

**IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU**

*(Civil Jurisdiction)*

**Civil Case No. 219 of 2005**

**BETWEEN: JOSEPH MALERE**  
First Claimant

**AND: PASCAL LABAN**  
Second Defendant

**AND: WILLIE DANIEL**  
Third Defendant

**AND: JOSEPH LAUTO**  
Fourth Defendant

**AND: HILAIRE BULE**  
Fifth Claimant

**AND: GAETON ABONG**  
Sixth Claimant

**AND: VANUATU BROADCASTING AND  
TELEVISION CORPORATION**  
Defendant

*Coram:* Justice N. R. DAWSON

*Date of Hearing:* 19<sup>th</sup> May, 2009

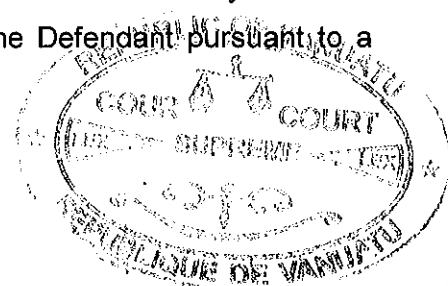
*Date of Decision:* 10<sup>th</sup> August, 2009

*Counsel: Claimants:* Mr. J. Malcolm

*Defendant:* Mr. J. L. Napuati

**DECISION**

1. This matter is before the Court to assess the quantum, if any, due to the Claimants pursuant to Section 56 (4) Employment Act [CAP. 160] ("the Act"), and the quantum, if any, that is due to them pursuant to common law damages, and costs in the Supreme Court.
2. The Claimants were all employed by the Defendant for between 3 ½ and 12 years until various times between 15<sup>th</sup> March, 2005 and 14<sup>th</sup> June, 2005 when they were all dismissed. The Claimants obtained a judgment against the Defendant pursuant to a Reserve Judgment dated 22 February 2008 of Bulu J.



3. The case then went on appeal to the Court of Appeal and in a Judgment dated 1<sup>st</sup> April, 2008 the Court of Appeal concluded the entitlements due to each of the Claimants as follows:

*"Judgment is confirmed against the Appellant in favour of the Respondents as follows:*

- |                  |   |              |
|------------------|---|--------------|
| 1. Joseph Malere | - | 600,500 VT   |
| 2. Gaeton Abong  | - | 615,708 VT   |
| 3. Pascal Laban  | - | 913,053 VT   |
| 4. Willie Daniel | - | 671,322 VT   |
| 5. Joseph Lauto  | - | 1,019,592 VT |
| 6. Hilaire Bule  | - | 1,373,904 VT |

*Each of those sums will attract Interests at 5% calculated from the 28<sup>th</sup> November 2005. The Orders made in the Supreme Court in respect of entitlements under Section 54(6) (sic s.56(4)) of the Employment Act, common law damages and costs and interests are quashed.*

*The issue of costs in the Supreme Court and entitlements under Section 56(4) of Employment Act and for common law damages are sent back to the trial judge for assessment unless settlement can be reached."*

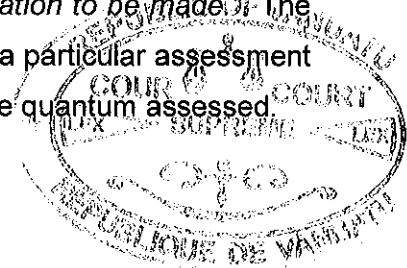
A hearing was held in this Court on 19<sup>th</sup> May 2009 to complete these remaining matters.

4. Section 56 (4) of the Act says

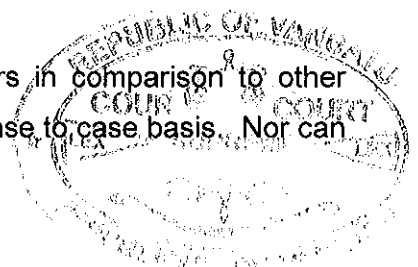
*"The Court shall, where it finds that the termination of the employment of an employee was unjustified, order that he be paid up to 6 times the amount of severance allowance specified in sub Section 2."*

5. This payment, commonly known as the multiplier, requires this Court to exercise a discretion as there is no guidance in the Act other than that it applies when the employer was unjustified in dismissing an employee. It has been previously established earlier in this proceedings that the Claimants were all wrongfully dismissed and pursuant to Section 56 (4) the hearing was for the purpose of ascertaining the quantum payable, if any, to each Claimant.

6. The Court of Appeal in its decision in this case, Civil Appeal Case No. 3 of 2008, P. 5 said *"the first thing to be noted is that it is not an automatic entitlement. The Court has an ability to make an order up to that maximum but it not a right. It requires an assessment of the circumstances and a proper judicial determination to be made."* The Court of Appeal then went on to say that when this Court makes a particular assessment under section 56 (4) it needs to explain its reasons in reaching the quantum assessed.



7. The Court of Appeal then went on to say *"There are two possibilities with regard to the meaning of Section 56 (4). In some cases it has been treated as a reflection of the circumstances which led to the dismissal and in others it has been treated more as compensatory for a person who is unable to obtain work..... it is possible that under either approach a good case could be advanced."*
  
8. It is clear from Section 56 (4) that termination of the employment must be unjustified. Therefore it is appropriate for this Court to take into account circumstances existing at the time of the unjustified termination when it comes to assessing the amount to be applied. Without intending to make an exhaustive list of factors that this Court could take into account, factors that could be considered relevant include:-
  - a) did the employee have a good work record?
  - b) had the employee been given any previous warnings?
  - c) was the unjustified dismissal a result of inept handling of the issue by the employer at the lower end or high handed arrogance at the higher end of the scale?
  - d) was the employee subjected to physical or verbal abuse by the employer at the time of the termination?
  
9. Other factors subsequent to the dismissal of the employee can also be taken into account when assessing the amount to be imposed and at what level. As a general principle, factors subsequent to the termination of employment should be factors personal to the employee that are reasonably foreseeable to the employer as potential difficulties an employee might face following the loss of employment. These factors again without creating an exhaustive list, could include:
  - a) the efforts the employee has made to mitigate his or her loss by looking for new employment
  - b) the age, qualifications, skills and health of the employee where those factors are relevant to his or her re-employment prospects
  - c) if the employee has found new employment, is his or her new salary package better or worse than that which he or she has lost?
  - d) has his or her health or that of the immediate family of the ex-employee suffered as a result of the unjustified termination?
  - e) have educational opportunities for the ex-employee's immediate family been lost as a result of the unjustified termination?
  
10. It is not possible to give a weighting to any of these factors in comparison to other factors. Also, the weight of a particular factor will differ on a case to case basis. Nor can



or should this Court set out a precise mathematical formula for calculating what if any compensatory amount should be paid. The assessment to be imposed will be a result of weighing all relevant factors in light of the circumstances of each case.

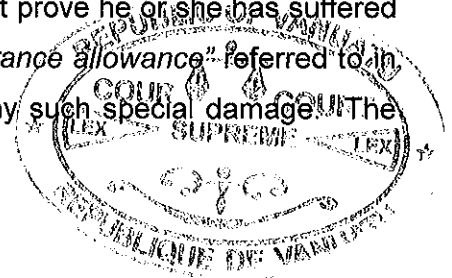
11. In this case the Claimants submit that a multiplier of the full amount of 6 times the amount of the severance allowance is appropriate. The Defendant submits that a multiplier of 2 times the amount of the severance allowance would be appropriate.

12. An assumption that this Court will, after looking at all the circumstances of each Claimant, then select a figure of between 1 and 6 and multiply the severance payment by that amount has already been rejected by the Court of Appeal in Melcoffee Sawmill Ltd v. George [2003] VUCA 24; Civil Appeal Case No. 18 of 2003 (7<sup>th</sup> November, 2003) where it said:

*"In Banque Indosuez Vanuatu Ltd v. Ferrieux 2VLR 490 (23 October 1990) this Court limited damages by reason of the manner of the dismissal to compensatory rather than punitive or exemplary damages but recognized the existence of the implied term of trust and confidence in an employment contract. The Court found that s. 56(4) "merely enables the Court to compensate an employee for any special damage which he has suffered by reason of an unjustified dismissal if the base severance allowance is insufficient (sic. Insufficient) for that purpose". In Mouton v. Selb Pacific Ltd (Judgment No.3)[1998] VUCA 8, CAC No.2 of 1995 the Court said that "the notion of compensation is a wide one" and that "it may be that section 56(4) is wide enough to allow the Court to have regard to distress and even ill health caused by the manner and circumstance of a dismissal."*

