

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

Civil
Case No. 16/1315 SC/CIVL

BETWEEN: Hilaire Yauko
Claimant

AND: USP University of the South Pacific
Defendant

Date of TRIAL: 24th day of October, 2017 at 9:00 AM

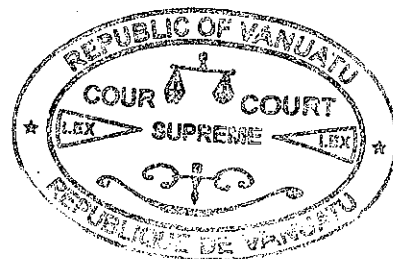
Date of Judgment: 3rd November 2017

Before: James Paul Geoghegan

In Attendance: Counsel - Willie Kapalu for the claimant
Counsel - Abel Kalmet for the Defendant

JUDGMENT

1. In 2009 the claimant Mr Yauko commenced supplying security services for the Defendant University ("USP") at its Santo campus. Mr Yauko submitted time sheets and invoices to USP on a fortnightly basis and was paid per fortnight. There was no written contract between the parties.
2. In late 2013, concerns were raised by USP in respect of various aspects of the performance of Mr Yauko and his employees. On December 9th 2013, the Santo



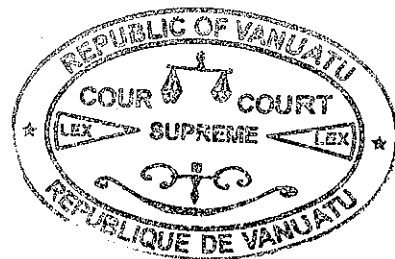
Sub-Center Co-ordinator wrote to Mr Yauko raising a number of concerns and referring to the fact that he had spoken with Mr Yauko regarding those concerns on a couple of occasions some four months prior to the letter. The concerns were around the reliability and consistency of the staff engaged by Mr Yauko, alleged damaged property, relatives and friends of Mr Yauko's employees gathering in the USP compound and helping themselves to fruit off the fruit trees in the compound and Mr Yauko's employees sleeping while on duty.

3. The evidence of Mr Yauko in this trial is that he responded to that complaint by terminating the employment of those employees who had not responsibly discharged their employment obligations. It is unclear how many employees were dealt with in this way.
4. On July 11th 2014, USP terminated its contract with Mr Yauko without notice. The letter was signed by the Santo Sub Center Co-ordinator, Jeffersen Trief and the relevant parts of the letter stated:-

"We would like to thank you for your services offered to USP since 2009 as the officer in charge of Nature security and we want to acknowledge your contribution to the safety of the facilities and infrastructure.

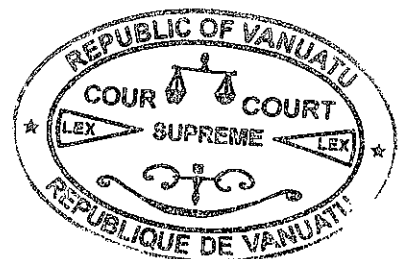
However, considering the continuous negligence of responsibility while on duty by your staff during the night shift, I regret to inform you that the administration has taken a firm decision to terminate your security services at Santo Sub Center starting on the 11th July 2014.

This is due to the continuous issue of sleeping, by your staff, while on duty during the night. A security staff was observed on the 29th of June (Sunday) in the early hours of the morning sleeping while on duty. Even the dogs scrapping for food in the nearby rubbish bin did not disturb the sleeping security. This practice has continued even after the warning letter issued on 9th of December 2013.

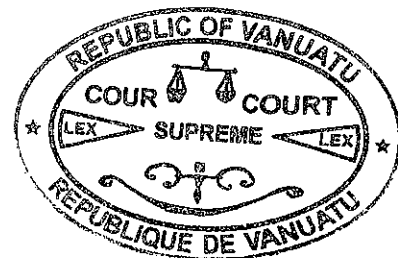


We hope you will understand and accept our decision and continue your support for these institutions”.

