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

Civil Case No. 49 of 2010

BETWEEN: **MARY JEREMIAH**
MARY JACK
NIPIKO APEN
ROSE STEPHEN
Claimants

AND: **TAFEA PROVINCIAL GOVERNMENT COUNCIL**
Defendant

Coram: ***Justice D. V. Fatiaki***

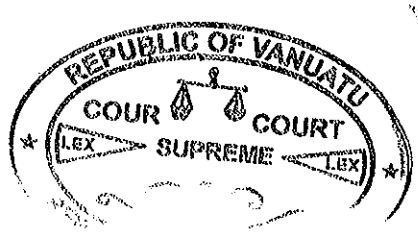
Counsels: *Mr. B. Yosef for the claimants*
Mr. L. Tevi for the defendant

Date of Decision: *17 June 2011*

JUDGMENT

1. The claimants were all former employees of the **Tafea Provincial Government Council** (*"the Provincial Government"*) who were terminated by a standard form letter dated Thursday 4 March 2010 signed by the Secretary General of the Provincial Government. The body of the letter reads:

> *"**Re: Redundancy payment***
>
> *Letter ia hemi serve blong informem you se TAFEA Provincial Government Council hemi decide blong redundanem you folem niu structure we hemi been approved long extraordinary Ordinary Session blong hem long number 10 February 2010 since position blong yu hemi been appolish under long niu structure.*
>
> *Termination blong you hemi effective start long 1 march 2010.*
>
> *Mi copyem letter ia igo long Accountant blong transferem every redundancy benefits blong you igo long Accountant blong you.*
>
> *Mi wantem tekem opportunity ia blong talem bigfala thank you long service we yu been providem long olgeta people blong TAFEA since you been employed by TAFEA Provincial Government mo long good cooperation mo working relationship*



we you been demonstratem long office blong you towardem olgeta colleagues staff we you been work wetem olgeta.

Thank you long understanding blong you mo wishim you every success long any future endeavour.

Yours sincerely,

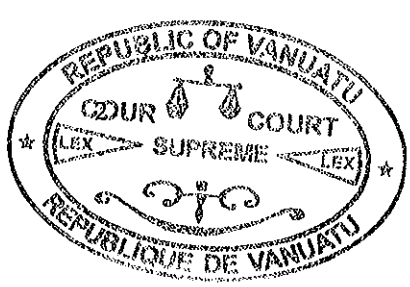
Noclam Tom Peter
Secretary General."

2. There is no suggestion in any of the letters that the claimants were being terminated as a result of misconduct or as a disciplinary measure. Indeed, the sole reason given for the claimants' termination was that they were being made redundant following the approval of a new organizational structure by the Provincial Government in which "*position blong yu hemi appolish under long niu structure*".

3. After an unsuccessful attempt to get themselves reinstated, the claimants issued proceedings in the Supreme Court claiming for various losses occasioned by their alleged wrongful dismissal from their employment with the Provincial Government including, for loss of the benefit of continued employment until their retirement at age 55 years. Surprisingly, there is no specific itemized claim pursuant to **Section 56 (4)** of the **Employment Act** as there should have been.

4. In its defence, the Provincial Government denies that the claimants were wrongfully dismissed and asserts that "*it has a right in law to terminate employees as long as it pays all their entitlements and, the defendant has paid all entitlements of the claimants upon their termination*", and further the termination were done "*... for the purposes of efficiency in the operation of the defendant*". How such operational efficiencies were to be achieved is not explained or identified in the pleadings or in any of the sworn statements filed on its behalf. Copies of what is said to be the new structure of the Provincial Council are attached however to the Claimant's sworn statements.

5. In reply, the claimants refer to the **Decentralization Act [CAP. 126]**, the **Local Government Council (Staff Regulations) No. 1 of 1994** and the **Standing Orders** of the Local Government Region and the claimants aver that their terminations were "*not done in good faith and within the confinements (sic) of the law*". In particular, the claimants complain that they have not breached any of their employment conditions which would warrant their dismissal or termination. They also challenge the legality of implementing the new organizational structure in the absence of prior approval by the Director of Provincial Affairs and the Minister of Internal Affairs.



