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

Civil Case No. 15/163 SC/CIVL

BETWEEN: GUILLAUME DEBAY

Claimant

AND: THE PACIFIC PASSION

First Defendant

AND: STEPHANE MARCEAU

Second Defendant

Coram: *Chief Justice Vincent Lunabek*

Counsel: *Mr. Less Napuati for the Claimant (until trial). The Claimant appeared in person in his final submissions (after he terminated his lawyer)*
Mrs. Marie-Noelle Ferrieux Patterson, for the Defendants

Dates of Hearing: 2nd, 3rd and 9th August 2016

Date of Delivery of Judgment: 9th April 2019

REASONS FOR JUDGMENT

Introduction

1. This is a claim for wrongful dismissal. The Claimant claims in his Amended claim filed 2 February 2016 for the following:

    1. Payment of VT818, 180 for severance pay.
    2. Annual Leave of VT559, 090.
    3. Breach of fixed term contract of VT2, 700, 000.
    4. Damages for ill treatment.
    5. Certificate for employment.
    6. Interests at the rate of 5%.

Background

2. The Claimant is a French National citizen and a resident of Vanuatu. He has applied to become a Ni-Vanuatu citizen and is awaiting a response from the Citizenship Commission of the Republic of Vanuatu (at the date of the trial of this proceedings).

3. The Claimant was employed by the Defendant, Pacific Passion Limited, as its Shop Manager from 4 October 2012 to 4 June 2015.

4. The Claimant was employed under four different contracts for a monthly salary of VT150, 000 on a part time basis and a full time basis at VT300, 000 per month until his dismissal on 04 June 2015.

5. The Claimant said that the Defendant did not mention the reason for his dismissal in the letter of dismissal dated 4 June 2015 addressed to him by registered mail, because the Defendant had no valid reason to justify the dismissal of the Claimant. The Claimant said the Defendant did fabricate a "scenario" alleging that the Claimant was involved in some kind of "pornographic material" during the working hours which he strongly denied.

6. The Claimant said the Defendant used such "strategy" for not paying the entitlements of the Claimant based on the (false) allegation of misconduct.

7. The Defendants' position is that the Claimant and the Defendant entered a written contract dated 20 February 2015 pursuant to which the Claimant was to be employed by the Defendant for 1 year. The nature of the Claimant's employment required him to use a computer that was connected to the internet.

8. The Defendant said the Claimant used the computer to download from the internet 161, 013 items that consisted of pornographic photographs and or moving pictures and 25, 899 other items for personal amusement such as internet gambling or games. It is said also the Claimant spent at least 50% of hours of employment accessing and watching those items or playing the games.

9. It is further said that many of the downloads were in breach of international copyright laws or otherwise and they were also in breach of sections 1(a) and (b) of the Obscenity Act [CAP 73].

10. On 1st June 2015, the Defendant gave the Claimant a letter containing these allegations and asking the Claimant to explain why he should not be dismissed for serious misconduct.

11. On 1st June 2015, the Claimant asked the Defendant to give him thirty (30) minutes to consider his position. The Claimant left the premises of the Defendant and did not return.

12. The Defendant said that it was on that basis that by letter dated 04th June 2015, the Defendant dismissed the Claimant for serious misconduct and provided him with payment of his accrued salary and leave pay.

13. The Defendant denies the balance of the claim and said that there was a fixed term contract for one (1) year from 01 March 2015 to 28 February 2016.

14. The issues to be determined will be on the basis of the material facts to be found on the evidence in this case.

15. The parties accepted the following issues to be determined by the Court. They are set below.

Issues

a) Whether or not the Claimant's dismissal for serious misconduct was justified?
b) Whether or not the Defendant was liable for breach of contract?
c) Whether or not the Claimant was given the opportunity to be heard in accordance with section 50 (4) of the Employment Act.
d) Whether the Claimant was paid his entitlements and annual leaves by the Defendant?

Evidence

16. The Claimant filed a sworn statement dated 31st August 2016 and he was also cross-examined by the Defendant's counsel.

17. The Defendant filed the following statements in support of the Defence:

- Stephane Marceau, the Director and shareholder of the company, Pacific Passion Limited, filed 14th September 2015;
- Linda Etul, an employee of the Defendant company, filed two statements at 16th May 2016 and 2 August 2016;

- Terry Maloney, manager and owner of the IT Business INCITE, filed 17th May 2016;
- Stephanie Kasten, an employee of the Defendant company, filed 16 May 2016; and
- Olaf De Ceuster, director owner of the company ODC Limited a company registered in Vanuatu and the director (office holder) of the Australian Firm ("Anything for I.T"), filed 19 May 2016.

18. The written statements filed in this case and the oral testimonies of their respective deponents and attachments to them constitute material evidence in this case. They are recorded in the Court file records. What I do next is to make specific findings of facts on disputed facts to assist me in determining the issues the Court is asked to determine.

