

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

Civil Case No. 112 of 2010

BETWEEN: EDGEL TARI
Claimant

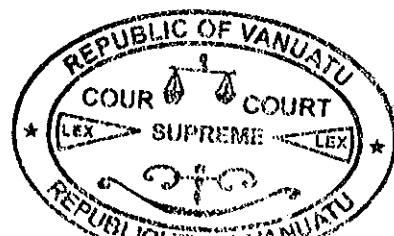
AND: THE REPUBLIC OF VANUATU
Defendant

Hearing: 20 July 2011
Before: Justice RLB Spear
In attendance: Andrew Bal for the Claimant
Florence Williams for the Defendant

JUDGMENT OF THE COURT

SPEAR J

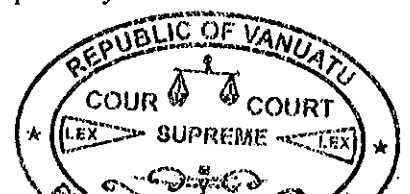
Delivered: 10 February 2012



1. Mr Tari claims damages and other statutory relief for the wrongful termination of his employment with *Malvatumauri National Council of Chiefs*.
2. The case first came before this Court for hearing on 6 June 2011. For reasons explained in the decisions given that day, the case was partly resolved by an admission on the part of the Republic that the termination of Mr Tari's employment was unlawful and wrongful. It was formally noted:

Judgment entered by consent in favour of the Claimant against the Republic of Vanuatu on liability arising from the admitted unlawful and wrongful termination of the contract of employment

3. That left the issues of damages and other statutory relief for determination.
4. Reference is also made to the Trial Ruling dated 20 July 2011 that dealt with certain preliminary issues raised at the commencement of this hearing.
5. I regret the delay in completing this decision and apologise to the parties for any inconvenience caused by it.
6. Mr Tari was engaged in about March 2004 by the Ministry of Internal Affairs to work for Malvatumauri. He was described as a consultant although in reality his role has always been as a Senior Manager; albeit one engaged on a fixed term basis. Certainly, there can be no suggestion that Mr Tari was ever an independent contractor in respect of whom the Employment Act [Cap. 160] did not apply. That indeed is conceded by the Republic and evidenced by the consent judgment entered earlier.
7. It does appear however that Mr Tari's employment responsibilities with Malvatamauri came about not because of an ongoing permanent need for his services but morefor specific projects. As is often the case, the funding for the specific projects had to be secured before the "contractor/employee" was engaged. In the case of Mr Tari, his initial and principal role was to help develop a corporate plan for Malvatumauri. In his unchallenged evidence, Mr Tari says that he worked on this between 2004 and 2008 and indeed developed the corporate plan. It would appear that his work was supported both financially and in other respects by *Ausaid* and the

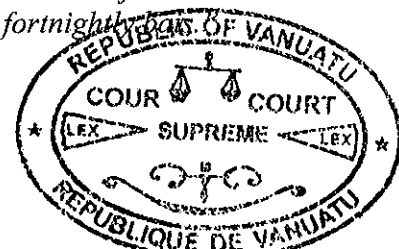


University of Queensland. It extended to developing a training program for the Chiefs in Vanuatu which appears to have become known as the *Kastom Governance Project*.

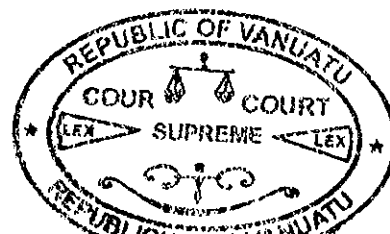
8. The background to Mr Tari's work is of importance because it did require him to work closely with *Ausaid* and also other external organisations.
9. This was by no means the only work undertaken by Mr Tari during those initial years. It simply gives some background to his continuing involvement with Malvatumauri. It also introduces one of the points of difference between the Chief Executive Officer of Malvatumauri (Sylwin Garu) and Mr Tari from about mid-2006 and which eventually led to Mr Garu's decision to dismiss Mr Tari in March 2007. Again, the full details of that dispute do not need to be explored given the concession by the Republic that the dismissal was unlawful and wrongful. Suffice it to say that there was, at the very least, some uncertainty on the part of Mr Garu, Mr Tari and a Mr Dickinson Tevi (another "consultant") as to who effectively was to manage the *Kastom Governance Project*; specifically, who had managerial responsibility for that project as between Mr Tari and Mr Tevi.
10. Mr Tari was eventually engaged directly and formally by Malvatumauri pursuant to a written contract dated 2 January 2006 for a fixed term of 12 months (1 January 2006 – 31 December 2006) with the purpose of the contract being described as follows, "*the main purpose of this contract is for Mr Edgel Tari to provide planning and development services and other professional services to Malvatumauri as specified in the duties and responsibilities scheduled attached to the contract – Schedule A*".
11. The remuneration was specified to be Vt 6,000 per day for normal working days and additionally,

