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

Civil Appeal
Case No. 23/307 COA/ CIVA

BETWEEN: THE REPUBLIC OF VANUATU
Appellant

AND: DOROSDAY KENNETH WATSON
Respondent

Coram:	***Hon Chief Justice V Lunabek*** ***Hon Justice JW von Doussa*** ***Hon Justice R Asher*** ***Hon Justice OA Saksak*** ***Hon. Justice D Aru*** ***Hon Justice EP Goldsbrough***
Counsel:	***S Aron for the Appellant*** ***MJ Hurley for the Respondent***
Date of Hearing:	***10th August 2023***
Date of Judgment:	***18 August 2023***

JUDGMENT OF THE COURT

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1. Dorosday Kenneth Watson, the Respondent to this appeal, worked in the Public Service beginning in 1987. She held various senior positions within the government, such as Director of Women's Affairs, Director of the Department of Agriculture, the Department of Fisheries and, finally, the Director General of the Ministry of Justice and Community Affairs.

2. She was appointed to the latter post on 15 November 2018 and removed from it on 18 March 2021, just two weeks or so after being awarded a salary increase for 'very satisfactory performance.'[1] Her removal came following a finding that she was guilty of serious misconduct. That finding followed a disciplinary process, about which there is no complaint, save that the finding of serious misconduct which flowed from it was flawed. There is no complaint about process, merely about substance.

[1] *2019 Performance Agreement endorsed by Decision 32, PSC.*

3. The claim for wrongful termination was heard and determined on a contested basis in the Supreme Court, and a decision was published on 17 March 2023. That decision was in favour of the Respondent, and it is against that judgment that this appeal is brought.

4. In the decision, it was found that the grounds relied upon by the Public Service Commission (PSC) in the disciplinary process did not and could not have amounted to serious misconduct and that the subsequent decision to terminate the employment of the Respondent was an unlawful termination. From that finding flowed various consequential orders for outstanding entitlements and severance payments.

5. The Respondent's employment contract with the Public Service Commission was of a four-year fixed term; by the time of her termination, she had served just over half of that period.

6. She was awarded a total of VT34,102,451 for the unlawful termination, which was broken down as: -

ENTITLEMENTS	TOTAL AMOUNT
Remuneration – remaining salary	VT8,908,720
Remuneration – salary increment	VT591,318
Annual leave	VT 513,450
Accommodation	VT920,000
Establishment allowance	VT40,000
VNPF contributions	VT830, 202
Other expenses	VT57,407
3months'notice (Director, DWA)	VT1,051,674
Severance allowance	VT4, 237,936
SUB-TOTAL	**VT17,150,707**
s.56(4) multiplier X4	VT16,951,744
TOTAL	**VT34,102,451**

7. The appeal is brought on six grounds. The first ground concerns liability in that it challenges the trial judge's findings concerning serious misconduct. Two grounds of appeal (2 and 3) concern severance pay, and the remaining grounds (4, 5 and 6) various other entitlements awarded. It seeks all relief awarded to the Respondent set aside and an award of costs in favour of the Appellant.

The appeal – Ground One – Serious Misconduct

8. The allegation of serious misconduct before the Public Service Commission arises from a complaint lodged with them by the then Minister of Justice and Community Services. That complaint was contained in a letter written by him on 1 December 2020. It set out three complaints. The first was headed 'Rebelling and Working Against the Government', the second 'Treason' and the third 'Breaches of the PSC Act No 11 of 1998'. Treason remains a criminal

offence in this jurisdiction, concerned mainly with those who owe allegiance to the Republic but are at war with it. The Respondent was not charged with that offence under section 59 of the Penal Code.

9. The genesis of the complaint was the filing, by the Respondent, of an application for Judicial Review of a decision of the Council of Ministers of 15 October 2020. That decision, subsequently revoked, approved the restructuring of the Ministry of Justice and Community Services into a Ministry of Fisheries, Ocean and Maritime Affairs. The application for relief pending Judicial Review was filed on 27 November 2020, with the substantive application for Judicial Review filed on 14 December 2020. A defence was filed by the present Appellant on 17 December 2020.

10. Following the Civil Procedure Rules Rule 17.8 conference, a finding was made on 2 March 2021 that the Applicant had an arguable case on the procedural grounds set out in the claim. The procedural grounds made out included breaches of various sections of the Government Act which the trial judge set out in paragraph 20 of her judgment.

11. The Government Act is designed to provide for the role, effective management, and responsibilities of the Executive. Part 3 sets out the provisions providing support to the Council of Ministers and establishes a Developmental Committee of Officials (DCO). The DCO is charged with various preparatory steps prior to the Council of Ministers receiving and considering a submission. Those steps include, inter alia, obtaining advice in advance from the Attorney General and the Director General of the Ministry of Finance and Economic Management on the legal and financial implications of the submission. These preparatory steps appear not to have been taken prior to the COM decision of 15 October 2020.

