

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**

(Criminal Jurisdiction)

CRIMINAL CASE No.39 of 2002

PUBLIC PROSECUTOR -v- MARKE LOWEN

Coram: Chief Justice Vincent Lunabek

Counsel: Daniel Evans for the Public Prosecutor ✓
John Malcolm for the Defendant

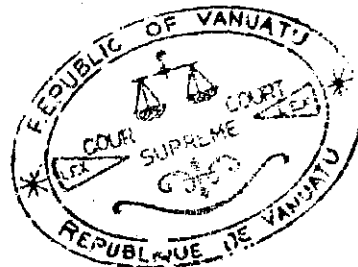
JUDGMENT

This is the judgment of the case. The defendant Marke Lowen is the owner and Manager of the Port-Vila Presse, a newspaper business which has commenced publishing in Port-Vila in November 2000.

The prosecution alleges that staff working at Port-Vila Presse were engaged as employees and therefore the provisions of Vanuatu National Provident Fund Act [CAP.189] ('the Act') are binding upon the defendant as their employer. The defendant is charged and he pleaded not guilty to 270 counts under the VNPF Act [CAP.189]. It is then apparent that at the end of the prosecution case the prosecution having not called evidence in relation to some other counts such counts must now have been withdrawn. They are so withdrawn. At the end of the prosecution case, the prosecution proceeds with 138 counts against the defendant under the VNPF Act [CAP.189]. These counts are set out below:

Count 1:

This count relates to the defendant failing to register as an employer pursuant to Section 22 and 50(1)(b) of the Act.



It is particularized that Marke Lowen (trading as Port Vila Presse) being the sole proprietor of Port Vila Presse a news media business in Port-Vila, having as at November 1999... as employees for whom you were liable to pay contributions to the Fund for, you did fail to register yourself and Port Vila Presse as an employer liable to contribute to the Fund.

Counts 29 to 45:

These counts relate to 3 separate offences in relation to Akesha Litch. Namely to register Akesha Litch as an employee contrary to Section 50(1)(b) of the Act, failing to pay contributions contrary to Section 26 and 50(1)(c) of the Act and, having failed to pay the applicable contributions, failing to pay the surcharge contrary to Section 26(2) and 50(1)(e) of the Act.

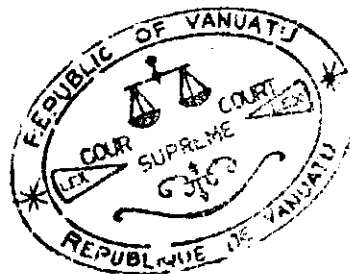
It is particularized that the defendant failed to cause Akesha Litch to be registered as a member of the Fund.

It is also particularized that the defendant failed to pay VNPF contributions in relation to Akesha Litch for the months of September 2001 to April 2002.

It is further particularized that the defendant having failed to pay VNPF contributions, failed to pay the surcharge due at the rate of 2% per month from the month of November 2001 to June 2002.

Counts 46 to 78:

Those counts relate to 3 separate offences in relation to Rex Issachar. Namely, failing to register Rex Issachar as an employee contrary to Section 50(1)(b) of the Act, failing to pay contributions contrary to Sections 26 and 50(1)(c) of the Act and, having failed to pay the applicable contributions, failing to pay the surcharge contrary to Section 26(2) and 50(1)(e) of the Act.



It is particularized that the defendant failed to cause Rex Issachar to be registered as a member of the Fund.

It is also particularized that the defendant failed to pay VNPF contributions in relation to Rex Issachar for the months of January 2001 to April 2002.

It is further particularized that the defendant having failed to pay VNPF contributions, failed to pay the surcharge due at the rate of 2% per month from the month of January 2001 to June 2002.

Counts 151 to 182:

Those counts relate to 2 separate offences in relation to Winston Tarere. Namely, failing to pay contributions contrary to Sections 26 and 50(1)(c) of the Act then, having failed to pay the applicable contributions, failing to pay the surcharge contrary to Sections 26(2) and 50(1)(e) of the Act.

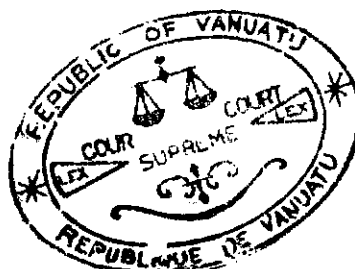
It is particularized that the defendant failed to pay VNPF contributions in relation to Winston Tarere for the months of January 2001 to April 2002.

It is also particularized that the defendant having failed to pay VNPF contributions, failed to pay the surcharge due at the rate of 2% per month from the month of March 2001 to June 2002.

Counts 183 to 212:

Those counts relate to 2 separate offences in relation to Jonas Cullwick. Namely, failing to pay contributions contrary to Sections 26 and 50(1)(c) of the Act and, having failed to pay the applicable contributions, failing to pay the surcharge contrary to Sections 26(2) and 50 (1)(e) of the Act.

It is also particularized that the defendant failed to pay VNPF contributions in relation to Jonas Cullwick for the months of February 2001 to April 2002.



It is further particularized that the defendant having failed to pay VNPF contributions, failed to pay the surcharge due at the rate of 2% per month from the month of April 2001 to June 2002.

Counts 213 to 234:

Those counts relate to 3 separate offences in relation to witness Antony Ligo. Namely, failing to register Antony Ligo as an employee contrary to Section 50(1)(d), failing to pay contribution contrary to Sections 26 and 50(1) and, having failed to pay the applicable contributions, failing to pay the surcharge contrary to Sections 26(2) and (50)(1)(e) of the Act.

It is particularized that the defendant failed to pay VNPF contributions in relation to Anthony Ligo for the months of July 2001 to April 2002.

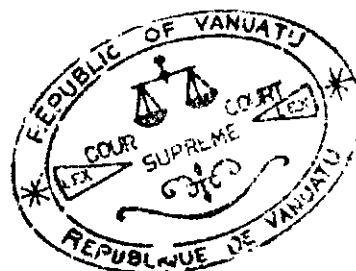
It is further particularized that the defendant having failed to pay VNPF contributions, failed to pay the surcharge due at the rate of 2% per month from the month of August 2001 to June 2002.

The charges are criminal and carry punitive sanctions. As in any criminal trial the law is for the prosecution to prove the case against the defendant beyond a reasonable doubt.

The relevant provisions of the VNPF Act [CAP.189] are set out below:

Section 22 of the Act provides:

"Every employer who has in his employ any person for whom contributions are payable under this Act shall apply to the board [Vanuatu National Provident Fund Board] in the prescribed manner for registration as an employer liable to contribute to the Fund and shall be so registered by the Board".



Section 23 of the Act provides:

"Every employer shall cause every employee of his to apply to the Board in the prescribed manner for registration as a member of the Fund and every such employee shall be registered as a member with effect from the date that contributions under this Act first became payable in respect of him".

Section 26(1) of the Act provides:

"The employer shall pay to the Board the contributions payable in any month for and by all of his employees by the end of the following month in such manner and in such form as may be prescribed".

Section 26(2) of the Act provides:

"Where the employer fails to pay some or all of the contributions due within the time specified in subsection (1) he shall be liable to a surcharge on the amount of the contributions not so paid at the rate of 2 per cent in respect of each month or part of the month after the due date for which the contributions remain unpaid...".

Section 50(1)(b) of the Act provides:

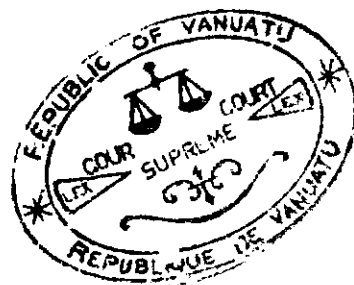
"Any person who-

(b) In respect of whom the provisions of either section 22 or section 23 apply fails to apply for registration;

fails to pay to the Board in any month any amount which, under section 26(1), he is liable to pay in that month in respect of any employee;

...

shall be guilty of an offence and shall be liable on conviction to a fine not exceeding VT100,000 or to a term of imprisonment not exceeding 6 months or to both such fine and imprisonment."



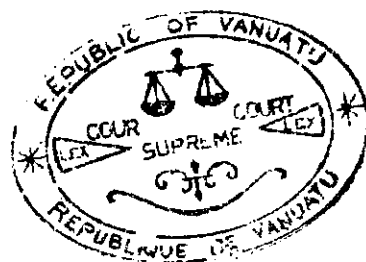
Elements of the Offence that the Prosecution Must Prove

In order to find the defendant guilty, the prosecution must prove the following:

1. That the defendant was a "director, manager, secretary or other similar officer" of 'Port-Vila Press' or was a, "partner of the body corporate, firm, society or other body of persons or was purporting to act in such capacity", in accordance with section 53 of the Act;
2. That the staff of 'Port-Vila Presse' were employees of the defendant's business and did not fall within any of the exemptions detailed in the Schedule or section 34(6) of the Act;
3. That the employees of 'Port-Vila Presse' received in excess of VT3,000 in any given month during which they were employed by the defendant in accordance with section 25(2) of the Act;
4. Being an employer, the defendant failed to apply for Registration as a member of the Vanuatu National Provident Fund (the 'Fund') in accordance with section 22 of the Act;
5. That the defendant failed to cause employees to be registered with the Fund in accordance with section 23 of the Act and section 9 of the Vanuatu National Provident Fund (Registration and Contribution) Regulation [CAP.189] (the 'Regulation');
6. That the defendant failed to pay contributions to the Fund. Namely, the defendant failed to deduct the employees' share of the contribution to the fund and failed to pay the employer's share of the contribution to the fund;
7. That the alleged offending was committed with the defendant's consent or connivance and that he failed to exercise such due diligence to prevent the commission of the offence in accordance with section 53 of the Act.

Applicable Legal Principles

1. Status of Staff: Employees vis-à-vis Independent Contractors



In order for the provisions of the Act to be binding upon the defendant it is necessary for the prosecution to prove that the staff of 'Port-Vila Presse' were employees, as opposed to independent contractors or agents. The prosecution relies on the definitions of employees' and 'employer' as provided in section 1 of the Act.

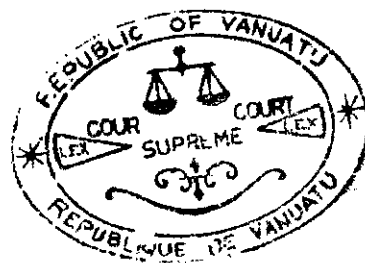
To demonstrate that the staff were employees, according to the definition prescribed by the Act, and by the common law, the prosecution relies on established common law tests. Several tests have been developed by the common law. A brief summation of the main tests follows:

(a) The Control Test

At its simplest, the control test relies on the degree of control exercise by the employer (master) and the person alleged to be his employee (servant). The greater the control that the employer exerts over the supposed employee, the more likely courts are to find an employee-employer relationship.

