

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Appellate Jurisdiction)

Civil Appeal Case No. 40 of 2014

BETWEEN: WALTER KALAMBAE
Appellant

AND: AIR VANUATU (OPERATIONS) LIMITED
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice Bruce Robertson
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Dudley Aru*

Counsel: *Mr. J. I. Kilu for the Appellant
Mr. E. Nalyal for the Respondent*

Date of Hearing: 10 November 2014

Date of Judgment: 14 November 2014

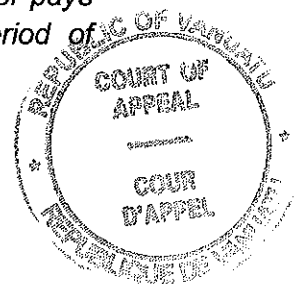
JUDGMENT

1. The facts in this appeal are undisputed and may be briefly stated. The appellant worked for 22 years with the respondent ("AVOL"). He maintained a satisfactory relatively trouble-free employment record and was looking forward to retiring in a couple of years.
2. However without prior warning or notice and by a letter dated 13 February 2013 the appellant's employment with AVOL was brought to an end. The letter reads:

"Dear Walter,

Pursuant to Section 49 – "Notice of Termination of Contract" – under the Employment Act of the Laws of the Republic of Vanuatu, which states in part:-

- *49(3.a) – where the employee is remunerated at intervals of not less than 14 days, shall not be less than 14 days before the end of the month in which the notice is given:*
- *49(4) – Notice of termination need not be given if the employer pays the employee the full remuneration for the appropriate period of notice specified in subsection (3).*



Air Vanuatu (Operations) Ltd. ("Air Vanuatu") hereby gives you notice of termination of your employment.

In final settlement and whilst acknowledging Section 49(4), Air Vanuatu elects to make the payments of three (3) months salary in lieu of such notice.

Accordingly, you are no longer employed by Air Vanuatu, effective immediately, 31 March 2013.

Your outstanding entitlements, including your three (3) months' salary in lieu of notice, is being deposited to your designated bank account in full and final satisfaction of all claims being:-

- 1. All Outstanding Salary*
- 2. Severance Payment*
- 3. Three (3) Months' In Lieu of Notice, and*
- 4. All Outstanding Annual Leave/Holiday Pay*

Please immediately return all Air Vanuatu property in your possession, including Uniforms, Security Identification Cards etc.

If for any reason in the future, you have to enter Air Vanuatu Offices and/or Property, could you please notify the undersigned for prior approval for such entry. If you fail to do so and do enter Air Vanuatu Officer and/or Property without authority, you may be prosecuted or sued for trespass.

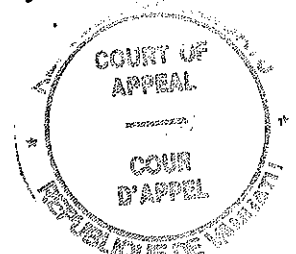
You will be provided details as to the payment made in due course.

On behalf of Air Vanuatu (Operations) Limited we take this opportunity to thank you for your loyalty with the company and for the service you have provided during your employment.

Yours faithfully,

*Reynolds Boeson
Manager Human Resources."*

3. The appellant's employment contract also had a termination clause in it that provided for termination by either party to the contract "... for any reason by either party giving the other a month notice or one month salary in lieu of notice ..."
4. No reason(s) were given in the letter terminating the appellant's employment with AVOL other than the solitary reference to **Section 49** of the **Employment Act**.



5. After unsuccessfully seeking reason(s) for his termination, the appellant issued a Supreme Court claim on 23 January 2014 seeking monetary entitlements under the Employment Act, common law damages, interest and indemnity costs.
6. No-where in the claim is there any clear statements that the appellant believed he had been dismissed for "*serious misconduct*" and no relief or declaration was sought for the same. Instead, the respondent bemoans the absence of any reasons for his termination and the failure to give him "*any opportunity to answer any charges against him prior to his termination in total breach of this (unidentified) constitutional rights to natural justice and the provisions of the Employment*" (see: **para. 11** of the claim).
7. In its defence AVOL specifically denies terminating the appellant's employment for "*serious misconduct*" [see: **para 16 (b)**] and although there are statements that purport to justify the appellant's termination after the event, the undeniable fact remains that none was provided in the termination letter which binds AVOL.
8. That was the unsatisfactory state of the pleadings before the trial judge at trial.
9. In a reserved decision the trial judge identified 2 fundamental issues for determination as follows:

