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

Civil Case No.17/1344

BETWEEN: JACKLYN SESE
SUSAN NOEL
Claimants

AND: AIRPORT VANUATU LIMITED
Defendant

Coram: *Mr. Justice Oliver A. Saksak*

Counsel: *Jane Tari Aru for the Claimant*
Nigel Morrison for the Defendant

Date of Hearing: *16th May 2018*
Date of Judgment: *22nd June 2018*

JUDGMENT

Introduction

1. This is an employment case. Jacklyne Sese (JS) was employed as a cleaner by the defendant since 2000 until her suspension on 20th December 2016 and ultimate termination on 20th January 2017. She had worked for a total of 16 years.

2. Susan Noel (SN) also was employed as cleaner by the defendant from 8th January 2008 until her suspension on 20th December 2016 and ultimate termination on 20th January 2017. She had worked for 9 years altogether.

Complaints/ Allegations

3. Both claimants complained that their terminations were unlawful and unjustified in that-

    a) They were not given a fair hearing opportunity to answer the allegations against them,

b) The defendant had a pre-conceived judgment prior to the hearing,

c) There were other avenues available for the defendant to take,

d) Their terminations were disproportionate to their actions.

4. Both claimants claim that as a result they have suffered loss and damages for-

a) Breach of contract,

b) Loss of expected and estimated future income,

c) Severance multiplier of 6 times,

d) 3 months notice,

e) VNPF contributions for 3 months,

f) Annual leave, and

g) Interests and costs.

Defence

5. The defendant denied liability for all losses and damages claimed, and said the claimants were dismissed for serious misconduct but were paid in full their leave and notice entitlements. They further said they have withheld severance payments due to the claimants.

Burden of Proof

6. The onus of proof rested on the claimants to prove their claims on the balance of probabilities. For this purpose Jacklyn Sese relied on her sworn statement filed on 10th August 2018 (Exhibit C1) and Susan Noel relied on her sworn statement filed on 10th August 2017 (Exhibit C2). Both were cross-examined by Mr Morrison.

Evidence

7. The defendant relied on the evidence of Eric Paolo filed on 21st September 2017 (Exhibit D1) and on the evidence of Gregory Tari filed on 27th September 2017 (Exhibit D2). Both were cross-examined by Mrs Aru.

Submissions

8. Counsel for the Claimants filed written submissions on 25th May 2018 and Mr Morrison filed written submissions in response on 8th June 2018. Two issues have been raised for determination by the Court-

   a) Were the Claimants unjustifiably dismissed?

   b) If so, what payments are they entitled to ?

Discussions and Findings

9. In the evidence of both claimants they complained about the poor performances of duties by the third cleaner by name of Nettie Pierre. She commenced work in 2007 under the supervision of Jacklyn Sese. Complaints were made about her poor performances. She was served with 3 warning letters. She received one suspension but was then reinstated in December 2016 one week prior to the claimants being served with their suspension letters.

10. In comparison Susan Noel received one warning letter then a suspension in December 2016 followed by termination in January 2017. Mrs Aru argued that the defendant could have done the same it did to Nettie Pierre. In other words the company should have given the claimants 3 warning letters before suspension and termination. Having

failed and having given preferential treatment to Nettie Pierre, the defendant's action was disproportionate and therefore it was unlawful and unjustified.

11. Mr Morrison argued that what Nettie Pierre did or omitted to do and how the defendant treated her case had no relevance to the claimant's case. In my view that argument is not altogether correct. The reason is this that the defendant like every other employer, has only one set of rules or policies which apply equally to every employee. It certainly cannot be correct to say that those polices could be applied differently to some employees only and not to the others who are alleged to have committed or omitted to act or perform in accordance with the policies or rules of the employer.

12. In Eric Paolo's evidence Susan Noel received a warning letter on 16th November 2009 and a letter of caution on 20th May 2013. Further, all cleaners were reminded about their poor performances by letter dated 16th October 2014. The letter is not specific as to whom it was addressed. But on 6th December 2010 Jacklyn Sese received a notice of suspension. She was reinstated by letter dated 17th January 2011.

13. From what happened, Susan Noel expected or anticipated a final warning letter before her suspension and termination. Jacklyn Sese on the other hand had no warning letters before her first suspension in 2010 and in 2016.

14. It is not therefore surprising that the claimants would complain about unfairness in the process of their terminations in light of the treatment afforded to their collegue Nettie

Pierre. In my view their complaint is legitimate. The claimants have therefore shown on the required balance of proof that they were unfairly treated by the defendant.

15. It is common knowledge that section 50 of the Employment Act gives power to the defendant to dismiss for serious misconduct, however subsection (3) clearly states that dismissal may only happen where the employer cannot in good faith be expected to take another course. And the term "May" implies this is only a discretionary power.

16. It is clear from the evidence that defendant had set a precedent with Nettie Pierre's case. That course was open for the defendant to take in relation to Susan Noel and Jacklyn Sese. They did not do that and so I find the defendant did not comply with subsection (3) of section 50. I am satisfied the claimants' terminations were not made in good faith in the circumstances they were made.

17. Looking now at the charge sheet annexed as GT2 to the sworn statement of Gregory Tari (Exhibit D2). A charge sheet has 5 pages in all. They are all in English Language. References are made to section 6, 7, and 8 of the Company Policies. The claimants are simple employees presumably with low levels of education. In my view it is doubtful that the claimants understood what these 5 pages documents were all about, despite the evidence of Gregory Tari that he explained to each of them in Bislama before each of them pleaded.