Control has been described as follows:

"The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other. A master is one who not only prescribes to the workman the end of his work, but directs, or at any moment may direct, the means also, or as it has been put, "retains the power of controlling the work": (Cropton J in Sadler v. Henlock (1855) 1198 E 209). A servant is a person subject to the command of his masters as to the manner in which he shall do his work: (see per Bramwell LJ in Yewens v. Noakes (1880) 6 QBD 530 at 532) and the master is liable for his acts, neglects and defaults, to the extent specified. An independent contractor is one who undertakes to produce a given result, but so in the actual execution of the work he is not under



the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand.”¹

It is necessary to take into account all of the features of the relationship between the defendant and his staff to determine the degree of control. It is also important to note that Courts have stated that the important feature of control is not the actual exercise of control, but the right of a supposed employee to exercise it.²

In Performing Rights Society Ltd v. Mitchell and Booker (Palais de Danse) Ltd [1924] 1 KB 762 it was said that one must look at the following matters, inter alia, to help determine the degree of control and, accordingly, the nature of the relationship:

- The nature of the task undertaken;
- The freedom of action given;
- The magnitude of the contract amount and the manner in which it is to be paid;
- The powers of dismissal;
- The circumstances under which payment of the reward may be withheld.

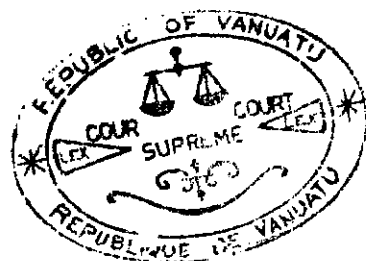
Whilst not exhaustive, the above list provides guidance as to those features indicative of control.

(b) 'The Organization Test'

Put simply, the Organization Test prescribes that an employee's work is done as, "an integral part of the business", whereas an independent contractor's work, "is

¹ *Performing Rights Society Ltd v. Mitchell and Booker (Palais de Danse) Ltd [1924] 1 KB 762 at 766-768 per McCardie J ([1924] 1 KB 762 at 766-768.*

² *Stevens v. Brodribb Sawmilling Company Pty Ltd, High Court of Australia, 1986 160 CLR 16, per Mason J at p.27 & Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance, [1968] 2 QB per MacKenna J at 515.*



not integrated into it but is only accessory to it.”³ Therefore, the more central the alleged employee’s work is to the primary business, the more likely that worker will be found to be an employee.

This test has been subject of judicial criticism.⁴ Accordingly, today it is typically treated as just one matter to take into account in determining the nature of the relationship.

4 (c) ‘The Multi-Factor Test’ or ‘Multiple Test’

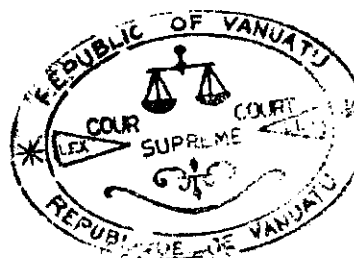
This test prescribes that no none test is fully indicative of the nature of the relationship. This test is currently the most widely accepted test in the common law world.⁵ In addition to the above tests the following indicia, inter alia, must be considered:

- The provision and maintenance of tools and equipment. If a worker supplies their own equipment, this, prima facie, suggests an independent contract;
- The granting of annual holidays, sick leave, long service leave and the like. If the worker has to make their own provision for holidays and sick leave, this will indicate an independent contract;
- The need to report one’s comings and goings. If a worker must inform someone of their movements this will suggest an employee-employer relationship;
- The hours of work. If the place and hours of work are not at the discretion of the worker, then this will simply that the worker is an employee;
- The right of a person to delegate the work which he or she has agreed to do. If the worker is able to delegate the work to others, it may indicate that he or she is under an independent contract;

³ *Stevenson Jordan and Harrison v. MacDonald and Evans*, [1952] 1 Times LR 101 per Denning LJ

⁴ *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance*, op cit., at p. 524

⁵ Robert Upex writes, “The test currently used is the ‘multiple test’, of which there are numerous variants”, *The Law of Termination of Employment*, 5th ed., Sweet & Maxwell, 1997, London



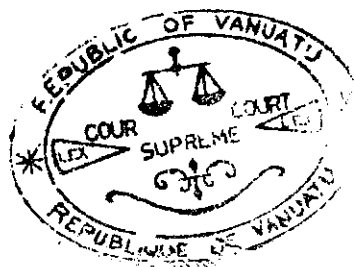
- The right of a person to incorporate and perform as a person in business on his or her own accord. If the worker operates under the name of a company or a registered business name, this will be a sign that the worker is engaged as an independent contractor;
- The mode of remuneration. If payments are made by means of 'lump sums', or reimbursement on the submission of invoices, this will be indicative of an independent contract;
- The ability of the person providing services to work elsewhere. If the worker is able to offer his services to others this will be indicative of an independent contract.
- A legal intention to be engaged as an independent contractor.

The prosecution says that the 'multi-factor' test is not a formalized test which allows for the definition of employer-employee or independent contractor to be positively determined by the application of any one factor alone. Instead, the prosecution says that all the indicia present in the case must be balanced in order to arrive at a final conclusion.

(d) Appropriate Test

The prosecution submits that the issue of who is an employee and who is an independent contractor must be approached on a case-by-case basis. The prosecution contends that all of the tests detailed above must be utilized in order to arrive at a correct and balanced outcome. In this regard, the prosecution argues that, in keeping with other common law countries, the multi-factor or multiple approach should be adopted in Vanuatu. The degree of weight to be place on any specific indicia is a matter for the Court. The prosecution contends, however, that the degree of control exercised by the defendant should be given prime consideration.

The prosecution adopts the words of the High Court of Australia:



*"But the existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this Court has been to regard it merely as one of a number of indicia which must be considered in the determination of that question:... other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee."*⁶

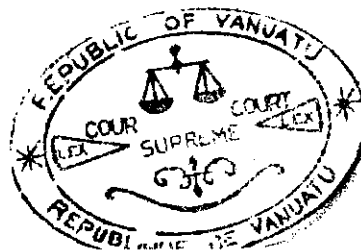
Contract of Employment

The prosecution alleges that the staff of 'Port-Vila Presse' were employed under contracts of employment.

The prosecution makes the following points in relation to contracts of employment:

- (a) Contracts of employment need not be reduced to writing but can be oral (see section 9 Employment Act [CAP.9] and section 1 VNPF Act [CAP.189]);
- (b) When an employment contract is not reduced to writing and is not orally expanded upon, various implied conditions are attributed by the common law;
- (c) If the Court accepts that the employment contract in this matter was not reduced to writing, there are no express contractual provisions that can help the Court in determining the nature of the relationship;
- (d) If the staff of 'Port Vila Presse' are found to be employees, all of the provisions of the Employment Act [CAP.9] are binding upon the defendant.

⁶ *Stevens v. Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 per Mason J at 24



Matters to be raised by Prosecution in Determining Staff

The prosecution will raise the following matters, inter alias, in order to prove that the staff of 'Port Vila Presse' were employees and not independent contractors:

1. The provision of equipment;
2. The method of engagement;
3. The method of payment;
4. the degree of control exercised by defendant.

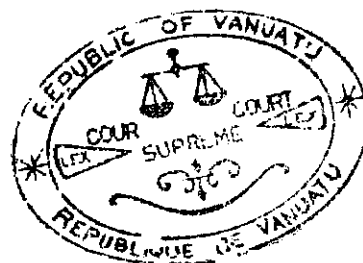
This will entail looking at matters such as:

- Working hours;
 - The requirement to attend work;
 - Superiors;
 - Place of work;
 - Holiday arrangements;
5. The degree of skills of staff;
 6. The intention of staff (i.e. on what basis they believed they had been engaged.
 7. Whether staff were in a business or their own;
 8. The ability of staff to delegate their work.

Status of Defendant

The prosecution alleges that the defendant was the director and manager of 'Port Vila Presse'. In accordance with section 53 of the Act the defendant, if found to fail within the category of individuals outlined, is liable for any offences committed by the body corporate under the Act.

The defendant, by his own admission, is the owner and publisher of 'Port Vila Presse'. The defendant was responsible for the hiring of staff, interviewing of staff, drafting of internal policies, communication of work policies and procedures



and acting as a spokesperson for the business. Staff considered the defendant to be the head of 'Port Vila Presse'.

The purported 'Independent Contractor Agreement' details the contracting party as 'Marke Lowen / Port Vila Presse', indicating an apparent ability to contract on behalf of the company.

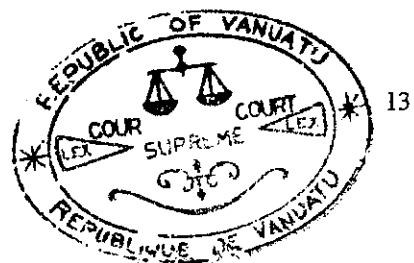
Failure to register as an Employer / Failure to register Employees / Fails to pay Contributions / Fails to pay Surcharge

The prosecution will rely on the evidence from the VNPF Investigator and the staff of Port Vila Presse in relation to the above matters.

The defence case is set out below:

The defendant says that he is not required to be registered as an employer under count 1. In respect to other counts the defendant says that he is not required to pay VNPF contributions. There is no requirement for him to pay surcharges. The basis of the defence is that each of the remaining counts relates to all people who are contracted as self-employed people. These people commenced their contract under an old oral agreement. Defence says the initial confusion was put into writing. In the circumstances of this case the defendant says the business licences were not required as journalists are exempted under the Rates & Taxes legislations (Exh.D1). The defendant further says that because the people engaged are self-employed the defendant did employ anybody except himself. If self-employed people wanted to pay contributions that is a matter for themselves.

The defence accepts the definition of employee contained in VNPF Act section 1. The defendant says that the issue in this case is what constitutes the contracts of service. The defence accepts the multi-factor test on determining whether it is the contract of or for service and the entire factual situation needs resolution the paramount factor being controlled.



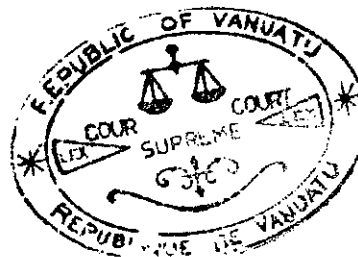
The multi-factor test is adopted by the Court to determine whether the contract is a contract of service or for service. The Court relies also on the persuasive authorities submitted by the prosecution in their submissions for guidance. But in any event, the law that must be applied by the Court in the present case is the VNPF Act [CAP.189].

I turn now to consider the evidence.

