

BETWEEN: JOHN COLRIDGE SOVAN, HENRY
NELSON NIN, BARRY KING QUARANI,
JANMES KALO, ROCKY WOGALE, RUDY
RIRI, OLIVE SABLAN, VERAVE JOE,
STEVE MOFFET and JOHN BAPTIST
Claimants

AND: PRESIDENT OF THE REPUBLIC OF
VANUATU
First Defendant

AND: SPEAKER OF PARLIAMENT
Second Defendant

AND: ATTORNEY GENERAL
Third Defendant

AND: THE GOVERNMENT OF THE REPUBLIC
OF VANUATU
Fourth Defendant

Before: Justice D. V. Fatiaki

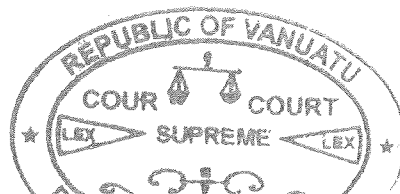
Counsel: Mr. D. Yawha for the Claimants
Mr. S. Kalsakau for the Defendants

Date of Delivery: 12 September 2019

DECISION

Background

1. On 22 September 2014 the late Baldwin Lonsdale was elected and took his oath as President of the Republic of Vanuatu ("**the President**"). After assuming office the President between 13 October 2014 and 28 April 2017 as "**the Employer**" entered into written employment agreements with each of the named claimants to work as a member of his "*support staff*" performing a variety of duties at the "*State Office*" and/or at his official residence, at the "*State House*" in Port Vila.
2. On 17 June 2017 the President met his untimely death and all claimants were terminated "*en masse*" without a written notice because it was said in **para. 6(d)** of the Defence that the claimants' employment agreements had "*ceased automatically upon the death of the President*". The Claimants disagree.



3. On 9 November 2017 the Claimants issued a Supreme Court Claim against the Defendants seeking damages for breach of their employment contracts.
4. On 31 January 2018 a Defence was filed on behalf of all defendants denying liability and stating that the Claim is misconceived, without any basis and it sought the dismissal of the entire Claim.
5. On 2 October 2018 during the course of a Conference in chambers, counsels agreed and identified two (2) preliminary legal issues for the determination of the Court, namely:
 - (1) **Have the Claimants been lawfully terminated from their respective positions and appointments?**
 - (2) **Are the Claimants as employees receiving gratuity entitled in law to payment of severance under Section 56 of the Employment Act?**
6. Written submissions were ordered and filed by counsels which the Court finds very helpful. The primary facts in the case are largely undisputed and are conveniently summarized by defence counsel as follows:

"On 22 September 2014, the former late President of the Republic of Vanuatu, His Excellency Baldwin Lonsdale ("late President"), was appointed to office;

On or about October 2014, the Claimants, except Steve Moffet who was appointed 28 April 2017, were each appointed under contracts of employment by the late President who is described therein as the "employer";

All of the Claimants' employment contracts included the following terms employment benefits:

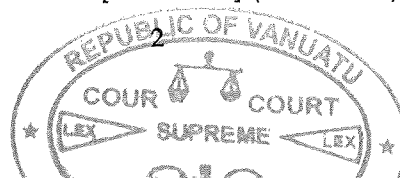
- *Their salary, leave allowances, and other benefits, would be as provided for by the Official Salaries Act [CAP. 168] as amended from time to time;*
- *In the event of termination:*
 - *3 months' notice of termination would be given; or*
 - *3 months' salary in lieu of notice would be paid.*

Further, it was an express term of the contract of appointment that the Claimants' employment would automatically cease if the employer ceased to hold office as the President of the Republic of Vanuatu. However, this term does not appear in Steve Moffet's contract;

On 17 June 2017, His Excellency Baldwin Lonsdale passed away on which occasion the Defendant treated the Claimants' employment as having been automatically ceased".

7. Also common to all employment contracts are the following elements conveniently summarized in the Claimants' submissions:

- (a) *Perform duties and responsibilities outline under the Schedules and job descriptions issued by the Employer;*
- (b) *Remuneration, allowance and benefit of each employee shall be as prescribed under the Official Salaries Act [CAP. 168] ("the OSA"); and*



(c) *The employment may be terminated under Clause 5.1 or 5.2 of the respective employment agreement of the Claimants*".

