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

Civil
Case No. 19/1944 SC/CIVL

BETWEEN: **Reno Emile**
Claimant

AND: **Republic of Vanuatu**
Defendant

Date of Trial:	23 June 2020
Before:	Justice V.M. Trief
In Attendance:	Claimant – Mrs M.G. Nari
	Defendant – Ms J. Toa
Date of Decision:	4 August 2020

RESERVED JUDGMENT

A. Introduction

1. This is a claim under the *Workmen's Compensation Act* seeking compensation for an injury suffered in an accident that occurred in the course of employment. The parties chose not to cross-examine any witnesses. I heard counsel's submissions and now determine the claim.

B. The Law

2. Subsection 1(1) of the *Workmen's Compensation Act* [CAP. 202] (the 'Act') provides:

> *1. (1) An employer shall pay compensation to any of his employees who suffers injury from any accident arising out of and in the course of his employment.*

3. Section 2 of the Act provides:

> *2. The amount of compensation payable under section 1 shall be in accordance with the Schedule to this Act.*

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4. Section 5 of the Act provides:

> *5. This Act shall apply –*
>
> *(a) to all contracts of employment (which in this Act includes any apprenticeship or similar legal relationship) in Vanuatu or in the Greater Economic Zone as from time to time defined;*
>
> *(b) any ship or aircraft registered in Vanuatu.*

6. Clauses 1-3 of the Schedule to the Act, as amended by the *Workmen's Compensation (Amendment) Act* No. 21 of 2013, provide:

> *1. The amount payable for death or total disability shall be three times the annual wages of the employee, subject to a maximum limit of eight million six hundred and forty thousand vatu.*
>
> *2. For the purposes of this Schedule -*
>
> *(a) "total disability" means an injury, whether of a temporary or permanent nature, which incapacitates an employee for any employment which he was capable of undertaking at the time of the accident;*
>
> *(b) "annual wages" include gross wages and any allowances paid to an employee by the employer and the value of any food, fuel or quarters supplied to an employee by the employer; and any overtime payments or other special remuneration for work done, whether by way of bonus or otherwise, if of constant character or for work habitually performed; but shall not include remuneration for intermittent overtime, or casual payments of a non-recurrent nature, any ex gratia payment whether given by the employer or other person, or the value of a travelling allowance, or the value of any travelling concession or a contribution paid by the employer towards any pension or provident fund, or a sum paid to an employee to cover any special expenses entailed on him by the nature of his employment.*
>
> *3. The amount payable for any of the following injuries is to be calculated as a percentage of the amount payable for total disability in accordance with the following scale, except that in no case the total amount payable is to exceed the amount payable for total disability:*

Injuries	*Percentage of incapacity*
...	...
Loss of arm at shoulder	*90*
Loss of arm between elbow and shoulder	*80*
Loss of arm at elbow	*70*
Loss of arm between wrist and elbow	*65*
Loss of hand at wrist	*60*
Loss of four fingers and thumbs or one hand	*60*
Loss of thumb (including part of a bone)	*20*
Loss of four fingers	*35*
One phalanx	*12*
The pulp of the thumb	*6*
...	...

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7. Clause 4 of the Schedule to the Act, as amended by the *Workmen's Compensation (Amendment) Act* No. 21 of 2013, provides:

> *4. The amount of payable in the case of an injury not specified in paragraph 3 shall be such percentage of 288 weeks' wages as is proportionate to the loss of earning capacity permanently caused by the injury.*

C. Statements of the Case

8. The Claimant Reno Emile by his Claim seeks orders for damages under two heads– compensation under the Act and general damages for pain and suffering, and for costs and interest.

9. The State denied in its Defence that Mr Emile suffered injury as a result of the State's negligence. That said, I do not understand how the State has construed the Claim as being a claim in negligence. The State also alleged that Mr Emile suffered injury by his own contributory negligence.

10. Finally, the State pleaded s. 32A of the *Police Act* [CAP. 105] in its Defence. This provision entitles a member of the Vanuatu Police Force to free medical treatment and full pay for the period of incapacity from an injury received in the actual discharge of his duty and without his own default. This is an employment entitlement which Mr Emile does not seek any payment of in his Claim. This aspect of the State's Defence is misconceived.

11. The Claimant Reno Emile must prove on the balance of probabilities that his injury was from an accident that arose out of and in the course of his employment. If he succeeds in doing so, I will determine the amount of compensation payable to Mr Emile under the Act, and what amount for general damages, if any.

