

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

**Civil**  
**Case No. 21/2282 SC/CIVL**

**BETWEEN: Daniel Morris**  
Claimant

**AND: Attorney General**  
Defendant

*Date of Trial:* 1 September 2021  
*Before:* Justice V.M. Trief  
*In Attendance:* Claimant – Mr S. Kalsakau  
Defendant – Mrs E. Blake  
*Date of Decision:* 23 September 2021

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**JUDGMENT**

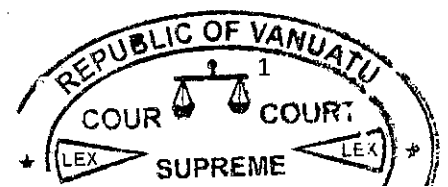
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A. Introduction

1. The Claimant Daniel Morris was employed by the Defendant Attorney General from 2009 to June this year.
2. By the Claim, Mr Morris alleges unlawful termination of his employment, unjustified dismissal and/or constructive dismissal. A declaration, employment entitlements and 5 times multiplier are sought.

B. Background

3. On or about 24 August 2009, Mr Morris commenced employment with the State Law Office under an employment contract with the Attorney General (the 'employment contract').
4. Mr Morris pleaded guilty to one count of misappropriation in relation to trust monies (from a family trust) and on 17 May 2021, was sentenced to 10 months imprisonment, suspended for 2 years, and ordered to repay the full sum of VT800,000 by fortnightly repayments of VT10,000: *Public Prosecutor v Daniel* [2021] VISC 111.



5. Mr Morris did not inform the Attorney General Arnold Kiel Loughman of the criminal charge against him or of his criminal conviction. After he was sentenced, he wanted to do so in person.
6. From 20 May to 4 June 2021, Mr Morris did not attend work as he was on leave. He resumed work on 7 June 2021.
7. In the morning of 7 June 2021, Jack Semeno, Director, Corporate Service Unit of the State Law Office handed Mr Morris a letter dated 7 June 2021 from the Attorney General which stated as follows:

*You will note that pursuant to clause 14.1 of the SLO Staff Manual...:*

*'Employees are required to inform the Attorney General if they are being charged with a criminal offence, and after the trial to inform him of her of the result, which will be checked by reference to the judgment in the case held by the Court Registry.'*

*You have failed to inform me of the criminal charges laid against you and also to inform me of the outcome of the... criminal case. I have considered that you have acted contrary to the requirements of the SLO Staff Manual.*

*Also, sub-clause 8.1(d) of your employment contract stipulates that a committal of a criminal offence tantamount to a serious misconduct.*

...

*... I have considered subs. 50(3) of the Employment Act where it avails me the opportunity to take any other course than to summarily dismiss you from your employment for serious misconduct.*

*I am mindful that your criminal conviction tantamount to a serious misconduct and your circumstance inclines me to invoke sub-clause 8.1(d) of your contract. However, I am also mindful of the exemplary service you have rendered to the State Law Office...*

*As such and in light of subs. 50(3) of the Employment Act, I ask that you tender your resignation within 3 days. I believe that a resignation affords me to award you any employment benefit to which I might consider credible in light of your conviction.*

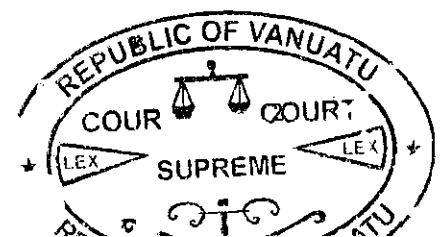
*Please note that this is the alternative opportunity I am offering to you as to what your employment contract envisages me to invoke.*

*(my emphasis)*

8. Mr Morris and the Attorney General then had a discussion about the letter. Mr Morris subsequently sought legal advice.
9. By letter dated 7 June 2021, Mr Kalsakau wrote to the Attorney General as follows:

*My client has instructed me that by letter dated 7 June 2021 you have asked him to resign within 3 days for reason being that he failed to inform you of the criminal proceedings and conviction and that you are of the view that the criminal conviction "tantamount to a serious misconduct".*

*At no time was he provided any opportunity to respond contrary to subs 50(4) of the Employment Act ... nor was he invited to address you on subs. (3).*



Given the above, I am of the considered view that you have acted contrary to your duty as a good employer in ensuring that my client is offered an adequate opportunity to respond or address you of any breaches or allegation which you may have against him. The fact that the criminal conviction is deemed as a serious misconduct DOES NOT excuse you from your duty under subs. 50(4).

