

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

Civil Appeal  
Case No. 24/3248 SC/CIVA

[2025] VUCA 9

**BETWEEN:** REPUBLIC OF VANUATU  
Appellant

**AND:** APOLINE SUMPTOH  
Respondent

**Coram:** *Hon. Chief Justice V Lunabek*  
*Hon. Justice M O'Regan*  
*Hon. Justice R White*  
*Hon. Justice O Saksak*  
*Hon. Justice D Aru*  
*Hon. Justice E Goldsbrough*  
*Hon. Justice M A MacKenzie*

**Counsel:** *Mr T Loughman for the Appellant*  
*Mr J Vohor for the Respondent*

**Date of Hearing:** *6<sup>th</sup> February 2025*  
**Date of Judgment:** *14<sup>th</sup> February 2025*

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## JUDGMENT

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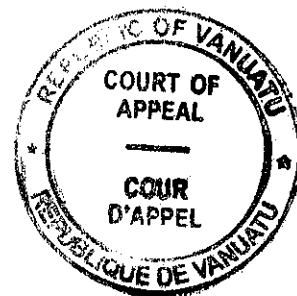
### Introduction

1. This is an appeal against a decision of the Supreme Court dated 19 August 2024 in relation to the calculation of the severance allowance payable to the Respondent, Mrs Sumptoh.<sup>1</sup>
2. Mrs Sumptoh was employed by the Public Service as a Customs Officer for 15 years.<sup>2</sup> On 26 June 2020, she voluntarily resigned, and ceased employment on 31 December 2020. In January 2021, Mrs Sumptoh was paid her various employment entitlements, including a severance allowance of VT 1,650,456, calculated at the rate of one month remuneration for each year of service.
3. She believed however, that she was entitled to a severance allowance of two months remuneration per year of service. Therefore, on 19 May 2023, Mrs Sumptoh issued proceedings seeking a further severance payment of VT 1,650,456, being an additional one month's remuneration per year of service. The Republic disputed Mrs Sumptoh's claim. Their position was that she was entitled to a severance allowance at the rate of one month per year served, and not two months. The defence was based on s.56(2) of the Employment Act [CAP 160] and their interpretation of Circulars issued by the Public Service Commission ('PSC') regarding severance allowances for members of the Public Service.

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<sup>1</sup> *Sumptoh v Republic of Vanuatu [2024] VUSC 243*

<sup>2</sup> *Her employment commenced on 10 October 2005 and ended on 31 December 2020*



4. The primary Judge rejected the defence as being without merit and held that Mrs Sumptoh was entitled to a severance allowance at the rate of two months remuneration per year of service. While acknowledging that s 56(2) of the Employment Act provided for the severance allowance at a rate of one month's remuneration per year of service, the primary Judge determined that the effect of PSC Circular No 29 dated 2 September 2020 ('the 2020 Circular') was that all public service employees were entitled to a severance allowance of two months' remuneration for each year of service. In so finding, the primary Judge relied on observations made by this Court in *Republic of Vanuatu v Watson* [2023] VUCA 31 as to the unconditional nature of the 2020 Circular. Accordingly, judgment was entered in Mrs Sumptoh's favour in the sum of VT 1,650, 456.

### **Appeal Grounds and contentions**

5. The appeal was advanced on three grounds of appeal, which overlapped. It is unnecessary to consider the grounds separately. What the Appellant contends is that the primary Judge erred in finding that Mrs Sumptoh was entitled to a severance allowance of two months remuneration per year of service because she wrongly construed the 2020 Circular as applying to all public service employees.<sup>3</sup>
6. Mr Vohor, for Mrs Sumptoh, contends that the primary Judge did not err. His submission is that the effect of the 2020 Circular is that all public servants were to be paid severance at the rate of two months per year served.

### **Consideration**

7. Part 11 of the Employment Act ('the Act') creates a specific regime with regard to payment of a severance allowance to employees. Section 54 identifies the qualifying circumstances and s.56 addresses the method of calculating the allowance.<sup>4</sup>
8. Where an employee voluntarily resigns, as Mrs Sumptoh did, the severance allowance is payable at the rate of one month's remuneration for each year of service, by virtue of ss.54(1)(d) and 56(2) of the Employment Act ('the Act') which say:

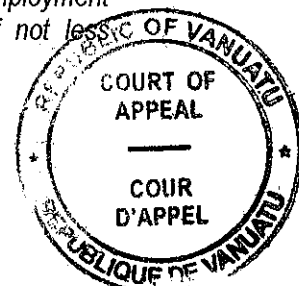
#### **54. Severance allowance**

*(1) Subject to section 55, where an employee has been in the continuous employment of an employer for a period of not less than 12 months commencing before, on or after the date of commencement of this Act, and*

- a. the employer terminates his employment; or*
- b. the employee retires on or after reaching the age of 60 years; or*
- c. the employer retires the employee on or after reaching the age of 60 years; or*
- d. where the employee has been in continuous employment with the same employer for a continuous period of not less*

<sup>3</sup> At paragraph 24

<sup>4</sup> See *Air Vanuatu (Operations) Limited v Molloy* [2004] VUCA 17



than 12 consecutive months, the employee resigns in good faith; or

- e. the employee ceases to be employed by reason of illness or injury and is certified by a registered medical practitioner to be unfit to continue to work,

The employer shall pay severance allowance to the employee under section 56 of this Act.

