

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

Civil Case No. 72 of 2009

BETWEEN: SIMON SUPA
Claimant

AND: PERRY PAKOA JAMES trading as VANUATU
PLANT HIRE
First Defendant

AND: THE FLETCHERS ORGANISATION
(VANUATU) LIMITED
Second Defendant

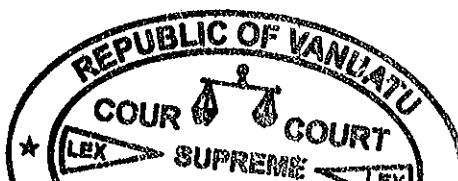
Coram: Justice D. V. Fatiaki

Counsels: Mr. C. Leo for the Claimant
Mr. J. Malcolm for the Defendants

Date of Decision: 28 October 2010

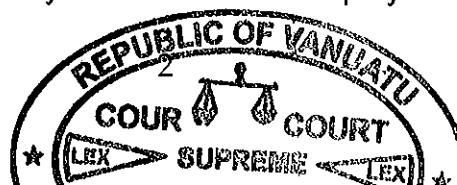
JUDGMENT

1. This action was commenced in June 2009 as a claim for various entitlements under the Employment Act for wrongful dismissal. The reliefs sought against both defendants were very similar except that the claimant sought a severance payment against the second defendant and against the first defendant, payment for loss of partnership.
2. There were inevitable inconsistencies between and within the claims, for instance, the claim for 3 months salary in lieu of notice suggests that the claimant was an employee of both defendants at the same time and the claim against the first defendant suggests that the claimant was both an employee and a partner of the first defendant at one and the same time yet there has been no reference to the Partnership Act [CAP. 92] in the claim.
3. There was also an unsuccessful attempt to strike out the claim in September 2009 and the claim was subsequently amended but the inconsistencies remained. A further and final amendment of the claim in March 2010 removed the Employment Act claims against the first defendant and replaced it with a claim for a "goodwill payment of VT600,000". The Employment Act claims continued against the second defendant. The action went to trial with the pleadings in that final amended state. The claimant gave evidence in support of his claim and the defence called 3 witnesses, Dean Perkins, Tony Care the manager of the second



defendant company (**Fletchers**) and Perry Pakoa James the accountant of Fletchers and owner of Vanuatu Plant Hire.

4. The Claimant's claim is that between June 2002 until November 2007 he was an employee of Fletchers working as an excavator operator. That in October 2006 he entered into a written partnership with the 3 defence witnesses and another and operated under the name **Vanuatu Plant Hire (VPH)**. The purpose of the partnership was to hire plant and equipment throughout Vanuatu, in particular, to hire a Daewoo excavator owned by Dean Perkins and his wife which was to be operated by the claimant. The partnership had a profit share arrangement for Tony Care (10%) Perry Pakoa (5%) and the claimant Simon Supa (5%) and an annual review date of "1st October each year".
5. The partnership agreement also contained the following significant clause:-
"Perry Pakoa and Simon Supa are employees as well as shareholders of the business and are therefore bound under the condition of their employment contracts. Their profit share is contingent on their performance as it is accepted that without their input the business will not succeed."
6. Despite the above-wording the claimant maintained that his employment with Fletchers was a continuous one and that his employment with VPH was merely on transfer or on a secondment basis with the full knowledge and approval of Tony Care, Fletchers manager at the relevant time. His employment with VPH was verbally terminated by Dean Parkins on 6 October 2007 without any warning or notice and Fletchers terminated him on 9 November 2007 also without any notice or warning.
7. In cross-examination the claimant accepted that from October 2006 to October 2007 he worked for VPH and was paid a monthly salary of VT80,000 by VPH. He also received his share of VPH profits for the year amounting to VT509,814. He accepts that whilst working with VPH some misconduct allegations were put to him but nothing eventuated. He maintained however that he did **not** resign from Fletchers and had gone to VPH at the direction of Tony Care. He accepted that after he was terminated with VPH he was offered employment with Fletchers which he accepted but he did **not** return to work as he had gone to his village to think about why he had been terminated from VPH. Finally he accepted that he was offered another job operating a machine at Undine Bay but he declined the offer.
8. Dean Perkins gave evidence as the manager of VPH during the relevant period. He testified that he first approached the claimant whilst he was still an employee of Fletchers in October 2006 and offered him a job with better conditions with VPH and the claimant agreed and joined VPH as a digger operator on a 1 year contract of employment. The employment



contract was reviewable annually and the claimant's profit share was intended to encourage good attendance and be an incentive for him to work hard for VPH. During the claimant's year long employment with VPH he had raised with him several complaints received from clients of VPH, especially to do with the claimant's time-keeping and he had verbally warned him several times prior to his termination in October 2007.

