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

Civil Case No.119 of 1998

BETWEEN: FIDEL VANUSOKSOK
Plaintiff

AND: VANUATU BROADCASTING AND TELEVISION CORPORATION
Defendant

Coram: ***R. Marum MBE J.***

Mr. Ronald Warsal for the Plaintiff
Mr. Jack Kilu for the Defendant

JUDGMENT

Action

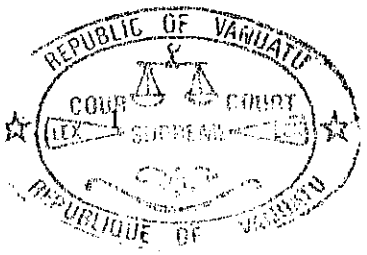
Termination of employment contrary to the Employment Act.

Claims

1. Damages for unjust dismissal at VT1,572,480.
2. Severance Pay for 2 years of employment at VT262,080.
3. 3 months pay in lieu of notice at VT411,120 for the period of 3 months.
4. Total claim is VT2,248,680.

Mode of proceeding

The plaintiff gave evidence and called Abong Thompson. The defendant did not call any evidence in the substantive case and in his counter claim.



Issues

1. ***Is whether the plaintiff was lawfully terminated as an employee of the defendant.***

2. ***Is whether the plaintiff was an employee of the defendant or not at the time he was re-employed.***

3. ***Is whether his second period of employment lawfully terminated.***

Defence and Counter Claim

The plaintiff in the counter claim failed to appear, as a matter of process Order 38 Rule 6 provides that: -

> *"If when a trial is called on the plaintiff does not appear and the defendant does appear, if he has no counter claim shall be entitled to dismissing the action."*

Therefor, the defendant counterclaim is dismissed. In dismissing the counter/claim, only the substantive matter between the plaintiff, Fidel Vanusoksok, and VBTC as the defendant is the only live action for the business of this Court to adjudicate upon.

Defence to be struck out

The plaintiff's counsel advances that, as the defendant fail to proceed with his counter claim, his defence in the substantive matter is to be struck out. On this advancement, it is far too late to strike out his defence, and let alone the plaintiff to call evidence to prove his case.

Evidence

The plaintiff was an employee of the defendant since 1979 to 1995. On the 20th July 1995 he tendered his resignation notice. On the 29th July 1995 he had an accident and admitted to the hospital and discharged on the 31st July

1995. On the 7th August 1995 the defendant's driver went to the plaintiff's house, sent by Joe Carlo, the General Manager at that time, to ask him to come back to work. The plaintiff told him that he could not go to work as he expected a suspension letter due to the accident. Later that day, the driver and Abong Thompson came back to the plaintiff's house. Abong Thompson was the program manager for the defendant, who told the plaintiff to come back to work. In his evidence, Joe Carlo, told him to go and ask the plaintiff to come back to work, as he was to go out on an overseas trip. The plaintiff came to work, and was the Acting General Manager of the defendant. When Joe Carlo came back from his trip the plaintiff went back to be the Deputy General Manager. This period was the normal employment period with the defendant up and until his resignation, and was not the subject of the plaintiff's claim, but to give a general view and understanding of the plaintiff's employment periods.

The claim under the Writ of Summons was upon the termination of the 26th August 1998. That is after he was terminated on the 31st of August 1995, but was approved for appointment by the Prime Minister on the 2nd December 1996 and to be appointed by the defendant as the Deputy General Manager. This was the second period of employment. He was in employment from 2nd December 1996 until terminated on the 26th August 1998, about 1 year 8 months. His approval for appointment was on temporary basis for three months, and to be appointed there after by the defendant as Deputy General Manager. When he was terminated he claimed for; 2 years severance pay; 3 months pay in lieu of notice; and damages for unjustified dismissal, totaling VT2,245,680.

I find his first employment and acceptance of resignation was proper and was no longer an employee of the defendant, and any disciplinary action for any misconduct in this term of employment should have been taken against him and not after termination, as at the time his resignation was accepted, he was no longer an employee of the defendant.

