

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

Civil Case No. 206 of 2013

BETWEEN : PETER FOGARTY

Claimant

AND: AIR VANUATU (OPERATIONS) LIMITED

Defendant

Coram: Justice Aru

Counsel: Mr. M. Hurley for the Claimant
Mr. E. Nalyal for the Defendant

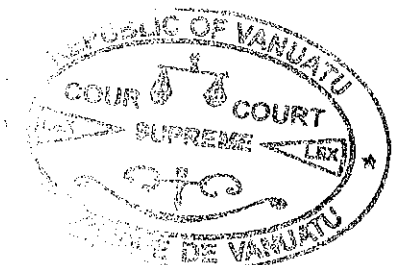
JUDGMENT

Introduction

1. The claimant is a former employee of Air Vanuatu (Operations) Limited and is now seeking payment VT 2,774,999 as his severance allowance entitlements for the period of 1st October 2004 to 31st October 2007 with interest at the rate of 5% until payment .
2. On 17 April 2014 part of the claim for 25% of salary deducted by the defendant for the period July 2010 to 31 October 2010 was abandoned by the claimant.

Agreed facts

3. The facts as agreed are that on or around 5 September 2004 the claimant and the defendant entered into a written employment contract where the defendant agreed to employ the claimant in the position of Pilot (ATR 42 Check and Training Captain) for a period of 2 years with effect from 1 October 2004 ("the First Employment Contract") .
4. On or around 28 August 2006 the claimant and the defendant entered into a written employment contract where the defendant agreed to employ the claimant in the position of Général Manager Flight Operations – Domestic (ATR, Twin Otters and Islanders)for a period of 2 years with effect from 28 August 2006 ("the Second Employment Contract").



5. On or around 22 October 2007 the claimant and the defendant entered into a written Employment Contract where the defendant agreed to employ the claimant in the position of General manager Flight Operations – Domestic for a period of 3 years with effect from 1 November 2007 ("the Third Employment Contract").
6. Following the defendant's notice of termination pursuant to the terms of the Third Employment Contract, the claimant ceased employment with the defendant effective from 31 October 2010.
7. The defendant has paid the claimant's severance allowance entitlements for the period of 1 November 2007 to 31 October 2010 pursuant to the Third Employment Contract.

Issues

8. The agreed issue for the court to determine is whether the defendant is liable to pay the claimant severance allowance for the period 1 October 2004 to 31 October 2007 inclusive and if so what is the sum payable.
9. Before the trial hearing begun, the defendant raised a further issue as to whether or not the claim was statute barred by the Limitation Act [CAP 212]. The claimant had no objection to it being added as a second issue for determination.

Evidence

10. The claimant's evidence in chief is his sworn statement filed on 12 May 2014. In summary he says that the defendant terminated his employment. On 9 July 2010 he was advised by the Chief Executive Officer of Air Vanuatu that his salary will be reduced by 25% and that his contract will not be renewed when it expires. The letter states :

"9 July 2010

*Capt. Peter Fogarty
General Manager Flight Operations Domestic
Air Vanuatu (Operations) Limited
Po Box 148
PORT VILA*

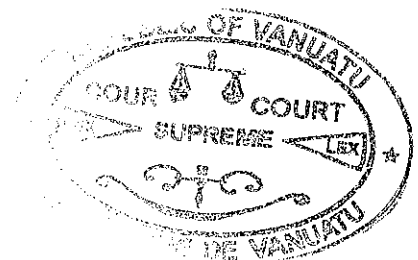
Dear Capt. Fogarty

.....

In addition, please see this as formal advice that your employment contract which expires 31st October 2010, will not be renewed beyond that date.

.....

*Yours sincerely
(signed)*



Joseph Laloyer
Chief Executive Officer

11. The claimant says that despite serving the defendant under the First, Second and Third employment Contracts, following his termination he was not paid any severance allowance entitlements under the First and Second Employment Contracts.
12. Regarding the First Employment Contract, he says that despite the stipulation in clause 3 for his monthly remuneration to be inclusive of severance allowances, what he received was his monthly remuneration and nothing extra was paid as severance allowance entitlements. Clause 3 provides:

"3. THE total remuneration of the Employee shall be VT 900,000 per calendar month and shall be subject to review in accordance with Company policy as approved by the Board of Directors. The monthly remuneration is inclusive of all salary entitlements including severance allowances. Therefore the employee shall not claim any severance allowance at the end of the employment contract.

