

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

Civil Case
No. 23/2968 SC/CIVL

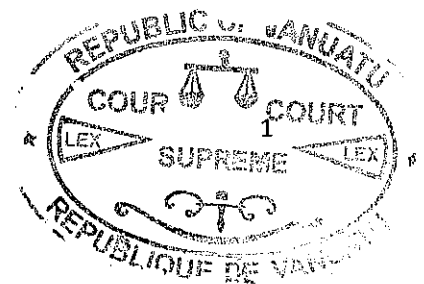
BETWEEN: Badley Antony Tarry
Claimant

AND: Republic of Vanuatu
Defendant

Date: 20 February 2024
Before: Justice V.M. Trief
Counsel: Claimant – Mr J. Tari
Defendant – Attorney General

DECISION AS TO APPLICATION TO SET ASIDE DEFAULT JUDGMENT

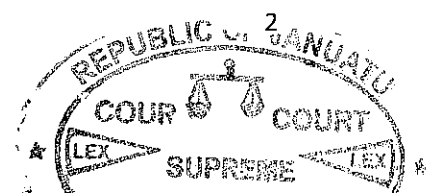
1. The Claim filed on 31 October 2023 seeks payment of arrears of salary. As no response or defence was filed, default judgment was entered on 21 December 2023 in favour of the Claimant Badley Antony Tarry.
2. On 16 January 2024, the Defendant State filed the following:
 - a. Application to Set Aside Default Judgment (the 'Application'); and
 - b. Sworn statement of Harold Tarosa; and
 - c. Sworn statement of Freddie Bong.
3. The grounds for the Application are that the Defendant's officers were busy with other duties and overlooked providing the Office of the Attorney General instructions to file a defence in time, and that the Claimant was suspended on half pay but half of his salary was not actually deducted during the period of suspension, so the Defendant deducted the requisite amount subsequently by deducting VT10,000 each pay day (from 20 February 2020 to 23 December 2022).



4. By Minute and Orders dated 17 January 2024, the Claimant was given the opportunity to file submissions in response to the Application, the Defendant submissions in reply and then the Court would determine the Application on the papers after that.
5. Only the Claimant filed submissions in response, on 29 January 2024.
6. I now determine the Application.
7. Rule 9.5 of the Civil Procedure Rules ('CPR') provides as follows:
 - 9.5 (1) *A defendant against whom a default judgment has been signed under this Part may apply to the court to have the judgment set aside.*
 - (2) *The application:*
 - (a) *may be made at any time; and*
 - (b) *must set out the reasons why the defendant did not defend the claim; and*
 - (c) *must give details of the defendant's defence to the claim; and*
 - (d) *must have with it a sworn statement in support of the application; and*
 - (e) *must be in Form 14.*
 - (3) *The court may set aside the default judgment if it is satisfied that the defendant:*
 - (a) *has shown reasonable cause for not defending the claim; and*
 - (b) *has an arguable defence, either about his or her liability for the claim or about the amount of the claim.*
8. The Court may set aside the default judgment if it is satisfied that the Defendant has shown reasonable cause for not defending the Claim and that it has an arguable defence, either about liability or the amount of the Claim: rule 9.5(3) of the CPR.

Reasonable cause for not defending the Claim

9. The only reason given for not filing a defence is that the Defendant's officers were busy with other duties and overlooked providing the Office of the Attorney General instructions to file a defence in time.
10. The sworn statement of Mr Tarosa, the Director of the Department of Customs and Inland Revenue's (the 'Department') does not contain any evidence as to when he or the Department's officers received a request for instructions from the Attorney General, or the specifics of their workload which prevented them providing instructions for the filing of a defence. He deposed only that the Department was heavily involved in the planning of a VAT Monitoring Exercise which took place from 1-31 December 2023. However, the Department is a large department and monitoring VAT is not its only function – its other functions relate to customs, rates, other taxes and border enforcement. It is therefore inconceivable that the



preparations for the VAT Monitoring Exercise wholly occupied all of the officers of the Department to the point that they and Mr Tarosa could not provide instructions for the filing of a defence.

11. For the reasons given, I am not satisfied that the Defendant has shown reasonable cause for not defending the Claim: rule 9.5(3)(a) of the CPR.

Arguable defence

12. It is alleged in the draft defence attached to Mr Bong's sworn statement that Mr Tarry was suspended on 29 April 2019 on half salary, then reinstated by Public Service Commission ('PSC') letter dated 28 May 2020 which stated that he was not entitled to half salary withheld during his suspension.

13. It is also alleged that the PSC's decision has never been challenged in a Court of law therefore it remains valid and was actioned from 20 February 2020 onwards after the Defendant realised that Mr Tarry had continued to receive full pay up until then, while suspended and contrary to the suspension decision. No legislative provision is cited setting out the PSC's power to withhold salary for an employee who was suspended and then reinstated.

