

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

**Civil Appeal
Case No. 22/59 CoA/CIVA**

BETWEEN: **Olivier Willy**
Appellant

AND: **Public Service Commission**
Respondent

Coram: *Hon Justice J Hansen*
Hon Justice D Aru
Hon Justice R White
Hon Justice O Saksak
Hon Justice E Goldsbrough

Counsel: *E Molbaleh for the Appellant*
S Aron for the Respondent

Date of hearing: *14 February 2023*

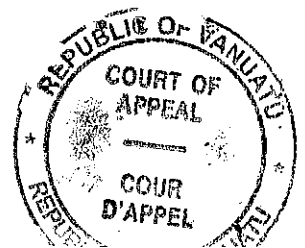
Date of Decision: *17 February 2023*

JUDGMENT OF THE COURT

1. The appellant seeks an enlargement of time to appeal against a consent order dated 17th March 2021. He has also filed a Notice and Grounds of Appeal.

Background

2. The appellant was employed by the respondent in the Department of Customs and Inland Revenue for 14 years. He held a number of positions between December 2003 and 2016, up to, and including, as acting manager.
3. On the 30th September 2016 he was suspended by the Director of Customs and Inland Revenue relating to an issue concerning him giving advice inconsistent with the requirements of Customs procedures for the importation of sandalwood from New Caledonia. It is said that this was at a cost to the revenue of Vanuatu. After some time in February 2017 his suspension was lifted. What occurred during that time is irrelevant for present purposes. The suspension being lifted was said to be to enable an investigation to be undertaken by the Department of Customs and the Prosecution Office.

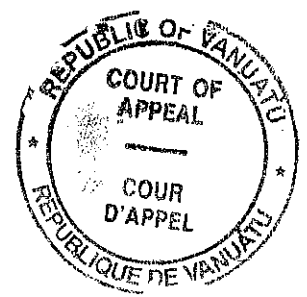


4. On 29th May 2017 the Public Service Commission wrote to him on the determination of disciplinary action brought against him, and advised that the Public Service Commission Disciplinary Board would commence in 28 days from the date of service of the notice. Various other matters occurred that are again irrelevant for present purposes. But ultimately, on 28th November 2017, he received an official letter from the respondent stating that, following the Public Service Disciplinary Board process, the respondent was satisfied the appellant's conduct amounted to serious misconduct and he was dismissed without benefit.
5. On 19th December 2017 the claimant, in Civil Case 3618 of 2017, issued proceedings challenging the correctness of the finding of serious misconduct. He was represented by Mr N Morrison. In the proceeding he sought a declaration that his termination was unjustified; reinstatement; damages to be assessed, including a multiplier upon any due severance payment; and interest and costs as the Court deemed just. Following negotiations, a consent order, dated 19th March 2021, was entered into in full and final settlement of all claims brought by Mr Willy. He was to be paid VT 6 million in two equal instalments: one on 1st May 2021 and one on 1st July 2021. That was signed by the appellant's counsel Mr Morrison, and Mr Gilu on behalf of the respondent. It was endorsed by the Judge and the Acting Chair of the Public Service Commission. We understand the sums due under the Consent Order have been paid.
6. Current counsel for the appellant seems to have been acting since at least September 2021, when he filed an urgent application to reinstate the matter. This was dealt with by GA Andrée Wiltens J in a minute of 29th September 2021. In that minute the Judge pointed out that serious allegations, tantamount to dishonesty on the part of previous counsel, were being alleged, and that to progress the matter there needed to be a waiver of legal professional privilege from the appellant. This was to enable previous counsel to surrender his file, and the allegations could be looked at in the light of the instructions received and advice given. The minute stated that a sworn statement from previous counsel dealing with those aspects would also be required. The judge noted it was inappropriate to grant the application for reinstatement without the preliminary material just mentioned, and, therefore, it was declined.
7. Mr Molbaleh did not comply with any of the matters in that minute. Rather, a notice of grounds of appeal and an application for leave to appeal out of time were filed on 6th December 2022. On 25th January this year, the waiver of legal professional privilege was filed. There is nothing from previous counsel before us.

