

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

**Civil
Case No. 17/2583 SC/CIVL**

BETWEEN: Rachel Tiome
Claimant

AND: National Housing Corporation
Defendant

Coram: *Justice Aru*
Counsel: *Mrs. P. Malites for the Claimant*
Ms. J. Toa for the Defendant

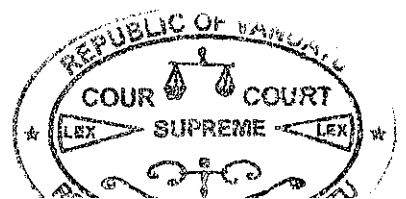
JUDGMENT

Introduction

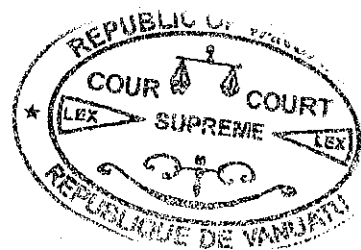
1. This is an employment dispute over non-payment of severance allowance.

Background

2. Most of the background facts are not disputed.
3. The claimant is a former employee of the National Housing Corporation (NHC). She was appointed a housing officer for the sales department of the NHC on 1 February 1996. Her employment was terminated with effect from 30 October 2016.
4. On 29 September 2011 the NHC Board of Directors under the chairmanship of Steven Natouka passed resolution No 20 of 2011 (Resolution 20/11) to pay all NHC employees severance entitlement at two months' salary per year of service and comprising goodwill payment, increase in salaries and other benefits the employee is entitled to during service.
5. On 3 March 2012 (March 3 letter) the General Manager John Terry informed the claimant by letter of the Board's decision that her severance entitlement is also comprised of other entitlements from January 1998 to 31 December 2011 in the sum of VT 3,748,500. He advised that the sum will be paid in instalments.



6. The March 3 letter also advised the claimant that her severance arrangement will be in lieu of and not in addition to any other severance policies which may be in effect from time to time beginning in 2012.
7. Furthermore the March 3 letter advised that the severance approved by the Board was based on two (2) months' pay for one year of service and comprises other benefits the claimant is entitled to during her service. Other benefits are increment of salaries which should have been paid to the claimant since her last increment, three months' notice, reparation allowance and unclaimed sick leave.
8. The claimant agreed to the terms of the March 3 letter that VT 3,748,500 will be paid by instalments due to financial difficulties faced by the NHC at that time.
9. The NHC made six (6) instalment payments to the claimant amounting to the sum of VT1, 069,525. Sometime in March 2013 the claimant received a further sum of VT 120,000 and the remaining balance was VT 2,558,975.
10. On 25 February 2013 the General Manager issued a letter to all staff advising that the was facing major financial difficulties as there was no new projects to generate income from since the end of 2012. In the same letter Mr Terry also advised that any NHC staff wishing to resign may do so as the NHC may also terminate staff but will pay their severance and any entitlements owed.
11. Despite this letter, the claimant still received her salaries at small amounts although all outstanding were recovered at her termination.
12. On 12 December 2014, the Council of Ministers (COM) in its Decision No193 of 2014 resolved that the NHC should be prepared for transition, including by redundancy or for cause termination of NHC staff.
13. On 22 December 2014 the new Board of Directors of the NHC under the chairmanship of John Salong considered Resolution 20/11 of the previous Board noting that it was a concern for the auditor as the decision made at that time should have been implemented. They failed to pay the two months' salary for one year of service, three (3) months' notice, gratuity payments and repatriation. The idea was good at that time to pay staff off and make them redundant but it did not happen therefore becoming a great liability on the NHC accounts.
14. The same day (22 December 2014) Resolution 20/11 to pay severance at two (2) months' salary for each year of service was revoked to maintain the Employment Act [CAP 126] requirements that severance shall be paid at the rate of one (1) month salary for each year of service.



