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

Civil Appeal
Case No. 23/777 COA/CIVA

BETWEEN: **FR8 LOGISTICS LIMITED**
Appellant

AND: **JOYCE LEONA**
Respondent

Date of Hearing:	***9 November 2023***
Coram:	***Hon Acting Chief Justice, Oliver A. Saksak*** ***Hon Justice Dudley Aru*** ***Hon Justice Mark O'Regan*** ***Hon Justice Richard White*** ***Hon. Justice Edwin P. Goldsbrough*** ***Hon Justice William K. Hastings***
Counsel:	***J Boe for the Appellant*** ***S Kalsakau and M Mala for the Respondent***
Date of Judgment:	***17 November 2023***

JUDGMENT OF THE COURT

Introduction

1. On 25th May 2020, the appellant (FR8) terminated the employment of the respondent ("*Ms Leona*"). She had been employed by FR8 as its Accounts Receivable Officer since 14th March 2016.

2. In the proceeding in the Supreme Court, the Respondent sought a declaration that the termination of her employment was unlawful and unjustified and sought payment of a severance allowance pursuant to s.54 of the Employment Act. FR8 resisted that claim, contending that Ms Leona had been dismissed for serious misconduct with the effect that she was precluded by s.55(2) of the Employment Act from an entitlement to a severance allowance.

3. The primary Judge upheld Ms Leona's claim (*Leona v. FR8 Logistics Ltd* [2023] VUSC 34) and, after declaring that FR8's termination of her employment was unlawful and unjustified, ordered it to pay a severance allowance of VT267,333 together with an "*uplift*" pursuant to s.56(4) of the Employment Act of VT801,999, this latter amount being 3 times the allowance of VT267,333. In additional the Judge ordered FR8 to pay outstanding salary of VT6,416 and interest on the judgment sums at specified rates.

4. FR8 now appeals against those orders. For the reasons which follow, we consider that the appeal should be dismissed.

Background Circumstances

5. FR8 employed Ms Leona pursuant to a written contract containing the following provisions which are presently relevant;

> *"[3] There will be staggered hours of work offered. The staggered hours of work will be as follows:-*
>
> *a) 7:30am to 4:30pm week days 4 hours between 8am and 12pm on Saturdays;*
>
> *b) 8am to 5pm week days 4 hrs between 8am and 12pm on Saturdays.*
>
> *(ii) Whichever option is selected the employee will be expected to work to these hours for the length of this contract.*
>
> *(iii) if Saturday doesn't work, eg (SDA) then other times may be agreed*
>
> *(iiii) Failure to work these hours will result in a deduction of pay.*
>
> ...
>
> *[7] The Employee is entitled to 15 days paid annual leave [equivalent to 1.25 days per month worked which must be taken within 3 months of the completion of this contract.*
>
> *[8] Sick Leave - The Employee is entitled to up [to] 21 days of full paid sick leave after rendering one year of service to the company. Sick leave will only be paid if;*
>
> *a) The Employee informs the employer that he or she is unable to work within 2 hours of being absent due to sickness; and*
>
> *b) A medical certificate from a registered physician must be provided.....*
>
> ...
>
> *[12] TERMINATION*
>
> *a) The contract can be terminated at any time by either party by giving 2 weeks written notice;*
>
> *b) if an employee is absent for more than 3 days without contacting the employer to explain the absence, or if the employee fails to turn up for work after the employer has expressly ordered him or her to recommence work after a period of leave then, through this action, the employee will have resigned and the employment relationship shall cease. No severance pay will be allocated in this instance;*
>
> *c) The Employer has the right to terminate the Employee's contract instantly without notice or severance in the event of serious misconduct by the employee. Serious misconduct includes but is not limited to the following;*
>
> .....

v) Continued failure to adhere to the hours agreed to in this contract.

....."