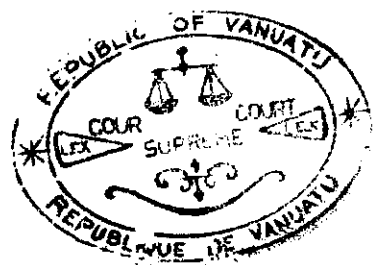
The summary of the evidence

Summary of the prosecution evidence

Jonas Cullwick is the first prosecution witness. This witness gave evidence to the following effect. He is 50 years of age. He is from Maewo residing in Port-Vila. Before he joined Port Vila Presse he worked for Radio Vanuatu until 2000. He started work with Port Vila Presse in January 2001 as sub Editor. He said he immediately reported to the Editors Ricky Binihi and Shirley Joy. He said the defendant was the owner of the Port Vila Presse. He came to see the defendant Mr. Lowen. Mr. Lowen told him that they had a job. He said he called the defendant a couple of months later, he called him again and Marke Lowen told him that he has a job for him. He said he went to see the defendant at his office at Port Vila Presse. He said he asked the defendant about the requirement of the job and the basic requirements about an employee. He was given the job. He said he met Lowen in his office two years ago. He said he asked him about the conditions of employment. The defendant told him he will be paid 80,000 VT per month. He did not sign any contract at that time. He did not recall the defendant told him or mentioned about an independent contract. He said he told the defendant that he needed a job. He mentioned that the editor Ricky Binihi assisted him by saying what are the requirements of the job. The system is that he did the work he has to do. He said that he needed to tell somebody that he would leave. His superior would help sometime. He worked at Port Vila Presse mostly from 8.30AM sometime earlier. His job requires not to go to hold up the

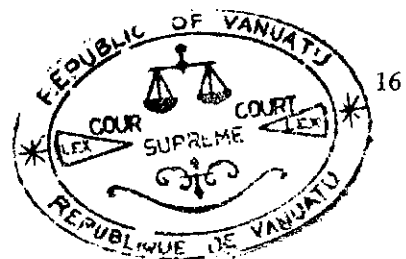


papers going on presse. He finished at work mostly at 5.00PM o'clock. He worked same hours every day. If he was allowed he could have worked on different times. If he did not turn up he needed to inform someone so that the papers are not held up. He gave evidence that he remembered the defendant as Manager tried to get them signed on a board when they are going in and out. As to equipment he said he used computers belonging to Port Vila Presse. He has no computer. He never worked at home. He would like to work at home. This would require an agreement with the employer. He was paid twice, on the 15th and at the end of the month. He did not receive slip of salaries. At once he and others were required to sign invoices on receiving payments. The Finance Manager prepared invoices. He did not prepare them. He said Lowen told them that they need to sign invoices. It would be easy for employees. He started to sign invoices two months after he started work with the Presse. Then he said they stopped to sign invoices for some reasons. He gave evidence that he and others received an increase from 80,000 VT to 100,000 VT in January 2002. He said Mr. Lowen decided to give them increases. He said they asked him about different things as to the structure. But Lowen gave them increases instead. He gave also evidence that if you need minor or petty things then Port Vila Presse pay for those. He said he never take any holiday leave apart from public holiday. He never arranged for someone else to do his job at Port Vila Presse. He said he did not think that someone outside can come in and do his job. He said they are not required to work anywhere else. He would like this to happen but he said the organization would not allow him to get paid. He said when people asked him where he works he said he was working for Port Vila Presse. He said when he started to work with Port Vila Presse he did not really know what was going on. He said he thought it was left in various situations. He denied that he ever talked to a person in Port Vila Presse of the status of work. He did not have a business licence. He never applied for one. He mentioned about some arrangements but he cannot recall. He was registered with VNPF. He does not think any payment for his VNPF accounts is paid. He made reference to a meeting. He said a letter was drafted to enquire about their VNPF situations. The letter was sent to various authorities including the defendant Mr. Lowen.

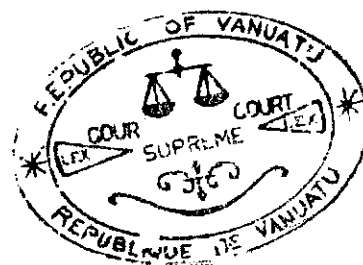


This witness says that he did not enter into a contract of independent contractor with Mr. Lowen. He made reference that there was some attempts at the beginning of the year. He said he told Marke Lowen that he could not sign the contract. That was sometime in mid May 2002. He said the letter he made reference to came from the administration. He said he got a letter he felt he could not sign the contract. He said he needed to discuss and agree to some of the points in the contract. He said that is the contract. He said he was asked to sign it instead. He mentioned that he did on several occasions have meeting with the defendant about his employment status. He denied that he never employed staff to work for him when he is at Port Vila Presse.

This witness was cross examined. He confirmed that prior to working at Port Vila Presse he was employed by Radio Vanuatu and VBTC. He was appointed as General Manager of VBTC continuously for 26 years. He left VBTC about October 2000. He mentioned that he did not resign but he was dismissed. There was an argument between the Board and himself he got paid and he left. He confirmed he started work with Port Vila Presse sometime in February 2001. He confirmed he used computers for Port Vila Presse. He said he has a computer at home but his computer is not the type of computer that defendant Lowen has in the office. However he said that the difference between the computers is not a matter. He mentioned that a computer in Port Vila Presse is able to fit into any information that was placed in. He mentioned also he needed to work into the computers to place the stories into the computers. He did not control any body. His work is to check and make corrections of the stories. This is his main job. He did not contract any body to do his job. He was then asked if from day one he was told he is an independent contractor. He said that he could not say that he is an independent contractor. He said he did not think that he recalled about the independent contractor in the first day of his work. He said he talked about the conditions of the work. He said he cannot recall that he discussed about the status of VNPF on the first day of work. He confirmed he had never applied for a business licence. And he was shown a document Exhibit D.1 he confirmed his signature, his name but he said it is not his writing. He said the signature on the



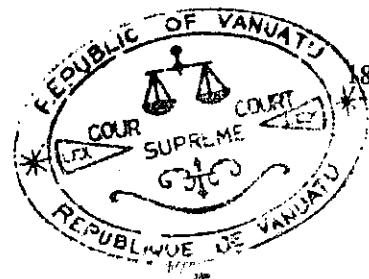
document was his signature and the date is 8 February 2001. He said despite signing this application form for business licence he never received a business licence. He said further that Mr. Lowen came with this paper but he told him he could not sign it. He pointed out that he could not sign it. He told Mr. Lowen that he needed to read through the document. He said he did not see any contractual document to confirm he was an independent contractor. He explained that he was looking for clarification. He was asked that if a letter of complaint was drafted by him. He said that it was the decision of the staff. He confirmed the staff did not want to lose their job. He was asked as to why he refused to sign the contract. He said that the conditions of the contract did not suit him. He said on several times he talked in respect to some parts of the conditions of the contract relative to the pay of the position. It was put to this witness that he was asked to be an independent contractor. This witness confirmed that he did not have the contract on the first day of his employment. Mr. Lowen told him that he could no longer employ him. The witness said he had no input in the contract. He said he has no copy of the said contract. The witness was shown a document he was asked to sign. The document was entitled independent contractor agreement. The witness says he did not recall about this document. The witness says further that he has no problem with the contract. He confirmed that he never signed such a contract. A letter of complaint was shown to the witness. The witness says he wrote the letter and signed the letter. He pointed out that the complaint is made by the staff of Port Vila Presse. It is a collective decision. They accepted it. He said the staff expatriate working with Port Vila Presse is not the issue. It is the rights of ni-Vanuatu employees to get their status cleared. It was suggested to this witness that he spoke to the defendant lots of time about their contracts. The witness accepted he spoke to the defendant about his and others' employment status. He said he saw a copy of the contract a week before he left sometime on May 2002. He confirmed his job is just editing newspapers. He confirmed the defendant does not allow him to work at home. He said there are hours for the work to be done. The most important thing is to get news on paper. He did not recall that Mr. Lowen took him in his office and told him that he would be an independent contractor.



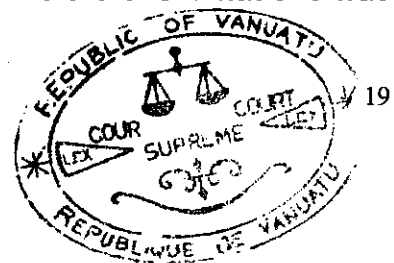
He was re-examined. He confirmed the signature on the business licence document is his signature. He said the Administrator filled the document out. The Manager thought it would be quicker. He said the office of the Port Vila Presse lodged the application for business licence when they started to discuss about the employment issues sometime in August 2002. He denied he did ask the business licence to be filled up for him. He said the staff needed to have their status clarified as to whether they are employees or independent contractors. He said he was not shown a copy of the contract where the contract was mentioned. Further he said after the form was filled in no Rates & Taxes were sent to him.

- He was shown the document D.2 he said he did not know who wrote the word 'absent' before his name on that paper. He did not encourage anyone to sign the document
- He said the staff went together and asked him to write the complaint letter. He said he wrote it as requested and all staff saw the content of the letter, read the letter and signed it. He said that at that stage ni-Vanuatu employees needed to be recognized also. He clarified that the document entitled 'independent contract' was shown to him for the first time in May 2002. Prior to May 2002 he had never seen such a document.

Akesha Litch is the second prosecution witness. She gave evidence to following effect. She started work sometime in September 2001 at Port Vila Presse. She says she does reporting from the Court House and she is a journalist. She gave evidence that at first, when she started she assisted in the laying out and advertising and she does research. Marke Lowen is the publisher of the Port Vila Presse. Her job was advertised in the newspaper. She applied for it and Marke Lowen accepted it. And said he had a job for her. She described her duties as to write and be a journalist. She mentioned she wrote by e-mail for the application. She applied for the vacancy of the position. She was interviewed for the position by the defendant Marke Lowen. Marke Lowen told her that she would be paid every fortnight, every two weeks. She said when she started there was no contract. She said Marke Lowen told her that she was accepted and she will be paid like all other staff Marke Lowen told her that he has some important work for her to do. She said Marke Lowen did not tell her about the duration for work. But