*In our view the loss of earnings for the further one-month beyond the duration of the notice period constitutes "special damage" and should be allowed under s.56(4). Under that section, although the Court "shall" order an additional sum over and above the basic severance payment, the additional payment must be to compensate for "special damage". In this case the respondent has not proved any special damage beyond his loss in the fourth months, and the award under s.56(4) cannot exceed that loss. We consider that there should be no multiplier of severance in respect of this relatively young respondent who was re-employed after only four months."*

13. This decision says that the purpose of s.56 (4) is for special damages where the severance payment was insufficient for that purpose, that the award of such a payment must be compensatory in nature, and that a Claimant must prove he or she has suffered a loss. Also "a sum of up to 6 times the amount of severance allowance" referred to in s.56 (4) sets a maximum amount that can be paid for any such special damage.



amount of special damages paid under s.56 (4) must relate to actual losses incurred and not be an arbitrary selection of a "multiplier" of between 1 and 6.

14. The circumstances common to all six claimants are:
- a) They have been held to have been unjustifiably dismissed from their employment by the Defendant. All are therefore entitled to an additional payment pursuant to s.56(4)
  - b) They have been employed by the Defendant in excess of 3 ½ years
  - c) They were employed by an employer in a highly specialised area of employment ie. television broadcasting, and there is little hope of any of them finding new employment in Vanuatu where they can use their highly specialised skills.
  - d) The evidence indicates that all were good employees.
  - e) Each of them have suffered an economic loss.
15. The individual circumstances of each Claimant are as follows:

**Joseph Malere -**

Occupation: Senior Technician  
Salary: VT 58,928 per month  
Length of Employment: 4 years 3 months  
New Employment: None. Has unsuccessfully applied for one job  
Personal Circumstances: Remains unemployed, has had financial hardship, supported by family. 47 months unemployed.

**Pascal Laban -**

Occupation: Camera man/ Editor  
Salary: VT 97,440 per month  
Length of Employment: 11 years 4 months  
New Employment: A Pastor of Assembly of God. Says he has unsuccessfully applied for jobs.  
Personal Circumstances: Was temporarily employed for 5 months, still unemployed, cannot pay his children's school fees. 42 months unemployed.

**Willie Daniel -**

Occupation: Technician Manager  
Salary: VT 76,440 per month  
Length of Employment: 12 years



New Employment: A bus driver and sells ice-blocks. Unsuccessfully applied for two jobs. Grows his own food.

Personal Circumstances: Substantially diminished earnings, unable to pay children's school fees. Largely unemployed for 47 months.

**Joseph Lauto –**

Occupation: Cameraman/ Editor

Salary: VT 76,440 per month

Length of Employment: 12 years

New Employment: Has not applied for any new jobs and has a quarrying business earning VT 50,000 per month

Personal Circumstances: Diminished earnings for 50 months.

**Hilaire Bule -**

Occupation: Sub-editor/ news

Salary: VT 97,440 per month

Length of Employment: 12 years 1 month

New Employment: Unsuccessfully applied for a job in Noumea. Has worked in a kava bar and does freelance works with the Independent Newspaper at VT30,000 per month since 2006

Personal Circumstances: Has gone into debt to pay his children's school fees. Diminished earnings for 49 months.

**Gaeton Abong -**

Occupation: Program Supervisor/ Acting Manager

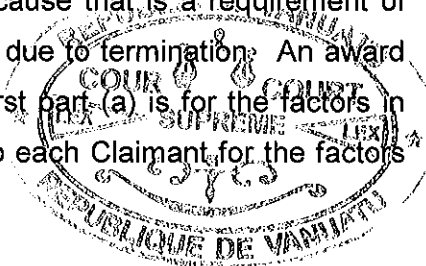
Salary: VT 80,640 per month

Length of Employment: 9 years 8 months

New Employment: 12 unsuccessful job applications. Worked in a kava bar at VT 5,000 per month. Since July, 2007 he has worked for the Government at a salary of VT 54,000 per month

Personal Circumstances: Had 27 months without any employment. Diminished earnings for 22 months.

