

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

Civil Appeal  
Case No. 22/2339 CoA/CIVA

**BETWEEN:** Winnie Timatua  
*Appellant*

**AND:** Republic of Vanuatu  
*Respondent*

**Coram:** Hon Chief Justice V Lunabek  
Hon Justice J Hansen  
Hon Justice D Aru  
Hon Justice V M Trief  
Hon Justice R White  
Hon Justice E Goldsbrough

**Counsel:** K T Tari for the Appellant  
L Huri for the Respondent

**Date of hearing:** 06 February 2023

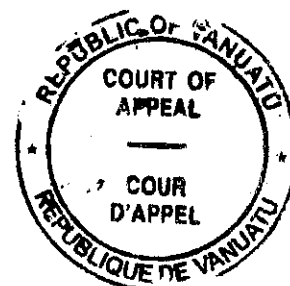
**Date of Decision:** 17 February 2023

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**JUDGMENT OF THE COURT**

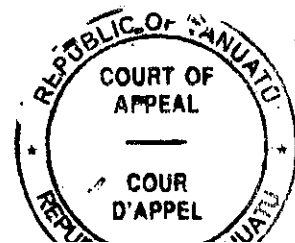
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1. The Appellant alleged that she had been constructively dismissed from her employment as a principal with the Teaching Service Commission (TSC) and that that dismissal was unjustified. In the proceedings filed in the Supreme Court, she claimed, pursuant to s.58(4) of the Employment Act, a severance payment of six times the basic severance entitlement under s.58(2) and damages for breach of her contract of employment.
2. However, at the trial, the Appellant abandoned the claim for the severance payment under s.58(4) and confined her claim to one for damages only.
3. The primary judge found that there had been no constructive dismissal and dismissed the Appellant's claim: *Timatua v Republic of Vanuatu* [2022] VUSC 122. She now appeals against that dismissal.
4. We consider that the appeal should be dismissed, albeit for reasons which differ from those of the primary judge. Our reasons follow.



## Factual setting

5. The evidence at trial established the following matters.
6. The Appellant had been employed continuously in the TSC with effect from 1995. On 23<sup>rd</sup> of February 2020, the TSC terminated the Appellant's employment without notice. It did so in reliance on an audit undertaken by the Internal Audit Unit of the Ministry of Education which indicated misappropriation of funds by the Appellant in her capacity as Principal of the Anamburu School. The Board of the TSC regarded the conduct as amounting to "*misconduct*" as defined in s.22(1)(f) of the Teaching Service Act, 2013.
7. Well before the termination of her employment, the Appellant had applied (on 4 January 2019) to the Ministry of Education and Training for appointment to the position of Basic Examination Officer (BEO). She was successful in that application as, on 4 November 2019, the Public Service Commission (the PSC) appointed her to the position of BEO with effect from 6 March 2020. However, it seems that the Appellant may not have been informed of that appointment until 2 March 2020.
8. The Appellant commenced an appeal to the Appeal Board, pursuant to s.58 of the Teaching Service Act (the TS Act) against her dismissal. She did so on 27 February 2020, i.e., before she had received written notice of her appointment to the PSC.
9. The Appeal Board found that the TSC had not complied with either s.50(3) or s.50(4) of the Employment Act 1983 nor with s.54(1) and 54(3) of the TS Act.
10. By its decision of 13 August 2020, the Appeal Board:
  - (a) "*set aside*" the decision of the TSC of 24 February 2020, i.e., the dismissal;
  - (b) held that the Appellant was entitled to payment of her salary from 24 February 2020 to 13 August 2020;
  - (c) acting pursuant to s.57 of the TS Act, suspended the Appellant, without salary, from employment with the TSC with effect from 13 August 2020 pending the completion of the investigation required by s.54(1) of the TS Act and the Appellant's response to that investigation as contemplated by s.50 of the Employment Act;
  - (d) informed the Appellant that she was entitled, pursuant to s.57(2) of the TS Act, to undertake paid employment during the period of her suspension; and
  - (e) informed the Appellant that she would be entitled to payment of her full salary during the period of the suspension, if it was found ultimately that she had not been at fault.