19. It is noted that the factual disputes arise more on the allegations of the Claimant of what he said Marceau on behalf of the Defendant did. However, Marceau filed a sworn statement and he also gave evidence. The Claimant did not challenged Marceau's evidence in cross-examination.

Findings

20. The findings on the evidence establish the following facts:

21. The Claimant started work with the Defendant on 14 October 2012 and he finished on 04 June 2015. He was working with the Defendant throughout that period (through four (4) different contracts) on continuing basis with the Defendant until his dismissal on 4th June 2015.

22. In cross-examination, the Claimant accepted the Defendant paid him the balance of his outstanding leave of 21 days of VT 300,000 and he also accepted receiving from the Defendant an amount of VT300, 000 for his salary for the month of May 2015. He confirmed in the year 2015, he took 21 days leave. He has 21 days leave outstanding which is paid to him. The Claimant claimed 41 days leave. He took 21 days leave in 2015 and the balance leave of 21 days was paid to him. He was also paid his salary for the month of May 2015. The date of payment was 12 June 2015 when the Claimant signed the document Annexure "F" to the sworn statement of Stephane Marceau. The Claimant accepted the same document were in his statement Annexures ("E")

and ('F"). He accepted they are the same documents - the pay slips and the cheques. He also got the two cheques of VT300, 000 each which were issued in his own names. One for his salary of May 2015 and the other for the balance of 21 days leave.

23. The Claimants denied, among others matters, the following:-

a) That the leave taken by him and paid by the Defendant in May 2015 is annual leave because it was notified to him but not applied for him. However, on the Claimant's own evidence, although the Claimant claim for 41 days leave, the Claimant accepted he took some annual leave in May 2015 and was paid for it on 12 June 2015. The Claimant also accepted he received a payment for part of his leave on 12 June 2015 (VT300, 000).

b) That Stephane Marceau had asked him to take some annual leave following the lack of work due to the Cyclone Pam especially at the beginning of May 2015. However, in his cross-examination despite his denial to that question, the Claimant corrected his answers and said that he received that letter on 7 May 2015 which confirmed the evidence of Stephane Marceau and the Claimant did not challenge Marceau's statement.

c) That the password from his computer was only known by him. He said the same password was used by everyone in the office of the Defendant. He also denied that he removed the password on 8 May 2015 allowing Stephane Marceau to access the computer when he left for his leave. However, the Defendant's witnesses, Linda, Stephanie and Stephane Marceau stated that they did not know the password and that they never accessed the Claimant's computer except Stephane Marceau on 8 May 2015 when the Claimant removed his password before he left for his annual leave. It is rational to say that since the Claimant and the Defendant knew when they signed the Claimant's contracts of employment that integrity is an important aspect of the contractual agreement between the parties, if downloads items including the pornography items would have been noticed by the Claimant if they were downloaded by other people using the computer,

the Claimant would noticed them and would have complained. It was not the case.

d) That spending all his time on the computer and in the office during the hours of work. However, in cross-examination, he admitted that until 2014, he stayed in the office and worked late but after 2014, he spent less time in the office. It is a fact that the defence witnesses (Linda and Stephanie) did not mention that there was anything different from mid – 2014 and nothing was put to them in cross-examination. It is rational to accept their evidence on this aspect.

e) The Claimant gave evidence to the effect that at different times he got a new computer in June 2014. In re-examination he gave the date of 24 June 2014 as being the date when he got his new computer. However, it is a fact that the documents taken from the hard disk of the computer as presented from the two experts (Terry Moloney and Olaf De Ceuster) statements showed that the hard disk of the new computer was installed on 10th June 2014 when the Claimant registered the computer to his name and transferred the software and data from his old computer to the new computer. This is inferred from the facts to this effect.

f) That the evidence put in re-examination of the Claimant by his lawyer referred to page 5 and 6 of the report of Olaf De Ceuster and to downloads of 2011 and 2015. The report was unchallenged and it is accepted as fact in this case. The Claimant stated that the information relating to the downloads of 2011 could not be his because he was not working for the Defendant in 2011. He only started to work for the Defendant in 2012. However, it is a fact that all the data showing the date of 2011 in fact showed also a date of 10 June 2014 on the right side column corresponding to the date of download of the data on the new computer. On the evidence wen looking at the column on the right it shows that the date of information is 2014 i.e. 10 June 2014 is the same on both columns being the date of the document and on the last column the default date of transfer of the documents if any. In this case,

both dates were the same. This means that the dates were created and entered on the computer on 10 June 2014.

g) That when looking at the data of 2011, the Claimant said that in one column the dates from 2011 showed different days and different months but the date on the right column was the same for all the 2011 documents: 10.06.14 which was the date of transfer when the computer was installed and loaded with the information (software and date). It is rational to say that the data on the computer dated 2011 was in fact transferred on the computer on 10.06.14 and has been there ever since and included different document loaded on the computer and different dates, but had all been transferred on the computer on 10.06.14.

h) That the Claimant contradicted himself when he stated that the new computer was obtained on 24 June 2014 when there is no evidence to support it. The fact is that it was 10.06.14 which was the date of installation of the computer as shown in paragraph 3 of the report of "Anything for IT" report in Olaf De Ceuster statement (annexure ODC4).

