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

Civil Appeal
Case No. 24/2913 COA/CIVA

IN THE MATTER OF: **AN APPEAL FROM THE SURPEME COURT OF THE REPUBLIC OF VANUATU**

BETWEEN: **MILAI VANUATU LIMITED**
Appellant

AND: **FRANKO YANKO WILSON**
Respondent

Date of Hearing:	***7 November 2024***
Coram:	***Hon. Chief Justice V. Lunabek*** ***Hon. Justice M O'Regan*** ***Hon. Justice R White*** ***Hon. Justice D Aru*** ***Hon. Justice E Goldsbrough*** ***Hon. Justice M A MacKenzie***
Counsel:	***S. Kalsakau for the Appellant*** ***L. Tevi for the Respondent***
Date of Decision:	***15 November 2024***

JUDGMENT

Introduction

1. The respondent, Mr Wilson, commenced employment with the appellant, Milai Vanuatu Limited on 9 November 2015. He was initially employed as chief stockman on a farm in Santo. On 5 May 2021, Milai Vanuatu terminated Mr Wilson's employment without notice, asserting that he had engaged in serious misconduct. The serious misconduct alleged by Milai Vanuatu at trial was that Mr Wilson had made two statements in 2020, which were contradictory. The statements relate to the management of the farm by a former employee, David Russet, who was in a dispute with Milai Vanuatu.

2. On 22 May 2020, Mr Wilson signed a statement relating to farm management issues at the request of Mr Lee, of Milai Vanuatu. This was not a sworn statement. Then, on 27 October 2020 Mr Wilson signed a sworn statement in relation to a claim between David Russet and Milai Vanuatu in Civil Case No. 780 of 2020. The sworn statement was filed by Mr Russet's lawyer in the Supreme Court on 10 November 2020 in support of Mr Russet's claim against Milai Vanuatu.

3. On 7 May 2021, Mr Wilson filed a claim alleging that the termination of his employment was unjustified and that he had not been given a fair opportunity to respond. He sought payment for 3 months' salary, a severance payment, annual leave, outstanding wages and severance entitlement under s 56 (4) of the Employment Act [CAP 160]

4. In the defence filed, Milai Vanuatu denied that the termination of Mr Wilson's employment was unjustified or unlawful. The defence as pleaded was:

   a) Mr Wilson had been provided with several opportunities to respond to the allegation against him, but he did not do so.

   b) Mr Wilson's employment was terminated because he produced, without Milai Vanuatu's consent, a sworn statement in support of a person who had issued proceedings against Milai Vanuatu.

5. We note that the pleading of Milai Vanuatu as to the reason for the termination was different from the reason advanced at trial, as the pleading made no reference to two statements, let alone alleging an inconsistency between the statements.

6. The primary judge considered that the termination of Mr Wilson's employment was unlawful and/or unjustified, on the basis that the reason for the termination was insufficient and inadequate. The primary judge did not consider there was any inconsistency, because he disregarded the statement signed by Mr Wilson on 22 May 2020. This was on the basis that this was not a sworn statement filed in the Supreme Court. The primary judge found:

   a) That Mr Wilson's part in Civil Case No. 780 of 2020 was only as a witness who made confirmations and was maintaining a neutral position as Chief Stockman for the company who served as such under Mr Russet as manager and also under Mr Lee; and

   b) That Mr Wilson was protected by s 50(2)(a) of the Employment Act, which provides that various acts shall not be deemed to constitute misconduct by an employee.

7. The primary judge entered judgment in Mr Wilson's favour and ordered Milai Vanuatu to pay Mr Wilson VT 3,334,090, together with interest from the date the claim was filed. The judgment sum was calculated as follows:

   a) 3 months' notice VT360,000
   b) Damages for unexpired term of contract VT360,000
   c) Outstanding wages VT120,000
   d) Annual leave outstanding VT94,090
   e) Severance allowance x 4 ..... VT2,400,000

Preliminary issues

8. Mr Kalsakau applied for leave to extend time to file an appeal and to amend the grounds of appeal. Neither application was opposed by Mr Tevi. We granted leave and now provide brief reasons.

