

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

Civil Case No. 163 of 2010

BETWEEN: **DIMITRI MALVIRLANI**
Claimant

AND: **THE GOVERNMENT OF THE REPUBLIC OF
VANUATU**
Defendant

Coram: **Justice D. V. Fatiaki**

Counsels: *Claimant in person*
Ms. Christina Thyna for the Defendant

Date of Judgment: *12 October 2012*

JUDGMENT

1. This is another case of a former employee of the **Vanuatu Maritime Authority** (VMA) claiming damages for breach of his employment contract and his entitlement under the **Employment Act**. Throughout these proceedings the claimant ably represented himself and the defendant was represented by counsel from the State Law Office. I am grateful to both for the valuable assistance provided to the Court.
2. Although the claim appears to be quantified at **VT24,334,000** it is clear that the claim is ultimately one for damages to be assessed by the Court on the basis of the evidence produced.
3. At the trial, the claimant produced a bundle of evidence comprised of six (6) sworn statements deposed by himself and a seventh sworn statement deposed by **Less John Napuati**, the **VMA** Commissioner at the relevant time [**Exhibits P (1) (A) to (F)** and **Exhibit P (2)**]. The defendant and the former VMA Commissioner testified at the trial and were cross-examined.
4. Counsel for the defendant, for her part produced two (2) sworn statements from **Daniel Morris** [**Exhibits D (1) (A) & (B)**] who also testified and was cross-examined.
5. At the end of the evidence in the case the parties agreed to the following six (6) issues:

"(1) *Was the claimant in continuous service whilst employed with VMA?*

(2) *Was the claimant entitled to Notice of Termination under the Employment Act?*



- (3) Was the termination of the claimant's employment unjustified?
- (4) Was the claimant entitled to severance payments under the Employment Act?
- (5) Is the claimant entitled to common law damages sought for the remainder of his contract? And
- (6) What remuneration figure is to be used in calculating severance if it is found to be payable?

6. Although the parties were unable to formally agree facts before the commencement of the trial most of the relevant facts are either common or undisputed by both parties and which I find are established from the evidence. It may be summarized as follows:

- (a) The claimant was employed by **VMA** under two (2) written contracts of employment between 2002 and 2007;
- (b) The first contract of employment commenced on **15 December 2002** and was for "... *an undetermined duration*". It was for the position of "*Trainee Accountant*";
- (c) The second contract of employment commenced on **20 September 2007** and was for the more senior position of "*Administrator of VMA*" and had a fixed term of "*three (3) years*". It would have expired on 20 September 2010;
- (d) The claimant's employer, the **VMA**, ceased operations on **31 December 2007** when Parliament repealed the Act creating and establishing the **VMA** (see: Vanuatu Maritime Authority (Repeal) Act No. 22 of 2007).

7. Of the Repeal Act the Court of Appeal said in **Benard v. Government of the Republic of Vanuatu** [2009] VUCA 24 (at **paras. 10 & 11**):

"The Repeal Act was passed on 31 December 2007 and came into force on 1 January 2008. It simply repealed the VMA Act and provided that the powers, functions or responsibilities of the VMA under any Act other than the VMA Act itself would be exercisable after the repeal by a person appointed by the Prime Minister for that purpose. It also provided that the Prime Minister could appoint a liquidator to the assets of the VMA. A liquidator was eventually appointed by the Prime Minister on 2 July 2008.

The instrument under which the Prime Minister appointed the liquidator instructed the liquidator to ascertain, collect and liquidate the assets of the VMA, ascertain and discharge the just liabilities from those assets and remit surplus to the Public Fund. Thus the liquidator would be obliged to pay the VMA's debt to the Appellant if there are available assets from which such payment could be made."

and later (at **para 36**) the Court of Appeal said:

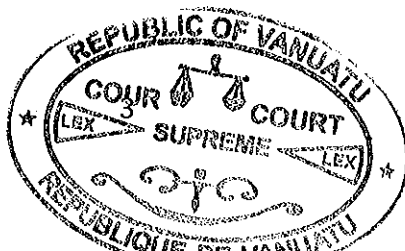


"In summary, we conclude that, at the relevant time, the VMA was a government agency for the purposes of the PFEM Act, and that the government is therefore liable for its debts under Section 57 of the PFEM Act".