Notwithstanding this, you have acted in a manner that has consequentially breached the term of trust and confidence between my client as the employee and yourself as the employer by forcing him to resign within 3 days.

In light of all the above, my client herein and in accordance with s. 53(1) of the Employment Act terminates his employment contract with immediate effect. In accordance with that subs., please pay out to my client his 3 months' pay in lieu of notice.

Moreover, please pay to my client **immediately** the following:

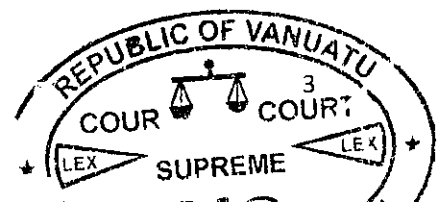
1. Outstanding pay;
2. Outstanding leave entitlements;
3. Extra responsibility allowance;
4. Severance allowance for his 12 years of service;
5. 5x severance multiplier;

We ask that you make the above payments in full within 7 days. Failing which, I hold instructions to sue you.

10. On 21 June 2021, the Attorney General made an instalment payment of VT100,000 to Mr Morris.
11. On 14 July 2021, Mr Morris filed Urgent Supreme Court Claim (the 'Claim').

C. Pleadings

12. It is alleged in the Claim that:
  - a) By his letter dated 7 June 2021, the Attorney General purportedly dismissed Mr Morris' employment on the grounds of serious misconduct and asked him to resign within 3 days;
  - b) Mr Morris' termination was unlawful and unjustified in that at no time prior to the 7 June 2021 letter was he given an adequate opportunity to respond to the allegations contained in the letter contrary to subs 50(3) and (4) of the *Employment Act* [CAP. 160] (the 'Act');
  - c) The decision to terminate Mr Morris' employment was unlawful, unjustified, a breach of trust and confidence and a serious breach of the employer's duty to act as a good employer;
  - d) As a result of the Attorney General's actions, Mr Morris has suffered loss; and
  - e) Alternatively, that Mr Morris was constructively dismissed as a consequence of the Attorney General asking him to resign.
13. The Claim is opposed.



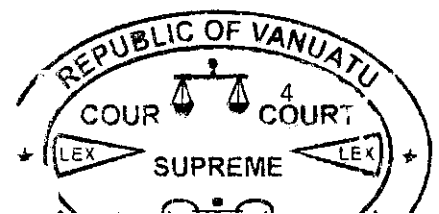
14. The Attorney General alleged the following in his Defence:

- a) That Mr Morris did not inform him of the criminal charge against him nor of the result of the criminal matter as required by clause 14.1 of the State Law Office Staff Manual;
- b) Denied that by his letter dated 7 June 2021, he purported to dismiss Mr Morris' employment on the grounds of serious misconduct;
- c) That his letter referred to clauses 7.2 and 8.1(d) of Mr Morris' employment contract in relation to his criminal conviction and opened discussions that alternatives, other than the summary dismissal provided for in the employment contract, could be considered;
- d) By Mr Kalsakau's letter to the Attorney General dated 7 June 2021, Mr Morris terminated the employment;
- e) Denied that he seriously breached a term or condition of the contract of employment including that he conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between him and Mr Morris;
- f) Denied that he repudiated the contract of employment;
- g) Denied that Mr Morris is entitled to 3 months' pay in lieu of notice as he terminated the employment without giving notice to the Attorney General; and
- h) That as Mr Morris terminated the employment, he is entitled to severance allowance and outstanding annual leave less 3 months' pay for the failure to give 3 months' notice of termination as required by subs. 49(5) of the Act and the VT100,000 paid to Mr Morris on 21 June 2021.

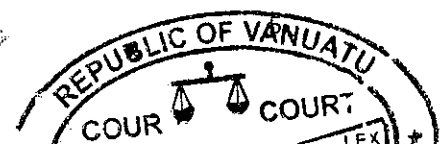
15. Both parties sought costs on an indemnity basis.

16. In Reply to the Defence, Mr Morris alleged as follows:

- a) Denied that there was any relevant connection between the criminal activity resulting in his conviction and his employment such that no reasonable employer would have gone ahead with summarily dismissing him;
- b) That clauses 7.2 and 8.1(d) of his employment contract did not preclude the Attorney General from ignoring subs. 50(4) of the Act nor the Attorney General's duty as a good employer to act fairly;
- c) That the Attorney General's conduct by making conclusions without hearing Mr Morris and then asking him to resign within 3 days breached the terms (express and implied) of the contract including the implied terms of trust and confidence and to take reasonable care not to damage the employment relationship and good faith; and



- d) That as a result of the said breaches, Mr Morris invoked s. 53 of the Act to terminate the employment contract and that such termination was forced upon him by the Attorney General's request that he resign.
17. The issues between the parties are:
- a) Was there a decision by the Attorney General to terminate Mr Morris' employment and was it unlawful? **[Issue 1]**
  - b) Was there unjustified dismissal or not? **[Issue 2]**
  - c) Was there a serious breach of the contract by the Attorney General such that Mr Morris could terminate the contract under subs. 53(1) of the Act? **[Issue 3]**
  - d) Was there constructive dismissal or not? **[Issue 4]**
  - e) Is Mr Morris entitled to 3 months' payment in lieu of notice or not? **[Issue 5]**
  - f) What is Mr Morris entitled to payment of? **[Issue 6]**
- D. Issue 1: Was there a decision by the Attorney General to terminate Mr Morris' employment and was it unlawful?
18. It is alleged in the Claim that the decision to terminate Mr Morris' employment was unlawful because by his letter dated 7 June 2021, the Attorney General purportedly dismissed Mr Morris' employment on the ground of serious misconduct and asked him to resign within 3 days.
19. Mr Kalsakau submitted that the only possible outcome as a result of the 2 options put to Mr Morris in the letter (summary dismissal on the ground of serious misconduct and resignation within 3 days) was cessation of his employment. Accordingly, by that letter, the Attorney General purportedly dismissed Mr Morris' employment on the ground of serious misconduct and asked him to resign within 3 days. He submitted that even where employment would be automatically terminated due to a criminal conviction, that did not do away with the protective provision of subs. 50(3) of the Act that the employee must be given the opportunity to be heard before the dismissal.
20. Clause 14.1 of the State Law Office Staff Manual provides as follows [copy in Attachment "AKL3" to Sworn statement of Arnold Kiel Loughman filed on 2 August 2021, "Exhibit D1"]:
- 14.1 *Employees are required to inform the Attorney General if they are being charged with a criminal offence, and after the trial to inform him or her of the result, which will be checked by reference to the judgment in the case held by the Court Registry.*
21. Summary dismissal for serious misconduct was provided for in clauses 7.2 and 8.1(d) of the employment contract as follows [copy of employment contract in Attachment "AKL1", "Exhibit D1"]:
- 7.2. *The Attorney General may terminate this agreement at anytime without notice or payment in lieu of notice where you have been guilty of serious misconduct.*



8.1 In addition to any other actions which may constitute serious misconduct the following action shall amount to serious misconduct, if you:

...

(d) commit a criminal offence.

22. The Attorney General made clear in his letter that he proposed resignation as an alternative to summary dismissal for serious misconduct in light of subs. 50(3) of the Act. Section 50 of the Act provides as follows (with emphasis on subs 50(3) and (4)):

50. (1) In the case of a serious misconduct by an employee it shall be lawful for the employer to dismiss the employee without notice and without compensation in lieu of notice.

(2) None of the following acts shall be deemed to constitute misconduct by an employee –

(a) trade union membership or participation in trade union activities outside working hours, or with the employer's consent, during the working hours;

(b) seeking office as, or acting in the capacity of, an employees' representative;

(c) the making in good faith of a complaint or taking part in any proceedings against an employer.

(3) Dismissal for serious misconduct may take place only in cases where the employer cannot in good faith be expected to take any other course.

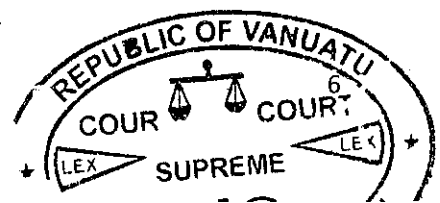
(4) No employer shall dismiss an employee on the ground of serious misconduct unless he has given the employee an adequate opportunity to answer any charges made against him and any dismissal in contravention of this subsection shall be deemed to be an unjustified dismissal.

(5) An employer shall be deemed to have waived his right to dismiss an employee for serious misconduct if such action has not been taken within a reasonable time after he has become aware of the serious misconduct.

