

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

Civil Case No .167 of 2015

BETWEEN: JONATHAN MANI
Claimant

**AND: CARPENTERS VANUATU HOLDINGS
LIMITED**
Defendant

Coram: *Mr. Justice Oliver A. Saksak*

Counsel: *Willie Kapalu for the Claimant*
Dane Thornburgh for the Defendant

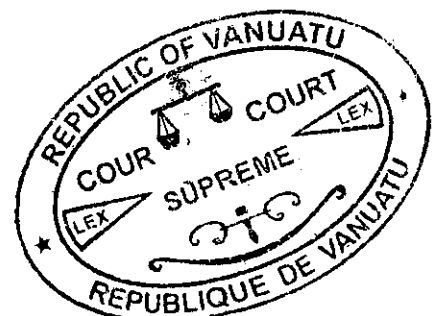
Date of Hearing: *4th July 2017*

Date of Judgment: *24th November 2017*

JUDGMENT

Introduction

1. This is a claim for damages for termination of employment pursuant to an employment contract.
2. The Claimant alleges his termination by the defendant on 7th November 2013 was unjustified.
3. His claims are for-
 - a) Unexpired term of contract for 2 years at VT 3.370.000,
 - b) One month salary in lieu of notice at VT 312.500,
 - c) Other benefits under the contract at VT 2.572.200,
 - d) 12% interests per month from date of termination to judgment, and
 - e) Costs.

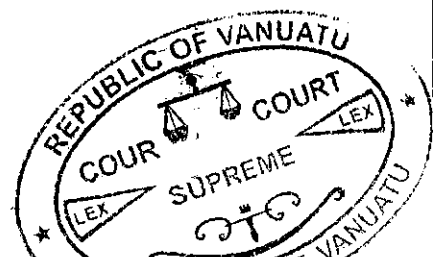


Facts

4. The Claimant entered into a contract of employment with the defendant on 15th October, 2009 initially for a period of 3 years. The contract was extended for a further period of 2 years on 15th July 2013.
5. The defendant employed the claimant to the position of Operations Manager with an annual remuneration of VT 3.370.000 per annum.
6. On 19th October 2013 the defendant wrote a letter to the Claimant suspending him from employment alleging conducts which amount to gross misconduct against him. The letter gave the Claimant notice that-
 - a) Internal investigations were being conducted,
 - b) Police investigations were also being conducted,
 - c) During the course of investigation the claimant would be interviewed and be invited to offer explanations, and
 - d) Any information gained from the investigation may be presented at the subsequent disciplinary hearing.
7. The Claimant was instructed that while on suspension he was to cooperate with the internal audit team investigating the allegations against him and that upon completion and finalization of an internal audit report the claimant would be provided an opportunity to respond, explain or comment on the report.
8. The claimant received a termination letter on 7th November 2013 terminating his contract of employment.

Allegations

9. The Claimant alleges-
 - a) No opportunity was given to him to answer the allegations made against him,



- b) He was prosecuted for misappropriation, however the charge was withdrawn for lack of evidence.
- c) His termination was unjustified and unlawful causing him to suffer damages.

Defence

- 10. The defendant denies all allegations and claims placing reliance on section 6.1 of the employment contract.

Issues

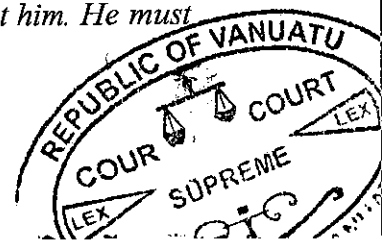
- 11. Two issues were raised by the claimant as follows:-

- a) Whether the Claimant's termination was unlawful and unjustified?
- b) Whether the Claimant is entitled to be paid the reliefs sought?

