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

Civil
Case No. 23/2189 SC/CIVL

BETWEEN: JOHN NELSON NIMBTICK
Claimant

AND: TEACHING SERVICE COMMISSION
First Defendant

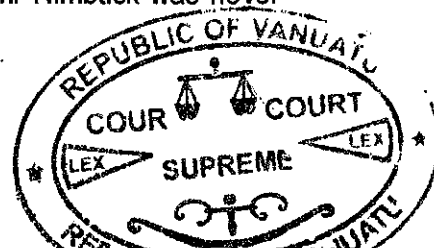
AND: THE REPUBLIC OF VANUATU
Second Defendant

Before: Justice M A MacKenzie
Hearing: 20 March, 21 March and 7 April 2025
Submissions: 14 April 2025 and 27 June 2025
Counsel: Claimant – Mr E Macreveth
Defendants – Mrs J Toa Tari

JUDGMENT

Introduction

1. This is an employment dispute. Mr Nimbtick, a teacher employed by the Teaching Service Commission ("TSC"), alleges that his employment contract was unlawfully or unjustifiably brought to an end partway through the fixed term. The TSC's position is that termination of the contract was justified and lawful.
2. On 3 December 2020, Mr Nimbtick signed a 4 year contract as the principal of Aulua School, South East Malekula. The contract was for the period 1 December 2020 to 1 December 2024.
3. Mr Nimbtick encountered difficulties at the school, and so on 13 January 2022, wrote a letter to the TSC requesting a transfer to another school. On 7 October 2022, the TSC resolved to transfer Mr Nimbtick to Pialulup school in Santo. Mr Nimbtick was never given a copy of that decision.



4. Mr Nimbtick did not take up the transfer. He asserts he was never told that the transfer request had been approved. The TSC assert he was verbally advised of the transfer decision by Mr Ova, based at the Sanma Education Office in Santo. On 11 May 2023, the TSC met and decided to terminate Mr Nimbtick's employment pursuant to cl D7.1(b) of the employment contract, due to possible breaches of contract. The TSC communicated this to Mr Nimbtick by letter dated 15 May 2023.
5. In the claim filed on 17 August 2023, Mr Nimbtick alleged that his employment was unlawfully terminated, because the TSC based the termination decision on unfounded allegations. By way of relief, he seeks an order for payment of the balance of salary owing under the contract, together with a severance allowance and other legal entitlements, and damages.
6. A defence was filed on 23 November 2023. The defence as pleaded was that Mr Nimbtick's employment contract was terminated for breach of the terms of the contract, because he did not go to the new school, Pialulup as directed and accepted a government scholarship without informing the TSC and obtaining approval before taking scholarship leave.¹ The TSC refute any entitlement to the relief sought in the claim.

The issues

7. Mr Macreveth filed a statement of agreed and disputed facts and issues prior to trial. Ms Toa Tari agreed these were the issues. The issues for determination are:
 - a. Whether termination of Mr Nimbtick's employment was unlawful or unjustified?
 - b. If so, is Mr Nimbtick entitled to the relief sought?

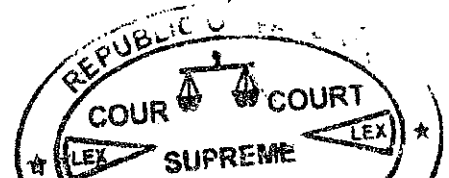
Was the termination of employment unlawful or unjustified?

The factual narrative

8. On 4 November 2020, Mr Nimbtick's appointment as principal of Aulua School, Southwest Malekula was approved by the TSC. As is evident from the letter of offer dated 4 November 2020, this was on a contract basis pursuant to s 42(2) of the Teaching Service Act. The letter said that the applicable terms and conditions of service were contained in the Teaching Service Act, the Teaching Service Staff Rules and the employment contract.²

¹ An alleged breach of cl D4.2 of the contract

² Refer Hardison Tabi's sworn statement filed on 29 July 2024, annexure HT 1 ("Mr Tabi's sworn statement".)



9. In order to take up the contract, Mr Nimbtick was required to resign from his substantive position. This was communicated to him by letter dated 20 November 2020.³
10. A fixed term contract formalising the appointment was signed by both Mr Nimbtick and the TSC on 3 December 2020. The contract was for a 4 year period, unless terminated earlier in accordance with clause D7.
11. Clause D7 of the contract provides for termination of the contract, and says:

D7 TERMINATION OF CONTRACT

D7.1 This agreement may be terminated.

(a) Automatically and without notice

- *If after agreement and signature of this contract, the employee fails to join his post when called upon to do so by the Administration.*
- *Following a serious offence on the decision of the Teaching Service Commission.*

(b) With notice

- *In case of removal of post for any other reason the TSC shall give the employee no less than one month notice. If the employee terminates **his** agreement, **he** shall give no less than one month notice to the TSC.*
- *In the event that the Teaching Service Commission is dissatisfied with the performance of **employee** as outlined in the review document provided under clause D3 of the agreement TSC may terminate the appointment of **the** employee with one month's notice.*

(c) For reasons of Health

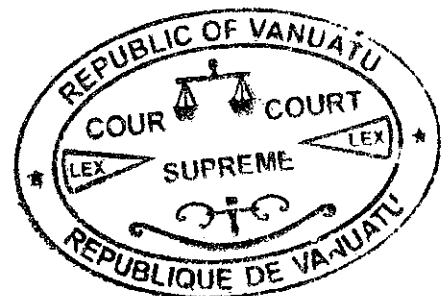
*D7.2 If the employee is certified medically unfit for service by a recognized Medical Practitioner, **he** is entitled to payment of his earned entitlements regarding leave.*

12. Other relevant provisions are:

D1 AGREEMENT

It is agreed between TSC and the Employee as follows:

³ Refer Mr Tabi's sworn statement, annexure HT 2.



