

(Civil Jurisdiction)

**BETWEEN: Samuel Kuai**  
Claimant

**AND: Shefa Provincial Government**  
Defendant

*Date of Hearing:* 6 September 2018  
*By:* Justice G.A. Andrée Wiltens  
*In Attendance:* Mr W. Kapalu for the Claimant  
Mr J. Tari for the Defendant  
*Decision:* 11 September 2018

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**JUDGMENT**

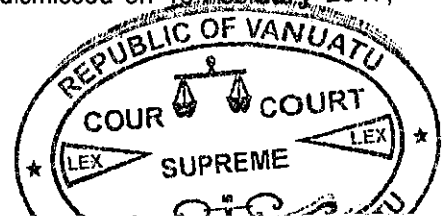
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A. Introduction

1. Mr Kuai alleged unjustifiable dismissal from his position of employment by the Shefa Provincial Government. He sought damages in respect of that in the sum of VT 2,892,420; and he also sought to be paid out his annual leave entitlement of VT 175,260, his living allowance of VT 306,000 and his child allowance of VT 74,000, together with costs.
2. All parts of the claim were disputed.

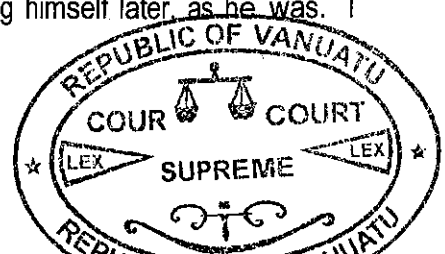
B. The Evidence

3. Mr Kuai produced 3 sworn statements, of 27 July 2017, 11 April 2018 and 18 May 2018, as Exhibits 1, 2, and 3. He told me he was employed as the Area Secretary for the Tanvasoko Ifira Area Council by the defendant. He started that employment on 12 January 2010; he was suspended on half pay from 21 September 2016, and was dismissed on 18 February 2017,

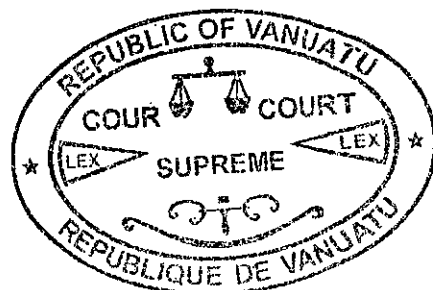


with certain statutory payments made as his final termination pay. He said he had never, despite asking, been paid either the living allowance or the child allowance. He also said he had not received annual leave for 6 of the 7 years employed by the defendant.

4. Mr Kuai was not challenged by Mr Tari in respect of his alleged under-payments. He was however, questioned about the reasons for his dismissal. Effectively there were 3 areas of his work performance that were queried:
  - Mr Alick had written to the defendant complaining about Mr Kuai drinking at his kava bar for free and promising in return to issue Mr Alick with a business licence, but not actually delivering on that promise;
  - Mr Tabi complained about paying Mr Kuai for a business licence, but eventually having to pay a second time as Mr Quai had simply kept the money; and
  - Mr Kiri alleged that Mr Kuai had arranged for an Independence Day celebration and sought VT 25,000 funding from his employer. Mr Kiri alleged that there was no such celebration, and the funds were used for purposes quite unrelated, including a payment to a local Chief – he was alleging Mr Kuai had obtained the funds by deception and then disbursed them as he saw fit.
5. Mr Kuai denied all these allegations, save for the celebration funding – which he admitted had occurred, but he said that was all later sorted out with the Council. He advanced the theory that Mr Alick did not even own a kava bar and was lying; and also that Mr Tabi was lying and that he had refunded the original payment made in full while suspended.
6. Mr Kuai complained about his suspension, claiming he had no knowledge why that was done. Mt Kapalu suggested the letter advising Mr Kuai of the suspension was contrary to natural justice due to the lack of detail provided. Mr Kuai accepted he was invited to attend the Council and explain his side of the story on 31 October 2016, where all the allegations were put. Mr Kapalu again suggested that natural justice required the complainants to also be at that meeting.
7. It was obvious that Mr Kuai felt aggrieved at his dismissal, as he considered he had done nothing wrong – and he had not been able to find alternative employment since being dismissed. However, in assessing his credibility and reliability I formed the view that he had convinced himself that he was right, without being able to stand back and look at the bigger picture. He admitted requesting the celebration funds on a pretext and not spending the funds appropriately. His justification for nevertheless protesting unjustifiable dismissal of having later squared that away with the Council, struck me as naïve and also untrue when I considered the later evidence. His suggestions that Mr Alick and Mr Tabi were lying about his conduct, without any apparent motive that he could point to, were lame and unrealistic – I did not accept his evidence in relation to that.
8. Mr Alick gave evidence before me, in support of his sworn statement (Exhibit 5) and an earlier complaint letter (appendix JO3). He was consistent throughout, and denied all counter suggestions put to him in cross-examination. He was a member of the public who had come forward to point out what he considered unsatisfactory performance. He stood to gain nothing as a result, except to probably be put to the trouble of justifying himself later, as he was. I believed him to be a credible and reliable witness.