23. Subsection 50(3) of the Act is plain on its face. An employer may only dismiss for serious misconduct where in good faith dismissal is the only reasonable option: *Pacific Passion Ltd v Debay* [2019] VUCA 57 at [15].

24. It is clear from any reading of the Attorney General's letter dated 7 June 2021 to Mr Morris, [copy attached to Mr Morris' sworn statement filed on 14 July 2021, "Exhibit C1"], that the Attorney General had not by that letter purported to or actually dismissed Mr Morris' employment on the ground of serious misconduct. He asked Mr Morris to resign within 3 days as an alternative to the summary dismissal provided for in the employment contract. Resignation could not be an option if the Attorney General had already dismissed Mr Morris' employment.

25. I consider that the Attorney General considered, as he was obliged to by subs. 50(3), if there was any other course available than dismissal for serious misconduct, and requested Mr Morris's resignation as the alternative course.



26. There may well have been other courses available such as a warning, suspension or demotion. However, Mr Morris did not respond to the Attorney General's letter suggesting those as alternatives. Instead, Mr Morris terminated his employment with immediate effect, which was communicated to the Attorney General by his lawyer Mr Kalsakau's letter dated 7 June 2021 [copy attached to "Exhibit C1"]. By doing so, Mr Morris pre-empted any termination of his employment by the Attorney General.
27. Mrs Blake submitted that if Mr Morris' argument succeeded, that the Attorney General's letter dated 7 June 2021 to him amounted to termination of contract then that would make redundant the operation of subs. 50(4) because as soon as the employer raises with an employee that he is considering whether to terminate for serious misconduct, it would be treated as bringing the employment to an end. I agree. Section 50 must be read as a whole and it cannot have been Parliament's intention that subs. 50(4) operate in the manner alleged unless the employer had actually dismissed the employee for misconduct without notice (see subs. 50(1)). In this case, there was no decision by the Attorney General to terminate Mr Morris' employment therefore subs 50(3) and (4) did not apply.
28. For the reasons given, there was no decision to terminate Mr Morris' employment and therefore no unlawful termination so my answer to Issue 1 is, "No."

E. Issue 2: Was there unjustified dismissal or not?

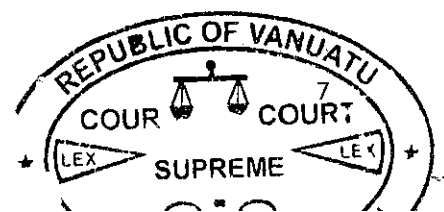
29. It is alleged in the Claim that the decision to terminate Mr Morris' employment was unlawful and unjustified in that at no time prior to the Attorney General's letter dated 7 June 2021 was Mr Morris given an adequate opportunity to respond to the allegation contained in the letter contrary to subss 50(3) and (4) of the Act:

~~(3) Dismissal for serious misconduct may take place only in cases where the employer cannot in good faith be expected to take any other course.~~

(4) No employer shall *dismiss* an employee on the ground of serious misconduct *unless* he has given the employee an adequate opportunity to answer any charges made against him and *any dismissal in contravention of this subsection shall be deemed to be an unjustified dismissal.*

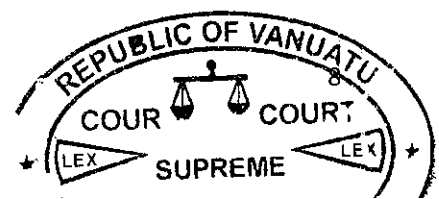
*(my emphasis)*

30. Unjustified dismissal is a statutory cause of action pursuant to subs. 50(4) of the Act. A dismissal on the ground of serious misconduct shall be deemed to be an unjustified dismissal if the employer made that dismissal without giving the employee an adequate opportunity to answer any charges made against him.
31. I accept Mrs Blake's submissions that subss 50(3) and (4) of the Act apply only if subs. 50(1) applies, that is, that the employee has committed serious misconduct and the employer has dismissed the employee. To read s. 50 otherwise would be contrary to the intention of Parliament which is to be derived from the words of the Act, having regard to the plain meaning of ordinary words and reading s. 50 as a whole: subs. 8(1) and paras (2)(a) and (c), *Interpretation Act* [CAP. 132].