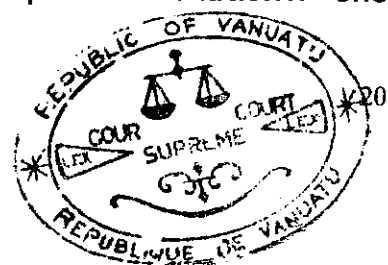


first Marke Lowen told her that because of her legal background she needed first to make herself familiar with the workplace. When she just started work with Port Vila Presse she said she assisted Mr. Lowen with the competition. She gave also evidence that she has no other superior than just Marke Lowen. He was telling her what to do with the competition. He told her to take the names and subscription for competitors. She says that is important for her to be familiar with everything in the newsroom. She says as a matter of common sense she will tell Lowen if she wanted to go home. Her usual working hours is from 7.30AM to 11.30AM – 1.30PM to 5 to 5.30PM. Sometimes she worked after these hours. She said if she did not turn up at work somebody will ring and ask and nothing will happen to her wages. As to the equipment she says she used a computer, telephone they are the Port Vila Presse's equipment. She only works at Port Vila Presse. She could not work at home. She would like to but she could not. She gave evidence that she was paid every fortnight. She received an invoice which is already prepared by Port Vila Presse Accountant. She read it, check it and sign it. She gave description of the process of the invoice. She says that every pay day everybody was called one by one inside the office of the Accountant. She called everybody she gave each of them their respective salaries. Each one check and then each one is given an invoice. She said she had never prepared an invoice. She said they received a bonus at the end of the year. She was told by the accountant that they received the pay rise that year. She also gave evidence that the Port Vila Presse pays for the first aid and bus fares. Sometimes they ask for advances like 100 VT or 200 VT. She also said that every body take holiday after 2 years. She says she took her holiday. She wrote a formal letter to Marke Lowen and asked if she can take holiday leave. She says she was never sick but her son was. She took 2 weeks holiday. After her holiday she says she received her pay. She received her normal salary. She said she never organized the advertisement. Kone Betsy who works at the advertisement section at the Port Vila Presse and she could not afford to call anybody. She does not know if she could be allowed to work elsewhere. She says she does not run her own business. She does not know what business whether it is incorporated or not. She says she is an employed person. Her evidence is to the effect that she was



not told of the status of her employment at the beginning. She says independent contract was introduced in December 2001. She says she thought she worked for Port Vila Presse before the contract starts. She says that the disciplinary process of Port Vila Presse is straight forward. She says if you commit an offence or misuse of company money you are just kicked out. She was shown a document called a Philosophy Approach. She says at Port Vila Presse Office they used to hear about it. She says Mark Lowen used to talk to them about it. She says that the Philosophy Approach is what they should do. She further says that she does not have a business licence, she has never applied for one. She does not know whether a person applied for it. She says to her knowledge she is not registered with VNPF, that there is no contribution paid, and she has not enquired about it. She says she got paid more than 3,000 Vatu. She gave evidence also that she saw that independent contract but she did never see who prepared it. She says they were told that they were just independent contractors about October 2001 by the publisher of Port Vila Presse. She says she was not involved in the draft of independent contract. She said she heard about the contract. It contains conditions of the work like VNPF contributions, salaries and they read through the contract and signed it. This is the only independent contract she signed with Port Vila Presse. She said they have a meeting to clarify their contract. The publisher told them about the contract what they should do.

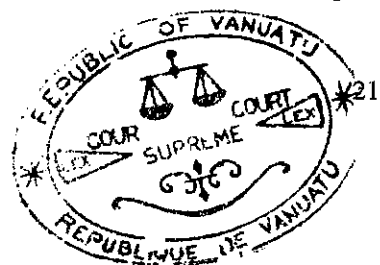
Akeshia Litch was cross-examined. She was shown a contract she says that this is her independent contract dated 7 January 2002. She said she signed the contract. The contract is exactly the same contract for everybody. She shows the signature of the defendant on the contract. She gave evidence that before she came to give her evidence in Court the defendant Marke Lowen has not threatened her. She says Lowen has told them to tell the truth. She further says that she received summons to come to Court. She says that a policeman came to their office and told her to come. She says she signed the summons. The police officer did not threaten her. As to her contract she gave evidence that she was not forced to sign the independent contract. She gave evidence that after she signed the independent contract she became an independent contractor. She



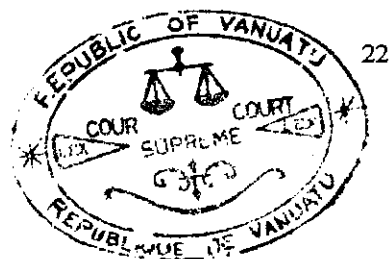
also says that she is aware about the notice of termination of the contract under the Employment Act. She also says that she did not wear uniforms. She was asked about the Accountant and she says the Port Vila Presse Accountant is Mrs. Mussika. She also says that the contract is the basis for her to work at Port Vila Presse. She confirmed that when she started working at Port Vila Presse Lowen talked to her in his room. She says she came to the office. She waited for Lowen. He talked to her about the work. They had coffee. At that time Lowen did not say anything about employee, employer or independent contractor. She said •Lowen said he had some work. She confirmed out of the money paid to her she does not loose any money. She confirmed that Lowen told her every week every body must have a meeting. One of the matters would be the news week. She says also that she could not recall Marke Lowen mentioning about the Philosophy Approach in the beginning but she says after she had worked for sometime she says Marke Lowen always told them that they must work together to make sure the papers come out in time. She confirmed she does not have a computer at home. She says she could not because she came to Court and take notes. She gave evidence that Mussika was the Accountant. They signed documents invoices every month when they started work until Linda Mussika left.

Akesha Litch was re-examined. She confirmed there is no independent contract mentioned at the beginning when she started work. She said she started work with Port Vila Presse in September 2001. She confirmed she has no accountant outside Port Vila Presse for her other needs. She was referred to the meetings and she says she is required to attend such meetings. She says it is a must for everyone. Everyone must attend.

Rex Issachar is the next prosecution witness. Rex Issachar is 26 years of age and lives in Port-Vila. He did not work now. Before he worked at Port Vila Presse from January 2001 until beginning June 2002. His job is sales officer. Sometimes he does reporting. Marke Lowen is a publisher. He regarded him as his superior. He gave evidence that he saw a vacancy position so he applied for it. He says there is no specification mentioned in the vacancy. He applied by sending a

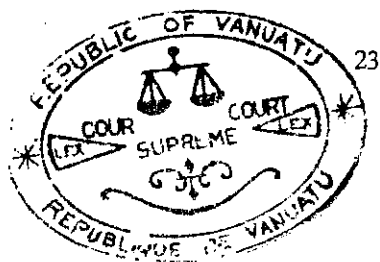


letter. He was asked for an interview. Marke Lowen did interview him. He is not sure if Marke Lowen said something about employment conditions. He said he was told he would be paid fortnightly. His task was to get advertisements. He said he did not sign any contract during the interview. He mentioned that Marke Lowen told him that Port Vila Presse would be like part of our living not like other newspapers. He said when he worked at Port Vila Presse he has a superior who is Marke Lowen. He told him what to do. He briefed him what type of advertisement and prices. He helped him with those things. If he has to leave office he needed to tell one of the journalists. He worked from 7.30AM to 11.30AM – from 1.30PM to 4.30PM. Sometime he finishes late. He could not work in different hours. He said if he did not if he did not turn up on the first allocation he would have a word with Marke Lowen. He gave evidence about system of recording. He said there is a board he has to leave information on the board for Marke Lowen. He gave evidence that he worked with computer of the Port Vila Presse. He said he worked at home by doing gardens. He did not write at home as journalist. He was paid fortnightly, he received pay slips. He did not prepare invoices. He signed invoices one at a time. He started to sign invoices when Mussika was employed by Port Vila Presse as Accountant. He said he has never received a bonus. He said he received a pay raise because Mr. Lowen made a promise to all staff that the following year there will be a pay raise. He is not sure about any expenses paid by Port Vila Presse. He has not taken any holiday when he worked with Port Vila Presse apart from Christmas public holidays. He said he was sick he was not paid, he arranged for someone in the Port Vila Presse to do the job but not a person outside the Port Vila Presse. She said she could not get someone from outside. He gave evidence issues was raised by staff. Staff wanted Marke Lowen to clarify whether they are contractors or employees. He said he was dismissed from Port Vila Presse because Marke Lowen told him that he cannot continue to him. He said he has never heard about Philosophy Approach. He has no business licence. No person applied for business licence on his behalf. He was shown a document on which his signature appears. He confirmed it was his signature. He said Marke Lowen gave him the document for him to sign it (Exh. P1). He said he was registered with the VNPF.



He said he did not receive a contribution to VNPF. He said he enquired to Port Vila Presse staff but he was told they cannot do that. He needed to do that for himself. He said if he got into an independent contract however, he could not recall about the date. He said he did not prepare the agreement. Lowen prepared the document. He said he did not have input to the content of the agreement. He said he did not know much about the content of the document. That is the only document he signed.

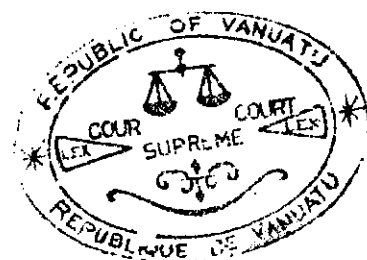
Rex Issachar was cross examined. He confirmed he signed two agreements with Port Vila Presse. One independent agreement for 2001 and one for 2002. He confirmed document 2001 was backdated (Exh. D8). He was not forced to sign the document. When he signed the document he said he is not sure whether he is contracted or he is an employee. He said when he worked at Port-Vila Presse he was engaged in various businesses. He said he operates music shows in Vanuatu. He said he sold T-shirts as part of No.2 promotion. He said he has no business licence to operate those businesses. He said after he worked at Port Vila Presse he carried on with some of those activities. He said he has a mobile phone at that time. However he said the mobile phone was given to him by the defendant. At Port Vila Presse he used e-mail, computer, telephone for his own businesses. And sometimes he asked Lowen. On leave holiday he got pay. He conducted other business while working at Port-Vila Presse. He has flexible hours. He worked at home. He has a computer at home but he cannot use that computer for work. He is not connected with e-mail. It is impossible to transfer anything from his computer to Port Vila Presse's computer. On or about June 2001 the issue about business licence arises and Lowen offered to complete and pay business licence for him. He could not recall that the business licence was never completed because he is exempted. He recall about signing a letter on August 11, 2001 written by Jonas Cullwick. The letter came into being after there were discussions about the conditions of the staff. He signed that letter but he was not present during discussions. He confirmed that the defendant told him that he could not afford to pay him. He denied that that allegation was raised at the time he left Port Vila Presse. He said his dismissal from Port Vila Presse was



made before he left Port Vila Presse. He confirmed that he did not pay any VNPF contributions. And he said that the reason is that he is an independent contractor. He said that he has given opportunity of taking another job but he chose to be an independent contractor. He was asked if the contract of employment reflect the terms of work in his understanding on the first day he has started work. He said yes. He recalled that he never employed someone else while working at Port Vila Presse. He confirmed that the management encourages all to work together as a group.

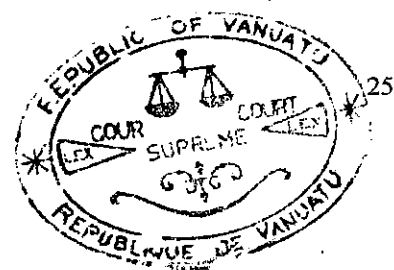
Under re-examination he says he could not recall about the date of the contract. He said one of the contracts governed the past relations with the defendant. He said he read all the documents but he did not understand much. He was asked whether he could explained what is an independent contractor he said he is not so sure. Asked if he is purported to be one. And he said yes. He said he did not recall about Lowen asking him to be an independent contractor. He said further that he is not working as a journalist outside Port Vila Presse. He said he used phone calls then Lowen gave him a mobile phone. He said he has not a mobile phone at home. Finally he said that he did not sign an independent contract with the defendant on the first day of his work with Port Vila Presse.

