

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

**Civil  
Case No. 22/1328 SC/CIVL**

**BETWEEN: Mansen Ahelmalahlah**  
*Claimant*

**AND: Vanuatu National Provident  
Fund Board**  
*Defendant*

***Date of Hearing:*** 13<sup>th</sup> June 2024

***Date of Delivery*** 17<sup>th</sup> July 2024

***Before:*** Justice E.P. Goldsbrough

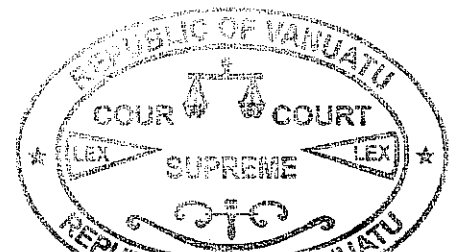
***In Attendance:*** Markward, M for claimant  
Blake, G for defendant

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**JUDGMENT**

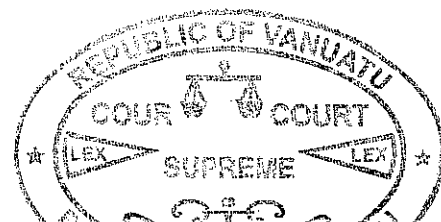
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1. This is a claim for damages based on unlawful termination of an employment contract and defamation. The contract began in July 2019, although the claimant began work for his employer, the Vanuatu National Provident Fund (VNPf), in April 2019 on probation and was terminated in November 2020 following a disciplinary hearing. A subsequent appeal against the decision of the Disciplinary Committee was dismissed.
2. The disciplinary proceedings are criticized for several reasons, beginning with a lack of specificity within the disciplinary charges. The criticism continues into the appeal process where it is said that, in addition to defaming the claimant, the decision on the appeal took into account matters not raised before the Disciplinary Tribunal.
3. The claim is for six years' salary, at an annual rate of VT1,906,500 making VT 11,439,000, severance pay of VT 238,312 being one- and one-half months, additional severance multiplier under section 56(4) of the Employment Act of VT 1,429,872, and missing VNPf contributions for the six years of VT 457,560 and VT 3,400,000 (mistakenly set out in the claim as VT 2,400,000) for defamation, stress and loss of employment, mental anguish and negligence.

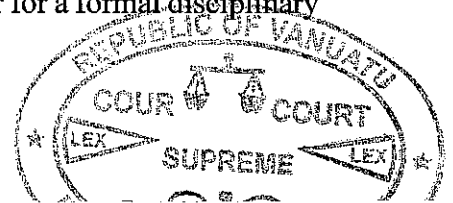


## Evidence

4. Evidence for the claimant is contained in the sworn statement filed 6<sup>th</sup> April 2023 and 22<sup>nd</sup> April 2024 by the claimant and two statements from former work colleagues both filed on 22<sup>nd</sup> April 2024. The claimant was cross-examined on his evidence. Evidence for the defendant organization is from the officer in charge of the Discipline and Professional Standards Office. She was also cross-examined on her evidence.
5. In his evidence, the claimant confirmed that his contract was for an unspecified period of time. He agreed that his employment performance had been adversely affected by criminal proceedings brought against him but subsequently dismissed. The curfew imposed on him within those criminal proceedings, he said, made it difficult for him to get to work on time. He agreed that there were other reasons why he found it difficult to get to work on time, including domestic responsibilities. He did not attempt to deny lateness but was more concerned that his lateness had been the subject of discussions with his employers. He was not prepared to say that every occasion was the subject of advance notice to his employers but that, from discussions he had with various representatives of his employers including the former GENERAL MANAGER of VNPF, Parmod Archary, his employers were aware of his difficulties.
6. He agreed that when he was suspended on 26 October 2020 it was on full pay. He agreed that he received notice of the disciplinary hearing in good time and a charge sheet in advance of the hearing on 17 November 2020. He felt that the charges lacked sufficient particulars, dates of being late and whether the particular lateness had been the subject of prior discussion with his bosses. He felt that dates and times were lacking and that task were not set out. He raised this at the Disciplinary hearing, requesting specific dates he was said to have been late and times of arrival but was told by the Chairman of the Disciplinary panel that his request for further information was denied. He agreed that he was given ample opportunity to address the panel and was not stopped from giving his side of the story. He suggested that he was not asked to explain the reasons for his lateness. He made the point that the disciplinary charge concerning lateness was not lateness per se but lateness without informing management. He agreed that the report which was the subject of a charge was submitted late. He gave reasons why that was the case, citing other demands from other officers for work to be done and how long the process was to prepare the particular report.



