

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 17/3171 CoA/CIVA

BETWEEN: AIR VANUATU (OPERATIONS) LIMITED
Appellant

AND: DIDIER VIRELALA
Respondent

Coram: Hon. Justice John von Doussa
Hon. Justice Raynor Asher
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd
Hon. Justice Gus Andrée Wiltens

Counsel: Mr E. Nalyal for the Appellant
Mr. F. Laumae for the Respondent

Date of Hearing: Thursday 19th April, 2018
Date of Judgment: Friday 27th April, 2018

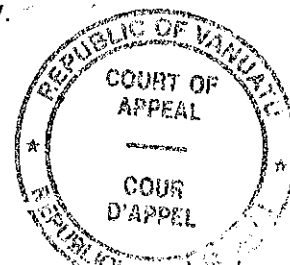
JUDGMENT

Introduction

1. Didier Virelala was employed as a pilot by the appellant Air Vanuatu (Operations) Limited (AVO). On 31 January 2014 that employment was terminated. He was paid VT6,125,870 for outstanding salary, severance, three months pay in lieu of notice and outstanding annual leave/holiday pay. He brought proceedings claiming against AVO a total of VT83,107,240 for unlawful termination. His claim of unlawful termination succeeded, but the damages ordered were VT18,604,548, considerably less than that claimed.
2. AVO appeals that decision of unlawful termination. There is no cross-appeal in respect of damages.

Background

3. Mr Virelala commenced his employment as a pilot on 26 April 2007. There were two three year contracts taking him to 30 September 2013. There were a number of incidents relating to his actions during the course of his duties, and from 30 September 2013 he was suspended, but on full pay.



4. On 31 January 2014 AVO sent him a letter terminating his employment (the letter). We set it out in full as the construction of the letter is important:

"RE: NOTICE OF TERMINATION OF EMPLOYMENT

Air Vanuatu (Operations) Limited, as your employer, hereby gives you notice that it has decided to terminate your employment for the reasons set out below.

As you know you are currently on suspension for the following incidents:

1. Being late for a flight on 18th December 2012 without a valid reason, which caused delay to the Air Vanuatu Flight. You were given your first written warning for this incident by letter dated 24th December 2012.
2. On 21st March 2013, whilst in the cockpit of the ATR72 aircraft with Captain Lobonmur Pesek after a flight you lost your temper and went into a rage and started shouting at Captain Pesek and caused a major disturbance that was witnessed by the loaders an engineer at Bauerfield airport. By letter dated 3rd April 2013, you were warned that if you caused anymore outburst of anger or poor self-discipline and control, or displayed unacceptable behaviour, you would be dismissed immediately.
3. On 2nd October 2013, you arrived for a flight badly dressed, and Captain David Keys told you that your standard of dress was poor and untidy, and you should dress smartly and to a high standard as a professional pilot, and you walked out of your job as first officer on that flight that morning, without giving any warning or notice to Captain Keys or Air Vanuatu and you took away the flight plan for that flight. As a result, that flight to Noumea was delayed for 21 minutes as a replacement first officer had to be called to take your place and another flight plan had to be printed.

All the incidents above, in particular, incidents 2 and 3 are very serious as they compromise your ability to conduct a flight safely.

In accordance with Section 49(4) of the Employment Act, Air Vanuatu pays you your outstanding entitlements, including your three (3) months salary in lieu of notice is deposited to your designated bank account in full and final satisfaction of all claims being

1. All Outstanding Salary
2. Severance payment
3. Three (3) months in Lieu of Notice, and
4. All Outstanding Annual Leave/Holiday pay

Your termination is therefore effective immediately.

Please return all of Air Vanuatu Property that you have in your possession.

Air Vanuatu takes this opportunity to thank you for your services to it, and wishes you well for your future.

Yours sincerely,

(Signed)

Joseph Laloyer

Chief Executive Officer

(Underlining for emphasis)"

5. AVO acted in accordance with that letter, making the payments that are set out.



6. Saksak J in the decision appealed from (Virelala v. Air Vanuatu (Operations) Limited [2014] No. 329) interpreted this letter as terminating Mr Virelala's employment for serious misconduct under s.50 of the Employment Act. There had been a failure to give Mr Virelala an opportunity to answer the allegations, and he was entitled to damages assessed pursuant to s.50(4) and s.56(4). The judge awarded Mr Virelala damages for lost wages and additional severance, but disallowed other claims.
7. In essence, before us the single submission of Mr Nalyal for AVO is that the letter constituted a termination of an employment contract on notice under s. 49 of the Employment Act, not for misconduct under s 50. Mr Nalyal does not challenge the amount of damages that were awarded.
8. Mr Laumae for Mr Virelala supports the judgment and submits that that the letter was for a s.50 dismissal. There is no cross appeal in relation to damages.