- (e) On **1 June 2008** the claimant entered into a Contract of Service with **Vanuatu Tyre Wholesalers** as its "*Sales Manager*" on a monthly remuneration of **VT50,000**. The claimant has remained in that position ever since.
- (f) On **19 October 2010** the claimant filed his Supreme Court claim and averred that at the date of the termination of his employment his "... *monthly remuneration was of VT365,000*".

DISCUSSION

- 8. As to **issues (1) and (2)** above, State counsel concedes that "*the claimant was in continuous employment whilst employed with the former Vanuatu Maritime Authority (i.e. 5 years and 3 months) and, whilst differing as to the amount, counsel also concedes "... that the claimant is entitled to notice*" (of termination) under **Section 49 (3) (a)** of the **Employment Act** [CAP. 160]. Both issues are accordingly determined in the claimant's favour.
- 9. In similar vein, State counsel concedes that "*the claimant is entitled to severance entitlement as prescribed by the Employment Act at the time of his dismissal, that is on 31 December 2007.*"
- 10. Counsel seeks however, to limit the applicable severance multiplicand to "... *half a months salary*" prescribed under the **Employment Act** as opposed to the larger "*one month of salary per year*" payable in accordance with the conditions outlined in the VMA Staff Manual which formed part of the terms and conditions of the claimant's employment contract and was binding on him (see: Clauses 11.3 & 11.4).
- 11. In particular, counsel relies on **Clause 10.4** of the claimant's employment contract to justify the limitation in so far as it is submitted, that, the repeal of the **VMA Act** constituted a termination "*for any reason other than those set out in Clause 9.1*" which deals with the employers right to suspend an employee for breach of the terms and conditions of employment and to dismiss for "*gross misconduct*".
- 12. I cannot agree with the submission which blithely ignores the fact that the **VMA** is the claimant's "*employer*" and furthermore, the repeal of the VMA Act was not effected by the **VMA** but was brought about by a supervening event, an Act of Parliament.
- 13. I am fortified by the judgment of the Court of Appeal in **VMA v. Bani Timbacci** [2005] VUCA 19 where the Court said:



"There can be no doubting after the judgment of this Court in Air Vanuatu (Operations) Limited v. Keith Molloy [2004] VUCA that the parties to an employment contract may negotiate and agree a severance allowance rate higher than that provided for in Section 56 (2) of the Employment Act. The question then is does the Inter Office Memorandum and Circular Memo constitute an agreement to vary the severance allowance rate by increasing it from the statutory rate of half a month salary to a month salary?"

and then in upholding the higher rate the Court said:

"Having considered the competing submission, we are satisfied that the documents do collectively constitute an enforceable agreement varying the severance allowance rate for the employees (of the VMA)."

14. In light of the foregoing I reject State counsel's submission seeking to limit the severance multiplicand to a rate of "half a months salary".
15. State counsel also submits that the remuneration to be used in calculating the severance, if it is payable, is:

"... VT300,000 per month as expressly provided under Clause 5.1 and Schedule 1 of the contract but not VT365,000 as alleged by the claimant.

The claimant cannot claim extra duty allowance as part of his remuneration as he performed these duties on a temporary basis while the position remained vacant".

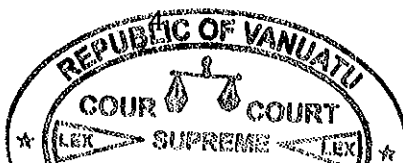
Again, I cannot agree.

16. **Section 56 (7)** of the **Employment Act** expressly provides:

"... the remuneration which shall be taken into account in calculating the severance allowance shall be the remuneration payable to the employee at the time of the termination of his employment".

(my underlining)

17. Given State counsel's concession that the correct remuneration figure is VT300,000 it is only necessary to consider the claimant's evidence in support of the additional **VT65,000** which he claims he was receiving at the date of his termination.
18. In this regard the claimant produced a letter dated **12 February 2007** addressed to **Less John Napuati**, Commissioner of Maritime Affairs confirming his agreement to take on additional responsibilities as **ISPS** officer and requesting "... that a monthly extra duty allowance of VT65,000 be paid on quarterly basis ...". By a handwritten response at the bottom of the claimant's letter the claimant's request was approved "... as fair and justified".
19. The claimant also produced a cheque payment voucher dated **3 April 2007** for **VT195,000** being: "monthly extra duty [ISPS] allowance -



January/February/March.” Finally, **Less John Napuati**, the then Commissioner of Maritime Affairs, deposed that “*at the time the VMA was closed ... the monthly remuneration of Mr. Malvirlani was in the sum of VT365,000*”. He was not cross-examined on this particular statement by State counsel which I accept.

