

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

Civil
Case No. 21/3403 SC/CIVL

BETWEEN: Harrison T Vaka'Matan Luen
First Claimant

AND: Allen Collins Faerua
Second Claimant

AND: Republic of Vanuatu
Defendant

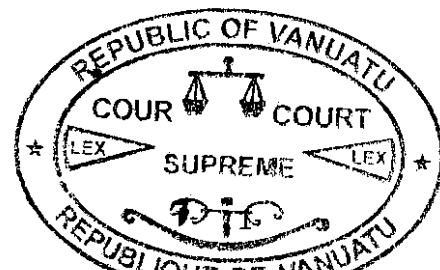
Date of Trial: 26 April 2024
Before: Justice V.M. Trief
In Attendance: Claimant – Mr D. Yawha
Defendant – Mrs F. Samuel
Date of Decision: 30 September 2025

JUDGMENT

[with corrections to paras 160 and 162 under the Slip rule]

A. Introduction

1. The First Claimant Harrison Toara Vaka'Matan Luen was employed as the Director General of the Ministry of Infrastructure and Public Utilities ('MIPU'). He was appointed under contract for a term of 4 years effective from 15 November 2018.
2. Allen Collins Faerua was employed as the Director of the Department of Public Works ('PWD'). He was appointed for a period of 3 years effective from 8 February 2019.
3. On 9 October 2020, the Public Service Commission ('PSC') terminated the Claimants' employment on the grounds of serious misconduct.

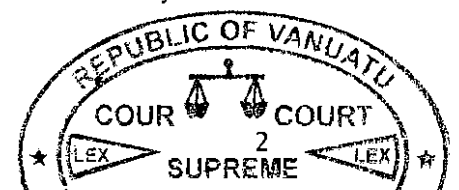


4. By the Claim, the Claimants are seeking payment of their contractual entitlements, 3 months' salary in lieu of notice, severance allowance, a three-times multiplier of their severance allowance, annual leave and various allowances; damages for economic loss; damages for defamation; damages for stress and shame; damages for unemployment following their termination; interest; costs; and any other order deemed just.
5. The Defendant the State denies that there was any unlawful termination of employment and that the Claimants are entitled to any relief.
6. By decision dated 5 July 2022, Justice Saksak struck out the Claim.
7. The Claimants appealed. By judgment dated 18 November 2022, the Court of Appeal allowed the appeal and returned the matter to the Supreme Court for trial before another Judge: Luen v Republic of Vanuatu [2022] VUCA 30.
8. On 26 April 2024, the matter proceeded to trial. I accepted counsel's request to make written closing submissions.
9. This is the judgment.

B. Background

10. I adopt the background set out in the Court of Appeal judgment at [5]-[9]:

5. *The PSC alleged on the basis of a complaint lodged by the Minister responsible for MIPU against Mr Luen and Mr Faerua that both had failed to perform their duties according to their core roles and responsibilities pursuant to s 20 of the Public Service Act [CAP 246]. As a result of the complaint the appellants were suspended on full salary and the PSC appointed a Panel to investigate the matter. The investigation proceeded and a report was produced on 11 August 2020.*
6. *By letter of 13 August 2020, the PSC sent a copy of the report to each appellant requesting their response to the allegations against them. On 20 August 2020 each of the appellants responded. Later on 3 September 2020 the PSC informed them that their suspensions were extended.*
7. *On 18 September 2020 the PSC invited the appellants to address s 50 (4) of the Employment Act [CAP 160] as to why their employment should not be terminated. Mr Faerua responded on 28 September 2020. Mr Kalmet of Hurley Lawyers responded on behalf of Mr Luen on 2 October 2020.*
8. *On 9 October 2020 the PSC considered the appellants' response then decided to terminate their employment. The PSC alleged that the appellants had by-passed the procurement process to award two government contracts to Prime Works Ltd with a value of both contracts exceeding VT 5,000,000 for the same work at the same location and distance and for the same period. This amounted to contract splitting contrary to s 13A of the Government Contracts and Tenders Act.*
9. *The contracts were No 597/19 and 598/19 for which it was alleged Mr Luen as DG was largely responsible. Mr Faerua was terminated because he had failed to carry out due*



diligence checks on the recommendations put forward by the Technical Evaluation Panel, contrary to s 34 (1) of the Public Service Act.

C. The Pleadings

11. This is an action for unjustified dismissal seeking damages for the wrongful termination of employment: Luen v Republic of Vanuatu [2022] VUCA 30 at [19].
12. The Claimants' case is that there had been no contract splitting and therefore the basis on which they had been dismissed was factually wrong. They allege that the front page of contract No. 597/19 included the words, "Stockpiling of Graveling Material" in its title but the actual content of the contract related to road clearing works, hence its subject matter concerned different nature of works from contract No. 598/19 which was for stockpiling of graveling materials.
13. The defence case is that contracts No. 597/19 and No. 598/19 were for the same nature of work, location, distance and time with a total contract value of VT8,073,000 thus there was contract splitting contrary to s. 13A of the *Government Contracts and Tenders Act* [CAP. 245] ('GCT Act') in order to bypass the tender process required for contracts over VT5,000,000. It is alleged that the Claimants used a Request for Quotation ('RFQ') process instead of the Request for Tender ('FFT') process required by the GCT Act. Finally, the State alleged that the Claimants failed to act with care and diligence contrary to para. 34(1)(d) of the *Public Service Act* [CAP. 246] ('PS Act') in allowing contract splitting to occur and in failing to detect the error in the heading on the cover page of contract No. 597/19.
14. The first issue to be determined is whether or not the matters that the State relied on for the termination of the Claimants' contracts constituted serious misconduct?
[Issue 1]
15. If the answer to **Issue 1** is, "Yes", the Claim must be dismissed.
16. If the answer to **Issue 1** is, "No" (that is, that the matters relied on by the PSC do not constitute serious misconduct), the next issue to be determined is what relief the Claimants are entitled to **[Issue 2]**.

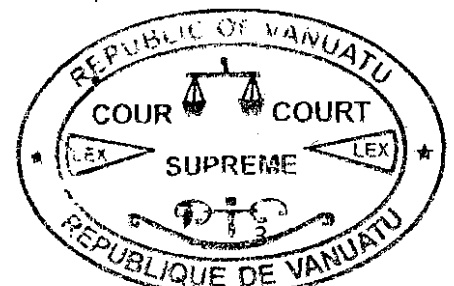
D. The Law

Employment Act [CAP. 160]

17. Section 50 of the *Employment Act* [CAP. 160] provides, relevantly, 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.*

...