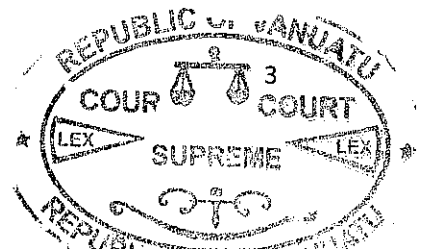
14. Paragraph 8(1)(d) of the *Public Service Act* [CAP. 246] (the 'Act') provides as follows:

8. (1) *Subject to Article 60 of the Constitution and to the provisions of this Act, the major functions of the [Public Service] Commission are:*

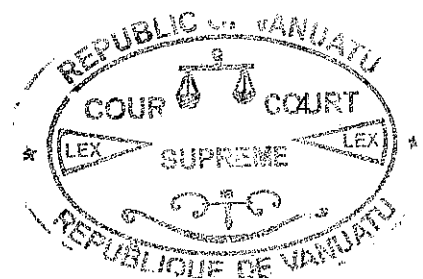
...

(d) *the resolution of employment disputes and discipline of employees in accordance with this Act;...*

15. Part 6 of the Act is titled, "Dispute and Disciplinary Procedure" and contains sections 35-39.
16. Subsection 35(3) of the Act provides that an employee may be suspended only by a director or a director-general.
17. Subsection 35(4) of the Act provides that disciplinary action may be taken against an employee whether or not he or she has been suspended.
18. Section 37 of the Act establishes the Disciplinary Board who is responsible for hearing and determining disciplinary offences (the 'Board').
19. A decision of the Board in a disciplinary matter may be appealed to the Supreme Court: s. 38 of the Act. If it is not appealed, the decision shall be subject to confirmation by the PSC not later than 45 days after it has been notified to the employee concerned: subs. 37(11) of the Act. The PSC may confirm, vary or quash decisions of the Board: subs. 37(12) of the Act.



20. There is no mention anywhere in the draft defence of any disciplinary process undertaken against Mr Tarry. It is envisaged in the Act that the Board hears and determines disciplinary offences. There is no mention that the Board ever heard and determined disciplinary offences against Mr Tarry.
21. Presumably if the Board found Mr Tarry guilty of a disciplinary offence, then it might decide as part of the punishment imposed that Mr Tarry would not be paid the half of his salary deducted whilst he was suspended. However, if the Board did not find Mr Tarry guilty of a disciplinary offence, the half of his salary which Mr Tarry was not paid during the period of his suspension must be immediately paid to him. There is no power otherwise in the Act for the Board or the PSC to decide that an employee is not to be paid the half salary withheld during his or her suspension.
22. As there is no mention of any disciplinary process undertaken against Mr Tarry, the Defendant has not shown any legal basis for the PSC's decision on his reinstatement that he is not entitled to his half salary withheld during his suspension.
23. Accordingly, I consider that the Defendant does not have an arguable defence, about its liability for the Claim nor about the amount of the Claim: rule 9.5(3)(b) of the CPR.
24. Claimant's counsel Mr Tari in his submissions in response cited the Court of Appeal judgment in *Niowenmal v Public Service Commission* [2015] VUCA 12 as authority on the issue of half salary withheld during the period of suspension. In *Niowenmal*, the claimant's employment by the PSC was for a fixed probationary period of two years and then her employment was terminated. The Supreme Court made interim orders to maintain the status quo "until further Order of the Court" as proceedings were on foot in that Court. When those proceedings were dismissed, the claimant's termination of employment was confirmed and she was not entitled to any further payment of salary. Accordingly, the facts in *Niowenmal* are distinguishable.
25. For the reasons given, I am not satisfied that the Defendant has shown reasonable cause for not defending the Claim: rule 9.5(3)(a) of the CPR and that it has an arguable defence, about its liability for the Claim or about the amount of the Claim: rule 9.5(3)(b) of the CPR. The Defendant's Application to Set Aside Default Judgment filed on 16 January 2024 is therefore **declined and dismissed**.
26. Costs must follow the event. The Defendant is to pay the Claimant's costs of the Application as agreed or taxed by the Master. Once set, the costs are to be paid within 28 days.
27. This matter must now proceed to assessment of the quantum of damages.
28. The Claimant is to serve this Decision on the Defendant and file proof of service **by 4pm on 27 February 2024**.



29. The Claimant is to file and serve sworn statements as to quantum of damages by **4pm on 19 March 2024.**
30. The Defendant is to file and serve sworn statements as to the quantum of damages by **4pm on 9 April 2024.**
31. The Claimant is to file and serve sworn statements in reply and submissions by **4pm on 23 April 2024.**
32. The Defendant is to file and serve submissions by **4pm on 14 May 2024.**
33. The Court will assess the quantum of damages on the papers unless the parties request otherwise due to the need to cross-examine any witness.

**DATED at Port Vila this 20th day of February 2024
BY THE COURT**

.....
Justice Viran Molisa Trief

