

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Civil Appellate Jurisdiction)

CIVIL APPEAL NO. 08 OF 2012

BETWEEN: THE REPUBLIC OF VANUATU
Appellant

AND: EDGEL TARI
Respondent

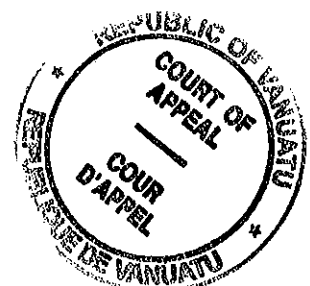
Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice von Doussa
Hon. Justice Young
Hon. Justice Fatiaki
Hon. Justice Saksak
Hon. Justice Aru

Counsel: G Avock for the Appellant
E Molbaleh for the Respondent

Hearing: 27 April 2012
Decision: 4 May 2012

JUDGMENT

4 May 2012



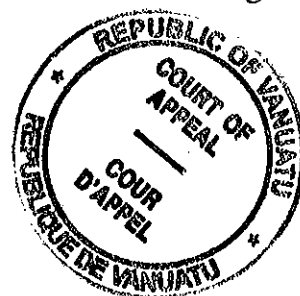
Introduction

1. Mr Tari was employed by the Ministry of Internal Affairs as a Senior Manager with the Malvatumauri National Council of Chiefs. His employment began in March 2004 and was due to end in December 2007. He was dismissed in March 2007. The Republic accepted that his employment was unlawfully and wrongfully terminated.
2. The issue before the Judge in the Supreme Court was therefore the appropriate award of damages and any other awards due. The Judge found that Mr Tari was entitled to:-
 - a) Unpaid wages of Vt 597,000;
 - b) A severance payment of six times his monthly salary totaling Vt 504,000;
 - c) Common Law damages of Vt 3,000,000 for the irreparable harm to Mr. Tari's reputation and work prospects; and
 - d) Common Law damages for humiliation and distress of Vt 100,000.
3. The Republic in this appeal originally challenged the award of the severance allowance and the common law damages. However, at the hearing before us the challenge to the severance payment award was abandoned. The appellants challenge to the two awards of common law damages allege that any of such damages were already covered by the severance award made pursuant to terms of s. 56 (4) of the Employment Act [Cap 160].

Facts

4. The Judge found Mr Tari's principal role was to develop a corporate plan for the Council of Chiefs. The Judge said:-

"13. Without question, Mr Tari was engaged in 2006 to work in a senior and highly responsible position which surely reflected his experience, his expertise and skills, his qualifications and his personal qualities which, by that time, were all well known at Malvatumauri."
5. In late December 2006 Mr Tari was suspended but that suspension was lifted in early 2007. His employment contract was then renewed in early 2007. Mr Garu the CEO of Malvatumauri dismissed Mr Tari in a letter to him on 6 March 2007. No warnings had been previously given to Mr Tari. In that letter Mr Garu said:-



- “1. *Despite your suspension last year for misrepresentation and the issuing potentially defamatory remarks that could damage Malvatumauri, you have again committed similar offence via your e-mails sent out to AusAID regarding the Vanuatu Kastom Governance Partnership project, and even with e-mail correspondence to ACPACS.*
2. *Your continuous winging and wining over how the Vanuatu Kastom Governance Partnership project should be managed when we have appointed a coordinator to manage the project.*
3. *Your attitude of rejection over the project and its staff indicating your lack of understanding and respect over Malvatumauri’s partnership rights and responsibility in that partnership arrangement.*
4. *I have received and confirmed reports of threats you personally made to certain members of staff which is quite uncalled for. Again a disrespect and total disregard of the authority vested in me as Secretary General and the President of Malvatumauri.*
5. *Continuous pestering in the office that your invoices are paid immediately despite knowing full well the constraint we currently face with our monthly warrant.”*

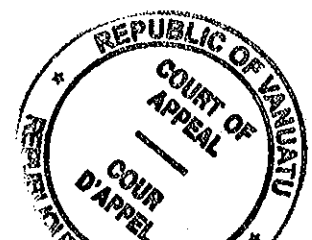
6. Mr Garu said that as a result Mr Tari’s employment contract was terminated immediately.