"Given the nature of the Malvatumauri and Chief's responsibilities, (Mr Tari) may be requested to work during weekends and public holidays. The weekends and public holiday rates will be Vt 6,000 per hour.

Mr Edgel Tari will be required to submit invoice to Malvatumauri for the payment of his services. Invoices may be submitted on a fortnightly basis.



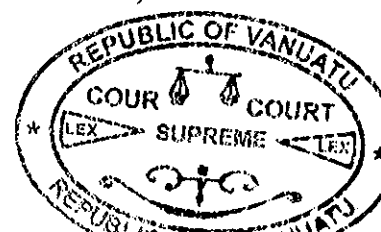
12. The contract goes on to describe Mr Tari as a former social planner with the National Planning Office. It acknowledges also that, prior to the contract commencement date of 1 January 2006, Mr Tari had been working with Malvatumauri through the Ministry of Internal Affairs from about March 2004 in a variety of respects including preparatory work for the 2004 and 2005 general meetings, the development of an information and filing system, the development of the first Malvatumauri Corporate Plan for years 2004 – 2008, the development and preparation of the Vanuatu Chief's Legislation and such like. Furthermore, work yet to be completed related also to the Malvatumauri Corporate Plan and its review together with related project planning and other similar work. The job description in the schedule also specified a role involved with the coordination of phase 2 of the Vanuatu Chiefs' Skills' Building and Training Project, the monitoring of the development of the Island Council of Kastom Chiefs and the review of the Malvatumauri National Council of Chiefs' Kastom's Policy.
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.
14. Mr Garu initially suspended Mr Tari in late December 2006 but that suspension was set aside by the President of Malvatumauri when he returned from Christmas leave in January 2007. Nothing turns on that suspension in so far as this case is concerned except that it identifies that certainly by December 2006, Mr Garu as CEO of Malvatumauri was experiencing difficulties in his relationship with Mr Tari.
15. Notwithstanding that suspension, and somewhat curiously, the 2006 contract was indeed renewed by Mr Garu for the year 2007 at the same time (20 December 2006) and on the same terms as for 2006. This was with Mr Tari's agreement.



16. Matters reached a head in March 2007. Mr Garu wrote to Mr Tari (by letter dated 16 March 2007) giving notice to Mr Tari that his current contract was “*terminated with effect as of today*”. Mr Garu went further and specified in that letter that the “*main reasons behind this termination*” were:

- “ 1. *Despite your suspension last year for misrepresentation and the issuing of 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.*”

17. It certainly appears that the cause for dissatisfaction between Mr Garu and Mr Tari was the question of managerial control in relation to the Vanuatu Kastom Governance Partnership project. Where-ever the rights or wrongs might lie in respect of that issue, what is clear is that Mr Garu did not manage this conflict at all well and resorted to summary dismissal when there was no justification for doing so. Particularly in respect of a senior management conflict such as this, every effort should have been made by the CEO (Mr Garu) to resolve the differences through mediation or the involvement of an intermediary or such like. However, it is unnecessary to deal further with that as the Republic accepts, as it had to, that Mr

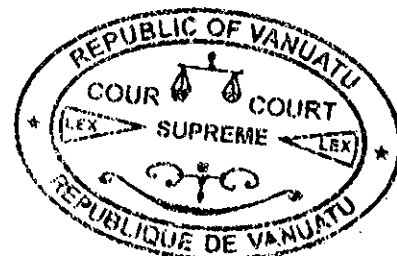


Garu was not entitled to summarily dismiss Mr Tari. That leaves the question of the assessment of damages for determination.

