

BETWEEN: Paul Dally
Claimant

AND: The Commissioner of Labour
First Defendant

The Republic of Vanuatu
AND: Second Defendant

Before: *Justice Aru*

In Attendance: *Mr. R. Tevi for the Claimant*
Mr. K. Ture for the First and Second Defendants

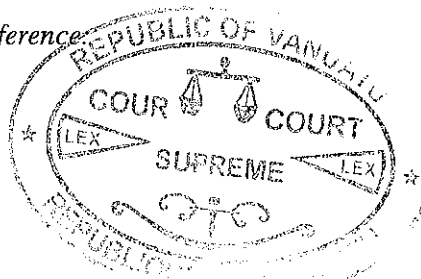
JUDGMENT

1. This is a claim for judicial review (JR) brought by the claimant seeking a mandatory order requiring the first defendant to renew the claimant's work permit.
2. On 2 May 2018 the first conference was held pursuant to rule 17.8 of the Civil Procedure Rules (CPR). Having heard argument and considering the papers filed, I was not satisfied that the claimant had an arguable case and struck out the claim and ordered costs in favour of the defendant to be agreed or taxed.
3. Rule 17.8 3), 4) and 5) provides:-

"(3) The judge will not hear the claim unless he or she is satisfied that:

- (a) the claimant has an arguable case; and*
- (b) the claimant is directly affected by the enactment or decision; and*
- (c) there has been no undue delay in making the claim; and*
- (d) there is no other remedy that resolves the matter fully and directly.*

(4) To be satisfied, the judge may at the conference



- (a) consider the papers filed in the proceeding; and
- (b) hear argument from the parties.

(5) If the judge is not satisfied about the matters in subrule (3), the judge must decline to hear the claim and strike it out."

- 4. I now provide my reasons. The claimant was formerly an employee of Vanuatu Air Charters Limited (VACL) trading as Air Taxis. On 4 November 2016 the former Commissioner of Labour (COL) wrote to VACL as the employer advising of his approval of the claimant's work permit which was to expire on 12 November 2017.
- 5. On 27 October 2017 the Department of Labour received two applications lodged by VACL to renew work permits for the claimant and a Mr Quintin.
- 6. On 15 November 2017 by letter to VACL the Acting COL approved the renewal of Mr Quintin's work permit.
- 7. On 28 December 2017 the Acting COL wrote a letter to VACL advising it of his decision not to renew the claimant's work permit. The letter reads:-

"28 December 2017
Owner and Manager
Air Taxi Vanuatu
Po Box 1053
PORT VILA
Dear Sir

The Labour (Work Permits) Act (CAP 187)

This is to inform you that your application dated 27 October 2017 regarding the work permit issue for Mr Paul Dalley is **refused** as per the provisions of section 7 (i) of the Labour (Work Permits) Act (CAP187):

Particulars of the application:

Full name of worker: Mr Paul Dalley

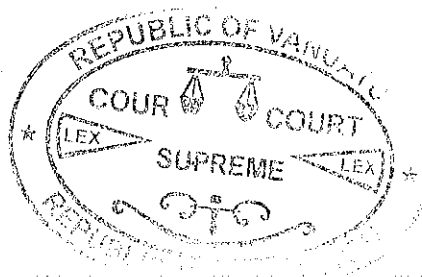
Nationality: New Zealander

Date of Birth: 22 June 1973

Occupation: Pilot

Position: As Senior Pilot to Air Taxi Limited

After careful consideration, I am convinced that *this position can be easily filled in by a local counterpart. I have noticed that you made no effort to hire a local qualified pilot as a counterpart required in order to meet standard requirement of a commercial licensed pilot.*



Should you wish to lodge an appeal against my decision , please do so in writing within 14 days from today .Your appeal should addressed to the Honourable Minister of Internal Affairs through the Department of Labour for onward processing .

By copy of this letter, the Principal Immigration officer is hereby informed accordingly.

Yours faithfully

(signed)

John Tasso

Acting Commissioner of Labour

Copy: PIO Vila”

(emphasis added)

8. This is the decision sought to be challenged by the claimant.
9. The legal framework for the employment of non-citizens in the Republic of Vanuatu is set out in the Labour (Work Permits) Act [CAP 187] as amended (the Act). If an employer is desirous of employing a non-citizen worker, then it has to apply to the COL. Section 2 (2) of the Act provides:-

“(2) Every employer who wishes to employ any non-citizen worker shall make application for a work permit to the Commissioner of Labour in the form and manner prescribed in Schedule 1.”

10. Once expired , a work permit could be renewed.(s5) Factors taken into account by the COL when considering renewals and new applications for work permits are set out in section 7 as follows:-

“7. Consideration of applications

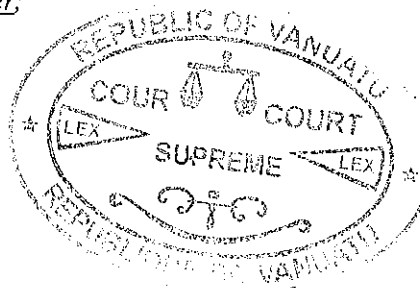
In considering any application made for the issue of a work permit or for the renewal or extension of a work permit or for the amendment of a work permit to authorise a change of employer or change of occupation, the Commissioner of Labour –

(a) shall ascertain whether the employer has advertised the vacant position adequately and whether any suitably qualified citizen worker has applied for the position or has sought similar employment, and

(b) may have regard to such other matters as he considers relevant and in particular –

(i) the employment record of the employer;

(ii) the ability of the employer to provide reasonable training facilities for a citizen-worker counterpart to a work permit holder;



(iii) *the professional or technical qualifications and experience of the prospective employee;*

(iv) *the protection of local and national interests; and*

(v) *whether the conditions of employment offered are in conformity with the laws of Vanuatu and with the terms of any collective agreement which may be in force in respect of the industry or occupation concerned, if any."*

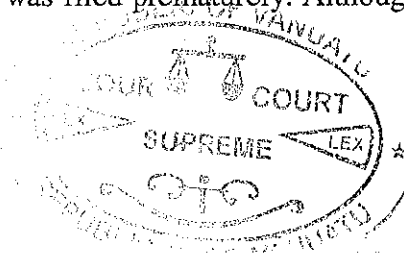
(emphasis added)

11. The acting COL in assessing the application for renewal of the claimant's work permit considered the employment record of VACL in line with s7 b) (ii) and advised that the application was refused. In addition, VACL was properly notified of its rights to appeal the decision.
12. The right of appeal is provided under section 12 of the Act. Any person aggrieved by a decision of the COL may appeal to the Minister:-

"12. Appeals

Any person aggrieved by a decision of the Commissioner of Labour or who has not received his decision within the period prescribed by subsection (1) of section 8 may appeal to the Minister. The Minister may in his discretion confirm, modify, amend or rescind such decision, or determine any application which has not been so determined by the Commissioner of Labour within the said period. The decision of the Minister shall be final and shall not be called into question in any court in any proceedings whatsoever."

13. The claimant's principal argument is that the COL was biased in refusing to renew his work permit. It was submitted that labour officers were in contact with the fiancé of the claimant's former wife over the custody of the children of the marriage. At the outset, although the proceedings are instituted by the claimant, this is a JR claim and the proper applicant would be the employer, VACL. The employer applied for the renewal of the claimant's work permit which was refused. The letter of refusal was addressed to VACL not the claimant.
14. Furthermore, to challenge the COL's decision, the first step in the process outlined in the Act is to appeal the decision to the Minister responsible for labour. No evidence is shown by the claimant that VACL as the employer and applicant appealed the COL's decision. On the other hand, even if the claimant could be considered "*a person aggrieved*" under section 12 of the Act, he has failed to pursue an appeal to the Minister. The wording of s 12 suggests that the Minister's decision is final "*and shall not be called into question in any court in any proceedings whatsoever.*"
15. There is no evidence of any decision of the Minister determining an appeal either from VACL or the claimant. The claim fails as it was filed prematurely. Although there was

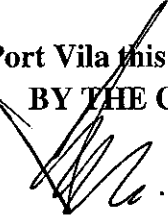


no undue delay in filing the claim, I am not satisfied that the claimant has an arguable case. The person who is directly affected by the decision of the COL is VACL who was the applicant. The claimant has an interest in the outcome as to whether or not he will continue to be employed by VACL in Vanuatu. The remedy that should have resolved the matter fully is the appeal to the Minister under s 12. However that process had not been exhausted prior to filing the JR claim. It was therefore not argued whether the Minister's decision could be challenged in Court.

16. For these reasons the claim was struck out.

DATED at Port Vila this 11th day of May, 2018

BY THE COURT



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D. Aru
Judge

