

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

Civil Case No. 337 of 2014

**BETWEEN: JESSIE AVOCK**  
First Claimant

**AND: SUSAN ISOBEL SOLIP**  
Second Claimant

**AND: REPUBLIC OF VANUATU**  
Defendant

**Coram:** Justice Chetwynd  
**Parties:** Mr. Temar for the Claimants  
No appearances for the Defendant

**Hearing** 17<sup>th</sup> August 2015

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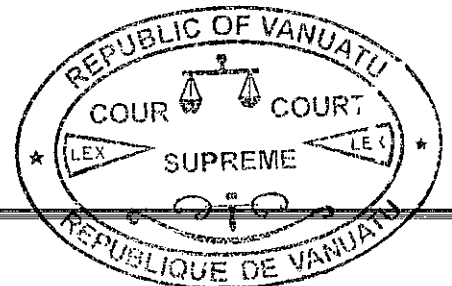
**JUDGMENT**

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1. John Jackson Avock and Amos Solip were career police officers. They both joined the police force at roughly the same time (round about April 1976) and sadly both died in service within a couple of months of each other, Mr Avock on 27<sup>th</sup> August 2009 and Mr Solip in April 2009. Both had worked their way up through the ranks reaching the rank of Senior Inspector and Chief Inspector respectively. Chief Inspector Solip died on the Weather Coast of Guadalcanal whilst on active duty with the Regional Assistance Mission to Solomon Islands (RAMSI). As far as I am aware at no time has there been any suggestion that Chief Inspector Solip's secondment to RAMSI has any bearing on this case. Therefore there does not appear to be any dispute that Senior Inspector Avock had served 28 years and 1 month and Chief Inspector Solip, 27 years and 9 months.

2. The Claimants in this case are the widows of the officers, Mrs Jessie Avock and Mrs Susan Isobel Solip. Mrs Solip has been granted Letters of Administration in respect of her late husband's estate. I have not been made aware of any objection or proposition to suggest that the Claimants are not the proper persons to pursue this claim or are not entitled to do so.

3. There is only one matter in contention and that is set out in the minute and directions published by Harrop J on 19<sup>th</sup> June this year. In brief, has the Defendant paid the deceased police officers and/or their estates what ought to have been paid under the law? His Lordship set the matter down so that preliminary issue could be argued and it has been agreed that a decision on the preliminary issue will dispose of the case.



4. Approaching this issue from the Defendant's point of view the State argues that the situation is covered by Police General Orders of 1993. They are said to state the following:-

*In the event of death of an officer, other than a temporary officer, during the course of his service, the Government shall pay to his legal personal representative a sum equivalent to one year's total emoluments*

In accordance with that provision the Claimants were paid VT2,080,656 and VT1,799,280 respectively. I have not seen a copy of the Police General Orders but there is no dispute that is the provision which appears in them and which was relied upon by the State.

5. What is said by the Claimants is that there are other statutory and regulatory provisions which apply. In particular The Police Act [Cap 105]. They refer to section 8 :-

*Except where expressly provided for by this Act, members shall be subject to the same terms and conditions of service as may apply to members of the public service.*

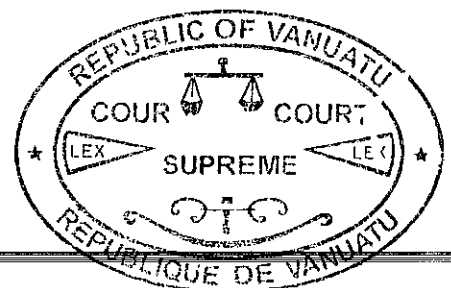
6. Looking at that section, the first question is are there other specific legislative provisions in relation to death ? It does appear there are but they were not referred to by either counsel for the Claimants or the Defendant. Those provisions were introduced by amendment in July 1991<sup>1</sup>. The amending Act provided:-

*32A (1) If any member is temporarily incapacitated by reason of any wound or injury or sickness contracted by him in the performance of any duty or training by him under this Act and such wound or injury is received or such sickness is contracted in the actual discharge of his duty as a member and without his own default, he shall be eligible to receive free medical treatment therefor and full pay for the period of such incapacity.*

