

BETWEEN: TALLIS JACK ANSON, FORRO HARRIS YOAN,
SANDY MARY KAWA, BONGNAIM EMILE,
KALMATAK MORRIS, BANI ALLAN ROW, TOA
KAMI, KALURA EDWARD, THOMAS WLLIAN, NOAL
JACKSON JOSIAH, VUTI DANIEL VORA, CARLO
SAMSON, TALIBAN SYLAIN, TOARA SMITH OBED,
TOR WILTON, JOEL MAWA LILY, KONALLY
MAGELLAN, AMKORI TUBEL WILLIE, DONALD
JAMES, YOSEF ATI, TITUS KALONGTAS ABEL,
BULETICK BERRY TONY, SOGOVLEA ALWIN,
LAPINPAL TERRY, NOAH PAKOA SALE, JAMES
DAVID ZETHICK, GLEN NICHOLSON MAHINA and
JAMES ARU TOKA
Claimants

AND: REPUBLIC OF VANUATU
Defendant

Date of Hearing: 3 July 2024
Date of Decision: 12 July 2024
Before: Justice M A MacKenzie
Counsel: Mr. Molbaleh for the Claimants
Mr. F. Bong for the Defendant

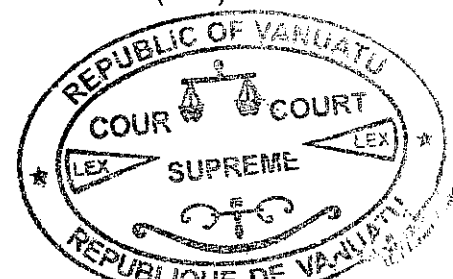
DECISION

The application

1. This is an application to strike out a claim that the Defendant has failed to pay out accrued annual leave to the Claimants.
2. The strike out application is opposed by the Claimants.

The claim

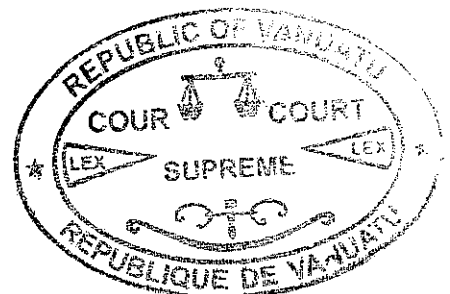
3. The 27 claimants are all Police Officers working within the Vanuatu Police Force (VPF).



4. The claim was filed on 7 December 2023. The claim is that the Defendant has failed to pay out accrued annual leave entitlements to the Claimants over a period of years. The overall date range for the accrued leave is 2014 – 2023, although the time periods are different for each Claimant, as set out at paragraph 6 of the claim.
5. The Claimants' cause of action is that by failing to pay out accrued leave annually, and allowing it to accrue, the Defendant has been negligent. As a result, the Claimants have suffered financially due to their financial commitments. Each Claimant filed a sworn statement setting out their financial commitments, described in the sworn statements as "heavy". The Claimants have not particularised what each individually seeks in terms of the pay out of accrued annual leave.
6. The Claimants are seeking that accrued annual leave be paid out before resignation or retirement. The claim was brought because some members of the VPF were in fact paid out 100 days accrued annual leave. As explained below, this was apparently in breach of Rule 6.62 of the Police General Orders ("PGOs").
7. A defence was filed on 9 January 2024. The Defendant denies that it was negligent in not paying the Claimants' outstanding annual leave entitlements as it is the discretion of the Minister in relation to payments of annual leave entitlements pursuant to Rule 6.62 of the PGOs.
8. Rule 6.62 of the PGOs provides that accrued annual leave shall not be paid out to a Police Officer until resignation or retirement.
9. Despite Rule 6.62, the Defendant concedes that 100 days of accrued leave was paid to all Police Officers. The defence sets out that the decision to pay out 100 days of leave was taken in consideration and regard to decreasing the considerable liability of the Defendant in relation to leave payment entitlements for members of the VPF.
10. The Defendant takes the position that the exercise of the Minister's discretion to make payments of leave entitlements does not provide a basis for serving Police Officers to seek payment of their annual leave entitlements.

