

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

Civil Case No. 100 of 2014

**BETWEEN : GREGORY TAKAU**

Claimant

**AND: REPUBLIC OF VANUATU**

Defendant

Coram: Justice Aru

Counsel: Mr. G. Avock for the Claimant

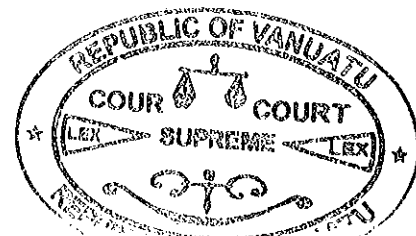
Mr. H. Tabi for the Defendant

**JUDGMENT**

Introduction

1. The claimant, Gregory Takau is a former employee of the Office of Public Prosecutor (the OPP). His employment begun in 2008 and on 13 March 2014 he was terminated by the Public Prosecutor. He now brings this claim and alleges that his termination was unlawful. He seeks the following relief:-

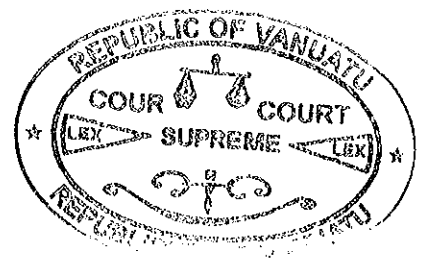
- 1) A declaration that the claimant's termination of employment constitutes unjustified dismissal;
- 2) VT 2,431,479 being for the remaining balance of his contract;
- 3) VT 703,190 being for his severance entitlement;
- 4) VT 125,237 being for his annual leave;
- 5) VT 4,219,420 being for entitlements pursuant to section 56 (4) of the Employment Act [CAP 160] (the Act);



- 6) VT 5,000,000 being for general damages;
- 7) Interest at 5%;
- 8) Costs.

## Background

2. The matter was listed for trial on 13 May 2015. The claimant filed a sworn in support of his claim and the defendants on the other hand filed sworn statements deposed by Leon Malantugun, John Timakata, Gray Vuke and Veronica Bule.
3. Before the trial hearing, the defendants admitted that since the claimant was not afforded an opportunity to be heard before his termination, his dismissal was unjustified. The only remaining issue was the question of quantum which the parties were required to address in their written submissions and they were heard on 28 May 2015.
4. The defendant accepts that the claimant is only entitled to be paid a total of VT 828,427 otherwise disputes the rest of the claims. The breakdown being as follows:-
  - 1) VT 703, 190 [severance allowance]
  - 2) VT 125,237 [annual leave]
5. It is not disputed that the claimant was employed by the OPP from 1 July 2008 and his contract of employment was renewed a couple of times. The contract he was serving at the time of termination begun on 5 June 2013 and would have lapsed on 6 June 2015 if not for the termination on 13 March 2013. During the course of his employment the claimant accepts that he received two warning letters and a suspension from the Public Prosecutor. The evidence of Leon Malantugun, John Timakata, Breny Vuke and Veronica Bule although not tested at trial are evidence of the claimant's conduct which are adverse to his position as a prosecutor.
6. In any event, it is not disputed that on 12 June 2013 the Public Prosecutor informed her staff members in a meeting which included the claimant that all warning letters issued to staff in



the past were revoked with effect from 12 June 2013. The staff members were also informed that with effect from 12 June 2013, three warning letters would be issued before any termination is effected.

7. As it is now admitted by the defendant, on 13 March 2014, the claimant was served with his termination letter without any warning and without affording him an opportunity to be heard before the termination.

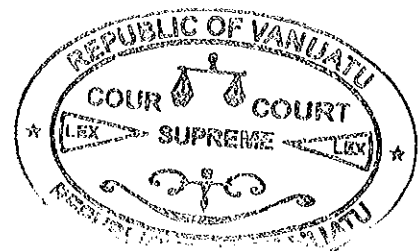
#### Issues

8. Given that the defendant accepts that the claimant is entitled to severance and annual leave entitlements, the only remaining issue is whether the claimant would also be entitled to the balance of the relief sought in the claim namely 3 months salary in lieu of notice, balance of contract, general damages and the 6 times multiplier pursuant to section 56 (4) of the Act.

#### 3 months salary in lieu of notice

9. This relief was not pleaded in the claimant's statement of claim and is only now raised in the submissions. The claimant accepts that it is not pleaded but submits that the court should exercise its inherent powers to order payment as it is a lawful entitlement. The defendant objects to the claimant claiming 3 months salary in lieu of notice as it was simply not pleaded in the claim. In **Republic of Vanuatu v Emil [2015] VUCA 16** the Court of Appeal stated (in relation to a claim for an award of damages which was not pleaded) that:-

*"It is not open to a Court to make findings and awards of damages on issues that are not raised on the pleadings, no matter how much the Court may be "concerned" about evidence which emerges at trial. If it does that, a fundamental unfairness and breach of natural justice occurs because the defendant has had neither notice from the claimant in his pleadings, nor from the Court, of the matter being in issue. He therefore does not have a fair opportunity to file and be heard in support of his defence."*



10. The fact is that the 3 months salary in lieu of notice was simply not pleaded and it would be unfair upon the defendant for the claimant to now raise it in his submissions therefore the claim for 3 months salary in lieu of notice is rejected.