24. The Claimant more specifically denied the following:-

a) That Stephane Marceau had asked him to take some annual leave following the lack of work due to Cyclone Pam especially at the beginning of May 2015. The evidence to the contrary was given by Stephane Marceau in his own statement and Marceau was not challenged on it. Marceau's evidence of this is accepted as a fact.

b) That during the phone conversation of 12.05.15 with Stephane Marceau, Marceau spoke to him about the pornographic and leisure material found on his computer as well as the professional data being deleted. It is a fact that the contrary evidence was given by Stephane Marceau and his evidence was not challenged by the Claimant. Marceau stated that by the time of the last contract dated 28 February 2015, the Claimant had only took a small part of his holiday entitlement. After Cyclone Pam in March 2015, the First Defendant's business dropped severely and he asked the Claimant to take his holiday but he refused so he consulted the Department of Labour. As a result of the advice he received, he signed the letter dated 7 May 2015 and gave it

to the Claimant. A copy of that letter was also sent to the Labour Department. The Claimant did not immediately leave to go on holiday saying that he had work to do on his computer. After working on his computer for quite a longtime, he left. On 08 May 2015, he said he examined the Claimant's computer and found out that a lot of the memory had been erased but, in the rash, he found quite a lot of pornographic material. Marceau stated that he contacted the Claimant about the pornographic material but the Claimant denied it and on or shortly after 12th May 2015 he received a document in French language from one Guy Bernard entitled *"Objet: Offre de règlement amiable quant à la situation contractuelle de votre employé en la personne de Mr. Guillaume DEBAY."* Marceau stated he sent the hard drive from the Claimant's computer to an Australian IT firm for recovery of the deleted materials and analysis and received verbal reports as a result of which he returned to the Department of Labour for advice. He substantively received the report, a copy of which is annexure C to his statement. The context reflect the original verbal report. As a result of the advice he received from Labour, Marceau prepared the letter dated 01 June 2015, a copy of which is annexure D to his statement and at 8.30am on 1st June 2015, the Claimant came to him and asked if he could leave the Defendant's office for 30 minutes to think about the letter and with his permission, left the office. The Claimant did not return after 30 minutes and at 11.45am Marceau stated he telephoned the Claimant's mobile phone number 7762430, but he did not answer. Marceau annexed his telephone invoice from TVL (Annexure G) for the relevant period showing his phone calls to the Claimant's mobile number. The Claimant did not answer to any of the calls. Marceau stated that three (3) days later, on 4th June 2015, the Claimant had still not returned or contacted him and the 48 hours that the Labour office had advised him to wait had passed, so he prepared and sent to the Claimant the letter of 04 June 2015 of which a copy ("E") is attached to his statement. On 12 June 2015, the Claimant came to the office of the First Defendant and collected his unpaid salary and holiday paid which is annexure "F" to his statement. The Claimant signed the receipts when he collected the money. What Stephane Marceau stated in his statement is not challenged by the Claimant and when there is a

substantial difference, the versions of Stephane Marceau is to be accepted as evidentiary fact.

25. It is also noted that the evidence of Linda and Stephanie are consistent and corroborate what Stephane Marceau stated in his statement. Linda remembered that after Mr. Debay came back from his holiday, Mr. Debay came to the office and told her and the staffs that he has received a letter from Mr. Marceau and that he might no longer be working with them. She asked the Claimant why he thought he will not be working with them but he did not tell them the reasons. Linda confirmed that few days after the Claimant passed outside the shop and told them that he could not come inside the shop anymore and that he will not be working anymore. The Claimant's evidence that Linda was lying in her statement is without foundation. It must be rejected and I do so here. The evidence on this factual dispute was that of Stephane Marceau which was not disputed by the Claimant. Linda provided a supporting and corroborating evidence to the same effect. Her evidence is also accepted on this point.

26. The evidence of the two experts, Olaf De Ceuster and Terry Moloney were unchallenged and not cross-examined. They are accepted as facts. They were asked to ascertain the identity of the machine, the user and to investigate the hard disk of the Defendant's computer used by the Manager in his office as it appeared that the computer has been used for non-related work and for criminal activity by watching, downloading pornographic material. They both have a wide and solid background and experience as IT specialists in their CVs. They found:

i) 550GB at the minimum had been deleted from the computer on 08.05.15. The total capacity of the hard disk was a little less than 1000GB
ii) The deleted items represented 186, 912 files
iii) The majority of these filed: 161,013 downloaded were a mixture of pornographic material classified as soft porn. They were all classified by name and folder.
iv) The computer was installed on 10.06.14 at 11.14am.

v) A number of emails addresses were used. GD admitted using some of them the professional and personal addresses not the addresses that were related to downloading pornographic material.

vi) There were a certain number of programs to assist the download of the data.

vii) Games were played on the computer.

viii) There was a lot of films downloaded in contravention of the copy right laws.

ix) The installed software suggested a specific configuration to allow for assisting downloads from the internet using download managers.

x) The event logged showed a regular pattern consistent with use during working hours.

xi) More than 80% of available data storage was used for images, movie downloads and games.

xii) The user was a Guillaume Debay as from the beginning on 10.06.14 when the computer was registered and installed.

xiii) There is evidence of material being deleted on 08.050.15.

xiv) There was no evidence of data being downloaded on the computer on or about 7th or 8th May 2015 but there is evidence that 186, 912 files were deleted on 8th May 2015.