.....

D1.2 The duration of this Agreement is from 1st December 2020 to 1st December 2024 inclusive unless terminated earlier in accordance with clauses D7.1

.....

D1.4 The Employee must assume Duties on the first date mentioned in clause D 1.2 unless the employee has obtained the prior written approval of the Chairperson of the TSC to assume the Duties at a later date.

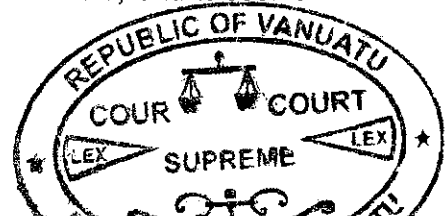
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D4 LEAVE

.....

D4.2 The Employee must obtain the approval of his immediate supervisor prior to taking any leaves.

13. Section 42(3) of the Teaching Service Act provides that a contract under s 42 may exclude the person engaged under the contract from being subject to the Act or certain provisions of the Act. There is nothing in the contract to exclude the Act applying. Therefore, by operation of law the Teaching Service Act applies.
14. On 13 January 2022, Mr Nimbtick wrote a letter to the TSC requesting a transfer to Navele School in Sanma Province. In the letter he explained that issues had arisen from the deaths of a teacher and the boarding master, which according to Mr Nimbtick, were related to nakaimas (witchcraft). As a result, various issues of concern had arisen to the point where his wife would not accompany him back to the school, unless he obtained a transfer to another school in a different province. In the event that there could not be a transfer, he wanted to know so that he could tender his resignation.
15. Mr Nimbtick did not continue in his position as principal of Aulua School. While Mr Tabi's evidence was that Mr Nimbtick should have been at Aulua School, Mr Nimbtick says that he was told to remain in Santo and wait for the decision. In his sworn statement, Mr Nimbtick said that following the transfer request, he was notified by the secretary of the Commission, Dick Hopkins that the board deliberated and approved his request for transfer, and that he was told he would have to wait to sign another contract once a vacant position was identified in another school. Mr Nimbtick's evidence is that he made follow up phone calls to the TSC and was told to wait. I am unable to give Mr Nimbtick's evidence about this any real weight, as this evidence is hearsay. That is because the person who told him to wait did not give evidence and Mr Nimbtick must be relying on the statements for their truth. That evidence is unable to be tested, and it seems

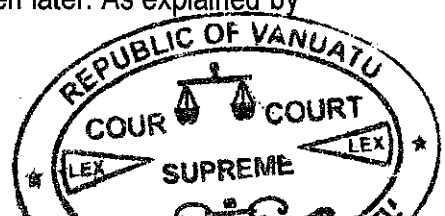


improbable that the TSC would advise Mr Nimbtick to wait when the consequence was that Aulua school would be left without a principal and saliently, that Mr Nimbtick was being paid a salary without doing any work.

16. Some months later, on 7 October 2022, the TSC met and resolved that Mr Nimbtick would be transferred to Pialulup School with immediate effect. The Commission also resolved that Mr Nimbtick's contract be later reviewed to reflect changes of the principal position. Mr Nimbtick was not provided with the TSC's transfer decision.
17. It is not in dispute that Mr Nimbtick did not go to Pialulup School.
18. Mr Nimbtick asserts that this decision was never communicated to him, either verbally or in writing. His evidence is that it was not until he was given the termination letter in May 2023 that there was any communication from the TSC.
19. In his sworn statement, Mr Tabi, the Acting Chairman of the TSC said that the transfer decision was communicated to the Sanma Education Office, and that Mr Nimbtick was verbally informed of the transfer to Pialulup School by Leo Ova. However, Mr Nimbtick failed to go to Pialulup School.
20. In 2023, Mr Ova was the Secondary School co-ordinator in the Sanma Education Office. In his sworn statement filed on 29 July 2024, he said that on 27 February 2023 at a staff meeting in the Samna Education Office, they resolved to locate Mr Nimbtick following notice of his absence from Aulua School. He also said that the staff meeting resolved that Mr Nimbtick would be placed at Pialulup School as per the decision of the TSC and he was tasked to make logistical arrangements for Mr Nimbtick to travel to Pialulup School. At paragraph 6 of his sworn statement, Mr Ova said:

"6. I confirm that I made attempts all through the month of March, April and May informing him of his new principal post and to assist him of his transfer to Pialulup School but without success"

21. Mr Ova was asked about this statement in cross examination. He said that during March, April and May 2023, he did inform Mr Nimbtick of his transfer to his new post at Pialulup School. He said they met in a number of places. They met in town and Mr Ova even went to Mr Nimbtick's home. Mr Ova's evidence was that he informed Mr Nimbtick that he would be going to Pialulup and that the transfer letter would be prepared and sent over later. Mr Ova was resolute in his evidence that Mr Nimbtick was aware of the transfer to Pialulup School. In answer to a question I asked, Mr Ova said that what he meant by "without success" was that Mr Nimbtick did not want to move to his "new transfer post". When I asked Mr Ova why Mr Nimbtick did not go, he said that it could have been because he did not have the transfer letter. He also said it was not usual for a teacher to go to a new post and the transfer letter to be given later. As explained by



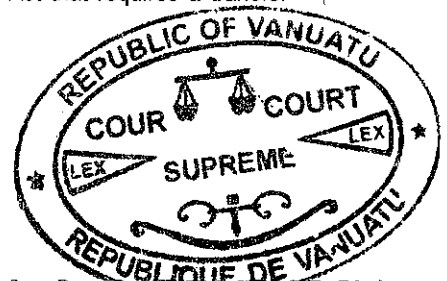
Mr Ova, the process adopted in the present case seems to have arisen because Mr Nimbtick had left Malekula some time ago and was not placed in a school.

