

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

Civil
Case No. 21/1453 SC/CIVL

BETWEEN: Joyce Leona
Claimant

AND: FR8 Logistics Limited (30371)
Defendant

Dates of Trial: 28 July 2022 and 27 October 2022
Before: Justice V.M. Trief
In Attendance: Claimant – Mrs M. Mala
Defendant – Mr J. Boe
Date of Decision: 21 April 2023

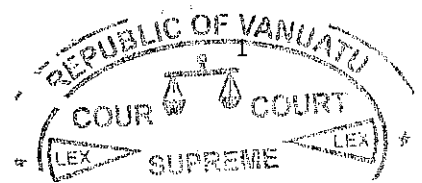
JUDGMENT

A. Introduction

1. This is an action arising from the alleged unlawful and unjustified termination of the Claimant Joyce Leona's employment contract with the Defendant FR8 Logistics Limited (30371) ('FR8').

B. Background

2. On 14 March 2016, Mrs Leona commenced employment with FR8 as Accounts Receivable Officer. She was in the continuous employment of FR8 until her termination.
3. Clauses 7 and 8 of Mrs Leona's employment contract provided as follows:
 7. *The Employee is entitled to 15 days paid annual leave (equivalent to 1.25 days per month worked) which must be taken within 3 months of the completion of this contract.*
 8. *Sick leave – The Employee is entitled to up [sic] 21 days of full paid sick leave after rendering 1 year of service to the company. Sick leave will only be paid if:*



- a. *The employee informs the employer that he or she is unable to work within 2 hours of being absent due to sickness; and*
- b. *A medical certificate from a registered physician must be provided.*

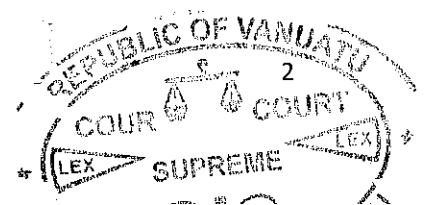
4. Clause 12 of Mrs Leona's employment contract provided as follows:

12. a. *The contract can be terminated at any time by either party by giving 2 weeks written notice.*
- b. *If an employee is absent for more than 3 days without contacting the employer to explain the absence, ... then, through this action, the employee will have resigned and the employment relationship shall cease. No severance pay will be allocated in this instance.*
- c. *The Employer has the right to terminate the Employee's contract instantly without notice or severance in the event of serious misconduct by the employee. Serious misconduct includes but is not limited to the following:*
 - i. **Theft** by the Employee from the Employer or other Employee, subcontractor, or persons or companies associated with the Employer or the Employers' representatives of [sic] families.
 - ii. **Assault or sexual harassment** by the Employee on the Employer, the Employer's representatives, other employees of the company, subcontractors, consultants, clients, or persons or companies associated with the employer or the Employer's representatives or families.
 - iii. **Consumption** of alcohol, kava, narcotics or any other illegal or unprescribed drugs during the hours of employment, or attending work while influenced by any of the above.
 - iv. *Refusal to follow the legal and reasonable instructions of the Employer or the company's representatives.*
 - v. *Continued failure to adhere to the hours agreed to in this contract.*
 - vi. *Approach by the employee to any client or person associated with the employer or the employer's representatives or families, for the purpose of soliciting money or goods.*
- d. *For minor offences, three written warnings will automatically terminate the Employee contract. No severance pay will be allocated in this instance.*
- e. *Special Note: Any violence, whether verbal or physical will not be tolerated, in any form and will constitute immediate dismissal.*

5. By letter dated 22 May 2020, FR8 notified Mrs Leona that her employment contract was terminated with immediate effect as a result of her attendance record as follows:

Dear Joyce, as you know we are going through tough times and a huge amount of the difficulties we currently face is that of getting debtors to pay us. Recently we granted several weeks of holiday to you – some if it was granted in advance of it actually being due.

This left a hole in the accounts department. Over the last 11 months you have also taken in addition to that time a further 22 days (so far – up until today) and we can feel the impact that this is having on our work to be done in the Accounts department.



Therefore, we regret to inform you that we are terminating your employment with immediate effect. We reached this decision after reviewing your attendance. The role that you hold is very critical in terms of maintaining a favourable cash flow and managing business continuity especially during a crisis we are in at the moment.

