

BETWEEN: HEATHER MARAKI, TENSLEE SUMBE, EVELYN TOA,  
CHARLIE ZIKAL, CHARLES SUMBE, FAITHY BULELING,  
NANCY HIWA, DRUZILA BRYANT, MOSES STEVENS,  
GEORGE SOKOMANU, JOHN NIAVIA, JEAN PIERRE  
SOLWAI, EVELYNE TAKALO, LEIKAR SALALI AND  
CLINTON HINGE

Claimants

AND: GRAND ISLE HOLDINGS LIMITED trading as PACIFIC  
ADVISORY

First Defendant

AND: GLEN GRAIG

Second Defendant

AND: ANZ (VANUATU) LIMITED

Third Defendant

**Coram:** Justice Oliver A. Saksak

**Counsel:** Dane Thornburgh for the Claimants  
Nigel Morrison for the First and Second Defendants  
Mark Hurley for the Third Defendant

**Date of Hearing:** 5-6<sup>th</sup> August 2019  
**Date of Judgment:** 6<sup>th</sup> December 2019

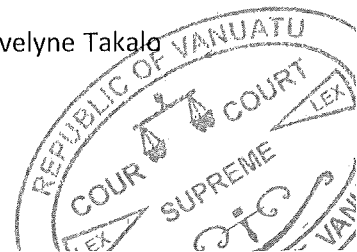
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## JUDGMENT

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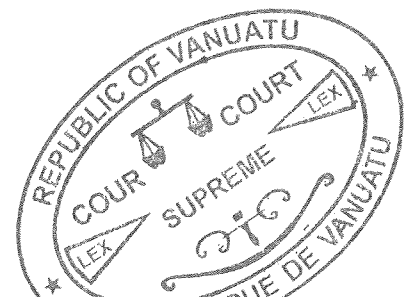
**Background**

1. The 16 named claimants were employed by Capital FM 107 in various roles. Heather Maraki, Evelyn Toa, and Moses Stevens, commenced employment on 1<sup>st</sup> March 2008.
2. Clinton Hinge commenced employment on 1<sup>st</sup> March 2007. Charles Sumbe and Faithy Buleling commenced employment on 16 June 2008. Druzila Bryant commenced work on 1<sup>st</sup> October 2007. Jean Pierre Solwai commenced work on 1 July 2009. Leikar Salali commenced work on 1 February 2012. George Sokomanu commenced work 1 June 2012. Evelyn Takalo



commenced work on 12 June 2012. Nancy Hiwa commenced work on 4 March 2011. Charlie Zikal commenced work on 1 February 2014. John Niavia commenced work on 1 September 2014.

3. Those employments ended on or about 28 February 2018 when the business assets of Capital FM 107 were sold to Multi Media Ltd. The sale was effected by the first and second defendants in their role as appointed receiver pursuant to a contract of sale. Under the terms of the contract the first and second defendants acted also as legal representatives of the vendor, which was Capital FM 107.
4. Capital FM 107 was sold to Multi Media for the sum of VT 40 million ( VT 40.000.000).
5. The first and second defendants paid the claimants as follows:-
  - a) Moses Stevens- VT 50.000  
( His unpaid leave and severance is VT 934,779)
  - b) Heather Maraki-VT 91,206  
( Her unpaid leave and severance is VT 1, 779, 704)
  - c) John Niavaka –VT 60.596  
( his unpaid leave and severance is VT 114,502)
  - d) Evelyne Toa- VT 50.000  
( Her unpaid leave and severance is VT 1,015,767)
  - e) Faithy Buleling- VT 10.000  
( Her unpaid leave and severance is VT 2,166,156)
  - f) Clinton Hinge- Nil payment  
( His unpaid severance entitlement is VT 234.0000)
  - g) Nancy Hiwa- VT 37.000  
( Her unpaid leave and severance is VT 749,305)
  - h) Evelyne Takalo- VT 67,000  
( Her unpaid leave and severance is VT 474, 562)
  - i) Leikar Salili- Nil payment  
( Her unpaid leave and severance is VT 1,001,537)
  - j) Jean Pierre Salowei- VT 67,000  
(His unpaid leave and severance is VT 1,008,404)
  - k) Tensley Bule- VT 28,000



- ( His unpaid leave and severance is VT 896,532)
- l) Densley Sumbe – VT 67,000  
( His unpaid leave and severance is VT 1,126,849)
- m) Charley Sikal- VT 67,000  
( His unpaid leave and severance is VT 339,169)
- n) George Sokomanu- VT 50,000  
( His unpaid leave and severance is VT 74,219)
- o) Charles Sumbe- VT 60,000  
( His unpaid leave and severance is VT 2,751,125)