6. The claimants also question the so-called redundancy reasons given by the Provincial Government for their terminations on the basis that there was **no** pressing need for a restructure and, in any event, the claimants' positions were retained or continued under the new organizational structure which saw an actual increase in the number of positions in the Provincial Government. No satisfactory detailed comparison of job numbers and titles or descriptions has been made to establish this latter claim as they should have done.

7. Having considered the legislative provisions referred to by the claimants in their reply, I am firmly of the view that, subject to one exception in the **Staff Regulations** which shall be referred to later, the legislative provisions do **not** assist the claimants.

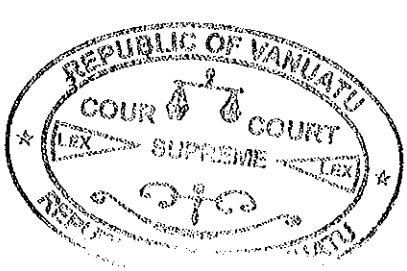
8. For instance, **Section 20** of the **Decentralization Act** [CAP. 127) expressly states:

> "*... a local government council may from time to time employ on such terms and conditions as it may determine such agents, servants, and workmen as may be necessary for the proper performance of its functions*".

9. Such a wide and subjective power to engage staff includes, in my view, power to establish an organizational structure as the local government council determines, and power, to change or alter such structure as the need arises from time to time and to make redundant such employees as no longer required.

10. Furthermore, the so-called requirement of prior Ministerial approval and publication of local government legislation is necessarily confined to what are called "*regional laws made for the good government of the region and the welfare of its people ... (and) as may be necessary for or incidental to the carrying out of the direct and indirect duties and powers referred to in Part I of the Schedule*" (***see:*** sections **26**, **28**, and **29** of the **Decentralization Act**).

11. A perusal of the various direct and indirect duties and powers enumerated in **Schedule 1** of the **Decentralization Act**, could not, by any stretch of the imagination, extend to the establishment of a staff organizational structure of a local government council such as to constitute it a "***regional law***" and require it (the organizational structure) to be submitted for Ministerial approval **before** it could be implemented. The fact that a similar organizational re-structure of the Provincial Government was submitted on an earlier occasion and was rejected by the relevant Minister for lack of sufficient funds to sustain the proposed structure, does **not** in my view, alter the applicable law **or** create a binding precedent for implementing future administrative organizational restructures.



12. Needless to say, in light of the foregoing, I have serious doubts about the correctness of the '*advice*' tendered by **Joe Narua** a former Secretary General of the Provincial Government concerning the requisite procedure to be followed by the Provincial Government in implementing its new organizational structure.

13. In similar vein, I do not accept counsel's submission that the provisions of the **Interpretation Act** [CAP. 132] have any relevance or bearing on "*regional laws*" passed by the Provincial Government in the exercise of its law-making powers, nor, given the detailed provisions of **Sections 28** and **29** of the **Decentralization Act**, is there a need to refer to the Interpretation Act [***see:*** Section 1 (b)] **or** to so-called "*statutory orders*" which undoubtedly have a legislative content and effect [**see:** Section 15 of the Interpretation Act]. In simple terms, an organizational structure is **not** legislation.

14. Then counsel refers to the provisions of **Chapter 7** of the **Staff Regulations** which deals with disciplinary offences and proceedings. Defence counsel submits that these provisions have **no** application to the present case as it is common ground that the claimants were **not** terminated as a disciplinary measure. I agree.

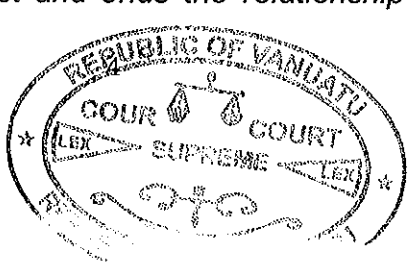
15. Defence counsel relies instead on the provisions of **Section 49** of the **Employment Act** which relevantly provides:

> "*(1) A contract of employment for an unspecified period of time shall terminate on the expiry of notice given by either party to the other of his intention to terminate the contract. ...*
>
> *(3) The length of notice to be given under subsection (1) –*
>
> *(a) where the employee has been in continuous employment with the same employer for not less than 3 years, shall be not less than 3 months; ...*
>
> *(4) Notice of termination need not be given if the employer pays the employee the full remuneration for the appropriate period of notice specified in subsection (3)*".

