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

Civil Appeal
Case No. 21/3281 CoA/CIVA

BETWEEN: DANIEL MORRIS
Appellant

AND: ATTORNEY GENERAL
Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Oliver SakSak
Hon. Justice Raynor Asher
Hon. Justice Dudley Aru

Counsel: ***Mr Kalsakau for the Appellant***
Mrs Blake for the Respondent

Date of Hearing: ***8 November 2021***

Date of Judgment: ***19 November 2021***

JUDGMENT

Introduction

1. This is an appeal from a judgment of the Supreme Court delivered on 23 September 2021. The appellant, Daniel Morris, challenges her decision dismissing his claim for unlawful termination of his employment, unjustified dismissal, and/or constructive dismissal.

Background

2. Mr Morris commenced employment with the State Law Office on 24 August 2009. There was a written employment contract (the Employment Contract) with the Attorney General.

3. He appears to have carried out his duties in an entirely satisfactory way. However, on 17 May 2021, having pleaded guilty, he was convicted on a count of misappropriation of trust monies from the family trust and sentenced to 10 months imprisonment suspended for two years. The amount involved was VT750,000, which had been spent. Mr Morris was ordered to repay that sum by fortnightly repayments of VT10,000.

4. This misappropriation had taken place in July 2009 and he was charged with the offending in July 2020.

5. Mr Morris was responsible to the Attorney General. He did not, prior to his conviction and sentence, inform him of the criminal charge.

6. From 20 May 2021 to 4 June 2021 Mr Morris did not attend work as he had taken leave. He resumed work on 7 June 2021.

7. On his first day back at work, 7 June 2021, he was handed a letter from the Attorney General which read 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.*

8. Mr Morris then went to see the Attorney General in his office and had a discussion about the letter. It is common ground that the Attorney General took the same position as he had expressed in the letter, and that he advised Mr Morris to go and seek legal advice.

9. On the same day Mr Morris went to see lawyers and the following letter was written by his lawyer to the Attorney General:

> *"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 consequently 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. On 14 July 2021 Mr Morris issued these proceedings.

11. The claim alleges that the Attorney General had purportedly dismissed him from his employment on the grounds of serious misconduct by his request that he resign within three days. It is alleged that the termination was unlawful and unjustified, and that at no time on 7 June 2021 was he given adequate opportunity to respond to the allegations contained in the letter, contrary to ss 50(3) and 50(4) of the Employment Act (the Act). It is alleged that the claimant's employment was terminated unlawfully and was unjustified, and that there was a breach of trust and confidence, and a serious breach of the employer's duty to act in good faith.

12. It is said that Mr Morris has suffered loss and a declaration is sought that his employment was terminated unlawfully and was unjustified and in breach of the implied terms of trust and confidence, or alternatively that he was constructively dismissed as a consequence of the defendant asking the claimant to resign. Three months' pay in lieu of notice was sought, as was outstanding annual and sick leave and extra responsibility allowances, as well as a severance allowance of two months for every year worked and a five times multiplier. Interest at 5% was also sought.

13. In the statement of defence the Attorney General denies that he purported to dismiss the claimant by sending the letter of 7 June 2021. He says that the appellant terminated the employment and not the respondent. He denies the allegations of ill treatment and breach and repudiation.

The Supreme Court decision

14. The Learned Supreme Court Judge helpfully identified six issues.

15. The first issue was whether there was a decision made by the Attorney General to terminate Mr Morris' employment. She determined that there was no decision to terminate Mr Morris' employment and there was no unlawful termination of the Employment Contract. The second question was whether there was an unjustified dismissal. She answered that question in the negative. The third question was whether there was a serious breach of the contract by the Attorney General to the extent that Mr Morris was able to terminate the contract under s 53(1) of the Act. She determined that there was no such breach of a serious term. In relation to the fourth issue, whether there was constructive dismissal, she determined there was no constructive dismissal. Finally, in relation to the fifth issue regarding entitlement to three months notice and the sixth issue of other entitlements, she held that Mr Morris was not entitled to three months' payment in lieu of notice, and he was entitled to some but not all the other payments sought. In particular however he was entitled to a severance payment but not the multiple increases sought.

