

(Civil Jurisdiction)

BETWEEN: EDWIN WAMILEE

Claimant

AND: MAPBEST PLANTATION LIMITED

First Defendant

AND: BOARD OF DIRECTORS

Second Defendant

Mr Justice Oliver A. Saksak

Mr Saling Stephens for the Claimant
Mr Daniel Yawha for the Defendants

Date of Hearing: 23rd August 2012
Date of Judgment: 7th March 2013

JUDGMENT

Background Facts

1. The Claimant was appointed as Plantation Manager of the First Defendant by the Second Defendant commencing on or about 12 August 1992. He was appointed on contractual basis with a fixed salary of VT40.000 per month. Under the contractual arrangement he was also entitled to 2% of the net profit earned year as a bonus or gratuity for want of better word.
2. On or about 9 May 2005, the Second Defendant wrote a letter in which they advised the Claimant about his demotion to Foreman with a reduced salary of VT30.000 per month. He was served with the letter only on 1 August 2005. The



letter contained 9 point allegations as the basis for the Claimant's demotion. The Claimant continued to receive a monthly salary of VT30.000 until 31 March 2007.

3. On 31 March 2007, the Claimant received another letter from the Second Defendant which advised him of his termination with effect from 16 March 2007. The letter was dated 25 March 2008. The letter contained 4 point allegations as the basis of his termination.

Claims

4. From those given facts, the Claimant filed proceedings on 2 June 2008 claiming that –

(a) From 31 April 2007 until 16 April 2008 he was not paid any salaries and claims the sum of VT375.000.

(b) He suffered loss and damages as follows:-

(i)	3 months in lieu of notice as foreman –	VT90.000
(ii)	Severance for 2 years and 8 ½ months –	VT81.250
(iii)	6 times multiplier under section 54(1) of The Employment Act Cap 160 x 4	<u>VT325.000</u> -
	Total	- <u>VT496.250</u>

(c) For being demoted from Plantation Manager to Foreman he suffered loss and claimed a total sum of VT2.306.940 calculated as follows:-

(i)	Payment of Gratuity at 2% per annum –	VT633.420
(ii)	Overtime -	VT203.520
(iii)	34 months of Manager's salaries -	VT1.020.000
(iv)	3 months salaries in lieu of notice -	VT120.000
(v)	Severance payment for 3 years and 3 months –	<u>VT66.000</u>
(vi)	Multiplier under section 54(1) of the	



Employment Act Cap 160 x 4

Total -

VT2.306.940

Reliefs Sought

5. The Claimant seeks the following reliefs –
 - (a) A declaration that his removal or demotion from Manager on 9 May 2005 was unjustified and unlawful.
 - (b) A declaration that his purported termination as Foreman on 16 April 2008 was unjustified and unlawful.
 - (c) An order that he be entitled to damages against the Defendants jointly and severally for being removed as Manager.
 - (d) In the alternative that he be entitled to recover the balance of his salaries up to 16 April 2008.
 - (e) An order for damages against the Defendants jointly and severally for being removed as Foreman.
 - (f) Interests at 4% per annum on judgment sum from the date of filing of his claims until final settlement; and
 - (g) Costs of and incidental to the action.

The Defence

6. The Defendant filed a Defence on 23 September 2008 which reveals that –
 - (a) The assertions by the Claimant in paragraphs 1 – 4 of his claims are admitted and are not in issue.
 - (b) The Claimant has a 2% entitlement as bonus but say it is calculated from the net annual profit, not the gross income.



- (c) The demotion of the Claimant from the position of Manager was due to non-satisfactory performance of duties and for nine allegations for which the Board requested the Claimant twice to make a report clarifying them and he failed to or omitted to do so.
- (d) For a period of almost two years from 31 August 2005 to 31 March 2007 the Claimant did not raise his complaint against his demotion, indicating he had accepted his demotion.
- (e) His salaries were not paid because the First Defendant was withholding them to repay the amounts the Claimant had admittedly misappropriated.
- (f) For those reasons the Defendants deny the Claimant is entitled any of the damages he claims under paragraphs 8, 11, 12 and 13 of his claims and say his claims should be dismissed in its entirety.

The Evidence

7. A. From the Claimant

In an attempt to prove his claims on the balance of probabilities the Claimant produced evidence orally and by sworn statements dated 19 June 2008 – (Exhibit C1), 2 June 2008 (Exhibit C2), 3 June 2008 (Exhibit C3), 18 October 2010 (Exhibit C4), 9th September 2011 (Exhibit C5 and Exhibit C6). He called independent evidence from his daughter, Dephnie Wamilee. She deposed to being served with her father's letter of termination on Saturday 13 April 2008 in her village and that she delivered it to her father only on 16th April 2008 upon her return to work.

B. From the Defendants

In support of their defences the Defendants produced evidence orally and by sworn statements from (a) Rinneth Shing – 6 October 2009 and 9 August 2012



(Exhibits D1 and D2); (b) Clenton Ronson – 18 September 2009 and 8 August 2012 (Exhibits D3 and D4).

