

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

Civil Case No.253 of 2014

BETWEEN: NEIL STEPHENS NETAF
Claimant

AND: VANUATU AGRICULTURE COLLEGE
Defendant

Coram: Justice D. V. Fatiaki

Counsel: Mr. B. Yosef for the Claimant
Mr. J. Malcolm for the Defendant

Date of Judgment: 5 May 2016.

JUDGMENT

1. This is an employment case in which the Claimant seeks various monetary orders against the Defendant College ("*the College*") for breach of his contract of employment.
2. The Claimant initially sued the Minister of Agriculture as second defendant but as no orders were sought against the Minister, the Claimant was ordered to file an amended claim. The amended claim merely pleaded that the Minister's action in terminating the claimant's employment was "*unlawful and illegal*", but again, no orders were sought against the Minister.
3. By order dated 24 October 2014 the claim against the Minister was summarily dismissed. Directions orders were also given for each party to file agreed facts and issues as well as a chronology. This was done.
4. The following chronology is a composite of the parties chronologies:
 - 11 February 2013 – The Claimant entered into an employment contract with the Defendant to serve as principal for a term of 3 years;
 - May 2014 – The Claimant raised various grievances with the Defendant employment contract including the absence of a review at the expiration of the 6 months probationary period;
 - 22 May 2014 – The Defendant wrote to the Claimant unilaterally extending his probation period until 31 October 2014;



- 29 May 2014 – The Claimant wrote to the Defendant expressing his considerable dismay with the Defendant’s actions in quite forceful and even accusative terms;
- 5 June 2014 – At the first extra ordinary meeting of the council of the Defendant the council discussed a mention to terminate the Claimant and resolved:

“to terminate the Claimant’s employment contract with effective today 5th of June 2014.”

 - The Council also resolved:

“that legal counsel... will draft letter of termination”

and further the Council appointed:

“Mr. Norman Davies be the Acting CEO and for VAC Management to advise position of CEO immediately”
- 6 June 2014 – By letter signed by the Minister of Agriculture the Claimant’s employment contract was terminated and the Claimant was directed to be paid:

<i>“(a) Notice – 1 month</i>	<i>VT250,000</i>
<i>(b) Severance</i>	<i>VT312,500</i>
<i>(c) Leave entitlements</i>	<i>VT46,876</i>
	<u><i>TOTAL VT609,376”</i></u>

 - The letter also:

“... Instructed the Chairman of the College to arrange to enclose a cheque in full and final satisfaction of any and all claims whatsoever. Banking the same will be deemed an acceptance.”

5. A consideration of the agreed facts; issues; and chronology clearly indicate that there is much in common between the parties and that the case could be dealt with on the sworn statements filed without the need for a trial. The issues were further condensed after discussions with counsels.

6. On 4th December 2014 with the agreement of counsels written submissions were ordered on the following preliminary issue:

“Whether the letter signed by the Minister of Agriculture dated 6 June 2014 validly and effectively terminated the Claimant’s employment contract?”

7. I am grateful to both counsels for the helpful written and oral submissions provided to the Court.



8. The claimant's submission is based on a close reading of the employment contract and the termination letter as well as the provisions of Clause 5.1 of the contract which reads:

"The Employee's employment under this Agreement may be terminated at any time in any of the following events, namely:

(a) Either party may terminate this contract by the giving of notice or payment in lieu of notice in accordance with the provisions of the Employment Act."

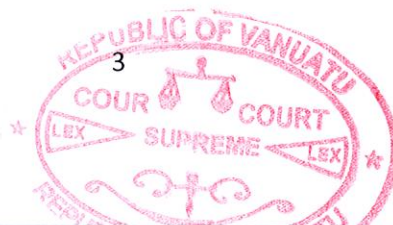
9. In particular, counsel submits in reliance on the principle of "privity of contract":

"The Minister was not a party to the employment contract that was (entered) on 11 February 2013. The only parties that have the right to exercise clause 5.1(a) to effectively terminate the Employment Contract was the Claimant and the Defendant. The actions of the Minister has contradicted the scheme of the legislation that establishes the Defendant."

