

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

Civil  
Case No. 13/262 SC/CIVL

**BETWEEN: Nuvi Iata**  
*First Claimant*

**AND: Leitau Iata**  
*Second Claimant*

**AND: Moses Kamut**  
*Third Claimant*

**AND: Tanna Coffee Development Company Limited**  
*Defendant*

*Coram: Judge Aru*

*Counsel: Mr. J. Ngwele for the Claimants*  
*Mr. E. Nalyal for the Defendant*

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**RESERVED JUDGMENT**

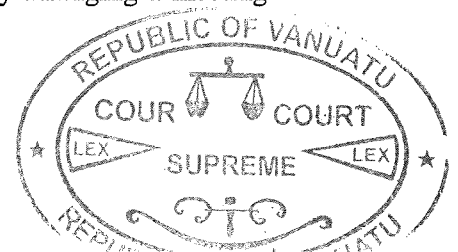
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**Introduction**

1. Mr Nuvi Iata, Mrs Iata and Mr Kamut were all employees of Tanna Coffee Development Company Limited (Tanna Coffee). All three were employed under contracts of employment. On the 27 and 29 of August 2013 all three employees were terminated by Tanna Coffee effectively ending their employment.
2. Following receipt of their termination letters, the claimants filed this claim challenging their dismissal.

**Summary of the Pleadings**

3. The claimants allege that their termination was unjustified as they were not given an opportunity to respond to the allegations against them; and that they were not given notice or any payment in lieu of notice. As a result they now claim their entitlements to severance, 3 months' notice, annual leave, Vanuatu national Provident Fund contributions and outstanding wages for overtime. In addition, they are seeking general damages.
4. The defendant on the other hand says that the claimants were terminated for serious misconduct and no notice was required for such a termination. It says it afforded an opportunity to the claimants to respond to their terminations by arranging a meeting

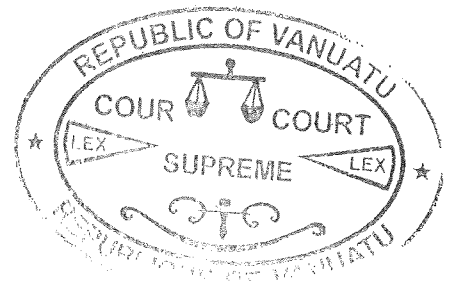


with the Labour Department. As the termination was for serious misconduct it says that the claimants are not entitled to any compensation except for their annual leave and Vanuatu National Provident Fund contributions.

5. The defendant also counterclaims for fraud against the claimants for overpayments for overtime, unpaid loans, advances and working on weekends and public holidays. These are all denied by the claimants.
6. There are two issues which arise requiring determination namely:-
  - Whether there was serious misconduct
  - Whether the terminations were justified
7. Under the Employment Act [CAP 160], s50 (1) provides that if an employee is dismissed for serious misconduct, he is not entitled to notice or to any compensation in lieu of notice. Secondly, s 50 (4) requires that before dismissing an employee on the grounds of misconduct, the employee must be afforded an opportunity to be heard. If the opportunity is not given, the termination is deemed unjustified. The claimants have the onus of proving their claim on a balance of probabilities.

### **Background Facts**

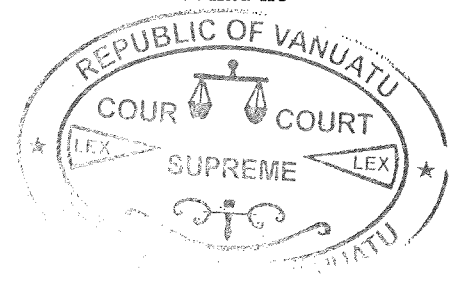
8. There is no dispute that the claimants were each put on contracts of employment. Mr Kamut signed his contract of employment with Tanna Coffee on 20 September 2010. Mr Nuvi Iata and his wife signed theirs on 25 November 2010. Prior to their formal contracts of employment, Mr Iata had been employed by the company since 1994. Mrs Iata had also been with the company since 2007 and Mr Kamut since 2008. Their contracts had standard terms apart from their positions and remuneration. Mr Iata was the Factory Production Manager with a salary of VT425 per hour. Mrs Iata was the Factory Assistant /Café Supervisor with a salary of VT260 per hour and Mr Kamut was the Factory/Roasting Assistant with a salary of VT250 per hour. This was later increased to VT360 per hour.
9. Each was required to work 9 hours per day including lunch break and entitled to 12 paid annual leave days per annum and 21 days paid sick leave per annum. In addition it was agreed that if the employment ceases the company will provide 4 weeks paid notice and will pay out any accumulated outstanding annual leave. In the event of resignation each claimant was required to give 4 weeks' notice and to serve out the notice period with the company.
10. On 27 August 2013 Tanna Coffee terminated the employment of Mr Iata by letter. Two days later on 29 August Mrs Iata and Mr Kamut were also terminated. Each was alleged to have committed serious misconduct.



