

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

Civil Case No. 250 of 2014 SC/CIVL

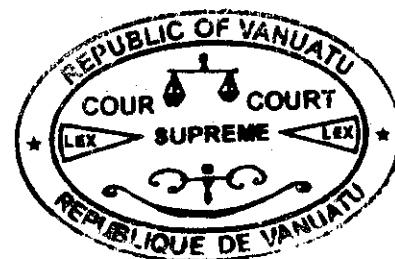
BETWEEN: BARRY QUARANI
Claimant

AND: AIRPORTS VANUATU LIMITED
Defendant

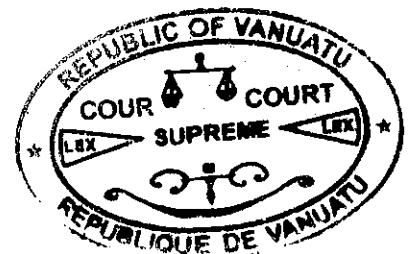
Date of hearing: December 12th 2016
Date of Judgment: March 17th 2017
Submissions Filed: December 20th 2016 and January 30th 2017.
By: Justice JP Geoghegan
Counsel: Felix Laumae for the Claimant
Nigel Morrison for the Defendant

JUDGMENT

1. These proceedings involve a claim by Mr Quarani that his position as Manager of Aviations Security with the defendant ("AVL") was unlawfully terminated on February 6th 2015.
2. Mr Quarani seeks damages against AVL in the sum of Vt 18,546,129 comprised as follows:-
 - a) Severance payment - Vt 16,999,980
 - b) Three months' notice - Vt 600,000
 - c) Payment of outstanding leave owing - Vt 63,000
 - d) Interest at the rate of 5% - Vt 883,149
3. The background to this matter is rather unusual.
4. Mr Quarani was employed by AVL since its incorporation in 2000.



5. On April 25th 2014, Mr Quarani's employment was summarily terminated. In a letter dated April 25th 2014 and signed by the Acting Chief Executive Officer of AVL, Mr Quarani was advised that the Board had received incident reports regarding Mr Quarani's disorderly, unlawful and irresponsible behavior arising from an incident on April 17th 2014 when it was alleged Mr Quarani was under the influence of alcohol. It was alleged, inter alia, that Mr Quarani had disturbed domestic flight operations and airline officials carrying out their duties, had used threatening offensive and insulting words against AVL Security Officers, had removed a company vehicle without proper authorization and had driven that vehicle while under the influence of alcohol. It was stated that Mr Quarani's conduct amounted to gross misconduct which in turn meant that his entitlements which would otherwise be payable were forfeited.
6. The dismissal had occurred without any disciplinary hearing or opportunity for Mr Quarani to be heard.
7. By letter dated November 4th 2014, Mr Quarani was reinstated by the then Chief Executive Officer of AVL Mr Peter Bong. That letter outlined that in a Supreme Court decision, the Court had ruled that an earlier shareholder's meeting terminating the Board of Directors was unlawful and therefore void. As such any decision made by the subsequent Board of Directors was illegal and of no effect. The letter went on to say that it had been brought to the Board's attention that Mr Quarani's employment was terminated by the "tainted" Board and that:-
- "As such, I wish to inform you that, such termination is illegal and is of no legal effect. You are therefore being reinstated to your former position as Manager AVSEC. Your entitlements will be backdate backed (sic) dated to a date of your terminations (sic)".*
8. On December 15th 2014 AVL conducted a disciplinary enquiry regarding the incident on April 17th 2014 which had given rise to Mr Quarani's earlier termination.
9. That hearing was conducted by the General Manager of Aviation Security Mr Abraham Nasak. During the course of the hearing Mr Quarani accepted that he was under the



influence of alcohol and a decision was made that he would be provided with a warning letter and be placed on six months "good behavior".

10. Unfortunately the matter did not stop there. Without any prior notice or warning Mr Quarani received a letter on February 6th 2015 from AVL's lawyers. That letter stated:-

"I am advised to inform you that the AVL Board of Directors reviewed your disciplinary hearing undertaken by Mr Abraham Nasak on 15th December 2014 at their meeting on 3rd February 2015. The Board has determined that Mr Nasak had erred in his conclusion and have revoked his decision and his letter to you dated 16th December 2014.

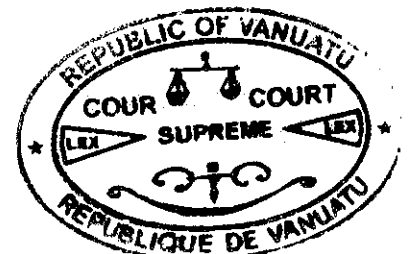
The Board has determined that by your own admission you were drunk on duty. By your own admission you do not recall the facts due to your being under the influence. The Board considered that your actions were a breach of the Aviation Security Act. The Board considered your actions to constitute serious misconduct under the Employment Act.