32. On the facts of this case, there was no dismissal or decision by the Attorney General to terminate Mr Morris' employment, on the ground of serious misconduct or otherwise, therefore there was no unjustified dismissal. My answer to Issue 2 is, "**No.**"
- F. Issue 3: Was there a serious breach of the contract by the Attorney General such that Mr Morris could terminate the contract under subs. 53(1) of the Act?
33. Mr Morris alleged that the Attorney General's conduct by making conclusions without hearing Mr Morris and then asking him to resign within 3 days breached the implied terms of the contract including of trust and confidence and to take reasonable care not to damage the employment relationship and good faith.
34. Mr Kalsakau submitted that read objectively, the only outcome of the Attorney General's letter was cessation of Mr Morris' employment. Mr Morris evidenced that he approached the Attorney General to reconsider the letter but the Attorney General stated that he would stand by it and to obtain legal advice. Mr Morris felt that it was unfair that he was not given an opportunity to explain himself beforehand and this was such a breach of trust and confidence that he terminated his employment pursuant to subs. 53(1) of the Act because of that breach.
35. Mr Morris also alleged that the decision to terminate his employment was a serious breach of the employer's duty to act as a good employer. Further, that clauses 7.2 and 8.1(d) of the employment contract did not preclude the Attorney General from ignoring his duty as a good employer to act fairly. I have already held that there was no decision by the Attorney General to terminate Mr Morris' employment and I am not certain that the Attorney General has a duty as alleged, unlike the duty imposed on the Public Service Commission by s. 15 of the *Public Service Act* [CAP. 246].
- ~~36. In case I misunderstood the pleading, I will treat this as another allegation that the Attorney General's conduct by making conclusions without hearing Mr Morris and then asking him to resign within 3 days breached the implied term of the contract that an employer must deal fairly with his employees.~~
37. Finally, Mr Morris alleged that as a result of the said breaches, he invoked s. 53 of the Act to terminate the employment contract and that such termination was forced upon him by the Attorney General's request that he resign.
38. Section 53 of the Act provides as follows:
53. (1) *If an employer ill treats an employee or commits some other serious breach of the terms and conditions of the contract of employment, the employee may terminate the contract forthwith and shall be entitled to his full remuneration for the appropriate period of notice in accordance with section 49 without prejudice to any claim he may have for damages for breach of contract.*
- (2) *An employee shall be deemed to have waived his right under subsection (1) if he does not claim it within a reasonable time after he has become aware of his being entitled thereto.*

*(my emphasis)*

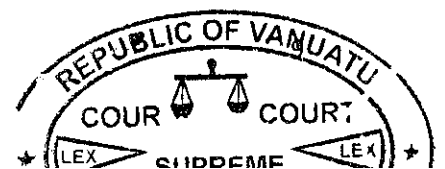




39. Mr Kalsakau confirmed that it is not part of his client's case that there was any ill treatment by the employer. Mr Morris' case is that the Attorney General committed a serious breach of the terms and conditions of the employment contract therefore he terminated the contract forthwith pursuant to subs. 53(1) of the Act.
40. It was accepted that the employment contract contains implied terms of trust and confidence and to take reasonable care not to damage the employment relationship and that the employer must deal fairly with his employees. Mr Kalsakau referred for the existence of the implied terms to Tuohy J's judgment in *Nipo v Vanuatu Football Federation* [2007] VUSC 65 at [13] referring to the Employment Appeal Tribunal's judgment in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, 670-672:

*... it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84...

41. I note that the Court of Appeal in *Republic of Vanuatu v Tari* [2012] VUCA 6 at [20] assumed the implied term of employment contracts that an employer must deal fairly with his employees.
42. Were the implied terms of the contract breached? Mr Morris alleged that the Attorney General breached the implied terms including of trust and confidence and to take reasonable care not to damage the employment relationship and good faith by his conduct of making conclusions without hearing Mr Morris and then asking him to resign within 3 days. He also alleged that this conduct by the Attorney General breached the implied term that an employer must deal fairly with his employees.
43. The Attorney General pointed out in his 7 June 2021 that Mr Morris' employment contract provided for summary dismissal in the case of serious misconduct, which included a criminal conviction. However, he was also mindful of the exemplary service that Mr Morris had rendered to the State Law Office and so requested resignation instead of summary dismissal. The Attorney General evidenced in "**Exhibit D1**" that this was offered so that Mr Morris could be paid his employment entitlements (they are not paid where dismissal for serious misconduct occurs). The Attorney General evidenced in "**Exhibit D2**" that if Mr Morris resigned, when he applied for another job, potential employers could be informed that Mr Morris resigned from his job with the State Law Office which seemed to him, on paper, to look better for Mr Morris than being terminated.
44. I consider that by his conduct and the considerations that he had in mind, the Attorney General dealt fairly with Mr Morris. I also consider that in doing so he was seeking to preserve the trust and confidence between him and Mr Morris, and took reasonable care not to damage the employment relationship.
45. In not informing the Attorney General of the criminal charge against him and his criminal conviction, Mr Morris arguably breached the term of trust and confidence between them and did not take reasonable care not to damage the employment relationship. Mr Morris evidenced that he did not inform the Attorney General because he preferred to do so in