5. Mr Yauko now seeks damages for breach of contract. It is accepted and acknowledged that at all times the contract between USP and Mr Yauko was a verbal one. Accordingly the onus is on the claimant to establish the terms of the contract which he claims have been breached.
6. It is appropriate to refer briefly to the pleadings filed on behalf of the claimant in this matter.
7. In a Supreme Court claim filed on April 20th 2016, Mr Yauko pleaded that the contract was terminated in July 2014 without any notice given to the claimant. That is not disputed. He pleaded that his contract with USP had been breached, the particulars of that breach being that the defendant did not give notice of termination and that the defendant *“did not serve the claimant of the termination letter”*.
8. Mr Yauko claimed damages in the sum of Vt 7, 896, 000 which appear to represent a total of 7 years income at Vt 94,000 per month.
9. An amended claim was filed by Mr Yauko on December 9th 2016. In that claim it was alleged that:-
 - a) USP had verbally contracted Mr Yauko to provide security to its Sub Center in Luganville Santo since 2009;
 - b) That the contract was for an indefinite period;
 - c) That “the term of a contract is to provide security and the payment of contract is Vt 94,000 per month”.
 - d) That the contract was terminated without any notice given to the claimant.



10. The particulars of the alleged breach provided in the claim included an assertion that USP did not act as a good employer and did not act in good faith in terminating the contract and that Mr Yauko was not given any opportunity to respond to the allegations made against him. It was also alleged that USP had not served Mr Yauko personally with the termination letter.
11. As to damages, the claim simply pleaded damages for breach of contract "to be assessed".
12. The nature of the amended claim was such that it appeared to be alleged by Mr Yauko that he was an employee of USP rather than an independent contractor. Indeed, at the outset of the hearing counsel provided me with a list of agreed issues the first of which was that the Court was required to determine whether or not the claimant was an employee of the defendant.
13. That situation was clarified by Mr Kapalu at the outset of the hearing and in his opening submissions when he conceded that Mr Yauko was an independent contractor and not an employee. In such a case, it was then merely an issue of the claimant establishing the terms of the contract and the breach of one or more of those terms by USP.
14. The matter further evolved during the course of the hearing to a point where in his closing submissions Mr Kapalu submitted that the case for the claimant was that, in the circumstances, there should have been notice provided to Mr Yauko of the termination of the contract and that the period of notice should have been between one and three months. This concession had the immediate effect of drastically reducing any damages which might be awarded to the claimant in the event of him being successful in his claim.

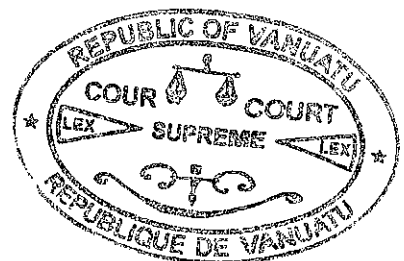


The Evidence

15. While there were sworn statements filed by the claimant and by three persons on behalf of the defendant, there is no dispute as to the essential facts as set out in paragraphs [1] to [4] herein. Mr Yauko was contracted to provide security services at USP Sub Center in Luganville, Santo in 2009. Although the evidence of Mr Yauko is that it was a term of the contract that he would be paid Vt 94,000 per month it would appear that in fact Mr Yauko rendered a timesheet and invoice to USP on a fortnightly basis and that it was met on that basis. The payments made to Mr Yauko accordingly varied from time to time with fortnightly payments being anywhere between Vt 46,700 and Vt 53,600. The evidence provided by USP establishes that a significant number of the payments were for Vt 47,200 per fortnight which roughly equates with Mr Yauko's assertion that the payment due to him under the parties contract was Vt 94,000 per month.
16. There is no evidence which establishes any other terms of the contract or regarding the events surrounding the parties entry into it.
17. It is axiomatic that the onus is on the claimant to establish the terms of the contract on which he relies. In his submissions on behalf of the claimant Mr Kapalu relied on the Court of Appeal decision in Ez Company Ltd vs. Republic of Vanuatu¹. I do not propose to refer to the details of that decision as I consider that it has no application to this case. The only issue in this case is whether or not the University was required to provide notice to Mr Yauko of the termination of the contract or whether it was entitled to regard the contract as one that was able to be terminated at will.
18. In that regard, Mr Kalmet submitted that the contract was one terminable at will. Mr Kalmet relied on Software Link (Australia) Pty Ltd v. Texada Software² where