In addition to the remuneration set out here in the employee shall be entitled during the term of employment to the following benefits:

- (1) fully serviced vehicle as per policy*
- (2) medical insurance cover per company policy which may be varied from time to time*
- (3) other benefits as per existing staff manuals."*

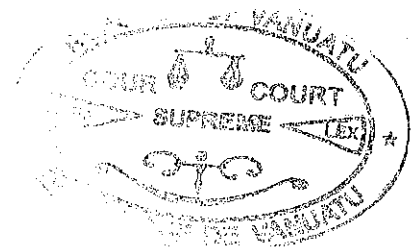
13. Similarly in relation to the Second Employment Contract, he says that clause 3 of the contract again provided for his monthly remuneration to include overseas allowances of VT 150,000 however what he received was his monthly remuneration and no additional sum of VT 150,000 or any overseas allowance was paid. Clause 3 of the Second Employment Contract provides :

"3. THE remuneration of the employee shall be VT 900,000 (inclusive of the overseas allowance of VT 150,000 and shall be subject to review in accordance with Company policy as approved by the Board of Directors . The employee shall be entitled during the term of employment to the following benefits:

- (1). Access to a fully maintained operational vehicle , when not required by others for operational purposes ;*
- (2). Telephone line rental as per Company policy ;*
- (3). Medical insurance coverage as per Company policy*
- (4). Other benefits as per existing staff manuals "*

14. He now claims VT 2,774,999 calculated based on his monthly salary of VT 900,000 being his severance allowance for the period 1 October 2004 to 31 October 2007.

15. The claimant was cross examined on his evidence.



16. The defendant's evidence in chief was given by Joseph Laloyer who is the Chief Executive Officer. He provided a sworn statement filed on 8 September 2014. His evidence in summary is that the claimant was originally employed on 1 December 1993. He resigned in November 1997 and was re-employed in October 2004 up to 31 October 2010.

17. He says that the claimant was originally employed from Australia and that the First, Second and Third Employment Contracts provide for the claimant's repatriation whenever his contract ends. Furthermore, he says that in relation to the First and Second Employment Contracts, the claimant had agreed with the defendant that severance allowance was included in his salary therefore he would not be claiming severance under these two employment contracts.

18. He says that the claimant was advised by letter of 9 July 2010 that his employment contract would not be renewed beyond 31 October 2010. Mr Laloyer was cross examined on his evidence.

Law

19. The claimant relies on Part 11 of the Employment Act [CAP 163] which makes specific provisions relating to severance allowance. Firstly s 54 provides for circumstances under which an employee could be entitled to claim severance one of which is termination of employment by the employer. Section 54 1) (a) provides:-

"54. Severance allowance

(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 employment;

.....

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

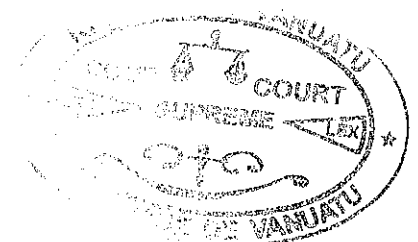
....."

20. To be eligible to claim severance an employee must be ordinarily resident in Vanuatu otherwise he is precluded by s 55 from making such a claim. Section 55 1) provides:

"55. When severance allowance not due

(1) Severance allowance shall not be payable to an employee who has been recruited outside Vanuatu and is not ordinarily resident in Vanuatu.

....."



21. The amount of severance allowance and the formula for calculating severance allowance is provided in s 56 which for present purposes is 1 months remuneration for every 12 months. Section 56 2) a) i) as amended provides:-

"56. Amount of severance allowance
.....
(2) Subject to subsection (4) the amount of severance allowance payable to an employee shall be –
(a) for every period of 12 months –
(i) 1 month's remuneration, where the employee is remunerated at intervals of not less than 1 month;
....."

22. Regarding the issue of limitation, actions in contract cannot be brought after expiration of 6 years from the date on which the cause of action accrued. Section 3 1) a) of the Limitation Act [CAP 212] provides:-

"3. Limitation of actions of contract and tort and certain actions
(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say –

(a) actions founded on simple contract or on tort;
....."

