

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

Civil Case No.103 of 2008

BETWEEN: ESTHER TOARA

Claimant

AND: AIRPORTS VANUATU LIMITED

Defendant

Coram: Vincent Lunabek Chief Justice

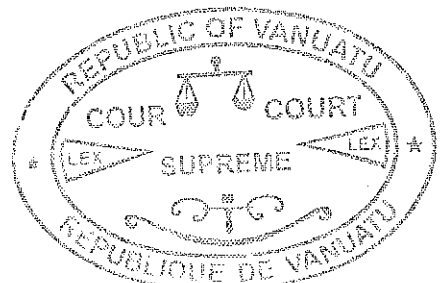
Counsel: Mr Daniel Yawha for the Claimant

Mr Mark Hurley for the Defendant

JUDGMENT

Introduction

1. On 31st of October 2006 a metal security gate at the Bauerfield Airport collapsed injuring Mrs. Toara who was employed as a security guard at the airport.
2. The defendant company accepts that they were negligence and so they accept liability for Mrs. Toara's loss. The only issue before this Court is therefore the proper calculation of damages. Mrs. Toara seeks damages of VT 3.000.000. The type and extent of each of the damages claim are not specified in the statement of claim. The defendants say a proper award of damages is not more than VT 513.000.

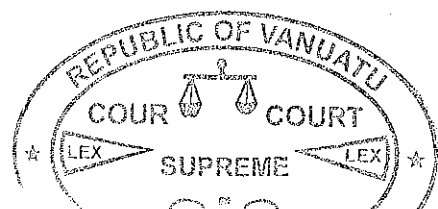


A

3. Subsequently in final submissions on this claim the claimant divided her claim for damages into VT 400.000 for pain and suffering and loss of amenities of life and VT 2.6 Million for economic loss. The defendants say that the proper award for damages for pain and suffering and loss of immunities of life is VT 425.000. They say damages for economic loss should not be payable but if it is a payment of no more than VT 88.000 should be made.
4. As can be seen there is no substantial dispute between the parties with respect to the amount of the award of general damages for pain and suffering. Both parties agree the award should be approximately VT 400.000. I adopt the higher of the two figures and set the general damages award at VT 425.000. The only issue between the parties therefore is the amount of compensation if any for pure economic loss.
5. The claimant seeks VT 2.6 million as previously mentioned.
6. The defendant in response says,
 - a) The claimant has not sought damages for economic loss in the statement of claim and so no award can be made.
 - b) In the alternative an award under paragraph 4 of Schedule to the Workman's Compensation Act [CAP 202] should result in an award for economic loss of no more than VT 88.130.

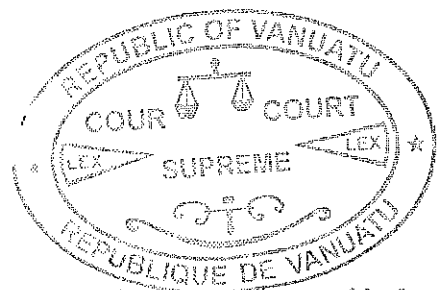
Background

7. Mrs. Esther Toara was initially employed for 6 months as a probationary security officer at the airport. After the 6 months expired on 27th April 2006 she was confirmed as a permanent full time employee. After the accident with the gate Mrs. Toara was taken to the Port Vila medical centre, she was examined and treated and x-rays were taken.



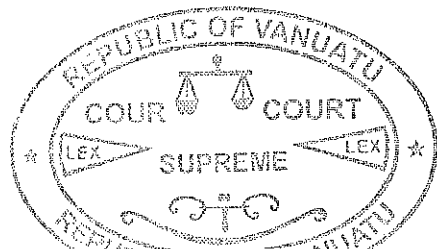
[Handwritten signature]

