

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Civil Appellate Jurisdiction)

CIVIL APPEAL NO. 01 OF 2013

BETWEEN: MARK ATI
Appellant

**AND: VANUATU COMMODITIES MARKETING
BOARD**
Respondent

Coram: Hon. Chief Justice Vincent Lunabek
 Hon. Justice John von Doussa
 Hon. Justice Ronald Young
 Hon. Justice Daniel Fatiaki
 Hon. Justice Robert Spear
 Hon. Justice Dudley Aru
 Hon. Justice Mary Sey

Counsel: J Tari for the Appellant
 F Williams for the Respondent

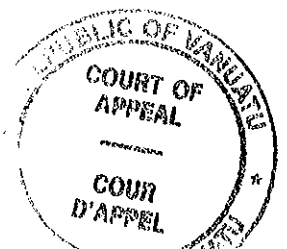
Hearing: 17 April 2013

Judgment: 26 April 2013

JUDGMENT

Introduction

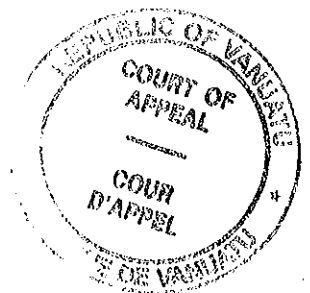
1. Mr Ati was the Vanuatu Marketing Board accountant. On 19 January 2012, the Board terminated Mr Ati's employment alleging serious misconduct. Mr Ati sued the Board alleging his employment had been unlawfully terminated. He sought damages for the unjustified dismissal being 3 months salary in lieu of notice, severance pay from the commencement of his employment in September 2003 and, based on an allegation of



unjust treatment, a multiplier of 6 of the severance payment due. At trial the respondent accepted the dismissal was unjustified. And so in the Supreme Court the contentious issue was damages.

The Supreme Court Decision and Appeal Grounds

2. The Judge in the Supreme Court concluded that section 49 (3)(b) of the Employment Act [Cap.160] provided that Mr Ati was entitled to only 14 days payment in lieu of notice. The Judge rejected Mr Ati's claims for severance payments and any multiplier. He refused to award common law damages on the basis that no such claim had been made in Mr Ati's pleadings. He awarded 10% of the costs payable on a standard basis given the very limited success by the appellant.
3. The Judge said that there was no evidence that Mr Ati had been employed by the Board since September 2003. He therefore limited his consideration to Mr Ati's current employment contract. That commenced on 27 April 2011 and was for 2 years and 8 months ending in December 2013. Mr Ati was dismissed by the Board on 19 January 2012 almost 9 months after his contract began. The Judge in the Supreme Court concluded that section 49 (3) (b) of the Employment Act limited the required notice of termination of employment (and thereby salary in lieu of notice) to 14 days. This 9 month period of employment also meant Mr Ati was not eligible for any severance allowance (see s. 54 (1) Employment Act).
4. The appellant says the Judge was wrong to limit the period of notice to 14 days. The contract of employment entered into by Mr Ati and the Board provided for 3 months notice. In addition to the 3 months payment in lieu of notice Mr Ati said the employment contract entitled him to be paid his full salary until the end of his employment contract (a total of 2 years 8 months). Mr Ati says there was undisputed evidence that he had been employed by the Board since the 1st of September 2003. He was therefore entitled to a severance allowance. Further the circumstances of his dismissal justified a multiplier of 6 being applied to his severance allowance (s. 56 (4) Employment Act [Cap.160]).



5. Surprisingly much of the respondent's submissions in both the Supreme Court and this Court were based on the proposition that Mr Ati's dismissal was justified for serious misconduct. Given the concession made by the Board in the Supreme Court this argument was not available to the respondents either in the Supreme Court or this Court.

Discussion – Payment in Lieu of Notice

6. The Judge appeared to overlook the contractual arrangements between the parties. Clause 10 as relevant provides:-

"10. Termination of Employment

A.