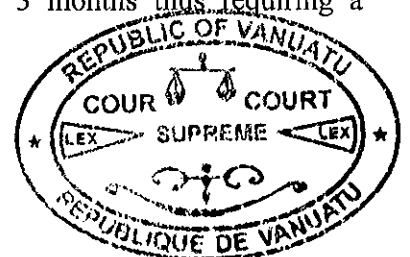
18. The evidence presented in this case for the claimant was in the form of 3 sworn statements from Mr Tari dated 9 August 2010, 24 March 2011 and 28 June 2011. For the defendant, the evidence was by sworn statements from Mr Garu dated 4 March 2011, Oriett Ronneth dated 20 July 2011 and Jack Loughman of the Department of Finance dated 20 July 2011.

19. Mr Tari's sworn statements explained how devastating his dismissal was on both himself and his family because of the initial and abrupt loss of income and the eventual difficulties he experience finding replacement employment. Again, it is unnecessary to delve too deeply into what was a very detailed explanation, indeed a detailed chronicle, of those difficulties. Suffice it to say that it was clearly devastating for Mr Tari and his family to be without any income at all following his summary dismissal in mid-March 2007 and then to be on a significantly reduced income after Mr Tari was able to find some temporary work for the latter half of 2007. In that respect, Mr Tari found himself unable to obtain senior management or policy positions in any of the Vanuatu Government Ministries despite applying for many positions and equally appeared unable to secure employment with the principal aid donors in Vanuatu with whom he had worked from as far back 1992. This is particularly detailed in section 2 of Mr Tari's sworn statement of 28 June 2011. I willl return to these issues in due course but it is timely to mention that the letter from Mr Garu of 16 March 2007 terminating Mr Tari's contract is specified to have been copied only to the Director General of the Ministry of Justice, Cultural and Social Affairs. However, Mr Tari's unchallenged evidence (his sworn statement of 28 June 2011 section E) is that this termination letter was indeed copied to *AusAID* as well and that this combined to have a substantial and lasting effect upon his ability to obtain replacement employment with other Government agencies or Departments or any of the aid donors.

20. Mr Tari's claim needs to be considered in 3 separate categories:-



- a) Outstanding wages;
 - b) Severance allowance;
 - c) Common Law Damages;
21. None of the deponents of the sworn statements were called for cross examination. That could have caused some real difficulty in this case if the dispute as to the background of the dismissal remained in issue. However, the concession by the Republic that the dismissal was wrongful and unjustifiable meant that that issue did not have to be explored further. Be that as it may, it is of particular importance and significance that Mr Tari's evidence as to the devastating effect of the summary dismissal on Mr Tari and his family has not been challenged either by contrary evidence or by cross examination. The Court of Appeal dealt with the predicament that a trial judge can face when deponents are not cross examined: see *Hack v. Fordham* [2009] VUSA 6/Civil Appeal Case 30 of 2008 (30 April 2009). It is unnecessary to deal further with that case in this respect except to note that it explains why the Republic is unable to contest the assertions made by Mr Tari as to the devastation to both his life and the life of his family that resulted from his summary dismissal.
22. At the commencement of this hearing, I was notified that counsel reached agreement on the following matters:-
- a) That for determination purposes, the Court should work off a notional monthly salary of Vt 126,000. That was most helpful as Mr Tari's remuneration entitlement was dependent on hours worked per week or month and with the possibility of overtime for weekend work to be remunerated at a much higher rate than during the normal working week. I have accordingly adopted Vt 126,000 as the monthly payment for the purposes of this case;
 - b) Counsel also agreed that the severance allowance (section 56 (2) Employment Act) should be based on employment for 1 year 3 months thus requiring a



calculation of 2/3s of Vt 126,000 being Vt 84,000. Again, I have adopted Vt 84,000 as the severance allowance for the purposes of this case.