Strike out application

11. On 19 March 2024, the Defendant applied to strike out the claim. The basis for the application is that the claim has failed to disclose any reasonable cause of action in law and that it is so clearly untenable that it cannot possibly succeed.
12. The strike out application is based on the Defendant's position that Rule 6.62 of the PGOs is expressed in mandatory terms, so there is no reasonable cause of action.



13. The application is opposed by the Claimants, on the basis that Rule 6.62 of the PGOs is obsolete and unconstitutional.

Approach to a strike out application

14. The jurisdiction to strike out a proceeding should be exercised sparingly, and only in clear cases where the Court is satisfied that it has both the material and the assistance from the parties to reach a definite conclusion.
15. The relevant principles are discussed by the Court of Appeal in *Hocten v Wang* [2021] VUCA 53. The Court of Appeal said (at 11-13);

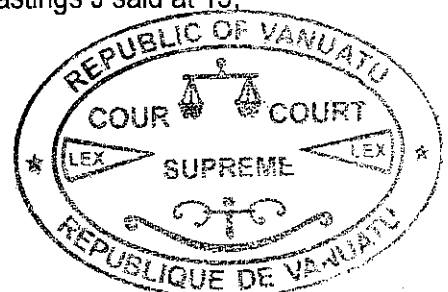
*"11. There is no jurisdiction to strike out a Claim in the Civil Procedure Rules, apart from a narrow provision in rule 9.10. However, pursuant to s 28(1)(b) and s 65(1) of the Judicial Services and Courts Act [Cap 270], the Supreme Court has jurisdiction to administer justice in Vanuatu, and such inherent powers as are necessary to carry out its functions. Rules 1.2 and 1.7 of the Civil Procedure Rules give the Supreme Court wide powers to make such directions as are necessary to ensure that matters are determined in accordance with natural justice. The jurisdiction to strike out is essential and must exist to enable the Supreme Court to carry out its business efficiently, so that hopeless or vexatious claims, causing unreasonable costs, do not prevent the Court from hearing proper claims. Such jurisdiction was recognised by this Court in *Noel v Champagne Beach Working Committee* [2006] VUCA 18.*

*12. The basis for striking out a proceeding is recognised in jurisdictions throughout the Pacific; see the New Zealand High Court Rules, r15.1, and *McNeely v Vaai* [2019 WSCA 12]. A pleading will be struck out:*

- a) if there is no reasonably arguable cause of action;*
- b) the claim is frivolous or vexatious;*
- c) it is otherwise an abuse of the process of the court.*

13. The jurisdiction should be exercised sparingly, and only in clear cases where the Court is satisfied that it has both the material and the assistance from the parties required to reach a definite conclusion. A claim should only be struck out when despite this material and assistance, and the chance to amend the pleadings to reflect that material, it cannot possibly succeed".

16. Striking out any statement of a case have been described by the Supreme Court as a "draconian remedy". In *Hungtali v Kalo* [2024] VUSC 136, Hastings J said at 15:



“Striking out any statement of a case is a “draconian remedy” (Asiansky Television plc v Bayer Rosen [2001] EWCA Civ 1792). Although striking out a claim is not inherently contrary to the Constitution’s guarantee of protection of the law, and equal treatment under the law or administrative action, in Article 5, the Court must nevertheless be cautious to ensure its exercise of discretion to strike out a claim does not violate those guarantees. A claim will not be suitable for striking out if it raises a serious factual issue which can only be properly determined by hearing oral evidence (Bridgeman v McAlpine-Brown [2000] LTL January 19, CA). Nor should a claim be struck out unless the Court is certain that the claim is bound to fail (Hughes v Colin Richards & Co [2004] EWCA Civ 266). In short, if a pleading raises a serious contested issue, then it should not be struck out and the issue should be determined after trial”.

