

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

Civil
Case No. 24/847 SC/Civil

BETWEEN: Bani Timbaci
Claimant

AND: Coconut Oil Production Santo Limited
Defendant

Before: Justice Oliver A. Saksak

Counsel: Mr John Malcolm for the Claimant
Mr Lent Tevi for the Defendant

Date of Hearing: 20th and 21st November 2024

Date of Oral Decision: 21st November 2024

Date of Written Judgment: 27th November 2024

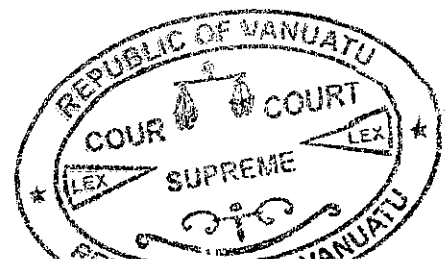
JUDGMENT

Introduction

1. This is an employment claim for damages for unlawful suspension and termination of employment in the sum of VT 4,150,000 and multiplier of six times to the total of VT 16,000,000.
2. After hearing evidence on 20th November and oral submissions by both Counsel on 21st November 2024, I announced orally that judgment be entered in favour of the claimant but the amount of damages would be assessed, and the judgment to be issued with reasons.
3. I now provide the reasons for that oral decision.

Background

4. The claimant is a resident of Luganville, Santo. The defendant is a registered company operating a Coconut Oil Mill in Luganville, Santo.



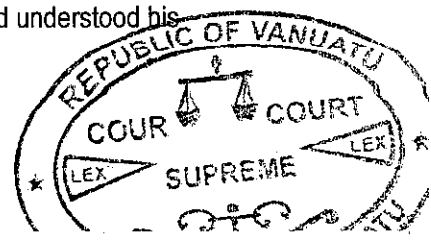
5. The defendant employed the claimant under an open contract as their Human Resource Officer from 20th January 2011.
6. The defendant suspended the claimant's employment on 20th March 2021.
7. The claimant subsequently as a result of his suspension, secured alternative employment opportunities with another similar operator, the Pacific Pride.
8. Two and half years later on 9th June 2023 the defendant's Chairman Mr Glaser formally wrote a letter to the claimant informing him that following investigation into the allegation made against him and based on the evidence provided, a conclusion of serious misconduct was reached.
9. The defendant therefore terminated the claimant's employment without entitlements and backdated the decision to 20 March 2021.
10. The termination as stated in the letter was made pursuant to section 50 of the Employment Act [Cap.160] (the Act).
11. The claimant alleged that both his suspension and termination were unlawful. He alleged that no reasonable notice was given to him, that the reasons given for the termination were unreasonable that no opportunity was given to him to be heard, and that the manner in which he was suspended and terminated was unfair and unjust.

12. His claims are-

a) For one year suspension without salaries-	VT 1,920,000
b) 3 months notice-	VT 480,000
c) Severance at VT 160,000 per month x 10 years-	VT 1,600,000
d) Common Law damages -	VT 150,000
e) Multiplier of six times severance-	VT 16,000,0000
TOTAL	VT 20,150,000

Defence

13. The defendant filed a defence on 24 April 2024 admitting parts of the claim but specifically denying that the claimant's contract was an open contract, that the claimant had understood his



suspension and termination, that no opportunity was given to the claimant to be heard prior to termination, that the suspension and termination of the claimant were unlawful. The defendant say the claimant is not entitled to the reliefs he claims.

Evidence

14. The claimant gave oral evidence in support of his claims. He relied on his sworn statement filed on 17 June 2024 tendered as Exhibit C1 and was cross-examined by Mr Tevi.

15. The defendant produced oral evidence from Bernold Glaser and Shaun O'Leary who relied on their sworn statements dated 20 September 2024 tendered as Exhibit D1 and of 18 September 2024, tendered as Exhibit D2. Mr Malcolm cross examined both witnesses in relation to their sworn statements.

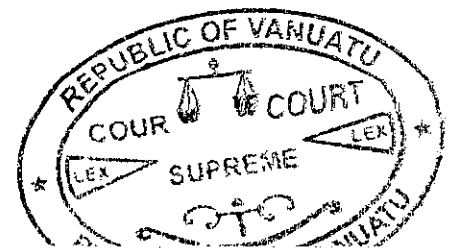
The Issues

16. Mr Malcolm submitted four issues-
 - a) Whether or not there was a right to suspend the claimant?
 - b) Whether or not the termination of the claimant was unjustified?
 - c) Whether or not there were grounds for termination?
 - d) Whether or not the claimant is entitled to a multiplier?