9. I say "termination" advisedly because in cross-examination Dean Perkins agreed that he had personally informed the claimant that his employment with VPH had ended as the partners of VPH had met and agreed that the partnership agreement (including the claimant's employment) would not be renewed or extended at the annual review on 1st October 2007.
10. Tony Care confirmed that the claimant was a digger operator for Fletchers from 29 June 2002 till October 2006 when he left Fletchers of his own accord and joined VPH. The claimant was paid his full entitlements when he left. In his sworn statement Tony Care deposed that "*Fletchers Company did not facilitate*" the arrangement whereby the claimant left and joined VPH nor were there any discussions about the claimant being transferred or remaining an employee of Fletchers during the time that he was working for VPH "*although we did inform him that his position was always available should he wish to rejoin Fletchers workforce*". As far as he and Fletchers were concerned "*after October 2nd 2006 Simon Supa was no longer an employee of Fletchers*".
11. In cross-examination he accepted that he had talked to the claimant about the excellent opportunity to make more money working for VPH and he supported the claimant's decision to leave Fletchers. The claimant was not paid severance pay at the time as he had voluntarily chosen to leave Fletchers. Fletchers had offered to re-employ the claimant after he was terminated by VPH and, although the claimant accepted the re-employment offer which was held open for him for a month, he did not turn up to work at all and was accordingly terminated by letter dated 9 November 2007.
12. Finally Perry Pakoa testified that he personally set up VPH in 2007 as a vehicle to do business and VPH leased machinery belonging to Dean Perkins who was also hired to supervise and manage the affairs of VPH. He said that the claimant was employed by VPH as a digger operator with a 5% profit share incentive. He is aware of several complaints from VPH clients about falsely inflated hours being submitted by the claimant for work that he had not done and, he is aware that the claimant was verbally warned on several occasions that this action could cause him to lose his job. The warnings fell on deaf ears and at a meeting of the partners of VPH on 6 October 2007 of which the claimant had been notified, it was decided that the claimant's annual contract of employment would not be renewed.



13. In cross-examination Perry Pakoa confirmed that he worked full-time as the office manager of Fletchers and was also the accountant responsible for making payments for VPH. He also accepted that whilst Fletchers and VPH were separate entities their administration was "run by one person". In this latter regard Tony Care accepted that the office of VPH was physically located in Fletchers Company offices "when it initially started".

THE CLAIM AGAINST VANUATU PLANT HIRE

14. I have carefully considered the conflicting evidence on this aspect of the claim and I make the following findings:

- (1) The claimant was employed by VPH on a one-year contract of employment from October 2006 until October 2007;
- (2) The employment contract formed an integral part of a profit-sharing partnership agreement entered into between the claimant and 5 other named individuals in October 2006 and entitled the claimant to a 5% share in the annual net profit of VPH;
- (3) The partnership agreement was subject to an annual review in October 2007 at which it would be decided whether the partnership should continue or cease operations;
- (4) The claimant was paid by VPH a fortnightly salary of VT40,000 during the year of his employment with VPH;
- (5) Under the partnership agreement the claimant received VT509,814 as his 5% share of VPH profits on 1 October 2007;
- (6) The claimant's annual employment contract and profit-share arrangement expired in October 2007 and was not renewed at a meeting of the partners on 6 October 2007;

15. **Section 48 of the Employment Act [CAP. 160]** clearly provides that:

"a contract of employment shall terminate on the last day of the period agreed in the contract or on completion of the piece of work specified therein."

16. In light of the foregoing I am satisfied and hold that the claimant's employment contract with VPH was for an agreed fixed period of 12 months and on the last day of the agreed period it terminated and was not renewed.



17. In those circumstances the claimant was not entitled to receive notice of termination from VPH under section 49 of the Employment Act nor was he entitled to any severance allowance under section 50. In simple terms, the claimant's employment with VPH terminated at the end of the agreed period (ie. through effluxion of time) and there is no question of him being dismissed or terminated by anyone.
18. Accordingly the claim against VPH has no substance and is dismissed with costs to be taxed if not agreed.