...
(my emphasis)

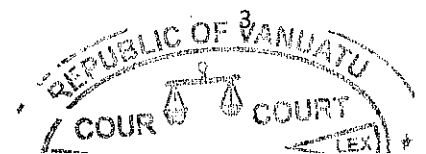
C. Pleadings

6. By the Claim, Mrs Leona alleges unlawful and unjustified termination as her employment was terminated with immediate effect and she was not given any opportunity to respond to the allegations against her or to address whether a course other than dismissal for serious misconduct was available. A declaration that the termination of her employment contract was unlawful, unjustified and in breach of the employment contract; payment of her salary up to the date of termination; severance allowance; annual leave, payment in lieu of notice; annual leave; a 4 times multiplier pursuant to subs. 56(4) of the Employment Act; interest and costs are sought.
7. FR8 disputes the Claim. It accepted that Mrs Leona's employment contract was subject to the Act: para. 2 of the Defence. It alleged that Mrs Leona breached clauses 8(a) and (b) and 12(b) and (c)(v) of her employment contract therefore severance is not payable. It also alleged that the advance pay that Mrs Leona took was larger than her payment due on termination and she still owes that money to FR8. Further, that Mrs Leona was not entitled to 3 months payment in lieu of notice and did not have any outstanding salary.
8. In the Reply to Defence, Mrs Leona denied breaching clause 8(a) of her employment contract as she made efforts to communicate her absence due to illness.

D. The Law

9. Section 49 of the *Employment Act* [CAP. 160] (the 'Act') provides, relevantly, as follows:

49. (1) *A contract of employment for an unspecified period of time shall terminate on the expiry of notice given by either party to the other of his intention to terminate the contract.*
- (2) *Notice may be verbal or written, and, subject to subsection (3), may be given at any time.*
- (3) *The length of notice to be given under subsection (1) –*
 - (a) *where the employee has been in continuous employment with the same employer for not less than 3 years, shall be not less than 3 months;*
 - (b) *in every other case –*
 - (i) *where the employee is remunerated at intervals of not less than 14 days, shall be not less than 14 days before the end of the month in which the notice is given;*
 - (ii) *where the employee is remunerated at intervals of less than 14 days, shall be at least equal to the interval.*
- (4) *Notice of termination need not be given if the employer pays the employee the full remuneration for the appropriate period of notice specified in subsection (3).*



...
(my emphasis)

10. Section 50 of the Act, relevantly, provides as follows:

50. (1) *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.*
- ...
- (3) *Dismissal for serious misconduct may take place only in cases where the employer cannot in good faith be expected to take any other course.*
- (4) *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.*
- ...

11. Subsection 54(1) of the Act provides, relevantly, as follows:

54. (1) *Subject to section 55, where an employee has been in the continuous employment of an employer for a period of not less than 12 months commencing before, on or after the date of commencement of this Act, and –*
- (a) *the employer terminates his employment; or*
- ...
- (d) *Where the employee has been in continuous employment with the same employer for a continuous period of not less than 6 consecutive years and the employee resigns in good faith; or*
- ...
- the employer shall pay severance allowance to the employee under section 56 of this Act.*

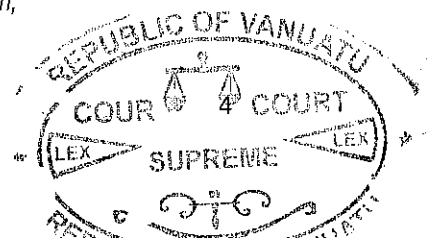
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12. Subsection 55(2) of the Act provides as follows:

55. ...
- (2) *An employee shall not be entitled to severance allowance if he is dismissed for serious misconduct as provided in section 50.*

13. Section 56 of the Act provides, relevantly, as follows:

56. (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 – 1 months remuneration;*



(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.

...

(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.

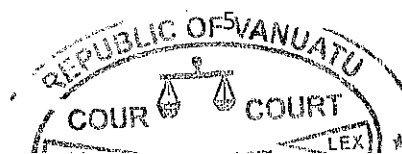
(6) The court may, where it thinks fit and whether or not a claim to that effect has been made, order an employer to pay interest, at a rate not exceeding 12 per cent per annum from the date of the termination of the employment to the date of payment.

(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.

