

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

Civil
Case No. 13/130 SC/CVL

BETWEEN: **Benuel Tarilongi**
Claimant

AND: **Republic of Vanuatu**
Defendant

Date of Hearing: 16 April 2020
Before: Justice G.A. Andrée Wiltens
In Attendance: Mr P. Fiuka for the Claimant
Mr L. Huri for the Defendant
Date of Decision: 22 April 2020

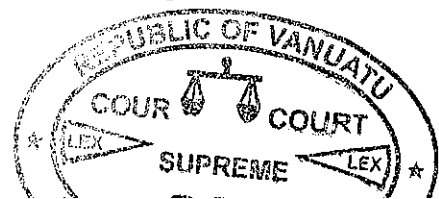
JUDGMENT

A. Introduction

1. This is a long-standing employment dispute.

B. Background

2. Mr Tarilongi was employed by the Public Service Commission ("PSC") of Vanuatu. He commenced such employment on 2 February 1987. He held various posts within the Department of Biosecurity, including as Director.
3. Mr Tarilongi's employment was terminated on 18 February 2013 by way of a letter from the PSC Chairman suggesting there had been serious misconduct. It is now accepted that the termination was unjustified.
4. By way of Claim dated 14 June 2013, Mr Tarilongi sought damages against the State under a number of heads totalling VT 79,701,867.



5. It is now accepted that the Claim be significantly reduced. Mr Fiuka abandoned the claims for damages relating to breach of contract, housing allowance, common law damages, child allowance and repatriation.
6. Equally some parts of the Claim are now admitted by Mr Huri. By Order of this Court on 24 October 2016, a large proportion of the claim for severance was agreed. The sum then agreed as owing was VT 10,799,769 – which was paid to the Claimant that very day. There was no complete agreement as a dispute remained as to when Mr Tarilongi commenced his employment with the PSC. That has now been resolved, and it is agreed that the severance sum be increased by VT 207,591 to take into account the 15 months longer period of service from 2 February 1987 as now acknowledged.
7. As well, 3 months of VNPF payments are accepted as being owed, which amounts to a total of VT 25,401.

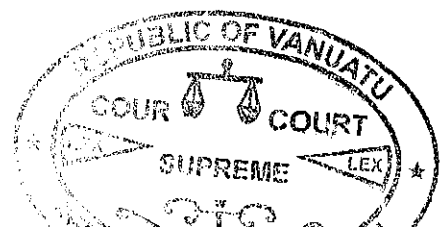
C. Remaining Issues

8. There are only two further matters to be determined. Firstly, pursuant to section 56(4) of the Employment Act ("the Act"), the Court shall, where it finds the termination of employment to be unjustified, order the employee be paid the severance allowance multiplied by up to a factor of six times.
9. Secondly, Mr Fiuka's Claim sought interest on all the various payments at 10% per annum. Mr Huri responded that the usual Supreme Court rate is 5% per annum.

(i) Section 56(4) multiplier

10. Mr Fiuka sought the highest multiplication be applied. His argument was that this was a mandatory provision, an argument difficult to accept. The mandatory aspect of section 56(4) of the Act is that the Court must make a decision as to whether the severance allowance be multiplied by up to a factor of 6 times; but it is not mandatory that the Court must impose the highest multiplier.
11. Mr Fiuka pointed to the various factors that might affect this assessment as set out in his written submissions. He submitted that the following paraphrased aspects were uncontested by the State:

- Mr Tarilongi was a long serving employee (26 years);
- Mr Tarilongi was dismissed on the pretext of previously disproved allegations;
- The State disclosed Mr Tarilongi's dismissal to the Daily Post and Radio Pacific Island Report, which affected Mr Tarilongi's reputation;
- The State treated Mr Tarilongi without care;
- Mr Tarilongi suffered financially in numerous ways as a result of his wrongful dismissal;



- Mr Tarilongi's family suffered stress and anxiety; and
 - Mr Tarilongi has not been able to secure new employment.
12. Mr Huri submitted that the lowest factor of multiplication be determined as sufficient in this case. Mr Huri relied on the authority in particular of *Sakari v Origin Energy LP Gas & Appliance Suppliers Ltd* [2014] VUSC 47; but also *Banque Indosuez Vanuatu Ltd v Ferrieux* [21990] VUCA 3, *Vanuatu Broadcasting and Television Corporation v Malere* [2008] VUCA 2 and *Berukilukilu v Government of the Republic of Vanuatu* [2016] VUSC 94. Mr Huri also relied on the sworn statement of M Toalak filed in support of the defence.
 13. Mr Toalak is the current Director of Biosecurity Vanuatu. Much of his sworn statement deals with aspects of the Claim that have now been abandoned by Mr Fiuka or agreed by Mr Huri. As well, Mr Toalak gives evidence of Mr Tarilongi's experience and expertise and opines Mr Tarilongi should have no difficulty in finding employment. He comments also on the assets of Mr Tarilongi and impliedly challenges the claim of hardship caused by the termination. Mr Toalak disputes that details of Mr Tarilongi's dismissal were disseminated by the State.
 14. M Toalak explains that delays in settling this case cannot all be laid at the feet of the State. Mr Tarilongi's previous counsel (plural) are said to be partly at fault in this regard. Further, despite being dismissed in 2013 and losing his entitlement to housing, Mr Tarilongi remained in subsidised State housing until 2017. Mr Toalak pointed to the State making an offer to resolve the case in May 2014, which was met by an unrealistic counter offer

(ii) Interest

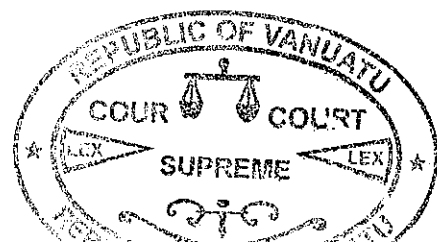
15. Mr Fiuka accepted that interest on the amounts owing be fixed at the usual Supreme Court rate of 5% per annum from 15 October 2018. There was no basis on which to award interest at a higher rate. The date of 15 October 2018 comes from when the Application for the Assessment of Damages was filed in the Supreme Court.

