

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

Civil Appeal
Case No. 22/1344 COA/CIVA

IN THE MATTER OF: AN APPEAL FROM THE SUPREME COURT
OF THE REPUBLIC OF VANUATU

BETWEEN: REPUBLIC OF VANUATU
Appellant

AND: EMIL MICHAEL
Respondent

Date of Hearing: 11 May 2023

Coram: Hon. Chief Justice V. Lunabek
Hon. Justice J. Mansfield
Hon. Justice R. Young
Hon. Justice D. Aru
Hon. Justice V.M. Trief
Hon. Justice E.P. Goldsbrough

Counsel: Mr S. Aron for the Appellant
Mr L. Tevi for the Respondent

Date of Judgment: 19 May 2023

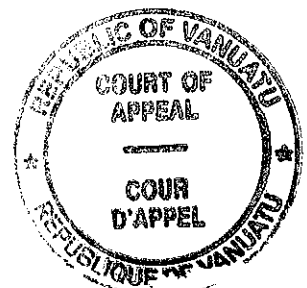
JUDGMENT OF THE COURT

A. Introduction

1. This was an appeal against the Supreme Court judgment awarding unpaid overtime and general damages to the Respondent Emil Michael. Mr Michael brought his claim against the Appellant State after retiring from the Fire Service following 27 years of service.

B. Background

2. Mr Michael joined the Vanuatu Police Force ('VPF') in February 1981.
3. From 1993 to December 2014, Mr Michael served as Officer-in-Charge ('OIC') of the Fire Service at Luganville. This was part of the Vanuatu Mobile Force ('VMF') Detachment Unit stationed there.

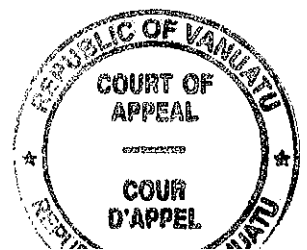


4. From 2015 until his retirement on 31 December 2017, Mr Michael served as Acting Commander of the Luganville Detachment.
5. In early 2019, Mr Michael approached Major Joel Thompson, Commander of the Luganville Detachment to 'verify' his claim for 1,033 outstanding days-off.
6. Without sighting any duty rosters or approved records of days worked or not, Sergeant Jeffrey Wimbong, the Luganville Detachment Clerk drafted a letter that Major Thompson signed dated 15 April 2019 'verifying' that Mr Michael had 'outstanding days-off' of 1,033 working days from his employment with the VMF from 1981 to 2017.
7. On 3 December 2020, Mr Michael filed a claim in the Supreme Court seeking special damages and general damages. It was pleaded, relevantly, as follows:
 5. *The standard practice was three persons per shift and During the course of his employment the Claimant under the Standard practice was working without enough or able man power. In which he had to perform extra duty to ensure the service delivery as per the SOP.*
 6. *As it was the Force practice to award compensation for the overtime in the form of days off instead of monetary terms.*
 7. *The Claimant had accumulate outstanding days off in which he was unable to take the entitlement as his employment contract comes to an end in 2017.*
 8. *After the retirement, the Claimant realizes that he had outstanding days off and had inquired about it. The Officer Commanding Santo Detachment who is also looking after the Fire Services in Santo, provided an official record of the days off at 1,033 working days.*

Particulars

Copy of the Verification Letter from Commander Detachment dated 15 April 2019.

8. The Claim was disputed and both parties filed evidence. Mr Michael contended that in 2019 he had the records showing his 1,033 days of outstanding days-off but the Detachment Commander did not ask to see the records, then in 2020, 60% of his records were destroyed by Tropical Cyclone Harold ('TC Harold').
9. Sergeant Wimbong contended that the records of officers' days-off were managed by the company sergeant major ('CSM') and the OIC of each unit (therefore Mr Michael for the Fire Service) but Mr Michael told him that the CSM's records were not accurate and he had all the OIC's records with him at home which he would bring in later on. While waiting for those records, Sergeant Wimbong prepared the 'verification' letter for the Commander. He did not receive records from Mr Michael who told him after TC Harold that all his records were destroyed by the cyclone.



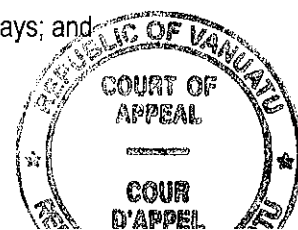
10. Major Thompson's evidence was that he signed the verification letter prepared by Sergeant Thompson who was the one who had had a discussion with Mr Michael. After that, he found out that Mr Michael was only entitled to 14 days off.
11. Mr Michael produced into evidence a copy of the Standing Operating Procedures of the Vanuatu Fire Service ('SOP'). Section 4 clause 12 of the SOP provides for three Operations Shifts and one Maintenance Shift, and for Operational Shifts to be manned by a Corporal and 5 firefighters per shift. The example of the shift roster in Annex C of the SOP appears to set out that an officer will be on duty for 24 hours then rest for the next 2 days.
12. Inspector Kency Jimmy, the VPF Assistant Legal Officer, adduced a copy of relevant parts of the Police General Orders ('PGO') into evidence. Annex 16.37 of the PGO provides for overtime as follows:

Class I: Overtime

Entitled to an overtime rate from 6pm-6am at the rate of 100Vt per hour for any official work during these late hours. Unsocial hours rate during weekends and public holidays from 7.30am-4.30pm at the rate of 120Vt/hour.

