

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

Civil Case No. 180 of 2012

BETWEEN: ALBERT KALO TOARA  
Claimant

AND: AIR VANUATU LIMITED  
Defendant

Coram: Justice Aru

Counsel: Mr. A. Bal for the Claimant  
Mr. E. Nalyal for the Defendant

RESERVED JUDGMENT

Introduction

1. Mr Kalo Albert Toara is a former employee of Air Vanuatu (Operations) limited ("AVOL") and filed this claim for overtime payments. He alleges that his overtime entitlements were not paid upon his termination. He also claims that his termination was unjustified.

Background

2. The Claimant took up employment with AVOL in 2006. His appointment letter dated on 9 March 2006 says that he was appointed to the position of Chef in



Charge in the Catering Department of AVOL and that his employment was effective as of 8 March 2006. The letter of appointment also sets out the Claimant's duties and responsibilities as follows:-

"Duties and responsibilities

Your position as chef in charge (Permanent, full time). In this position you must perform such duties and responsibilities as may be required by Air Vanuatu from time to time and are within your capabilities. If required operationally, you may be required to perform shiftwork or day work or any combination thereof.

You will report to Roy Ernest – Catering Manager, until further notice is given to you by Air Vanuatu about any change in reporting relationships."

3. The Claimant occupied the position as Chef in Charge of Catering until his employment was terminated on 23 December 2011.

Claim

4. The Claimant alleges that when he was terminated, his entitlements for overtime hours worked on Saturdays from March 2006 to August 2011 were not paid. Furthermore, he alleges that his termination was unjustified. As a result he says he suffered damage and now seeks the following relief:-

- 1). VT 3,999,600 for overtime payment;
- 2). VT 500,000 for general damages;
- 3). VT 500,000 for special damages; and
- 4). Costs



## Defence

5. AVOL in its defence says that when the Claimant's employment was terminated all his entitlements were paid including overtime. It denies that the Claimant has suffered any loss or damage and says that the Claimant is not entitled to the relief claimed.

## Evidence

6. The Claimant relies on his sworn statement filed on 29 October 2012 and tendered as Exhibit "C1".
7. AVOL filed two sworn statements deposed by Reynold Boeson. The first was filed on 13 April 2013 and tendered as Exhibit 'D1'. The second was filed on 1 July 2013 which was tendered as Exhibit 'D21'.

## Issue

8. The main issue is whether AVOL owes the Claimant any unpaid overtime from the period March 2006 to August 2011 and secondly, whether his termination was unjustified.

## Law

9. Section 26 of the Employment Act [CAP 160] ("the Act") provides:-

"26. Overtime pay

- (1) In respect of work carried out in excess of the normal hours of work mentioned in section 22(1) an employee shall be paid overtime at the following rates:-





- (a) for work on public holidays or Sundays: at a minimum rate equal to one-and-a-half times the normal hourly rate;
  - (b) for work carried out in excess of the normal weekly hours of work –
    - (i) for the first 4 hours: at a minimum rate equal to one-and-a-quarter times the normal hourly rate;
    - (ii) in excess of 4 hours: at a minimum rate equal to one-and-a-half times the normal hourly rate;
  - (c) for work (other than work as a night watchman) carried out at night between 8 p.m. to 4 a.m. in excess of the normal weekly hours of work: a minimum rate equal to one-and-three-quarter times the normal hourly rate.
- (2) Subsection (1) shall not apply to persons engaged in domestic service of the employer.”

#### Discussion

10. This is a claim for non-payment of overtime. Section 26 of the Act sets out the rates in relation to overtime work. As the Claimant alleges that he has not been paid his overtime for the period March 2006 to August 2011, he has the burden of proof to prove his claim on the balance of probabilities. He has to show that he worked in excess of the normal weekly hours of work and was not paid by AVOL. The claim as pleaded at paragraph 9 and 10 of the claim states:-

*“9. The Claimant at times was requested to work on Saturday on an overtime basis but he has never been reimbursed for.*

#### *Particulars*

*a). March 2006 to August 2011 – 5 years 5 months = 65 months x 3 hours*



*195 hours – 631.250 Vatu/hr x 150*

*Total amount = Vatu 184,640*

*b). Day off – four hours for half day calculations*

*Total hours from March 2006 to August 2011 – 5 years 5 months = 65 months x 4 hours = 260 hours*

