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

CIVIL APPEAL CASE No. 54 of 2012

IN THE MATTER OF THE EMPLOYMENT ACT [CAP 160]

BETWEEN: WILCO HARDWARE HOLDINGS LIMITED
(Appellant)

AND: ATTORNEY GENERAL
(Respondent)

Coram: Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Robert Spear
Hon. Justice Dudley Aru
Hon. Justice Mary Sey

Counsel: Mr. G. Blake and Mr. N. Morrison for the Appellant
Mr. A. Obed for the Respondent

Date of Hearing: 17th April 2013
Date of Judgment: 26th April 2013

JUDGMENT

1. This appeal arises as a result of the decision by Fatiaki J. delivered on 30th November 2012 whereby the Judge upheld the respondent's claim and declared that a severance allowance payable under Section 56 of the Employment Act is to be calculated at the rate of *"1 month's remuneration"* for every preceding 12 months of continuous employment.

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2. The grounds of the appeal are that the learned Judge erred in law in failing to find that, pursuant to the Act as amended by Act No.33 of 2009, with effect from 26 October 2009, a severance allowance payable under Section 56 of the Act is to be calculated at the rate of half a month's remuneration for every 12 months of continuous employment prior to 26 October 2009 and at the rate of one month's remuneration for every 12 months of continuous employment beyond 26 October 2009.

3. The facts of this case are Agreed Facts as follows:

> *"1. **Elking Vora** commenced employment with Wilco on 8 March 2004 and was terminated on 17 February 2010;*
>
> *2. Wilco calculated his severance allowance at the rate of half a month's remuneration for every year of employment prior to 26 October 2009;*
>
> *3. **Tom Carlo** commenced employment with the ANZ Bank on 22 February 2000 and was terminated on 30 December 2009*
>
> *4. The ANZ Bank calculated his severance allowance at the rate of half a month's remuneration for every year of employment prior to 26 October 2009;*
>
> *5. **Glenda Laban Vatoko** commenced employment with the ANZ Bank on 11 November 2002 and she resigned in good faith on 3 December 2009;*
>
> *6. The ANZ Bank calculated her severance pay at the rate of half a month's remuneration for every year of employment prior to 26 October 2009."*

4. All the employees were paid severance allowances computed under the old rate for the period of employment up to 26 October 2009 and at the new rate for the period of employment after 26 October 2009.

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5. The issue in contention before the Supreme Court was whether or not the Act as amended by Act No.33 of 2009 is retrospective in its intent, effect and operation.

6. The appellant's counsel in his written submissions and during the hearing before us narrowed the focus of the appeal to three issues formulated thus:

   (a) Whether the interpretation of the Employment Act as amended by Act No. 33 of 2009 upheld by Fatiaki J. attracts the "well known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested....."

   (b) In the event that the above principle did or should have applied, whether "such a construction appears very clearly or by necessary and distinct implication in the Act....."

   (c) Did Fatiaki J. err in concluding at [38] that adoption of a pre-October 2009 rate for calculating severance allowance is tantamount to reviving the repealed rate after its repeal?

7. On the first issue, the appellant's counsel submitted that any consideration of the issues "required the trial Judge to look beyond the import of Section 11(1) (c) of the Interpretation Act." In support of this argument counsel cited the principle of statutory interpretation stated by Dixon C.J. in Maxwell v Murphy (1957) 96 CLR 216 at 267, which case concerned an amendment to existing legislation:-

   "The general rule of the common law is that a statute changing the law ought not, unless the intention appears

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with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer, impose or otherwise affect, rights or other liabilities which the law had defined by reference to past events"

8. Counsel further submitted that the principle "has application beyond strictly accrued rights under the Interpretation Act" and that Lord Brightman in his advice to the Privy Council in Yew Bon Tuw v Kenderaan Pas Mara [1983] 1 AC 553 at 558 stated that:

> *"Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty or attaches a new disability, in regard to events already passed."*

9. On the second issue, the appellant relied on the Court of Appeal decision in Burns Philp (Vanuatu) Limited v Maki [1989] VUCA 4 which, by parity of reasoning, was argued to support the conclusion that the amendment had a retrospective effect.