7. It seems the letter of dismissal was copied to the Director General of the Ministry of Justice, Cultural and Social Affairs and to the Director of AusAID in Vanuatu.

8. A few days after his dismissal Mr Tari went to his office at Malvatumauri to collect his personal effects. He was told to leave. He tried to get his belongings again on 26 March but the Police were called and he was advised to leave and served with a trespass notice.

Supreme Court Decision

9. The Judge stressed that the Republic had not challenged Mr. Tari’s evidence of the devastating effect the dismissal had on him, his family and his employment reputation.

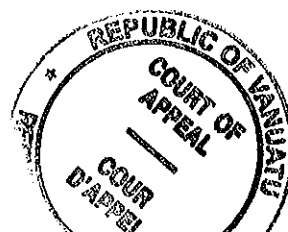


The Judge considered 3 categories of claims, outstanding wages, severance allowance and common law damages.

10. To understand the appellant's case with respect to its challenge to the Judge's award of common law damages, it is necessary to provide some background in relation to the severance allowance. Section 56 (4) of the Employment Act allows a Judge to award up to 6 times the severance payment due to an employee if "*the termination of the employment of an employee was unjustified*". The Judge considered that "*this case easily reaches the category of the worst case of its type*".
11. The evidence to support this conclusion was the Judge said, the circumstances of the dismissal, the subsequent conduct of the employer particularly when the respondent went to collect his personal items and the devastating effect the dismissal had on Mr. Tari and his family.
12. As to the latter point the Judge noted Mr. Tari had suddenly been left with no income for his family. This resulted in his daughter being sent home from school for unpaid fees, having to arrange credit with a local shop for food and electricity and water being cut off for some days when he could not pay his accounts.
13. This was the evidence therefore of the circumstances which gave arise to the Judge's conclusion that the maximum multiplier under s. 56 (4) should be applied.

Common Law Damages – Submissions and Discussion

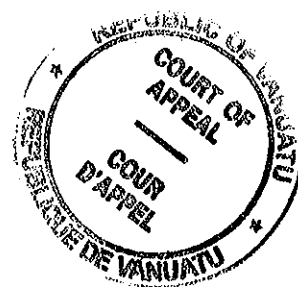
14. The Judge noted that Mr Tari's claim for common law damages was a claim for general damages for the harm done to his reputation and a similar amount for distress and humiliation following his dismissal. However the Judge said that it was appropriate to recast this part of Mr Tari's claim. The Judge accepted that the publication of the letter of dismissal had done irreparable harm to Mr Tari's reputation and work prospects. As a result he concluded that Mr Tari's ability to obtain further employment suitable to his qualifications was compromised. The Judge considered an award of special damages of Vt 3 million was appropriate. Further he ordered Vt 100,000 damages for the humiliation



and distress that Mr. Tari had suffered in the circumstances of his dismissal and the subsequent conduct by his employer.

15. In analyzing whether the appellant is correct in its claim that no award of common law damages should have been made by the Judge there are two important principles to be kept in mind. Firstly, the purpose of an award under s. 56 (4) of the Employment Act. This Court in a number of cases has observed that s. 56 (4) enables the Court to compensate an employee for any special damage suffered from an unjustified dismissal where the basic severance allowance is insufficient to do so: Banque Indosuez Vanuatu Ltd v. Marie Ferrieur, Appeal Case 1 of 1990, 2 VLR (1989-1994), and Hack v. Fordham, [2009] VUCA 6. This Court has said that in appropriate circumstances section 56 (4) may also be used to compensate an employee to reflect the circumstances of his or her dismissal: Vanuatu Broadcasting and TV Corporation v. Malere & Ors. [2008] VUCA 2.
16. The second important feature is to consider the extent of common law damages awarded in breach of employment contract cases. Any right to damages in common law can only arise from a breach of the employment contract. The Republic accepts there was a breach in this case. That breach of contract by the employer entitled Mr Tari at least to his wages for the remaining portion of his contract.
17. Are further damages claimable however? In Melcoffee Sawmill Ltd v. George [2003] VUCA 24, this Court considered early English authority as to the right of an employee to recover damages for the manner of the wrongful dismissal and for any difficulty in obtaining employment.

