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 State***
Mr. G. M. Blake for the defendants

Date of Decision: *30 November 2012*

JUDGMENT

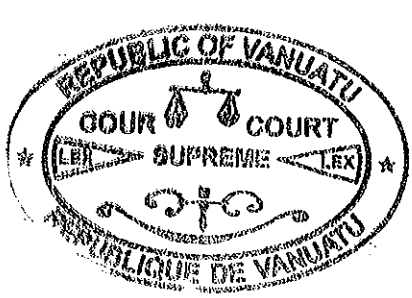
1. This case concerns the interpretation of **Section 56** of the **Employment Act** [CAP. 160] as amended by **Act No. 33 of 2009** which commenced on **26 October 2009** (the '*2009 Amendment Act*'). **Section 56** is primarily concerned with the quantification and payment of severance allowance to an entitled employee.

2. The "*2009 Amendment Act*" provided *inter alia* for the following relevant amendments of the **Employment Act**:

> "7. ***Paragraph 54 (1) (d)***
> *Repeal the paragraph, substitute*
>
> *(d) where the employee has been in continuous employment with the same employer for not less than 6 consecutive years and the employee resigns in good faith; or*"
>
> *8.* ***Paragraph 56 (2) (a)***
> *Delete "2", substitute "1".*

3. For completeness mention should be made of the Employment (Amendment) Act No. 31 of 2008 which was also brought into effect on 26 October 2009 and which had earlier provided for the following relevant amendments to **Sections 54** and **56** of the **Employment Act**:

> "*10.* ***Paragraph 54 (1) (d)***



Delete "where the employee has been in continuous employment with the same employer for a continuous period of not less than 10 consecutive years."

11. **Paragraphs 56 (2) (a) (i) and (ii)**
Repeal the sub paragraphs.

12. **Paragraph 56 (2) (a)**
After "*12 months*" insert "*2 months remuneration*".

4. One thing is clear from the above and that is that Parliament had intended in 2008, to increase the severance allowance rate four-fold to "*2 months remuneration*" from "*half a months remuneration*", but later, changed its mind, in 2009, and doubled the rate to "*1 months remuneration*".

5. Accordingly, as from 26 October 2009, **Section 56** reads:

"*(1) Subject to the provisions of this Part the amount of severance allowance payable to an employee shall be calculated in accordance with subsection (2).*

(2) Subject to subsection (4) the amount of severance allowance payable to an employee shall be –

(a) for every period of 12 months – 1 months remuneration;

(b) for every period less than 12 months, a sum equal to one-twelfth of the appropriate sum calculated under paragraph (a) multiplied by the number of months during which the employee was in continuous employment.

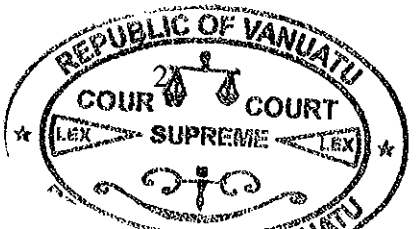
(3) ...

(4) The court shall, where it finds that the termination of the employment of an employee was unjustified, order that he be paid a sum up to 6 times the amount of severance allowance specified in subsection (2).

(5) Any severance allowance payable under this Act shall be paid on the termination of the employment.

(6) The court may, where it thinks fit and whether or not a claim to that effect has been made, order an employer to pay interest at a rate not exceeding 12 per cent per annum from the date of the termination of the employment to the date of payment.

(7) For the purposes of this section the remuneration which shall be taken into account in calculating the severance allowance shall be the remuneration payable to the employee at the time of the termination of his employment."



6. To assist in the interpretation of the "*2009 Amendment Act*" **Section 8** of the **Interpretation Act** [CAP. 132] provides:

"*(1) Every Act must be interpreted in such manner as best corresponds to the intention of Parliament.*

(2) The intention of Parliament is to be derived from the words of the Act, having regard to:

(a) the plain meaning of ordinary words;

(b) ...

(c) the whole of the Act and the specific context in which the words appear;

(d) headings and any limitation or expansion of the meaning of words implied by them;

(e) grammar, rules of language, conventions of legislative drafting and punctuation.