D. Discussion

16. There is in reality only one aspect of the case that requires determination by this Court.
17. The basis on which to determine at what rate the severance allowance is to be multiplied is not set out in the legislation. The Court of Appeal appears to have first given the matter some consideration in the *Banque Indosuez* case. The Court held that aggravated or punitive damages should not be part of this assessment. Further, any difficulty in finding fresh employment cannot found any award of damages. The Court stated:

"[Section 56(4)] merely enables the Court to compensate an employee for any special damage which he has suffered by reason of an unjustified dismissal, if the basic severance allowance is insufficient for that purpose."

18. The Court of Appeal also cautioned against compensating employees twice for the same wrong. Therefore, it was considered that any award of damages at common law should be set off against any award under section 56(4) of the Act.



19. The Court of Appeal in the *Vanuatu Broadcasting* case, confirmed my doubts regarding Mr Fiuka's submission that it was mandatory to multiply the severance allowance by 6. The Court stated:

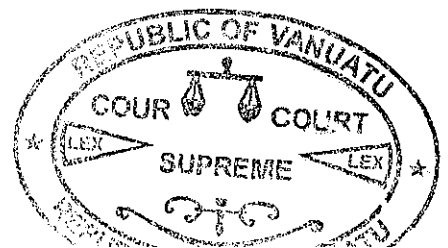
"On the question of the possibility of an assessment of 6 times the severance sum under Section 56(4) the first thing to be noted is that it is not an automatic entitlement. The Court has an ability to make an order up to that maximum but it is not a right. It requires an assessment of the circumstances and a proper judicial determination to be made."

20. I did not glean assistance from the *Berukilukilu* case. Some of the factors listed in that case as impacting on the assessment are in my view contrary to the Court of Appeal statements on the subject. The case of *Sakari* was of assistance in that a further principle was spelt out, namely that damages are not to be awarded for the manner of dismissal.

21. I now look at the matters raised by Mr Fiuka to see if and how they apply to the assessment of the appropriate multiplier:

- Mr Tarilongi was a long serving employee (26 years). That is true and is reflected in the large amount of the severance allowance.
- Mr Tarilongi was dismissed on the pretext of previously disproved allegations. The manner of dismissal is not relevant.
- The State disclosed Mr Tarilongi's dismissal to the Daily Post and Radio Pacific Island Report, which affected Mr Tarilongi's reputation. This is denied by Mr Toalak. Regardless of the causal allegation, the fact remains that Mr Tarilongi's reputation would have been diminished. That equates to special damage.
- The State treated Mr Tarilongi without care. The State is meant to be a model employer. It has fallen well short of that standard in the treatment of Mr Tarilongi. That is also special damage.
- Mr Tarilongi suffered financially in numerous ways as a result of his wrongful dismissal. The sudden unexpected loss of income is a factor of relevance, regardless of Mr Tarilongi's assets and supposed abilities. His dismissal occurred in 2103. The consequences for him are finally being resolved in April 2020. I note Mr Toalak's comments regarding the delays caused by counsel – but that cannot necessarily be attributed to Mr Tarilongi. This too equates to special damage.
- Mr Tarilongi's family suffered stress and anxiety. There is no evidence to suggest that anything out of the ordinary is involved. I do not consider this relevant.
- Mr Tarilongi has not been able to secure new employment. This is a matter that cannot be taken into account.

22. The end result that I arrive at is that the severance allowance be multiplied by 3, pursuant to section 56(4) of the Act to take into account special damage occasioned to Mr Tarilongi that is not adequately reflected in the bare severance allowance.



E. Result

23. The State is to pay Mr Tarilongi the VT 207,591 additional severance payment now accepted as owed. The State is to also pay Mr Tarilongi the VT 25, 401 outstanding VNPF contributions.
24. The severance allowance total is VT 10,799,769 plus VT 207, 591, namely VT 11,007,360. That sum multiplied by 3 equals VT 33,022,080.
25. Interest on the amounts owing, totalling VT 33,255,072, is fixed at 5% per annum from 15 October 2018.
26. Counsel agreed that costs in favour of Mr Tarilongi be ordered. The quantum of those costs, if not agreed between counsel is to be settled by taxation.
27. Pursuant to Rule 14.5(1), I now schedule a Conference at 1.30pm on 7 May 2020, to ensure the judgment has been executed or for the judgment debtor to explain how it is intended to pay the judgment debt. For that purpose, this judgment must be served on the Second Defendant.

Dated at Port Vila this 22nd day of April 2020
BY THE COURT


Justice G.A. Andree Wiltens

