

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

**Civil
Case No. 16/3718 SC/CIVL**

BETWEEN: Linda Tupou Kalpoi
Claimant

**AND: The Government of the Republic of
Vanuatu**
First Defendant

AND: Vanuatu Tourism Office
Second Defendant

Date of TRIAL: *30th, 31st day of October and 1st November, 2017 at
9:00 AM*

Date of Judgment: *14th February, 2018*

Before: *James Paul Geoghegan*

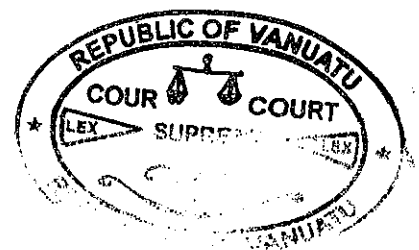
In Attendance: *Counsel – Mr Malcolm for the Claimant*

*Counsel – Mr Daniel for the Vanuatu
Tourism Office*

*Mr T Loughman (SLO) for the Republic of
Vanuatu*

JUDGMENT

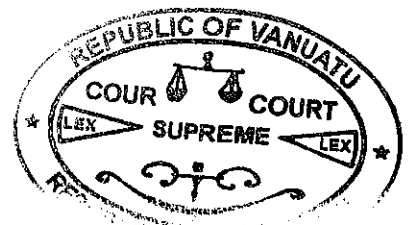
1. These proceedings consist of a claim by the claimant Mrs Kalpoi that on October 14th 2016 her employer the Vanuatu Tourism Office ("VTO") repudiated her employment contract thereby unlawfully terminating her employment as the VTO General Manager.



2. In the event of her claim being successful Mrs Kalpoi seeks damages against VTO of Vt 111, 168, 299 comprising salary, severance pay and benefits totaling Vt 31, 304, 555, a multiplication of severance totaling VT79, 788, 744 and common law damages totaling VT75,000.
3. VTO denies liability and while it acknowledges that an employment contract was signed by Mrs Kalpoi and the then Chairman of the VTO, it claims that the agreement is invalid on the basis that it was obtained through the fraud of Mrs Kalpoi and her collusion with the then Chairman of the Board Mr Fred Paul. It maintains that for that reason the contract was never a valid and binding contract between the parties.
4. At the close of the claimant's case, no relief was sought against the second defendant which, while represented throughout the trial, played no active part in it. In such circumstances, it is difficult to know why the State was named as a defendant in the proceedings.
5. During the course of the trial the Court heard oral evidence from nine witnesses. For the claimant, those witnesses consisted of the claimant, Mr Paul Fred, the Chairman of the VTO at the time of Mrs Kalpoi's alleged appointment and Mrs Meriam Numake a VTO Board Member at the relevant time. Witnesses called for the defence consisted of Mr Robert Avio, Mr David Seule, Mr Brian Death, Mr Paul Ravun and Mr George Borugu all of whom were Board members at the time of Mrs Kalpoi's alleged appointment and Mrs Nancy Kalorib who was the Secretary for VTO at the relevant time. The sworn statements for the first defendant of Adela Aru, Simon Douthett, Mike Crawford and Luke Dini were accepted without the need for cross examination.

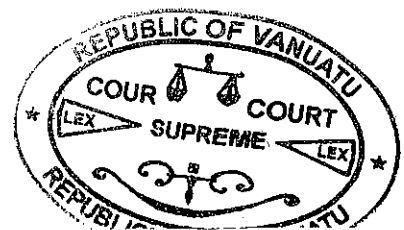
THE EVIDENCE

6. Up to the time of the alleged repudiation of her employment, Mrs Kalpoi had worked on and off for the VTO for some 29 years. She commenced working for the VTO in 1984 and was employed there until 2007 when



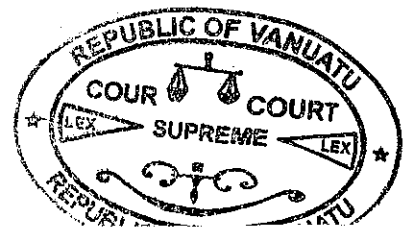
she left to take up a position with the ANZ Bank. Mrs Kalpoi returned to the employment of the VTO in 2011 as General Manager, a position she held until the termination of her employment.

7. Mrs Kalpoi's existing employment contract had expired on June 1st 2016. Rather than being renewed it was extended to November 1st 2016 to enable the re-advertising of her position and the possible recruitment of her replacement. It is clear from the evidence that some members of the Board felt the need for a change of General Manager but Mrs Kalpoi was free to, and in fact did, reapply for her position.
8. There is no suggestion in any of the evidence that Mrs Kalpoi was anything other than a loyal and hardworking employee.
9. In May 2016, a sub-committee was elected by the Board to conduct a review of all candidates who had applied for the position of General Manager and to select a short list for the interviews. That sub-committee consisted of Mr Fred, Mr Avio Roberts and Mr Adrian Mooney. The position was advertised in Vanuatu, Australia, New Zealand, Fiji and New Caledonia.
10. On August 29th 2016, a short list of four applicants was provided by the sub-committee to the Board. Those applicants included Mrs Kalpoi and Mrs Adela Aru who was eventually appointed as General Manager of the VTO and still occupies that position. A selection committee was formed in order to review and interview the candidates and provide recommendations back to the Board. That selection committee consisted of Mr Death, Mrs Numake, Mr George Dier, Mr Roberts and Mr Douthett, all members of the Board of the VTO.
11. After the completion of interviews by the selection committee a meeting was held with the Minister of Tourism, the Honourable Joe Natuman, at the Minister's office on September 27th 2016 in order to provide the



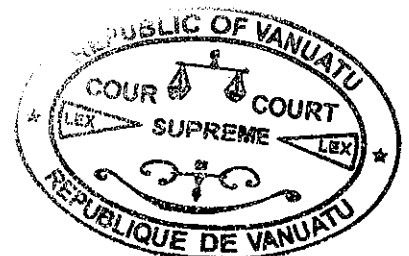
findings of the panel and to discuss government direction for the future of the VTO and tourism. It would appear that this meeting occurred on the recommendation of Mr Roberts who was the representative on the Board of the VTO for the Minister of Tourism. All selection committee members were present save for Mrs Numake who was in Tanna where she lives and operates her business.

12. It is clear from the evidence that there was a split vote among the selection committee regarding who was seen as the most suitable candidate. That split vote was three/two in favour of the applicant Mrs Aru.
13. The issue of the appointment of the new General Manager was placed on the agenda for a Board meeting on September 29th 2016.
14. What is abundantly clear from the evidence which I have heard is that the Chairman of the VTO Mr Fred was strongly in favour of retaining Mrs Kalpoi's services. He was aware also that some Board members, including Mr Death, were of the view that a change was necessary and were in favour of the appointment of Mrs Aru.
15. Prior to the Board meeting on September 29th the Chairman, along with the Mrs Kalpoi, met with members of the Board who were from islands other than Efate. There was a "briefing". While in their evidence Mr Fred and Mrs Kalpoi maintained that this was usual practice given that Board members from other islands often did not have email access and accordingly had to be provided with a Board meeting agenda and other documents in paper rather than electronic form, I am satisfied having heard the evidence that one of the principal purposes of that meeting was to discuss the reappointment of Mrs Kalpoi and to garner support for it.
16. Despite her role as General Manager I am of the view that Mrs Kalpoi's attendance at the "briefing" of the outer island Board members which



included discussion regarding her possible re-appointment was highly inappropriate. While Mrs Kalpoi stated in her evidence that she had not considered at that time the possibility of a conflict of interest I am highly surprised by that, given the length of time she had served in her role as General Manager. It should have been obvious to both she and the Chairman that her presence at any discussion regarding her appointment was unwise and inappropriate. It should also have been abundantly clear to both, that meeting with certain Board members in the absence of others in such circumstances was extremely unwise to say the least.