11. At the trial, all three claimants were called to give evidence and were cross examined. Mr Terry Adlington who is the Managing Director of Tanna Coffee was the only witness who gave evidence for the defendant. He was also cross examined.

## Discussion

12. The allegations against the claimants as set out in their letters of termination are more or less the same and could be summarised as follows. Collusion with other staff members to defraud the company by increasing overtime payments, increasing staff salaries and making unauthorised advances and loans and secondly disrespecting Mr Adlington's partner, Mrs Yasmine Adlington. As against Mr Iata it was alleged that he had too many unexplained absences from work and threatened Mr Adlington on two occasions.
13. In his sworn evidence, Mr Adlington admitted that Mr Iata approached him and apologised for his behaviour. Mr Adlington accepted the apology but said he could not forgive Mr Iata for what happened on the two occasions.
14. Specific allegations against Mrs Iata were that several small bags of money allocated to staff were found in her bag. Under cross examination she stated that as the Café Supervisor she received money as well and prepared records each day and gave them to Mr Kamut to enter the data in the computer. The small bags of money were staff advances. This would first be authorised by Mr Adlington before Mr Iata and Kamut are informed to prepare the advances. She also stated that Mr Kamut did their banking for them as she had no free time to attend the bank and she would also give her own funds or casino winnings to Mr Kamut to deposit into her account.
15. As against Mr Kamut it was alleged that he entered Mr Adlington's house uninvited and removed a computer and other items. Under cross examination Mr Kamut said the laptop was his and he went and got it before he was terminated. Apart from the laptop, he took nothing that belonged to Tanna Coffee. There is no evidence from the defendant to contradict what he said.
16. When cross examined all three claimants confirmed that Mr Adlington was aware and agreed to payments of overtime, advances and loans. That nothing could be done without his knowledge. In addition they confirmed that despite their entitlements to lunch breaks they never took it as they were required to work overtime due to an increase in orders.
17. Mr Adlington himself in cross examination confirmed that roasting takes more than 8 hours a day and to fulfil orders more time is required. In 2010 they had a lot of orders up to 30 tons which increased to 35 tons in 2011. Exports were 6 to 8 tons and local supply was 13 to 14 tons. He went further to say that on public holidays during cruise ship days the claimants would work overtime. On cruise ship days both the factory and shop would open. He stated that the claimants were paid for the overtime worked. In 2011 there was an increase in the wage bill and he spoke to Mr Iata about it but had no

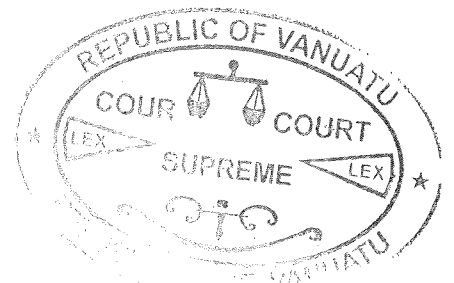


records to that effect. Mr Iata in his evidence said due to increase in demand they had to work overtime.

18. Mr Adlington further confirmed under cross examination that his instructions to staff were all verbal and not written or recorded and that he has meetings with staff but there are no records or minutes of such meetings in his sworn evidence.
19. The claimants added that despite their entitlement to annual leave in their contracts, Mr Iata was only allowed to take his annual leave once in 2012. Mrs Iata took her annual leave in 2012 and 2013. Mr Kamut took his annual leave in 2013.
20. Although Mr Iata said he was hired as the security, this is denied by Mr Adlington. Mr Iata could not produce any evidence of the appointment other than a pat on the back by Mr Adlington. If he was so appointed, it was incumbent upon Mr Iata to get it signed of in writing by the company. The evidence is lacking and therefore the claim for employment as security is refused.
21. In like manner is Mr Iata's claim that he was hired to feed the employees. Given the company's denial, the evidence is lacking that he was hired to provide meals for the employees. The claim for providing meals is also rejected.