B. Termination by the Employer

(i) The Employer may terminate the employee employment by providing three months notice in writing to the employee in line with the following:

a) Where the employer agreed to settle all outstanding salary, leave entitlements and other benefits for remaining part of contract.

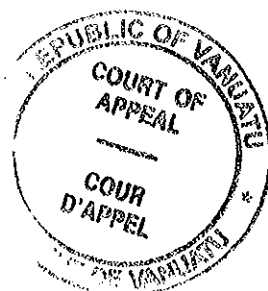
b) Where the reasons of termination is acceptable by the employee.

(ii)"

7. It is clear therefore that Mr Ati was entitled to 3 months notice by the contract entered into with the Board. He was therefore entitled to 3 months pay in lieu of notice when notice was not given, as here.

Payment for rest of contract

8. Reference to clause 10 of the contract of employment gives rise to the appellant's second claim arising from his dismissal. Clause 10 B i (a) of the contract appears to require the Board to pay Mr Ati's salary and other expenses to the end of the contract period as well as 3 months notice if it wishes to terminate his employment without cause. Before us the

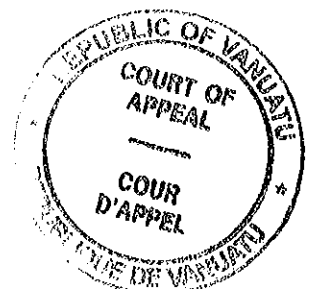


appellant sought an order that his salary and his expenses (as damages) be paid to the end of the contract period, 20 December 2012.

9. Whatever the precise meaning of clause 10 B the appellant did not include such a claim in his Supreme Court pleadings. The damages he sought were limited to salary in lieu of notice (3 months), severance allowance and a multiplier. We consider it would now be unfair to let the appellant amend this claim to seek payment pursuant to clause 10 B (i) (a).
10. The purpose of pleadings is to fairly inform the claimant's opponent of the extent of the claim faced. Amendments to the claim are typically permitted before trial because an opponent can reconsider and readjust their case accordingly. But to allow a re-pleading of a case before an Appeal Court adding a new head of damage creates obvious unfairness (see for example Wayhon v. Wimpey [1971] ALL ER 474 at 470 and Blay v Bollard and Morris [1930] ALL ER 609 at 612). We therefore reject the appellant's claim for a further award of damages based on Clause 10 B of his employment contract.

Severance

11. We disagree with the Judge that there was no evidence to establish Mr Ati had been employed by the Board since 2003. In his sworn statement Mr Ati said he had been employed by the Board since 1 September 2003 as an accountant or an accounts clerk. The Board did not dispute this claim by any evidence to the contrary. The fact that Mr Ati's current employment contract commenced in 2011 did not assist the Judge in determining when Mr Ati's employment commenced for the purpose of calculating severance allowance. In those circumstances the Judge should have accepted Mr Ati's evidence of the commencement date of his employment. We therefore accept Mr Ati's evidence that his employment with the Board began on 1 September 2003.
12. For the purpose of calculating Mr Ati's severance allowance we also need to determine the date on which his employment ceased. We are satisfied for the purposes of calculating his severance allowance, Mr Ati's employment ceased on the day he was



dismissed, 19 January 2012. The appellant submitted 2 other dates should be considered. Firstly, the appellant said the appropriate date was at the end of Mr Ati's employment contract, 20 December 2013. The appellant said that this was the correct date because clause 10 of the employment contract anticipated that was the date on which Mr Ati's income would cease. In the alternative Mr Ati said his employment was terminated at the end of the 3 month notice period required by clause 10 of his contract.

13. Section 54 of the Employment Act describes the circumstances of an entitlement to a severance allowance. Section 56 is concerned with the amount of the severance allowance.

Subsection 5 provides as follows:-

"Any severance allowance made under this Act shall be paid on the termination of the employment".