18. Paragraph 54(1)(a) of the *Employment 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 –*

(a) *the employer terminates his employment; or*

...

19. Subsection 55(2) of the *Employment 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.*

20. Section 56 of the *Employment 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;*

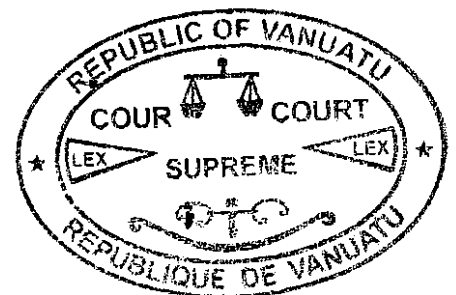
(b) *for every period less than 12 months, a sum equal to one-twelfth of the appropriate sum calculated under paragraph (a) multiplied by the number of months during which the employee was in continuous employment.*

...

(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).*

Government Contracts and Tenders Act [CAP. 245]

21. Section 13A of the GCT Act provides as follows:



- 13A. (1) A government agency or the Board must not split a single procurement requirement into separate packages or award more than one contract or arrangement in relation to the same or substantially similar subject matter for the purpose of avoiding the requirements of the tender process provided for by this Act or any regulation made under this Act.
- (2) Despite subsection (1), a government agency may divide a procurement requirement, which could be procured as a single contract into a package consisting of several lots which are to be bid together, where it is anticipated that the award of several separate contracts may result in the best overall value for the government agency.

22. Section 14 of the GCT Act provides as follows:

14. A person who contravenes... subsection... 13A(1) commits an offence and is liable on conviction:
- (a) in the case of a natural person – to a fine not exceeding VT2,000,000 or imprisonment for a term not exceeding 2 years, or both; or
- (b) in the case of a body corporate – to a fine not exceeding VT10,000,000.

Public Service Act [CAP. 246]

23. Subsection 29(1) of the PS Act provides as follows:

29. (1) The Commission may dismiss an employee at any time for serious misconduct or inability but subject to its obligations to act as a good employer.

24. Paragraph 34(1)(d) of the PS Act provides as follows:

34. (1) Every employee, director-general, director or senior administrator (as the case may be), must in the course of his or her employment in the Public Service: –

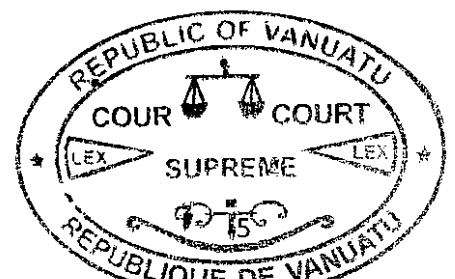
...

- (d) act with care and diligence; and

...

E. Evidence

25. Mr Luen relied on his Sworn statements filed on 1 February 2022 [Exhibit C1] and 27 February 2025 [Exhibit C2]. Mr Faerua relied on his Sworn statement filed on 3 March 2022 [Exhibit C3]. Both were cross-examined.
26. The State relied on the Sworn statements of Jonathan lavere filed on 25 April 2024 [Exhibit D1], Simil Johnson on 25 February 2022 [Exhibit D2] and Henry Worek on 14 August 2023 [Exhibit D3]. Mr lavere and Mr Worek were cross-examined.



F. Issue 1: Whether or not the matters relied on for the termination of the Claimants' contracts constituted serious misconduct?

27. In the case of serious misconduct, the employer may dismiss the employee with immediate effect pursuant to subs. 50(1) of the *Employment Act* and subs. 29(1) of the *PS Act*.

28. There is an additional provision in para. 17C(a) of the *PS Act* in relation to the termination of a director general which provides as follows:

17C. *A director-general may be terminated by the Commission on any of the following grounds:*

(a) *serious misconduct as defined in the terms and conditions of his or her contract;*
or

...

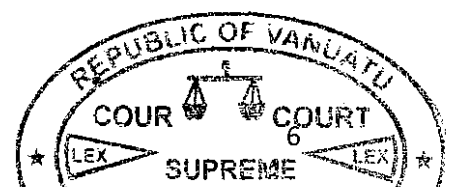
29. Schedule C of both Claimants' employment contract provided for the disciplinary procedures for serious misconduct. However, no issue is raised in respect of the disciplinary procedures that were followed. As already stated, the Claimants' case is that there was no contract splitting therefore the basis on which they have been dismissed was factually wrong.

30. The Court of Appeal stated in its judgment in *Republic of Vanuatu v Watson* [2023] VUCA31 at [17] that where the PSC's finding of misconduct is challenged, the Courts are obligated to consider whether the facts alleged in the disciplinary proceedings amounted to serious misconduct:

17. ... *[Republic of Vanuatu v Mele [2017] VUCA 39] does not support the principle that, in an appropriate case such as this where the finding of misconduct is indeed challenged, neither the trial Court nor this Court on appeal can look at the decision on serious misconduct. Both the trial Court and this Court on appeal were entitled to consider whether the facts alleged in the disciplinary proceedings amounted to serious misconduct. Indeed, the Courts were obligated to do so.*

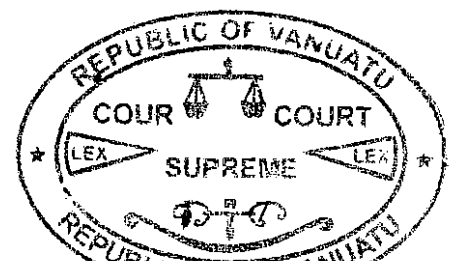
31. It is the PSC as the employer who bears the onus of proving the allegations of serious misconduct: *Government of Vanuatu v Mathias* [2006] VUCA 7 per the Court of Appeal.