*260 hours x 631. 250 Vatu = 164, 125 Vatu164,125*

*Total amount: 184,640 + 164,125 = Vatu 348,765*

*10.The Claimant has never been paid the overtime works done during his employment with the defendant.”*

11.Mr. Boeson for the Defendant in his evidence says that the Claimant was appointed by letter dated 9 March 2006 [Exhibit D2- Annexure RB1]. He had a number of disciplinary issues which were raised with the Claimant [Exhibit D2 – Annexure RB3, RB4, RB5 and RB6] before the allegations were put to him in writing on 12 December 2011[Exhibit D2 –Annexure RB7] . The Claimant responded to those allegations by hand written letter on 16 December 2011 [Exhibit D2 – Annexure RB8].

12.On the 23 December 2011 the Claimant was terminated by letter [Exhibit D2 – Annexure RB9]. At paragraph 6 of the letter the Claimant was advised as follows:-

*“Your outstanding entitlements, including your three(3) months’ salary in lieu of notice, is being deposited to your designated bank account in full and final satisfaction of all claims being:*

*1) All outstanding salary;*



- 2) *Severance payment*
- 3) *Three (3) months in lieu of notice ;and*
- 4) *All outstanding annual leave /holiday pay."*

13. The Claimant on the other hand says at paragraphs 8 , 9 and 10 of his sworn statement [Exhibit C1] that:-

*"8. I am employed by the defendant on every Monday to Fridays every week.*

*9. At times I was requested to work on Saturday on an overtime basis but I am never been reimbursed for the overtime job I did.*

*10. I am claiming my overtime see payment. See Annexure marked AKT3."*

14. Annexure AKT3 to the Claimant's sworn statement is a letter dated 31 May 2012 from Mr Edwin Kalorisu of EK Consultancy Services to the Public Solicitor, Claimant's Counsel. In his letter, Mr Kalorisu outlines certain calculations made in respect of the Claimant's overtime and forwarded to the Public Solicitor to consider *"whether the calculations are justifiable."*

15. Under cross examination the Claimant says that his claim was based on a breakdown prepared by the Labour Department. Mr Kalorisu of EK Consultancy Services whose calculations the Claimant relies upon was not called to give evidence or did not file any sworn statements in support of the Claimant's case.

16. That alone is enough to put into question the amount claimed as overtime .The particulars in the claim give a total of VT 348,765 whereas the relief claimed in





paragraph 1) is a sum of VT 3, 999, 600 for overtime payment. The Claimant has not produced any salary slips or any evidence of overtime claimed. Mr. Boeson in his evidence stated that all employees of AVOL are issued with salary slips which gives their salary plus overtime and net salary.

17. To rely on Mr. Kalorisu's letter as evidence of the overtime claimed would in my view amount to hearsay evidence. Similarly, there is no record or evidence of any calculations done by the Labour Department to support the Claimant's evidence despite his reliance on their advices. No labour officer was called as a witness to support the Claimant's case.

18. I am not satisfied that the Claimant has proved his case for the above reasons therefore the issue must be answered in the negative. The Claimant has not shown by his evidence that AVOL owes him any overtime pay.

#### Unjustified dismissal

19. The Claimant pleads at paragraph 3 of the claim that his claim against AVOL was for overtime and unjustified termination. No evidence was led as to whether the Claimant's termination was unjustified. Allegations of his misconduct were put to him [Exhibit D2 – Annexure RB7] and he responded [Exhibit D2 – Annexure RB8] before he was terminated and paid all his benefits [Exhibit D2 – Annexure RB9]. This part of the claim also fails.

#### Damages

20. The claim for General and Special damages also fails as no evidence was led to show that the Claimant had suffered general damages in the sum of VT 500, 000 or Special Damages in the sum VT 500,000.



21. The claim is therefore dismissed and the Defendant is entitled to costs to be paid by the Claimant on a standard basis or to be taxed by the Master failing agreement.

DATED at Port Vila, this 22 day of March 2016.

BY THE COURT



D. ARU  
Judge.

