr Michel's career path in the Public Service was Mr Michel's move from Principal Management Office to that of Auditor General which was initiated by Mr Michel's own written request to Mr Mael to be "*transferred*" to that post. The most recent and highly improper action was the direction of the PS Department's acting director, Mr Andre Lesines to the Finance Department to pay Mr Michel severance pay because he "*ceased as a Civil Servant appointee*" when he was transferred to the post of Auditor General.
- 1.5 Mr Michel is plainly implicated in this matter. As a senior public servant working in the PS Department he would have known better than most his path to Auditor General was in breach of the law. He has gained personally from participating in a series of illegal acts.

2 JURISDICTION AND SCOPE OF ENQUIRY

- 2.1 Pursuant to arts 62(1) and 62(2) of the Constitution and s 14(1) of the Ombudsman Act, the Ombudsman has jurisdiction to investigate into administrative defects and improper administrative practices. The Prime Minister, the PS Commission, and PS Department and its officers all fall within the Ombudsman's jurisdiction.
- 2.2 Accordingly the Ombudsman conducted an enquiry into Mr Michel's appointments as Principal Management Officer and Auditor General. The purpose of the enquiry was to determine whether appointment procedures set out in the Constitution, the PS Act and the Manual were followed. In the event that these laws were not followed a further issue arose: that of breaches of the Leadership Code.

3 PRELIMINARY REPORT

On or about 28 January I issued and circulated a confidential and secret preliminary version of this public report. The preliminary report was sent to:

- Hon Maxime Korman, former Prime Minister
- **Mr Maurice Michel**, Auditor General
- **Mr Sethy Regenvanu**, former acting Prime Minister
- **Mr William Mael**, former chairman of the Public Service Commission
- Mr Edwin Basil, member of the PSC
- Mr Amos Andeng, member of PSC
- Mr Koriaru Kalori, member of the PSC
- Mrs Maria Crowby, former director of the Public Service Department
- Mr André Lesines, former deputy director of the PSD
- Mr Joseph Carlo, present chairman of the PSC
- Mr Waimini Perei, present (acting) director of the PSD

Those persons in bold exercised their constitutional right to reply to the preliminary report. The other people did not and must be assumed to agree with the report where it concerns them. Copies of the replies are annexed to this report. They are discussed further in section 6.

4 FACTUAL BACKGROUND

- 4.1 For ease of reference the essential facts revealed by the Ombudsman's Office's enquiry are set out below in a chronology. Following the chronology this report details further information obtained from investigation and interviews carried out by the Ombudsman's Office.

Chronology of Facts

Date	Event
15.01.92	PM Korman temporarily appoints Mr Michel (" MM ") Principal Management Officer in the Public Service Department of the Vanuatu Government Public Service from 01.02.92 (P17 grade). Appointment till " <i>further notice</i> ".
25.02.92	MM convicted in Supreme Court at Port Vila of criminal offence on guilty plea and sentenced to 6 months' imprisonment.
25.02.92	Public Prosecutor notifies Public Service Commission in writing of conviction of MM.
13.08.92	Mr Korman's private secretary Mrs Y Sam advises Director of Public Service (Jacob Thyna) that Mr Korman has approved MM resuming his post as Principal Management Officer.
13.08.92	Mr Regenvanu, as acting PM, temporarily appoints MM Principal Management Officer in the Public Service Department of the Vanuatu Government Public Service from 17.08.92 (P17 grade). Appointment till " <i>further notice</i> ".
16.07.93	Mr Andre Lesines, deputy director of PS Department writes to Mr William Mael, Chairman of the PS Commission recommending MM's temporary appointment be made permanent.
09.09.93	Mrs Maria Crowby, director of PS Department, writes to MM under direction from PS Commission offering permanent appointment as Principal Management Officer in the PS Department from 01.09.93. There should be a 2 year probationary period before appointment confirmed (ie 01.09.95).
11.07.94	Mrs Crowby completes probation recommendation form and recommends MM's permanent appointment be confirmed.

- 4.3 In his evidence to the Ombudsman Mr Mael said that all applications must go to the PS Department before they are sent to the PS Commission. He also said that when a permanent post is being advertised interested persons must apply for the post. A person cannot be transferred to a permanent post without applying for the post.
- 4.4 When asked if it is possible for any civil servant to be transferred to the post of Auditor General, Mr Mael replied "***It is not right according to law but in this case it has been done so it is up to the Ombudsman to correct it***".
- 4.5 A member of the Commission, Mr Edwin Basil said in his evidence that he did not see Mr Michel's application. When Mr Basil was shown Mr Michel's letter his response was that the letter was a request for transfer and not an application. He said these are two different things.
- 4.6 When Mr Mael was asked why the post was advertised twice, his answer was because there were only two applicants the position was re-advertised to see if there were any other interested persons. According to Mr Mael, there were only two applicants for this post. Mr Tosusu and Mr Michel. However the PS Department said that they never saw Mr Michel's application and they do not know how his application was proposed.
- 4.7 The PS Commission sat on 13, 19 and 20 April 1995 and appointed Mr Michel as Auditor General effective as of 15 May 1995. As to the criteria used for this appointment, Mr Mael said the post required someone with accounting background. Mr Mael did not appear to appreciate the difference between what an auditor does and what an accountant or book keeper does.
- 4.8 During the course of investigation I spoke to Mr Isaisa Vakabua, Secretary General of the South Pacific Association of Supreme Audit Institutions based in Fiji and this is what he said about some of the qualifications of Auditor Generals in the Pacific Region:

Australia (States)	-	Auditor Generals in all states of Australia are qualified chartered accountants.
Fiji	-	The Auditor General is not a qualified accountant but has 40 years of experience in auditing.
Papua New Guinea	-	The Auditor General is fully qualified with a degree and Master's degree in Accounting.
New Zealand	-	The Auditor General is a qualified chartered accountant.
Tonga	-	The Auditor General has been appointed because of his long experience in auditing and recent qualification.

- 20.07.94 Chairman of PS Commission, Mr Mael confirms permanent appointment of MM as Principal Management Officer in the PS Department.
- 27.06.94 PS Department advertises post of Auditor General. Closing date 27.07.94.
- 27.07.94 Mr P Tosusu (a former Auditor General for 6 years) only applicant for Auditor General position.
- 05.08.94 Mrs Crowby informs MM successful probation period completed and permanent appointment as Principal Management Officer confirmed (13 months' early; probation period was 01.09.93-01.09.95).
- 01.09.94 MM writes to Mael requesting to be **transferred** to the post of Aud Gen. Submits CV.
- 21.09.94 Mrs Maria Kalsakau, Principal Administration Officer by letter to him, draws to MM's attention his unaccounted bills for overseas telephone calls.
- 04.11.94 Aud Gen post re-advertised by PS Dept.
- 18.11.94 Mr Tosusu applies again. Sole applicant.
- 04.12.94 PS Dept submit Mr Tosusu and MM's applications to PS Commission. PS Dept leaves decision to PS Commission. Mr Korman recommends MM for post.
- 13-20.04.95 PS Commission meets and appoints MM as Aud Gen.
- 10.05.95 Mr Lesines, as deputy director of PS Dept, confirms in writing to MM PS Commission's appointment of MM as Aud Gen. Salary VT1.723.800 per annum and "*your other terms and conditions of service contained in your letter of appointment remain unchanged*" ie referring to terms as for Principal Management Officer.
- 13.12.95 PS Dept rejects MM's application for long service payment.
- 02.05.96 PS Dept (A Lesines, as acting director) writes to Finance Department authorising it to pay MM 3 months' notice plus severance for the period 17.08.92 to 14.05.95 (when MM Principal Management Officer).

Information obtained through interviews and investigation

- 4.2 As stated in the chronology, on 1 September 1994, Mr Michel wrote to the former Chairman of the Commission, Mr Mael, asking to be transferred to the post of Auditor General. A copy of this letter is annexed as "1".

Western Samoa - The Auditor General is a qualified chartered accountant.

4.9 Mr Michel has a certificate in Accounting with less than 6 years experience of helping to prepare accounts for private companies. It would be fair to describe him as a book keeper. By contrast Mr Tosusu had 14 years' experience in the Audit Office, six of these as Auditor General.

4.10 The PS Department's advertisement for the post of Auditor General relating to the qualification requirements was as follows:

"Education: B. Comm, MBA or Certified Professional Accountant

Specialised Training:

Experience: Must have spent a number of years at the most senior levels of a bureaucracy and have had responsibility for directing an audit department"

4.11 It is difficult to understand how Mr Michel was appointed as he does not meet these requirements. On the other hand, though not holding a degree Mr Tosusu has considerable experience in auditing and has certificates showing his training specifically in the auditing field. Mr Michel was recommended by Mr Korman to be appointed to the post of Auditor General.

4.12 In Mr Basil's evidence he stated that the reasons why Mr Michel got the job was because Mr Tosusu held the post for 6 years already so the PS Commission decided that another person should take over the job. I am surprised that this is the reason given. In my opinion this would have been a reason **for** appointing Mr Tosusu and not against. It was not the case of giving someone else another turn. If fresh blood was wanted why not advertise in Papua New Guinea, Fiji or elsewhere in the Pacific.

4.13 Importantly, it is to be noted that the PS Commission overlooked Mr Michel's criminal conviction given in February 1992 by the Supreme Court of Vanuatu. As will be explained in the next section the law prevents the appointment of applicants to public service positions (the Auditor General is a public servant) who have been convicted of a crime in the four years before applying.

