

BETWEEN: Tony Kanegai
Claimant

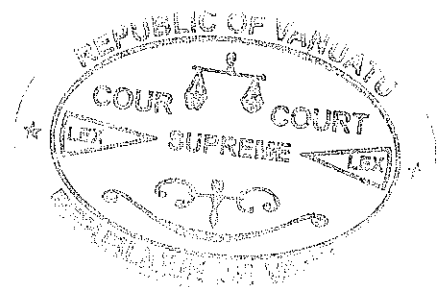
AND: Telecom Vanuatu Limited
Defendant

Date: 24 June 2019
Before: Justice Stephen Felix
Counsel: Mr James Tari for the Claimant
Mr John Malcolm for the Defendant
Date of Decision: 13 January 2021

JUDGMENT

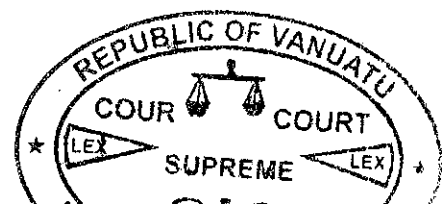
A. Introduction

1. This is an employment case, with the allegation being that the employee has not been paid his full entitlements upon leaving the service of his employer.
2. The case was heard in June 2019. The Judge hearing the case reserved judgment. However, by the time the Judge resigned from the judiciary, no judgment had been published. Counsel were subsequently consulted as to how best to finalise the matter. It was agreed another Judge should review all the available material, which included the pleadings, sworn statements, notes of evidence, and final submissions filed by both counsel. A decision could then be issued based on this material without the matter having to be re-heard.
3. This decision accords with what counsel agreed was the best way forward.



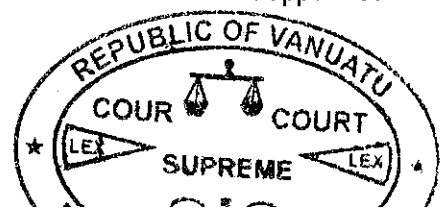
B. Background

4. Telecom Vanuatu Limited ("TVL") employed the Claimant, Mr Tony Kanegai, between 31 August 1989 and 25 June 2015.
5. The employment commenced with a letter of employment and was subject to TVL's then Internal Regulations. The Internal Regulations set out the terms and conditions that applied to both employer and employee in much the same way as a contract of employment.
6. Of relevance to this claim are the following:
 - Cl 6: Standard Working Hours, which stipulated that the weekly hours of work consisted of 36.25 hours or 7.25 hours a day, 5 days a week.
 - Cl 13: Overtime, which provided that any time worked in excess of the 36.25 hours per week in any one month was to be paid as time and a half. It also set out that 7.25 man hours were equal to 1 leave day. Such leave had to be taken within the financial year and was not able to be accumulated from one year to the next.
 - Cl 32: Registration, which set out that employees were to give notice to Management in accordance with s. 49 of the Employment Act No, 1 of 1983.
7. By email dated 11 July 2011, TVL staff were advised that the weekly hours had been increased to 40 hours per week. The morning and afternoon opening hours were set out, and they were to take immediate effect.
8. TVL's Internal Regulations were subsequently also amended, no doubt partly due to the change of working hours. According to Ms Valerie Dinh they came into effect as from 26 November 2012, and had the imprimatur of the Commissioner of Labour and Employment Services – both matters were unchallenged.
9. This second version of the Internal Regulations, inter alia, set out the new work hours in accordance with the 11 July 2011 e-mail at clause 7. Overtime was dealt with in clause 14, and set out that overtime was "...anytime worked in excess of the 44 hours per week based on



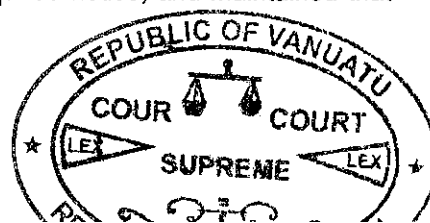
that particular month". It was to be calculated at 125% of the hourly rate for the first 4 hours, and 150% for any hours in excess of that. Again, there was provision for converting overtime hours to leave at 8 hours per day's leave, which leave was to be taken in the financial year and which could not be accumulated from one year to the next. The resignation provisions set out in clause 33 remained the same.