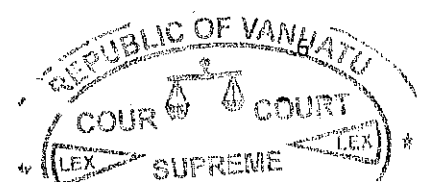
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E. Evidence

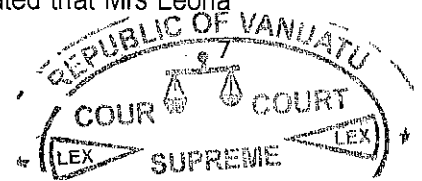
14. **Mrs Leona** deposed in her Sworn statement filed on 25 August 2021 [**Exhibit C1**] that on 15 May 2020, she worked in the morning but took the afternoon off to go to the Emergency Department at the Vila Central Hospital ('VCH') to use the nebulizer as she was sick with asthma and flu. The nurse gave her a medical certificate for 15 and 18 May 2020. On 19 May 2020, she returned to VCH for a check-up and was given another medical certificate for 19 and 20 May 2020. Anita Koanapo, the FR8 Accounts Clerk called and Mrs Leona told her of her sick leave on 19 and 20 May 2020. She did not have enough bus fare to drop the medical certificate to work so she called the FR8 driver Derrick George to pick it up from her but the FR8 Director did not allow him to.
15. Thursday 21 May 2020 was a public holiday for Ascension Day so there was no work. She met Anuj Kumar, FR8's CFO at Manples market and told him that she had been absent from work due to her medical condition. She gave FR8 her medical certificates for 15-20 May 2020 after she received her termination letter. She was never given any opportunity to respond to the allegations made against her. FR8 has not paid her severance or 3 months' payment in lieu of notice. It has not paid her outstanding salaries until the date of termination or annual leave even though it said in para. 5 of the termination letter that it would.
16. In March 2020, the first Covid-19 case was announced and a state of emergency was announced for schools in Port Vila. She requested 2 weeks' leave without pay to take some children of her husband's relatives back to Pentecost island to keep them safe. When she took her leave form to Mr Kernot, he on his own accord authorised 1 week pay advance to be paid to her. The GM processed the advance pay for VT16,040 being Mrs Leona's hourly rate of VT401 for 5 days. To Mrs Leona, this was not a pay advance as Mr Kernot voluntarily authorized it, she did not request it.
17. Mrs Leona attached copies of her employment contract and the termination letter [Annexures "**JL1**" and "**JL2**" respectively, **Exhibit C1**].



18. Mrs Leona deposed in her Sworn statement filed on 13 July 2022 [**Exhibit C2**] that she did not attend work on 22 May 2020 as her babysitter did not turn up that day. She requested the day off via Skype to Anuj Kumar, FR8's Chief Financial Officer. After she was given her medical certificate for 2 days' sick leave on 15 and 18 May 2020, she called FR8 driver Derrick to come pick it up from her at hospital but he said that Mr Kumar did not approve of that run. She went back to hospital on 19 May 2020. While there, Anita Koanapo, FR8's Accounts Clerk, called her. She understood that Anita conveyed her absence with excuse to Nechelle McEwen, Personal Assistant to the Director. She did not have enough bus fare to drop the medical certificates off to FR8. She believes that she complied with her employment contract by informing FR8 of her absences through telling the driver on 15 May 2020 and the Accounts Clerk on 19 May 2020.
19. She was only absent for 5 days with excuse. She notified FR8 of those absences through the phone calls and Skype with FR8 officers. She repaid in 2019 her cash advance of VT13,000 for 11-24 March 2019 in Mrs McEwen's evidence. By May 2020, she no longer had any outstanding pay advances.
20. In her Sworn statements filed on 4 August 2022, Mrs Leona replied to the sworn statements of Mrs McEwen [**Exhibit C3**], Mr Kumar [**Exhibit C4**] and Mr Kernot [**Exhibit C4**].
21. At trial, Mrs Leona stated that she is 31 years old. Since her termination by FR8, she worked with Wantok on a 6-month contract. Three weeks ago, she started work as a teller at the Bred Bank (since 11 July 2022).
22. In cross-examination, Mrs Leona agreed that FR8 management consisted of Mr Kernot, Mr Kumar and Mrs McEwen. She agreed that she regularly took sick leave and had to obtain a medical certificate for that. She said she informed management – Mr Kumar – of her sick leave on 15 May 2020. She agreed that after she got her medical certificate on 15 May 2020, she called Derrick. She denied calling Derrick on 19 May 2020. She stated that management were aware of her sick leave on Monday 18 May; on Tuesday, Anita called her. She denied that she was absent from work for 5 days without advising FR8 so therefore had resigned. It was put to her that after she read the termination letter, she signed it as agreeing with the statements made in the letter. She replied, "No!" It was put to her that when she signed it, she made the decision to terminate herself. She answered, "They told me to sign it."
23. In re-examination, Mrs Leona explained that she regularly took sick leave because she sometimes gets asthma attacks and management were all aware of her health. She explained that she did not call Derrick on 19 May, but management called her. On 25 May 2020, she and Mr Kumar went to the Conference Room. He handed her the termination letter. She read it then asked him if it was her termination letter? He said yes without giving any explanation. Then he told her to sign the letter.
24. **Anuj Kumar** deposed in his Sworn statement filed on 21 October 2021 [**Exhibit D1**] that he is FR8's CFO. He did not receive a call from Mrs Leona on 19 May 2020. They met at Manples market on 21 May 2020 but did not discuss her health and reasons for her absence. He repeated the same in his Sworn statement filed on 16 May 2022 [**Exhibit D2**].