CLAIM AGAINST FLETCHERS

19. Here the claimant asserts that he was in continuous employment with Fletchers from 2002 until he was terminated without notice in November 2006. He claims that he was entitled to a payment under section 49 in lieu of notice in addition to severance allowance under section 56 of the Employment Act.
20. Fletchers defence is that the claimant's employment with Fletchers was not continuous rather, it was broken into two parts. The first part ended when he voluntarily commenced employment with VPH in October 2006 and, the second part, began with the offer of re-employment with Fletchers after his employment contract with VPH ended. The claimant was terminated during the second part of his employment after a month.
21. After careful consideration of the evidence I make the following findings:

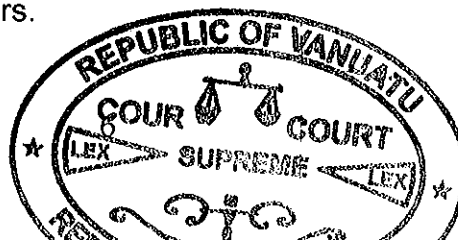
(A) pre-VANUATU PLANT HIRE

- (1) The claimant was in continuous employment with Fletchers under a contract of employment for an unspecified period of time between 29 June 2002 and October 2006 when the claimant left of his own accord;
 - (2) That the claimant's employment with Fletchers was effectively terminated by the claimant when he signed the employment and profit-share agreement with VPH in October 2006 and then actually commenced working for and being paid by VPH;
 - (3) The claimant was not transferred or seconded by Fletchers to VPH in October 2006.
22. In those circumstances I have no hesitation in concluding that the claimant has no valid claim against Fletchers for the period from June 2002 to October 2006 under the Employment Act.



(B) post-VANUATU PLANT HIRE

23. This situation is a little more difficult to analyze although much of the evidence covering the period between October 2006 and November 2007 is undisputed, such as, Fletchers offer to re-employ the claimant; the acceptance of that offer by the claimant; the failure of the claimant to turn up for work for over a month after accepting Fletchers' re-employment offer; and lastly, the termination of the claimant's contract of (re)employment by letter dated 9 November 2007.
24. Defence counsel's simple submission is that the claimant's (re)employment contract with Fletchers lasted for no longer than 6 weeks after which time it was properly and lawfully cancelled for serious misconduct thereby disentitling the claimant to any payments under the Employment Act.
25. In this regard I have considered the provisions of **Section 11** of the **Employment Act [CAP. 160]** which envisages the situation where a contract of employment has been transferred from one employer to another where there has been a change of ownership of the former employer either through the sale of its business or by the formation of a new entity, then the contract of employment continues to bind the new employer/entity for the purposes of the Employment Act.
26. I am satisfied however that the section is inapplicable to the present case as Fletchers, the claimant's former employer, neither changed nor ceased operations with the formation of Vanuatu Plant Hire (VPH). Furthermore although the claimant asserts that he was transferred from Fletchers to VPH pursuant to a written agreement the fact remains that the agreement does not clearly state that the claimant was being transferred and in any event, Fletchers ceased to supervise or pay the claimant's salary and wages once he commenced duties with VPH.
27. In similar vein I have also considered whether the ameliorating provisions of **Section 54(2)(c)** read with **Section 55 (4)** of the Employment Act might assist the claimant in his claim to "**continuous employment**" against Fletchers so as to entitle him to a severance allowance. Again, in this regard, it is common ground that the claimant was offered and accepted employment by Tony Care who was a partner of VPH and manager of Fletchers to commence immediately with Fletchers after his employment ceased with VPH.
28. The above, in my view, is a circumstance covered by **Section 55(3)(b)** of the Employment Act and by the terms of **Section 55(4)** would constitute under **Section 54(2)(c)** ... "**continuous employment**" for the purposes of prima facie entitling the claimant to claim a severance allowance under **Section 56** of the Act against Fletchers if his (continuous) employment was terminated by Fletchers.