### **Claims**

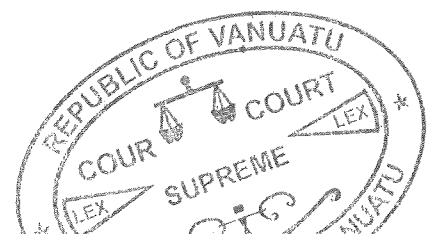
6. The claimants therefore claim for their unpaid leave and severance entitlements in the total sum of VT 19,800,203 as against the first and second defendants for breach of the Employment Act and for breach of fiduciary duties.
7. As against the third defendant the claimants claim that the first and second defendants were agents of the third defendant and that they were negligent, reckless and careless in appointing the first and second defendants having known they were not qualified to be appointed as receiver and manager.
8. The Claimants claim for severance pursuant to section 54 (1) of the Employment Act, unpaid annual leave pursuant to section 29, a multiplier of up to 6 times the amount of severance pursuant to section 56 (4) of the Act, and for interest at 12% per annum from termination to date of payment.

### **Burden of Proof**

9. The claimants have the civil standard of proof of their claims on the balance of probabilities.

### **Evidence**

10. All the 16 claimants filed sworn statements in support of their claims filed on different dates. They also relied on the sworn statement of Ericka Stewart filed on 22 January 2018. 15 of the claimants including Erick Stewart were cross-examined by Counsel for the defendants in relation to their statements. Only Druzila Bryant was not available at trial and was not cross-examined.



## Defence

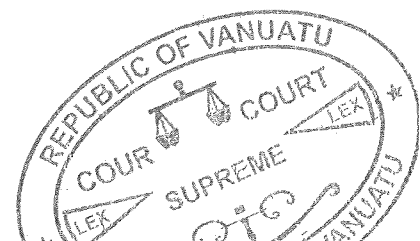
11. The first and second defendants generally denied having any liability to the claimants and say the claimants have not proved their claims due to lack of disclosure of documents confirming their claims. The third defendant also denied liability and say the claimant's claim against them should fail.

## Submissions

12. The claimants and Third Defendant have not filed any written submissions. But the First and Second Defendants filed submissions on 11 September 2019. They have raised only one issue of whether the claimants have proved their case on the balance of probabilities.

## Discussion

13. On the issue of leave entitlements, first the pleading. The claim filed on 25 September 2017 does not plead specifically what date (day, month and year each of the claimants were employed. They have not pleaded specifically what year they each earned leave and whether leave was taken or not taken. Further the claimants have not pleaded that they were each employed under an oral or written contract. Courts cannot go beyond what is pleaded. See Republic.v. Micheal Emil CAC 45 of 2014.
14. Section 9 of the Employment Act [ CAP. 160] states-  
*"A contract of employment may be made in any form, whether written or oral, Provided that a contract of employment for aa fixed term exceeding 6 months or making it necessary for the employee to reside away from his ordinary place of residence shall be in writing and shall state the names of the parties, the nature of employment, the amount and the mode of payment of remuneration, and where appropriate, any other terms and conditions of employment including housing, rations, transport and repatriation."*  
(underlining for emphasis).
15. The claimants were Ordered to make discovery and disclosure of documents relating to their employment on 24<sup>th</sup> September 2018, 25<sup>th</sup> October 2018, 22<sup>nd</sup> November 2018, 11<sup>th</sup> April 2019 and 28<sup>th</sup> May 2019. Whilst the first, second and third defendants complied, the claimants through their counsel did not comply with those specific direction orders.



16. Section 29 of the Employment Act provides for annual leave and states-

**"Annual leave**

*(1) Every employer shall grant an employee who has been in continuous employment with him for 12 consecutive months annual leave on full pay at the rate of 1 working day for each month of employment."*

17. Section 30 provides the manner in which annual leave is to be taken as follows:-

**"30. Manner in which annual leave to be taken**

*(1) The annual leave shall be taken in one period or if the employer and the employee so agree, in not more than 2 separate periods.*

*(2) If the employer and the employee so agree, the annual leave or either of its parts, may be taken wholly or partly in advance before the employee has acquired entitlement thereto.*

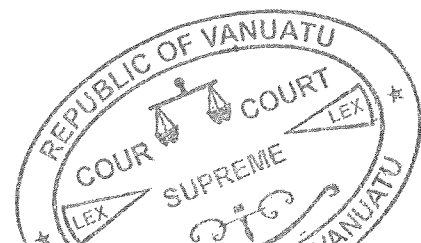
*(3) The date of the annual leave shall be fixed by the employer, who shall in so far as it shall be practicable in the circumstances of the undertaking, comply with the employee's request in this respect."*

18. The evidence of all the claimants were very similar in nature. They all say that as at 5 April 2017 their employments were terminated. However they have not shown for which year leave entitlements were due and whether they sought application to take leave entitlements for a particular year.