Discussion

23. The first issue is whether the defendant is liable to pay the claimant severance allowance for the period 1 October 2004 to 31 October 2007 inclusive and if so what is the sum payable. Before deciding this question, the first hurdle the claimant has to overcome is whether he was ordinarily resident in Vanuatu at the time of his termination. Secondly, the claimant must establish that he was terminated after being continuously employed by the defendant for a period of not less than 12 months.

24. In *Mouton v Selb Pacific Ltd* [1998] VUCA 8 the Court of Appeal said:-

"The evident purpose of the severance allowance provisions is to offer a measure of security to residents of Vanuatu who lose their employment at the initiative of the employer or because of injury or ill health. The Act is concerned with the situation of residents at the time of their dismissal."
(emphasis added)

25. Both parties accept that the claimant was terminated by letter dated 9 July 2010 and the termination became effective on 31 October 2010 and that at that time the claimant was ordinarily resident in Vanuatu. Furthermore, under cross examination Joseph Laloyer confirmed that the claimant was paid severance at the end of his Third Employment Contract.



26. Given that severance was paid on the Third Employment Contract, the claimant is entitled to claim severance on the First and Second Employment Contracts as he was ordinarily resident in Vanuatu during that period. Whether the defendant is liable or not is a matter for the court.
27. The defendant submits firstly that the fact that the claimant waited until September 2013 to file his claim means that he has lost his right to claim any severance. Secondly under the First Employment Contract, the claimant by signing the contract agreed that pursuant to clause 3 he agreed to a term of the contract that he "*shall not claim any severance allowance at the end of his employment contract.*"
28. The third limb of the defendant's argument is that having agreed to clause 3 of the First Employment Contract, the claimant is estopped from claiming severance under this contract. It was further submitted that the claimant under cross examination said he read and understood the contracts before signing them.
29. Finally the defendant submits that the claimant waived his rights as a result of accepting an offer of payment from the defendant .The argument as to waiver arises as a result of the claimant's hand written signed note at page 2 of Mr. Laloyer's letter to the Department of Labor on 11 January 2011 informing Labor that the claimant's severance for period November 2007 to October 2009 would be paid at 1 months salary for each year of service. The claimant's hand written note reads:-

"I accept Air Vanuatu's offer to pay out severance as stated, over a period of two months as of this date.

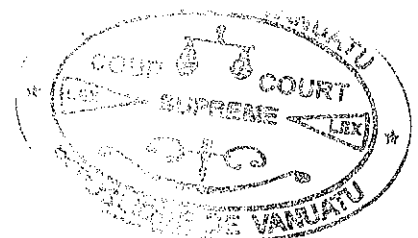
(sign)

Peter Fogarty"

30. The argument as to waiver is without basis and runs contrary to s18 of the Employment Act which provides:-

- "18. Acceptance by employee of pay is no bar to subsequent proceedings
- (1) No statement such as "received in full settlement of all claims" made by the employee, whether during the period of his contract or after its termination, shall have the effect of waiving any rights he may have under the said contract.
- (2) The acceptance without protest or reservation by an employee of a pay document shall not be held to imply renunciation on his part of the claim for all or any part of remuneration which may be due to him and such acceptance shall not be held to imply the settlement of all claims."

31. In *Air Vanuatu (Operations) Ltd v Molloy* [2004] VUCA 17 the Court of Appeal said:-



"We are accordingly of the view that there is no barrier in law or in principle which restricts the ability of an employer and an employee to make their own private arrangement with regard to a severance entitlement providing it does not in any way undercut or minimize the employee's entitlements under Part XI.

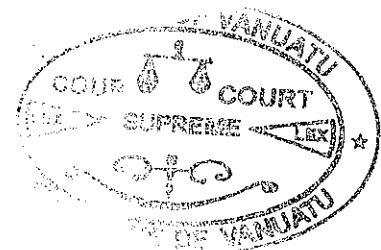
We hold that position notwithstanding the provisions of section 56 (5) which provides that a severance allowance payable under the Act is to be paid on the termination of the employment. A proper and adequate allowance paid earlier than that date could be more favourable from the point of view of an employee and therefore it might be permissible under the Act."