(***see:*** also to similar effect are the provisions of **Chapter 11.4** and **11.5** of the **Staff Regulations**).

16. However, in **Nin and Others v. Torba Provincial Government Civil Case No.69 of 2010** [2011] VUSC 22; where a similar mass dismissal occurred, this Court said of Section 49 of the Employment Act:

> "*... a notice of termination whether given under Section 49 or under Section 11.4 of the Staff Regulations effectively terminates the employment contract and ends the relationship of employer*



and employee. What it does not and cannot do, is to legitimize or justify an otherwise unjustified dismissal or wrongful termination".

That case is readily distinguishable however, from the present case, on the basis that the terminations there, occurred under the pretext of an organizational restructure that did **not** in fact take place, and, was contrary to performance appraisal reports that recommended the continued employment of the dismissed staff members.

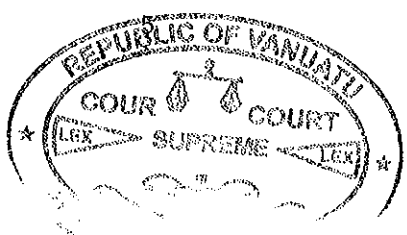
17. Be that as it may, the Provincial Government by its own admission and actions correctly accepts that a severance allowance was due and payable to the claimants as a consequence of the termination of their employment. The claimants do **not** challenge that such a payment was due and paid to them pursuant to **Sections 54** and **56 (1)** of the **Employment Act**, instead, they seek an additional payment of severance allowance under **Section 56 (4)** on the basis that their terminations were "*unjustified*".

18. The **Employment Act** no-where defines the meaning of the term other than to deem as "*unjustified*" any dismissal for serious misconduct that occurs without giving the employee an adequate opportunity to answer any charge made against him [***see:*** Section 50 (4)]. I am content therefore to give the term its ordinary and natural meaning short of actual illegality with the onus on the employer to establish some justification for the dismissal or termination.

19. In this latter regard the Provincial Government reaffirms through its assistant Secretary General's sworn statement as follows:

> "*3. Long namba 10 February 2010, TAFEA Province hemi mit long wan extraordinary session blong hem mo appruvum wan niufala structure long administration blong hem.*
>
> *4. Long Extraordinary session ia, Defendant hemi decide tu blong hemi mekem redundant mo terminatem ol Claimants from ol position blong olgeta ibin apolished long niufala structure we Defendant hemi jes appruvum.*
>
> ...
>
> *7. TAFEA Province long taem blong termination blong ol Claimants, hemi bin pem aot ol full employment entitlements blong ol Claimants folem law. Mi annexem wetem statement ya olsem "**DT3**" true copies blong ol statements blong Account blong Defendant we hemi showem ol payments we Defendant hemi mekem iko long ol Claimants.*"

20. For their part, the claimants, whilst acknowledging and accepting the various terminal payments that were made to them, nevertheless, disputes



the reasons or justification given by the Provincial Government for their respective terminations **i.e.** redundancy owing to the abolition of the Claimant's positions.

21. It is somewhat ironic that the present claimants were appointed to their various positions after a similar restructure exercise was undertaken by the Provincial Government in 1997 in which, all its employees were made redundant at the time.

22. It may well be that the claimants might have been able to establish, through a detailed comparison and close cross-examination of the Provincial Council's witnesses, that the new restructure was **not** a genuine or bona fide re-organisation in the sense that their positions were **not** abolished but merely re-named and that therefore they should be allowed to retain their "*re-named*" positions but that was neither properly pursued **nor** established to my satisfaction.

23. Be that as it may, the claimants say that the Provincial Government's redundancy program "*... was done contrary to the legal elements of redundancy*" (whatever that may mean). In particular, the claimants assert that the Provincial Government's new organization structure:

- **Did not** effect a reduction in the numbers of staffs;
- **Was not** required or dictated by any policy or economic necessity;
- **Did not** significantly change the role or functions of the claimants existing positions or posts within the organization; and
- **Improperly** made the claimants redundant without an objective performance appraisal justifying such action in respect of each of them.

24. Whilst the first three enumerated features commonly occur in organizational restructures, their absence is **not** necessarily fatal to either the genuiness of the restructure and/or any redundancies that may result from it.