12. The issues between the parties are:

- Was Mr Emile's injury from an accident arising out of and in the course of his employment? ['**Issue 1**']
- Was Mr Emile's injury caused by his own contributory negligence? ['**Issue 2**']
- If the answer to Issue 1 is "Yes", what is the amount of compensation payable to Mr Emile under the Act? ['**Issue 3**']
- Is Mr Emile entitled to general damages and if so, in what amount? ['**Issue 4**']

D. Evidence

13. Rule 11.7(1) of the *Civil Procedure Rules* provides that the sworn statements that are filed and served become evidence in the proceeding unless the Court has ruled inadmissible. At the commencement of the trial, counsel confirmed that they did not

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require any witness for cross-examination. Given none of the witnesses were cross-examined, I accept their evidence as filed.

14. The following is undisputed:

- In 1993, Mr Emile became a member of the Vanuatu Mobile Force ('VMF'), which is part of the Vanuatu Police Force.
- On 28 October 2016, Mr Emile was on duty at the Fire Station in Port Vila and climbed onto the roof of the Fire Station building to collect his clothes that he had left on the roof to dry. He used the mango tree next to that building to climb up onto the roof. On his way back down, he slipped and fell and broke his left forearm.
- On 8 December 2016, the Vila Central Hospital issued a Medical Report for Mr Emile.
- Based on that Medical Report, Mr Emile was given six weeks leave on full pay from 1 November 2016 to 16 December 2016.
- On 20 December 2016, Mr Emile's superior Lieutenant Bomma Avia wrote a letter to certify and confirm Mr Emile's accident and injury.
- By letter dated 25 February 2017, Mr Emile made a claim to the State for his injury.
- By letter dated 18 July 2017, Insp. Kency Jimmy, Assistant Legal Officer of the Vanuatu Police Force denied the claim, alleging contributory negligence.
- By letter dated 30 October 2017, Mr Emile was given 3 months' notice of his retirement from the Vanuatu Police Force.
- Mr Emile continued to work until the cessation of his employment on or about 30 January 2018.
- After rejection of his solicitor's demand, Mr Emile filed the Claim on 1 August 2019.

E. <u>Issue 1: Was Mr Emile's injury from an accident arising out of and in the course of his employment?</u>

15. Subsection 1(1) of the Act provides that workmen's compensation is payable to an employee "who suffers injury from any accident arising out of and in the course of his employment". It is undisputed that Mr Emile suffered injury on 28 October 2016. I therefore need to determine whether or not Mr Emile's injury was from an accident that arose out of or in the course of his employment.

16. Mr Emile worked in the VPF as a firefighter. His evidence is that on 28 October 2016 while still on official duty he climbed onto the roof of the building to collect his dry clothes. On his way down, he slipped and fell and broke his forearm. Mr Emile attached Lt Avia's letter dated 20 December 2016 to his sworn statement and relied on it as

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confirmation by his superior of the accident. Lieutenant Avia was the Officer-in-Charge of the Fire Service at Port Vila.

17. The State also relied on the letter – it was attached to Insp. Jimmys sworn statement. However, the version of the letter attached to Mr Emile's sworn statement is different to the version attached to Insp. Jimmy's sworn statement.

18. The letter attached to Mr Emile's sworn statement stated:

> *This report is to certify that Cpl Reno was performing his official 24 hrs shift duty on the 28 October 2016 and he climbed behind the mango tree at the fire station to collect some of his washed clothes and socks on the station roof when he came across an incident and caused fracture on his left hand.*
>
> *The roof height is about 2.5m from the ground and he slipped over the branch he was stepping on before coming down which this is a normal routine for all fire fighters using this route to climb the roof when drying their clothes <u>when he suddenly came across the incident of causing fracture on his left hand</u>.*

19. The words underlined above are different in the version attached to Insp. Jimmy's sworn statement:

> *The roof height is about 2.5m from the ground and he slipped over the branch he was stepping on before coming down which this is a normal routine for all fire fighters using this route to climb the roof when drying their clothes <u>but it was not a official tasks delegated to him to come across the incident</u>.*

20. The letter is hearsay and inadmissible if it is relied on to prove that Mr Emile's climbing onto the roof when drying his clothes was not an official task delegated to him. Accordingly, I disregard that assertion in the version of the letter attached to Insp. Jimmy's sworn statement. In any event, what Mr Emile's official tasks were is not in issue. The issue for determination is whether the accident arose out of or in the course of Mr Emile's employment.

21. The letter is also hearsay and inadmissible if it is relied on to prove that it was a normal routine for firefighters to use the route that Mr Emile used to climb onto the roof when drying their clothes. Accordingly I disregard also that assertion in the letter attached to Mr Jimmy's sworn statement.

22. Ms Toa submitted that Mr Emile's climbing onto the roof was not in the course of his employment because doing so was not part of his Job Description. Whether or not it was part of Mr Emile's Job Description is not in issue. This submission is rejected.