Discussions

- 12. It is not disputed the claimant commenced work with the defendant from 15th October 2009 under an employment contract for 3 years and extended by another 2 years. It is also not disputed that he was suspended from 19th October 2013 until 7th November 2013 when he was terminated by letter. It is not disputed that his salaries were VT 3,750,000 per annum.
- 13. On the first issue Mr Kapalu submitted the defendant had not complied with section 50 (3) and (4) of the Employment CAP.160. Counsel argued the Claimant's employment was not done in good faith and further that he was not given any opportunity to answer the allegations made against him. Mr Kapalu argued further that the criminal charges laid against the claimant in Criminal Case o. 147 of 2013 were withdrawn showing the allegations made against the claimant had no basis, and that there was no audit report produced by the defendant to require the claimant to answer. Counsel relied on the case authority of Kanda .v. Government of Malaya (1975) AC 179 where Lord Denning said:

" if the right to be heard is to be a real right when is worth anything, it must carry with it a right in the accused man to know the case against him. He must



know what evidence has been given and what statements have been affecting him, and then he must be given a fair opportunity to correct or contradict him.”

14. Both the claimant and defendant disclosed the claimants employment contract as “JM1” to the claimant’s sworn statement (Exhibit C1) and as Annexure “A” to the sworn statement of Lou Donchos dated 1st July 2016 (Exhibit D3).

15. Section 6 of the contract provides for Termination as follows:

“ the contract may be terminated by CHL (Defendant) without notice on any of the following grounds:-

6.1 (a) Gross misconduct, wilful disobedience by Employee of a lawful or reasonable order from the Director/ Directors of CHL or its nominee.

(b)Where employee is guilty of misconduct by an act of omission or commission that is inconsistent with employees due and faithful discharge of Employee’s duties.

(c) Misuse or misappropriation of CHL’s funds or property by Employee’s duties.

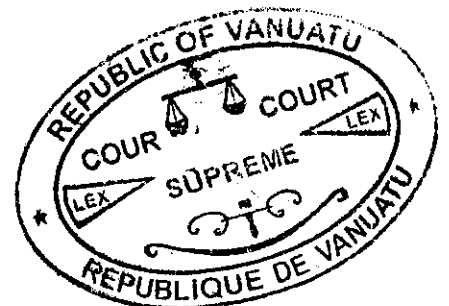
(d)Habitual neglect of duties by Employee.

(e)Abusive use of toxicating liquor or drugs by Employee.

(f) Commission of and conviction for an Indictable offence in Vanuatu by Employee.

(g) Employee becoming of unsound mind.

(h)On any other ground on which CHL is entitled to terminate the contract without notice at common law.



6.2. Either CHL or Employee may terminate this Agreement by giving one (1) month's notice in writing to terminate."

16. Both the claimant and defendant also disclosed the suspension letters dated 19th October 2013 as "JM3" to the sworn statement of the Claimant (Exhibit C1) and as Annexure "G" to the sworn statement of Lou Donchos (Exhibit D3) the letter is dated 11th October 2013. The letter of 19th October 2013 was addressed to the Claimant and states:

" SUSPENSION FROM DUTY-OPERATIONS MANAGER CARPENTERS HARDWARE (VANUATU) LTD

We regretfully notify to you that allegations against you on the following matters are very serious to the level of terminating your employment with the company as this could be considered as gross misconduct with the reference to our employment contract.

Stock take loss of VUV 10.7 Million from the recent stock take.

Missing stock of 3.534 loss of cement, noted subsequently to the stock take, where you have admitted of disposing a quantity of cement without any approval from the superior/ management.

However, the management decided to suspend(sic) you from duty of Operations Manager- Carpenters Hardware Limited with immediate effect whilst the above allegations of misconduct are investigated.

Appropriate investigations are already in progress by both internal parties as well as the investigators from the Police. In the course of the investigation you will be interviewed and will be invited to offer explanation or comment on the allegations. Any information which is gained during the investigation process may be presented at any subsequent disciplinary hearing.

During your suspension you will continue to enjoy the facility of the company accommodation provided and 50% of your contractual salary but you will not receive your holiday entitlements, company vehicle, mobile phone and the note book computer.

It is a term of your suspension that you are not required to attend work including relief work however should you wish to visit your place of work or any other establishment of Carpenters Vanuatu during your permission and arrangement with the management. Failure to seek such prior permission may be treated as serious misconduct.

You should remain available to the management during your normal working hours over the period of your suspension and attend meeting if required. You are not permitted to meet or discuss official matters with any of the Carpenters Vanuatu Group employee unless it has been permitted by the Management.

Yours Sincerely,

Carpenters Vanuatu Holdings Ltd

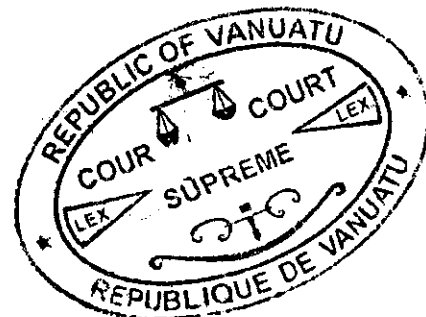
(signed)

Suren Abey Wicknema

Country CEO/Director

Cc: Commissioner of Labour

Geoffrey Gee and Partners, Company Lawyer."



17. The letter dated 11th October 2013 as " G" is entitled exactly as JM 3 but the first paragraph is quite different. It reads:

" Further to the discussion you had with the undersigned country CEO/ Director of Carpenters Vanuatu Holdings Limited regarding the above matter, I am writing to confirm that you have been suspended from duty with immediate effect whilst the following allegations of misconduct are investigated.

- *Stock take loss of VUV 10.7 mn occurred from the recent stock take.*
- *Missing stock of 3.534 bags of cement, noted subsequent to the stock take, where you have admitted of disposing a quantity of cement without any approval from the superiors/ management".*

18. The immediate paragraph following that states: " However, the management decided....." is missing. The ensuing three paragraphs are maintained however a final short paragraph is included. It states:

" Acknowledged receipt of this letter by signing and returning one copy of this letter.

Your Sincerely,

(signed)

Suran Abey Wiknema

Country CEO/ Director

I have read and accept the above

Jonathan Mani.... Date....."

19. This letter is unsigned and undated by the Claimant to indicate receipt and acceptance.

However this omission was not pleaded in the claim and is not therefore an issue.

20. The letter of termination is dated 7th November 2013 written by Mr Nigel Morrison of Ridgway Blake Lawyers.

It is annexed by the claimant to his sworn statement exhibit C1 as "JM4". The defendant annexed the same letter as "K" to the sworn statement of Lou Donchos but it is not on letter head. However it is not in dispute. It reads:

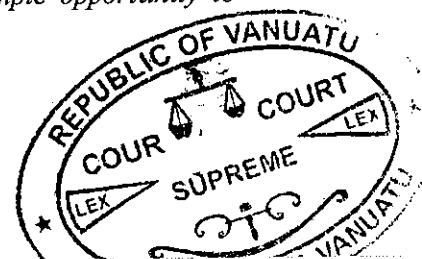
"Dear Sir,

Re: EMPLOYMENT TERMINATION FROM CARPENTERS HARDWARE LIMITED.

As you are aware you are currently under suspension from you employment.

You have been suspended as result of allegations against you for misappropriation or similar offences whilst in our client's employ.

The Police have investigated the allegations. You have had ample opportunity to respond to those allegations.



Our client has now determined that they have no alternative then to terminate your employment.

The termination is effective immediately.

You will be provided with a certificate of your employment as required by section 52 of the Employment Act.

Your final pay will be calculated and available within 7 days. Our client requires you to vacate other company accommodation provided to you by 1 pm on Friday 15 November 2013. The property should be returned to them in the same condition as that which it was provided to you. A representative of your employer will meet you at the property at 1 pm next Friday. They will inspect the property with you, accept they keys from you and deliver your termination payment and certificate of employment.

In respect to the ongoing police prosecution your employer reserves all rights in respect to any misappropriate amounts.

*Yours faithfully,
(Signed)
Nigel Morrison”*

CC: Department of Labour”.

21. The claimant has not pleaded whether he was paid any entitlements as indicated in his termination letter and there is no evidence that it was paid by the defendant and received by the claimant. It is not in issue.
22. The claimant made clear admissions about being responsible for the losses of the cement claimed and that he was given the opportunity to answer the charges made against him. Following are the relevant parts of his cross-examination by Mr Thornburgh.

Q: It is fair to say you are fully aware of the allegations?

A: Yes, I am fully aware.

Q: What do you understand that to be?

A: Stock take losses, misappropriation and loss of cement.

Q: Is that why you were dismissed?

A: Yes.

Q: Have you read the statement of Lou Donchos?

A: Yes.