6. By letter dated Friday 22nd May 2020, but handed by FR8's Chief Financial Officer, Mr. Kumar, to Ms Leona at the commencement of work on Monday 25th May 2020, FR8 informed her that her employment was being terminated with immediate effect. The letter stated (relevantly):

> *"Dear Joyce, as you know we are going through tough times and a huge amount of the difficulties we currently face is that of getting debtors to pay us. Recently we granted several weeks of holiday to you- some of it was granted in advance of it actually being due.*
>
> *This left a hole in the Accounts department. Over the last 11 months you have also taken in addition to that time a further 22 days (so far up until today) and we can feel the impact that this is having on our work to be done in the Accounts department.*
>
> *Therefore, we regret to inform you that we are terminating your employment with immediate effect. We reached this decision after reviewing your attendance. The role that you hold is very critical in terms of maintaining a favourable cash flow in managing business continuity especially during a crisis we are in at the moment."*

7. As it is apparent, FR8 did not assert in that letter it was dismissing Ms Leona because of serious misconduct. Nor did it allege any breaches by Ms Leona of her contract of employment. Instead FR8 seemed to attribute its decision to terminate to the financial circumstances which it was then experiencing and to a review of Ms. Leona's attendance.

8. However, in the filed defence in the Supreme Court, FR8 alleged breaches by Ms Leona of cll 8(a) and (b) of the contract of employment and sought to invoke cll 12(b) and (c)(v). In particular, it alleged that Ms Leona had, in contravention of cll 8(a) and (b) been absent from work on purported sick leave without having informed it of her inability to work within two hours of the absence and without providing a medical certificate from a registered physician. At the trial, it emerged that this allegation related to absences of Ms Leona from work on 15th, 18th - 20th and 22nd May 2020.

9. In addition, FR8 alleged that Ms Leona had been absent from work for more than 3 days without contacting it to explain her absence. This was said to give rise to the deemed resignation from employment for which cl 12(b) provided. Finally, FR8 alleged that it had been entitled by cl12(c)(v) to terminate Ms Leona without notice and without payment of a severance allowance by reason of "her continued failure" to adhere to the hours agreed to in [the employment] contract".

Statutory Provisions

10. Sections 49 and 50 of the Employment Act contain provisions concerning termination of employment which are presently relevant:

> *"NOTICE OF TERMINATION OF CONTRACT*
>
> *49. (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;*
>
> *...*
>
> *(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).*
>
> *MISCONDUCT OF EMPLOYEE*
>
> *50. (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.*
>
> *....*
>
> *(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."*

11. 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 55(2) qualifies that obligation by providing that an employee who is dismissed for serious misconduct is not entitled to the severance allowance. Sections 56 and 57 provide for the computation of the amount of the severance allowance. 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 –*

(i) *half a month's remuneration, where the employee is remunerated at intervals of not less than 1 month;*

(ii) *15 days' remuneration, where the employee is remunerated at intervals of less than 1 month;*

(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.

..."

The Findings of the Primary Judge

12. The Judge found that Ms Leona had attended work on Friday 15th May 2020 but in the afternoon, had gone to the Vila Central Hospital for medical treatment. She was there given a medical certificate for that day and for Monday 18th May 2020. Because of changed arrangements following the onset of COVID 19, it had not been necessary for Ms Leona to work on Saturday 16th May 2020. On Tuesday 19th May, Ms Leona had returned to the Hospital and had been given a medical certificate for that day and the following day. Thursday 21st May 2020 was a public holiday and it was not necessary for Ms Leona to work. The Judge found that Ms Leona had not attended work on Friday 22nd May 2020, having stayed home to care for a child following the non-arrival of the pre-arranged babysitter.

