

BETWEEN: Airports Vanuatu Limited
Appellant

AND: Derrick Kalo Toara
Respondent

Date of Hearing: 9th November 2021

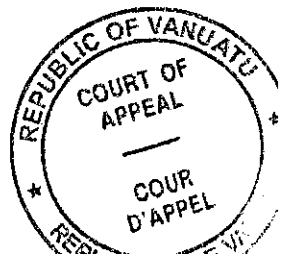
Before: Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Raynor Asher
Hon. Justice Oliver Saksak
Hon. Justice Dudley Aru
Hon. Justice Viran Molisa Trief

Counsel: Mrs. E. Blake for the Appellant
Mr S. Kalsakau the Respondent

Date of Decision: 19th November 2021

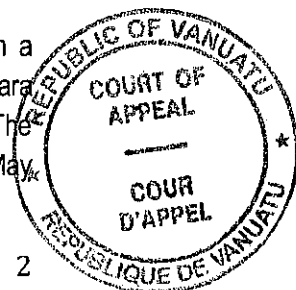
JUDGMENT

1. The employment of the respondent, Mr Toara, with the appellant, Airports Vanuatu Limited (AVL), was terminated with immediate effect by AVL by letter dated 4 March 2019. In the Supreme Court, Mr Toara claimed severance entitlements alleging unjustified dismissal. AVL disputed the claim and the allegation that the dismissal was unjustified.
2. The Supreme Court held that Mr Toara had been dismissed on an unjustifiable basis, and awarded him three month's salary in lieu of notice and a severance allowance.
3. AVL appeals from this decision contending that the Mr Toara's dismissal was justified being based on his serious misconduct; therefore he was not entitled to a payment in lieu of notice or to a severance allowance. Mr Toara by cross-appeal seeks to increase the severance allowance.
4. The critical issue raised by AVL's appeal is whether the trial judge misapprehended AVL's case and the nature of the defence raised by it. AVL contends that its defence asserted, and could only be understood to assert, that Mr Toara was dismissed for serious misconduct in exercise of AVL's statutory right to do so under s.50(1) of the Employment Act [CAP 160]. The trial judge however took the view, erroneously AVL says, that the dismissal was based on breaches of AVL's Code of Conduct which had been wrongly applied in disciplinary proceedings taken against Mr Toara.



The factual background

5. To understand AVL's appeal it is necessary to consider the facts as found at trial and the disciplinary process undertaken leading up to AVL's decision to terminate the employment. In that process three separate incidents during Mr Toara's employment were canvassed.
6. Mr Toara commenced his employment with AVL on 11 April 2008 as the Green Watch Chief Supervisor for the Pekoa Fire Service in Espiritu Santo after some initial training. AVL operates the facilities at the Pekoa airport. Air Vanuatu, as an airline operator, is a major user of the airport.
7. The first incident occurred on 7 March 2015. Mr Toara did not attend work at 15.00 hours. Instead, at 18:15 hours, AVL received a report that he and a junior ARFF officer were consuming alcohol and driving an AVL vehicle which crashed resulting in damage to the vehicle.
8. AVL suspended Mr Toara due to this incident from 7 March 2015 to 8 April. AVL then removed the suspension as Mr Toara was remorseful for his actions, understood his failure to comply with AVL requirements, and was willing to improve should he be given a second chance. He was demoted from Leading Fire Officer to Fire Crew Officer. In September 2015, he was reinstated to his former position as supervisor at Pekoa Airport.
9. The second and most important incident occurred on 20 August 2018. Mr Toara was on annual leave. He had consumed alcohol the previous evening, and again in the morning of 20 August 2018, before he went to Pekoa airport where he checked in as a passenger to fly to Port Vila to attend his younger sister's wedding. Mr Toara denied being drunk, but admitted that he had taken drink. Despite being checked in, he was subsequently told that he was not permitted to board the flight to Port Vila due to the obvious effects of his consumption of alcohol. That annoyed him greatly. He reacted by putting his arms around an Air Vanuatu staff member and attempted to kiss her on the mouth. She said he tried to do so twice despite her pushing him away. He said it only happened once. Mr Toara accepted that he then threw a plastic bottle at her, which hit her left eye. Then Mr Toara hit a male Air Vanuatu staff member who said he was punched but Mr Toara denied that and said it was merely a slap which was dispensed out of frustration due to not being permitted to board the flight with his friends despite having been checked in. He admitted also spitting at him. Mr Toara eventually caught a later flight that same day, and was able to attend the wedding. He subsequently spoke to the female staff member whom he had earlier accosted and apologized to her. He gave her a payment of VT 1,000 to say sorry, which she accepted.
10. AVL suspended Mr Toara for the 20 August 2018 incident. He was served with a suspension letter (suspension period for 2 weeks). In the letter of suspension, Mr Toara was directed not to enter Pekoa Airport without prior approval from the AVL CEO. The suspension continued on, by means of several extensions, until he was dismissed in May 2019.



