

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

**Civil Case No. 12 of 2014**

**BETWEEN: WALTER KALAMBAE**  
*Claimant*

**AND: AIR VANUATU (OPERATIONS) LTD**  
*Defendant*

*Hearing: Thursday 18 September 2014*  
*Judgment: Monday 29 September 2014*  
*Before: Justice Stephen Harrop*  
*Appearances: Jack Kilu for the Claimant*  
*Edward Nalyal for the Defendant*

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**RESERVED JUDGMENT OF JUSTICE SM HARROP**

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**Introduction**

1. Walter Kalambae worked for Air Vanuatu (*“the company”*) for more than 22 years. His employment began on 3 December 1990 and was abruptly terminated on 13 February 2013 with no reasons given. Air Vanuatu simply gave him written notice pursuant to section 49 of the Employment Act [Cap.160] (*the Act*) and paid him three month’s salary in lieu of notice together with a severance allowance under section 54 (1) and other entitlements. Although he received that salary in lieu of notice he was permitted to work, and was paid for working, until 31 March 2013.
2. Mr Kalambae was understandably aggrieved by the company’s failure to give him any explanation for its decision and he claims that it acted *“in total breach of his constitutional rights to natural justice and the provisions of the employment act.”*
3. As he contends the termination of his employment contract was unjustified, Mr Kalambae claims under section 56 (4) of the Act five times the amount of severance allowance to which

he was entitled under section 56 (2) and which he was paid. He also claims common law damages in the sum of Vt 500,000 because of the aggravating circumstances of his termination and continued poor treatment since termination together with interest and costs.

4. Mr Kalambae also says that from December 2009 to the end of his employment he was underpaid at the rate of Vt 11,000 per month. On the application of the company's salary scale, which increased with length of service, Mr Kalambae says that from 4 December 2009 he ought to have been receiving Vt 191,500 per month rather than Vt 180,000 per month.
5. Mr Kalambae's severance multiplier claim is therefore made in the alternative depending on the Court's finding in relation to his monthly salary for the period from 4 December 2009 to 31 March 2013. A finding in his favour on that issue would also increase the basic severance payment itself so he claims that too.
6. On termination Mr Kalambae received the sum of Vt 4,655,095. In total he claims that a further Vt 22,941,490, or alternatively Vt 20,661,850, ought to be awarded to him because his termination was unjustified and because of the surrounding circumstances.
7. The company denies any further liability. It says it has paid Mr Kalambae everything to which he is entitled having regard to what was an ordinary termination by notice under section 49. Indeed, by effectively giving him some 6 weeks' written notice of termination *and* three month's salary in lieu of notice it has gone beyond its obligations to him. Further it says that oral notice of termination, which is sufficient under section 49 (2), was given on 11 January 2013 so that Mr Kalambae had nearly three months' notice of termination *as well as* payment of three month's salary in lieu of notice.
8. The company says that the termination of contract was in no way unjustified and that it had no obligation to provide reasons or to give Mr Kalambae any opportunity to "*answer charges*" as it would have been required to do had this been a dismissal for serious misconduct (section 50 (4)). Accordingly the company says that the jurisdiction to make an award under section 56 (4), of a payment up to six times the amount of the basic severance allowance, is simply not enlivened. That only happens where the Court finds that the termination of an employee

was unjustified; here it was justified because it was simply an “on notice” termination in accordance with section 49.

9. As to the claim for the increased monthly salary, the company says that while it acknowledges the existence of the pay scale, any such increment was at the discretion of the company and based on the performance of each employee. It further says that during the relevant period Mr Kalambae and other employees were advised that no employee would receive such an increment because the financial situation of the company did not allow it.

### **Issues**

10. Leaving aside some factual disputes which need to be resolved, the two fundamental issues I need to determine are:
  - 1) Was the termination of contract unjustified?
  - 2) Was Mr Kalambae entitled to the monthly salary increment or not?
11. Depending on the answers to these key questions, others may arise for determination.

### **The Evidence**

12. Mr Kalambae was the sole witness in support of his claim. For the company evidence was given by Reynolds Boeson, the Manager of Human Resources and by Rene Bebe, the Manager of Financial Control. All three witnesses were cross-examined.
13. I do not propose to traverse all of the evidence given because in my view the facts directly relevant to my decision are within a relatively narrow compass and largely undisputed.
14. The facts as I find them to be are that the reason why Mr Kalambae’s contract was terminated was that for some time, in the company’s view, his work performance in relation to reduction of the accounts receivable had been below par. Mr Bebe said that when he rejoined Air Vanuatu as the Manager of Financial Control in March 2010, Vt 215,000,000 was outstanding with 62% of that sum at least four months old. Some debts were two or even three years old.

