

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

**Civil
Case No. 20/2839 SC/CIVL**

BETWEEN: Nguk Yank Dennis Nai
Claimant

AND: The Republic of Vanuatu
Defendant

Coram: *Justice Aru*

Counsel: *Mr. N. Morrison for the Claimant*
Mr. S. Aron for the Defendant

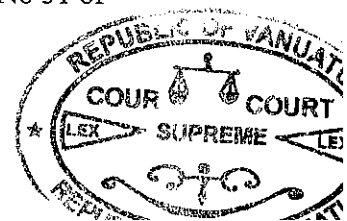
JUDGMENT
(Assessment of Damages)

Introduction

1. This is a claim for outstanding salaries, benefits and other entitlements and damages under a contract of employment. The defendant did not file a defence and default judgement was entered as to liability with damages to be determined. The parties were then directed to file submissions and sworn statements for damages to be assessed.
2. The claimant filed his written submissions supported by his sworn statement filed on 15 October 2020. The defendant has not filed any submissions in response. It relies on the sworn statement of Mr. Yvon Basil, Director of Foreign Affairs Department filed on 26 October 2021. In response, the claimant filed reply submissions on 1 December 2021.

Background

3. The Foreign Services Act No 20 of 2013 (the Act) came into force 4 November 2013. On the 27 August 2015 the claimant was appointed Ambassador Extra Ordinary and Plenipotentiary of the Republic of Vanuatu to the People's Republic of China. As Head of Mission, his term of office was 3 years and is eligible for reappointment only once by the Minister on the recommendation of the Foreign Service Board. His terms and conditions were set out in Order 130 of 2015 which were amended by Order No 31 of 2017. It sets out the following:-



5. *Remuneration and Allowance*

- (1) *the remuneration of the employee is a monthly salary of VT 500,000;*
(2) *the employee is entitled to the following allowances and benefits :*

(a) *domestic (within jurisdiction)duty travel allowance of VT10,000 per day for the first*

7days , the domestic travel allowance will be reduced by 50% ;his or her working partner

(b) *a Housing allowance of VT 350,000*

(c) *medical allowance VT 300,000;*

(d) *no transport allowance will be provided as the embassy has a vehicle ;*

(e) *overseas mission travel allowances that are claimable by upon endorsement by the Director General*

(f) *child / education of VT 50,000 per child per term limited to two children only under the age of 18 ;*

(g) *spouse support allowance of VT 20,000 per month that is payable only to a legal spouse or partner and will be paid only if a spouse accompanies his or her working partner to the Mission (Based overseas) ;*

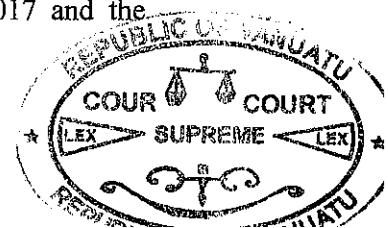
(h) *currency exchange rate & bank cost provision of VT 70,000 per annum ;*

(i) *entertainment allowance of VT 200,000 per annum – this is an accountable allowance and is included in the operational budget and requires that amounts expended be reflected in the Missions Financial report submissions.*

4. In addition the claimant was entitled to annual leave at a rate of one and three quarter working days for every month of service and sick leave at the rate of 21 days per 12 months of service.
5. On **3 February 2017** by Order 31 of 2017, the claimant's terms and conditions were amended stating that he is to hold office for a period of 3 years effective on the same date.
6. The claimant's appointment expired on **3 February 2020**. Upon expiry of his appointment the claimant was informed by letter from the Ministry of Foreign Affairs dated 4 May 2020 that his appointment had come to an end and that the position will be readvertised.

Starting date of employment

7. It is important to first ascertain the correct start date of the claimant's employment as a Government employee. The claimant accepts that when the first appointment was made on 27 August 2015 his credentials were not accepted by the Chinese Government. He only begun his employment once his credentials were accepted. His terms and conditions of appointment were therefore amended by Order 31 of 2017 and the



appointment became effective from 3 February 2017 for a period of 3 years. There is no evidence that the claimant received any remuneration prior to 3 February 2017.

8. As a matter of contract, the claimant became an employee of the State as of 3 February 2017.

Entitlements

Severance

9. The claimant's contract was for a period of 3 years and lapsed on 3 February 2020. The defendant accepts that the claimant is entitled to severance. The full severance package calculated by the defendant which I award inclusive of outstanding leave is VT 4,448,871.