7. He went on to speak of the appeal letter, how it was an opportunity for him to include anything and everything that he wished to place before the Chairman of VNPF. He agreed that there were matter he might have included in his appeal, such as discussions with his Team Leader over the late report and issues within the reporting line. He agreed that he should have included those matters in his appeal but that he had not done so.
8. He received the letter from the Chairman of VNPF rejecting his appeal and maintained that this letter said that he had committed a criminal offence. The letter is exhibited as MA26 to one of his statements. His complaint of defamation arises from that letter because, he said, it spoke of an 'attitude problem', which he said was false, but agreed that he had no evidence that the letter went outside of VNPF, his employer.
9. Finally, he gave evidence of a lack of warnings prior to the commencement of the disciplinary process, either about his lateness or his work performance.
10. There were necessary redactions to evidence contained in the remaining statements. With those redactions, the defence no longer sought to cross examine the authors. With the admission of that evidence, which did not assist the claimant in any material way, the case for the claimant came to an end.
11. The only witness for the defendant organization was that of Clera Seth, its Senior Discipline Officer. She produced several documents from VNPF records including the minutes of the Disciplinary hearing of 17 November 2020 which recorded her presence. She explained that her presence was virtual through a poor internet connection and she missed part of the meeting because of that. She had no reason to doubt the accuracy of the minute even though she had not produced it. She could not explain some of the material the minutes spoke of, but confirmed that the attendance record referred to by one of the members was not available to the Court. She had no knowledge of whether, prior to the matter being drawn to her attention as a formal disciplinary case, whether the claimant had received oral or written warnings concerning his conduct, but agreed that this was standard policy which should have been followed. She confirmed that she could not produce any record of the claimant's late attendance at work, nor any record of what tacks he was supposed to have failed at.
12. She explained that the policy is clear, that a Team Leader should approach an employee for an explanation as to misconduct before reporting the matter for a formal disciplinary



process, to include a verbal, then written, and finally, a final warning, and that she was not aware of any of these prior steps having been taken by VNPF.

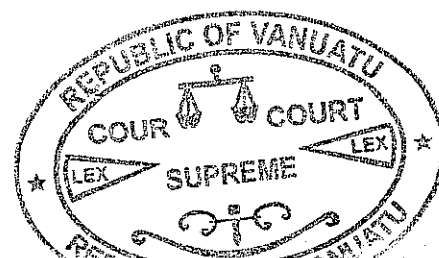
13. Because of that, she characterised this case as a case concerning leadership. She described how a lateness issue should have been the subject of discussions with the Human Resources section which maintains attendance records. She could not explain why such a record was not available to the Court. She finally confirmed that she had not received, nor heard of any complaint against the claimant before his suspension.
14. She confirmed that her responsibility did not include the subsequent appeal to the Chairman of VNPF but that she eventually received a copy of the response from the Chairman disallowing the appeal for her file.

## **Legislative Framework**

15. The following legislation is relevant to the claim.
16. Section 50 of the Employment Act provides: -

### **50. Misconduct of employee**

- (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 employees' 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.

17. Section 56 of the Employment Act provides for the calculation of the severance payable as follows: -

(1) Subject to the provisions of this Part, the amount of severance allowance payable to an employee shall be calculated in accordance with subsection (2).

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

(a) for every period of 12 months -

(i) half a month's remuneration, where the employee is remunerated at intervals of not less than 1 month;

(ii) 15 days' remuneration, where the employee is remunerated at intervals of less than 1 month;

(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.