(3) Where the application of subsection (2) would produce:

(a) an ambiguous result; or

(b) a result which cannot reasonably be supposed to correspond with the intention of Parliament, the words are to receive such fair and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

(4) In applying subsection (3) the intention of Parliament may be ascertained from:

(a) the legislative history of the Act or provision in question; and

(b) explanatory notes and such other material as was before Parliament; and

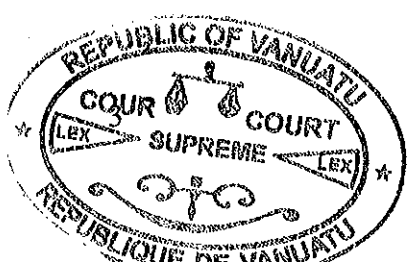
(c) ....

(d) ...."

7. It is clear from the above that the over-riding concern of statutory interpretation is the ascertainment of the intention of Parliament derived primarily from the plain and ordinary meaning of the enacting words; the context in which they occur within the Act; any relevant headings; and applicable grammar, rules of language and punctuation. Furthermore, resort to the object of an Act and to extraneous secondary interpretative aids and materials is only to be had where an ambiguous or an unintended result would be produced.

8. Furthermore, given the particular nature and purpose of the "*2009 Amendment Act*", **Section 11** of the **Interpretation Act** relevantly provides:

"***11. Effect of repeal***



(1) Where any Act of Parliament repeals any Act, the repeal shall not –

(a) Revive anything not in force or existing at the time at which the repeal takes effect; or

(b) Affect the previous operation of the enactment so repealed or anything duly done or suffered under it; or

(c) Affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

..."

9. The entitlement to a severance allowance however, is dealt with by **section 54** of the **Employment Act**. It recognizes five (5) separate instances or categories of entitled employees who have been in the continuous employment of an employer for a period of not less than 12 months. These are where:

"*(a) the employer terminates the employment;*

(b) the employee retires on or after reaching the age of 55 years;

(c) the employer retires the employee on or after reaching the age of 55 years;

(d) the employee has been in continuous employment with the same employer for a continuous period of not less than 6 consecutive years, and the employee resigns in good faith; or

(e) *the employee ceases to be employed by reason of illness or injury and is certified by a registered medical practitioner to be unfit to continue to work.*"

In those given categories, the employer has a mandatory duty ("*shall*") to pay severance allowance to the employee calculated under **section 56**.

10. Most importantly, for present purposes, **section 54** expressly applies to employment "*commencing before, on or after the date of commencement of this Act*". That the foregoing expression renders an employee's entitlement to severance allowance, retrospective, cannot now be doubted and I refer to the unappealed judgment of *Coventry J.* in **Hotel Equities South Pacific Limited v. Commissioner of Labour** [2003] VUSC 136 where he said of the **Employment (Amendment) Act No. 8 of 1995** which introduced the words "*... before, on or after the date of commencement of this Act*" into **section 54**:

"*... in my judgment by adding the words 'before, on or after the date of commencement of this Act' the legislature clearly was saying to qualify for severance it did not matter when the employment started. Given the time when the amendment was made it would have been a pointless amendment*

unless the intention was also to make the relevant time for calculation of the figure start, not at the commencement of the Act, but at the commencement of the period of employment. The wording of the amendment is consistent with no other interpretation. Accordingly in my judgment severance is payable for the period from the date of the commencement of the period of continuous employment whether or not that was before 30 May 1983."

(my underlining)

This latter date marks the coming into force of the provisions of the Employment Act when it was first enacted.

11. Plainly, by the **Employment (Amendment) Act No. 8 of 1995**, Parliament made its intention abundantly clear that an employee's entitlement to a severance allowance is "*retrospective*" to the date when the employee first commenced continuous employment with his/her employer even if that date occurred before the Employment Act was enacted.

12. In the present case, State Counsel submits that there is **no** ambiguity in the meaning and effect of the "*2009 Amendment Act*" which plainly intended to increase the amount of severance allowance payable to an entitled employee from "*... half a months remuneration ...*" for every period of 12 months continuous employment to "*1 months remuneration*". In other words the amendment did not affect or alter the retrospective nature of an employee's entitlement to a severance allowance, just the amount of that entitlement.