The plaintiff continued to work from 2nd December 1996 until the 26th August 1998 when terminated. His employment as of 2nd December 1996 started a new era with the defendant. The defendant, between the periods of the 2nd December 1996 to 28th July 1998 had all the opportunity to challenge the validity of employment of the plaintiff. The defendant counsel also advances on Ombudsman report against the plaintiff. On this advancement

the status of Ombudsman reports are purely recommendatory and made in accordance of the complaint.

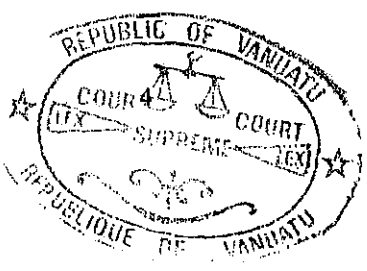
The plaintiff statement of claim, Paragraph 3 refer to the Employment Act CAP 160, where the plaintiff alleges that his termination was contrary to s.49, s.54, s.56 (2) and 50 (4).

Section 49 of the Employment Act reads: -

> "*(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 not be 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 not 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).*"

Section 50 (4) reads: -

> "*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.*"



Section 54 reads: -

"*(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.*

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

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

Section 56 (2) reads: -

"*Subject to subsection (4) the amount of severance allowance payable to an employee shall be-*

(a) For every period of 12 months –

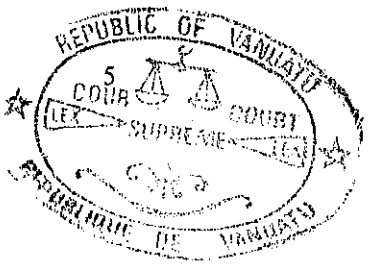
(i) Half a month's remuneration, where the employee is remunerated at intervals of not less than 1 month;

(ii) 15 days' remuneration, where the employee is remunerated at intervals of less than 1 months;

(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."

Section 50 (5) reads: -

"*An employer shall be deemed to have waived his rights 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.*"



In addition, section 12 of the VBTC Act must also be included and to be applied, which gave the power to the Prime Minister the exercise of power for approval for appointment of the General Manager.

Section 12 (1) of the VBTC Act reads: -

> *"The Corporation shall, with the approval of the Prime Minister, appoint a competent and experienced person in the field of broadcasting as General Manager."*

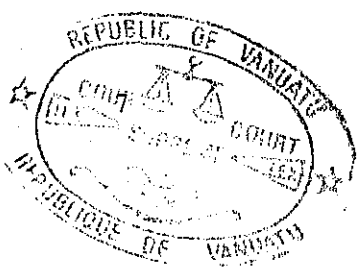
Section 12 is a consultative provision for consultation between the Corporation and the Prime Minister in regards to appointment of a General Manager. The Corporation, under s.12 has the power to appoint on approval only by the Prime minister. The letter by the Prime Minister of the 2-12-96, was a letter of approval for appointment, pursuant to section 12 of the VBTC Act, which gives power to the Corporation to appoint the plaintiff as Deputy General Manager. If there was a conflict between the Corporation and the Prime Minister over the plaintiff's appointment then, consultation was left open between the Corporation and the Prime Minster. If s.12 was meant to give the sole power to the Prime Minister, than the Board should not have been mention in section 12. When both authorities are mention than that is consultative power to be exercise jointly in appointment. The effect of s.12 does not give power to the Prime Minister to direct the Board to appoint a General Manager, but meant for the Board to first consider a person to be appointed than submit his name to the Prime Minister for his approval. If the Prime Minster approves, the person can be appointed by the Board. A difficult situation may arise where the Prime Minister refuses to approve an appointment. If this arises, than under s.12 consultation must take place. If consensus is not reach than new appointment process must take place again. The legal framework of s.12 was in place for a good cause, and that is to ensure that there should not be any interference to the appointment of the G/M in a statutory organisatation such as the VBTC. At the same time the power of the Prime Minister too, is given as a form of check and balance on appointment to the post of G/M on decision taken by the Board.

The letter of the 2nd December 1996 was an approval for appointment for a period of three months probation as deputy General Manager. The period of three months was probationary period and meant for the Corporation to sit and to exercise their power, whether to appoint the plaintiff as the Deputy General Manager within that period or not. Section 12 allows the Prime

Minster to approve an appointment of General Manager and not a Deputy General Manager. In my view any other appointment to any other position, apart from the position of G/M was a matter within the power of the board to appointment and does not require the approval of the Prime Minister. The Prime Minister has the power under s.12 to approve an appointment to the position of General Manager only after the name of the person is referred to him by the board, but has no power to direct the board to appoint who he wants to be the General Manager. In addition, he has no power under s.12 to approve an appointment of any person to be a Deputy General Manager. However, his powers under s.12 also extend to appointment of Acting General Manager. Acting G/M and Deputy G/M must be defined to give effect to s.12. Acting G/M status is a General Manager, and only occupying the post for a temporary period waiting for permanent appointment. An acting G/M can either is confirm on the post or other person can be appointed to be the General Manager. Whereas, a deputy General Manager's post is a substantive position, however a deputy General Manager can be made acting General Manager for a temporary period and if General Manager is appointed then the deputy G/M goes back as Deputy G/M.

The corporation fail to consider the approval by the Prime Minister to appoint the plaintiff within the period of three months or there after, and left it for too long resulting for the plaintiff to work from 2nd December 1996 until 26th August 1998, when he was formerly terminated. With these happening, if the corporation had appointed the plaintiff in accordance with his letter of approval, than that will be an exercise of power off the Board, and will make him permanent officer, as he was not, his status remain as temporary employee until the Board sits to appoint him. No evidence to say that he was not paid from the 2nd December 1996 to the 26th August 1998 when he was terminated, otherwise he would have complained already. I am satisfied that he was paid for the period from the 2nd December 1996 to 26th August 1998 as continue temporary employee of the defendant until terminated, and as such he was subject to the provision of the Employment Act and also the VBTC Act including any entitlement thereof.

Kilu advances that the plaintiff's appointment as Deputy General Manager was only up to the period that the General Manager returns. In this advancement this cannot stand, as the letter of approval did not specify, but refer to administration and staffing which meant to be a new administrative position and different to the role of the General Manager, who is the chief



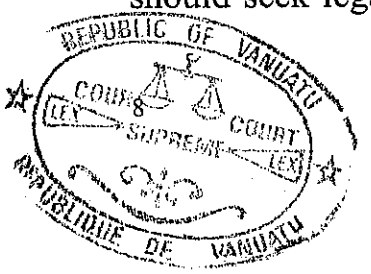
executive officer of the defendant, and his status as temporary employment was covered under section 54 of the Employment Act.

SERIOUS MISCONDUCT

Section 50 of the Employment Act did not express what is serious misconduct within the meaning of section 50. However, I am of the view that it was meant that way for some good cause. One of the good cause is for the Employment Act not to limit serious misconducts, and rather leave that open to the discretion of the respective authorities dealing with disciplinary matters within their respective department or statutory bodies in accordance with the Acts and Rules governing disciplinary matters in that institution, to distinguish what conducts are serious and those not. Likewise, under the VBTC Act of 1992 and particularly section 14, 15 and 16 of the VBTC Rules, which section 16 of the Rules, define serious misconduct. Further, if the defendant was aware of a serious misconduct by the plaintiff then disciplinary action should have been taken straight away. If not then the defendant has waived his right under section 50 (5) of the Employment Act not to take disciplinary action within a reasonable period. And a reasonable time was within his first term of employment.

