

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

Civil
Case No. 20/2398 SC/CIVL

BETWEEN: **Leviah Apson Apunga**
Claimant

AND: **Anglican Church of Melanesia
Vanuatu**
Defendant

Date of Trial: 20 July 2021
Before: Justice V.M. Trief
In Attendance: Claimant – Mr J.W. Taiva and Mr E. Molbaleh, the latter by phone link from Tanna
Defendant – Mr L. Tevi
Date of Decision: 20 September 2021

JUDGMENT

A. Introduction

1. The Claimant Leviah Apson Apunga was employed by the Defendant the Anglican Church of Melanesia Vanuatu ('ACOM') to work as an Accountant at its head office at Luganville, Santo.
2. In July 2019, Mr Apunga was made redundant. Mr Apunga is claiming that his employment was unlawfully terminated. ACOM has counter claimed for repayment of salary that Mr Apunga overpaid to himself and damages for breach of contract.
3. Neither party required witnesses for cross-examination therefore this matter proceeded by way of written submissions. Mr Molbaleh did not file submissions for the Claimant despite reminders from the Court. I thank Mr Tevi for his submissions for the Defendant.
4. Mr Molbaleh had also not given earlier notice of his unavailability for trial therefore having given him an opportunity to be heard, I ordered him to personally pay wasted costs of VT172,180 to the Defendant by 4pm on 20 September 2021 pursuant to rules 15.26(2)(b) and 15.26(3) of the *Civil Procedure Rules*. Mr Molbaleh agreed to that amount and sought 2 months in which to pay.



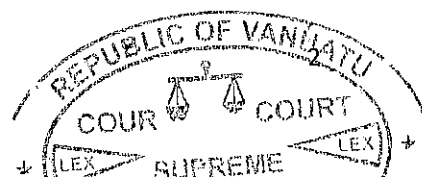
B. Background

5. On 1 January 2016, Mr Apunga commenced employment as an Accountant with ACOM at its head office at Luganville, Santo under a 5-year fixed term contract commencing on 1 January 2016 (the 'contract'). The contract could be terminated by either party giving 3 months' notice or 3 months' salary in lieu of notice.
6. By letter dated 18 July 2019, Mr Apunga's employment was terminated by way of redundancy. The letter stated as follows:

*Your employment will formally come to an end on **15th October 2019**. However, instead of you serving out 3 months' notice period, ACOM will pay... your redundancy entitlements. The following payment will be made to you at your time of redundancy:*

	Entitlement (Vatu)	Paid up to date	Remaining balance
<i>Notice period of 3 months</i>	750,000.00	0	750,000.00
<i>Gratuity</i>	1,080,000.00	1,065,000.00	15,000.00
<i>Severance pay</i>	2,250,000.00	(2,376,218.00)	(126,218.00)
<i>Accrued annual leave</i>	265,384.66	0	265,384.66
<i>Repatriation Costs</i>	451,980.00	<i>Air tickets will be paid from Honiara to Santo by ACOM.</i>	
<i>Vanuatu National Provident Fund</i>			
<i>Advances owing to ACOM</i>			536,785.00
Balance to pay less repatriation cost, over drawn severance, plus advance owing to ACOM and VNPF costs			367,381.66

7. Mr Apunga approached ACOM straight away to revoke the termination letter; ACOM refused.
8. A solicitor's letter was sent dated 26 August 2019.
9. By the Claim, Mr Apunga alleges that ACOM breached the contract by failing to give 3 months' notice or payment in lieu of notice and not giving Mr Apunga an opportunity to respond to the allegations against him. He seeks damages for unlawful termination and common law damages.
10. In its Defence, ACOM alleged that Mr Apunga was one of a number of staff made redundant after a review of the head office's operational structure and that it had already paid Mr Apunga's employment entitlements. ACOM counter claimed for repayment of



salary that Mr Apunga overpaid to himself from 7 April 2016 to 23 July 2019 totalling VT4,159,537 and for damages for breach of contract.

11. The issues between the parties are:

- a) Did ACOM breach the contract? **[Issue 1]**
- b) Did Mr Apunga breach the contract? **[Issue 2]**

C. Issue 1: Did ACOM breach the contract?

12. Mr Apunga alleged in his Claim that ACOM breached the contract by failing to give 3 months' notice or payment in lieu of notice and not giving Mr Apunga an opportunity to respond to the allegations against him. He seeks damages for unlawful termination and common law damages.