15. From that point he told Mr Kalambae that something had to be done to get customers to reduce this level of indebtedness. At the end of 2010 Vt 72,000,000 had to be written off. A substantial portion of the outstanding debt related to Government Departments or Ministries. While of course Mr Kalambae was not responsible for creating those debts, the company considered he was not being aggressive enough in his efforts to reduce them.
16. In late 2012 and again in early 2013 Mr Bebe met with Mr Kalambae and Mr Boeson and he was told that his work performance had to improve. No written warnings were however given to him or specific targets as to what the company expected him to achieve and by when. Nor was Mr Kalambae told that if his performance did not improve then his contract would be terminated. He was given no indication at all that his longstanding employment was at risk.
17. On 11 January 2013, Mr Bebe and Mr Boeson met again with Mr Kalambae and told him that his employment would be ending. I accept that this came as complete shock to him and that even though there had been earlier discussions about his performance these were, curiously, not overtly linked to the decision to terminate. Mr Bebe accepted in cross-examination that there was simply no discussion about that.
18. As is obvious from this Mr Kalambae had no opportunity to respond to the reasons for his termination because he was not given any.
19. The company's silence as to reasons was maintained by the terms of its termination letter of 13 February 2013, which stated:

*Walter Kalambae  
Finance Department  
PO Box 148  
PORT VILA, VANUATU*

*Dear Walter,*

**Re: EMPLOYMENT AIR VANUATU (Operations) LIMITED**

*Pursuant to Section 49 – “Notice of Termination of Contract” – under the Employment Act of the Laws of the Republic of Vanuatu, which states in part:-*

- 49 (3.a) – where the employee is remunerated at intervals of not less than 14 days, shall not be less than 14 days before the end of the month in which the notice is given.
- 49 (4) - Notice of termination need not be given if the employer pays the employee the full remuneration for the appropriate period of notice specified in subsection (3).

*Air Vanuatu (Operations) Ltd (“Air Vanuatu”) hereby gives you notice of termination of your employment.*

*In final settlement and whilst acknowledging Section 49 (4), Air Vanuatu elects to make the payment of three (3) months’ salary in lieu of such notice.*

*Accordingly, you are no longer employed by Air Vanuatu, effective immediately, 31 March 2013.*

*Your outstanding entitlements, including your three (3) months’ salary in lieu of notice, is being deposited to your designated bank account in full and final satisfaction of all claims being:-*

1. *All Outstanding Salary*
2. *Severance Payment*
3. *Three(3) Months’ In Lieu of Notice, and*
4. *All Outstanding Annual Leave/Holiday Pay.*

*Please immediately return all Air Vanuatu Property in your possession, including Uniforms, Security Identification Cards etc.*

*If for any reason in the future, you have to enter Air Vanuatu Offices and/or Property, could you please notify the undersigned for prior approval for such entry. If you fail to do so and do enter Air Vanuatu Offices and/or Property without authority, you may be prosecuted or sued for trespass.*

*You will be provided details as to the payment made in due course.*

*On behalf of Air Vanuatu (Operations) Limited we take this opportunity to thank you for your loyalty with the company and for the service you have provided during your employment.*

*Yours faithfully,*

*Reynolds Boeson  
MANAGER HUMAN RESOURCES*

20. In relation to the salary increment issue, the company witnesses said that the increments indicated in the pay scale were not something to which employees were automatically entitled but rather had to be approved by the Chief Executive Officer. Mr Boeson said there was a

memorandum from the Chief Executive Officer in 2009 saying that no increment would be paid to any employee because of the company's financial position. However he did not produce that memorandum and, even if it existed, I am not satisfied that that was the reason for Mr Kalambae not receiving an increment. Rather, Mr Bebe made clear in his evidence that the Chief Financial Officer, Helen Kalmet, in the exercise of her discretion about whether or not to grant the increment had decided that Mr Kalambae's current salary of Vt 180,500 per month was sufficient, having regard to his performance. He accepted that the decision had been made in relation to Mr Kalambae personally rather than on a company-wide basis.

21. Mr Bebe also accepted that Mr Kalambae was not told of the reason for his not receiving the increment.
22. I accept Mr Kalambae's evidence that other employees in his section did receive the increment so I reject Mr Boeson's evidence that there was a company-wide decision to deny everyone such an increment, or at least if there was, it was not applied to everyone.
23. That said, Mr Kalambae himself accepted in cross-examination that any increase in salary was based on performance and it was a matter in the ultimate discretion of the Managers of the company whether or not the pay scale should be applied. He agreed that it was a combination of length of service and performance which would determine what an employee was paid at any particular point in time.