person as it was a serious matter and that he was not in office when he went to find him on 17-19 May 2021. However, Mr Morris was then on leave from 20 May to 4 June 2021. During that time, he was not at work to inform the Attorney General in person, so in those circumstances, I consider that he should have taken steps to call or email him, or write to him, to inform him of his criminal conviction. Mr Morris agreed in cross-examination that he had not. In not doing so, Mr Morris was arguably the one who breached those implied terms of the contract.

46. In the circumstances, I consider that there was no breach of the contract by the Attorney General such that Mr Morris could terminate the contract under subs. 53(1) of the Act and answer Issue 3, "No."

G. Issue 4: Was there constructive dismissal or not?

47. Mr Morris alleged in the alternative that he was constructively dismissed as a consequence of the Attorney General asking him to resign.

48. The Attorney General denied any repudiation of the employment contract in his letter to Mr Morris dated 7 June 2021.

49. Justice Tuohy discussed the concept of constructive dismissal and s. 53 of the Act in *Nipo v Vanuatu Football Federation* [2007] VUSC 65 at [12] and [14]-[16] as follows:

12. *The concept of constructive dismissal has long been established in employment law. At common law, it takes place when an employer repudiates a contract of employment and the employee responds by cancelling the contract. In substance, the employer has dismissed the employee although technically there has been a resignation.*

...

14. *In Vanuatu, Parliament has made specific provision for constructive dismissal in s. 53 of the Employment Act [CAP. 160]:*

**"BREACH OF CONTRACT BY EMPLOYER**

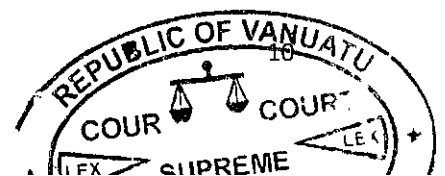
53. (1) *If an employer ill treats an employee or commits some other serious breach of the terms and conditions of the contract of employment, the employee may terminate the contract forthwith and shall be entitled to his full remuneration for the appropriate period of notice in accordance with section 49 without prejudice to any claim he may have for damages for breach of contract."*

15. *This may in some respects establish a lesser threshold of employer misconduct than the common law, but an employee in Vanuatu appears able to rely on either or both of the common law and s. 53. This is because of s. 6 of the Employment Act which provides:*

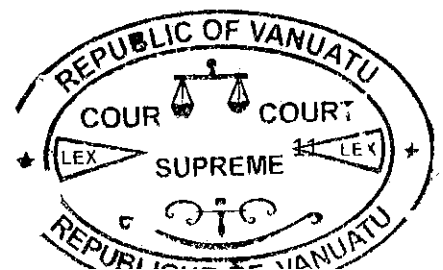
*"Nothing in the Act shall affect the operation of any law, custom, award or agreement which ensures more favourable conditions in any respect to the employees concerned than those provided for in this Act."*

50. The Court of Appeal discussed constructive dismissal in *Ahelmalahlah v Republic of Vanuatu* [2018] VUCA 16 at [31] and [32], relevantly, as follows:

31. *Constructive dismissal is a doctrine developed on the basis of an employment relationship governed by an employment contract; Western Excavating (EEC) Ltd v Sharp [1978] OB 761 at 769....*