13. The termination letter itself stated that ACOM would pay Mr Apunga 3 months' pay in lieu of notice:

... instead of you serving out 3 months' notice period, ACOM will pay... your redundancy entitlements. The following payment will be made to you at your time of redundancy:

	Entitlement (Vatu)	Paid up to date	Remaining balance
<i>Notice period of 3 months</i>	750,000.00	0	750,000.00

14. Was Mr Apunga paid 3 months' pay in lieu of notice? Seniorita Gete, Senior Finance Officer of ACOM evidenced in her sworn statement filed on 18 February 2021 that on 9 August 2019, ACOM paid Mr Apunga's employment entitlements in full. Ms Gete attached the receipt of payment as annexure "SG3" to her sworn statement. The receipt was signed Mr Apunga on 9 August 2019. The receipt shows that "3 Months payment in lieu of serving: VT750,000" was paid. This corresponds to the amount stated in the termination letter for 3 months' pay in lieu of notice. Accordingly, ACOM did not breach the contract for failure to pay 3 months' pay in lieu of notice.

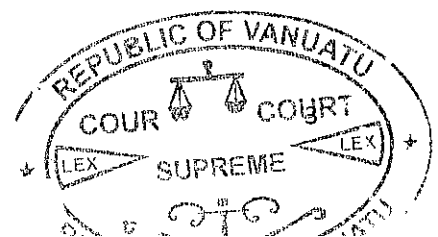
15. Mr Apunga also complained that ACOM breached the contract by failing to give him an opportunity to respond to the allegations against him. However, there is no evidence of any allegations against him. No allegations having been made against him, there was no need to give him an opportunity to be heard and no failure to do so.

16. For the reasons given, my answer to Issue 1 is, "**No.**" Mr Apunga is therefore not entitled to damages for unlawful termination and common law damages.

D. Issue 2: Did Mr Apunga breach the contract?

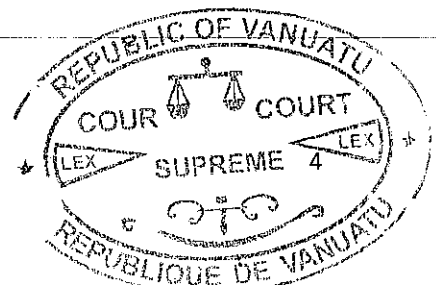
17. The contract (annexure "**LAA1**" to Mr Apunga's sworn statement filed on 4 September 2020) provided for Mr Apunga's salary as follows:

6. **SALARY AND BENEFITS**

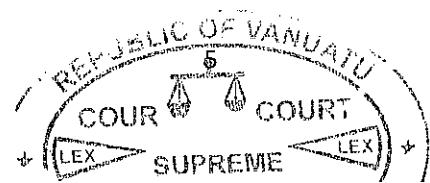


i. Salary

- a. For completing the Employee's duties in accordance with this contract, ACOM will provide to the Employee the salary of **VUV120,882** per month at Level 7.15, payable fortnightly into the Employee's nominated account. In addition, 15% of his basic salary will be payable to the Employee per month as extra responsibility allowances for carrying out the accounting duties for COM Holdings Limited and ACOM Program Funds.*
 - b. The salary for part of a month will be calculated on a pro-rata of 30 days.*
 - c. Severance allowance equivalent to one month's salary is payable to the Employee after continuous employment of not less than 12 months.*
18. The salary provided in the contract of VT120,882 per month equates to VT55,791 per fortnight. This is the basic salary Mr Apunga was entitled to be paid each fortnight.
19. Ms Gete attached to her sworn statements copies of Mr Apunga's pay slips for the pay dates commencing on 7 April 2016 to 23 July 2019 (annexures "SG4" to "SG85"). Every pay slip shows an amount higher than VT55,791 paid for Base Pay:
 - a) From 7 April 2016 to 6 May 2016 (3 pay dates), Base Pay of VT92,307 hence VT36,516 overpayment each pay date, totalling VT109,548 overpayment;
 - b) On 20 May 2016 pay date, Base Pay of VT123,076 hence VT67,076 overpayment;
 - c) From 3 June 2016 to 2 December 2016 (14 pay dates), Base Pay of VT92,307 hence VT36,516 overpayment each pay date, totalling VT511,224 overpayment;
 - d) On 6 December 2016, Base Pay of VT161,846 hence VT106,055 overpayment;
 - e) From 21 December 2016 to 10 January 2017 (2 pay dates), Base Pay of VT92,307 hence VT36,516 overpayment each pay date, totalling VT73,032 overpayment;
 - f) From 27 January 2017 to 7 April 2017 (6 pay dates), Base Pay of VT110,769 hence VT54,978 overpayment each pay date, totalling VT329,868 overpayment;
 - g) On 21 April 2017, Base Pay of VT144,000 hence VT88,209 overpayment;
 - h) On 5 May 2017, Base Pay of VT110,769 hence VT54,978 overpayment;
 - i) On 19 May 2017, Base Pay of VT124,061 hence VT68,270 overpayment;
 - j) On 2 June 2017, Base Pay of VT159,507 hence VT103,716 overpayment;
 - k) From 16 June 2017 to 4 December 2017 (13 pay dates), Base Pay of VT110,769 hence VT54,978 overpayment each pay date, totalling 714,714 overpayment;
 - l) On 12 December 2017 for that and the following 2 pay dates, Base Pay of VT420,923 hence VT253,550 overpayment;



