

BETWEEN: Tarigitabo Eslyn Salmel
Claimant

AND: Government of the Republic of Vanuatu
First Defendant

AND: Penama Provincial Government
Second Defendant

Date: 26th July 2023

Before: Justice W.K. Hastings

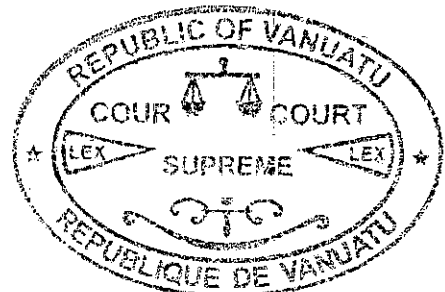
Counsel: Mr E Molbaleh for the Claimant

Mr F Bong for the First and Second Defendants

JUDGMENT

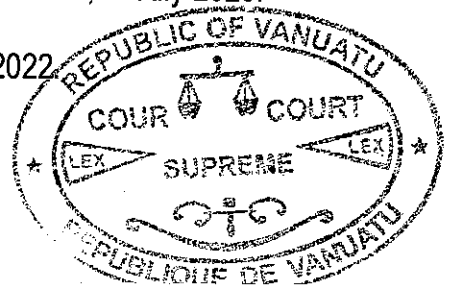
Introduction

1. Ms Salmel worked for the Penama Provincial Government (PPG) as a Community Liaison Officer. She claimed she worked from July 2020 until her employment was terminated without notice in April 2022.
2. At its annual budget meeting on 21 and 22 April 2022, the PPG resolved to terminate Ms Salmel's employment contract because she was not performing the duties set out in clause 1 of that contract. Ms Salmel agreed this was when her employment was terminated, but denied not performing her duties.
3. Ms Salmel claimed severance "for the duration of her contract," damages of VT 2,000,000 for unlawful dismissal, and general damages of VT 2,000,000.
4. On the morning of trial, the defendants admitted liability. The trial did not take place. Both counsel asked to make written submissions on the appropriate amount of severance payable to Ms Salmel and damages if any. Neither wished to speak to their submissions. I granted their request.



The intended duration of Ms Salmel's employment

5. There are two different versions of her employment contract. The version attached to the sworn statement of Moses Tiro Bani, the Secretary General of the Penama Provincial Government Council dated 6 July 2023, is signed by Ms Salmel and Kelly Tabi, the Assistant Secretary General. It states the contract is for a fixed term beginning on 3 May 2020 and ending on "May _____, 2022," a period of about two years. This section has not been completed in the signed version attached to Ms Salmel's second sworn statement dated 22 February 2023, which appears to contain the same signed final page. None of the pages of either version of the contract is initialed.
6. A number of other documents contain different dates of employment:
 - a. In her first sworn statement dated 9 February 2023, and in her claim, Ms Salmel said she started work in July 2020 but did not state the intended end date.
 - b. At page 4 of his written submissions dated 14 July 2023, Mr Molbaleh submitted that Mr Bani "inserted the wrong dates" in the version of the contract annexed to his sworn statement, and that the agreed duration of Ms Salmel's contract was from April 2020 to November 2022, a period of two years and seven months.
 - c. In his letter to the Attorney-General dated 6 February 2023, Mr Molbaleh states that Ms Salmel's employment was intended to run from July 2020 until November 2022, a period of two years and four months.
 - d. In their defence, the defendants pleaded the contract was for a specific period of two (2) years which commenced in November 2020 and was to end in November 2022, based on Ministry of Internal Affairs records of the budget meeting of 21-22 April 2022 which, as pleaded, show her employment from 16 November 2020 to March 2022, the month before it was terminated. These records are not in evidence.
 - e. Mr Bani stated in his sworn statement dated 6 July 2023 that the contract was for two years from May 2020 to May 2022. There is nothing in the resolution of the PPG Council annexed to Mr Bani's sworn statement that refers to the intended duration of the contract.
7. As a result of the defendants' admission of liability, the deponents of the sworn statements were not cross-examined. It is for the claimant to prove her claim on the balance of probabilities. The budget meeting records which are particularized in support of the defendant's claim that the contract was for two years from November 2020 have not been produced. Neither Mr Bong nor Mr Molbaleh submitted the start date was May 2020, which is contained in the version of the contract attached to Mr Bani's sworn statement. In the absence of any persuasive evidence to the contrary, I find it more likely than not that the claimant commenced her employment when she said she did, in July 2020.
8. As for the end date, both counsel submitted it was November 2022.



