

IN THE MAGISTRATES' COURT
OF THE REPUBLIC OF VANUATU
HELD IN PORT VILA
(Civil Jurisdiction)

Civil Case No. 48 of 2010

BETWEEN: SIMON MAHIT

Claimant

AND: THE GOVERNMENT OF VANUATU

Defendant

Mr. Daniel Yawah the Claimant
Attorney General for the State

RESERVED JUDGEMENT

The Claim

The claim is pursuant to contracts of employment dated 15th February 2005 and 19th January 2007. The Claim is for

- a) Three months' payment in lieu of notice under clause 5.3 of the contract and the Employment Act
114,864VT
- b) Overtime hours worked in 2005, 2006 and 2007. 657,920.92VT

The Onus of Proof

In the claim the onus is on the claimant to prove the case on the balance of probabilities.

Background

The Claimant was employed as a driver for the then Minister for Foreign Affairs in the Vanuatu Government. There was provision in the contract of employment for the termination of the employment should a number of events occur relating to the Minister ceasing to hold office, the then Prime Minister ceasing to hold office or the abolition of the Ministerial Office.

Clause 5.3 of the contracts stated

Notwithstanding the provisions of the Official Salaries Act [Cap 168] and any other clause in this contract, where the employees' employment ceases under clause 5.2 of this contract. The employer shall be paid his entitlements (if there is any) pursuant to the Employment Act [Cap 160}

The claimant's employment was terminated under these provisions.

The Claimant's initial claim before the court was struck out but allowed to be reinstated by order of the court dated 27th May 2014.

As the case progressed it was indicated that the Defence did not dispute the Claimant's right to three month's payment in lieu of notice. This was confirmed in their written submissions filed 22/2/17 at paragraph 22.

There was also an indication that the Defence did not dispute that overtime could be claimed for under the contract of employment. (Paragraph 20 of the filed submissions)

The Defence did not dispute that if overtime entitlements existed at the termination of the contract, the Claimant would be entitled to payment for that.

What the Defence disputed was that any entitlement to overtime actually existed at the time the contract was terminated because at that time no claim for overtime had been checked and verified as required by the process for overtime claims. They argue that because no overtime claim had been approved no "entitlement" to be paid an amount existed when the employment terminated.

The issues for the Court to decide

The issue for the court to decide is a narrow one. Was there any "entitlement" to a specific amount of overtime payment at the time the Claimant's employment was terminated.

The relevant law

There is no dispute that S26 Employment Act applied to the employment of the Claimant.

The Evidence

The Claimant's case

The claimant filed a sworn statement on 25th May 2010. Annexed to that statement was Annexure SM3 detailing the overtime work he relied upon.

Annexure SM4 was a letter from the then Deputy Prime Minister and then Foreign Minister informing the Director of Finance to pay other overtime entitlements.

The Claimant did not file any evidence of an approval to pay him the overtime claimed in SM3. In fact, the Claimant's own evidence is that the claims were never authorized. The Claimant states in his sworn statement in reply to the defence evidence, at Paragraph 7, "*When I submit, Terry refused to sign on the designated space as "Manager" in the form.*"

What is not explained by the Claimant's evidence is why he had waited until his employment ceased to pursue his overtime claims for 2005, 2006 and 2007. At paragraph 8 and 9 of his sworn statement in reply he says that he was aware that there was an issue, in the mind of Mr. Kapah, about whether or not he was entitled to overtime from 2005 to 2007. Despite this ongoing issue, the Claimant kept submitting the overtime claims instead of having the issue clarified and the periods either authorized or not. The only evidence submitted by him of efforts to have this clarified is the letter sent by the Minister SM3.

The defendant's case

The Defendant filed a sworn statement of Terry Kapah, administration and Finance Officer Corporate Services of the Department of Foreign Affairs. At paragraph 12 he set out the required procedure for what were generally referred to as overtime claims. His sworn evidence is that the statement of overtime in SM3 are "incomplete" as they did not contain the "signatures of the Supervisor, the Manager and the Director as required under PSC form 4-1".

Mr. Kapah's statement also set out evidence relied upon to raise doubt about the accuracy of these overtime claims. For example, he refers to time claimed when the Minister was absent and therefore the Claimant driver could not have been required to work overtime. The Claimant disputes this evidence and in his sworn statement in response said he did not claim for dates the Minister was away.

By allowing this issue to go unresolved the Claimant was in the position, at the time his employment ceased, that he had not obtained authorization.

Thus he has not been able to produce evidence to the court of approved overtime at the time his employment ceased.

Without deciding the facts about what periods the Claimant actually worked the overtime, the court can confidently conclude that there was no authorization of any overtime periods at the time the employment ceased.

Reasons for accepting or rejecting relevant aspects of the evidence

The letter from the then Deputy Prime Minister SM4 was dated 10th June 2005. It is not clear what was “attached” to that letter but whatever it was it could not have been any of the documents that are part of SM3 that related to periods after the date of the letter. The court finds that SM4 goes to support that in effect the Minister supported that overtime be paid to the Claimant, not that an entitlement to overtime pay existed at the time the employment was terminated.

Therefore, SMS4 is not an approval of the overtime set out in SM3.

The evidence of Mr. Kapah concerning the accuracy of the periods claimed in SM3 leads the court to conclude that those periods were not authorized for payment when the Claimant’s employment ceased. Even if they were accurate, the lack of approval of these periods and absence of the required signatures leads the court to conclude that these claims for overtime had not become concrete entitlements at the time the Claimant ceased his employment.

Even the Claimant in his submissions refers to the fact that the approval process was not completed.

Findings of fact by the Court

Taking into account the evidence and the comments above the court finds as a matter of fact that there were no approved claims for overtime due to be paid to the Claimant at the time his employment ceased.

As a consequence, there were no overtime entitlements in existence when the Claimant’s employment ceased.

Conclusions based on the law and the facts.

Clause 5.3 of the contract of employment refers to “entitlements (if there is any)” at the time the employment ceases.

The Claimant has failed to establish that any entitlements for overtime existed at the time his employment ceased. Having failed to do this the operation of S26 of the Employment Act does not come into play for a calculation of the amounts due.

Decision

1) As it was conceded by the Defendant that the Claimant was entitled to payment of 3 months in lieu of Notice I find for the Claimant on that aspect of his claim.

2) I am not satisfied on the balance of probabilities that the Claimant has established its claim in relation to the overtime pay sought. On that aspect of the claim I find for the defendant.

If the Defendant has not already paid the Claimant the sum sought in relation to 3 month's pay in lieu of notice, this is to be paid to the Claimant within 28 days of the date of this Judgment.

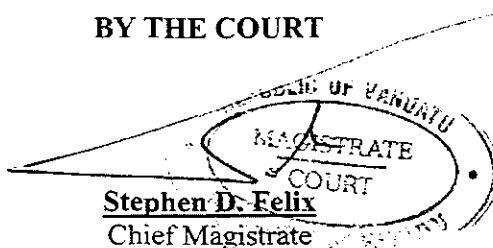
Costs

I make the following order as to costs.

The Claimant had claimed for two separate amounts. The Claimant was successful in relation to the claim for pay in lieu of notice. He was not successful in the aspect relating to the overtime. On that basis I make an order that each party is to bear its own costs.

Dated at Port Vila this 3rd day of July, 2017

BY THE COURT


Stephen D. Felix
Chief Magistrate