REC: 24/9/03

IN THE MAGISTRATE'S COURT
OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 45 of 2003.

BETWEEN: MADELEINE WATELEN
Plaintiff

AND: PATRICIA MICHELLE JOLI
Defendant

JUDGMENT

A Magistrate court claim was filed 6 March, 2003. Plaintiff, **Madelene Watelen**, prayed this court will order Defendant, **Patricia Joli,** to pay her over time, annual leave, three (3) months notice, severance pay and other costs court deems fit. Upon receipt of the claim defendant denied all such claims. She instead made counterclaim against the Plaintiff claiming payment in lieu of three (3) months notice. Brief facts are set out below.

Brief facts

Plaintiff claimed to have worked for the Defendant as of 17 April, 1998, to 16 July, 2003, when she terminated the contract. She worked as a domestic servant (house girl). She terminated the contract on the grounds of employer ill treatment and breach. Sometime 22 February, 2002, after the husband left the defendant, new additional terms were made between the parties. These were, that Plaintiff had to leave her own home and reside in the defendant's home. Defendant promised to pay her over time if she works extra hours and sleeps with her in the house, the sum of VT500 each day as from Monday to Friday, VT1000 for Saturdays and VT2000 Sundays. Despite all these, defendant never paid what she had agreed. Subsequently, Plaintiff came to this court seeking enforcement of this and other entitlements.

Issue

The main issue here is whether the Plaintiff, a domestic servant, like any other employees, is entitle to those benefits provided for in the Employment Act. If she is, does section 26 apply in her calculation of over time pay?

Facts and evidence

There is no dispute the plaintiff had worked for the defendant as from 17 April, 1998, up to the time she terminated the contract. She said in her sworn statement at paragraph 8 that having worked for three (3) years she became acquainted with the defendant and her family. She said that during the first three (3) years, it was relatively calm until somewhere at the beginning of 2002, when **Mr. Joli,** the husband, and the defendant began living apart. Subsequently, **Mr. Joli**, on 22 February, 2002, left the family. She said that when, **Mr. Joli,** left, it affected her and most of all the defendant and her children. Plaintiff then asked the defendant to cease work and pay out her outstanding entitlements. It appears at paragraph 15 of the plaintiff's sworn statement that defendant refused to accept her request. Instead, some new terms were added to the original agreement where plaintiff had to leave her home at Tebakor and came to sleep and reside at the defendant' home. This became effective on 22 February, 2002, to 16 July, 2002, the day she terminated the contract. In that agreement the defendant, apart from paying the plaintiff's normal salary, agreed to pay VT500 extra for every night she sleeps with her in her house as from Monday to Friday. During week-ends she agreed to pay VT1000 for every Saturday she worked and VT2000 for every Sunday. All these claims are admitted by the defendant in her oral and unsworn statement at paragraph 6.

Law

Whether the provisions of the Vanuatu Employment Act applies to a domestic servant is yet to be decided by case-law. None of the cases that I have had the opportunity to look at discusses this topic. The task of this court then is to decide whether an individual employed as a domestic servant, is an '**employee**' under the provisions of the Act. It must be made clear on the outset that no one test provides a complete answer to the question of employment status and the courts have recently held that this issue is one of fact and not law. **(See Privy Council decision in Lee-v-Chung [1990] 2 W.L.R 1173).**

The starting point here is to define what is meant by '**employee.**' Simply, it means an individual who has entered into or works under a contract of employment. The test for determining whether the person is an employee depends on the relationship existing between the employer and the employee. This may include things like employer being able to exert control over the employee and also the method by which salary is paid, whether randomly or every end of the month. Similarly, where a contract of employment exist an employee is obligated to work only for that employer and not for any other employer. Other issues may include things like hours of work, overtime, holidays and national insurance contributions like VNPF.

Having said this, the question I must ask myself is whether **Madelene Watelen** is an employee. In other words, does she satisfy those tests prescribed above. She said in her evidence that she started work for the defendant on 17 April, 1998. Until she terminated the contract on 16 July, 2002, she never worked for any other employer. During those

years she was under the control of the defendant. A typical day's work saw her arrived at the premises at around 7 am and would then receive instructions from the defendant. She would then work until 11.30 where she would take a few minutes off for lunch and then continue on thereafter until 4.30 pm or 5 pm in the afternoon. Sometime she would work through lunch hours or late in the evening if asked. She said that having worked there for quite sometime she was very familiar with the kinds of jobs she was required to do. She also received a salary every end of the month the sum of VT27,000 and a VNPF contribution. It appears that there is a relationship existing between the plaintiff and the defendant. That relationship, in my view, can only be that of employer/employee and I so rule that **Madelen Watelene** is an employee and is entitled to those benefits prescribed under the Vanuatu Employment Act. I shall now deal with each of those benefits.

Overtime pay

The question is whether the Plaintiff, a domestic servant, is entitled to overtime pay. Section 26 (1) reads,

"In respect of work carried out in excess of the normal hours of work mentioned in s22 (1) an employee shall be paid overtime at the following rates-

(a) for work on public holidays or Sundays: at a minimum rate equal to one-and-a half times the normal hourly rate;

(b) for work carried out in excess of normal weekly hours-

(i) for the first 4 hours: at the minimum rate equal to one-and-a quarter times the normal hourly rate;
(ii) in excess of 4 hours: at the minimum rate equal to one-and-a half times the normal hourly rate

(c) for work (other than work as a night watchman) carried out at night between 8 pm to 4 am in excess of the normal weekly hours of work: a minimum rate equal to one-and three-quarter times the normal hourly rate.

(2) Subsection (1) shall not apply to persons engaged in domestic service of the employer".

The wording of subsection (2) is clear and unequivocal. It forbids the calculation of overtime pay as prescribed above. The question I must ask myself is whether subsection (2) also forbids overtime pay for a domestic servant. In other words, does that subsection prohibit payment of overtime to a domestic servant? I think not. That section, in my view, only prohibits the calculation of overtime payment for domestic servant. It does not prohibit overtime payment. The Act itself is silent on this point.

There is, however, another point needs clarification and that is the nature of the contract parties agreed to on 22 February, 2003. This agreement is what I called 'additional terms

to the original contract' which began on 17 April, 1998. In that agreement, parties agreed that plaintiff leave her home to reside with the defendant in her home. It was also agreed that every Monday to Friday the defendant was to pay the plaintiff VT500, if she slept in the defendant's home. It was also agreed that defendant pay the plaintiff VT1000 and VT2000 for every Saturday and Sunday she worked. These, in my view, are additional terms to the original contract.

If they are additional terms to the contract would it be right to say that the agreement is contrary to section 26 (2) of the Act. In other words, is the agreement contrary to that subsection rendering it to become ***void ab initio***. I do not think so. The agreement was not in anyway an illegal agreement so as to contravene s26 (2). Section 26(2), as stated earlier, provides methods by which to calculate overtime pay for other employees but not for domestic servant. It does not, in my view, prohibit any over time pay to a domestic servant. In this case, it is in the terms of the contract that defendant pay plaintiff's over time. Such agreement, if they are terms of the contract, parties must be bound by it.

Annual leave

Section 29 of the Employment Act reads,

"Every employer shall grant an employee who has been in continuos employment with him for 12 consecutive months annual leave on full pay at the rate of 1 working day for each month of employment".

In her evidence, the plaintiff said that since she started work on 17 April, 1998, to 16 July, 2002, the day she terminated the contract, she was never given leave. Asked whether she knew she was entitled to 12 working days annual leave she said "yes, but the defendant never allowed me to go on leave whenever I asked". She said that up to the time the defendant's husband ran away she also requested her leave but was also refused.

The question now is whether the plaintiff is entitled to annual leave pay. According to section 29 above, for annual leave to be claimed, an employee must be in continuos employment for 12 consecutive months with the same employer. I am also satisfied that when the husband left, the plaintiff continued working for the defendant without annual leave until 16 July, 2002, when she decided to terminate the contract. Altogether, the plaintiff has been working for the defendant and her husband without annual leave for approximately 3 years 3 months, well beyond what is required by law. I, therefore, grant her leave entitlement.

Payment in lieu of 3 months notice

There are 3 ways a contract can be terminated in the Employment Act. We are not really concerned with any of these for the time being. What we are more concerned with is where an employee has terminated a contract because of employer ill treatment or breach.

In this case, the plaintiff gave evidence that she terminated the contract because of employer ill treatment and breach. Section 53 (1) reads,

"If an employer ill-treats an employee or commits some other serious breach of the terms and conditions of the contract or employment, the employee may terminate the contract forthwith and shall be entitled to his full remuneration for the appropriate period of notice in accordance with section 49 without prejudice to any claim he may have for damages for breach of contract.

(2) An employee shall be deemed to have waived his right under subsection (1) if he does not claim it within a reasonable time after he has become aware of his being entitled thereto.

This section is clear and unequivocal. It authorizes an employee to terminate the contract if the employer ill treats or breaches the contract. In this case, the plaintiff gave evidence that she was never paid the VT500 for every Monday to Friday she slept with the defendant, VT1000 and VT2000 for every Saturdays and Sundays she worked. She also stated in her evidence that since she left her home to sleep with the defendant she was at the disposal of the defendant for 24 hours. She said that every night the defendant went out she would look after the children. Even when she returned at night or early morning she would wake her up to attend to her and her friends. That she was not given a proper sleeping room to sleep in but a living room where she was exposed to any disturbances whether late at night or early morning. In addition, she was not given annual leave nor a weekly rest of 24 consecutive hours as stated under s25. All these actions, in my view, are justifiable for the plaintiff to terminate the contract. I am, therefore, fully satisfied that the defendant has ill treated and breached the agreement she yet has initiated. The provision of section 53 (1) is clear. It authorizes the plaintiff to claim payment in lieu of notice, in this case 3 months.

Severance pay

Severance pay are usually paid where an employer terminates an employee's employment, or where the employee reaches the age of 55 and the employer retires him, or where the employee ceases to be employed because of illness. Amendment Act No.33 of 1989, amended section 54 (1) and reads,

"Subject to section 55, where an employee has been in continuos employment for a period of not less than twelve months, with an employer on a contract of employment of this Act, and –

(a) ***the employer terminates his employment; or***

(b) ***on or after the employee reaching the age of 55, the employer retires him; or***

(c) *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,*

the employer shall pay severance allowance to the employee under the Act.

This section when read by itself has no effect to the plaintiff's claim for severance pay. It must be read together with section 53 (1). The above section itself does not provide for severance pay to be paid where an employee terminates the contract. The question now is whether section 53 (1), as stated above, can be of assistance. That section states that where the employee terminates the contract, he will be entitled to remuneration for the period of appropriate notice as prescribed under section 49 without prejudice to any claim he may have for breach of contract. Here, the phrase 'without prejudice to any claim he may have for breach of contract' is, in my view, stating that other legal entitlements must also be paid where plaintiff has terminated the contract on the grounds of employer ill treatment or breach. I am, therefore, satisfied that the plaintiff is entitled to severance pay.

Defense

Defendant, on the other hand, denied any breached of contract. She admitted in paragraph 6 of her unsworn statement and also whilst giving oral evidence that there was such an agreement for her to pay over time. Asked why she did not pay the plaintiff, she said that she paid all what she had agreed to pay. She was asked whether she can proof by record but she said, "my records were all lost when we were moving out of our house at Belleview to Salili". In court, she only produced payment she made on 15 May, 2002, but failed to substantiate payments for the months of February, March, April, June and up to July 16, 2002. When asked about leave entitlement she said that the plaintiff had taken her leave though failed to produce records of leave taken.

Defense counsel submitted that prior to 22 February, 2002, the Plaintiff had a different employer and, therefore, cannot claim leave entitlement. With respect to counsel's submission, I cannot accept his submission on this point for 2 reasons. First, is that the defendant is the same employer who employed the plaintiff since 17 April, 1998. The agreement of 22 February, 2002, like I said earlier, are additional terms to the original contract. Secondly, a contract of employment can be transferred from one employer to another provided the employee consents to that transfer. In this case, the plaintiff consented to continue working for the defendant. This is well provided for under s11 of the Act.

Defense also made counter claim on the grounds of failing to give 3 months notice. They also submitted that the termination of the contract by the employee under s53 (1) was not justified on grounds that the facts presented did not constitute a fundamental breach. The question I must ask myself is whether there was a serious breach. I answer this question in the affirmative. The facts and evidence indicated very clearly that the defendant, for the past 3 years and 3 months, failed to notify the plaintiff of her right to take leave. Not

only that but also failed to allow the plaintiff to take leave when requested. Similarly, she failed to pay the plaintiff the over time she agreed to pay as agreed. That to me is serious breach the fact that these were fundamental terms parties agreed to.

Finally, defense submitted that severance pay is simply not available for the Plaintiff. That submission also cannot stand. There are 3 reasons why I said this. First is that, on the outset, I have considered the type of work the Plaintiff did and I am fully satisfied that she is the employee under the Act. Secondly, the Plaintiff has been working for more than 12 months for the same employer. Thirdly, although the amended s54 of the Act, does not specify severance pay to be paid where an employee terminates the contract, s53 allows the plaintiff to claim 3 months notice under s49 and without prejudice to any claim she may have for damages for breach of contract.

Before I make the orders, there is one point that needs clarification. In the statement of claim filed on 6 March, 2003, the Plaintiff pray that the court will order the defendant to pay the sum of VT565,488 being for over time and/or bonus. In the claimant's synopsis of legal submissions, her counsel distinguished between over time pay and bonus pay. I failed to see how the sum of VT565,488 can be substantiated for over time pay. This was not pleaded or argued separately than bonus and it will not be fair for the defendant to have lost that opportunity to defend just because Plaintiff failed to make those distinctions in the first place . Therefore, I will treat them as inseparable.

The result is that the Plaintiff is entitle to those benefits and I so order the defendant to pay as follow:

1.

(a) Over time/bonus from 22 February, 2002 to 15 July, 2002, a total of 144 nights @ VT500.....VT72,000

(b) 21 Saturdays @ VT1,000 per Saturday.....VT21,000

(c) 21 Sundays @ VT2,000 per Sunday.....VT42,000

(d) Less payment which the claimant received on or 15 May, 2002.....VT8,000

2. Annual leave in the sum of.....VT45,000

3. Three (3) months salary in lieu of 3 months notice.....VT81,000

4. Severance allowance in the sum of.....VT55,250

Total = VT316,250

5. I allow 10% interest on the said sum calculated to be VT86 per day starting from the date of filing, namely, 6 March, 2003, to completion of payment.

6. Defendant to pay costs in the middle scale as stated under Rule 15.10 as follow:

Drafting and settling claim.....VT10,000
(including counter claim)

For drafting and settling any other.....VT4,000
application to the court, including
an application for enforcement and
a judgment order

For preparation for trial only.....VT3,000

For any court appearance including.....VT15,000
For entry of default judgment, but not
For trial or adjournment

For court appearance for adjournment.....VT4,000

First day appearance, for each half.....VT20,000
Day or part of a half day

Each subsequent half day ie. 2/3 of half day rate and calculated as follow:

VT20,000 divide by 2 = VT10,000 divide by 2/3 = VT6,666. Trial took only one day. Therefore, the amount allowed will be VT6,666.

Total cost to pay is *VT62,666*

Dated at Port Vila this 16 day of September, 2003.

Jerry Boe
Magistrate

REPUBLIC OF VANUATU
TRIBUNAL DE PREMIERE INSTANCE
MAGISTRATES' COURT
REPUBLIQUE DE VANUATU