4.14 Evidence from the Audit Office suggests that the auditor's work is not being supervised closely by the Auditor General. Most of the reports are handled by the senior auditors. It also appears that there is not much communication between the Auditor General and his officers. Since May 1995 until now the Audit Office has had only three office meetings. In the past, meetings were held once every two months.

4.15 This would appear to be the result of Mr Korman's determination to help Mr Michel in his career as well as the PS Commission and PS Department not doing their jobs properly or in accordance with law.

5 RELEVANT LAWS & CONCLUSIONS OF LAW AND FACT

- 5.1 In this section the facts identified in section 4 above are considered by reference to the relevant laws. My conclusions on the requirements of the law for appointment of public servants appear in this section. Based on these conclusions I also include my findings of facts.

Appointment of public servants - jurisdiction of the PS Commission

- 5.2 Arts 60(1) & (4) of the Constitution provide:

- (1) The Public Service Commission shall be responsible for the appointment and promotion of public servants, and the selection of those to undergo training courses in Vanuatu or Overseas. For such purposes it may organise competitive examinations.
- (4) The Commission shall not be subject to the direction or control of any other person or body in the exercise of its functions.

- 5.3 S 3(1)(f) of the PS Act provides:

- (1) The Commission shall in respect of the Public Service, be responsible for -
- (f) acting as the personnel authority for the Public Service.

- 5.4 Art 57(3) of the Constitution provides (and repeated in cl 2.1[iii] of the Manual):

No appointment shall be made to a post that has not been created in accordance with a law.

Temporary appointment of public servants - jurisdiction of the PS Commission and the Prime Minister

- 5.5 Art 57(4) of the Constitution provides (and repeated exactly in cl 2.1[i] Manual):

- (4) The Prime Minister or the chairman of a Local Government Council may, exceptionally, make provision for the recruitment of **staff for a specified period to meet unforeseen needs**.

In urgent cases, the Public Service Commission may, after consulting the Ministers responsible for finance and public administration, make such a decision instead of the Prime Minister.

(emphasis added)

- 5.6 Cl 1.4[f] of the Manual defines "*temporary officer*" or "*temporary appointment*" as:

... an officer appointed by a Letter of Temporary Appointment, and recruited for a short-term appointed **expected to come to an end in a few weeks or months** because of the return of the substantive holder of the post or because of the completion of normal recruitment procedures.

(emphasis added)

5.7 Cl 3.21 of the Manual provides:

The Minister responsible for the Public Service may approve temporary appointments to any posts in the Public Service including posts on the Permanent Establishment, in the following circumstances:-

- [a] where a substantive vacancy exists and needs to be filled quickly, pending normal procedures;
- [b] where a temporary vacancy exists for a short period, i.e. three months or less, pending the return of the substantive holder of the post.

In each case the Minister shall satisfy himself that a vacancy actually exists and that sufficient financial provision is available before making the appointment.

Criteria and determination of criteria for appointment

5.8 Art 57(2) of the Constitution provides (repeated in cl 2.1[i] of the Manual):

- (2) Only citizens of Vanuatu shall be appointed to public office. **The Public Service Commission shall determine other qualifications for appointment to the public service.**

(emphasis added)

5.9 Cl 2.2[i] of the Manual provides:

- [i] **Qualifications** for appointment to the Public Service, and equivalent qualifications or types of previous relevant employment to be recognised as equivalent, **shall continue to be decided by the Minister responsible for the Public Service.** However the assessment of individual applicants for appointment and the selection of the candidate to be appointed from among those qualified in terms of the approved Job Description shall be the responsibility of the appropriate Service Commission.

(emphasis added)

5.10 This clause appears to contradict the art 57(1) of the Constitution. The former says the Public Service Commission determines the qualifications and the latter suggests it is the Minister (PM). The Constitution prevails over the Manual

5.11 Cl 2.3 provides:

No person may be appointed to an office in the Public Service:

- [a] unless he fulfils the physical requirements for the appointment; if he is under 18 years of age;

if he is over 55 years of age in respect of an appointment on contract;
unless he has a knowledge of English or French.

- [b] unless he is of good character, but a person may be considered for appointment if **he has not been convicted of an offence for a period of not less than 4 years**, and there is no known reason to suppose that he is not of reformed character and fit for Appointment in the Public Service.

(emphasis added)

- 5.12 Cl 2.3[b] means that a person convicted of a criminal offence within the last 4 years cannot be considered for appointment. Both the PS Commission and PS Department had the Public Prosecutor's letter advising of Mr Michel's conviction on their files. **Once Mr Michel was released from prison the decision to re-employ him was with the PS Commission and not the Prime Minister.** This is provided for in cl 10.8 of the Manual as follows:

If an officer is sentenced to a term of imprisonment or subjects himself to a term of imprisonment by failure to pay a fine, he shall be automatically dismissed and shall not receive any emoluments from the date of the decision of the court or the date he is sent to prison for failing to pay a fine. The matter shall be reported by the officer's Head of Department to the Director of Public Service who shall bring it to the attention of the Public Service Commission together with his own observations. **The Commission shall decide whether the officer is re-engaged.** If the officer is re-engaged, his salary shall be paid from the date on which he resumes duty, and the intervening absence regarded as suspension without salary on disciplinary grounds.