20. It should be noted that it is not the claimant's salary at the date of commencing his employment or under his contract of employment that is relevant, but, the salary he was receiving “... *at the time of the termination ...*” Furthermore **Sections 17 (3) & (4)** of the **Employment Act** which deals with receipts for remuneration, clearly provides for the issuance of a “*pay voucher*” to an employee at the time of payment of remuneration and such voucher shall “*give details of the way in which the remuneration has been calculated*”.

21. In **NBV v. Cullwick** [2002] VUCA 39 the Court of Appeal in recognizing the absence of a definition for “*remuneration*” in the Employment Act said:

“The word ‘remuneration’ is not expressly defined in the Act. However there are many indications from the use of that expression in various sections of the Act which indicate that remuneration is a payment made periodically during the currency of the employer and employee relationship, and covers payments due from the employer ... for on-going work provided by the employee ... the conclusion we have expressed gains support in particular from the provisions of ss. 16 (4), (5), (6) and (7), 17 (3), 21 (2) (a) and (3), 31, 36 (2), 49 (3) (b) and 53’.

(my underlining)

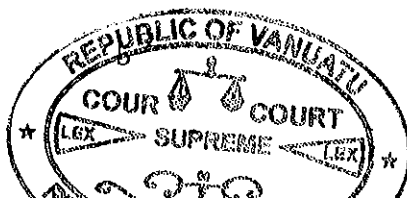
22. Accordingly, in the absence of a definition of “*remuneration*” in the **Employment Act** I am satisfied and find that the claimant's “*remuneration at the time of the termination of his employment*” was **VT365,000**. It is the appropriate figure to be used in calculating his severance allowance under the Employment Act. **Issues (4) and (6)** are also decided in the claimant's favour.

23. **Issue (3)** asks whether the claimant's termination was “*unjustified*”. Although the issue could be framed better, it is common ground that the termination of the claimant's employment contract occurred as an inevitable consequence of the repeal of the Act which created the **VMA**. That was legislative act of Parliament the reasons for which are non-justificiable and, for which, neither the **VMA** (as employer) and the claimant can be held responsible.

24. In short, the claimant's employment contract was frustrated and came to an end when his employer ceased to exist. The claimant says “*the contract should have been transferred to another government department or agency*” as the claimant was willing to continue to perform his contract with another government entity. I cannot agree.

25. The doctrine of contractual frustration is succinctly described by **Salmon LJ** in **Denmark Productions Ltd. v. Boscobel Production Ltd.** (1969) 1 QB 699 when he said at **p. 725**:

“This was a doctrine evolved by the Courts to meet the case in which a contract became impossible through some super-vening event, not reasonably foreseeable ...



when the contract was made and for which neither contracting party was in any way responsible”.

26. In my view the repeal of the **VMA** Act was just such a super vening event which rendered the continued performance of the claimant’s employment contract legally “*impossible*” despite the claimant’s agreement to perform it with a different employer.
27. In **Benard v. VMA** [2012] VUCA the Court of Appeal in rejecting a submission that the government was liable for the payment of appellant’s salary until the end of his contract said (at **paras. 30 to 33**):

“Mr. Benard submits that the Judge was wrong in his conclusion as to frustration. He said the Republic could not rely upon its own actions, being the repeal of the VMA, to excuse them from liability on his contract and so the doctrine of frustration could not apply to this case.

We consider that the significant point is that the contract was frustrated not by the Executive arm of the Government, who had the responsibility for the decisions of the VMA, but by Parliament. Parliament was not a party to the employment contract. The VMA did not frustrate the contract. Parliament did. We therefore reject that submission.

Mr. Benard's next submission was that s.12 of the Employment Act obliges his employer to provide work and to pay him during his contract whether work was provided or not. Section 12 of the Employment Act provides as follows:

“12. Duty of employer to provide work

Except in the case of, and during an emergency which prevents him from doing so, every employer shall provide the employee with work in accordance with the contract during the period for which the contract remains in force and on such number of working days as is expressly or impliedly provided in that contract. If the employer fails to provide work as aforesaid he shall pay to the employee, in respect of every day on which he shall so fail, remuneration at the same rate as if the employee had done the day's work.”