### **Findings**

22. The claimants were permanent staff of Tanna Coffee. They served in their positions exceptionally well which benefitted the company and helped it to meet increasing orders from its local and overseas clients. Up to the date of their termination there is no evidence that they were ever disciplined or given disciplinary warnings by the company.
23. Their contracts of employment provided that they were entitled to 12 paid annual leave days each year and 21 days sick leave. Given the work load, they were not given leave as per the terms of their contracts. Mr Iata took his annual leave only once in 2012, Mrs Iata took leave in 2012 and 2013 and Mr Kamut only went on leave in 2013. Although they were not given annual leave as contracted, they continued to serve the company.
24. Mr Adlington confirmed that overtime claims were well accepted and was a usual practice. When the claimants worked overtime, they were entitled to overtime pay.
25. The claimants did not get annual leave annually and did not have proper lunch breaks because of the amount of work. They worked on cruise ship days, public holidays and Sundays.
26. All their loans, advances and overtime were approved by Mr Adlington.



Whether there was serious misconduct

27. Under s 50 (1) of the Employment Act, the employer may dismiss the employee for serious misconduct without notice and without payment in lieu of notice. Such dismissal may take place only in cases where the employer cannot in good faith be expected to take any other course. (s50 (2)). There is no evidence of any fraud or collusion to defraud the company or that company funds were misappropriated. Mr Adlington gave oral evidence confirming that a complaint was lodged with the Police but nothing eventuated. Whether the Police investigated and found no substance in the complaint nobody knows. There is no evidence that the claimants were prosecuted for fraud or misappropriation or whether any of them was convicted. When the demands increased naturally the claimants would have to work overtime thereby increasing their overtime claims. They were entitled to payment for working overtime as confirmed by Mr Adlington.
28. Considering the evidence, I am not satisfied that there was serious misconduct and answer the issue in the negative.

Whether the terminations were justified

29. The final three paragraphs of the claimants' letters of termination stated that:-

*"Consequently (according to verbal advice received from the Labour Department) who have informed me that there is ample justification under the Vanuatu Labour Act section 50 (1) to dismiss you immediately from your employment without notice and without compensation in lieu of notice as a result of "Serious Misconduct" on your behalf and under section 50 (2), as your employer, I cannot in good faith be expected to take any other course.*

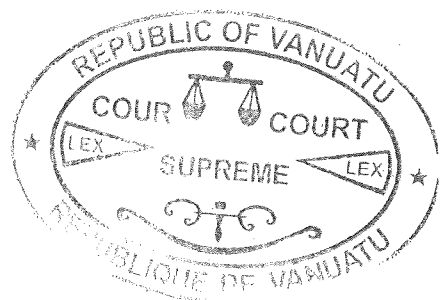
*Therefore in accordance with section 50 (4), I afforded you adequate opportunity to answer any charges made against you that stemmed from the instance referred to 'above', but in keeping within the letter of the law, I am now making an appointment with the Labour Department for a conference at the earliest possible time, where you will be afforded a further opportunity to answer any charges stemming from our investigation.*

*You are hereby requested to vacate the company owned premises where yourself and your family currently reside (leaving it in a neat, tidy and orderly manner) within 24 hours of receipt of this letter. Your entitlements (in terms of holiday pay due and severance allowances) will be calculated in due course according to the information at hand and the response provided by yourself. This amount will be deposited into your personal bank account at the earliest time available.*

*(sign)*

Terry Adlington  
Managing Director, TCDC

Cc Labour Department"



30. Section 50 (4) specifically states:-

*“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.”*

31. To dismiss an employee on the basis of serious misconduct, Parliament intended that specific allegations of the serious misconduct must first be provided to the employee, following which he must then be afforded adequate opportunity to respond prior to any decision to terminate without notice. Where this process is not complied with the termination will be deemed unjustified.

32. In each claimant’s case, the letter of termination first says that the claimant is dismissed immediately then tells the claimant that an appointment is being made with the Labour Department to afford them an opportunity to answer the charges against them.

