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

Civil Case No. 108 of 2011

BETWEEN: GASTON THÉOPHILE
Claimant

AND: ALIZÉS ÉNERGIES (VANUATU) LIMITED
Defendant

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

Counsels: ***Mr. C. Leo for the claimant***
Mr. M. Hurley for the defendant

Date of Decision: *27 November 2012*

JUDGMENT

1. On **4 May 1998** the claimant commenced employment with **UNELCO**. On **2 July 2010** the claimant was transferred from **UNELCO** to an associated company **SOCOMETRA** where he worked until **25 September 2010** when the claimant was again transferred to the defendant company **ALIZÉS ÉNERGIES VANUATU LIMITED** as a Laboratory Technician. Significantly, the claimant's employment contract with **SOCOMETRA** and the defendant company recognized the continuity of his service commencing from **4 May 1998**. (*see*: the "***Ancienne***" clause).

2. On **28 April 2011** the claimant was terminated by the defendant company for "*serious misconduct*". The dismissal letter reads (in English translation):

> "*Dear Sir,*
>
> *Re: Dismissal*
>
> *You have attended a meeting on 17 April 2011 in the presence of the Human Resources Manager and your Director in accordance with Section 50 (4) of the Employment Act [CAP. 160] as amended to answer the charges made against you.*
>
> *On 14 April 2011, you went to a restaurant/bar with a company's vehicle. Thereafter, you left that restaurant/bar completely drunk. You were on stand-by that evening. The next morning, the stand-by vehicle was seen abandoned on the parking of the Department of Energy (Georges Pompidou) with two flat tires and some empty bottles of beer in the vehicle.*
>
> *During our meeting, you have admitted that you got drunk that evening and drove the vehicle in that state.*
>
> *You have also admitted that your conduct was really serious.*

Unfortunately, this is not your first serious misconduct during a stand-by duty. On 14 June 2008, you have had a similar conduct which resulted in your dismissal commuted to a suspension of 8 days. In complement to this suspension, you have been given a final warning with a reprimand to the effect that no other serious misconduct would be made during a probation period of 3 years. To date, this probation period had not come to an end yet.

Having regard to the seriousness of your conduct, we inform you that we terminate your employment contract from today.

Please find attached the details of payment of all your entitlements which amount to VT808,744.

Yours faithfully,

Anatole HYMAK
Human Resource Manager
Alizés Énergies Vanuatu Limited"

3. In brief, the letter charges the claimant on **14 April 2011**, with being drunk on duty; driving a company vehicle whilst drunk; and abandoning the vehicle with 2 flat tires.

4. In his **Reply** to these charges, the claimant, without denying the drinking and driving on duty and the abandonment of the vehicle, merely asserts, that he was "*off duty with UNELCO on the UNELCO's vehicle and not with the defendant*", in other words, "*UNELCO and the defendant are two separate entities*". With reference to the wrongly dated **17 April 2011** meeting which the claimant attended with **Mr. Frederic Petit** (the defendant's General Manager) and **Mr. Anatole Hymak** (the defendant's Human Resource Manager), the claimant states: "*... I admitted wrong during the period he (sic) was off duty and driving the UNELCO's vehicle and not the defendant*".

5. I can deal immediately with the claimant's vain attempt to distinguish between his immediate employer **ALIZÉS ÉNERGIES** and **UNELCO**. I say '*vain*' advisedly because besides the identity of their Board members and common shareholders, the claimant frankly admitted under cross examination that part of his duties with the defendant company involved being on "*standby duties*" with **UNELCO**'s water team to deal with emergencies such as broken water pipes. He also agreed that whenever he was rostered on "*standby duties*" he was provided with a **UNELCO** vehicle. In particular, he accepted that on the night of **14 April 2011**, he was rostered on "*standby duties*" with **UNELCO**'s water team ("*Service Eau*") and was given a **UNELCO** vehicle with registration number **9606**. He was also shown several of his payslips and accepted that his immediate employer paid him VT10,000 for '**Prime Attente**" ("*standby duties*") for the relevant weeks work.

