

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

Civil
Case No. 23/150 SC/CIVL (Manual)
Case No. 23/65 SC /CIVL (CMS)

BETWEEN: Magalie Fiakaifonu
Claimant

AND: S.W International Limited T/A Sharper Image
Defendant

Before: *Justice Oliver A. Saksak*
Counsel: *Mr Mark Hurley for the Claimant*
Mr John Malcolm for the Defendant

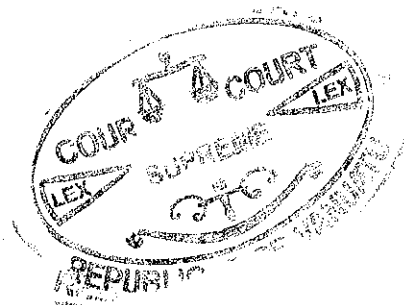
Date of Hearing: *4th – 5th April 2024*
Date of Judgment: *12th April 2024*

JUDGMENT

Introduction

1. This is a claim for additional and outstanding entitlements claimed by the claimant pursuant to the Variation of Employment Agreement dated 12th December 2019.
2. The claims are detailed as follows:-

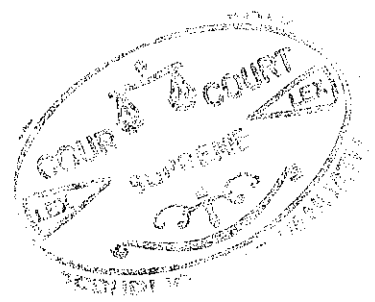
a) Severance-	VT 491,217
b) Annual Leave-	VT 362,280
c) Maternity Leave-	VT 1,140,480
d) 3 months notice-	VT 2,592,000
e) 5% Net Sharing Profit-	To be confirmed
f) VNPF on Net Sharing Profit-	To be confirmed



3. The claimant had been in the employ of the defendant from or about 2009.
4. On 1st December 2018 she signed a contract with the defendant for a fixed term of three years. Pursuant to clause 6.2 of the contract either party could give a 3 months notice to terminate the contract.
5. The original contract of employment dated 1st December 2018 was varied twice. The first variation was dated 12th December 2019 which deleted clause 2 and stipulated that-
" This contract shall be for a permanent position commencing 1st December 2018."
6. The variation agreement was signed by the claimant in her position as General Manager and employee. The agreement was witnessed by Peato Petelo, the company accountant both on behalf of the company and the claimant as employee.
7. The second variation was dated 7th September 2020 which varied amongst others, the claimant's monthly salaries from VT 700,000 per month to VT 900,000 per month from 1st July 2020. The variation included an amendment to clause 5 which provides for Interest Profit Sharing of 5% on the next profits of the company from 1st March 2021 to end of March 2021, annexed as Schedule A.
8. Except for the first variation agreement which the defendant disputes, the stated facts above are common ground and are not in dispute.

Further Facts

9. The claimant gave 3 months of notice of her resignation from the company via skype to Mr Waligorski on 23rd September 2019. The notice would lapse after 3 months on 23rd December 2019.
10. However between 9th October 2019 and 14 November 2019 negotiations were held between the claimant and Mr Waligorski proposing to the claimant to withdraw her resignation and to remain in the defendants' employ.



11. On 26 November 2019 Mr Waligorski advised the claimant by email that he was moving forward with Geoffrey Gee on the modification of her contract of 3 years to an unspecified term. Mr Waligorski indicated also that he would contact QBE Insurance in Port Vila for the life insurance and retirement of the claimant.
12. Mr Waligorski drafted the variation document after getting advice from Geoffrey Gee and sent the agreement to the claimant with an email dated 12th December 2019. By the same email Mr Waligorski advised that he could not sign the document not being a lawful officer or director but that he had asked her to sign it alongside Peato Petelo, the Accountant as the Defendant's representative. Two skype calls were made between the claimant and Mr Waligorski on 12th December 2019.
13. On 14th December 2019 the claimant sent an email to Mr Waligorski asking him if-
"It would be possible to wait for your response on the retirement plan before signing this variation please?"
14. There being no response from Mr Waligorski and being aware that her resignation effective date was impending on 23rd December 2019 as the expiry date of her 3 months notice, the claimant signed the first variation agreement witnessed by Peato Petelo between 12 and 14 December 2019.
15. In the intervening period, and pursuant to a medical certificate issued by Dr R Nguyen of Novo Medical dated 22nd October 2021, on 29th October 2021 the claimant commenced her maternity leave on or about 1st November 2021.
16. The defendant disputing the validity of the first variation agreement maintained the 3 year term contract of 2018 and on 6th October 2021 (2 months before the expiry date) Geoffrey Gee & Partners sent a letter to the claimant informing her that her 2018 contract would not be renewed after 30th December 2021.
17. By the defendant's letter dated 1st November 2021 it was asserted that claimant's contract would expire on 30th November 2021.



18. Following that assertion the defendant on 9th December 2021 credited to the claimant's Bred Bank (Vanuatu) Account the sum of VT 12,026,303 as full and final settlement of her employment entitlements.

19. It is from those facts that the claimant filed her claims for outstanding severance allowance, annual leave, maternity leave, salary in lieu of notice, outstanding profit share entitlements and VNPF entitlements.

Defence

20. The defendant disputes only the existence of the first variation agreement dated 12th December 2019 and denies that the claimant is entitled to the reliefs she seeks. The defendant filed a defence on 22nd February 2023.

Evidence

21. The claimant relied on her evidence by sworn statements dated 1st June 2023 (Exhibit C1), and further sworn statement filed on 22nd August 2023, (Exhibit C2) She was cross-examined by Mr Malcolm in relation to her sworn statements.

22. For the defendant, they relied on the evidence by sworn statements of Mr Waligorski filed on 26th May 2023 (Exhibit D1), of 30th August 2023 (Exhibit D2) and of 28 September 2023 (Exhibit D3), and on the evidence by sworn statements of Peato Petelo dated 7th July 2023 (Exhibit D4) and of 14 September 2023 (Exhibit D5). These witnesses were cross-examined by Mr Hurley.

Issue

23. The Court is asked to decide one main issue of whether or not the first variation agreement dated 12th December 2019 is valid?

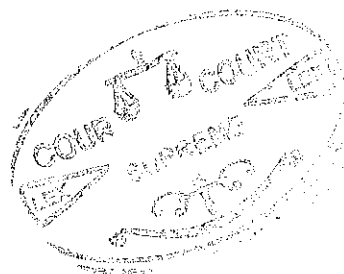
Discussion

24. The claimant has the duty of proof on the balance of probabilities.

25. On this issue the claimant submitted that from the evidence adduced the claimant has shown that the first variation agreement is valid.



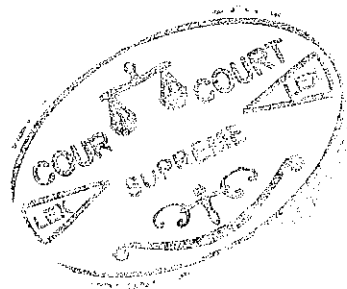
26. The defendant disputes the validity of the first variation agreement on the basis that the claimant had no authority to sign it. Further the defendant disputes that the first variation agreement was signed on 12th December 2019 and submitted it was signed on 7th September 2020, relying on the evidence by Peato Petelo.
27. On the evidence of Mr Waligorski the first variation agreement was endorsed by him in his letter of 26th November 2019 when he advised the claimant he would move forward with Geoffrey Gee on the modification of her contract of 3 years to an unspecified term.
28. Further, on his own evidence, Mr Waligorski took advice from Geoffrey Gee and drafted the variation agreement himself and sent it by email on 12th December 2019 to the claimant. That draft included Appendix A which contains Interest Profit Sharing Eligibility Requirements.
29. Subsequent to that email Mr Waligorski had skype calls with the claimant on 12th December 2019 telling her he could not sign the variation agreement not being a lawful officer or director. However it was the evidence of the claimant that Mr Waligorski had told her to sign the variation agreement as company representative alongside Peato Petelo as the Company Accountant. The claimant gave evidence of a screenshot of the skype calls of 12th December 2019 at page 11A of Exhibit C1.
30. On the variation agreement dated 12th December 2019 at page 2 immediately below the date stated as 12th December 2019 are the words:
- " SIGNED BY the duly authorized representative of the employer in the presence of :"* (underlining for emphasis)
31. From the evidence, it was Mr Waligorski himself who drafted the agreement. He said he did it after advice from Geoffrey Gee. Then he argued that the claimant had no authority to sign the document. If that is correct why does the document include the words "signed by the duly authorized representative of the Employer?". " Further who allowed it to happen that way? On the balance of probability on the evidence by the claimant, it was probable than not that Mr Waligorski had told the claimant to sign the document alongside Mr Petelo.



32. Going further, the document had the signatures of the claimant as the General Manager at the time of the defendant and employee, and of Peato Petelo, the Accountant. These were 2 senior employees and officers of the Company acting on the advice of Mr Waligorski given verbally by skype calls on 12th December 2019.
33. The argument and submission that the defendant did not give authority to the claimant to sign the first variation is absurd and untenable. It is rejected.
34. The defendant appeared to make an issue of the date on which the agreement was signed but that too is an absurd argument. The evidence of the claimant was that the draft was sent in by email on 12th December 2019 by Mr Waligorski therefore that date appearing on the document is consistent with the date of the email. That made it unconvincing for the Court to believe Mr Petelo's evidence that it was signed later on 7th September 2020. That could not be possible in view of the fact the 3 months notice period of the claimant's resignation was to expire on 23rd December 2019. It made more sense therefore that the claimant should be forced to sign the document on the 12th December 2019 to preserve her status rather than wait until 7th September 2020. It was therefore probable that the document was signed on 12 or 14 December 2019 than not.
35. As to whether Mr Waligorski took advice from Mr Gee to draft the first variation agreement is in doubt. Mr Gee was not called to confirm that assertion. If that was the case it would have been proper for the draft to be sent back to Mr Gee to check and to sign it as the Director which would have been the proper course to take. Instead the evidence was that Mr Waligorski sent it directly to Mrs Faikaifonu on 12th December 2019. By necessary inference that step was his direct authority to the claimant as General Manager for the Company and employee, with instruction to sign the document as a company representative and witnessed by Mr Petelo.

Findings

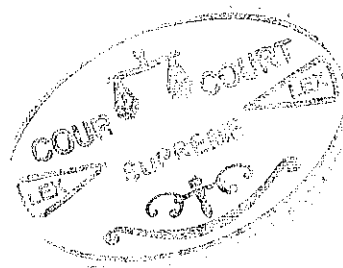
36. From the analysis of the evidence before me and the discussion above I find as follows:-
- a) The first variation agreement dated 12th December 2019 was drafted by Mr Waligorski on legal advice.



- b) The document was sent by email directly to the claimant by Mr Waligorski with instruction to her to sign it as company representative alongside Mr Petelo as Company Accountant.
- c) That action on Mr Waligorski's part by necessary inference was his direct authority to Mrs Fiakiafonu to sign the First Variation Agreement.
- d) The screenshots of skype calls made on 12th December 2019 in the evidence make it probable than not that Mr Waligorski gave verbal authorization to the claimant to sign the agreement.
- e) The date " 12th December 2019" appearing at the top of page 2 of the Agreement of Variation infers that document was received on that date and therefore making it more probable that it was signed either on that date or on 14th December 2019 according to the claimant's evidence, and not on 7th September 2020 as asserted by Mr Petelo.
- f) The First Variation Agreement dated 12th December 2019 was validly executed and is a legally binding Agreement between the Company and the claimant.
- g) Section 18 of the Employment Act is no bar to the claimant's proceeding despite she has been paid over VT 12,000,000 so far.
- h) The claimant was a truthful witness. Portions of Mr Waligorski's evidence lacked credibility.

Conclusions

- 37. Having so found, I am satisfied the claimant has proved her claims on the balance of probabilities and it follows therefore that she is entitled to additional employment benefits outstanding as a result of the first variation Agreement.
- 38. I reject the defendant's submissions but accept the totality of the claimant's submissions.



39. Accordingly I enter judgment for the claimant for the following:-

- | | | |
|----|-------------------------------------|-----------------|
| a) | Severance- | VT 491,217 |
| b) | Annual Leave- | VT 362,280 |
| c) | Maternity Leave- (section 36) | VT 1,140,480 |
| d) | 3 months notice- (section 49(3)(a)) | VT 2,592,000 |
| e) | 5% Net Sharing Profit- | To be confirmed |
| f) | VNPF on Net Sharing Profit- | To be confirmed |

40. The claimant's claim for a multiplier was abandoned and is not included in the awards made.

41. The claimant is entitled to interest of 5% per annum from 9th December 2021 to the date of settlement.

42. Finally the claimant is entitled to her costs of the proceeding on the standard basis as agreed or taxed.

DATED at Port Vila this 12th day of April 2024

BY THE COURT


Hon. Oliver A. Saksak

Judge

