**IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU**
*(Civil Jurisdiction)*

**CIVIL CASE No.136 OF 2009**

**BETWEEN:** **TYRONE MANN**
Claimant

**AND:** **AIR VANUATU LTD**
Defendant

***Coram:*** ***Justice D. V. Fatiaki***

***Counsel:*** *Mr. J. Kilu for the Claimant*
*Mr. J. Malcolm for the Defendant*

***Date of Decision:*** *5 November 2010*

# JUDGMENT

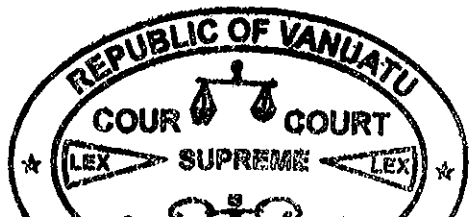
1. On 14 January, 2008 the Claimant commenced employment with the Defendant Company as the **Catering Administration Manager** on a salary of VT 3,000 per hour based on a minimum 40 hour per week. The Claimant claims that he was employed as a full time employee under an oral contract of employment for an unspecified period of time. On first joining he presented the Defendant company with a valid residence visa and work permit which he had obtained whilst working for a previous employer and was advised that the Defendant company would see to the renewal of his work permit and resident visa.

2. Unfortunately and unbeknown to the Claimant his work permit and residency visa were **not** renewed and he only became aware of the Defendant's failure when he received an official letter from the **Department of Labour** dated 22 April 2009 advising him that he was in breach of the **Labour Act** [Cap 187] for working without a valid work permit. The letter demanded payment of a penalty of VT 50,000 before the Claimant's work permit could be renewed.

3. The Claimant immediately approached the Defendant's General Manager Human Resources about the matter and was assured that everything would be sorted out and he was told to provide a passport photo to be used on his renewed work permit and residence visa.

4. On 24 April 2009 the Claimant provided his passport photo and in return, received an Appointment Letter offering him the position of **Executive Chef (Permanent, Full-time)** with the Defendant company for a fixed term of 3 years with effect from 27 April 2009 on a monthly salary of VT451, 000. The seven (7) page-letter contained a total of 28 separate clauses which set out in some detail the terms and conditions of the offer.

5. It is only necessary for present purposes to set out the following significant clauses (so far as relevant):



"*TERMINATION OF EMPLOYMENT*
*Employment may be terminated either by yourself or Air Vanuatu, for any reason, by either party giving to the other three (3) months notice or three (3) months salary in lieu of notice or by otherwise mutual agreement.*

*Air Vanuatu may terminate your employment without notice in the event of serious misconduct or other sufficient cause, in which case salary and other remuneration is payable up to the date of dismissal only. "Serious misconduct" includes but is not limited to theft, consumption of or being under the influence of alcohol or other drugs whilst on duty, fighting, representing Air Vanuatu without authorization, including acting in a manner that will bring the image of Air Vanuatu into disrepute, and other matters in accordance with Air Vanuatu policies as varied from time to time".*

*WORK AND RESIDENCY PERMITS*
*The costs for the issuance of both work and residency permits to the Employee will be borne by the Employer. The Employee must, at all times during the term of Agreement, be eligible to be the holder of such Permits."*

6. Returning to the offer letter, the penultimate paragraph required the Claimant to sign and return the original copy of the letter in order to accept the appointment. The Claimant accepted the appointment later that same day. Significantly, the offer letter ended on the following promising if somewhat ironic note:

*"Tyrone, I welcome you to Air Vanuatu and trust that we will have a mutually rewarding working relationship".*

7. What happened next can only be described as bizarre and unfortunate. It is described in the Claimant's sworn statement [Exhibit P.1] as follows:

*"22. In the evening, I went to the kava bar to have kava with friends when 2 security officers from Air Vanuatu arrived and handed me the termination letter at 6:30 pm in the evening.*

*24. I was shocked about the sudden termination as I believed that the Department of Labour did not require my employment to be terminated or (sic) did not even require me to stop work. They simply required us to regularize any work permit status so that I could continue on with work lawfully.*

*25. I also had completed the application forms and left them with Alan Burke and so I failed to understand why I was being terminated due to the Defendant's own failure to renew my work permit. They were even given the necessary documents originally in January 2008 when I first joined the company and yet they did not comply with their obligations as required by the*

*Labour Act and how (sic) they terminate my employment for their own failure."*

8. For completeness I set out the Claimant's termination letter which, somewhat surprisingly, was signed by the Chairman of the Board of Directors of the Defendant company and reads as follows:

*"Dear Tyrone,*

*Re: EMPLOYMENT AIR VANUATU (Operations) LIMITED*

*Air Vanuatu has recently received notice from the Labour Department that you are an "illegal employee" i.e. working without a valid work permit and consequently this may place Air Vanuatu in contravention of the Labour Laws. To ensure that Air Vanuatu is always in compliance with the laws of the country I hereby gave you notice of termination of your employment with effective from Friday 24 April 2005.*

*Accordingly you are no longer employed by Air Vanuatu, effective immediately, 24 April 2005.*

*Your outstanding entitlements will be deposited into your designated bank account in full and final satisfaction of all claims.*

*Please immediately return all Air Vanuatu property in your possession including uniform, Security Identification Card etc.*

*If for any reason in the future, you have to enter Air Vanuatu Office and/or property, could you please notify the undersigned for prior approval for such entry.*

*Yours faithfully,*

*Charles Daliure Lini*
*CHAIRMAN BOARD OF DIRECTORS."*

With that termination letter what was to have been a day of celebration and hopeful anticipation turned into a nightmare of uncertainty and anxiety.

9. On 20 October 2009 the Claimant issued proceedings claiming the following for unjustified dismissal:

***3 months Notice***

| | |
|---|---|
| *3 months notice under the Employment contract (VT 451,000 x 3)* | *VT1,355,000* |

***Sick Leave***

| | |
|---|---|
| *VT15,034 per day x 21 days x 3 years* | *VT947,142* |

***Salary***
*VT 451,000 x 12 x 3 years* *VT16,236,000*

*(**Note:** This head of claim is unfortunately worded but clearly is a claim for damages for breach of the claimant's contract of employment as Executive Chef.)*

***Severance Entitlement Under Contract***
*½ month salary VT225,500 x 3 years* *VT67,652*

*(**Note:** This particular head of claim is confusing and unclear and I do not propose to grant anything under it).*

***Severance Entitlement under Section 56.4 of Employment Act***
*VT 676,500 x 6 points*
*factor under Section 56(4) of the Employment Act* *VT4,059,000*

***Vanuatu National Provident Fund Contribution***
*451,000 x 4% = 18,040*
*12 x 3 x 18,040*
*VT649,440*

***Total:*** ***VT23,923,082***"

10. The Claimant also sought **VT8,000,000** in punitive/exemplary damages together with interest of **5% per annum** and costs.

11. The trial of the action was extremely brief. The following sworn statements were produced in support of the claim and exhibited by consent:

- Tyrone Mann dated 20 October 2009 - (Exhibit P. 1)
- Tyrone Mann dated 20 February 2010 - (Exhibit P. 2)
- Jeannine Mann dated 10 February 2010 – (Exhibit P. 3)
- Smith Vira dated 10 February 2010 – (Exhibit P. 4)
- Nerry Pakoa dated 10 February 2010 – (Exhibit P. 5)
- Watson Marivire dated 10 February 2010 – (Exhibit P. 6)

None of the deponents were called or cross examined and indeed defence counsel conceded liability but disputed some of the heads of claim and the quantum. No sworn statements were produced in support of the Defendant.

12. Counsels also helpfully agreed the following facts and issues:

"***AGREED FACTS***

*THE defendant concedes:-*

*1) The claimant's employment commenced 4th January 2008.*

2) *ON 24 April 2009 he executed an employment agreement with the Defendant.*

3) *HE was an employee (not a contractor) since 14 January 2008.*

4) *HE was terminated wrongfully on 24 April 2009 by the Chairman for failing to get work permits and residency.*

5) *IT was Air Vanuatu's obligation to maintain his (immigration) status.*

6) *HE is entitled to*
   a) *Three months notice VT 1,355,000*
   b) *Severance ( x 1 year 84 days) VT 277,380*

***AGREED ISSUES***

1) *The effect of clause 13 (of the claimant's contract of employment);*

2) *Whether sick leave is payable;*

3) *Severance multiplier;*

4) *VNPF claim;*

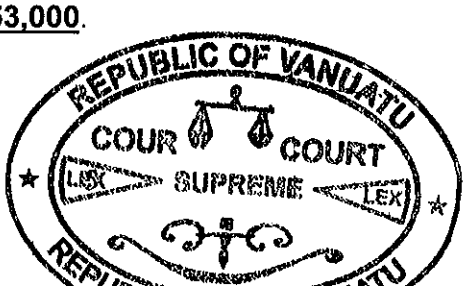
5) *Are punitive damages payable in contracted (sic) law?".*

13. I also received comprehensive written submissions filed by both counsels to assist me with regards to the heads of claim and the quantum to be assessed on each (if allowed).

14. For completeness I record that after the trial the Claimant through his counsel unsuccessfully sought to obtain an interim consent order for the payment of the 2 monetary items that have always been conceded by Defence counsel, namely, the 3 months notice and severance allowance for 1 year 84 days. [**see:** agreed fact (6) (b)above].

15. I turn then to consider the claim for relief under the various heads outlined in Claimant's counsel's submissions.

16. **THREE MONTHS NOTICE**
This is a contractual entitlement under **Clause 14** of the Claimant's terms and conditions of employment and is properly conceded by defence counsel.
Accordingly, I award the Claimant under this head the sum of:
**VT (451,000 x 3) = VT 1,353,000**.



17. **SICK LEAVE**
In this regard counsel submits that the claim *"is based on the fact that had his employment contract not been wrongfully terminated, he would have had a chance of receiving such a benefit during the 3 years term of the contract."*

18. Defence counsel submits however that *"Sick Leave is not a benefit due and payable whether taken or not it simply allows someone to be paid his salary whilst off work sick for a specified period."*

19. I agree with defence counsel's submission which is based on common sense and re-inforced by the clear requirement to produce *"authorized medical certificates"* for sick leave taken under **Clause 8** of the Claimant's contract of employment. The claim under this head is accordingly dismissed.

20. **VNPF CONTRIBUTION**
The claimant says he is entitled to an amended claim for VNPF "*in the sum of VT(451,000 x 4% x 3) = VT54,120 for the 3 months notice*".

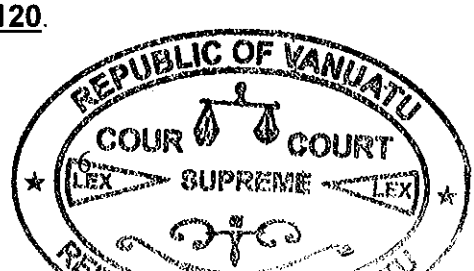
21. Defence counsel whilst accepting the possibility of a claim under this head for the 3 months notice period, nevertheless, denies the claimant's entitlement to claim VNPF payment which "*only the VNPF has standing to make demand if due on any payment or payment to be made*". No authority was cited for this submission but in any event the Court of Appeal has said in **Leingkone v. VBTC** [2002] VUCA 45: "*... VNPF contribution payments can never be treated as an optional extra. Those must be made by every employer at all times.*"

22. In this regard **Section 26(1)** of the **Vanuatu National Provident Fund (VNPF) Act** [CAP. 189] imposes a mandatory duty on an employer to pay to the VNPF on behalf of its employee a contribution at the rate of 8% of an employee's remuneration "*... of which half (ie 4%) is to be paid by the employer and half by the employee*".

23. Furthermore although judgment was given in the absence of defence counsel, I note that Treston J. awarded VNPF contributions in a claim for breach of an employment agreement in **Judith Kaspar Kere v. Ifira Wharf & Stevedoring** [2005] VUSC 120. The Court of Appeal in describing the claim as one for loss and damages for unjustified dismissal of a single parent with 2 school age children who was summarily dismissed by her employer barely 4 months after she began employment on a fixed term contract of 3 years, and, in refusing leave to appeal, said: "*If leave to appeal out of time were granted, the appeal would undoubtedly fail*".

24. I am satisfied that the Claimant is entitled to claim what would have been his employer's contribution during the 3 months notice of termination period that the Defendant was obliged to give the Claimant under the Employment Act, and which was denied to the Claimant by his wrongful and summary termination.

25. In light of the above I uphold the Claimant's amended claim under this head and award him the sum of **VT54,120**.



**SEVERANCE ALLOWANCE**

26. In this regard defence counsel conceded (and it is accepted by the Claimant's counsel) that his severance allowance under **Section 56(2)** of the **Employment Act [CAP. 160]** is calculable on the basis of (1/2 month salary x 1 year 84 days) ie. **VT277,390**. Defence counsel does not concede however that the Claimant is entitled to any severance under **Section 56(4)**.

27. I confess to some difficulty in understanding defence counsel's submissions on this aspect of the claim, in particular, the submission that: "*The Claimant is not entitled to severance for future employment*" and "*severance is based on years and days employed not future economic loss*". When questioned by the Court, however, defence counsel indicated that the concession at **agreed fact 6(b)** referred to the Claimant's employment prior to his termination ie. presumably as Catering Administration Manager of the Defendant company since 14 January 2008 (***See:*** **agreed fact (3)**). In other words, counsel was making **no** concessions with regard to the Claimant's severance entitlements after his termination presumably because the Claimant did not ever commence working as Executive Chef since his employment contract for that position was effectively terminated before its commencement date, which was 27 April 2009.

28. The entitlement to a severance allowance is provided for in **Section 54** of the **Employment Act** and, with respect, is clear. Where an employee has been in continuous employment of an employer for a period of not less than 12 months and the employment is terminated by the employer, then "*the employer shall pay severance allowance to the employee under Section 56*". There is no requirement that the employment be in the same postion so long as it is with the same employer. Furthermore termination need not be of wrongful nor does it have to be "*unjustified*".

29. I receive some support from the judgment of the Court of Appeal in **Banque Indosuez Vanuatu Ltd. v. Ferrieux** [1990] VUCA3 where the Court said in construing Section 56(4):

> "*We have had considerable difficulty with Section 56(4). In this context, we take "shall" to mean "must". So that where a court finds that a dismissal is "unjustified" it is obliged to make an award under this head, subject to a maximum figure*". (my underlining for emphasis)

30. I accept that **Section 55** sets out various circumstances where a severance allowance is **not** payable to an employee including where the employee is "*dismissed for serious misconduct as provided in Section 50*". None of those circumstances are pleaded or raised in this case and the section may therefore be put to one side.

31. **Section 56(2)** sets out the relevant statutory formula for calculating the minimum amount of severance allowance payable to an employee based upon his ending remuneration and the employee's length of service. As a convenient shorthand this agreed figure of **VT277,390** might be described as the "***multiplicand***". I say "*minimum*" advisedly because not only is an employer under a mandatory ("***shall pay***") duty to pay severance allowance to an employee in the circumstances described in **Section 54(1)(a) to (e)**, but also,

because **Section 56(4)** clearly empowers the Court to order that an employee be paid "*... up to 6 times the amount of severance allowance specified in subsection (2)*" (my underlining). Again for convenience this figure might be described as the "***multiplier***".

32. I accept that the multiplier under **Section 56(4)** is a matter for the Court's assessment and determination but the enlivening event or condition precedent to the activation of the subsection is "*... a finding that the termination of the employment ... was unjustified...*". In this regard the provisions of **Section 50(3), (4) & (5)** provides some assistance and guidance to the Court.

33. By that I mean that **Section 50(3)** envisages dismissal for serious misconduct as only available as a last resort where: "*... the employer cannot in good faith be expected to take any other course*" **and**, even if dismissal is accepted as the appropriate penalty, to be valid, it must still be effected or implemented "*... within a reasonable time*" of the serious misconduct occurring. [**see**: **Section 50(5)**]

34. Finally in my view, **Section 50(4)** assists the Court in interpreting **Section 56(4)** by "*deeming*" any dismissal in contravention of the natural justice requirement of the subsection to be an "***unjustified dismissal***" which is the very finding that the Court must make **before** Section 56 (4) is enlivened.

35. In the present case defence counsel concedes as much in his written submissions as well as in **agreed fact (4)** above.

36. Plainly the Claimant is entitled to a severance allowance under **Section 56(4)** calculated on the basis of the agreed multiplicand and, all that the Court has to determine is the appropriate multiplier which may extend "***up to 6***". Defence counsel submits that the multiplier in the present case could produce a "***VT0***" sum and Claimant's counsel urges the maximum ie. "***6 x***".

37. I can say immediately that I do **not** accept defence counsel's submission which would produce a "*ZERO*" figure for severance allowance. Such a submission ignores the mandatory nature of **Section 54** as to the employee's entitlement to a severance allowance and the employers duty to pay it, **but also**, the provisions of **Section 56(2)** which provides for a **minimum** severance allowance which in my view, is payable notwithstanding the provisions of subsection (4) which **only** operates to increase (and never to reduce or eliminate) the minimum severance allowance payable under subsection (2).