17. The Board meeting on September 29th was held at the Holiday Inn. It was attended by all of the Board members with the exception of Mr Seule, the Board member appointed on behalf of Air Vanuatu Limited attended by proxy. A copy of the Minutes of the meeting produced by the Secretary of the Board Mrs Nancy Kalorib, who was responsible for keeping and typing those Minutes records the discussion concerning the appointment of the General Manager.
18. While there is no formal record of the fact that Mrs Kalpoi, who was present at the Board meeting, was absent during this discussion the evidence given by those at the meeting clearly establishes that she had absented herself from the meeting at this time. The recorded Minutes may be summarized as follows:-
 - a) Mr Death addressed the Board on the process adopted by the recruitment committee, the fact that there were two final candidates, Mrs Kalpoi and Mrs Aru, that both candidates had impressed the Panel but that the Panel was unable to reach a consensus which required it to return to the Board to finalize.
 - b) The Board was advised that the Panel choice by majority was in favour of the appointment of Mrs Aru.



- c) Mr Avio, the representative of the Ministry of Tourism advised the Board that the Ministry's view was that the Tourism industry required change.
- d) There were clearly different views held by Board members in respect of the strength of the respective candidates and whether or not change at management level was required.
- e) The Chairman suggested that the Board determine the issue there and then and that a "voting process by ballot box be carried out immediately".
- f) After some discussion a secret ballot was conducted. The Minutes record that of the 13 votes cast Mrs Kalpoi received 6 votes and Mrs Aru, 7 votes.
- g) The Minutes then record that Mrs Kalpoi was asked to return to the conference room for the meeting to proceed and discuss other outstanding matters.

19. Item 17 which is the last item on the agenda records the following:-

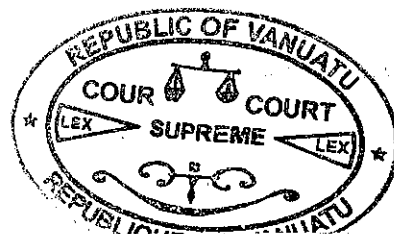
"Apologies and last remarks

The Chairman apologizes for any harsh words that were exchanged in the meeting and requested for handshake with the member Brian Death. He again acknowledge (sic) all Board members for their contribution to today's meeting.

The Chairman continued to advice that the Minister will give his advice however, another urgent meeting will be convened to formalize the General Manager's appointment.

The meeting was declared closed after a word of prayer".

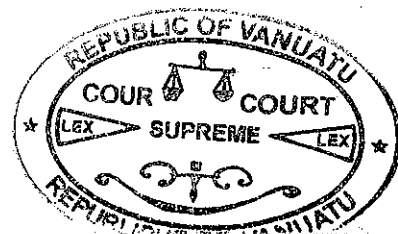
20. There was some focus on the content of the Minutes at this trial as it was apparent that the Minutes produced by Mrs Kalorib were different from the Minutes produced by Mr Fred. I am satisfied however that the Minutes maintained by Mrs Kalorib accurately reflect what transpired at



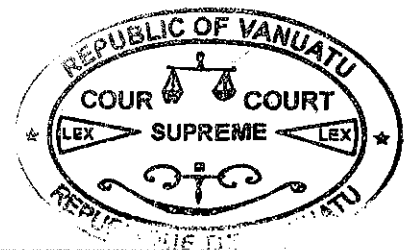
that meeting and where there is any conflict in content I rely upon the record prepared by Mrs Kalorib. In any event, I am of the view that nothing of significance hinges on any difference in those records.

21. On the face of it therefore the Board had voted and had decided that Mrs Aru was the successful candidate. It is clear also however that no resolution was passed declaring Mrs Aru to be the successful candidate and duly appointed and another meeting to "formalize" the appointment was anticipated. Quite what that means is open to speculation, however given the failure to record a resolution appointing Mrs Aru and given the clear intention to hold another meeting, I conclude that the meeting of September 29th did not constitute a formal appointment.
22. While it is clear from the evidence that the Board members who favored the appointment of Mrs Aru left that meeting assuming that the Board had voted on, and accordingly determined the matter, Mr Fred decided to seek legal advice from counsel for the VTO regarding the VTO Board composition and voting rights associated with the voting process during the VTO Board meeting to appoint the General Manager.
23. After the completion of the September 29th Board Meeting, Mr Paul instructed Mrs Kalpoi to contact Mr Gary Blake of Ridgeway Blake, lawyers in order to seek legal advice *"on the legality of the VTO Board composition and voting rights associated with the process for the appointment of the General Manager"*.¹ Mrs Kalpoi deposed that Mr Blake advised *"that some of the Board members that voted had no legal mandate or vote as they are not a proper legal VTO Board member"*.
24. It is difficult to know exactly what advice Mr Blake was requested to provide and what advice he actually provided as it is clear that the exchanges between Mrs Kalpoi and Mr Blake were verbal. In addition, Mr Blake was not called to give evidence in respect of the matter.

¹ See sworn statement Linda Kalpoi dated March 31st 2017 paragraph 8 (j).. note that the reference to (29/10/16) is regarded by me as being a typographical error)



25. What is also clear is that it was completely inappropriate for Mrs Kalpoi to be engaging in discussions with Mr Blake on this matter and for her to have then reported to Mr Fred regarding the content and effect of Mr Blake's advice. The conflict of interest in this was there for any responsible and reasonable person to see. While it was Mrs Kalpoi's advice that she "*removed herself*" when the conflict of interest became apparent and that she had sought the advice acting on instructions from the Chairman, I regarded her evidence as rather disingenuous. The evidence of Mr Fred was that he simply did not think that Mrs Kalpoi had a conflict of interest and that a conflict of interest had never occurred to him. Mr Fred's evidence on this point and on other matters relating to the Board meetings held demonstrated a very concerning lack of knowledge regarding his role as Chairman of the Board.
26. As a result of the alleged advice received from Mr Blake, Mr Fred instructed Mrs Kalpoi to contact the Board Secretary and to notify Board members that a Board meeting would be held at 3 pm on September 30th at the Melanesian Hotel.
27. Nine Board members attended that meeting, those members being Mr Fred, Mr Douthett, Mr Death, Mr Huri, Mrs Numake, Mr Hibgame, Mr Crawford, Fr Dini, and Mr Ravun. Mrs Kalpoi was also in attendance. A proxy from the Air Vanuatu Board member was provided to the Chairman.
28. The Board Minutes record that the Chairman confirmed that he had consulted with the first political advisor to the Minister of Tourism regarding the recruitment of the General Manager. Not surprisingly, the advice received was that the recruitment of the General Manager was entirely a matter for the Board of Directors. The Chairman then advised the meeting that following the Ministry's advice he sought legal advice on the outcome of the voting during the September 29th Board Meeting.



