IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU
(Appellate Jurisdiction)

Civil Appeal Case No. 19 of 2004

BETWEEN:

AIR VANUATU (OPERATIONS) LIMITED
Appellant

AND:

KEITH MOLLOY
Respondent

Coram: Hon. Justice Robertson
Hon. Justice Von Doussa
Hon. Justice Fatiaki
Hon. Justice Treston
Hon. Justice Bulu
Hon. Justice Saksak

Counsels: Mr. Malcolm for the appellant
Mr. Ozols for the respondent

Hearing Date: 26 October 2004
Judgment Date: 4 November 2004

JUDGMENT

This is an appeal against the decision of the Chief Justice delivered in the Supreme Court at Port Vila on the 8th September 2004 following a defended hearing on 31st of August 2004. The matter at issue was the respondent Mr. Molloy's entitlement to a severance allowance from the appellant company in respect of the continuous period from 25th April 1987 until 27th April 2003 in which there were six contracts of employment between them.

Although a substantial number of issues were covered in the hearing in the Supreme Court and in the submissions and oral material before us, the case really boils down to four fundamental issues.

First, whether Mr. Molloy was covered by the provisions of Part XI of the Employment Act [Cap. 160] and entitled to a severance allowance for the period of his employment.

Secondly, if he was entitled, was it open to the parties to enter into a private contract, which altered the basis upon which the severance allowance was to be paid. If that was permissible, did a lawful variation occur in the final employment contract, which was entered into between the parties in 2001 to that effect.

Thirdly, was there a proper exercise of discretion in awarding interest at 12% from the date when he ceased to be in employment until the date of payment.

Finally, was there a proper basis for the court to award indemnity costs in Mr. Molloy's favour in respect of the hearing in the Supreme Court.

Section 54 of the Employment Act provides: -

"SEVERANCE ALLOWANCE

(1) Subject to section 55, where an employee has been in continuous employment of an employer for a period of not less than 12 months commencing before, or after the date of commencement of this Act, and-

(a) the employer terminates his appointment; or

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

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

(d) where the employee has been in continuous employment with the same employer for a continuous period of not less than 10 consecutive years, 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,

the employer shall pay severance allowance to the employee under section 56 of this Act.

(2) For the purposes of subsection (1) -

(a) an employee who works for his employer on 4 or more days in any week shall be deemed, in respect of that week, to have been in continuous employment;

(b) no employee shall be held to have ceased to be in the continuous employment of an employer by reason of his participation in a strike which is not unlawful;

(c) where an employee ceases to be in the employment of one employer and enters the employment of another under section 55(4), his employment by the first and second employer shall be deemed to be continuous employment.

(3) *For the purposes of section 308 of the Companies Act, Cap. 191 severance pay shall be deemed to be wages".*

There was substantial argument before us about whether there was a termination of the contract, whether a contract for a fixed term can come within the severance entitlements and other issues, which do not grapple with the central point.

By memorandum dated 24 January 2003, Mr. Molloy was advised that the renewal of his employment seemed difficult to consider. The document provided as follows: -

> *"As you know, your employment contract with Air Vanuatu finishes on 24th April 2003.*
>
> *On several occasions, you have stated that your employment with Air Vanuatu will come to an end when you stop flying.*
>
> *The Vanuatu Civil Aviation Authority has requested the Board of Directors of Vanuatu to limit the age of airline pilots to 60 years old.*
>
> *Therefore under these circumstances, it seems difficult to consider a renewal of your employment with Air Vanuatu.*
>
> *We had discussed in the past several options for your succession, it is now time to implement on these plans.*
>
> *Please contact me when you return from leave".*

Following on from that, the uncontroverted evidence is that when the existing contract came to an end there was no new contract and his employment came to an end. At that stage Mr. Molloy was over the age of 55.

We have no difficulty in concluding that in terms of section 54 (1) (a) there was a termination of his appointment. The issue is not whether the contract was terminated but whether ***"his appointment"*** was terminated. Equally, we are of the view that it could be said that Mr. Molloy was retiring after reaching the age of 55 years or that Air Vanuatu retired him after reaching the age of 55 years. We are unable to see any sensible way in which subsection (1) was not met and we are satisfied that the starting point for the payment of a severance allowance existed.

Sections 54 (2) and (3) have no application to the facts of this case.