18. Examining the Charge sheets carefully they are too general and vague. A good charge should be short and clear, with dates and times the alleged acts or omissions happened. The purported charges under section 6.12.3.2 list 5 alleged contravention

of responsibilities but each fail to specific the times and dates on which the acts or omissions alleged occurred. This in my view was a grave and serious error made by the disciplinary panel. Gregory Tari conceded in cross-examination that no dates or times were stated in the charges.

19. Further when we have those 5 charges, it was encumbened upon the panel to give opportunities to the claimants to answer each charge separately as they were put to them. From the evidence that is not what occurred. On page 5 of the charge sheets there is only one guilty plea recorded. This is consistent with the evidence of the claimants that at the hearing they were asked only one question and having answered, it was recorded against them as a guilty plea to all the other charges. That in my view could not be the correct approach.

20. Eric Paolo gave evidence about the claimants' time sheets annexed to his sworn statement (Exhibit D1) as "EP3". These show lateness to work, absence from work or leaving work early. These should properly have been particularised in the charges 2, 3, 4 and 5, but were not. The absence or omission of those particulars meant that the claimants were not given adequate opportunity to answer all the charges made against them. That being so, I am satisfied that the defendant had contravened section 50 (4) of the Employment Act.

21. Further, when each of the claimant received their letters of termination dated 20th January 2017 the Human Resource Manager advised "*that you have pleaded guilty to all charges laid against you*".

I find this to be incorrect and in direct contradiction to the one guilty plea recorded against them on page 5 of the charge sheets when 5 charges altogether were listed.

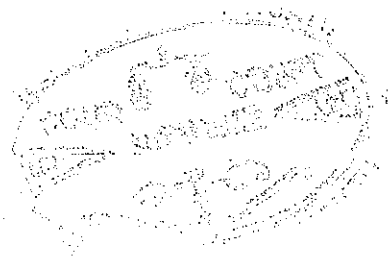
22. Furthermore these letters of 20th January 2017 were written and issued by the Human Resource Manager on the same date as the Disciplinary Panel sat. I find that it is in direct contradiction to the instruction of the Chair of the Panel contained in his email dated 25th January 2017 at 12:46pm (Annex GT3) which states-

> *" HR Manager to finalized (sic) this recommendations in writing and addressed (sic) to them before end of next week. Hard copies of (sic) to will be handed to HR office."*

23. 20th January 2017 was a Friday. From the email of Gregory Tari of Wednesday 25th January the letter of termination was to have been issued by " end of next week", which was 31st January 2017. There is an inference here that termination would take effect from 31st January 2017, at the end of the month. This presumably was so that the claimants would receive their salaries/wages to the end of that month and any entitlements due to them. However their terminations came early on the same date the disciplinary panel met.

24. The only possible inference the Court draws from those 20th January 2017 letters is that their terminations were prejudged and made before- hand. As such I am satisfied that the claimants' terminations were unlawful and unjustified.

25. For the findings and reasons given, I answer the first issue in the affirmative.



26. For these second issue, it is clear to me that the claimants are now entitled to the following,

    a) Severance payment

    b) 1 month salary for period of suspension.

    c) 11 days wages from 21-31st January 2017.

    d) Common Law damages.

    e) VNPF contributions

    f) Interests of 5% per annum for termination to judgment.

    g) Costs

27. I agree with Mr Morrison's submissions that the claimants are not entitled to a multiplier in circumstances of their poor attendance records and poor performances resulting in a couple of warnings to Susan Noel and a previous suspension and reminder to Jacklyn Sese.

28. From the evidence Jacklyn Sese has been paid her 3 months notice and unpaid leave in the sum of VT 253,770. And Susan Noel has been paid her 3 months notice and unpaid leave in the sum of VT 264, 420.

29. It has been agreed by the defendant that any severance payable to Jacklyn Sese should be VT 953, 779 and to Susan Noel, the sum of VT 467,583. These sums are accordingly awarded to the claimants.

30. As for VNPF contributions for 3 months each claimant has claimed VT 13, 094 for these. The defendant having paid off their 3 months notice, it is my view they should have paid their VNPF contributions as well. Therefore these are allowed as well.

As for common law damages Mrs Aru submitted the claimants are entitled to them relying on the case of Melcoffeee Sawmill Ltd.v. Geroge [2003] VUCA 24 and the English, Australian and Fijian authorities referred to in that case.

31. In the claimant's case there was overwhelming evidence in their sworn statements and oral evidence that they were both working mothers with children, some of whom attended school and they were paying school fees. As such one could understand the distress they both faced when immediately after the panel hearing on 20th January 2017 they both received letters of termination.

I therefore agree with Mrs Aru that common sense dictates that the claimants suffered distress and humiliation in the way that both were treated. As such I am satisfied that both claimants are entitled to common law damages. I reject Mr Morrison's submissions on this point.

The Result

In conclusion the claimants are successful in their claims and judgment is entered in their favour against the defendant for the following sums-

a) For Jacklyn Sese-

(i)	Severance	VT 953,779
(ii)	Common Law Damages	VT 100.000
(iii)	VNPF	VT13,094
(iv)	1 month Salary (suspended)	VT 56, 942
(v)	11 days wages	VT 24, 090

(vi)	5% Interest	VT 57,395
	Total	VT 1, 205, 300

b) For Susan Noel

(i)	Severance	VT 467, 583
(ii)	Common Law Damages	VT 100,000
(iii)	VNPF	VT 13,094
(iv)	1 month Salary (suspended)	VT 52,884
(v)	11 days wages	VT 22,374
(vi)	5% interest	VT 32, 797
	Total	VT 688,732

Cost

32. Finally the claimants are entitled to their costs of the proceedings on the standard basis as agreed or taxed.

DATED at Luganville this 22nd day of June 2018

BY THE COURT

OLIVER.A.SAKSAK

Judge