

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

Case No. 21/2919

BETWEEN: BOB JAMES
Claimant

AND: JOHNNY JOSEPH ARNHAMBAT
Defendant

Date of Decision: 17th August, 2023

Coram: Magistrate Fsam

Appearances:

Ms Bakokoto_L for the Claimant

Mr Ture_K for the Defendant

DECISION ON LEGAL SUBMISSIONS

Introduction

- 1) The Claimant, Mr. Bob James, brings a claim for breach of the Minimum Wage and Minimum Wages Board (Amendment) Order N0. 116 of 2019, wherefrom he alleges being underpaid by the defendant Mr. Johnny Joseph Arnhambat, and he seeks payment of Judgment sum of VT454,925 with interests and costs.
- 2) Mr. Arnhambat, opposes the claim on the basis that Mr. James had agreed to the daily remunerated rate of 890VT of which he was being paid, under the casual employment agreement made between the parties, and on which he is relying for its full terms and effect.

Background

- 1) It is accepted that on the 30th of October, 2019, Mr. James and Mr. Arnhambat entered into a casual employment agreement where Mr. Arnhambat employed Mr. James as a security officer under his company called *Ahapi Security Services*. It is alleged that the claimant worked "night shifts" from 5:30 pm to 6:00 am during weekdays and "day shifts" from 12:00 pm till 6:00 am on Saturdays. His night shifts would cover on average, 12.5 hours and 18 hours on average for his day shifts.
- 2) Mr. James also alleged that he was being underpaid, following his shift hours with particulars of underpayment in paragraph 7 of the claim as follows:



“a. Minimum Wage and Minimum Wages Board (Amendment) Order NO. 116 of 2019 stipulates a rate of VT 220 per hour.

b. Pay slips show a rate of approximately VT 71 per hour during night shifts and VT49 per hour during day shifts.

c. The underpayments are VT149 per hour during night shifts and VT171 per hour during day shifts. “

3) Mr. Arnhamabat denies this allegation and says that prior to signing the casual employment contract, its terms and conditions were explained to the claimant, in other words he agreed to the said terms before signing the contract.

4) And Mr. Arnhamabat states that if the employment contract was made contrary to the relevant section of the Minimum Wage and Minimum Wages Board (Amendment) Order No. 116 of 2019, then it would imply that the whole contract is unlawful, void ab initio, and could not be enforced by any court of law. That he terminated the claimant for non-attendance to work on numerous occasions.

5) Counsels Ms. Bakokoto and Mr. Ture agreed to filing written submissions for my consideration wherefrom decision given shall also determine the claim.

Discussion on Submissions

6) Ms. Bakokoto, on behalf of the claimant, made submissions under 4 issues, and Mr Ture made submissions on 2 issues which I deal with each accordingly.

7) First in respect of the claimant’s submission, as to the question of whether or not the defendant remunerated the claimant at a rate below the statutory rate, it is submitted that the defendant acted in contrary to sections 2 and 10 of the Minimum Wage and the Minimum Wages Board Act [Cap 182], and that he remunerated the claimant at a rate below that required by statute.

8) Under Parts 2 and 4 of the Minimum Wage and Minimum Wages Board Act [CAP 182] the following relevant sections 2 and 10 state:

“2. Minimum wage for workers

Notwithstanding anything in this Act or any other law, award or agreement or contract of service to the contrary, every worker as from the date of commencement of this Act (30 December 1984) shall be entitled to receive from his employer for his work a minimum wage of VT 7,000 per month[] calculated on the basis of 22 working days in a month and 8 working hours in a day:*

Provided that -



(a) where a law, award, agreement or contract of service entitles a worker to a higher wage than that specified in this section, such higher wage shall not be reduced;

(b) where pursuant to this Act a minimum wage Order is made by the Minister for workers in any occupation or class or grade of occupation, the minimum wage specified in this section shall cease to apply to such workers as from the date of commencement of such Order.

...

10. Application of the Act

(1) Subject to the provisions of subsection (2), the provisions of this Act shall apply to all workers, including public servants, members of the teaching service, the police force, the Vanuatu Mobile Force and the prison services and persons employed by statutory bodies."

9) In pursuant to section 2(b) the recent amendment to the Act as referred to is Order No. 116 of 2019 where the rate of VT200 per hour was amended to VT 220 per hour. And if I may add, the more recent amendment was gazette in June this year, 2023, as is reflected in Order No. 127 of 2023, where the VT 220 rate is now moved up to VT 300 per hour.

10) Clearly, the Act stipulates for the given rate to be paid to all workers as defined in section 10 above, and accordingly, the defendant paid the claimant below the rate required by statute. And so I agree with claimant on this issue, and I answer it in the affirmative, that the defendant did remunerate the claimant at a rate below that required under statute.

11) As to the issue of whether or not the claimant accepted the VT890 daily remuneration rate; It is argued by the claimant that he was rushed into signing the agreement because he was asked to commence work that afternoon of the 30th of October, 2019, and the hourly rate was not disclosed to him at that time of signing.

12) I find for this issue that there is not enough evidence from the claimant to support his position. I consider his statement filed 14/12/21 and given the inconsistencies of evidence with that by Ms Varina Tari, I have to look at the contract itself to decide on this issue.

13) I also note that the rate of remuneration of VT890 was inserted in handwriting, and whether or not this was there prior to signing, is not the greater concern for me in this case, but whether that rate was communicated before the signing. I therefore accept the defence evidence, that this was so communicated.



14) Further to this issue, I note also the last paragraph of the contract before the signatures, that reads:

"The condition has been accepted by the two parties. And not legal processing is necessary due to this arrangement. We have signed the conditions, "

15) I believe this was meant to be a disclaimer clause where the defendant is not taking any responsibility for any actions against his company having signed the agreement with the claimant.

16) I believe also that having being satisfied with the explanation, the claimant signed the contract because he agreed to start work there and then, knowing what he was getting himself into.

17) And I answer the question posed in the affirmative, that the claimant did accept the rate of VT890.

18) Now to the question of whether the entire agreement was unlawful and not enforceable; it is submitted that the defendant has a legal obligation to pay the claimant at VT220 per hour, or higher and reference was made to cases of *Public Prosecutor v Kalbram, Goiset v Blue Wave Limited [2001] VUSC 124*, and *Tari v Telecom Vanuatu Limited [2017] VUSC 138* and statutory provisions as follows:

- section 6 of the Employment Act [Cap 160],

"6. Effect of custom, agreement etc.

Nothing in this Act shall affect the operation of any law, custom, award or agreement which ensures more favourable conditions in any respect to the employees concerned than those provided for in this Act."

- and section 11(3) of the Minimum Wage and Minimum Wages Board Act [Cap 182]

"11. Offences

...
(3) It shall be an offence for an employer to pay a worker a wage or remuneration that is less than the minimum wage prescribed in this Act or in a minimum wage Order for the class or grade of occupation to which such worker belongs.

Penalty: a fine of VT 200,000 or imprisonment for 4 years, or both."



19) Before I decide this issue, I also note the defence submission on their first issue of whether the agreement was tainted by illegality. The relevant case of *Enfield Technical Service Limited v Payne* (2007) IRLR 840 was cited for reference.

20) And I reflect on both issues by respective counsels hand in hand to decide on the legality of the contract.

21) In the case of *Enfield Technical Services Ltd*, the Employment Appeal Tribunal (EAT) considered the effect of the doctrine of illegality on claims for unfair dismissal, where it was found that the contract in this case was not illegal and there was no intention by the employer to misrepresent the nature of relationship. In contrast to the case before us, the claim is for breach of statutory duty, however the underlying principle relied on in is as stated by Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp 341 at 343 that:

"No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. ..."

22) I accept the defence's submission that section 11 does not impose a statutory duty on the defendant instead it makes it an offence to award wages to employees that were lower than the minimum wage.

23) That the proper question to consider, which reflects on the claimant's claim in this case, is whether the Act gives the claimant a private law right of action sounding in damages, where there is a breach of the Act.

24) I consider the case of *Jean-Marc Pierre v Republic of Vanuatu, Civil Case No. 194 of 2012*, where further reference was made to the cases of *R. v Deputy Governor of Parkhurst Prison, ex p. Hague*, [1991] 3 All ER 733, and *M. v Newham L.B.C.* [1991] All ER 602 at 625.

25) In *R v Deputy Governor of Parkhurst Prison, ex p. Hague* case, the House of Lords stated that the primary question in relation to an action for breach of statutory duty is always whether the legislation intended to create a civil remedy for aggrieved individuals as with the claimant in this case.

26) And having so considered, I find that the language of the Act in itself, does not intend to create a civil remedy for the claimant, nor provide for an action for breach of statutory duty. However, it makes the conduct, an offence under section 11 in awarding wages lower than the minimum wage.

27) Therefore, given the relevant evidence before me, I concur with defence counsel that the agreement was tainted by illegality since its inception, where the parties have knowingly entered into arrangements which have to their knowledge represented the facts of the employment relationship to be other than they really were, and in so doing, such an arrangement have in effect breached the provision of the Act, rendering the agreement illegal and void ab initio, and in contrary to public policy on the grounds of performance.



28) And in answer to the question posed by the claimant, I find the employment agreement was unlawful and not enforceable.

29) Now moving on to the final question by the claimant on whether or not the claimant's non-attendance constitutes a serious misconduct, or if such intentions as alleged does call for a termination of contract, I see that there are insufficient evidences before me to persuade me if any towards a clear decision, so I will not deal with this issue any further.

Result

30) The Claimant is not entitled to the reliefs sought.

31) That costs fixed at the amount of VT 100,000 is awarded in favour of the defendant, or taxed failing agreement.

Dated at Port Vila this 17th day of August, 2023.

BY THE COURT


Magistrate

