

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

**Civil
Case No. 17/814 SC/CIVL**

BETWEEN: Dr Andrian KL Thomas
Claimant

AND: Vanuatu Investment Promotion Authority (VIPA)
First Defendant

AND: The Republic of Vanuatu
Second Defendant

Coram: *Justice Dudley Aru*

Counsel: *Mr. A. Godden for the Claimant*
Mr. J. Malcolm for First Defendant
Ms. J. Toa for Second Defendant

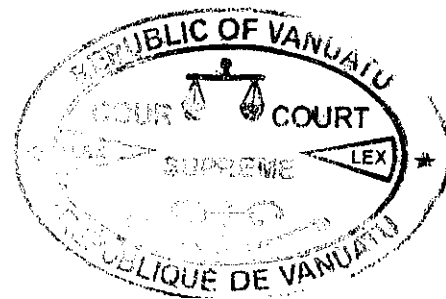
JUDGMENT

Introduction

1. This is a claim for breach of contract filed by Dr Thomas against the Vanuatu Investment Promotion Authority (VIPA) and the Republic of Vanuatu. At the relevant time Dr Thomas was the Chief Executive Officer (CEO) of VIPA.

Background

2. On 12 May 2015 the claimant entered into a contract of employment with VIPA with an annual salary between VT3, 175, 200 – VT3, 397, 880. When she terminated the contract she was receiving a salary of VT4, 139,520 per annum. The contract was for a specific term of three (3) years effective from 13 May 2015 to 13 May 2018.
3. In accordance with s 21 (1) of the Vanuatu Foreign Investment Promotion Act [CAP 248] as amended (the Act), on 22 May 2015, the Deputy Prime Minister as Minister responsible for VIPA appointed Dr Thomas as the CEO of VIPA effective from 13 May 2015.
4. On 20 October 2016 the VIPA board allegedly suspended the claimant from duty on half salary with effect from 26 October 2016.



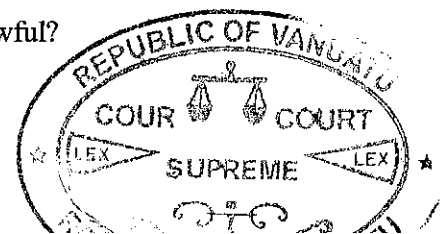
5. On 31 October 2016 a formal suspension was issued by the Minister responsible with effect from 1 November 2016. The suspension was later extended by the Minister responsible for the following periods:-
 - 14 November to 25 November 2016;
 - 24 November 2016 to 9 December 2016;
 - 8 December 2016 to 16 December 2016; and
 - 16 December 2106 until further notice
6. On 28 November 2016 an External Investigation Committee (EIC) appointed by the VIPA board to investigate the allegations against the claimant produced a report on their investigations.
7. On the 14 December 2016 the VIPA board wrote to the claimant informing her of the findings of the EIC and giving her seven (7) days to respond.
8. On the 18 December 2016 she responded.
9. On 8 April 2017 the Minister of Internal Affairs in accordance with clause 15 of the employment contract appointed Mr Robert Bohn as arbitrator to deal with the dispute. On 4 July 2017, the arbitrator informed the parties that the matter could not be resolved by arbitration.
10. On 31 March 2017 the claimant filed her claim.

Summary of the pleadings

11. The claim was amended several times and in the further amended Supreme Court Claim filed on 21 July 2017 the claimant alleges that her continuous suspensions were unlawful and that they amount to ill treatment. The relief sought is a total amount of VT22, 636, 738. The figure is for the full three (3) year term of the contract inclusive of severance, leave, salary recuperation, damages and a severance multiplier.
12. The first defendant denies any liability for the claimant terminating her employment. It says that the suspension of the claimant was lawful. The second defendant also says that that the suspension was lawful and extensions of the suspension were required to enable VIPA to complete their investigations.

Issues

13. Two main issues arise for consideration namely:-
 - Whether the suspensions by the Minister responsible were lawful?



- Whether the claimant's contract was terminated and if so whether she is entitled to any damages?

Submissions

14. In summary the claimant submits that there was constructive dismissal when VIPA ceased payment of her salary in February 2017 without any prior notice. She says that her indefinite suspension on half salary amounted to ill treatment and was therefore unlawful. It was further submitted that the claimant was entitled to payment of severance, annual leave, sick leave half salary recuperation and a 6 x multiplier on her severance.
15. The first defendant submits that the VIPA EIC report found that there was serious misconduct on the part of the claimant and recommended her termination. It was submitted that Mr Nalyal's evidence as the chairman of the EIC was not challenged on the findings of the report when cross examined.
16. It was submitted that neither VIPA nor the Minister responsible terminated the claimant's employment and that the filing of the claim should be treated as her resignation.
17. The second defendant on the other hand submits that the suspensions of the claimant were lawful as they were based on decisions of the VIPA board. Secondly that the second defendant did not terminate the claimant as CEO and therefore the claimant is not entitled to any damages or entitlements as claimed.

Discussions

Issue 1: Whether the suspensions by the Minister responsible where lawful?

