

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

**Civil Appeal Case No. 7 of 2014**

**BETWEEN: ZETH SHIPPING SERVICES**  
*Appellant*

**AND: JEAN MARIE ROUVOUNE**  
*Respondent*

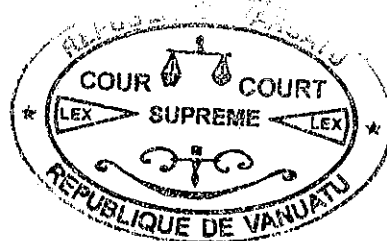
*Hearing: Thursday 9 June 2016*  
*Judgment: Thursday 23 June 2016*  
*Before: Justice JP Geoghegan*  
*Appearances: Less John Napuati for the Appellant*  
*Stephen Carlo (PSO) for the Respondent*

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**JUDGMENT**

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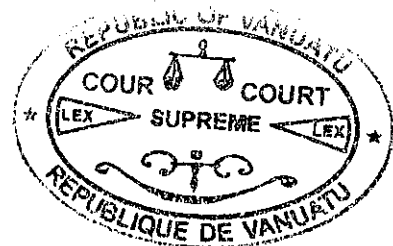
1. This is a civil appeal from a Magistrates' Court decision delivered on May 30<sup>th</sup> 2014 in respect of an employment dispute between the parties.
2. The respondent Mr Rouvouné had claimed that his employment had been unlawfully terminated by the appellant Zeth Shipping Services ('Zeth') on August 17<sup>th</sup> 2011 having been employed by them as the first captain of a vessel, MV H Tino, since June 2011. The essential dispute between the parties was that Mr Rouvouné claimed that he had been dismissed summarily and without due course while Zeth claimed not only that Mr Rouvouné had been lawfully dismissed but that he had consented to the termination of his employment. The reason for his alleged consent was that he was leaving for employment with another shipping company.



3. The grounds of appeal set out in the notice of appeal are that the Magistrates' Court had failed to take into account the written submissions filed on behalf of the appellant May 9<sup>th</sup> 2014 and upon *"further grounds to be provided by counsel for the appellant"*.
4. The hearing in the Magistrate's Court was unusual in the sense that the judgment records that all parties were in Court on September 27<sup>th</sup>, 2013 when counsel for both parties agreed that there was no need for a trial as it would be costly for the parties. They were clearly content for the Magistrate to deal with the matter on the basis of the evidence filed. The Magistrate accordingly directed both counsel to file written submissions and provided a timetable for doing so. Neither party complied with that timetable with counsel for Mr Rouvone filing submissions on March 25<sup>th</sup> 2014 rather than on October 27<sup>th</sup> 2013 resulting in counsel for Zeth requesting a further one month from March 25<sup>th</sup> 2014 to file a response. That request was granted, however the Magistrate's judgment records the following:-

*"The date for the decision was thus scheduled to 30 May 2014. The request one month period lapsed on 25 April 2014, counsel for the defendant fail (sic) to file a response.*

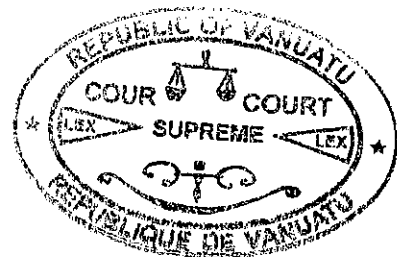
*I am obliged to work on material presented to me"*.
5. The Magistrate granted judgment in favour of Mr Rouvone. She ordered Zeth to pay Vt 880,000 together with costs of Vt 10,000 within 3 months of service of the judgment on Zeth.
6. The Magistrate referred to the background circumstances relating to the employment of the Mr Rouvone and a termination letter which he received on August 17<sup>th</sup> 2011 setting out various reasons for the termination of his employment. She also referred to the fact that the claimant relied on sections 48, 49 and 53 of the Employment Act [Cap. 160] together with the common law. She formulated the questions to be considered by the Court as follows:-



- a) Whether there was a legally enforceable contract of employment;
- b) Which term of that contract is the principle (sic) term;
- c) Whether the employer has breached that contract.