11. The Appeal Board first informed the Appellant of these matters in a letter dated 13 August 2020 and confirmed them in a letter dated 31 August 2020.
12. It was common ground that, as at 13 and 31 August 2020, the Appellant had not informed the Appeal Board of her employment in the PSC. Moreover, the TSC itself was not aware of that employment.
13. For reasons not disclosed in the evidence, the TSC did not immediately arrange the investigation required by s.54 of the TS Act.
14. Matters took another turn when the Ministry of Education informed the TSC on 2 January 2021 that it had not "processed" the Appellant's "reinstatement" by reason of her having been on the government payroll since 6 March 2020 in her employment as a BEO. The TSC passed this information on to the Appeal Board. That led to the Appeal Board on 2 February 2021 issuing a further ruling in the following terms:

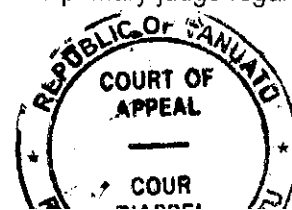
*"(1) that the decision of the Appeal Board to uplift your termination and to place you on suspension without salary until proper investigation following proper procedures are carried out **is revoked**. Furthermore, that its decision to instruct the Commission to backpay your salary from the date on which you were terminated (24 February 2020), to the date the Appeal Board has suspended you without salary (13 August 2020), **is also revoked**.*

*(2) that the severance allowance for your service served as an employee of the Teaching Service Commission is to be paid to you in full due to procedural failures by the TSC;*

*(3) that regarding the issue of misappropriation and pursuant to Section 54(1) - (5) of the Teaching Service Act 2013, if the Commission reasonably suspects that you have a committed a criminal offence based on the Audit Report of Anamburu School, the Commission is responsible to request the Police Fraud Section or other appropriate authority to conduct a proper investigation into the matter."*

(Emphasis added)

15. In short, the Appeal Board revoked its decision of 13 August 2020 setting aside the termination of the Appellant's employment and set aside its suspension of the Appellant's employment with effect from 13 August 2020. It also ordered that the Appellant be paid a severance payment "in full" by reason of the procedural failures of the TSC. The consequence was that the Appellant's employment had come to an end on 24 February 2020. It is implicit that the Appeal Board regarded that termination as unjustified, having regard to s.50(3) of the Employment Act and to s.54 of the TS Act.
16. We mention that no issue was taken at first instance about the propriety of the Appeal Board's decision on 2 February 2021 to revoke its earlier decision.
17. Matters then took a further turn on 15 July 2021 when the Appellant wrote a formal letter of resignation to the TSC, with that resignation having immediate effect. The primary judge regarded



this letter of the Appellant as having no legal effect. In our view, that was a correct finding although not for the reasons stated by the judge.

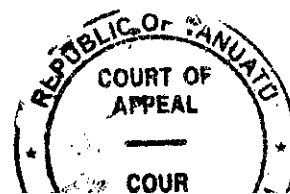
### **The claim in the Supreme Court**

18. Four days later, on 19 July 2021, the Appellant commenced the proceedings in the Supreme Court which give rise to the present appeal. She alleged that the failures of the TSC to “*determine the future of her employment*” after the Appeal Board’s decision of 13 August 2020 constituted constructive dismissal. She asserted that she was, in consequence, entitled not only to the basic severance payment for which s.58(2)(a) of the Employment Act provides but also to an amount up to six times that basic entitlement, pursuant to s.58(4) of the Employment Act. The Appellant claimed in addition damages in respect of the constructive dismissal she alleged.
19. As already noted, at the outset of the trial, the Appellant abandoned the claim for a further severance payment and pursued only the claim for damages in respect of the TSC’s repudiation of her contract of employment.

### **The decision of the Primary Judge**

20. The critical part of the reasons of the primary judge appears in the following paragraphs:

10. *“I accept Mr Hopkins Dick’s evidence that at no time did Ms Timatua advise the TSC that she had commenced alternative employment. That was a clear breach of her obligations to the TSC.*
11. *The TSC Appeal Board, by the decision of 2 February 2021, impliedly made clear that had the Board been advised of Ms Timatua’s alternative employment in August 2020, she would not have been re-instated, even on a suspended basis. In effect, the Board indicated that by her acceptance of alternative employment in early March 2020, Ms Timatua had herself ended her employment relationship with the TSC.*
12. *The TSC Appeal Board’s February 2021 decision to revoke the earlier decisions removed the need for the TSC to conduct an investigation. The fact that the TSC did not instigate an inquiry between 13 August 2020 and 2 February 2021, while demonstrating behaviour inconsistent with the TSC’s obligation to be a good employer, cannot be cited by Ms Timatua in support of her Claim due to her own dereliction of her obligations to her former employer.*
13. *I find that Ms Timatua’s letter of resignation of 15 July 2021 is of no legal effect.*
14. *I do not accept the argument that Ms Timatua was employed by the TSC through to the time of her formal resignation r to 29 July 2021, when her employment with the PSC was made permanent.*
15. *I conclude there was no constructive dismissal. Accordingly, the Claim for a multiplier times 6 of Ms Timatua’s severance payment cannot be awarded, as there is no legal basis for the same.”*



21. As is apparent, the judge found that there had been no constructive dismissal because, as His Honour considered it, the Appellant had herself ended the employment relationship with the TSC by her acceptance of employment with the PSC in early March 2020. The judge also found that the Appellant could not rely on the TSC's failure, in the period between 13 August 2020 and 2 February 2021, to instigate an investigation because she had herself been "*in dereliction of her obligations*" to the TSC by failing to advise it that she had commenced employment with the PSC.