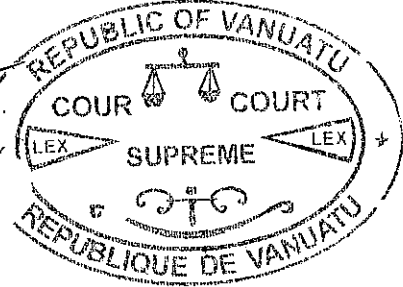
- m) From 9 February 2018 to 16 November 2018 (20 pay dates), Base Pay of VT92,307 hence VT36,516 overpayment each pay date, totalling VT730,320 overpayment;
- n) On 3 December 2018, Base Pay of VT64,615 hence VT8,824 overpayment;
- o) On 12 and 20 December 2018 (2 pay dates), Base Pay of VT92,307 hence VT36,516 overpayment each pay date, totalling VT73,032 overpayment;
- p) On 11 January 2018, Base Pay of VT107,692 hence VT51,901 overpayment; and
- q) From 23 January 2019 to 23 July 2019 (14 pay dates), Base Pay of VT115,384 hence VT59,593 overpayment each pay date, totalling VT834,302 overpayment.
20. The total basic pay overpaid to Mr Apunga from 2016-2019 was VT4,178,619.
21. None of this evidence is contested.
22. ACOM has proved its Counter Claim on the balance of probabilities or that it is more likely than not that Mr Apunga overpaid himself. I find that Mr Apunga breached the contract and the breach of trust between himself and ACOM by overpaying himself.
23. The receipt of employment entitlements paid to Mr Apunga on termination included 'Outstanding salary advance' of VT607,410. I assume this referred to Mr Apunga's salary overpayments. Accordingly, VT607,410 of the salary overpayments have been repaid; Mr Apunga owes ACOM the balance of VT3,571,209. Judgment will be entered against Mr Apunga accordingly.
24. My answer to Issue 2 is, "**Yes.**"
25. No submission has been made as to why there should also be an award of common law damages. There is no order for such damages.
- E. Result and Decision
26. In conclusion, I answer the issues as follows:
- a) Issue 1: Did ACOM breach the contract? "**No.**"
- b) Issue 2: Did Mr Apunga breach the contract? "**Yes.**"
27. For the reasons given, the Claimant has failed to prove the Claim on the balance of probabilities. The Claim is **dismissed**.
28. For the reasons given, the Defendant has proved its Counter Claim that on the balance of probabilities Mr Apunga overpaid himself. **Judgment** is entered for the Defendant on the Counter Claim. The Claimant is to pay the Defendant VT3,571,209 being the balance of the monies overpaid (the 'judgment sum').
29. The Claimant is to pay the Defendant interest on the judgment sum until fully paid, at the Supreme Court rate of 5% per annum.



30. There is no order for common law damages.
31. The Claimant is to pay the Defendants' costs as agreed or taxed by the Master. Once set, the costs are to be paid within 28 days.
- F. Enforcement
32. Pursuant to rule 14.3(1) of the *Civil Procedure Rules*, I now schedule a Conference **at 1.30pm on 18 October 2021** at the Luganville Court House to ensure the judgment has been executed or for the judgment debtor to explain how it is intended to pay the judgment debt.
33. For that purpose, this judgment must be served on the Claimant and proof of service filed.

DATED at Port Vila this 20th day of September 2021
BY THE COURT

.....
Justice Viran Molisa Trief

The seal of the Supreme Court of the Republic of Vanuatu is an oval-shaped emblem. It features a central shield with a scale of justice at the top, flanked by the words 'COUR' and 'COURT'. Below the shield, the word 'SUPREME' is prominently displayed. The shield is also flanked by the word 'LEX' on both sides. The entire emblem is encircled by the text 'REPUBLIC OF VANUATU' at the top and 'REPUBLIQUE DE VANUATU' at the bottom, separated by small decorative elements.