Submissions

8. At the end of trial hearing Counsel requested time to file written submissions. The Court allowed 21 days to the Claimant and a further 21 days thereafter for the Defendants. Mr Yawha filed written submissions on 19 September 2012. Mr Stephens has not filed any written submissions or if he has the Court has not seen them.

Discussions And Considerations

9.1. Mr Yawha raised four issues in his written submissions. Counsel also sets out in chronological order the events that gave rise to the Claimants claims which is of great assistance to the Court and for which the Court is indeed grateful. The four issues which Counsel urges the Court to consider and determine are –

- (a) Whether the Claimant is entitled to be paid any outstanding bonuses?
- (b) Whether the Claimant's demotion was unlawful and if so, whether he is entitled to the damages claimed?
- (c) Whether the Claimant's termination is unlawful and if so, whether he is entitled to the damages claimed?
- (d) Whether the Claimant is entitled to recover the balances of his alleged labour entitlements up to 16 April 2008?

The First Issue-Bonus

9.2. The evidence of Clenton Ronson, Exhibit D4 annexes the Policy and Procedures of the Mapbest Plantation Clause 2. O provides for Job Descriptions of the Manager. Clause 2.1.9 states –



"The wages are set by the Board of Directors at a flat monthly rate with a bonus coming as a percentage of Year Net Profit to be paid one time only. Bonus set at 2% is recommended." (My underlining for emphasis).

9.2.1. The Claimant asserts he is entitled to 2% of the revenue for the years 2002 to 2005 in the sum of VT633.420. In his sworn statement of 2 June 2008 (Exhibit C2), the Claimant annexes a summary of revenue for 2002 to 2005. The defendants dispute this contention and submit the Claimant is entitled to a 2% bonus but it is paid from the net profit made in each year and not from the gross revenue. The defendants further submit that in the years 2002, 2004 and 2005 the company did not make any profit. As such, there was no bonus payment. There was only one bonus payment made in 2003 out of the profit made in that year. The Court accepts the defendants' contentions and submissions.

9.2.2. In light of the evidence and submissions by the defendants the Court finds and rules that—

(a) The Claimant is entitled to a 2% bonus but it is payable from the net profits made in each working year and not from the gross revenue as claimed.

(b) No profits were made in 2002, 2004 and 2005 and therefore no bonuses are payable to the Claimant in respect to those years.

(c) The Claimants' claims for bonuses for those years are therefore hereby dismissed.

The Second Issue: Demotion

9.3. The Claimant's evidence (Exhibit C2 Annexure "F") discloses a letter of demotion dated 9 May 2005 which he received on 1st August 2005. The letter contains nine



points allegations as the basis for his demotion. His evidence also discloses his Employment Contract (Exhibit C2 – Annexure “C”). I set out the relevant parts as follows –

“Mapbest Plantation

Employment Contract for Position of Manager:

This contract is between Edwin Wamilee and Mapbest Plantation. Commencing on September 1st 2002 and up for review March 1st, 2003 whereas Mapbest Plantation being the employer.

Mapbest Plantation has agreed to employ Edwin Wamilee herein-after referred to as the “employment” for the probationary period of six months to the day for the position of Plantation Manager.

The Employee and Mapbest Plantation have reached mutual agreement and understanding in the acceptance of the following conditions:

- 1. The employee shall be employed for a period of six months probation period under which reviews and prescribed meetings will be conducted at the discretion of the Board of Directors.*
- 2. The employee shall receive 40.000 vatu per month. Being incremented twice monthly for a period of six months. After which the wages to be received by the Board.*
- 3. Not relevant.*
- 4. The employee is directly responsible to the Board of Directors with the Chairman being the representing party.*
- 5. The employee shall not conduct business in the manner of personal gain or status.*



6. *All Mapbest Plantation Policy must be consulted, understood and followed in the matter concerning assets and business practice.*

7. *The employee is bound by Holidays, Days off, and Sick Leave as for the follow employees with annual leave calculations starting after the six-month probation period.*

I have read, understood and agreed to the terms of this contract and have the opportunity to obtain legal advice, with respect to this contract, if so desired.

*Signed: Edwin Wamilee
Employee
Owen Edwin
Chairman
Nasse Carlo
Witness.”*

9.3.1. The defendants submit that the demotion of the Claimant was lawful relying on the common law position (in spite of the fact that there is no provision in the Employment Act) that an employer has the right to hire, fire, promote and demote its employees in the best interest of the company's business. They rely on the case law of Tsibon v. Deou Motors Ltd [2002] VUSC 5; Civil Case No. 111 of 2000.

The Court accepts the defendant's submissions.

9.3.2. The defendants further submit that after his demotion the Chairman of the Second Defendant verbally asked the Claimant on least four occasions that he submits a report concerning the misuse of monies received from sale of bullocks. The report was submitted some 22 months later and 5 months after his



suspension. They further submit that the Claimant had never challenged his demotion until after his termination.