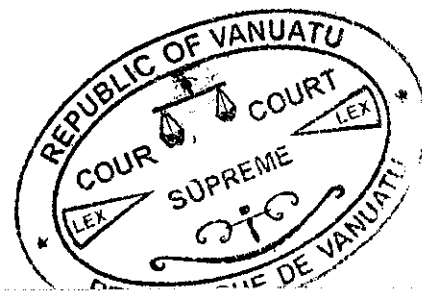
Q: Shown Document, page 2 paragraph 6 “Stock take Shortages” – VT10,700,000 lost. Do you agree that paragraph perfectly sets out the figure put to you?

A: Yes.

Q: Refer to Annexure C setting out the losses uncovered?

A: Yes I agree. Annexure C relates to cement.

Q: Refer to paragraph 7 – Do you agree with that paragraph?



A: I agree.

Q: Refer to paragraph 8 – Do you agree Police earned at 2 investigations?

A: I agree.

Q: 2 Investigations (a) by the Police and (b) by the Company?

A: Yes.

Q: Do you agree investigation by Company?

A: Yes.

Q: Do you agree some cement were destroyed?

A: I agree, I said something.

Q: As Manager you agree you were responsible?

A: I agree.

Q: As Operations Manager you were aware of procedures?

A: Agree.

Q: You agree there was procedure about how damaged stocks were to be dealt with?

A: I agree.

Q: That procedure is as per paragraph 9 of Lou's statement?

A: Agree.

Q: And you did not do that?

A: Agree.

Q: You agree you dealt with that figure without consultation with Finance Department?

A: Agree.

Q: As a result Finance Department became suspicious. Annexure F – Statement to Police of Devapriye – Do you agree value of 3,544 was approximately VT2,6 Million?

A: Yes.

Q: Refer to paragraphs 12 and 13 – Suspension letter: Annexure "G". Do you agree?

A: Agree.

Q: Did you receive this letter?

A: I received it.

Q: So you were aware of what allegations made against you?

A: Agree.

Q: As a result from October 11, 2013 you had an opportunity to put your case?

A: Agreed.

Q: And you had ample opportunity to address those issues?

A: Yes.

Q: And you did address them?

A: Yes.

Q: How did you address them?

A: I was arrested by the Police.

Q: Do you agree you were terminated because the Police arrested you?

A: Yes, agree.

Q: I put to you that is incorrect. There was a failure to follow company procedure when you damped cement and that had nothing to do with police investigations?

A: Agreed.

Q: Refer to October 11, 2013 letter.

A: I came after I was released next day and gave me the second letter.

Q: The police made a decision to arrest you, not Carpenters Group?

A: yes

Q: Not Carpenters Group?

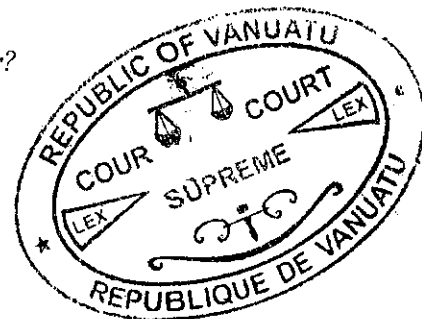
A: No

Q: Refer to paragraph 14 Annexure "H". that is your signature?

A: yes, I agree

Q: The date is 12/10/013, the next day after the suspension letter?

A: Yes



Q: you wrote this letter on 12/10 and given to company on 12/10?

A: Agreed

Q: Where is it in that letter have you addressed the 2 issues for your suspension?

A: No

Q: You agree you had ample opportunity to do it?

A: I disagree

Q: the very next day you wrote and did not address the issues?

A: Correct, But the letter says it was subject to police investigations. I was waiting for the result of the police investigation.

Q: So you agree you were terminated on company's investigations?

A: Agreed

Q: Page 3 of Termination- Clause 6.1 (a) Your actions were gross misconduct warranting your termination?

A: Agreed

Q: you were terminated according to contract?

A: Agreed

Q: You only claim is 1 month?

A: Agreed

Q: You agree your claim has no basis?

A: Agreed

Q: you could have claimed for only 1 month notice.

A: Yes"

23. In re-examination Mr Kapalu referred the claimant to paragraph 6 of the original claim and asked whether the company invited him to answer for VT 10.6 million?

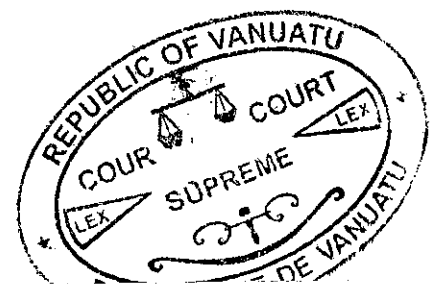
The answer was:

"Yes, I did. Auditors came from Malaysia to Check. Friday, I was arrested"

24. Noah Kiki, a security officer with VSS and witness for the defendant gave evidence about how the claimant requested him on several occasions to load stock onto the claimant's truck at evenings and at weekends and made confessions annexed "A" to his sworn statement (Exhibit D2)

25. Similarly Thomas Pako, a sales Representative with the defendant company gave evidence confirming that he assisted the claimant sell a total of 4 containers of cement at VT 990 per bag to customers and made admission of it in his Annexure "A" (Exhibit D1).

26. There is no reason to disbelief the evidence of Noah Kiki and Thomas Pako and I accept them as truthful witness. On the other hand the evidence of the claimant lacks credibility due to their inconsistencies revealed through his cross-examination by defence Counsel.



Findings

27. I therefore find from the evidence that-

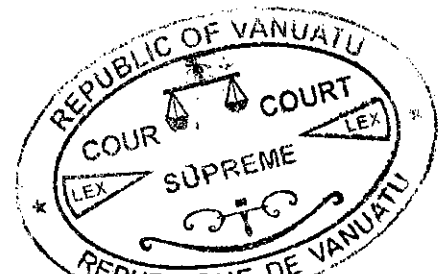
- a) The claimant had sole responsibility for inventory of cement.
- b) He omitted or failed to notify Management of alleged hardened cement.
- c) He omitted or failed to seek prior permission to destroy or sell the hardened cement.
- d) Having sold the hardened stock, the claimant omitted or failed to direct the proceeds of the sales to the Finance Department of the defendant company.
- e) He admitted to his acts or omissions.

28. I am satisfied the claimant had by his acts and/or omissions breached clause 6.1 (b), (c) and (d) of his employment contract and the defendant lawfully terminated his employment for gross misconduct.

29. I am further satisfied from his sworn admissions in the evidence the claimant was given an opportunity to answer the allegations made against him. I therefore reject his submission that section 50 (4) of the Employment Act was not complied with by the defendant company.

30. I am satisfied the defendant had complied with section 50 (1) of the Act by not giving him any notice and by not paying any compensation in lieu of notice.

31. I am satisfied the acts and omissions of the claimant were such that the defendant company could not in good faith be expected to take any other course, but to dismiss him for serious misconduct as they did.



32. The submission that Criminal Case No. 147 of 2013 was withdrawn against the claimant is untenable. His termination was not made subject to or depending on the police investigations. Rather it was made upon the company's own internal investigation and reports. Had the case not been withdrawn but continued it is my view the criminal Court would after hearing evidence, come to the same conclusion as this Court has.

33. The case of Kanda.v. Government of Malaya does not assist the Claimant's case.

The Result

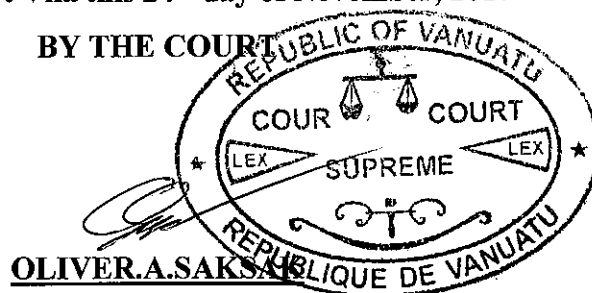
34. The Claimant is unsuccessful and his claims are dismissed in their entirety.

35. The Claimant has put the defendant to costs.

36. The defendant is entitled to their costs of the proceeding against the claimant on the standard basis as agreed or taxed.

DATED at Port Vila this 24th day of November, 2017

BY THE COURT



OLIVER.A.SAKSA

Judge