27. Terry Moloney ("TM") the other expert confirms the report of Olaf De Ceuster and adds that:

a) The dates of the pornographic files indicate that they were loaded into the computer in 2012, 2013 and 2014;

b) There was a significant number of files that appear to have been downloaded to this PC in June 2014;

c) The date stamps indicate that these files were downloaded during works hours and after working hours

d) It should be noted that with a 512 kbps internet connection, the 46GB of movies and pictures mentioned above would have taken approximately 5 days of permanent download at full speed to download these materials and therefore 100 days for full 550GB;

e) TM also noted the download the program "Hide it" took place on GD's computer allowing to hide quickly what is on the screen from the employer or a client coming in the office;

f) Even though TM said and wrote in his statement that it is not possible to say how much of this was downloaded and how much could have been loaded from other sources: email, user created documents loaded from USB drive, he added in his re-examination that:

   i) There were numerous programs in the computer to download or assist the download of material from internet including but not limited to Torrens program and that there was some material downloaded in the software to download.

   ii) That changing dates of data on a computer whether after downloading it or transferring it was extremely difficult. In fact he added when data is transferred from a hard disk to a computer, the date that appears next to the document is a default date when the transfer is done.

   iii) TM said that to change the dates of the documents can be done but he never saw it done and it requires a lot of expertise.

g) When asked if there were some programs to assist download of data, TM said he found some software programs such as Torrens and also other such program.

28. The issue of the material downloaded in the Claimant's hard disk at work with dates going back to 2011 was raised in the re-examination of Claimant, Guillaume Debay (G.D,):

a) GD's position on this non authorized data was that it could not be him especially in 2011 because he was not working for the Defendant in 2011. He only started in 2012.

b) GB has stated throughout this case that he did not download anything except some documents for work. However, the experts found (TM in his re-examination) that some of the matter being the subject of controversy were already in software programs and that downloads took place during working hours and this could only be done by GD as

witnessed by other employees as he was the only user of his computer.

c) GD's re-examination [paragraph 9(t)] showed that the data with different dates individually going back to 2011 showed in the column the most on the right in front of each document of 2011 the same date: i.e. 10.06.14 which was the date when the new hard disk of the new computer was installed.

d) At the date of 10.06.14 the hard disk was installed and software and the documents transferred from the former computer or from another device to the new computer.

e) In his re-examination the expert Terry Moloney stated that any data transferred from a device to another would show as date the default date of the date when the data is transferred. This would explain why the data shown in 2011 to GD during his re-examination showed 10.06.14 which was the date when the computer was installed and the date when the data got transferred to the new computer, and any other data that GD alleges was transferred without his knowledge onto his new computer by other people would show a default date. The only time when Mr. Marceau had access to the computer was either from the evening of the 7th May 2015 (if one believes some of the statement of GD) or at the latest the 8th of May 2015. No important download was noticed or remarked by the experts on those dates.

f) It can be concluded that the data of 2011 was transferred on 10.06.14 and was on the computer of GD since that date.

g) And if GD alleges that Stephane Marceau did that progressively throughout the years and months then it does not make sense as the data downloaded according to the experts at different times and hours during working hours over a few years. Stephane Marceau did not have access to the computer during working hours at all.

h) Therefore one can conclude that the material of 2011 belonged to the user and was put on his computer at that date. Basically these data were on the computer since 10.06.14 and the user had to be aware of what was on his computer since that date and if it had been loaded without his knowledge, he would and should have reacted strongly and brought this matter to Stephane Marceau's attention as the

confidentiality was a very high priority in their contract of employment and GD was supposed to be the only one using that computer.

i) GD hinted in his re-examination that some other people could have had access to his computer i.e. staff members and they could have downloaded throughout the years the non-work related data on his computer. GD should have noticed it but it was not the evidence of the staff members of the Defendant. They said they did not have access to the Claimant's computer. It would have needed a conspiracy between 2 staff members being witness in this case to hide the fact that they were downloading pornographic material and leaving it on their boss' computer. This is very unlikely as a hypothesis as the Claimant would have seen this activity, being a person knowledgeable more than an ordinary user as he admitted.

j) If GD tries to allege that Stephane Marceau downloaded unauthorized material and transferred it to GD's computer, they would have to prove it on a high level of proof than balance but as for a criminal case, as they allege fraud. The onus of proof is for them to establish it and it is a high onus, an onus of criminal proof: beyond reasonable doubt (ref to Obscenity Act). However, even on the test of balance of probabilities the Claimant fails to prove that the material was introduced in his computer by anyone else than him.

k) The conclusion is that during working hours at different times over months these data were downloaded and watched by the Claimant.