(emphasis added)

- 5.13 Cl 3.14 requires applicants to include an official statement of police record or equivalent document with their applications. Mr Michel never did this. He cannot claim to be ignorant of the Manual's requirements particularly as he was a senior officer in the PS Department.

- 5.14 Cl 2.4 of the Manual addresses the question of qualifications as follows:

- [i] Annex II to these Orders shows the qualifications normally required for appointment to each grade of post.
- [ii] Possession of the **qualifications, etc., specified in Annex II** does not qualify a person automatically for the grade in question. They **are minimum qualifications without which a person will normally not be considered.** In the case of particular posts the Minister responsible for the Public Service may specify additional qualifications or other criteria which shall apply to all candidates for those posts. Professional knowledge gained by experience in the Service or elsewhere may be accepted by the Minister in lieu of the qualifications specified in Annex II. However, in the assessment of individual applicants for appointment and the selection of the candidate from among those qualified in terms of the approved Job Description shall be the responsibility of the appropriate Service Commission.

Recruitment procedure

- 5.15 Clauses 3.11 to 3.19 in part B of Chapter 3 of the Manual set out the procedure for recruitment of staff for the Public Service. Without repeating these clauses in full what is to happen is as follows:
- there must be an existing or forthcoming vacancy (cl 3.11)
 - PS Minister (PM) approves a vacancy for recruitment (cl 3.12)
 - PS Dept director notifies PS Commission of the approved vacancy (cl 3.12)
 - PS Commission decides whether the recruitment is by competitive examination or otherwise (cl 3.12)
 - PS Commission notifies Department of Labour and Employment of the vacancy and full details of it (cl 3.13).
 - PS Commission advertises vacancy on radio and in press, overseas if necessary and circularises it within the Public Service (cl 3.13).
 - ~ Closing date for applications normally one month after advertisement (cl 3.16(b))
 - ~ PS Minister can waive local advertisement:
 - " if satisfied no local candidate available, or
 - " if local candidate trained at public expense for specialised post (cl 3.13).
 - The PS Commission is to make a background check of the applicants from authorities in each particular applicant's province (cl 3.16(a)).
 - After the advertised closing date for their receipt the PS Commission sorts through the applications received and identifies those that are eligible (cl 3.16(b)); ie age, possesses required qualifications per Annex II, no criminal conviction.
 - The PS Commission gives all eligible applications to the relevant Head of Department for the vacancy concerned (cl 3.16(b)).
 - Department Head lists eligible candidates in order of preference according to experience, qualification and suitability for vacant position (cl 3.16(b)).
 - If more than one candidate PS Commission has option to hold competitive examination (but does not have to) (cl 3.16(b)).
 - PS Commission meets and selects successful candidate and reports decision to PS Dept director (cl 3.17).

- ~ If applicable, PS Dept director to seek any other approval as may be necessary; eg Chief Justice (cl 3.17)
 - ~ Selection process also to be used to keep a list in order of merit of unsuccessful candidates for future vacancies (cl 3.5).
- PS Department director determines salary and conditions to be offered in accordance with policy directions of the PS Minister (cl 3.18).
 - PS Department offers vacant position to successful candidate by Letter of Appointment, setting terms of engagement (cl 3.19).

Probationary period of two years

- 5.16 Cl 3.6[a] provides:

Each candidate for permanent appointment shall be appointed **on probation for two years** [PS 1/82] and confirmation of his permanent appointment shall be decided by the Public Service Commission **only after the expiry of the probationary period** and with the favourable recommendation of the officer's head of department.

(emphasis added)

- 5.17 Mr Michel had not completed 2 years service as a permanent officer only 11 months (01.09.93-20.07.94; 11 months only therefore 13 months early). He was not eligible therefore to have his permanent position "*confirmed*"

Auditor General is a public servant

- 5.18 S 1(1) of the PS Act provides:

(1) In this Act, unless the context otherwise requires -

... "officer" means a person holding or acting in any office in the Public Service

"Public Service" means the service of the Republic in any capacity other than as a judge, or member of the armed forces, police or teaching services.

- 5.19 The Auditor General is in the service of Vanuatu because he is responsible for the auditing (that is inspecting, examining and reviewing) the spending of public money. He is therefore an "*officer*" in terms of the PS Act and the provisions of the PS Act and the Manual apply to the Auditor General.
- 5.20 Additionally, both art 25(4) of the Constitution and s 2(1) of the Audit of Public Accounts Act [Cap 165] provide for the Auditor General to be appointed by the PS Commission "*on its own initiative*". Logically, the appointment of the Auditor General and the terms of the appointment must derive from the Manual.