Section 55 (1) provides:-

> *"Severance allowance shall not be payable to an employee who has been recruited outside Vanuatu and is not ordinarily resident in Vanuatu".*

The evidence was that Mr. Molloy was employed while resident in Vanuatu. All of the employment contracts, which were signed between the parties, provided for a repatriation allowance. This might be thought to be inconsistent with a person ***"ordinarily resident in Vanuatu"***. The issue however, does not arise in this case in

that in the pleading Mr. Molloy asserted that ***"he is resident of Port Vila since 1987"***. This was admitted in the statement of defence so that disposes of that statutory denial of the right to severance.

None of the issues raised in section 55 (2), (3), (4), (5) or (6) have any application to this case. Accordingly, we are of the view that the Supreme Court was correct in concluding that the right to severance existed although we have expressed the legal position in a slightly different way.

The next question in this case is whether it is possible for parties in an employment contract to do a deal and reach an agreement whereby the statutory entitlement and benefits of severance were provided at some earlier date and in some alternative ways which were not detrimental to the position of Mr. Molloy as an employee.

Part XI of the Employment Act creates a specific regime with regard to a severance allowance. Section 54 identifies the qualifying circumstances. Section 55 indicates circumstances which vary or remove the general entitlement.

The method of calculation of the allowance is set out in detail in section 56. Section 57 identifies the deductions, which can be made.

Section 6 of the Employment Act provides that nothing in the Act shall affect the operation of any law, custom, award or agreement which ensures more favourable conditions in any respect to the employees concerned than those provided for in this Act.

We are accordingly of the view that there is no barrier in law or in principle which restricts the ability of an employer and an employee to make their own private arrangement with regard to a severance entitlement providing it does not in any way undercut or minimize the employee's entitlements under Part XI.

We hold that position notwithstanding the provisions of section 56 (5) which provides that a severance allowance payable under the Act is to be paid on the termination of the employment. A proper and adequate allowance paid earlier than that date could be more favourable from the point of view of an employee and therefore it might permissible under the Act.

The second aspect of this issue is whether the Employment Contract Renewal dated 1 May 2001, which is in writing and duly signed by the respondent Mr. Molloy and the Managing Director of the appellant company, does fulfil the essential criteria.

Paragraph 3 of that agreement provides: -

> *"The total remuneration of the Employee shall be Vt 966 700 per calendar month and shall be subject to review in accordance with Company policy as approved by the Board of Directors. The monthly remuneration is inclusive of all salary entitlements including severance allowances. The Employee shall be entitled during the term of employment to the following benefits:*
>
> *(1) Fully serviced vehicle as per policy*

(2) Telephone Line Rental

(3) Medical Insurance coverage as per company policy

(4) Other benefits as per existing staff manuals

The Employee shall be entitled to 6 weeks Annual leave such leave to be taken in each year of employment or in the following year at time or times agreed to by the management and shall not be accrued unless such accrual is agreed to in writing by the Managing Director. At the end of the contract period 50% of any outstanding leave will be paid out on application, with the balance to be carried forward into the next contract period where applicable. The total balance shall be paid out if no further contract is entered into."

The submissions on behalf of the respondent were most dismissive about the effect of this provision. Complaint was made by counsel that no witnesses were called to give evidence as to what they might have meant. With respect to Mr. Ozols that rather overlooks the fundamental interpretation approach of the law of this country to contract.

On its face the contract says that the specified sum includes severance allowance. There are suggestions made that this was in some way unconstitutional because expatriate staff was treated differently than local staff and that in the absence of evidence, the claim that this avoided severance liability was without foundation. That is to have the onus quite the wrong way around. The notation on the document made by Mr. Molloy makes it clear that he was aware of this provision. It had not existed in previous contracts and therefore as a starting point in contractual interpretation there could be no doubt at all that the deal completed on the 1 May 2001 included a component in respect of his entitlement in Part XI of the Act. The onus was on Mr. Molloy to demonstrate that for some reason that should not been enforced. Nothing was advanced to suggest that in the arrangement that he negotiated he had not received some amount for severance and of course it would be wrong for him to double up in respect of that entitlement.

That having been said however, the issue for the Court is whether it can be satisfied that the provisions were in terms of section 6 of the Act more favourable than if Part XI had operated in a more conventional way. On that issue we can not be satisfied. The starting point is half a month remuneration for every period of twelve month which just involves a simple calculation. 1/26 of the salary is the beginning entitlement.