22. On the face of it, there is an inconsistency between Mr Ova's sworn statement and his evidence given during the trial as to attempts to contact Mr Nimbtick. If there is an inconsistency, it does not necessarily mean the evidence cannot be relied upon. Inconsistencies can happen even when a witness is telling the truth. Whether or not an inconsistency impacts on the credibility and reliability of evidence will turn on the nature of the inconsistency, whether it is minor or significant and any explanation given for the inconsistency. The inconsistency could be seen to be significant. However, Mr Ova gave an explanation for the difference between his statement and his evidence. Further, it is likely that it was poor drafting rather than Mr Ova changing his narrative as he gave clear, and firm evidence that he had spoken to Mr Nimbtick on a number of occasions. Mr Ova's evidence that Mr Nimbtick did not want to go, likely because he did not have a transfer letter, is congruent with Mr Nimbtick's own view that a transfer letter was required prior to him taking up the transfer.⁴ Mr Ova's evidence is also congruent with the concern that the Sanma Education Office had about Mr Nimbtick to the point where they emailed the TSC asking for Mr Nimbtick to be disciplined. Therefore, I accept Mr Ova's evidence that he made contact with Mr Nimbtick and told him to take up the transfer to Pialulup school.
23. Mr Nimbtick's nonattendance at Pialulup School eventually came to the attention of the TSC. The acting Provincial Education Officer of Sanma Education Office, Mr Vocor, communicated this to the TSC by email on 19 April 2023.⁵ Mr Vocor asked the TSC to discipline Mr Nimbtick.
24. The TSC was also informed that Mr Nimbtick had been awarded a Vanuatu government scholarship, and that Mr Nimbtick had signed the award letter in March 2023. There was no evidence before the Court about the Government scholarship, its terms, or whether it conferred any financial benefits.
25. The TSC resolved at its meeting on 11 May 2023 to give one month's notice to terminate Mr Nimbtick's contract as principal at Pialulup School in accordance with clause D7.1(b) of the employment contract. The TSC communicated the decision in a letter to Mr Nimbtick dated 15 May 2023.⁶ The letter said:

⁴ See paragraph 7 of Mr Nimbtick's sworn statement filed on 7 February 2025. While nothing turns on this point, there is nothing in either the employment contract itself or the Teaching Service Act that requires a transfer decision to be in writing. See in particular s 40 of the Act

⁵ Refer Sworn statement Hardison Tabi, annexure HT 6

⁶ Refer Mr Tabi's sworn statement, annexure HT 9





GOVERNMENT OF THE REPUBLIC OF VANUATU
MINISTRY OF EDUCATION AND TRAINING
TEACHING SERVICE COMMISSION
Joint Court Area, Emile Mercet Street,
Private mail Bag 9028, Port Vila

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TEACHING SERVICE COMMISSION
LA COMMISSION DU SERVICE DE L'ENSEIGNEMENT



COUVERNEMENT DE LA REPUBLIQUE DE VANUATU
MINISTRE DE L'EDUCATION ET DE LA FORMATION
LA COMMISSION DU SERVICE DE L'ENSEIGNEMENT
Zone commune De La Cour, Rue Emile Mercet,
Sac postal privé 9028, Port Vila

15th May 2023

To: John Nelson Nimbtick
C/: Sanma Education Office
Luganville, Santo

Dear Mr. Nimbtick,

ONE (1) MONTH NOTICE OF TERMINATION OF YOUR EMPLOYMENT CONTRACT WITH TEACHING SERVICE COMMISSION

The Commission Board at its meeting No. 10 on the 11th May 2023 has deliberated on a complaint made against you on the 19th April 2023 by the Acting PEO of Sanma Education Office that you were not in your allocated school at Pialulup School and currently receiving a full salary without occupying the Principals position, which is a possible breach of clause D1.4 of your contract agreement.

The Commission was made aware that you had been informed by the Sanma Education Office of your transfer to Pialulup School to head the school however to date you are not in the school. Furthermore, the Commission has been made aware through the Scholarship Unit that you had been awarded a scholarship and signed off on your award to which you do not have any approved study leaves which is a possible breach of clause D4.2 of your contract agreement.

Thus, the Commission wishes to give one month notice of Termination of your current employment contract as Principal of Pialulup School in accordance with clause D7.1(b) of your contract agreement, effective as of the date of this letter.

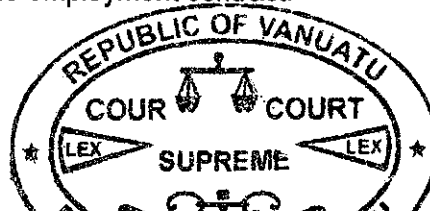
By copy of this letter the Director Finance and Administration and Salary Section is informed of your one month notice of termination of employment contract and is advised to process any legal entitlements accordingly.

Yours faithfully,

TEACHING SERVICE COMMISSION

HARDISON TABI
Acting Chairperson

26. The TSC used cl D7.1(b) to terminate Mr Nimbtick's employment contract upon one month's notice. The TSC appear to have terminated his employment for cause, as the reasons for termination in the letter are possible breaches of the employment contract.



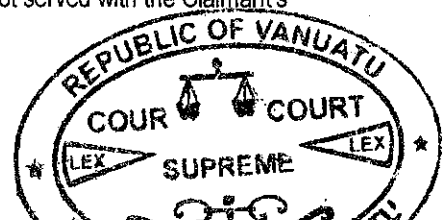
As I have said, the defence as pleaded is that the contract was terminated because Mr Nimbtick breached the contract, rather than possible breaches.