(emphasis added)

32. In this case, the Court of Appeal was clearly of the view that private arrangements between an employer and an employee can be made to facilitate payment of severance however these cannot undermine the clear provisions of Part XI of the Act regarding severance.
33. Having heard the evidence, I find that the claimant's evidence regarding monthly payments of remuneration under the First Employment Contract is that what he received per month was his remuneration. Nothing extra or additional was paid as severance allowance entitlements. This evidence was unchallenged.
34. Similarly, in relation to the Second Employment Contract, I find that with regards to the monthly payments of remuneration, the VT 150,000 was not paid and nothing extra was paid as overseas allowance. This evidence also was unchallenged. There is no reference to severance allowance under the Second Employment Contract and I accept the claimant's submissions that there is no valid reason to imply that overseas allowance means severance.
35. The answer to the first issue must therefore be that the defendant is liable to pay the claimant severance allowance under the First and Second Employment Contracts as he was continuously employed by the defendant during the period 1 October 2004 to 31 October 2007.

Limitation period - bar to bring proceedings

36. The issue raised by the defendant is that the claim is time barred under the Limitation Act. The gist of the defendant's submissions is that the claim as founded on simple contract (employment contract) was not brought within 6 years as required by the Act therefore pursuant to s 3 a) of the Limitation Act, the claim is now time barred .
37. The defendant relies on what the Court of Appeal said in *National Bank of Vanuatu v Cullwick* (majority judgment) [2002] VUCA 39 that:-



"severance payments are therefore not subject to the time limit in s 20 (Employment Act) but to the general provisions of the Limitation Act".

38. There is no ambiguity in s 3 a) of the Limitation Act as it clearly states that an action in contract cannot be brought "after expiration of six years from the date on which the cause of action accrued." Section 3 must be read in conjunction with s 54 1) of the Employment Act. In the present case the claimant was in continuous employment pursuant to the First, Second and Third Employment Contracts. His termination occurred as a result of the 9 July 2010 letter advising that once his contract (Third Employment Contract) expires on 31 October 2010 it will not be renewed. That is when his cause of action accrued.

39. In Molloy's case the Court of Appeal considered the effect of six contracts of continuous employment and said:-

"...severance allowance will be payable for the full 16 years."

40. Recently in Wilco Hardware Ltd v Attorney General [2013] VUCA 12 the Court of Appeal said in relation to s 54 of the Employment Act that:-

"...severance is not a liability until the contingency is triggered under Section 54. It is this section which creates the entitlement for employees who have been in the continuous employment of an employer for a period of not less than 12 months. To put it literally, there is no obligation to pay severance allowance until Section 54 is triggered. It is only when the entitling event occurs that the employer has a mandatory duty to pay severance allowance to the employee calculated under Section 56 which deals with the quantification."

(emphasis added)

41. The triggering event is termination of employment by the employer therefore the claimant became entitled to claim severance when his termination became effective on 31 October 2010. That is when his cause of action accrued and when the claim was filed on 18 September 2013, it was clearly within time and not statute barred by s 3 a) of the Limitation Act.

42. Judgment must therefore be entered for the claimant. On the question on costs, the claimant submits that costs should be awarded on an indemnity basis pursuant to Rule 15.5 of the Civil Procedure Rules.

43. I adopt what Spear J said in Triwood Industries Ltd v. Stevens [2012] VUSC 1999 at paragraph 10 of his Judgment that:-

"Indemnity costs should only be imposed in exceptional cases. However, where a case is seen as hopeless or obviously lacking any realistic prospect of success, to maintain the claim invites serious consideration of awarding costs on an indemnity basis."



44. The defendant was put on notice by the claimant on 13 May 2014 that there appears to be no defence to the claim. This is quite obvious given that severance was paid on the claimant's Third Employment Contract . Similarly given what the Court of Appeal said in Molloy the defendant properly advised should have known that he had no chance of success.

Order

45. I therefore enter judgment for the claimant in the sum of VT 2,774,999 with interest at 5% per annum from 31 October 2010 until payment and the defendant shall pay the claimant's costs on an indemnity basis.

46. An enforcement conference is listed for 19 December 2014 at 8.30 am.

DATED at Port Vila, this 3 day of December , 2014.

BY THE COURT

.....
D. ARU
Judge.