10. Mr Kanegai, in his written evidence stated that in January 2015 the TVL CEO Mr Prakesh Bheekhoo spoke to him about some customer complaints. Mr Bheekhoo blamed Mr Kanegai for the complaints and first suggested that Mr Kanegai take early retirement, or else he would be disciplined and terminated due to incompetence. Mr Kanegai further stated that this was most concerning, as he very much valued his reputation in the telecommunications industry, built up over the past 30 years.
11. Mr Kanegai went on to say that Mr Bheekhoo made oral promises – that if early retirement was accepted, TVL would pay Mr Kanegai's remuneration and entitlements in full, including the 3 months' notice he was required to be given. Mr Kanegai stated that he had agreed to consider the proposal.
12. There was a second meeting until Mr Bheekhoo a few days later at which Mr Kanegai accepted early retirement. The matter was delegated to another TVL employee to do the necessary calculations and paper work. However, despite Mr Kanegai pushing for progress through February 2015 that staff member left TVL's employ without completing the work he had several times promised he would attend to.
13. In May 2015, Mr Kanegai again met with Mr Bheekhoo who promised it would all be sorted out and completed by the end of May that year.
14. On 19 June 2015, Mr Kanegai met with Ms Dinh who advised that she had prepared all the papers for Mr Bheekhoo to sign. She advised the package included 3 months' notice pay and that the final amount of VT 5.8 million was to be paid by installments over 3 months. Mr Kanegai stated that he was not content with that and told Ms Dinh that he would discuss the matter with Mr Bheekhoo once he received the written offer.
15. This evidence was not dealt with orally at trial by either counsel, nor was there any cross-examination of either Mr Kanegai or Ms Dinh relating to this. Mr Bheekhoo did not appear at



trial, or provide a sworn statement of evidence. This state of affairs is most unhelpful to a Court attempting to fairly resolve the dispute – both parties have been let down.

16. On 25 June 2015, Mr Kanegai was given a letter of the same date signed by Mr Bheekhoo and headed: "Re: Early Retirement Proposal". It set out TVL's proposal for Mr Kanegai's early retirement effective from 30 June 2015. It took into account outstanding leave due, severance, VNPF contributions and severance already part-paid in arriving at a final payment due to Mr Kanegai of VT 5,095,899. This amount was to be settled by 30 June 2015. There was no provision for payment of salary in lieu of notice.
17. Mr Kanegai stated that he noticed the letter did not cover the 3 months' notice pay he had been promised, and he said he asked Ms Dinh about that. He stated that Ms Dinh responded that was the decision Mr Bheekhoo had taken when deciding that the final payment was to be made by way of a lump sum.
18. Mr Kanegai stated further that he challenged Mr Bheekhoo about the lack of the 3 months' notice pay when he met with Mr Bheekhoo the next day. Mr Kanegai stated that Mr Bheekhoo replied it was done to avoid setting a precedent and also because the TVL Board had not agreed to pay it. Mr Kanegai responded that he would continue to pursue the 3 months' notice pay.
19. What is related in paragraphs 17 & 18 above regrettably suffers from the same issues as earlier set out in paragraph 15 above.
20. By letter dated 29 June 2015, Mr Kanegai formally accepted TVL's early retirement proposal.
21. On 1 July 2015, details of the final settlement were recorded on a document signed by Mr Kanegai and presumably Ms Dinh on behalf of TVL. The amounts due and owed are set out in a table, with the final figure being VT 5,095,859. Mr Kanegai signed and dated the document next to a statement stating "Received in full and settlement by Employee". The cheque made payable to Mr Tony Kanegai and dated 30 June 2015 is also in evidence.
22. On 21 August 2015, the Commissioner of Labour, on Mr Kanegai's behalf, wrote to TVL seeking redress for the 3 months' notice pay withheld by TVL. The Commissioner pointed to section 49 of the Employment Act which deals with such required notice, and maintained that



Mr Kanegai was entitled to be paid VT 750,000 for the lack of notice given to him as required by the law.

23. Mr Bheekhoo responded by letter dated 27 August 2015. He maintained in his letter that Mr Kanegai had agreed to waive his entitlement to payment in lieu of notice in order to get a lump sum payment. Mr Bheekhoo further ventured that Mr Kanegai could be paid the sum requested if he worked out his notice.

24. Mr Kanegai's Claim was filed in the Supreme Court on 28 June 2018. TVL's defence was filed on 12 July 2018.

25. Attempts between counsel to settle the claim failed and hence the trial was required.

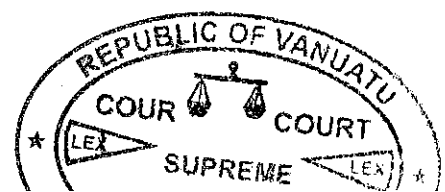
C. Issues

26. Clearly, whether Mr Kanegai is entitled to 3 months pay for the lack of notice must be determined. It is not disputed that if appropriate, the amount is VT 750,000.

27. As part of the evidence in support of this aspect of the claim, the evidence of Mr Jimmy Jack was tendered. It was objected to on the basis of lack of relevance. The trial judge ruled it was admissible. However, looking all at the evidence before the Court, I consider that Mr Jack's dealings with TVL were unique to Mr Jack's circumstances. Similarly, the fact that Ms Lilly Louis Toura was given 2 months' pay in lieu of notice does not assist Mr Kanegai – her situation may well have also been quite different to that of Mr Kanegai. For the purposes of my arriving at a decision in this matter, I have paced this evidence to the side and given it no weight.

28. For the first time, the matter of overtime was raised in the Claim. It is disputed that any payment in respect of that is owing. Accordingly, this issue is also required to be determined; and if it is due, in what amount.