This Court said “*Under the principles of earlier cases such as Addis v. Gramophone Company Ltd [1909] AC 488 HL Courts have held that an employee cannot recover damages for the manner in which the wrongful dismissal took place, for injured feelings or for any loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment*”.



This Court then considered the approach in Australia and more recently in England and the law in Vanuatu as to damages for breaches of employment contract.

We said “*we are of the view that at common law there should be some recompense to an employee who is being unjustifiably and unexpectedly dismissed*”. This Court therefore recognized that an employee could be entitled to compensation for the distress and humiliation needlessly inflicted upon him by his employer in the manner in which he was dismissed.

18. Finally in Banque Indosuez Vanuatu Ltd (supra), this Court noted that common law damages cannot be awarded for loss of future opportunities by an employee and “*in particular any difficulty in obtaining future employment.*” (See also Addis v. Gramophone Co. Ltd (supra). In Johnson v Unisys Ltd (2003) AC 518 HL an employee sought damages for loss of earnings claiming the manner of dismissal meant he had been unable to find work. His claim failed. Their Lordships refused to extend the recovery of damages to such cases. This was especially so their Lordships said where the employee had legislative remedies for wrongful dismissal. Section 56(4) provides legislative remedies for wrongful dismissal in this case.
19. Applying those principles to the current case we do not consider either the award of Vt 3 million or the award of Vt 100,000 for common law damages were justified in law. Mr Tari had been awarded his full pay from dismissal in March 2007 to the end of his contract in December 2007 less the other wages he was able to earn during this time. Mr Tari also received the maximum severance allowance multiplier of six. This was a compensatory payment of special damages arising from his instant unjustified dismissal. It also covered as we have noted, any distress caused arising from the circumstances of his dismissal.
20. The justification for common law damages in this case could only arise from the breach of the implied term of such a contract that an employer must deal fairly with his employees and, as relevant here, in the manner and circumstances of Mr Tari’s dismissal. The manner and circumstances of Mr Tari’s dismissal had already been compensated as



part of the rational for the six times multiplier of the severance award. Any further award for the humiliation arising from the circumstances of his dismissal were therefore a double award of damages for the same factor.

21. The Judge in awarding the VT 3 million concentrated on the respondent's difficulty in obtaining further future employment and his loss of reputation as a result of being instantly dismissed. As we have noted loss of future employment opportunities has never been a basis for awarding common law damages for a breach of an employment contract and especially as here there is a legislative available process for compensation- (s. 56 (4).
22. In summary therefore, the payment of VT 100,000 for the humiliation arising from the unfair dismissal had already been compensated by the section 56 (4) payment. There is no right to common law damages for any difficulty Mr.Tari may have in obtaining future employment nor in loss of reputation arising from the unjustified dismissal. The award of Vt 3 million was not based on any damages claim recognized by law arising from the breach of Mr. Tari's employment contract.
23. Mr Tari has been compensated for the circumstances under which he was dismissed and for any special damage arising from his dismissal by the six times multiplier award made pursuant to s. 56 (4). We are satisfied the Judge was wrong to make an award of common law damages. The appeal is therefore allowed. We set aside the two common law damage awards of Vt 3 million and Vt 100,000.

Costs

24. The appellant has been successful in this appeal and is therefore entitled to costs which if not agreed should be on standard basis.

Dated at Port Vila, this 4th May, 2012

BY THE COURT

Hon. Chief Justice V. LUNABEK

