

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

Civil Case No.279 of 2013

BETWEEN: FREDERICK KAPALU
Claimant

AND: TEACHING SERVICE COMMISSION
Defendant

Coram: D. V. Fatiaki

Counsels: Ms. P. Kalwatman for the claimant
Mr. H. Tabi for the defendant

Date of Judgment: 16 July 2014

JUDGMENT

1. This claim for severance benefits under the Employment Act ("*the Act*") falls to be determined on a preliminary issue agreed by the parties as follows:

"Whether the claimant is entitled to severance under Section 54 of the Employment Act?"

THE PLEADINGS

2. The claim is brought by the only son and duly appointed administrator of the estate of **Marie Assumption Nirua** ("*the deceased*") a primary school teacher employed by the defendant who died "*in service*" on 1 March 2011 after 29 years of continuous employment. It is an admitted fact that the deceased died as a result of "*Diabetes*" (see: Death Certificate dated 02 March 2011).
3. The defendant denies the claim on the basis:

"that severance allowance is a payment to an employee whose employment comes to an end by any reasons under subsection 54(1) of the Act and "death in service" is not one of the reasons".
4. It is common ground that the deceased's estate was paid a sum of VT917,280 pursuant to **Rule 12.7** of the Teaching Service Staff Rules No. 40 of 1985 which provides:

"Death in Service



12.7 In the event of the death of an officer other than a temporary officer during the course of his service, the government shall pay to his legal personal representative a sum equivalent to one year total emoluments, and in addition in the case of an expatriate contract officer a sum equivalent to the unpaid gratuity which would have been due to him had he satisfactorily completed the whole period of his contract".

5. Having noted the above, **Section 76** of the Employment Act (disregarding inapplicable exceptions and modifications) clearly provides that the provisions of the Act "... apply in relation to public servants and to the Government and any other public authority in Vanuatu". Clearly the existence of Rule 12.7 does not preclude the application of the provisions of the Employment Act to the deceased.
6. I am grateful for the helpful written submissions provided by counsels which I have read and considered.

COUNSELS SUBMISSIONS

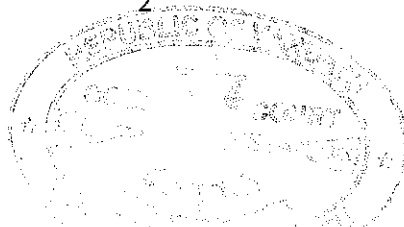
7. The defendant's simple straight forward submission is encapsulated in 3 paragraphs as follows:

"9. ... death in service is not one of the events mentioned in section 54 of the Act which could trigger the claimant's entitlement to severance payment under section 56 of the Act. Therefore, we submit that the TSC or Government has no obligation under the Act to pay the severance allowance to the claimant.

10. The defendant further submits that death in service does not fit within the meaning of paragraph 54(1) (e) of the Act as a type of illness or injury as alleged by the claimant.

11. The Court of Appeal stated in the case of *Wilco Hardware Ltd. v. Attorney General*, at paragraph 24 that:

"... the termination of an employment relationship by the death of an employee does not trigger an entitlement to a severance allowance. ... the only provision that could arguably deal with the situation where an employee dies during the course of his employment is S.54 (1) (e) of the Act ... We do not wish to say more than this provision appears only to address the situation of an employee falling ill or being injured AND then being certified by a registered medical practitioner as to be unfit to continue to work. This is in contrast to where an employee dies howsoever while still in employment. This may be a drafting oversight and we raise it only to ensure that the issue is considered by the responsible body."



12. *In any event, paragraph 54(1) (e) of the Act could not apply to the claimant as at no stage was she certified by a registered medical practitioner unfit to continue to work but in fact was in continuous employment with the defendant until she died on 1 March 2011 (death in service)".*

8. For completeness however, and to better appreciate the true nature and context of the above quotation I set out (in full) para 24 of the Wilco judgment referred to in defence counsel's submission, which reads:

"24. As we observed above, the termination of an employment relationship by the death of an employee does not trigger an entitlement to a severance allowance. This was raised by us in passing during the course of Mr Blake's submissions. Mr Blake responded that the death of an employee during the course of employment would trigger an entitlement of a severance allowance "under the death provisions". If that is correct, the severance allowance would naturally become an entitlement of the deceased's employee's estate. This appeal does not turn on this point but it is one which has caused us some disquiet. That is because the only provision that could arguably deal with the situation where an employee dies during the course of his employment is S.54 (1) (e):

S.54 (1) (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

We do not wish in this appeal to say more than this provision appears only to address the situation of an employee falling ill or being injured AND then being certified by a registered medical practitioner as to be unfit to continue to work. This is in contrast to where an employee dies howsoever while still in employment. This may be a drafting oversight and we raise it only to ensure that the issue is considered by the responsible body."