10. The respondent, on the other hand, contended that in order to calculate the severance payment under the formula in Section 56 of the Employment Act, the commencement of the period of "continuous employment" referred to in Section 54 includes the period before 26 October 2009. The respondent further argued that the right or entitlement to a severance allowance under one or other of the qualifying events under Section 54 crystallizes or becomes payable only at the end of an employee's employment.

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It is then required to be quantified at the prevailing rate whatever that may be, and irrespective of when the rate was fixed by Parliament.

11. A starting point in determining the issues raised by the appellant is Section 54 of the Employment Act. Subsection (1) 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.*

12. It is clear from the above provisions 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

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employer has a mandatory duty to pay severance allowance to the employee calculated under Section 56 which deals with the quantification.

13. Section 56 as amended by Act No.33 of 2009 now reads:

"*(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 – 1 months remuneration;

(b) for every period less than 12 months, a sum equal to 1/12 of the appropriate sum calculated under paragraph (a) multiplied by the number of months during which the employee was in continuous employment.

(3) .....
(4) .....
(5) .....
(6) .....

(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."

14. It will be noted that in case of continuous employment longer than 12 months, Section 56 does not specify the commencement of the time period to which the calculation of the severance payment is to be applied. The duration of the time period is specified in Section 54 as the period of "continuous employment commencing before, on or after the date of commencement of this Act." The words "commencing before, on or after the date of

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commencement of this Act" were added by the Employment (Amendment) Act No 8 of 1995.

15. It is clear that the intention of Parliament in amending Section 56 of the Employment Act was to increase the amount of severance allowance payable to an entitled employee from "*half a month's remuneration*" for every period of 12 months continuous employment to "*1 month's remuneration*". There is no ambiguity in the meaning and effect of Section 56 as amended by Act No.33 of 2009. The emphasis in subsection (2) thereof is on continuous employment. The Explanatory Note to the said Act specifies that 1 month's salary is to be calculated by the number of years worked which supports this conclusion. The question as to whether an employee commenced work before or after 26 October 2009 is irrelevant as what is important for the calculation of severance payment is the number of years worked. A statute is not retrospective merely because it affects rights; nor is it retrospective merely because part of the requisites for its action is drawn from time antecedent to its passing. See R v. St Mary Whitechapel (1848) 12 QB 120; See also Halsbury's Laws of England (4th ed.) Vol. 44 at para. 921.

16. Parliament has in clear and unambiguous terms expressed its conclusion that where an employee at the termination of his or her employment is entitled to a severance payment under Section 54 it will be at the rate prescribed at the date of termination by Section 56 for the full period of "continuous employment." In so far as the appellant's grounds of appeal argue that Parliament has not expressed a clear intention that the new rate for severance payments introduced in the amending Act will apply to the entire period of "continuous employment" referred to in Section 54, those grounds must fail.

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17. The appellant's submissions refer to Section 11 (1)(c) of the Interpretation Act, but do not discuss the application of that provision which reads:

Section 11 - *Effect of repeal*

(1) Where any Act of Parliament repeals any Act, the repeal shall not –

(c) Affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed.

This provision addresses the type of situation which arose in this case when the amending Act (read with another amending Act No. 31 of 2008) came into force, the terms of which expressly deleted the former provision and substituted the new period of 1 month. For the purpose of *Section* 11 (1) (c), the deletion of the former provision constituted its repeal. The question which *Section* 11 (1) (c) poses is whether at 26 October 2009 employers under the provisions of the Employment Act, as it stood prior to 26 October 2009, had acquired or accrued a right or incurred a liability to pay severance at the repealed rate for that part of the continuous period of employment that preceded the commencement of the amendment. The answer to this question lies in the terms of Section 54 and 56 which we have already discussed. For the purposes of the law, a right is not acquired and does not accrue until it actually vests in the holder of the right, and correspondingly a liability is not incurred until it is capable of enforcement.

18. Under Section 56 no such right or liability arises in an employer unless and until one of the events mentioned in Section 54 happens so as to trigger the entitlement of an employee to a

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severance payment. The fact that such an event may never occur even where an employee has been in continuous employment for more than 12 months illustrates this. For example, the termination of the employment may happen because the employer ceases to exist as happened with the Vanuatu Maritime Authority (see Bernard v. Republic of Vanuatu [2012] VUCA 4, CAC No. 5 of 2012) or because the employee is dismissed for wilful misconduct or dies. No right or liability within the scope of section 11 (1) (c) is acquired, accrued, or incurred unless and until one of the events in section 54 (1) happens.