32. ... at the heart of the doctrine of constructive dismissal is the concept of repudiation of contract; conduct which shows the employer no longer intends to be bound by one or more of the essential terms of the contract; *Western Excavating (EEC) Ltd v Sharp* [1978] OB 761 at 769....
51. Mr Kalsakau submitted that read objectively, the only outcome of the Attorney General's letter was cessation of Mr Morris' employment. When the Attorney General stated that he would stand by it and to obtain legal advice, Mr Morris felt that it was unfair that he was not given an opportunity to explain himself beforehand and terminated his employment pursuant to subs. 53(1). However, the termination had occurred by way of the Attorney General's letter; Mr Kalsakau's letter was just a reaction to the Attorney General's letter and was the result of the termination through the Attorney General's letter. He submitted that Mr Morris' resignation was forced as the result of both options given was cessation of employment, with the end result of pushing Mr Morris out of office.
52. Mr Kalsakau also submitted that s. 50 of the Act applies where an employee has been constructively dismissed, as subs. 50(4) contains the words, "any dismissal in contravention of this subsection".
53. Mrs Blake submitted that the Attorney General's conduct and/or his 7 June 2021 letter to Mr Morris did not amount to either an express or implied repudiation of the employment contract. She submitted that the Attorney General's evidence showed that he had not made up his mind whether to terminate the employment for serious misconduct. That is, the fact that he gave the resignation alternative to Mr Morris showed that there was no final decision on his part to terminate for serious misconduct without notice. Mrs Blake submitted that without that finality of what the Attorney General would do, the element of repudiation did not exist in this matter.
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54. I have already held that by his conduct and the 7 June 2021 letter, there was no decision by the Attorney General that he would terminate the employment; he had instead requested Mr Morris' resignation as the suggested alternative course. I do not accept Mr Kalsakau's submission that the only possible outcome was cessation of employment because Mr Morris could have responded by suggesting other alternative courses. Instead, he tendered his resignation the same day. There being no decision by the Attorney General to terminate the employment, it cannot be said that he had repudiated the contract. For the reasons given under Issue 3 above, it also cannot be said that the Attorney General had breached the implied terms of the contract so seriously that it constituted a repudiation of the contract.
55. I do not agree with Mr Kalsakau's submission that s. 50 applies to cases of constructive dismissal. Section 50 must be read as a whole – there must be an actual dismissal by the employer in the case of a serious misconduct by the employee, then subss 50(3) and (4) apply requiring that the employee has been given an opportunity to be heard as to the charges of serious misconduct against him and the employer in good faith could not have been expected to take another course.
56. For the reasons given, my answer to Issue 4 is, "No."



H. Issue 5: Is Mr Morris entitled to 3 months' payment in lieu of notice or not?

57. Section 49 of the Act provides, relevantly, as follows:

49. (1) *A contract of employment for an unspecified period of time shall terminate on the expiry of notice given by either party to the other of his intention to terminate the contract.*
- (2) *Notice may be verbal or written, and, subject to subsection (3), may be given at any time.*
- (3) *The length of notice to be given under subsection (1) –*
- (a) *where the employee has been in continuous employment with the same employer for not less than 3 years, shall be not less than 3 months;*
- (b) *...*
- (4) *Notice of termination need not be given if the employer pays the employee the full remuneration for the appropriate period of notice specified in subsection (3).*
- (5) *If an employee fails to give to the employer appropriate notice under this section, the employer may deduct from the employee's entitlements the sum required for the period of notice.*

58. Mr Morris' employment contract was for an unspecified period of time therefore it would terminate on the expiry of notice given by either party to the other: subs. 49(1) of the Act. As he had been in continuous employment with the Attorney General for over 3 years, at least 3 months' notice was required: subs. 49(3) of the Act. Payment in lieu of notice could be paid by the employer or deducted from the employee's entitlements: subs 49(4) and (5) of the Act.

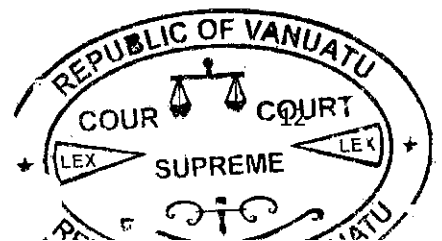
59. The Attorney General did not seriously breach a term of the employment contract such that subs. 53(1) of the Act applied, therefore Mr Morris is not entitled to 3 months' pay in lieu of notice pursuant to that subsection.

60. I have found that Mr Morris in fact terminated his employment. He did so without giving 3 months' notice therefore his entitlements must be reduced by the amount of 3 months' salary, in accordance with subs. 49(5) of the Act. Accordingly, I answer Issue 5, "No."