Submissions

29. The scenario claimed by the Claimant that Stephane Marceau fabricated or falsified the evidence of the material information in the computer records to make it looks as if the Claimant (Guillaume Debay) had downloaded pornography so that Stephane Marceau could dismiss him for misconduct is unsupported by the Claimant's evidence. It is a question that in law Mr. Debay as the Claimant needs to prove on the balance of probabilities. There is not a slightest evidence in support of the Claimant's claimed scenario. That allegation or submission by the Claimant is rejected as not founded on material evidence.

30. I now turn to consider the issues the Court is asked to determine. I propose to deal first with issue (c).

I. Whether or not the Claimant was given the opportunity to be heard in accordance with section 50 (4) of the Employment Act [CAP 160]?

31. Section 50 of the Employment Act deals with the dismissal of an employee for serious misconduct. It is a critical section for dismissal for cause. Section 50 of the Act provides as follows:-

"50. Misconduct of Employee

(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.

(2) None of the following acts shall be deemed to constitute misconduct by an employee –

(a) trade union membership or participation in trade union activities outside working hours, or with the employer's consent, during the working hours;

(b) seeking office as, or acting in the capacity of, an employees' representative;

(c) the making in good faith of a complaint or taking part in any proceedings against an employer.

(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.

(5) An employer shall be deemed to have waived his right to dismiss an employee for serious misconduct if such action has not been taken within a reasonable time after he has become aware of the serious misconduct."

32. In this case, it is a fact that before the Claimant is dismissed for serious misconduct on 04 June 2015, the Defendant, by a letter dated 30 May 2015, wrote to the Claimant asking for clarifications regarding some facts as specifically stated in the letter. It is noted that the letter ended with the following:

"Considering these facts as proof of serious misconduct on your behalf, we are asking you to provide some explanations and clarifications on the points mentioned above."

33. The letter of 30 May 2015 is set for ease of reference. It reads:

May 30th 2015

Subject: Clarifications regarding some facts

After noticing that a high number of data and files had been deleted from your computer during your last leave, we have discovered the following on your computer:

You were downloading filed on the following websites (among others): expresssleech.cm, 4upld.com, Torent411 and youtubedownloadersite.com. You were also streaming and watching videos during working hours.

The email address that was used was: goldorack256@yahoo.fr

With the account: goldorack256

An enormous amount of downloaded files were then discovered on your computer, including:

- *Video Games*
- *Fitness*
- *Movies*
- *Comic Books*
- *MP3 Files*
- *AND a high amount of pornographic documents (of different genre and type: movies, photos, books and others) saved under different folder names:*

---Save du 500 Go---; ---Save Dur Caroline ---; expressleech

Different history and recent tabs on your computers activity, since June 2014, confirming the downloading and viewing of the different media described above.

Considering these facts as proof of serious misconduct on our behalf, we are asking you to provide some explanations and clarifications on he points mentioned above.

Regards,

34. By perusing subsections (4) of the section 50 above, I am satisfied that the Defendant by the letter of 30 May 2015, had given the Claimant an opportunity to answer to the factual allegations made against him. The Defendant has

given the Claimant an opportunity to be heard. The Claimant did not dispute whether or not the time given between the letter dated 30 May 2015 and the dismissal letter dated 04 June 2015 was not a reasonable opportunity. The Claimant disputed that the Defendant failed to provide him an opportunity to be heard as he did not receive the letter dated 30th May 2015. I have found against the Claimant that the Defendant has given an adequate opportunity to respond and give explanations as requested. The facts in this case show that when the Claimant was informed of the factual allegations put against him, he asked to leave the office of the Defendant for about 30 minutes to think about them and discussed them with his wife. The Claimant never returned to his office. He did not respond to the factual allegations put against him and did not either respond to the telephone calls to him on 30 May 2015. In that circumstance, I am satisfied that the letter of 30 May 2015 to the dismissal letter of 4 June 2015 constituted a reasonable opportunity for him to answer and be heard.

35. My answer to the issue (c) is in the affirmative (yes). The Claimant was given a reasonable opportunity to be heard in accordance with section 50 (4) of the Employment Act. The burden of establishing "serious misconduct" under section 50 (1) of the Employment Act rests and squarely on the employer to establish on a balance of probabilities (see **Government of Vanuatu v. Mathias [2006] VUCA; CAC 10.06 (1 June 2006)**). I next deal with issue (a).