8. I set out the relevant excerpts in Clause 5.1 and Clause 5.2 of the employment agreements as follows:

"5. TERMINATION OF AGREEMENT AND EMPLOYMENT

5.1 *The Employee's employment under this Agreement may be terminated at any time in any of the following events, namely:*

(a) ***Either party may terminate this contract by the giving of notice or payment in lieu of notice in accordance with the provisions of the Employment Act [CAP. 160];***

[omitted paras. (b) to (e) are not relevant]

5.2 ***Notwithstanding the provisions of Clause 5.1, the employee's employment under this Agreement will automatically cease if the:***

(a) ***Employer ceases to hold office as the President of the Republic of Vanuatu; or***

(b) ***Position of (the Employee) is abolished by amendment to the OSA***".
(my highlighting)

9. I note the use of the active verb "**terminate**" in Clause 5.1 dealing with the termination of an employment contract by the giving of a notice of termination or payment in lieu. This may be contrasted with the use of the neutral passive word "**cease**" in Clause 5.2 (above) where the employment contract automatically ends if the employer ceases to hold office as the President for any reason and without the need for a termination notice. In both instances the result is the same in so far as the claimants' employment contracts comes to an end.

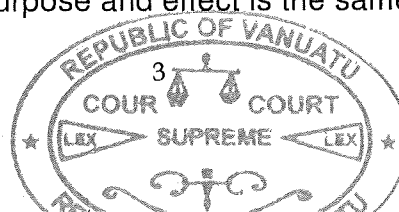
10. In some of the employment agreements however, a shorter Clause 5.2 is differently worded as follows:

Notwithstanding the provisions of the Official Salaries Act [CAP. 168] and any other clause in this contract, where the employee's employment ceases on 20 September 2009 (sic), the employer shall be paid his entitlements (if there is any) pursuant to the Employment Act [CAP. 160]".

(my highlighting)

11. The reference in the above shorter Clause to a specific cessation date which closely mirrors the last days of the President's term of office confirms the clear, direct and intentional linkage of the President's "*term in office*" and the duration of the claimants' employment contracts that contained the shorter Clause. Whatsmore the words in brackets "**(if there is any)**", implies that there may not be any "*entitlement*" payable at the end of the affected claimants' employment contracts pursuant to the Employment Act [CAP. 160].

12. Although the two versions of Clause 5.2 may be differently worded, in my view, their common intention, purpose and effect is the same and is not in doubt. It is,



to re-inforce the direct connection between the President remaining in office and the continued existence of each claimant's employment contract.

13. As to issue (1), defence counsel writes that "... *the employment came to an end by operation of a term of the contract*" and "*by reason of the death of the late President ... on 17 June 2017*". It was also "... (a) *common understanding of the parties that they would hold their positions as long as the late President was in office*". In other words, the Claimants' employment was: "... *for a specific period (ie. so long as the employer held office as President)*" [see: Clause 1.1 read with Clause 5.1(a) and 5.2].
14. Later, counsel submits, the late President was appointed to "... *the Office of the President of the Republic of Vanuatu for a term of 5 years (ie. September 2019)*" and after his appointment "*the President then employed the claimants into various positions within his office*". That is to say, the President personally chose and appointed the Claimants and was the designated contracted: "**Employer**" in each of their employment agreements. It was not the constitutional "*office of the President*" but its human incumbent who was the employer.
15. As for the longer Clause 5.2 defence counsel submits:

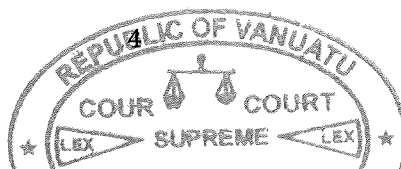
"(it) ... *was directly related to the late President's term in office and once that came to an end either naturally (by effluxion of time) or suddenly by death (as in this case), the Claimants' employment ceases*" and later:

"Clause 5.2 *was never intended that the Claimants in this case would continue in employment if the late President ceased to hold office*".
16. In opposing submissions, Claimants' counsel writes in respect of issue (1) that the Defendant had breached Clause 5.1(a) by orally terminating each claimant without notice or payment in lieu. In other words "... *the death of the President does not prevent the Office of the President from complying with the law of giving notice*". I would agree if the opening words of Clause 5.2 did not exclude Clause 5.1 by the use of the word "**notwithstanding**".
17. The longer Clause 5.2 is contained in the employment agreements of three (3) claimants namely, **John Sovan, Henry Nin and Verave Joe** and counsel lays emphasis on the wording in para. (a) and submits that the crucial phrase: "... (the) ... **employer ceases to hold office as the President** ..." has two (2) meanings:

"First: *cease to hold office as a result of the removal of (sic) misconduct or incapacity under Article 36 of the Constitution of the Republic of Vanuatu;*

"Second: *cease to hold office as a result of serving end of five year term of the President under Article 36 of the Constitution of Vanuatu*".