9. I find therefore that the intended duration of Ms Salmel's employment was from July 2020 to November 2022, a period of two years and four months.

The appropriate award

Severance payment calculation

10. In his written submissions, Mr Molbaleh submits "that in this present case we agree that we take 15% of her annual salary and we multiply for the number of years in the contract rounding it up to 3 years." Mr Bong submits this is the correct calculation, but that there should be no rounding up.
11. Both counsel agree that clause 4E of the contract applies instead of s 56 of the Employment Act [CAP 160]. In terms of s 6 of that Act, clause 4E ensures "more favourable conditions" than those in the Act.
12. Both versions of the contract contain the same version of clause 4E which is headed "Severance Pay" and which states in part:

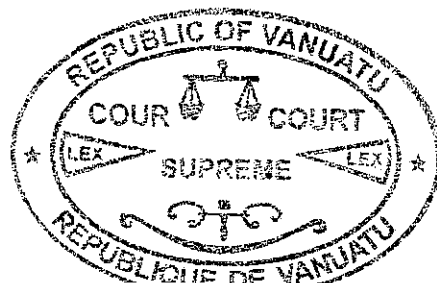
"Employee shall be entitled to 15% of your annual salary multiply by the number of years being employed by the employer."

Both versions also state Ms Salmel's salary to be VT 580,000 per annum.

13. I take the number of years to be 2.33 (four months is one third of a year). Fifteen percent of Ms Salmel's annual salary is (VT 580,000 X 15%) VT 87,000. When that figure is multiplied by 2.33, the result is VT 202,710.
14. The claimant is entitled to a severance payment under clause 4E of VT 202,710.

The effect of s 56(4)

15. Section 56 of the Employment Act [Cap 160] states that where the court finds "that the termination of the employment of an employee was unjustified, the court shall order that he be paid a sum up to 6 times the amount of severance allowance specified in subsection (2)."
16. Both submissions proceed on the assumption that s 56 also applies to severance payments calculated under a provision in an employment contract. Both submissions appear to assume the s 56(4) payment is in addition to the severance payment calculated using the formula in clause 4E of the employment contract.
17. In addition to a severance payment calculated in accordance with clause 4E, Ms Salmel claims unpaid wages from May to November and a multiplier of 6, and in the claim, damages totaling VT 4,000,000.



18. I will deal first with the claim for unpaid wages, then damages, and then the appropriate multiplier.

Unpaid wages

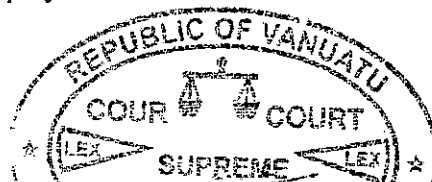
19. Mr Bong submits Ms Salmel is not entitled to claim remuneration for the period after her employment was terminated up to the date her contract would otherwise have ended. Mr Molbaleh submits she is.
20. I agree with Mr Bong. In *Robertson v Luganville Municipal Council* [2001] VUCA 14, the Court of Appeal plainly stated “an employee who is wrongfully dismissed cannot recover wages after the date of his dismissal.” There is no liability for wages or salary unless earned through work or service, even though the employee’s inability to work is a consequence of the employer’s wrongful act.

Damages

21. Mr Bong submits that Ms Salmel is not entitled to damages. Mr Molbaleh’s submissions make no reference to the claim for VT 2,000,000 damages for unlawful dismissal and the claim for another VT 2,000,000 general damages sought in the claim, neither of which are supported by the particulars required by r.4.10(2) of the Civil Procedure Rules. Section 56(4) is intended to provide the compensation for wrongful dismissal in any event.
22. There will be no award of damages in addition to the severance and s 56(4) payments.