Transfers

- 5.21 Art 58(2) provides:

Senior public servants in Ministries may transferred by the Prime Minister to other posts of **equivalent rank**.

(emphasis added)

5.22 S10 of the PS Act provides:

Subject to the power of the Prime Minister under Article 58(2) of the Constitution, the Commission may transfer any officer from one office or position to another office or position in the Public Service of **equivalent rank**, whether or not the transfer involves a change of location.

(emphasis added)

5.23 Both these laws make it clear that a public servant can only be transferred to a post of equivalent rank. Given the large increase in salary from 1,050,504 Vatu to 1,723,800 Vatu for Mr Michel when he was transferred clearly the position of Auditor General was not "*equivalent*" to Principal Management Officer.

Severance pay

5.24 S 5 of the PS Act provides:

An officer retired in accordance with section 4 shall be entitled to receive a severance payment calculated at the rate of 1 month of the annual salary payable to the officer immediately before the day of retirement for each year served with the Vanuatu Government since 30 July 1980, and pro rata for each uncompleted year.

5.25 Reflecting art 57(8) of the Constitution, s 4(1) of the PS Act provides:

... for the purposes of ensuring the renewal of holders of public offices within the Public Service, the Commission after consultation with Prime Minister may compulsorily retire any officer from the Public Service.

5.26 Mr Michel was not "*compulsorily retired*" per s 4 of the PS Act; nor was his position as Principal Management Officer in the PS Dept terminated. Thus s 54(1) of the Employment Act [Cap 165] does not entitle him to severance pay either. Accordingly, any severance payment to him was without any basis in law.

6 REPLIES

Mr Mael, former PSC Chairman

6.1 Mr Mael's reply is very short. He does not dispute the Ombudsman's findings. Nor does he argue that the appointments of Mr Michel were legal. In his own words, Mr Mael says:

"Mo nao wia mi realise se P.S.C I mekem samfala mestaek taem hemi I stap considerem case ia."

- 6.2 Whilst the country will be very disappointed to see the former chairman of the PSC effectively admit that he and the Commission "made a mistake" at least he does not attempt to make any excuse for his misconduct. This is refreshing change and Mr Mael's admission is responsible. A copy of his reply appears as "2".

Mr Sethy Regenvanu, former acting Prime Minister

- 6.3 It will be recalled from the chronology that on 13 August 1992 Mr Regenvanu when he was acting Prime Minister signed a letter temporarily appointing Mr Michel as the Principal Management Officer until further notice when he came out of jail. In short Mr Regenvanu's explanation is that he relied on his staff that everything was in order. In particular, Mr Regenvanu sought to justify his position by saying:

*"Indeed the policy approach I adopted as a Minister in **routine matters of this nature** was to rely upon the competency of the technical staff of the department to verify all applications to ensure compliance with relevant rules and regulations before my decision as minister was sought."*

(my emphasis added)

- 6.4 Had the temporary appointment of Mr Michel been a routine matter then Mr Regenvanu's explanation would have been partially reasonable. However, Mr Michel's appointment was not routine. His appointment was done under a special constitutional power given to the Prime Minister under art 57(4) (refer para 5.5 above). It is an **exceptional** power.
- 6.5 Mr Regenvanu's explanation is unacceptable in my opinion. He was an experienced politician and must know the Constitution. He must be held accountable for his illegal action. Having said that, he has at least replied to the criticism made of him. These criticisms are relatively minor compared to those against Mr Korman, the former Prime Minister who did not reply at all who bears the greater responsibility for what occurred. A copy of Mr Regenvanu's reply is annexed as "3".

Mr Michel

- 6.6 A copy of Mr Michel's reply is annexed as "4". It will be seen that Mr Michel does not dispute the facts that are detailed in the report. The essence of his reply are as follows:
- He complains that he did not get a copy of the report in French.
 - His "*request*" for a "*transfer*" to the position of Auditor General was not a "*request*" but an "*application*" and he did not interfere with the Public Service Commission by addressing it directly to the Chairman of the Public Service Commission.
 - His position of Principal Management Officer in the Public Service Department was "*equivalent*".

- the fact of his criminal conviction was not an automatic bar to him becoming Auditor General because the Public Service Commission would have to follow the Government's interpretation of the PS Manual.
- There was nothing wrong with him receiving severance pay on his transfer.

These points are addressed in turn.

No French copy of the preliminary report

- 6.7 Mr Michel never asked for a French copy of the preliminary report when he received a copy of the preliminary report. Had he done so it could have been provided.
- 6.8 Mr Michel is francophone. That does not prevent him from communicating in English or Bislama in his professional life. This is shown through Mr Michel's reply. He chose to reply in English and clearly has understood the contents of the preliminary report exactly. This complaint does not have any bearing on the facts in any event.

