

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

Civil
Case No. 23/702 SC/CIVL

BETWEEN: Apolline Sumptoh
Claimant

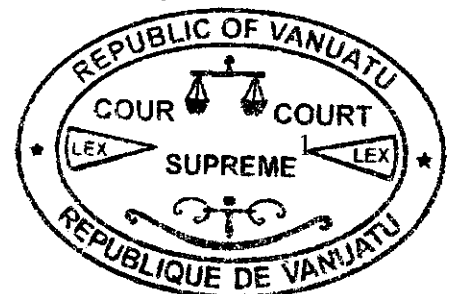
AND: Republic of Vanuatu
Defendant

Date of Trial: 16 July 2024 & 25 July 2024
Before: Justice V.M. Trief
In Attendance: Claimants – Mr E. Molbaleh
Defendant – Mrs N. Robert
Date of Decision: 19 August 2024

JUDGMENT

A. Introduction

1. The Claimant Apolline Sumptoh worked for the Defendant State as a Customs officer from 10 October 2005 to 31 December 2020. She ceased employment following her resignation dated 26 June 2020. In January 2021, the State paid her employment entitlements including severance allowance of VT1,650,456 at the rate of one month per year of service.
2. On 19 May 2023, Mrs Sumptoh filed the Claim alleging that she is entitled to severance allowance at the rate of 2 months per year served. She is seeking an order for the second month of severance allowance allegedly owed totalling VT1,650,456, VT1,500,000 damages for negligence, VT2,260,000 general damages, interest and costs.
3. In the Defence filed on 6 July 2023, the State denied that it was liable to pay Mrs Sumptoh a second month of severance per year served, relying on subs. 56(2) of the *Employment Act* [CAP. 160] (the 'Act') and the Circulars issued by the Public

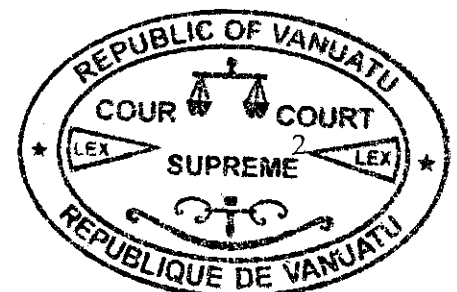


Service Commission ('PSC') dated 2 September 2020, 16 September 2022 and 26 October 2022. It denied the claim in negligence.

B. Evidence

4. The Claimant **Apolline Sumptoh** was not required for cross-examination. Accordingly, her Sworn statement filed on 19 May 2023 [Exhibit C1] and her Sworn statement filed on 16 May 2024 [Exhibit C2] were tendered by consent.
5. Mrs Sumptoh deposed that she was paid her employment entitlements on cessation of her employment but due to her and her family's financial commitments, is now seeking payment of the second month of severance allowance that she believes should be paid to her. She relies in particular on the PSC Circular dated 2 September 2020 which stated that public servants be paid severance allowance at the rate of 2 months per year served, retrospective to 20 October 2017.
6. The State called two witnesses: Collins Gesa and Jonathan Iavere.
7. **Collins Gesa** is the Acting Director of the Department of Customs and Inland Revenue ('DCIR'). He adopted and relied on the Sworn statement of Harold Tarosa filed on 8 April 2024 [Exhibit D1]. Mr Tarosa had sworn that statement when he was the Director of the DCIR. Various business records of the DCIR were attached to **Exhibit D1** including Mrs Sumptoh's appointment letter, resignation letter and records of the payment of her employment entitlements.
8. Mr Gesa was cross-examined. He was steadfast in cross-examination that the employer the PSC makes the decision whether severance be paid at the rate of 2 months per year served, or not.
9. In re-examination, Mr Gesa stated that the Director of the DCIR receives PSC circulars and has a duty to implement what is in the circulars.
10. **Jonathan Iavere** is the Acting Secretary of the PSC. He relied on his Sworn statement filed on 5 July 2024 [Exhibit D2] in which he adopted and relied on the Sworn statement of James Melteres filed on 3 August 2023 (Mr Melteres was the then Secretary of the PSC) attaching copies of the PSC Circulars dated 2 September 2020, 16 September 2022 and 26 October 2022.
11. The PSC Circular No. 29 of 2020 dated 2 September 2020 [**Exhibit D2 – Attachment "JM1"**] stated as follows:

This Memo serves to inform all PSC employees that the Commission at its meeting No. 17 of 15 September 2020 has approved to revoke the previous one (1) month rate of severance allowance to two (2) months per year of service.



The effective date for implementation of two (2) months rate of severance is 15 September 2020.

The Commission further approved in principal that 2 months rate of severance has retrospective effect to 20 October 2017. As such, former employees who had only received a severance of 1-month per year of service since 20 October 2017 are to be paid the additional 1-month severance.

However, due to financial challenges that the country is experiencing with regards to global pandemic and natural disasters, the implementation of decision to backdate payments of 2 months' severance is withheld until such time the Commission determines an implementation date...

All heads of ministries and departments will be advised accordingly through a formal instruction from PSC on the implementation date for backdate payments.