19. In the present case the periods of continuous employment of each of Elking Vora, Tom Carlo and Glenda Laban Vatoko terminated after 26 October 2009. No right or liability had been acquired, or had accrued or been incurred under Sections 54 and 56 until their periods of employment terminated. Section 11 (1) (c) of the Interpretation Act is in our opinion fatal to the appellant's case. Although the appellant's submission invites the Court "to look beyond Section 11 (1) (c)" to the rule of construction referred to by Dixon C.J. in Maxwell v Murphy, the appellant gains no support from that case as Parliament has in our opinion clearly expressed its intention. The appellant's reliance on Yew Bon Tew v Kenderaan Pas Mara suffers the same fate as the language used in Sections 54 and 56 is clearly against the construction for which the appellant contends.

20. The second issue raised by the appellant places reliance on the earlier decision of this Court in Burns Philip (Vanuatu) Limited v Maki. We do not consider that decision assists the appellant. The issue in that case was whether severance was payable in respect of that part of the period of continuous employment of the respondent before the commencement date of the Employment

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Act. The Court of Appeal referred to the transitional provision of the Act in Section 80 that provided that the Act applied to all contracts of employment in force at the date of the commencement of the Act. This provision made clear that the Act would apply to employment contracts already existing when the Act commenced. Section 54 of the Act at that time read:

> *"(1) Subject to section 55, where an employee has been in continuous employment for a period of not less than 12 months with an employer and the employer terminates his employment or retires him on or after his reaching the age of 55, the employer shall pay severance allowance to the employee".*

The Court of Appeal held that only the period of continuous employment that occurred after the commencement of the Act has to be taken into account for the calculation of severance, as to include the period before the commencement would be to give the Act a retrospective effect. Parliament had not by "clear language" expressed an intention that the Act was to apply to employment before the Act commenced.

21. The transitional provisions in Section 80 are no longer part of the Employment Act as they are no longer necessary. An amendment to Section 54 of the Act in 1989 made it clear that the severance provisions of the Act continued to apply to contracts of employment entered into before the commencement of the Act. Then came the Employment (Amendment) Act No 8 of 1995 which introduced the words "commencing before, on or after the date of the commencement of the Act" which now qualify the preceding words "continuous employment of an employer for a period of not less than 12 months....." The effect of the 1995 amendment was to extend the operation of the Act of any part of

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the continuous employment that occurred before the commencement of the Act, and the reasoning of the Court of Appeal in Burns Philip can no longer apply. We agree with the conclusion of Coventry J. in Hotel Equities South Pacific Limited v. Commissioner of Labour [2003] VUSC 136 that "by adding the words 'before, on or after the date of commencement of this Act' the legislature clearly was saying to qualify for severance it did not matter when the employment started".

22. The third issue raised by the appellant is whether Fatiaki J. erred in concluding that adoption of a pre October 2009 rate for calculating severance allowance is tantamount to reviving the repealed rate after its repeal. The observation of the judge to this effect at the conclusion of his judgment assumes the correctness of the interpretation he had already placed on the Act and is not part of the essential reasoning for his decision. In any event we do not understand the observation to be one based on an erroneous application of section 11 (1)(a) of the Interpretation Act. The judge's observation does not constitute an appealable error in his reasoning.

23. For these reasons the appeal is dismissed. The appellant must pay the respondent's costs of the appeal at the standard rate.

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

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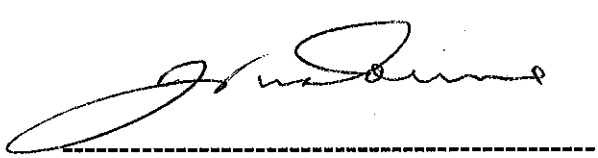
the deceased's employee's estate. This appeal does not turn on this point but it is one which has caused us some disquiet. That is because the only provision that could arguably deal with the situation where an employee dies during the course of his employment is S.54 (1) (e):

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.

Dated at Port Vila this 26th day of April 2013.

FOR THE COURT



Hon. Justice John von Doussa