.....

**56. Amount of severance allowance**

(1) Subject to the provisions of this Part, the amount of severance allowance payable to an employee shall be calculated in accordance with subsection (2).

(2) Subject to subsection (4) the amount of severance allowance payable to an employee shall be –

(a) for every period of 12 months – 1 months remuneration;

(b) for every period less than 12 months, a sum equal to one-twelfth of the appropriate sum calculated under paragraph (a) multiplied by the number of months during which the employee was in continuous employment.

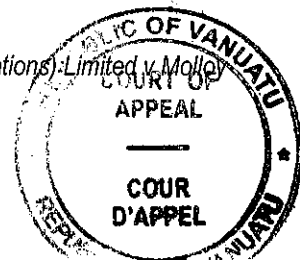
- 9. As this Court said in *Banque Indosuez Vanuatu Limited v Ferrieux* [1990] VUCA 3, the Act read as a whole provides certain minimum standards for employees. However, parties to an employment agreement can agree on conditions more favourable than provided for in the Act.<sup>5</sup>
- 10. The primary Judge acknowledged that the applicable rate of severance under ss. 54(1)(d) and 56(2) of the Act was one month's remuneration per year of service. However, the primary Judge reasoned that the effect of the 2020 Circular was that all public service employees were entitled to a severance allowance calculated at two months' remuneration per year of service.
- 11. Relevantly, the 2020 Circular provides:

*"This memo serves to inform all PSC employees that the Commission at its meeting No 17 of 15 September 2020 has approved to revoke the previous one (1) month rate of severance allowance to two (2) months per year of service.*

*The effective date for implementation of two (2) months rate of severance is 15 September 2020.*

*The Commission further approved in principle that 2 months rate of severance has retrospective effect to 20 October 2017. As such, former employees who had only received a severance of 1 month per year of service since 20 October 2017 are to be paid the additional 1-month severance....*

<sup>5</sup> See s 6 of the Act, *Banque Indosuez Vanuatu Limited v Ferrieux and Air Vanuatu (Operations) Limited v Molloy* [2004] VUCA 17.



*...The decision applies across the board for all line agencies and all public servants at any permanent level within the public service...*

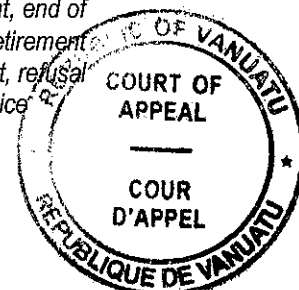
12. The Appellant contends that the 2020 Circular did not apply to all public service employees. Rather, it should be construed as revoking the instruction issued by the PSC on 20 October 2017 changing the severance allowance from two months' to one month's remuneration per year for a limited category of employees ceasing employment. The Respondent, on the other hand, contends that the 2020 Circular should be taken at face value, and therefore applied to all public service employees. Therefore, the primary Judge did not err.
13. To consider the competing contentions, some background is needed. The starting point is to consider the different categories of cessation of employment and the applicable severance allowance as provided for in the Public Service Staff Manual ('the staff manual'). As detailed in the sworn statement of Johnathon Iavere<sup>6</sup>, the staff manual provides for differing severance allowance rates depending on the reason for ceasing employment.<sup>7</sup> Notably, employees ceasing employment for age retirement, medical retirement and standing for election to Parliament are entitled to a severance allowance at the rate of two months' remuneration per year of service.<sup>8</sup> In comparison, the severance rate for all other categories of cessation of employment, including voluntary resignation, is two weeks remuneration per year of service.
14. However, at meeting No 21 of 2017, the PSC decided to reduce the severance allowance rate from the two months provided for in the staff manual for employees ceasing employment by reason of age retirement, early retirement and medical retirement, to one month per year of service.<sup>9</sup> Accordingly, on 20 October 2017 the PSC issued a detailed letter of instruction specifying that the severance allowance rate was to now be calculated on the basis of one month's salary per year of service and not two months as stated in the staff manual. This applied to three categories of employees ceasing employment- age retirement, early retirement and medical retirement.
15. In 2020, the PSC issued another instruction regarding the severance allowance rate. This is detailed in the 2020 Circular, which recorded that the PSC approved the revocation of "the previous one (1) month rate of severance allowance to two (2) months per year of service", and to have retrospective effect to 20 October 2017. It further provided that "As such, former employees who had only received a severance of one month payment per year of service since 20 October 2017 are to be paid the additional one-month severance per year of service."
16. Importantly, the Circular recorded that the decision applied across the board for all agencies and "all public servants at any permanent level within the service." The primary Judge construed that statement to mean that the two months' severance calculation applied to all public service employees. As such, she rejected the Appellant's argument that the 2020 Circular was limited to age retirement, early retirement and medical retirement.
17. The 2020 Circular is ambiguous and badly expressed. It does not refer to the instruction issued on 20 October 2017, and does not explicitly record that the two months' severance allowance only