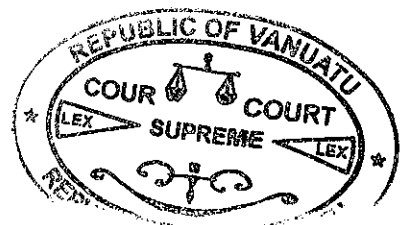
29. The evidence of Mr Fred was that Mr Blake provided advice that at least four members of the "voting Board" did not have any legal standing or right to vote in accordance with the Vanuatu Tourism Office Act, those members being, Mr Death, Mr Douthett, Mr Hipgame and Mr Roberts. Mr Fred gave evidence that the advice received was that Mr Death was not a representative of the Vanuatu Chamber of Commerce and Industry as required, that Mr Douthett was not the General Manager or Chairman of the Vanuatu Hotel and Resorts Association as required, that Mr Hipgame "had no written advice from the Vanuatu Tour Operators Association" and that Mr Roberts had no appointment at that time by the Minister of Tourism. Accordingly, said Mr Fred "the Board wasn't valid as was the vote".
30. Paragraph 3.5 of the Minutes records that:-

"The Chairman stated that due to these irregularities [it is not clear from the Minutes themselves what "these irregularities" were] he sought legal advice and has called for this full Board meeting whilst the outer island members are still in town and as per his ruling at the Holiday Inn Board Meeting decision to call a follow on Board meeting to complete the appointment of the General Manager after consultation with the DPM's office, the voting on the 29th Board meeting was not correct as a number of members who voted did not have the legal mandate to cast votes on behalf of their association".

31. The Minutes then record that Fr. Dini requested that Mrs Kalpoi leave the room while discussions regarding this matter were taking place. The Chairman then responded that Mrs Kalpoi would leave after going through the legality of the voting rights. Paragraph 3.7 of the Minutes then records the following:-

"The General Manager, Linda Kalpoi outlined the legal advices to the members and left the room.

3.7.1 *There was no legal mandate for votes:*



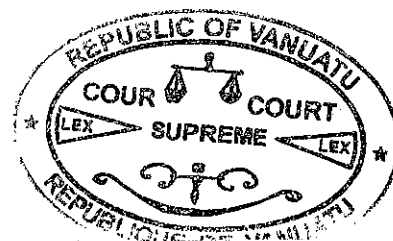
3.7.2 Thoroughly, the VTO Act outlines the composition of the Board section 5 [Cap. 142] and sub section (2) states that members of the office appointed (a) by the airlines shall be at Marketing Director or General Manager level, (b) by associations shall be either at Chairman or General Manager level.

3.7.3 Member Simon Douthett is only a representative of VHRA (as he is not the Chairman or General Manager of VHRA) and could not vote; VCCI representative, Member Bryan Death also has no right to vote as he is not the General Manager or Chairman of VCCI; member Andrew Hibgame as a representative of VTOA does not have the right to vote as he is not the Chairman or General Manager of VTOA".

32. The fact that Mr Paul permitted Mrs Kalpoi to remain at the meeting and to outline legal advice which had been provided verbally to her and had accordingly been received and interpreted by her and only her is astonishing.
33. The fact that the Chairman of the Board had not contacted Mr Blake to verify whatever advice was given, in my assessment, supports the conclusion that Mr Fred had predetermined the outcome of the meeting and was determined that those members of the Board who did not support the reappointment of Mrs Kalpoi would be removed from the Board.
34. Paragraph 3.16 of the Minutes then record that:-

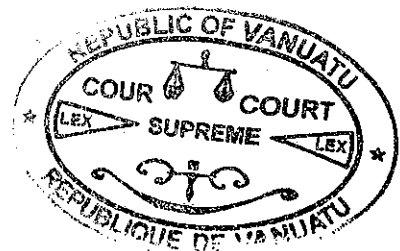
"The Chairman recommended that due to the legal advices it is clear that the voting of the Board meeting held yesterday at Holiday Inn is invalid and Adela is disqualified as the attributes and criteria were not met. As the Chairman, I would like to present this to the Board for discussion and decision".

35. This conclusion was nonsensical. There is no provision for Board members with voting rights and those without. Either someone was a Board member or they were not. If they were a Board member they had voting rights. If they were not, then the only conclusion which could



logically be drawn from that is that they had effectively been removed from that position by the Chairman.

36. Accordingly, of the remaining seven Board members (including the proxy vote) who voted on the appointment of a General Manager, six voted in favour of Mrs Kalpoi who was re-appointed to her position.
37. Not surprisingly, despite the Chairman's advice to Mr Death, Mr Douthett and Mr Hipgame that they could remain and "contribute" to the meeting but could not vote on the General Manager issue, all three left the meeting. It is clear that they were most unhappy, to say the least, with the manner in which the Chairman had dealt with the issue.
38. Later the same day Mrs Kalpoi signed an employment contract with the VTO for a period of 4 years from September 30th 2016. The contract was signed on behalf of the VTO by Mr Fred.
39. It is clear that these events caused considerable division and friction within the Board and that Mr Fred was subsequently replaced as Chairman by Mr. Seule in an Acting Chairman capacity. That in turn, led to a decision being made by the Acting Chairman that the contract of Mrs Kalpoi was "illegal" and that she should be removed from her office and replaced by Mrs Aru.
40. On Saturday October 8th, while waiting to board a flight to Auckland to attend an SPTO Board of Director's meeting in the Cook Islands, Mrs Kalpoi was approached by the first Private Advisor for the Minister of Tourism and was told that she should not board the flight and that if she did so the Minister would not attend the Tourism Minister's held in conjunction with the SPTO Board of Director's meeting. Mrs Kalpoi was told that Mr Fred's position as Chairman of the VTO was terminated. Given the advice which she received, she did not board the aircraft.



41. On Wednesday October 12th the Acting Chairman of the VTO Mr David Seule called on Mrs Kalpoi at the VTO offices and advised her that Mrs Aru was now the General Manager, that Mrs Kalpoi was no longer the General Manager and that she was required to vacate her office. Her employment was terminated accordingly. Upon the termination of her employment she was paid the sum of VT6,794,429². That sum was comprised as follows:

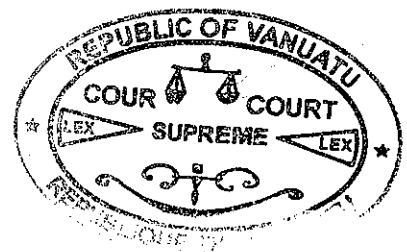
(a) Severance allowance	VT2,483,845;
(b) 3 months notice	VT1,375,668;
(c) Repatriation costs	VT150,000;
(d) Outstanding bonus and other replicable entitlements:	
i) unused compassionate leave and days off	VT571,431;
ii) 2016 bonus	VT458,556;
iii) Board member sitting allowances	VT120,000;
iv) Unused annual leave	VT1,264,556;
v) Unused sick leave	<u>VT370,372;</u>
	Total VT6,794,429.

42. Mrs Kalpoi's effective date of termination was November 1st 2016. Mrs Aru was advised of her appointment to the role of General Manager on October 15th and she signed an employment contract on October 17th.

43. As previously outlined, there was no evidence given by Mr Blake as to the nature of his conversation with Mrs Kalpoi on September 30th. What was provided however was a copy of the letter written by Mr Blake to Mr Fred concerning Board composition and voting rights. That letter is dated October 4th. It is a lengthy document which runs to some nine pages. At the outset of the letter Mr Blake refers to an email received on October 3rd 2016 from Mrs Kalpoi following on from discussions between Mr Blake and Mrs Kalpoi on September 30th. The email of October 3rd was not produced in evidence.

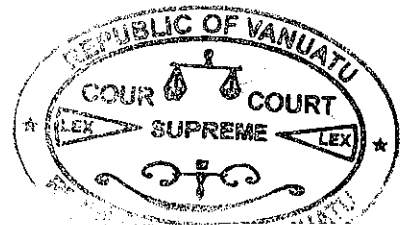
44. In the second paragraph of the letter Mr Blake states:-

² See Annexure H sworn statement Nancy Kalorib dated 12th May, 2017.



"Mrs Kalpoi advised in her email that you seek our advice regarding the Vanuatu Tourism Office ("VTO") board composition and voting rights, associated it seems with the process for the appointment of the GM. We note that Mrs Kalpoi is the existing GM, and may not therefore be 'independent' and 'disinterested' as regards the issues arising. We simply point this out and make no further comment at this stage. We shall leave it to you to copy her in as you see fit".

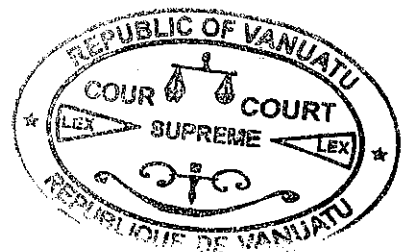
45. The letter goes on to refer to *"the background information and your instructions as set out in Mrs Kalpoi's email"*. That background information and instructions were then set out, some of those were being:-
- a) *"That the panel had not followed the process to report back to the Board after final interviews and that instead of reporting to the Board in line with a Minute of Board decision the Panel made a report to the Minister of Tourism "about a candidate that some members of the panel had contacted to apply and subsequently short listed"*.
 - b) *"The panel went to the Minister to favour the candidate with some of the members in the Panel favoured"*.
 - c) *"That before the Board meeting on September 29th "a member of the Panel was seen lobbying and trying to influence other board members to vote for the candidate that Bryan had identified as a better candidate to enable the change to the VTO General Manager"*.
 - d) *That "a vote was held and it was 6 to 7 in favour of the other candidate (due to pressure from the Panel who had used the Minister of Tourism's name being the Deputy Prime Minister)."*
 - e) *"The Chairman proposed to the board that since the panel has not provided a proper report and had used the Minister's name the board will not make a decision nt he appointment of the General Manager but will need to seek advice from the Minister of Tourism in regards to his direction given to the Panel"*.
 - f) *The background and instructions included a reference to the fact that 10 members has attended the September 30th meeting with two proxies given the Chairman and that member "who did not have correct or legal standing in the board left during the voting session which left 7 members that completed the process of voting based on*



merit that went in favour of the current General Manager with 7 votes to 1".

46. In his advice Mr Blake traversed the relevant provisions of the Vanuatu Tourism Office Act and at pages 4-6 of his letter referred specifically to members Mr Death, Mr Douthett, Mr Hibgame and Mr Roberts.
47. With reference to Mr Death, Mr Blake referred to two questions which arose which he did not have the requisite instructions to answer, namely whether or not Mr Death was the Chairman or at General Manager level at VCCI and whether Mr Death was appointed by the Board of the CCI to be their representative to the VTO board. Mr Blake expressed the opinion that Mr Death was only eligible for membership on the VTO Board if he was the Chairman or at General Manager level of VCCI and was appointed by VCCI as their representative to the VTO Board. Clearly therefore, further enquiries needed to be made.
48. As to Mr Douthett, Mr Blake expressed the view that Mr Douthett was only eligible as a member of the VTO Board if he was the Chairman or General Manager or at General Manager level with the Vanuatu Hotel and Resorts Association and was appointed by that Association as their representative for three years.
49. As to Mr Hibgame, Mr Blake expressed a similar opinion to that expressed regarding Mr Death and Mr Douthett and as to Mr Roberts, Mr Blake enquired as to whether or not the Chairman had sighted evidence of an appointment of Mr Roberts by the Minister of Tourism. The letter ended by stating the following:-

"From the instructions provided, it appeared that there was an ordinary meeting on the 29th of September 2016. To determine whether or not the composition of the members of the VTO Board present at the meeting is in line with the Act and satisfied the quorum requirements, we refer to our



advice set out in Paragraph 2 above. Your instructions on the issues raised would be required for us to advise further on this.

Furthermore, we draw your attention to section 9 (6). Section 9 (6) implies that if there are more than 4 vacancies in the membership of the VTO Board, then the proceedings of any meeting shall be invalidated. We do not have the information to provide you with the advice on whether the proceedings on the 29th September 2016 were invalidated however the provisions is clear that if there is more than 4 vacancies in the members of the VTO Board then the proceedings in the meeting is invalid.

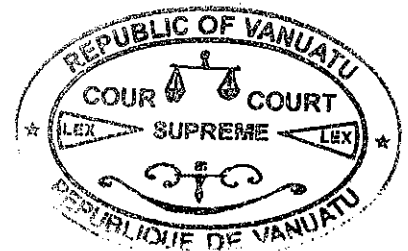
We refer to the meeting of 30 September 2016. In Mrs Kalpoi's email to us, the meeting was referred to as "urgent or extra ordinary board meeting".

Section 9 (4) of the VTO Act states that for "extraordinary meeting", the Minister is the person to convene extraordinary meetings after consultation with the not less than 7 members by 30 days prior notice in writing signed by them.

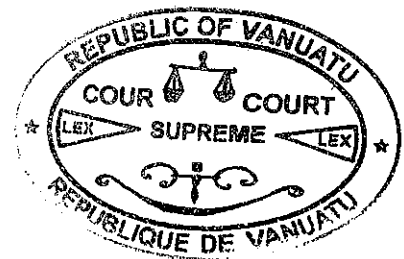
If however the meeting of 30 September 2016 is not an 'extraordinary meeting' as out in the VTO Act, but a continuation of the 29th September 2016, then the Chairman is the person to convene the meeting as he convenes all other meetings other than 'extraordinary meetings'.

50. The email from Mrs Kalpoi to Mr Blake which presumably contained Mr Blake's instructions, was not placed before the Court.
51. What appears clear from Mr Blake's advice is that it was provisional only. It was dependent upon the ascertainment of other factual matters. This is not surprising given the subject matter, however despite this both Mrs Kalpoi and Mr Fred chose to present this advice as firm and unequivocal and as a basis upon which certain Board members were advised that they would be unable to vote.
52. That a Chairman and General Manager would act in this way in respect of a matter that directly affected the future employment of the General Manager is deeply concerning.

DISCUSSION



53. In its statement of defence, VTO pleaded that Mrs Kalpoi's contract is invalid as it was obtained through fraud given that a new General Manager of VTO had already been appointed at the Board Meeting on September 29th. The VTO pleads that the Board meeting of September 30th was *"illegally and improperly convened contrary to section 9 (4) of the Vanuatu Tourism Act [Cap. 142]"*. It is also pleaded that the Board had no mandate to hold the meeting of September 30th.
54. Pursuant to section 5 of the Vanuatu Tourism Act (*"the Act"*) the VTO shall consist of 16 members comprised of representatives from organizations specified in section 5 (1)(A) and 1 (b).
55. Section 5 (4) provides that the General Manager shall be a member of the office ex-officio. Section 5 (7) provides that:-
- "(7) Where the Chairman or Deputy Chairman is satisfied that a member of the office appointed under sub sections (1) and (2) -*
- (a) Has been absent from two consecutive meetings of the office without the consent of the Chairman;*
 - (b) Has become insolvent;*
 - (c) Has incapacitated by physical or mental illness;*
 - (d) Has been convicted of a crime involving moral turpitude; or*
 - (e) Is otherwise unable to unfit to discharge the functions of a member; the Chairman or Deputy Chairman may declare the office of the member vacant and the Association and/or airline will appoint a replacement member".*
56. In this case the Chairman did not declare the office of any member to be vacant.