38. In similar vein the Court of Appeal in **VBTC v. Malere and others** [2008] VUCA2 said of the meaning and purpose of **Section 56(4)**:

> "*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 lead to the dismissal and in others it has been treated more as compensatory for a person who is unable to obtain work*".

39. What then should the "*multiplier*" be in the present case?

40. In addition to the deeming effect of **Section 50(4)** defence counsel submits that:

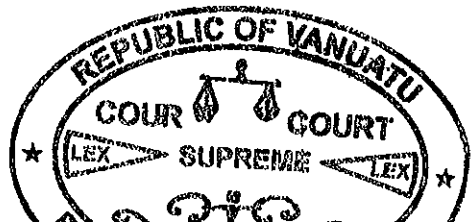
> "*The gravity of the circumstances under which the Claimant was terminated (as fully listed out in paragraph 18 (a) to (j) of the claim), are serious and call for severance payment to be calculated using a 6 multiplier rate*".

41. In brief, the Claimant was summarily terminated outside office hours without warning or notice and purportedly for a reason or default which was entirely his employer's responsibility to fulfill, both by law and under the terms of the Claimant's contract of employment (***see***: **Section 2(2)** of the **Labour Act** [CAP. 187] and **Clause 18** of the contract of employment).

42. I also note that the multiplier in **Section 56(4)** is linked directly to a termination of employment that is "***unjustified***" and therefore has no application to a bare termination or to one that is justified. The additional fact that the multiplier is given as a range ie. "*... **up to 6 times***", suggests to my mind that the legislature was aware that unjustified terminatons are **NOT** all the same and do in fact vary both as to the circumstances leading up to and at the point of the actual termination, as well as, the consequences for the unjustly terminated employee.

43. The factors that might influence the Court's decision as to the appropriate multiplier in a case of unjustified dismissal, was recently considered by Dawson J. in **Joseph Malere and others v. VBTC** Civil Case No. 219 of 2005 where he said at pages 3/4 of his judgment delivered on 10 August 2009:

> "*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?*
>
> *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?*

*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*".

44. The Claimant has led evidence from various witnesses including himself and his wife about how his sudden and summary termination had affected him physically, emotionally and financially as well as the welfare of his family. I accept all of that evidence which was not disputed or challenged and although it lacked detailed figures there is not the slightest doubt in my mind that the Claimant's dismissal was the result of "*high handed arrogance*". I am satisfied that the evidence supports a multiplier of **five (5)** under **Section 56(4)** and I so find. Accordingly, under this head of claim I award the Claimant severance allowance of (VT277,390 x 5) = **VT1,336,950**.

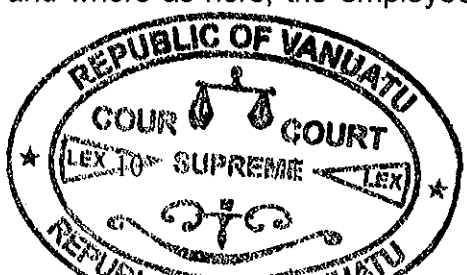
**BREACH OF CONTRACT**

45. Under this head the Claimant claims the entire salary that he would have received had he been allowed to serve out his contract for 3 years and which was prematurely and wrongfully terminated by the Defendant company.

46. Defence counsel's simple submission however is "*that where there is either a fixed term contract BUT terminable on a specified notice period (not less than the Employment Act) ... the maximum allowable damage (subject to mitigation) is either the notice period or 3 months AND in any/either event in this case 3 months. The Claimant is not entitle to seek 3 years damage on top of the 3 months claimed and accepted.*"

47. Counsel cites the decision of the Court of Appeal in **Lo v. Sagan** [2003] VUCA 16 in support of the submission but that case is easily distinguished from the present case on the basis, that it involved an employment *"contract of unspecified duration* (and therefore) *could be lawfully terminated on three months' notice or on payment of remuneration in lieu of such notice"* the claimant's contract in this case however was for a fixed term of 3 years and in terms of section 48 of the Employment Act." .....*Shall terminate on the last day of the period agreed in the contract..."*

48. I accept at once that the claimants' contract provides for its termination by either, party giving 3 months notice or payment of salary in lieu of notice but that does **not** excuse or validate a wrongful or unjustified dismissal **nor** does it preclude a claim for damages for breach of contract. This is particularly so in the present case, where the termination clause itself specifically permits the *"termination without notice* (as occurred in the claimants' case) *in the event of serious misconduct"* (as defined) and where as here, the employee is not guilty of any misconduct at all.