Submissions

27. For the Claimant, Mr Macreveth contended that the termination of employment was unjustified.⁷ That is on the basis that:
- a. The TSC failed to personally serve Mr Nimbtick with the transfer decision or inform him of the transfer to Pialulup school.
 - b. The Court should reject Mr Ova's evidence that he told Mr Nimbtick about the transfer decision, as his evidence was contradictory and as such, should be rejected.
 - c. That the TSC followed a process that was procedurally unfair to Mr Nimbtick as they deliberated on the issues without giving Mr Nimbtick the right to respond to the allegations prior to deciding to terminate the contract. Therefore, there was a breach of the principles of natural justice.
 - d. That the employment contract related to Mr Nimbtick's role as principal of Aulua school, not Pialulup school. That the contract itself did not specify that the TSC had any right to transfer Mr Nimbtick under the original contract. This is particularly given that it is unusual for a transfer without a transfer document and signing a new contract.
 - e. That Mr Nimbtick did not breach any of the terms of the employment contract as alleged by the TSC.
28. For the TSC, Ms Toa Tari made a number of submissions directed towards the termination of the contract under cl D7.1 as being justified given Mr Nimbtick's failure to comply with the transfer direction and accepting a government scholarship.⁸ She submitted that the TSC was justified in terminating the contract because Mr Nimbtick had breached the employment contract. Ms Toa Tari's submissions went beyond the pleaded defence, and asserted breaches of contract not pleaded. For example, that he failed to perform his duties from 13 January 2022, that there was a breach of cl D2.3 relating to payment of wages, because Mr Nimbtick was not working, as required under the contract. Notably, there was no counterclaim seeking to recover wages for the period of time Mr Nimbtick was not working after he left Aulua school. I will not consider those alleged breaches of contract, because they were not pleaded. There was some

⁷ As set out in his written submissions filed on 14 April 2025

⁸ Written submissions were filed on 27 June 2025. The Defendant was apparently not served with the Claimant's written submissions



cross examination, but it is unfair for the TSC to make an issue of these matters in closing submissions.⁹ The TSC could have sought leave to amend the defence but did not.¹⁰

29. Ms Toa Tari also submitted that the TSC was entitled to terminate the contract under D7.1 by giving the notice provided for in cl D7.1. Ms Toa Tari contended in her written submissions in reliance on *Tarilongi v Vanuatu National Provident Fund* [2020] VUCA 32, and *Didou v Vanuatu National Provident Fund* [2023] VUCA 47 that the TSC adopted the same process as was undertaken in both those cases, so the termination was justified.¹¹ Both cases relate to termination of employment during a fixed term contract where the termination by notice provision mirrored s 49 of the Employment Act.
30. In *Tarilongi*, the Court considered termination of employment pursuant to a clause of a fixed term employment contract. The Appellant was employed pursuant to a fixed term employment contract, which provided for termination at any time by either party on 3 months' notice. She was suspended from her employment pending an investigation which was never completed. Instead, a few months later, her employment was terminated under the contract. The Court of Appeal said at paragraph 25:

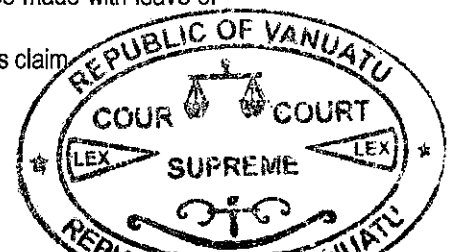
25. It is not suggested by counsel for Ms Tarilongi that, in the routine case, there is any specific procedural fairness requirement to be implied before the exercise of the right of termination under clause 13.1. That was an appropriate position to adopt. The position is clear, as the words are clear. The same position applies when exercising the statutory right of termination on notice under section 49 of the Employment Act. Kalambae v Air Vanuatu (Operations) Limited [1024] VUCA 34 confirms that. Section 48 of the Employment Act does not assist the contention on behalf of Ms Tarilongi as it merely says that a contract of employment shall terminate on the last day of the period agreed in the contract. The last day agreed in the contract in the present circumstances is the period of 5 years as shortened by any termination under clause 13 of the contract.

31. I make two points.
32. Firstly, the defence, as pleaded, was not that cl D7.1(b) gave the TSC the right to terminate the employment contract at any time, or for any reason. The TSC specifically pleaded that the contract was terminated because Mr Nimbtick breached the contract by not taking up his new principal's post and accepting a government scholarship without advising the TSC and having approved leave.

⁹ See *Shefa Provincial Council v Timbaland Ltd* [2025] VUCA 30 at paragraphs 17-19.

¹⁰ Rule 4.11(2)(a) and (b) of the Civil Procedure Rules provides that an amendment may be made with leave of the Court at any stage of the proceedings

¹¹ It is unnecessary to refer to *Didou*, as the appeal related to a limited issue irrelevant to this claim



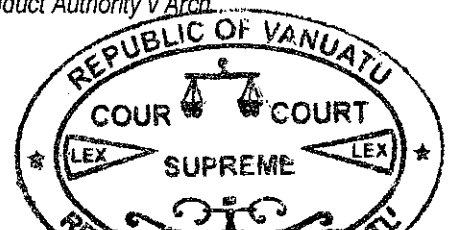
33. The Court cannot allow counsel to raise for the first time in submissions a significant issue, which was not, but could have been, pleaded.¹² Both parties could then have considered the issue and framed their evidence and submissions accordingly. Mr Macreverth had no opportunity to address this contention, and importantly, the case was not argued on the basis that the TSC had a right to terminate the contract without cause. The TSC's position was that it terminated the contract because Mr Nimbtick breached the contract, as detailed at paragraphs 19 and 20 of Mr Tabi's sworn statement.
34. Secondly, *Tarilongi* does not assist in determining whether the termination of the employment contract was unlawful. For one reason, as I have said, the defence was not that there was a contractual right of termination without justification or reason. Another reason is that unlike *Tarilongi*, there are statutory provisions which apply in Mr Nimbtick's case, along with the employment contract. As I will explain, the Teaching Service Act sets out the steps the TSC must take to ensure procedural fairness, when conduct issues arise.