25. **Chris Kernot** deposed in his Sworn statement filed on 21 October 2021 [**Exhibit D3**] that there were many cash advances made to Mrs Leona as well as advances on holiday pay not yet accrued. Mrs Leona was frequently absent. After consultation, discussions and giving her an opportunity to respond, Mrs Leona agreed that under clause 12(b) of her employment contract she had voluntarily resigned as she was absent without explanation for over 3 days. She acknowledged the breach by signing the termination letter on 25 May 2020.
26. At trial, Mr Kernot added that he was ultimately responsible for hiring and firing staff. Mrs Leona's job in the Accounts Receivables section was the lifeblood of the company because if they did not collect the money due to them, the company would be in a perilous position all the time. Maybe Mrs Leona could have done another role in the company but all other roles were filled and they were specialised functions which would take a great deal of training.
27. In cross-examination, Mr Kernot stated that the management team involved all supervisors and department managers. He stated that the word "employer" in clause 12(b) of the employment contract meant management and the employee's supervisor but not any staff. He was asked where "employer" was defined in the contract. He replied that every employee had Skype on their phones and know who their boss is. He disagreed that Mrs Leona calling any employee constituted telling the "employer." He stated that he was only aware of 1 or 2 occasions when Mrs Leona had asthma attacks at work and she did not at that time. He agreed that Mrs Leona was absent for 5 days. It was put to him that no one in management met with Mrs Leona to give her an opportunity to respond. He replied that they had a conversation on 25 May 2020.
28. There was no re-examination.
29. **Nechelle McEwen** deposed in her Sworn statement filed on 21 October 2021 [**Exhibit C6**] that she is the Personal Assistant to FR8's Director and is part of the management team. She manages communications from staff who report absence from work due to illness and processes staff advances and staff annual leave entitlements. Mrs Leona was absent on 6 days (including Saturday 16 May 2020). On 15 May 2020, she asked Anita to look for Mrs Leona after noticing her absence because normally Mrs Leona would send her medical certificate and notify of her absence but none was sent. In the 6 days she was absent, she did not produce her medical certificates or communicated on Skype or by phone to one of their drivers to pick up her medical certificate as is normal practice. A medical certificate was obtained later only for 15 and 18 May 2020 and Mrs Leona's normal work hours required her to work on 17 May 2020. In their Skype conversation after her termination on 25 May 2020, Mrs Leona agreed that there was no annual leave entitlement because it had been paid in advance. A further deduction from any termination payments was because of a VT13,000 pay advance for 11-24 March 2019.
30. At trial, Mrs McEwen added that the management team was made up of Mr Kernot, Mr Kumar and herself. She stated that Mrs Leona often advanced her salary including for her wedding dress, her husband's airfare and also allowances when traveling to other islands. Sometimes she advanced more than her salary so she had to talk to Mr Kernot not to advance all her salary or it would be deducted later on in the next payroll. She was asked why Mrs Leona is not entitled to annual leave or severance? She stated that Mrs Leona

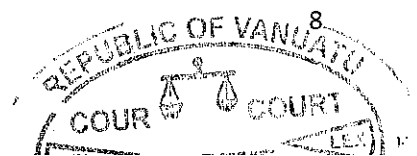


was no longer entitled to annual leave because she applied for it in advance and not to severance because she had been absent for more than 3 days. Mrs McEwen stated that deductions were always stated on Mrs Leona's pay slip and she was aware of using up her 15 days annual leave because she applied for it in advance and was paid it – she had already used all of it.