12. There was nothing contained in the application for Judicial Review seeking to overturn the decision on policy grounds.

13. It appears that the Respondent had been strongly advised by the then Minister to await further legal advice from the Attorney General's Chambers prior to filing her application for Judicial Review. She chose not to wait for that further advice, perhaps as she had seen that there was legal advice from the Chambers dated 18 November 2020 indicating that the decision was indeed in accordance with the Constitution. That advice is exhibited on page 95 of Appeal Book B as part of the Confidential Investigation Report. If the Appellant has at any other time sought and obtained legal advice on the various provisions of the Government Act alleged to have been breached, that advice does not appear in the Appeal Books and counsel for the Appellant indicated in any event that it would be the subject of legal professional privilege.

14. The principal challenge to the finding that this did not constitute serious misconduct is based on a submission that the Court was not entitled to consider the question, that is to say, the Court was not entitled to look at the findings made by the Public Service Commission but only the process which led to the conclusion. That notion arises from a decision of this Court in *Republic of Vanuatu v Mele* [2017] VUCA 39.

15. In *Mele* in paragraph 49 this Court said: -

> *'Once these standards are met and the PSC decision is given, it will not be for the Courts to re-decide whether or not the circumstances justify dismissal.'*

16. Those remarks must be read in the context of the case. Earlier, in paragraph 40, this Court set out that context: -

> *'Because Mr Mele had not denied the allegations of misconduct in his pleadings the Republic did not call any evidence at trial to prove these allegations. And so the Republic submitted it was not open for the trial Judge to make findings on whether the allegations were true. When he did so he fell into error.'*

17. Thus, *Mele* does not support the principle that, in an appropriate case such as this where the finding of misconduct is indeed challenged, neither the trial Court nor this Court on appeal can look at the decision on serious misconduct. Both the trial Court and this Court on appeal were entitled to consider whether the facts alleged in the disciplinary proceedings amounted to serious misconduct. Indeed, the Courts were obligated to do so.

18. Unlike *Mele*, which was a case based on a failure to follow due process, this case, where there is no complaint about due process being followed, is about the substantive finding of serious misconduct.

19. The finding of serious misconduct, as explained by the Public Service Commission in its letter of 18 March 2021, exhibited on pages 190 and 191 of Appeal Book B is based on the Respondent showing an intention against the implementation of government policy and thus breaching various provisions of the Public Service Act.

20. Yet, as the trial judge explained beginning with paragraph 76 of her decision, the Respondent's concern was about process and not about policy. She was right, as it turned out, to be concerned about the process. That is evidenced in material from the submissions of the Appellant made in the Court below about obtaining legal advice after the event (paragraph 81).

21. Thus, the finding of serious misconduct was not and could not have been made out. Whilst the Public Service Commission and indeed this Court would have grave concerns about any senior Public Servant seeking to overturn or delay the implementation of legitimate and lawful government policy, this is not such a case. It is nothing more than a case of drawing the attention of the Court to serious deficiencies in following statutory procedure. One duty ascribed to the position of Director General is to keep his or her employer out of trouble. An observer may conclude that in this case, she was doing no more than that.

22. Given our finding on the question of serious misconduct, we do not need to consider section 50 (3) of the Employment Act [Cap 160]. The dismissal was unjustified and so the employer did not

need to consider whether they could not in good faith consider any other course. The recommendation to the PSC was to find alternative employment within the government. They chose not to do so, but in the event, that choice will not impact this appeal.

23. This ground of appeal is dismissed.

The Appeal – Ground 2 – severance at 2 months per annum

24. Under clause 19.1 of her contract of employment, the Respondent was entitled to a severance allowance calculated at the rate of one-month of remuneration for every year of service under the contract.

25. On 2 September 2020, for reasons not disclosed in this appeal, the PSC issued a circular to all PSC employees of its decision to replace one month of remuneration with two months of remuneration with an effective date of 15 September but also backdated where funds permitted to 20 October 2017. That circular is set out in the reasons for judgment in the Court below in paragraph 126.

26. The Appellant submits that to put the circular into effect, individual employment contracts must have been varied to include the more generous severance allowance, and that no such variation had been effected in this case. The Respondent submits that the publication of the Circular by the PSC effectively varied each and every contract to which it applied in the same way as a general PSC salary increment is effected.

27. The Circular itself makes no reference to the requirement of variation to individual contracts nor any other restriction on implementing the decision. In those circumstances, it is difficult to see what purpose, if any, the Circular had if it is to be construed as only applying to officers whose contracts were varied accordingly. Imposing that condition changes the whole tenor of the Circular, as submitted by the Appellant as being discretionary. There is nothing in the Circular that supports the discretionary argument. To the contrary, the unconditional nature of the circular indicates that the variation is effective immediately.