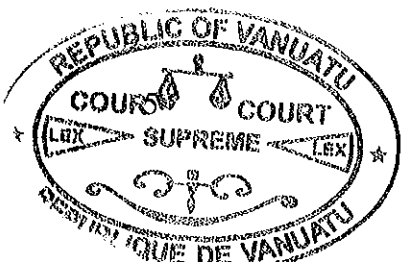
13. Alternatively, Counsel submits that any ambiguity that may arise (which is denied) is resolved by reference to the **Explanatory Notes** to the "*2009 Amendment Act*" which clearly states that the amendment "*provides for severance allowance to be calculated at the rate of 1 months salary by the number of years worked*". The commencement date of the amendment "*is irrelevant*" so long as the employee's entitlement to payment of a severance allowance accrues after the "*2009 Amendment Act*" has come into effect.

14. Defence Counsel submits however, that the "*2009 Amendment Act*":

> "*... operates in a two tiered manner when quantifying severance entitlements i.e. Severance is to be calculated at the pre-26 October 2009 rate* (half a months remuneration) *in respect to service prior to that date and at the new rate* ('1 months remuneration') *in respect of service thereafter.*"

15. The **Agreed Facts** in the case signed by both counsels are as follows:

> "*1. **Elking Vora** commenced employment with Wilco on 8 March 2004 and was terminated on 17 February 2010;*
>
> *2. Wilco calculated his severance allowance at the rate of half a month's remuneration for every year of employment prior to 26 October 2009;*



3. ***Tom Carlo*** *commenced employment with the ANZ Bank on 22 February 2000 and was terminated on 30 December 2009;*

4. *The ANZ Bank calculated his severance allowance at the rate of half a month's remuneration for every year of employment prior to 26 October 2009;*

5. ***Glenda Laban Vatoko*** *commenced employment with the ANZ Bank on 11 November 2002 and she resigned in good faith on 3 December 2009;*

6. *The ANZ Bank calculated her severance pay at the rate of half a month's remuneration for every year of employment prior to 26 October 2009."*

16. From the agreed facts it is possible to conclude the following:

(1) All employees on behalf of whom the claim is brought namely **Elking Vora**, **Tom Carlo** and **Glenda Laban Vatoko** were terminated or resigned after the "*2009 Amendment Act*" had come into force on 26 October 2009;

(2) All employees were entitled to receive severance allowance under the Employment Act;

(3) All employees were paid severance allowances computed under the old rate for the period of employment up to 26 October 2009 and at the new rate, for the period of employment after the 26 October 2009;

It is also common ground that the "*2009 Amendment Act*" came into effect on 26 October 2009 before the employees became entitled to receive or be paid a severance allowance.

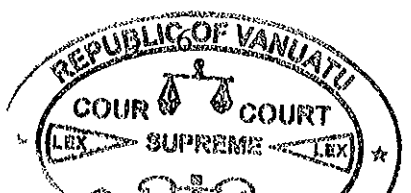
17. The sole **Agreed Issue** is as follows:

> "*Whether or not the rate provided for by the 2009 Amendment of Section 56 of the Employment Act [CAP. 160] applies to the calculation of severance allowance for the period of employment prior to 26 October 2009.*"

18. Although the agreed issue could be better framed, counsels written and oral submissions makes it clear that the real issue in contention is whether or not the "*2009 Amendment Act*" is retrospective in its intent, effect and operation. I am grateful to both counsels for the assistance provided to the Court.

19. State counsel's primary submission is that the "*2009 Amendment Act*" is **not** retrospective *per se* but counsel accepts that:

> "*In order to calculate severance payments in the present case, part of the requisite for its action has to be taken from the date of commencement of the period of continuous employment which is before 26 October 2009" (ie the date of commencement of the 2009 amendment Act.)*



20. Put another way, an employee's entitlement to a severance allowance is undoubtedly retrospective and the right or entitlement to a severance allowance crystallizes or becomes payable only at the end of an employee's employment when it is then required to be quantified at the prevailing rate whatever that may be, and irrespective of when the rate was fixed by Parliament.