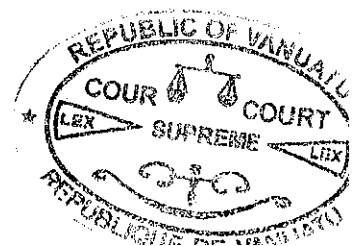
15. The Board decision of 22 December 2014 reducing the severance payment rate to one (1) month salary for each year of service was not communicated to the claimant and other NHC employees.
16. On 20 July 2016, the NHC Board of Directors resolved to terminate the claimant following continuous cash flow difficulties as set out in the claimant's notice of termination of contract dated 28 July 2016.
17. On 28 July 2016 the Board by letter of the same date informed the claimant of her termination effective from 30 October 2016 which gave the claimant 3 months' notice.
18. Upon termination the claimant was paid the sum of VT 959,678. The sum of VT513, 177 was for her severance, VT 178,980 for outstanding salaries and VT267, 521 was for her VNPF benefits.
19. The claimant received the sum of VT513, 177 on her termination but declined to accept it as final payment of her severance and filed these proceedings.
20. The claimant was in continuous employment with the NHC until her termination on 30 October 2016.

Issues

21. The claimant disputes the amount of severance paid to her at the end of employment. The issues agreed are:-
 - (i) Whether the claimant should be paid severance at the rate of two (2) months' salary for each year of service for the period between June 1996 to 31 December 2011.
 - (ii) Whether the VT 3,748,500 calculated severance includes other benefits the claimant is entitled to during service such as good will payment increment of salary, three months' notice, reparation allowance and unclaimed sick leave?
 - (iii) Whether the claimant should be paid severance at a rate of 2 months or 1 months' salary for the period from 2012 till her termination

Evidence

22. The claimant's case is supported by her two (2) sworn statements filed on 16 July 2019 and 27 March 2020 respectively and a sworn statement from Alison Baltor filed on 23 April 2020.



23. For the defendant they rely on the sworn statement of John Salong filed on 31 October 2018.

The law

24. Applicable laws under consideration are the National Housing Corporation Act [CAP188] (NHC Act) and the Employment Act [CAP 160]. The NHC Act establishes the NHC as body corporate and s 6(3) in relation to employment of its officers provides:-

*“(3) The Corporation may appoint and employ a secretary to the Corporation and such other officers and servants of the Corporation, on such terms and conditions as it may from time to time determine, being officers and servants that it may consider necessary for the proper and efficient carrying out of the functions of the Corporation.
...”*

25. Section 6 of the Employment Act provides:-

*“6. Effects of custom, agreement etc.
Nothing in this Act shall affect the operation of any law, custom, award or agreement which ensures more favourable conditions in any respect to the employees concerned than those provided for in this Act.”*

26. And s 56 (2) and (7) provides:-

“56. Amount of severance allowance

...

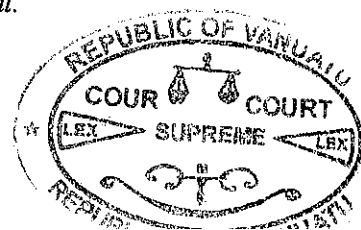
(2) Subject to subsection (4) the amount of severance allowance payable to an employee shall be –

(a) for every period of 12 months – 1 months remuneration

(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.

....

(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. ”



Discussion

27. Most of the essential facts were agreed and no trial was required. The parties agreed that the issues raised were a matter for legal argument and that judgment be issued on the submissions once filed. I now deal with the issues raised.

Issue (i) - Whether the claimant should be paid severance at the rate of two (2) months' salary for each year of service for the period between June 1996 to 31 December 2011.

28. Mr. Natouka's Board in Resolution 20/11 (**Annexure 'JS2'** to the sworn statement of John Salong) resolved that:

"Board I resolve se NHC I pem severance pay blong ol staff blong hem long two (2) manis per one year of service. Mo back datem I go kasem taem we staff hemi startem work long NHC, emi includim ol goodwill payment olsem mo increase of salary and ol narafala entitlement."

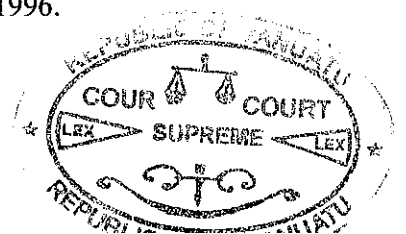
29. The General Manager in his March 3 2012 letter (**Annexure 'RT5'** to the claimant's sworn statement filed on 16 July 2019), informed the claimant of Resolution 20/2011 that "...all VNHC staff current employees must be paid their severance entitlements and any other benefits due to them commencing January 1998 to 31 December 2011."