23. Both the monthly remuneration amount of Vt 126,000 and the severance allowance of Vt 84,000 are obviously careful estimates by counsel as to what the true average amount would be notwithstanding the uncertainty that must arise where the remuneration of an employee is principally dependent on days worked and with overtime.

Outstanding Wages/ Remuneration

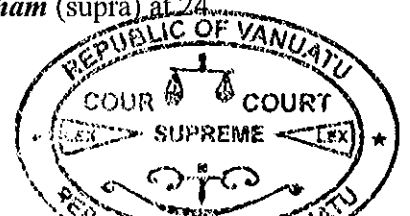
24. Mr Tari is entitled to the wages due to him for the balance of his contractual term; that is, effectively 9 ½ months to 31 December 2007 which equates to Vt 1,197,000.
25. Consideration then needs to be given to the amount that Mr Tari earned after his dismissal and for the latter half of 2007. He was obliged to seek replacement work under his duty to mitigate his loss.
26. Mr Tari initially found work after his dismissal with the Garrison Bank – an off-shore bank. The actually salary paid was not detailed but simply described by Mr Tari as, “*very low just enough to cover my family rent and subsistence in Port Vila*”. That employment lasted only until July 2010 when the Garrison Bank ceased its operation in Vanuatu.
27. Mr Tari also worked between June 2007 and October 2007 in a junior position with the Department Health on a wage of Vt 54,091 per fortnight.. It was not entirely clear from the material provided but if, on that basis, Mr Tari worked the full months of June and October then that would amount to 21 weeks. Taking that as 10 fortnights, this results in an amount of Vt 540.091. However, it is more likely that the full months from June to October were not worked so I have treated this accordingly as Vt 500,000.
28. I also allowed Vt 100,000 in respect of the employment with the Garrison Bank.



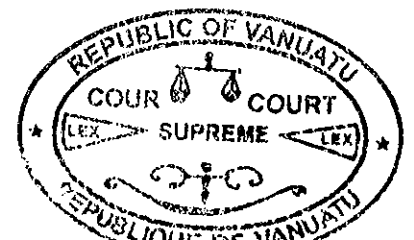
29. This leaves an amount due to Mr Tari for outstanding wages of Vt 597,000 (1,197,000 less 600,000).

Severance Allowance

30. As indicated, the severance allowance (s 56 (2)) is to be treated as Vt 84,000. However, it is abundantly clear, and it has of course been conceded, that the termination was unjustified and that the Court is accordingly entitled to order further that Mr Tari be paid an amount of up to 6 times the amount of that severance allowance.
31. I have mentioned before but reiterate that the unchallenged evidence from Mr Tari is that both he and his family suffered grievously by reason of the employment being cut short and without notice. It is implicit by reason of the provisions of the Employment Act, that an employee can be summarily dismissed only in the event of serious misconduct and where no other course of action is open to the employer – see s 50. Indeed, section 50 (4) requires an employer, before dismissing an employee on the grounds of serious misconduct, to give the employee “*an adequate opportunity to answer any charges made against him*” and the section continues to add any dismissal in contravention of that sub section “*shall be deemed to be an unjustified dismissal*”.
32. Accordingly, the concession by the Republic that Mr Tari’s summary dismissal was unjustified was hardly surprising.
33. It is well settled that the purpose of the assessment of the multiplier under section 56 (4) “*is to enable the Court to compensate an employee for any special damage which he has suffered by reason of an unjustified dismissal if the basic severance allowance is insufficient for that person..... the section may also be invoked to reflect the circumstances which led to the dismissal*” –*Hack v. Fordham* (supra) at 24.



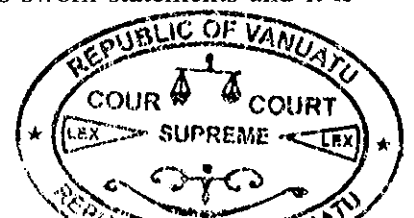
34. Mr Tari has detailed in extensive form exactly how devastating his summary dismissal was for both himself and his family. First, he was left with no income at all and that included benefits that were due to him. Mr Tari consult his solicitors who wrote to Malvatumauri seeking his benefits including the severance allowance but were told on 3 April 2007 that Malvatumauri were not prepared to pay anything. Mr Tari then quickly found himself in a position where he was unable to pay his daughter's school fees at Central School but he managed to arrange with the school for a time payment. He had to resort to obtaining credit from a local store for such necessities as rice and firewood. He was left at times with no money to cover rent, food or school fees until he was able to find work; albeit somewhat menial work (for him) and poorly paid. In June 2007, Mr Tari's daughter was sent home from school from non payment of school fees and he had no money to pay the fees as requested. Later that month, he found he could not pay electricity and water for his home as his savings at Westpac had been used up resulting in those essential services being cut for some days. That occurred on two separate occasions and his family found itself having to obtain water from their neighbor.
35. The circumstances of the dismissal were obviously highly distressing for Mr Tari and unsurprisingly so. There were no warning letters expressing dissatisfaction with Mr Tari's work. He was at his home on Monday 19 March 2007 at 5.00 pm when the driver from Malvatumauri delivered the letter from Mr Garu dated 16 March 2007 giving notice of his dismissal. Mr Tari went in to the office on Wednesday 21 March 2007 to collect his personal effects and to speak with the President of Malvatumauri who was, as it happened, away on Pentacost. There was an unpleasant encounter in his office with Mr Garu who told Mr Tari that he was not allowed in the office..
36. Mr Tari went back to the Malvatumauri office on 26 March 2007 in the hope of meeting with the President and to collect the rest of his personal items. The President was still away. The police were called and Mr Tari had to suffer the indignity of being ordered by the police to leave the office. To add insult to injury, the police subsequently served him with a trespass notice forbidding him from entering on to the Malvatumauri office premises.



37. The unchallenged evidence from Mr Tari demands a very clear and firm response by this Court to what was undoubtedly ill-tempered, arrogant and insensitive conduct on the part of Mr Garu in his capacity CEO of Malvatumauri. Mr Garu may have become frustrated with Mr Tari but this was not the way for any employee to be treated.
38. This case easily reaches the category of the worst case of its type. It is an example of a senior manager's misuse of authority and his complete disregard for the sensitivity that must always be recognised in employment disputes. The severance allowance will increase by a factor of 6 to reflect Mr Garu's appalling conduct as CEO of Malvatumarui in this respect. That results in an award of Vt 504,000.
39. Mr Tari has also dealt extensively with the difficulties he encountered financially in the subsequent years to 2007. However, there has to be some limit placed upon this as he was on a fixed term contract and only for that 2007 year when this contract was terminated. He was not entitled to have his contract further extended with Malvatumauri in to 2008 although he might have had some expectation in that respect. That is, he would have had no recourse at law if Malvatumauri had decided not to extend his contract for 2008 and he would then have been in a position of being without income unless he found alternative employment.
40. However, that does not mean that he is not entitled to seek damages for the position in which he found himself in subsequent years. Just that this should not be reflected in this assessment of the section 56 (4) multiplier in case it amounts to double counting of damages.

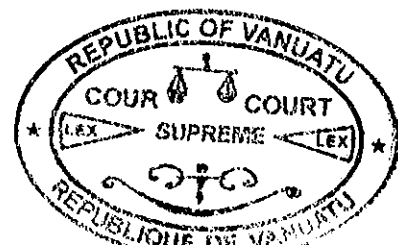
Common Law Damages

41. What was particularly damaging to Mr Tari was not just the dismissal and the financial difficulties that this caused but the damage he also suffered to his reputation particularly with Government Departments but also the principal aid donors in Vanuatu. This is all carefully detailed by Mr Tari in his sworn statements and it is



unchallenged evidence. It is clear that he applied for numerous positions within Government Departments and with local aid donors but he found that all doors were closed to him. Indeed, it appears that he has persistently applied for every position he became aware of that remotely suited him and he continues to do so. In one case, it was made clear to him that he could not be considered seriously for the position as it would require him to establish a working relationship with Malvatumauri.