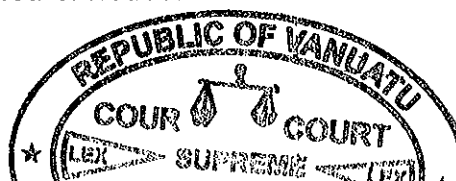


29. In this latter regard again it is common ground that Fletchers did without warning or notice, terminate the claimant's employment by letter dated 9 November 2007 which reads (in its material parts):

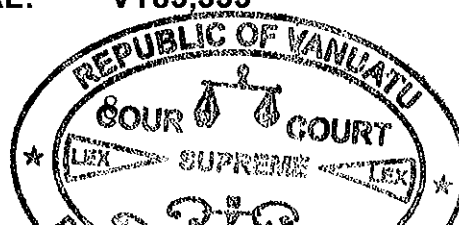
"This letter serves as termination of your employment contract with Fletchers Construction. The termination is based on your lengthy absence from the 8th of October 2007 to today's date being the 19 November 2007; no valid reason was given to this office for this extended period of absence."

30. I am satisfied that an employee's unnotified and unexplained absence from his employment for over 5 weeks without his employer's prior knowledge and approval *prima facie* constitutes "serious misconduct", sufficient to disentitle such employee from receiving any severance allowance **but only if** his dismissal complies with the requirements of Section 50. [see: Section 55(2) of the Employment Act].
31. It is common ground that the requirements of **Section 50(4)** of the Employment Act was **not** complied with by Fletchers when it terminated the claimant's employment and therefore his termination is, in the words of the subsection "**deemed to be an unjustified dismissal**" whatever the underlying reason for the dismissal might be and however justified an employer may feel in dismissing the employee. I acknowledge that there appears to be some tension between the provisions of subsection (1) and subsection (4) of section 50 but I am content to read subsection (1) as directed at the notice of termination requirements of section 49 and, subsection 4, as incorporating natural justice requirements into the dismissal process of an employee on the ground of serious misconduct.
32. Accordingly, I hold as a matter of law that the claimant's dismissal was "*unjustified*" and he is entitled to notice or compensation in lieu thereof under section 49, as well as to a severance allowance calculated on the basis of his 13 months of "*continuous employment*" with Fletcher.
33. I receive some support for the former proposition from the recent judgment of the Court of Appeal in **Hack v. Fordham [2009] VUCA 6** where an employee was dismissed in not dissimilar circumstances to the claimant in this case and the Court in upholding a claim under Section 49 and for a severance allowance said (at p. 5):

"19. It is common ground that the respondent was not given any opportunity to answer to charges made against him in the letter of 4th July, 2006 which terminated his employment. As no opportunity was given to answer the charge of misconduct, it is not open to Mr. Hack to contend that the respondent was dismissed on the ground of serious misconduct, and the respondent is therefore entitled to recover payment in lieu of notice.



20. *On the question of the claim for severance allowance, the issue is whether the termination was unjustified rather than whether it was unlawful. Under ss. 54 and 55 of the Employment Act, an employee with a sufficient period of service is entitled to a severance allowance where the employment is terminated for reasons other than for serious misconduct as provided in s.50."*
34. Having said that I respectfully agree with the observations of Dawson J. in **Joseph Malere and others v. VBTC** Civil Case No. 219 of 2005 where he enumerated several non-exhaustive factors that the Court should consider in assessing severance allowance, including:
- “(a) *Did the employee have a good work record?*
- (b) *Had the employee been given any previous warnings?*
- (c) *Was the unjustified dismissal a result of inept handling of the issue by the employer at the lower end or high handed arrogance at the higher end of the scale?*
- (d) *Was the employee subjected to physical or verbal abuse by the employer at the time of termination?”*
35. I am satisfied in the particularly narrow circumstances surrounding the claimant's dismissal in the present case, that it was a result of ineptitude and a lack of appreciation of the meaning and effect of the applicable provisions of the Employment Act and must therefore be considered at the lower end of the scale.
36. I also take into account the admission by the claimant that after he was dismissed by Fletchers he turned down at least one real offer of employment.
37. There will be judgment entered for the claimant against Fletchers in the following sums in accordance with relevant provisions of the Employment Act:
- (1) Pursuant to Section 49(3)(b)(i):
Payment in lieu of notice – **VT40,000;**
- (2) Pursuant to Section 56(2):
- Under paragraph (a): VT40,000
 - Under paragraph (b): VT43,333
- TOTAL: VT83,333**



- (3) Pursuant to Section 56(4):
Severance allowance of VT(83,333 x 2) = **VT166,666**
- (4) Pursuant to Section 56(6):
Interest of **5% per annum** on the sums awarded in (1), (2) and (3) above calculated from 9 November 2007 until the date of payment;
- (5) Costs in favour of the claimant on a standard basis to be taxed if not agreed.

DATED at Port Vila, this 28th day of October 2010.

BY THE COURT