Submissions

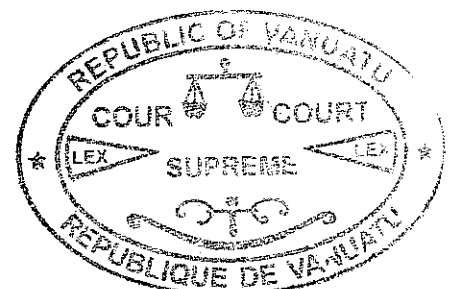
17. Neither counsel filed any written submissions. They relied on the pleadings and made oral submissions.

Defendant’s submissions

18. The Defendant acknowledges that the court’s discretion should be exercised sparingly, and that the Claimants case must be so clearly untenable that it cannot possibly succeed, referring to *Electricity Corp Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641 as applied in *Noel v Champagne Beach Working Committee* [2006] VUCA 18.
19. The Defendant submits that the claim is so clearly untenable that it cannot succeed. As such, the court must exercise its inherent jurisdiction to strike out the claim in its entirety. This is because the claimants are current members of the VPF, and so are not entitled to be paid out any accrued annual vacation leave, such entitlement only coming into effect on their resignation or retirement, in accordance with Rule 6.62 of the PGOs.

Claimant’s submissions

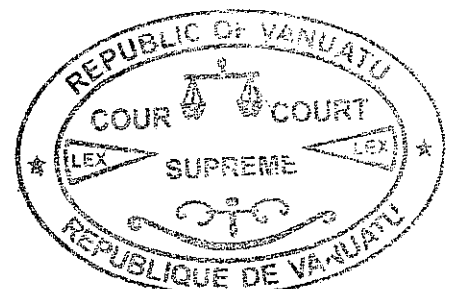
20. The Claimants oppose the application to strike out the claim.
21. The Claimants’ response is that Rule 6.62 is obsolete and does not match the real life situations of the Claimants, who currently face financial difficulties. Their financial circumstances could be better managed if they are paid the entitlements now, as opposed to retirement. Second, Rule 6.62 is unconstitutional as it is unfair for the Claimants not to have their entitlements now.



Discussion

22. There is no suggestion that the claim is frivolous, vexatious or an abuse of process.
23. The submissions made by counsel focussed on Rule 6.62 of the PGOs and whether the rule means that the Claimants have no reasonable cause of action. It is necessary then to consider not only Rule 6.62 of the PGOs but also the recent circumstances of accrued leave being paid out to serving Police Officers, as that is the basis for the claim.
24. Rule 6.62 is found in Chapter 6 of the PGOs, which contains the Terms and Conditions of employment. At Chapter 6.1, it is noted that the Police Act provides the framework for determination of the terms and conditions of employment for Members of the VPF which are set by s 82 of the Police Act (Cap 105). Members are paid such salaries and allowances fortnightly in arrears as may from time to time be approved by the COP (Commissioner of Police).
25. Rule 6.62 of the PGO governs the payment of accrued leave and says;

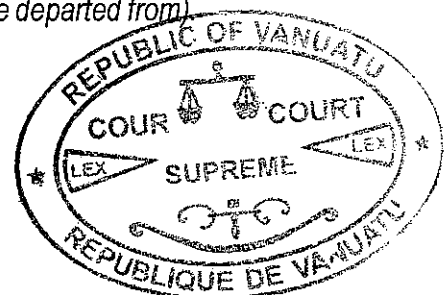
“ Any accrued annual vacation leave shall not be paid out until the individual leaves the VPF through resignation or retirement”.
26. Rule 6.62 is clear and is expressed in mandatory terms. However, despite Rule 6.62, accrued annual leave balances have been paid out to serving Police Officers of the VPF. The circumstances are explained in the sworn statement of John Taleo filed on 18 February 2024. Mr Taleo is the current Chair of the Police Service Commission.
27. Mr Taleo says that in December 2020, the Police Service Commission made a decision to accept the decision of the Public Service Commission to pay out 100 days of accrued leave on every leave balance in excess of 100 days. By letter of 2 December 2020, the then Chair of the Police Service Commission gave instructions for payment of 100 days leave across the board of every leave balance in excess of 100 days.
28. The Police Service Commission has now revoked that decision, based on Rule 6.2 of the PGOs. On 8 March 2024, Mr Taleo wrote to the Commissioner of Police and advised that with immediate effect, the decision of the past Commission dated 3 December 2020 was revoked with immediate effect. This is because the decision for payment of accrued leave was inconsistent with Rule 6.2. The directive issued was *“Furthermore, I demand your good office to **STOP** payment of accrued annual leave and also make sure that accrued annual leave is executed and processed in line with Clause 6.2 of the Police General Order (copy attached)”.*