Anthony Ligo is the next prosecution witness. His evidence is to the following effect. He lives in Port-Vila and works at Port Vila Presse. He started sometime in June 2001. He works as journalist. And delivered newspapers. Lowen is the Manager of Port Vila Presse. He gave evidence that he had 2 years contract with Unelco and he had problems and then the contract came to an end and he was looking for different positions. He contacted the media they had discussions with Marke Lowen and he approached Port Vila Presse and he agreed to work with Port Vila Presse. He came on and interviewed with Marke Lowen. He was then interviewed by Mr. Lowen. He said Marke Lowen accepted he came in on contract like every body. He agreed on the contracted basis. He was paid for work done. He worked as part of marketing team. One or two months after Moses Stephens resigned he asked if he could leave marketing and worked as



sports journalists. And he said he did his own articles. He did his own stories. He said he work for himself. Mostly on Wednesday he said he does not work. He said he got paid with the work he did and he also got paid for the distributions of the newspaper. He said he used the Port Vila Presse car. At Port Vila Presse he used computer when he did not have any computer. He said Lowen provided something for convenience. He said he collected news outside, write it up and type it up at Port Vila Presse. He said he did not receive pay slips. When Linda Mussika was there he got invoices and signed them. Once he got paid invoices were sent to him. He could not recall when he started signing invoices. He mentioned that at the end of last year they got bonus. Marke told them that they will receive bonus. He received an increase because Marke Lowen is happy of his work. He said he has never got holiday. When he worked he said he asked someone in Port Vila Presse to take his place. He asked his wife to do distributions of papers with him. He produced one or two reports outside Port Vila Presse and he got paid for that work. He said he started work on oral independent contract. And they talked about it. He said Mark Lowen spoke about Philosophical Approach. He said he will talk to them about this. He said there is no need to get business licence for journalists. That he could not recall if someone applied for his business licence. He was told to get a business licence. He could not have one. He applied for it but he did not receive it. He said he was told that because he was an independent contractor he has to pay for his own VNPF contributions. He said he signed a contract sometime at the end of last year. He agreed before he signed. He signed it on the same date. And he made no amendments. And this is the only written contract he has.

This witness was cross-examined. He said he signed two documents (Exh. D10 & D11). To his understanding the two documents reflect his discussions before he started work. He denied he ever spoke to the defendant's counsel. He denied he ever talked to the defendant Mr. Lowen before he came to Court. When he signed the contract he said he did not receive any threats and he said he was told he worked on contract individually he signed the contract after their discussions as a group. So then he signed it. He gave evidence that they used to

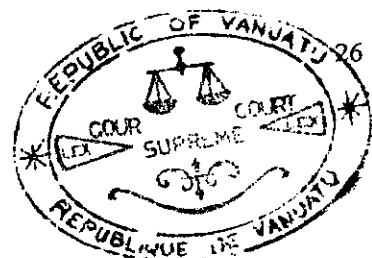


pay lump sums. So now Marke produces the system reflecting in the columns that is shown to him. He said that it was only a few months ago that the system of payment changed to a situation whereby the staff would be paid on a different basis. To the journalists he said he knows the system and however for the rest of the staff he did not know. He gave evidence that he did not work every day in the office. He does not record any time. When he was out of office he leaves a phone call number. He was given a mobile phone. He was doing his work on the field. He wrote at home and type it on a computer in the office.

His evidence is that after a month of working at Port Vila Presse, they started to talk about their positions in respect to their status. There were discussions, how they work at Port Vila Presse. It was clear that they do not get VNPF contributions. He said they started to raise concerns. They decided to write letters. They wrote a letter after they talked about their conditions. And the situations are sorted out. Those who are not happy have gone. He said he did not know who wrote the invoices.

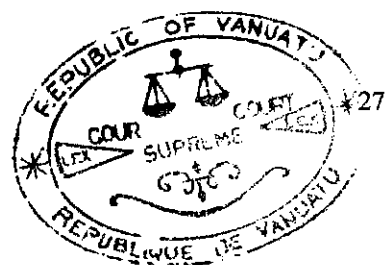
He was re-examined. He said he works on Saturday as sports journalist. He never asked the defendant he told him as soon as he finished his work. Then he took a day off. He confirmed that after they started work they were worried about their status. There were lots of discussions between them and the defendant Marke Lowen. Some of them resigned. Others decided to stay.

The next prosecution witness is Winston Tarere. Tarere's evidence is to the following effect. Tarere is 28 years of age. He worked with Port Vila Presse from January 2001. He is a journalist reporter. Lowen is the publisher of Port Vila Presse. He wanted to join a newspaper. He found out a vacancy on paper advertisement. He wrote a letter and sent it to current publisher. There was no formal interview but he talked with Lowen before hand. Marke Lowen told him what the job is all about. He had a conversation with Marke Lowen. He was told that he was joining the Presse on a condition. Set the contract for a certain salary for 80,000 VT per month. He said he did not sign anything. He said he has



superior, his editors. He will consult them for help. He told them now and again if he wanted to leave the office. He was told to write down time he came in and out of the office. He worked anytime. If he did not turn up to work then that does not matter. He said sometimes he went out he did get paid for what he did. In the office he used the computer provided by the Presse. He did not provide for his own computer. He does his work only at Port-Vila Presse. When he started work he got paid every fortnight, 15th and 30th of the month. As to the pay structure he does not think that there is a structure. He said he does not receive pay slips. At one stage he submitted invoices. That had stopped. Everything has now taken care of for them. At some stage invoices were made by Linda Mussika. He received increase payment. The publisher is happy about what they do. So they received a pay raise. He said for expenses a company pays for bus fares, books and pens. He did not have holidays. He did not work for any body else. He said if he had opportunities he will. When he started work he was told about the contract. He said it is the first time they enter into a contract. He said he is not involved in any discussions about the contract. He is not aware about disciplinary processes. He heard about Philosophy Approach. He said the publisher talked to them every day about Philosophy Approach. He could not remember exactly all what was said. The business licence was filled up for him. Louise Cooper filled it up for him. But not at his request. And he signed it thereafter. He is registered with VNPF. There was no monthly contributions received. He has to pay for himself. He said now he is on an independent contractor. They were asking for written contract and the company produced it for them. The publisher prepared the contract for them. He has no input. He gave evidence before the contract came into being, they talked about the conditions of the work. There was a letter explaining how they felt about the status of their work.

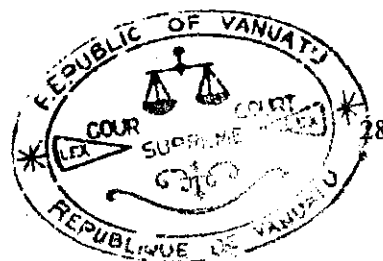
This witness was cross-examined. He said he never talked to the defendant's counsel. He said he never talked to Mr. Lowen before he came to Court. He said he signed the contract of his free will. He was re-examined. He confirmed that the contract was never shown to him on the first day of his starting work.



The second last prosecution witness is John William Timakata. Timakata's evidence is to the following effect. Since 1999 he worked with VNPF. He was the Manager Legal Compliance. Now he worked as a Consultant. At VNPF, as Manager, he is responsible to ensure that all employers comply with the Vanuatu National Provident Fund Act. He confirmed he was involved with the investigation of Marke Lowen the defendant. He further said that the investigation is not concerning Mark Lowen alone. There are others. He said they have identified Marke Lowen in Port Vila Presse as an established business in town employing a certain number of people doing work at Port Vila Presse premises. This is part of the check of the VNPF system to identify whether a business or an employer is registered. He said they do that to Mark Lowen and businesses that were not registered. They identified some of the employees working at Port Vila Presse. They checked whether their staff accounts were registered. Some staff were not registered. Those who are registered were registered by former employer. Those are Betty, Tony Ligo. Akesha Litch is a staff of Port Vila Presse. She is not registered. Issachar is also not registered. His contribution is not paid. No VNPF contributions paid made to Tony Ligo. This witness says he was given a copy of the 'Philosophy of Approach'. He spoke to Mr. Lowen. He said they explained to him what they are going to do at the premises. He said they required him to inspect the documents and interviewed the staff. He interviewed the staff. He said Marke Lowen gave the document called 'Philosophy of Approach'. He did interview the defendant in March 2001.

He was then cross-examined. He was shown documents signed by some individuals. This witness says he has seen the document and he says those people confirmed that they self-employed people. He was asked if self employed people do not require to contribute to VNPF. He said under the Act that is correct.

This witness was re-examined. He said the defendant was trying to sort out the situation when he did the investigation. Business licences were filled up.



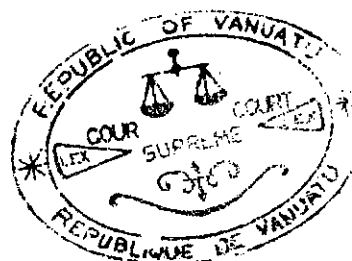
The prosecution last witness is Edwin Kalorisu. Kalorisu is the Acting Deputy Commissioner of Labour. He is in charge of staffing and labour management. In August 2002 he received a copy of a letter from the staff. He found it difficult because the staff were employed for 9 months. He wrote letter advising the management. In his letter he said the nature of work relationship is not clear.

He was cross-examined. He confirmed that the contract of employment can be oral. He said he wrote a letter but there is no letter to him in reply.

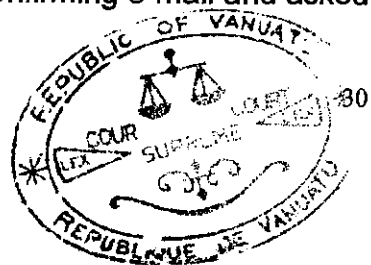
Summary of the defence evidence

The evidence of the defendant, Marke Lowen

Marke Lowen gave evidence to the following effect. He lives at No.3 Port-Vila. He is a publisher. He owned a newspaper, Port Vila Presse. He started in November 11, 2002. He said the Presse does not employ anybody. They did have a person from England who left after 3 months. She is English. The majority of staff were working for VBTC. People who came to Port Vila Presse were sacked from VBTC. He had wanted to produce an online news service. He spoke with Shirley Joy and Ricky Binihi. He told them to buy news stories if any of them were interested to sell stories to him. Shirley and Ricky passed this information to their other colleagues who have been sacked by the VBTC. A meeting was arranged between himself and six former VBTC employees. At this meeting he made it clear that he wishes to purchase story on a free lance basis. Due to past work practice which he felt contributed to the internal problem of the VBTC he decided to make it clear which he has made clear to all subsequent people who wrote for the Presse that he is not prepare to employ journalists to write stories. He made it clear to all involved that he did not wish to replicate the situation at the VBTC. He was solely offering them an opportunity to get of the street and make some money through writing stories which he will choose whether or not to publish.



