

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

Civil Case No. 19/1278

BETWEEN: Derrick Kalo Toara
Claimant

AND: Airports Vanuatu Limited
Defendant

Date of Hearing: 7 April 2021

By: Justice G.A. Andrée Wiltens

Counsel: Mr S. Kalsakau for the Claimant
Mrs E. Blake for the Defendant

Date of Judgment: 2 August 2021

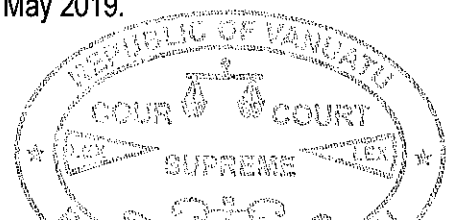
Judgment

A. Introduction

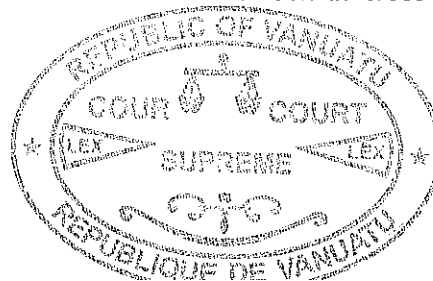
1. This is a Claim by Mr Toara alleging unjustified dismissal and seeking payment of severance entitlements. Airports Vanuatu Limited ("AVL") sought to justify the dismissal and it disputed owing any severance payments to Mr Toara.

B. Facts

2. AVL employed Mr Toara as the Green Watch Chief Supervisor for the Pekoa Fire Service in Espiritu Santo. He was given initial training in 2007 and started in his permanent position as from 11 April 2008. His employment was finally terminated on 26 May 2019.



3. He was a popular member of AVL staff and well known by all AVL personnel due to his long service and the fact that he had been elected as Vice-Chairman of the Social Club Committee in 2018.
4. Mr Toara was not an exemplary member of staff.
5. Firstly, in March 2015, he failed to attend work due to being drunk with a junior colleague. At that time he also caused an accident in an AVL vehicle he was driving, causing damage to the vehicle. As result of this, Mr Toara was suspended prior to being later re-instated although demoted in rank. Subsequently he was given a second chance and re-appointed to be the supervisor again. At the time Mr Toara promised to not again misbehave.
6. Secondly, Mr Toara was involved in another incident on 20 August 2018, when he was on annual leave. He had consumed alcohol the previous evening, and again in the morning of 20 August 2018 before he went to Pekoa airport and checked in as a passenger to fly to Port Vila to attend his younger sister's wedding. Mr Toara denied being drunk, but admitted that he had taken drink. Despite being checked in, he was subsequently told that he was not permitted to board the flight to Port Vila due to the obvious effects of his consumption of alcohol. That annoyed him greatly.
7. He allegedly reacted by putting his arms around Nadia, an AVL staff member, and attempted to kiss her on the mouth. She said he tried to do so twice, despite her pushing him away. He said it only happened once. Mr Toara accepted that he then threw a plastic bottle at her, which hit her left eye.
8. Then Mr Toara he hit a male AVL staff member. The allegation was that Mr Toara had punched that male staff member, but Mr Toara denied that and said it was merely a slap, which was dispensed out of frustration due to not being permitted to board the flight with his friends despite having been checked in. He admitted also spitting at that male staff member.
9. Mr Toara eventually caught a later flight that same day, and was able to attend the wedding. Subsequently he spoke to Nadia, whom he had earlier accosted, and apologised to her. He gave her a payment of VT 1,000 to say sorry, which she accepted. That has been subsequently confirmed by Nadia in her sworn statement.
10. This 20 August 2018 incident led to Mr Toara being suspended on full pay by letter served on him dated 19 December 2018. That suspension continued on, by means of several extensions, until he was dismissed in May 2019.
11. In his first sworn statement in support of his Claim, Mr Toara complained that although his suspension letter indicated that he would receive full pay, when he checked his bank accounts he had in fact only received half-pay. He withdrew that contention in cross-examination at trial.

