

BETWEEN: **REPUBLIC OF VANUATU**
Appellant

AND: **JEAN YVES BIBI**
Respondent

Coram: *Hon. Chief Justice V. Lunabek*
Hon. Justice M. O'Regan
Hon. Justice R. White
Hon. Justice D. Aru
Hon. Justice V. M. Trief
Hon. Justice E. Goldsbrough
Hon. Justice M. A. MacKenzie

Counsel: *Mr L. Huri for the Appellant*
Mr M.J. Hurley for the Respondent

Date of Hearing: *5 February 2025*
Date of Judgment: *14 February 2025*

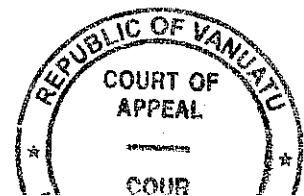
JUDGMENT OF THE COURT

Introduction

1. This appeal raises a single issue, being a challenge to the amount of the severance payment under s.56 (4) of the Employment Act [CAP 160] allowed in the award of damages to a dismissed employee.

Background circumstances

2. The Public Service Commission (the PSC) appointed Mr Bibi as its Secretary- General on a fixed term contract for 4 years, commencing on 24 September 2019. His salary was VT6,356,900. Other



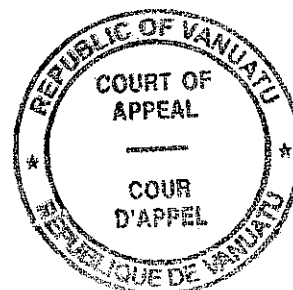
allowances and entitlements meant that his total remuneration, including his entitlement to annual leave, was regarded as being VT7,771,177.

3. On 24 December 2020, the PSC suspended Mr Bibi and, following a disciplinary process, terminated his employment on 18 February 2021 on the ground of serious misconduct. Mr Bibi's challenge to the lawfulness of the termination was unsuccessful at first instance: *Bibi v Republic of Vanuatu* [2022] VUSC 13. An appeal resulted in his claim being remitted to the Supreme Court for re-hearing: *Bibi v Republic of Vanuatu* [2022] VUCA 15. Subsequently, and following its consideration of the reasons of this Court in *Republic of Vanuatu v Nasak* [2024] VUCA 4, the Republic admitted liability.
4. The matter then proceeded to an assessment of damages. It was common ground in that re-hearing that Mr Bibi had been unemployed from his termination on 18 February 2021 until commencing a six month contract in the Republic's Innovation and Development Unit (the IDU) on 11 March 2024. His annualised salary in that position was VT4,682,900.
5. The primary Judge was told of the prospect of that contract being extended for a further six months and, on the appeal, it was acknowledged that that had occurred.
6. In a judgment delivered on 9 October 2024 (*Bibi v Republic of Vanuatu* [2024] VUSC 311), and amended under the slip rule on 12 November 2024, the Judge awarded Mr Bibi damages as follows:
 - (a) Salary for the balance of the 4 year fixed term contract VT15,672,171;
 - (b) Housing allowance VT2,465,399;
 - (c) Fuel allowance VT462,233;
 - (d) Telephone allowance VT60,000;
 - (e) VNPF contribution VT652,982;
 - (f) Outstanding leave VT1,843,637;
 - (g) Severance payment under Section 54 and Section 56(2)(a) of the Employment Act VT4,237,936;
 - (h) Severance payment under Section 56(4) of the Employment Act (multiplier of 2) VT8,475,872;Total VT33,870,230.

The Employment Act

7. Subject to some exceptions which are not presently relevant, s.54 (1) of the Employment Act obliges an employer who terminates the employment of an employee with at least 12 months of continuous service to pay a severance allowance under s.56. That section provides relevantly:

56. Amount of severance allowance



- (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 – 1 month remuneration
 - (i) Subject to subsection (4) the amount of severance allowance payable to an employee shall be –
 - (a) for every period of 12 months – 1 month remuneration;
 - (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).