His "request" was not a "request" but an "application"

- 6.9 Mr Michel draws attention to the fact that the word used in the top of his letter is "*demande*" and that this means "*application*" in English and "*request*". Whilst the usual use of the word is that it means "*request*" it is possible for the word to mean "application" as well. However, Mr Michel overlooks the contents of his own letter to Mr Mael (annexure "1") where in paragraph 2 he describes his action as "*ma requête de transfert à ce poste*". The context of the letter and in particular the use of the word "*requête*" make it clear that Mr Michel is asking Mr Mael to transfer him to the post of Auditor General.
- 6.10 Secondly, Mr Michel suggests that there is nothing wrong with addressing the letter to Mr Mael. The explanation is confusing but he suggests he discussed the matter with the PS Department Director, Mr Lesines and then says "*Contrarily to what the Ombudsman said, I didn't directly sent my letter to Mr Mael. Though it is addressed to him as Chairman of the Public Service Commission*". These statements do not make sense. How is it that Mr Mael received the letter, though it was not sent to him directly, but at the same time it was addressed to him. Very mysterious!
- 6.11 What is significant about the reply is that Mr Michel admits speaking to the PS Department Director about the position. Whilst it is not stated by Mr Michel what was said it does have the appearance of favouritism or cronyism and is a further indication that the appointment was made in improper as well as illegal circumstances. At the end of the day Mr Michel was trying to get the vacant high paying post of the Auditor General through informal channels to avoid the usual selection process. MM was working in the same office as PS Department Director.

Principal Management Officer is a post equivalent to the Auditor General

- 6.12 With respect to Mr Michel, I find this argument incredible. To be blunt I think that Mr Michel must have been deluded to make such a statement. As pointed out above in para 5.23 Mr Michel's salary increased from VT1,050,504 to VT1,723,800. It is difficult to reconcile a salary increase of almost 75% with a transfer to an "equivalent" post.

Criminal conviction

- 6.13 On the one hand Mr Michel accepts that it is up to the PS Commission alone to determine whether a convicted criminal can be re-engaged into the Public Service but then says that the PS Commission has to follow the interpretation given on the PS Manual by the Prime Minister.
- 6.14 This contradiction in terms by Mr Michel reveals some further matters. First, Mr Michel accepts that it was up to the PS Commission alone to re-engage him as a Principal Management Officer in the PS Department. As is undisputed the PS Commission never met to decide whether or not to engage after his release from prison. On that basis Mr Michel therefore accepts that his re-appointment by Mr Regenvanu was incorrect.
- 6.15 Secondly, his legal conclusion based on his reading of cl1.3 of the PS Manual that the PS Commission "*could somehow be directed or influenced by the Government as the staff manual is amendable by the Minister responsible for Public Service*" is wrong. The provisions of article 60(1) of the Constitution show that this argument is nonsense. The article states:

- (4) The Commission shall not be subject to the direction or control of any other person or body in the exercise of its functions.

The Constitution is the supreme or mother law of Vanuatu.

Severance pay

- 6.16 Basically Mr Michel's explanation is that since the PS Department said he was entitled to severance pay he raised no question and took the money. Out of the whole reply this attitude that he has demonstrated in response to this point is the most concerning. Did Mr Michel not ask himself what he was "*severed*" from. He was still in the Public Service. As he would have it he was "*transferred to an equivalent post*". How then can it not be as clear as day that there was something wrong in him receiving this payment. He asked no questions at all.
- 6.17 Why this part of the reply is of such concern is that Mr Michel is presently working as the Auditor General. As Auditor General one of his most important jobs is to check that all expenses out of public money are proper and lawful. If the Auditor General is able to blindly accept money in circumstances where at the very least he should have checked the legal position with the Attorney General's Office there can be no public confidence in the holder of the post.

Conclusion

- 7.18 Mr Michel does not dispute the events set out in the chronology of events at para 4.1. He fails to answer a number of important points, such as:
- why he allowed himself to be appointed and reappointed to the post of Principal Management Officer in circumstances where there was no emergency to recruit him and;
 - why the PS Commission never sat to decide to re-engage him;
 - why he was confirmed as permanent before he had not completed 2 years' probation;
 - why he never submitted his police record to the PS Commission or Department.
- 6.19 It is also of note that his reply silently presumes that Mr Michel feels that there is nothing wrong with him as a convicted criminal holding the post of Auditor General. Mr Michel clearly feels that the public will have no question mark over his trustworthiness or suitability for the position despite the criminal conviction.
- 6.20 Mr Michel's reply raises nothing of any substance. Its overall effect confirms that his appointment was illegal and also demonstrates that he is unsuitable to be considered for any position in the Public Service let alone the post of Auditor General.