Discussion

35. Whether or not Mr Nimbtick's employment was unlawfully terminated turns on the construction of the employment contract and any applicable statutory provisions. Notably, neither counsel addressed the proper construction of the contract, cl D7.1 or the applicability of the Teaching Service Act at all in their written submissions, other than Mrs Toa Tari acknowledging that it applied.
36. The proper approach to construction of the contract is an objective one. The aim is to ascertain the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably be available to the parties at the time of the contract.¹³ The interpretive exercise encompasses text, context and purpose.
37. In Mr Nimbtick's case, the contract was a fixed term contract for a period of four years, unless terminated in accordance with clause D7. The TSC terminated the contract pursuant to cl D7.1(b). As pleaded in the defence, this was for breach of contract.
38. Clause D7.1(a) provided for termination of contract without notice in two circumstances; failure to take up the principal's post, and a serious offence as decided by the TSC. "Serious offence" must mean serious misconduct.

¹² See above, n9

¹³ *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1



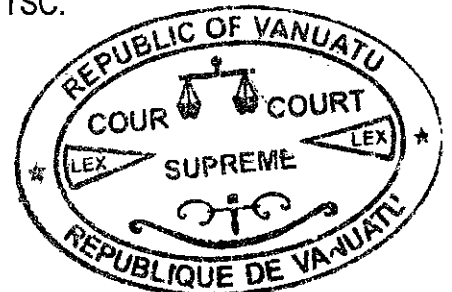
39. Clause D7.1(b) provides for termination of the contract by the TSC with no less than one month's notice, in the event of removal of post for any other reason. The reference to "*any other reason*" logically must relate to cl D7.1(a). I construe this to mean that if Mr Nimbtick was removed from his principal's post for a reason other than serious misconduct or failure to take up the principal's position, the TSC had the right to terminate the contract on one month's notice. Mr Nimbtick was to give the same notice period as the TSC in the event he decided to terminate the contract. Clause D7.1(b) does not say anywhere that the contract could be terminated on notice for possible or established breaches of the contract.
40. The proper construction of Clause D7.1(b) is not easy to ascertain, as it is poorly drafted. But I consider that what is important here, is the external context to the contract. As the letter of offer set out, the contract was pursuant to s 42(2) of the Teaching Service Act. Saliently, s 42(3) says:

"(3) A contract under this section may exclude the person engaged under the contract from being subject to this Act or certain provisions of this Act and may be for such period as the Commission determines".

41. While it was open to the parties to contract out of the Teaching Service Act or certain provisions, there is nothing in the employment contract to suggest that the Act or certain provisions did not apply to Mr Nimbtick. As I have said, the letter of offer the TSC confirmed that the Teaching Service Act applied, along with the employment contract.
42. In Mr Nimbtick's case, the employment contract was terminated because the TSC received a complaint, and after deliberating on the complaint, decided to terminate the contract on the basis of possible breaches of contract. As Mr Tabi said in his sworn statement,¹⁴ the TSC received an email from Mr Vocor dated 19 April 2023 about the fact that Mr Nimbtick had not taken up the transfer to Pialulup school. Mr Vocor asked the TSC to discipline Mr Nimbtick. The TSC acted on the report from Mr Vocor because at its meeting on 11 May 2023, it resolved to give one month's notice of termination to Mr Nimbtick in accordance with cl D7.1(b) of the employment contract. The TSC wrote to Mr Nimbtick on 15 May 2023, and terminated his employment contract. In the letter, the TSC detailed that it had deliberated on a *complaint* made against him on 19 April 2023,¹⁵ which included his nonattendance at Pialulup school, yet was being paid. Further, that he had been awarded a scholarship but did not have any approved study leave. The TSC described these issues as possible breaches of the employment contract. And the defence as pleaded was that Mr Nimbtick breached his contract of employment with the TSC, because he failed to take up the new principal's position at Pialulup school and accepted a scholarship without informing the TSC.

¹⁴ At paragraph 13

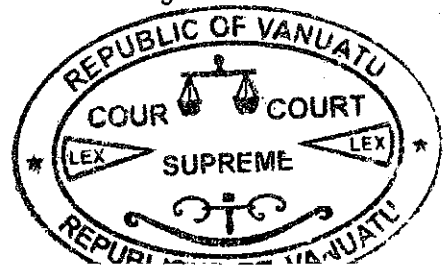
¹⁵ emphasis added



43. In terminating Mr Nimbtick's employment contract, the TSC had concerns as to Mr Nimbtick's conduct, which appear to be warranted. Although the TSC confirmed to Mr Nimbtick that the Teaching Service Act applied, I infer they either overlooked or ignored the Act's application to Mr Nimbtick, and instead focussed on the employment contract. The Teaching Service Act provides for a mandatory disciplinary process which in the context of whether or not the contract was lawfully terminated, is relevant, and must prevail over the employment contract.
44. The Teaching Service Act sets out employee obligations and a disciplinary procedure to be followed where a breach of discipline is alleged or suspected. Pursuant to s 50(b) of the Act, employees must at all relevant times obey any lawful direction given by the TSC, including a direction to transfer. Further, pursuant to s 52(1)(c) an employee is guilty of misconduct if they wilfully disobey or disregard a lawful direction given by a person in authority.
45. Part 9 of the Teaching Service Act sets out the disciplinary procedure to be followed. If a breach of discipline is alleged or suspected, and is not minor, the TSC must arrange for an investigation to be undertaken, and the employee must be advised of the alleged misconduct or failure to comply and be given a reasonable opportunity to respond.
46. Relevantly, s 54 says:

54. Disciplinary investigation

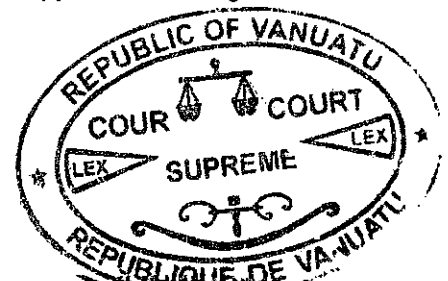
- (1) *If a breach of discipline is alleged or suspected and is not minor, the Commission must arrange for an investigation to be undertaken. The investigation must be conducted by a senior employee or other suitably qualified person with no previous involvement in the matter and a written report must be prepared by the investigator for the Commission's consideration.*
- (2) *The employee who is subject to the investigation must be advised of the details of the alleged misconduct, failure to comply, inefficiency, incompetence, lack of fitness or inability and be given a reasonable opportunity to respond. Any such response must be included in the written report provided to the Commission and must be considered in determining whether there has been a breach of discipline.*
- (3) *Minor disciplinary issues are to be dealt with directly by the principal of the relevant school. If the minor disciplinary issue concerns a school principal, it is to be dealt with by the relevant Provincial Education Officer or Education Authority.*
- (4) *Ceremonies and other custom practices may be used in resolving minor disciplinary issues.*



- (5) *If the Commission reasonably suspects that an employee has committed a criminal offence which has a penalty of imprisonment for 12 months or more it must as soon as possible, advise the Police or other appropriate authority.*

47. As set out in s 56(1) of the Act, if the TSC determines that an employee has committed a breach of discipline, the employee must be given a reasonable opportunity to make a submission as to penalty. There are a range of penalties which the TSC has the discretion to impose, from a caution or reprimand at one end, and at the other end of the spectrum, dismissal.¹⁶ So, for teachers, there is a double layer of procedural fairness when disciplinary issues arise; when a breach of discipline is alleged or suspected, and then again, prior to the imposition of a penalty, once a determination is made that a teacher has committed a breach of discipline.
48. Mr Vocor asked the TSC to discipline Mr Nimbtick, because he did not take up the transfer. While he may not have used the statutory language, Mr Vocor must have been alleging a breach of discipline. In the termination letter, the TSC said they had deliberated on a complaint made against him by the Sanma Education office and said there were possible breaches of contract. These breaches were failing to obey the transfer decision and accepting the government scholarship, and not having any approved study leave. The TSC then terminated the contract on notice under cl D&.1(b). A compelling inference is that TSC suspected a breach of discipline given that the letter expressly set out that they had considered Mr Vocor's complaint that he had not taken up the transfer to Pialulup school.
49. Under the Teaching Service Act a failure to obey a transfer direction is a suspected or alleged breach of discipline under s 51(a) or (c), and so an investigation was mandated. In such circumstances, the TSC was obliged to arrange for an investigation to take place pursuant to s 54 of the Act. Mr Nimbtick would then have been advised of the details and be given a reasonable opportunity to respond before a decision was made. The TSC would not be obliged to accept his explanation. The TSC would then have had the discretion to impose a penalty of either dismissal or termination of contract pursuant to cl D7.1(b), but not before giving him another opportunity to make a submission as to penalty under s 56(1) of the Act.
50. While I accept that generally in an employment dispute there is no specific procedural fairness requirement where misconduct is suspected, as opposed to serious misconduct, the Teaching Service Act itself provides for mandatory investigation of alleged or suspected discipline. Section 42 enables the Act or certain provisions to be contracted out of, in employment contracts for teachers, but that did not occur in Mr Nimbtick's case. So, as I have said, the Teaching Service Act applied, including the

¹⁶ The discretionary penalties are set out in s 53 of the Teaching Service Act

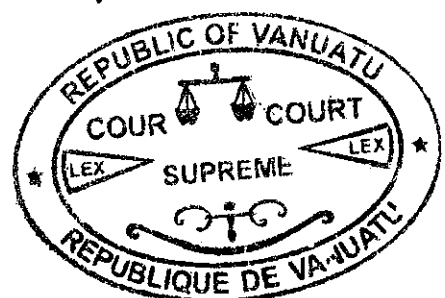


disciplinary provisions. Thus, there was a procedural fairness requirement. The TSC was required to follow the disciplinary procedure laid out in the Act before Mr Nimbtick's employment could be terminated, as there was an alleged or suspected breach of discipline. They did not follow the procedure set out in s 54, and there is no evidence as to why that did not happen.

51. Therefore, for the reasons set out in the preceding paragraphs, it is more likely than not that Mr Nimbtick's employment was unlawfully or unjustifiably terminated. That is because there was an alleged or suspected breach of discipline, and so the TSC was obliged to follow the disciplinary procedures set out in Part 9 of the Teaching Service Act. As detailed above, Mr Nimbtick should have had an opportunity to respond to the alleged discipline breach before a determination was made. Once a determination was made, there should have been a further opportunity to respond before termination of employment. But as noted, the TSC did not follow any of the procedures laid down in Part 9 of the Act.
52. Therefore, the claim for unlawful termination of employment succeeds.