32. Accordingly, it is the PSC who bears the onus of proving that contracts No. 597/19 and No. 598/19 were for the same nature of work, location, distance and time with a total contract value of VT8,073,000 thus contract splitting occurred contrary to s. 13A of the *Government Contracts and Tenders Act* [CAP. 245] ('GCT Act') in order to bypass the tender process required for contracts over VT5,000,000. The PSC also bears the onus of proving that the Claimants unlawfully used a Request for Quotation ('RFQ') process for the two contracts instead of the Request for Tender ('FFT') process required by the GCT Act. Finally, the PSC bears the onus of proving that the Claimants failed to act with care and diligence contrary to para. 34(1)(d) of the *Public*



Service Act [CAP. 246] ('PS Act') in allowing contract splitting to occur and in failing to detect the error in the heading on the cover page of contract No. 597/19.

33. Was there contract splitting as alleged by the PSC or not?
34. Subsection 13A(1) of the GCT Act refers to splitting a single procurement requirement into separate packages or awarding more than one contract in relation to, "*the same or substantially similar subject matter for the purpose of avoiding the requirements of the tender process provided by this Act...*"
35. Mrs Samuel submitted that the two contracts related to the same subject matter, namely an 8km road from Sele village to Miraymiray, for the same time period of 25 November 2019 to 30 January 2019, with the same contractor Prime Roadworks Limited with a total contract value of VT8,073,000.
36. I will deal first with the submission as to time period, then with the submission as to subject matter.
37. A copy of contract No. 597/19 was in the evidence of Mr Luen [**Exhibit C1 – Attachment "HL11A"**], Mr Faerua [**Exhibit C3 – Attachment "AF5A"**] and Mr Johnson [**Exhibit D2 – Attachment "SJ29A"**]. Its terms included the following:
- a) Contract dated 17 December 2019 between the PWD as the "Employer" and Prime Roadworks Limited of Luganville, Santo as the "Contractor";
 - b) Section B: Contractor's Quotation was for a period of works commencing on 25 November 2019 and to be completed by 30 January 2020;
 - c) Section C: Schedule of Requirements (Description of Works...) includes, "*Road clearance works are intended to be implemented on the road from Sele Village to Miraymiray...*"
 - d) Also stated in Section C:
 - 6.1 Roadway Clearance Works**
 - a) *Clearing shall consist of the removal of trees, bushes, other vegetation's, rubbish and all other superfluous material including the disposal of material resulting from the clearing and crabbing.*
 - b) *The moving of certain amount of soil or gravel material may be inherent to or unavoidable during the process of clearing and no extra payment will be made for this. Clearing shall include removal of all rocks and boulders of up to 0.15m³ which are exposed or lying on the surface.*
 - e) At the end of Section C, on page 6, is a table showing the **timeline** for the works **commencing in week 2 of Quarter 3, and ending in week 1 of Quarter 4**; and



- f) Section E: Activity and Price Schedule states, "Activity Description: Being for road clearance 8km from Miraymiray to Sele village" with a Total Lump Sum of **VT3,910,000**.

38. A copy of contract No. 598/19 was in the evidence of Mr Luen [**Exhibit C1 – Attachment "HL11B"**], Mr Faerua [**Exhibit C3 – Attachment "AF5B"**] and Mr Johnson [**Exhibit D2 – Attachment "SJ29B"**].

- a) Contract dated 17 December 2019 between the PWD as the "Employer" and Prime Roadworks Limited of Luganville, Santo as the "Contractor";
- b) Section B: Contractor's Quotation was for a period of works commencing on 25 November 2019 and to be completed by 30 January 2020;
- c) Section C: Schedule of Requirements (Description of Works...) includes, "Stockpiling of coronous is to be carried out at a quarry site between Sele and Miraymiray..."
- d) Also stated in Section C:

STOCKPILING SPECIFICATIONS

1.1 EXCAVATION, PROCESSING AND STOCKPILING OF CORONOUS MATERIAL

1.1.1 Compliance Measures

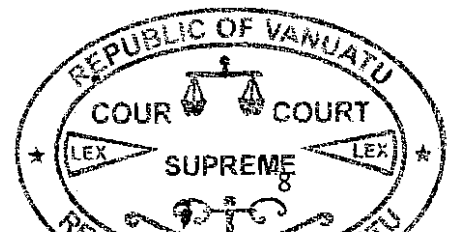
Extraction of coronous gravel material from quarry site, processing (screening, blending and crushing necessary to obtain the specified material) and stockpiling on site in separate regular geometrical shapes of both conforming and non-conforming/oversize material. Supplied coronous gravel material shall be free of vegetable matter, balls of clay, topsoil, overburden and any other deleterious materials...

- e) At the end of Section C is a table showing the **timeline** for the works **commencing in week 4 of Quarter 3, and ending in week 3 of Quarter 4**; and
- f) Section E: Activity and Price Schedule states, "Activity Description: Being for stockpiling of 3,800 m3 coronous gravel materials at Miraymiray quarry site" with a Total Lump Sum of **VT4,163,000**.

39. I find that the parties to the two contracts are the PWD as the "Employer" and Prime Roadworks Limited of Luganville, Santo as the "Contractor."

40. I also find that the value of contract No. 597/19 was VT3,910,000, and of contract No. 598/19 was VT4,163,000.

41. Mrs Samuel in her submission is referring to the time period of 25 November 2019 to 30 January 2019 set out in clause 2 of "Section B: Contractor's Quotation" of the contracts.



42. The document in Section B is the contractor Prime Roadworks Limited's quotation in response to that RFQ, in which it stated in its clause 2 as follows:

SECTION B: CONTRACTOR'S QUOTATION

EMPLOYER'S RFQ WORKS NUMBER: 597/19/WK/RFQ/SN/SA/RR/VRFRP/PWD

...

- 2) *Works will commence on: 25-November-2019*
Works to be completed by: 30-January-2020

43. However, this submission overlooks the terms in "Section C: Schedule of Requirements (Description of Works"...)" of the two contracts as to the works required under each contract and the timeline for completing the works. Section C of both contracts ended with a table with the headings "Description of Work, "Quarter 1", "Quarter 2", "Quarter 3" and "Quarter 4" and shaded-in boxes showing when the works required would be carried out.