11. The third incident occurred on the 22 December 2018. Mr Toara and three of his friends went to Pekoa Airport, despite the restriction condition in his suspension letter. It was alleged by AVL that they were intoxicated, but Mr Toara maintained that only his friends were drunk, and that he was not. It was contended further by AVL that Mr Toara had threatened a member of AVL staff, but Mr Toara stated that he could not recall speaking to that person; and he denied making a threat to assault all the staff then present. Mr Toara considered the staff member's written report regarding the incident to be unfair to him and inaccurate. He also claimed that his friends had forced him to go to Pekoa Airport.
12. On 17 January 2019, AVL served on Mr Toara a letter advising him that a disciplinary committee had been established to look into the matter of charges set out in the letter and that during the investigation process he would be given the opportunity to respond to the allegations. (Mr Toara said he did not receive this letter but the Trial Judge found otherwise, and that he was clearly informed prior to the hearing of the issues that would be raised).
13. The reference in the charges to CPPM is a reference to the Corporate Policy & Procedures Manual promulgated by AVL. The charges, as set out in the letter, were as follows:

Charge 1:

Statement of offence:

Failure to comply with Section 8.3.3 of the CPPM which outlined 'unacceptable behavior' which are listed under the following sections:

1. Abuse, harassment or discrimination,
2. Physical assault,
3. Threatening or intimidating behavior,
4. Directly or indirectly engaging in any activity which could, by association, cause AVL public embarrassment or other damage,
5. Not adhering to Safety and Security Procedures and Standards.

Particulars of Offence:

Kalo Toara your actions on 20 August 2018 towards the Air Vanuatu staff at Pekoa displayed unprofessionalism and in direct breach of the Unacceptable behavior outlined by the CPPM. Your actions could potentially cause AVL public embarrassment in an operation where safety is paramount.

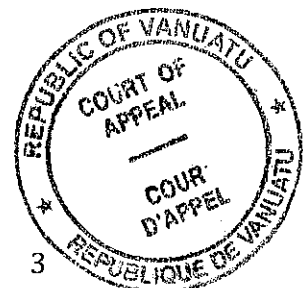
Charge 2:

Statement of offence:

Acting in contrary to Sections 8.3.4(1) and 8.3.4.2(1-5) of the CPPM which outlined responsibilities for Managers, Supervisors and Co-ordinators to provide employees as a positive role model and staff being responsible for their own actions/behavior. Moreover, treating fellow employees and customers fairly and equitably.

Particulars of Offence:

Kalo Toara your actions on 20 August 2018 puts into question your role as senior ARFFS office at Pekoa who is supposed to be a role model and set standards for



your fellow employees and customers. Furthermore, you fail to take responsibility of your own behavior that is expected of you as an AVL employee.