The Magistrate referred to the evidence of Mr Royvouné and to the contents of the letter dated August 17<sup>th</sup> 2011.

7. The Magistrate referred to Zeth's confirmation that Mr Rouvouné was terminated on "*cross misconduct*" (clearly what was intended was a reference to gross misconduct) and that Mr Rouvouné's conduct had caused financial loss to the Zeth. She referred to a letter from Zeth to the Labour Department dated 9 November 2011 wherein Zeth again referred to the reasons for termination, those reasons being the same as expressed in the letter of August 17<sup>th</sup> 2011.
8. The Magistrate referred to a sworn statement of Mr Zeth Massing who appears to be the owner of Zeth Shipping Services and to a sworn statement dated May 18<sup>th</sup> 2012 where Mr Massing confirmed that he had spoken to Mr Rouvouné who had said that he was going to find other employment. There was reference also to a failed negotiation through the Department of Labour with the Magistrate determining that the Minutes of the meeting at the Labour Department would not be taken into consideration in deciding the case given that it was attempt to settle the matter out of Court.
9. The Magistrate then reached the following conclusions:-
  - a) That the contract was a legally enforceable contract of employment. I would make the observation that that did not appear to be disputed between the parties;
  - b) That the term of the contract was for 1 year;
  - c) That Zeth had breached the contract by dismissing Mr Rouvouné.



10. The Magistrate concluded that there had been a breach of section 48 of the Employment Act and that pursuant to section 49 Mr Rouvonne was entitled to notice given that the contract was for 1 year. The Magistrate found that there was no breach of section 53 as that section referred to ill treatment of an employee by the employer and that in this case there was no issue regarding that.

11. The Magistrate then went on to state that the claimant did not properly consider section 53 (sic). It is clear that that is simply a typographical error in the judgment as the Magistrate then immediately referred to section 50. It is clear that the reference to section 53 is in fact a reference to section 50. Section 50 provides as follows:

***"50. Misconduct of employee***

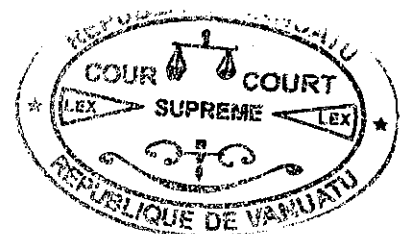
*(1) In the case of a serious misconduct by an employee it shall be lawful for the employer to dismiss the employee without notice and without compensation in lieu of notice.*

*(2) None of the following acts shall be deemed to constitute misconduct by an employee –*

*(a) trade union membership or participation in trade union activities outside working hours, or with the employer's consent, during the working hours;*

*(b) seeking office as, or acting in the capacity of, an employees' representative;*

*(c) the making in good faith of a complaint or taking part in any proceedings against an employer.*



*(3) Dismissal for serious misconduct may take place only in cases where the employer cannot in good faith be expected to take any other course.*

*(4) No employer shall dismiss an employee on the ground of serious misconduct unless he has given the employee an adequate opportunity to answer any charges made against him and any dismissal in contravention of this subsection shall be deemed to be an unjustified dismissal.*

*(5) An employer shall be deemed to have waived his right to dismiss an employee for serious misconduct if such action has not been taken within a reasonable time after he has become aware of the serious misconduct."*

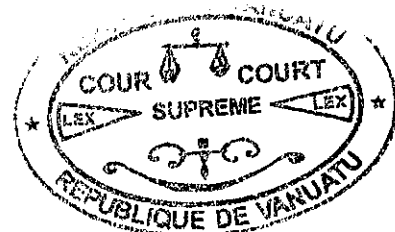
12. The Magistrate recorded in her decision with respect to section 50 the following:

*"25. The claimant did not consider section 50 of the Employment Act.*

*26. The Court found that:*

- In this case the defendant as the employer waived his right to dismiss the claimant for serious misconduct under subsection (5). He furthermore did not give adequate opportunity to answer any charges made against him. And he breached the contract of employment.*
- The defendant is liable and must pay the damage sought".*

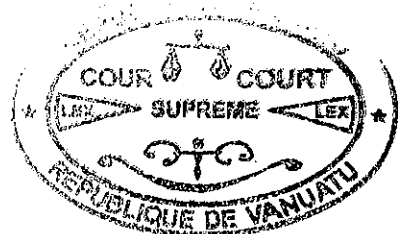
13. The submissions filed on behalf of Zeth consist of 5 paragraphs over 2 pages. The essential submission was that Zeth terminated Mr Rouvouné's employment lawfully in accordance with the provisions of the Employment Act [Cap. 160]. Mr Napuati for Zeth then referred to various parts of the evidence emphasizing the fact that the evidence demonstrated Mr Rouvouné consented to the termination and that the evidence by Mr Massing was corroborated by his 2 secretaries "who were present when the interview was conducted right up to his termination". Reference was made in Mr Napuati's submissions to section 50 with Mr Napuati's submission being that Zeth complied with the provisions of section 50 (4) of the Employment Act but that as the pleadings filed by



the claimant relied on sections 48, 49 and 53 of the Employment Act and not section 50 (4) Mr Rouvone could not rely on section 50 (4) of the Employment Act as it was never pleaded.

14. It is not entirely clear why Mr Napuati's submissions referred to section 50 (4) however it appears to have been in response to a reference to section 50 in the submissions filed by counsel for Mr Rouvone.
15. One thing is clear from the pleadings. Although section 50 is not referred to specifically in the statement of claim filed on behalf of Mr Rouvone it is clear that Mr Royvone denied the allegations made against him by Zeth and paragraph 15 of the claim refers to the claimant relying "*on the Employment Act [Cap. 160] and common law*".
16. An amended statement of defence filed by Zeth on September 12<sup>th</sup> 2013 refers specifically to section 50 of the Act by pleading that Mr Rouvone's employment was terminated on the grounds of gross misconduct "in accordance with section 50 (1) of the Employment Act [Cap. 160].
17. In support of his submission that the Magistrate was not entitled to entertain a consideration of section 50 Mr Napuati relies on the Court of Appeal decision in Rogara v. Takau [2001] VUCA 15 where at page 6 the Court of Appeal observed that:

*"It is a fundamental principle of the law that, in any case, a person against whom allegations are made should know what the allegations are with precision so that they can decide how to respond to them. We have been persuaded that the line here was breached. If the dispute is considered solely in terms of the strict letter of the pleadings, the judgment appears to have straightened to areas which do not come within them and that serious factual issues which were not raised by the pleadings and upon which evidence was led at the trial over counsel's objections, had a material influence on a Judge".*



The fundamental reason for the Court of Appeal's decision is that a party should not be prejudiced by the Court adopting a course of action where the Court relies for its judgment on issues in respect of which a party has not been given an opportunity to call evidence. At the core of all of this is prejudice to a party.

18. For Mr Rouvouné, Mr Carlo submits that there is no obligation on a claimant to plead law in a statement of a case and there is no obligation to plead each and every section and sub section of a relevant act. Mr Carlo refers to the civil procedure rules and rule 4.2 (1) (a) (b) and (c) which provide that the statement of claim must:

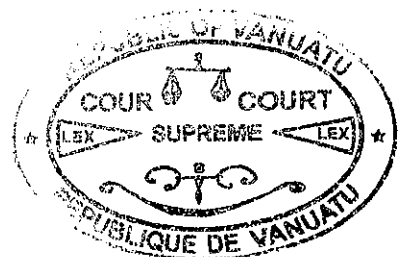
*"a) Be as brief as the nature of the case permits;*

*b) Set out all the relevant facts on which the party relies, but not the evidence to prove them; and*

*c) Identify any statute or principle of law on which the party relies, but not contain the legal arguments about it?"*

19. In my assessment this case can be distinguished from the case in Rogara where the Court referred to the fact that *"there was never a proper meeting of minds by or of the parties"*. In this case the evidence was on the table. Section 50 itself was being relied upon by Zeth. In my view that brought the provisions of section 50 into play and it could not be said that Zeth suffered any prejudice by the Magistrates reference to s. 50 (3).