16. Essentially Mr Kalsakau for Mr Morris challenges all these conclusions save for some of the monetary awards, submitting in essence a termination by the employer by the letter of 7 June 2021in breach of s 50(4) of the Employment Act or a breach of s 53 of that Act. He submits that as a consequence Mr Morris should receive further payments of 3 months' salary in lieu of notice, and a multiplier for the severance pay in terms of s 56(4) of the Employment Act.

17. Mr Kalsakau submits that the Supreme Court Judge was in error in her analysis of the letter of 7 June 2021 and the discussion of that same day. He accepts that the letter did not actually dismiss Mr Morris and described it as a purported dismissal or an implied dismissal.

18. Mr Kalsakau submits that the respondent repudiated the Employment Contract of Mr Morris entitling Mr Morris to terminate the contract. In this respect this ground of appeal overlaps with his later submission that the letter of 7 June 2021 failed to afford Mr Morris the opportunity to answer the allegations being made against him that might lead to his dismissal in breach of s 50 of the Employment Act, and was a constructive dismissal.

The Employment Act provisions relating to termination

19. Part 10 of the Employment Act contains the provisions relating to termination and is headed "Termination of Contract". These provisions are unique to the Republic of Vanuatu, and create laws relating to Vanuatu that must be interpreted according to the intention of Parliament. As a backdrop to those provisions common law employment concepts can be of relevance but the plain words of the statute will always prevail.

20. The first section in Part 10, s 48, states that a contract of employment shall terminate in accordance with the contract, subject to the provisions of that part of the Act. Section 49 provides for termination by either employer or employee on notice, and for that notice to be three months after three years continuous employment.

21. Section 50 of the Employment Act provides:

> **50. *Misconduct of employee***
>
> *(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.*

22. Sections 51 and 52 provide for an employee seeking work during the notice period, and the provision of a certificate of employment.

23. Section 53 reads:

> ***53. Breach of contract by employer***
>
> (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.*
> ...

24. Part 11 of the Employment Act is headed Severance Allowance, and contains detailed provisions relating to severance payments, including the amount of those payments.

25. It can be seen that in addition to the expiry of an employment contract in accordance with its terms, there are two ways an employer can terminate an employment contract. The first is set out in s 49.

A contract of employment, for an unspecified period of time, can terminate on the expiry of notice given by either party of an intention to terminate the contract.

26. The second way, set out in s 50, arises when there is serious misconduct. The section, which is quoted above, is headed "Misconduct of Employee". It sets out a regime for terminating for serious misconduct without notice and without compensation (s 50(1)). It arises under s 50(3) where "the employer cannot in good faith be expected to take any other course". Section 50(4) contains the obligation to not dismiss an employee without giving the employee an adequate opportunity to answer any charges, and any dismissal in contravention of the section shall be deemed to be an unjustified dismissal.

27. Sections 50(3) and 50(4) of the Employment Act on a plain reading must be read together. As was said in *Pacific Passion Limited v Debay*[1]: "they cannot be read separately from each other". Indeed s 50(4) also qualifies s 50(1), as all dismissals under s 50 require the observance of s 50(4). Even in the most egregious and obvious case of apparent misconduct an employee should be given a chance to answer the charges. A hearing is not required, but a fair chance to explain must be provided by the employer.

Did the letter of 7 June 2021 terminate Mr Morris' employment?

28. In essence on this first point, Mr Kalsakau argued that the letter of 7 June 2021 constituted an implied termination. Alternatively it constituted a constructive dismissal. Either way, the obligation placed by s 50(4) on an employer to give the employee an opportunity to answer the allegations was not met.

29. Thus, assuming that s 50(3) applied and the Attorney General could not in good faith have been expected to take any course other than dismissal, s 50(4) also applied. Even in those circumstances the employee should be given an adequate opportunity to answer any charges.

30. The Learned Judge dealt with the question of whether the letter of 7 June 2021 constituted a termination as follows:

> *"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."*

31. For the purposes of s 50(4) and understanding the meaning of the word "dismissal", it must be recorded that repudiation by one party does not in itself terminate a contract. It takes two parties

[1] [2019] VU CA 57

to end a contract, and there must be an acceptance of repudiation by the other side.[2] It was stated by this Court in *Banque Indosuez Vanuatu Ltd v Ferrieux*[3]:

> *"At common law the usual law of contract applies to a contract of employment. It is not ended by the repudiation of one party. It is only ended when the other party accepts that repudiation."*

32. Mr Kalsakau relied on the statement in the often-cited case of *Auckland Shop Employees Union v Woolworths (NZ) Limited*:[4]

> *"Obviously there is a dismissal when an employer in fact 'dismisses' a worker in the ordinary meaning of the word. But the arbitration court has held in a line of cases that the concept is wider and includes constructive dismissal. In our opinion that is the correct approach. In the context of an act and good industrial relations it is right to assume that Parliament would have meant 'dismissal' to cover cases where in substance the employer has dismissed a worker although technically there has been a resignation. "*

33. As we have set out, it is the combination of the employer's actions and the repudiatory actions, and the employee's acceptance of them, that constitutes the dismissal. The quoted statement from *Auckland Shop Employees Union* case was not addressing the issue that we now have to address, namely whether constructive dismissal falls under s 50(4) or s 53 of the Employment Act. Given that s 53 deals specifically with conduct that would constitute constructive dismissal, in our view the plain intention of the legislature was that s 53 would apply to constructive dismissal and not s 50(4) which deals with actual dismissal.

34. Mr Kalsakau submitted that in the context of s 50(4) it is only right to assume that Parliament would have meant "any dismissal" to include constructive dismissal. We do not accept this submission. The repudiatory conduct of an employer amounting to constructive dismissal is not in itself a dismissal, but rather an act which, when combined with an acceptance at a later point in time by the employee, can constitute a constructive dismissal. Dismissal does not occur when the repudiating event by the employer takes place. It occurs later when the dismissal is accepted. While we accept that there is an arguable ambiguity in the way the word "dismissal" is used in s 50(4), and that in some context "dismissal" will include constructive dismissal, we do not consider that is the case in s 50(4). In our view Parliament has expressly provided for constructive dismissal in s 53, which we consider below, and did not intend "dismissal" to mean constructive dismissal in s 50(4).

35. We agree with the trial judge that the letter of 7 June and the subsequent discussion with the Attorney General plainly did not involve dismissal of Mr Morris as an employee in the sense that the word "*dismissed*" is used in s 50(4). The employment contract had not been terminated; it continued to exist. In our view "*dismiss*" means actual dismissal, and not such repudiatory conduct within the context of the section.

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[2] *Gunton v Richmond-Upon-Thames LBC* [1981] 1 Chancery Ch 448 and *Heyman v Darwins Limited* [1942] AC 356 (at [361])
[3] [1990] Vu Law Rep 2
[4] [1985] 2 NZLR 372 at [374]

36. We agree that the letter plainly did not dismiss Mr Morris. It asked that he tender his resignation within 3 days. He remained in employment. It was not intended to terminate the Employment Contract although that may have been the long-term goal. The employment continued in the meantime. Thus we agree with the trial judge that letter of 7 June did not constitute a termination giving rise to the application of s 50(4).

Section 53

37. The employee in essence has an election when faced with the employer's repudiatory conduct. That employee can choose to hold the employer to the contract and stay on until the employer takes further action. Alternatively, the employer can accept the repudiation and terminate.

38. It has long been accepted in Vanuatu that constructive dismissal applies in the Republic. This was the essence in the decision in *Banque Indosuez Vanuatu Ltd*. In *Nipo v Vanuatu Football Federation*[5], where Tuohy J noted:

> *"In Vanuatu, Parliament has made specific provision for constructive dismissal in s 53 of the Employment Act."*

39. Turning to the specific words of s 53, the question arises whether the Attorney General's office ill treated Mr Morris or committed some other serious breach of the terms and conditions of his contract of employment, giving rise to the right to terminate the contract forthwith.

40. Section 53(1) reflects the common law. As Tuohy J pointed out in *Nipo v Vanuatu Football Federation*[6] referring to the decision of *Woods v WM Car Services (Peterborough) Ltd*[7]:

> *"... 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."*

41. So the question is whether the letter of 7 June and the consistent conduct of the Attorney General through 7 June constituted a breach of s 53 being ill treatment, and a breach of the implied duty of good faith and fair dealing. The letter points out the breach of clause 14.1 of the SLO Staff Manual, and the failure to inform directly. It notes clause 8.1(d) of the Employment Contract stipulating that a committal of a criminal offence is tantamount to serious misconduct. It refers to s 50(3) and says that the criminal conviction "inclines me" to invoke that clause; but it also says the Attorney General is mindful of the exemplary service rendered by Mr Morris to the State Law Office. It then goes on to say that in the light of s 50(3) "I ask that you tender your resignation within three days". It is then said in the last sentence "please note that this is the alternative opportunity I am offering to you as to your employment contract envisages me to invoke". He had previously quoted provision 8.1(d) in the SLO Staff Manual stating that a conviction was serious misconduct.