23. The other witness for Mr Emile was Raymond Takaua. His evidence is that he is a former member of the VMF and worked with Mr Emile in the VMF Fire Service from 1996 to 2010. In December 2014, he became the Officer-in-Charge of the Fire Service at Santo. He stated that all firefighters at the VMF Camp dried the water hoses and their uniforms all the time on the roof of the Fire Station. Mr Takaua stated that the hoses and uniforms were always hung on the roof of the Fire Station from the time that he worked until Mr Emile's accident in 2016. He stated that as stated by Lt Avia in his letter

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dated 20 December 2016, it is a normal route for firefighters to climb the mango tree onto the roof to dry their clothes. He added that all water hoses are also hung on the roof. Finally, Mr Takaua evidenced that he also had climbed onto roof of the Fire Station to hang hoses and clothes while he worked there. His evidence is that he and other firefighters used the same route that Mr Emile used resulting in his accident.

24. The State chose not to cross-examine Mr Takaua therefore none of his evidence was challenged. I therefore wholly accept Mr Takaua's evidence.

25. The evidence before me from Mr Emile is that he was still on official duty when he climbed onto the roof of the Fire Station building, and fell and broke his forearm. Mr Takaua's evidence is that the firefighters at the VMF Camp dried the water hoses and their uniforms all the time on the roof of the Fire Station. He evidenced that this was the practice from 1996 until Mr Emile's accident in 2016. He also evidenced that it was a normal route for firefighters to climb the mango tree onto the roof to dry their clothes.

26. I accept therefore that it was the practice of the firefighters at the Port Vila Fire Service to dry the water hoses and their uniforms and clothes on the roof of the Fire Station. They climbed up onto the roof and back down via the nearby mango tree. I accept that this route of climbing up onto the roof and back down was used by Mr Emile, Mr Takaua and other firefighters, and this was the route used by Mr Emile resulting in his accident and injury. In addition, there is no evidence that Mr Emile was ever ordered or directed by one of his superiors not to climb the mango tree onto the roof of the Fire Station to dry his clothes.

27. In the circumstances, I consider that Mr Emile has proved on the balance of probabilities that his injury was from an accident which arose out of and in the course of his employment.

28. Ms Toa accepted that it was the firefighters' practice to hang their clothes and hoses on the roof, however submitted that this was not an authorised act and was <u>not</u> connected with his employment. Ms Toa relied on *Temar v Republic of Vanuatu* [2004] VUSC 70; Civil Case 112 of 2003 for the principle that a master is not responsible for an employee's independent act. I note that *Temar v Republic of Vanuatu* involved a claim for vicarious liability. No such claim is made in this proceeding. This submission does not assist me.

29. Accordingly, my answer to the question, "Was Mr Emile's injury from an accident arising out of and in the course of his employment?" is "**Yes.**"

F. <u>Issue 2: Was Mr Emile's injury caused by his own contributory negligence?</u>

30. Ms Toa submitted that the elements of contributory negligence were as follows:

- That Mr Emile owed a duty of care to himself;
- That Mr Emile did not take sufficient care required; and

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- As a result, he suffered his injury.

31. I do not accept Ms Toa's submission that Mr Emile owed a duty of care to himself. Ms Toa submitted that Mr Emile did not exercise the standard of care that a reasonable person would have exercised in a similar situation to use the mango tree as a means to climb up to the roof of the fire station building to dry his clothes. However, a standard of care only applies where there is a duty of care. Ms Toa did not refer me to legislation or case law that establishes a duty of care on Mr Emile's part. I do not accept that Mr Emile had such a duty.

32. If I am wrong and Mr Emile did owe a duty of care to himself, there is no evidence that Mr Emile did not take the level of care required. The State chose not to cross-examine Mr Emile therefore this aspect of the State's defence was not put to Mr Emile. There is also no evidence to support the State's assertion that Mr Emile did not take sufficient care resulting in his injury.

33. Finally, the Act does not provide that contributory negligence is a defence to a claim for workmen's compensation. I therefore conclude that this aspect of the State's Defence stems from counsel misconstruing the claim as a claim in negligence. It is not a claim in negligence. It is a claim for workmen's compensation and for general damages.

34. My answer to the question, "Was Mr Emile's injury caused by his own contributory negligence?" is, "**No**".

G. <u>Issue 3: If the answer to Issue 1 is "Yes", what is the amount of compensation payable to Mr Emile under the Act?</u>

35. Mrs Nari relied on *Toara v Airports Vanuatu Limited* [2014] VUSC 166; Civil Case 103 of 2008 where the Court calculated the Claimant's loss under the Act for injuries sustained at her place of work.

36. Section 2 of the Act provides that the amount of compensation payable is to be in accordance with the Schedule to the Act. By virtue of s. 5 of the Act, the Act applies to all contracts of employment.

37. The Schedule to the Act provides that the maximum payment is for 100% disability ('total disability'), subject to a maximum limit of VT8,640,000.