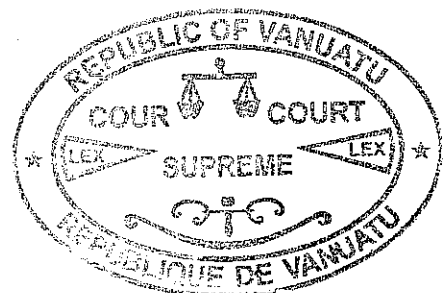
(3) Where remuneration is fixed at a rate calculated on work done or includes any sum paid by way of commission in return for services, the remuneration shall, for the purposes of this section, be computed in the manner best calculated to give the rate at which the employee was being remunerated over a period not exceeding 12 months prior to the termination of his employment.

(4) The court shall, where it finds that the termination of the employment of an employee was unjustified, order that he be paid a sum up to 6 times the amount of severance allowance specified in subsection (2).

(5) Any severance allowance payable under this Act shall be paid on the termination of the employment.

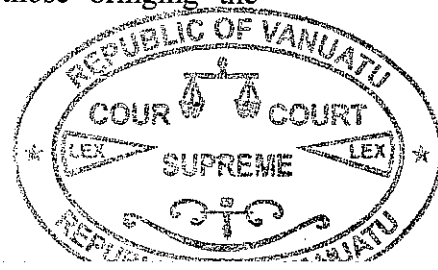
(6) The court may, where it thinks fit and whether or not a claim to that effect has been made, order an employer to pay interest, at a rate not exceeding 12 per cent per annum from the date of the termination of the employment to the date of payment.

(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.

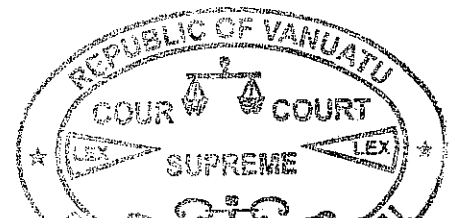


## Discussion

18. The claimant was not employed for long with VNPF before his performance was shown to be lacking, mainly through his inability to get to work on time. This itself would be sufficient to warrant the application of the Human Resources policy concerning discussions and assistance, oral and written warning and thereafter the formal disciplinary process being invoked. Equally, the failure to complete assigned tasks, regardless of often begin late for work, but perhaps not unrelated to that, itself would cause an issue to be raised.
19. There is no doubt that the claimant had an appalling time keeping record during his sort stay at VNPF. He admits that he was often late. His excuses were not particularly compelling. His explanation of lateness due to the curfew hardly credible. Yet the disciplinary offence was not simple timekeeping but was coupled with failing to keep management informed. Quite why the employer unnecessarily coupled the two, in the process making the task of establishing the charge much harder for themselves, remains unexplained.
20. Given the material before the disciplinary committee appeared to be little but a timekeeping record, how could that committee make any reliable finding concerning the management awareness of the issue? The officer referred to most often by the claimant was the former General Manager of VNPF, whose input to the committee appears to have been lacking. Given that, the committee would face serious difficulty in arriving at an evidence-based finding. It would have been a simple task to note the attendance record from the Human Resources department, if indeed that document was before the committee. Looking for detail of the management position as regards advance or even later explanation would be a quite different matter and appears not to have formed part of the committee findings.
21. Equally, what is to be said of the failure to follow established policy of discussion, suggested improvements and oral warning, either in the case of timekeeping or failing to deliver on assigned tasks? The policy exists for a purpose and the unexplained failure to apply it suggests a degree of predetermination amongst those bringing the disciplinary charges.