9. There is a discretion to enlarge the time to appeal.[1] The appeal was filed 3 days out of time, and there is no discernible prejudice to Mr Wilson. In those circumstances, time to file the appeal is enlarged.

10. A notice of appeal may be amended with the Court's leave.[2] Mr Kalsakau sought to amend the notice of appeal by adding a ground. The proposed ground was straightforward and was addressed by Mr Tevi in his written submissions. As such, there was again no prejudice to Mr Wilson, so the grant of leave to add a new appeal ground was allowed.

Appeal Grounds

11. Mr Kalsakau advances 4 grounds of appeal:

    1. The Judge erred in law and/or fact by making findings of facts outside of the claim pleaded.

    2. The Judge erred in law and/or fact by holding that the termination of employment was unlawful and unjustified.

    3. The Judge erred in law and/or fact when he found that there was no inconsistency in Mr Wilson's statements and by finding that Mr Wilson was protected by s 50 (2) of the Employment Act.

    4. In the alternative, the judge erred in law and/or fact in his assessment of the awards made to Mr Wilson.

12. Mr Tevi's position is that the appeal should be dismissed. In his written submissions, Mr Tevi acknowledged that the award for outstanding pay in April 2021 cannot stand as Mr Wilson was paid the wages on 12 May 2021.

Appeal Ground 1

Did the judge err by making findings of fact outside of the claim as pleaded?

13. Mr Kalsakau submits that the Supreme Court had been limited to determining whether or not Milai Vanuatu afforded Mr Wilson an opportunity to respond before dismissal. His submission is that the claim pleaded unjustified termination based on natural justice, and not whether Mr Wilson's actions amounted to serious misconduct.

14. The claim, as pleaded at paragraph 3, was that Milai Vanuatu terminated Mr Wilson's employment unjustifiably and failed to afford him natural justice in responding to the allegations. It did not plead that Milai Vanuatu had terminated the employment unjustifiably "by" failing to afford Mr Wilson natural justice. Further, paragraph 4 of the claim pleaded that "*as a result of the claimants unlawful and/or unjustified termination*" Mr Wilson suffered and continues to suffer loss and damages for the termination.

15. The defence denied that the termination of employment was unjustified or unlawful, and at paragraph 3b. and 3c. alleged that Milai Vanuatu had had no choice but to terminate Mr Wilson's

[1] *rule 9 of Court of Appeal rules 1973*
[2] *rule 24 of the Court of Appeal Rules 1973.*

employment as he had failed to respond and that his employment was terminated because of the sworn statement made in support of a claim against Milai Vanuatu, without their consent.

16. The claim could have been pleaded with greater clarity. However, it is evident from the claim, the evidence filed by Mr Wilson and the conduct of the trial, that whether Mr Wilson's actions amounted to serious misconduct formed part of the claim. During the trial both Mr Wilson and Mr Lee were cross-examined about whether or not the statements were contradictory, which was Milai Vanuatu's reason for immediate termination of Mr Wilson's employment.[3] Further, the defence and the evidence filed by Mr Lee addressed not only the natural justice issue but the reason for the termination of employment.

17. Therefore, the primary judge was not limited to considering only whether Mr Wilson had been given a fair opportunity to respond to the allegation.

18. This ground of appeal fails.

Appeal Grounds 2 and 3:

Did the primary judge err in the finding the termination of employment was unlawful and unjustified?

19. Section 50 of the Employment Act says:

> *MISCONDUCT OF EMPLOYEE*
>
> *50. (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 employee's 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.*

[3] *Refer pp 78 and 81 of Appeal Book B*

> *(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.*

20. In the case of serious misconduct, an employer may dismiss an employee with immediate effect pursuant to s 50 (1) of the Employment Act. Serious misconduct is not defined in the Act. What amounts to *"serious misconduct"* is a question of fact in the particular circumstances of the case.