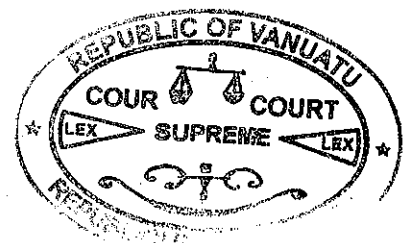


57. Section 9 of the Act governs meetings of the Office and provides, inter alia that:-

- a) The office shall meet once every month (section 9 (1));
- b) The Minister may convene extra ordinary meetings after consultation with not less than 7 members by 30 days prior notice in writing (section 9 (4));
- c) The quorum at any meeting shall be six members (section 9 (5)).
- d) The proceedings of any meeting shall not be invalidated by any vacancies in the membership of the office provided the number of such vacancies does not exceed 4 (section 9 (4)).
- e) The Office may invite any persons *"to participate in meetings but they shall have no vote"*. (section 9 (8)).
- f) Decisions of the Office shall be made by a majority vote of members present and voting, the Chairman of the meeting having a casting vote (section 9 (9)).
- g) Subject to the Act the Office may make internal rules regulating its procedure for the Chairmanship, calling, conducting and adjournment of meetings at the office (section 9 (11)).

58. No evidence was produced at this hearing of any internal rulings made in accordance with section 9 (11). The evidence establishes that the meeting of September 30th had the necessary quorum. In addition, despite the fact that I conclude that the disqualification of Mr Death, Mr Hibgame and Mr Douthett amounted to a declaration (however wrong or unlawful) by the Chairman that the offices of those members were vacant pursuant to S 5(7)(e) that has no effect upon the outcome. That is because pursuant to S 9(4) the proceedings of any meeting could only have been invalidated if more than four Board offices had become vacant. That was not the case here.

59. As to the submission that the meeting of September 30th was an extraordinary Board meeting which could only have been convened by the



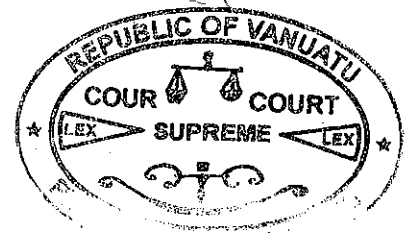
Minister, I disagree. The evidence clearly establishes that the meeting of the 29th was simply adjourned to the 30th for further discussion regarding the appointment of the General Manager.

60. Section 18 of the Act governs the issue of contracts entered into by the VTO and provides:-

"18. Contracts

A contract which if made between natural persons would by law be –

- (a) required to be sealed shall be made, varied or discharged by the Office under seal;*
 - (b) required to be in writing signed by the parties may be made, varied or discharged on behalf of the Office in writing signed by a person acting with its express or implied authority;*
 - (c) valid if although made by parol only may be made, varied or discharged by parol on behalf of the Office by any person acting with express or implied authority."*
61. While Mr Fred endeavoured to persuade me through his evidence that the eligibility of the Board members referred to had been a long standing and legitimate source of concern, I reject that evidence. When asked directly why he had only considered legal advice after the vote in favour of Mrs Aru had been undertaken Mr Fred was simply unable to answer the question. I was not surprised by that inability, as I consider that no satisfactory explanation could have been proffered in the circumstances which existed. My assessment of Mr Fred's conduct is regrettably that he engaged in a deliberate commercial gerrymander in order to create a situation which ensured the appointment of Mrs Kalpoi to the position of General Manager.
62. Mr Fred's position with respect to the appointment of the General Manager was made clear in his sworn statement dated March 31st 2017.



63. At paragraphs 12 and 13 of that statement he deposed:-

"12. Mr Death self-appointed himself to be the Chairman of the Panel and key to the outcome that saw the Panel with no written report to the Board but chose to report to the Minister of Tourism to brain wash the Minister along with those Panel members that were on his side that it is time for a change to the VTO General Manager.

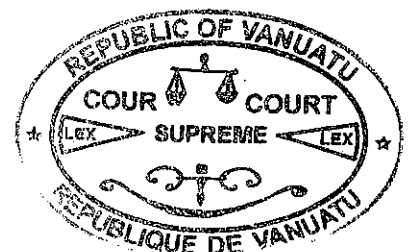
13. I realized it was a set up by Brian and his allies and I took the decision along with the outer island Board members who were fully in support of the General Manager and voted her back to the position as they have seen her hard work and sacrifices made during her 18 years at the VTO that brought the VTO to where it is now".

64. In his sworn statement Mr Fred made it abundantly clear that he was determined to see Mrs Kalpoi re-appointed as General Manager and that he was concerned by the actions of Board members who wanted a replacement. I am left with the distinct impression that rather than providing leadership and endeavoring to act as a unifying influence on the Board, Mr Fred conducted himself in a divisive and inappropriate way. It is abundantly clear from the evidence that Mr Fred was prepared to take whatever steps were necessary to secure Mrs Kalpoi's re-appointment.

65. Mr Fred's motivations for doing so were referred to at paragraph 17 of the sworn statement of March 31st 2017 where he stated:-

"However I was extremely concerned about the outcome in particular the compilation of the Board and did not pass a motion to endorse Adela's appointment as the new GM, the matter was pending and I informed the Board that I will consult with the Minister before I convene another Board meeting to finalize the appointment of the General Manager."

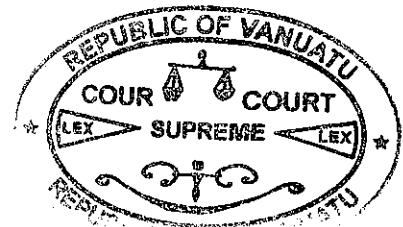
66. Mr Fred's "extreme concern" regarding the compilation of the Board was not a matter communicated to the Board members in question and was not a matter referred to in the Minutes.



67. As to the claim by the First Defendant that there had been collusion between Mr Fred and Mrs Kalpoi, and that in effect there had been a fraud perpetrated upon the Board I find that the evidence does not enable me to reach such a conclusion particularly taking into account the higher threshold required when allegations of fraud are made. Despite the disingenuity previously referred to Mrs Kalpoi, struck me as a reliable witness and had clearly previously been highly regarded by Board members. However, despite her experience as a General Manager found her to be concerningly unaware of what appeared to be positions of conflict of interest. She should not have been speaking with Mr Blake regarding legal advice on the matter. I accept however that she was working at the direction of Mr Fred. While she acted very unwisely, and in doing so has contributed to the problems that have arisen, there is a difference between that and acting fraudulently or in a willfully misleading manner. A responsible and competent Chairman would not have placed her in the position that she found herself. In all of the circumstances I do not find that Mrs Kalpoi acted fraudulently as submitted by the second defendant.

68. I do not have the same view of Mr Fred. His actions were manipulative and showed a lack of knowledge of and competence in, his role as Chairman of a Board. If he had doubts regarding the eligibility of various Board members he should have taken time to hear from them regarding the issue and, in the event that he was still left in some doubt he should have sought legal advice and then waited to consider that legal advice, including sharing it with the Board members affected before taking further steps. He did none of those things and, putting aside the subsequent actions of the Board in dismissing Mrs Kalpoi, Mr Fred's actions have created this situation. His conduct fell far below the conduct which might be expected of a responsible and competent Chairman.