II. Whether or not the Claimant's dismissal for serious misconduct was justified?

36. In this case, factual material evidence exist to dismiss the Claimant for cause ("serious misconduct"). However, Mr. Guillaume Debay, like any other employee working in the public or private sector has legal rights protected by the law. He is entitled to the procedural fairness in the manner he has been dismissed under s.50 (3)(4) and (5) of the Employment Act. The fact that the Claimant did not provide any explanations or responses to the allegations made against him as requested by the Defendant, is not a license for the Defendant not to comply with s.50(3) of the Employment Act. As I have decided earlier, I am satisfied the Defendant by the letter of 30 May 2015 has given an adequate opportunity to the Claimant to be heard in explaining and answering the factual allegations made against him. This is in relation to the opportunity given to the

Claimant (employee) to answer to the nature of allegations and the specific and particulars of the allegations made against him. I take it that section 50 (4) is the relevant subsection.

37. The next question is when the dismissal letter dated 04 June 2015 was made, whether the Defendant gave the Claimant an opportunity to make submissions on the circumstances of section 50 (3) of the Employment in relation to his intended dismissal. Section 50 (3) reads:

"50. Misconduct of Employee

(1) .....

(2) ....

(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...."

38. On perusal of subsection (3) above, dismissal is the only course that the employer can take. As a matter of justice and procedural fairness, the Claimant (as employee) must have an opportunity to be heard or make submissions on the decision to dismiss him or not to dismiss him but to consider options (alternatives) on the circumstance of the case if there is any. The Claimant is the only person to make such submissions or through his lawyer but in this case, the Claimant terminated his lawyer as I mentioned at the beginning of this judgment.

39. I set out below the letter of dismissal dated 04 June 2015:-

June 4th 2015

Subject: Letter of dismissal

During our meeting on Monday morning from 8.30am to 9.30am in the offices of Pacific Passion, you failed to explain and clarify any of the facts you have been accused with.

You then proceeded to leaving the office asking for 30 minutes to think, but since 9.30am on June 1st, you have not returned to the office and did not answer the phone.

Having respected the 48 hour delay required
By the labour inspectorate, we hereby notify you of your dismissal for serious misconduct.

The company hold your salary and paid leave for the month of May as well as any amount on your accounts, which you can collect.

Regards,

40. The letter of dismissal of 4 June 2015 does not show whether the Defendant before preparing and sending it to the Claimant complied with the provisions of subsection (3) of s.50 of the Employment Act. Further, there is no evidence that he Defendant (employer) had applied his mind in considering section 50 (3) of the Employment Act when making the decision to dismiss the Claimant on 4 June 2015. I hold that the dismissal of the Claimant (Guillame Debay) on 4 June 2015 was unjustified, although, the Defendant paid the Claimant his leave entitlements and the Claimant's salary for the month of May 2015.

41. I answer to issue (a) in the negative (No). The dismissal of the Claimant on 4 June 2015 was unjustified as the Defendant did not comply with section 50(3) of the Employment Act. The case authority on the point is **Public Service Commission –v- Tari [2008] VUCA 27 Civil Appeal case No.23 of 2008 (4 December 2008)** where the Court of Appeal held at page 3 of the judgment:

> *"We are satisfied the process used to dismiss Mr. Tari was according to law save for compliance with s.50 (3) of the Employment Act."* This is what happened in this case. I next consider issue (b).

III. Whether or not the Defendant was liable for breach of contract?

42. On 20 February 2015, the Defendant (as employer) and the Claimant (as employee) signed an employment contract for a period of 1 year commencing 1 March 2015 to 1 March 2016. The Claimant was paid a monthly salary of VT300, 000. The contract was to expire on 1st March 2016.The Defendant (as employer) terminated the contract of the Claimant (as employee) by the letter dated 4 June 2015 for serious misconduct. The contract was exhibited at Annexure "A4" of the sworn statement of the Claimant (the terms and clauses

of the contract were in French language). Its clause 6 deals with Repudiation (Resiliation du contrat). Clause 6(1) provides:-

"The parties may put an end to the employment in the following way:-

c) By the employer in accordance with the provisions of the law.

d) By the employer without notice or payment in lieu of notice for valid cause in respect to this contract and "cause" may mean notably:

(i) Any breach of any clause of this contract by the employee, at the exclusive discretion of the employer;

(ii) .....

(iii) ....

(iv) Breaches by the employee of the laws, including any act of dishonesty such as or misappropriation;

(v) ....

(vi) Misconduct of the employee the gravity of which, would according to the employer for the fact that the employee is considered as his employee; and

(vii) ...."

43. On 04 June 2015, the Defendant terminated the contract of employment of the Claimant for serious misconduct. The evidence is overwhelmingly to this effect. The Claimant was continuously employed by the Defendant through different staged contracts from October 2012 to 04 June 2015. In June 2014, the Claimant said the Defendant provided him a computer to use for his work as the shop manager of the Defendant. The Claimant, during the working hours and after working, used the Defendant's computer given to him for his professional work, and downloaded material items including pornographic material classified as soft porn. On 04 June 2015, the Claimant was dismissed for serious misconduct without notice or payment without notice in lieu. The letter of 04 June 2015 was consistent with the provisions of clause 6 of the contract of employment of the Claimant signed on 20 February 2015. However, clause 6 (1) (b) provides that the parties may repudiate or put an end to the contract and paragraph (b) of sub clause (1) of clause 6 provides that if it is by the employer, the employer putting an end to the contract has to comply with the provisions of the law. The law includes the contract and the statutory

legislations. Here I think section 50 of the Employment Act [CAP 160] is critical. Section 50 of the Employment Act has been defined earlier. There is no need to define the section again. I should only refer to it in the relevant part of the judgment.