9.3.3. The Contract of employment does not make provision for demotion. It provides however for a six-months probation period after which review should have been made but it clearly stated that it was all *“at the discretion of the Board of Directors.”*

9.3.4. The defendants’ evidence reveals misuse of subsidies from the Vanuatu Commodities Marketing Board and Misappropriation of monies received from sale of bullocks by the Claimant – See Rinneth Shing’s sworn statements Exhibits D1 and D2. The amounts misused was the sum of VT191,497 beginning from 20 December 2002 to 16 April 2005. These misuses occurred prior to demotion on 9 May 2005.

9.3.5. The Claimant clearly admitted misappropriations of the Company’s monies in his oral evidence. In his evidence (Exhibit C2 – Annexure “E”) the Claimant discloses Job Descriptions of the Board of Directors, Manager, Foreman, Accountant and Driver/Salesman. On the Managers’ duties is that he *“must understand that he is ultimately responsible for the productivity and profitability of the Plantation.”*

The defendant’s evidence was that in 2002, 2004 and 2005 the Plantation did not make any profits. The first point of allegation stated in the letter of demotion states –

“Report blong yu ie no reflectem wok long plantation olsem we ol share holder I expectem.”

From this, the Court infers that the shareholders expected profitability and where there was no profit for those three years under the Claimant’s management, only he was ultimately responsible.

The Court will infer therefore that it was under those circumstances that the Claimant’s contract was not reviewed in March 2003 and within the ensuing six months thereafter until May 2005 when the Board took a decision to demote him.



Within the terms of the contract, the Board had exercised their discretion in deciding to demote the Claimant. And having given the Claimant up to four times demands to produce a report to explain and clarify allegations raised against him, the Board had acted reasonably in the exercise of their discretion. And I so rule.

9.3.6. As for the Claimant's failure or omission to complain against his demotion, such failure and/or omission amount to a waiver. Equally he did not complain against non-review of his position after 1st March 2003. The Court infers under those circumstances that the Claimant had accepted what the defendants had done to him at the time.

9.3.7. As regards the Claimant's claims for overtime payments, these are not substantiated by any evidence as to the details of them. In any event the claims for overtime for 2003 to 2005 are time-barred.

9.3.8. In the final analysis, the Claimant's claims under paragraph 8 of his claims totalling VT2,306,940 fail and are hereby dismissed.

The Third Issue: Termination

9.4. The Claimant's case is that his termination on 25 March 2008 was unlawful and unjustified for reason that he was not given the opportunity to explain himself. He discloses his letter of termination in his sworn statement of 2 June 2008 (Exhibit C2 – annexure "I"). The letter lists four allegations for which the termination was made. It alleges basically misuse of the company's moneys and the concern that it was the second time around the offending was done by the Claimant.

9.4.1. The defendants submit that the termination of the Claimant was lawful and that as such his claims for damages should not be allowed. The evidence of Clenton Ronson in his sworn statement dated 18 September 2009 (Exhibit D3) show that after March 2007 the Claimant was not paid any salaries but his salaries were recouped to reimburse all moneys he had misappropriated.



9.4.2. The Court accepts the defendant's submissions that the Claimant's termination was lawful on the basis of serious misconduct constituted by theft of VT30,000 and misappropriation of the sum of VT191,000. The Claimant gives evidence of cash advances in the sum of VT240,577 (Exhibit C2, Annexure "G"). These amounts were well over the Claimant's monthly salaries and therefore following the case of J v. PSC [2009] VUSC 128; Civil Case No. 216 of 2005 his actions amounted to serious misconduct for which the defendant were entitled to terminate without notice. There was no other alternative course for the defendants to take. This was an employee who was demoted, then suspended and finally dismissed not only for misuse and misappropriations, but also because he could not produce or perform to the expectation of the Defendants in accordance with his job descriptions.

9.4.3. The complaint that the Claimant was not given an opportunity to explain himself is without foundation. The evidence of the defendants is that he was asked up to four times to produce a written report following his demotion in May 2005. He did not do so until 2 years and 3 months later when he wrote a letter of explanation. That was enough to afford him natural justice – See Ben Garae v. PSC [2005] VUCA 20; Civil Appeal Case 3 of 2005.

9.4.4. For the reasons and findings made above, the Court rules that all claims relating to termination of the Claimant's appointment as Foreman fails and are hereby dismissed.

The Fourth Issue – Outstanding Labour Entitlements

9.5. The Claimant has no claims for outstanding leave entitlements. It appears to the Court that the Claimant has no other outstanding labour entitlements. On that basis these claims are dismissed.

Conclusion



10. The Claimant's claims are unsuccessful and are hereby dismissed in its entirety.

Costs

11. Under normal circumstances, costs would follow the event. In this case the defendants would be entitled to costs. However, considering the circumstances of both the Claimant and the Defendants, both parties have benefitted to some extent by the Claimant's action. For that reason, costs must lie where they fall. There will be no orders as to costs. Each party will meet their own costs.

DATED at Luganville this 7th day of March 2013.

BY THE COURT



OLIVER A. SAKSAK

Judge

