

**IN THE MAGISTRATES COURT
OF THE REPUBLIC OF VANUATU**
(Criminal Jurisdiction)

**Criminal
Case No. 21/184 MC/CRML**

PUBLIC PROSECUTOR

V

FERDINAND WONG

Date of Sentence: 16th July, 2021.

Before: Magistrate FSam

In Attendance: Mr Nathan_K for the Prosecution

Mr Kapalu_W for the Defence & Defendant.

Copy: Mr Kevin Nathan of The VNPF, Mr Willie Kapalu of Kapalu Lawyers.

VERDICT & SENTENCE

Introduction

1. On the 26th of February, 2021, the Defendant Mr Ferdinand Wong had pled not guilty to the following two counts against him: Count 1 of failure to register his employee, namely one Iris Toa, under section 23 and section 50(1)(b); and Count 2 of Failure to pay to the Board, the employee Iris Toa's monthly contributions under section 26(1) and 50(1)(c) of the Vanuatu National Provident Fund Act (Hereinafter referred to as "VNPF Act).

2. At the conclusion of the prosecution's case, Mr Kapalu made a no-case-to-answer submission however, I had ruled that there was some evidence that would lead to Mr Wong's conviction, and for him to state his defence.



3. Mr Wong maintained his plea of Not Guilty to both counts against him and the court read out his statement of rights under section 88 of the Criminal Procedure Code.

4. Although trial was delayed for some time due to Mr Nathan's commitment to other matters in the islands, it did eventuate and the court did had the opportunity to hear evidences from witnesses from both sides as well as relevant submissions from both counsels.

Brief Facts

5. Mr Ferdinand Wong is the owner of Inomakas shop located at namba 3 area, Port Vila, and he had employed Iris Toa to work in his shop's bakery.

6. There were some facts in dispute particularly with regards to what year Ms Toa actually began working as an employee for Mr Wong. Ms Toa alleges she had worked between the period of January 2007 to July 2020, whilst both Mr Wong and her cashier, Ms Garae, stated in evidence that Ms Toa worked from 2016 to July 2020.

7. While I had to rely on the evidence adduced at Trial to ascertain the period of employment in this case, it is from the alleged period of employment with the defendant, that the complainant Ms Toa, complaint that Mr Wong had failed to register and pay her contributions accordingly.

Law

8. The onus of proof is on the Prosecution to prove the charges against Mr Wong.

9. The Prosecution must prove each element of the offences against Mr Wong, beyond a reasonable doubt in order to achieve a conviction.

10. With respect to the charge of failure to register employees under section 23 and section 50(1)(b) of the VNPF Act, Prosecution must prove:

- that the defendant **Mr Wong was the employer of the complainant Iris Toa,**



- that Mr Wong failed to cause his employee, Ms Toa to apply to the Board for registration as a member of Fund,
- and that Ms Toa was not registered with effect from the date that contributions become payable in respect of her.

The Maximum penalty imposed for this offence is a fine of VT100, 000 or 6 months imprisonment or both.

11. For the charge of Failure to pay to the Board the contributions payable in any month for his employee under section 26(1) and 50(1)(c) of the Act, the Prosecution must prove:

- that Mr Wong was the employer of the complainant Iris Toa,
- that Mr Wong failed to pay to the Board Ms Toa's monthly contributions totaling at VT 284,924 for the period between January 2007 to July 2020.

The Maximum penalty for this offence is a fine of VT200,000 or 1 year imprisonment or both.

Evidence & Findings

12. Ms Iris Toa and Mr Malcholm Garae are the two Prosecution witnesses and the defence relied on the evidence of the defendant Mr Wong and Ms Estella Garae. Both sides also relied on exhibited evidence.

13. As to count 1, Ms Toa, Mr Wong and Ms Estella Garae all gave evidence that Mr Ferdinand Wong is the employer of Inomakas store. All three also confirmed that Ms Toa is an employee of Inomakas store. This evidence is accepted by the court. However, as aforementioned, there was conflicting evidence as to the start of her employment with Inomakas.

14. While Ms Toa stated she had worked for Mr Wong between the periods from January 2007 to July 2020, this was disputed by Mr Wong where he stated that Ms Toa started work on the 31st of January, 2016 to 30th of July, 2020. It was Mr Wong's cashier, Ms Estella Garae,



whose evidence gave both her and Mr Wong away as untruthful witnesses, with respect to the year Ms Toa actually started work. Ms Garae when asked under direct examination when she started work at Inomakas shop, she said she started in 2010. And when asked if Ms Toa was already employed then, she answered 'yes'. And interestingly, when asked again if Ms Toa had worked for some time already in the shop, she answered '2016' which I take it as her answer to when Ms Toa started work. However this second answer obviously contradicted her initial respond that Ms Toa was already employed before she (Ms Garae) was employed in 2010, which is why I do not consider her as a truthful witness, or Mr Wong for this matter.

15. While giving their evidence, I was able to test all the witnesses' demeanor as well and find Ms Toa's evidence was more compelling throughout questioning; I therefore rely on Ms Toa's evidence and conclude that she was employed under Mr Wong's employment at Inomakas bakery shop between the periods of January 2007 to July 2020.