Charge 3:

Statement of offence:

Acting in contrary to Sections 8.5.1 to 8.5.4 of the CPPM which outlines Harassment and AVL's commitment to promote a working environment free of intimidation, threat and humiliation and that any form of harassment is not permitted, tolerated or accepted.

Particulars of Offence:

Kalo Toara on 20 August 2018 your actions towards the Air Vanuatu staff at Pekoa is unacceptable particularly in an area where safety or that of others is dependent on you as an AVL employee but more so as an AVL senior employee who is supposed to promote AVL's core values and lead by good examples.

Charge 4:

Statement of offence:

Failure to comply with Section 8.7.2 (2, 5a and 5b) regarding alcohol/kava/drugs restrictions at AVL premises or within customer service areas.

Particulars of Offence:

On 20 August 2018 Kalo Toara you entered the AVL premises under the influence of alcohol and harassed and physically assaulted the Air Vanuatu staff in the view of customers within the public access areas. Moreover, despite the fact that you were already on suspension, you arrived at the Pekoa Airport gate on 22 December 2018 threatening to kill another colleague or other airport staff following reports received while you were under the influence of alcohol.

Charge 5:

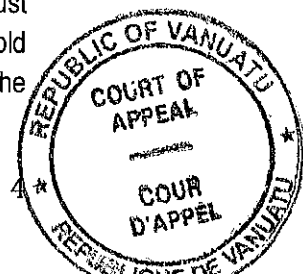
Statement of offence:

Breach of the terms and conditions of your current suspension in contrary to Section 8.3.3(5) of the CPPM.

Particulars of Offence:

Kalo Toara during the period of your current suspension we received reports about you entering the Airport gate with three of your colleagues. This is despite our letter to you dated 19 December 2018 in which you were advised of the terms and conditions of your current suspension. Under point 5 of the letter stated that 'You are not to enter the Pekoa Airport premises during the period of suspension unless approval has been given by the Chief Executive Officer'. Your action displayed failure to comply with work procedures/simple instructions from your superiors.

14. The disciplinary hearing took place on 25 February 2019. Each of the 5 charges was put to Mr Toara, with the relevant facts detailed for him to respond. Mr Tari, the AVL Manager of Operations who chaired the discipline committee, appended the Disciplinary Report dated 26 April 2019 to his sworn statement. The report makes plain the allegations Mr Toara was asked to respond to, and that all bar the final charge related to the 20 August 2018 incident. Mr Toara admitted each of those charges when asked to explain. He told the inquiry that he had apologized for his actions to the female staff member and that she



had accepted his apology. He maintained that he was not on duty at the time of the 20 August 2018 incident.

15. The disciplinary committee made the following recommendations:

In light of the discussions, the serious breaches to the policies and his Employment Contract poses a serious attitude concerns that resulted on the incidents. Moreover, these are occurrences which Mr Toara had been previously warned and given a final warning. As a senior firefighter Mr Toara is expected to maintain the standard required by the profession and which shall be reflected in his actions.

Therefore the Disciplinary Committee sees no alternatives but recommend that the Manager Human Resources issue his letter of termination outlining the reasons for the decision taken...

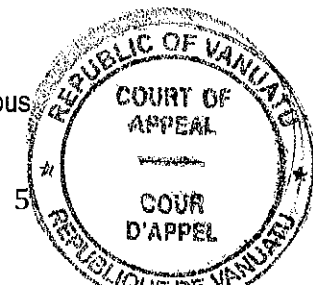
16. On 4 March 2019, by letter, AVL terminated Mr. Toara's employment. The letter was served on Mr Toara on 8 March 2019. The letter of termination stated the following grounds for termination:

- *The recent incident resulting on your current suspension (i.e. the incident on 20 August 2018) and which is a re-occurrence of similar type of incident in which you have been adequately and previously warned;*
- *The willful breaches of policies governed under your terms and conditions of your employment.*

17. AVL gave him 7 days to appeal that decision. He did so and this led to a meeting between Mr Toara and the AVL CEO, Mr. Rakau. The CEO rejected the appeal. Mr Toara was paid wages and other outstanding entitlements up to when he was advised of the rejection of his appeal. He was not paid anything in lieu of notice and no severance allowance.