29. Rule 6.62 should be read in conjunction with Chapter 1 of the PGOs, the introductory chapter. The PGOs are issued under the authority provided to the Commissioner of Police (COP) by s 6 of the Police Act (CAP 105).
30. Chapter 1 records that the authority to interpret and administer Force Orders including PGOs including the power to amend, repeal or waive any Force order either in general or in any particular case, is vested with the Commissioner of Police acting in accordance with any general directions of the Minister. Thus, the clear inference is that the PGOs, including Rule 6.62, can be amended, repealed or waived.
31. Chapter 1 also sets out that in the event of a conflict between PGOs and any other instruction or direction issues under the authority of the COP and the Police Executive, PGOs shall prevail unless a contrary intention is stated but where any conflict exists between the law and the PGOs, the law shall prevail.
32. A plain reading of Chapter 1 is that, even though expressed in mandatory terms, Rule 6.62 is not absolute. It can be amended, repealed or waived by the Commissioner of Police. It is subordinate to any conflicting law.
33. One possible interpretation of the decision to pay out accrued annual leave balances of serving Police Officers, despite Rule 6.62, is that there has been an amendment, repeal or waiver of Rule 6.62, whether intended or not.
34. Does the claim disclose a reasonably arguable cause of action?
35. The claim is poorly pleaded. It appears to be a claim for economic loss, but does not adequately plead such a claim. The claim alleges that the Defendant has been negligent, which is a matter for the Court to determine. In *Vanuatu Ferry Ltd v Republic of Vanuatu* [2024] VUCA 17, the Court of Appeal set out the test for whether a duty of care arises (at 28) and said;

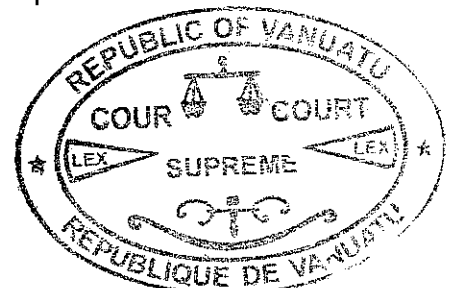
"In Vanuatu, the three stage test set out in Caparo v Dickman^[14] applies in considering whether a duty of care arises. The House of Lords, in that case, set out three requirements in establishing duty, first, reasonable foreseeability of harm to the claimant, second, proximity or neighbourhood between the claimant and the defendant and, third, whether it is fair, just and reasonable to impose a duty of care in such a situation. Caparo was considered by the United Kingdom Supreme Court in Robinson v Chief Constable of West Yorkshire Police.^[15]

"Properly understood, Caparo thus achieves a balance between legal certainty and justice. In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from)



In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable.”