(my underlining for emphasis)

9. The claimant's slightly more involved submission is advanced under 3 subheadings which may be extracted as follows:

1. Death is a type of "illness or injury" within section 54 (1) (e) of the Employment Act.

"The three requirements for severance under Section 54(1) (e) are:

- 1. The employment ceases.*
- 2. The reason for the employment ceasing is illness or injury.*
- 3. The employee is unfit to continue work as certified by a medical practitioner.*

In this case these three requirements are satisfied. The employment stopped. The reason for the employment ceasing (or ending) was illness. That illness was diabetes. The illness caused the employment to cease. The illness also caused the death of the claimant. The death certificate is clear and undisputed evidence that the claimant was unfit to continue work.

In its defence, the defendant states:

"severance allowance is a payment to an employee whose employment comes to an end by any reasons under subsection 54(1) of the Act and 'death in service' is not one of the reasons [paragraph 3(b)]

The claimant does not need to establish 'death in service' as a stand-alone trigger or reason for severance. According to the terms of section 54, the claimant only needs to establish that the employment ceased; that the reason for the cessation was illness and that the employee was not fit to continue work. These matters have been established in this case.

2. In the alternative, severance is payable upon death because Section 54 is not an exhaustive list of circumstances where severance is payable.

"A list of circumstances where severance allowances is not payable appears in Section 55 of the Employment Act.

This provision demonstrates two things. Firstly, it shows that section 54 is not an exhaustive or complete list of situations where severance is payable. Severance may be payable in situations that are not listed in section 54, including loss of employment after the death of an employer.

Secondly, it shows that where the employment relationship is frustrated (ended) by the death of the employer, severance is payable. It is logical, sensible and consistent to conclude that where the employment relationship is frustrated by the death of the employee (rather than the death of an employer), severance is also payable. Section 55 (3)(a) is premised on the assumption that severance is payable where the employment relationship is ended by death of one of the parties.

It is also significant that the death of an employee is not one of the specified situations in section 55 where severance is not due. Section 55 does not prevent severance being paid in the case of an illness of an employee which leads to death. If Parliament had intended for severance not to be payable upon death of an employee, it would have added "death in service" to the list of circumstances in section 55.

3. The Interpretation Act supports a finding that severance is payable upon death".

In this regard, after setting out the provisions of Section 8 (3) (a) and (b) of the Interpretation Act (as amended in 2010), the submission continues:

"The employment bargain between an employee and employer is often unequal. This is particularly so in Vanuatu where workers often have limited education and a very basic understanding of their legal rights. The minimum wage in Vanuatu is low compared to international standards and many workers struggle to provide the basics of food, shelter, transport and education for their families. They are the working poor. The provisions of the Employment Act generally provide protections and entitlements for Vanuatu workers. The intent and spirit of the Act is to support and protect workers and to provide a legal guarantee of their hard earned entitlements.

It is within this statutory and policy context that the Employment Act needs to be interpreted. Where there is ambiguity, or a result which cannot reasonably be supposed to correspond with the intention of Parliament, the section should be given a fair and liberal construction. A fair and liberal construction of sections 54 and 55 would provide an entitlement to severance where a worker dies.

To deny severance to a teacher who provided outstanding service to the students of Vanuatu for almost 30 years would be contrary to the spirit and intent of the Employment Act. It would also lead to absurd outcomes. Workers who are getting older would simply resign to avoid the risk of losing their severance because of unexpected death whilst still in service. Longstanding workers with illnesses or uncertain medical conditions who still want to work would be advised by lawyers that they should immediately resign so as to protect their severance entitlements."

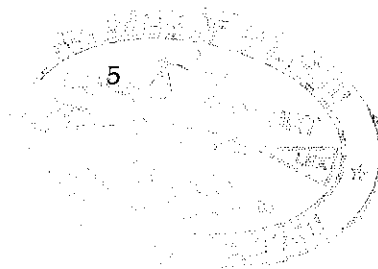
And counsel for the appellant trenchantly submits:

"It would be a terrible injustice for any worker who is killed in service (eg. A bank teller shot by a robber) to be denied severance."

The same may be said of an innocent employee who dies of a work-related accident.