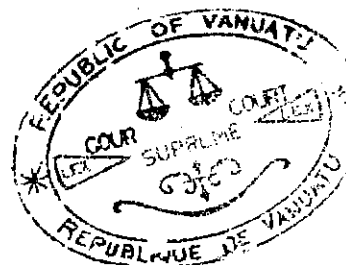
He gave evidence that in November 2001 when they first commenced he paid a flat sum on the basis that the people who worked at Port Vila Presse had been without any form of income for many months and it was done in order to help them out and get back on their feet. He gave evidence about how he started to pay those people. He said once journalists were back on their feet it was agreed that they would be paid by the quality of their writings. Column centimeters. They are not required to work any set of hours. No minimum hours is set. He said there is indication as to how to provide stories so he knows he will have enough material to put in the papers. They were free to write if they want. He accepted that there is evidence before the Court that he provided apple computers. There was no floppy disk facilities. He confirmed also that the contractants have access to the internet. There is no agreement preventing any of the contractants to work at home. There is no other constraints on them as if they wish to work at home, other than the fact that he has to be able to get their material into his computer system where the layout of the newspaper is done by using specialized software. If they wish to purchase similar equipment or find a different means of formatting and sending their writing they are free to do so. In respect to newspapers other than the Presse, he said there is no agreement preventing stories to be sold somewhere else. People working at the Presse are free to do so. He said some of them have done that elsewhere. The income that they earn in that activity the Presse takes no part of it. The contractants are not required to wear uniforms. He has no agreement to pay for medical. He said he has paid it occasionally because if they have no money he is not going to leave them. He said it is about people. As to expenses he has authorized bus fares. But generally he does not hold the people the content of their stories. They do what they want. It is their responsibility to write their stories. He was shown the document (Exh. D1) dated 19 February 2002. The defendant says he received that particular letter. It granted exemptions to any journalist. He explained that it stands from when he first approached the journalists. He told them they would not be employees. They would have to satisfy themselves personally any requirement as set out in the Ministry of Finance in regard to licence to work and write. He initially made telephone calls to Rates & Taxes. He followed up by confirming e-mail and asked



the director of Rates and Taxes the requirements on behalf of the group of journalists so that he himself was satisfied that those people were operating themselves with the law by not needing individual licences. He said he has no ability to discipline the journalists. He is only refusing to pay them if they do not provide their writings. He was shown the document Exhibit D2 dated 19 February 2002. He said that there is a bit large number of people contracted by the Presse.

As to who wrote the letters he said they had discussions in regard of the feeling of harassment he then authorize their letter. It was standard and undersigned as truthful which they understood and freely signed. The letter came about due to the fact that all of the people were clear of their entitlement to be exempted from business licences. However, there were concerns over pressure from VNPF demanding the pay money which they considered legally they should not have to pay. When he decided how much to pay people on flat rate amount he considered the monthly income of journalists at the Trading Post. He then doubled that amount and allowed another 12% of that sum as being the fund contribution as he was aware that may be one day he would targeted for simply not wanted to pay VNPF. This sum of money allowed individual contractors to contribute VNPF if they wish with no advantage to them. He confirmed he received a copy of a letter from Kalorisu from the Labour Office. He said there is no issue to resolve. They are not employees. He has no complaint reported to him. He said everyone wants more money. He was shown the document called 'Philosophy Approach'. He said the document was drafted by the English girl and given to him to consider if in fact it was in line with his thinking. He said he is not. However it was circulated. The girl printed it and gave him a copy. He did not provide a copy to Timakata.

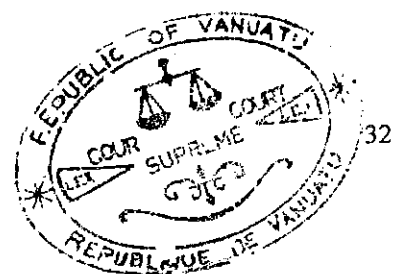
This witness was cross-examined. He confirmed he is the publisher. He did not employ the people working at Port Vila Presse. He said he engaged them. He denied some of the prosecution witnesses' testimonies. There was a meeting but some of the witnesses were not present in the meeting.



When asked if he had interviewed each of the witnesses he said it was made clear to each of them that they are not employees. They are told they are not employees. He was asked that in September Akasha Litch said that she was not told about her employment status. Other witnesses said they wanted the defendant to clarify their status. He said the people working at the Presse wanted to have their conditions stated in writing. He was asked to explain to Court what it means sign in and sign out. He said this is to find the movement of the people. People are ringing to find out. He said they are told to use his premises to get contact. That makes sense. The English girl was working with him for about 5 months as a General Manager. She drafted the document. The defendant says he did say nothing about the document. He says that one of the concerns was that he was not a party to the draft. That his personal philosophy is his own. The English girl does something for her own. He said the document was not purported to have come from him. He said he did not know it was circulated. He said he never circulated it. He said he did not pay the contribution of the English lady that he employed because she got paid in London.

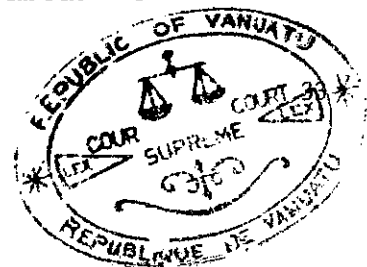
It was put to him that some of the witnesses said that the defendant talked about the philosophy approach to them. This witness said you can put this to him and the witness would say no. He is not aware about the date. As to the payment of two weeks he said it is a tricky question. The lump sum is consistent to self employed. Consistent was an accountant lump sum. That is that they are on contract paid for urgently they required to be paid so. He said people working on the new system. Some of the people have same tasks. He said they are more than 2 independent contract documents signed. There are new contracts every year.

It was put to him why it is not possible to pay journalists. He said there is no reason at all people need money urgently. Some of the people will be disadvantaged by particular language. He has paid additional salaries because of work they do. And he does not want to loose those people at pleasure.



Marke Lowen said that the people who work at Port Vila Presse do not have their own equipment. The system of invoices helps them out. None of those people did supply their equipment. As to the papers and pencils he said that those people usually supply for themselves. They did it themselves. He was asked if it is not strange that he supplied the equipment and they have an independent contract he said no. He had done this overseas. As to why he did not stipulate that contractants will have some equipment, he said that they had made verbal agreements and they are put into written contracts.

He was asked if there are independent contracts why he made it in writing. His evidence to this effect is that in the end when the VNPF started to make noises he wanted to be clear. He backdated the contracts legally and it is not a problem. They work and write stories supplied to him. He said everything was clear from the beginning. Some people wanted to have something on permanent basis. There was no payment as usual. He said he gave money out of his pocket. He is a generous person. He said the contract did not mention about policy. They have double ones. He gave an example that no one should download pornographic material out of the computers. He denied the evidence given by Jonas Cullwick. He said Jonas Cullwick wanted a great pay. He engaged Akeisha Litch to write reports about Court cases. He would not allow her to do that. It is up to him to decide what he pays for. He wanted someone to make reports about court cases. He said why he prepared business licenses for Port Vila Presse he said that because people are called that they are self employed. They are waiting for Rates & Taxes to give them exemptions. The defendant says that Port Vila Presse Accountant had her business on her own. As to the reception, it is a very small matter. The girl at the reception is a translator. Various people can answer the telephone. He said Akeisha Litch never did any layout. The people at the Port Vila Presse did have different scope from scope of their own independent contract. As additional expenses he said he paid from time to time little things as generous payments. No deduction was made for such additional expenses. He said he did not deduct for those expenses. It is in his interests to give them the additional expenses. He pointed that he mentioned about incidentals. He



mentioned that nobody oversees the work of the people working at the Port Vila Presse. He has journalists as editors. Akasha Litch had very little knowledge of the journalism. But she came out of University with little experience.

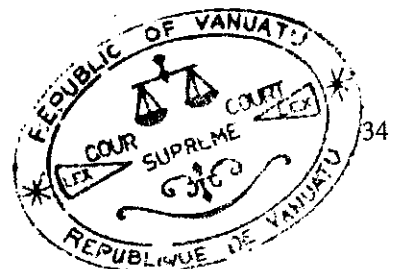
It was put to this witness that some of the witnesses of the prosecution consider Shirley Joy and Ricky as their superiors. He said this means that they are editors. As to Exhibit D2 this witness says that there is no issue to settle the conditions of the people engaged. He said at this stage Jonas Cullwick was disappointed. The woman from England was put to a position Jonas Cullwick can do. So he pushed for others to sign the letter. There was discussion about the letter in respect to the status of the people engaged. Some of the people working at the Port Vila Presse felt they were put in a situation in favour of Cullwick. In respect to document D2 this witness says that Cullwick was not there. He was not there he refused to sign. He said he did not write the word 'absent' on the document D2. He said the staff are happy to sign the document. He said he refused the increase of pay. He further said that at that time they did not want to pay VNPF. They have their own choice. They did not remember they knew what their employment said. He said he did not concede to that. He was asked if he paid VAT tax. He then said he did not know. He said he has an accountant to take care of what she does. He guessed what they are doing VAT enquired on them.

Assessment of evidence: Fact findings - credibility of witnesses

On the basis of the evidence before me, the following facts are established:

1. Method of Engagement & Employment status

The defendant, Marke Lowen, is the owner and the publisher of the newspaper Port Vila Presse. He advertised the vacancies for various positions. People who worked at the Presse applied for the positions. The defendant interviewed each of them and offered each of them a job at the Presse.



The Port Vila Presse started its activity in November 2000.

I find that witnesses who worked at the Presse did not tender, submit quotations or enter into negotiations regarding their remuneration. None of the witnesses signed an independent contract at their interview or when they first commenced working.

It is a fact that most of the witnesses were unsure as to whether they were independent contractors or not.

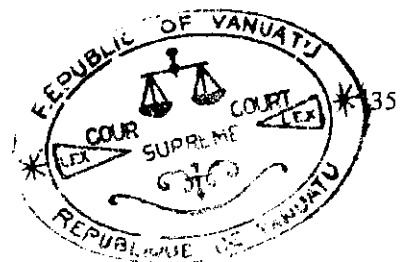
It transpires from the evidence that the witnesses working at the Presse were told of their employment status by the defendant.

I reject the evidence of the defendant that there is a verbal independent contract from the commencement of the work by each of the witnesses for the following reasons:

- It is an extraordinary situation that an independent contractor would not be aware of his/her own status, especially in circumstances where the defence maintains that a verbal contract was in place. The existence of a verbal contract is contrary to the evidence that has emerged from witnesses. It is a fact that the defendant did not even discuss their employment status with them when engaging them.

It is an extraordinary situation that the witnesses who are purportedly independent contractors would need to be informed of their status.

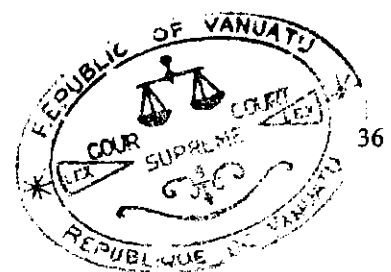
It is also a fact that because the status of the witnesses was not clarified to each of them right from the start, they were confused. That confusion is an indication that the independent contract was not discussed during the interview stages between the defendant and each of the witnesses as their evidence point to that effect. This confusion by the witnesses culminated to their meeting and the letter



of 11 August 2001, written by Jonas Cullwick and signed by the witnesses for the defendant to clarify their employment status.

Below are part evidence in support of the above.

- In examination in chief, and again in cross-examination, Res Issachar said he was not sure on what basis he was employed when he commenced work and that his employment status was never clarified. In cross-examination the defendant stated that such an oversight was due to the witness not remembering a discussion as to status;
- Evidence has been given by Rex Issachar of a meeting in which staff went to in order to clarify with the defendant the issue of their employment status;
- Jonas Cullwick, in examination in chief and cross-examination, gave evidence that he could not recall if he was told about his employment status during his interview with the defendant. He also gave evidence that he could not recall ever being told he was an independent contractor. In cross-examination the defendant disputed such evidence, stating that Jonas Cullwick 'knew full well' the basis on which he was engaged;
- When giving evidence Jonas Cullwick constantly referred to other staff members as employees;
- In examination in chief Akesha Litch gave evidence that she was not told of her employment status when she was engaged by the defendant. She further stated that the defendant told her in October 2001 that she was an independent contractor and that the defendant explained to her what an independent contractor was. In cross-examination the defendant simply told the Court that the evidence of Akesha Litch on this point was 'incorrect';
- Rex Issachar and Winston Tarere gave evidence that they were not told how long they would be engaged for. One would expect an independent contractor to be engaged to do a specific task for a set period or until the completion of that task;



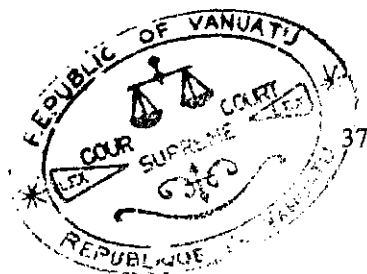
- Jonas Cullwick gave evidence of a letter being written to the defendant as concerns staff employment status. This letter was exhibited and is dated August 11, 2001. The prosecution contends that this letter is demonstrative of the confusion that surrounded employment status. This letter, headed 'Staff Grievances Over Working Conditions' clearly expresses the concerns of staff at the lack of employment status;
- Evidence was given by Edwin Kalorisu, Acting Deputy Commissioner of Labor, that, having received the August 11, 2002 letter, his Office regarded the staff as employees.

2. Business of their Own

The witnesses did not run their own business when they commenced work at 'Port Vila Presse'. None of the witnesses were incorporated or were partnerships. It is unusual that independent contractors would not have a business of their own. A typical feature of an independent contractor is that they run their own business and are thereby responsible for all the administrative functions consequential to operating such a business.

The materials disclose that the issue of a business licence exemption was not clarified by the defendant until January 2002, over one year after the business had commenced. Prior to this time the defendant did attempt to obtain a business licence for his staff. In this regard, evidence has emerged that everything done in relation to obtaining a business licence was done by the defendant and not by any of the witnesses.

In relation to business licences, the fact is also that not all witnesses have been exclusively working as journalists for which the exemption relates. Evidence has been given by Akesha Litch, Rex Issachar and Tony Ligo that they all carried out other roles, aside from being journalists. The exemption, as exhibited, clearly relates to journalists, and no other category of people.

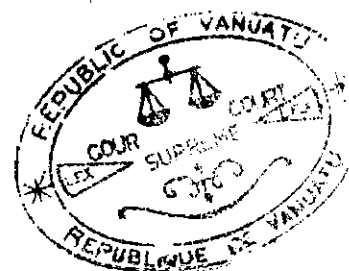


- Akesha Litch gave evidence that she didn't think she worked at 'Port Vila Presse' as a business;
- Winston Tarere said that he was not in a business of his own when he commenced working at Port Vila Presse;
- Rex Issachar and Akesha Litch, in examination in chief, did not even know that a business licence had been completed on their behalf;
- Winston Tarere gave evidence that the business licence application was not done at the request of the staff;
- Rex Issachar gave evidence, in cross-examination, that he knew nothing of any exemption in relation to business licences;
- Jonas Cullwick gave evidence that he couldn't recall if he signed a business licence application. He said that he'd never personally applied for a business licence.

3. Invoices

It is established that invoices were prepared by 'Port Vila Presse' for staff to sign for services rendered. Upon signing these invoices they were then given back to 'Port Vila Presse'. In a 'normal' independent contract relationship the bookkeeping and accounting functions of the independent contractor would be completely separate from the contractor. It is a strange scenario whereby the administrative functions of the independent contractor are carried out by the principle.

- All of the witnesses gave evidence of having invoices prepared by Port Vila Presse as opposed to themselves;
- Rex Issachar gave evidence that he did not know why he signed invoices;
- Winston Tarere gave evidence that the invoices were prepared by Linda. He stated that invoices were no longer being submitted;
- Akesha Litch also gave evidence that the invoices were prepared by the accountant;



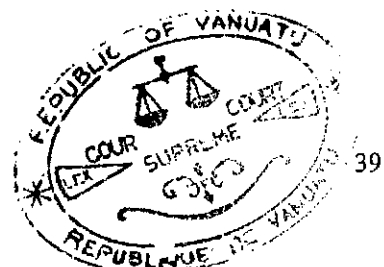
- In cross-examination the defendant stated that invoices were prepared by 'Port Vila Presse' was as a matter of convenience. This explanation is rejected. It can be inferred on the basis of facts as found that the arrangement at 'Port Vila Presse' was that invoices were being prepared to give the relationship the appearance of an independent contract. The process of preparing invoices is straight-forward and in a typical independent contract relationship would be carried out by the contractor. The evidence pointed to the contrary.

4. Job Roles

- Akesha Litch gave evidence that she has had numerous roles at PVP. She said that at first she assisted with lay-out, advertising and reception work. She said that she then became a reporter;
- Akesha Litch said she initially helped the defendant with a competition in order to make herself familiar with the workplace;
- Tony Ligo also gave evidence that he changed work roles from a marketing position to a reporting position;
- Rex Issachar said the defendant helped him with his job;
- In cross-examination the defendant stated that he engaged Akesha Litch without her having any journalistic experience. Akesha Litch, in examination in chief, gave evidence of the defendant helping her with a competition and the defendant explaining such a task as an exercise whereby she could familiarize herself with the workplace.

The evidence discloses a situation akin to a contract of employment. The defendant engaged staff without experience that therefore needed to be trained. Such staff did not carry out one defined role, but did several tasks.

5. Method of Payment, Incidental Expenses, Sick-Pay, Bonuses and Pay Rises



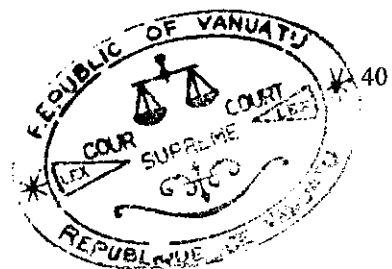
All of the staff gave evidence that they commenced work receiving fortnightly payments. Such form of payment is consistent with a contract of employment whereby payment is not linked to the outcome of one specific task and is periodical. Under an independent contract one would expect payment to vary according to the amount of work undertaken by the contractor.

During the trial, evidence was given by Anthony Ligo that it was only a few months ago that the above system changed to a situation whereby staff would be paid on a different basis. This is close to two years after 'Port Vila Presse' commenced publishing. Anthony Ligo was the only witness to give evidence as to this method of payment. Mr. Timakata gave evidence that the defendant was trying to sort the situation out during the investigation of the matter.

It is difficult to understand why the method of payment detailed above was not instigated at the inception of the business. The explanation that the need to ensure quick payment was the impetus behind such an arrangement cannot be accepted. The evidence indicates that this payment method was in place for close to two years.

Contrary to a typical independent contract, and, indeed, contrary to the written independent contract, is the payment of incidental work expenses by 'Port Vila Presse'. Several witnesses gave evidence of the defendant paying for incidental expenses. The prosecution submits that a true independent contract is one in which the independent contractor pays for all or his or her own supplies and services, as one would expect of a person running their own businesses. Any financial burden of the independent contractor is not subsumed by the principal and vice-versa. This is one of the key advantages of an independent contractor arrangement.

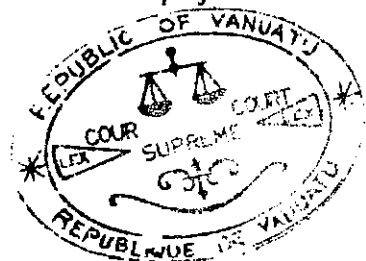
The payment of a bonus and pay-rises is also foreign to a true independent contract. With an arms-length financial relationship existing between contractor and principle, it is an atypical situation whereby a principle deviates from any supposed agreement and pays a contractor additional moneys outside the terms



of the agreement. Again, one of the key advantages of an independent contract is the financial simplicity; the principal pays a fixed amount to the contractor and no more.

The evidence shows also that a scenario, whereby sick-pay is paid by the principal, as has emerged in this matter, which is similarly unfamiliar to a true independent contractor and principal relationship. In such a situation, one would expect the contractor to simply organize someone to carry out his or function and then directly remunerate that person.

- Jonas Cullwick said that 'Port Vila Presse' would pay for bus fares;
- Akesha Litch said that 'Port Vila Presse' paid for medical items, toiletries and bus fares and had given her an advance;
- Winston Tarere said that 'Port Vila Presse' would pay for scrapbooks and pens;
- Akesha Litch, Tony Ligo and Winston Tarere all gave evidence that at Christmas they would receive a bonus;
- Rex Issachar gave evidence, in cross-examination, that he was still paid on sick days;
- Akesha Litch gave evidence that she was paid when she took days off owing to her children being ill;
- Jonas Cullwick gave evidence that he received a pay-rise from 80,000 Vatu to 100,000 Vatu. Akesha Litch and Rex Issachar also gave evidence that they had received a rise;
- In cross-examination the defendant appeared to state that any payment of incidental expenses and sick-pay was purely an altruistic exercise on his part. Such an explanation is rejected and seen as an attempt by the defendant to explain his actions in conformity with an independent contractor relationship.
- No evidence has been received in relation to staff being given an 'option' when they first commenced work as to their method of payment. Indeed,



any such a contention would appear to be contrary to the evidence of the defendant himself.