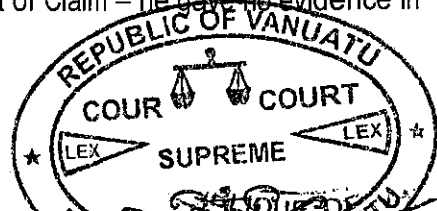
9. Mr Tabi also gave evidence in support of his sworn statement (exhibit 7) and an earlier letter of complaint (appendix JO3). He was in the same position as Mr Alick – with nothing to gain by coming forward and complaining about a Council employee's unacceptable work performance. I believed him. He was a straight-forward and consistent witness. He accepted in cross-examination that Mr Kuai had later, when serving his suspension, refunded the original VT 10,000 – as there was nothing in writing to either prove or disprove that, I took that acceptance by Mr Tabi as a clear sign of his honesty. He could easily have said no to that proposition in the hope of getting the money out of the Council!
10. Mr Kiri confirmed he had raised the false celebration funding matter. As far as he knew, it had not subsequently been resolved. I could not see any motive for Mr Kiri to make up his evidence – and in any event, Mr Kuai accepted that this had occurred. There was no reason to not accept Mr Kiri as a witness of the truth. Mr Kiri's sworn statement was exhibit 6, and his original complaint was also part of appendix JO3.
11. Ms Orah was in fact the principal defence witness. She produced the documents above-referred to as appendix JO3 to her sworn statement (Exhibit 4). She also produced:
- Mr Kuai's offer of employment letter (appendix JO1),
  - part of an internal Council report on Mr Kuai's work performance (appendix JO2),
  - a copy of Mr Kuai's celebration funding request and the approval of the same (appendix JO4),
  - a list of the questions put to Mr Kuai when he attended the 31 October 2016 meeting regarding his work performance and the allegations against him (appendix JO4),
  - a copy of the letter requiring Mr Kuai to attend the 31 October 2016 meeting (appendix JO5),
  - a copy of the Investigation Report produced by the Council (appendix JO6),
  - a copy of the letter of termination (appendix JO7), and
  - a calculation sheet setting out Mr Kuai's termination entitlements (appendix JO8).
12. I felt the need to intercede, as I considered Mr Kuai was in danger of not being able to fully advance his case. I therefore cross-examined Ms Orah on Mr Kuai's behalf. She eventually agreed that Mr Kuai really did not know the reasons behind his suspension, as the reasons were not spelled out in the letter advising him of the suspension, or even in the letter requiring him to attend the 31 October 2016 meeting. She accepted also, that if anyone had recorded Mr Kuai's answers to the matters put to him (she thought that had occurred), that would have been helpful to the Court in deciding this case – in any event, it was not produced, and I therefore was ignorant as what explanations had been provided, if any.



13. No questions had been put to Ms Orah by Mr Kapalu regarding anything but Mr Kuai's suspension and ultimate termination. I therefore questioned Ms Orah about the other parts of Mr Kuai's claim.
14. Ms Orah accepted that Mr Kuai was entitled to be paid a living wage, for the entirety of his employment by the defendant. He was also, subject to 2 qualifications, entitled to the child allowance for his 2 children. Ms Orah told me that Mr Kuai was owed 141 days leave at the date of termination, which was part of the VT 569,700 sum paid to him at the end of his employment – she said he was not owed any further leave.
15. I invited Mr Kapalu to ask further questions arising – he declined.
16. I considered Ms Orah to be an excellent witness, and I accepted what she told me. Her concessions were a clear indicator to me of a lack of bias and an intention to assist the Court with her evidence. She appeared to be consistent and reliable.
17. I heard oral submissions by Mr Kapalu, and I was given written submissions by Mr Tari which he saw no need to address orally. I indicated I would provide reasons for my decision in due course, but I immediately advised the outcome of the case.