13. The effect was that Ms Leona had been absent from work at FR8 for five days: 15th, 18th 19th, 20th and 22nd May 2020. The Judge found that Ms Leona had not contacted one of her supervisors at FR8 on 15th and 18th May 2020 to explain her absence. We think it likely that the supervising personnel at FR8 must have known of the reasons for Ms Leona's absence on the afternoon of Friday 15th May 2020, given that she had left her place of work to go the hospital for urgent treatment for her asthma. The Judge found that Ms Leona had asked one of FR8's drivers to come to collect a medical certificate for 15th and 18th May to take to FR8 but considered this insufficient notice to the relevant personnel within FR8, being Ms Leona supervisors. In relation to the absences on 19th and 20th May, the Judge found that Ms Leona had spoken to the Accounts Clerk on 19 May and had explained that she continued to be ill. The Judge found that the Accounts Clerk had conveyed that explanation to Ms McEwen, the personal assistant to Mr

Kernot, the Director of FR8. The Judge was satisfied that this constituted conduct by Ms. Leona to explain her absence to FR8 on 19th and 20th May 2020.

14. In relation to the absence on 22nd May 2020, it was common ground that Ms Leona had contacted Mr Kumar by Skype to explain her absence that day.

15. In summary, the Judge was satisfied that, of the five days of absence, Ms Leona had provided explanations for the absences on 19th, 20th and 22nd May. The Judge considered that Ms Leona had failed to provide an explanation for the absences on 15th and 18th May.

16. The Judge then went on to find that, by reason of leave previously taken, Ms Leona had exceeded her annual leave and sick leave entitlements with the consequence that her absences on 19th, 20th and 22nd May 2020 constituted a breach of cl12(c)(v) of the employment contract. The Judge characterised that breach as serious misconduct (apparently relying on cl 12(c)(v) of employment contract) with the consequence that Ms Leona was not entitled to payment in lieu of the 3 months' notice for which s. 49(3)(a) and (4) of the Employment Act provide.

17. The Judge then found that, even though these circumstances would have justified FR8 terminating Ms Leona's employment without notice and without a severance allowance, the termination was unlawful and unjustified because FR8 had not complied with s.50(3) and (4) of the Employment Act.

18. The Judge then found that Ms Leona was entitled to a severance allowance of VT267,333 and in addition an "*uplift*" of 3 times that amount.

The Appeal

19. FR8 advances 4 principal grounds of appeal. They will be identified separately below.

20. In the submissions filed in advance of the appeal hearing, counsel for the respondent outlined an intention to argue that the Judge had been wrong in finding that Ms Leona had breached cll 12(b) and 12(c)(v) of the employment contract and therefore wrong in finding that she had "*committed serious misconduct*". Counsel wished to contend that in these circumstances, it had not been necessary for the Judge to have regard to s.50(3) and (4) of the Employment Act.

21. At the hearing, the Court pointed out to counsel that Ms Leona had not filed any notice of cross appeal or notice of contention as required by Rule 23 of the Appeal Rules. Counsel did not seek then to pursue the submission. It is accordingly not necessary for this Court to consider whether the conduct found by the Judge was serious misconduct within the meaning of s. 50 and 55 of all the Employment Act, nor whether the conduct in breach of cll 12(c)(v) of the employment contract as found the Judge could constitute serious misconduct within the meaning of those provisions of the Employment Act.

Was there error in the Judge's Application of section 50(4)?

22. As already seen, section 50(4) prohibits termination on the ground of serious misconduct unless the employee has been given an adequate opportunity to answer any charges against him or her. A dismissal in contravention of that prohibition is deemed by the Act to be an unjustified dismissal. FR8 submitted that the Judge's finding that it had breached s.50(4) was wrong because it had given at least two opportunities Ms Leona "to give any protest or reasoning which might persuade [its] management of reasoning for considering a change in the outcome of dismissal for serious misconduct".

23. We note at the outset that an opportunity for protest or to provide reasoning to persuade an employer to *change* a decision already made is not the equivalent of an opportunity to answer any charges made by the employer before the employer makes the decision to dismiss. However, that can be put to one side for present purposes.