The relief sought

53. Mr Nimbtick seeks to be paid the balance of the fixed term contract, the severance allowance and other legal entitlements. He also seeks an order for damages of VT 50,000.
54. In the defence, the TSC refute any entitlement to the relief as sought.
55. Again, counsel's written submissions do not address this issue in any meaningful way. Mr Macreveth's sole submission is that Mr Nimbtick is entitled to the relief as sought. He makes no specific submissions about any of the heads of relief sought. The submissions filed by the TSC do not address the issue at all, other than contending that Mr Nimbtick is not entitled at relief at all. With respect to both counsel, their submissions are inadequate. The Court is entitled to expect counsel to address in submissions all matters in issue.
56. I did consider whether to seek further submissions from counsel regarding the issue of relief but determined that it was undesirable to deal with the issues on a piecemeal basis, and that given the state of the pleadings and the evidence as to relief, providing counsel with a further opportunity to file submissions, would be unlikely to assist.



Payment of the balance of the contract

57. In *Republic of Vanuatu v Watson* [2023] VUCA 31, the Court of Appeal considered what entitlements must be ordered to be paid when a fixed-term contract is brought to an unjustified end. The Court of Appeal rejected a no work, no pay argument because there was a fixed term contract and said at paragraph 34:

Unlike the employee on wages or a periodic salary, the fixed-term employee can recover entitlements beyond the termination date, as contractual entitlements. Thus, the principle relied upon by the Appellant where this Court said an employee cannot recover wages after the date of his dismissal does not support the argument that a fixed-term employee cannot recover the balance of his or her contractual entitlements.

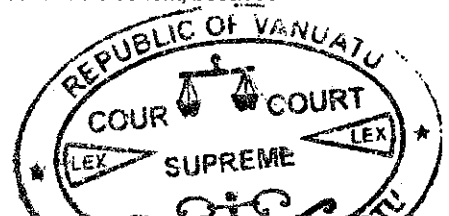
58. *Watson* was applied in *Republic of Vanuatu v Arnhambat* [2024] VUCA 29. The Court of Appeal said at paragraphs 16 and 17:

16. We have found that this fixed-term contract was brought to an unjustified end. In such a situation, an employee can recover the balance of his or her contractual entitlements as set out in this Court's judgment in Republic of Vanuatu v Watson [2023] VUCA 31 at [36]-[38].

17. Mr Bong submitted that Mr Arnhambat had not carried out any work therefore he was not entitled to salary. As set out in the Watson case referred to above, the principle of no work, no pay was discussed and applied in the judgment of this Court in Robertson v Luganville Municipal Council [2001] VUCA 14. However, that case is distinguishable on its facts as it was not a fixed-term contract case. Accordingly, there is no merit to this ground of appeal and the primary Judge was correct to award payment of 3 months salary.

59. Mr Nimblick's fixed term contract was brought to an unjustified or unlawful end. Therefore, Mr Nimblick can recover the balance of his contractual entitlements, in accordance with *Watson* and *Arnhambat*.
60. Mr Nimblick is to be paid the balance of entitlements under his employment contract, as from 15 May 2023.¹⁷

¹⁷ The Court is troubled by the fact that Mr Nimblick was receiving a Vanuatu government study scholarship during the term of the fixed term contract, and the potential double benefit to him, financially. However, as noted, there is no counterclaim for repayment of salary, and more importantly no evidence at all as to what financial benefits might be paid under the terms of the scholarship. The TSC were very concerned about the scholarship, so could have put evidence before the Court, but did not. So, I can put it no higher than a potential double benefit, because to do anything else would be speculation.



Severance

61. In the relief sought in the claim, Mr Nimbtick seeks an order for the TSC to pay a severance allowance and other legal entitlements due. Mr Nimbtick does not specify what other legal entitlements he is seeking. In the claim, as pleaded, Mr Nimbtick does not seek a multiplier pursuant to s 56(4) of the Employment Act. However, I must consider the multiplier issue, because s 56(4) is expressed in mandatory terms.
62. Part 11 of the Employment Act ('the Act') creates a specific regime with regard to payment of a severance allowance to employees. Section 54 identifies the qualifying circumstances and s 56 addresses the method of calculating the allowance.
63. Section 54 of the Employment Act provides that when an employer terminates the employment of an employee who has been in continuous employment for at least 12 months, the employer must pay a severance allowance to the employee under s.56. Section 56 provides (relevantly):

AMOUNT OF SEVERANCE ALLOWANCE

56. (1) *Subject to the provisions of this Part, the amount of severance allowance payable to an employee shall be calculated in accordance with subsection (2).*

(2) *Subject to subsection (4) the amount of severance allowance payable to an employee shall be-*

(a) *for every period of 12 months – 1 months remuneration;*

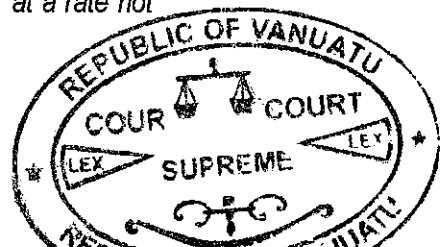
(b) *for every period less than 12 months, a sum equal to one-twelfth of the appropriate sum calculated under paragraph (a) multiplied by the number of months during which the employee was in continuous employment;*

.....

(4) *The court shall, where it finds that the termination of the employment of an employee was unjustified, order that he be paid a sum up to 6 times the amount of severance allowance specified in subsection (2).*

(5) *Any severance allowance payable under this Act shall be paid on the termination of the employment.*

(6) *The court may, where it thinks fit and whether or not a claim to that effect has been made, order an employer to pay interest, at a rate not*



exceeding 12 per cent per annum from the date of the termination of the employment to the date of payment.