6. On **14 April 2011** after he finished work at **5pm** he left the defendant's premises in **UNELCO**'s vehicle **9606**. He then met some friends and went at about **8pm** to a local bar/restaurant called **BODEGA** where he had some

drinks. He left at about **11pm** feeling "*a little bit drunk*". From **Bodega** he drove a friend to the George Pompidou Building which houses the Ministry of Lands, to get his friend's car that was parked there.

7. On arrival at the Ministry of Lands car park the claimant apparently ran over some cut iron pipes lying on the car park which punctured the front and rear tires on the passenger's side of his vehicle No. **9606**. He tried to get replacements for the punctured tyres but was unsuccessful. Eventually, after informing **Joseph Litch** the duty foreman of **UNELCO**'s standby water team in the early morning hours of **15 April 2011**, of the whereabouts of vehicle **No. 9606**, the claimant went home, leaving the keys in the vehicle.

8. When the vehicle was eventually retrieved from where the claimant had abandoned it, at the Ministry of Lands car park, it had the ignition keys, a couple of empty beer bottles, and a carton of cooked food inside.

9. Although **15 April** was <u>not</u> a working day for the claimant as he had taken approved leave from his employer, he agreed in cross-examination that he remained on "*standby duty*" with **UNELCO**'s water team. Fortunately however "*...there was no call- out on that day*".

10. On Monday **18 April 2011** when the claimant returned to work he was confronted by a clearly angry General Manager who demanded the office/laboratory keys from the claimant and sent him directly to the Human Resources Manager who, in turn, handed him a letter (wrongly dated 17 April 2011) which reads (in English translation):

    "*Dear Sir,*

    Re: Notice

    We have received a report from the Supervisor of the Water Section that on 14 April 201, you went to a restaurant/bar with a company's vehicle. Thereafter, you left that restaurant/bar completely drunk.

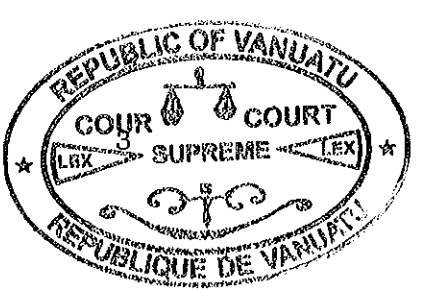
    The next morning, the stand-by duty vehicle was seen abandoned on the parking of the Department of Energy (George Pompidou) with two flat tires and some empty bottle of beer in the vehicle.

    Having notice your absence at work that morning, the Water Supervisor went to your house for more information. He notice that you were still drinking and that you did not bother to return to work nor inform your supervisors about your absence from work.

    Your conduct is totally inacceptable.

    Therefore in accordance with Section 50 (4) of the Employment Act [CAP 106] as amended, we put you on notice to attend a meeting today at 3.00pm at the Personnel Department to answer the charges made against you.

    Yours faithfully,



Anatole HYMAK
Human Resource Manager
Alizés Énergies Vanuatu Limited'

11. **Section 50 (4)** of the **Employment Act** [CAP 160] provides:

> "*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*'.

12. From the letter it is sufficiently clear that consideration was being given to dismissing the claimant for "*serious misconduct*" and further, he was given an opportunity to answer the charges against him. The fact that the claimant was given only 5 hours to come up with an answer or explanation might be considered "*inadequate*", but, given that the claimant was **not** dismissed on the spot after the 3.00 p.m. meeting, and, given the intervening weekend before he was called upon to answer the charges, I am satisfied the claimant had and was given "*an adequate opportunity*" to think about and formulate an answer for his misbehaviour.

13. Indeed, the undisputed evidence is that the claimant provided to his employer, a written explanation on **18 April 2011** and, although there is some dispute as to whether or not it was taken into account, certainly there was no acknowledgment of the claimant's letter in his dismissal letter, the fact remains that the claimant was **not** actually dismissed until **28 April 2011**. In my view, there has been no breach of the requirements of **Section 50 (4)**.