69. But where does all of that get to ? Given the particular circumstances of this case I do not accept the submissions on behalf of the second

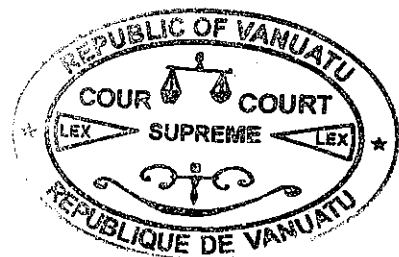


defendant that this is a situation where constructive fraud can be applied. That anticipates circumstances involving intended deception and misrepresentation. On the facts of this case such considerations do not apply to the actions of Mrs Kalpoi. For example, while it is contended that she misrepresented the legal advice provided by Mr Blake, there is no basis upon which I could draw that conclusion. That is because Mr Blake was not called to give evidence about his conversation with Mrs Kalpoi. She may well have related her understanding of what Mr Blake had said. In addition I do not consider the authorities of Isleno Leasing Co Ltd v Air Vanuatu (Operations) Ltd³ and Fogarty v Air Vanuatu⁴ to be of assistance. Both are fact specific and in the case of Fogarty the “unlawfulness” of the contract was created by the fact that Mr Fogarty did not have a work permit and therefore could not legally have undertaken his employment duties.

70. As I have already concluded, despite the submissions of the second defendant the meeting of September 29th did not have the effect of appointing Mrs Aru as General Manager and created no basis upon which there was a binding legal contract between the parties. Accordingly, the meeting of September 30th, which clearly was clearly nothing more than a continuation of the adjourned meeting from September 28th was, despite Mr Fred’s actions, a validly constituted meeting with a quorum capable of passing the resolution which it did. In resolving that Mrs Kalpoi would be re-appointed as General Manager the Board was not exceeding its lawful authority or acting beyond its lawful capacity. Accordingly I find that the employment contract entered into by Mrs Kalpoi was a valid contract binding between the parties.
71. Having come to that conclusion, it must follow that Mrs Kalpoi’s contract was unlawfully terminated. It is clear that once Mr Fred was removed as Chairman of the Board, the “new” Board or Acting Chairman decided to

³ [2016] VUCA 43

⁴ [2017] VUCA 14

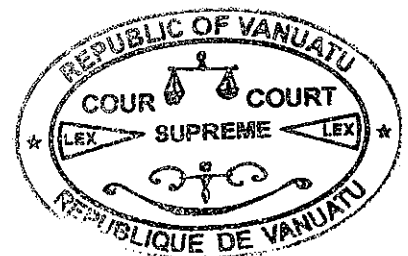


terminate Mrs Kalpoi's employment and employ Mrs Aru. It would appear that the Board took no legal advice before embarking on this course of action. It appears to have taken the view that Mrs Kalpoi's contract was invalid and/or illegal. It was not entitled to take the course of action which it did.

72. Part of Mrs Kalpoi's claim was that she was entitled to severance for 29 years pursuant to the provisions of section 54 (2) (c) which provides that for the purpose of ascertaining whether an employee has been in the continuous employment of an employer:-

"(c) Where an employee ceases to be in the employment of one employer and enters the employment of another under section 55 (4), his employment by the first and second employer shall be deemed to be continuous employment".

73. Section 55 (4) contemplates situations where employees are offered employment by a new employer who is taking over an existing business. Examples of such circumstances are where an employer dies and an employee is offered continuing employment by the representative of the deceased or where an employee is re-employed on the sale of a business sold as a going concern.
74. Mr Malcolm conceded that there was no evidence which could satisfy the provisions of section 55(4) and accordingly the claim for severance based on continuous employment for 29 years was not pursued. It should never have been pursued given her intervening employment by ANZ.
75. It is immediately apparent from the claimant's statement of claim that there is some confusion regarding the basis upon which damages could be awarded to Mrs Kalpoi. The sum sought by Mrs Kalpoi totals Vt 111, 168, 299. The particulars of the statement of defence break down those figures as follows:-



- a) Employment Salary to 30th September 2016(sic)VT22, 010, 688
- b) Severance – 29 yearsVT13, 298, 124
- c) Benefits – i) Housing – 4 yearsVT2, 400,000
 - ii) Cost of living allowance – 4 years VT204, 000
 - iii) Child allowance – 18 years VT324, 000
- d) Common law damages – VT75, 000
- e) Severance (x6) –VT79, 788, 744

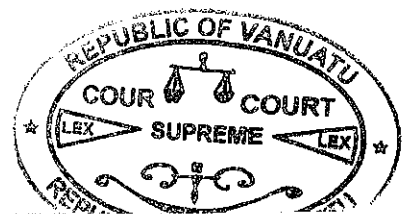
76. Even in the event of Mrs Kalpoi being successful these figures are unsustainable. They rely on an assumption that the Court would be prepared to award Mrs Kalpoi the entire benefits of her four year employment contract and would also be prepared to award severance pursuant to the provisions of section 56(4) of the Employment Act.

77. There are difficulties with such an approach, which does not factor in the need to take account of the claimants duty to mitigate her loss and the fact that simply because someone has a fixed term contract they can be placed in a position where loss of employment results in an unjustified windfall resulting in a claimant receiving far more than he or she would have earned if the employment contract had simply ended upon the expiration of its term. Unfortunately, none of these issues were addressed by counsel.

78. There are however, other difficulties with the figures set out in the statement of defence.

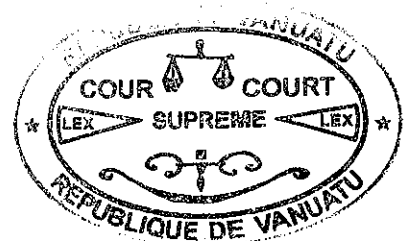
79. Firstly, Mr Malcolm has already conceded that severance could not be calculated on the basis of a 29 year period. In this case there was no continuous employment which would have justified such a severance payment. If the Employment Act were to apply, severance could only be calculated on the basis of Mrs Kalpoi's employment since 2011.

80. Secondly, the claim for child allowance for Vt 324,000 is based on a fundamental misunderstanding of the employment contract. There is



clearly evidence that Mrs Kalpoi received a child allowance however it is completely unclear as to what level of allowance she was entitled to. There is no evidence of how many children she had or how old they were.

81. Putting that to one side, the claim of VT 324,000 appears to have been reached by taking the monthly payment of VT 1500 for one child and then multiplying it to obtain an annual child allowance of VT 18,000. It has then been multiplied by 18 years for reasons which are unclear. Mrs Kalpoi could not have expected to receive a child allowance beyond the duration of her four year contract. The most she would be entitled to is VT 72,000.
82. In all of this, Mrs Kalpoi acknowledges having received the sum of Vt 6, 932, 257 from the VTO.
83. I turn then to consider the issue of damages. Regrettably, Mrs Kalpoi's claim is very poorly pleaded and does not distinguish between a fixed term contract and permanent employment. In addition, the fixed term was for a period of four years, a period expressly in contravention of S. 15 of the Employment Act which provides that the maximum duration of employment which may be stipulated in any contract "*shall in no case exceed 3 years.*" I received no submissions from either counsel on this issue so am left to resolve the matter on the evidence and submissions I have.
84. What is absolutely clear is that Mrs Kalpoi's claim is excessive and that would not have assisted in any possible settlement of this matter. In addition, the Republic was added as a Second Defendant for no good reason.
85. In his submissions Mr Malcolm submitted that Mrs Kalpoi was entitled to three years salary and entitlements including unpaid severance.