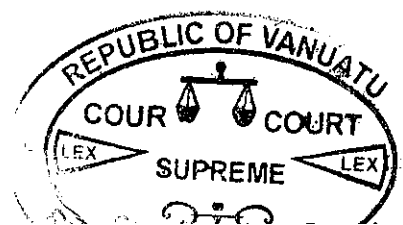
18. Section 21 (1) and (3) of the Act provides:-

"21. CEO and other staff of Board

(1) The CEO is to be chosen by the members of the Board through an open and competitive selection process based on merit and appointed by the Minister for a period of not less than 1 year and not more than 3 years.

.....

(3) The Minister must appoint as CEO the person chosen by the members of the Board."



19. It is mandatory that any person chosen by the VIPA Board as CEO must be appointed by the Minister. Dr Thomas was appointed CEO on 22 May 2015 with effect from 13 May 2015 and the appointment was to have lapsed on 13 May 2018. By virtue of s21 of the Interpretation Act [CAP 132] the ministerial power to appoint also includes power to remove or to suspend. The VIPA Board had no authority to suspend the claimant when it did on 20 October 2016.

20. On 31 October 2016 the Minister responsible suspended the claimant with effect from 1 November 2016.

21. In part the Minister said:-

"My decision to suspend you was based on a recommendation that was unanimously approved by the VIPA board in its extraordinary meeting of 20 October 2016 for reported breaches of the VIPA staff manual and other misconduct allegations. Your suspension takes effect as of 1 November on half salary. Your suspension is made in accordance with section 2.7 "Suspension from Duties" of the VIPA staff Manual – 2015 subject to the time required for completion of further investigation into these allegations."

22. This was followed soon after by a number of extensions on the basis that investigations were ongoing. Finally on 16 December the Minister informed the claimant by letter that her suspension was extended until further notice.

23. Section 6.7.2 of the VIPA Staff Manual explicitly states that:-

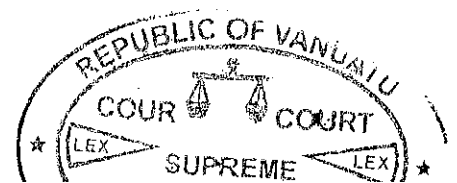
"No suspension under this section shall exceed (2) weeks."

24. As the investigations were on going, the suspension continued for over a month and a half and remained in place until the claim was filed. Under cross examination Mr Natuman stated that each suspension was only for a period of two weeks. That is misleading as the undisputed fact is that the claimant did not return to work after the first letter of suspension was issued. By extending the suspensions before they lapsed the suspension exceeded two weeks.

25. I am therefore satisfied that the suspension was unlawful.

Issue 2: Whether the claimant's contract was terminated and if so whether she is entitled to any damages?

26. The claimant pleads at paragraph 15 of her claim that she was on suspension from 18 December 2016 to 31 March 2017 and as a result she felt she was being ill-treated and filed her claim. The claimant at paragraph 16 of the claim says that she terminated her own employment.



27. The contract came to an end as a result of the claimant filing her claim. There is no evidence that she was pressured with resignation or dismissal as the matter was still under investigation. Hence any claim for constructive dismissal is denied.
28. The claimant's employment was effective from 13 May 2015. When the claim was filed she had been in employment for roughly 1 year 8 months and was on half salary as from 20 October 2016. Payment of her salary ceased in February 2017. Section 53 of the Employment Act [CAP 160] provides:-

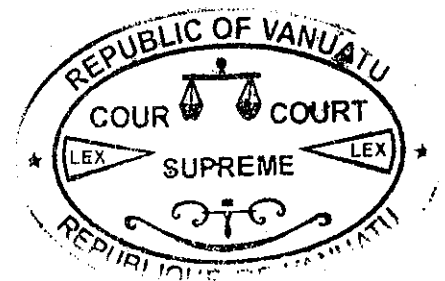
"53. Breach of contract by employer

(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."

29. Having found that the suspension was unlawful, this in my view amounts to ill treatment of the claimant. Therefore she was entitled to terminate the contract pursuant to s 53 of the Employment Act. The next question is whether she is entitled to claim any entitlements or damages as pleaded. The answer is yes but it would be limited to the period she was employed. Section 53 above recognises that she is entitled to full remuneration for the appropriate notice period without prejudice to any claim for damages for breach of contract. In addition she is entitled to her severance and her half salary for the period of her suspension.
30. The claimant has not provided any evidence of her salary at the time of her termination. A copy of her salary slip would have sufficed but there is nothing in her sworn statements. Under cross examination the claimant said her annual salary was VT 4,000,000. The calculations used by the Department of Labour to work out her entitlements for the period 15 May 2016 to 15 May 2017 which is the salary she would have earned before termination was VT 4,139,520 per annum VT 344,960 per month. I therefore make the following awards:-

- 3 months' notice -VT 1,034,880
- Severance [1 year 8 months] salary for each year served -VT 574,873



- Half salary recuperation [4 months] -VT 689,920
- Common law damages -VT 50,000

Conclusion

31. Judgment is entered for the claimant in the sum of VT 2,349,673. In addition she is entitled to costs to be agreed or taxed.

DATED at Port Vila this 16th day of March, 2020

BY THE COURT

D. Aru
Judge