I disagree and would include a third meaning namely, where the President ceases to hold office as a result of his death.
18. In my view the phrase is simple, unrestricted and straight-forward and means what it says. There is no reason to limit its natural meaning by reference to Article



36 of the Constitution which refers *inter alia* to the President's "**removal**" which latter word is both pro-active and more specific than the actual expression used in the Clause namely, "**cease to hold office**" which is neutral and wide enough to include the President dying while in office as occurred in the present case.

19. In my view the longer Clause 5.2 is merely a specific instance of the general common law rule that:

"A contract of employment is discharged by the death of either the employee or the employer"

[see: Halsburys Laws of England (4th edn) reissue at para. 287].

20. More specifically, in Farrow v Wilson (1869) LR4 CP744, Willes J. said:

"Where ... personal considerations are the foundation of the contract, as in cases of principal and agent and master and servant, the death of either party puts an end to the relation; and, in respect of service after the death, the contract is dissolved, unless there be a stipulation express or implied to the contrary".

[as cited by the learned authors of Macken, McCarry & Sappideen's Law of Employment (4th ed) at p.235] with the following relevant addition or observation:

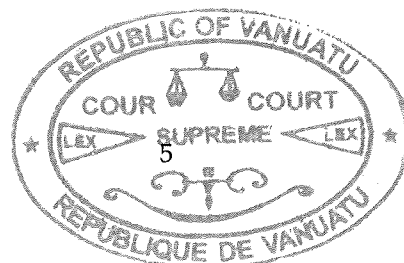
"Even where the employer is somewhat more remote from the employee, there can still be a "personal" contract, or at least a contract involving a close and confidential relationship between the parties".

21. The above extracts accurately and closely reflects the "*persona*" nature and highly "*confidential*" quality of the Claimants' employment with their "**Employer**" the President who is the constitutional "*Head of the Republic*" symbolizing "*the unity of the nation*" with an important role in the making of laws and in the exercise of the prerogative of mercy.
22. I also agree that the claimants are similar to "*political appointees*" or "*political advisers*" in so far as there is no security of tenure and the existence of a direct connection between the Claimants' employment and their employer continuing in office, as discussed in the Kalpokas case where the Court of Appeal said:

"The meaning and scope to be attached to the expression "political advisers" may be open to argument it is clear that none of the positions to which the respondents were appointed were intended to attract tenure. On the contrary the distinguishing feature of "political appointees" is that they hold office only for so long as the government to whom they render assistance.

It is to be noted that the letters of appointment do not purport to appoint the respondents as public servant. On the contrary, the letters specified that the provisions of the Official Salaries Act regulate the appointees' entitlement to salary, leave, allowances and other benefits and privileges. If the letters intended to appoint the respondents to the public service, this statement would be unnecessary, ...".

And later:



"The very notion of political appointees is that the office to which appointments are made are offices within the particular Government of the day, and that the holder of those offices will have particular allegiances to the Government and not to an opposing political party".

23. In the present case paraphrasing the above citations, it might be said that the Claimants are each "*Presidential appointees*" who owe a personal and confidential allegiance to the President and each holds his appointment for so long as the President remains in office.
24. In light of the foregoing, the answer to **Issue (1)** is: "**Yes**".
25. However, if I should be wrong in the above answer, then I am satisfied that the CEO of the President's Office namely, **Solomon Bethuel**, gave an oral notice to the Claimants terminating their employment with effect from 17 June 2017. However, the termination notice is non-compliant with the provisions of Section 49 of the Employment Act and therefore the Claimants are entitled to payment of an amount calculated pro-rata in accordance with Section 49(3)(b) of the Employment Act.
26. I turn next to consider the second issue concerning the Claimants' entitlement to "*severance*" under the Employment Act.
27. The common factual background to **Issue (2)** is the presence of Clause 3.1 in each claimants' employment agreement which reads:

"3. REMUNERATION, ALLOWANCES AND BENEFITS

3.1 The remuneration of the Employee shall be

*(a) a fixed salary as prescribed under the Official Salaries Act [CAP. 168] ("**the OSA**");*

(c) All those allowances and benefits as prescribed by the OSA –

3.2 (not applicable) ...