22. The charge sheet for the disciplinary hearing listed three charges, yet the particulars of charges two and three are identical, so it is difficult to see what the third charge of insubordination amounts to, other than not completing tasks, which is the subject of charge two. In its summary of findings sent to the claimant on 19<sup>th</sup> November 2020, whilst setting out the hearing found insubordination, there is nothing in the remainder of the letter explaining how this finding can be explained other than not completing tasks as required.
23. The disciplinary process was, in my view, flawed. There is a demonstrated failure to follow pre-disciplinary policy before the proceedings were instigated, there was a failure to consider the 'without informing management' aspect of the qualified time issue and a complete lack of evidence on insubordination other than a duplication of charges arising from the same facts, not producing one report on time. That, in my view is sufficient to support a finding of unlawful dismissal.
24. The appeal against the findings of the disciplinary committee was determined by the Chairman of VNPF and his decision communicated in a letter dated 3 January 2021. It is this letter that is said to contain the defamatory material. The paragraph complained of does not, as the claimant said in his evidence, say that he is guilty of a criminal offence, merely that the Chairman has identified an attitude problem displayed by the claimant. That is expressed to be learnt in addition to the Disciplinary Hearing material, but the source of this knowledge is not specified. It does appear that the Chairman took into account material not the subject of the Disciplinary Committee hearing given his own language used in that letter.
25. The Chairman concludes that because of the Disciplinary Appeal hearing material and because of his knowledge of an attitude problem gleaned from elsewhere, the appeal must fail. That alone is grounds to find that the appeal was not properly considered and determined. It is not, however, defamatory in the way that the claimant seeks to persuade this Court. This failure properly to consider and determine the appeal is grounds alone to find in favour of the claimant on his unfair dismissal claim.
26. Damages for loss of employment are dealt with under the unlawful termination aspect of the claim and cannot form a separate claim, as is pleaded here. Equally, damages for mental anguish, stress unless proved by evidence, themselves are not recoverable.



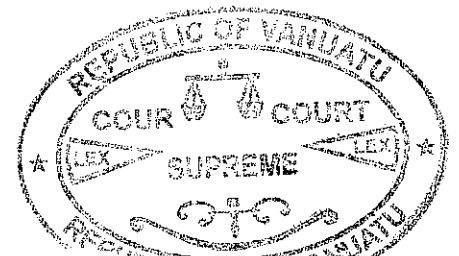
merely through the fact of losing one's employment. That part of this claim must therefore fail. The defamation has not been shown as the material is not defamatory, nor has it been shown to have been published. There is no medical evidence of stress or mental anxiety above that which will normally be present in a compliment termination case.

27. Negligence was never pleaded and appears only in the summary of items claimed. It has not been established on the evidence and is therefore dismissed.
28. The claimant seeks salary for six additional years, for which no reason has been given. The contract was for an unspecified length of time. Damages are not recoverable beyond the requisite notice period. Given that this employment lasted less than three years, that would be two weeks wages. He is entitled to severance pay for the one year and 205 days.
29. The provisions of section 56 (4) regarding the multiplier to be applied, if any, concerning the severance allowance falls to be considered. This employee was not summarily dismissed. He was given a hearing to explain his conduct. He admitted a failure on his part to keep good and admitted a failure to deliver work commitments on time. That the process was flawed because of the material that the disciplinary hearing was unnecessarily required to consider and the earlier failure of adherence to policy on the part of VNPF managers is significant but cannot negate the poor performance of this employee. Properly handled, this dismissal would have been both lawful and justified. A significant increase in severance by applying a high multiplier cannot be justified in those circumstances. It would reflect a compensatory payment for special damages which have not arisen in this case. An additional amount representing a multiplier of one is therefore awarded.

## **Decision**

30. Unlawful termination is found to have been established by the claimant and consequential relief is therefore available. Defamation has not established by the claimant and that part of the claim is dismissed. The following orders are made:

Two weeks' salary in lieu of notice VT 74,793





Severance VT 253,067  
Additional severance, representing a multiplier of one  
VT 253,067  
Making a total award of VT 580,927 together with interest at the  
rate of 5% until date of payment of judgment sum

31. Counsel were invited to make submissions on costs. Having considered the submissions filed, no order for costs is made. In particular, when considering the question, account was taken of a without prejudice offer made earlier in the proceedings and the fact that the majority of the claim brought has not been successfully.

**DATED at Port Vila this 17<sup>th</sup> day of July 2024.**

**BY THE COURT**

*E.P. Goldsbrough*

**E.P. Goldsbrough  
Judge of the Supreme Court**

