

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

Civil Case No. 69 of 2009

BETWEEN: HENRY NIN, CHARLES SMITH,
PHILIP SOVAN, SMITH NICE,
STEPHEN ELMAN and ANN FRED
Claimants

AND: TORRES and BANKS PROVINCIAL
COUNCIL (TORBA)
Defendant

Coram: Justice D. V. Fatiaki

Counsels: Mr. J. Kilu for the Claimants
Mr. B. Bani for the Defendant

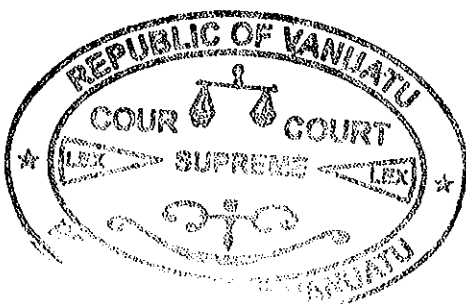
Date of Judgment: 14th April 2011

JUDGMENT

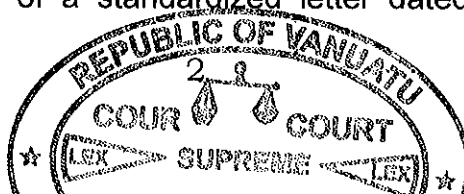
1. In this action the Claimants who were all former employees of the Torres and Banks Provincial Council (*the Council*) seek compensation pursuant to Section 56 of the Employment Act [CAP. 160] "... due to their unlawful termination". That section provides:

"56. Amount of severance allowance

- (1) Subject to the provisions of this Part, the amount of severance allowance payable to an employee shall be calculated in accordance with subsection (2).
- (2) Subject to subsection (4) the amount of severance allowance payable to an employee shall be –
- (a) for every period of 12 months –
- (i) half a month's remuneration, where the employee is remunerated at intervals of not less than 1 month;
- (ii) 15 days' remuneration, where the employee is remunerated at intervals of less than 1 month;



- (b) for every period less than 12 months, a sum equal to one-twelfth of the appropriate sum calculated under paragraph (a) multiplied by the number of months during which the employee was in continuous employment.
- (3) Where remuneration is fixed at a rate calculated on work done or includes any sum paid by way of commission in return for services, the remuneration shall, for the purposes of this section, be computed in the manner best calculated to give the rate at which the employee was being remunerated over a period not exceeding 12 months prior to the termination of his employment.
- (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).
- (5) Any severance allowance payable under this Act shall be paid on the termination of the employment.
- (6) The court may, where it thinks fit and whether or not a claim to that effect has been made, order an employer to pay interest, at a rate not exceeding 12 per cent per annum from the date of the termination of the employment to the date of payment.
- (7) For the purposes of this section the remuneration which shall be taken into account in calculating the severance allowance shall be the remuneration payable to the employee at the time of the termination of his employment.”
2. The Council in its amended defence pleads that the Claimants “terminations were made pursuant to appraisals of each staff conducted by the Council” and further “the terminations were made pursuant to Clause 11.4 of the Local Government Council (Staff Regulation) and which clause is a general provision for ‘Termination of Service’ as opposed to Clause 11.2 which provides for termination following a disciplinary process”.
3. It is common ground that each of the Claimants were employees of the Council for varying lengths of time all exceeding 12 months and each occupied different positions within the Council. All Claimants were also terminated by copy of a standardized letter dated 28 November 2008



written on behalf of the Council and signed by its Secretary General. The relevant body of each termination letter reads as follows:

"Termination Blong Yu Olsem (the Claimant's name)"

Folem Torba Provincial Kavman Kaonsel sitting long manis November 2008, Kaonsel ibin luk mo tokbaot appraisal ripot blong yu. Appraisal ripot ia ifolem Chapter 6, Section 6.19 blong Local Government Council (Staff Regulation). Mo folem Chapter 7, section 7.2 (c), Torba Provincial Kavman Kaonsel ibin luk se yu no stap mekem gud ol job responsibilities blong yu. Wetem lukluk ia, Kaonsel ibin decide blong terminatem employemen blong yu olsem (the Claimant's post/position) wetem Torba Provincial Kavman.