21. State counsel also submits in reliance on the provisions of **Section 11 (1) (a)** of the **Interpretation Act** [CAP. 132] that the effect of the "*2009 Amendment Act*" was to repeal and replace the pre-existing severance allowance rate of "*half a months remuneration*" with the new rate of "*1 months remuneration*", such that, from the commencement date (ie. **26 October 2009**) the only and sole applicable rate for the calculation of severance allowance in **Section 56** is "*1 months remuneration*". In counsel's words "*... from 26 October 2009 'half a months remuneration' ceased to be part of the law*" and therefore, any calculation of severance allowance using "*half a months remuneration*" after its repeal (would be) "*clearly a breach of the law*".

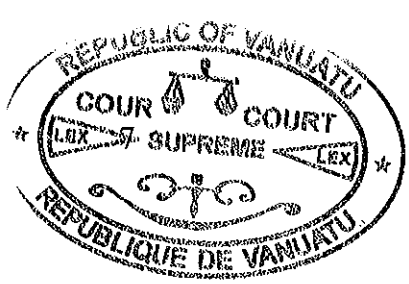
22. Defence counsel for his part relies on **Section 11 (1) (c)** of the **Interpretation Act** which provides that the repeal of an Act does not "*affect any ... obligation or liability acquired, accrued or incurred under any enactment so repealed*" and counsel forcefully submits:

> "*An employer is reasonably entitled to expect that when he assesses his exposure to accrued severance obligations he can do so without Parliament suddenly doubting that existing, as opposed to future, liability overnight after he has gone down the track with his investment decisions. If the claimant's contentions are adopted it is the existing accrued liability that the employer has provided for that would be doubled. In the case of a company the resuld could be even more drastic when one has regard to the laws touching insolvent trading.*"

23. I note at once that the saving provision relied upon by Defence counsel is in the past tense, so that, it is only when a severance allowance has become payable that it can be said to have been "*... acquired, incurred or accrued ...*".

24. As was said by the **Lord Chancellor** in delivering the judgment by the Privy Council in **Abbott v. The Minister of Lands** [1895] AC 425 at 431:

> "*It has been very common in the case of repealing statutes to save all rights accrued. If it were held that the effect of this was to leave it open to anyone who could have taken advantage of them, the result would be very for reaching ...*
>
> *It may be, ..., that the power to take advantage of an enactment may without impropriety be termed a 'right'. But the question is whether it is a 'right accrued' within the meaning of the enactment ...*



Their Lordships think not, and they are confirmed in this opinion by the fact that the words relied on are found in conjunction with the words "obligations incurred or imposed". They think that the right ... existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a "right accrued" within the meaning of the enactment."

25. Applied to the present context, unless and until the requirements of **section 54** of the Employment Act have been met and satisfied, an employee's "*right*" to a severance allowance, and, an employer's "*liability*" or "*obligation*" to pay the same cannot be said to have been "*acquired, accrued or incurred*".

26. As to when? Severance allowance is payable, **section 56 (5)** is clear, that it is payable "*on the termination of the employment*". This is reinforced by **section 56 (7)** which provides for severance allowance to be calculated on the basis of the employee's remuneration "*at the time of the termination of his employment*".

27. Furthermore, where an employee has been in continuous employment for a period exceeding 12 months, a severance allowance is still only payable upon the satisfaction of at least one of the five (5) pre-conditions to an employer's liability set out in **section 54**.

28. Until that point in time and before quantification of the amount due, the employer's "*liability*" to pay and, the employee's "*right*" to be paid remains, in my view, a contingent one. Indeed, there is **no** absolute certainty that a severance allowance is or will be payable under the Act for if the employee was recruited outside Vanuatu and is not ordinarily resident in Vanuatu or is dismissed for "*serious misconduct*", the employee loses his entitlement to a severance allowance altogether [***see***: sections 55 (1) & (2)], and, the employer's co-relative "*liability*" is also extinguished.