This decision applies across the board for all line agencies and all public servants at any permanent level within the Public service.

Each Ministry and Line Agency is required to manage the severance allowance of their current and former employees in accordance with these recent changes.

...

12. The PSC Circular No. 22 of 2022 dated 16 September 2022 [**Exhibit D2 – Attachment “JM2”**] stated as follows:

This circular serves to inform that the Public Service Commission at its meeting No. 14 of Saturday 10th September 2022, decision 14, when considering whether other form of cessation of employment should be paid for 2 months' severance per year of service, the Commission in the exercise of Section 44(1)(2) of the Public Service Act, endorsed as follows:

1. This following form of cessation of employment are entitled to 2 months' severance per year of service:

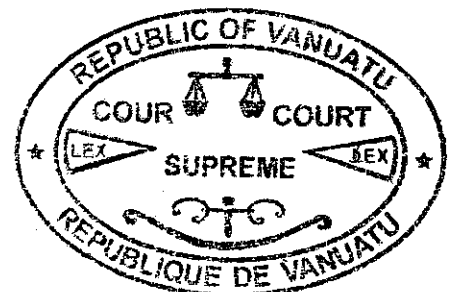
- a) Voluntary resignation
- b) Redundancy
- c) The operation of Law
- d) Accident in Service
- e) Cessation of Contracts after 12 months
- f) Upon discretionary power of the Commission it may ordered for 2 months' severance entitlement, for employee who is dismissed for disciplinary offences
- g) Order by Court of Law
- h) Compulsory retirement
- i) Standing for Election to Parliament
- j) Dismissal for refusal to accept a transfer with or without valid reason
- k) Dismissal for cause

...

13. The PSC Circular No. 29 of 2022 dated 26 October 2022 [**Exhibit D2 – Attachment “JM3”**] stated as follows:

This circular serves to provide further clarification to the PSC External Circular No. 22 of 2022, as follows:

...



2. *Employees who have their employment ceased under any form of cessation of employment following within the list below, are entitled to 2 months' severance and it is effective from 10th September 2022. Further, these form of cessation of employment are not retrospective to 20th October 2017:*
- a) *Voluntary resignation*
 - b) *Redundancy*
 - c) *The operation of Law*
 - d) *Accident in Service*
 - e) *Cessation of Contracts after 12 months*
 - f) *Upon discretionary power of the Commission it may ordered for 2 months' severance entitlement, for employee who is dismissed for disciplinary offences*
 - g) *Order by Court of Law*
 - h) *Compulsory retirement*
- ...

14. Mr lavere also relied on his Sworn statement filed on 5 July 2024 [**Exhibit D3**]. He deposed that the PSC decided at its meeting on 20 October 2017 that severance allowance would be calculated at the rate of one month's salary per year served for public servants who ceased employment by way of age retirement, early retirement and medical retirement. Subsequently, the PSC issued its Circulars dated 2 September 2020, 16 September 2022 and 26 October 2022. He confirmed the PSC's position that Mrs Sumptoh is not entitled to two months' severance.

15. Mr lavere's account remained unchanged in cross-examination. He stated that Mrs Sumptoh was only entitled to severance at the rate of 1 month's salary per year served.

C. Submissions

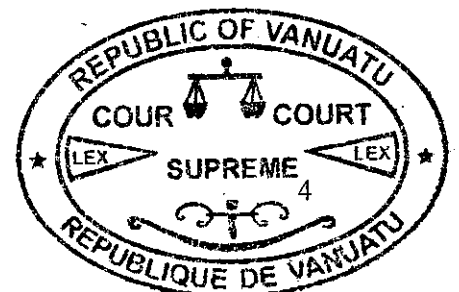
16. Claimant's counsel Mr Molbaleh submitted that the PSC Circular dated 2 September 2020 applies to Mrs Sumptoh because it was made before Mrs Sumptoh ceased her employment on 31 December 2020. On the other hand, State counsel Mrs Robert submitted that the net effect of the three PSC Circulars was that Mrs Sumptoh was not entitled to severance at the rate of 2 month's salary per year of service.

D. Consideration

17. Severance allowance is payable at the rate of 1 month's remuneration for each year of service pursuant to para. 54(1)(d) and subs. 56(2) of the Act.

18. Paragraph 54(1)(d) of the Act provides 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 –*
- ...



- (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.

(my emphasis)

19. Subsections 56(1) and (2) of the Act provide 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.*

20. However, the PSC stated in its Circular dated 2 September 2020 that it had approved severance allowance for all public servants 'at any permanent level within the Public service' at the rate of 2 months' remuneration per year, effective from 15 September 2020 [**Exhibit D2 – Attachment "JM1"**].

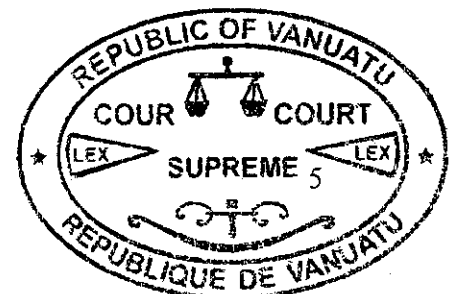
21. The Court of Appeal considered the PSC Circular dated 2 September 2020 in its judgment in *Republic of Vanuatu v Watson* [2023] VUCA 31 and held as follows at [25] and [27]:

25. On 2 September 2020, for reasons not disclosed in this appeal, the PSC issued a circular to all PSC employees of its decision to replace one month of remuneration with two months of remuneration with an effective date of 15 September but also backdated where funds permitted to 20 October 2017. That circular is set out in the reasons for judgment in the Court below at paragraph 126.

