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

Civil Case No. 141 of 2010

BETWEEN: ATTORNEY GENERAL

Claimant

AND: ANZ BANK (VANUATU) LIMITED

First Defendant

AND: WILCO HARDWARE HOLDINGS LIMITED

Second Defendant

Coram: ***Justice D. V. Fatiaki***

Counsels: *Mr. A. F. Obed for the Claimant*
Mr. G. Blake for the Defendants

Date of Decision: *11 November 2011*

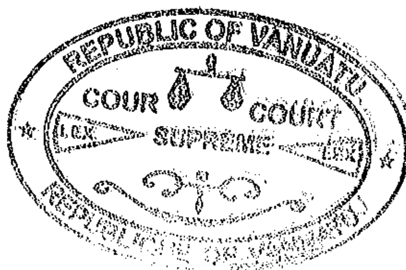
RULING

1. On 15 September 2010 the Attorney General filed a claim in the Supreme Court seeking a declaration under the Employment Act on behalf of named employees of the two defendants companies who had been terminated in circumstances that entitled the named employees to be paid a severance allowance computed in accordance with the provisions of **Section 56** of the **Employment Act** [CAP. 160].

2. The claim further asserts that the named employees were paid severance allowances "*contrary to Section 56 of the Act at the rate of ½ month salary for every year of employment prior to 26 October 2009 and at the rate of 1 month salary for every year of employment after 26 October 2009*" being the date on which, it is accepted by both parties, the amendment of **Section 56** was gazetted.

3. In particular, the Attorney General seeks:

> *"A declaration that severance allowance payable under Section 56 of the (Employment) Act is to be calculated at the rate of 1 month's remuneration for every preceding 12 months of continuous employment."*



4. On 12 October 2010 the defendant companies who are represented by the same firm of solicitors, filed separate defences denying the substance of the claims. In addition, both defendants "*... denies that the claimant has the power to bring the application ex-officio, or that the claimant has any standing generally to bring the claim*".

5. As for the "*powers*" of the **Attorney General, Section 10 (2)** of the **State Law Offices Act** [CAP. 242] expressly vests the Attorney General: "*... with all such duties, functions and powers as may be provided for by the Constitution, statute and at common law*".

6. At a conference on 26 June 2011 the parties agreed to file submissions on the following preliminary issue:

   > "*Can the Attorney General bring an ex-officio claim on behalf of employees under the Employment Act in respect of a claim under Section 56 of the Employment Act (as amended)?*"

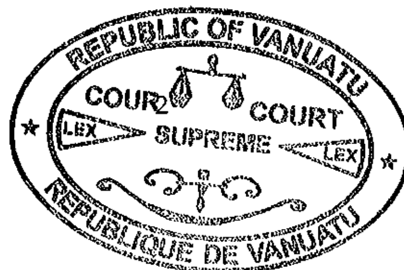
7. Written submissions were ordered and these were eventually completed on 24 February 2010. I am grateful to both counsels for the assistance provided in the submissions.

8. The Attorney General's short submission is to the effect that his office has standing to maintain an "*ex-officio*" claim for a declaration as to public rights and the proper interpretation of a statutory provision. Furthermore the Attorney General has the power and duty to issue an action as a relator to prevent breaches of public law such as the Employment Act.

9. In support of his submissions the Attorney General generally relies on **Halsburys Laws of England** (4th Edition); the judgment of the House of Lords in **Gouriet v. Union of Post Office Workers** (1977) 3 ALL ER 70 and the short decision of the Chief Justice in **Attorney General v. NEVCO** [2006] VUSC 3.

10. In this latter case in rejecting as "*baseless*", a similar submission by the defendants that the Attorney General had no "*locus standi*" to make the urgent application being considered in the case, the Hon. Chief Justice said (at p. 2):

    > "*Section 6* (of the State Law Office Act) *has no application in the case before the Court ..., the application was made on behalf of the Attorney General on the basis of his powers and duty to issue the action as a relator to prevent further breaches of the public law by ...* (the defendants)*...*".



11. The defendants response is to the effect that:

> *"The right of an employee to be paid severance and its quantification on termination of an individual's employment is not a "public right". It is a feature of the private contractual relationship between an employer and the employee albeit one imposed by legislative enactment. It is a "private right" capable of enforcement by the employee bringing civil proceedings to enforce his/her contractual rights. Indeed as the claimant's submissions acknowledge some employers have adopted the interpretation pressed by the claimant (sic)".*

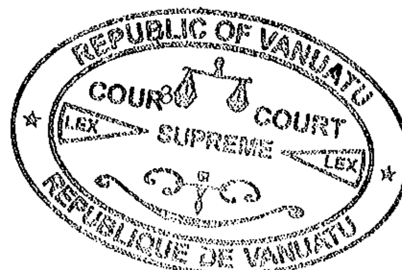
In brief, counsel submits that employment is a private contractual matter and Parliament has elected to legislate for certain minimum requirements, but the matter remains private nevertheless.

12. In other words, the right of an employee to receive the payment of a severance allowance on termination, and therefore the interpretation of the law in quantifying that entitlement, is <u>not</u> a "*public right*" capable of being enforced or protected by the Attorney General.

13. Defence counsel accepts however, that if the public right exists "*then the Attorney General is competent to enforce it but if there is no public right then he is not competent to take the proceedings. However it is not enough to say that it is in the public's interest to have a court decide on the meaning and effect of the amendment to the Employment Act. The right in question needs to be a public right ...*"

14. For his part defence counsel relies on the judgment of Palmer J. (as he then was) in **Attorney General v. Super Entertainment Centre Ltd.** [1996] SBHC 5 and the decision of the UK Court of Appeal in **AG (ex rel. Scotland) v. Barrett Manchester Ltd and Bolton Metropolitan Borough Council** (1992) 63 P & CR 179 in which Nichols LJ discusses and differentiates between the meaning of the expressions "*public right*" and "*public interest*".

15. With all due regard to defence counsel's submissions I do not find it helpful to consider the present case or the Employment Act on the basis of "*public*" or "*private*" rights. On one level <u>**all**</u> legislation is public in its general application and although some of its provisions may be said to give rise to benefits and protections that are enforceable by individual employees, that, does not deny the public nature of the legislation in



question <u>or</u> the public interest in ensuring that the law is both clarified and enforced.

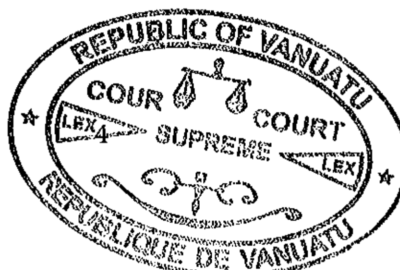
16. In the context of the **Employment Act** [CAP. 160] which seeks to provide for the general principles relating to contracts of employment and matters incidental therefor, there are numerous provisions plainly intended to protect or benefit different categories of employees such as "*women*" and "*young persons*", and yet others, that seek to impose minimum requirements and conditions of employment for **<u>all</u>** employees regardless of age or gender, such as, those provisions dealing with termination of employment and the payment of severance allowances. All the above provisions whilst plainly for the benefit or protection of employees nevertheless, impose duties on employers under pain of criminal sanction.

17. In my view the mere fact that a contract of employment might be considered one between an employer and employee and therefore, to that extent, giving rise to enforceable "*private*" rights does not alter the public character of the provisions of the Employment Act which has been passed for the benefit of **<u>all</u>** employees and which are super-imposed into the individual employee's employment contract.

18. As the Court of Appeal said in **VNPF v. Aruhuri** [2001] VUCA 16 (at p. 5):

> "*On one view and on a narrow reading it may be said that a contract of employment is simply one in which an employee agrees that in consideration of a wage or other remuneration, he will perform some service or work for his employer. We are satisfied however that a contract of employment in this day and age in Vanuatu is more than that. Undoubtedly a general legal relationship exist between an employer and employee but it is a relationship in which the law, both common law and to a significant extent statute, imputes several rights and responsibilities to each side*".

19. The fact that a contravention or failure to comply with the provisions of the **Employment Act** is made a criminal offence punishable by a VT100,000 fine or imprisonment for a term not exceeding 3 years is a further indication that the provisions of the Act are imposed for the working public's benefit, and breach of them is a public, not a private, wrong for which the Attorney General can, if he thinks it in the public interest to do so, to take proceedings to prevent the commission or continuation of a public wrong.



20. As was relevantly observed by Lord Simonds in referring to the Betting and Lotteries Act 1934 in **Cutler v. Wandsworth Stadium Ltd**. [1892] 3 Ch 242 when he said:

> "*... the sanction of criminal proceedings emphasizes that this statutory obligation like many others which the Act contains, is imposed for the public benefit and that the breach of it is a public, not a private, wrong*".

21. Furthermore Baggally CJ in **AG v. General Eastern Railway Co.** [1879] 11 CLD 449 speaking of the role of the Attorney General in the enforcement of the law observed:

> "*It is in the interest of the public that the law should in all respects be respected and observed, and if the law is transgressed or threatened to be transgressed ... it is the duty of the Attorney General to take the necessary steps to enforce it nor does it make any difference whether he sues ex officio, or at the instance of relators*".

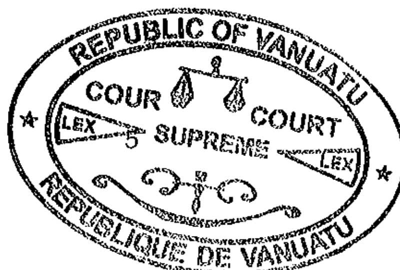
22. I am not unmindful of the seeming absence of trade unions or pressure groups in Vanuatu who might be expected to pursue employee interests **nor** can I ignore the high costs of litigation which may well be beyond the financial means of many individual employees. In such circumstances, it cannot be that the Attorney General as the acknowledged representative of the "*public interest*" is impotent to secure obedience of the law **nor** in my view, should contraventions of the law be allowed to occur or continue with impunity merely because the person most directly affected by the contravention is unwilling to invoke the law **or** (more likely) unable by reason of impecuniosity from doing so.

23. In light of the foregoing I am satisfied that the issue earlier identified in **paragraph 6** ibid must be answered in the affirmative.

24. By way of further directions with a view to progressing the matter, I make the following orders:

    (a) Claimant to file and serve a reply to defence (if desired) by 18 November 2011;

    (b) Claimant to file and serve sworn statements in support of claim by 25 November 2011;



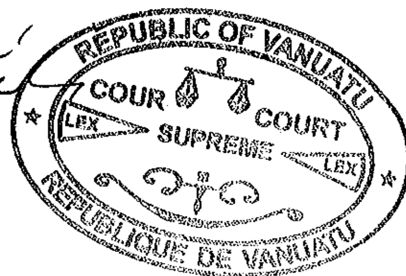
(c) Defendant to file and serve response sworn statements by 9 December 2011;

(d) Parties to file agreed chronology, facts and issues by 15 December 2011 to be initiated by the claimant by 28 November 2011;

(e) Matter adjourned for further directions on 16 December 2011 at 9.30 a.m.

DATED at Port Vila, this 11th day of November, 2011.

BY THE COURT



D. V. FATIAKI
Judge.