Section 12 of the Employment Act is concerned with existing employment. Mr Benard's employment ended on 31st December 2007 when his employer went out of existence. In those circumstances section 12 of the Employment Act can have no application to the situation and does not entitle Mr Benard to payment beyond 31 December 2007.”

28. In light of the foregoing I answer **issue (3)** in the negative in the defendant's favour.
29. The sole remaining issue relates to the unexpired portion of the claimant's employment contract (*i.e.* 33 months) and asks whether the claimant is entitled to common law damages. The question if I may say so, wrongly assumes that the claimant's employment contract was wrongly terminated by



his employer. This has been answered by the Court's determination of **issue (3)** above, in the defendant's favour.

30. In support of this "*head of claim*" the defendant refers to decisions in:

- (a) **Parente v. VMA** [2004] VUSC 41;
- (b) **Ferrieux v. VMA** [2004] VUSC 50; and
- (c) **Timbacci v. VMA** [2005] VUCA 19;

31. I have considered all three (3) decisions that are easily distinguished on the facts from the present case. In all 3 decisions the **VMA** was still very much in existence and the Court found in each case, that the **VMA** had breached its respective employee's contract of employment and was therefore liable. In other words, the contracts were not frustrated by the actions of a third party as occurred in the present case over which the **VMA** had no control.

32. Having said that, I am satisfied that the claimant is entitled to receive compensatory damages for the period before he obtained alternative employment on **1 June 2008** (ie. 5 months) during which time he was laboring under the reasonable expectation that he would be re-employed by the defendant in the government department that would be taking over the **VMA**'s responsibilities. I am also mindful that a liquidator for the **VMA** under the Repeal Act was not appointed until **2 July 2008**, and further, the claimant's special qualifications made it difficult for him to obtain employment commensurate with his qualifications when he eventually decided to start looking after it became clear to him that he would not be re-employed.

33. In light of the foregoing and subject to an award of compensatory damages this remaining **issue (5)** must be and is decided in the defendant's favour. This head of claim is accordingly dismissed.

34. In conclusion judgment is entered for the claimant in the following sums:

(1) Under Section 49 of the Employment Act [CAP. 160]:

VT(365,000 x 3) **VT1,095,000**

(2) Under Section 56 (2) (a) & (2) (b) of the Employment Act [CAP. 160]:

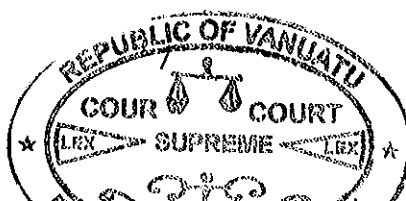
VT(365,000 x 5) + VT(1,825,000/12 x 3) **VT2,281,250**

(3) Under Sections 32 & 16 (8) of the Employment Act [CAP. 160]:

VT(365,000 x 21/30) **VT255,500**

TOTAL = VT3,631,750

35. On the above judgment sum the claimant is awarded interest at the rate of **10% per annum** with effect from **31 December 2007** until fully paid up. *i.e.* VT(363,175x 4.75) **VT1,725,081**



- (4) Compensatory Damages for 5 months of unemployment occasioned by the sudden termination of the claimant's employment contract coupled with the defendant's indication of re-employment and the claimant's inability to obtain employment despite his efforts:
 $VT(365,000 \times 5) = VT1,825,000$

With interest @ 10% per annum with effect from the date of filing of the claim (i.e. **19 October 2010**) a period of 2 years being an additional sum of $VT(182,500 \times 2) = VT365,000$.

Making a total of: $VT(1,825,000 + 365,000) = \underline{VT2,190,000}$

36. Consistent with **Rule 15.4** of the **CPR**, the claimant is also granted **all** disbursements including filing fees and photocopying charges associated with the institution and prosecution of these proceedings to judgment.

SUMMARY


37. Judgment is entered for the claimant as follows:

	<u>VT</u>
(1) Notice	1,095,000
(2) Severance	2,281,250
(3) Annual leave	255,500
(4) Interest	1,725,081
(5) Compensatory Damages + 10% interest	<u>2,190,000</u>
TOTAL =	<u>VT7,546,831</u>

- (6) All disbursements.

DATED at Port Vila, this 12th day of October, 2012.

BY THE COURT


D. V. FATIAKI
 Judge.