### **Submissions**

24. I pointed out to Mr Kilu that the claim did not expressly plead that this was in truth a termination for serious misconduct which enlivened the section 56 (4) jurisdiction. He accepted that but submitted that it was obvious that Mr Kalambae did claim his termination was unjustified. Further it was in effect a dismissal for serious misconduct namely the alleged failure to perform adequately in relation to the recovery of the substantial debts owed to the company. He submitted that the company's failure to refer to this as the real reason for the dismissal, which it now accepts it was, showed that it had acted in breach of its obligations under section 50 (4) of the Act which required that Mr Kalambae be given an adequate opportunity to answer any charges made against him. Because he was not given that

opportunity his dismissal was deemed, by s.50(4) to be unjustified and this enlivened section 56 (4).

25. As to the salary increment issue, Mr Kilu submitted that because there had been no warnings about lack of performance and because on previous occasions Mr Kalambae had automatically received the increment as his years of service accrued, the company had an obligation to increase his salary in December 2009. Regardless of whether the company was satisfied with his performance, it was required to follow its usual practice and apply the pay scale anyway.
26. Mr Kilu submitted that the circumstances of this termination warranted the award of common law damages on top of the payment of five times the basic severance allowance sought under section 56 (4). He submitted that Vt 500,000 was appropriate although he accepted that the highest award of which he was aware under this head was Vt 100,000. He also submitted that interest ought to be awarded on the payment under section 56 (4) pursuant to section 56 (6). Although that allows interest up to 12%, Mr Kilu accepted, based on another Supreme Court judgment, that 10% would be appropriate. He also sought interest at 5% per annum on the underpaid salary.
27. Mr Nalyal submitted that the termination was entirely justified and proper in terms of section 49 of the Act. There was no obligation to provide a justification for it or reasons for it and Mr Kalambae had no basis for complaint; indeed he had been treated more generously than required.
28. Mr Nalyal denied that Mr Kalambae had been guilty of misconduct let alone serious misconduct and therefore denied that the company had obligations under section 50 (4) to explain its concerns and to give him an adequate opportunity to respond before deciding whether or not to terminate. He also pointed out (correctly) that there had been no pleading by Mr Kalambae that this was a dismissal for serious misconduct dressed up as a termination on notice.

29. In short, because the termination was an orthodox termination on notice under section 49 it was justified and could not give rise to any further payment than those which Mr Kalambae had already received.
30. In relation to the salary increment issue, Mr Nalyal submitted that Mr Kalambae had no *right* to such an increment. It was a matter for discretion for the company's managers and where they had decided in their discretion not to grant the increment that was not a decision which could be challenged or the subject of a claim under the Act.

### **Discussion and Decision**

31. This case turns on the application of the sections in the Act relating to termination of contract. Also relevant, to the extent not in consistent with those sections, is Mr Kalambae's employment contract dated 4 June 2007 relating to his appointment to the position of Accounts Receivable Supervisor (Permanent, Full-time).
32. The contract provided under the heading termination of employment:
- “Employment may be terminated by either yourself or Air Vanuatu for any reason by either party giving to the other one (1) month's notice of one (1) salary [sic] in lieu of notice or by otherwise mutual agreement.*
- Air Vanuatu may terminate your employment without notice in the event of serious misconduct or other sufficient cause, in which case salary and other remuneration is payable up to the date of dismissal only. “Serious misconduct” includes but is not limited to theft, consumption of or being under the influence of alcohol or other drugs whilst on duty, fighting, representing Air Vanuatu without authorization, including acting in a manner that will bring the image of Air Vanuatu into disrepute and other matters in accordance with Air Vanuatu policies as varied from time to time.”*
33. I obtained clarification from Mr Nalyal that the company had provided the amount of notice required by section 49 rather than that indicated by the contract because this was more generous to Mr Kalambae. Mr Nalyal accepted that the company could not contract out of the Act or at least not to the prejudice of an employee.