44. Accordingly, I find that in contract No. 597/19:

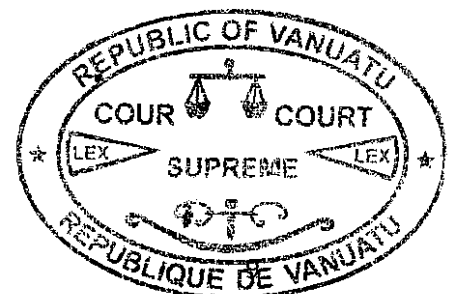
- i) the works required were, "*Road clearance works are intended to be implemented on the road from Sele Village to Miraymiray...*"; and
- ii) the timeline for the roadway clearance works was on page 6 and showed the works **to commence in week 2 of Quarter 3, and ending in week 1 of Quarter 4;**

45. I find that in contract No. 598/19:

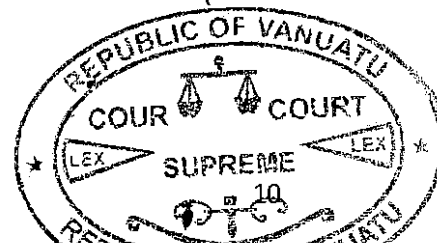
- i) the works required were, "*Stockpiling of coronous is to be carried out at a quarry site between Sele and Miraymiray...*"; and
- ii) the timeline for the stockpiling of coronous gravel material works showed the works **to commence in week 4 of Quarter 3, and ending in week 3 of Quarter 4.**

46. I accept that the scope of works for the two contracts required the contractor to submit a quote for works for the time period 25 November 2019 to 30 January 2019. However, I find that the actual timeline for carrying out the required works under each contract was set out in Section C of each contract – see the preceding paragraph. I therefore reject the State's submission as to the time period for the two contracts.

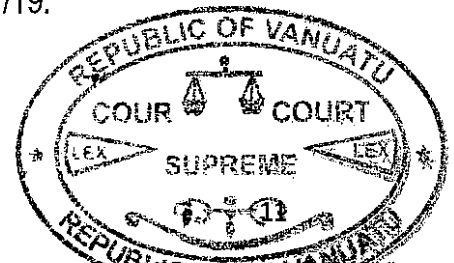
47. I now turn to the State's submission as to subject matter.



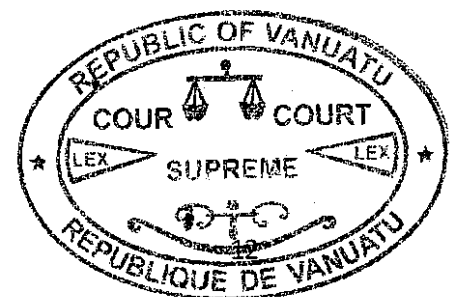
48. Mrs Samuel submitted that the two contracts related to the same subject matter, namely an 8km road from Sele village to Miraymiray.
49. Mr Luen adduced into evidence copies of RFQ contracts awarded for required works/activities for small scale rural roads in the same time period as contract No. 597/19 and No. 598/19 where the works are separated [**Exhibit C2 – Attachments “HL1”-“HL15”**]. Mr Luen’s evidence was that stockpiling works have always been separated from road clearing works given their different nature and volume of works. My reading of these contracts shows there were contracts for road clearing works (**Attachments “HL4”, “HL5”, “HL7”, “HL10”, “HL11”, “HL13”, “HL14” and “HL15”**), for stockpiling of coronous material (**Attachments “HL6”, “HL9” and “HL12”**) and for gravelling works (**Attachments “HL1”-“HL3”**). One contract was for road clearing, grubbing and gravelling [**Attachment “HL8”**]. None of this evidence has not been contradicted.
50. Mr Luen’s evidence was also that PWD processed over 500 contracts for works on rural roads in the period 2018-2019 in order to respond to the Council of Ministers’ directives in relation to delivering access to the rural and remote areas of Vanuatu [**Exhibit C2 – page 6**]. This evidence has also not been contradicted.
51. Mr Luen’s detailed evidence in cross-examination and re-examination was that the two contracts No. 597/19 and No. 598/19 had different nature of work with corresponding different units of measurement. Mr Faerua in cross-examination and re-examination was adamant that the two contracts had different nature of work as he also explained in detail.
52. Defence witness Mr Worek agreed in his sworn statement that there were two different nature of work in the two contracts. That is, that one contract was for stockpiling works and the other contract was for road clearance works, albeit all activities were to be carried out on the same 8km road from Sele village to Miraymiray [**Exhibit D3 – para. 19(ii)**]. In cross-examination, he confirmed that road clearing works are a totally different nature of work from stockpiling works.
53. I accept Mr Luen and Mr Faerua’s evidence, which Mr Worek agreed with, and find that the two contracts related to work to be carried out at the same location, namely the 8km road from Sele village to Miraymiray but that the nature of work required by each contract was different. That is, the nature of the work required under contract No. 597/19 was road clearing works whereas the nature of work required under contract No. 598/19 was stockpiling of coronous gravel material.
54. I accept the Claimants’ evidence and also find that the different nature of work required by each contract was underscored by the different units of measurement used. The unit of measurement for the road clearing works was linear metres (8km). However, the unit of measurement for the stockpiling works was volume (cubic metres).



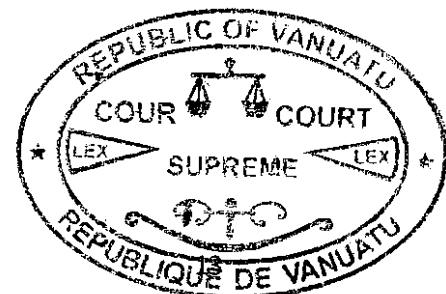
55. I also find that the awarding of separate RFQ contracts for different nature of required works/activities for small scale rural road works, such as a contract for road clearing works and a separate contract for stockpiling of gravel material works was not limited to the scoping and award of the two contracts No. 597/19 and No. 598/19 but was consistent with the PWD's scoping and award of other RFQ contracts as shown by the RFQ contracts that Mr Luen adduced into evidence [**Exhibit C2 – Attachments “HL1”-“HL15”**].
56. I also find that the subject matter of contract No. 597/19 was road clearing works, and that of contract No. 598/19 was stockpiling of coronous gravel material.
57. Accordingly, I reject the State's submission that the two contracts related to the same subject matter. The two contract were plainly concerned with different subject matter, one being road clearing works whilst the other was stockpiling of coronous gravel material works. I so find.
58. Given my finding that the two contracts No. 597/19 and No. 598/19 related to different subject matter, the element in subs. 13A(1) of the GCT Act of "*awarding more than one contract in relation to the same or substantially similar subject matter...*" could not be satisfied.
59. If both contracts were, for example, for *road clearing works* at the same location, namely the 8km road from Sele village to Miraymiray, and the contracts were split in order to bring the value of each contract under VT5,000,000, that would satisfy the element of splitting a single procurement requirement into separate packages or awarding more than one contract in relation to the same subject matter for the purpose of avoiding the tender process provided by the GCT Act. However, that is not the present case.
60. For the foregoing reasons, I am satisfied and find that there was no contract splitting as alleged by the PSC.
61. I now deal with that aspect of the Claimants' case alleging that there is an error in the heading on the cover page of contract No. 597/19.
62. The heading on the cover page of both contracts is, "Contract: Stockpiling of Gravelling Material (3800 m3) between Sele and Miraymiray quarry site."
63. The Claimants' case and undisputed evidence is that this heading on the cover page of contract No. 597/19 is erroneous because the works required under that contract are roadway clearance works, not stockpiling of gravelling material. Defence witness Mr Worek agreed with the last question put to him in cross-examination that there is an error in the heading on the cover page for contract No. 597/19.