¹ 2015 DUCA 8

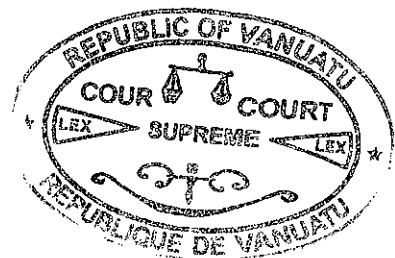
² 2005 FCA 1072



Ryan J quoted the following from Crawford Fitting Co v Sydney Valve and Fittings Pty Ltd (1988) 14 NSWLR 438, 443-4:-

"When the question arises whether a commercial agreement for an indefinite period may be terminated, the onus depends upon whether the agreement contains an implied term to that effect; Winter Garden Theatre (London) Ltd v. Millennium Productions Ltd [1948] AC173205; Martin – Bay K aircraft Co. Ltd. v. Canadian Flight Equipment Ltd [1955] 2QB556 of 581; Australian Blue Metal Ltd v. Huse [1963] AC74@97; Deco-Wall International SA v. Practitioners and Marketing Ltd [1971] 1WLR361 of 371, 376; [1971] 2ALLER 216 @ 224, 229 and Barro Group Pty Ltd v. Frazer [1985] VR 577 at 583-584, 585. The existence of the term is a matter of construction. But the question of construction does not depend only upon a textual examination of the words or writings of the parties. It also involves consideration of the subject matter of the agreement, the circumstances in which it was made, and the provisions to which the parties have or have not agreed; Re Spenborough Urban District Council's Agreement [1968] CH139 of 147.

After noting, at 443, authority to the effect that there is no presumption of permanency in the case of an indefinite commercial agreement but if there is it is in favour of termination and not perpetuity, his Honour went on to observe, at 44, 445 and 448; "Whether a contract is terminable on reasonable notice instead of at will also depends upon the existence of an implied term; Winter Garden Theatre (London) v. Millennium Productions Ltd (at 206); Martin – Baker Aircraft Co. Ltd v. Canadian Flight Equipment Ltd (at 581); Australian Blue Metal Limited v. Huse (at 99). That question is determined by the circumstances existing at the date of the contract; Australian Blue Metal Ltd v. Huse (at 99). However the reasonableness of the period of notice depends upon the circumstances existing when the notice is given; Winter Garden Theatre (London) Ltd v. Millennium Productions Ltd (at 199-200); Australian Blue Metal Ltd v. Huse (at 99); WK Witt (WA) Pty Ltd v. Metters Ltd and General Industries Ltd [1967] WAR 15 at 23-24; Decro-Wall International SA v. Practitioners and Marketing Ltd (at 370; 224; 376 – 377; 229; 381; 234)."



19. There is regrettably no evidence regarding the circumstances which existed at the time this contract was entered into.
20. All that can be said is that the Claimant was contracted to supply security services for the Defendant on an ongoing basis. Payments were made on a fortnightly basis.
21. In such circumstances I am satisfied that the Court may regard the contract as being one that was terminable at will by either party. As referred to above, while the contract was an ongoing one between the parties and therefore of indeterminate duration there is no presumption in favour of a contract in perpetuity and it is reasonable to imply a term entitling the parties to terminate the contract. There is simply no evidence which would justify the Court finding that the contract was one terminable on the provision of reasonable notice. Even if that were the case I am satisfied that the reasonable notice would have been dictated by the payment arrangements under the contract, rendering a period of reasonable notice to be two weeks. As I have said however, I find that the contract was one which was terminable at the will of either party.
22. Accordingly, the Claimant's case fails and is dismissed. In the circumstances the Defendant is entitled to costs and is awarded costs accordingly. Costs are to be agreed between the parties within 21 days failing which they are to be taxed.

DATED at Port Vila this 3rd day of November, 2017

BY THE COURT

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James Paul Geoghegan

Judge