The Supreme Court proceedings

18. By his Amended Statement of Claim Mr Toara alleged that the decision to terminate his employment was done contrary to the rules of procedural fairness, was unjustified, and was irrational, harsh and unfair. He sought a declaration to that effect, payment of his lawful entitlements on termination, three months pay in lieu of notice and a severance payment under s.50(4) of the Employment Act.
19. AVL in its Defence made a blanket denial of the specific allegations in the Amended Statement of Claim. AVL maintained that the process and substance of the dismissal were lawful, and that it had relied on lawful grounds, Mr Toara having had inter alia physical confrontation with an Air Vanuatu member of staff at the workplace.
20. Counsel for AVL opened her case by saying that the defence was based on the serious misconduct of Mr Toara and concluded by identifying three issues for determination:



- Did the conduct on 20 August 2018 amount to serious misconduct;
- Was the termination process made in accordance with the law – was this a case where the employer could not in good faith have been expected to take any other course;
- Was Mr Toara given an adequate opportunity to answer any charge made against him?

21. The issues identified by counsel, and the claim for a severance payment under s.50(4) of the Employment Act are based on sections within Part 10, Termination of Contract, and Part 11, Severance Allowance, of the Employment Act. The relevant sections provided:

50. Misconduct of employee

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

...

(3) *Dismissal for serious misconduct may take place only in cases where the employer cannot in good faith be expected to take any other course.*

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

55. When severance allowance not due

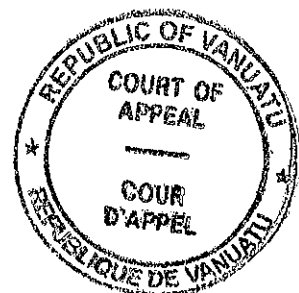
(2) *An employee shall not be entitled to severance allowance if he is dismissed for serious misconduct as provided in section 50.*

56. Amount of severance allowance

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

22. The final submissions of counsel for AVL based the defence to the claim squarely on s.50(1) contending that the conduct of Mr Toara on 20 August 2018 was serious misconduct and that the procedural requirements of ss.50(3) and 50(4) had been complied with. However the trial judge declined to decide the case on this basis. He said:

30. *Nowhere in the documentation produced to this Court relating to Mr Toara's dismissal, nor in the evidence at trial was it contended that in fact the termination of employment was based on the concept of "serious misconduct" as found in section 50(1) of the Employment Act. That was first mentioned in Ms Blake's final submissions. She advocated strongly that the Court consider the case from that vantage point.*



31. *However, I decline to allow the defence to shift tack in such manner so late in the piece. To permit that would be to allow the defence to ignore their pleadings and the evidence it adduced. It would be grossly unfair to Mr Toara, who responded to AVL's defence consistently on the basis that he was off duty and that therefore the Code did not apply – and that point was finally conceded by Mr Tari in cross-examination. Had the case been pleaded differently and run along more usual Employment Act lines, Mr Toara would have had to respond differently, but he was not afforded the opportunity of doing so.*
32. *AVL's justification for Mr Toara's dismissal fails. It is not accepted. Had the matter been dealt with without resort to the Code of Conduct, the position may well have been otherwise, but that is not the case. I find that the AVL Code of Conduct is not the appropriate measure by which to assess Mr Toara's conduct.*
23. The trial judge decided the case on a different basis. During the cross examination of Mr Tari he was shown Section 7 of the Corporate Policy and Procedures Manual which is entitled Code of Conduct. Section 7.1 reads *The Airports Vanuatu (AVL) Code of Conduct (Code) governs all AVL operations and activities and the conduct of all employees on duty for AVL.* The judge's notes of evidence record:

