

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

Civil Case No.76 of 2013

BETWEEN: LINETTE BERUKILUKILU
Claimant

**AND: GOVERNMENT OF THE REPUBLIC OF
VANUATU**
Defendant

Coram: Justice D. V. Fatiaki

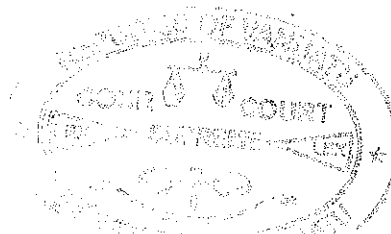
Counsel: Mr. B. Bani for the Claimant
Mr. L. Huri for the Defendant

Date of Delivery: 5 August 2016.

JUDGMENT

Background

1. The claimant commenced employment on 2 March 1993 with the Department of Livestock and Quarantine as Plant Health Officer (Fruit Fly). After a restructure in 2013 the claimant was appointed Plant Protection Officer (Fruit Fly) in the newly created Department of Biosecurity, Vanuatu.
2. By letter dated 22 February 2013 from the Public Service Commission (PSC) the claimant was summarily dismissed for alleged serious misconduct. There had been no forewarning or opportunity given to the claimant to answer the non-specific allegations made against her which dated back to 2009. The so-called allegations disclosed in the termination letter included "misappropriation of government revenue"; "negative attitude"; "maladministration"; "unprofessional and unsatisfactory work performance" and "failing to report criminal offences".
3. On 23 April 2013 the claimant issued proceedings in the Supreme court for unjustified dismissal claiming damages for breach of contract including penal severance allowance in the total sum of VT60,219,283.
4. On 30 January 2014 the Public Service Commission offered to revoke the claimant's termination and reinstate her back to her official position. The revocation and reinstatement decision was taken because the PSC acknowledged: "... that proper procedures in relation to your termination from the public service were not followed in the sense that no EDR was issued to you to provide you with an opportunity to be heard prior to ... termination of your employment ...". However, the claimant did not return to



work as it came far too late and she was already occupied with a personal agricultural project.

5. On 6 February 2015 the defendant filed a defence. While denying that the claimant has suffered any loss or damage the defendant admitted that the claimant's termination "... was not made in accordance with the Public Service Act" furthermore the claimant "... had not been afforded an opportunity to respond to the allegations made against her".
6. On 13 August 2015 liability having been admitted by defence counsel judgment was entered for the claimant in the sum of VT5,428,844 being for severance and 3 months salary in lieu of notice plus damage to be assessed in accordance with Section 56(4) of the Employment Act.
7. Competing sworn statements were filed by the parties addressing the "*multiplier*" to be adopted for the purposes of Section 56(4). The claimant reduced her original claim from the maximum allowable to a reduced multiplier of "4". The defendant argued for a multiplier of "2".
8. In June 2016 the Court eventually received written submissions from counsels. It is common ground that the claimant's termination was "*unjustified*". Furthermore the claimant's severance allowance under Section 56 of the Employment Act was agreed in the sum of VT5,049,584.
9. Defence counsel in her submissions noted the claimant's refusal to return to work, her acceptance of a reduced multiplier figure and the paucity of the evidence of dependency produced by the claimant. Counsel accepts however that any award should include matters deposed in the claimant's sworn statement of 26 February 2014 and the claimant's expenses incurred in this matter. In this regard the claimant's sworn statement details the "*tardy attitude*" exhibited in the defendant's actions after the claim was filed in April 2013 and the eventual payment of a minimum severance allowance after numerous court attendances and letters, in August 2015.
10. Claimant's counsel for his part, refers to several case precedents and urges a "... multiplier of '4' given the circumstances leading to her dismissal" including the defendant's clear breach of the Public Service Act in unilaterally terminating the claimant without affording her an opportunity to respond to any allegations and the fact that the claimant would have received the severance allowance awarded "... if she had simply resigned from her job".

Discussion and Decision

11. Section 56 of the Employment Act provides:

"56. Amount of severance allowance

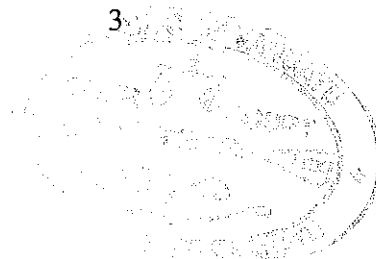


- (1) *Subject to the provisions of this Part, the amount of severance allowance payable to an employee shall be calculated in accordance with subsection (2).*
 - (2) *Subject to subsection (4) the amount of severance allowance payable to an employee shall be –*
 - (a) *for every period of 12 months –*
 - (i) *half a month's remuneration, where the employee is remunerated at intervals of not less than 1 month;*
 - (ii) *15 days' remuneration, where the employee is remunerated at intervals of less than 1 month;*
 - (b) *for every period less than 12 months, a sum equal to one-twelfth of the appropriate sum calculated under paragraph (a) multiplied by the number of months during which the employee was in continuous employment.*
 - (3) *...*
 - (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).***
 - (5) *Any severance allowance payable under this Act shall be paid on the termination of the employment.*
 - (6) *The court may, where it thinks fit and whether or not a claim to that effect has been made, order an employer to pay interest, at a rate not exceeding 12 per cent per annum from the date of the termination of the employment to the date of payment.*
 - (7) *For the purposes of this section the remuneration which shall be taken into account in calculating the severance allowance shall be the remuneration payable to the employee at the time of the termination of his employment."*
12. In Bindhoo v. H. K. S. Jankee and 32 others [2000] UKPC 28 the Privy Council said:

"... severance pay is clearly payable whether or not the employee's dismissal is contrary to the provisions of the Labour Act. If the employee is otherwise eligible, it is sufficient that his employment has been terminated whether lawfully or not. If the termination was unjustified the allowance is payable at the penal rate ..."

And later in rejecting as "*misconceived*" the need for a dismissed employee to establish financial loss in a claim for severance allowance, the Court said:

"the allowance is not payable as damages for breach of contract or as compensation for loss of employment. As in the case of redundancy pay in the UK,



the employee has a statutory right to payment whether or not he has suffered financial loss by reason of the termination of his employment. The allowance is payable ... whenever the conditions set out in the Section are satisfied. This does not require proof of financial loss. The allowance is payable at the penal rate ... whenever the court finds that the employee's dismissal was unjustified ...

13. Clearly the condition precedent to an award under Section 56(4) is a finding that the employee's termination was "unjustified". In this regard Section 50(4) clearly states:

"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 sub-section shall be deemed to be unjustified dismissal".

Accordingly, the claimant's dismissal is by law "unjustified". The condition precedent for the invoking of Section 56(4) is satisfied and the court is required ("shall") to make an order that the claimant "... be paid a sum up to 6 times the amount of severance allowance ...".

14. In considering the meaning and purpose of Section 56(4) the Court of Appeal has said:

"... (the section) 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" (see: Banque Indosuez Vanuatu Ltd. v. Ferrieux [1990] VUCA 3).

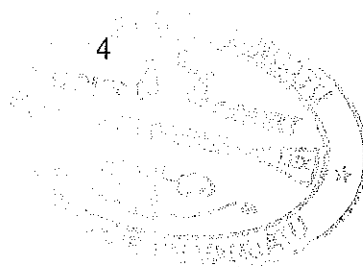
and later:

"... the notion of compensation is a wide one. 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 circumstances of a dismissal ..." (see: Mouton v. Selb Pacific Ltd. [1998] VUCA 8).

and finally:

"... 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 work ..." (see: VBTC v. Malere [2008] VUCA 2).

15. In William v. Shefa Provincial Council [2003] VUSC 96 the Supreme Court awarded the employee the maximum multiplier for severance allowance on the basis "*... that the claimant has remained unemployed from the date of the unjustified termination of his employment until now. This is by way of special damage*".



16. The last case I refer to is the judgment of the Supreme Court in Malere and others v. VBTC [2010] VUSC where the Court enumerated several non-exhaustive factors or questions that may influence the Court in assessing the “multiplier” in an award of a severance allowance under Section 56(4) as follows:

Pre-dismissal factors

- 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?”*

Post-dismissal factors

- 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?”*

(my sub-headings)

17. In the present case claimant’s counsel submits that the claimant relies only on the first possibility in Malere (ibid) and highlights the following pre-dismissal circumstances:

- The claimant’s faithful and unblemished service record of almost 20 years with the same department;
- The absence of any complaints or disciplinary action taken against the claimant during her 20 years of service;
- The failure of the claimant’s employer to give her any notice or details of the allegations of serious misconduct and to afford her an opportunity to respond to them;



- The unilateral summary termination of the claimant's employment without prior warning or notice and without payment of the claimant's statutory entitlement under Section 49(4) of the Employment Act;
 - The fact that the claimant still had 13 years of employment left before retirement, is in her mid-forties and is the sole provider of her family of 3 children and her elderly mother;
18. In light of the foregoing circumstances there is not the slightest doubt in my mind that the claimant's dismissal was "*high-handed*" and uncaring. Furthermore given the rather specialized nature of the claimant's experience and qualifications and her advancing years, her prospects of obtaining other employment is not high.
19. I also take into account the fact that the claimant was offered reinstatement to her former position albeit after a year had passed, and that she rejected it as meaningless as she was already occupied with a personal agricultural project setting up a farming venture for her brother in law.
20. In all the circumstances I consider that the claimant is entitled to an additional payment under Section 56(4).
21. Accordingly judgment is entered for the sum of VT5,049,584 with interest of 5% per annum calculated from 22 February 2013 and continuing until the judgment sum is fully paid up.
22. The claimant is also awarded costs to be taxed if not agreed.

DATED at Port Vila, this 5th day of August, 2016.

BY THE COURT



D. V. FATIAKI
Judge.