C. Discussion

18. There was over-whelming evidence to support the correctness of the decision to end Mr Kuai's employment. I accept the defendant's procedures could have been better – for example, Mr Kuai should have been given explicit details of the allegations against his work performance at the time of his suspension and again at the time he was asked to attend the 31 October 2016 meeting to explain himself. However, I am satisfied that any lack of natural justice involved in those steps not being adequately dealt with was overcome when Mr Kuai was given every opportunity to deal with the allegations at the meeting. And the reality is that he could have been instantly dismissed for his accepted dishonesty, without the investigation and suspension.
19. Each of the allegations alone would have been sufficient, if believed, to have caused the end of Mr Kuai's employment. To drink kava for free in return for a promised business licence that never eventuates is unacceptable from a Council employee – it is corrupt behaviour. To take cash from a business owner without a written receipt is questionable behaviour – and to then require a second payment before attending to the issuance of a business certificate is theft, and it is corrupt behaviour. To seek funding for an event that was never going to occur, and to then spend the money on other things rather than to return it, is also theft and/or obtaining by deception.
20. What the defendant was facing, was 3 clear examples of dishonest conduct by an employee. Mr Kuai should not have expected to continue in the Council's employ, but he has seemingly justified his position on the deluded basis that he was not instantly dismissed and the celebration incident was resolved, as well as believing the other witnesses were simply lying.
21. The claim for unjustifiable dismissal must fail. It is dismissed.
22. Equally, his claim for an entitlement to being paid his outstanding leave is also dismissed. The only reference to this aspect of his claim is in his statement of Claim – he gave no evidence in



relation to it; and more significantly, Mr Orah's evidence on the point was that he had been paid what he was owed, and she was not challenged as to that. I accepted her evidence on the point.

23. However, Ms Orah quite fairly conceded that Mr Kuai was entitled to the living allowance – which had not been paid to him. She agreed that Mr Kuai was entitled to that allowance even while suspended on half pay. The entitlement equates to VT 51,000 per year of employment. Therefore Mr Kuai is entitled to receive a payment, in relation to this aspect of his claim, in the amount of VT 357,000.
24. Further, Ms Orah agreed Mr Kuai had not received the child allowance either – and again, he was entitled to that even while under suspension on half pay. He claimed that in relation to 2 children, who are now in their late teens. For reasons that Mr Kapalu explained were to do with section 20 of the Employment Act [Cap 160], he only sought VT 74,000. The time limitation in section 20 does not, on my reading of the provision, mean that only 3 years of the allowance is payable – it is that the claim must be made within 3 years from the cessation of employment. Mr Kuai's claim is in time. He is therefore entitled to 7 years child allowance for 2 children, a sum equal to VT 168,000.
25. As referred to earlier, there are two qualifications in relation to the child allowance – there is the requirement of proof: firstly, of parentage by means of birth certificates; and secondly, of attendance at school by means of certificates of attendance. I direct that Mr Kuai is to file the required evidence to support this aspect of his claim within 21 days. Failure to do so will result in the defendant not having to deal with this part of the claim.

D. Result

26. Mr Kuai's claims for unjustified dismissal and for outstanding leave entitlements fail.
27. The defendant is to pay Mr Kuai VT 357,000 for the unpaid living allowance over the period of his employment.
28. The defendant, subject to the required proof being tendered within time, is to pay Mr Kuai VT 168,000 for the unpaid child allowance for his 2 children over the period of his employment.
29. Interest is payable, on the two sums mentioned above, at 5% per annum from the date of the claim being filed until fully paid.
30. Costs are to lie where they fall, as both sides have achieved some success.

**Dated at Port Vila this 11th day of September 2018**

**BY THE COURT**

*G.A. Andrée Wiltens*  
Justice G.A. Andrée Wiltens\*