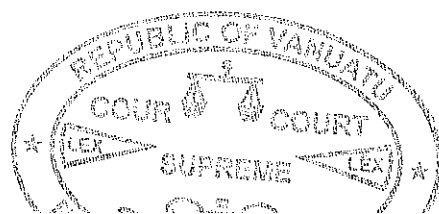


12. Part of his suspension required Mr Toara to not to enter Pekoa airport without prior approval from the AVL CEO.
13. However, contrary to this restriction in his third brush with his employers, Mr Toara accepted that he had gone to Pekoa Airport on 22 December 2018 with some friends. It was contended by AVL that they were all drunk; but Mr Toara maintained that only his friends were drunk, and that he was not. It was contended further by AVL that Mr Toara had threatened a member of AVL staff, but Mr Toara stated that he could not recall speaking to that person; and he denied making a threat to assault all the staff then present. Mr Toara considered the staff member's written report regarding the incident to be unfair to him and inaccurate. He also claimed that his friends had forced him to go to Pekoa Airport.
14. There was a Disciplinary Hearing relating to the second incident held on 25 February 2019. Mr Toara complained that he was not interviewed prior to this hearing, and that various available witnesses had not been interviewed. He complained further of not knowing the subject matter of the hearing in advance. He maintained he was unfairly taken by surprise.
15. However, I find that there was clear evidence to the contrary, in particular the letter of 17 January 2019. This clearly set out that Charge 1 related to Mr Toara's actions towards staff at Pekoa on 20 August 2018 causing AVL embarrassment, Charge 2 related to Mr Toara's failure to act as a positive role model during that incident, Charge 3 related to his failure to promote a violence and harassment-free work environment by virtue of his conduct at that time, Charge 4 related to Mr Toara's obvious previous consumption of alcohol affecting his behaviour at that time, and Charge 4 [should be 5?] related to Mr Toara and 3 friends entering Pekoa Airport contrary to the terms of the suspension on 22 December 2018 and threatening staff. The letter appended the relevant extracts of the AVL Code of Conduct, which all the charges related to.
16. I find that Mr Toara, contrary to his assertions, was clearly fully informed prior to the hearing of the the issues that would be raised at the Disciplinary Hearing.
17. The charges, as set out in the letter, alleged breaches of AVL's Code of Conduct as follows:
 - Charge 1 – section 8.3.3;
 - Charge 2 – section 8.3.4.1(1) and 8.3.4.2(1-5);
 - Charge 3 – 8.5.1 and 8.5.2;
 - Charge 4 – 8.7.2(2, 5a and 5b); and
 - Charge 4 [5?] – 8.3.3(5).
18. At the hearing, each of the 5 charges was put to Mr Toara, with the relevant facts detailed for him to respond to. Mr Tari (an AVL witness) appended the Disciplinary Report dated 26 April 2019 to his sworn statement. This document also made it plain what allegations Mr Toara was asked to respond to, and that all bar the final aspect related to the 20 August 2018 incident. In fact, Mr Toara admitted each of those charges when asked to explain. He told



the Inquiry that he had apologised for his actions to Nadia, and that she had accepted his apology. He maintained that he was not on duty at the time of the 20 August 2018 incident.