Balance of contract

11. At the time of the claimant's termination of employment, it was pleaded that the contract of employment was to come to an end on 6 June 2015. Under this head, the claimant claims salaries in the sum of VT 2, 431, 479 for the remaining term of the contract being 1 year and 3 months and 19 days. This part of the claim is abandoned by the claimant in his submissions on the basis of what the Court of Appeal said in **Robertson v Luganville Municipal Council [2001] VUCA 14**. Therefore nothing further needs to be said about that.

General damages

12. The claimant claims under general damages the sum of VT 5, 000, 000. Under the Civil Procedure Rules, rule 4.10 sets out the requirements for claiming damages in a claim and sub rule (2) and (3) provides:-

*(2) If general damages are claimed, the following particulars must be included:*

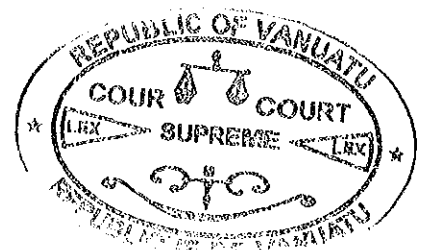
*(a) the nature of the loss or damage suffered; and*

*(b) the exact circumstances in which the loss or damage was suffered; and*

*(c) the basis on which the amount claimed has been worked out or estimated.*

*(3) In addition, the statement of the case must include any matter about the assessment of damages that, if not included, may take the other party by surprise.*

13. The claim as filed does not plead any of the above and does not set out the basis upon which the VT 5,000,000 claimed has been worked out. On the basis of what the Court of Appeal said in Emil above this head of claim must also be rejected.



6 times multiplier

14. Section 56 of the Act provides for the amount of severance allowance payable to an employee and how it is to be calculated. Subsection (4) states:-

"....

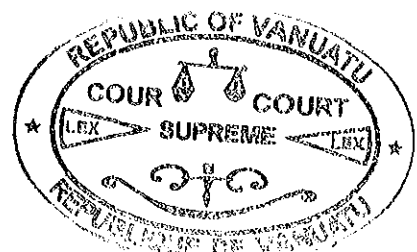
*(4) The court shall, where it finds that the termination of the employment of an employee was unjustified, order that he be paid a sum up to 6 times the amount of severance allowance specified in subsection (2).*

...."

15. The claimant submits that he is entitled to claim under this head as the defendant has admitted that the termination was unjustified. Furthermore, it was submitted that after the 12 June 2013 meeting, the Public Prosecutor as head of the office had the option of given the claimant three warnings before terminating his employment. As this did not occur, the termination was done in bad faith as the Public Prosecutor neglected her own procedures and summarily terminated the claimant's employment.
16. It was further submitted that the amount of severance as calculated is not sufficient as had notice been given, the claimant would have had time to seek alternative employment. It was submitted that a 3 times multiplier should be awarded to compensate the claimant. The defendant on the other hand submits that the amount of severance is sufficient to compensate the claimant for the manner in which his employment was terminated. In **Banque Indosuez Vanuatu Limited v Ferrieux** [1990] VUCA 3 the Court of Appeal said that:-

*"It is well established at common law that on wrongful dismissal an employee cannot be awarded aggravated or punitive damages. Nor can he be awarded damages for any difficulty he may have in obtaining fresh employment. (Addis v Gramophone Co Ltd [1909] A.C. 488.)*

.....



.....  
*In our view section 56(4) does not give the court power to award a sum akin to aggravated or punitive damages, or for loss of career prospects. It merely enables the Court to compensate an employee for any special damage which he has suffered by reason of an unjustified dismissal, if the basic severance allowance is insufficient for that purpose. The law presumes that a person should not be compensated twice for the same wrong, so that any award under this statutory head must be set off against any award of damages at common law.*

*(emphasis added)*

17. Given the nature and circumstances surrounding the claimants termination, section 50 (1) of the Act specifically states that *"in the case of a serious misconduct by an employee it shall be lawful for the employer to dismiss the employee without notice and without compensation in lieu of notice."*

18. Subsection (4) qualifies the general rule in subsection (1) by specifically stating that:-

*"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."*

*(emphasis added)*

19. The Public Prosecutor was wrong in terminating the claimant's employment without affording him an opportunity to be heard as required by section 50 (4). I am of the view that the termination without an opportunity to be heard is adequately compensated by the payment of severance which in this case is VT 703, 190. This would have likely been forfeited had the opportunity been given to the claimant to be heard before his employment was terminated.

20. The claimant is therefore only entitled to the following which are awarded:-



1). VT 703, 190 [severance allowance]

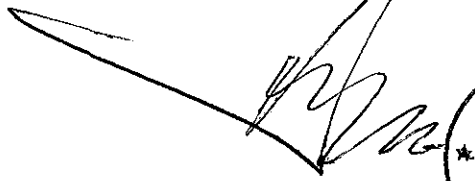
2). VT 125,237 [annual leave]

3). Interest at 5%

4) The claimant is entitled to costs on a standard basis as agreed or taxed.

DATED at Port Vila this 11 day of August, 2015.

BY THE COURT



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D. ARU  
Judge