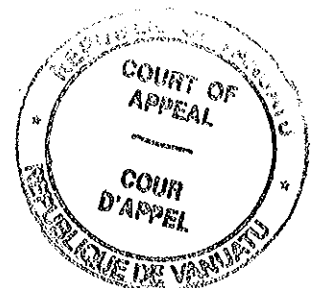
14. Mr Ati's employment was terminated (although unlawfully) on the 19th January 2011. He left his employment on that date and did not resume his employment after that date. It could not be said his employment continued during the 3 month period he was entitled to payment in lieu of notice nor during the longer period left on his contract. The appellant's severance allowance therefore should be calculated from 1 September 2003 to 19 January 2012 a period of 8 years and 4 months.

Multiplier

15. The final claim for consideration was based on section 56 (4) of the Employment Act which provides as follows:-

"The Court may, 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)."

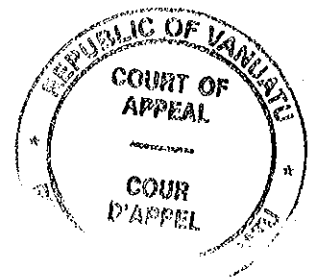
16. This Court identified the relevant principles to the application of s. 56 (4) in Banque Indosuez Vanuatu Ltd v. Marie Noelle Ferrieux [1990] VUCA 3. The Court said:-



"In our view Section 56 (4) does not give the Court power to award a sum akin to aggravated or punitive damages, or for loss of career prospects. It merely enables the Court to compensate an employee for any special damage which he has suffered by reason of unjustified dismissal, if the basic severance allowance is insufficient that purpose".

(See also Hack v. Fordham [2009] VUCA 6).

17. The basis for the appellant's claim for a severance multiplier is because the appellant:-
- a) Was immediately dismissed without a chance to respond to serious allegations against him;
 - b) Was refused the right to uplift his personal belongings from the Board;
 - c) Suffered an unjustified dismissal and;
 - d) Was a good employee.
18. The appellant had been employed by the respondent for almost 10 years before he was dismissed. He had no prior notice of dissatisfaction with his services to the Board. He had no prior notice of the reasons why the Board dismissed him, nor was he given any chance to respond to the allegations against him. We are satisfied in these circumstances that there is justification for the application of section 56 (4) of the Employment Act and the payment of a multiplier of the severance allowance. In the circumstances we have described we fix a multiplier of 3. We agree with the Judge that no further claims for common law damages arising from the circumstances of the appellant's dismissal can be made. They were not pleaded.
19. The appeal is allowed. We quash the decision as to damages in the Supreme Court. The compensation payable for unjustified dismissal is therefore as follows:
- a) 3 months salary in lieu of notice Vt 690,000
 - b) A severance allowance based on 8 years 4 months Vt 1,916,667
(8 x Vt 230,000 + 4/12 x 230,000)
 - c) A 3x multiplier of the severance payment in terms
of section 56 (4) of the Employment Act. Vt 5,750,001



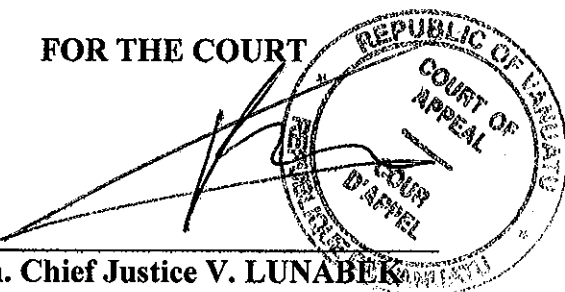
(Vt 1,916,000 x 3)

Vt 8,356,668

Costs

20. Because of the appellant's limited success in the Supreme Court he was only awarded 10% of the standard costs award by the Judge. Given the appellant has now substantially succeeded he is entitled to full costs in the Supreme Court and full standard costs in this Court.

FOR THE COURT



The signature is a stylized, cursive scribble in black ink, written over the seal. The seal is circular with a double border. The outer border contains the text "REPUBLIC OF VANUATU" at the top and "COURT OF APPEAL" at the bottom. The inner border contains the text "COURT D'APPEL" at the bottom. The center of the seal is blank.

Hon. Chief Justice V. LUNABEK