86. The principles regarding the assessment of damages for wrongful dismissal were referred to by the Court of Appeal in Vanuatu Maritime Authority v Timbacci⁵, the Court of Appeal said:-

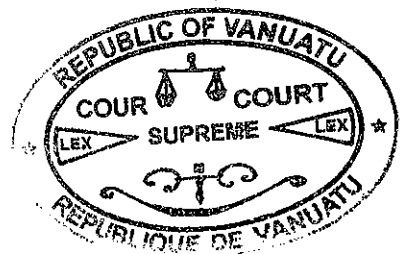
"The legal principles that guide a Court in the assessment of damages for wrongful dismissal are not in doubt and are conveniently summarized in paragraphs 933 and 934 of McGregor on Damages (13th Edition) at page 635. It reads:-

The measure of damages for wrongful dismissal is prima facie the amount that the (respondent) would have earned had the employment continued according to contract, subject to a deduction in respect of any amount accruing from any other employment which the (respondent) in minimizing damages either had obtained or reasonably could have obtained. The rule is crystalized anomalously in this form. It is not the general rule of the contract price less the market value of the (respondents) services that applies; instead the prima facie measure of damages is the contract price, which is all the (respondent) need show. This is then subject to mitigation by the (respondent who is obliged to place her services on the market, but the onus here is on the (appellant) to show that the (respondent) has or should have obtained an alternative employment.

Basically, the amount that the (respondent) would have earned under the contract is the salary or the wages that the (appellant) had agreed to pay".

87. On the face of it therefore, Mrs Kalpoi would be entitled to receive, subject to other considerations such as the need for mitigation and receipt of an immediate payment, the amount which she would have earned under her fixed term contract.
88. For these purposes however, the term of the contract must be regarded as being for a three year⁵ rather than a four year period. Although the Court received no submissions on this the decision in Vanuatu Maritime Authority v. Timbacci makes it clear that section 15 of the Employment

⁵ 2005 VUCA 19



Act means that any term which is agreed by the parties in excess of three years is reduced to a term of three years.

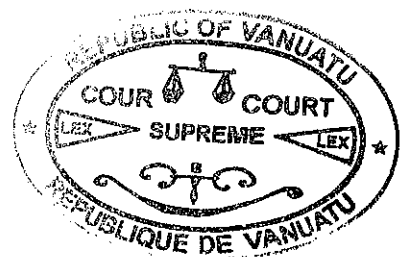
89. With reference to mitigation, that was clearly pleaded at paragraph 16 of the claimant's statement of claim. It was also denied by the first defendant at paragraph 16 of its statement of defence.

90. No evidence of any kind was contained in the sworn statements filed by Mrs Kalpoi addressing the issue of mitigation. When Mrs Kalpoi commenced her evidence she described her occupation as currently unemployed. Apart from that there is simply no evidence at all of what attempts she had made to mitigate her loss. The lack of such evidence is clearly completely unsatisfactory. Given Mrs Kalpoi's experience at a senior management level one might think that her services would be in demand and that she would be able to undertake further employment even if not at the salary level and status of her former employment.

91. Clauses 3.1 to 3.4 of Mrs Kalpoi's employment contract set out the remuneration which she was entitled to on an annual basis. That was as follows:-

- a) Salary:VT5, 502, 670
 - b) Housing allowance: VT600,000
 - c) Child allowance:..... VT18,000
- Total: **Vt 6, 171, 672.**

92. The employment contract also refers at clause 3.3 (e) to the receipt of a bonus, however that was based on assessment of performance as conducted by the Board on annual reviews and accordingly I do not make an allowance for that. Clause 3.3 (a) of the contract refers to Mrs Kalpoi being entitled to "other benefits as per existing staff manual as amended" however evidence was given as to what those benefits were.



93. Clause 15.3 of the contract sets out the entitlements payable to Mrs Kalpoi upon "*termination or completion*" of the contract. They are as follows:-

- a) Severance allowances of an amount equal to one month's salary for every year of service and a pro-rated for every uncompleted year.
- b) Three months' notice.
- c) Repatriation costs of Vt 150,000.
- d) Outstanding bonus and other applicable entitlements .
- e) Outstanding annual leave.
- f) Outstanding sick leave.

94. 15.3 (g) provides that:-

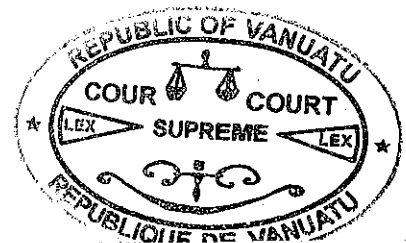
"In the case of terminating this contract before the completion date by the employer without valid reasons or with injurious motives, the remainder (sic) of the contract shall be compensated in full (salary and other benefits) to the employee".

95. On the basis of an employment period from June 1st 2011 to September 30th 2019, a period of 8 years and 4 months, at a monthly salary of Vt 458,556 the relevant amount of severance payable to Mrs Kalpoi would have been Vt 3, 821, 300.

96. Accordingly, putting aside matters such as outstanding bonuses, annual leave, sick leave and "*other applicable entitlements*" none of which can be calculated at this point, I calculate that throughout the course of her contract, Mrs Kalpoi would have received the sum of Vt 23, 861, 984 comprised as follows:-

- a) Salary for three years (at Vt 6,171,672 per annum)VT18, 515, 016
- b) Severance payable upon terminationVT3, 821,300
- c) Repatriation costsVT150,000
- d) 3 months' notice (based on salary not allowances)VT1, 375. 668

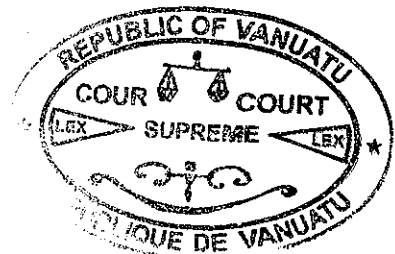
VT23,861,984



97. Mrs Kalpoi's employment was terminated effective from November 1st 2016. Exactly one year later she was still unemployed, there being no evidence having been given by her as to why that was so and what efforts, if any, had been made by her to obtain employment.
98. In Vanuatu Maritime Authority v Timbacci the Court of Appeal commented on what it described as a "regrettable failure" to focus on the critical issue of mitigation. The same regrettable failure has occurred in this case. Rather than referring the matter back to the Supreme Court for further evidence on this point, or rule that Mr Timbacci should receive only nominal damages because of inadequate proof as to what he did, or reasonably could have done, to earn for himself, the Court of Appeal adopted the following course:-

"The starting point is what he would have earned if there had not been an unjustifiable termination. That is Vt 3, 100,000 which is one month at Vt 350,000 and 11 months at Vt 250,000. Mr Timbacci worked from March 2004. His failure to obtain employment from October 2003 until then is not unreasonable. For the next seven months we estimate and earned benefit of Vt 50,000 per month. That is on the basis that as well as some actual wages he would have had the benefit of accommodation and keep. Vt 2, 750,000 was accordingly the sum which we award for the breach of contract.