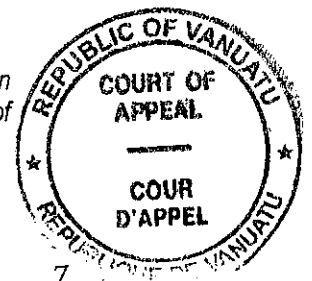
Counsel: Look at Code of Conduct
Tari: Yes
Counsel: Clause 7 refers to "on duty"
Tari: Yes
Counsel: So the Rules only apply to staff while on duty?
Tari: No
Court: Why not?
Tari: AVL is a corporation. Whether or not you are on duty staff must comply
Counsel: Where does it say so in Manual?
Tari: It's not
Court: So when off duty, staff can do what they like?
Tari: Yes
Court: Why then the termination?
Tari: On reflection the DC (discipline committee) erred
Court: Why DC looking at it
Tari: Cos (on) AVL premises.

24. The basis on which the proceedings were decided is recorded in the following paragraphs of the judgement:

29. *AVL's attempted justification of Mr Toara's termination was based entirely on his breaches of AVL's Code of Conduct. As it was accepted by Mr Tari that Mr Toara was off duty, the provisions of the Code did not apply on 20 August 2018, reprehensible as Mr Toara's conduct was at that time.*

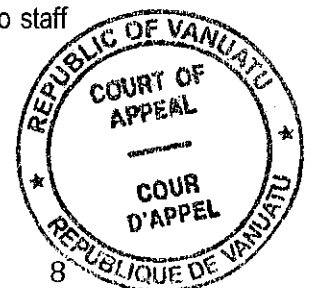
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33. *In the circumstances, Mr Toara's claim must be allowed. He was dismissed on an unjustifiable basis. He is accordingly entitled to 3 months' salary in lieu of notice as well as his severance allowance.*



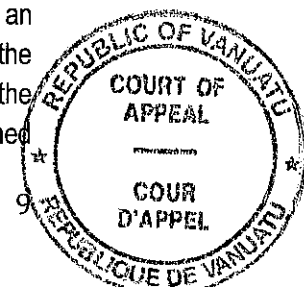
Discussion

25. AVL contends that the pleadings when construed against the provisions of the Employment Act made it clear from the outset that its defence was that dismissal occurred on the basis of serious misconduct and the defence case was opened on that basis. And moreover, the Trial Judge was in error in his understanding that the provisions of the Corporate Policy and Procedures Manual under which Mr Toara had been charged did not apply.
26. We consider that AVL is correct on both grounds.
27. As to the pleadings, the claim for relief sought a severance payment under s.50(4) and in particular as to why there was a lack of procedural fairness reference is made to the employer's obligation under s.50(3). But more important is the statutory context which governs the case. Part 10 of the Employment Act sets out the ways in which an employment contract can be terminated. Section 48 provides that a contract of employment shall terminate on the last day of an agreed period in the contract or on the completion of the piece work therein. Section 49 provides for termination by either party on giving notice for the necessary period prescribed in the section. Section 50 provides for dismissal by the employer in the case of serious misconduct by the employee, subject to compliance with the procedural requirements of ss.50 (3) and (4). Section 53 provides for the termination of the contract by the employee, if the employer ill-treats the employee or commits some other serious breach of the contract of employment.
28. Part 10 sets out comprehensively these ways in which a contract of employment can be terminated. In this case the contract was not for an agreed period, no notice was given by either party, and it was not the employee who terminated the contract. The only avenue for termination was under s50 (1), and that posed the question was there serious misconduct and if so were the procedural requirements of s50 (3) and (4) met. If yes then the dismissal was lawfully effected. If no, then the termination is deemed to be an unjustified dismissal which attracts a possible entitlement by the employee to an extra severance payment under s.56 (4).
29. The assertion by AVL that the dismissal was lawful could only be made out by establishing serious misconduct under s.50(1) and its defence was to be understood accordingly.
30. As to the provisions of the Code of Conduct, we consider that the Trial Judge was misled by being directed only to Section 7 of the Corporate Policy and Procedures Manual during the cross examination of Mr Tari. The charges against Mr Toara were laid not under Section 7 but under Section 8 of the Manual. Section 8 is entitled Standards of Conduct. The introduction to that section indicates that it is not limited in application only to staff whilst on duty. The introduction provides:
1. *The standards of conduct that Airport Vanuatu Limited (AVL) requires as a company are essential to corporate success.*
 2. *Every employee of AVL must be aware and abide by these standards*



