

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

Civil Case No. 21/2346 SC/CIVL

BETWEEN: Winnie Timatua
Claimant

AND: Republic of Vanuatu
Defendant

Date of Hearing: 27 June 2022
Coram: Justice G.A. Andrée Wiltens
Counsel: Mr P. Fiuka for the Claimant
Mr L. Huri with Mr F. Bong for the Defendant
Date of Judgment: 30 July 2022

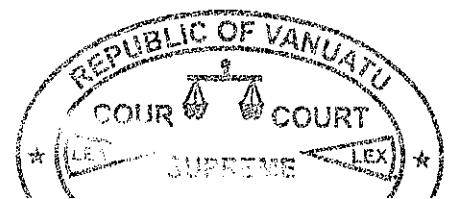
JUDGMENT

A. Introduction

1. This is a Claim for (i) outstanding severance allegedly owing but not paid in full, and (ii) damages for alleged constructive dismissal.
2. The first aspect of the Claim was abandoned at the commencement of trial. Ms Timatua accepted that her severance entitlement was restricted to one month's salary per year of service (which she had already been paid), not two month's salary per year of service as claimed. The latter calculation only commenced after 3 June 2021, by which time her employment with the Defendant in her capacity as a teacher, she now apparently accepts, had already ended.

B. Background

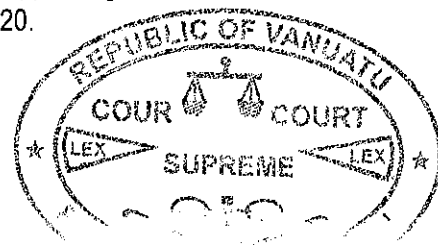
3. In evidence were various sworn statements, submitted by the witnesses for both sides of this dispute. Those witnesses were not required by either counsel for cross-examination, and



accordingly the trial proceeded by way of oral submissions based on the written evidence already filed with the Court.

4. From those statements the following relevant background facts are established:

- Ms Timatua was appointed as a teacher by the Teaching Service Commission (“the TSC”) as from 10 November 1994, effective as from 1 February 1995. She taught, in all, for some 25 years in different capacities.
- On 4 January 2019, Ms Timatua applied for a position with the Public Service Commission (“the PSC”) as a Basic Examination Officer.
- On 5 February 2020, the TSC received certain advice regarding possible employment issues affecting Ms Timatua. This was in the form of a letter from the Director of Education Services, part of the Ministry of Education. The letter addressed to the TSC Chairman advised that the Internal Audit Unit of the Ministry had carried out an audit, “...which confirmed some misappropriation of funds by Ms Winnie Timatua while she was Principal...”. The Audit Unit had made some recommendations, including that Ms Timatua refund: (i) VT 2,260,000 paid out for services not received, (ii) VT 250,000 for an unexplained payment, and (iii) VT 606,560 for leave taken without request or approval. The letter concluded by asking the TSC Chairman to deal with Ms Timatua accordingly. The 27-page audit report was appended with the letter. [Unfortunately, the copy presented in evidence is incomplete, in that only every second page has been produced.]
- By letter dated 24 February 2020, following the TSC’s second meeting of the year, the TSC terminated Ms Timatua’s employment as a teacher, without notice. The letter explained the termination was based on “acts of misappropriation” of school funds by Ms Timatua as Principal of Anambrou School, as evidenced by an audit report prepared by the Ministry of Education’s Audit Department. The letter set out that the TSC regarded such conduct as amounting to “misconduct” as that term is defined in section 52(1)(f) of the Teaching Service Act No. 38 of 2013. Ms Timatua was instructed by this letter to return all government property in her possession and to vacate her office by 26 February 2020. She was also advised she was able to appeal the decision within 28 days.
- That decision was appealed by Ms Timatua in a 5-page document dated 27 February 2020, apparently received by the TSC on 1 April 2020.
- On 2 March 2020, some 4 weeks after her application, Ms Timatua was appointed, on a probationary basis, as a Basic Examination Officer. The appointment was said to have started on 4 November 2019, but it appears she only commenced such employment, and was appropriately paid for that, as from 6 March 2020.
- On 9 June 2020, Ms Timatua was notified by letter that her appeal against her dismissal by the TSC was scheduled for hearing on 24 June 2020.

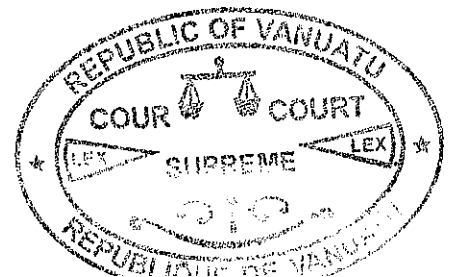


- On 24 June 2020, Ms Timatua's appeal was heard by the TSC Appeal Board. The decision was reserved for further consideration, and her case was again discussed by the Board on 13 August 2020.
- On 13 August 2020, following the further consideration, the appeal decision was published in the form of a 3-page letter addressed to Ms Timatua. It appears from a hand-written notation at the top of the letter that it was received by her on 1 September 2020.

The letter records that the TSC Appeal Board agreed with Ms Timatua's submissions that sections 50(3) and 50(4) of the Employment Act [Cap 160] had not been complied with, as well as sections 54(1) and 54(3) of the Teaching Service Act. This amounted to procedural failures by the TSC in arriving at the decision to terminate. Accordingly, the result of the appeal was that the appeal was allowed. Ms Timatua was additionally awarded back-pay from 24 February 2020 to 13 August 2020.

However, pursuant to section 57 of the Teaching Service Act, the TSC Appeal Board suspended Ms Timatua, without salary, effective from 13 August 2020 pending the completion of an investigation into the misappropriation allegations made against her. Ms Timatua was advised that the TSC would, as soon as possible, appoint an investigator to conduct a "proper investigation" and provide a written report for the TSC's consideration. Ms Timatua was further advised that if the investigation did not find her to be at fault, she would be entitled to reimbursement of her full salary for the period of her suspension. She was also advised that in the interim she was entitled to take up other employment.

- On 31 August 2020, the TSC Appeal Board forwarded Ms Timatua a letter explaining the result of her appeal and requesting her co-operation with the pending investigation. This letter was apparently received on 1 September 2020, according to the hand-written notation at the top of the document.
- By letter dated 2 December 2020, a law firm acting on Ms Timatua's instructions wrote to the TSC Chairman seeking severance, multiplied by 6, for Ms Timatua's unjustified dismissal.
- By letter of 2 February 2021, the TSC Appeal Board advised Ms Timatua that it had reviewed the earlier decision of 13 August 2020 following receipt by the Board of a communication from the TSC Finance Unit advising that it had not, and would not, process the Board's decision relating to back-pay. This was stated to be due to the fact that Ms Timatua had been on the PSC's payroll as a Basic Examination Officer since 6 March 2020. The Board's review resulted in the revoking of the previous decision to uplift Ms Timatua's termination and place her on suspension without salary. The decision to award back-pay from 24 February 2020 to 13 August 2020 was also revoked.

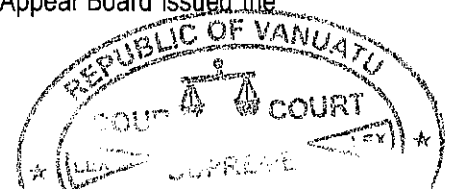


The Appeal Board went on to advise Ms Timatua that it had instructed the TSC to pay her due severance in full; and that the Board had indicated to the TSC that if the allegations were to be pursued, a referral to the police should be made. The handwritten notation at the top of this letter indicates Ms Timatua received it on 29 March 2021.

