

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

CIVIL CASE 23 of 2013

BETWEEN: ANNIVA TARILONGI
Claimant

AND: VANUATU NATIONAL PROVIDENT FUND
Defendant

Coram: Vincent Lunabek –Chief Justice

Counsels: Mr Bill Bani for the Claimant
Mr Garry Blake for the Defendant

Date of hearing: 22 September 2016

Date of judgment: 31 October 2016

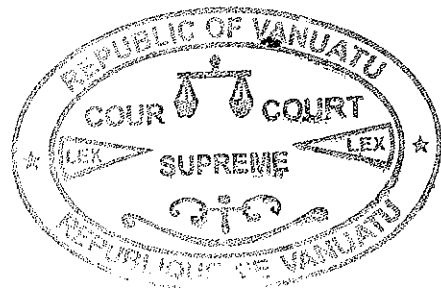
REASONS FOR JUDGMENT

Introduction

1. This is a claim for breach of the contract of employment. The Claimant claimed that the Defendant breached her contract of employment by wrongfully and prematurely terminating her employment contract with the Defendant.
2. The Claimant alleged she has suffered and continued to suffer damages. She sought following damages and other relief against the Defendant:
 - 1) Judgment in the sum of VT 36,802,133;
 - 2) Interest at 10% per annum;
 - 3) Costs
 - 4) Any other orders as this honourable Court deems fit.

Background Facts As Agreed By the Parties

3. The Claimant was employed by the Defendant as its General Manager.
4. The Employment of the Claimant as the General Manager of the Defendant commenced on the 25th of February 2011 pursuant to a written contract of employment.



5. The written contract in clause 13.1 states:

The Employment may be terminated by the Board at any time by either of the parties hereto giving to the other not less than three (3) months prior written notice of termination.

6. The Defendant suspended the Claimant on full pay on the 14th of August 2012.

7. The Claimant's employment was terminated effective 16 January 2013 at which time the Claimant was paid three months' salary in lieu of requiring her to serve out the three month notice period provided for under clause 13.1 of the Claimant's written contract.

8. No reasons for the termination were provided.

9. On termination the Claimant was paid the following:

(a) The Three (3) months' salary in lieu of notice – Vatu 2,160,000

(b) Three (3) days' salary – Vatu 99,420

(c) Leave pay for any outstanding leave up to the end of notice period – Vatu 1,483,028

(d) Severance pay calculated at one month salary for every year of service –Vatu 1,535,712

(e) Housing allowance up to the end of notice period – Vatu 376,570

(f) Phone allowance – Vatu 156,904

(g) Payment of gratuity on a pro rat basis –Vatu 866,666

10. The total amount paid out to the Claimant was VT6, 678,300.

Issues:

11. Parties invite the Court to determine following issues:

1. Did the suspension of the claimant affect the right of the Defendant to terminate her under Clause 13.1 of the employment contract?

2. Was the Claimant lawfully terminated by the Defendant relying on Clause 13.1 of the Employment contract?
3. If the Claimant was not lawfully terminated, what damages flow?
4. If lawfully terminated per 2 above, has the claimant been paid all her entitlements on termination of her contract?

12. I will answer each issue in turn.

Issue No.1: Did the suspension of the Claimant affect the right of the Defendant to terminate her under Clause 13.1 of the employment contract?

13. The Claimant has instituted this case against the Defendant as she believed that the Defendant has breached her contract of employment in terminating her employment with the Defendant as its General Manager by a letter dated 17 January 2013.
14. Before the Defendant terminated the employment of the Claimant as its General Manager, the Defendant issued a letter of suspension dated 14 August 2012.
15. The relevant part of her letter of suspension reads:

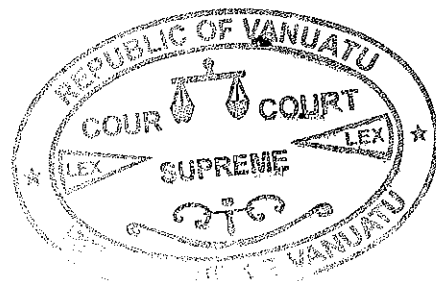
"The Board has followed closely the serious allegations that have been made against you and the management of the Vanuatu National Provident Fund (VNPF). The Allegations had created grave grievances to the members of the Fund, and fuelled threats, risks and possible riots as was experienced in 1998.