29. An argument presented by Mr Malcolm to the presiding Judge mirrored the response made by Mr Bheekhoo in his response letter to the Commissioner for Labour, namely that Mr Kanegai was not entitled to proceed with his Claim as he had accepted the payment on 25 June 2015 in "full and final settlement". I reject that argument completely. Section 18(1) of the Employment

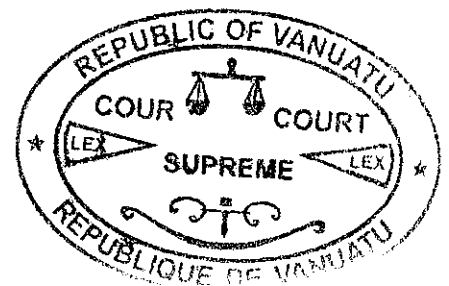


Act specifically permits claims to be made during the life of contracts of employment, and even after such contracts have ended, where settlement on this basis was entered into.

30. Finally, counsel spent some time arguing whether the claim was out of time. Section 20 of the Employment Act accordingly has application. It precludes the commencement of actions for the recovery of remuneration after 3 years has passed from the end of the period to which the remuneration relates. Given that Mr Kanegai's employment with TVL ceased on 30 June 2015, any claim for the remuneration of his benefits had to be commenced by 30 June 2018. Accordingly, Mr Kanegai's Claim is in time, just. Therefore, I do not need to further address this aspect.

D. Discussion

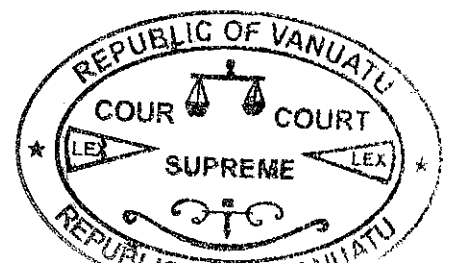
31. It is undisputed that Mr Kanegai's employment ended on 30 June 2015. He claims he was not given 3 months pay in lieu of notice prior to that, although the evidence is that "negotiations" regarding his early retirement were on-going for some time prior to that date. Indeed, the only evidence relating to when the issue was first raised comes from Mr Kanegai himself, and he refers to discussions in January and early February 2015 which led to his accepting the proposal in February 2015. He continued to be paid from then until end-June.
32. Section 49 of the Employment Act has application, as although the situation was not a termination of employment, TVL's Internal Regulations invoked the same notice requirements in the case of an employee resigning. I note that s.49 of the Employment Act provides for notice to be given either in writing or orally.
33. In my view TVL effectively gave Mr Kanegai more than 3 months' notice of his ceasing employment, through the discussions had in January and February 2015 with Mr Bheekho.
34. Although, Mr Kanegai pointed repeatedly to oral promises allegedly made, there is no concrete independent evidence to support that. It is in my view, more likely than not that in order to be paid the full amount owing in one lump sum that Mr Kanegai forewent his rights to 3 months' notice or pay in lieu.
35. Accordingly, this part of Mr Kanegai's Claim fails.



36. The second aspect of the Claim deals with overtime. In November 2012, the hours TVL staff were required to work were lengthened from 32.25 hours a week to 40 hours per week. As well, the overtime calculations set out in TVL's Internal Regulations were amended to match the provisions in the Employment Act. They were approved by the Commissioner for Labour.
37. The change was implemented without demur by TVL's staff. The first inkling TVL had that there was an issue with the change of working hours came when Mr Kanegai's Claim was filed in the Supreme Court almost 3 years after he had left TVL's employ.
38. There is no impediment in law to TVL altering the terms and conditions of employment. Staff can object if they so choose, or negotiate better remuneration if warranted. Nothing of that sort appears to have followed the change of working hours.
39. On that basis alone Mr Kanegai's claim for overtime has no merit.
40. However, his claim is circumspect further due to the manner in which the claim is advanced. Mr Kanegai does not rely on TVL's second Internal Regulations to calculate what he says is owing, despite the fact they were in operation at the time, not the earlier version of the same. Had he applied the correct Internal Regulations, firstly the claim would have been for a lesser amount; and secondly, it may have had a better footing. To make the claim under the outdated TVL Internal Regulations further reduced the merit of the claim.
41. Additionally, Mr Kanegai has ignored the issue of overtime being required to be taken in the financial year it was due. He has also ignored the conversion of overtime to leave days.
42. The whole issue of overtime was misconceived, and accordingly this aspect of Mr Kanegai's claim also fails.

E. Result

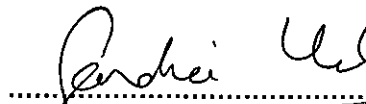
43. The claim is dismissed as unmeritorious.
44. TVL is entitled to costs. There is a signaled issue in relation to costs in the correspondence between counsel when attempts were made to resolve the case.



45. Counsel are invited to file written submissions as to costs within 14 days for the Court to consider on the papers. If counsel wish to be heard, the submission should make reference to that so that a date can be set.

DATED at Port Vila this 13th day of January, 2021.

BY THE COURT


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Justice G.A. Andrée Wiltens