*(2) If any member receives any permanent disablement attributable to any wound or injury received or sickness contracted by him in the circumstances referred to in subsection (1), the Minister may, after consultation with the Minister responsible for finance, pay gratuity to such member at such rates as shall be prescribed.*

*(3) If any member is killed or dies as a result of any wound or injury received or sickness contracted by him in the circumstances referred to in subsection (1), the Minister, after consultation with the Minister responsible for finance, grant to the dependants of such member such pension or allowance at such rates as shall be prescribed.*

<sup>1</sup> The Police Amendment Act 1991 (No 1 of 1991)



(4) If the property of any member is damaged during the performance of any duty or training by him under this Act, such property being damaged without his default and on account or circumstances specifically attributable to the nature of his duties as a member, the Minister, after consultation with the Minister responsible for finance, award such member such compensation at such rates as shall be prescribed.

(5) The Minister shall not award to any member or to the dependants of any member any gratuity, allowance, pension or compensation under subsections (2), (3) or (4) if such member or such dependants is or are eligible to receive a gratuity, allowance, pension or compensation in respect of the same disablement, death or damage under any other law in force at the time.

As far as I am aware or have been able to ascertain the Act still applies but can, in this case, have no or minimal effect. This is because first, there is no indication that the two officers died as a result of any wound or injury or sickness "contracted in the performance of any duty" and secondly because subsection 5 provides that eligibility for alternative payments removes the obligation on the Minister to make payments under this section. The Claimants' case is that there are other legislative provisions that the dependants of the two officers can resort to and there is no need to have recourse to section 32A.

7. Before turning to those other provisions, it should be mentioned there *is* now legislative provision for payments in respect of the death in service of a police officer by yet another amendment to the Police Act<sup>2</sup>. Hopefully it will remove any doubt in the future. It covers the situation where there has been a death in service in a less restrictive fashion that as set out in section 32A :-

*"29. Severance payment*

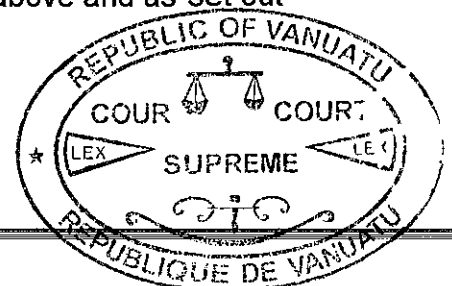
*A member who has:*

- (a) retired in accordance with section 28; or*
- (b) died in service or due to a natural cause; or*
- (c) an illness and is discharged on medical ground; or*
- (d) resigned,*

*is to receive from the Government a severance payment calculated at a rate as is determined for public servants by the Public Service Commission and pro-rata for each uncompleted year."*

Unfortunately this amendment did not become operative or effective until 17<sup>th</sup> January 2011 and the Claimants cannot take advantage of its provisions. However, the 2010 amendment does reinforce the close relationship between Police terms and conditions and Public Service terms and conditions referred to in paragraph 5 above and as set out

<sup>2</sup> Police (Amendment) Act No. 22 of 2010



in section 8 of the Police Act. Police officers are by that section required to be treated, so far as terms and conditions are concerned, as if they are public servants.

8. The Claimants argue that because police officers are to be treated in most respects as if they were in public service the authority for payments for death in service (over and above as provided for in the Police General Orders) can be found in the Public Service Act and the Public Service Staff Manual 2002 which was published by the Public Service Commission pursuant to section 44 of the Act. The latter section reads:-

*44. Public Service Staff Manual and instructions*

*(1) Subject to the provisions of this Act and any regulations prescribed, the Commission may from time to time publish a Public Service Staff Manual to provide for:*