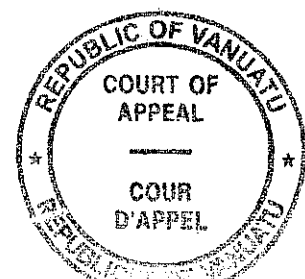
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The Decision of the Primary Judge

8. In the present case, Mr Bibi claimed the severance payment required by s.54 and s.56(2) in the sum of VT4,237,936 and the severance payment required by s.56(4) with a multiplier of 2. The Judge upheld that claim, thereby rejecting the Republic's submissions that a multiplier of one was appropriate:

25. The amount of severance is now agreed but the issue is the multiplier. The claimant submits a multiplier of 2 times according to Watson's case. The Republic submitted that only a multiplier of one should be sufficient.

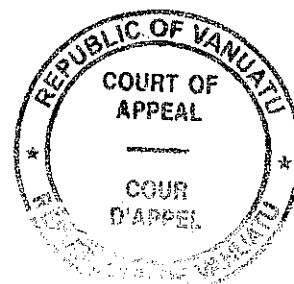
26. I disagree with the State's submission. The defendant endeavoured to justify or mitigated the claimant's financial losses and hardships by engaging Mr Bibi in the Innovation and Development Unit under a new contract effective from 11 March 2024 to 11 September 2024. This is disclosed in the sworn statement of Mr lavre dated 29 September 2024 as Annexure "J11".



27. However, the engagement was only for a period of 6 months. And from the date of Mr Bibi's termination on 18 February 2021 to 18 February 2024, it has been some 3 years that he was unemployed.
28. Under those circumstances I accept Mr Hurley's submission that Mr Bibi is entitled to a multiplier of 2 times his severance allowance, which is VT 4,237,936 x 2 = VT 8,457,872.

The Appeal

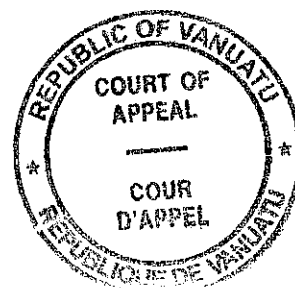
9. Both counsel accepted, correctly, that the Judge's selection of a multiplier of 2 was an exercise of discretion with the consequence that the principles of appellate restraint stated in *House v The King* (1936) 55 CLR 505 and applied by this Court in cases such as *Family Boetara v Molsakel* [2018] VUCA 28 at [12] are applicable. In the circumstances of this case, this means that this Court may interfere with the Judge's selection of the multiplier of 2 only if satisfied that he had proceeded on a wrong principle, had overlooked a relevant matter, or had failed to have regard to a relevant matter.
10. The principal submission of the Republic was that in applying a multiplier of 2, the Judge had failed to have regard to the significant award to Mr Bibi of his salary for the balance of his fixed term contract. In round terms, at the time of his termination, Mr Bibi had served one year and 5 months of his 4 year contract. He had accordingly been awarded salary for the balance of the 4 year term, namely 2 years and 7 months. The Republic submitted that this was a significant sum of which the Judge had not given proper recognition.
11. Secondly, counsel emphasised the Respondent's engagement of Mr Bibi in the IDU on 11 March 2024 on a six months contract with the renewal of that contract for a further 6 months on 12 September 2024.
12. Counsel for Mr Bibi emphasised a number of matters:
- (a) Even with the payment for the balance of his contract, Mr Bibi had been without income for the period from 24 September 2023 until commencing his contract position on 11 March 2024 and, in any event, had not been in receipt of income from 18 February 2018 until 11 March 2024;
 - (b) The vilification and defamatory comments on social media which Mr Bibi had suffered following his suspension on 24 December 2020;
 - (c) The hardship he and his wife had experienced in meeting financial obligations during the long period he had been without income;
 - (d) Mr Bibi's isolation from public and other activities; and



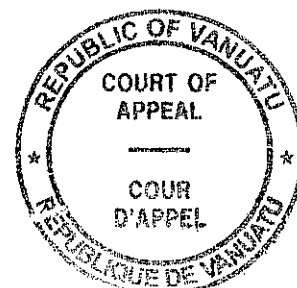
- (e) The lack of security in the two contracts in the IDU.