49. In this regard **section 53 of the Employment Act** is illustrative in providing that where an employer mistreats or commits a serious breach of a contract of employment, the employee is entitled to terminate the contract and to receive "*his full remuneration for the appropriate period of notice ... without prejudice to any claim he may have for damages for breach of contract.*" (my underlining)

50. In **Vanuatu Maritime Authority v. Timbacci** [2005] VUCA 19 the Court of Appeal said:

> "*The legal principles that guide a Court in the assessment of damages for wrongful dismissal are not in doubt and are conveniently summarized in paragraphs **933 & 934** of **McGregor on Damages** (13th Edition) at page 635. It reads:-*
>
> *"The measure of damages for wrongful dismissal is prima facie the amount that the (Respondent) would have earned had the employment continued according to contract, subject to a deduction in respect of any amount accruing from any other employment which the (Respondent) in minimizing damages either had obtained or reasonably could have obtained. The rule has crystallized anomalously in this form. It is not the general rule of the contract price less the market value of the (Respondent's) services that applies; instead the prima facie measure of damages is the contract price, which is all the (Respondent) need show. This is then subject to mitigation by the (Respondent) who is obliged to place his services on the market, but the onus here is on the (Appellant) to show that the (Respondent) has or should have obtained an alternative employment.*
>
> *Basically, the amount that the (Respondent) would have earned under the contract is the salary or the wages that the (Appellant) had agreed to pay*". (para 934)
>
> And later at para 937 is the following relevant passage:
>
> "*Strictly there should be a deduction in respect of the immediate payment*"

51. In light of the foregoing I reject defence counsel's submission and turn to consider the Claimant's claim for damages for breach of contract (which is wrongly headed: **salary** in the claim) and I begin with what the Claimant would have earned had his employment continued under the contract, namely, the salary which the Defendant company had agreed to pay ie. VT(451,000 x 12 x 3) = **VT16,236,000**.

52. Having said that I am mindful that this award is being made 18 months after the wrongful termination of the Claimant's contract of employment and within the 3 year term of the contract. I am also aware that in that time the Claimant would have earned VT(451,000 x 18)=VT8,118,000 had his employment not been wrongfully terminated. I also accept that the period of 24 months is a reasonable time for the Claimant to secure permanent employment and accordingly that will be the base figure adopted for the purpose of calculating the damages to be awarded under this head of claim ie. **VT451,000 x 24 = VT10,824,000.**

53. Next I am obliged to consider any income earned by the Claimant by way of mitigating his loss.

54. In this latter regard the Claimant has deposed without challenge that after he was terminated so abruptly he had to quickly seek alternative means to earn an income to support his Ni-Vanuatu wife and 2 children as he is a foreigner with no close relatives or families in Vanuatu to turn to for support. He unsuccessfully applied for various positions both locally and overseas and he also earned a little money helping out at the Shefa and Red Light Nakamals (kava bars) by transporting their kava to the grinder and then preparing kava juice for sale. He also sold pawpaw and cream biscuits to earn additional money to support his family.

55. Subsequently the Claimant obtained in October 2009 employment as a chef with a local restaurant. Details of this are contained in counsels submission as follows:

> "*The new job is a 1 year contract and he receives a salary of VT100,000 per month. He has earned a monthly salary of VT100,000 from November 2009 to March 2010, a period of 5 months receiving a total salary of VT500,000 in mitigating his losses.*"

Since then, the Claimant would have earned a further VT700,000 bringing his total earnings in mitigation to VT(500,000 + 700,000) = VT1,200,000 which must be deducted from the total salary the Claimant would have earned under his employment contract with the Defendant company.

56. Doing the best that I can with the paucity of detail as to the duration of employment and the amount of income earned immediately after his termination, I estimate that the Claimant would have earned since April 2009 a maximum of **VT1,500,000** by way of mitigating his losses up till October 2010 when the Claimant would again become unemployed.

57. The Claimant is accordingly awarded damages for breach of contract in the sum of: VT(**10,824,000 – 1,500,000**) = **VT9,324,000** which is reduced in recognition of the immediacy of the payment involved, to a round figure of **VT9,000,000**.

58. **EXEMPLARY/PUNITIVE DAMAGES** This final substantive head of claim is quantified in the claim as **VT8,000,000.** I note however that counsel's submissions in support of this particular claim and which post-dates that of defence counsel is headed: **COMMON LAW DAMAGES** and is probably prompted by defence counsel's written and oral submissions where he writes: "*There are no punitive damages in contract law or employment law*", and later, "*The Claimant has not claimed common law damages in the pleadings*".

59. Defence counsel accepts however that the Courts in Vanuatu have recognized and awarded common law damages for emotional pain and distress arising out of the manner in which an employee's employment was wrongfully terminated. In this regard in **Melcoffee Sawmill Ltd. v. George** [2003] VUCA where an employee was abused and sworn at before being sacked on the spot and which the Court categorized as "*preemptory, insulting, harsh and overbearing*" the

Court of Appeal awarded the employee a nominal sum of VT30,000 under this head of damages despite the lack of specific evidence.

60. By contrast, in the present case, there is a good deal of undisputed evidence from the Claimant and, his wife as to the manner and circumstances leading up to his termination and how the Claimant's sudden and unexpected termination affected him physically, mentally and emotionally as well as his financial welfare. (**See**: **paragraph 20 of the Statement of Claim** and **paragraphs 12 to 19** of counsel written submissions).

61. I am satisfied that the circumstances leading up to the Claimant's termination and the reason for his termination were directly caused by the negligence of senior executives of the Defendant company and for which the Claimant became the unsuspecting scapegoat and victim. The manner of his termination ie. summarily without fore-warning or notice and by letter hand-delivered outside office hours and witnessed by his friends was unnecessarily cruel and humiliating.

62. In the Claimant's own words:

> "*I constantly ponder over my situation, I just do not understand why I should have to go through such a terrible time just for something which I am never responsible for, and for some offence which I have never committed. The law requires employers to act as good employers and I do not believe that the Defendant has acted as a good employer in my situation as it has cause me immense pain and suffering simply for no valid reason at all.*"

63. The Court of Appeal said in the **Melcoffee** case:

> "*... we are of the view that at common law there should be some recompense to an employee who has been unjustifiably and unexpectedly dismissed ...*"

and later:

> "*The Courts must be seen to mark their disapproval for bad business practies and unacceptable summary dismissals of the kind demonstrated in this case.*"

64. Accordingly I award the Claimant a sum of **VT100,000** by way of common law damages for the unnecessary humiliation and suffering caused to the Claimant by the manner of his dismissal.

**SUMMARY**

65. Judgment is entered for the Claimant as follows:

| | | |
|---|---|---|
| (1) THREE MONTHS NOTICE | - | VT1,353,000 |
| (2) VNPF CONTRIBUTION | - | VT54,120 |
| (3) SEVERANCE ALLOWANCE | - | VT1,386,950 |

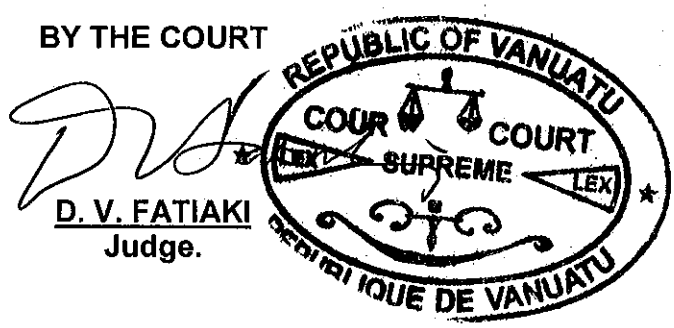
| | | | |
|---|---|---|---|
| (4) DAMAGES FOR BREACH OF CONTRACT | - | | VT8,000,000 |
| (5) COMMON LAW DAMAGES | - | | VT100,000 |
| | | **TOTAL** | **VT9,894,070** |

(6) **INTEREST** on the sums awarded in (1), (2), (3) and (5) above calculated at the rate of **5% per annum** with effect from 24 April 2009, and, in respect of item (4) above, from today until paid in full;

(7) **COSTS** are ordered against the Defendant, on a standard basis to be taxed if not agreed by the parties.

**DATED at Port Vila, this 5th day of November, 2010.**

**BY THE COURT**




**D. V. FATIAKI**
**Judge.**