

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

Civil Case No. 113 of 2007

BETWEEN:

**DICK MANALANG, EDWARD BOULET, JOHN BEN, PETER BUMSENG, ANNIE
NAMURE, NELSON SETHRACK, SEULE FRED, ROY KALANGI, JOEL PAKU, JANET
MARIE, NEHAPI LAFLYN, MARY TONY, KALSAL DAVID, GRAHAM TASI, TITUS
ANDREW, KARL AKAU, NILON SKEPHA, PIERRE WILLY, MATURINE HENRY,
NORMAN WILLY, AISON HENRY, NALIN TAURAI, DICKSON PANTUTUN, EVELYNE
BEN, JOHN KARIE, VIVIAN TARI, THOMAS BULEMEME, JOSEPH MICAH, STEVEN
KAUKEI, WILLY OVA and YANNICK WILLY**

Claimants

AND:

VANUATU ABATTOIRS LIMITED

Defendant

Coram: Justice N. R. DAWSON

Date of Hearing: 10th May 2010

Date of Decision: 29th June, 2010

Counsel: Mr. C. Leo for the Claimants

Mr. N. Morrison for the Defendant

JUDGMENT

1. At the hearing of this case the Claimants clarified that their claims were for severance payments pursuant to Section 56 (4) of the Employment Act [CAP 160] (*"the Act"*). The claims are pursuant to s. 50 (1), (3) and (4) of the Act.
2. The Claimant's counsel was to have filed final submissions by 17th May, 2010 and has not done so. The parties are entitled to a decision and this judgment is delivered accordingly.
3. The Claimants are members of the Vanuatu National Workers Union, all are employees of the Defendant, and work in the Defendant's abattoir. There were ongoing disputes between the parties during 2004 which on occasions lead to work at the abattoir stopping. Matters came to a head on 16th June, 2004 when Union members refused to work. After various meetings, discussions and correspondence between the Union, Department of Labour and the Defendant, it was agreed that the Union members would return to work on 23rd June, 2004.
4. At 7:40 am on 23rd June, 2004 the Union members stopped work. After requests from a Board member of the Defendant to resume work and the arrival at the abattoir of a representative of the Department of Labour and a Union representative, work resumed after 10:00 am but then almost immediately stopped again at 10:45 am. A number of cattle had been shot in preparation for

processing and were left hanging with the guts hanging out of the carcasses.

5. Once again, the workers were urged to return to work and advised that their employment could be terminated if they failed to do so. Work did not resume and the Defendant had the workers bused from the abattoirs at 4:00 pm.

6. On the 30th June, 2004 the Union, Department of Labour and the Defendant had a meeting. No agreement was reached. The Board of the Defendant then met and resolved to terminate the employment of the Claimants, with the exception of the Claimant, Willie Ova, whose employment had been terminated earlier on 15th June, 2004.

7. The relevant portions of s.50 of the Act are:-

"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.

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

(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."

8. Section 56 (4) of the Act says:-

"56. Amount of severance allowance

(4) The Court shall, where it finds that the termination of the employment of an employee was unjustified, order that he be paid a sum up to 6 times the amount of severance allowance specified in subsection (2)".

9. The letter dated 2nd July, 2004 from the Defendant dismissing the Claimants (except for Willie Ova) is as follows:-

"Re: TERMINATION OF EMPLOYMENT

We wish to advise that your employment is terminated.

You have failed to attend to your duties over and beyond the last week. Meetings were held and an understood resolve was reached.

Unfortunately again on Wednesday 23 June 2004 you failed to attend to your duties and refused to work. You have not returned since.

Warnings have been given and explanations sought in accord with Section 50(4) of the Employment Act. Explanations you have given are unsatisfactory.

We therefore have no alternative than to dismiss you for serious misconduct in accord with Section 50(1) of the Employment Act.

All company property should be returned forthwith and you should arrange to collect your final payment from Department of Labour.

Yours faithfully
VANUATU ABATTOIRS LIMITED

B TARILONGI
CHAIRMAN OF THE BOARD (Acting)"

10. A finding that the dismissal of the Claimants was unjustified (s. 54 (4)) is necessary before considering what if any severance payment is due to the Claimants. The conduct of the Defendant must therefore be looked at to see if there was compliance with the relevant subsections in S. 50 of the Act.