34. Sections 48 to 53 of the Act provide:

***“TERMINATION OF CONTRACT***

**48.** *Subject to the provisions of this Part a contract of employment shall terminate on the last day of the period agreed in the contract or on the completion of the piece of work specified therein.*

***NOTICE OF TERMINATION OF CONTRACT***

**49.** *(1) A contract of employment for an unspecified period of time shall terminate on the expiry of notice given by either party to the other of his intention to terminate the contract.*

*(2) Notice may be verbal or written, and, subject to subsection (3), may be given at any time.*

*(3) The length of notice to be given under subsection (1)-*

*(a) where the employee has been in continuous employment with the same employer for not less than 3 years, shall be not less than 3 months;*

*(b) in every other case-*

*(i) where the employee is remunerated at intervals of not less than 14 days, shall be not less than 14 days before the end of the month in which the notice is given;*

*(ii) where the employee is remunerated at intervals of less than 14 days, shall be at least equal to the interval.*

*(4) Notice of termination need not be given if the employer pays the employee the full remuneration for the appropriate period of notice specified in subsection (3).*

***MISCONDUCT OF EMPLOYEE***

**50.** *(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.*

*(2) None of the following acts shall be deemed to constitute misconduct by an employee-*

*(a) trade union membership or participation in trade union activities outside working hours, or with the employer's consent, during the working hours;*

*(b) seeking office as, or acting in the capacity of, an employee's representative;*

*(c) the making in good faith of a complaint or taking part in any proceedings against an employer.*

*(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.*

*(5) An employer shall be deemed to have waived his right to dismiss an employee for serious misconduct if such action has not been taken within a reasonable time after he has become aware of the serious misconduct.*

#### **EMPLOYEES MAY SEEK WORK DURING NOTICE**

*51. During the period of notice an employee shall be entitled to a reasonable period of time off work without loss or reduction of remuneration in order to be able to seek other employment.*

#### **CERTIFICATE OF EMPLOYMENT**

*52. (1) An employee whose employment has been terminated shall be entitled to receive from the employer, on request at the time of the termination, a certificate specifying the dates of his engagement and termination and the type of work on which he was employed.*

*(2) Nothing unfavourable to the employee shall be inserted in such a certificate.*

#### **BREACH OF CONTRACT BY EMPLOYER**

*53. (1) If an employer ill treats an employee or commits some other serious breach of the terms and conditions of the contract of employment, the employee may terminate the contract forthwith and shall be entitled to his full remuneration for the appropriate period of notice in accordance with section 49 without prejudice to any claim he may have for damages for breach of contract.*

*(2) An employee shall be deemed to have waived his right under subsection (1) if he does not claim it within a reasonable time after he has become aware of his being entitled thereto."*

35. These sections are effectively a code for the termination of all employment contracts in Vanuatu.

36. In my view the plain meaning of section 49 is that either party, without any justification or reasons given, may give notice to the other party at any time, orally or in writing, to terminate an employment contract.

37. Noticeable by its absence of these sections is any obligation cast on an employer to treat an employee fairly, including to consult an employee about the risk of termination and the reasons for termination, in circumstances falling short of serious misconduct.
38. To put this in another way, every employee in Vanuatu, no matter how long-serving and no matter how unblemished their work performance record may be, is at risk of their contract being terminated on a maximum of three months' notice. Parliament has decided to strike the balance between employers and employees interests in that way. This is not the balance which has been struck in many other jurisdictions, but it is the law in Vanuatu and the Court must apply it.
39. Here the company did not at any stage claim that Mr Kalambae was guilty of misconduct, let alone serious misconduct and it did not dismiss him for any such reason but rather took the easier, if potentially more expensive, option of terminating Mr Kalambae's contract on notice. Had there been serious misconduct then it would have been entitled under section 50 (1) to dismiss him without notice and without compensation in lieu of notice. It also would not have been required to pay any severance allowance as section 55 (2) makes clear.
40. What is also obvious from the scheme of the Act, in my view, is that where an employer complies with the conditions in section 49, such a termination can never be held to be an unjustified termination. That is because it is a manner of termination expressly provided for in the Act and which by definition every employee must accept as justified if it occurs. An employer must equally accept as justified a termination by notice given by an employee.
41. This means that, unless I uphold Mr Kilu's submission that this was in truth and substance, if not in form, a dismissal for serious misconduct, then no payment under section 56 (4) is possible because a pre-condition to such a payment is that the termination was unjustified.
42. I do not accept that this was a "*closet*" dismissal for serious misconduct in the guise of a termination on notice. There has been no suggestion that Mr Kalambae engaged in anything coming close to "*misconduct*" let alone "*serious misconduct*". The contract itself gives the flavour of what amounts to serious misconduct and it does no more than reflect the common

understanding of such a term. The most that Mr Kalambae was guilty of, according to the company, was inadequate performance of his duties over a period of time.