64. There can be no dispute that Mr Nimbtick is entitled to be paid a severance allowance in accordance with s 56(2), as the contract commenced on 3 December 2020, and Mr Nimbtick's employment was terminated on 15 May 2023. It may be that the payment has already been made, as s 56(5) provides that any severance allowance payable under the Act shall be paid on termination of employment. There is no evidence as to whether it has been paid or not.
65. In *FR8 Logistics v Leona* [2023] VUCA 46, the Court of Appeal considered the approach to the multiplier under s 56(4), and said:

40. The Judge referred to Vanuatu Broadcasting and Television Corporation v Malere [2008] VUCA 2 in which this Court said: -

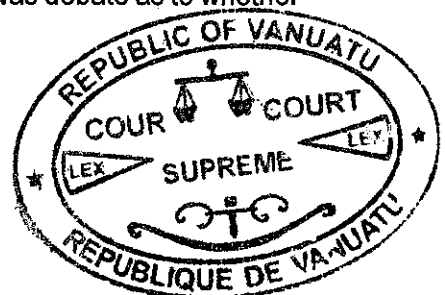
"There are two possibilities with regard to the meaning of Sections 56 (4). In some cases, it has been treated as a reflection of the circumstances which lead to dismissal and in others it has been treated more as compensatory for a person who is unable to obtain work. Whether in this case it matters which of the approaches is adopted we do not know and it is possible that under either approach a good case could be advanced"

41. The Judge also referred to Republic of Vanuatu v Mele [2017] VUCA 39 in which this Court referred to both the unjustified nature of the dismissal and Mr Mele's loss of future employment opportunities to earn income as justifying an uplift of 2 times. The Court said: -

"[59] However s56(4) is quite different. It is for compensation for unjustified dismissal. While it uses severance pay as a basis for the multiplier this is simply a formula for calculating the compensation due, if any, for unlawful dismissal.

[60] Compensation for unlawful dismissal, beyond the entitlement of all employees (e.g. notice/annual leave) will be for the dismissal itself and for the consequences of the unlawful dismissal and the loss of the job."

66. In *Milai Vanuatu Ltd v Wilson* [2024] VUCA 50, the Court of Appeal was of the view that the purpose of s 56(4) was compensatory but noted that there was debate as to whether



it is a reflection of the circumstances of the dismissal or more compensatory for a person who is unable to find work.¹⁸

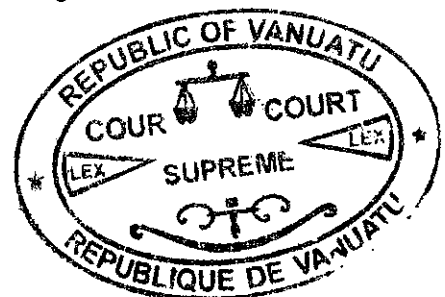
67. In terms of assessing the multiplier under s 56(4), there is no evidence at all to assess the multiplier, whether compensatory or to reflect the circumstances of the dismissal itself. Mr Nimbtick gave no evidence in his sworn statements or during the trial as to the effect of the termination of employment on him, or his ability to find employment. There is no evidence, for example, of lost opportunities for employment, or any other consequence. The only evidence was of Mr Nimbtick being in receipt of a Vanuatu government scholarship, both before and after the contract was terminated. As I have already observed, no detail is known about that, including any (if any) financial benefits.
68. Further, as the Court of Appeal explained in *Republic of Vanuatu v Watson* [2023] VUCA 31, an employee on a fixed term contract is better off than an employee whose term of employment is not for a fixed term, because they may expect to receive the balance of their entitlements for the remaining term of the contract, and took this advantage into account in reducing the applicable multiplier from 4 to 2.
69. Relevantly, Mr Nimbtick is to be paid the balance of entitlements under his employment contract. To that extent, he has an advantage over an employee who is not on a fixed term contract. This is a consideration to be taken into account in determining the multiplier. And as I have said, there is no evidence at all as to the consequences of the termination of employment for Mr Nimbtick, and minimal evidence as to the government scholarship. Taking both those factors into account, I apply a multiplier of one, which means that Mr Nimbtick is to be paid the bare severance allowance.

Damages

70. Mr Nimbtick seeks damages of VT 50,000 for stress endured to date.
71. In *Remy v Kyong Sik Jang* [2018] VUCA 5, the Court of Appeal set out the principles guiding a Court in assessing damages. Pertinent to this claim, the Court said that when a Court is required to assess damages, the Court starts from the principle that it is for the Claimant to identify the losses which are claimed, and to lead evidence to establish them.¹⁹
72. As I have already said, there is no evidence as to the consequences of termination of the contract, and whether that caused stress to Mr Nimbtick. He neither identified any loss, nor gave any evidence to establish that he is entitled to damages for stress.

¹⁸ At paragraph 37

¹⁹ At paragraph 30



73. Mr Nimbtick is not entitled to an award for damages for stress.

Result

74. I make the following orders:

- a. The claim for unlawful and unjustified termination of employment succeeds.
- b. Mr Nimbtick is to be paid the balance of entitlements under the employment contract.
- c. Mr Nimbtick is to be paid a severance allowance in accordance with s 56(2) of the Employment Act, if not already paid.
- d. Pursuant to s 56(4) of the Employment Act, there is a multiplier of one, for the reasons set out above. This means he is to be paid the bare severance allowance.
- e. The claim for damages is declined and dismissed.
- f. Costs to Mr Nimbtick at the standard rate, as either agreed or taxed.

**DATED at Port Vila this 21st day of August 2025
BY THE COURT**

name
.....
Justice M A MacKenzie