[5] [2017] VUSC 65 at [40]
[6] [2017] VUSC 85 at [13]
[7] [1981] ICR 666, 670-672

42. In our view these two sentences read together are plainly a threat of dismissal if resignation is not provided. In this regard we respectfully disagree with the Learned Supreme Court Judge. The only implied alternative to resignation offered by the letter was termination. The Attorney General was effectively giving Mr Morris no choice but to resign. The alternative was dismissal. Thus while Mr Morris is the one who terminates the relationship, the real reason for that termination is the Attorney General's conduct. It was unfair conduct, in that the employer's mind was made up without giving the employee a chance to explain. An explanation might be seen as highly unlikely to change matters, but a chance should be given and the employee should be listened to with an open mind.

43. The provisions in the staff manual relating to what is serious misconduct cannot excuse the respondent from observing s 50(4). As was said by this Court in *Government of Vanuatu v Mathias*,[8] provisions of another applicable regulation, in that case s 29(1) of the Public Service Act providing for dismissal for serious misconduct, cannot "preclude the application of the protective provisions of s 50 of the Employment Act to the exercise of the power". We respectfully agree with that observation, and the protective provision in s 50(4), even if it does not apply directly because there has been no termination, applies in relation to the employer's general duty to the employee referred to in s 53. It is unfair to peremptorily require resignation without affording the employee a chance to answer the allegations, no matter how serious and proven the conduct. It is a form of ill treatment to repudiate the employment contract without giving an employee opportunity for an answer the allegation on which the repudiation is based.

44. We are therefore of the view that the letter of 7 June 2021 was a constructive dismissal in terms of s 53 of the Employment Act. It was ill treatment.

Remedy

45. We now turn to the question of the appropriate remedy, given our finding that there has been no breach of s 50(4), but a termination by Mr Morris under s 53.

Three months' pay in lieu of notice

46. Under s 53, the employee, having terminated the contract, "... shall be entitled to his full remuneration for the appropriate period of notice in accordance with s 49 without prejudice to any claim he may have for damages for breach of contract".

47. In his submissions Mr Kalsakau, for Mr Morris, submits that the appellant is entitled to recover three months pay in lieu of notice and a multiplier in terms of s 56(4) of the Employment Act.

48. We agree that he is entitled to recover three months' pay in lieu of notice. That is what s 53(1) says.

Severance allowance

[8] [2006] VUCA 7

49. Section 54 provides:

> ***"54. Severance allowance***
>
> *(1) Subject to section 55, where an employee has been in the continuous employment of an employer for a period of not less than 12 months commencing before, on or after the date of commencement of this Act, and –*
>
> *a) the employer terminates his employment; or*
>
> *b) the employee retires on or after reaching the age of 55 years; or*
>
> *c) the employer retires the employee on or after reaching the age of 55 years; or*
>
> *d) where the employee has been in continuous employment with the same employer for a continuous period of not less than 10 consecutive years, the employee resigns in good faith; or*
>
> *e) the employee ceases to be employed by reason of illness or injury and is certified by a registered medical practitioner to be unfit to continue to work,*
>
> *the employer shall pay severance allowance to the employee under section 56 of this Act."*

50. The Severance allowance set out in s 54(1)(a) is payable when the employer "terminates" the contract. The word "dismissal" is not used. However, we do not think that constructive dismissal invoking s 53 and termination by an employee can apply, as it must be the employer not the employee who terminates. As we have set out, it is actually the employee who terminates in a constructive dismissal context. However s 54(1)(d) appears to apply, as Mr Morris had been in continuous employment for over 10 years, and had resigned in good faith, given our s 53 finding.

51. However he has already received his base severance allowance, as noted in the judgment.[9] What is sought on appeal is the application of a multiplier under s 56(4) of the Employment Act.

52. We are of the view that no severance multiplier increasing the base severance already ordered, or indeed any damages, would be payable. This is because of the egregious nature of his misconduct and it has to be said, the strong likelihood of dismissal even if Mr Morris had been given a chance to answer the charge.