You are hereby advised that your employment with AVL is terminated with immediate effect.

The Board notes that you have had the opportunity to respond already. The Board considers that there is no alternative determination in your circumstances due to the severe nature of your breach".

11. Even if the original decision to give Mr Quarani a final warning was a lenient one, the actions of the Board were extraordinary.

12. AVL filed a statement of defence to Mr Quarani's original claim on August 14th 2014. On June 8th 2015, Mr Quarani filed an amended statement of claim. Despite directions requiring AVL to file a statement of defence to the amended statement of claim and sworn statements in support, AVL consistently failed to do so resulting in my making an order striking out the defendant's defence on May 31st 2016.

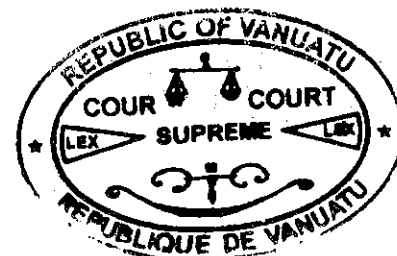


13. On August 16th 2016 Mr Morrison, who had not previously been acting for AVL appeared at a conference on behalf of AVL. Mr Morrison indicated that he may receive instructions to reinstate the statement of defence and I adjourned the matter to October 14th for a formal proof hearing. That date was subsequently changed by agreement to October 21st. The formal proof hearing could not proceed for reasons which do not need to be set out in this judgment. However Mr Morrison again advised that it was likely that he would be instructed to file an application to set aside the previous order in the proceedings striking out AVL's defence. The matter was adjourned to December 12th and a direction made that on the date the matter would proceed as a formal proof hearing or a directions conference depending on whether any applications were filed by AVL.

14. On December 12th Mr Morrison again appeared for AVL and I noted that no application had been made by AVL to reinstate its statement of defence. I was advised by Mr Morrison that AVL had been endeavoring to settle the matter by dealing directly with Mr Quarani rather than through lawyers. Mr Morrison sought an opportunity to file an application to reinstate the statement of defence, however I declined to grant that application given the significant period of time that AVL had already had to file such an application. Mr Quarani was present to give evidence if required and I directed that a formal proof hearing proceed.

15. Mr Morrison did not require Mr Quarani for cross examination and advised the Court that Mr Quarani's claim for severance of Vt 200,000 x 14 years and 2 months, namely Vt 2, 833, 330 was accepted by AVL. AVL also accepted Mr Quarani's claim for Vt 600,000 for three months' notice, Vt 63,000 for outstanding leave and Vt 883, 149 being interest on Mr Quarani's claim at the rate of 5%. The entry of judgment against AVL in respect of those sums was accordingly accepted by AVL.

16. What was not accepted was the claim by Mr Quarani pursuant to section 56 (4) of the Employment Act for the application of a multiplier of 6 in respect of severance. I directed the filing of submissions in respect of such a matter and those submissions have now been filed. This issue is the only issue for determination.



17. Section 56 of the Employment Act provides as follows:-

"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 –

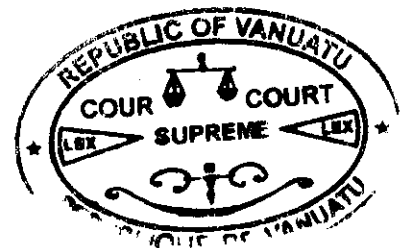
(i) half a month's remuneration, where the employee is remunerated at intervals of not less than 1 month;

(ii) 15 days' remuneration, where the employee is remunerated at intervals of less than 1 month;

(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.

(3) Where remuneration is fixed at a rate calculated on work done or includes any sum paid by way of commission in return for services, the remuneration shall, for the purposes of this section, be computed in the manner best calculated to give the rate at which the employee was being remunerated over a period not exceeding 12 months prior to the termination of his employment.

(4) The court shall, where it finds that the termination of the employment of an employee was unjustified, order that he be paid a sum up to 6 times the amount of severance allowance specified in subsection (2).



(5) Any severance allowance payable under this Act shall be paid on the termination of the employment.

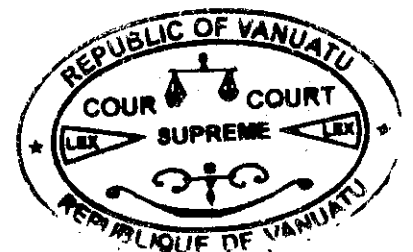
(6) The court may, where it thinks fit and whether or not a claim to that effect has been made, order an employer to pay interest, at a rate not exceeding 12 per cent per annum from the date of the termination of the employment to the date of payment.