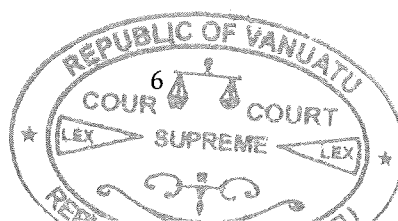
3.3 (not applicable) ...".

28. It is also common ground that included in the "*allowances and benefits*" for each claimant is an annual "**gratuity**" payable at the rate of one twelfth of the employee's annual salary multiplied by two (2) for each completed year of employment and pro-rata for each uncompleted year.
29. On this second issue Defence counsel writes:

"Our simple answer is: No, the claimants receiving gratuity, are not entitled to severance under Section 56 of the Employment Act.

We rely on the authority of Molisa v Republic of Vanuatu [1994] VU Law rp. 4 as authority for this proposition"

And later after a close analysis of the Molisa decision counsel submits:



"... the general provisions of the Employment Act do not apply in the situation where the special provisions of the OSA apply dealing with effectively the same subject matter ... a person receiving gratuity under the OSA is not entitled again to be paid severance under the Employment Act".

30. In this latter regard although the OSA post-date the Employment Act by one (1) day, it makes no mention of it in the context of the "*gratuity*" payable under its terms nor does it expressly exclude the payment of a "*severance allowance*" to the recipient of a "*gratuity*" as it could have for the avoidance of any doubt. By the same token, Section 55 of the Employment Act does not expressly include the receipt of a "*gratuity*" payment as one of its enumerated exclusions for the payment of a "*severance allowance*".
31. I accept the judgment in the Molisa case as far as it goes. I note however that the learned judge does not refer to the provisions of Section 57 of the Employment Act [CAP. 160] which impliedly reinforces and supports the judge's view that:

"the payment (of a "gratuity") under the Official Salaries Act is in the nature of a severance allowance. The only difference between the severance allowance and the gratuity is that it would appear in practice the gratuity is paid on an annual basis whereas severance allowance is paid at the termination of the employment. The history of the payment paragraph E of Part 2 of the Official Salaries Act provides support to this view".

And later he concludes:

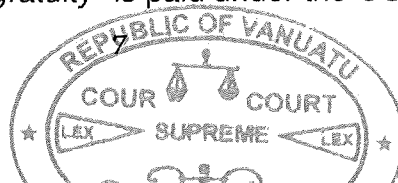
"... the provisions of the Official Salaries Act override the general provisions of the Employment Act and the Applicant has no entitlement to the payment of severance allowance for that period during which she was in receipt of the benefits payable pursuant to the Official Salaries Act".

32. In reaching that conclusion the learned judge said that:

"... the basic (unidentified) inconsistencies between the OSA and the Employment Act are in my view not capable of reconciliation as the OSA provided clearly greater benefits for identifiable posts within the service of the Republic of Vanuatu and Government. It is not my view that Parliament intended that those with the specifically nominated posts should be paid severance pay twice".

(my highlighting)

33. Although I accept the learned judge's conclusions about "*double – dipping*", I do not necessarily agree that there is an irreconcilable inconsistency between the "*gratuity*" payment under the OSA and the payment of a "*severance allowance*" under the Employment Act.
34. In my view, the relevant provision of the Employment Act assumes that the two (2) payments can co-exist, because, the severance allowance which only becomes payable "*at termination*" [**see:** Section 56(4)], is to be reduced by "*any gratuity granted by the employer*" and which is paid annually during the course of the employee's employment [**see:** Section 57(1)(b)(i)]. In other words, the ultimate accounting and actual payment of a "*severance allowance*" occurs at the termination of the employment and not during the duration of the employment contract which is when the "*gratuity*" is paid under the OSA.