43. Accordingly the company had no obligation to give Mr Kalambae an adequate opportunity to answer “any charges made against him” in terms of section 50 (4). Its failure to do this was not therefore a basis on which I could conclude that this was an unjustified dismissal giving rise to the possibility of a payment under section 56 (4). I accept Mr Nalyal’s submission that this was a straightforward termination by notice under s.49. It was not an unjustified termination in any relevant sense.
44. I am therefore satisfied that Mr Kalambae’s claims for a payment under section 56 (4) and for common law damages have no foundation and must be dismissed. The reality, harsh though it may seem, is that he was not well treated by the company in the sense that he was not given clear targets to achieve with the risk of termination clearly stated to him and further he was not given any reason for the termination when it did occur. Most surprisingly, seeing that the company considered there was a justification for its termination of Mr Kalambae’s contract, despite the recent discussions with him about his level of performance, this was not in any way said by the company representatives to be linked to the decision to terminate.
45. In addition Mr Kalambae was not accorded the courtesy of being told that he was not receiving the 2009 increment because his level of performance did not warrant it. Indeed through the company’s pleadings and Mr Boeson’s evidence he was given a false reason for the decision not to increase his monthly salary to the Vt191,500 level that his length of service made possible.
46. However, such unfair treatment does not under section 49, or any other provision, give rise to any remedy. Effectively an employer which is willing to provide the requisite notice, or the appropriate payment in lieu of notice, does not have to act fairly towards even a longstanding employee such as Mr Kalambae. That said, I accept Mr Nalyal’s point that Mr Kalambae did receive the benefit of both a period of notice and payment in lieu of notice which the company had no obligation to provide in addition.

47. The employment laws of many countries provide remedies for employees who are treated unfairly by an employer in relation to termination of employment. For example in New Zealand the governing provision in the Employment Relations Act 2000 states:

**103A Test of justification**

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

48. If this provision, or one like it, were part of the law of Vanuatu, the result of this case would likely have been very different. I am not in a position to comment on Mr Kalambae's performance but I can comment on the procedural performance of Air Vanuatu as I heard evidence about it. That fell well short of the process a fair and reasonable employer would have followed in respect of Mr Kalambae, an employee of 22 years' standing and only two years short of the company's retirement age of 55. Such an employer would have been upfront with Mr Kalambae back in 2009 as to why, by contrast with other staff in his section, he was not receiving his salary increment. It would have set out in writing the shortcomings it saw in his performance. It would have had regular reviews thereafter with written advice as to their outcomes and future expected performance and goals. It would have clearly stated that unless certain targets were met, his continued employment was at risk. Mr Kalambae struck me as the sort of person who would likely have responded positively to such advice, especially as he had entered into some financial commitments on the assumption of his continued employment.

49. An employer does not have to go beyond complying with the law, but there is of course nothing to prevent it acting more favourably towards employees than it needs to. Good employers all over the world recognise that such an attitude is likely to be repaid in improved employee performance, loyalty and workplace morale. Air Vanuatu is a responsible and significant employer in Vanuatu. If the way Mr Kalambae was treated is typical then I respectfully suggest it may see fit to reconsider some of its human resources practices.
50. However, as I have noted, the Vanuatu Parliament has struck the balance between the interests of employers and employees in a different way. It has effectively decreed that an employee's employment may be terminated with no justification whatever and with no obligation to give reasons, unless serious misconduct is alleged, in which case some particular obligations arise, as set out in s50. It is entirely a matter for the Parliament to enact legislation setting the rules for termination of employment. Once it has done so, all employees are deemed to know the law and the Courts must uphold it.
51. As to the salary increment issue, while I accept that there was a regular pattern of such increments being paid to Mr Kalambae as his years of service accrued, the reality is that his contract signed in 2007 provided that his salary was to be paid at the rate of Vt 180,500 per month. There was no reference in that contract to any basis for an increase. I do not accept that the presence of the pay scale as a guide to increases in salary meant there was an automatic obligation for the company to apply it to increase the salary of all employees as they acquired the requisite length of service and regardless of their performance.
52. Mr Kalambae himself accepted that the payment of such increments did depend on the exercise of a discretion by senior managers of the company and that this would take into account performance. There is no jurisdiction for this Court to review the exercise of that discretion and indeed Mr Kalambae does not request that. Rather he pleads that this was *entitlement*. I do not agree that it was an entitlement but rather it was a matter which would arise for consideration when the next step of the pay scale was reached. That however did not mean the increment would necessarily be granted. The company clearly considered the matter

and decided, rightly or wrongly for performance reasons, not to grant the increase to Mr Kalambae.

53. I therefore dismiss Mr Kalambae's claim for an increase in monthly salary from December 2009.

### **Result**

54. Mr Kalambae's claim fails in all respects and judgment is entered for the company. It is entitled to costs which may be taxed if they cannot be agreed. It is entirely a matter for the company, but when determining its attitude to seeking costs I suggest it may wish to take into account the comments I have made about its treatment of Mr Kalambae.

**BY THE COURT**