Although the entitlement is extinguished if a person is dismissed for serious misconduct, the converse is that an unjustified termination can lead to an entitlement of up to six times the amount of severance allowances. Further, the severance allowance is calculated on the basis of the remuneration payable at the time of termination and that is not easy to determine in advance.

We are not persuaded that it would be impossible for a contract to be entered into which covered all these contingencies. Mathematical calculations of entitlement after

termination could be undertaken to cover all relevant circumstances with a top up occurring. The bald assertion in this contract does not lead us to that point.

An additional factor arises in this case because for 14 years prior to the final contract, various contracts made no suggestion that the total remuneration payable included a component for severance allowance. The issue of prepayment could only relate to the last two year period where the parties contract for the first time specifically so provided.

Although it is clear that there must be some accounting between these parties about that severance component, the uncertainties involved are such as to make it undesirable for us to interfere with the statutory regime in this piece of litigation. We are satisfied that the normal provisions should apply and a calculation based on half a month for each of the 16 years is appropriate.

If the parties can not agree as to what must be owed by Mr. Molloy for the two year period during which he will effectively have some doubling up in his entitlement to severance allowance, that will have to be the subject of a separate case properly pleaded and properly responded to. Hopefully common sense will prevail and avoid the need for that step. Meantime in this proceeding, without prejudice to the appellant's right to a recovery for his double payment of severance in the final two years, severance allowance will be payable for the full 16 years.

The third issue concerns the award of interest at 12% from the 27 April 2003 to the date of payment. With due respect to the Chief Justice section 56(6) provides for interests at a rate ***'not exceeding 12%'.*** 12% is neither a requirement nor an entitlement. In pre judgment interest, the important fact is to reflect the reality of a person having been kept out of money to which he is entitled.

Counsel advised us that there was no evidence called on this point and no submissions were made upon it. In our judgment in the absence of evidence, the court should only award what would be the amount that a person could receive from a normal bank investment during the relevant period. *Richard Lo trading as LCM* v *Sagan* [2003] VUCA 16; Civil Appeal Case No. 27 of 2003.

Counsel were not keen for us to send the matter back for further evidence or inquiry. We are satisfied that in those circumstances, the appropriate basic interest rate of 5% is all that can be justified. Interest should be compensatory, not punitive. We allow the appeal by reducing the interest rate accordingly to 5% from 27 April 2003 to the date of payment.

The final issue concerns the ordering of full indemnity costs "in view of the complete lack of merit in the defendant's case and in the manner in which it failed to produce any evidence".

The case before the Chief Justice was a claim for VT15, 907, 200. The second half of the claim asserting that Mr. Molloy had been in the Government service was only abandoned in the course of the hearing. It can not therefore be said that the defendant in responding to the case had no merit. What Mr. Molloy claimed he only obtained half of as a result of the proceedings. That indicates a defence with real merit.

Further the fact that no evidence was called by the defendant is not a factor to be weighed. This was essentially a case of statutory and contractual interpretation in respect of which evidence may not have been required at all. There was certainly no onus on the defendant in the lower court to call evidence. It should not be punished for taking an understandable position.

The awarding of indemnity costs arises only in very extreme cases. We are told that there were no submissions made on the point and no opportunity for the parties to comment on the possibility. There is nothing available before us to suggest that even if that opportunity had been provided there would have been any justification to exercise the cost discretion to make such an extraordinary order in the circumstances of this case.

Accordingly the appeal succeeds on that ground also. We quash the order for indemnity costs made in the Supreme Court and substitute it with an order for standard costs on the amount recovered.

Mr. Molloy is entitled to a severance allowance calculated in terms of Part XI of the Employment Act for the entire period of his employment by the appellant. His obligation to reimburse his employer for the sum he received for severance allowances between 2001 and 2003 continues to exist. Mr. Molloy is entitled to interest of 5% on the amount of his severance allowance from termination to date of payment.

As far as the question of costs in this court is concerned, we do not make any costs orders at all. Each party succeeded in part and costs will lie where they fall.

Dated at Port Vila, this 04th day of November 2004

BY THE COURT

Hon. Justice Robertson
Hon. Justice von Doussa
Hon. Justice Fatiaki
Hon. Justice Treston
Hon. Justice Bulu
Hon. Justice Saksak