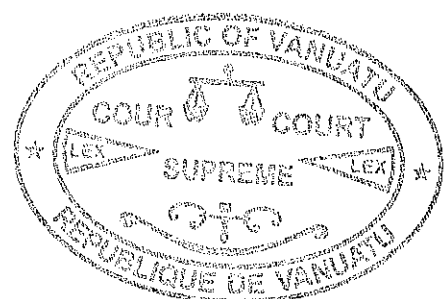
19. The Disciplinary Committee recommended that Mr Toara's employment be terminated due to his misconduct, despite his previous difficulties resulting in a final warning, and due to a failure by Mr Toara to improve his attitude subsequently. I note that the warning given was not a final warning. I consider that little turns of this incorrect statement.
20. Mr Tari advised the Court that the Disciplinary Committee comprised himself and four others. He agreed that neither Nadia or the male staff member who had been confronted by Mr Toara on 20 August 2018 were interviewed as part of the inquiry. He did not consider that significant as Mr Toara had accepted all the allegations against him. Mr Tari accepted that Mr Toara was off duty that day, and accordingly that Mr Toara was not representing AVL. The Committee had assumed Mr Toara was not in uniform at the time.
21. Mr Tari was asked to consider Section 7.1 of AVL's Code of Conduct. He accepted that the plain meaning of the section was that the provisions of the Code only applied to staff while they were on duty. He attempted to suggest that staff were effectively on duty at all times, but ultimately conceded the Code made no mention of that, and that section 7.2.1 of the Code demonstrated his contention to be incorrect. When these matters were put to him, Mr Tari conceded that the Disciplinary Committee's recommendation had been made in error.
22. Mr Toara was closely cross-examined about the alleged breaches of the Code of Conduct. His rather cavalier and arrogant response to those questions were an attempt to minimise the seriousness of his objectionable actions. He maintained that he was off duty at the time as justification for much of what occurred. He accepted that had he been on duty the provisions of the AVL Code of Conduct would have been breached. He accepted also that his behaviour had been unacceptable whether in breach of AVL's Code or not.
23. Following the Disciplinary Committee Hearing, Mr Toara's employment was terminated by letter dated 4 March 2019, served on him by a police officer on 8 March 2019. Mr Toara considered that to be inflammatory. I saw little merit in his protestation as supporting his Claim.
24. The explanation in the letter referred to previous similar incidents following which Mr Toara had been given a second chance providing his behaviour improved. The letter pointed to the fact that Mr Toara had attended an awareness programme relating to the AVL Corporate Policies and Procedural Manual, which had educated him regarding his employer's expectations of staff and outlined the consequences for breaches. In fact that programme had occurred only a month earlier. The letter concluded that Mr Toara's conduct had continued to be unsatisfactory and that AVL had determined his employment be terminated on the grounds of: (i) his recent recurrent incident resulting in his suspension and warning, and (ii) the wilful breaches of policies governed by the terms and conditions of his employment.



25. That letter also set out his ability to appeal that decision within 7 days, which opportunity Mr Toara took; and that led to a meeting between Mr Toara and the AVL Chief Operating Officer, Mr Jason Rakau, on 14 March 2019. Mr Toara's evidence was that the appeal had gone extremely well. He was confident of re-instatement.
26. However, Mr Toara was first made aware of the result of his appeal when a letter dated 21 March 2019 was delivered to his home on 26 May 2019. The explanation for the delay was difficult to comprehend. However, Mr Toara was clearly not concerned at the delay as he only opened the letter the next day and then discovered that the AVL CEO had confirmed his termination. The letter referred to Mr Toara's previous suspension and, despite assurances to the contrary, that his behaviour had shown no signs of improvement. He pointed to standards of conduct that AVL staff were required to adhere to, and that Mr Toara's conduct had put AVL in an awkward position. The result of the appeal was a surprise to Mr Toara, as he maintained he had been orally assured by his CEO during the appeal meeting that he would be re-instated. He contended also that his immediate supervisor, Mr Bethel had re-assured him that he would be re-instated.
27. I do not accept Mr Toara's attempts to put words into the mouths of others. It is inherently unlikely that in the course of an appeal the CEO of AVL would re-assure Mr Toara of his imminent re-instatement given Mr Toara's conduct. It is also inconsistent with what actually occurred, namely shortly after the hearing Mr Rakau confirming the termination, without any reason provided for his sudden reversal of alleged approach. In this regard, I noted that Mr Rakau's sworn statement was admitted into evidence by consent and there was no cross-examination. I accept Mr Rakau's unchallenged version of events. I disbelieved Mr Toara's evidence in relation to this aspect.
28. As part of his Claim, Mr Toara produced a calculation by AVL of his severance entitlement, if he were found to be unjustifiably dismissed. That amounted to VT 992,895. In his evidence, Mr Toara advised that he remained unemployed at the time of trial. He provided no details of his attempts to find alternative employment. He stated that his financial position was difficult, and explained that the family was surviving by gardening. He accepted that all his VNPF payments had been properly attended to by AVL, and did not seek to pursue the claimed salary anomalies or allowances part of his Claim.