The grounds of appeal

8. The grounds of appeal arise from a Public Service Commission's External Circular issued on 24th November 2020, which at bullet point three states:

"If there are recurrent budget savings now in 2020 severance arrears payments of former civil servants can be paid backdated to October 2017. This is in order to



comply with the Commission's directive taken in Meeting Number 17 to change the one month's severance back to two months' severance entitlement."

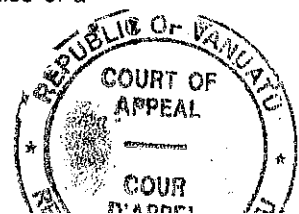
9. Where there was a termination without fault the severance payment was calculated by applying a multiplier for time of service to one month's salary. The effect of the External Circular was to increase the one month salary to two months salary. A doubling of the entitlement.
10. Essentially, the grounds of appeal maintain that the Judge was wrong to endorse the Consent Order in the light of the External Circular, and that the appellant never instructed his counsel to accept the lower one month salary in the calculation that led to the VT 6 million settlement. Based on the External Circular he says he should have received VT 12,000,000. In simple terms the grounds of Appeal, somewhat repetitively, repeat the appellant's belief he was entitled to severance based on the higher sum that came from applying the External Circular.

Submission

11. Mr Molbaleh simply relied on his written submissions stating the External Circular entitled his client to VT 12,000,000 and his lawyer was never instructed to accept less.
12. The respondent refers to the decisions in this Court of *In re Estate of Kalmet* [2014] VUCA 21; Civil Appeal Case 11 of 2014 (25 July 2014) and *Wikeley v Trustees International Ltd* [2019] VUCA 74; Civil Appeal Case 2774 of 2019 (15 November 2019), to set out what steps should have been taken by the appellant.

Discussion

13. For the moment we set aside the Application to Enlarge Time and consider the merits of the purported appeal.
14. There is one fundamental matter that did not seem to be addressed or considered by either party. Mr Willy was dismissed for serious misconduct. The proceedings he filed challenged that. He was not in a position where he had any established right for any severance payment. It was accepted by both counsel that no right to severance payments arises for public servants dismissed for serious misconduct. Mr Willy, at trial, faced a real litigation risk that if his proceedings were unsuccessful, he would receive nothing and could be possibly ordered to pay costs. He had no automatic entitlement to either the VT 6 million, or the doubled sum under the External Circular. It is against that background that the settlement was negotiated. It may very well be in those circumstances that the consent order was a generous one for the appellant.
15. This is a case where the appellant was represented by counsel. He had no automatic right to a severance payment. The Consent Order came after negotiations and was the compromise of a

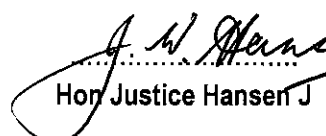


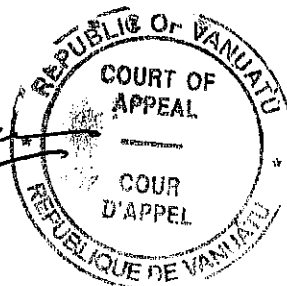
contested action. While a waiver of professional privilege has been filed, (very late), there is no Sworn Statement from the appellant's former counsel. The submission that statement could not be obtained because Mr Morrison was on holiday is frankly ridiculous. From other cases heard in this session, we are aware that Mr Morrison was out of the jurisdiction from 12th December 2022 until 31st January 2023. The appellant had ample time from 29th September 2021 to obtain this information.

16. As well, if this appeal was successful and the Consent Order was set aside the appellant would have to refund any money's received under the Consent Order. That is because what would then apply is that there was still a need to determine his claim that he was not terminated for serious misconduct.
17. This is a case where the appeal has no merit. Nothing has been raised that would warrant setting aside a Consent Order. We have to say that a basic investigation of the facts and legal principles by Mr Molbaleh would have revealed the appeal was hopeless. As well the unexplained delay on its own would be enough to refuse leave in this case. But added to this is the fact any appeal would fail. Leave to enlarge time to file the appeal is refused. There will be costs to the respondent in the sum submitted for of VT 75,000.

Dated at Port Vila this 17th day of February 2023.

BY THE COURT


Hon Justice Hansen J



The seal is circular with the text "REPUBLIC OF VANUATU" at the top and "REPUBLIQUE DE VANUATU" at the bottom. In the center, it reads "COURT OF APPEAL" and "COUR D'APPEL".