(7) For the purposes of this section the remuneration which shall be taken into account in calculating the severance allowance shall be the remuneration payable to the employee at the time of the termination of his employment."

18. Section 56 (4) requires the Court by use of the mandatory term "shall" to order a multiplier of up to six times the amount of severance allowance "where it finds that the termination of the employment of an employee was unjustified".

19. It is clear in this case, and AVL appears to have accepted through its actions in these proceedings that Mr Quarani's termination of employment was unjustified. It was completely wrong for AVL to have put Mr Quarani through a disciplinary process with a clear outcome only to subsequently and completely without notice reverse that decision. The fact that Mr Quarani may have had the opportunity to be heard an earlier hearing could not relieve his employer of the obligation to enable him to be heard in respect of any further action. That is quite apart from the question of the legitimacy of the action in the first place. I am satisfied in the circumstances of this case that Mr Quarani's termination was unjustified.

20. While the Court does not have any discretion whether or not to apply a multiplier where it finds termination of the employment to have been unjustified, it clearly does have a discretion in respect of the specific multiplier to be applied.



21. In this regard Mr Laumae referred to the following matters as justifying the application of a multiplier of six:-

- a) That Mr Quarani was the longest serving employee of AVL having worked for AVL since its incorporation.
- b) That AVL treated Mr Quarani without "caring" for him as one of the longest serving employees.
- c) The suffering which Mr Quarani went through with his family since he was unjustly terminated; and
- d) The fact that Mr Quarani had to sell kava and did fundraising to pay for his children's school fees and day to day survival in Port Vila.

22. ~~The evidence given by Mr Quarani in respect of these matters is rather scant. As to personal hardship there are brief statements contained in sworn statements dated November 11th 2015 and October 20th 2016. At paragraph 21 of Mr Quarani's sworn statement dated 11th November 2015 he states:-~~

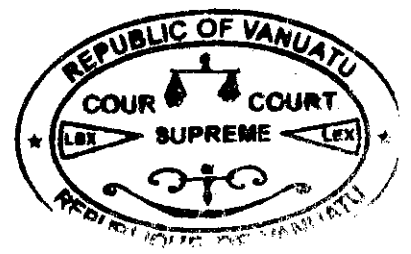
"21. I have suffered with my family in Port Vila. My children are without school fees. I have to make small fundraising making kava and sell to my families day to day livings, my children's school fees etc."

23. In his sworn statement of 20th October 2016 Mr Quarani states:-

"8. I have been left without salary since 25th April 2014 to 5th November 2014 a total of seven (7) months. I really suffered with my children and family in Port Vila where life is expensive.

9. I had to make fundraising every weekend to pay for day to day food and transport and school fees for my children. My friends came to support my fundraising."

24. There are no details given as to the extent of the fundraising required to pay for day to day expenses or whether or not income was earned by other members of the family or in other ways. It can readily be accepted however that Mr Quarani's dismissal and subsequent lack of income would have caused hardship.



25. As to the claim by Mr Quarani that he was the longest serving employee of the defendant I could not locate any such evidence but what is clear is that he was, prior to his dismissal, a very long standing employee.

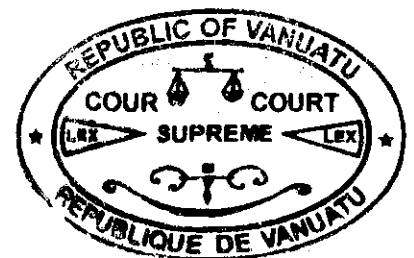
26. As to the contention that the defendant treated Mr Quarani without care given his long service, the same duty of natural justice and fairness applies to all employees regardless of their length of service. What is perhaps unique in this particular case however is that Mr Quarani was dealt with on three separate occasions in respect of the same incident. On two of those occasions he was dealt with without being given the opportunity to be heard. One might have thought that by February 6th 2015, AVL would appreciate the need to proceed with care and caution.

27. There is also a gap in Mr Quarani's evidence with reference to his position since February 6th 2015. His reference to a lack of salary was a reference to the period between April 25th 2014 and November 5th 2014 when he was reinstated. The reinstatement letter dated November 4th 2014 and produced by Mr Quarani stated that Mr Quarani's entitlements would be backdated to the date of his terminations. There is no reference in the evidence at all as to whether or not that occurred but the letter itself would certainly indicate that it was intended. It is not for the Court to speculate as to what actually happened. It is for Mr Quarani to provide appropriate evidence. The evidence given by Mr Quarani and referred to in paragraph [23] herein does not clarify the position at all.