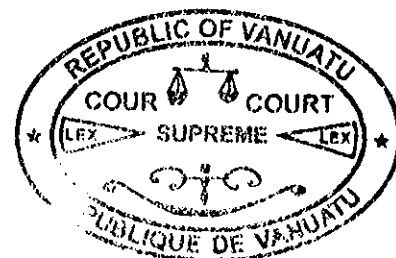
42. Mr Tari asserts (not challenged or contradicted) that Malvatumauri sent a copy of the letter of termination to *AusAID* and it takes little imagination to appreciate that the circumstances of his dismissal and the complaints made by Mr Garu against him would have become widespread knowledge within senior Government Department circles and with the principal aid donors without too much delay. There was no need at all for Malvatumauri to have sent a copy of that letter of termination to *AusAID* or indeed to other Government Departments. Simple notification that Mr Tari had ceased employment with Malvatumauri was all that was required either to Government Departments or the principal aid donors that Malvatumauri worked with. To go further and provide a copy of the letter that accused him of such disagreeable and disrespectful conduct would unquestionably have damaged his employment prospects in Vanuatu within the employment sector that he could have expected to find replacement work.
43. There is again nothing to counter Mr Tari's contentions that he was unable find work and that this had a continuing financial effect upon both him and his family which continues today. In his final sworn statement, Mr Tari details carefully all the difficulties that he encountered as he found himself virtually unemployable in relation to positions for which his qualifications and experience would have easily qualified him. It is well understood that Malvatumarui is a vital and active component of the constitutional and governmental framework of Vanuatu. It is accordingly easy to see how it became difficult for Mr Tari to find replacement employment suited to his qualifications and experience as that type of work would be understood as likely to bring him in to contact with Malvatumauri.



44. Mr Tari seeks general damages for the harm done to his reputation in the sum of Vt 4 million and specific damage in a similar amount for all the complications, the distress and the humiliation he suffered over the years 2008 and onwards. However, it is important to approach the assessment of the common law damages in a slightly different way to the way in which Mr Tari has presented this part of his claim.
45. I accept unreservedly that the wrongful dismissal coupled with the publication of the detailed letter of termination to Government Departments and *AusAID* did irreparable harm to his reputation and work prospects in a limited job market in this relatively small community and that this continues to this day. This occurred at a time when it can be accepted that Mr Tari was at the most productive stage of his life (he has now 56 years of age). It is hard to see an alternative explanation for the inability of Mr Tari to secure employment suited to his qualifications and experience in this relatively small community. This special damage warrants an award of Vt 3 million which is a modest award given the income that he could have expected to have enjoyed over the last four or so years.
46. For the hurt, the humiliation and the distress suffered by him, I award the further sum of Vt 100,000.
47. It simply must be understood that an employment contract is one founded on trust and respect. There are procedures available for bringing an employment contract to an end and they can be resorted to even in cases that fall short of serious misconduct. Those in management roles must understand that they are dealing with the lives of not just the employee but often also the employee's family. Care and sensitivity must be given to situations that have created problems within the employment relationship. Summary dismissal, and then the adoption of a defiant attitude to the sacked employee, as has occurred here, must be treated by the Courts in a way that leave the employer in no doubt at all that it will not be tolerated.

Conclusion

48. The total damages accordingly amount to Vt 4,201,000:



a)	Outstanding wages (para 29)		597,000
b)	Severance allowance (para38)		504,000
c)	Common Law damages		
	i) Special (para 45)	3,000,000	
	ii) General (para 46)	<u>100,000</u>	
			<u>3,100,000</u>
			4,201,000

49. Judgment is entered for the Claimant in the total sum of Vt 4,201,000 together with interest thereon at 5% per annum from 1 September 2010 (commencement of the proceeding) until receipt of payment.
50. The Claimant would usually receive an award of costs. However, the issue of costs is problematic as the Claimant is represented by the Public Solicitor and, of course, the Defendant is represented by the State Law Office. If an order of costs is required, the Public Solicitor is to file a memorandum in that respect by 2 March 2012 and the State Law Office is to file any reply by 23 March 2012. In that event, the costs will be determined on the papers filed.

BY THE COURT