6. Control

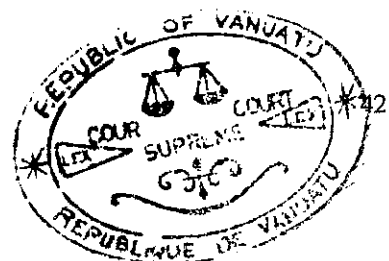
As to the issue of control generally the prosecution refers to its opening submissions.

Has the defendant exercised a degree of control consistent with an independent contractor-principal relationship? The exhibited document entitled 'Philosophy and Approach' is important when analyzing the extent of control. The document was drafted by an employee of the defendant's company, was circulated to staff and spoken about by the defendant. In particular, the evidence of Akesha Litch given in examination in chief, she stated, in relation to the 'Philosophy and Approach' document, that the staff had 'all heard about it' from the defendant.

This document goes into a minutia of detail that demonstrates a wide degree of control. The written instructions, as contained in the document, demonstrate a degree of control over staff inasmuch as it is concerned with the manner of the performance of work as it is with the end result.

The following features of the exhibited document are reflective of control and therefore an employer- employee relationship:

- The document refers to 'management' (see, for example, paragraph 1.3);
- The document refers to 'reliable and regular attendance" at work (see paragraph 2.1);
- The document refers to management telling staff their hours of work, uses the term 'working hours', and refers to the need to obtain permission to leave work (see paragraph 2.1 & 2.2);
- The document refers to holiday leave and absenteeism (see paragraph 2.8);



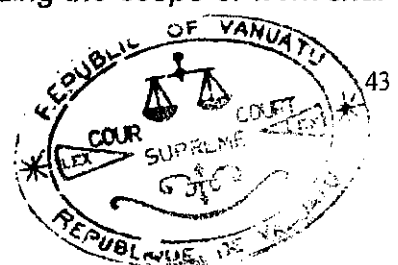
- The document refers to disciplinary procedures and 'summary dismissal' (see paragraph 6.1); *"An employer can have no more 'practical control' over an employee than the right to dismiss the employee"*;
- The document uses the term 'employee' to describe staff (see paragraph 6.6).

All of the above are typical features of an employee-employer relationship. It is extraordinary that such detailed matters of control can be said to exist in the context of an independent contract.

Further indicative of control is evidence from some witnesses that efforts were made to have them record their comings and goings.

- Jonas Cullwick said, in examination in chief, that he remembered the defendant trying to get staff sign on a board where and when they were going;
- Rex Issachar, in examination in chief, said that there was a board at 'Presse' to let Mark know where one was going. He also stated that he would need to contact someone at 'Port Vila Presse' and tell them if he was not coming to work;
- Winston Tarere said that at one stage a book system was introduced whereby everyone had to report their comings and goings.
- Akesha Litch gave evidence that when she wanted a holiday she would write a formal letter to the defendant;
- The exhibited letter to the defendant of August 11, 2001 states: *"...you have moved to penalize us by cutting our salaries in line with your 'sign in sign off' book..."*. This clearly indicates a link between recording movements and payment and is not, therefore, simply a book used to monitor movements for convenience as the defendant maintained in cross-examination.

On the matter of control, it is interesting that the written independent contract states, *"any advice given independent contract regarding the scope of work shall*



be considered as instruction" (paragraph 6). This document indicates that the defendant is capable of instructing staff as to the manner in which they carry out their work.

7. Delegation

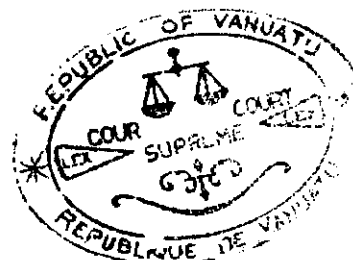
This is in keeping with a person running a business of their own.

- When asked in examination in chief as to whether he could have someone else do his job, Jonas Cullwick replied, 'I don't think so';
- Rex Issachar said in examination in chief that he could not have someone else do his job;
- Akesha Litch said that she would not get someone else to carry out her role when taking holidays;
- Akesha Litch said that she would not get someone else to carry out her role when taking holidays;
- No prosecution witness gave evidence that they had ever delegated their task to a third party.

8. Equipment

The evidence shows that the witnesses use the computers of the Port Vila Presse to do their work. The defendant owns the tools.

The principal would outline, when engaging the contractor, what items he or she requires to perform his or her role and it would be the responsibility of the contractor to obtain and maintain such equipment. To the extent that such tools do not conform with the work to be carried out, it is the responsibility of the contractor to obtain the correct tools.



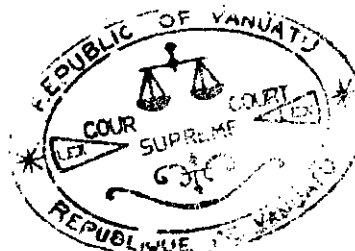
- Anthony Ligo, in cross-examination, stated that he was provided with a mobile phone by the defendant;
- Jonas Cullwick said 'Port Vila Presse' provided all of the equipment he used and stated that he would need the defendant's consent to work at home;
- Akesha Litch gave evidence that the defendant told her that her first task when commencing work at 'Port Vila Presse' was such that she could familiarize herself with the workplace;
- All of the other witnesses stated that they used equipment provided by the defendant;
- The prosecution contends that is an odd arrangement to have a 'sign-in sign-out' book, as detailed in the 11 August 2001 letter, when there is absolutely no requirement that staff work at the defendant's place of business.

Typically an independent contractor would own and use their own equipment, as befits running a business of their own. Before engaging an independent contractor, a principal would typically enquire of an independent contractor as to ownership of tools of trade/business.

9. Status of Written Contracts

In this matter the defendant presented to staff a contract to sign.

The contract presented to the Court for 2002 states that it shall be, "effective commencing 7th January, 2002". 'Port Vila Press' commenced publishing in November 2000. By his own admission, the defendant stated that the contract was drafted purely as a result of the investigation into 'Port Vila Presse'. In these circumstances, the independent contract agreement was drafted in an attempt to circumvent the true nature of the relationship between the parties. It was drafted after the investigation into the defendant had begun in order to portray to investigators the purported arrangement between staff and the defendant. It is



circumstances, the independent contract agreement was drafted in an attempt to circumvent the true nature of the relationship between the parties. It was drafted after the investigation into the defendant had begun in order to portray to investigators the purported arrangement between staff and the defendant. It is strange that if the defendant was so sure of the legality of his oral contract that he felt the need to reduce this to writing, irrespective of whether an investigation was being carried out or not. In any event, the 7 January 2002 contract does not purport to govern any prior relationship.

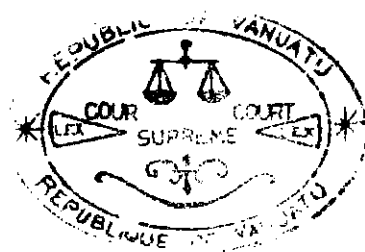
The further contracts that are presented to this Court by the defence were professed to be signed on the date as marked on the contract. That is the day that the witnesses were engaged by 'Port Vila Presse'. The Court has heard evidence that this was not the case, but that they were in fact entered into on the same date as the 7 January 2002 contracts. In these circumstances the Court should be alert as to the true nature and purpose of the contract. These contracts were drafted in an attempt to circumvent the true nature of the relationship between the parties as disclosed in the evidence of the various witnesses.

As detailed above, evidence has been given that some staff were unaware of their employment status when they commenced work. It is odd that a condition of a written contract could then purport to impute knowledge upon them.

The witnesses were not required to wear uniforms. This was not a matter raised by the prosecution and I accept that it does not form part of the prosecution case.

It is not part of the prosecution case that salaries may have or were reduced for leave of sickness. Any payment of sick leave or leave is contrary to an independent contract arrangement.

In relation to the dates that appear on the individual counts, that the staff have given evidence of their commencement date at Port Vila Presse and the fact that they have never received VNPF payments. Accordingly, the staff were engaged



by the defendant for those months that appear on the individual counts. These are not in dispute and accepted as such. When the prosecution evidence differs from the evidence of the defence, I prefer the evidence of the prosecution witnesses.

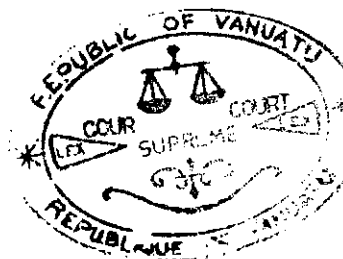
It follows as a matter of fact that on the basis of the whole evidence before the Court and submissions and arguments of counsels, the staff working at Port Vila Presse were engaged as employees from the period covering January 2001 to April 2002. Any respective contract for that period either oral or in writing is a contract of service but not a contract for service.

Application of the law to the facts

Section 1 of the VNPF Act provides:

“employee’ means any person, not being a person of any of the descriptions specified in the Schedule nor a person exempted by an Order made under section 60(a) nor under section 34 or 35 who-

- (a) is employed in Vanuatu under a contract of service or apprenticeship, whether written or oral or whether expressed or implied; or*
- (b) being a citizen of Vanuatu, is employed in the manner specified in the last preceding paragraph outside Vanuatu by an employer having a place of business in Vanuatu; or*
- (c) being a citizen of Vanuatu, is employed under a contract of service entered into in Vanuatu as a master or member of the crew of any vessel, or as captain or member of the crew of any aircraft, the owners of which have a place of business in Vanuatu; or*
- (d) is declared by the Minister, in his discretion by Order published in the Gazette to be an employee for the purpose of this Act;*



'employer' means the body or person with whom the employee entered into a contract of service or apprenticeship and includes any body or person designated as the employer by an Order made by the Minister under section 60; ..."

There is no need to state all other relevant provisions of the VNPF again here. They are already mentioned earlier on in the judgment (at pages 4 & 5). I bear them in mind at this stage. I consider and apply them on the facts before the Court in respect to each and all essential elements of the offences as set out in the judgment (at page 6).

Applying the law to the facts as found I am satisfied that the prosecution has proved each and all essential elements of the offenses as charged beyond a reasonable doubt.

The defendant was the employer of the prosecution witnesses and, was accordingly responsible to register as an employer, register employees, namely: Akesha Litch, Rex Issachar, Anthony Ligo, Jonas Cullwick, Winston Tarere and by failing to pay contributions, failed to pay the surcharge due at the rate of 2% per month from the month of January 2001 to June 2002.

Verdict

The defendant, Marke Lowen, is found guilty and convicted on each and all of the 138 counts as charged.

Dated at Port-Vila this 18th day of June 2003

BY THE COURT
REPUBLIC OF VANUATU
SUPREME COURT
Vincent LUNABEK
Chief Justice