Submissions

17. Mr Malcolm submitted firstly that there was no provision in the Employment Act allowing for suspension of the claimant's employment and his salaries. Counsel referred and relied on sections 12 and 21 of the Act and 29 and 30 in relation to leave entitlements. Secondly that there was nothing in the Act preventing the claimant from secondary employment with Pacific Pride. Thirdly, that the dismissal of the claimant was made without reasonable opportunity to be heard after some 2 ½ years, and that there were other available options and remedies the defendant could have afforded to the claimant, rather than dismissal. Fourthly that his termination was unjustified entitling the claimant to a multiplier of 3.5 times. Counsel referred to and relied on section 56(4) of the Act.

18. Mr Malcolm relied on the case authorities of Salmel v The Government [2023] VUSC 116, Bibi v Republic [2024] VUSC 311, Ati v VCMB [2013] VUCA 1, Lukai v PVMC [2018] VUSC 175



and Quaram v Airports Vanuatu Ltd [2017] VUSC 27 in support of the claimed heads of damages.

19. Finally Mr Malcolm submitted the Claimant should be entitled to costs on an indemnity basis in the sum of VT 3 million.
20. Mr Tevi handed up written but unfiled submissions dated 21 November 2024. In summary Mr Tevi's submission were that the claimant's suspension and termination were lawful due to the claimant's failure to report the action of Mr Joinry who allegedly made false entries of hours into his pay book after three other employees had reported the incident to the claimant.
21. Counsel submitted that omission amounted to neglect of duty which was serious misconduct on his part, this making his termination lawful, under section 50 of the Act.
22. Mr Tevi submitted further that despite the claimant was given the opportunity to answer the allegation made against him, that he failed to do so and had remained silent for 2 years in which he found alternative employment with Pacific Pride. Further Counsel submitted that due to delay and the serious health issues of the Chairman, Mr Glaser no unreasonable delay was caused.
23. Finally in relation to leave, the defendant accepted the claimant is owed only 8 days of annual leave that they still have to pay. Mr Tevi submitted the claim should be dismissed with costs.

The Law

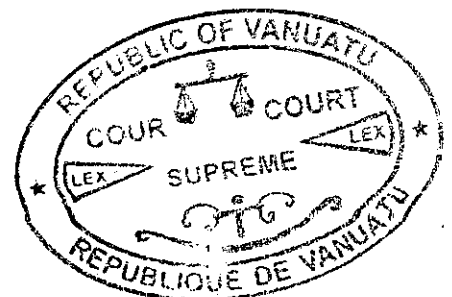
24. Section 9 of the Act provides for form of contract-

"9. Form of contract

A contract of employment may be made in any form, whether written or oral:

Provided that a contract of employment for a fixed term exceeding 6 months or making it necessary for the employee to reside away from his ordinary place of residence shall be in writing and shall state the names of the parties, the nature of employment, the amount and the mode of payment of remuneration, and, where appropriate, any other terms and conditions of employment including housing, rations, transport and repatriation."

(my emphasis)



25. Section 12 provides-

"12. Duty of employer to provide work

Except in the case of, and during, an emergency which prevents him from doing so, every employer shall provide the employee with work in accordance with the contract during the period for which the contract remains in force and on such number of working days as is expressly or impliedly provided for in that contract. If the employer fails to provide work as aforesaid he shall pay to the employee, in respect of every day on which he shall so fail, remuneration at the same rate as if the employee had done the day's work. (My Emphasis)

26. Section 21 provides-

"21. Deductions from remuneration

(1) Except as provided in this section and subject to any collective agreement binding on the employer and the employee, no employer shall make any deduction or make any agreement with an employee for any deduction from the employee's remuneration for, or in respect of, any fine or of bad or negligent work or damage to the materials or other property of the employer. (My Emphasis)

Provided that subject to a prior written approval of a labour officer, a deduction may be made in respect of any loss or damage to materials or other property of the employer caused by the wilful misconduct or negligence of the employee.

(2) Deductions may be made from the remuneration of an employee only in respect of all or any of the following –

(a) any sums advanced by the employer to the employee, in anticipation of the regular period of payment of his remuneration;

(b) the actual cost to the employer of any materials, tools or implements supplied to the employee by the employer at the employee's request for use by him outside the course of his employment;

(c) an amount, approved by a labour officer, being the fair value of any rations or the fair rent for any accommodation provided by the employer for the employee;

(d) at a written request of an employee –

(i) the cost of any articles purchased by him on credit from the employer;

(ii) the cost of any food provided by the employer and prepared or consumed on his premises:

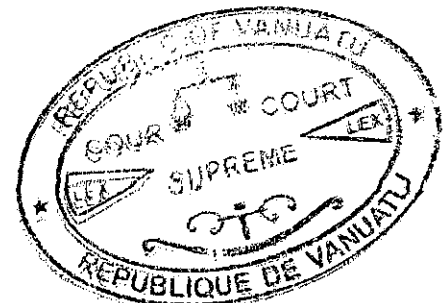
Provided that such cost shall not exceed the lowest price at which the employer sells such articles or food to members of the public;

(e) the amount of any membership fees or similar dues paid over by the employer at the employee's request to any trade union registered under the Trade Unions Act [Cap. 161];

(f) any sum in respect of any other matter as may be prescribed:

Provided that, except in the case of an attachment or assignment of remuneration ordered by the court, the total amount of the deductions referred to in this section may not exceed one-third of the total amount of the employee's remuneration in any pay period.