### **The Appeal**

22. At the heart of the submissions of counsel was the proposition that the Appellant's omission to inform the TSC of her employment with the PSC was an irrelevant consideration to which the judge should not have had regard.

### **Consideration**

23. The course of events outlined above indicates that the TSC had terminated the Appellant's employment on 24 February 2020. Although the Appeal Board initially set that termination aside, that setting aside was revoked by the decision of 2 February 2021, with the effect that the TSC's termination of the Appellant's employment stood. The Appellant's employment having come to an end on 24 February 2020 by reason of the TSC's actions that day, there was no occasion, after 2 February 2021, for a later constructive dismissal by the TSC arising from its failure to undertake the required investigation. The omission of the TSC to arrange an investigation in the period between 31 August 2020 and 2 February 2021 could not reasonably be regarded as giving rise to a circumstance of constructive dismissal occurring some time (presumably late) in that period. That is especially so given that the Appellant had written to the TSC on 2 December 2020 demanding payment of a severance allowance with the multiplier for which s.58(4) provides, in consequence of the termination on 24 February 2020. That letter is inconsistent with the claim of constructive dismissal which the Appellant attempted to amount in the proceedings at first instance.
24. The parties appeared to have overlooked at trial that the effect of the Appeal Board's decision of 2 February 2021 was to restore the position as it was on 24 February 2020. The primary judge was, with respect to His Honour, in error in failing to find that that was so. The omission of the Appellant to inform the TSC of her alternative employment was irrelevant to the conclusion that the dismissal on 24 February 2020 was unjustified because the dismissal had taken effect before the Appellant had been offered, let alone had accepted, the alternative employment with the PSC.
25. However, contrary to the submission of the Appellant's counsel, the Appellant's commencement of employment with the PSC was very relevant to the question of whether the Appellant had suffered any loss which could sound in damages in consequence of the unjustified termination and to the assessment of any such damages. As it happens, the Appellant did not adduce evidence at trial of any such loss. Both her employment with the PSC and the payment of a substantial severance payment of VT3,286,597 on 22 December 2021 would have made it difficult for her to do so. That is



because she had, by accepting the employment with the PSC, mitigated any loss arising from the unjustified dismissal. Counsel for the Appellant did not contest the categorization of the Appellant's employment with the PSC as stable and secure, and did not point to any evidence indicating that the Appellant's salary as a BEO is less than that which she was receiving in the TSC.

26. It is established that regard may be had to a severance payment in an assessment of common law damages on a termination of employment when the losses for which damages are payable have been compensated for by the severance payment: *The Republic of Vanuatu v Tari* [2012] VUCA 6 at [16] – [23]. As we have said, the Appellant did not prove that she had suffered loss of a character not compensated in the severance payment.
27. For these reasons, we consider that the judge was correct in dismissing the Appellant's claim for damages, although not for the reasons which His Honour gave.

### Costs

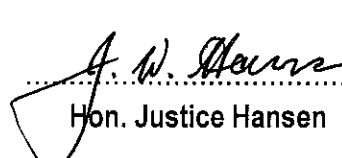
28. The Appellant also contended that the costs of VT125,000 which the judge had ordered her to pay to the Respondent were excessive. Counsel submitted that the costs awarded should not have exceeded VT50,000.
29. While we consider that the sum of VT125,000 does seem high for a case involving a one day trial only, we are not satisfied that it has been shown that the judge's exercise of discretion with respect to costs has miscarried. The Respondent's costs included the preparation for trial as well as the trial itself. They included the costs of the investigation of the circumstances giving rise to the Appellant's claim, the filing of a defence, the filing of the sworn statement of Mr Dick, the attendance at an unspecified number of conferences in the Supreme Court, as well as counsel's attendance at the trial. Accordingly this part of the Appellant's appeal does not succeed.

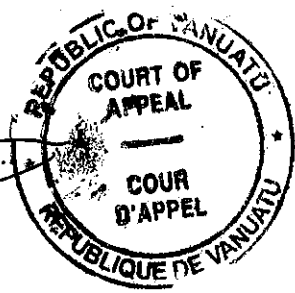
### Conclusion

30. For the reasons given above the appeal is dismissed. The Appellant is to pay the Respondent's costs of the appeal which we fix in the sum of VT50,000.

DATED at Port Vila, this 17<sup>th</sup> day of February 2023

BY THE COURT

  
Hon. Justice Hansen



The seal is circular with the text 'REPUBLIC OF VANUATU' at the top and 'REPUBLIQUE DE VANUATU' at the bottom. In the center, it reads 'COURT OF APPEAL' and 'COUR D'APPEL' separated by a horizontal line.