- (1) *Was the termination of contract unjustified?*
- (2) *Was Mr. Kalambae entitled to the monthly salary increment or not?*

After a full and careful consideration of the relevant provisions of the Employment Act including Sections 48 to 53, the trial judge expressed the view (at **para 36**) that:

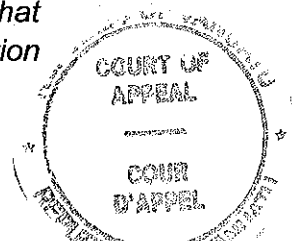
"the plain meaning of section 49 is that either party, without any justification or reasons given, may give notice to the other party at any time, orally or in writing, to terminate an employment contract".

Later in the judgment he observed (at **para 40**):

"What is also obvious from the scheme of the Act, in my view, is that where an employer complies with the conditions in Section 49 such a termination can never be held to be an unjustified termination."

And finally, in conclusion (at **para. 50**):

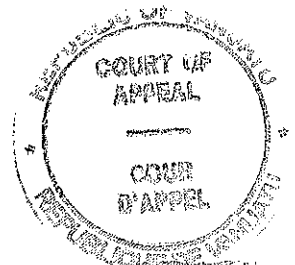
"... the Vanuatu Parliament has struck the balance between the interests of employers and employees in a different way. It has effectively decreed that an employee's employment may be terminated with no justification



whatever and with no obligation to give reasons, unless serious misconduct is alleged, in which case some particular obligations arise, as set out in Section 50. It is entirely a matter for the Parliament to enact legislation setting the rules for termination of employment. Once it has done so, all employees are deemed to know the law and the courts must uphold it".

10. The appellant's claim was dismissed with costs in favour of AVOL to be taxed if not agreed.
11. Even accepting that there had been discussions between the Finance and Human Resources Managers of AVOL and the appellant about his work performance prior to the termination letter, the trial judge did not accept the appellant's submission that what had occurred was a "... closet dismissal for serious misconduct in the guise of a termination on notice. There has been no suggestion that Mr. Kalambae engaged in anything coming close to misconduct let alone serious misconduct" (see: para 42).
12. The appellant appeals against this specific finding in his first ground of appeal. Counsel's submission in the Supreme Court did not directly address this matter and, indeed, **paragraphs 8 and 17(c)** of the submission accepts that the respondent's termination letter disclosed no reason(s) at all for his sudden termination.
13. The appellant's written submissions on the appeal are slightly more focused in referring to the evidence and the cross-examination of AVOL's Finance Manager, but the trial judge had fully canvassed the evidence and accepted that even though there had been earlier discussions about the appellant's performance "... there were, curiously, not overtly linked to the decision to terminate. Mr. Bebe (the Finance Manager) accepted in cross-examination that there was simply no discussion about that".
14. Having considered the matter we are not satisfied that the challenged finding was either unsupported by the evidence or constituted an error on the part of the trial judge who saw and heard the witnesses at the trial.
15. The first ground of appeal is accordingly dismissed.
16. The second alternative ground of appeal is summarized by appellant's counsel in his submissions as follows:

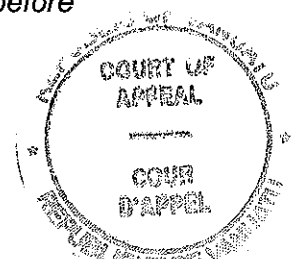
"The appellant says that even a so-called justified termination on notice under Section 49 would still require the respondent to have to give the appellant the opportunity to answer the charges against him prior to his termination".



17. We would observe at the outset that this ground of appeal contains several unwarranted assumptions in so far as **Section 49** of the **Employment Act** nowhere requires a termination notice to be either "*justified*" or be preceded by the laying of any charges against the terminated employee. Nor were there any charges against the appellant in the present case.
18. Nevertheless counsel relies on **Article 5** of the **Constitution** in support of his submissions that the fundamental inalienable right under **sub-article 1 (d)** to "*protection of the law*" as exemplified by the provisions of **Section 50(1)** of the **Employment Act** and which requires an employee to be given "*an adequate opportunity to answer any charges made against him*" before the employee can be dismissed on the grounds of "*serious misconduct*", should be read into Section 49. We cannot agree.
19. The **Employment Act** which provides for general principles relating to contracts of employment and matters incidental therefor, establishes or recognizes two separate and distinct processes or avenues by which an employer may bring an employment contract to an end – (1) By **Notice of termination** pursuant to **Section 49** and (2) By dismissal under **Section 50** in the case of "*serious misconduct*" by any employee. Similarly, an employee may end his employment contract by notice under Section 49 or, summarily, for his employer's serious breach of the terms and conditions of the contract of employment or for ill-treatment (see: **Section 53**).
20. For comparative purposes we set out the provisions of Sections 49 and 50:

"49. Notice of termination of contract

- (1) *A contract of employment for an unspecified period of time shall terminate on the expiry of notice given by either party to the other of his intention to terminate the contract.*
- (2) *Notice may be verbal or written, and, subject to subsection (3), may be given at any time.*
- (3) *The length of notice to be given under subsection (1) –*
 - (a) *where the employee has been in continuous employment with the same employer for not less than 3 years, shall be not less than 3 months;*
 - (b) *in every other case –*
 - (i) *where the employee is remunerated at intervals of not less than 14 days, shall be not less than 14 days before the end of the month in which the notice is given;*



- (ii) where the employee is remunerated at intervals of less than 14 days, shall be at least equal to the interval.
- (4) Notice of termination need not be given if the employer pays the employee the full remuneration for the appropriate period of notice specified in subsection (3).

50. Misconduct of employee

- (1) In the case of a serious misconduct by an employee it shall be lawful for the employer to dismiss the employee without notice and without compensation in lieu of notice.
- (2) None of the following acts shall be deemed to constitute misconduct by an employee –
 - (a) trade union membership or participation in trade union activities outside working hours, or with the employer's consent, during the working hours;
 - (b) seeking office as, or acting in the capacity of, an employees' representative;
 - (c) the making in good faith of a complaint or taking part in any proceedings against an employer.
- (3) Dismissal for serious misconduct may take place only in cases where the employer cannot in good faith be expected to take any other course.
- (4) No employer shall dismiss an employee on the ground of serious misconduct unless he has given the employee an adequate opportunity to answer any charges made against him and any dismissal in contravention of this subsection shall be deemed to be an unjustified dismissal.
- (5) An employer shall be deemed to have waived his right to dismiss an employee for serious misconduct if such action has not been taken within a reasonable time after he has become aware of the serious misconduct."

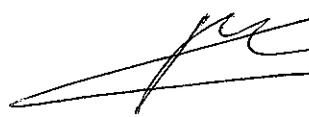
21. We agree with the trial judge that termination by notice (as opposed to dismissal) does not require any work-related reason or cause to be given to the employee for the issuance of the notice. Nor does it require a charge or allegation of "serious misconduct" to be proffered against the terminated employee.



22. To accept the appellant's submission of requiring a charge to be laid and an opportunity to be given to the employee to answer the charge either in or before a notice of termination can issue, would improperly introduce an element of "cause" or "misconduct" into **Section 49** that Parliament has not seen fit to include in it and which is already provided for in **Section 50**.
23. In our view the separation and wording of section 49 and 50 was intentional and clearly reflects the differences in the processes for ending an employment contract. This is evident from the section headings as well as the use of "notice", "terminate" and "termination" in Section 49 versus "serious misconduct", "dismissed" and "dismissal" in Section 50.
24. The distinction is further exemplified by the process required to effect a termination by notice and a dismissal for serious misconduct. **Section 49** merely requires a notice of intention to terminate to be given or payment in lieu. **Section 50** on the other hand, can be invoked "... without notice and without compensation in lieu of notice" and requires a charge(s) to be made against the employee who must be given an adequate opportunity to answer and, even if proven, dismissal can only occur if the employer cannot in good faith be expected to take any other course. Furthermore unreasonable delay by an employer constitutes a waiver of the right to dismiss for serious misconduct.
25. In our view **Section 49** is entirely consistent with **Article 5 (1)(d)** of the **Constitution** in that it is a provision contained within "a law" namely the **Employment Act** and is protective of an employee in the event of the premature termination of his employment contract by his employer. This protection takes the form of imposing a minimum length of notice to be given and financial compensation in lieu of notice.
26. The appeal is therefore dismissed. The appellant must pay the respondent costs of the appeal.

DATED at Port Vila, this 14th day of November, 2014.

BY THE COURT


Vincent LUNABEK
Chief Justice.