All overtime and unsocial hours entitlements shall be paid on a monthly basis and approved by a filled timesheet certified by his/her formation commander by the DCMS responsible for financial matters.

13. Following a hearing on 29 and 30 August 2022 and in a decision dated 24 November 2022, the primary Judge determined Mr Michael's claim as follows:
 - a. First, whether the 2 days-off claimed were an entitlement under the *Police Act* and the PGO. He held that the SOP of the Fire Service provided for firefighters to work a 24-hour shift and then take 2 days off. Further, that where Mr Michael did not take those 2 days off but also worked on those days, they became his 'overtime' and so he was entitled to overtime payments at the rates of VT100 per hour and of VT120 per hour for working unofficial hours and unsocial hours;
 - b. Secondly, whether the Respondent State should compensate Mr Michael for the outstanding days-off. The primary Judge answered that in the affirmative as he had found that these were an employment entitlement; and
 - c. Thirdly, the primary Judge rejected the State's witnesses' evidence as lacking credibility. He took into account Mr Michael and his witnesses' evidence that he worked on his rest days, and that even though Mr Michael had not disclosed the records of his 1,033 days to the State, that in all probability he had shown the records to the Commander to have enabled him to sign the verification letter. The Judge held that Mr Michael had proved he was entitled to 1,033 days; and



- d. Finally, the primary Judge awarded VT1,236,600 as compensation at the rate of 1,033 days x VT120, and VT2,000,000 general damages, totalling VT3,263,600 [sic] as well as interest and costs.

C. Grounds of Appeal

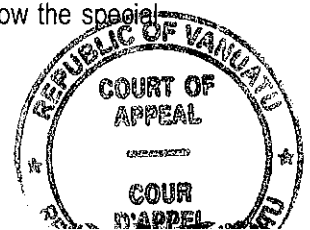
14. It was submitted that the primary Judge erred in his finding that the 2 days-off practice constituted overtime as Mr Michael's fortnightly salary had remunerated him for those days, the 2 days-off were not an employment entitlement under the PGO and no evidence had been adduced of records showing particular weekends and public holidays worked.
15. It was also submitted that Mr Michael misled Sergeant Wimbong into preparing the verification letter but then never provided him the record of his outstanding days-off whereas he had only 14 days-off outstanding. It was submitted that the primary Judge erred in awarding VT2,000,000 general damages as this was not particularised in the Claim as required by rule 4.10(2) of the *Civil Procedure Rules* (the 'Rules') and there was no evidence to support an award in that amount.

D. Discussion

16. Rule 4.10 of the Rules provides as follows:

- 4.10 (1) *If damages are claimed in a claim or counterclaim, the claim or counterclaim must also state the nature and amount of the damages claimed, including special and exemplary damages.*
- (2) *If general damages are claimed, the following particulars must be included:*
- (a) *the nature of the loss or damage suffered; and*
- (b) *the exact circumstances in which the loss or damage was suffered; and*
- (the basis on which the amount claimed has been worked out or estimated.*
- (3) *In addition, the statement of the case must include any matter about the assessment of damages that, if not included, may take the other party by surprise.*

17. A claim for damages must be properly particularised. The verification letter was referred to as the particulars of Mr Michael's claimed 1,033 days-off. That was incorrect. Instead, the dates that Mr Michael had accrued as days-off but which he worked on, and how much he was entitled to for each of those days, should have been set out in particulars to show how the special



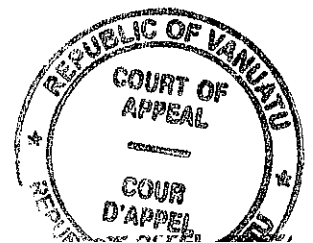
damages claimed (VT7,375,620) were calculated. The dates provided could then have been checked against the VPF's records as well as checked whether or not they fell on weekends and public holidays. In addition, there was no pleading as to why general damages were payable nor the basis for the amount sought. Accordingly, the appellant did not comply with rule 4.10(2) of the Rules and the Claim did not contain proper particulars of the damages claimed.