29. Defence counsel also made extensive submissions about the origins and rationale for a severance allowance as providing "*some sort of financial support for employees when they cease work*".

30. More particularly, counsel referred to an employer's "*liability*" or "*obligation*" to pay a severance allowance once an employee has served the employer for more than 12 months and, how the "*2009 Amendment Act*" effectively doubles the employer's liability. If allowed to operate retrospectively the "*2009 Amendment Act*" could have drastic consequences for employers who up till then, have operated, planned and provisioned for its severance allowance obligation or liability on the basis of the old rate.

31. Counsel also cited 2 passages from the judgments in **Burns Philip (Vanuatu) Ltd. v. Maki** [1989] VUCA 4 which endorsed the presumption against construing legislation as having a retrospective operation unless such a construction appears very clearly or by necessary and distinct implication in the Act and submits: "*... if Parliament had intended to make it absolutely clear (**ie.*** that the

'2009 Amendment Act' had retrospective effect), *it could very easily have done so. It did not do so.*"

32. It might be that Parliament could have made its intention doubly clear by saying that the new rate for severance allowance introduced by the "*2009 Amendment Act*: shall be deemed to apply from the commencement of an employee's period of "*continuous employment*" but that is unnecessary on my reading of the "*2009 Amendment Act*" which merely changed the rate upon which severance allowance was to be calculated and not the employee's "*right*".

33. As was said by **Coventry J.** in the **Hotel Equities** case (op. cit) in referring to **Section 56** of the **Employment Act**:

> "*Subsection (2) sets out the amount payable by reference to the number of years and months employed and whether the employee was paid not less than monthly or at intervals of less than a month. There is no provision specifically or impliedly giving a start date for the number of years and months employed*".

34. I accept State Counsel's submission that **section 54** must be read with **section 56** to give it any sense. **Section 54** defines an employee's "*right*" or entitlement to a severance allowance and **section 56** establishes the method of calculating or quantifying that entitlement.

35. Defence counsel submits however that "*what is important in the context of this case is that it is an employer's liability or obligation*" (to pay severance allowance) and further, "*... one cannot simply ... treat the liability to* (pay) *severance in isolation, only being relevant the day the employee is terminated*".

36. State Counsel's brief oral response is that **sections 54** and **56** are framed in terms of an employee's "*right*" or entitlement to a severance allowance and not in terms of an employer's "*liability*" or "*obligation*" to pay. Furthermore, this is not a case of an "*accrued*" liability in the sense of a liability that is due and payable and has been quantified before the passing of the "*2009 Amendment Act*".

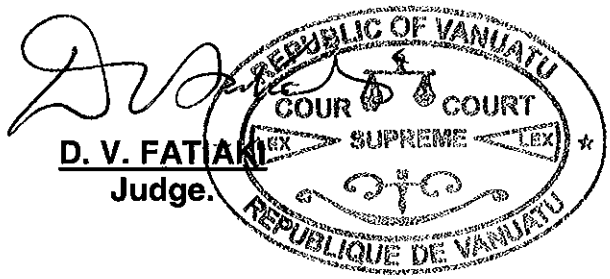
37. Whilst I appreciate the force of Defence counsel's submissions I cannot agree with them when one considers the wording and scheme of the relevant provisions.

38. In my view, it is the law at the time of an entitled employee's termination or resignation that is relevant and **not** at any other time. Furthermore, if Defence counsel's submissions were to prevail, then, there would be two (2) effective rates for calculating severance allowance applicable to the same employee and for the one period of "*continuous employment*" which in turn, would have to be broken up. That would not be consistent with the intention of Parliament in repealing the old rate and substituting a new rate in its place. In my view, the adoption of the pre-October 2009 rate even for the limited purpose of calculating severance allowance up to the date of its repeal, tantamounts to reviving the repealed rate after its repeal. That cannot be right and I reject the submission.

39. For the foregoing reasons, I uphold the claim and declare that severance allowance payable under **Section 56** of the Employment Act is to be calculated at the rate of "*1 months remuneration*" for every preceding 12 months of continuous employment.

DATED at Port Vila, this 30th day of November, 2012.

BY THE COURT



D. V. FATIAKI
Judge.