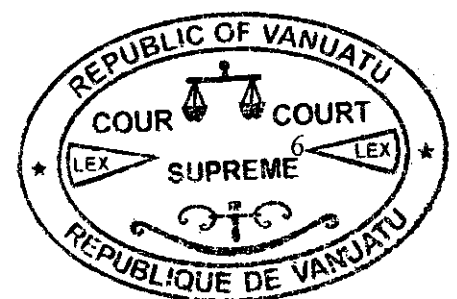
...

27. *The Circular itself makes no reference to the requirement of variation to individual contracts nor any other restriction on implementing the decision. In those circumstances, it is difficult to see what purpose, if any, the Circular had if it is to be construed as only applying to officers whose contracts were varied accordingly. Imposing that condition changes the whole tenor of the Circular, as submitted by the Appellant as being discretionary. There is nothing in the Circular that supports the discretionary argument. To the contrary, the unconditional nature of the circular indicates that the variation is effective immediately.*

(my emphasis)



22. In the *Watson* judgment, the Court of Appeal referred to the unconditional nature of the PSC Circular dated 2 September 2020 and held that it was effective immediately, that is, effective from 15 September 2020.
23. It is trite law that an employee's entitlements are those provided by the law in effect on the date of his or her cessation of employment.
24. Mrs Sumptoh ceased her employment with the State on 31 December 2020. The PSC Circular dated 2 September 2020, which provided that all permanent public servants were entitled to payment of severance at the rate of 2 months' remuneration per year of service, had already taken effect from 15 September 2020.
25. Accordingly, Mrs Sumptoh is entitled to severance at the rate of 2 months' remuneration per year of service pursuant to the PSC decision referred to in the PSC Circular dated 2 September 2020.
26. The State relied on the two subsequent PSC Circulars dated 16 September 2022 and 26 October 2022 for its defence denying that Mrs Sumptoh is entitled to severance at the rate of 2 months' remuneration per year served.
27. The PSC Circular dated 16 September 2022 by its terms provided for 2 months' severance for employees who ceased employment due to voluntary resignation [**Exhibit D2 – Attachment "JM2"**]. Mrs Sumptoh resigned from the Public Service therefore she ceased employment due to voluntary resignation. She had already ceased employment on 31 December 2020, so it is unclear how the PSC Circular dated 16 September 2022 applies to her. Even if it did, this Circular simply reiterated the position that Mrs Sumptoh is entitled to severance at the rate of 2 months' remuneration per year of service.
28. The PSC Circular dated 26 October 2022 by its terms was effective from 10 September 2022 [**Exhibit D2 – Attachment "JM3"**]. Mrs Sumptoh had already ceased employment by then. That Circular simply does not apply to her.
29. For the reasons given, there is no merit to the defence case denying Mrs Sumptoh's entitlement to severance at the rate of 2 months' remuneration per year of service. I find and declare that Mrs Sumptoh is entitled to severance allowance at the rate of two months' remuneration per year of service.
30. The remaining aspect of the Claim is that the State was negligent in not paying Mrs Sumptoh a second month of severance payment. This was inadequately pleaded because there was no pleading in the Claim of a duty of care, the acts or omissions alleged to constitute breach of the duty of care, and the loss or damage allegedly suffered as a result of that breach. Even if those elements of the negligence



cause of action had been pleaded, I am not aware of a duty of care imposed by law in respect of the payment of severance allowance.

31. If an employer fails to pay severance, it may be sued for payment of the employee's contractual entitlement to a severance allowance. However, this alone does not constitute a duty of care on the employer actionable by an action for negligence. I find, therefore, that there is no reasonable cause of action in negligence disclosed in the Claim and that even if there had been, the Claimant has failed to prove negligence on the part of the Defendant. The aspect of the Claim alleging negligence is dismissed.
32. It follows that there will not be any award for the damages sought or at all.

E. Result and Decision

33. For the reasons given, judgment is **entered** for the Claimant in the sum of VT1,650,000 (the 'judgment sum').
34. The Defendant is to pay interest of 5% per annum on the judgment sum until fully paid.
35. Costs must follow the event. The Defendant is to pay the Claimant's costs of the proceeding as agreed or taxed by the Master. Once settled, the costs are to be paid within 28 days.

F. Enforcement

36. Pursuant to rule 14.3(1) of the *Civil Procedure Rules*, I now schedule a conference **at 1.20pm on 17 September 2024** to ensure the judgment has been executed or for the judgment debtor to explain how it is intended to pay the judgment debt. For that purpose, this judgment must be personally served on the Defendant.

**DATED at Port Vila this 19th day of August 2024
BY THE COURT**


Justice Viran Molisa Trief