28. That ground of appeal is not made out.

The Appeal – Ground 3 – the multiplier

29. In section 56 (4) of the Employment Act it is provided that: -

> *"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 six times the amount of severance allowance specified in subsection (2)."*

30. At the time of this decision, and now, the severance allowance specified in subsection (2)is one month remuneration for every year of service.

31. An employee of the Public Service Commission, by virtue of the 2 September 2020 circular is already at an advantage compared with a private sector employee. In the private sector, the requirement in legislation is one-month remuneration for each year of service. Specific contracts may provide otherwise but the minimum remains.

32. Equally, when it comes to damages, an employee on a fixed-term contract is better off than an employee whose terms of employment are not for a fixed term. The fixed-term employee may expect to receive the balance of his or her contractual entitlements for the remaining term of the contract. The employee who simply works from month to month has no such additional balance of entitlements.

33. We consider that those two advantages that apply to the Respondent should be taken into account when the Court determines the applicable multiplier. We agree that an award of some order is mandated by section 56 (4). When taken into account, those factors should carry more weight that the circumstances surrounding the unjustified termination. In that way, the award is more compensatory than punitive.

34. In her consideration, the trial judge did not address these two advantages and that appears to have led her into error in assessing the correct multiplier. In the circumstances, this Court considers that a multiplier of 2 adequately reflects the correct position. In coming to that conclusion, we have also considered the award in total. The award in the Court below represents roughly six years' salary at 2022 levels and more than that at 2021 levels.

35. This ground of appeal is successful, and the multiplier is reduced from 4 to 2, reducing the amount set out in the penultimate row of the table above from VT16,951,744 to VT8,475,872.

The Appeal – Ground 4 – outstanding salary

36. This ground of appeal raises the question of what entitlements must be ordered to be paid when a fixed-term contract is brought to an unjustified end. The Appellant relies upon *Robertson v Luganville Municipal Council* [2001] VUCA 14 where the principle of no work, no pay was discussed and applied. There is no doubt that, in the circumstances of that case, the principle was correctly stated and applied.

37. That case, however, was not a fixed-term contract case, as this case is. Unlike the employee on wages or a periodic salary, the fixed-term employee can recover entitlements beyond the termination date, as contractual entitlements. Thus, the principle relied upon by the Appellant where this Court said an employee cannot recover wages after the date of his dismissal does not support the argument that a fixed-term employee cannot recover the balance of his or her contractual entitlements.

38. That ground of the appeal must fail, although we do agree with the submission that it was an error to suggest the award was made because it was not opposed. It may have been opposed but it was nevertheless properly found due.

The Appeal – Grounds 5 – accommodation and other allowances and 6 – salary increments

39. The Appellant relies upon the same authority as in Ground 4 above to support the contention that these awards, including accommodation and establishment allowances and VNPF contributions, as well as salary increments that would have have accrued during the balance of the Respondent's fixed-term contract are improper. For the same reasons as set out above, the grounds of appeal are dismissed.

Decision

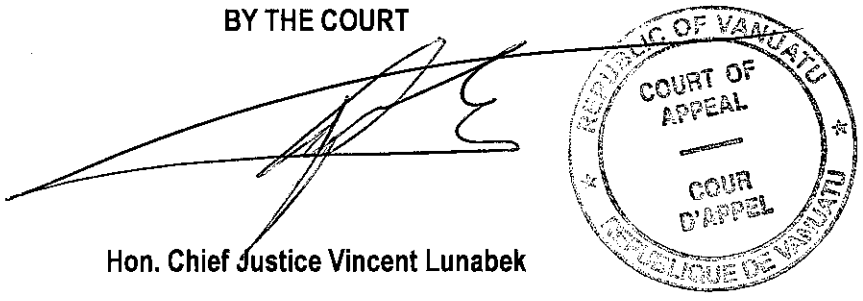
40. The appeal is allowed in part. The multiplier applied to the calculation of additional severance under section 56 (4) is reduced from 4 to 2. The balance of the judgment and award of damages remains in force unchanged.

41. There is no suggestion that the awards were mathematically incorrect and so the only change to be made to the table setting out the total relief awarded is to reduce VT34,102,451 to VT26,626,579.

42. As to costs, the Appellant failed on all but one ground of appeal. The principal challenge was to the finding of unjustified termination. In the circumstances, we order that the costs of and incidental to the appeal be awarded to the Respondent, to be agreed or taxed.

Dated at Port Vila, this 18th day of August 2023

BY THE COURT



Hon. Chief Justice Vincent Lunabek