21. Where an employer's view of misconduct is challenged, the Court is obliged to consider whether the facts as alleged amount to misconduct. As this Court said in *Republic of Vanuatu v Watson* [2023] VUCA 31 at 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.*

22. The employer bears the burden of establishing serious misconduct: *Government of Vanuatu v Mathias* [2006] VUCA 7.

23. On Milai Vanuatu's pleaded defence, it was not necessary for the primary judge to have considered whether Mr Wilson actions amounted to serious misconduct. That is because his provision of a sworn statement for use by Mr Russet in his proceedings constituted the *"taking part in [a] proceeding against an employer"* which s 50(2)(c) of the Employment Act precluded from being deemed misconduct. Mr Kalsakau's submission was that for s 50(2)(c) to apply, the statement had to be truthful. On a plain reading of s 50(2)(c), there is no basis for such a gloss on the provision. Providing a sworn statement in the proceeding against Milai Vanuatu did not constitute misconduct.

24. Milai Vanuatu's revised case was that there was serious misconduct arising from the provision of inconsistent statements. In his email of 5 May 2021 terminating Mr Wilson's employment, Mr Lee of Milai Vanuatu, told Mr Wilson that he had received legal advice that his employment should be terminated because of the contradiction in his evidence to the extent that he had perjured himself, a serious offence under the Penal Code.

25. The distinction between the two statements drawn by the primary judge was that the statement of 27 October 2020 was on oath and had been filed in relation to a Supreme Court claim and the other was not. That is why he put the statement of 22 May 2020 to one side. Having done so, the primary judge assessed that the sworn statement filed in the Supreme Court claim was not contradictory.

26. Mr Kalsakau argued that it was an act of dishonesty for Mr Wilson to portray the company's business in one light and then give a different picture in another statement. What Milai Vanuatu is asking the Court to accept is that one of the two statements made by Mr Wilson must have been wrong and therefore Mr Wilson was dishonest. However, there are any number of reasons why there may be differences or inconsistencies between statements made by a person that do not involve dishonesty. For example, Mr Wilson explained in a sworn statement that when he made the first statement, he was not given the opportunity to give a full explanation about various

events.[4] Other examples may be given. A later statement may correct an earlier statement. A difference between statements may arise from them addressing different issues. One statement may not be entirely volitional, as when provided under duress. There was evidence in this case that Mr Wilson had been subjected to a degree of duress from Mr Lee in providing the statement on 22 May 2020.

27. Even on Milai Vanuatu's revised defence, this was not a case of serious misconduct justifying termination of employment without notice. The mere fact that the two statements appeared inconsistent did not imply dishonesty. There was no error by the primary judge in finding that the termination of employment was unlawful and unjustified.

28. Appeal grounds 2 and 3 fail.

Appeal Ground 4

Did the primary judge err in assessing the awards for the unlawful and unjustified termination of employment?

29. The primary judge assessed that Mr Wilson was entitled to various sums arising from the unlawful and unjustified termination of his employment. Milai Vanuatu takes issue with that assessment. Mr Tevi concedes that Mr Wilson was paid his April wages, albeit in May 2021. The award of VT 120,000 for outstanding wages is set aside.

30. Mr Kalsakau submits that the primary judge erred in the assessment of the award for damages for the unexpired term of the contract, annual leave and the severance allowance.

31. First, we accept Mr Kalsakau's submission that the award of VT 360,000 for damages for the unexpired term of the contract should be set aside. During the hearing, Mr Tevi acknowledged that Mr Wilson's employment contract was open ended and not a fixed term contract. As such, there was no basis for a damages award for the unexpired term of the contract. But for the termination of employment without notice, Mr Wilson's employment would have continued until either party gave notice of an intention to terminate the employment contract. The award for not giving Mr Wilson 3 months' notice[5] correctly provided for the lack of notice given to Mr Wilson upon termination of his employment.