16. There was evidence that other employees of Inomakas store were registered in 2016, with their outstanding contributions being paid by their employer, Mr Wong. For Ms Toa, she found out she had no money in her account, after seeking financial assistance during the Covid-19 situation, and from which she found out she was not registered as a Member as yet, and it is from this finding that she lodged her complaint with the VNPF on the 23rd November, 2020. This is confirmed by Mr Malcolm Garae in his evidence.

17. Mr Wong gave evidence that he had not registered Ms Toa because she did not give her VNPF number to the cashier, Ms Garae, and that she is only a casual employee.

18. Under cross examination, while Ms Estella Garae gave evidence in support that Ms Toa did not give her VNPF card to her, it is clearly noted that she was not too certain on the VNPF requirements herself as to registration of employees under their employment, and given this uncertainty, it also reflects on her evidence as being untruthful. When asked if she had other employees registered, she answered, 'when they gave their VNPF cards, she had them registered, and that is when they started work'-these were other employees who along with Ms Toa, had



applied in 2016 for membership with the Fund. And as to her evidence that Ms Toa never gave her VNPF number, I do not accept her evidence as truthful.

19. I find that Ms Toa had applied for membership with the other employees back in 2016, that she did approach both the defendant and Ms Garae with her VNPF number, believing she would be registered then, but only to find out in 2020, that she was never registered as a member of the VNPF.

20. This is evident in Ms Toa's evidence that she along with other employees had gone in to apply with the VNPF membership in 2016, and she did bring her card first to her employer Mr Wong, who then directed her to Ms Garae. I believe she did make that attempt to apply for her VNPF card, however both Mr Wong and Ms Garae failed to cause her to register accordingly, clearly because Mr Wong considered her a casual worker, and it is obvious that this is the main reason Mr Wong is relying on in not registering Ms Toa in this case.

21. I find the Prosecution has therefore proven the elements of Count 1 against Mr Wong beyond a reasonable doubt. That Mr Wong as Ms Toa's employer did fail to cause Ms Toa to register as a member of the VNPF Fund.

22. With respect to Count 2, there is evidence that Ms Toa is making VT38, 000 a month or more, and under section 25(2) & (3) of the VNPF act, she is entitled to contributions accordingly, despite her being a casual employee.

23. I find that Mr Malcolm Garae's evidence is also compelling, to the extent that despite several attempts made to Mr Wong's work and home premises to conduct investigation with respect to Ms Toa's complaint, Mr Wong deliberately failed to cooperate with them, clearly not giving in to understanding the situation surrounding Ms Toa's case, and his unwillingness shows his ignorance to the law in this regard. Mr Garae confirmed in his evidence that Mr Wong did not wish to settle Ms Toa's case with the same reasons, because she did not give her VNPF number and she is a casual employee. This reasoning by Mr Wong is also evident in the inspections reports tendered as evidence for the prosecution.



24. That had Mr Wong cooperated with the inspectors, and provided the relevant salary records for Ms Toa, this would be properly reflected in evidence before this court. However I accept that attempt was made on the part of VNPF inspectors, but due to Mr Wong's unwillingness to cooperate, this is so reflected with the current VNPF records pertaining to Ms Toa's membership contribution with VNPF.

25. I am also satisfied that the Prosecution had proven the elements of Count 2 beyond a reasonable doubt. That Mr Wong as Ms Toa's employer, did fail to pay to the Board contributions for Ms Toa from the period between January 2007 to July 2020 at a total sum of VT 284,924.

Verdict

26. Accordingly, I find Mr Wong guilty of Count 1 and Count 2 and convict him of the two counts.

Aggravating and Mitigating Factors

27. With respect to his sentence, I consider the following factors, - the aggravating factors to the offending, are that Mr Wong failed to cooperate with the VNPF inspectors who had made several attempts of demands to Mr Wong to pay Ms Toa's contribution, that he was aware of his appointments with the inspectors but failed to turn up for same.

28. Mr Kapalu raised in mitigation, that Mr Wong is not too familiar with the provisions of the VNPF Act, although I do not treat this as a mitigating factor to the offending, given his unwillingness to cooperate with the VNPF inspectors, clearly shows his plain ignorance of the law itself. Therefore, there is no mitigation factor to consider in respect of the offending.

Personal Factors



29. Mr Wong is a long time businessman in Port Vila, before and after independence, and has contributed to the development of this country, and he has no prior convictions.

Sentence:

30. Given the relevant factors, I sentence the defendant Mr Wong to a sentence of Fine as follows:

- For Count 1 a fine of VT10,000;
- For Count 2: a fine of VT 20,000.

31. As to outstanding contributions, the defendant Mr Wong is ordered to pay within a month from today, the total of VT 284,924 as total contributions for the period of employment of Ms Iris Toa, from January 2007 to July 2020.

32. As to manner of payment, the defendant Mr Wong is to pay the total fine of VT 30,000 after settlement of the VNPF contributions or 1 month imprisonment in default of both Fine and contributions.

33. The defendant is informed of his right to appeal his sentence if he is not happy with it.

DATED at Port Vila, this 16th day of July, 2021.

BY THE COURT



**Fsam
Magistrate**