31. Mrs McEwen also stated that Mrs Leona had no outstanding salaries till the date of her termination due to her cash advances. After her termination she still has an outstanding balance owed to FR8. Mrs Leona was notified of this through the deductions on her pay slip. The normal communication within their office when a staff member is sick is for him or her to call their direct supervisor or the manager and also send a message to their group chat on Skype. Mrs Leona was absent for 6 days from 15-22 May, excluding Saturday and Sunday. In the past, Mrs Leona normally followed these procedures to inform the management team. She normally called them to tell them she was away and even made effort of taking a photo of her medical certificate and sending it to them. She stated that for 15-20 May 2020, there were no calls or messages from Mrs Leona about her 2 days sick leave.
32. In cross-examination, Mrs McEwen agreed that on 19 May 2020, she noticed that Mrs Leona was absent so she asked Anita to check on Mrs Leona's whereabouts. Anita said that Mrs Leona said she was still not feeling well but that was after 4 days that she was absent without informing them of her condition; they had had no idea of her condition or health on the preceding days that she claimed she was sick. She agreed that there was a separate Skype group chat for Accounts and a separate one for management.
33. Mrs McEwen stated that they were aware that Mrs Leona went to hospital on 15 May 2020 but there was no medical certificate provided that she would be unable to attend the next day and did not hear anything from her. They were aware only on that date, 15 May 2020, that Mrs Leona was feeling unwell. She agreed that 21 May was a public holiday. It was put to her that Mrs Leona was absent for 5 days, not 6. She replied that if you remove 1 day for the public holiday, it was 5 days but they normally went to work on Saturdays too. It was put to her that the FR8 internal Memo [Annexure "**JL6**", **Exhibit C5**] meant there was no work on Saturdays and Sundays. She replied, "Yes, during that period" and then after reading "**JL6**", said that she was not sure if on 16 May 2020, they were closed or not.
34. Mrs McEwen agreed that **Exhibit C6** and Attachments "**NL1**" and "**NL2**" related to a pay advance in 2019 but stated that her file also shows that there was an additional payment to Mrs Leona for her annual leave for 2020. She agreed that that was not in evidence. She referred to a Skype conversation in which Mrs Leona agreed that she had been paid her 2020 leave but that this too was not in evidence. It was put to her that there was no evidence that Mrs Leona agreed that she does not have any annual leave left therefore she still has annual leave for 2020. She replied, "No, she doesn't."
35. There was no re-examination.

F. Findings

36. It is accepted that 21 May 2020 was a public holiday so Mrs Leona was not required to attend work.



37. In Mrs Leona's evidence, when the Covid pandemic broke out, FR8 stopped work on the weekends according to the FR8 internal Memo [Annexure "JL1 to **Exhibit C2**]. Mrs McEwen stated that normally they also worked on Saturdays but was not sure whether or not they did on Saturday 16 May 2020. Mr Kernot was not questioned as to whether or not they worked on that Saturday. Accordingly, I consider that it was more likely than not that Mrs Leona was not required to work on Saturday 16 May 2020. I find therefore that Mrs Leona was absent from work for 5 days which were 15, 18-20 and 22 May 2020.
38. Mrs Leona deposed that she obtained medical certificates in relation to her absences on 15 and 18-20 May 2020 but only provided them to FR8 after she received her termination letter. Mrs McEwen deposed that a medical certificate was obtained later only for 15 and 18 May 2020. Neither party has adduced copies of any medical certificate into evidence. It is telling that Mrs Leona did not send a copy of either medical certificate via Skype to the management team. I find therefore that only the absences on 15 and 18 May 2020 were sick leave for the purpose of clause 8 of the employment contract but not the absences on the other days.

Did Mrs Leona breach clause 12(b) of her employment contract?

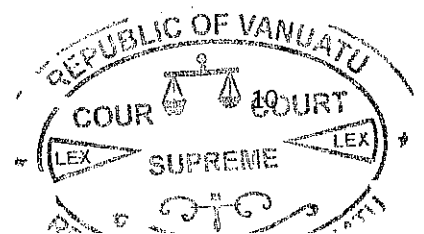
39. FR8's case was that Mrs Leona's absence for over 3 days without explanation was a breach of clause 12(b) of her employment contract and constituted resignation, ending the employment relationship.
40. Clause 12(b) of Mrs Leona's employment contract required her to contact 'the employer' to explain her absence because if she were absent for more than 3 days without doing so, she would be regarded as having resigned and no severance would be payable.
41. Mr Kernot deposed that Mrs Leona voluntarily resigned as she was absent without explanation for over 3 days and that she acknowledged the breach by signing the termination letter on 25 May 2020. In cross-examination, Mrs Leona denied that by signing the termination letter, she agreed with the statements made in it (presumably the allegations against her). She said, "They told me to sign it." Mrs Leona's bare signature appears at the bottom of the letter. There were no words added to say that her signature was in acknowledgment of her resignation or that she accepted that she had breached her contract. The inference drawn by Mr Kernot is simply not credible. I find that Mrs Leona signed the termination letter to acknowledge receiving it but not for any other purpose as alleged by FR8.
42. Mrs Leona's case is that her contact with the driver Derrick on 15 May 2020 and with the Accounts Clerk on 19 May 2020 constituted contact with FR8 to explain her absences therefore she did not breach clause 12(b) of her employment.
43. Mrs McEwen's evidence was that it was normal practice to call one of the drivers to pick up [Mrs Leona's] medical certificate. In Mrs Leona's evidence in **Exhibit C1**, she called the driver Derrick on 19 May 2020 to come collect her medical certificate from her at home but Derrick said that Mr Kernot refused. In her evidence in **Exhibit C2**, she said that she called Derrick on 15 May 2020 to come pick up her medical certificate from her at the hospital but