11. Section 50 (1) requires serious misconduct by an employee before it is lawful to dismiss an employee without notice and without compensation. This Court finds that the behaviour of the Claimants in continuing to stop work without notice on a number of occasions notwithstanding the continued protestations of the Defendant was sufficient to constitute serious misconduct. The Claimants had persistently failed to carry out their employment duties and failed to address any issues they might have with the Defendant in a responsible manner.

12. Section 50 (3) prevents dismissal for serious misconduct unless the employer has in good faith no other alternative. The Claimants had stopped work on many occasions, usually when animal carcasses still required processing. They could not be in any doubt that their refusal to work on these occasions had caused hygiene problems for the Defendant and had been very costly to the Defendant. Evidence was given that the Defendant was considering closing down the abattoir because its business was no longer viable due to the actions of the Claimants. The Defendants had on every occasion tried to persuade the Claimants to return to work. This Court therefore finds that the Defendants had acted in good faith, had given the Claimants every opportunity to return to work on every occasion the Claimants had stopped work, and could not realistically be expected to take any other action but dismiss the Claimants.

13. Section 50 (4) prevents an employer from dismissing an employee for serious misconduct unless the employee has had adequate opportunity to answer any charges made against him. The onus is upon the employer to stipulate any such charges and to communicate them to the employees. It cannot be assumed by an employer that an employee will know what the charges may be. Section 50 (4) does not require that the charges be in writing and given to the employees, but ideally and practically that would be a proper and the best method. Time must also be given to the employee to respond.

14. In this case the Defendant had not given to the Claimants notice in writing of the charges against them. The Defendant argues that concerns the Defendant had with the Claimant's behaviour were obvious. The failure of the Defendant to give notice of the charges in writing to the Claimants makes it more difficult for the Defendant to satisfy this Court that the requirements of S. 50 (4) had been complied with by the Defendant.

15. The Claimant's refused to work on a number of occasions during 2004. On the 16th June, 2004

the Claimants stopped work and meetings, discussions and correspondence took place which could leave the Claimants in no doubt that their refusal to work on that day was the major concern of their employer. The Claimants are all Union members and were represented throughout that time by the Union. The Department of Labour was also involved and the result was a return to work on 23rd June, 2004.

16. On the 23rd June, 2004 the Claimants again stopped work. A Board member of the Defendants spoke to them and asked them to return to work. Warnings were given to the Claimants of the possible consequences if they failed to return to work. The Claimants knew what the Defendants charges were and they had the opportunity to respond. After Union and Department of Labour representatives came to the work place and discussions took place with them, the Claimants returned to work just after 10:00 am. At 10:45 am, the Claimants stopped work again, refused to return to work and eventually were bused home at 4:00 pm.

17. The onus on the Defendant to satisfy this Court that the Claimants knew of the Defendants charges against them and showing that the Claimants had adequate opportunity to respond has been discharged. The Claimants continued refusal to work and stoppages without notice were clearly charges against the Claimants by the Defendant as these two issues continued to arise again and again throughout 2004. The Claimants were warned and had many opportunities and sufficient time to address both charges if they had so chosen. The Claimants cannot be said to be unaware of the Defendant's charges. Nor can it be said they lacked proper advice. The Claimants were on many occasions represented at meetings and during correspondence by their Union. In addition, the Department of Labour was also involved in these meetings and correspondence. The dismissal of the Claimants by the Defendant was a justified action under the Act and the Claimants claim for severance payments must fail.

18. The only exception to this finding is the Claimant Willy Ova who had been dismissed on notice earlier on 15th June, 2004 and who did in fact receive termination pay. No attempt has been made by the Claimant's counsel to explain why he is a Claimant in this case and no basis has been established for a claim by him against the Defendant.

19. Costs are awarded to the Defendant on a standard basis, at an amount to be agreed upon by the parties, or failing agreement, as taxed by the Court.

DATED at Port Vila, this 29th day of June, 2010

BY THE COURT

N. R. DAWSON
Judge