<sup>6</sup> Filed on 5 July 2024

<sup>7</sup> The specific categories are listed at cl 5.1 – 5.14 of the staff manual- age retirement, medical retirement, end of temporary salaried employment, end of contract employment period, voluntary resignation, compulsory retirement as the result of a disciplinary hearing, immediate dismissal with cause, standing for election to parliament, refusal to accept a transfer, redundancy, removal of a Director-General or Director from office; and death in service

<sup>8</sup> See cl 5.1(b)(i), cl 5.2.3(a)(i) and cl 5.10(d))

<sup>9</sup> As provided for in s 44(1) and (2) of the Public Service Act [CAP 246]

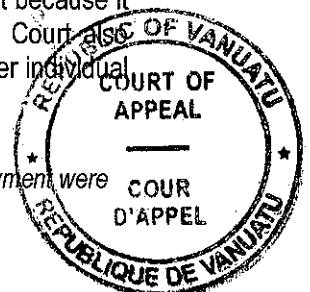


applied to employees ceasing employment by reason of age retirement, early retirement and medical retirement. That stands in stark contrast to the detailed and specific instruction issued by the PSC on 20 October 2017. The hint that the intent and purpose of the 2020 Circular was to reverse the 20 October 2017 instruction is that it refers to revoking the previous one month severance with retrospective effect to 20 October 2017.

18. The poor choice of language used in the Circular left open the argument that the two month rate of severance allowance per year applied to all public service employees. It is inexplicable that the 2020 decision was not expressed in clearer terms. That said, it is tolerably clear that the decision set out in the 2020 Circular only reverses the decision made on 20 October 2017, when considered in the wider context, as detailed above. We accept the contention that the 2020 Circular should not be considered in isolation and should be construed in context. We make the following points.
19. First, as we have said, the staff manual provides that only certain employees ceasing employment are entitled to severance of two months' remuneration per year of service. Saliently, these include age retirement and medical retirement, but not voluntary resignation.
20. Secondly, on 20 October 2017, the PSC reduced the severance allowance rate from the two months provided for in the staff manual for age retirement, early retirement and medical retirement, to one month.
21. Thirdly, the decision contained in the 2020 Circular to revoke the one month severance allowance had retrospective effect to 20 October 2017. This was the date the PSC issued the instruction to reduce the two months' severance allowance provided for in the staff manual to one month for age retirement, early retirement and medical retirement. That cannot be co-incidental. The references to 20 October 2017 in the 2020 Circular dated 2 September 2020 must mean that Circular was only intended to change the severance allowance for those affected by the decision of 20 October 2017.
22. Fourthly, the Minutes of meeting No 17 of September 2020 support such a construction of the 2020 Circular. The Minutes record that the PSC approved to revoke the previous one-month severance decision and resolved to implement two months severance retrospective to 20 October 2017 when the decision to pay one month for "this category" was made.<sup>10</sup>
23. We make two further points:
24. First, while the question of Mrs Sumptoh's severance entitlement must be determined at the time her resignation came into effect on 31 December 2020, the fact that the PSC extended the two months' severance allowance to other categories of cessation of employment in 2022, including voluntary resignation, is consistent with our view that the Circular of 2 September 2020 did not apply to all public service employees, but rather reversed the decision made on 20 October 2020. Otherwise, the 2022 Circulars were unnecessary.<sup>11</sup> However, this is not a factor we have relied on in reaching our conclusion.
25. Secondly, this Court's decision in *Republic v Watson* [2023] VUCA 31 does not assist because it dealt with a different issue in relation to the severance allowance rate. While the Court considered the construction of the 2020 Circular, the argument in *Watson* was whether individual

<sup>10</sup> Refer Appeal Book A, p 31

<sup>11</sup> In 2022, the PSC issued two Circulars advising that a number of categories of cessation of employment were entitled to two months' severance. One such category was voluntary resignation



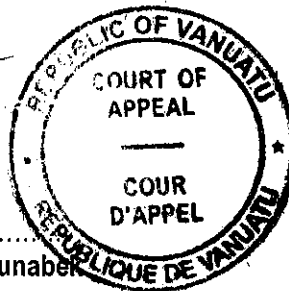
employment contracts had to be varied to include the two months severance allowance for the Circular to have effect. This Court rejected that contention and held that the unconditional nature of the Circular indicated that the variation was effective immediately. Relevantly, as noted, the reasons for issuing the 2020 Circular were not disclosed to the Court.

26. For these reasons, we consider that the primary Judge erred in holding that the 2020 Circular applied to all public service employees. Construed in context, the Circular was only intended to change the severance for those employees affected by the instruction issued by the PSC on 20 October 2017

#### **Disposition of the appeal**

27. We make the following orders:
- a. The appeal is allowed.
  - b. There is no order as to costs. Ordinarily, the Appellant would be entitled to costs. However, this was something of a test case. Further, as we have said, the poor choice of language in the 2020 Circular left open the argument that the change to the severance allowance applied to all public service employees.

**DATED this 14th day of February 2025  
BY THE COURT**



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Hon. Chief Justice, Vincent Lunabet