he said that Mr Kumar did not approve of that run. I accept that Mrs Leona had tried to get Derrick to come and pick up her medical certificate however she could also have called Mr Kernot or Mr Kumar to explain her absence but she did not. She could have sent a message to management via Skype but she did not.

44. I am unable to agree that contact with the driver on 15 May 2020 constituted contact with FR8. The persons who Mrs Leona needed to contact about her absences were the management team so that they could rearrange the Accounts section to cover her absence. Accordingly, I find that Mrs Leona did not contact FR8 on 15 and 18 May 2020 to explain her absence.
45. Mrs McEwen deposed that she sent Anita on 15 May 2020 to find out where Mrs Leona was. However, in cross-examination, she agreed that she sent Anita on 19 May 2020 to find out where Mrs Leona was after noticing her absence. Through Anita's call, they became aware for the first time that Mrs Leona was still not feeling well. I find that it was more likely than not that Anita called Mrs Leona on 19 May 2020 and what Mrs Leona told her which she relayed to Mrs McEwen constituted contact with FR8 to explain her absences on 19 and 20 May 2020.
46. It is common ground that on 22 May 2020, Mrs Leona contacted Mr Kumar via Skype to let him know she could not attend as her babysitter had not turned up [Annexure "JL9", **Exhibit C4**]. That constituted contact with FR8 to explain her absence on that day.
47. In summary, Mrs Leona contacted FR8 on 19-20 May 2020 and 22 May 2020 and explained her absences. She failed to do so only on 2 days being 15 and 18 May 2020. Accordingly, Mrs Leona did not breach clause 12(b) of her employment contract.

Did Mrs Leona breach clause 12(c)(v) of her employment contract?

48. FR8 also alleged that in being absent from 15-22 May 2020, Mrs Leona breached clause 12(c)(v) of her employment contract because that constituted continued failure to adhere to the hours agreed to in the contract. In that case, FR8 had the right to terminate Mrs Leona's contract instantly without notice or severance.
49. I have already held that the absences on 15 and 18 May 2020 were sick leave. There is no suggestion that Mrs Leona had exceeded her sick leave entitlement.
50. The absences on 18-20 May and 22 May 2022 were not sick leave nor taken as leave without pay so they must have been taken as annual leave.
51. There is no suggestion that Mrs Leona had annual leave for 2019. The question is what annual leave she had for 2020.
52. Mrs McEwen's evidence was that Mrs Leona did not have any annual leave left for 2020 as she had been paid it. However, Mrs McEwen accepted that nothing had been adduced into evidence to show that Mrs Leona had been paid her annual leave for 2020.



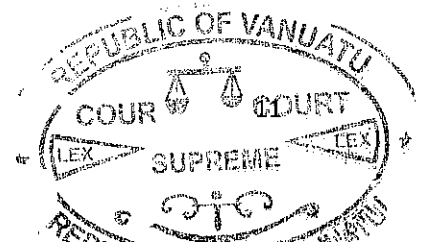
53. Clause 7 of Mrs Leona's employment contract provided for 15 days paid annual leave "(equivalent to 1.25 days per month worked)." By May 2020, Mrs Leona had worked 5 months of the year therefore she was entitled to 6.25 days of annual leave (5 months x 1.25).
54. In Mrs Leona's evidence, she took 2 weeks leave when the first Covid-19 case was announced to take her husband's relatives' children back to Pentecost and was paid a week's pay in advance. That means 5 days of that period of leave was leave without pay and the other 5 days were paid annual leave. Mrs Leona's absences on 19, 20 and 22 May 2020 added another 3 days so by 22 May 2020, she had taken 8 days annual leave. In doing so, Mrs Leona exceeded the 6.25 days of annual leave that she had accrued and did not have any annual leave left for 2020 and she breached clause 12(c)(v) of her employment contract.