24. In support of its contention, FR8 sought first to rely on the discussion between Mr Kumar and Ms Leona on 25th May when he handed her the letter of termination. The fundamental difficulty for FR8 with this submission is that the termination letter was dated 22nd May 2020 and Judge found that it had been prepared on that day. That is to say, the letter of termination had been prepared before Mr Kumar spoke to Ms Leona on 25th May 2020. There was no basis for any finding to the contrary. A second fundamental difficulty for FR8 with this submission is that Mr Kumar, who handed the termination letter to Ms Leona did not claim to have given her any opportunity to respond to FR8's concerns that she had been absent without leave or had otherwise been in breach of her employment contract.

25. We are not overlooking that in his sworn statement, Mr Kernot *said "after consultation, discussion and giving her the opportunity to respond, the respondent agreed that that under her employment contract clause12 (b) she had voluntarily resigned*". We note that assertion was not made in direct speech, did not provide any particulars of the alleged "*consultation, discussion or opportunity to respond*" and is not consistent with the statement in the letter of termination that it was FR8 which was "*terminating*" Ms Leona's employment with immediate effect. It is understandable that the Judge rejected Mr Kernot's evidence on this topic as "*fanciful*".

26. Finally, it is trite to say that FR8 could not rely on any "*opportunity*" which it had given to Ms Leona *after* it had terminated her employment.

27. In the oral submissions on the appeal, counsel for FR8 submitted that s.50 (4) should not be construed as imposing absolute obligation. He submitted that it should instead be understood as operating in a commercial environment in which the employer's interest in running a profitable business should be balanced against the employee's interest in having an adequate opportunity to respond to any charges. We do not accept this submission. The balancing of interest between employer and employee is a matter for the Parliament and it has chosen, in s.50(4), to prohibit employers from dismissing employees on the ground of serious misconduct without first giving the employee an adequate opportunity to answer any charges. In the circumstances of this case,

the Judge was correct that FR8 had not given the respondent any opportunity, let alone an adequate opportunity, to answer "*charges*" against her. Accordingly, this ground of appeal fails.

Did the Judge err in the Application of section 50(3)?

28. FR8 contended that the Judge was in error in finding a breach of s.50(3) of the Employment Act. It submitted that the Judge should instead have found that it could not, in good faith, have been expected to take any course other than dismissal. FR8 emphasised in this respect that Ms Leona had had a specialized function in its workplace, that she had been unreliable in attending work, and that she had not been complying with her contract of employment.

29. FR8 submissions on this ground were made on the assumption that s.50(3) required consideration only of whether Ms Leona could be accommodated in an alternative position. That is a misunderstanding as s.50(3) requires the employer to consider in good faith whether it could adopt an alternative course of action; not whether it could in good faith employ the employee in an alternative position. The former involves a broader range of alternatives than the latter. It might involve, for example, the counselling of the employee or the giving of a formal warning or caution.

30. The alternatives which may be available to an employer acting in good faith are likely to vary according to the circumstances of the case. There are some forms of serious misconduct by employees which are plainly inconsistent with any continuation of the employment relationship so that termination might properly be regarded as the only practical alternative. In the less serious case, other alternatives may well be available. The respondent's conduct in the present case was hardly in the former category. Ms Leona was a long serving employee and the aspects of her conduct which were of concern to FR8 had been of short duration only and, and on their face, capable of remedy by her.

31. This ground of appeal is not made out.

Did the Judge err by not having not having regard to section 34 of the Employment Act?

32. Section 34(2) of the Employment Act provides:

> *"34. Sick leave*
>
> *(2) An employee who absents himself from work on grounds of illness shall, except where the employer is aware of the nature of the illness, as soon as practicable notify the employer of the illness and if he remains ill –*
>
> *(a) within the municipal boundaries of Port Vila or Luganville for more than 2 days;*
>
> *(b) in any other area for more than 4 days,*
>
> *shall forward to the employer a medical certificate of illness."*

33. In its notice of appeal, FR8 complained that that the Judge had not taken s.34 of the Employment Act into account in her consideration of Ms Leona's claim. In particular, it complained that the Judge had not considered whether Ms Leona had provided a medical certificate "*as soon as practicable*" as required by section 34(2). Counsel for FR8 made a submission to the same effect in the "*Skeletal Summary*" provided in advance of the appeal hearing.

34. Counsel for Ms Leona pointed out that FR8 had not sought to rely on s.34 at the trial and had not even brought it to the attention of the Judge. Mr Boe, who was counsel for FR8 both at first instance and on appeal, did not challenge that contention and there is no indication in the appeal papers that FR8 had sought to rely on the s.34 at the trial. The Judge can hardly have been in error in not having regard to a consideration on which FR8 itself did not rely. Accordingly, this ground of appeal fails.

Did the Judge err in the Severance Allowance?

35. FR8 contended first that, Ms Leona having on the Judge's finding committed serious misconduct, s.55(2) meant that she was not entitled to a severance payment. This submission overlooked that s.55(2) precludes the payment of a severance allowance if the employee is dismissed "*for*" serious misconduct. In the present case, FR8's non-compliance with s.50(4) meant that FR8 had not been entitled to terminate Ms Leona for serious misconduct. It cannot rely on its own unlawful conduct to disentitle Ms Leona to a severance allowance.

36. Next, FR8 submitted that the Judge had been in error in ordering a severance allowance of VT 267,333 and, separately, an amount equivalent to 3 times the severance allowance. The submission seems to be that s.56 contemplated the payment of only one severance allowance even when a sum calculated in accordance with sub(2) is ordered in accordance with sub(4).

37. We do not accept that submission. In our view, s.56 contemplates two forms of payment: first, a severance allowance calculated in accordance with subs(2) and, separately, a sum calculated in manner indicated in subs(4). A number of matters indicated that this construction of section 56 is appropriate. First, s.56(1) specifies that the severance allowance required by s.54 is to be calculated in accordance with subs(2) and not in accordance with both subs(2) and (4). Secondly, an employer is to pay the required severance allowance on a termination of the employee's employment whereas the sum contemplated by subs(4) is an amount ordered to be paid by the Court. As a matter of necessity any Court order for the payment of the additional amount will be subsequent to the time of termination. Finally, subs(4) refers to the severance allowance only for the purpose of identifying the manner of calculation of the additional sum which the Court may order.

38. The Judge proceeded on this understanding of s.56 and Judge did not refer the sum of VT 801,999 as a severance allowance.

39. Next, FR8 submitted that Judge's use of a multiplier of 3 meant that Ms Leona had received more than was necessary to compensate her for the period it had taken her to find another job. It noted that by the time of the conclusion of the trial on 27th October 2022, Ms Leona had had two employments, one for a period of 6 months and one for a period of 3 weeks.

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 is 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."*

42. We note that these are the same matters to which trial judge in the present case had regard in fixing a multiplier of 3.

43. We also note that the sum produced by the 3x multiplier (VT801,999) is in round terms VT32,000 more than 12 months of Ms Leona's salary at the time of her termination. Plainly, she was without employment for a much longer period than 12 months.

44. It would of course have been relevant to the assessment of the multiplier if Ms Leona's employment had been vulnerable to termination for serious misconduct after compliance with section 50(3) and (4). This would have meant that Ms Leona could not have had an expectation of secure continued employment. However we think it far from clear that the conduct of which FR8 complained, even if serious misconduct as defined in the employment contract, could properly be characterised as serious misconduct within the meaning of s.50 of the Employment Act.

45. We consider that the Judges' award of a sum using a multiplier of 3 in addition to the severance allowance calculated under s.56(2) can reasonably be regarded as high. However, having regard to the compensatory purpose of the payment and Ms Leona's particular circumstances, we do not consider that it can be regarded as so high as to warrant this Court's intervention.

46. This ground of appeal fails.

Disposition of the Appeal

47. For the reasons set out above, the appeal is dismissed.

48. The appellant is to pay the respondent's costs fixed in the sum of VT150,000.

DATED at Port Vila this 17th day of November 2023

BY THE COURT

Hon. Acting Chief Justice Oliver A Saksak