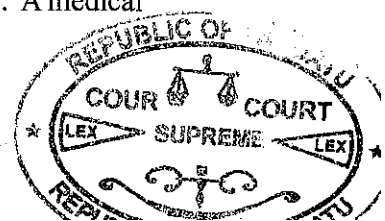
Outstanding salary

10. The contract lapsed on 3 February 2020. The defendant accepts that the claimant is entitled to his salary, housing allowance and bank costs of exchange for the period from 3 February to 4 May 2020 when he was notified by the Minister of Foreign Affairs that his contract was at an end and will not be renewed. The claimant is entitled to VT 2,519,330 in outstanding salary.

Continuation of package until Repatriation

11. The defendant says that they made two attempts to repatriate the claimant and his family in October 2020 and again on 24 May 2021 but the offer was refused by the claimant therefore he is not entitled to a continuation of package until repatriation was offered.
12. The claimant disputes that. He submits that he is entitled to a continuation of package until the offer of repatriation was made. The claimant says that he was effectively abandoned in China at the height of the COVID 19 pandemic with his wife and three children. He says that no offer of repatriation was made for over a year after he was notified that his contract will not be renewed. During that period the area he was living in was placed in a lock down for 6 weeks due to COVID 19, his children did not attend school and the government did not provide any funds to assist him. He had to borrow money from family and friends to survive.
13. There is no legal basis to claim for continuation of package until repatriation as the claimants employment came to an end on 3 February. It was confirmed by the Minister of Foreign Affairs on 4 May 2020. There is no evidence that the contract was extended pending repatriation. The claim for VT 10,509,000 in respect of the continuation of package until repatriation is therefore rejected.

14. The claimant is entitled to be repatriated by the government as he was sent to China to serve as its Ambassador. (58 of the Employment Act [CAP 16] as amended). A medical



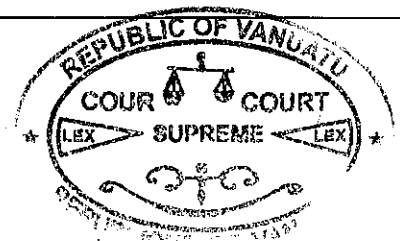
certificate provided by his doctors in China shows that he currently cannot travel for medical reasons. I allow his costs for repatriation once he is fit to travel being airfares for 5 persons plus a 1 x 40 foot container at VT1, 387,500.

Claim for refund of expenses

15. I make no award for any outstanding payments expensed by the claimant listed in **Annexure "E"** of his sworn statement filed on 10 June 2021. The expenses may have been incurred however no receipts of such payments have been provided in the claimant's evidence.
16. The defendant also says that these costs should have been covered by operational funds budgeted by the Government and provided to the embassy in the sum of VT 8,371,664. The funds could only be accessed by applying for approval and submitting an Overseas Mission Travel Form. The claimant has not provided evidence that these travels were approved by the defendant.

Exemplary/Aggravated damages

17. The claimant submits that he is entitled to exemplary damages for the way he was treated or abandoned at the end of his contract.
18. To date the claimant is still in China unable to travel for medical reasons. In **Republic of Vanuatu v Emil** [2015] VUCA 16 the Court of Appeal said that it is trite to say that "*exemplary damages may only be awarded where there are circumstances of aggravation or flagrancy making the conduct of the defendant extraordinary and deserving of punitive damages.*"
19. When I consider the claimant's evidence and particularly what is said at paragraph 12 above, I am satisfied that the defendant's conduct was high handed and vindictive to abandon the claimant after his contract came to an end. He is a citizen of the Republic of Vanuatu serving as Ambassador overseas. The Minister of Foreign Affairs informed him on 4 May 2020 that "*his contract as Ambassador has ended. With the Ambassador's post now being vacant, the position will be advertised....We wish you the best in your future endeavours ...*" In the letter the claimant was not informed whether he will be repatriated or what assistance will be provided to him pending any repatriation.
20. And this occurred during the COVID 19 pandemic. On 29 of July 2020 the Director of Foreign Affairs informed the claimant that the "*government will honour its commitments ...*". To date the claimant is still in China.
21. There is some mitigation in the sense that international borders were in lock down due to COVID 19 and overseas travel was severely restricted. Considering these factors, I will allow an award of VT3, 000,000 for exemplary damages.

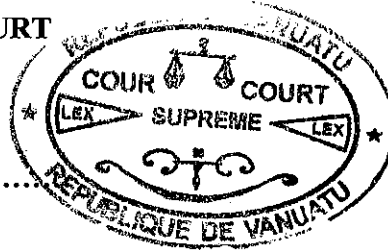
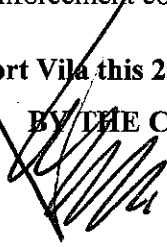


Result

22. The total awarded to the claimant as damages is VT 11,355,701 with interest at 5%.
The matter is listed for an enforcement conference at 8.30 am on 22 February 2022.

DATED at Port Vila this 25 day of January, 2022

BY THE COURT



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D. Aru
Judge