20. In addition, it is clear from the case presented by Zeth that it was relying on a finding by the Magistrate that Mr Rouvouné had consented to the termination of his employment. Although no reasons are expressed as to why the Magistrate rejected that evidence it is implicit from the judgment that she must have done so. In effect, the parties have placed the Magistrate in a difficult position by asking her to determine the case on the papers when there were clearly contested issues of fact and those issues ran to the



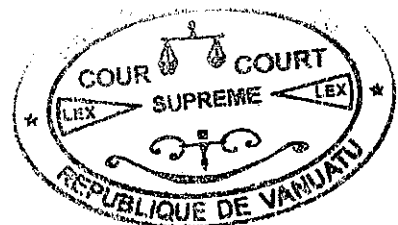
heart of the argument being presented by Zeth. But that is what the parties elected to do.

21. In addition, the evidence presented by Zeth from two employees, which it claims corroborates the contention that Mr Rouvone consented to the termination of his employment simply does not do that. The evidence of those two employees, Clera Fred and Marie Apal was primarily in respect of the actions of a Mr Jenkenson who allegedly called to Zeth's offices requiring a letter of termination of Mr Rouvone's employment. It appears this occurred after Mr Rouvone's employment had been terminated by Mr Massing. It appears that Mr Jenkenson may have had some connection with Mr Rouvone. The evidence refers to Mr Jenkenson's alleged aggression and hostility towards the two women. Mr Jenkenson did not give evidence of any kind in the proceedings.

22. The only reference in the evidence of the two women to a conversation between Mr Massing and Mr Rouvone regarding a termination of Mr Rouvone's employment is a statement by Ms Fred that:-

*"Finally, myself and Marie Abal did witness the conversation between [Rouvone] and Zeth regarding the termination".*

23. Mr Napuati submitted that if you took Mr Massing's evidence together with that of Ms Fred and Ms Apal then it is "powerful" evidence of the fact that the termination was agreed. I disagree with that submission. The evidence of Ms Fred (Ms Abal did not offer independent evidence of that issue herself) simply says she and Ms Abal witnessed the conversation between Mr Rouvone and Mr Massing. They do not give evidence of the contents of that conversation. There is no dispute that a conversation took place about termination. There is a dispute as to whether or not the contents of that conversation included a statement by Mr Rouvone that he consented to the termination, something which he clearly denied. In those circumstances, the so called "powerful" evidence is corroborative of very little, if anything.





24. Putting aside the reference to section 50 (3) it is clear from the decision that the Magistrate had already reached a conclusion, before considering section 50 (3) that the claimant had breached the defendant's employment contract and that the claimant was entitled to notice. Strictly speaking, the Magistrate was not required to go on and consider section 50 (3) as she had already reached her decision.
25. I am satisfied that receipt of the claimant's submissions by the Magistrate before she released her judgment would have made no difference to the conclusions which she reached. While the judgment is less reasoned than would be ideal, the Magistrate has given reasons for her to decision.
26. I would add, although it is not necessary to do so that it is clear that Mr Rouvone denied the alleged incidents which purportedly justified the termination of his employment. In such circumstances it is incumbent on an employer to prove, on the balance of probabilities that Mr Rouvone was responsible for these things. In that regard evidence must be led as to the substance of the allegations and not just the process around them. No such evidence appears to have been placed before the court.
27. Accordingly the appeal is dismissed. The costs of this appeal are awarded to the respondent and those costs are to be agreed within 14 days or taxed.

**Dated at Port Vila, this 23rd day of June 2016**

**BY THE COURT**