10. Although defence counsel relies heavily on the observations of the Court of Appeal in the Wilco case (*op.cit*) the remarks were undoubtedly "*obiter dictum*" about a matter that did not directly arise for determination in the appeal and was prompted by the Court. That much is clear from a reading of the whole of the final paragraph of the judgment set out in paragraph 7 above. It is also clear in my mind that diabetes is an "*illness*".
11. Having said that, the answer to the preliminary question posed earlier, turns primarily on the construction of **Section 54** according to its terms and within the broader context of the Employment Act.

THE LAW



12. **Section 54** occurs in Part XI of the **Employment Act** [CAP. 160] and was first enacted in the Employment Act No. 1 of 1983 which commenced on 30 May 1983. Prior to that there had been no provision for the payment of a severance allowance under an employment contract. Section 54 is expressly made "*subject to Section 55*" and refers in subsection (1) to the severance allowance being paid "*to the employee under section 56 of this Act*".

13. I therefore set out **Sections 54, 55 and 56** which provides as follows:

"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; 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 of 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.

For the purpose of this subsection, "medical practitioner" means a medical practitioner registered as a health practitioner under the Health Practitioners Act, to practice medicine and/or surgery.

(2) *For the purposes of subsection (1) –*

- (a) *an employee who works for his employer on 4 or more days in any week shall be deemed, in respect of that week, to have been in continuous employment;*

- (b) *no employee shall be held to have ceased to be in the continuous employment of an employer by reason of his participation in a strike which is not unlawful;*
 - (c) *where an employee ceases to be in the employment of one employer and enters the employment of another under section 55(4), his employment by the first and second employer shall be deemed to be continuous employment.*
- (3) *For the purposes of section 308 of the Companies Act [Cap. 191] severance pay shall be deemed to be wages.*

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.*
- (2) *An employee shall not be entitled to severance allowance if he is dismissed for serious misconduct as provided in section 50.*
- (3) *Where –*
 - (a) *an employer dies and the employee is employed or offered employment by the personal representative of the deceased forthwith after the death;*
 - (c) *employment by a partnership ceases on the dissolution of the partnership, and the employee is employed or offered employment by a member of the dissolved partnership or a new partnership forthwith after the dissolution;*
 - (d) *employment by a body corporate ceases on the dissolution of that body and the employee is employed or offered employment by some other corporate body in accordance with an enactment or a scheme of reconstruction forthwith after the dissolution; or*
 - (d) *employment ceases on the disposal of the goodwill, or of the whole or a substantial part of the business as a going concern, or of that part of the business in which the employee is employed and he is employed or offered employment by the person who acquires the goodwill or business or part of the business forthwith after the disposal,*

on terms and conditions which are not less favourable than those of the former agreement, the employee shall not be entitled to severance allowance.

- (4) *Where an employee to whom an offer is made in any of the circumstances specified in subsection (3) accepts the offer, he shall be deemed to have entered the employment of the person by whom the offer is made forthwith upon the cessation of his employment with the first employer.*
- (5) *Where an employee is deemed to be in continuous employment in accordance with section 54(2) and that continuous employment is terminated in circumstances in which severance allowance is payable, the employer in whose service the employee was employed immediately before the termination shall be deemed to be the employer during the whole of the period and shall be liable to pay severance allowance accordingly.*
- (6) *An employer who is liable to pay severance allowance under subsection (5) shall –*
 - (a) *be entitled to deduct any period and to make any deduction which any previous employer would have been entitled to deduct or to make had the previous employer become liable to pay severance allowance; and*
 - (b) *be exempt from any liability to pay the allowance in respect of any period for which any previous employer was exempt from such liability.*

56. Amount of severance allowance

- (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).*
- (2) *Subject to subsection (4) the amount of severance allowance payable to an employee shall be –*
 - (a) *for every period of 12 months –*
 - (i) *half a month's remuneration, where the employee is remunerated at intervals of not less than 1 month;*
 - (ii) *15 days' remuneration, where the employee is remunerated at intervals of 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 the employee was in continuous employment.*
- (3) *Where remuneration is fixed at a rate calculated on work done or includes any sum paid by way of commission in return for services, the remuneration shall, for the purposes of this*

section, be computed in the manner best calculated to give the rate at which the employee was being remunerated over a period not exceeding 12 months prior to the termination of his employment.

- (4) The court shall, where it finds that the termination of the employment of an employee was unjustified, order that he be paid a sum up to 6 times the amount of severance allowance specified in subsection (2).
- (5) Any severance allowance payable under this Act shall be paid on the termination of the employment.
- (6) The court may, where it thinks fit and whether or not a claim to that effect has been made, order an employer to pay interest, at a rate not exceeding 12 per cent per annum from the date of the termination of the employment to the date of payment.
- (7) For the purposes of this section 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."