44. It is noted that on 30 May 2015, Mr. Marceau on behalf of the First Defendant wrote a letter to the Claimant, Guillaume Debay, and asked him to give his explanations and responses to these alleged facts. The letter is set out below for ease of reference:

> *May 30th 2015*
>
> *Subject: Clarifications regarding some facts*
>
> *After noticing that a high number of data and files had been deleted from your computer during your last leave, we have discovered the following on your computer:*
>
> *You were downloading files on the following websites (among others): expresssleech.cm, 4upld.com, Torent411 and youtubedownloadersite.com. You were also streaming and watching videos during working hours.*
>
> *The email address that was used was: goldorack256@yahoo.fr*
>
> *With the account: goldorack256*
>
> *An enormous amount of downloaded files were then discovered on your computer, including:*
>
> - *Video Games*
> - *Fitness*
> - *Movies*
> - *Comic Books*
> - *MP3 Files*
> - *AND a high amount of pornographic documents (of different genre and type: movies, photos, books and others) saved under different folder names:*
>
> *---Save du 500 Go---; ---Save Dur Caroline ---; expressleech*
>
> *Different history and recent tabs on your computers activity, since June 2014, confirming the downloading and viewing of the different media described above.*
>
> *Considering these facts as proof of serious misconduct on our behalf, we are asking you to provide some explanations and clarifications on he points mentioned above.*
>
> *Regards,*

45. It is noted that the Defendant considered these alleged facts as proof of serious misconduct on the Claimant's behalf, he then asked the Claimant to provide some explanations and clarifications. It is noted that the Claimant did not use the opportunity given to him to explain and answer to the alleged facts put against him. He did not answer to the telephone calls of the Defendant (employer) either.

46. The Defendant obtained advice from the Department of Labour, waited for 48 hours and on 4 June 2015, prepared and sent the letter of dismissal of the Claimant. As noted earlier, the Defendant failed to comply with section 50 (3) of the Employment Act. The dismissal of the Claimant may be based on evidence of misconduct which was serious but the process to dismiss the Claimant on 4 June 2015, was wrongful as the Defendant failed to comply with section 50 (3) of the Employment Act. This constitutes a breach of the contract of employment executed between the parties on 20 February 2015. In law, the Defendant is liable for the breach of the said contract. The Court of Appeal in **Republic of Vanuatu –v- Tari [2012] VUCA 6 Civil Appeal case No.08 of 2012 (4 May 2012)** dealt with this issue when the Court held:

> *"15. In analyzing whether the appellant is correct in its claim that no award of common law damages should have been made by the Judge there are two important principles to be kept in mind. Firstly, the purpose of an award under s. 56 (4) of the Employment Act. This Court in a number of cases has observed that s. 56 (4) enables the Court to compensate an employee for any special damage suffered from an unjustified dismissal where the basic severance allowance is insufficient to do so:* ***Banque Indosuez Vanuatu Ltd v. Marie Ferrieur, Appeal Case 1 of 1990, 2 VLR (1989-1994), and Hack v. Fordham, [2009] VUCA 6****. This Court has said that in appropriate circumstances section 56 (4) may also be used to compensate an employee to reflect the circumstances of his or her dismissal:* ***Vanuatu Broadcasting and TV Corporation v. Malere & Ors. [2008] VUCA 2****.*
>
> *16. The second important feature is to consider the extent of common law damages awarded in breach of employment contract cases. Any right to damages in common law can only arise from a breach of the employment contract. The Republic accepts there was a breach in this case. That breach of contract by the*

employer entitled Mr Tari at least to his wages for the remaining portion of his contract.

17. *Are further damages claimable however? In* ***Melcoffee Sawmill Ltd v. George [2003] VUCA 24****, this Court considered early English authority as to the right of an employee to recover damages for the manner of the wrongful dismissal and for any difficulty in obtaining employment."*

This Court then considered the approach in Australia and more recently in England and the law in Vanuatu as to damages for breaches of employment contract.

We said "we are of the view that at common law there should be some recompense to an employee who is being unjustifiably and unexpectedly dismissed". This Court therefore recognized that an employee could be entitled to compensation for the distress and humiliation needlessly inflicted upon him by his employer in the manner in which he was dismissed.