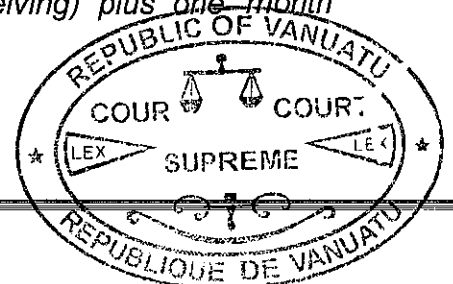
- (a) eligibility for appointment to the Public Service;*
- (b) procedure for such appointment (including probationary appointments and periods);*
- (c) salaries, allowances and payments in respect of overtime;*
- (d) mileage allowance and use of vehicles;*
- (e) subsistence, posting and travelling allowances;*
- (f) travel allowances beyond Vanuatu;*
- (g) housing benefits;*
- (h) general conduct;*
- (i) discipline;*
- (j) leave entitlements;*
- (k) medical entitlements;*
- (l) training and courses;*
- (m) cessation of service;*
- (n) superannuation;*
- (o) employment of contract employees.*

Referring the manual itself, it provides:

*5.14 Death in service*

*(a) In the event of the death of an officer or daily rated worker during the course of his or her service, the government shall pay to the officer's or daily rated worker's legally nominated beneficiary the following entitlements:*

- (i) standard entitlements specified in Section 4.1 of this chapter that the officer or daily rated worker has accrued up to the date of his or her death; and*
- (ii) a sum equivalent to six months total yearly remuneration (including any allowances the officer or daily rated worker was receiving) plus one month*



*remuneration for every one year of service provided by the officer or daily rated worker; and*

*(iii) a pro-rata amount for any period of less than 12 months employment that the officer or daily rated worker is in continuous employment in the Public Service; and*

*(iv) In the case of citizens of Vanuatu, repatriation costs of the body back to his or her home island and place of origin.*

*(b) In the event of the death of a temporary salaried employee during the course of his or her period of employment, the determination of entitlements, if any, will be at the discretion of the Commission.*

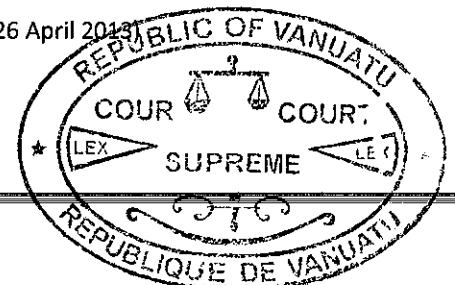
*(c) In the event of the death of an expatriate contract employee during the course of his or her service, the government shall pay to the expatriate contract employee's legally nominated representative a sum equivalent to the unpaid gratuity which would have been due to him or her had they completed the whole of the contract period.*

9. In all the circumstances I would have to say that contrary to the submissions by the Defendant, the Claimants have not been paid all they were entitled to. If proper regard is had to the provisions of the Public Service Act the dependants should be paid further sums. If we look at Senior Inspector Avock, his dependants should have been paid in the region of VT 4,630,500. Chief Inspector Solip's dependants should have received in the region of VT 6,297,480. The formula for calculating those sums is quite simple. It is what is set out in the Public Service Staff Manual and is expressed as follows  $((P/2) + ((P/12) \times Y) + ((P/12)/12) \times M)$ . [Where P is the total of the annual remuneration and allowances paid to the officer at the time of death, Y is the number of completed years in in service and M is the number of months in part years of service.] It should be noted that the remuneration includes allowances (see 5.14(a)(ii) above). It is not clear from the evidence before the court whether the figures quoted in evidence as being the annual salaries included allowances. For that reason I have expressed the entitlement in the terms of "in the region of". Of course from the entitlement under the Public Service Act should be deducted what was paid out under the Police General Orders.

10. Even if I am wrong in applying the Public Service Act formula to arrive at a figure for compensation for death in service the issue before the Court may still be in doubt. It is possible from the judgment of Fatiaki J in the case involving Frederick Kapalu<sup>3</sup> that the Claimants may be entitled to severance payments under the Employment Act. His Lordship carefully analysed Section 54 and in particular subsection (1)(e) of the Act. He identified the obiter comments in the Court of Appeal case<sup>4</sup> where the Court considered

<sup>3</sup> *Kapalu v Teaching Service Commission* [2014] VUSC 89; Civil Appeal 279 of 2013 (16 July 2014)

