

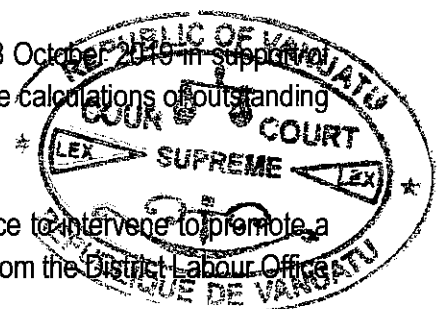
BETWEEN: Nelson Nanan, Margaret Vagongon, Leo Moli, Inneth Toara, Jonathan Nalpini Micah, Enna Maki, Gratsilla Kuren, Loren Loloma Aining, Selia Nambong, Harry Arukesa, James Aruduru, Manhil Randal, Baptist Calo, Steve Bule Kislafos, Japhet Hinge, Manai Alam and Kahi Percy
Claimants

AND: Simone Traniet Dinh as Administator in the Deceased Estate of Gilbert Dinh Van Than
t/a Crystal Blue Resort
Defendant

Date: 11 December 2023
Before: Justice W. K. Hastings
Distribution: Mr. S. Kalsakau for Claimants
Mrs. M. N. F. Patterson for the Defendants

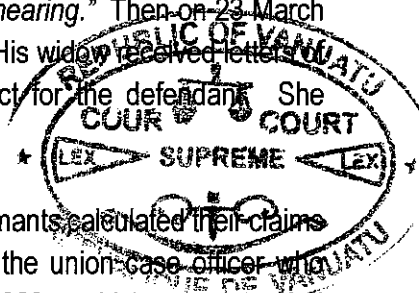
DECISION ON STRIKE-OUT

1. The defendant has applied to strike out the claim of the 17 named claimants pursuant to r.9.10(1)(b) and the inherent jurisdiction of the Court, with indemnity costs awarded to the defendant. The claimants oppose the application.
2. The claim was filed on 17 April 2019. It arose from the sale of the Crystal Blue Resort in 2017. The claimants were all employees of Gilbert Dinh Van Than (now deceased and represented by the administrator of his estate). They allege they are owed three months' notice, severance, annual leave, overtime pay, public holiday allowances and reimbursement of housing rent deducted. The defence is that all the entitlements that were owed to the claimants were paid by the defendant.
3. Leo Moli, one of the claimants, filed a further sworn statement on 18 October 2019 in support of the claim. He attached a spreadsheet showing what he claimed to be calculations of outstanding entitlements.
4. The Vanuatu National Workers Union asked the District Labour Office to intervene to promote a settlement under s 4 of the Trade Dispute Act [Cap. 162]. The letter from the District Labour Office



dated 16 December 2019 is annexed as GB10 to the sworn statement of Gilbert Dinh Van Than filed on 3 May 2021. In it, the Acting Deputy Commissioner of Labour stated that “*all severance pay checked and paid out according as per the Employment Act...*”. He wrote that “*Notice of Termination has been provided to all employees for those that haven’t Notice in writing, Notice was paid out according to Employment Act ...*”. He wrote that “*I have witness and certified the final and correct calculation of the employment entitlement after meeting with both parties Employer and employees.*”

5. The file was transferred to the Master for mediation on 6 November 2019.
6. Mediation failed. On 2 March 2021, the Master struck out the defence and entered judgment for the claimants. The defendant’s appeal to the Court of Appeal was dismissed because the appeal should have been heard in the Supreme Court.
7. The file returned to the Supreme Court. What followed was a history of adjournments. A trial date was set for 20 August 2021. The defendant’s then lawyer sought another date “*due to other commitments*” so the trial was adjourned to 6 October 2021. It was then adjourned to 18 November 2021 due to the Judge being assigned to undertake a week-long tour of Tanna. It was adjourned again to 23-25 May 2022 as a result of neither counsel being ready for trial. That date was adjourned because of “*other competing trials*” to 20-22 June 2022. Then, by joint memorandum, counsel sought an adjournment, which was granted, to 22 July 2022. Counsel for the defendant sought a further adjournment as a result of his obligations as a Member of Parliament, and counsel for the claimants sought an adjournment due to bereavement. The adjournment was granted, and the trial rescheduled for 7 October 2022. The trial was again adjourned at defence counsel’s request to 21 November 2022 because he was standing in the general election. The judge attempted to bring the trial forward but could not because he was asked to be on the Court of Appeal at short notice. The defendant then instructed new counsel and the matter was adjourned to a pre-trial conference on 2 February 2023 and has been adjourned to new conference dates ever since.
8. Of the seven adjournments noted above, three were made as a result of requests by defence counsel, two as a result of joint requests by the defence and claimants’ counsel, one because of “*other competing trials*” and one by the judge being sent on circuit on short notice.
9. The trial also became derailed partly as a result of the Minutes of 21 July 2022 and 21 November 2022 in which each judge sought from counsel a schedule that was clearer and better itemised than the one attached to Mr Moli’s sworn statement of 18 October 2019. As a result, the proceedings were reduced to a series of chambers conferences mostly concerned with attempts to comply with the Minute of 21 July 2022. In the Minute of 9 March 2023, the Judge observed “*these proceedings were filed in April 2019 and are well overdue for hearing.*” Then on 23 March 2023, the Court was informed that the defendant had passed away. His widow received letter administration and Mrs Patterson filed a notice of beginning to act for the defendant. She requested time to come to grips with the by now quite thick file.
10. Mrs Patterson sought further and better particulars about how the claimants calculated their claims on 11 July 2023. After further delays, Mr Kalsakau tracked down the union case officer who managed the case. Mr Kalsakau filed a memorandum on 22 August 2023 to which was appended

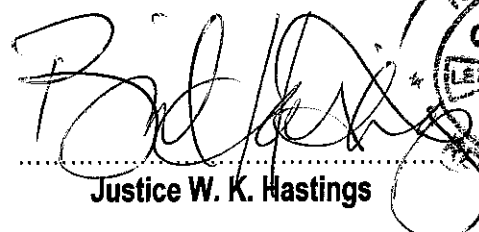


the Moli spreadsheet, and another memorandum on 30 October 2023 to which was appended an example of how the figure for each head of claim for each claimant was calculated. On 4 December 2023, Mrs Patterson filed a sworn statement from Lindsay Barrett, a chartered accountant, who deposed that the information contained in the memorandum of 22 August 2023 *"is similar to the information contained in the new memorandum except that the data are put in a table in the recent memorandum and contain the same information as the summary sheet of 2019. Therefore no added particulars are added in the memorandums."* Mr Kalsakau submitted that Mr Barrett did not say he reviewed the defendant's books to assess the claims against what is in the books, and he could not say the claimants are not able to prove their claims.

11. Mrs Patterson submitted the claimants have had many chances to produce the information requested by the judge on 21 July 2022. She submitted claimants' counsel has made many *"unsupported excuses"* for not providing the information requested. Mr Kalsakau responded that he has made best efforts to obtain the information sought, but the records used to make the calculations are in the hands of the employer, not the employees.
12. The claimants have a grievance that needs to be tested and resolved. The repeated adjournments of the trial dates should not be visited on them, particularly given the reasons for the adjournments. That the trial dates were repeatedly set down however, shows that judges at the time considered there was enough evidence to go to trial. That evidence is the same now as it was then.
13. The disclosure rules can remedy the issues identified in the Minute of 21 July 2022. Rule 8.2 states that all parties have a duty to disclose documents that *"to a material extent adversely affect that party's case or supports another party's case."* There are no sworn statements on file listing the documents, stating that the party understands the obligation to disclose, and stating that to the best of the party's knowledge, *"he or she has disclosed all documents that he or she must disclose."* Applications may be made for an order to disclose documents and an order to dispense with disclosure. There does not seem to be on file any evidence that either party has acknowledged their duty to disclose or that any applications have been made.
14. For these reasons, the application to strike out the claim is declined.
15. This matter is well overdue for a hearing. Earlier trials have been set down for three days. This trial will take place on 27, 28 and 29 May 2024 at Dumbea. Counsel are at liberty to apply for disclosure orders if needed. Mr Kalsakau is to be accorded the same opportunity Mrs Patterson had to review the Court file on a date and time to be arranged with my secretary. The next conference will be on 20 February 2024 at 10am.
16. Costs of this application in the cause.

DATED at Port Vila this 11th day of December 2023

BY THE COURT


Justice W. K. Hastings