18. *Finally in Banque Indosuez Vanuatu Ltd (supra), this Court noted that common law damages cannot be awarded for loss of future opportunities by an employee and "in particular any difficulty in obtaining future employment." (See also Addis v. Gramophone Co. Ltd (supra). In Johnson v Unisys Ltd (2003) AC 518 HL an employee sought damages for loss of earnings claiming the manner of dismissal meant he had been unable to find work. His claimed failed. Their Lordships refused to extend the recovery of damages to such cases. This was especially so their Lordships said where the employee had legislative remedies for wrongful dismissal. Section 56(4) provides legislative remedies for wrongful dismissal in this case.*

47. In this case too, I think I will consider this question on the same basis of s.56 (4) and any entitlement of the Claimant under this section 56(4) will be considered in the next and final issue. I now do so.

VI. Whether the Claimant was paid his entitlements and annual leaves by the Defendant

48. In this case, it is noted that the Defendant dismissed the Claimant by letter dated 4 June 2015 and paid him the balance of his annual leaves (21 days leave) and a month salary covering the month of May being the last month of employment with the Defendant. The Claimant accepted he signed two cheques of VT300, 000 each corresponding to the balance of his leaves and the salary for the month of May 2015.

49. The Claimant claimed for leave benefits covering the former period of the contract. I take it that it is a claim with no extra evidence in support apart from the balance of leave entitlements of 21 days admitted and that the Claimant accepted payment on 12 June 2015. It is already settled.

50. However, I think in the circumstance of this case and on the evidence, the Claimant is entitled to his severance allowances calculated in this way:-

    Severance pay

    300, 000VT x 2 = 600, 000VT

51. The Claimant will be compensated in the manner of the breach of his contract by the recourse of the legislative remedies under section 56 (4) of the Employment Act. The circumstances of the present case justified a multiplier of 2. The Claimant is entitled to 600, 000VT x 2 = 1, 200, 000VT

52. In this case it is noted that because the process of dismissal was unjustified, section 55 (1) is not applicable.

53. The Claimant claimed for 8 months extra of the balance of his contract of employment signed on 20 February 2015 with the Defendant. This claim is refused. The Claimant said he stopped working for the Defendant on the 4th of June 2015 when he received his dismissal letter dated 4th June 2015. The case authority in support of this proposition is the case of **Robertson v. Luganville Municipal Council [2001] VUCA 14, Civil Appeal Case 09 of 2001 (November 2001)** when the Court of Appeal stated:-

> Although not specifically argued on the appeal, the claims for relief in paragraphs 3 and 5 of the Plaintiff's original claim appear to reflect a common misunderstanding about contracts of employment. Although with other contracts the general rule is that a purported termination that is ineffective in law does not bring the contract to an end, and that rights may continue to accrue under the contract until it is lawfully terminated, that rule is modified in contracts of employment. Contracts of employment are subject to an exceptional principle, sometimes referred to as 'no work, no pay'. The most comprehensive statement of this principle is that of Dixon J in Automatic Fire Sprinklers v. Watson **[1946] HCA 25; (1946) 72 CLR 435** at 465 who said that a contract of employment:

"is commonly understood as involving no liability for wages or salary unless earned by service, even though the failure to serve is a consequence of the master's wrongful act. It is, of course, possible for the parties to make a contract for the payment of periodical sums by the master to the servant independently of his service... But, to say the least, it is not usual. The common understanding of a contract of employment at wages or salary periodically payable is that it is the service that earns the remuneration and even a wrongful discharge from the service means that wages or salary cannot be earned however ready and willing the employee may be to serve and however much he stand by his contract and decline to treat it as discharged by breach."

An employee who is wrongfully dismissed cannot recover wages after the date of his dismissal. The employee may have other remedies based on breach of contract, but in the present case the appellant's employment was terminated lawfully that question does not arise.

54. The Claimant claimed for 14 days' notice. In the circumstances of this case, the Claimant is not entitled to the 14 days' notice or payment of 14 days in lieu of Notice. Section 50 (1) of the Employment Act applies in this case.

55. The Claimant is entitled to 5% on the total amount of Vt 1,800,000 to be paid to the Claimant by the Defendant per annum from 4 June 2015 (time of dismissal) to the date of payment.

56. In summary, the Claimant is entitled to:-

    i) Severance pay: VT300, 000 x 2 = VT600, 000

    ii) Entitlements under s.56 (4) of multiplier 2 corresponding to the compensation for breach of contract: VT1, 200, 000.

    iii) Total amount is VT1, 800, 000.

    iv) Interests at 5% on this amount of VT1, 800, 000 per annum from the date of termination (04 June 2015) until the date of payment.

57. The Claimant is entitled to his costs on the standard basis and such costs are to be determined failing agreement.

58. The Defendant is ordered to pay the total amount of VT1, 800, 000 by 14 days from the date of this judgment i.e. 23 April 2019.

Dated at Port-Vila, this 9th April 2019
BY THE COURT

Vincent LUNABEK
Chief Justice

REPUBLIC OF VANUATU
COUR COURT
LEX SUPREME LEX
REPUBLIQUE DE VANUATU