38. Clause 3 of the Schedule to the Act sets out a range of particular injuries expressed as a percentage of total disability. For example, a loss of an arm at the shoulder is considered a 90% disability. The loss of four fingers is a 35% disability.

39. Clause 4 of the Schedule to the Act provides that in the case of an injury not specified in clause 3, the amount of compensation payable shall be such percentage of 288 weeks' wages as is proportionate to the loss of earning capacity permanently caused by the injury.

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40. Mr Emile's particular injury is not specified in clause 3 of the Schedule to the Act therefore clause 4 applies.

41. What is Mr Emile's loss of earning capacity permanently caused by the injury? Mr Emile has adduced into evidence his medical certificate by Dr King dated 16 February 2018. The State has not challenged this evidence by way of cross-examination or otherwise, nor has it brought any medical evidence to rebut Dr King's assessment. I therefore accept what is in Dr King's medical certificate to the effect that Mr Emile has a total of 40% disability due to limitation of flexion (30%), loss of strength (5%) and wrist deformation with persistent pain (5%). Mr Emile also stated in his sworn statement that he suffers loss of strength in his left arm and persistent pain and cannot do much about his financial situation. He and his wife do subsistence farming to take care of their family.

42. In the absence of any other evidence, I accept that Mr Emile's 40% disability equates to a 40% loss of earning capacity permanently caused him by his injury.

43. In accordance with clause 4 of the Schedule to the Act, the amount of compensation payable shall be such percentage of 288 weeks' wages as is proportionate to the loss of earning capacity permanently caused by the injury.

44. Exhibit C1 tendered by consent at the trial – a print-out from Smartstream, the Government's electronic payroll system – evidences that Mr Emile's fortnightly pay was VT24,444. His weekly wage therefore was VT12,222.

45. Therefore the calculation pursuant to clause 4 of the Schedule is:

VT12,222 x 288 weeks x 40% = VT1,407,974.

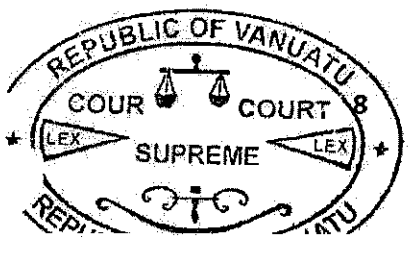
46. My answer to the question, "If the answer to Issue 1 is "Yes", what is the amount of compensation payable to Mr Emile under the Act?", is **"VT1,407,974."**

H. <u>Issue 4: Is Mr Emile entitled to general damages and if so, in what amount?</u>

47. In December 2016, the Officer-in-Charge of the Port Vila Fire Station confirmed Mr Emile's accident and injury, and that he had taken 6 weeks medical leave.

48. At the time of the accident, Mr Emile was already past the retirement age of 55 (his date of birth is set out in Dr King's medical certificate dated 16 February 2018).

49. Mr Emile evidenced that he suffers a loss of strength in his left arm and persistent pain. I accept that he suffered continuous pain from the time of his accident to cessation of his employment, and that he continues to do so. Despite the continuous pain suffered from the time of the accident and his already being past the retirement age, Mr Emile was kept on active duty for another 15 months until his employment ceased on 30 January 2018.



50. In the circumstances, I consider that Mr Emile has proved his pain and suffering from his injury suffered in the accident and is entitled to general damages. I consider that this pain and suffering was added to by Mr Emile having to sue to obtain compensation under the Act because of the way that the State misconstrued his claim. I award Mr Emile the VT500,000 general damages sought.

I. Result and Decision

51. In conclusion, I answer the issues as follows:

- Was Mr Emile's injury from an accident arising out of and in the course of his employment? **"Yes."**
- Was Mr Emile's injury caused by his own contributory negligence? **"No."**
- If the answer to Issue 1 is "Yes", what is the amount of compensation payable to Mr Emile under the Act? **""VT1,407,974."**
- Is Mr Emile entitled to general damages and if so, in what amount? **"Yes – VT500,000."**

52. I enter judgment for the Claimant Mr Emile as follows:

a. The Defendant is to pay to the Claimant the sum of VT1,907,974;

b. The Defendant is to pay to the Claimant interest at the rate of 5% p.a. on the sum of VT1,907,974 from 1 August 2019 (the date of filing the Claim) until the sum is paid in full; and

c. Costs should follow the event. The Defendant is to pay the Claimant's costs as agreed, or taxed by the Master. Once settled, the costs are to be paid within 21 days.

J. Enforcement

53. Pursuant to rule 14.3(1) of the *Civil Procedure Rules*, I now schedule a Conference **at 8am on 31 August 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 personally served on the Defendant.

DATED at Lakatoro, Malekula this 4th day of August 2020
BY THE COURT

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Viran Molisa Trief
Judge

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