I. Issue 6: What is Mr Morris entitled to payment of?

61. Besides 3 months' pay in lieu of notice, Mr Morris sought payment of:

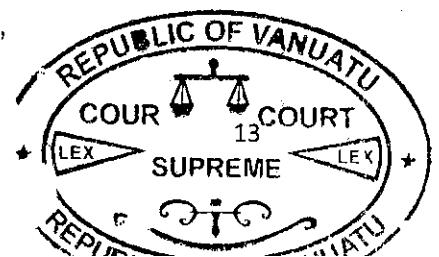
- a) Outstanding annual leave;
- b) Outstanding sick leave;
- c) Extra responsibility allowances – taking on the work of Kepry Sablan (deceased) and driver on top of his usual responsibility;
- d) Severance allowance at 2 months for every year worked;
- e) 5 times multiplier;



- f) Interest at 5%; and
  - g) Costs on an indemnity basis.
62. Mr Semeno attached to his sworn statement a calculation of Mr Morris's entitlements [Attachment "JPS4", "**Exhibit D4**"] including severance allowance, 21.30 days outstanding annual leave, and deductions for 15 days overpayment of salary, housing allowance and child allowance during 2 pay periods after Mr Morris' resignation but before the Government ceased paying his salary. Mrs Blake submitted that the VT100,000 instalment paid on 21 June 2021 must also be deducted.
63. I do not accept that outstanding sick leave is an employment entitlement. Sick leave is not accrued from year to year like annual leave, such that the employee is to be paid for the days not taken. Accordingly, Mr Morris is not entitled to payment of 'Outstanding sick leave'.
64. Entitlement to extra responsibility allowances was raised in an unorthodox manner in the Claim – appearing only in the prayer for relief. I do not accept that it was properly pleaded however will address it as both parties filed evidence on it.
65. Mr Kalsakau also submitted that even though the Attorney General evidenced that no form had been completed approving payment of extra responsibility allowance, that Mr Morris had undertaken extra responsibilities so he was entitled to be paid, and at the least, the Court should take it as a factor in considering what multiplier to apply.
66. Mr Kalsakau's submission is compelling however it is not for the Court to step into the shoes of the employer and substitute its decision in place of the employer's. It is accepted that the workplace procedure requiring completion and approval of extra responsibility allowance had not been complied with. Accordingly, Mr Morris is not entitled to payment of extra responsibility allowance.
67. Mr Semeno calculated severance allowance at 2 months for every year worked.
68. In the absence of unjustified dismissal, Mr Morris is not entitled to 5 times multiplier or any other multiplier under subs. 56(4) of the Act.
69. In summary, Mr Morris is entitled to payment of severance allowance as calculated and outstanding annual leave. Deductions must be made for 15 days overpayment of salary, housing allowance and child allowance, 3 months pay in lieu of notice and the VT100,000 already paid.


J. Result and Decision

70. In conclusion, I answer the issues as follows:
- a) Issue 1: Was there a decision by the Attorney General to terminate Mr Morris' employment and was it unlawful? **"No."**
  - b) Issue 2: Was there unjustified dismissal or not? **"No."**



- c) Issue 3: Was there a serious breach of the contract by the Attorney General such that Mr Morris could terminate the contract under subs. 53(1) of the Act? **"No."**
- d) Issue 4: Was there constructive dismissal or not? **"No."**
- e) Issue 5: Is Mr Morris entitled to 3 months' payment in lieu of notice or not? **"No."**
- f) Issue 6: What is Mr Morris entitled to payment of? "Mr Morris is entitled to payment of severance allowance as calculated and outstanding annual leave. Deductions must be made for 15 days overpayment of salary, housing allowance and child allowance, 3 months pay in lieu of notice and the VT100,000 already paid."
71. For the reasons given, the Claimant has failed to prove the Claim on the balance of probabilities.
72. The Claim is **dismissed**.
73. Mrs Blake informed the Court during the trial that the Defendant was ready to pay Mr Morris' entitlements but had held off making payment pending the outcome of this matter. Accordingly, I order that the Defendant pay Mr Morris his entitlements **by 4pm on 30 September 2021**.
74. The parties are to file and serve their submissions as to costs **by 4pm on 8 October 2021**.
- K. Enforcement
75. Pursuant to rule 14.3(1) of the *Civil Procedure Rules*, I now schedule a Conference at **3.30pm on 22 October 2021** to ensure the judgment has been executed or for the judgment debtor to explain how it is intended to pay the judgment debt.
76. For that purpose, this judgment must be served on the Defendant and proof of service filed.

DATED at Port Vila this 23<sup>rd</sup> day of September 2021  
BY THE COURT

  
Justice Viran Molisa Trief