Termination blong employemen blong yu ifolem Decentralization Act [CAP. 230], Part 3B – Officers and Staff, Section 181, sub-section (b). We ikivem right long Kaonsel olsem Legislative bodi blong Provincial Kavman blong mekem decision olsem.

Folem Employment Act [CAP. 160], Part X, Termination of Contract, Section 49, Sub-section 3 (a), mbae yu servem 3 manis notice blong yu start long 1st December 2008 kasem end blong February 2009.

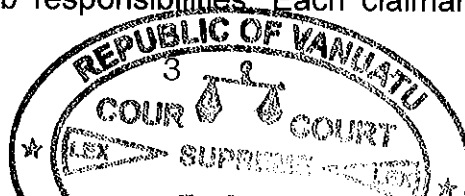
Mo folem Employment Act [CAP. 160], Part XI, Severance Allowance, Section 54, Sub-section (1), mbae Torba Provincial Kavman ipaem severance allowance blong yu start long date we yu kam wok kasem date we mbae ifinis long service blong Provincial Kavman wetem eni nara entitlement blong yu.

Wetem hemia, mi wantem talem bigfala tankio long yu long ol service we yu bin mekem ikam long Torba Provincial Kavman blong benefitem ol pipol blong Torba Province.

Mi stap advisem yu blong yu no mekem eni unlawful samting we mbae isave mekem se yu lose mol benefit we Torba Provincial Kavman mbae ipaem ikam long yu.

Mi stap wishem yu all the best long fuija wetem eni nara wok or samting we yu mbae imekem."

4. It is immediately apparent that the Council had decided to terminate the employment of each of the Claimants after considering the particular employee's appraisal report and the provisions of Section 7.2(c) of the Local Government Council (Staff Regulations) Regulation No. 1 of 1994 ("the Staff Regulation") and concluding that each claimant had not properly carried out his/her job responsibilities. Each claimant was also given 3



months notice of termination pursuant to Section 49 (3)(a) of the Employment Act and each was paid a severance allowance in accordance with Section 54 (1) of the Employment Act [CAP. 160].

5. Noteworthy however, by its complete absence, is any mention or reference to Section 11.4 of the Staff Regulations in the Council's termination letter. That particular section which is relied upon in the Council's amended defence is to be found in Chapter 11 of the Staff Regulations under the heading: "TERMINATION OF SERVICE" and reads:

"11.4 The service of an officer or employee may be terminated by giving due notice in accordance with the terms of his engagement, and if no period of notice is specified therein, by giving three months notice or three months salary in lieu of notice".

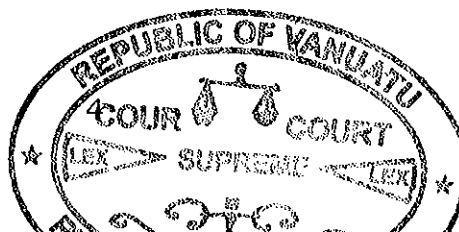
6. By way of contrast Section 11.2 provides for termination of an employee's services following a disciplinary procedure prescribed under Chapter 7 of the Staff Regulations. In this latter regard Section 7.2 (c) which was the particular provision referred to in each Claimant's termination letter provides:

"7.2 Notwithstanding the previous paragraph every officer or employee of the Council commits a disciplinary offence for the purposes of disciplinary proceedings who –

(c) is negligent, careless, indolent, inefficient, or incompetent in the discharge of his duties".

7. The inconsistency or difference between the positions taken in the Claimants' termination letter and the Council's amended defence gives rise to an issue of fact and credibility with the Secretary General of the Council maintaining that the Council had invoked Section 11.4 of the Staff Regulations to terminate the Claimant's employment, against, the Claimant's equally forceful claims that they had been terminated as a result of a disciplinary measure taken under Section 7.2 (c) of the Staff Regulations.