7 PRELIMINARY FINDINGS OF WRONGFUL CONDUCT

Former Prime Minister Hon Maxime Carlot Korman

Finding No1: Temporary appointments (on 15.01.92 & 13.08.92) of M Michel as Principal Management Officer unlawful and abuse of power

- 7.1 Under art 57(4) of the Constitution the Prime Minister can **exceptionally** appoint temporary staff for a specified period (between a few weeks and up to 6 months; see clause 1.4(f) at para 6.5-6.6 above) due to unforeseen needs. In other words in an emergency situation. It is a power of the Prime Minister that will only in very rare cases be used.
- 7.2 In this instance Mr Korman abused his power under the Constitution and acted unlawfully because of the following:
- (a) There was no emergency before either of the two temporary appointments of Mr Michel;

- (b) Both appointments were not for a specified period; both were said to be "*until further notice*";
- (c) The second appointment was even worse because by this time Mr Michel was a convicted criminal which under the Manual prevented him from being appointed as a public servant at all; and
- (d) On the assumption that the first appointment was legal (which it was not) it was not for Mr Korman to take the decision to reappoint Mr Michel. That decision was with the PS Commission as set out in cl 10.8 of the Manual (refer 6.12 above).

Finding No 2: Breach of the Leadership Code under the Constitution

- 7.3 By reason of his abusing his constitutional power (under art 57(4)) above and acting illegally Mr Korman has fallen below the standard required of this country's leaders by the Constitution's Leadership Code (art 66). He has allowed his integrity to be called into question and left himself open to a charge of political corruption. Respect for his Office has in my opinion been lost as a result of his temporary appointments of Mr Michel.
- 7.4 In all the circumstances, my opinion is that Mr Korman's recommendation of Mr Michel to the post of Auditor General was not based on merit but rather was a political favour. Accordingly, Mr Korman again fell below the standard expected of leaders under the Constitution. Art 66(1) says that a leader

... has a duty to conduct himself in such a way, both in his public and private life, so as not to-

- (a) Place himself in a position in which he has or could have a conflict of interests or in which the fair exercise of his public or official duties might be compromised;
- (b) demean his office or position;
- (c) allow his integrity to be called into question; or
- (d) endanger or diminish respect for and confidence in the integrity of the Government of the Republic of Vanuatu.

Former deputy Prime Minister, Hon Sethy Regenvanu

Finding No 3: Furthering the second unlawful appointment of Mr Michel as Principal Management officer as directed by Mr Korman

- 7.5 Mr Regenvanu signed the second letter of temporary appointment, under instruction from the Prime Minister of the time Mr Korman. Mr Regenvanu should have independently satisfied himself that he could legally exercise the constitutional power under art 57(4) before signing the letter.

Public Service Commission (Messrs William Mael, Edwin Basil, Amos Andeng and Koriaru Kalori) and Public Service Department (Mr Andre Lesines and Mrs Maria Crowby)

Finding No 4: Permanent appointment of Mr Michel as Principal Management officer unlawful

- 7.6 Mr Lesines acted illegally when on 16.07.93 he recommended that Mr Michel's appointment be made permanent. As did the PS Commission under the Chairmanship of Mr Mael by making Mr Michel's appointment permanent. These two acts were illegal because:
- (a) The whole recruitment procedure (see 6.15 above) to find the best person on merit was ignored; and
 - (b) Because of his criminal conviction Mr Michel could not be appointed a public servant in the first place.

Finding No 5: Confirmation of permanent appointment of Mr Michel as Principal Management Officer unlawful

- 7.7 As noted in 6.17 above Mr Michel had not completed 2 year's service as a permanent officer; only 11 months (01.09.93-20.07.94; therefore 13 months early). He was not eligible therefore to have his permanent position "*confirmed*".
- 7.8 Mrs Crowby acted contrary to the Manual when she recommended to the PS Commission that Mr Michel's permanent appointment be confirmed because he had not completed two years' probation. Likewise, the PS Commission's confirmation was also illegal for the same reason (and the earlier reasons stated in Finding No 4 above).

Finding No 6: PS Commission's appointment of Mr Michel as Auditor General unlawful

- 7.9 The PS Commission improperly appointed Mr Michel to the position of Auditor General and thus his appointment does not have a legal basis for the following reasons:
- (a) Mr Michel breached the appointment procedure by applying directly to Mr Mael instead of applying to Director of PS Department;
 - (b) Mr Michel did not apply for the post of Auditor General. His letter was a request for transfer to this position. An application and a transfer are two different things according to Public Service laws and Mr Basil, a PS Commissioner. A Principal Management Officer can not possibly be transferred to the post of Auditor General. A transfer can only be made on equivalent rank (art 58(2) of the Constitution, s 10 of the PS Act refer 6.21 - 6.23 above);
 - (c) Mr Michel did not meet the minimum requirements because he:

- did not have the professional experience and the qualifications required by the advertisement (see 4.10 above) and by the responsibility of the post; and
 - had a criminal conviction within the last 4 years (refer cl 2.3[a] and cl 2.3[b] set out above at paras 6.11 and 6.12);
- (d) Mr Michel did not submit his police record nor did the PS Commission ask for it. Both of Mr Michel and the PS Commission acted contrary to cl 3.14 of the Manual which requires a police record with all applications (refer para 6.13 above)

Finding No 7: Failure to act independently; breach of art 60(4)

- 7.10 The PS Commission consisting of Messrs William Mael, Edwin Basil, Amos Andeng and Koriaru Kalori breached its constitutional duty to act independently and fairly by accepting and being influenced by Mr Michel's request and Mr Korman's recommendation. It cannot be said that their decision was based on merit of the candidate.

Finding No 8: Breach of the Leadership Code under the Constitution

- 7.11 By failing to act independently and without favour the PS Commission as a body and the members individually failed to meet the standard expected of leaders under the Leadership Code (art 66(1) see 7.4 above).

Finding No 9: Severance pay to Mr Michel without legal or reasonable basis

- 7.12 Mr Lesines was wrong to write to the Finance Department suggesting that Mr Michel be paid severance pay. This was contrary to the requirement of s5 of the PS Act that it is only payable where an officer has been compulsorily retired. It was also completely unreasonable for Mr Michel to receive a lump sum of money when he moved from one high paying job in the Public Service to another even more high paying job.
- 7.13 Mr Lesines has left himself open in the eyes of the public as being corrupt by his actions of helping a work colleague to a substantial benefit that he was not entitled to.

Mr Michel

Finding No 10: Interference with the PS Commission's independence and generally improper and dishonest conduct

- 7.14 Mr Michel who was an officer within the PS Department knew full well the appointment procedures in the Manual. Mr Michel acted improperly by sending his request for "transfer" to the post of Auditor General directly to Mr Mael. Mr Michel in doing so interfered with the Commission's constitutional duty to act independently.

- 7.15 Overall, Mr Michel's conduct to advance his career in the Public Service provide the best evidence as to why he should **not** be the Auditor General. In all the unlawful actions of Mr Korman, Mr Regenvanu, Mr Mael (and the other members of the PS Commission), Mrs Crowby and Mr Lesines stated above Mr Michel was a willing participant. An Auditor is required to examine closely accounts and practices to report on and to prevent illegalities and amongst other things corruption. Mr Michel must have known that what he did to get his jobs was wrong.

8 RECOMMENDATIONS

RECOMMENDATION NO. 1

PS Department to recruit and PS Commission to recruit an Auditor General

- 8.1 Due to my opinion that the appointment of Mr Michel's appointment has no basis in law or otherwise (and this opinion accepted by the former Chairman, Mr Mael) I recommend that the PS Department and Commission immediately take steps to advertise, select and appoint an Auditor General. This must be done in accordance with the law.

RECOMMENDATION NO. 2

Repayment of severance pay

- 8.2 Subject to the Attorney General's Office confirming my view that there was no basis for Mr Michel to have received severance pay when he was transferred I recommend that he pay it back to the Government. If the money is repayable according to the Attorney General's Office and Mr Michel does not pay it back I recommend that Mr Michel be sued for recovery of the money.

Power of Temporary Appointment by the Prime Minister

- 8.3 The power of temporary appointment belonging to the Prime Minister under art 57(4) of the Constitution be used as prescribed by the Constitution:
- "exceptionally"
 - "for a specified period"
 - "to meet unforeseen needs"

A new practice has been taking place for a few years. Public servants have been dismissed and the Prime Minister has apparently replaced them using and misusing his powers under the Constitution to temporarily appoint new staff illegally shortcutting the normal procedures as required by the Constitution and the Law.


Former Prime Minister Korman

- 8.4 In accordance with s23 of the Ombudsman Act, because of his breach of the Leadership Code, I recommend respectfully to His Excellency the President of the Republic of Vanuatu to reprimand the Leader of Opposition, Mr Maxime Carlot Korman reminding him about the respect of the Constitution and the respect of the rules of the Public Service, as he misled the President of the Republic who signed the appointment letter.
- 8.5 As Mr Lesines has left the Public Service, there appears to be no possibility to recommend any disciplinary actions against him.
- 8.6 The same applies to former Minister Sethy Regenvanu who has not been re-elected as member of Parliament and is therefore not a leader any more under section 10 of the Constitution and the Ombudsman Act.
- 8.7 The PS Department submission form to the PS Commission to appoint civil servant must be changed to its original form i.e leaving out the Minister of Public Service's recommendation (also Prime Minister).

This practice was imposed in 1992 when Mr Korman was Prime Minister. It is an interference with the PS Commission's constitutional responsibility in permanent appointments of public servants. As was seen in this inquiry where the PS Commission appointed Mr Michel because he was recommended by the Prime Minister. It appeared difficult for the PS Commission to go against the Prime Minister's recommendation.

This practice is illegal and must be stopped.

Dated this 6th day of March 1997



MARIE-NOËLLE FERRIEUX PATTERSON
OMBUDSMAN OF THE REPUBLIC OF VANUATU