(3) Notwithstanding anything contained in subsections (1) and (2) an employer may at the request of an employee make deductions from the employee's remuneration and pay to the appropriate authority, person or account any subscriptions which the employee has agreed to contribute to any provident or pension fund or similar scheme approved by the Commissioner."



27. Section 48 of the Act provides-

"48. Termination of contract

Subject to the provisions of this Part a contract of employment shall terminate on the last day of the period agreed in the contract or on the completion of the piece of work specified therein."

28. Section 49 of the Act provides-

49. Notice of termination of contract

(1) A contract of employment for an unspecified period of time shall terminate on the expiry of notice given by either party to the other of his intention to terminate the contract.

(2) Notice may be verbal or written, and, subject to subsection (3), may be given at any time.

(3) The length of notice to be given under subsection (1) –

(a) where the employee has been in continuous employment with the same employer for not less than 3 years, shall be not less than 3 months;

(b) in every other case –

(i) where the employee is remunerated at intervals of not less than 14 days, shall be not less than 14 days before the end of the month in which the notice is given;

(ii) where the employee is remunerated at intervals of less than 14 days, shall be at least equal to the interval.

(4) Notice of termination need not be given if the employer pays the employee the full remuneration for the appropriate period of notice specified in subsection (3)."

29. Section 50 of the 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;

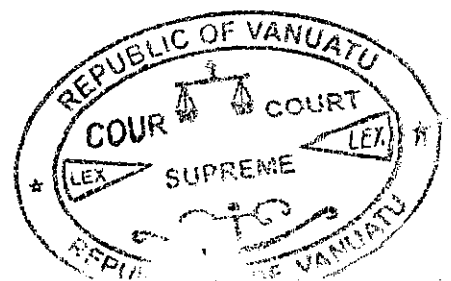
(b) seeking office as, or acting in the capacity of, an employees' representative;

(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."



30. Section 51 of the Act provides-

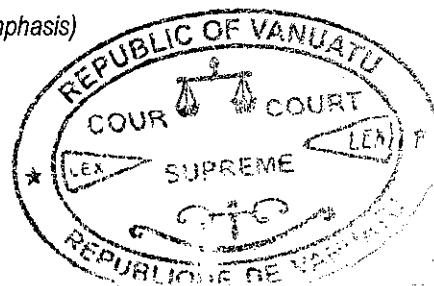
"51. Employees may seek work during notice

During the period of notice an employee shall be entitled to a reasonable period of time off work without loss or reduction of remuneration in order to be able to seek other employment."

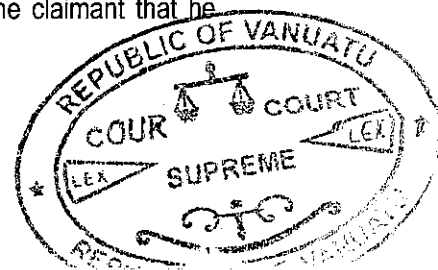
Discussion

31. First on the sworn evidence of both Mr Glaser and Mr O'Leary. Exhibit D1 is a statement of 9 paragraphs and one annexure. Mr Glaser has not disclosed any medical report or certificate showing that since March 2021 until May 2022 he was seriously and physically incapacitated. Further Mr Glaser has not disclosed any contract of employment of the claimant and/ or any staff manual of the defendant company which provides specifically for suspensions and the procedures to be followed when suspending an employee of the defendant company.
32. Mr Malcolm was right when he submitted that section 50 of the Act makes no provision for suspension of an employee.
33. Mr Timbaci in his response dated 12 August 2022 annexed " B" to his statement Exhibit C1 stated in paragraph 7 that the claimant wrote employment contracts of every staff but which have not been endorsed by the Board of Directors. And in paragraph 8, he says there are no formal contract templates. This evidence stand unchallenged and un rebutted by Mr Glaser.
34. Mr O'Leary's evidence by sworn statements has only 3 paragraphs with 2 annexures. The second annexure is a purported report of 4 pages long. Mr Malcolm objected to this document as inadmissible being based on hearsay.
35. I accept that submission. This purported report is made on hearsay evidence, it is an unbalanced report. In order for it to be accepted, it was encumbered on Mr O'Leary to have also interviewed Peter, Obed, Wilson, Mr Joinry and Mr Philip to get a balanced view and information. And why was that necessary?
36. It was because by the time Mr Timabci was interviewed on 20 April 2023, he had written to the defendant company on 12 August 2022 stating in paragraph 2:-