33. Mr Adlington under cross examination said he met with Mr and Mrs Iata for 3 hours. There is no record or minute of the meeting. There is also no evidence that specific allegations in the termination letter were put to the three claimants to answer before they were terminated. The letter of termination is evidence that the claimants were terminated then notified in the same letter to answer the charges against them at the Department of Labour. The terminations in my view were unjustified as no adequate opportunity was given to the claimants to answer the charges before their termination.

34. My answer to the second issue is also in the negative.

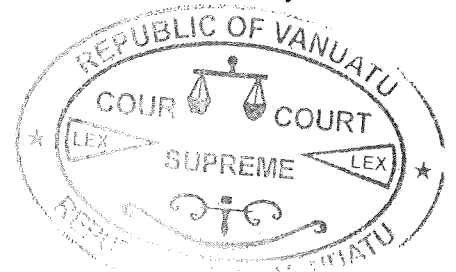
## **Damages**

35. Each claimant is also seeking general damages as follows:-

- Mr Nuvi Iata - VT 7,000,000
- Mrs Leitau Iata - VT 3,500,000
- Mr Moses Kamut - VT 3,500,000

36. In their Claim, there is no specific pleading by each claimant for the amount claimed. It was generally pleaded at paragraph 30, 31 and 32 that the claimants have suffered stress, anxiety and hardship and that they were not able to secure another employment. As a result they suffered loss. The Civil Procedure Rules (r 4.10) requires that a claim for general damages must provide the following particulars; nature of the loss or damage suffered, exact circumstances in which the loss or damage was suffered and the basis on which the amount claimed was worked out or estimated. These particulars were not provided.

37. Furthermore, there is no medical evidence that the claimants suffered stress and anxiety. On that basis the claim for damages must be rejected.



## Result

38. The claimants are only entitled to their severance, notice, annual leave and any outstanding salary or entitlement which are calculated as follows:-

a) Nuvi Iata

- Severance - VT 68,000 per month x 15 years = VT 1,020,000
- 3 months' notice – VT 68,000 per month x 3 = VT 204,000
- Annual Leave – VT 3,400 per day x 12 days annual leave x 12 years = VT 489,600
- Outstanding entitlement for work during public holidays (15 public holidays) = VT 3,400 per day x 2 = VT 6,800 x 15 public holidays x 11 (years in which he did not take holiday) = VT1,122,000
- Outstanding salary for period 15 August 2013 (2 weeks' pay) = VT 6,374
- Outstanding Vanuatu national Provident Fund contribution for the period 15 August 2013 =VT 75

**TOTAL = VT2, 842,049**

b) Leitau Iata

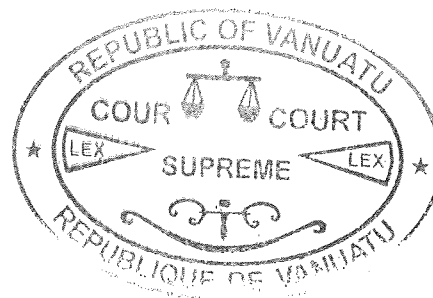
- Severance - VT 41,600 per month x 6 years = VT 249,600
- 3 months' notice – VT 41,600 per month x 3 = VT 124,800
- Annual Leave – VT 2,340 per day x 12 days annual leave x 3 years = VT 84,240
- Outstanding entitlement for work during public holidays (15 public holidays) = VT 2,240 per day x 2 = VT 4,480 x 15 public holidays x 4 (years in which he did not take holiday) = VT268,800

**TOTAL = VT727, 440**

c) Moses kamut

- Severance - VT 45,600 per month x 5 years = VT228,000
- 3 months' notice – VT 45,600 per month x 3 = VT 136,800
- Annual Leave – VT 2,880 per day x 12 days annual leave x 4 years = VT 138,240
- Outstanding entitlement for work during public holidays (15 public holidays ) = VT 2,880 per day x 2 = VT 5,760 x 15 public holidays x 5 (years in which he did not take holiday) = VT432,000

**TOTAL = VT 935, 040**



**Conclusion**

39. Judgment is entered for the claimants and the counterclaim is therefore dismissed. The claimants are entitled to costs to be agreed or taxed.

**DATED at Port Vila this 24<sup>th</sup> day of October, 2019**

**BY THE COURT**

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**D. Aru**  
**Judge**