14. Be that as it may the claimant's "*explanation*" besides complaining about the General Manager's attitude, contains the following relevant admissions (in English translation):

    (a) "*Further to the incident of 14 to 15 April 2011, I admit that I have committed a serious misconduct*" ("*fait une grave erreur*");

    (b) "*I accepted to take some drinks with some friends*" ("*accepte de boire avec des amis*")

    (c) "*It is true I was on stand-by for Unelco*" ("*il est vrai que j'etais d'attente pour UNELCO*")

    In summary, the claimant admitted he was on "*standby duties*" for **UNELCO** on the evening of 14 April 2011; that he had had alcoholic drinks with some friends that evening; and he accepts that those actions constituted "*serious misconduct*" on his part.

15. That drinking on duty and driving an employer's motor vehicle whilst drunk and causing damage to the vehicle does constitute "*serious misconduct*" has been established in a series of judgments of the Supreme Court including, **William Bani v. Government of the Republic of Vanuatu** [2007] VUSC 12 (at para

23) and **Ernest Bani v. Public Service Commission** [2008] VUSC 2 (at paras 7 & 30) and lastly, in **PSC v. Nako** [2009] VUCA 7 where the Court of Appeal in discussing whether the facts in the case could constitute "*serious misconduct*", said:

> "*Those facts include the circumstances leading to the damage to the Government car. Whilst s. 29B sets out a summary procedure for imposing a monetary penalty for the unauthorized use of a Government vehicle, s. 29B (5) make it plain that such use may give rise to disciplinary proceedings. Here the ministerial complaint was not limited to unauthorized use but included serious damages to the car. The reference to the damage makes the cause of the damage relevant and part of the complaint. The alleged cause was drunken driving. The combined effect of s. 29B (5), s. 19A (3) and s. 29 means that such conduct could provide ground for the Commission to dismiss the respondent for serious misconduct if the Commission was satisfied that the conduct was sufficiently serious.*"

16. Furthermore in **Bani**'s case (op. cit) **Tuohy J.** in rejecting a submission that previous instances of misconduct were irrelevant, said (at **para 26**):

> "*The Commission must be entitled to look at an employee's past record as disclosed by his personal file when deciding how to deal with proven serious misconduct and the employee must expect this.*"

17. In this case, the employer's dismissal letter refers to the claimant's prior misconduct whilst on "*standby duties*" on **14 June 2008** for which the claimant was suspended for 8 days, given a final warning and placed on probation for 3 years. At the time of the present incident the claimant's probation period still had a month remaining.

18. Notable by its absence however, in the employer's correspondence, is any reference to the provisions of **section 50 (3)** of the **Employment Act** which permits an employer to dismiss an employee for "*serious misconduct*" only if "*the employer cannot in good faith be expected to take any other course*".

19. In this particular regard the Court of Appeal relevantly said in **PSC v. Tari** [2008] VUCA 27:

> *"No mention was made of ss.(3) by the Commission when it invited Mr. Tari's submissions in response to the disciplinary report and accompanying letter. It did not mention s.50 (3) when it dismissed him. The terms of ss.(3) impose a positive duty on the Commission. It is only permitted to dismiss an employee if it cannot in good faith be expected to take another course. Other "course(s)" may include demotion or transfer to another government department. These are also serious responses to misconduct by an employee. (see Government of Vanuatu v. Mathias [2006] VUCA7).*
>
> *Consistent with this obligation the Commission should invite those whom it has concluded may have been guilty of serious misconduct to address ss.(3). This should be done before a decision on the employees' future is reached. When communicating its decision on dismissal (or otherwise) the Commission will need to identify it has considered s.50 (3) and (if appropriate) concluded (in good faith) that it cannot take any course other than dismissal.*

In this case the Commission did not invite Mr. Tari to address ss.(3) nor is there anything to illustrate it turned its mind to this fundamental obligation. Given this positive obligation and the Commission's failure to establish that it had undertaken the analysis demanded by s.50 (3) we conclude the Respondent could not have been lawfully dismissed and his dismissal was therefore unjustified. In reaching this conclusion therefore we agree with the concern of the Supreme Court judge."