8. The Secretary General without admitting any error on his part, deposed that all terminations "... followed the Local Government Council Staff Regulation Chapter 11.4 instead of Chapter 7" and "... therefore the terminations made were not based on disciplinary grounds but instead upon full and frank consideration of appraisal reports on all members of Staff of Torba Provincial Council including those who were terminated". (Whatever that may mean).



9. The Secretary General's explanations and clarifications drew a sharp response from the Claimants that the Secretary General was less than truthful as he was bound by the clear terms of the termination letter that he signed which "... cannot be clarified because whether it was right or wrong has no turning back it has costs us our jobs and our livelihood. It cannot be re-written."
10. In his oral testimony the Secretary General explained that "... the termination letter resulted from a Council sitting in November 2008 where the Council looked at staff appraisal reports and Council decided to terminate the 6 Claimants and the letter I wrote I called together staff and quoted section of Staff Regulation Chapter 7 regarding discipline. Council had decided termination and I merely implemented that decision and I misquoted the decision referred to the wrong Regulation Chapter 7 which relates to discipline whereas I should have referred to Chapter 11 termination."
11. Under cross-examination the Secretary General maintained that he had made an error in quoting the wrong section from the Staff Regulations in the termination letter and that the Council's clear decision after studying the appraisal reports, was to terminate the Claimants employment. He was constrained however to reluctantly accept that a low score for example, in the first-named claimant's appraisal report, could constitute a disciplinary offence of "inefficient or incompetent" under Section 7.2 (c) of the Staff Regulations.
12. In so far as it may be necessary to decide the issue, I am satisfied after carefully considering all of the evidence, that the Claimants were **not** dismissed pursuant to a disciplinary procedure but rather, each claimant had his employment contract unilaterally terminated by the Council under Section 11.4. I am also of the view that the reference in the Claimants' termination letters to Section 7.2 (c) of the Staff Regulations was an unfortunate error.
13. I say "unfortunate" advisedly because it led the Claimants' and their counsel to conclude that their terminations were disciplinary in nature whereas they were not. Having said that, this does not conclude the case nor is it an answer to the Claimants' claim under Section 56(4) of the Employment Act for unjustified dismissal.
14. Defence counsel in his closing submissions wrongly identifies what he considers to be the sole issue in the case as "were the terminations of the six employees made on grounds of 'serious misconduct'?" and counsel conveniently summarises the Council's case in the following terms:

"The Defendants stated that the terminations were effected following consideration and discussion on Appraisal Reports on each employee. Mr. Shedrack Welegetabit clarified on re-examination that the consideration of Appraisal Report and a



disciplinary matter are two separate things. That the latter comes under clause 7 of the Staff Manual and involves a process whereas the former is done by the Council from time to time. In our submission, the two are independent of each other.

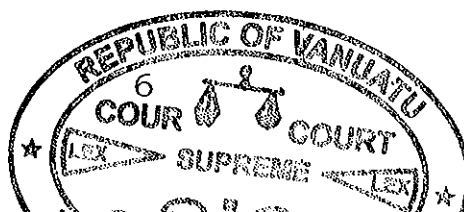
In his oral evidence, Mr. Welegtabit stressed that the Council had resolved to terminate the six employees in its meeting in November, 2008 and that the minutes of the Council meetings confirm that position. However, it was a human error on his part to refer to clause 7.2 (c) instead of referring to the correct provision under the Staff Regulations which is clause 11.4. He further added that he is an agricultural economist and not a trained lawyer.

The evidence adduced by the Defendant goes to show clearly that the Defendant did not treat the terminations as being for disciplinary offences although it mistakenly referred to a wrong clause. Instead, the minutes of the Council meeting show that the intention and will of the Council as the Employer, was that the six claimants must be terminated."

15. *Defence counsel concludes with the submission that "... it is crystal clear that the Claimants were not terminated or dismissed on grounds of serious misconduct. Consequently the answer to the question posed at the outset must be in the negative. That is the Claimants were not terminated on allegations of serious misconduct but by power of the Council pursuant to Clause 11.4 of the Staff Regulations as well as section 49 of the Employment Act."*
16. *Claimants' counsel on the other hand, equally forcefully, submits "... that whether or not the terminations were done under section 11.4 of the Regulation is irrelevant because the fact still remains that they have been terminated without being given any opportunity to be heard in breach of their constitutional right to be heard". Secondly, counsel submits, in a reference to section 50 (3) of the Employment Act, that "it was not a case where the Council was left with no other choice, but to have to terminate the Claimants". In counsel's words:*

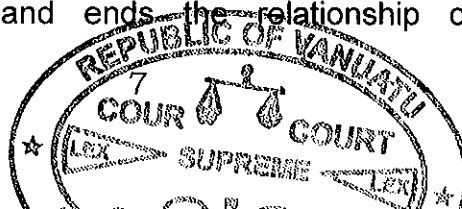
"An employer's action to terminate an employee's employment is a serious matter which ultimately will bring the employee's employment and livelihood to an end. It is therefore vital that such an employee must be given the right to be heard as guaranteed to every individual by the Constitution."

"An employer has the right to hire and fire, but such right has to be performed in strict recognition of the employee's constitutional rights to (be) heard. Only after an employee has

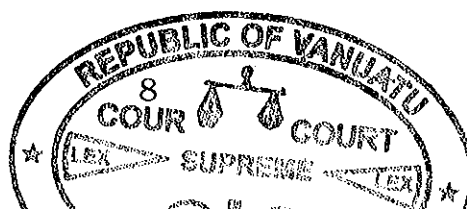


been heard, then it is really up to the employer if he wishes to terminate the employee”.

17. I confess to some difficulty in understanding counsel's submission seeking to incorporate the terms of Article 5 (2) of the Constitution, which clearly deals with criminal matters into the realms of employment contracts. Nor, given the nature of the Council's defence do I understand the reference to Section 50 of the Employment Act.
18. Equally, an employer's right under Section 49 of the Employment Act to terminate a contract of employment which has an unspecified term, by the giving of a notice of termination, does **not** mean that such a termination cannot be unjustified or wrongful or that a severance allowance is not payable in terms of Section 56 (4) of the Employment Act. In this view I plainly disagree with defence counsel's submissions.
19. Under Section 54 of the Employment Act the right of a dismissed employee who meets the minimum requirement of being in the continuous employment of his employer for 12 months or more, to receive a severance allowance from his employer under Section 56, [assuming he is not disqualified under Section 55(2)], is simply based on the fact that "*the employer terminates his employment*" and nothing more. In other words so long as it is the employer who terminates the employment, the employer is *prima facie* liable to pay the terminated employee, a severance allowance unless saved by Section 55 of the Act.
20. In the present context each of the Claimants had been employed by the Council for more than 12 months and on the Council's own admission none had been dismissed for a disciplinary offence or for serious misconduct which would disqualify the Claimants under Section 55 (2) from receiving a severance allowance under Section 56. Indeed, the Council positively pleaded and proved that each Claimant was paid a severance allowance calculated under subsections (1) and (2) of Section 56, at the time of his/her termination thereby conceding that a severance allowance was due and payable to the Claimants in the circumstances.
21. In my view, Section 49 is a protective provision for an employee such as to require an employer to either give notice of termination to the employee before his/her dismissal or payment in lieu. It is not intended as defence counsel appears to suggest, as a provision legitimizing or authorizing dismissal by notice however unjustified or wrongful the termination might be. It is only where termination is based on proved '*serious misconduct*' that no notice is required at all [see: Section 50 (1)]. Anything short of that requires notice.
22. In other words, a notice of termination whether given under Section 49 or under Section 11.4 of the Staff Regulations effectively terminates the employment contract and ends the relationship of employer and



- employee. What it does **not** and cannot do, is to legitimize or justify an otherwise unjustified dismissal or wrongful termination.
23. The relevant factual circumstances of the Claimants' dismissals are not seriously disputed and are conveniently summarized in Claimants' counsel's submissions as follows:
- "Sometime before November, 2010 the Secretary General of Torba Provincial Council drew up appraisal reports in respect of the Claimant's work performances.*
- The appraisal reports on the Claimant's work performances were done without any consultation with the Claimants and were then submitted to the Council by the Secretary General with his recommendations that the Claimants continue to be employed by the Council under certain conditions.*
- On 3rd to 14th November, 2010, the Council at its ordinary sitting discussed the Claimants' appraisal reports and resolved to terminate all the Claimants ..."*
24. It is also common ground that prior to their terminations, the Claimants had never been given any written or verbal warning(s) **or** been reprimanded, or dealt with for any disciplinary offences with regard to their behaviour and work performance throughout their years of employment with the Council.
25. Even the appraisal reports which undoubtedly prompted the termination was never provided to the Claimants for their comments and explanations **nor** did the Council consider it prudent or necessary to require the Claimants' personal attendance, for the purposes of clarification and mitigation, at the relevant meeting at which the appraisal reports were considered and discussed and the termination decisions taken. This was particularly called for, as the appraisal reports actually recommended the continued employment of each of the Claimants by the Council.
26. The Council minutes do not record that consideration was given to any alternative method of dealing with the Claimants short-comings highlighted in their respective appraisal reports or to some lesser form of '*punishment*' and, whilst the Council's clear decision in respect of each of the Claimants was to terminate his/her employment, no real attempt has been made by the Council since the terminations, either in the sworn statements filed on its behalf or in its amended defence, to justify the Claimants dismissals.
27. On the basis of the evidence and pleadings before me I am satisfied and so find that the unilateral dismissal of each of the Claimants by the Defendant Council was, in all the circumstances, '*unjustified*' and



accordingly attracts an additional severance allowance payable under Section 56(4) of the Employment Act [CAP. 160].

28. I turn next to consider the "*multiplier*" under the Section. In this regard Claimants' counsel notes the following features that are common to all Claimants:

"(a) summarily terminated;

(b) although the Secretary General had recommended that the Claimants continue their employments, yet the Council decided to terminate each of them for matters which were merely disciplinary matters;

(c) it was their first time incidents;

(d) they were never given any prior warning or reprimand or disciplinary punishment;

(e) they were never given any opportunity to be heard prior to their termination even though their employment were their means of livelihood;

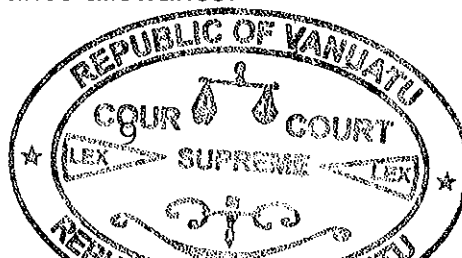
(f) having been terminated, they have generally found life difficult;

(g) Mr. Nin met with the Secretary General to discuss their reinstatements and warned of a likely action under Section 56 (4) of the Act, but the Council did not take any heed of the warning."

29. In addition the Claimants are "*locals*" in the sense that they all originate from the various islands that comprise the TORBA Province and therefore their dismissals would have a greater humiliating impact than if they were amongst strangers;

30. The Claimants all seek the maximum allowable severance allowance under section 56 (4) of the Employment Act, but, after considering all the evidence including the positions of each claimant; their lengths of service with the Council; their unblemished employment records; the circumstances of their unilateral termination and their future prospects of obtaining employment, I am inclined to award a lesser multiple of '*4 times*' to each of the Claimants under section 56(4) of the Employment Act.

31. Accordingly each of the Claimants are awarded under Section 56(4) the following additional severance allowance:




- **Henry Nin**
VT (289,380 x 4) = VT1,157,520
- **Charles Smith**
VT (151,996 x 4) = VT607,984
- **Philip Sovan**
VT (271,442 x 4) = VT1,085,768
- **Smith Nice**
VT (151,996 x 4) = VT607,984
- **Stephen Elman**
VT (463,376 x 4) = VT1,853,504
- **Ann Fred**
VT (408,674 x 4) = VT1,634,696

Together with interest of **5% per annum** under Section 56(6) of the Employment Act calculated from 28 November 2008 until paid in full.

32. The Claimants are also awarded their costs on a standard basis to be taxed if not agreed.

DATED at Port Vila, this 13th day of April, 2011.

BY THE COURT


D. V. FATIAKI
 Judge.