16. An award must be made in favour of each Claimant because that is a requirement of s.56 (4) and because each Claimant has suffered losses due to termination. An award is therefore made to each Claimant in two parts. The first part (a) is for the factors in paragraph 14 herein. The second part (b) is an award to each Claimant for the factors



that are individual to each Claimant in paragraph 15 herein. The payments under (b) take into account the differing lengths of employment of each Claimant, salaries as at the date of termination, each Claimant's efforts to find new employment, hardship relating to educational opportunities of the Claimant's children, and amounts earned by each Claimant since termination.

The awards are as follows:-

Joseph Malere - a) VT 500,000  
b) VT 350,000  
VT 850,000

Pascal Laban - a) VT 500,000  
b) VT 750,000  
VT 1,250,000

Willie Daniel - a) VT 500,000  
b) VT 500,000  
VT 1,000,000

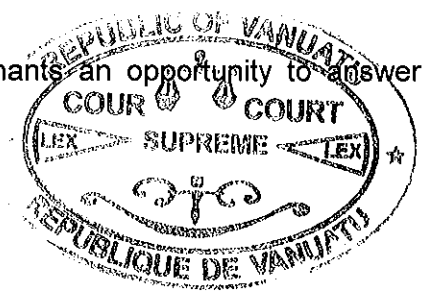
Joseph Lauto - a) VT 500,000  
b) VT 300,000  
VT 800,000

Hilaire Bule - a) VT 500,000  
b) VT 350,000  
VT 850,000

Gaeton Abong - a) VT 500,000  
b) VT 350,000  
VT 850,000

17. It was accepted by the Court of Appeal in Vanuatu Maritime Authority v. Bani Timbaci [2005] VUCA 19 CAC 24 of 2005 (18<sup>th</sup> November, 2005) that an award can be made for common law damages in cases such as this if the circumstances of the employed person's dismissal justify the making of such an award. In his Reserved Judgment dated 22<sup>nd</sup> February, 2008, Bulu J. notes that :

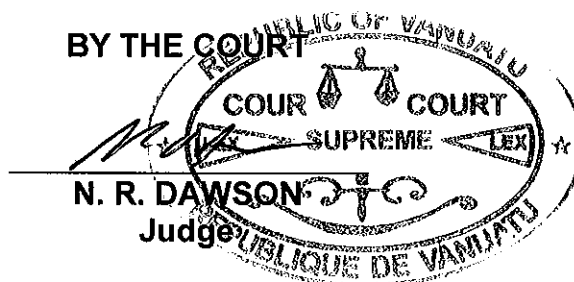
- a) The Defendant neglected to give the Claimants an opportunity to answer charges of serious misconduct against them.



- b) The reasons for dismissal given by the Defendant were wrong and misconceived.
- c) The Defendant has been dilatory in defending this claim and has caused unreasonable delay to the prejudice of the Claimants.
18. It is appropriate therefore to award common law damages to each of the Claimants. VT 75,000 has been claimed for each Claimant. In all the circumstances, that is not an unreasonable amount and an award of VT 75,000 for common law damages is made to each Claimant.
19. In addition to the amounts awarded to each Claimant, the Defendant is to pay interest:-
- a) At the rate of 5% calculated from 19<sup>th</sup> May, 2009 on the amounts awarded in paragraph 16 herein
- b) At the rate of 5% calculated from 30<sup>th</sup> June, 2005 for the amounts awarded in paragraph 18 herein.
20. As the Claimants have been successful in their action and because a substantial portion of the Claimants costs have been as a result of the Defendants failure to address the claim in the proper manner, costs are awarded against the Defendant in favour of the Claimant on a standard basis, as agreed by the parties, or failing agreement, as taxed by this Court.

**Dated at Port Vila, this 10<sup>th</sup> day of August, 2009**

**BY THE COURT**



**N. R. DAWSON**

**Judge**