<sup>4</sup> *Wilco Hardware Holdings Ltd v Attorney General* [2013] VUCA 12; Civil Appeal 54-12 (26 April 2013)



the wording of subsection (1)(e) in relation to the words "*the employee ceases to be employed by reason of illness or injury and is certified by a registered medical practitioner to be unfit to continue to work*" and decided that there were two disjunctive limbs to the provision. That would seem sensible because to say that an employee needs a medical certificate as to his fitness for work when he has died would lead to the macabre situation where a medical practitioner has to provide a certificate saying this man is unfit for work because he is dead. His Lordship posed the question:-

*"It is clear from a reading of Section 54 that "death" of an employee is not clearly expressed as an entitling event. That is regrettable but understandable because of the many uncertainties in life, "death" is a certainty and when it occurs, it necessarily extinguishes the employment relationship. In the circumstances can it be said that the legislature must have intended to exclude "death" as an entitling event ?"*

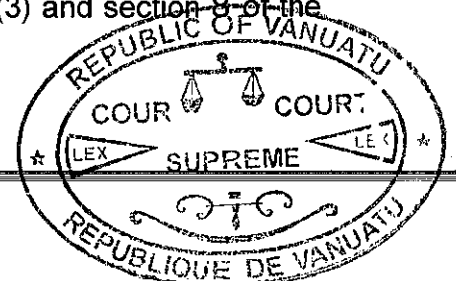
In his consideration of the question he opined :-

*"In summary, Section 54 which creates an employee's entitlement to a severance allowance does not expressly include "death" of an employee as an "entitling event". By the same token, Section 55 which identifies the circumstances where a severance allowance is not payable to an employee does not expressly identify the death of an employee as a "disentitling event". Indeed the provisions dealing with the severance allowance is completely silent on the death of an employee as opposed to the death of an employer. "*

After further consideration of the nature and purpose of a severance allowance His Lordship concluded:-

*"I hold that it could not be Parliament's intention that an employee who is compulsory retired or who takes voluntary retirement should receive a "severance allowance", whereas an employee of the same age and length of service who dies "in service" is denied the "security" of a "severance allowance" merely because of the misfortune that he didn't retire before his death. In my view, an employee's entitlement to a severance allowance should not be denied on such a fortuitous eventuality."*

11. Following Fatiaki J's decision it is possible that the Claimants could maintain claims for severance allowances as provided for in the Employment Act as well as claims under the Public Service Act. Of course they could not claim both at the same time but they are entitled to choose the most advantageous remedy. It would seem to me that the calculations set out in the Public Service Staff Manual are more generous especially as both Police Officers died before the amendment of the Employment Act in 2009 which changed the multiplier from one half of a month's salary for every year worked to one month's salary for every year worked. That is somewhat fortuitous and likely renders what I have said about the Employment Act *obiter dictum*. I say fortuitous because Section 6 of the Employment Act is relevant Section 76(3) is problematic. There appears to be some tension between the provisions of 76(3) and section 8 of the



Police Act. In brief, section 8 of the Police Act says officers are to be treated as if they were Public Servants, section 76(1) of the Employment Act says the provisions of the Employment Act apply to Public Servants but section 76(3) says the opposite and specifically excludes members of the police force from being covered by its provisions. Fortuitously, because the Public Service provisions are more beneficial to the Claimants it is likely that I am not going to be required to make a decision in respect of that conundrum.

12. In the circumstances it seems sensible not make a formal order at this stage. I will allow counsel to consider my comments about the Employment Act. They can check the maths involved and counsel can also check the amounts which should be attributed to each officer by way of remuneration bearing in mind my comments in paragraph 9 above. The question of costs needs to be resolved and unless counsel for either side have any strong views or submissions in connection with costs it seems they should follow the event. The Claimants' costs should be paid at the standard rate and taxed if not agreed. If counsel want to draft a final order for my consideration taking into account what is said in this judgment I would be happy to go that route. On the other hand, if counsel would prefer another hearing date when further submissions could be heard and a final order made, I am just as happy with that alternative course. To assist I will fix a hearing for 28<sup>th</sup> September 2015 at 2:30 pm for the purpose of further argument on the final order but if counsel prefer the first option and present me with a draft order to sign before that date I will consider the order and vacate the hearing.

DATED at Port Vila this 20<sup>th</sup> day of August 2015.

BY THE COURT

  
CHETWYND