99. The fact that I am leaving Vanuatu to return to New Zealand renders any further hearing regarding evidence on mitigation impossible. Accordingly the most appropriate course, in my assessment, is to make an allowance for a reasonable period of time for Mrs Kalpoi to obtain alternative employment. I consider that it is appropriate to allow Mrs Kalpoi a period of 18 months after which it would be reasonable to consider that she could have or should have obtained alternative employment. Accordingly I deduct one third from the figure of Vt 22, 336, 316 which is comprised of the sum of Vt 23, 861, 984 less the three months' notice and repatriation



costs which Mrs Kalpoi would have received regardless of the term of the contract. That one third amounts to Vt 7,445,438.

100. Accordingly the appropriate damages payable to Mrs Kalpoi amount to Vt 14,890,878.

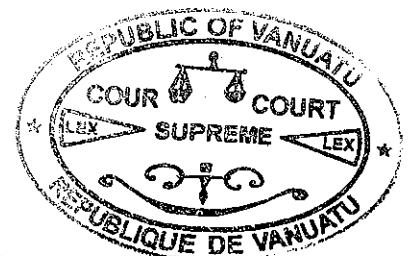
101. With reference to the award of common law damages, there is clear authority that an award of damages can be made.

102. In his submissions Mr Malcolm submitted that common law damages were "*as a result of loss of confidence*". There is absolutely no evidence of any loss of confidence on the part of Mrs Kalpoi although one could reasonably anticipate that her dismissal came as a shock to her even given the circumstances in which she was re-appointed to her position.

103. Having been a hardworking and loyal employee her contract was terminated without notice and while I do not accept the submissions of Mr Malcolm that "*she was publicly removed from a plane*" (she was not) and "*thrown out of her office with no notice*" her contract was certainly terminated in circumstances which would have come as a shock to her. However, it is incumbent upon any claimant making a claim for common law damages to support that claim with appropriate evidence. Mrs Kalpoi has not, and accordingly I decline to award common law damages.

104. I turn then to determine the issue of multiplication of severance under Section 56(4) of the Employment Act which provides that:

"The Court shall, where it finds that determination of the employment of an employee was unjustified, order that he be paid a sum up to six times the amount of severance allowance specified in subsection (2)".



105. In this case the severance payable to Mrs. Kalpoi upon the termination of her contract was VT2,483,845⁶. No challenge was made to the accuracy of that figure and I accept that as correct. Mrs. Kalpoi seeks a multiplication of six times that severance payment pursuant to Section 56(4), a total sum of VT14,903,070.

106. The consideration of the application of a multiplier under Section 56(4) is mandatory upon the court finding that termination of employment was unjustified. Accordingly I am required to consider that issue in this case. The multiplier which is applied however is a matter for the discretion of the Court.

107. In Quarani v. Airports Vanuatu Limited⁷ I refer to Malere & Ors. v. Vanuatu Broadcasting and Television Corporation⁸ where Dawson J. set out the relevant factors which the Court should consider in any application of the multiplier including:

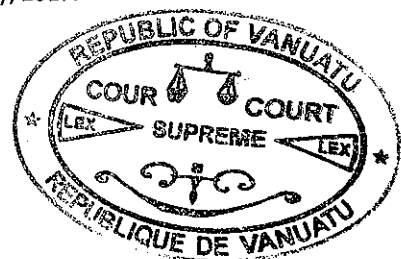
- (a) Whether the employee had a good work record;
- (b) Whether the employee had been given previous warnings;
- (c) Whether the unjustified dismissal was a result of a net handling of the issue by the employer at the lower end of higher end arrogance of the higher rendered scale;
- (d) Whether the employee was subjected to physical or verbal abuse by the employer at the time of the termination.

108. I would also add that I consider that it is appropriate for the court to look at the particular circumstances of an employment contract and, in the case of a fixed term contract such as this, to consider whether application of the multiplier will result in a payment to the employee which will effectively

⁶ See annexure H to sworn statement of Nancy Kalorib dated 24th May, 2017.

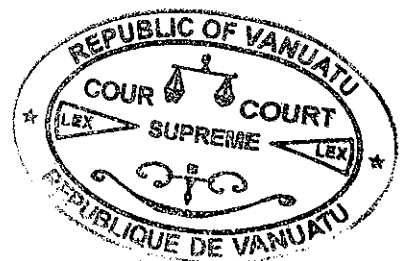
⁷ [2017] VUSC 27

⁸ [2009] VUSC 164

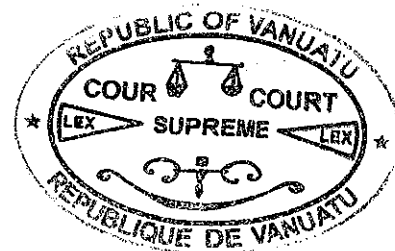


amount to unjust enrichment. While this is a case involving the abrupt termination of the employment of an individual described as a hardworking and loyal employee, it is difficult to justify an award which could result in that individual receiving a payment in excess of that which she would otherwise have received had she remained in employment for the term of her contract. Given the circumstances of this particular case I consider that it would have been highly unlikely, had Mrs. Kalpoi remained in her employment that she would have been re-engaged at the end of her contract.

109. There is no question that her employer acted wrongly in terminating her employment. The poor conduct of Mr. Fred, referred to previously in this judgment was then compounded by the decision, presumably by Mr Seule, to terminate Mrs. Kalpoi's employment without the benefit of legal advice and without discussing the matter with Mrs. Kalpoi. Although it is a matter of conjecture, if the Board had communicated with Mrs. Kalpoi regarding its concerns over the matter it may have been possible to reach an agreement regarding termination of her employment which was acceptable to both parties. Instead, the Board has proceeded on the ill founded assumption that Mrs. Kalpoi's contract was in some way void ab initio and that it could therefore embark on termination of her employment without notice. It could not.
110. Having said that I do not accept that application of a multiplier of 6 would result in a just outcome taking into account all of the facts regarding the background of this matter. I consider that the appropriate multiplier is one 2 times Mrs. Kalpoi's severance, a total sum of VT4,967,690.
111. Accordingly I award Mrs. Kalpoi the sum of VT19,858,568 comprised of damages arising from the breach of employment contract in the sum of VT14,890,878 together with an award pursuant to Section 56(4) of the Employment Act of VT4,967,690.

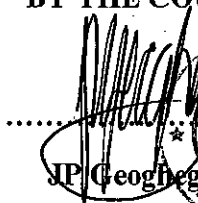


112. From the sum of VT19,858,568 I deduct the sum of VT6,932,257 referred to in paragraph [40] which was the amount paid to Mrs Kalpoi upon termination of her employment. Accordingly the total sum ordered to be paid by the second defendant to the claimant is the sum of VT12,926,311.
113. Interest is sought by the claimant at the rate of 5% on the judgment sum and there are no submissions from the second defendant which would suggest that the payment of interest is opposed or that the amount of interest sought is unreasonable. Accordingly interest is awarded on the judgment sum at the rate of 5% per annum from November 1st, 2016 to the date of payment.
114. As to costs, I have previously referred to the fact that the claim filed by Mrs. Kalpoi was excessive and could not have assisted in the matter being resolved by agreement. A far more realistic claim may well have led to the matter being settled. Having said that, Mrs. Kalpoi has been successful in her claim and on that basis she should be entitled to costs. Accordingly the claimant is awarded costs against the second defendant on a standard basis.
115. I record that at the close of the case Mr. Malcolm confirmed that no relief was sought against the State. On that basis the State was invited to seek costs but made no application. Accordingly costs are not granted in favour in favour of the first defendant against the claimant. I can indicate however that had such an application been made, it would have been granted.



DATED at Port Vila, this 14th day of February, 2018.

BY THE COURT


JP Geoghegan
Judge