" I note the allegation registered in your letter by the security officers. Infact there was no formal approach either in writing or meeting me in my office as the HR at that time." (my emphasis)



37. By that sentence, Mr Timbaci had responded to the allegation which had no basis unless they were made formally in writing and in his office. That is why it was necessary to have interviewed these employees as well to establish the truth and substance of the alleged complaint before taking the decision to suspend and/or terminate his employment.
38. The purported report is therefore inadmissible as evidence to support the defence case.
39. Next, Mr Glaser concluded in his paragraph 9 that the company acted within the Employment Act in consideration, "and did not at this point pursue the issue of fraud." (my emphasis).
40. I have to ask why the decision not to pursue the issue of fraud was taken and yet to proceed to terminate the claimant? Such action was inconsistent with the company's claim that the act was a serious criminal offence, yet they chose not to pursue it, but to terminate the claimant instead. That was an unreasonable and unjustified action on the defendant's part.
41. Next, the delay was of about 2 ½ years. The defendant stated the delay was attributed to covid and the health issues of Mr Glaser.
42. I take judicial notice of the covid issue but I do not accept the second reason. Mr Glaser was only incapacitated from 18 July 2024 to 12 September 2024. This period is well outside the covid period to 22nd June 2023 when Mr Glaser wrote the first letter to Mr Timbaci. Mr Timbaci responded on 12 August 2022 and it took 10 months until 9 June 2023 when Mr Glaser wrote to inform Mr Timbaci that he had been terminated backdated to 20th March 2021. I am satisfied the delay taken by the company as unreasonable delay. Covid period had ended for Vanuatu and Mr Glaser was not incapacitated during that period. Those reasons are insufficient and unreasonable.
43. The claimant was without remuneration for the period of his suspension explaining why he secured alternative employment for his and his family's survival.
44. Section 51 of the Act allows an employee to seek other employment during the period of notice. Here it was not a notice of termination but an actual suspension without payment of wages. Technically the suspension during the period of Covid was a notice to the claimant that he



would be terminated. He was denied his whole wages or salaries which I think is contrary to section 21 of the Employment Act.

45. Next, the claimant was employed for more than 10 years and without contract in contravention of section 15 of the Act. The evidence is clear that there was an open contract of more than 3 years. As such section 9 requires that the contract shall be in writing with the names of the parties, the nature of employment, the amount of salaries and mode of payments of salaries and other terms and conditions of the employment.

46. Mr Timbaci in his response on 12 August 2022 raised 8 matters or issues of concerns from paragraph 1 to 8. It appears to me those are the real reasons why Mr Timbaci was terminated by letter of 9th June 2023 under the guise of suspension for negligence as alleged.

47. Clearly I am satisfied the termination of the claimant was unlawful and unjustified.

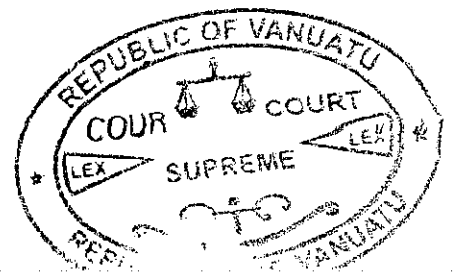
48. Applying the law to the facts, I find as follows-

- a) There was no right in law to suspend the claimant.
- b) The termination of the claimant was unlawful and unjustified.
- c) There were insufficient reasons for the claimant's termination.
- d) The claimant is entitled to a multiplier of three times.

49. For those reasons judgment was entered in the claimant's favour.

50. I assess his damages to be as follows-

a) 1 year suspension without salaries-	VT 1,920,000.
b) 3 months notice -	VT 1,480,000
c) Severance x 10 years at VT 160,000- per month	VT 1,600,000
d) Common law damages-	VT 150,000
e) Leave- 8 days outstanding (to be provided by Defendant)	
f) Multiplier of 3 times-	VT 4,800,000
Sub- Total-	VT 8,850,000



51. The claimant is entitled to interest on this total sum at 5% per annum from 20 March 2021 to the date of Judgment payable within 28 days from the date of the judgment.
52. The claimant is entitled to his costs of and incidental to the action on the standard basis as agreed or taxed.
53. The matter be returnable for enforcement conference on 31st January 2025 at 8:15am.

DATED at Port Vila this 27th day of November 2024

BY THE COURT


Hon. OLIVER A SAKSAK

Judge