Did Mrs Leona commit serious misconduct?

55. Given the breach of clause 12(c)(v) of her employment contract, Mrs Leona committed serious misconduct.

Were subs 50(3) and (4) of the Act complied with?

56. Even though clause 12(c)(v) of Mrs Leona's employment contract provided for instant dismissal without notice or severance, FR8 must nevertheless comply with subs. 50(4) of the Act which requires it to give the employee an adequate opportunity to answer the charges made against him or her before instantly dismissing him or her on the ground of serious misconduct.
57. The termination letter made clear that the termination was "with immediate effect." Mrs Leona's evidence is that when she attended work on 25 May 2020, she was handed the termination letter and was not given any opportunity to respond to the charges against her. Mr Kernot's evidence that there was discussion and that Mrs Leona was given an opportunity to respond before her termination were directly contradicted by the terms of the termination letter and Mrs Leona's evidence. It is telling that Mr Kumar did not give any evidence about the circumstances in which he gave the termination letter to Mrs Leona. I reject Mr Kernot's evidence which was fanciful and at worst, a complete fabrication.
58. The termination letter had already been prepared on and was dated 22 May 2020 while Mrs Leona was absent so it clearly was done without any discussion with her and without giving her any opportunity to respond to the charges set out against her in the letter. I find to that effect and that Mrs Leona's dismissal was made in contravention of subs. 50(4) of the Act.
59. Mrs Leona was not asked to address whether there was another course available than dismissal. It follows that FR8 also contravened subs. 50(3) of the Act.
60. Mrs Leona's dismissal was accordingly unlawful and unjustified.



Did Mrs Leona take advance pay that was larger than her payment due on termination?

61. FR8 alleged that the advance pay that Mrs Leona took was larger than her payment due on termination. However, it did not adduce any evidence to show this. The only evidence as to advance pay was that of a pay advance in 2019, in Mrs McEwen's evidence [**Exhibit C6**]. FR8 has failed to prove this aspect of its Defence.

Is Mrs Leona entitled to 3 months payment in lieu of notice?

62. In the case of serious misconduct, it is lawful for the employer to dismiss an employee without notice and without payment in lieu of notice: subs. 50(1) of the Act. Accordingly, Mrs Leona is not entitled to 3 months payment in lieu of notice.

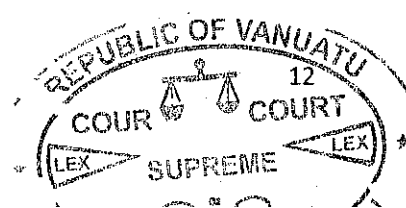
Does Mrs Leona have outstanding salary?

63. Mrs Leona's evidence was that FR8 had not paid her outstanding salaries until the date of termination even though it said in para. 5 of the termination letter that it would. She did not provide evidence as to how much salary remained outstanding. I note that a copy of Mrs Leona's pay slip for the period 4 May-17 May 2020 was set out in Annexure "JL5" of **Exhibit C5**. After deductions for cash advances of over VT20,000, her net pay for that period was VT2,957. I infer that that amount has been paid.
64. For the following pay period, Mrs Leona is entitled to salary for 18 May 2020 (sick leave) and 19 May 2020 (paid annual leave). However, she is not entitled to salary for 20 and 22 May 2020 as her absences then were in excess of her annual leave entitlement. Accordingly, Mrs Leona is entitled to outstanding salary of VT6,416 for 18 and 19 May 2020.

Is Mrs Leona entitled to severance allowance?

65. Mrs Leona qualified for a severance allowance as she had been in FR8's continuous employment for over 12 months and FR8 terminated her employment: subs. 54(1) of the Act.
66. Subsection 55(2) of the Act provides that an employee shall not be entitled to severance allowance if he or she is dismissed for serious misconduct "as provided in s. 50."
67. In *Public Service Commission v Tari* [2008] VUCA 27 at pp 6-7, the Court of Appeal stated as follows:

Section 54 (1) of the Employment Act identifies when an employee is entitled to a severance allowance. Mr. Tari qualified for a severance allowance by virtue of this section. The Court may order the employer to pay up to six times the severance allowance if the dismissal is [sic] unjustified: s.56 (4).



The Commission made no severance allowance payment to Mr. Tari because they dismissed him for serious misconduct. If an employee is lawfully dismissed for serious misconduct a severance payment is prohibited: s.55 (2).