64. Accordingly, I accept and find that there is an error in the heading on the cover page of contract No. 597/19 in referring to the stockpiling of gravelling material when the works required under that contract were roadway clearance works.
65. I turn now to deal with the defence case as to the Claimants' allegedly unlawful use of the RFQ process for the two contracts instead of the RFT process required by the GCT Act.
66. The GCT Act provides that a tender process must be followed for contracts with a value of VT5,000,000 or more. That is, the RFT process must be followed for contracts with a value of VT5,000,000 or more.
67. Defence witness Mr Johnson adduced into evidence a copy of the "PWD Procurement Procedure" [**Exhibit D2 – Attachment "SJ30"**]. This provides for the RFQ process to be used for procurements valued at less than VT5,000,000 [at pp 6-7]. It also provides that any procurement valued at more than VT5,000,000 is defined as a "Government Contract" under the GCT Act hence the tender process requirements of that Act must be followed.
68. Mr Luen gave detailed evidence, including in cross-examination and in re-examination, explaining the PWD procurement process. His evidence is consistent with the contents of the "PWD Procurement Procedure" document.
69. Mr Faerua also gave detailed evidence, including in cross-examination, as to the PWD procurement process. His evidence also is consistent with the contents of the "PWD Procurement Procedure" document.
70. Mr Worek's evidence in paras 3-7 of his sworn statement [**Exhibit D3**] as to the PWD procurement process is consistent with the contents of the "PWD Procurement Procedure" document.
71. I accept and find that the PWD procurement process is as set out in the "PWD Procurement Procedure" document. It provides for an independent process for the scoping of works, the evaluation of the quotes or tenders submitted, and the award of contracts. Under the RFQ process, a director general signs a contract only at the final approval stage.
72. In the present case, the value of the road clearing works which was the subject of contract No. 597/19 was VT3,910,000 (that is, under VT5,000,000). Accordingly, I find that the tender process or RFT process was not required, but that the RFQ process under the "PWD Procurement Procedure" applied. I also find that the Claimants lawfully followed the RFQ process resulting in the awarding of contract No. 597/19.



73. In addition, the value of the stockpiling of gravel material works which was the subject of contract No. 598/19 was VT4,163,000. Similarly, I find that the tender process or RFT process was not required, but the RFQ process under the "PWD Procurement Procedure" applied. I also find that the Claimants lawfully followed the RFQ process resulting in the awarding of contract No. 597/19.
74. For the reasons given, I reject the defence case that there was contract splitting contrary to s. 13A of the GCT Act in order to bypass the tender process required for contracts over VT5,000,000. As already stated, the Claimants lawfully used the RFQ process for the scoping, evaluation and awarding of the two contracts No. 597/19 and No. 598/19.
75. I would add that para. 14(a) of the GCT Act makes contract splitting an offence. Paragraph 14(a) of the GCT Act provides that a natural person who contravenes subs. 13A(1) commits an offence punishable upon conviction by a fine not exceeding VT2,000,000 or imprisonment not exceeding 2 years, or both.
76. However, neither Claimant has ever been convicted by a court of the offence of contract splitting prescribed in subs. 13A(1) and para. 14(a) of the GCT Act.
77. I take judicial notice of the fact that only Mr Luen out of the two Claimants was charged with an offence against s. 13A of the GCT Act, in *Public Prosecutor v Luen*; Criminal Case No. 1561 of 2022 ('CRC 22/1561').
78. I also take judicial notice of the fact that on 6 June 2023, the Public Prosecutor filed a *nolle prosequi* in CRC 22/1561 pursuant to subs. 29(1) of the *Criminal Procedure Code* as briefing of their witnesses showed no contract splitting.
79. On 12 June 2023, I as the presiding Judge in CRC 22/1561 informed Mr Luen that he was accordingly discharged in respect of the charge against him – see the Minute and Orders dated 12 June 2023 attached to the Claimants' submissions filed on 16 May 2024.
80. Given that neither Claimant has ever been convicted of the offence of contract splitting contrary to s. 13A of the GCT Act, it is surprising that the PSC saw fit to conclude that they committed contract splitting.
81. I turn now to deal with the aspect of the defence that the Claimants failed to act with care and diligence contrary to para. 34(1)(d) of the *Public Service Act* [CAP. 246] ('PS Act') in allowing contract splitting to occur and in failing to detect the error in the heading on the cover page of contract No. 597/19.
82. First, for the reasons set out earlier, there was no contract splitting.



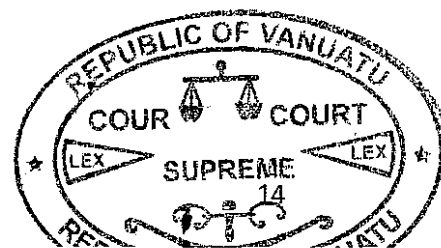
83. Secondly, I have found that there was an error in the contract heading on the cover page of contract No. 597/19. However, that was simply an error in the heading but was not material to or determinative of the substance of the contract.
84. Accordingly, I find that there was no failure on the Claimants' part as alleged to act with due care or diligence contrary to para. 34(1)(d) of the PS Act.
85. For the reasons given, I conclude that the matters that the State relied on for the termination of the Claimants' contracts did not constitute serious misconduct. The PSC reached conclusions which simply had no factual basis.
86. Accordingly, my answer to **Issue 1** is, "**No**".
87. The PSC has failed to discharge its onus to prove that the Claimants were guilty of serious misconduct.
88. It follows that the Claimants' termination of employment on the ground of serious misconduct was **unjustified**.
89. The Claimants have therefore proved the Claim on the balance of probabilities.

