

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

Civil Appeal
Case No. 19/3155 CoA/CIVA

BETWEEN: **Nuvi Iata**
First Appellant

Leitau Iata
Second Appellant

Moses Kamut
Third Appellant

AND: **Tanna Coffee Development Company
Limited**
Respondent

Coram: **Hon. Chief Justice V. Lunabek**
Hon. Justice J.W. Hansen
Hon. Justice R.C. White
Hon. Justice O. Saksak
Hon. Justice V.M. Trief

Counsel: **Mr J. Ngwele for the Appellants**
Mr E. Nalyal for the Respondent

Date of Hearing: 13 February 2020

Date of Judgment: 20 February 2020

JUDGMENT

A. Introduction

1. This is an appeal against a Supreme Court decision which held that the appellants' dismissal was unjustified but then did not make any order pursuant to subs. 56(4) of the *Employment Act* (the 'Act') for payment of a sum up to 6 times the amount of severance allowance.



B. Background

2. The appellants were all employees of the respondent. All three were employed under contracts of employment. The first and second appellants signed their contracts of employment on 25 November 2010. Prior to that, the first appellant had been employed by the respondent since 1994 and the second appellant since 2007. The third appellant signed his contract of employment on 11 September 2010. He had been employed by the respondent since 2008.
3. On 27 August 2013 the respondent terminated the first appellant's employment by letter. It terminated the second and third appellant's employment two days later, also by letter. Each was alleged to have committed serious misconduct.
4. Each appellant's letter of termination stated that they were dismissed immediately from employment without notice and without compensation in lieu of notice as a result of alleged serious misconduct that they had committed. The letter went on to state that a meeting was being arranged with the Labour Department to afford them an opportunity to answer the charges against them. They were requested to immediately vacate the company owned premises where they resided.
5. The appellants filed a claim seeking payment of their severance, notice, annual leave, outstanding salary and general damages. The respondent counterclaimed alleging fraud for overpayments for overtime, unpaid loans, advances and working on weekends and public holidays.

C. The Decision

6. The primary Judge held that there was no evidence of any fraud or misappropriation of company funds. There was no evidence that anything came of the complaint lodged with the Police. Accordingly, he was not satisfied that there was any serious misconduct by the appellants.
7. Each appellant's letter of termination stated first that they were dismissed immediately then told them that an appointment was being made with the Labour Department to afford them an opportunity to answer the charges against them. There was no evidence that specific allegations in the letters were put to the three appellants before they were dismissed. The primary Judge held that the terminations



were unjustified as no adequate opportunity was given to the appellants to answer the charges against them before their employment was terminated.

8. The Court entered judgment for the claimants and dismissed the counterclaim.
9. The appellants filed their Notice of appeal seeking an Order for payment pursuant to subs. 56(4) of the Act. After the call over at the beginning of this Court of Appeal session and without notice to either the appellants or the Court, the respondent filed a cross appeal. This was 4 months out of time and filed without any application for leave to file out of time. When this was put to Mr Nalyal at the commencement of the hearing of the appeal, he had no satisfactory answer. After consultation with his client, he informed the Court that the respondent withdrew its cross appeal.

D. Grounds of Appeal

10. The appellants submitted that having found that their termination was unjustified, the primary Judge erred in not making an Order pursuant to subs. 56(4) of the Act. They submitted that the multiplier be at least 3 times their severance allowance due to the gravity and circumstances of their dismissal, and because they were senior employees of the respondent company. Further, they were required to immediately vacate where they were residing. They were not given any time to find alternate accommodation. All three appellants had commenced employment with the respondent on Tanna Island but then moved to Port Vila where they resided in company premises.
11. The respondent submitted that a multiplier of not more than 2 was appropriate. It referred to *Republic of Vanuatu v Mele* [2017] VUCA 17 in which an uplift of 2 times was applied for the failures of the employer in the dismissal itself and for the consequences of the unlawful dismissal and the loss of the job for the employee. The respondent also referred to *Ati v VCMB* [2013] VUCA 1 which fixed a multiplier of 3 and took into account the length of employment, that no prior notice of dissatisfaction with the employee's services was given, he had no prior notice why the Board dismissed him, nor was he given any chance to respond to the allegations against him.

E. Discussion

12. Regrettably the appellants did not remind the primary Judge in their closing submissions that they were also seeking an order pursuant to subs. 56(4) of the Act.



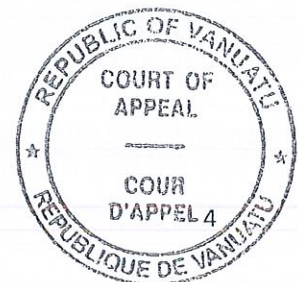
If they had, no doubt the primary Judge would have made the requisite order thus avoiding the need for this appeal. This will be reflected in this Court's order as to the costs of this appeal.

13. It is accepted that the wording of subs. 56(4) of the Act is mandatory. Where the Court finds that the termination of the employment of an employee was unjustified, it shall order that he or she be paid a sum up to 6 times the amount of their severance allowance.
14. The respondent alleged that each of the appellants had committed serious misconduct and immediately dismissed them from employment. The letter it wrote to each appellant stated that their dismissal was immediate but that a meeting would be arranged with the Labour Department at which they would be afforded an opportunity to be heard on any charges against them. A complaint was put to the Police. There was no evidence as to the outcome of that complaint. We agree with the primary Judge that the terminations were unjustified as no adequate opportunity was given to the appellants to answer the charges before their termination.
15. The first appellant was employed by the respondent for 15 years. The second and third respondents were employed for 6 years and 5 years respectively. Nevertheless on dismissal, the first appellant and his wife the second respondent and brother-in-law the third respondent were required to immediately vacate the company premises where they resided. They had had to relocate from their home island of Tanna to Port Vila for their work. They were not given any time to find alternate accommodation in Port Vila.
16. We are satisfied that the failures of the respondent in the dismissal itself, and the consequences of the unlawful dismissal and the loss of the job for the appellants, justify an uplift of 2 times pursuant to subs. 56(4) of the Act.