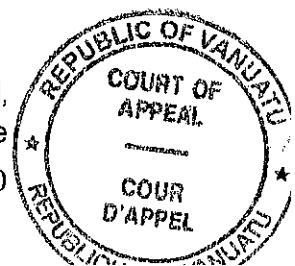
and the conduct required of them.

3. *Both AVL and Employees are bound by relevant State legislation in relation to standards and conduct.*
 4. *Wilful disregard of Company Policies will lead to disciplinary procedures, up to and including, dismissal.*
31. The Employment Act in s.75 provides that the employer may make regulations to provide for matters concerning the technical organisation of the work of the undertaking, discipline and requirements concerning hygiene and safety necessary for the proper operation of the undertaking. Once made and approved under subs.75(2) the regulations become part of the contract of employment. Section 8 of the Manual contained terms of employment that in our opinion may apply whether or not an employee is on duty.
32. Whether an alleged breach of the Standards of Conduct which occurs whilst an employee is not on duty can amount to serious misconduct within s.50(1) of the Act will require close consideration of all the circumstance of the particular case, including the nature and scope of the role of the employee under the contract of employment, the nature and seriousness of the alleged breach, and where and when it occurred. In common parlance it will be a case of asking whether the breach is of such seriousness as to indicate that the employee is not a fit and proper person to hold the duties and responsibilities which attach to the position held by the employee in the employer's business or organisation. A demonstrable connection between the breach and the employer's business or organisation will be an important consideration so as to recognise on the one hand the rights and expectations of the employer and on the other hand the personal rights and private life of the employee.
33. Mr Kalsakau, counsel for Mr Toara placed reliance on an Australian case, *Rose and Telstra Corporation Limited* (U No. 20564 of 1998) in support of his submission that as Mr Toara was not on duty or in uniform during the incident on 20 August 2018 his conduct was not related to his contract of employment. *Rose* is an arbitration decision decided under legislation that is similar in purpose to Part 10 of the Employment Act. The discussion in the decision is instructive. Mr Rose had been dismissed after being involved in a fight late at night in an hotel room he was sharing with a fellow employee. He was employed as a telephone technician. He and his fellow employee after work and out of uniform had spent the evening drinking and then attending a nightclub before returning to their room where the fight broke out between them. It was a serious fight. Mr Rose was stabbed and required medical treatment and the other employee was charged with a criminal offence and gaoled. Telstra dismissed Mr Rose for improper conduct. The Tribunal found that the termination of his employment was not justified as it lacked the required connection to his employment.
34. The principle derived from Australian case law that guided the Tribunal was that an employee's behaviour outside of working hours will only have an impact on the employment to the extent that it can be said to breach an express or implied term of the contract of employment. There must be a relevant connection between the impugned



conduct and the employment. The many Australian cases discussed in the decision illustrate that in every case the necessary connection must be judged having regard to all the circumstances of the case including that an employee is entitled to a private life. The principles applied in the *Rose* decision accord with our interpretation of the requirements of Part 10 of the Act.