8. Unfortunately there are few medical records available which record her injuries immediately after the accident. However a report by Doctor Spooner of 18th January 2008 (about 15 months after the action) notes that Mrs. Toara had moderately severe pain on the left side of her neck, shoulder, and the “midline aspect of her left scapular region” (the middle of her upper left back) the report noted Mrs. Toara had come for a medical consultation in November 2006 complaining of left shoulder pain, numbness in the fingers, and weakness in her upper limbs. Mrs. Toara had been prescribed in the inflammatory for her pain.
9. Mrs. Toara continued with visits to the medical center in early and late December 2007. Doctor Spooner considered her pain arose from the injuries received in the 2006 metal gate accident. He considered these “arthritic pains” would likely continue and get worse as Mrs. Toara grew older. Blood tests apparently confirm there was “some inflammatory process or condition developing in her body”.
10. This conclusion appeared to be consistent with Mrs. Toara’s various complaints of pain in her neck and back arising from the 2006 accident.
11. Mrs. Toara saw a physiotherapist in May 2009. The physiotherapist in a report to the Court said Mrs. Toara had a full range of movement in her shoulder, elbow, wrist and fingers accept the following:
 - a) As to her left shoulder joint, she had pain on the left shoulder and reduced shoulder flexion due to the pain in her shoulder,
 - b) she had reduced rotation of her right elbow joint due to pain.



[Handwritten signature]

- c) As to muscle testing her left shoulder, left elbow and left wrist had a complete range of motion but with some resistance.
- d) The physiotherapist noted that Mrs. Toara had told her that she could not do about 30% to 40% of household chores due to the pain in her joints.
12. The hospital records noted Mrs. Toara had told them that she had not been in particular pain at the time of the accident but was numb in both arms a few weeks later and after a year, the significant pain began.
13. Mrs. Toara's yearly income after she had become a permanent employee in early 2006 was VT432,000. This increased to VT440,640 in November 2006. This was when Mrs. Toara was given additional responsibility (I note after the accident) by her employer.
14. Mrs. Toara was regularly absent from her employment after the accident because of the pain she was suffering. Because of these difficulties alternative work within the Airport Security Service, at the airport was provided by the defendant. However this alternative work did not help Mrs. Toara.
15. In August 2008 Mrs. Toara was dismissed with notice and severance pay from the Airport Security Service. The letter from her employers said she was being compulsorily retired. This was based on an assessment of Mrs. Toara's medical reports and her health. The letter said the retirement was because her medical condition had "adversely affected her performance" of Mrs. Toara's duties and responsibilities. The letter further said that her health had caused her to be absent from work and had directly affected her punctuality and efficiency. One month notice was given.

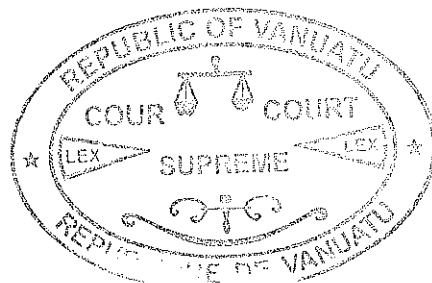


✓

16. Mrs. Toara now says that because of her pain she has had to give up any paid work. She says that she struggles to do her household chores especially washing, cooking and cleaning. Her condition is worse in cold and rainy days particularly the pain. Mrs. Toara says her sleep is interrupted and she has to regularly take pain killers. She says that she has a 100% disability and is unable to work in paid employment at all. She therefore says a calculation of her economic loss should be based on her claim that she has a 100% disability.

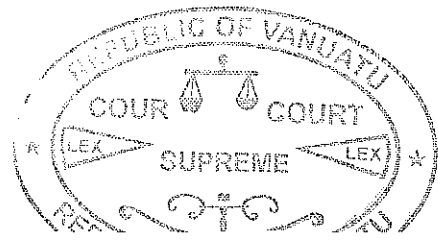
Can the claimant seek economic loss damages?

17. The defendant says the claimant's statement of claim does not seek any damages for economic loss and the Rules of Court prohibit such a claim being made without the notice of such pleading. No such notice has been given to the defendants.
18. I accept that the claimant's pleadings make no mention of any economic loss claim nor are there any facts pleaded in the statement of claim which could give rise to an economic loss claim. At the time the proceedings were filed, in June 2008, the claimant was still employed full time for the Aviation Security Service. At that time therefore she would have suffered no economic loss based on an inability to work. Mrs. Toara could not have established any inability to work then given she was in full time employment.
19. The original pleading in the statement of claim was therefore based on a claim for damages for pain and suffering and loss of enjoyment of life caused in and following the accident.