The appropriate multiplier

23. I now turn to the appropriate multiplier. Mr Molbaleh relies on *Republic of Vanuatu v Tari* (Civil Appeal No 8 of 2012, Court of Appeal, 4 May 2012), in which a multiplier of 6 was upheld as appropriate compensation for the distress and humiliation caused by the circumstances of Mr Tari’s dismissal (Mr Tari’s employment was immediately terminated, he was prevented from collecting his personal effects, his daughter was sent home from school, and he had to arrange a line of credit to pay for food, electricity and water). Mr Bong submits in Ms Salmel’s circumstances, the appropriate multiplier is 2 and relies on *Republic of Vanuatu v Mele* [2017] VUCA 39.
24. In *Mele* at paras 59-60, the Court of Appeal said while s 56(4) uses severance pay as a basis for the multiplier, “this is simply a formula for calculating the compensation due, if any, for unlawful dismissal.” The Court said, “compensation for unlawful dismissal ... will be for the dismissal itself and for the consequences of the unlawful dismissal and the loss of the job.”
25. In this case, the defendants have admitted liability but without agreed facts. It is, as a result, difficult to ascertain the circumstances surrounding the termination of Ms Salmel’s employment. In his sworn statement of 6 July 2023, Mr Bani states that Ms Salmel’s employment was terminated on the basis of allegations raised by two councillors at the Council budget meeting on 21 and 22 April 2022. They alleged that Ms Salmel did not provide monthly reports as stipulated in paragraph 1 of the employment contract and that

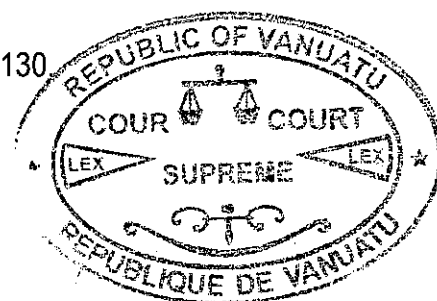


she “could not be found at her place of work for long periods of time (weeks).” Mr Bani states that he was at the meeting when the decision to terminate the contract was made. In her second sworn statement dated 22 February 2023, Ms Salmel explained her apparent absences were the result of the lack of public roads and the great distances she needed to cover to do her job as a community liaison officer working to promote the education of women and the development of women’s cooperatives in the eastern part of Pentecost Island. She said her employment was terminated without notice, and that she found out her contract was terminated when her salary stopped.

26. Ms Salmel states in both sworn statements that the termination has adversely affected her life. She states she has had difficulty paying her children’s school fees, looking after her aged mother and mother-in-law, repairing her house damaged by cyclone Harold, and completing two unfinished houses for tourists. She says her husband is not working and she finds it hard to earn money.
27. Mr Bong submits that although the defendants dismissed Ms Salmel without notice, without investigating the allegations and without giving her the opportunity to address the allegations, the defendants did not obstruct Ms Salmel’s demand for severance and indeed told her they wanted to settle the severance claim. Mr Bong also submits there is no evidence that Ms Salmel is finding it difficult to pay school fees. Unlike the situation described in *Republic v Tari* (Civil Appeal No 8 of 2012, Court of Appeal, 4 May 2012), there is no evidence that Ms Salmel’s children have been sent home from school for non-payment of fees. He submits food is plentiful on Pentecost, and no one has to pay water or electricity bills.
28. On the evidence before me, Ms Salmel’s employment contract was terminated, like Mr Tari’s, without notice, without any investigation of the allegations and without giving her the opportunity to address them. There is no evidence Ms Salmel suffered humiliation equivalent to that suffered by Mr Tari, and I accept the defendants were slow in processing, but not opposed to, a severance payment. Unlike what appears to have happened in this case, the allegations in *Mele* were investigated, but the results of the investigation were found not to have been sufficiently critically analysed by the dismissing authority. To my mind, the circumstances of Ms Salmel’s termination are not as serious as those in *Tari* but somewhat more serious than those in *Mele*. I also accept that not having a regular salary has presented difficulties to Ms Salmel, but they do not seem to be in the order of the difficulties experienced by Mr Tari. Taking all of these matters into account, I consider a multiplier of 3 to be appropriate.

Result

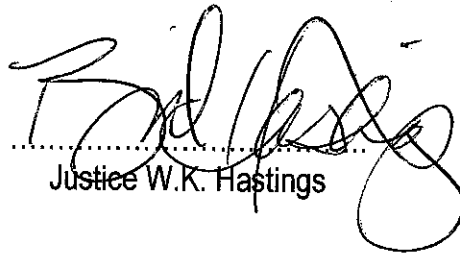
29. I award the claimant VT 810,840 calculated as follows:
 - a. Severance payment under clause 4E of the employment contract of VT 202,710; plus
 - b. Section 56(4) payment, using a multiplier of 3, of VT 608,130.



30. Costs to the claimant are to be taxed if not agreed.

Dated at Port Vila, this 26th day of July 2023

BY THE COURT


Justice W.K. Hastings