G. **Issue 2: What relief are the Claimants entitled to?**

90. The relief sought includes contractual entitlements, 3 months' salary in lieu of notice, severance allowance, a three-times multiplier of their severance allowance, annual leave, payment of various allowances, damages for economic loss, damages for defamation, damages for stress and shame, and damages for unemployment following the Claimants' termination.
91. I will address in turn each aspect of the relief claimed: (i) contractual entitlements (ii) 3 months' salary in lieu of notice; (iii) severance allowance; (iv) 3-times multiplier of severance allowance; (v) annual leave; (vi) payment of various allowances; (vii) damages for economic loss; (viii) damages for defamation; (vix) damages for stress and shame; and (x) damages for unemployment following the Claimants' termination.

H. (i) Contractual entitlements

92. Both Claimants were on fixed-term contracts. Mr Luen was on a contract for a term of 4 years. Mr Faerua was on a contract for a term of 3 years.
93. A fixed-term employee can recover entitlements beyond the termination date, as contractual entitlements. Therefore, a fixed-term employee can recover the balance of his or her contractual entitlements: Republic of Vanuatu v Watson [2023] VUCA 31 at [37] per the Court of Appeal.



94. The term of Mr Luen's contract commenced on 15 November 2018: clause 2.2 of his contract [**Exhibit D2 – Attachment "SJ3"**]. He was dismissed on 9 October 2020. He had served 1 year and 11 months of his contract. Accordingly, he is entitled to payment of his salary for the remaining 2 years and 1 month of his contract.
95. Mr Luen's annual salary was VT5,989,600: clause 5.1 of his contract [**Exhibit D2 – Attachment "SJ3"**].
96. Accordingly, I find that Mr Luen is entitled to payment of his salary for the balance of his contract (2 years and 1 month) as follows:

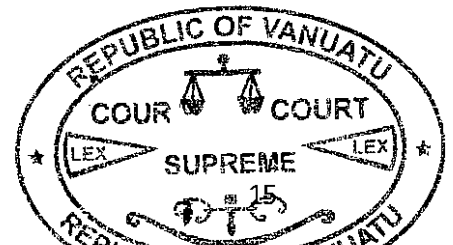
VT5,989,600 x 2 years	= VT11,979,200
+ (VT5,989,600 /12) x 1 month	= VT499,133
Total	= VT12,478,333

97. The term of Mr Faerua's contract commenced on 8 February 2019: clause 2.2 of his contract [**Exhibit D2 – Attachment "SJ5"**]. He was dismissed on 9 October 2020. He had served 1 year and 8 months of his contract. Accordingly, he is entitled to payment of his salary for the remaining 1 year and 4 months of his contract.
98. Mr Faerua's annual salary was VT4,682,900: clause 5.1 of his contract [**Exhibit D2 – Attachment "SJ5"**].
99. Accordingly, I find that Mr Faerua is entitled to payment of his salary for the balance of his contract (1 year and 4 months) as follows:

VT4,682,900 x 1 year	= VT4,682,900
+ (VT4,682,900/12) x 4 months	= VT1,560,967
Total	= VT6,243,867

I. (ii) 3 months' salary in lieu of notice

100. Having been unjustifiably dismissed, the Claimants are entitled to payment of 3 months' salary in lieu of notice of the termination of their employment.
101. Mr Luen's annual salary was VT5,989,600, hence a monthly salary of VT5,989,600 /12 = VT499,133.
102. Accordingly, I find that Mr Luen is entitled to VT499,133 x 3 = **VT1,497,399 for 3 months' salary in lieu of notice.**
103. Mr Faerua's annual salary was VT4,682,900, hence a monthly salary of was VT5,980,600 /12 = VT390,242.



104. Accordingly, I find that Mr Faerua is entitled to $VT390,242 \times 3 = VT1,170,726$ for **3 months' salary in lieu of notice.**

J. (iii) Severance allowance

105. Clause 19.1 of Mr Luen's employment contract provides as follows [**Exhibit D2 – Attachment "SJ3"**]:

19.1 The Employee is entitled to severance allowance calculated at the rate of one (1) month remuneration for every year of the performance of this Contract.

106. Mr Luen had served 1 year and 11 months of his contract.

107. Accordingly, I find that Mr Luen is entitled to **payment of severance allowance** at the rate of 1 month's remuneration (VT498,383) per year of service and a pro rata amount for the number of additional months served in accordance with subs. 56(2) of the *Employment Act* calculated as follows:

VT499,133 x 1 year	= VT499,133
+ (VT499,133/12) x 11 months	= VT457,539
Total	= VT956,672

108. Clause 18.1 of Mr Faerua's employment contract provides as follows [**Exhibit D2 – Attachment "SJ5"**]:

19.1 The Employee is entitled to severance allowance calculated at the rate of one (1) month remuneration for every year of the performance of this Contract.

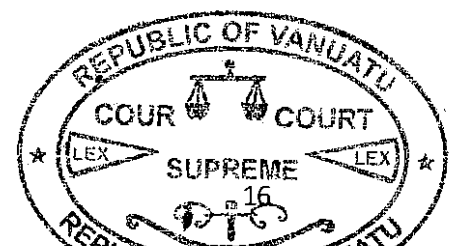
109. Mr Faerua had served 1 year and 8 months of his contract.

110. Accordingly, I find that Mr Faerua is entitled to **payment of severance allowance** at the rate of 1 month's remuneration (VT390,242) per year of service and a pro rata amount for the number of additional months served in accordance with subs. 56(2) of the *Employment Act* calculated as follows:

VT390,242 x 1 year	= VT390,242
+ (VT390,242 /12) x 8 months	= VT260,161
Total	= VT650,403

K. (iv) 3-times multiplier of severance allowance

111. The Claimants sought a 3-times multiplier of severance allowance in the Claim. In their submissions, they sought a 4-times multiplier.