28. For AVL, Mr Morrison referred to a number of authorities which have considered the approach to be taken under section 56 (4). In Malere & Ors. v. Vanuatu Broadcasting and Television Corporation¹, the Court of Appeal stated:-

"There are two possibilities with regard to the meaning of section 56 (4). In some cases it is being treated as a reflection of the circumstances which led to the dismissal and in others it has been treated more as compensatory for a person who is unable to obtain work.....It is possible that under either approach a good case could be advanced".

¹ [2008] VUCA 2



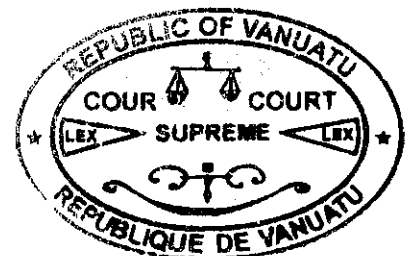
29. In the Supreme Court decision in Malere and Others v. Vanuatu Broadcasting and Television Corporation² Dawson J observed that the Court needed to take into account the circumstances existing at the time of the unjustified termination when it comes to assessing the amount to be applied. He listed the relevant factors the Court should consider as including:-

- a) Did the employee have a good work record?
- b) Had the employee been given any previous warnings?
- c) Was the unjustified dismissal a result of inept handling of the issue by the employer at the lower end or high handed arrogance at the higher end of the scale?
- d) Was the employee subjected to physical or verbal abuse by the employer at the time of the termination?

30. Dawson J also referred to factors subsequent to the termination of employment which are personal to the employee but could be considered as reasonably foreseeable to an employer as potential difficulties which might arise from the loss of employment. Those factors include:-

- a) The efforts the employee has made to mitigate his or her loss by looking for new employment.*
- b) The age, qualifications, skills and health of the employee with those factors irrelevant to his or her reemployment prospects.*
- c) If the employee has found new employment, is his or her new salary package better or worse than that which he or she has lost?*
- d) Has his or her health or that of the immediate family of the ex-employee suffered as a result of unjustified termination?*
- e) Have educational opportunities for the ex-employee's immediate family been lost as a result of the unjustified termination”.*

²[2009] VUSC 164



31. With reference to the personal circumstances that I have just referred to there is really no evidence from Mr Quarani in respect of any of those matters other than the broad reference which I have referred to earlier.

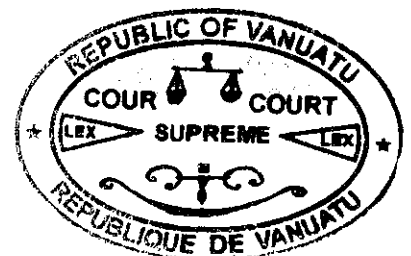
32. In Ati v. Vanuatu Commodities Marketing Board³ the Court of Appeal considered the multiplier applicable in circumstances where the appellant employee had been employed for almost ten years before dismissal, had had no prior notice of dissatisfaction with his services, had no prior notice of the reasons why he was dismissed and was not given any chance to respond to the allegations against him. The Court considered that a multiplier of 3 was appropriate.

33. In Hack v. Fordham⁴ the Court of Appeal upheld the application of a multiplier of 5 in circumstances where the dismissed employee had relocated to Vanuatu from Australia to take up employment, the termination was without notice, where the adverse effects on the respondent's family was so great that he had to send his family back to Australia and where the employee was required to sell his property in Australia to relocate to Vanuatu to take up the employment opportunity.

34. In considering the circumstances in this case and the factors which the Court is required to take into account, there is simply insufficient evidence to remotely justify the application of a multiplier of 6. However the circumstances around the termination of Mr Quarani's employment, the fact that he was dealt with three times in relation to the same incident and the fact that AVL acted with a degree of high handedness in finally terminating his employment justifies the application of a multiplier greater than 1, that being the multiplier submitted as appropriate by Mr Morrison. I also consider however that the Court is entitled to take into account the fact that there had been some contribution on Mr Quarani's part to the need for disciplinary measures to be taken in the first place. In assessing all of these factors I consider that the appropriate multiplier to apply in this case is a multiplier of 2.

³ [2013] VUCA 1

⁴ [2009] VUCA 6



35. Accordingly, judgment is entered in favour of Mr Quarani against AVL for the following sums:-

- a) Severance at - Vt 200,000 x 14 years and 2 months x 2 multiplier
- Vt 8,499,999
- b) Three months' notice - Vt 600,000
- c) Payment of outstanding leave - Vt 63,000
Total: Vt 9,162,999
- d) Interest on the judgment sum at the rate of 5% from 6th February 2016 to the date of judgment.

36. The claimant is entitled to costs and costs are awarded in favour of the claimant accordingly. Costs are to be as agreed within 14 days of the judgment or as taxed.

Dated at Port Vila, this 17th day of March, 2017

BY THE COURT