35. The circumstances in the *Rose* case included that the fight did not occur in a public place and was known about by only a few people so that there was no evidence that it impacted on the corporate reputation of the employer. Mr Toara's circumstances were quite different. The behaviour of Mr Toara on 20 August 2018 was alcohol caused and involved physical assaults on two Air Vanuatu staff. It occurred within the airport precincts and in full view of the public in the airport. He was well known to the staff of Air Vanuatu who were there, and in the circumstances the fact that he was not on duty or in uniform seems hardly to the point. On his own admission his behaviour broke each of the Standards of Conduct the subject of the charges.
36. AVL manages a major facility at the Pekoa airport. It is a facility in which other enterprises including airlines have staff working and members of the public coming and going. High standards of behaviour are expected of its employees whilst on the airport premises to protect the safety and comfort of other employees, of others who come and go, and the corporate reputation and image of AVL. This applies to Mr Toara along with all of AVL's employees, but in his case he held an important senior staff position as a Chief Supervisor in the fire protection unit of the airport which required a person whose performance in an emergency situation could be assured.
37. In our opinion the conduct on 20 August 2018 did constitute serious misconduct, and on the evidence this aspect of the AVL defence was established.
38. For the dismissal to be lawful under s.50(1) AVL also had to establish compliance with the procedural requirements of ss.50(3) and (4). Again, we think the evidence shows compliance.
39. The evidence shows no lack of good faith on the part of the AVL officers who made the decision. In deciding whether to terminate Mr Toara's employment AVL considered whether a less severe outcome was feasible. AVL reasonably took into account that he had been given a second opportunity after the alcohol induced vehicle crash in 2015, and that during his suspension after the 20 August 2018 incident he entered the airport contrary to the condition of his suspension, again in circumstances involving alcohol. We consider it was not unreasonable for AVL to take the position that Mr Toara could not be trusted to act responsibly and was unsuitable to hold a responsible staff position such as that of a fire officer.
40. The procedure required by s.50(4) occurred. Mr Toara was given a very full opportunity to understand and answer the charges of misconduct alleged against him.
41. The allegations in the Amended Statement of Claim that the termination was irrational, harsh and unfair and in breach of the rules of natural justice did not help to identify the

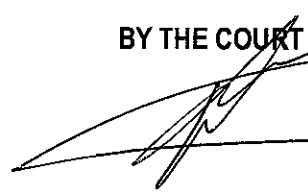


real issues in the case. Even if the processes followed by AVL were shown to be irrational harsh and unfair that could amount to a breach by the employer of a contractual duty to act fairly and in good faith towards Mr Toara. However, that breach would not provide a separate ground for rendering the termination of his employment unlawful. Conduct of that kind could give the employee the right to terminate the contract under s.53(1) of the Act but that did not happen here. It was the employer who terminated the contract and under Part 10 of the Act the lawfulness or otherwise of the termination falls to be determined under s.50. Irrationality, unfairness or harshness by the employer are very relevant to the procedural requirements of s.50(3) and (4) but do not otherwise render the termination unlawful.

42. In summary, we consider the ground of defence to the claim under s.50(1) was open to AVL at trial, and was made out on the evidence. The appeal therefore succeeds. The judgment in the Supreme Court must be set aside and the claim dismissed. Mr Toara is not entitled to a payment in lieu of notice (s.50(1)) or to any severance payment (s.55(2)).
43. This conclusion makes it unnecessary to consider the cross-appeal which must also be dismissed.
44. Costs both in this Court and in the Supreme Court must be paid by Mr Toara as the unsuccessful party.
45. The formal orders of the Court are:
 - a) Appeal allowed;
 - b) The judgement in the Supreme Court is set aside;
 - c) Cross-appeal dismissed;
 - d) The respondent Mr Toara to pay the appellant AVL's costs in the Court below and in this Court on the standard basis to be agreed or in default of agreement taxed.

DATED at Port Vila this 19th day of November, 2021

BY THE COURT


.....
Hon. Vincent Lunabek
Chief Justice