Consideration

13. In *Republic of Vanuatu v Watson* [2023] VUCA 31, this Court considered the relevance, in the fixing of the appropriate multiplier under s.56(4), of two matters: a PSC circular indicating that certain employees were entitled a severance payment at the rate of 2 months for each year of service, and the payment of the balance of a fixed term contract. In relation to these two matters, this Court said:
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 than the circumstances surrounding the unjustified termination. In that way, the award is more compensatory than punitive.*
14. Having regard to these matters, the Court in *Watson* reduced the trial Judge's multiplier of 4 to 2.
15. *Watson* is the authority for the proposition that, in fixing the multiplier, account should be taken of the benefit to employees on fixed term contracts who, on the premature termination of their contracts, receive payment for the unexpired term of their contracts. The decision in *Watson* is not to be applied in a mechanistic way, for example, as indicating that all employees on fixed term contracts are entitled to have a multiplier of two applied under s.56(4). To the contrary, regard must be had to the individual circumstances of each case, including the extent of the expired portion of the fixed term for which the employee is entitled to payment.



16. The Republic did not submit that the Judge's approach in Mr Bibi's case had been mechanistic in the way just described.
17. The payment out of the unexpired portion of the fixed term contract was even more relevant in Mr Bibi's case than in *Watson* as the unexpired portion of his contract was 2 years and 7 months compared with the unexpired portion of 1 year and 8 months in Ms Watson's case.
18. Likewise, it was appropriate for the Judge to take account of the steps taken by the Republic in 2024 to mitigate Mr Bibi's loss, by employing him in the IDU.
19. The difficulty for the Republic on the present appeal is that it cannot be said that the Judge overlooked either of the two matters on which it relies. As to the first, the Judge referred twice to the decision in *Watson*, at [17] and again at [25]. In these circumstances, it is improbable that the Judge overlooked that he was required in the assessment to have regard to the substantial sum Mr Bibi was receiving for the unexpired term of his contract. To the contrary, the Judge had awarded Mr Bibi the sum of VT15,672,171 for this head of damage.
20. As to the second matter said to have been overlooked, the Judge addressed specifically the submission of the Republic on this topic, at [26] – [27] of his reasons, set out above. It was not a matter to which the Judge failed to have regard.
21. Moreover, there were other relevant considerations, including those emphasised by counsel for Mr Bibi, which are set out earlier in these reasons. We did not understand counsel for the Republic to contend to the contrary.
22. It may be that the fixing of a multiplier of 2 in the present case was generous and possibly higher than the multiplier which would have been fixed by this Court had it been the court at first instance. But, the application of the principles of appellate restraint in cases of appeals against the exercise of a discretion means that we are not satisfied that the Republic has established appealable error.
23. We mention one further matter. It emerged during the submissions on appeal that Mr Bibi's severance payment under s.56(4) had been calculated in accordance with an entitlement for 2 months for each year of service, or part thereof, this being thought to be his entitlement under a PSC circular issued on 2 September 2020. The view that this was required by s.56(4) may be inconsistent with its terms as it contemplates only an uplift of "*the amount of severance allowance specified in sub-section (2)*", namely one month's remuneration for each year of service, or a pro-rata amount. However, the Republic did not contend on this appeal that the Judge had been in error in this respect, and it would have been difficult for it to do so, given that it had agreed the severance entitlement (other than the multiplier) at first instance. We emphasise however that this decision is not to be regarded as judicial endorsement of the approach adopted by the parties in this case. Consideration of this issue will have to await a case in which it arises for determination.



Conclusion

24. For the reasons given above, the appeal is dismissed. The Republic is to pay Mr Bibi's costs of and incidental to the appeal fixed in the sum of VT75,000.

DATED this 14th day of February 2025.

BY THE COURT



Hon. Chief Justice V. Lunabe