20. I accept at once, that the claimant's employer was entitled to form the view that the claimant's actions on the night of **14 April 2011** constituted "*serious misconduct*" and, with that, there can be no argument. But, the more difficult question remains, – was the claimant's dismissal taken "*in good faith*" in circumstances where his employer could not "*be expected to take any other course*"?

21. **Section 50 (3)** recognizes that "*dismissal*" is a punishment of last resort only to be imposed where no other lesser punishment is reasonably available to an employer acting in good faith, even where, an employee has been guilty of "*serious misconduct*". The fact that such a dismissal has the inevitable consequence of extinguishing an employee's past service record as well as any entitlement to notice and to a severance allowance, reinforces in my view, the gravity of the employer's decision to dismiss.

22. As the Court of Appeal said in **Mouton v. Selb Pacific Ltd.** [1998] VUCA 8:

> "*The evident purpose of the severance allowance provisions is to offer a measure of security to residents of Vanuatu who lose their employment at the initiative of the employer or because of injury or ill health*".

23. In this instance, the claimant had been in "*continuous employment*", albeit with three related employers, for a cumulative period just short of **13 years** and, although his employment record was by no means unblemished, it was of sufficient duration and continuity to require a reasonable employer to seriously consider a less draconian alternative before adopting the "*last resort*" and denying the claimant the "*measure of security*" offered by his severance allowance entitlement.

24. Furthermore in **AVL (Operations) Ltd. v. Molloy** [2004] VUCA 17 where the employee's contract of employment came to an end through effluxion of time and there was no renewal of the employee's appointment, the Court of Appeal, nevertheless, upheld the employee's entitlement to a severance allowance, saying:

> "*We have no difficulty in concluding that in terms of section 54 (1) (a) there was a termination of his appointment. The issue is not whether the contract was terminated but whether 'his appointment' was terminated. Equally, we are of the view that it could be said that Mr. Molloy was retiring after reaching the age of 55 years or that Air Vanuatu retired him after reaching the age of 55 years. We are unable to see any sensible way in which subsection (1) was not met and we are*

satisfied that the starting point for the payment of a severance allowance existed."

A *fortiori* in the present case where the claimant's employment was actually terminated by his employer.

25. I am also fortified by the observations of *Treston J.* when he said in **De Gaillande v. ANZ Bank (Vanuatu) Ltd.** [2008] VUSC 8 (at **paras 79, 80 and 82**):

> *"79. Section 50(3) is more problematic. I am not aware of any reported decision in which it has been analyzed. It is clear from its wording that the fact that an employee has committed serious misconduct is not of itself sufficient to justify summary dismissal. An employer must also satisfy the Court that it cannot "in good faith" be expected to have taken any other course. The phrase "in good faith" is a colloquial expression which in context equates to "reasonably".*
>
> *80. I am not satisfied on the evidence that the Bank could not reasonably be expected to have taken any course other than summary dismissal. Of course the Bank saw the claimant's actions as dishonest, possibly amounting to criminal offending and on that basis no other course of action could have been taken. But looking at the claimant's misconduct as consisting of breaches of her duty to the Bank to avoid conflicts between her personal interests and those of the Bank and its customers it is not so clear that summary dismissal was the only outcome possible.*
>
> *...*
>
> *82. No doubt because of the view the Bank took of the claimant's conduct, there was no evidence of what other options apart from dismissal may have been available. However it is obvious that an employer in dealing with an employee guilty of misconduct has other options ranging through counseling, further training, a formal warning, transfer, loss of seniority, demotion and loss of bonuses or any combination of those."*

In this latter regard **Section 54 (1)** includes in the categories of long-serving employees of 10+ years who are entitled to a severance allowance, an "*... employee who resigns in good faith*" which, in the circumstances, was an option which was also available to the defendant company but was not offered to the claimant.

26. As for the applicability of **section 55 (2)**, suffice it to say, I am **not** satisfied that the defendant employer considered or complied with the provisions of **section 50 (3)** in dismissing the claimant outright without severance benefits.

27. In the present case there does not appear to have been any thought given by the defendant company to the strictures of **section 50 (3)** nor was the claimant's views sought on the matter (as it should have been). Indeed, I got the distinctly unfavourable impression that the claimant's immediate supervisor had determined that the claimant would be dismissed once he had taken the office keys off him on the morning of **18 April 2011** and everything after that was geared towards achieving or effecting that pre-determined end.

28. Indeed, it is common ground that the claimant's supervisor said to him that he did not wish to see him in the office when he recovered the office keys from him immediately before sending him to the Human Resources Manager to be dealt with "*urgently*". In the result, although the claimant was **not** terminated until **28th April**, he was not suspended, even temporarily, nor was he recalled to work after he was sent home on **18 April 2011** as might be expected if the defendant company considered that the claimant's employment continued.

29. In this regard the two main defence witnesses were adamant that the decision to terminate the claimant was take on **21 April 2011**, but, no satisfactory explanation was forthcoming as to why? the claimant had not been recalled or why? it had taken a whole week to write and inform him of his termination. Nor is the matter clarified by the payment of the claimant's salary up to **28 April 2011** despite him not being at work from the 19th and despite the decision to dismiss him having been made on 21st April.

30. I can now deal briefly with the issues agreed by counsels at the trial. As to **Issue (1)**: Whether the claimant was guilty of "*serious misconduct*" due to his acts and omissions on 14 and 15 April 2011? My firm and clear answer is in the affirmative. That does not necessarily mean that the claim is bound to fail just that the employer need not give the employee notice of termination. [*see*: Section 50 (1)].

31. As to **Issue (2)** whether the defendant's termination of the claimant's employment effective from 28 April 2011 complied with the provisions of section 50 of the Employment Act [CAP. 163] as amended?, the evidence raises 2 sub-issues, namely:

    (a) Whether the defendant complied with **Section 50 (4)**?

    On the evidence, even on the basis that the claimant was terminated on 21 April 2011 as the defence witnesses maintained, I am satisfied that there has been substantial compliance with the provisions of **section 50 (4)** of the Employment Act and I turn to the second sub-issue:

    (b) Did the defendant comply with **section 50 (3)** in dismissing the claimant?

    In light of the preceding discussions, my equally clear answer to this question is in the negative. Accordingly, I find that the claimant's dismissal was "*unjustified*". I say nothing about the applicability of **Section 50 (5)** where the claimant's employer was aware of the claimant's serious misconduct for over 10 days.

32. In the result I answer **Issue 3** in the claimant's favour and enter judgment for the following sums:

    (1) Severance Allowance under **Section 56 (2)** of the Employment Act:

    (a) VT(206,327 ÷ 2 x 12 years) = 1,237,962
    (b) VT(1,237,962 ÷ 12 x 11 months) = 1,134,798
    VT2,372,760

(2) Mandatory increase under **Section 56 (4):**

by a factor of **0.25** i.e. VT(2,372,760 ÷ 4) = VT593,190

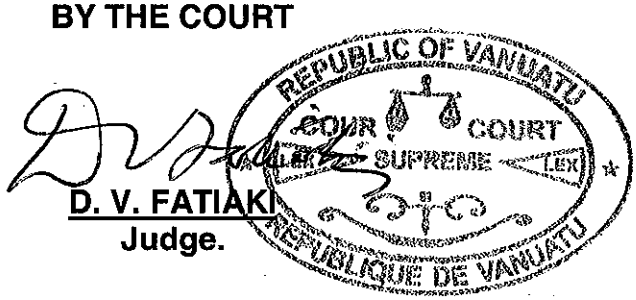
(3) Interest under **Section 56 (6) @ 5% per annum** on the awards in **(1) & (2)**:

VT(3,559,140 x 5% x 1.5 years) = VT266,935

33. The claimant is also awarded costs to be taxed if not agreed.

DATED at Port Vila, this 27th day of November, 2012.

BY THE COURT



D. V. FATIAKI
Judge.