DETERMINATION OF THE ISSUE

14. Subject to a minimum period of 12 months "*continuous employment*", Section 54 clearly establishes an employee's entitlement to a severance allowance and an employer's co-relative duty to pay. In particular, the section sets out five (5) separate events or circumstances that entitles an employee to a severance allowance [see: paras (a) to (e)].
15. Although the entitling events are different they do share one important common feature or result, namely, the employment relationship between the employer and the employee is brought to an end. This can occur either by the employer terminating or compulsorily retiring the employee [paras (a) & (c)]; or the employee voluntarily retiring or resigning "*in good faith*" [paras (b) & (d)].
16. The last entitling event which may occur independently of the employer or employee, is contained in **para (e)** which provides:

"Where 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".
17. It can be seen from a careful reading of **para (e)** that the provision may be separated into two (2) "*limbs*" at the disjunctive "*or*". The first "*limb*" being contained within the words:

"The employee ceases to be employed by reason of illness ..."

And the second "*limb*" may be found in the words:

"The employee ceases to be employed by reason of ... injury and is certified by a registered medical practitioner to be unfit to continue to work".

18. Common to both "*limbs*" is the cessation of employment but in my view, only the second "*limb*" requires a medical practitioner's certification of incapacity. Needless to say if an employee's "*illness*" does not adversely affect his attendance at work but results in death then, in my view, there is no need for a medical practitioner's certification of incapacity. The absence of a comma sign (,) after the word "*injury*" lends some support for this construction.
19. I accept that not all "*illnesses*" or "*injuries*" result in immediate death or incapacity, hence the need for a medical practitioner's certification but, where the first or only outward sign of an employee's "*illness*" is his or her death, then, in my view, it could not have been Parliament's intention nevertheless to deny such an employee a severance allowance because of the mere absence of a medical certification of incapacity during the deceased employee's lifetime. In my view death is itself the best evidence of incapacity and where death has occurred it would be absurd to require a medical certification of incapacity "*ex post facto*".
20. As the Court of Appeal said in PSC v. Manuake [2003] VUCA 21 in construing Section 56(1) of the Employment Act:

"If it is possible, the words of a statute must be construed so as to give them a sensible meaning: Halsbury's Laws of England 4th edn Vol 44 para. 860".
21. It is clear from a reading of Section 54 that "*death*" of an employee is not clearly expressed as an entitling event. That is regrettable but understandable because of the many uncertainties in life, "*death*" is a certainty and when it occurs, it necessarily extinguishes the employment relationship. In the circumstances can it be said that the legislature must have intended to exclude "*death*" as an entitling event?
22. To answer the question, I turn to consider Section 55 which is conveniently headed: "**When severance allowance not due**". The section sets out several disentitling events or circumstances, including, where the employee was recruited outside Vanuatu and is not ordinarily resident in Vanuatu [subsection (1)] or the employee is dismissed for "*serious misconduct*" [subsection (2)] or where the employer "*dies*" or is "*dissolved*" and the

employee is re-employed on terms and conditions which are not less favourable [subsection (3)].

23. It is clear that in enacting Section 55 the legislature was clearly mindful of the possibility of "death" (albeit of the employer) bringing the employment relationship to an end and was concerned to secure some continuity in order to protect an employee's employment and severance benefits in such an eventuality [subsection (5)].
24. Furthermore it is clear by its absence, that the "death" of an employee is not clearly expressed to be a "disentitling event" as one would have expected if it was the clear intention of Parliament to exclude such an event from a severance allowance entitlement.
25. That being so, in my view, it is a clear inference that the death of an employer is "*prima facie*" an "entitling event" where the employee is not re-employed on equal or better terms (see: Benard v. Republic of Vanuatu [2012] VUCA where the employer (VMA) ceased to exist by legislative repeal and an award of a severance allowance was sustained without doubt or question by the Court of Appeal).
26. In summary, Section 54 which creates an employee's entitlement to a severance allowance does not expressly include "death" of an employee as an "entitling event". By the same token, Section 55 which identifies the circumstances where a severance allowance is not payable to an employee does not expressly identify the death of an employee as a "disentitling event". Indeed the provisions dealing with the severance allowance is completely silent on the death of an employee as opposed to the death of an employer.
27. Although an employee's entitlement to a "severance allowance" does not crystallize until at least one of the events or circumstances enumerated in Section 54 (1) has occurred, thereby ending the employment relationship, once the entitlement crystallizes the severance allowance must be paid. An employee's "illness" is a recognized entitling circumstance which in my view, crystallizes upon death.
28. Another possible approach raised by the particular facts of this case might be to consider whether or not the deceased's entitlement to a severance allowance is a personal entitlement or does the entitlement survive her death and vest in her estate for the benefit of her surviving family members.
29. Section 54 (3) provides that for the purposes of Section 308 of the Companies Act which deals with preferential payments in a company winding-up, "severance pay shall be deemed to be wages" and shall be paid in priority to all other debts (see also: Section 308 (1)(a) which expressly includes "severance allowance" under the Employment Act).

