

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

Civil Case No.57 of 2003

BETWEEN: HOTEL EQUITIES SOUTH PACIFIC
LIMITED

Plaintiff

AND: COMMISSIONER OF LABOUR

Defendant

AG 15/28/03

JUDGMENT

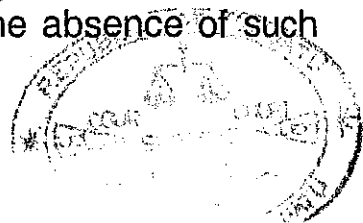
The claimant used to run a hotel in Port Vila. In about March 2003 it was sold to a third party. Just before sale the employment of all staff was terminated. Severance payments were made under the Employment Act, the Act.

The date of commencement of the Act was 30 May 1983. Some employees had been in continuous employment since before that date. They claimed severance pay from the start of their employment. The plaintiff said it was only payable from 30th May 1983 and lodged these proceedings to determine that question.

The defendant is the Commissioner of Labour. He has made a direction as to the severance he thinks should be paid. In any event the employees affected have all been notified or given the opportunity to join the proceedings. None has asked to do so. This is a sensible and practical course and keeps costs to the minimum.

In *Burns Philp v Maki* (Vol2 VLR p.458) the Court of Appeal held that severance pay should be calculated from the date of commencement of the Act.

In 1995 there was an amendment to section 54 of the Act. The plaintiff argued that amendment did not alter the entitlement date for severance. The Act could not be retrospective, the amendment only changed the detail of who was entitled to severance. To be retrospective the language had to be plain and unambiguous. There was a presumption against retrospectivity. The Court should not speculate upon Parliament's intention in the absence of such language.



The defendant said the amendment clearly did have retrospective effect, in what would be a small number of cases. Sections 54 and 56 of the Act should be read together to ascertain the intent. The amendment specifically overruled Burns Philp.

The original section 54 reads:-

"(1) Subject to section 55, where an employee has been in continuous employment for a period of not less than 12 months with an employer and the employer terminates his employment or retires him on or after his reaching the age of 55, the employer shall pay severance allowance to the employer."

The Employment (Amendment) Act No. 8 of 1995 states:-

"2. Section 54 of the principal act, is amended by repealing the first paragraph of subsection and substituting the following paragraph:-

(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 appointment;

(b)

the employer shall pay severance allowance to the employee under section 56 of this Act".

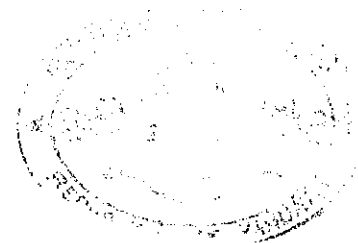
Section 56 states:-

"(1) Subject to the provisions of this Part, the amount of severance allowance payable to an employee shall be calculated in accordance with subsection (2)."

Subsection (2) sets out the amount payable by reference to the number of years and months employed and whether the employee was paid not less than monthly or at intervals of less than one month. There is no provision specifically or impliedly giving a start date for the number of years and months employed.

The judgement in the Burns Philp case is dated 12 July 1984. That is between the commencements of the principal act and the amending act.

The concluding remark in that case is *"It has, of course, been laid down in the clearest possible terms that no statute or order is to be construed as having a retrospective operation unless such a construction appears very clearly or by necessary and distinct implication in the Act"*.



The amendment introduces the words "*for a period of not less than 12 months commencing before, on or after the date of commencement of this Act*", (underlining added).

This was not the only change brought about by this section of the amendment Act. However, the other changes could have been brought about without the necessity to add the underlined words.

The Burns Philp case is not entirely clear as to which is the relevant date for assessing if an employee is entitled to severance, (not the actual calculation of severance). For example, if an employee of three years continuous employment was terminated 6 months after the commencement date would he be entitled to no severance or half a year's severance? The latter appears to be the case, although it is not clear. Reference is made in Burns Philp to transitional provisions in section 80, which supports this, although the act stops at section 79.

Whatever is the answer to that question, in my judgment by adding the words "*before or after the date of commencement of this Act*" the legislature clearly was saying to qualify for severance it did not matter when the employment started. Given the time when the amendment was made it would have been a pointless amendment unless the intention was also to make the relevant time for calculation of the figure start, not at the commencement of the Act, but at the commencement of the period of employment. The wording of the amendment is consistent with no other interpretation.

Accordingly in my judgment severance is payable for the period from the date of commencement of the period of continuous employment whether or not that was before 30th May 1983.

There will be no order for costs. The plaintiffs have acted in an open and "proper" way. The point they advanced, though unsuccessful, was arguable.

Dated at Port Vila, this 27th day of June 2003.


R. J. COVENTRY
Judge.