And later counsel submits:

"... the actions of the Minister on his letter of 6 June 2014 are illegal. He has no legal authority to cloth (sic) himself and assumes power and obligations and relies on clause 5.1(a) to terminate the employment of the claimant. His actions is ultra vires. Therefore any actions that flows out of his decisions would be void ab initio with no legal effect."

10. Counsel seeks to distinguish the case of Kalambae v. Air Vanuatu (Operations) Ltd [2014] 34 VUCA on the basis that, unlike the present case, it was the employer who actually terminated the employment contract in the proper legal fashion. Here there was no letter or notice from the College to inform the Claimant that it is now exercising the power under clause 5.1(a) to terminate the employment contract.
11. Defence counsels' submission on the other-hand, relies heavily on the Kalambae decision and is predicated on the undisputed resolution of the management Council of the College of 5 June 2014 terminating the Claimant's employment "... forthwith effective today 5 June 2014". Counsel also submits (without any supporting evidence) "...that the request that the letter be signed by the Minister was an effective delegation of the authority of the Council". And further:
- "... There is nothing in the claimant's Contract of Employment or the Vanuatu Agriculture Act [CAP. 314] stipulating who can or who cannot exercise the actual (termination) notice."*
12. There is substance in both submissions. In my view however, the defence submissions are correct for the following reasons:




- (a) Undoubtedly, the claimant's employment contract was entered between the claimant and the College as the designated parties to the contract as: "employer" and "employee", but, with all due regard to the claimant's submission, the Minister of Agriculture is not an interfering "busybody" or complete stranger.
13. Indeed Section 21(1) of the Vanuatu Agriculture College Act [CAP. 314] is clear in so far as it provides that appointment of the principal occurs "... **after consultation with the Minister**" and, in my view, an appointment is unlikely to be made without the Minister's approval.
14. Furthermore, Section 7(d) gives the Minister an effective "veto" power over the dismissal of the principal which can only occur "...**with the prior approval of the Minister**". Plainly, the Minister has a vital and continuing role to play in both the appointment as well as in the dismissal of the Claimant, albeit, that the College is the designated "employer".
- (b) Although much has been said about the requirement to give a notice terminating the Claimant's employment and who can give or sign it, in my view the submissions are based on a misconstruction of Section 49 of the Employment Act and Clause 5.1(a) of the employment contract.
15. Clause 5.1(a) which is drafted with the disjunctive "**or**", provides for the giving of a notice of termination by the employer (or): "... *payment in lieu of notice in accordance with the provisions of the Employment Act [CAP. 160]*" and Section 49(4) of the Employment Act clearly states that:
- "Notice of termination need not be given if the employer pays the employee the full remuneration for the appropriate period of notice ..."*
16. Both provisions gives the employer an option to give notice of termination or pay the remuneration for the requisite notice period. Neither provision requires a notice of termination to be given if the employer opts for and pays the employee "... *the full remuneration for the appropriate period ...*" which in the Claimant's case was a months salary.
17. It is undisputed that the College elected and paid the claimant a month salary "*in lieu of notice*" consistent with the Council's termination resolution of 5 June 2014 and in strict compliance with the provision of Clause 5.1(a) and section 49(4) of the Employment Act. In my view there was no need at all to give the claimant "*notice of termination*" as wrongly assumed in the submissions.
18. I accept in the nature of things, a reasonable and responsible employer would advise a terminated employee that his services are no longer required. But failure to do so does not mean there has been a breach of Clause 5.1 if payment of salary for the required notice period is made.



19. That in my view was part of the clear intent and purpose of the hand-delivered letter of 6 June 2014 and the mere fact that it was written and signed by the Minister does not override or replace the Council's earlier lawful resolution to terminate the Claimant's employment "*forthwith*". Additionally, the Minister's letter is more readily accepted as evidencing the Minister's necessary approval of the Council's decision to dismiss the claimant, than as, an "*ultra vires*" usurpation by the Minister of the Council's statutory function and powers as asserted in the claimant's submissions.
20. In light of the foregoing, I answer the preliminary question in the affirmative and dismiss the claim with costs of VT50, 000 to be paid to the Defendant within 21 days.

DATED at Port Vila, this 5th day of May 2016.

BY THE COURT


D. V. FATIAKI
Judge.