30. There is no doubting in my mind that "wages" that are due and payable to an employee are by its very nature paid "in arrears" and are therefore claimable by a deceased employee's estate.

31. Furthermore under Section 56 (5):

"Any severance allowance payable under this Act shall be paid on the termination of the employment".

Given that clear mandatory statement as to when a severance allowance is to be paid, I am driven to the conclusion that Parliament must have intended that a severance allowance "shall be paid" even if the death of the employee occurred simultaneously with the termination of his or her employment.

32. In this regard also, section 57 of the Act provides:

"57. Deductions from severance allowances

(1) *An employer may deduct from any severance allowance payable –*

(a) in the case of an employee who is retired on or after attaining the age of 55 years:

(i) half the amount of any gratuity due at the age of 55 years from any pension fund;

(ii) any gratuity granted at the age of 55 years by the employer;

(iii) 5 times the amount of any annual pension granted at the age of 55 years from any pension fund mentioned in paragraph (a)(i) above;

(iv) 10 times the amount of any annual pension granted at the age of 55 years by the employer;

(b) in any other case –

(i) any gratuity granted by the employer;

(ii) any contribution made to any pension fund mentioned in paragraph (a)(i) above by the employer.

(2) *For the purpose of this section "pension" fund means any provident or pension fund or seminal scheme (other than the Vanuatu National Provident Fund established by and under the Vanuatu National Provident Fund Act [Cap. 189], as amended from time to time) which fund is specifically approved by the Commissioner."*

33. The section authorizes an employer to deduct from the severance allowance payable to an employee who is retired on or after age 55 years any gratuity or a proportion of any annual pension granted to the employee by the employer or from any pension fund and in any other case (such as the present), the employer is authorized to deduct: "... any annuity and any contribution made to any pension fund ... by the employer".

34. The nature and purpose of a "severance allowance" has been variously described:

- "... to ensure that at the end of his employment an employee will receive, in one way or another, a minimum sum calculated according to his length of service. We say "in one way or another" because under Section 57 the employer may deduct from severance allowance certain other payments made by his for the benefit of the employee"; (viz: Banque Indosuez Vanuatu Ltd. v. Ferrieux [1990] VUCA 3;
- "... 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." (viz: Mouton v. Selb Pacific Ltd. (Judgment 3) [1998] VUCA 8));

and later in the Mouton judgment:

- "... to provide security for the residents of Vanuatu where their employment relationship is severed by the employer. Security will be needed where the prospect of the employee receiving remuneration from other employment in the future is uncertain or improbable. The extent of the need will vary according to the circumstances of the case."

35. In addition to the above, the "Section 57 deductions" points in my view, to a nature and purpose of a "severance allowance" which equates it with a "gratuity" or "pension" such that those payments by an employer are deductible, presumably, to avoid a "double" benefit accruing to the employee. In a country with no established universal pension or superannuation scheme or welfare safety net, a "severance allowance" may be seen as also providing a form of security and benefit for an employee's dependents after his death.

36. Agreeing with the submissions of counsel for the claimant, I hold that it could not be Parliament's intention that an employee who is compulsory retired or who takes voluntary retirement should receive a "severance allowance", whereas an employee of the same age and length of service who dies "in service" is denied the "security" of a "severance allowance" merely because of the misfortune that he didn't retire before his death. In

my view, an employee's entitlement to a severance allowance should not be denied on such a fortuitous eventuality.

37. For the foregoing reasons I answer the preliminary issue in the affirmative. The claim succeeds and the claimant is awarded the sum of VT2,039,222. Pursuant to Section 56(6) of the Employment Act interested of 5% per annum is awarded on the above sum calculated from 1 March 2011 until paid.
38. The claimant is further awarded standard costs to be taxed if not agreed.

DATED at Port Vila, this 16th day of July, 2014.

BY THE COURT



D. V. FATIAKI
Judge.