35. Claimants' counsel in seeking to support a "severance" payment and without distinguishing the Molisa decision (*ibid*) which is heavily relied on in defence submissions, writes (in reliance on the decision in Attorney General v Kalpokas [1999] VUCA 4):

"In the present case the staff were appointed by late President Baldwin Lonsdale as political appointees who are doing public services work under the Vanuatu Government which means they are doing the public service of the Republic of Vanuatu and they are remunerated under Official Salaries Act ..."(whatever that means).

36. Counsels' oral submissions are more helpful where she says under the employment contracts, each claimant is entitled to be paid his/her "entitlements" under the shorter Clause 5.2 because their contracts ceased or were prematurely terminated or cancelled, before the end of their respective terms and beyond each claimant's control. In particular, counsel refers to the highlighted passage in the shorter Clause 5.2 which reads:

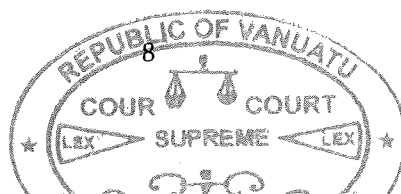
*"Notwithstanding the provisions of the Official Salaries Act and any other clause in this contract, **where the employees' employment ceases on 20 September 2009 (sic), the employee shall be paid his entitlements (if there is any) pursuant to the Employment Act**"*.

(my highlighting)

The Employment Act provides for many employee "entitlements" including: "remuneration"; "hours of work and overtime pay"; "annual leave and sick leave"; "termination of contract by notice or payment in lieu"; and a "severance allowance".

37. However in accordance with the above highlighted passage, payment of these "entitlements" is conditional on the employee's employment ceasing on 20 September 2019. Even then, payment of any entitlement is still dependent on it being due and payable at the time of the cessation of the employment contract.
38. In other words, if the employee's employment ceases for whatever reason before 20 September 2019 (which is what occurred) then, no entitlement is payable under the above shorter Clause 5.2. Furthermore no "entitlement" is payable if it has not accrued or is not due under the Employment Act on the designated cessation date, 20 September 2019.
39. Be that as it may, Section 56 of the Employment Act sets out the pre-conditions to an employee's entitlement to receive a "severance allowance" at the termination of his/her employment contract. These are, for present purposes:
- (a) 12 months continuous employment; and
 - (b) The employer terminates the employee's employment.

It is common ground that all claimants (except Steve Moffet) satisfy pre-condition (a), but, the parties differ on the answer to pre-condition (b). The Claimants say their employment was orally terminated after the President's death, whereas, Defence counsel says termination occurred "automatically" as a result of Clause 5.2 being triggered by the President's death ie. by operation of law.




40. After careful consideration of the competing submissions and the decision in Molisa's case and the Court's clear answer to Issue (1), I am satisfied that the equally clear answer to Issue (2) is: "No".
41. If I should be wrong however in that view, then my determination is that any "severance allowance" to which the qualified claimants are entitled to be paid must be reduced by the total amount of annual "gratuity" (if any) that has been paid to each claimant before his/her termination. In this regard the parties are directed to agree and to calculate the amount(s) payable to each claimant in accordance with Section 56 and reduced by the amount of any "gratuity" paid in accordance with Section 57(1)(b) of the Employment Act.
42. For completeness, I record that the Claimants are entitled to be paid remuneration on a "quantum meruit" basis for the undisputed two (2) weeks that each worked at the request of the Council of Ministers "... in facilitating the body of the late President to his home island" in Torba for the performance of traditional mourning rites and ceremonies and eventual burial. Again. The calculation of these amounts is left to counsels to agree and compute for each claimant.
43. Finally, in the event that there is no appeal filed by either party within 14 days, counsels are directed to file a consent judgment by 26 September 2019 which includes:
- (1) A "pro-rata" payment in accordance with para. 25 (above);
 - (2) A "severance allowance" (if any) which is payable to each claimant in accordance with para. 41; and
 - (3) A "quantum meruit" amount payable to each claimant in accordance with para. 42.

Such consent judgment shall include "interest" of 5% per annum on the above sums calculated with effect from 09 November 2017 until fully paid up. The Claimants are also entitled to standard costs to be taxed if not agreed.

DATED at Port Vila, this 12th day of September, 2019.

BY THE COURT


D. V. FATIAKI
Judge.