C. Discussion

29. AVL's attempted justification of Mr Toara's termination was based entirely on his breaches of AVL's Code of Conduct. As it was accepted by Mr Tari that Mr Toara was off duty, the provisions of the Code did not apply on 20 August 2018, reprehensible as Mr Toara's conduct was at that time.



30. Nowhere in the documentation produced to this Court relating to Mr Toara's dismissal, nor in the evidence at trial was it contended that in fact the termination of employment was based on the concept of "serious misconduct" as found in section 50(1) of the Employment Act. That was first mentioned in Ms Blake's final submissions. She advocated strongly that the Court consider the case from that vantage point.
31. However, I decline to allow the defence to shift tack in such manner so late in the piece. To permit that would be to allow the defence to ignore their pleadings and the evidence it adduced. It would be grossly unfair to Mr Toara, who responded to AVL's defence consistently on the basis that he was off duty and that therefore the Code did not apply – and that point was finally conceded by Mr Tari in cross-examination. Had the case been pleaded differently and run along more usual Employment Act lines, Mr Toara would have had to respond differently, but he was not afforded the opportunity of doing so.
32. AVL's justification for Mr Toara's dismissal fails. It is not accepted. Had the matter been dealt with without resort to the Code of Conduct, the position may well have been otherwise, but that is not the case. I find that the AVL Code of Conduct is not the appropriate measure by which to assess Mr Toara's conduct.
33. In the circumstances, Mr Toara's claim must be allowed. He was dismissed on an unjustifiable basis. He is accordingly entitled to 3 months salary in lieu of notice as well as his severance allowance.
34. Pursuant to section 56(4) of the Employment Act, where the termination is unjustified, the Court is required to set a multiplier of up to 6 times the severance amount. The Court has been referred to *Quarani v Air Vanuatu Limited* Civil Case No. 250 of 2014, which I consider to be a helpful authority. In that decision, Justice Geoghegan adopted the comments of Justice Dawson in *Malere and Others v Vanuatu Broadcasting and Television Limited* [2009] VUSC 164 regarding factors to be taken into account in determining the appropriate multiplier. Justice Dawson thought the following should be included in that exercise:
- Did the employee have a good work record?
 - Had the employee been given any previous warnings?
 - 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?
 - Was the employee subjected to physical or verbal abuse by the employer at the time of termination?
35. Having regard to those factors, all of which in this instance point to the lower end of the multiplier scale as being appropriate, and also adding to that the unacceptable behaviour of Mr Toara at trial to attempt to bolster his case, when he attempted to put certain words into



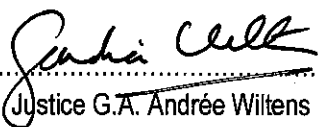
the mouths of AVL staff which if accepted (they are not) would have greatly benefitted his case, I consider that the lowest possible multiplier is appropriate in this case.

E. Result

36. AVL is to pay Mr Toara his final monthly salary times 3. Looking at the documents provided in evidence, that appears to be a base salary, plus VNPF contribution, of VT 93,836. By my reckoning that totals VT 281,508.
37. AVL is to also pay Mr Toara his severance entitlement. AVL has calculated that to be VT 992,895. The multiplier to be applied is times 1.
38. AVL is to pay interest at 5% p.a. on the salary component as from the date of the Claim, namely 28 May 2019 until payment in full has been made. AVL is to pay interest at 5% p.a. on the severance entitlement as from the date of Mr Toara's termination, namely 26 May 2019, until the sum has been fully paid.
39. Mr Toara is entitled to his costs. Once settled, by agreement between counsel or by the Master if there is no agreement, they are to be paid in 21 days.
40. There will be a further conference at 8am on 24 August 2021 for AVL to advise the Court that the awards have been paid or that arrangements have been entered into to enable that to occur. Alternatively, enforcement of the judgment will follow.
41. For that reason, a copy of this judgment must be served on AVL with a proof of service filed in due course.

Dated at Port Vila this 2nd day of August 2021

BY THE COURT


Justice G.A. Andrée Wiltens

