

(Civil Jurisdiction)

Magistrate: Jimmy Garae

**BETWEEN: MR KENNERY ALVEA of
Luganville, Santo in the Republic of
Vanuatu**

Plaintiff

**AND: THE BOARD OF
MANAGEMENT RURAL SKILLS
TRAINING PROGRAMME, an
unincorporated Institution trading
as a non government organization of
P O Box 1456 Port Vila, Efate in the
Republic of Vanuatu**

Defendant

JUDGEMENT

This is a claim by the Plaintiff against the Defendant for the payment of severance allowance.

The Plaintiff is a former employee of the Defendant. The Defendant is a quasi-governmental organisation, and by its name I assume its role is to undertake training in various skills in rural areas of Vanuatu.

The Plaintiff entered into a written contract of employment with the Defendant on 2 March 1994. The contract was to terminate on 30 June, 1996. Renewal of the contract was to be subject to availability of funding (clause 1.3).

On 26 September 1996 Mr Bob Longhman, the RSTP National Coordinator, informed the Plaintiff by letter that his employment with RSTP "shall not be renewed for an extra term".

The Plaintiff was in the employ of the Defendant for a period of two years and nine months and he claims severance allowance for this period.

The Plaintiff claims severance allowance pursuant to sections 54 (as amended) and 56 of the Employment Act, (Chap.160). Section 54(1) (as amended) provides that:

"Subject to section 55, where an employee has been in the continuous employment 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 appointment; 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 for 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.

And section 56(2) provides that:

"Subject to subsection (4) the amount of severance allowance payable to an employee shall be -

- (a) for every 12 months -
 - (i) half a month's remuneration, where the employee is remunerated at intervals of not less than 1 month;
 - (ii) 15 day's remuneration, where the employee is remunerated at intervals of not less than 1 month;
- (b) for every period less than 12 months, a sum equal to one-twelfth of the appropriate sum calculated under paragraph (a) multiplied by the number of months during which which the employee was in continuous employment."

On 26 September 1996 when the Plaintiff was informed by the Defendant his contract of employment was not to be renewed for another term he was earning a fortnightly basic salary of VT25,200. He was also being paid fortnightly family allowances of VT1,000, costs of living allowance of VT2,125, and housing allowance of VT7,000. Gross pay he received fortnightly was VT35,325. From this amount, VT849 was deducted and paid into the Vanuatu National Fund as the plaintiff's contribution. The net pay the plaintiff received per fortnight was VT34,416, and in a month he was paid a net salary of VT68,952.

The Plaintiff was employed by the Defendant for 2 years and 9 months. The Employment Act (Section 56(2)) entitles him to severance allowance of 15 days for every year of employment. He had been earning VT34.467 per fortnight and this comes to VT2.298 per day. Therefore, he is entitled to $2 \times 15 = 30 + 9/12 \times 15 = 41.25$.

Accordingly $41.25 \times 2.298 = \text{VT}94.792$.

The plaintiff has included his fortnightly allowances of VT10.125 in calculating his severance allowance.

I am of the opinion that he erred in so doing. The view I take is that "remuneration" in section 56(2) means salary or wages, excluding allowances, e.g family allowances, cost of living allowance, and housing allowance. Therefore, in this instant case VT10,125 less from VT34.376 would be the appropriate amount in calculating severance allowance and this amount is VT24.351.

Accordingly $41.25 \times 1.623 = 66.948$.

Allowances do not bear the same meaning as "remuneration" in section 42. Remuneration is payment for regular employment and is dissimilar to allowance. The contract of employment between the parties in this case is clear on this issue (clause 5). It provides the basic monthly remuneration, and also makes provision for the payment of allowances. In effect therefore, basic remuneration be the basis for the calculation of severance allowance in this case.

In answer to the plaintiff's claim, Mr Alatoi Ishmael Kalsakau of the Attorney General's Chambers appearing for the Defendant submitted that the plaintiff is not entitled to be paid severance allowance since he was employed under a contract with specific terms. He referred the Court to clause 1.8 of the contract which provides that the contract may be varied

by agreement in writing between the National Advisory Committee and the employee at any time during the term of the contract. That the Plaintiff had failed to avail himself to this clause to seek inclusion of severance allowance in the contract. Mr Kalsakau submits that since the plaintiff was employed under a contract with specific terms he is not entitled to severance allowance as provided under the Employment Act. The contract specifies what benefits he is entitled to and he is not to be entitled to additional benefits which are not specified as terms of the contract.

I do not accept the submission of the Defendant that employees employed under a contract with specific terms as the case in this instant case are not entitled to severance allowance where the contract does not provide for such benefit. A contract which fails to include a clause for severance allowance ultra vires the Employment Act which is an Act of Parliament and I accept the plaintiff's submission on this issue. In the case The Government of the Republic of Vanuatu -v- Grace Mera Molisa. (1989 - 1994) VLR., 722, Downing J held:

"The Employment Act is an Act of general application, that is it is applied generally to all contracts of employment whether they are in the Public Service or in the private sector", and that:

"The purpose of the Employment Act is to regulate employment and to imply conditions into contracts of employment in Vanuatu. Such conditions include remuneration, hours of work, annual and sick leave, severance allowance and the repatriating of employees to home islands to name only some of the conditions".

The provisions of the Employment Act on employee's benefits are mandatory and where any contract fails to incorporate any benefits like severance allowance, such clause is to be implied into the contract. All contracts must be made so as not to defeat the effect of a statute or be against public policy. In this case severance allowance is to be implied a term of the contract between the parties and I so hold.

This was the only defence raised by the Defendant in the Statement of Defence. However, the Defendant came up with a further issue of over payment of salary to the plaintiff. This issue was not pleaded as a defence in the statement of defence. It was put to the plaintiff in cross examination that he was overpaid fortnightly by VT2,700. I do not wish to dwell on this issue since it was not pleaded as a defence but, to say that the demeanour of the witness, Mr. Bob Loughman, National Coordinator of RSTP when he gave evidence on the same was such I do not believe him.

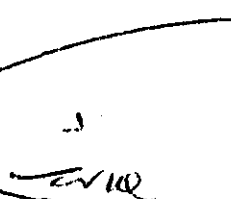
The appropriate avenue available to the Defendant if there was over payment of salaries was to file a counterclaim, which again he failed to do.

I therefore enter judgment for the plaintiff.

ORDER

1. That the Defendant do pay to the Plaintiff severance allowance in the sum of VT66.948 with interest calculated at the rate of 5% per annum effective from 26 September, 1994.
2. That the Defendant pay the costs of this action.
3. That the judgment debt be paid within 30 days from the date hereof.

Dated at Luganville this 19th day of June, 1998.



JIMMY GARAE
Senior Magistrate