A handwritten signature or set of initials, possibly "A", is written in the bottom right corner of the page.

20. As I have noted a few months later in August 2008, Mrs. Toara was compulsorily retired from her job because she could not adequately perform the duties allocated by the Aviation Security Service given the injury she suffered.
21. At the time Mrs. Toara was compulsorily retired due to her medical condition an amended statement of claim should have been filed seeking damages for economic loss.
22. Rule 4.10 (1) of the Civil Procedure Rules provides that a statement of claim must “state the nature and amount of the damages claimed”.
23. In Rule 4.10 (3) it is provided that the statement of the case should have included any matter about the assessment of damages that, if not included, may take the other party by surprise.
24. The defendants’ case is that the claimants pleadings are inadequate and the defendant has been taken by surprise by the claimant’s economic loss claim.
25. While it is clear that the claimant’s pleadings were inadequate I am satisfied that the defendants did have notice of the intention of the claimant to bring an economic loss claim within her total VT 3 million damages claim. In her sworn statement of February 2009 Mrs. Toara described how she had lost her job as a result of her injuries. Correspondences from her employer attached to her sworn statements, confirmed that she had been “compulsorily retired due to her health”. She said in her sworn statement that she did not consider she could work in the future because of her injuries and in particular the pain she suffered.



Information about her salary which she received as a security officer was also included.

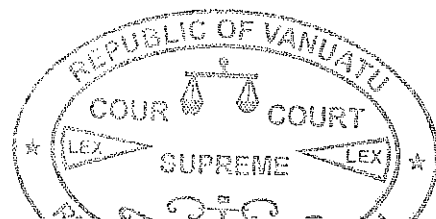
26. I am satisfied in the particular circumstances of this case that there is no prejudice to the defendants in allowing Mrs. Toara's claim for economic loss to proceed. I am satisfied that the defendant understood the essential elements of Mrs. Toara's claim for economic loss. However Mr. Toara's pleadings were inadequate and any costs award in her favour will need to be reduced to reflect this inadequacy. I am therefore satisfied that Mrs. Toara's economic loss claim is not prohibited by the inadequacy in her pleadings.

What, if any, economic loss damages should be awarded.

27. There is a vast difference in the quantum of damages I am invited to award between Mrs. Toara and the defendant. Mrs. Toara says that economic loss damages should be VT2.6 million. The defendant says, it should be VT88.000. The Workman Compensation Act [CAP 202] governs damages for economic loss arising from work injuries (Section 1).

28. Much of the claimant's submissions appear to approach the assessment of damages as if it was an assessment based on personal injury caused in a motor vehicle accident not arising out of the course of employment. This is the wrong approach. Section 2 of the Act provides that the amount of compensation to be awarded is to be in accordance with the Schedule to the Act itself. The Act is to apply by virtue of section 5 to all contracts of employment.

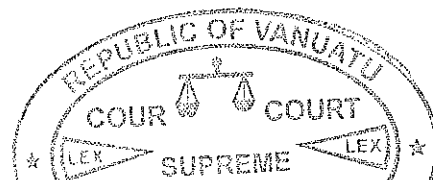
29. The Schedule to the Act requires that an assessment be made on an applicant's disability expressed as a percentage of total disability. The



[Handwritten signature]

maximum payment is obviously for 100% disability. Clause 1 of the schedule provides that the maximum payable for total disability is VT2.000.000. Self evidently therefore Mrs. Toara's claim for VT 2.6 million cannot succeed. It is more than the maximum and more than a payment for 100% disability.

30. The Schedule to the Act gives a range of examples for particular losses expressed as a percentage. For example a loss of a finger is considered a 10% disability. A loss of a foot is 40%. The schedule to the Act does not specify how Mrs. Toara's injuries are to be assessed as a percentage of total disability. In those circumstances, paragraph 4 of the schedule provides that the amount payable will be such a percentage of 208 weeks wages as is proportionate to the loss of earning capacity permanently caused by the injury, subject to a maximum limit of VT 2.000.000.
31. This clause therefore requires this Court to make an assessment of Mrs. Toara's loss of earning capacity caused by the injury as a percentage of total disability. It is common ground that Mrs. Toara weekly salary at the time of the claim was VT8.474. Thus if Mrs. Toara suffered 100% loss of earning capacity she would be entitled to a payment of $VT8.474 \times 208$ weeks.
32. The defendants say at most taking an account of the percentages involved in serious injuries (for example the loss of hearing one ear at 30% , the loss of the toes of all of one foot 15%, loss of a tongue 20% and the loss of a hand 80%) illustrates that a disability assessment of 5% for Mrs. Toara's injuries is appropriate.
33. Mrs. Toara's loss of earning capacity is not simple to assess. The most comprehensive report is by the physiotherapist. She noted that most of the



[Handwritten mark]

muscle testing in Toara's shoulder, elbow and wrist showed an almost complete range of movement. Mrs. Toara has restricted movement in her left shoulder joint and restricted movement of her left elbow. The pain she clearly suffers cannot be ignored given it also has a significant effect on Mrs. Toara's work capacity. There is no reason to doubt Mrs. Toara's claim that she cannot perform 30% to 40% of her household chores. This illustrates the limitations of her physical activity in any employment. On the other hand there is very little evidence from Mrs. Toara why she could not take a sedentary job such as a clerk which would not require significant physical activity, further there is very limited medical evidence which directly assesses Mrs. Toara's percent liability.

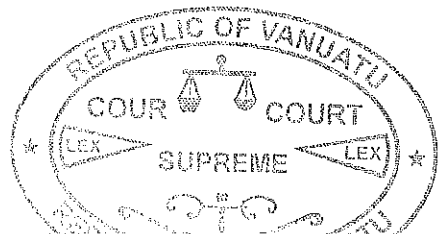
34. Mrs. Toara's claim for 100% disability cannot at all be justified. Her loss of earning capacity is nothing like that percentage. However I am satisfied that the defendants assessment of 5% is far too conservative. That assessment does not take into account the range of injuries and the depilating effect of the pain Mrs. Toara's suffers which significantly limits her work capacity. I am satisfied that Mrs. Toara's loss of permanent earning capacity should be set at 20%.

35. Based on that assessment the clause 4 schedule calculation is,

$$\text{VT } 8.474 \times 208 \text{ weeks} \times 20\% = \text{VT } 352.518$$

36. Mrs. Toara is therefore entitled to a total damages award of VT 777.518 being the general damages award of VT425.000 together with the economic loss damages of VT 352.518.

37. Mrs. Toara is entitled to interest of 5% from the filing of this proceedings being 24th June 2008 to the date of this judgment but not on a compounding basis.

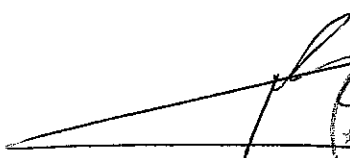
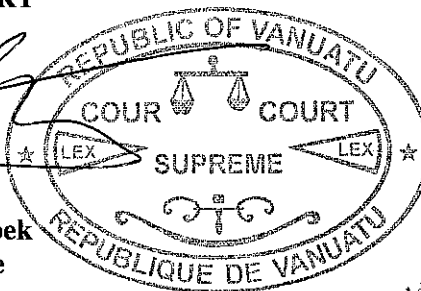


Costs

38. My tentative view is that Mrs. Toara should have cost against the defendants given her success but reduced by 50% to reflect the inadequate pleadings and inflated claim. I therefore invite submissions to be made within 14 days by the claimant in support of an order for cost from the date of this judgment and in reply a further 14 days by the defendant.

Dated at Port Vila, this 10th day of December 2014.

BY THE COURT

**Vincent Lunabek
Chief Justice**