112. As this Court has found that the termination of the Claimants' employment was unjustified, due to the mandatory wording in subs. 56(4) of the *Employment Act*, it shall order that they be paid a sum up to 6 times the amount of severance allowance: *Iata v Tanna Coffee Development Co Ltd* [2020] VUCA 12 at [13].

113. 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.

114. 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.*

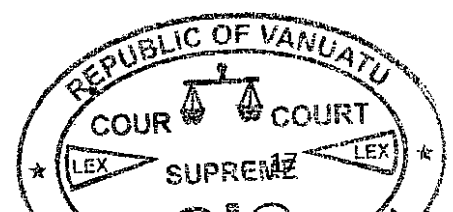
115. In *Republic of Vanuatu v Watson* [2023] VUCA 31 at [32], the Court of Appeal stated as follows then ordered a 2-times multiplier:

32. *... an employee on a fixed-term contract is better off than an employee whose terms of employment are not for a fixed term. The fixed-term employee may expect to receive the balance of his or her contractual entitlements for the remaining term of the contract. The employee who simply works from month to month has no such additional balance of entitlements.*

116. The Claimants will receive the balance of their salary for the remaining term of their contracts hence they are better off than an employee whose term of employment is not for a fixed term.

117. However, I take into account that the unlawful dismissals of the Claimants removed them from very significant jobs in the Public Service.

118. I also take into account the circumstances which lead to the Claimants' dismissals. The failures of the PSC in dismissing them were serious. They were suspended on initial charges (of failing to spend Government infrastructure funds, and delaying the



provision of information to an Investigation Team) which were not proven but then, were dismissed on another set of allegations (alleged contract splitting in awarding the two contracts No. 597/19 and No. 598/19). However, the subject matter of each contract No. 597/19 and No. 598/19 is different – road clearing works for contract No. 597/19, and stockpiling of gravel material for contract No. 598/19. The RFQ process under the PWD Procurement Procedure applied to the two contracts, which the Claimants lawfully followed. Consequently, the PSC reached conclusions which simply had no factual basis in finding that the Claimants engaged in contract splitting and finding that they failed to take due care and diligence contrary to para. 24(1)(d) of the PS Act. In addition, neither Claimant has ever been convicted of the offence of contract splitting contrary to s. 13A of the GCT Act.

119. I consider that the foregoing factors justify **an uplift of 2 times the amount of each Claimant's severance allowance**. The 2-times multiplier is primarily a reflection of the circumstances which lead to the Claimants' dismissals, calculated as follows.

- a) **2-times multiplier of Mr Luen's severance allowance** (VT956,672) is $VT956,672 \times 2 = VT1,913,344$; and
- b) **2-times multiplier of Mr Faerua's severance allowance** (VT650,403) is $VT650,403 \times 2 = VT1,300,806$.

L. (v) Annual leave

120. Clause 7 of the Claimants' employment contracts provided that they were entitled to 21 days' annual leave per annum. However, there is no evidence as to how many days' annual leave each Claimant had already taken and how much annual leave they had left.

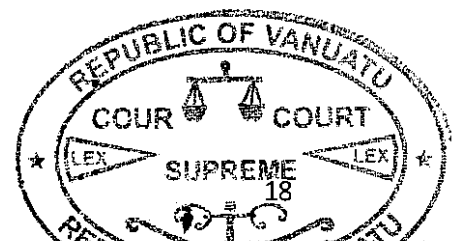
121. I therefore **decline** to make an order as sought in relation to annual leave.

M. (vi) Payment of various allowances

122. Mr Luen is claiming payment of VT4,455,000 vehicle and fuel allowance, VT3,000,000 overseas mission travelling allowance, VT2,160,000 domestic travelling allowance, VT5,400,000 board member sitting allowances and VT3,840,000 housing allowance.

123. Clause 10.1 of Mr Luen's employment contract provides that the PSC may allocate a Government vehicle to Mr Luen to be utilized by him for the duration of his contract. There is no provision for a vehicle and/or fuel allowance.

124. Accordingly, I **decline** to make an order as sought in relation to vehicle and/or fuel allowance.



125. Clause 6.1 of Mr Luen's employment contract provides as follows:

6.1. *The Employee is entitled to the following allowances with the Manual:*

- a. *Overseas mission travel allowance;*
- b. *Domestic duty travel allowance; and*
- c. *Allowance for sitting on Boards and or Committees.*

126. "Manual" is defined in clause 1.1.1. of Mr Luen's employment contract to mean the "Public Service Staff Manual."

127. There is no evidence of the applicable provisions of the Public Service Staff Manual. There is also no evidence as to each of those allowances.

128. Accordingly, I **decline** to make an order as sought in relation to overseas mission travelling allowance, domestic travelling allowance, and board member sitting allowances.

129. Finally, clause 11 of Mr Luen's employment contract provides as follows:

11.1. *The Employer may provide a reasonably furnished Government house to the Employee.*

11.2 *In the event that a Government house is not available, the Employer may pay the Employee a housing allowance of VT80,000 per month.*

130. There is no evidence as to whether clause 11.1 of Mr Luen's employment contract (provision of a reasonably furnished Government house) or clause 11.2 (payment of a housing allowance of VT80,000 per month) applied to Mr Luen. There is also no evidence of housing allowance already paid to Mr Luen or the amount said to be owing to him.

131. Accordingly, I **decline** to make an order as sought in relation to housing allowance.

132. Mr Faerua is claiming payment of VT900,000 housing allowance, VT300,000 mileage allowance and VT40,000 annual establishment allowance.

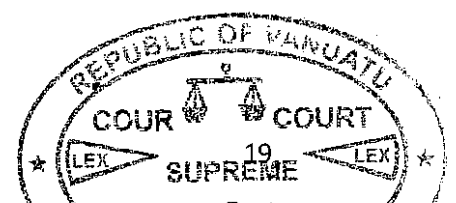
133. Clause 11 of Mr Faerua's employment contract provides as follows:

11.1. *The Employer is not entitled to a Government house.*

11.2 *The Employer will pay the Employee a housing allowance of VT60,000 per month.*

134. There is no evidence of housing allowance already paid to Mr Faerua or the amount said to be owing to him.

135. Accordingly, I **decline** to make an order as sought in relation to housing allowance.



136. Clause 10 of Mr Faerua's employment contract provides that the PSC may authorize Mr Faerua to use a Government vehicle during official hours for the duration of his contract. There is no provision for a mileage allowance.