Principle of Natural Justice

There were three reasons stated in his suspended letter; *that he fail to carry out his tasks; that he was under investigation by Ombudsman over the car crash of the defendant's Suzuki; and Over his employment.* Further, he was under suspension on half salary and was not working. I am satisfied that he was properly informed of the reasons of his suspension. When this occurred, the duty was upon him to response to the Corporation on those three charges as stated in that letter of suspension, if not, the corporation can proceed to deal with the matter in his absence, as there will be nothing from him in his defence or so to assist the Corporation to decide upon those charges. I find that by virtue of Section 50 (4) of the Employment Act, the defendant complied by serving the suspension letter on the plaintiff and setting out the reasons and then wait for his response to the charges. As this was not forthcoming, the defendant had no option but to sit and decide to dismiss him, and this was proper. If the defendant did not know what to do then he should seek legal advice or legal assistance somewhere else. I find that he



was afforded the right to be heard by the Corporation, but fail to exercise that right by not responding to the charges. I find that procedural fairness was afforded to him but he failed to make use of it, which was to his disadvantages. For these reasons, I find that the dismissal decision was proper and was in compliance with Section 50 (4) of the Employment Act. Therefore the claim for damages for unjustly dismissal is dismissed.

Severance Pay

Kilu advances that the defendant never employed the plaintiff. On this advancement my finding was that the plaintiff was paid his salary and there was an implied contract of employment whereby the plaintiff be continued to be employed until such time the Corporation sits to discuss his appointment. It can be argued on the other side of the coin that his appointment was not proper and he should not be paid, if this was so, than the defendant should only blame itself for its own inefficiencies in not sitting down to consider the approval for appointment, and rather let it to run, not only that, but even continue to pay him. He also advances that the plaintiff was charged for serious misconduct. On this advancement he had two period of employment. His first employment was not a matter for this judgement and any misconduct in his first employment cannot be attached to his second term of employment. However, if the Corporation had taken into consideration the conduct of the plaintiff in the period of his first employment on this next consideration for appointment, pursuant to the letter of the 2nd December 1996, then that will be a matter entirely for the Corporation to consider as reference purposes.

The Writ of Summons before the Court and the Statement of Claim therein only refer to claims after the 2nd December 1996 till the 26th August 1998 and not before, and therefore, the only area concerned the plaintiff suspension, was failure to properly use of the defendant's vehicle in the time of his second employment. I find this as not serious misconduct, but rather failure of effectively performing responsibilities assigned to him. Kilu advances on Section 55 (2) of the Employment Act that reads: -

> *"An employee shall not be entitled to severance allowance if he is dismissed for serious misconduct as provided in Section 50."*

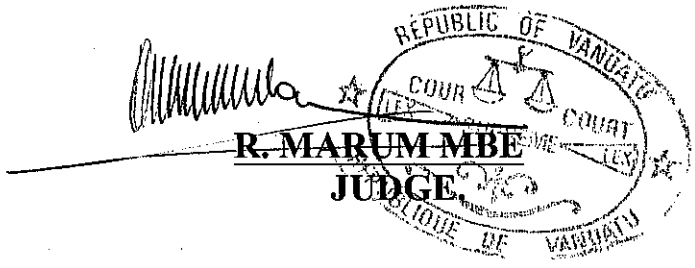
As his action did not amount to serious misconduct, he was entitling to severance pay for the period from 2nd December 1996 to 26th August 1998.

Three months pay in lieu of notice

The condition of employment was to end at the time the Corporation sits to consider the plaintiff's appointment in accordance with the letter of approval for appointment by the Prime Minister. Even though, it was far too late to sit pursuant to the Prime Ministers letter, it was still taken within the letter of approval for appointment. In the case of the plaintiff, a notice was not required, but a decision pursuant to the letter of appointment. And when the decision was made by the Corporation on the 24th August 1998 and served on the plaintiff on the 28th August 1998, that was sufficient requirement in compliance with the approval for appointment by the Prime Minister on the 2nd December 1996 and was only entitle to his last pay. For these reasons, I will dismiss the claim for three months pay in lieu of notice but only to his last pay.

With these findings the plaintiff is only entitled to severance pay to be calculated from the 2nd December 1996 to 26th August 1998.

Dated at Port Vila, this 13th day of July 2001.



R. MARUM MBE
JUDGE.