53. As we have already set out, Mr Morris was found guilty of a serious dishonesty offence. Given the nature of his employment in the Attorney General's office, where integrity and openness with superiors is essential, this in itself was an extremely serious breach of the direct obligation that he had. The statement in sub clause 8.1(d) of his Employment Contract stipulated that the committal of a criminal offence was tantamount to a serious misconduct. Further there is a plain breach of clause 14.1 of the SLO Staff Manual which stated that:

[9] At [67].

"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."

54. This clause contains an obligation that might be expected in any event, given the importance of probity in the office. And yet Mr Morris did not inform the Attorney General that he was being charged. He did not inform him of the conviction.

55. We reject entirely the explanations put forward by Mr Morris as to why he did not do so as providing any excuse. In his explanation Mr Morris asserted that he did not inform the Attorney General about the charges he was facing because he thought the matter would be resolved out of court as a family matter. He said that the possibility of the Public Prosecutor withdrawing the charges was raised but after it became clear that the complainant could not withdraw the charges once made, he had received advice to plead guilty, which he did.

56. We see this as no explanation or excuse for him failing to let his employer know at the first opportunity about the charge he faced. If in fact he had done this, the outcome of this whole unhappy series of events could have been entirely different. He might have provided an explanation that moved his employer. Instead he did nothing.

57. On 17 May 2021 he received a copy of the judgment sentencing him. He applied at that point for sick leave. He says he went to the Attorney General's office to inform him of the judgment and apologise, but the Attorney General was not in and on sick leave. He noticed that the Solicitor General also was not in the office. So he then left his application for leave on the secretary's desk. He then took four days off, being 20, 21, 27 and 28 May to attend to a personal matter. He did not take leave on 20 and 21 May and instead was at work for the week of 17 to 21 May. He ultimately took sick leave on 24 and 25 May. He did not recall the Attorney General ever being in the office and he says he enquired again. He decided to inform him the following week. However, then from 24 May to 4 June he was on sick leave. He resumed work on 7 June.

58. We find this account of events a totally unsatisfactory explanation for his failure to advise his employer of his charge and then his conviction. All he needed to do was to send him an email. There are periods of his absence from work that he does not explain. Plainly he had an obligation to inform the Attorney General, and our interpretation of the events is that he just did not feel up to doing so. While he is perhaps entitled to some sympathy for being reluctant to have to confess to such serious misconduct, that is no excuse.

59. This second failure, the failure to inform, further increased the seriousness of the misconduct and in our view to a very considerable degree. It showed an unwillingness on Mr Morris' part to face up to the implications of his wrongdoing. That reluctance made him more undesirable as an employee in the Attorney General's office, where obviously integrity and openness between an employer and employee is paramount.

60. Thus it seems to us inevitable that Mr Morris was going to be dismissed. Even if he had been given an opportunity to explain, he was likely to have been dismissed. For this reason we do not

think he is entitled to any damages or any further payments, beyond the three months' lieu of notice. Indeed he should regard himself as fortunate to have that benefit.

61. Therefore we will allow the appeal but only in part. We conclude that there was a constructive dismissal and Mr Morris was entitled to rely on s 49, and is entitled to three months' notice. In all other respects the claim is dismissed.

Costs

62. Mr Morris has had some limited success. For the reasons that we have already set out as to his conduct, and because his success has only been partial, we do not consider it appropriate that the usual rule that costs follow the event, should apply. Equally, however, given the failure to give an opportunity to answer the charges, we do not consider that the Attorney General should receive any costs. Accordingly we make no order as to costs.

63. We note that the trial judge issued a decision awarding costs in the Supreme Court to the respondent, including some indemnity costs. She relied on a Calderbank letter. However in the light of our decision that payment in lieu of notice must be paid, that Calderbank offer was materially lower than what Mr Morris received. In the light of our reasoning, we consider that the appellant should have been partially successful in the Supreme Court, and received more than the slender amounts offered, which did not include any payment of three months' notice. There should be no extra costs arising from the Calderbank offer. We rescind the Supreme Court costs order. Given that the appellant should have been partially successful in the Supreme Court and received three months' salary in lieu of notice, but that there should have been no extra severance allowance as he sought, costs in the Supreme Court are to lie where they fall.

64. The end result is that neither party is to pay any costs in either Court. They are each to bear their own costs.

DATED at Port Villa this 19th day of November 2021

BY THE COURT

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Chief Justice V. Lunabek

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU