

2014. That from the period of his appointment in 2014 to December 2017, he never received prosecution allowance.

Legal Issue

4. The issue before the court for determination is therefore:

Whether the Claimant is entitled to the prosecution allowance at the amount of VT1500 or VT5000?

Submissions

5. The Claimant relies on section 15 of the Public Prosecutor Act, statements of State Prosecutors Noel Titus Thompson, Toara Smithy Obed and Bice Alfred Hill, the claimant's instrument of appointment and the High Court of Australian case of *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd (1986) 160 CLR 226* to support his submission that he is entitled to VT5000 Prosecution allowance as it had become a customary practice for all state prosecutors to have been paid prosecution allowance of VT5000.

6. Under Part 3, Division 3, Section 15 of the Public Prosecutor's Act, it states:

“15. Salary, allowances and other benefits

The Public Prosecutor is entitled to such salary, allowances and other benefits as are prescribed under this Act or the Official Salaries Act [Cap. 168], whichever applies, and as may otherwise be agreed to in writing by the Public Prosecutor and the Minister on behalf of the Government.

7. The appointment of the claimant as a state prosecutor is made pursuant to the following provision of the Public Prosecutor's Act which states:

“22. State Prosecutors

(1) The Public Prosecutor may, by instrument in writing, appoint:

(a) a member of the Vanuatu Police Force;

...

to be a State Prosecutor for the purpose of any prosecution or class of prosecution.”

8. The claimant's functions as a state prosecutor is provided for under the Public Prosecutor's Act as :

“23. Functions of Prosecutors



(1) *The functions of the Deputy Public Prosecutor, Assistant Public Prosecutors and State Prosecutors are:*

(a) *to conduct, and appear in, prosecutions on behalf of the Public Prosecutor; and*

(b) *any other functions that are given to the Deputy Public Prosecutor, Assistant Public Prosecutors or State Prosecutors by or under this Act or any other law, or by the Public Prosecutor.*

(2) *In the performance of their functions, the Deputy Public Prosecutor, Assistant Public Prosecutors and State Prosecutors must have regard to the need to ensure that the prosecutorial system gives appropriate consideration to the concerns of the victims of crime."*

9. Section 15 of the Public Prosecutor's Act applies to the claimant who is appointed as a state prosecutor, carrying out the function of the Public Prosecutor, and as directed by the Public Prosecutor himself, and it applies to the claimant to the extent of his *entitlement to such salary and allowances and benefits* as stated.

10. There is evidence from three state prosecutors that they had been receiving prosecution allowance of VT5000 from 2006 till December 2017 when the Government Remuneration Tribunal ("GRT") determination of salary scale came into effect.

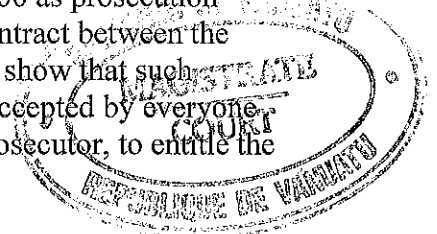
11. I consider the case of *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd (1986) 160 CLR 226*, at 336, where Gibb CJ, Mason Wilson, Brennan and Dawson JJ said:

"There must be evidence that the custom relied on is so well known and acquiesced in that everyone making a contract in that situation can reasonably be presumed to have imported that term into the contract."

12. While it is assumed that the Public Prosecutor then may have used its power under section 15 of the Public Prosecutor's Act to impose VT5000, and wherefrom the three state prosecutors have been paid this amount, such must constitute a custom practice that is implied under this Act to entitle the claimant to the amount of VT5000. And I quote the words of Jessel M. R. in the High Court of Australia case of *Con-Stan Industries of Australia Pty Ltd* above cited:

"(The Custom) must be so notorious that everybody in the trade enters into a contract with that usage as an implied term. It must be uniform, as well as reasonable, and it must have quite as much certainty as the written contract itself" (underlined my emphasis).

13. Accordingly, there is no further evidence to assist this court as to how Mr Titus Thompson, Mr Toara Obed and Mr Bice Alfred were getting the VT5000 as prosecution allowance from 2006 till 2017. And if it was by any implied term of contract between the then Public Prosecutor and the Minister responsible, it is not enough to show that such practice is so common or a custom practice that is so well known and accepted by everyone in the State Prosecution, the Police Force or the Office of the Public Prosecutor, to entitle the



claimant to such amount, given the principle set out in the High Court of Australia case above.

14. Defence counsel relies on his submission with particular reference to the 1993 Police General orders, the Police Commissioner Mr Robson Iavro's sworn statement, and the case of *M (a Minor) and another v Newham London Borough Council and Others*.

15. I accept that while the 1993 General Orders had been applicable till 31st of December 2017 when it was replaced by the GRT determination of 2017, it clearly sets out the Prosecution allowance of VT1500 per fortnight, for all members of the Police Force appointed as prosecutors. The claimant seems to accept this, yet seeks to be paid prosecution allowance of VT5000 instead because other state prosecutors have been paid this amount.

16. From the evidence, while Mr Hill, Mr Thompson and Mr Obed, had been paid the amount of VT5000 from 2006 onwards, it was not clear if they had accepted such allowance then as an implied term to their contract of employment, specifically in respect of their prosecution allowance, especially while the 1993 Police General orders was already in force.

17. I therefore, accept the Defendant's submission that with a law (1993 Police General Orders) in place, I cannot rule base on some custom practice that is not obvious to both parties, as it is also obvious that not both parties have accepted VT5000, as an implied term into any contract between them, specifically pertaining to prosecution allowance of state prosecutors.

Decision

18. Having so considered, and in answer to the issue of *whether the claimant is entitled to the prosecution allowance at the amount of VT1, 500 or VT5, 000?* I find that the claimant is entitled to Prosecution allowance of VT1500, and I so make the following orders:

- 1) That the claimant be paid prosecution allowance of VT1500 per fortnight for the periods from 3rd of February, 2014 to 31st of December, 2017 at a total of VT148,500.
- 2) As the claimant has only been partly successful, each party shall bear their own costs of this proceeding.
- 3) That Claimant reserves the right to appeal this Decision if he is not happy with it.

Dated this 19th of August, 2021.

BY THE COURT


MAGISTRATE