...

As this matter is serious and for the safety of the fund, as well as the advice from the Government and instruction from the Minister responsible, I as chairman after informing the board members resolved to suspend you from duties as from today 14th August 2012, until full investigations against you are completed. Your suspension will be on full salary until or unless Board decides otherwise... [Emphasis added].

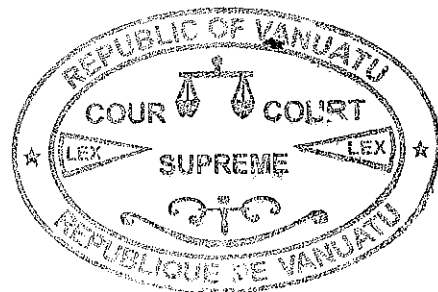
16. In his sworn statement filed 27 May 2014, Mr Simil Johnson, Chairman of the Board of Trustees of the Defendant, deposed to the following effect [23-32]:

"As the time of suspension the Board noted serious allegations raised by the Public. The reasons for the Board to suspend the Claimant and her allies were clearly spelled out in the letter of suspension. They were to be suspended on full salary until the Board decides otherwise. The suspension was to be until investigations and outcome of such investigations are completed. The Board registered three different investigations on



VNPF to be carried out and the claimant was made aware of each one as two of three of these investigations were carried out while the claimant was not yet suspended. The Board did not set up a separate investigation committee but relied on the Reports of the RBV, the Auditor General and that of the Ombudsman. However, the Report of the Auditor General is made for and owned by the Government and thus, is not owned by the VNPF Board in any way. By January 2013, the Board had not officially received any reports from any of the investigating agencies and the Board by this time had spent huge amount of money to pay salaries of each of the suspended staff and their benefits. In early 2013 the Board decided to terminate the claimant and her allies upon normal termination principles by paying each of them including the claimant's three months' notice and other benefits as provided under the Employment Act and her contract of Employment. Specifically for the Claimant, the Board considered her contract of Employment in detail and decided to terminate her under clause 13.1 of her contract. The decision to terminate and pay all entitlements legally due to the claimant and her allies is for her own safety and their families and also to protect their reputation and respect within the public so they can easily find jobs elsewhere without being haunted by the issues surrounding their employment with VNPF."

17. I find these as facts leading up to the suspension and the termination of the Employment Contract of the Claimant. As basic facts, they are not disputed by the Claimant. What is in dispute was the effect to be given to these facts.
18. From these facts, it was clear that the Defendant suspended the Claimant on 14 August 2012. The suspension was effective from that date until full investigations against the Claimant are completed. The Claimant was suspended on full salary until or unless the Board decides otherwise. The Defendant did not complete the disciplinary process started against the Claimant. The Defendant did not make a decision on the final outcome of investigations against the Claimant. There was a suspension but there was no outcome of investigation or finding or charge laid against the Claimant requiring the Defendant to inform the Claimant about and which will require the Claimant to answer it or them. As there was no outcome or finding of the investigation, there was nothing for the Defendant to notify the Claimant about and there was nothing for the Claimant to answer. The fact remains there was a suspension. On 16 January 2013, notwithstanding the suspension, the Defendant through its Board "decided otherwise" and terminated the employment of the Claimant as its General Manager under Clause 13.1 of the Contract of Employment of the Claimant.
19. Was the suspension materially relevant for the exercise of contractual right pursuant to Clause 13.1?



20. It is submitted on behalf of the Claimant that the Defendant by leaving unfinished process and by terminating the employment contract without cause, under Clause 13.1 of the Contract of employment, the Defendant abused the employee's contract of Employment. It is also submitted for the Claimant that under the particular circumstances of this case, the suspension of the Claimant directly affected the right of the Defendant to terminate the Claimant under Clause 13.1 of the Contract of Employment.