36. The claim does not particularise either, what accrued leave each Claimant is seeking. The Limitation Act (CAP 212) will apply to parts of the claim, as the claim for accrued leave dates back to 2014, and so parts of the claim will be time-barred. This has not been raised by the Defendant.
37. That Rule 6.62 may be obsolete is a submission, not a cause of action. As to the submission that the rule is unconstitutional, as Mr Bong said in oral argument, the proper process would be to bring a claim under the Constitution.
38. The Defendant argues there is no reasonable cause of action because Rule 6.62 of the PGOs is expressed in mandatory terms, so precludes accrued annual leave being paid out until resignation or retirement.
39. So, the question for the purposes of the strike out application is whether Rule 6.62 is absolute? The payment of accrued annual leave is one of the Terms and Conditions of employment set out in Chapter 6 of the PGOs. Rule 6.62 is a mandatory provision that Police Officers are not to be paid out their accrued leave entitlements until either resignation or retirement. Yet, it is undisputed that a decision was made to pay out accrued leave to serving Police Officers.
40. On the face of it, and subject to the Limitation Act (CAP 212), there is a possible argument that by deciding to pay out accrued leave across the board to Police Officers prior to resignation or retirement, Rule 6.62 has been amended or waived. Chapter 1 of the PGOs envisages amendment or waiver of PGOs, which then are not absolute, as discussed above. The decision to do so is not necessarily in contravention of Rule 6.62, because at first blush it has been varied or waived. It is arguable that if Rule 6.62 has been amended or waived, there is a basis for the Claimants to seek early pay out of accrued leave. No doubt the Defendant will maintain it was a discretionary payment which gives no basis for a claim. It cannot be said, though, that it is so untenable that it should be struck out.
41. This has not been pleaded. An application for leave to file an amended claim could have been filed once the defence was filed. In that regard, *Hocten v Wang* is relevant. The Court of Appeal said that the appellant may have a claim, but it was not specifically pleaded. The Court said that the failure or omission may have required an amendment

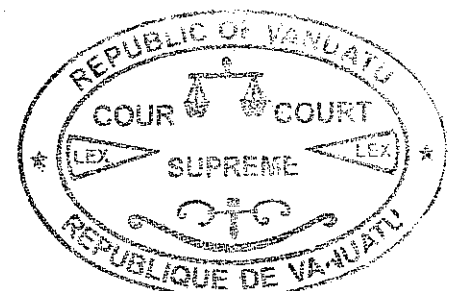


to the claim, but that is not fatal to it being considered as a possible successful basis of claim for the purposes of a strike out application. The Court went on to say that "*Claims should only be struck out if even on the best pleadings possible following amendment the claim is not reasonably arguable*".

42. In addition, the Court does not have both the material and assistance from the parties required to reach a definite conclusion. There is not a factual dispute, but material to the issue before the Court, is the extent to which accrued leave has been paid out since 2020. Was it a one off payment or has accrued leave been paid out to serving Police Officers on an ongoing basis since the decision was made in December 2020?
43. An available inference from Mr Taleo's letter to the Commissioner of Police, is that accrued annual leave of serving VPF officers has been paid out on ongoing basis since 2020, given that he issued a directive on 8 March 2024 to the Commissioner to stop payment of accrued annual leave. Ongoing pay out of accrued leave to serving Police Officers could arguably suggest the decision to do so has extended beyond an exercise of discretion. But then again it may not. However, it is an important piece of information, not available to the Court.
44. The defence sets out that the decision to pay out 100 days leave was to reduce leave payment entitlements for members of the VPF. Given that this is an application to strike out the claim, the Court would ordinarily expect there to be material before the Court to confirm that was the reason for the pay out of accrued leave.
45. For the purposes of the strike out application, the above matters are relevant to an assessment of whether Rule 6.62 is in fact mandatory or whether it has been amended or waived given the pay out of accrued leave.
46. Although the claim as pleaded is inadequate, the claim should not be struck out. Having regard to *Hocten v Wang*, there is a reasonably arguable cause of action, for the reasons set out above. That is not to be taken as any indication as to the merits. If the Court is minded to grant leave to file an amended claim, the spectre of indeterminate liability will likely be raised. Also, the Court does not have both the material and assistance from the parties required to reach a definite conclusion.

Result

47. The application to strike out the claim is declined.
48. The Claimants have liberty to file and serve an amended claim within 21 days.
49. The Defendant is to file and serve a defence 21 days thereafter.
50. **A conference is to be held on 30 August 2024 at 3.30pm.**



51. Costs are to lie where they fall, given the issue raised as to the adequacy of the claim.

DATED at Port Vila this 12th day of July 2024
BY THE COURT