- By letter dated 15 July 2021 Ms Timatua resigned from her post with the TSC as a teacher. She advised she been patient for "almost two years" and felt she been treated unfairly regarding her employment status. The TSC received that letter on 2 August 2021.
 - On 29 July 2021, Ms Timatua's appointment to the position of Basic Examination Officer with the PSC was made permanent.
5. In her second sworn statement, Ms Timatua makes it clear she was dissatisfied that the TSC had taken no steps towards either appointing an investigator or conducting any investigation. She maintains the TSC did not act as a good employer, which it was statutorily bound to do. She makes such complaint as she maintains she would have been cleared of the allegations against her, which she has had no opportunity to refute or adequately respond to, due to the TSC's inaction. She was in a situation where she had no real choice but to resign and confirm her employment with the PSC on a permanent basis, which eventuated at her request after she had resigned from the TSC. She alleges she was constructively and unjustifiably dismissed and accordingly is due her employment entitlements.
6. Ms Timatua's third sworn statement does not advance the matter.
7. In his sworn statement, Mr Hopkins Dick, the TSC's Secretary General, deposes to the TSC having no knowledge of Ms Timatua's employment with the PSC prior to 13 August 2020, the date the TSC Appeal Board finally determined Ms Timatua's appeal. It was his evidence, unchallenged, that Ms Timatua did not at any time reveal her alternative employment to the TSC. It was further his evidence, also unchallenged directly, that Ms Timatua had terminated her employment with the TSC by the provision of her letter of resignation dated 15 July 2021.

C. Discussion

8. There is no evidence the TSC has commenced an investigation into the allegations against Ms Timatua, as she was advised would occur in the TSC Appeal Board's decision of 13 August 2020. Nor is there any explanation as to why this has not taken place. She has not been given an opportunity to properly and fairly address those allegations. Ms Timatua's concerns regarding this are, on their face, reasonable and legitimate.
9. However, Ms Timatua applied to the PSC for employment as a Basic Examination Officer on 4 January 2019. Although it is her position that she was entitled to undertake alternative employment while on suspension, as provided for in Section 57(2) of the Teaching Service Act, at the time of Ms Timatua's application she was not under suspension. Her employment with the TSC was terminated on 24 February 2020, and her employment with the TSC was not re-instated (albeit as a suspended employee) until the TSC Appeal Board issued the




decision of 13 August 2020. By then, Ms Timatua had been in the alternative employ of the PSC (albeit on a probationary basis) for over 5 months.

10. I accept Mr Hopkins Dick evidence that at no time did Ms Timatua advise the TSC that she had commenced alternative employment. That was a clear breach of her obligations to the TSC.
11. The TSC Appeal Board, by the decision of 2 February 2021, impliedly made clear that had the Board been advised of Ms Timatua's alternative employment in August 2020, she would not have been re-instated, even on a suspended basis. In effect, the Board indicated that by her acceptance of alternative employment in early March 2020, Ms Timatua had herself ended her employment relationship with the TSC.
12. The TSC Appeal Board's February 2021 decision to revoke the earlier decisions removed the need for the TSC to conduct an investigation. The fact that the TSC did not instigate an inquiry between 13 August 2020 and 2 February 2021, while demonstrating behaviour inconsistent with the TSC's obligation to be a good employer, cannot be cited by Ms Timatua in support of her Claim due to her own dereliction of her obligations to her former employer.
13. I find that Ms Timatua's letter of resignation of 15 July 2021 is of no legal effect.
14. I do not accept the argument that Ms Timatua was employed by the TSC through to the time of her formal resignation r to 29 July 2021, when her employment with the PSC was made permanent.
15. I conclude there was no constructive dismissal. Accordingly, the Claim for a multiplier times 6 of Ms Timatua's severance payment cannot be awarded, as there is no legal basis for the same.

D. Result

16. The Claim fails and is dismissed.
17. Costs are to follow the event. I set them at VT 125,000, and they are to be paid by Ms Timatua within 28 days.

Dated at Port Vila this 30th day of July 2022nd


for Justice G.A. Andrée Wiltens

