IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal Case No. 1328 of 2017

BETWEEN: **Port Vila Municipality**
Appellant

AND: **Sam Elkem Lukai, Joyce Mahit, Billy John Mark, Agath Roher Tari, Amos Mathias, Bais Jean Mark, Rene Peter Obed, John Kalo, Sandy Samson Robert Tougen, Kency Tasso Jonathan, Pakoa Ben, Jeremiah Daniel James, Collin Tomaki, Andray Nambith, Natioiase Loume, Sangul Jacklyne, Nalisere John Alick, Fred Tasso, Hanninton Serli**
Respondents

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Daniel Fatiaki
Hon. Justice Ronald Young
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd
Hon. Justice Paul Geoghegan

Counsel: *Mr. L. Napuati for the Appellant*
Mr. L. Malantugun for the Respondents

Date of Hearing: *12th July 2017*

Date of Judgment: *21st July 2017*

JUDGMENT

1. This is an appeal by the Port Vila Municipality (PVM) against a decision of the Supreme Court delivered on 29 May 2017 where the Court entered judgment on liability in favour of the respondents.

2. The respondents are all former employees of PVM who have served in various departments of the appellant and in different capacities.

3. On 3 March 2014 the PVM informed staff through a memorandum issued by the Town Clerk that the PVM was undergoing a restructuring program and sought indications in writing from those who wanted to be included in a redundancy package to apply before 15 April 2014.

4. On 25 February 2015 the Town Clerk wrote to the Commissioner of Labour advising him of the redundancy program.

5. Sometime thereafter the respondents received a letter on various dates advising them that they had been made redundant and that they would be paid their severance and leave entitlements. Some served their three months' notice whilst the rest were paid three months' salary in lieu of notice.

6. Thereafter the respondents issued proceedings on 27 September 2016 claiming that the termination of their employment was wrong and sought damages for unlawful termination. Initially the State Law Office acted for the appellant and filed a defence on 11 January 2017. Subsequently Mr Napuati of Warsal Lawyers began acting and also filed a defence on 28 January 2017. In both defences, PVM denied that the respondents were entitled to any damages.

7. Prior to the decision under appeal, two interlocutory applications were made by PVM which have some bearing on the final judgment. The first was to strike out the claim on the basis that section 67 of the Employment Act [CAP 160] was irrelevant to the respondents' case and, secondly, that the respondents were lawfully terminated under section 49 of the Employment Act and therefore reliance on section 56 (4) had no application to their case.

8. The trial Judge in dismissing the strike-out application made substantive findings of fact that the decision and actions of PVM was unlawful in that some terminations were disguised as redundancies when they were disciplinary matters and there was unchallenged evidence that following the so-called restructure the number of staff increased rather than reduced.

9. The second application was an application for leave to appeal the decision on the strike out application. Leave was refused and with the agreement of the parties the matter was set down for trial on 29 May 2017 at 9.00 am. The respondents agreed to withdraw their application for summary judgment. The trial Judge directed that PVM file its sworn statements by 28 April and the respondents to respond by 19 May.

10. On the day of the trial, 29 May 2017 Mr Napuati failed to appear and produced a medical certificate that gave him sick leave for three days under cover of a letter that sought an adjournment of the trial. The trial Judge upon hearing Mr. Kapapa for the respondents in chambers noted:

> *"5. The court informed Counsel about some short comings of the defendant. These are:*
>
> *a) the defendant has not paid the trial fees*
>
> *b) they have not filed any notices of intention to cross examine the claimants and their witnesses. As such all the evidence of the claimants are unchallenged;*
>
> *c) they filed a statement from Ruru Herve Kasten but well outside of 28 April 2017 as ordered on 13 April. As such that statement is inadmissible.*
>
> *6. That being the position, Mr Kapapa pointed out that the court had made substantial findings in its decision dated 13 March 2017. The court had made decisions on the substantive claims of the claimants and as such there is no further need for a trial hearing in absence of the defendant's intention to cross examine witnesses for claimants. Mr Kapapa therefore proposed two options:*
>
> *a) for the court to admit all the sworn statements of the claimants into evidence and enter judgment as to liability with quantum to be assessed at a later stage;*
>
> *or*
>
> *b)If the court was minded to grant an adjournment , to award wasted costs for today and tomorrow to the claimants.*
>
> *7. I am in favour of the first option. The defendants have failed to abide clear court orders. Those failures in my view are simply to delay the progress of this case. Rule 12.9 (1) (b) and (c) gives the court this discretionary power....."*

11. The application for an adjournment was refused. The Judge ordered that the claimants sworn statements be admitted into evidence and judgement was

entered in favour of the respondents as to liability with quantum to be assessed. No reasons were given by the Judge for his conclusion as to liability. The parties were then directed to file sworn statements and written submissions on the assessment of damages.

12. A number of grounds of appeal were raised but we need focus only on one ground, the failure of the Judge to give reasons for his conclusion that there should be judgment as to liability.

13. Rule 12.9 of the Civil Procedure Rules provides that the Court may adjourn the proceeding or give judgment for the Claimant or permit the Claimant to call evidence to establish that the Claimant is entitled to judgment. The Judge chose to enter judgment in respect of liability only and directed a further hearing for the assessment of damages.

14. This we consider was the correct approach given an adjournment had been refused. While the Judge was entitled to approach the matter in this way, rule 13.1 identifies the obligation of a Judge in giving judgment. It requires the judgment to; set out the evidence; find the facts; state the law and its application to the facts; and give reasons for those decisions. The Judge did not follow those requirements in his decision.

15. The Judge's failure to give reasons for his decision had particular relevance to the claim under section 56 (4) of the Employment Act.

16. This section enables the Court to give an additional sum for up to 6 times the severance allowance payable (section 56 (2)) where the termination of the employee was unjustified. The award under section 56 (4) required specific findings by the Judge as to the circumstances of the dismissal. Without those findings liability could not be established.

17. For these reasons the appeal will be allowed, the matter referred back to the trial Judge to give reasons for his determination of liability and to hear any further evidence and/or submissions on the question of damages including an award under section 56 (4) of the Employment Act.

18. One final matter. In this case counsel for the appellants filed a medical certificate and applied for an adjournment of the trial in writing. The application for an adjournment required an appearance of counsel before the Judge. Counsel could and should not assume such an application will be granted.

19. Counsel appearing on the adjournment application will be expected at least to explain why the medical certificate means trial counsel cannot conduct the trial and why other counsel could not be instructed.

20. The appeal is allowed. Each party to bear their own costs.

DATED at Port Vila this 21st day of July, 2017.

BY THE COURT

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Hon Vincent Lunabek

Chief Justice

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU