IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU HELD AT PORT VILA

Civil Case No. 28 of 1999

(Civil Jurisdiction)

BETWEEN : MR. JEFFREY ARU

(Plaintiff)

AND : THE VANUATU BREWING LIMITED

(Defendant)

RULING ON APPLICATION UNDER LIMITATION ACT (N0. 4 of 1991)

On 22nd day of December 2000 the Court of Appeal allowed an appeal in this case concerning the Limitation Act and ordered it be returned to the Supreme Court to be reheard, (Civil Appeal Case 8/00).

I have heard the evidence of the plaintiff, Jeffrey Aru, and Emphraim Matthias (the Commissioner of Labour), Yaxley Ben and Roger Wate. For the defendant I have heard the evidence of Murray Parsons (the general manager of the defendant company), Silas Saro and Ernie Japhet. Evidence, for the most part, was given by adoption of affidavit and cross-examination thereon.

In 1990 the plaintiff started work with the Vanuatu Brewing Company Limited. On 6th December 1994 he says he suffered an accident at work causing injury to his right wrist and residual loss of use. His employment was terminated on 14th December 1998. He now sues his employer for damages. The action was commenced on

25th March 1999. On 26th June 2000 he made application under section 16 (3) Limitation Act, No. 4 of 1991 for leave to proceed out of time. It is agreed that it was brought to his counsel's attention in September 1999 that leave would be needed. This is an action for damages for negligence and breach of duty in respect of personal injuries. The time limit for filing this action, unless leave is given, is three years.

Leave was granted by another judge. On 22nd December 2000 the appeal against that decision was allowed and the matter returned to the Supreme Court for rehearing.

The Court of Appeal described the Limitation Act as "unnecessarily complex and difficult to understand" and "convoluted".

It is agreed the application for leave was made after the commencement of the action. Section 16 (3) therefore applies.

(3) *"Where such an application is made after the commencement of a relevant action, the court may grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if the like evidence were adduced in that action, that evidence would, in the absence of any evidence to the contrary, be sufficient –*

(a) to establish that cause of action, apart from any defence under subsection (1) of section 3; and

(b) to fulfil the requirements of subsection (3) of section 15 in relation to that cause of action,

and it also appears to the court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the plaintiff that the matters constituting that cause of action had occurred on such a date as, apart from the last preceding section, to afford a defence under subsection (1) of section 3."

Section 15 (3) states;

15. (3) *" The requirements of this subsection shall be fulfilled in relation to a cause of action if it is proved that the material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which –*

(a) either was after the end of the three-year period relating to that cause of action or was not earlier than twelve months before the end of that period; and

(b) *in either case was a date not earlier than twelve months before the date on which the action was brought".*

On the evidence adduced by and on behalf of Jeffrey Aru it appears that, if the like evidence were adduced in the action, that evidence would be sufficient to establish the cause of action. There is no dispute about that.

I now consider section 15 (3). The plaintiff must shew "material facts" which were or included "facts of decisive character" were outside his knowledge (actual or constructive) until after three years from the accident. "Material facts" is defined at section 18 as,

"In sections 15 and 17 any reference to material facts relating to a cause of action means a reference to any one or more of the following:-

(a) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting that cause of action;

(b) the nature or extent of the personal injuries resulting from that negligence, nuisance or breach of duty;

(c) the fact that the personal injuries so resulting were attributable to that negligence, nuisance so breach of duty, or the extent to which any of those personal injuries were so attributable".

'Facts of a decisive character are defined by section 19 as

19. *" For the purposes of sections 15 and 17, any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a reasonable person, knowing those facts and having obtained appropriate advice within the meaning of section 21 with respect to them, would have regarded at that time as determining, in relation to that cause of action, that,*

apart from any defence under subsection (1) of section 3, an action would have a reasonable prospect of succeeding and resulting in the award of damages sufficient to justify the bringing of the action."

Facts will be taken as outside the knowledge of a person when,

"20. (1) *Subject to the provisions of subsection (2), for the purposes of sections 15 to 17 a fact shall, at any time, be taken to have been outside the knowledge, actual or constructive, of a person if, but only if-*

(a) he did not then know that fact ;

(b) in so far as that fact was capable of being ascertained by him, he had taken all such action, if any, as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice as aforesaid which respect to those circumstances.

The answers to this part depend upon my assessment of the evidence of the plaintiff. There was certainly exageration in the extent of the injury itself. The original pleading stated his right wrist was hanging only by its skin . His medical evidence shews the injury to be nothing like so severe.

The plaintiff, on his own evidence, accepted he started seeking advice for his injury a day or so after his employment was terminated. He says upto that time he thought the company would 'sort it out', and any compensation be payable when he stopped work. There was no explanation as to why he should think that. Yaxley Ben, a fellow

employee, but now no longer with the defendant company, supported the plaintiff's testimony. Apart from that, there is no evidence to support the plaintiff's contentions; there is nothing from the hospital records (I accept that such might not always be obtainable), no other employee, no documentation of any kind. The plaintiff in effect assumed the company knew of the incident and would act without any imput from him.

The defendant's manager and two witnesses say they knew nothing of an accident. There is no recollection of the plaintiff or anyone else telling them, the accident book is silent, wage records tend to shew the defendant working, there is no sick note and there is signing for wages for the 14 days after the accident when he says he was away on sick leave. The plaintiff was terminated in circumstances he thought were unfair, and within a day or so he started to make enquiries about medical reports and a legal action. The defendant's witnesses say he often had a bandage on his right hand from the time when he commenced work. He was lifting heavy barrels with both hands throughout his work at the defendant's, there was no sudden inability as the plaintiff suggested.

I find that where the evidence of the plaintiff and Yaxley Ben differs from that of the defence witnesses I prefer that of the defence witnesses.

I am not satisfied the plaintiff has shewn on balance that material facts of a decisive character were outside his knowledge until after the period. Indeed, if he thought he would receive compensation when his employment terminated he would have first sought it form his employer. Instead he went to the Labour

Commissioner, doctor and the Public Solicitor. This is precisely the course he could have taken in the weeks and months after the alleged accident.

The plaintiff on his own evidence knew there was an injury at work, he knew the extent of that injury and regarded throughout his employer as being liable to pay compensation.

Any reasonable person in the circumstances the plaintiff says he found himself would have obtained advice and doubtless regarded himself as having a reasonable prospect of success in an action. The plaintiff has not shewn he had taken all such action, if any, as it was reasonable for him to have taken for the purpose of obtaining appropriate advice. He knew, as he did so later, that he could seek assistance from the Commissioner for Labour. He did not make any attempt to do so. For no apparent reason he considered the company would just pay him compensation.

I return to the last part of paragraph 16 (3). It cannot have been outside the plaintiff's knowledge that he was out of time until after the commencement of the action. All the decisive material facts were within his knowledge, actual or constructive when he saw his solicitor in January 1999. Leave should been sought under section 16 (2).

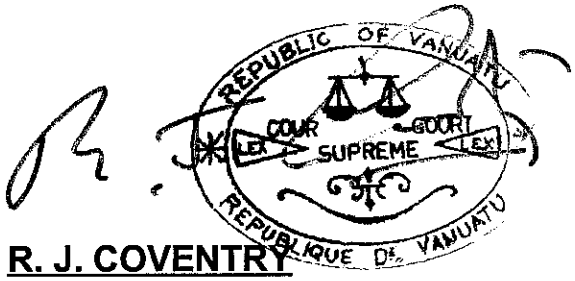
Even had the plaintiff overcome these hurdles the Court has a discretion whether or not to grant leave in respect of an action. I would not exercise that discretion in the plaintiff's favour. It is far from clear on balance whether there was an accident at work causing this injury, there is nothing to support the plaintiff save the evidence of Yaxley Ben. I prefer the evidence of the defendant's witnesses who

heard no report of an accident and saw no change in the plaintiff's capability. If the action proceeded the defendants, because of the delay and the failure to notify, would find it impossible to mount any kind of defence. Once it was known leave would be required there was a further delay of approximately six months before leave was actually sought. This whole matter was activated within a few days of the plaintiff being dismissed, unfairly as he thought .

In all the circumstances, therefore, I refuse leave for the purposes of section 15. The case is dismissed.

The plaintiff to pay the defendant's costs as agreed or taxed.

Dated at Port Vila this 12th day of November 2001.



R. J. COVENTRY

Judge