137. Accordingly, I **decline** to make an order as sought in relation to mileage allowance.

138. Finally, clause 13 of Mr Faerua's employment contract provides for establishment allowance as follows:

13.1. The employee is entitled to an annual allowance of twenty thousand vatu (20,000) payable on 31st January each year, for the purpose of assisting the employee with the immediate cost of installation and rental of telephone line and telephone at his or her residence. For the case where the appointment date falls after this said date, the employee is still entitled to this allowance effective as of the date of the appointment.

139. Given that Mr Faerua's appointment date was after 31st January, he was entitled to payment of an establishment allowance as of the date of his appointment (8 February 2019). However, there is no evidence to explain why this had not yet been paid to Mr Faerua after the 1 year and 8 months that he had already served under his contract. There is also no evidence as to the amount said to be owing to him.

140. Accordingly, I **decline** to make an order as sought in relation to establishment allowance.

141. In summary, the Claimants are **not entitled to payment of any of the various allowances claimed.**

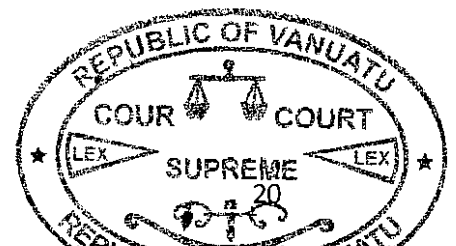
N. (vii) Damages for economic loss

142. Mr Luen is claiming payment of VT21,232,470 economic loss for 8 months of late payment or non-payment of a boat loan and loss of business.

143. Mr Faerua is claiming payment of VT4,176,000 for Stella Mare nakamal business, VT512,000 Freshwota housing loan repayment and VT200,000 Stella Mare land loan repayment for economic loss for 8 months of late or non-payment of loans.

144. There is no evidence as to each Claimant's loans or loss of business. In addition, it is not clear to me how the State is to be held liable for their non-payment of loans or other loss of business on this action for unjustified dismissal.

145. Accordingly, I **decline** to make an order as sought in relation to damages for economic loss.



146. My assessment of the damages claimed for economic loss is **nil**.

O. (viii) Damages for defamation

147. There is no cause of action for defamation (or libel or slander) pleaded in the Claim.

148. Accordingly, the Claimants are **not** entitled to damages for defamation.

149. My assessment of the damages claimed for defamation is **nil**.

P. (vix) Damages for stress and shame

150. I do not accept that the Claimants are entitled to damages for stress and shame as any compensation for stress and shame suffered as a result of an unjustified dismissal is to be considered under the multiplier pursuant to subs. 56(4) of the *Employment Act*.

151. In addition, there is no evidence as to stress or shame suffered.

152. My assessment of the damages claimed for stress and shame is **nil**.

Q. (x) Damages for unemployment following the Claimants' termination

153. I do not accept that the Claimants are entitled to damages for unemployment following the Claimants' termination as compensation for unemployment following an unjustified dismissal is to be considered under the multiplier pursuant to subs. 56(4) of the *Employment Act*.

154. In addition, there is no evidence as to what unemployment the Claimants suffered following their dismissals and how long that lasted for.

155. My assessment of the damages claimed for unemployment following the Claimants' termination is **nil**.

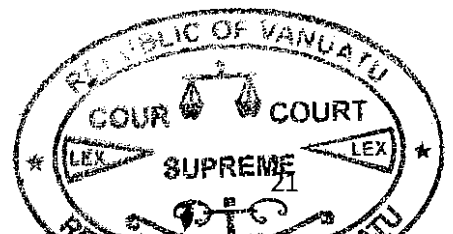
156. This concludes the Court's consideration of **Issue 2**.

R. Result and Decision

157. The Claimants have proved the Claim on the balance of probabilities.

158. Judgment is **entered** for the Claimants.

159. The Defendant is to pay the following to the First Claimant totalling **VT16,845,748** (the 'judgment sum'):

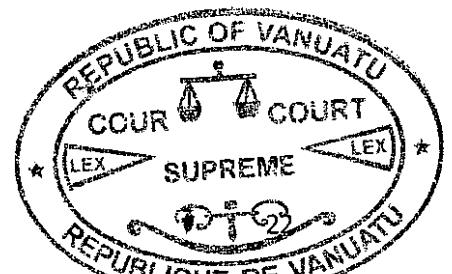


Balance of contractual entitlements	VT12,478,333
3 months' salary in lieu of notice	VT1,497,399
Severance allowance	VT956,672
Multiplier x2 pursuant to subs. 56(4) of the <i>Employment Act</i>	VT1,913,344
Annual leave	0
Vehicle and fuel allowance	0
Overseas mission travelling allowance	0
Domestic travelling allowance	0
Board member sitting allowances	0
Housing allowance	0
Damages for economic loss	0
Damages for defamation	0
Damages for stress and shame	0
Damages for unemployment following the Claimants' termination	0
TOTAL	VT16,845,748

160. Interest is to be paid on the judgment sum at the rate of 5% per annum from 9 October 2020 until fully paid.
161. The Defendant is to pay the following to the Second Claimant totalling **VT9,365,802** (the 'judgment sum'):

Balance of contractual entitlements	VT6,243,867
3 months' salary in lieu of notice	VT1,170,726
Severance allowance	VT650,403
Multiplier x2 pursuant to subs. 56(4) of the <i>Employment Act</i>	VT1,300,806
Housing allowance	0
Mileage allowance	0
Establishment allowance	0
Damages for economic loss	0
Damages for defamation	0
Damages for stress and shame	0
Damages for unemployment following the Claimants' termination	0
TOTAL	VT9,365,802

162. Interest is to be paid on the judgment sum at the rate of 5% per annum from 9 October 2020 until fully paid.



163. Costs must follow the event. The Defendant is to pay the Claimants' costs on the standard basis as agreed or taxed by the Master. Once set, the costs are to be paid within 21 days.

164. I decline to order costs on an indemnity basis as no findings have been made as to any of the matters provided for in rule 15.5(5) of the *Civil Procedure Rules*.

S. Enforcement

165. This matter is listed for Conference **at 1.20pm on 18 November 2025** for the Defendant to inform the Court: (i) that it has paid the judgment sums 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.

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

**DATED at Port Vila this 30th day of September, 2025
BY THE COURT**


Justice Viran Molisa Trief