21. Clause 13.1 of the Contract of Employment between the Claimant and the Defendant deals with termination of the employment. It provides:

"13. TERMINATION

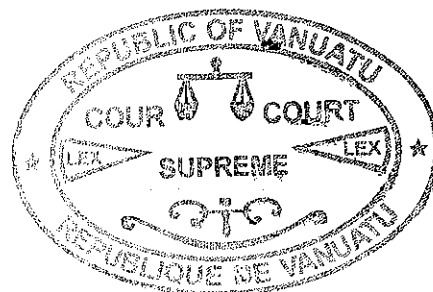
13.1 The Employment may be terminated by the Board at any time by either of the parties here to giving to the other not less than three (3) months prior written notice of termination.

13.2 The employment may be terminated without notice by the Board if the Board finds the General Manager guilty of misconduct provided that the General Manager shall be afforded reasonable opportunity to answer any allegations made against her before the Board makes a decision terminating the Employment on the grounds of misconduct."

22. I have perused the Contract of Employment there is no clause in respect to the suspension of the Claimant contained in it. I take it that there is no issue taken in the claim, as filed, with the legality of the suspension and there was no damages claimed. I take note of the submissions of the Claimant in paragraph 11 of the Supplementary Submissions by the Claimant but they are just submissions without claims or pleadings or remedy and they cannot be entertained.

23. The issue raised by the Claimant is whether the suspension affected the Defendant's right to terminate the Claimant without cause pursuant to Clause 13.1 of the Contract of Employment.

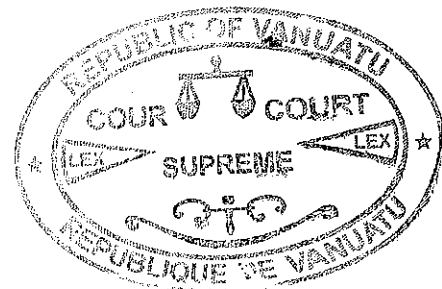
24. The Claimant's main argument seems to be that the right to invoke Clause 13.1 was somehow suspended or otherwise made inoperative or unable to be relied upon, whilst



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the Claimant remained suspended and prior to the completion of investigations and the notification to the Claimant of the outcome of those investigations.

25. Clause 13.1 of the Contract of Employment was clear. There is no ambiguity in the reading and meaning of Clause 13.1. There was no evidence of any dispute as to the meaning and understanding of Clause 13.1 of the Claimant's Contract of Employment by the Claimant.
26. The argument seems to be that because there was a suspension, Clause 13.1 of the contract of employment is not the right clause to be invoked. The suspension is the beginning of disciplinary process against the Claimant. The Claimant is expecting to be notified of the outcomes of the investigations and likely disciplinary charge to answer.
27. The facts of this case are as agreed by the parties and also summarised at paragraph 18 of this judgment. They are clear and straightforward. In short, despite suspension, there is no investigation; there is no report and outcomes; there is no disciplinary charge against the Claimant.
28. The Claimant was terminated by notice and without cause pursuant to Clause 13.1 by the letter of the Defendant, dated 17 January 2013, but with effect from 16 January 2013. It was an exercise of the contractual right by the Defendant in the circumstances of this case. It was not an abuse of contractual power by the Defendant. There is no evidence to that effect. In this case, the termination was without cause, and the words 'at any time' expressly permitted termination under Clause 13.1, notwithstanding any existing suspension. I accept the submissions that there was no need to conclude the investigations or advise the Claimant of their outcome before exercising rights under Clause 13.1 of the contract. The outcomes of the investigations were not relevant to her termination.
29. It was also submitted for the Claimant that in the circumstances, there is a difference between the exercise of the statutory power to terminate a contract for unspecified period without restriction and the contractual right to do the same thing. I have perused the language of section 49 of the Employment Act, there is no statutory restriction in that section to that very effect. There is no practical difference between the two (the

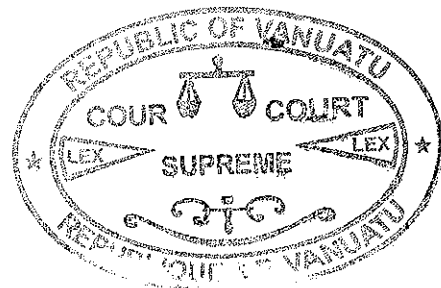


exercise of the statutory power to terminate a contract for unspecified period without restriction and the contractual right to do the same thing). I accept the Defendant's submissions that if there is no statutory restriction, then in the absence of a contractual term placing limits or qualifications on Clause 13.1 right, then there can be no such restriction.