Analysis

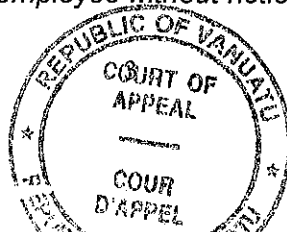
9. Sections 49 and 50 of the Employment Act are critical, and we set them out:

"49. Notice of termination of contract

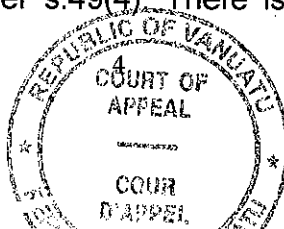
- (1) *A contract of employment for an unspecified period of time shall terminate on the expiry of notice given by either party to the other of his intention to terminate the contract.*
- (2) *Notice may be verbal or written, and, subject to subsection (3), may be given at any time.*
- (3) *The length of notice to be given under subsection (1) –*
 - (a) *where the employee has been in continuous employment with the same employer for not less than 3 years, shall be not less than 3 months;*
 - (b) *in every other case –*
 - (i) *where the employee is remunerated at intervals of not less than 14 days, shall be not less than 14 days before the end of the month in which the notice is given;*
 - (ii) *where the employee is remunerated at intervals of less than 14 days, shall be at least equal to the interval.*
- (4) *Notice of termination need not be given if the employer pays the employee the full remuneration for the appropriate period of notice specified in subsection (3).*

50. Misconduct of employee

- (1) *In the case of a serious misconduct by an employee it shall be lawful for the employer to dismiss the employee without notice and without compensation in lieu of notice.*



- (2) *None of the following acts shall be deemed to constitute misconduct by an employee –*
- (a) *trade union membership or participation in trade union activities outside working hours, or with the employer's consent, during the working hours;*
 - (b) *seeking office as, or acting in the capacity of, an employees' representative;*
 - (c) *the making in good faith of a complaint or taking part in any proceedings against an employer.*
- (3) *Dismissal for serious misconduct may take place only in cases where the employer cannot in good faith be expected to take any other course.*
- (4) *No employer shall dismiss an employee on the ground of serious misconduct unless he has given the employee an adequate opportunity to answer any charges made against him and any dismissal in contravention of this subsection shall be deemed to be an unjustified dismissal.*
- (5) *An employer shall be deemed to have waived his right to dismiss an employee for serious misconduct if such action has not been taken within a reasonable time after he has become aware of the serious misconduct."*
10. It is necessary to interpret the actions of the AVO in terminating Mr Virelala's employment. The letter signed by the Chief Executive Officer of the AVO is critical; there were no discussions or other actions of relevance, save for one, which we refer to later.
11. The first part of the letter reads as if this is to be a termination for misconduct. Indeed it says that the AVO has decided to terminate Mr Virelala's employment for misconduct. It then lists the three reasons for his suspension, and details three incidents, which if they are true do demonstrate serious misconduct. The AVO goes on to say that the incidents are all very serious as they compromise Mr Virelala's ability to conduct a flight safely.
12. However the next paragraph of the letter does not refer to s 50 of the Employment Act. It says that in accordance with s.49(4) of the Employment Act the AVO will pay his outstanding entitlements including three months pay in lieu of notice. It lists the four payments to be made, which in addition to the three months pay, includes severance pay. Despite the first part of the letter, this is unambiguously a termination under s.49. It says so, and under s.49 it is obligatory to give notice or salary in lieu, and severance pay.
13. Then we come to the other critical factor; the actions of the AVO. The appropriate period of notice under s.49(3) was three months notice. Section 49(4) gives the option of paying three months salary instead. AVO actually paid the three months of salary. It also paid the severance pay under s.54. These actions are consistent only with a termination under s.49(4). There is no provision for giving three



months notice or paying cash in lieu in s.50. There is no entitlement for severance pay in the case of dismissal for misconduct under s.50: see s.55(2). Although it is not central to the finding, we note that Mr Virelala accepted these payments.


14. The premise of the Supreme Court judgment was that the termination was under s.50, and that the termination was invalid because no opportunity was given to Mr Virelala to answer the allegations of misconduct under s.50(4). If this had been a termination under s.50, that would be right. But it was not such a termination. It was a termination under s.49, and there is no obligation to give notice under that section. The quid pro quo for this is that notice or payment in lieu must be given, and there are entitlements including severance. Mr Virelala received these.
15. Thus there was an error made in the judgment, as Mr Virelala had not made out his claim. He has misinterpreted the nature of his termination. He had not been terminated for serious misconduct, despite the allegations of misconduct that had led to his suspension, and which were re-iterated in the letter. He had been terminated under the notice section.
16. The result must be that the appeal is allowed. Mr Virelala's contract was validly terminated on notice and he was paid what he was due.

Result

17. The appeal is allowed.
18. The orders made in the Supreme Court including the costs order are set aside.
19. The appellant AVO is entitled to costs on a standard basis in this Court and the Supreme Court. We so order.

DATED at Port Vila, this 27th day of Apri, 2018.

BY THE COURT


Hon. Justice von DOUSSA