25. I accept that there appears to have been some confusion on the part of the Provincial Government as to the legality of the implementation of its new organizational structure as well as on the meaning of the term "*redundancy*" in the reorganization of its staffing requirements as evidenced in the relevant minutes and highlighted in counsel's submissions.

26. In this regard the **Employment Act** contains a solitary reference to the term in the context of **Section 67** which requires an employer:

> "*... proposing to dismiss as redundant ten or more employees at 1 establishment within a period of 30 days or less ... (to) notify*

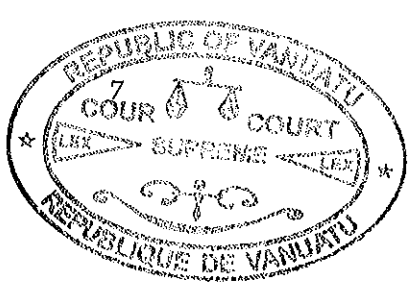
the Commissioner (of Labour) of his proposal at least 30 days before the first of those dismissals is proposed to take place".

27. Plainly, dismissal by reason of redundancy is **not**, *per se*, an illegal or unauthorized activity and necessarily involves a mass termination of employees by the one employer. In this regard it is not known what proportion of the Provincial Council's employees were constituted by the claimants, one third, a half or more? As was noted by the learned author of **Marken, McCarry and Sappideen's The Law of Employment** (4th edn) at p.182:

> "*Redundancy is a relatively recent social and industrial phenomenon. It is not a concept known to the common law of contract. It is not a ground for summary termination. Therefore, the employer must give the employee proper notice of termination of the contract of employment. The classic definition of 'redundancy' ... was given by Bray CJ in R v. Industrial Commission of South Australia Ex parte Adelaide Milk Supply Co-op Ltd. (1997) 16 SASR 6 where his Honour said (at p.8):*
>
> > "*... the concept of redundancy ... seems to be simply this, that a job becomes redundant when the employer no longer desires to have it performed by anyone. A dismissal for redundancy seems to be a dismissal, not on account of any personal act or default of the employee dismissed or any consideration peculiar to him, but because the employer no longer wishes the job the employee has been doing to be done by anyone*".
>
> *... It was brought about as a result of increasing unemployment consequent upon economic and industry downturn, company amalgamations and take overs, technological change and restructuring or reorganizations of employment ...*"
>
> (my underlinings)

and later at p. 183 the authors further observe:

> "*A redundancy may arise as a result of a restructure in order to increase competitiveness or profitability of the business. It has been accepted that an employee's position is redundant where the duties that go to make up that position are split up and spread amongst other employees ... Ryan CJ in the Industrial Relations Court of Australia in Jones v. Department of Trade and Minerals (1995) 60 IR 504 ... said*



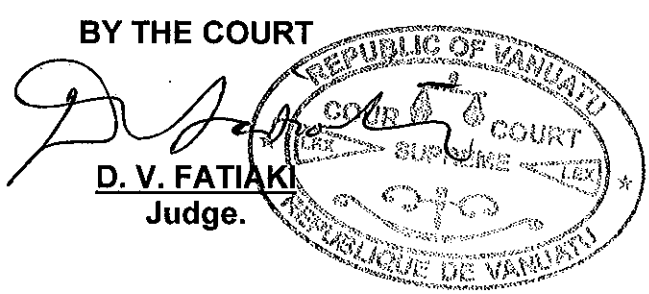
> "*... it is within the employer's prerogative to rearrange the organizational structure by breaking up the collection of functions, duties and responsibilities attached to a single position and distributing them among the holders of other positions including newly-created positions*".
>
> *(my underlining)*

28. In the final analysis, the decision *when?* and *how?* to restructure and what redundancies (if any) should occur within the organizational restructure are solely for the employer to make as it sees fit, and, it is **not** for the Court or the redundant employees to second-guess or undermine the restructure on the basis of some perceived unfairness in its implementation.

29. For the foregoing reasons the claim must be and is hereby dismissed in its entirety. The Provincial Government is awarded costs to be taxed if not agreed.

DATED at Port Vila, this 17th day of June, 2011.

BY THE COURT



D. V. FATIAKI
Judge.