30. And that "*the severance calculation as approved by the Board ...is based on two months' pay for one year of service ...*"

31. Section 6 of the Employment Act allows employers to give favourable conditions to their employees than those provided in the Act itself. That has been confirmed by the Court of Appeal in **Air Vanuatu (Operations) Limited v Molloy** [2004]VUCA 17. Under resolution 20/11 the Board decided that severance for its employees be paid at the rate of two (2) months' salary for each year served for the period January 1998 to 31 December 2011. A period of 13 years.

32. The March 3 letter confirmed that "*all other previous severance entitlements since each employee was recruited were paid off up to December 1997 by the previous management*". That is not disputed. The claimant accepts that she is only entitled to severance at the rate of two (2) months' salary for each year served from January 1998 to December 2011.

33. The two (2) months' salary per year severance was only approved to cover a specific period being January 1998 to December 2011 not starting from June 1996.



Issue (ii)- Whether the VT 3,748,500 calculated severance includes other benefits the claimant is entitled to during service such as good will payment increment of salary, three months' notice, reparation allowance and unclaimed sick leave?

34. The March 3 letter made it plain that the severance calculation approved by the Board was based on two (2) months' salary for each year served and comprises other benefits the claimant was entitled to during her service. Therefore the sum of VT 3,748,500 referred to in the letter as "severance" was an all-inclusive amount with other benefits and it was not just severance alone.
35. The defendant submits that Resolution 20/11 was revoked on 22 December 2014 therefore the claimant was no longer entitled to severance at the rate of two (2) months' salary for each year served. That submission is rejected. As a matter of contract and custom agreement between employer and employee, the claimant accepted the amount offered to her and the NHC made part payment of the amount agreed. The claimant is entitled to the remaining balance which is VT 2,658,975.

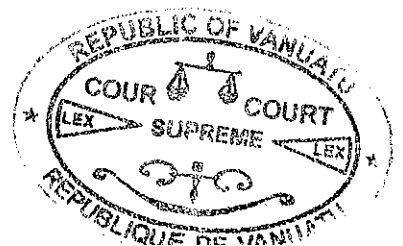
Issue (iii)- Whether the claimant should be paid severance at a rate of 2 months or 1 months' salary for the period from 2012 till her termination

36. The severance payment at the rate of two months' salary for each year served was approved for a specific period of time namely January 1998 to December 2011.
37. From January 2012 onwards the claimant was only be entitled to severance at the rate of one (1) month for each year served as provided by the Employment Act. Resolution 20/11 was not extended by the Board to apply beyond December 2011. The claimant has been paid severance at one (1) month salary for the relevant period when her employment was terminated on 30 October 2016.

Result

38. I answer the issues raised as follows:-

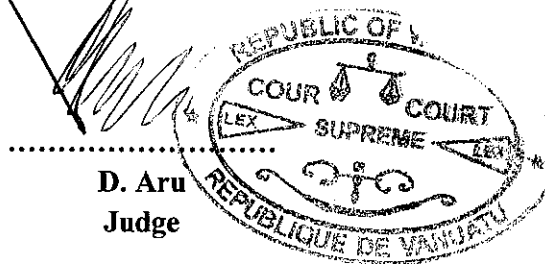
- a) For issue (i) the answer is No. The claimant does not dispute and therefore accepts that her entitlements for the period 1996 to 1997 have been paid by the previous management. She is only entitled to two (2) months' salary for each year served for the period January 1998 to December 2011. A period of 13 years.



- b) In relation to issue (ii) the answer is Yes. The amount of VT 3,748,500 is inclusive of severance and other benefits and is for a specific period. She has been paid in part and is entitled to the balance. The NHC is ordered to pay the remaining balance of VT 2,558,975 with interest at 5% within 21 days.
- c) In relation to issue (iii) the answer is No. From 2012 onwards the claimant is only entitled to severance at the rate of one (1) months' salary for each year served and she has been paid her severance at the end of her employment.
39. The claim is allowed in part and the claimant is entitled to costs accordingly to be agreed or taxed by the Master.
40. A further conference for the purposes of enforcement is listed for 20 September at 11.00 am.

DATED at Port Vila this 26 day of August, 2021

BY THE COURT



**D. Aru
Judge**