We have concluded the dismissal was unjustified in that it failed to address section 50 (3). In those circumstances a severance allowance was payable and the multiplier provision in s.56 (4) was triggered. The judge in his judgment set the multiplier factor at 3. There was no challenge to this assessment. We therefore confirm the judge's assessment.

(my emphasis)

68. FR8's termination of Mrs Leona's employment contravened both subss 50(3) and (4) of the Act. In those circumstances, Mrs Leona is entitled to severance allowance.
69. Mrs Leona's hourly rate of remuneration at the time of her contract termination was VT401 resulting in monthly pay of VT64,160. She is entitled to severance allowance of 1 month's remuneration for every period of 12 months: para. 56(2)(a) of the Act.
70. She worked from 14 March 2016 to 22 May 2020 therefore 4 years and 2 months. Accordingly, she is entitled to severance allowance of VT267,333.
71. I consider that the amount of Mrs Leona's severance allowance is an amount that FR8 could easily have paid before now and therefore it is fitting that FR8 be ordered pursuant to subs. 56(6) of the Act to pay 12 per cent interest per annum on the sum of severance allowance from the date of the termination of employment to the date of payment.

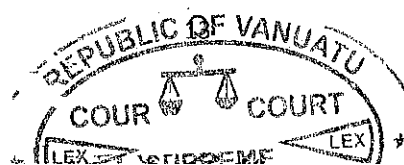
What multiplier is to be awarded to Mrs Leona?

72. The wording of subs. 56(4) of the Act is mandatory. Where the Court finds that the termination of an employee was unjustified, it shall order that he or she be paid a sum up to 6 times the amount of their severance allowance: *Iata v Tanna Coffee Development Co Ltd* [2020] VUCA 12 at [13].
73. In *Vanuatu Broadcasting and Television Corporation v Malere* [2008] VUCA 2 at p. 5, the Court of Appeal stated as follows:

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 obtain work. Whether in this case it matters which of the approaches is adopted we do not know and, it is possible that under either approach a good case could be advanced, but we have no option but to allow the appeal on this ground and the issue will have to go to trial if there is no agreement reached.

74. Mrs Leona gave *viva voce* evidence-in-chief that she has only worked for 6 months with Wantok and then 3 weeks with the Bred Bank since she was terminated by FR8.
75. In *Republic of Vanuatu v Mele* [2017] VUCA 39 at [61]-[62], the Court of Appeal stated as follows:

61. *Here the failures of the PSC in dismissing Mr Mele were serious. As we have noted the PSC effectively set aside Mr Mele's explanations as to the allegations against him. When*



faced with concern expressed by the investigating committee that they had insufficient time to investigate some allegations the PSC gave no additional time but found those allegations proved. The PSC reached conclusions which simply had no factual basis. And finally the PSC gave no effective reasons for their conclusions.

62. *As to Mr Mele's future the unlawful dismissal removed him from a very significant job in the Public Service. His loss of future employment opportunities and income would inevitably be significant. These factors easily justify an uplift of 2 times.*

76. The factors of Mrs Leona being unable to find long-term work in the nearly 2 years since she was terminated by FR8 and the lack of any discussion with her about her attendance and number of days of leave taken prior to handing her termination letter justify an uplift of 3 times the amount of her severance allowance (VT267,333 x 3 = VT801,999).

G. Result and Decision

77. A declaration that the termination of the Claimant's employment contract by the Defendant was unlawful and unjustified.

78. The Defendant is to pay to the Claimant severance allowance of VT267,333.

79. The Defendant is to pay interest on the sum of severance allowance of 12 per cent per annum from 22 May 2020 (the date of the termination of the employment) to the date of payment.

80. The Defendant is to pay to the Claimant outstanding salary of VT6,416 and a 3 times multiplier of VT801,999 (the 'judgment sum').

81. The Defendant is to pay to the Claimant interest on the judgment sum of 5 per cent per annum from 22 May 2020 (the date of the termination of the employment) to the date of payment.

82. Costs should follow the event. The Defendant is to pay the Claimant's costs as agreed or as taxed by the Master. Once set, the costs are to be paid within 21 days.

H. Enforcement

83. This matter is listed for Conference **at 1.25pm on 22 May 2023** for the Defendant to inform the Court: (i) that it has paid the sums ordered or (ii) to explain how it intends to do so. If there is no satisfactory conclusion, the file will be transferred to the Master for enforcement action.

84. For that purpose, this judgment must be personally served on the Defendants and proof of service filed.

DATED at Luganville this 21st day of April 2023

BY THE COURT


Justice Viran Molisa Trief