18. The Claim referred to both the standard practice in the SOP of three persons per shift and to overtime as an employment entitlement. The Police General Orders provides for overtime as a benefit therefore overtime is an employment entitlement. However, the SOP does not contain any provision for three persons per shift. Its Section 4 clause 12 provides for 3 operational shifts, each one to be manned by a Corporal and 5 firefighters. At most, the SOP was evidence of the Fire Service's procedure of resting an officer for 2 days following a 24-hour shift but is not and could not be evidence of any actual days-off accrued by Mr Michael. Accordingly, the primary Judge erred in his findings that the Fire Service's practice of according 2 days-off constituted overtime and that the State should compensate Mr Michael for those days.
19. Even if the damages claimed had been properly particularised, Mr Michael faced an insurmountable challenge in terms of the evidence. It is uncontroverted that as OIC of the Fire Service at Luganville, Mr Michael was responsible for keeping the records of his (and other officers') days-off. No explanation has been given for why he took those records home. In his evidence, he said 60% of his records were destroyed by TC Harold. However, even then, he did not provide the remaining 40% of his records to Sergeant Wimbong or adduce them in evidence. Without the records in evidence, Mr Michael and his four witnesses' evidence that he worked continuously without taking days-off (without giving any dates for days-off which were actually worked on) is general evidence which was not sufficiently specific to enable an assessment of additional days worked.
20. The way that the Claim was pleaded relied on the verification letter signed by Major Thompson. Major Thompson deposed that Sergeant Wimbong drafted that letter for him but after he signed it, he subsequently discovered that Mr Michael was only entitled to 14 days off. Major Thompson has clearly recanted the evidence that he provided a verification letter for the 1,033 days-off claimed by Mr Michael.
21. Additionally, it is common ground that the verification letter was prepared and signed without Sergeant Wimbong or Major Thompson sighting any of Mr Michael's records. Accordingly, the primary Judge erred in his finding that in all probability, Mr Michael had shown his records to the Commander to have enabled him to sign the verification letter. There was no evidential basis for such finding.
22. The appellant chose not to comply with the Rules as to particularising damages. There was no information set out in the Claim as to the dates of the 1,033 days-off claimed nor as to how the damages sought had been calculated. He simply produced one payslip to show his fortnightly earnings at the time his employment came to an end. All of the appellant's evidence was



general evidence without sufficient specification. The Commander who had provided a verification letter to Mr Michael recanted that evidence and it was accepted that he signed that letter without sighting any of Mr Michael's records. None of those records have been adduced into evidence. In the circumstances, this Court cannot be satisfied that the Claim was proved and the appeal must be allowed.

23. There remains the question whether the Claim should then be dismissed or the matter remitted to the Supreme Court for rehearing before a different judge.
24. There are some circumstances which take this matter out of the ordinary.
25. Mr Michael was obviously believed by the primary Judge and there was strong supporting evidence that he was hardworking, including that he often worked on his rostered days off. The primary Judge was impressed enough to try and assess the loss on the assumption that he was entitled to 1,033 days' pay at overtime rates for an 8 hour day.
26. The State proceeded to the trial without asking for any clarification of how the loss of days was calculated, or the period it related to, and without itself producing its records. The way in which those records disproved Mr Michael's claim was not explained.
27. In those circumstances, we think it is appropriate to remit the matter to the Supreme Court for rehearing before a different Judge. Mr Michael will have to give better detail about the periods he worked when he was not rostered. As he made the calculation as to 1,033 days, he should explain how he made it. He will have to explain who authorised him to do so. It is not uncommon for there to be a system of an employer to authorise and record overtime worked. If so, it should be explained and the records produced. It is, or should be, a matter of concern to the State that the claimed overtime was worked, namely continuous lengthy hours (if that is what it was), simply on health and safety grounds. No doubt the one day on/two days off approach is to ensure that the Fire Service operates safely and effectively.
28. The State, for its part, will have to consider the impact of Mr Michael getting his full fortnightly pay, covering 10 days (on the day on/2 days off basis). Its records may show the overtime worked, as working on the days off would appear to be overtime. It may have, or had in the relevant past, overtime approval procedures. It may explore the possibility of a relevant time limitation, depending on the period over which the claim is made. It will need to identify the relevant records, and if they support a conclusion inconsistent with the claim, it will have to present that evidence in a proper form. It may have to more carefully analyse the claimed losses, including the relevant pay rates and terms from time to time. How was overtime paid in the case of other employees? Did they get delayed time off? Did they get additional payment at a higher hourly rate?
29. That is not intended as a comprehensive proper review of how the case is to be proved. It is an indication of the sorts of evidence that the parties probably should have brought before the



Court. It may expose parts of the claim where the employer is prejudiced by the delay before the Claim was filed.

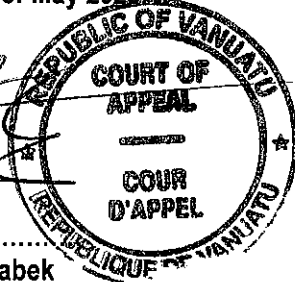
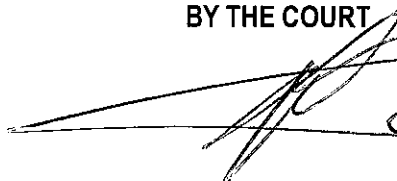
30. Having regard to the unhelpful and incomplete way in which each of the parties conducted the hearing, in effect leaving the Judge to speculate, in our view the proper order is to remit the Claim to the Supreme Court for case management and rehearing before another Judge.

E. Result

31. The appeal is allowed.
32. The whole of the decision dated 24 November 2022 is set aside and the Claim is remitted to the Supreme Court for rehearing by a different Judge.
33. The Respondent is to pay the Appellant's costs of the appeal fixed at VT30,000 within 28 days.

DATED at Port Vila this 19th day of May 2023

BY THE COURT



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Hon. Chief Justice V Lunabek