32. Second, we do not accept the submission that there was no evidential basis for the claim for outstanding annual leave. Mr Kalsakau conceded that it was the employer's responsibility to maintain financial records for employees. Mr Wilson, in such circumstances, can hardly be criticised for not having the actual records. He did though provide evidence of the annual leave entitlements,[6] which in the absence of any other evidence to the contrary, the primary judge was entitled to accept.

33. Third, the main issue as to the quantum awarded is whether the judge erred in applying a multiplier of 3 in assessing the severance allowance. Section 54 of the Employment Act provides that when an employer terminates the employment of an employee who has been in continuous employment for at least 12 months, the employer must pay a severance allowance to the employee under s.56. Section 55(2) qualifies that obligation by providing that an employee who is dismissed for serious misconduct is not entitled to the severance allowance. Sections 56 and

[4] *Sworn statement filed on 16 February 2022, paragraphs 9-13*
[5] *as provided for in s 49 of the Employment Act*
[6] *Annexure FYW 2 to his sworn statement filed on 31 August 2021*

57 provide for the calculation of the amount of the severance allowance. Section 56 provides (relevantly):

> *AMOUNT OF SEVERANCE ALLOWANCE*
>
> *56. (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;*
>
> .....
>
> *(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.*

34. It was argued that there was no justification for a severance allowance award with a multiplier of 3. Rather, a multiplier of 0.5 should have been awarded. In oral submissions, Mr Kalsakau said that the primary judge erred in applying a multiplier of 3, comparative to *Republic of Vanuatu v Mele* [2017] VUCA 39. Mr Mele was a senior public official. He was dismissed from his role as Director of Agriculture by the Public Service Commission after being in the role for just over two years. The dismissal was held to be unjustified. This Court upheld the decision of the primary judge to apply an uplift of 2 times and said it was easily justified given that the failures of the PSC in dismissing Mr Mele were significant. The unlawful dismissal removed him from a very significant job in the Public Service and his loss of future employment opportunities and income would inevitably be significant.

35. The circumstances of *Mele* are so factually distinct from Mr Wilson's circumstances, that a comparison does not assist. Here, there was no basis for termination of employment, and Mr Wilson's unlawful dismissal meant that he lost his role as the Field Manager on the farm.

36. Further, because Mr Wilson's employment contract was not for a fixed term, he did not have the advantage of receiving the balance of his contractual entitlements for the remaining term of the contract. As this Court explained In *Republic of Vanuatu v Watson* [2023] VUCA 31, an employee on a fixed term contract is better off than an employee whose term of employment is not for a fixed term, because they may expect to receive the balance of their entitlements for the remaining term of the contract, and took this advantage into account in reducing the applicable multiplier from 4 to 2.

37. Taking into account that the purpose of the payment is compensatory,[7] we see no reason to interfere with the primary judge's exercise of discretion to uplift by a multiplier of 3.

38. No errors are identified in the primary judge's assessment of the awards for annual leave and the severance allowance, which were within his discretion. For reasons explained above, the awards for outstanding wages and damages for the unexpired term of the contract are set aside.

Disposition of the appeal

39. We make the following orders:

a) The awards of VT 120,000 for outstanding wages and VT 360,000 for damages for the unexpired term of the contract are set aside;

b) The appeal is otherwise dismissed;

c) As Milai Vanuatu failed in its major grounds of appeal, it is to pay Mr Wilson's costs of and incidental to the appeal fixed at VT 100,000.

DATED at Port Vila, this 15th day of November, 2024

BY THE COURT

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

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Hon. Chief Justice Vincent Lunabek

[7] *This Court in Republic of Vanuatu v Mele [2017] VUCA 39, Vanuatu Broadcasting and Television v Malere [2008] VUCA 2, Republic of Vanuatu v Watson [2023] VUCA 31, and FR8 Logistics v Leona [2023] VUCA 46 has confirmed that the award is compensatory, although there is debate as to whether it is a reflection of the circumstances of the dismissal or more compensatory for a person who is unable to find work.*