19. Section 29(1) requires that leave must be taken after 12 months of consecutive service. If it is not taken in one period, the employer and employee must agree for leave to be taken in 2 separate periods. (section 30(1)).

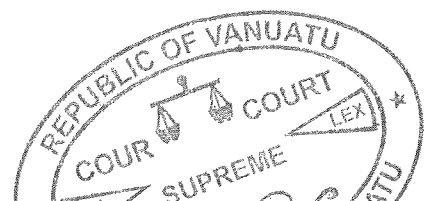
20. In my view the details of those leave entitlements and whether they were requested for each year and granted or refused, should have been specifically pleaded to enable the defendants to adequately respond thereto.

21. It is common knowledge that in every sphere of employment leave entitlements is an integral part of employment, and records and details of them are kept and maintained as best as possible. In the claimants' case there is lack of record as to leave entitlements. As it was their case and allegations, it was encumbered on them to prove their claims with records. It is not adequate and sufficient to merely say as at their termination date, they were not paid leave entitlements. They have to show first those leave were available to them for each specific year and that they so requested or applied for the leave to be taken and were either granted or



refused. They have not done that. And to simply claim that for 6 years etc they did not take any leave is contrary to the provision of section 30 of the Employment Act.

22. Having said all that, my conclusion on the issue of annual leave is that this part of the claim fails and is accordingly dismissed.
23. As for severance entitlements first as discussed earlier in relation to leave, there is lack of any written contract. Either they exist and are not discovered and disclosed or they do not exist, in which case it must be declined. Contracts were oral and impliedly. From the evidence they existed until termination on 5<sup>th</sup> April 2017. Section 29 of the Employment Act acknowledges that a contract of employment can be in any form, oral or written.
24. Ericka Stewards' evidence disclosed a document Headed "FM107 Staff Details as per JBD" marked "A" to her statement (Exhibit C1). Indeed all the claimants also disclose this document showing the various starting dates, their positions, the hours worked, leave and monthly salaries.
25. Ms Stewart was the Human Resource Manager of Capital FM 107. In that capacity there is no reason to disbelieve her evidence. Her evidence corroborates the evidence of all the 16 claimants that, despite a lack of document showing a written contract, these claimants were in fact employed by the Capital FM 107. Without them this Radio Station would not have operated all those years until 5<sup>th</sup> April 2017.
26. There is a further documentary evidence that corroborates those facts. This is the document marked Exhibit C 17 B Headed "KPI REPORT". These contain base salaries and fortnightly salaries. Relevantly it shows as follows –
  - (a) Evelyn Toa – VT40,000 base salary and VT20,000 fortnightly salary for 1-15 May 2016.
  - (b) Moses Stevens – VT12,500 payable for 1-15 May 2016.
  - (c) Heather Maraki – VT60,000 and VT30,000 fortnightly for 1-15 May 2016.
  - (d) Tensly Sumbe – VT60,000 and VT30,000 fortnightly for 1-15 May 2016.
  - (e) Sale Tilea Sikal – VT40,000 and VT20,000 fortnightly for 1-15 May 2016.
  - (f) Evelyn Takalo – VT40,000 and VT20,000 fortnightly for 1-15 May 2016.



- (g) Jean Pierre Salowei – VT30,000 and VT15,000 fortnightly for 1-15 May 2016.
- (h) Drusilla Bryant – VT40,000 and VT20,000 fortnightly for 1-15 May 2016.
- (i) Densley Bule – VT36,000 and VT18,000 fortnightly for 1-15 May 2016.
- (j) John Niava – VT30,000 and VT15,000 fortnightly for 1-15 May 2016.
- (k) George Sokomanu – VT16,000 and VT8,000 fortnightly for 1-15 May 2016.

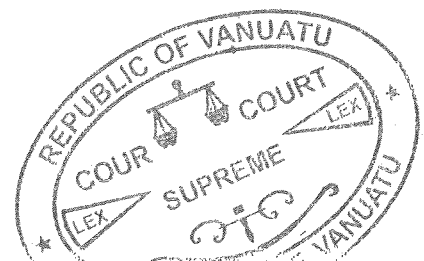
27. There are inconsistencies with the monthly or base salaries of Heather Maraki, Evelyn Toa, Tenslee Sumbe, Tensley Bule, Moses Stevens, John Niava and Jean Pierre Solwai. And Charles Sumbe, Faithy Buleling, Nancy Hiwa, Leikar Salali and Clinton Hinge do not appear on the document exhibit C 17 B. The maker of this document is unknown and was not cross-examined. However it is relevant evidence in so far as the claimants had base salaries and were paid fortnightly.

28. As for what years each claimant started work with Capital FM 107, the only relevant evidence showing start dates is that document marked A to the sworn statement of Ericka Stewart. These are confirmed by the start dates of each of the claimants in their respective sworn statements. On the balance of probabilities the claimants, including Drusilla Bryant have proven to the Court they are entitled to severance entitlements for the years they were employed by Capital FM 107.

29. Contrary to the submissions of the first and second defendants, the document marked "A" to the claimants' sworn statements are entirely reliable evidence and is admitted by the Court as proof of the claimants' claims for severance.

30. Mr Morrison submitted also that Leikar Salali, Clinton Hinge and Charles Sumbe are not and should not be claimants in this case. I accept that submission for reasons given by Mr Morrison. The claims of Leikar Salali, Charles Sumbe and Clinton Hinge are therefore dismissed.

31. As for Drusilla Bryant it did not matter that she did not appear at trial, her evidence by sworn statement is admissible evidence. She is part of the group of claimants. They have sued as a group and not individuals. On that basis she is entitled to be paid her severance payments.



32. The claims of the remaining 13 claimants for severance entitlements are successful and they will have judgment for that part of their claim.

33. The claimant's claims for a multiplier of 4 is rejected and are dismissed. Their terminations were not unjustified dismissals. There were terminations as a result of Capital FM 107 being sold as a going concern.

34. The claimants' claims against the third defendant are misconceived and are hereby dismissed.

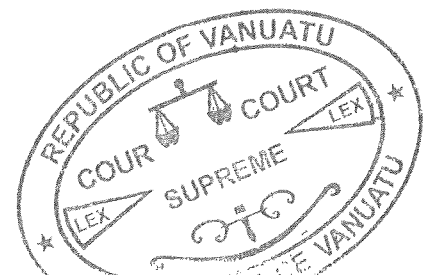
### The Result

35. The claimants have judgment but only in respect of their claims for severance allowances as follows –

- (a) Heather Maraki – VT432,000 less VT91,206 already paid.
- (b) Tensley Sumbe – VT280,000 less VT67,000 already paid.
- (c) Evelyn Toa – VT240,000 less VT50,000 already paid.
- (d) Charlie (Sale) Sikal – VT123,068 less VT67,000 already paid.
- (e) Faithy Buleling – VT522,247 less VT10,000 already paid.
- (f) Nancy Hiwa – VT179,671 less VT37,000 already paid.
- (g) Tensley Bule – VT182,729 less VT28,000 already paid.
- (h) Moses Stevens – VT252,000 less VT50,000 already paid.
- (i) George Sokomanu – VT77,151 less VT50,000 already paid.
- (j) John Niava – VT99,868 less VT60,596 already paid.
- (k) Jean Pierre Solwai – VT306,630 less VT67,000 already paid.
- (l) Drusilla Bryant – VT376,548 less VT76,000 already paid.
- (m) Evelyne Takalo- VT 188,603 – VT 67,000 already paid.

36. I Order the First and Second Defendants to pay the balance of the claimants' severance payments as follows –

- (a) Heather Maraki – VT340,794
- (b) Tenslee Sumbe – VT213,000
- (c) Evelyn Toa – VT190,000
- (d) Charlie (Sale) Sikal – VT56,068
- (e) Faithy Buleling – VT512,247





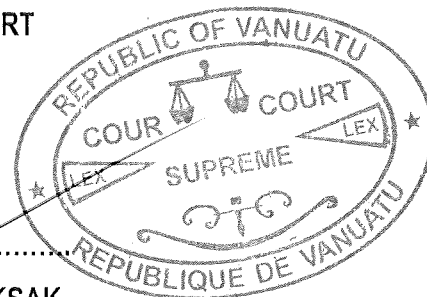
(f)	Nancy Hiwa –	VT 142,671
(g)	Tensley Bule –	VT 154,729
(h)	Moses Stevens –	VT 202,000
(i)	George Sokomanu –	VT 27,151
(j)	John Niava –	VT 19,272
(k)	Jean Pierre Solwai –	VT 239,630
(l)	Drusilla Bryant –	VT 300,548
(m)	Evelyne Takalo-	<u>VT 121,603</u>
	<b>Total –</b>	<b><u>VT2,519,713</u></b>

37. The 13 claimants are entitled to interests of 5% per annum from 5 April 2017 to date of judgment added to their respective amounts awarded.

38. And the claimants are entitled to their standard costs incidental to this action as agreed or taxed. The First and Second Defendants will pay these costs. The Third Defendant is not entitled to any costs.

**DATED at Port Vila this 6<sup>th</sup> day of December, 2019**

**BY THE COURT**



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**OLIVER A. SAKSAK**

**Judge**