F. Result

17. The appeal is allowed. In addition to the sums awarded by the Supreme Court, each appellant is awarded a 2x multiplier of their severance payment in terms of subs. 56(4) of the *Employment Act*:

- a. Nuvi lata VT1,020,000 x2 = VT2,040,000
- b. Leitau lata VT249,600 x2 = VT499,200



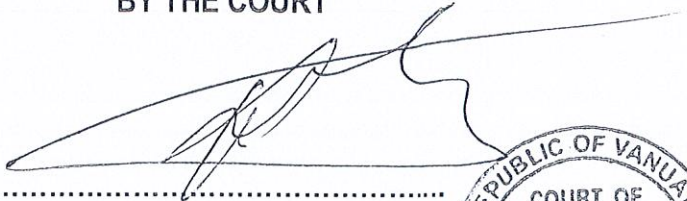
c. Moses Kamut 228,000 x2 = VT456,000

18. The respondent is to pay each appellant the sums ordered in this judgment and in the Supreme Court's judgment within 30 days.

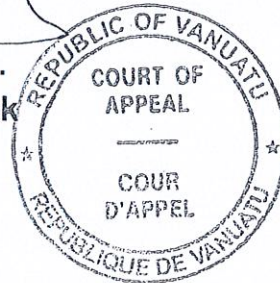
19. Each party will bear their own costs of this appeal.

DATED at Port Vila this 20th day of February 2020

BY THE COURT



.....
Hon. Chief Justice Vincent Lunabek



Indigène Lawyers

Barristers & Solicitors

Chiefs Nakamal Rd, Nambatu Area, Port Vila, Vanuatu

Our reference: JN/15/163

21st February 2020

Edward Nalyal

Edward Nalyal & Partners

Port Vila

Dear Sir,

**NUVI IATA & ORS vs. TANNA COFFEE DEVELOPMENT COMPANY LIMITED;
CAC 3155 OF 2019 & NUVI IATA & ORS vs. TANNA COFFEE DEVELOPMENT
COMPANY LIMITED; 262 OF 2013**

We refer to the above and to the judgment of the Court of Appeal dated 20th February 2020.

The Court has directed your client to pay the following amount (including Supreme Court judgment) within 30 days:

Nuvi Iata

- Severance – VT 2,040,000
- 3 months' notice – VT 68,000 per month x 3 = VT 204,000
- Annual leave – VT 3,400 per day x 12 days annual leave x 12 years = VT 489,600

Justin Ngwele (LLB) USP | Andrew Bal (LLB) USP | Jona Mesao (LLB) USP | Albert Nalpini (LLB) USP

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- Outstanding entitlement for work during public holidays (15 public holidays) = VT 3,400 per day x 2 = VT 6,800 x 15 public holidays x 11 (years in which he did not take holiday) = VT 1,122,000
- Outstanding salary for period 15 August 2013 (2 weeks' pay) = VT 6,374
- Outstanding Vanuatu National Provide Fund contribution for the period 15 August 2013 = VT 75

TOTAL FOR NUVI IATA = VT 3,862,049

Leitau Iata

- Severance – VT 499,200
- 3 months' notice – VT 41,600 per month x 3 = VT 124,800
- Annual leave – VT 2,340 per day x 12 days annual leave x 3 years = VT 84,240
- Outstanding entitlement for work during public holidays (15 public holidays) = VT 2,340 per day x 2 = VT 4,680 x 15 public holidays x 4 (years in which he did not take holiday) = VT 280,800

TOTAL FOR LEITAU IATA = VT 989,040

Moses Kamut

- Severance – VT 456,000
- 3 months' notice – VT 45,600 per month x 3 = VT 136,800
- Annual leave – VT 2,880 per day x 12 days annual leave x 4 years = VT 138,240
- Outstanding entitlement for work during public holidays (15 public holidays) = VT 2,880 per day x 2 = VT 5,760 x 15 public holidays x 5 (years in which he did not take holiday) = VT 432,000

TOTAL FOR MOSES KAMUT = VT 1,163,040

The total amount of money to be paid to our clients being their employment entitlements is **VT 6,014,129**. You are directed to pay the said sum within 30 days from the date of judgment. We expect payment no later than 21st March 2020. Failure to do so will result in an application for enforcement of the award.

Justin Ngwele (LLB) USP | Andrew Bal (LLB) USP | Jona Mesao (LLB) USP | Albert Nalpini (LLB) USP

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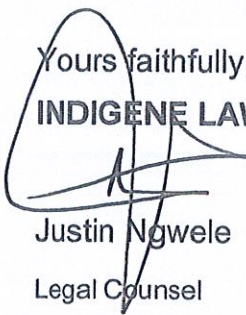
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In the Supreme Court, we were also awarded costs of the proceeding. We will prepare our statement of costs and forward it to you within the next 7 days.

Thank you for your understanding.

Yours faithfully,

INDIGENE LAWYERS



Justin Ngwele

Legal Counsel

Justin Ngwele (LLB) USP | Andrew Bal (LLB) USP | Jona Mesao (LLB) USP | Albert Nalpini (LLB) USP

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