30. Clause 13.1 of the Claimant's Contract of Employment mirrors section 49 of the Employment Act. I accept that the right to terminate on notice without cause and without reasons or justification exists under Clause 13.1 of the contract of employment. The case of **Kalambae –v- Air Vanuatu (Operations) Ltd [2014] VUCA 34** is the authority for this proposition. I reject the submissions made on behalf of the Claimant to the contrary.

31. Further following submissions are made on behalf of the Claimant:

- (i) It was an implied term and condition of the Claimant's contract that at all times, the Defendant would afford the Claimant the constitutional right of natural justice or a right to be heard in relation to the outcome of any investigation(s) or allegations which would be instigated by the Defendant against the claimant.
- (ii) It was also an implied term and condition of the Claimant's Contract that at all times, the Claimant was entitled to be promptly notified and informed of the completion of the outcome of any investigation or allegation which would be instigated by the Defendant against the Claimant.
- (iii) The terms of the suspension letter were specific in that the Claimant was being suspended "until full investigation and outcome of the investigations against you are complete."
- (iv) By direct implication, the Claimant was entitled, whilst on suspension, to be notified and informed by the Defendant of the completion of the outcome of the investigations against the Claimant.
- (v) Upon reading the suspension letter, the Claimant had a reasonable expectation that the Defendant would afford the Claimant a fair opportunity to answer to or respond to the



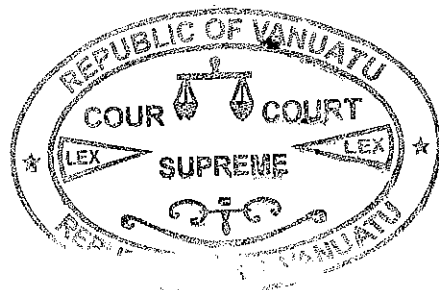
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“outcome of the investigations” against the Claimant when such investigations were completed.

(vi) The implied trust and confidence in a contract of employment would be that when the Defendant suspended the Claimant, the Claimant trusted that the Defendant (employer) would complete the said investigations against the Claimant (employee) and thereafter, the Claimant would be given a fair opportunity to answer to or respond to the outcome of such investigation.

32. I consider carefully each and all submissions (i);(ii);(iii);(iv);(v);(vi) above, the claim as filed and relief sought and the facts (as agreed by the parties and the facts as I find them with common sense and logic in this type of case on the material sworn statements before the Court), I express the following view:- First, as the facts show, there was a suspension but there was no finding or outcome of investigations nor charge that the Claimant was to be notified of and for which she was required to answer and the present case is a case of termination of employment by notice and without cause pursuant to Clause 13.1 of the contract. There is no such constitutional right of natural justice or right to be heard in relation to the outcome of investigations or allegation or charge because there were none on the facts of this case. But even if they were any (on assumption only) they were not relevant for the termination of the Claimant under Clause 13.1 of the Contract of Employment.

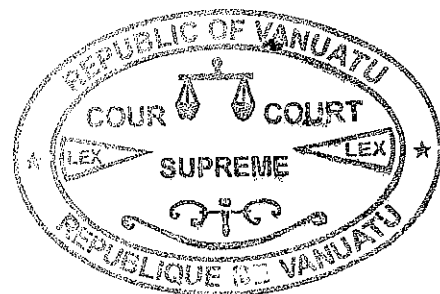
33. Second, as to whether they are implied terms and conditions of the Claimant’s contract, I have read and perused the Claimant’s Contract of Employment, I am of the view that the language of the contract is very clear and there is no reason to depart from its language. The language of the contract was complied and applied by the Defendant in terminating the contract. There is no such provision(s) in the contract nor is there any basis to imply such provision(s), nor has it been pleaded or asserted in any respect that the contract was somehow amended by agreement to preclude reliance upon Clause 13.1 of the contract pending the outcome of investigations. There is no evidence to the effect that an amendment to the Claimant’s contract was mutually agreed by all parties and that there was an understanding of such amendment.



34. I have read each and all the cases referred to by Counsel for the Claimant but to my judgment, there is no authority to which the Claimant's Counsel directed the Court which supports the legal principles relied upon or any authority which supports an interpretation of the meaning of the contract which qualifies the language of Clause 13.1 of the Claimant's Contract of Employment.
35. It is noted that contrary to Clause 13.1 of the contract which allows for termination with notice and without cause, Clause 13.2 allows for termination without notice but there must be cause, namely a determination that the employee has been guilty of 'serious misconduct'. It is clear that Clause 13.2 was not relied upon and there is no basis to assert that the Claimant was terminated under Clause 13.2 as submitted on behalf of the Claimant.
36. I answer issue No.1 in the negative - No.

ISSUE No.2: Was the Claimant lawfully terminated by the Defendant relying on Clause 13.1 of the Employment Contract?

37. The Claimant invited the Court to make a finding that in view of submissions made on behalf of the Claimant, it is said, the Claimant was not lawfully terminated by Clause 13.1 instead the correct Clause should have been Clause 13.2.
38. As I have said earlier, Clause 13.2 was not invoked by the Defendant as the basis for termination of the Claimant's employment with the Defendant. The termination in this case was specifically in accord with Clause 13.1 and proper notice was given and the Claimant accepted that the entitlements paid in accord with the service of the three (3) months' notice of termination were correct on the facts of this case.
39. It is noted that the termination with immediate effect by paying salary in lieu of notice was what the Defendant did in the present case.
40. 'Paying salary in lieu of notice' was not expressly spelled out under Clause 13.1 of the contract. The question then is: - Was giving notice and upfront paying of salary in lieu render the termination of the Claimant, in this case, an unjustified termination on 16 January 2013?



41. In the present case, I think not, for the following reasons:

First, I find support from the persuasive authority of the Fiji Supreme Court Judgment in **Central Manufacturing Company Ltd –v- Kant [2003] FJSC5** relying upon decisions of the High Court of Australia in **Sanders v Snell [1998] 196 CLR 329** and the Supreme Court of Canada in **Wallace v United Grain Growers Ltd [1997] 3 SCR 701**. In that case, the Fiji Supreme Court adopted the reasoning of the Supreme Court of Canada in **Wallace –v- United Grain Glows Ltd [1997] 3 SCR7C** as reflective of the better approach relying on the following statement of Iacobucci J:

“In the absence of just cause, an employer remains free to dismiss an employee at any time provided that reasonable notice of termination is given. In providing the employee with reasonable notice, the employer has two (2) options; either to require the employee to continue working for the duration of that period or to give the employee pay in lieu of notice...”

In the event that an employee is wrongfully dismissed, the measure of damages for wrongful dismissal is the salary that the employee would have earned had the employee worked during the period of notice to which he or she was entitled...

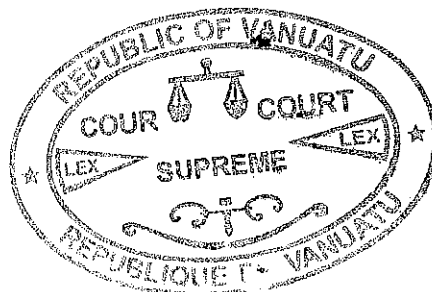
The fact that this money is awarded as damages at trial in no way alters the fundamental character of the money. An award of damages in a wrongful dismissal action is in reality the wages that the employer ought to have paid the employee either over the course of the period of reasonable notice or as pay in lieu of notice.”(Emphasis added).

42. Applying **Wallace –v- United Grain Glows Ltd [1997]**, the Fiji Supreme Court then held:

“It follows that in our opinion, the Court of Appeal erred in concluding that the Petitioner acted unlawfully in terminating the Respondent’s contract of employment forthwith paying him three (3) months’ salary in lieu of notice.”

43. I take note and bear in mind of the concerns expressed by the Courts of England in the authorities referred to in **Central Manufacturing Company case** at the impact of immediate termination as opposed to termination requiring the service of a notice period on the basis that it was advantageous for an employee to be seeking employment whilst in employment as opposed to seeking employment whilst ‘unemployed’.

44. The analysis of the phrase “payment in lieu of notice” adopted by the House of Lords in **Delaney v Staples [1992] 1 AC 687** was used to describe many types of payment, the legal analysis of which differed. Lord Browne-Wilkinson identified four principal categories, the first is commonly called “garden leaves”. His Lordship described that category in the following terms:



"(1) An employer gives proper notice of termination to his employee, tells the employee that he need not work until the termination date and gives him the wages attributable to the notice period in a lump sum. In this case (commonly called "garden leaves") there is no breach of contract by the employer. The employment continues until the expiry of the notice: the lump sum payment is simply advance payment of wages."

45. The four of those categories was in the following terms:

"Without the agreement of the employee, the employer summarily dismisses the employee and tenders a payment in lieu of proper notice... The employer is in breach of contract by dismissing the employee without proper notice. However, the summary dismissal is effective to put an end to the employment relationship, whether or not it unilaterally discharges the contract of employment. Since the employment relationship has ended, no further service has to be rendered by the employee under the contract. It follows that the payment in lieu is not a payment of wages in the ordinary sense since it is not a payment for work done under the contract of employment."

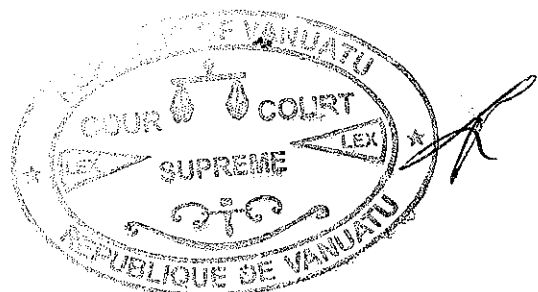
46. Their Lordships in **Central Manufacturing Company Ltd v Kant [2003]** at page 16, stated:

*"... A logical distinction can be drawn between the first and fourth categories. The Court of Appeal in William Hill Organisation Ltd v Tucker [1998] IRLR 313 appeared to draw just such a distinction, as did the Employment Court of New Zealand: McAulav v Sonoco New Zealand Ltd [1998] 2 ER NZ 225. **However, we regard the distinction as somewhat artificial, at least at a practical level. It can scarcely make any difference whether a person is told that he is dismissed forthwith, and given payment of salary in lieu of notice, or told that he is still employed but is not to perform any further duties. Accordingly, we prefer the Canadian approach to this issue to that apparently now taken in the United Kingdom.**"[Emphasis added].*

47. I agree with the Supreme Court of Fiji in Central Manufacturing Case that the distinction described above appeared to be artificial and there is no big difference whether a person is told that he or she is dismissed forthwith, and given payment of salary in lieu of notice, or told that he or she is still employed but is not required to perform any further duties.

48. Referring to the Canadian case of Wallace referred to earlier, the Fiji Supreme Court stated:

"In Wallace, the Supreme Court of Canada held that the contract of employment has many characteristics that set it apart from an ordinary commercial contract. The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence most in need of protection. Employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal. While a dismissed employee was not entitled to compensation flowing from the fact of dismissal itself, where it could be shown that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment, and

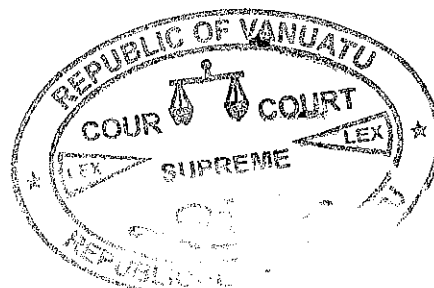


damage to self-esteem might all be worthy of compensation. Often the intangible injuries caused by unfair dealing on dismissal, will lead to difficulties in finding alternative employment. However, the intangible injuries are sufficient to merit compensation in and of themselves. In appropriate case, damages may be awarded for mental distress."

49. I adopt the Judgment of Fiji Supreme Court in in **Central Manufacturing Company Ltd – v- Kant** [2003] FSC5 on this issue as my own in the present case.
50. Second, further support for the approach preferred by the Fiji Supreme Court is to be found in the Vanuatu Parliament acknowledging in section 49 of the Employment Act, albeit in reference to a contract for an indefinite period, that the payment of salary in lieu of notice is a proper and valid alternative to requiring the person to serve out the notice period. It recognises the existence of an implied right to pay salary for the notice period forthwith and thereby immediately terminate the employee.
51. I answer issue No.2 in the affirmative – Yes.

ISSUE No.3: If the Claimant was not lawfully terminated, what damages flow?

52. The only issue to determine is what of any damages flow given the payment of salary for the requisite notice period. In this case, the Claimant was not required to work during the 'notice period' but received full payment as if she had. Serious misconduct is not an issue in this case and it has not being alleged. Severance was in fact paid. Section 50 of the Employment Act are not relevant to the claim and there is no claim under section 56 (4) made by the Claimant to this effect.
53. The question that follows is as to what damages the Claimant has suffered. Section 56 (4) is a mandatory authorities (see the Court of Appeal in *Ferrieux* (1990) VUCA 3 and *Marton –v- SELB Pacific Limited* (Judgment No.3) [1998] VUCA 8) on one side and breach of contract is dependent upon proof of damage on the other side. In this case, the fact is that the Claimant was paid all that would have been due to her had she been given three (3) months' notice as opposed to payment in lieu of notice. The question then is had she suffered loss? If any loss is suffered, there was no evidence presented of any general or exemplary damages. There was no claim for exemplary damages made.
54. In this case, it is noted that there is no claim alleging that the payment of salary in lieu of notice amounted to a breach of contract or that it amounted therefore to unlawful



dismissal. The entire claim focused entirely upon the allegation that by reason of suspension, the Defendant waived its rights to terminate whilst that suspension was current.

55. The submissions of the Claimant that her purported termination under Clause 13.1 would amount to unjustified termination under Clause 13.2 are rejected as there are no legal bases for such contentions. The wording of the contract is unambiguous and there is no evidence to support the inclusion, by rectification, or additional words to give a meaning for which the Claimant contends. Furthermore, rectification is not sought by way of relief.

56. The submissions of the Claimant that she would be entitled to damages for breach of contract being the balance of the contract term by the annual salary payment are rejected as her termination was a lawful termination under Clause 13.1 of her Contract of Employment.

57. The submissions of the Claimant that the amount due to her would be as under s.56 (4) of the Employment Act was refused as it was not pleaded in the claim, no relief was sought to that effect and there is no factual proof of any such claim.

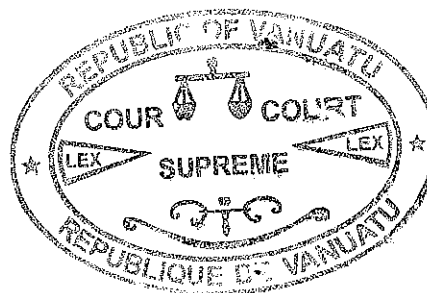
58. I answer issue No.3 as follows:

(i) The Claimant was lawfully terminated and there was no damage flown from her termination. I answer in the negative- No.

(ii) If I am wrong on this issue, and that the Claimant would be entitled to damage under s.56 (4) of the Employment Act, there is still no damage flown from termination as a matter of pleading and factual proof. I answer still in the negative- No.

Issue No.4: If the Claimant is lawfully terminated per 2 above, has she been paid all of her entitlements on termination of her contract?

59. The Claimant agreed that if she had been lawfully terminated, she had been paid all her entitlements on termination by the Defendant. There is no further issue here.




60. I answer issue no. 4 in the affirmative - Yes.
61. Before I dispose of this case, I note the submissions of the Claimant made in respect to a counter-claim by the Defendant against the Claimant containing allegations of misconduct of sorts against the Claimant but such allegations had never been raised directly to her termination nor were allegations raised in her respective termination letter of 16th January, 2013.
62. I take it that these matters raised in the counter-claim are matters independent from her claim and the circumstances leading up to her termination were not connected to her termination.
63. Based on the forgoing considerations, I dismiss the claim.

Conclusion and Disposition

1. I give judgment in favour of the Defendant on the Claimant's claim.
2. I dismiss the claim.
3. I order that the Defendant is entitled to its costs on the standard basis. Such costs shall be agreed or determined.

Dated at Port-Vila, this 31st day of October 2016

BY THE COURT


Vincent LUNABEK
Chief Justice

