IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU

CIVIL CASE NO. 1 OF 1990

BETWEEN : BANQUE INDOSUEZ VANUATU LIMITED

(Appellant)

AND : MARIE-NOELLE FERRIEUX

(Respondent)

JUDGMENT

Banque Indosuez Vanuatu Ltd ("the Bank") appeals against the judgment of Cooke C.J. on 12th January, 1990, when he awarded Marie-Noelle Ferrieux ("Miss Ferrieux") damages for wrongful dismissal.

The facts:

The following facts emerge from the Chief Justice's findings of fact, which are not now disputed, and the agreed documents.

Miss Ferrieux was employed by the Bank as a Senior Executive. On 28 August, 1987, her boyfriend was alleged to have switched labels on wine bottles at a local store. The incident blew over and there has never been any suggestion that Miss Ferrieux was personally involved. Nevertheless gossip spread. A number of bank employees presented a petition to the Acting Manager (the Manager being on leave) asking for clarification. He spoke to Miss Ferrieux, who

assured him that she had nothing to do with the incident.

The Manager returned from leave soon afterwards. Instead of making enquiries, which would have shown that Miss Ferrieux was innocent, he decided to treat the matter very formally. He prepared two letters. One contained her resignation "on the grounds of personal convenience"; the other stated her innocence but suggested that her boyfriend was guilty. The Manager demanded that she sign one or the other before she left the office. Not surprisingly, she refused to sign either. She was prepared to sign a letter stating her innocence, but said that she would write it herself.

In her position, we would have adopted the same attitude. The alternatives presented were quite unreasonable.

The next day, 22nd September, Miss Ferrieux attended a meeting with the petitioners. The Manager told them that he had spoken to the Manager of the store, who had told him there was no evidence that Miss Ferrieux was involved in the incident.

That should have been the end of the matter. But on the following day, 23rd September, the Manager interviewed Miss Ferrieux and asked what she was going to do. She did not think that any action was required. She became annoyed and said that she would make a formal complaint about his

handling of the matter. At this the Manager began to shout at her, and told her that she was suspended immediately. She returned to her office, but a few minutes later he followed her and told her:

> "....You are suspended immediately: you are forbidden to talk to anyone in the bank. Return the documents of Inpact (the trust company which she headed). Give me your keys; and give me details of your appointments".

He demanded that she come to his office the next morning and told her "I have destroyed bigger people than you and I will destroy you". She went home.

The Chief Justice found that:

> "The Manager here in requiring the Plaintiff to sign only his letter of innocence ... and suspending the Plaintiff when she refused to sign, the Manager and Defendant were in breach of the implied term of the contract of employment that the employer would not without reasonable cause conduct itself in a manner calculated or likely to damage or destroy the relationship of confidence and trust between the contracting parties; and that the breach, going to the root of the contract, was so fundamental as to constitute a repudiation of the contract of employment."

Some two hours after Miss Ferrieux left the office the

Manager sent her a letter requiring her to return to work immediately. She did not go. She did go on 24th September, and handed him a letter of complaint. It was long intemperate, and highly critical of the Manager. She said that "...if the appropriate steps are not initiated by the end of this week to resolve these complaints ... I shall be obliged to seek redress through higher channels ..." She left.

On 25th September, the Manager sent her another letter ordering her back to work. She did not go. But she did complain in writing to the head office of the bank, asking for "quick measures" to be taken.

Miss Ferrieux remained at home, but there was further correspondence. She wrote to remind the bank of certain deadlines for re-registration of companies. She wrote to exercise her right as an employee to buy shares. She received a letter from the Assistant Manager and replied on 14 October that she had referred the matter to head office and was awaiting their instructions. On 16 October the bank wrote claiming "...the right to dismiss you without notice ..." but stating that "... we are disposed to accept your resignation ..." and suggesting a meeting. The same day she wrote to head office setting out what she considered to be "...the minimum effective procedure..." (move the Manager, dismiss her assistant, severely discipline the person behind the petition, and severely rebuke all other petitioners.)

On 22nd October, Miss Ferrieux replied to the letter of 16th stating firmly that she was not at fault; that she was

prepared to take legal action to protect her interests; and that "...in no circumstances shall I resign...". She agreed to meet, with her lawyer, on 23rd October.

The bank's lawyer was absent and the meeting was postponed until 30th October. The agreed minute of that meeting records that Miss Ferrieux's lawyer suggested that "...if the bank was willing to accept Miss Ferrieux's terms of reinstatement, there would be no need to resort to official channels...". The bank's lawyer asked the Manager if he would consider reinstatement; and he made it clear that he would not have her back because of her letters of complaint to Paris. The minute concludes that Miss Ferrieux's lawyer "...stated that there was evidently no point in continuing with the meeting and (Miss Ferrieux) would proceed with the legal action...".

On 3rd November, 1987, the bank wrote to Miss Ferrieux purporting to dismiss her, but offering her the opportunity to resign within 7 days. On 6th November it advised her that her work permit had been returned for cancellation. And on the same day she wrote to head office. She explained that "...it was (the Manager's) behaviour which had made it impossible for me to work under normal conditions..." She said that she had always been and still was willing to return to work and did not want to go to law, but that she could "...no longer delay taking the actions I have attempted for more than 6 weeks to avoid..." and had instructed her lawyer to proceed.

According to a chronology which we were given a letter

before action was written on 10th November.

The law:

The main issue is whether repudiation of a contract of employment by the employee automatically ends that contract; or whether it is ended only when the employee accepts that repudiation.

Although the statement of claim pleads a repudiation by the bank which was accepted by Miss Ferrieux, all of the argument at the trial, and consequently the judgment now appealed, was based on the assumption that a sufficiently serious breach of contract by an employer would bring the contract to an end automatically, without the need for acceptance.

There has been a line of cases in England which tends to support that view. We do not propose to recite them. They are usefully reviewed in Gunton -v- Richmond on Thames L.B. C. [1981] 1 Ch 448. That case shows that the law has now been redirected to the basic principle stated by Viscount Simon L.C. in Heyman v Darwins Ltd [1942] AC 356 (at p 361):

> "repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation on the one side, and acceptance of the repudiation on the other"

At common law the usual rule of contract applies to a contract of employment. It is not ended by the repudiation of one party. It is only ended when the other party accepts that repudiation.

There is an alternative claim under Section 53 of the Employment Act, which states:

BREACH OF CONTRACT BY EMPLOYER

53 (1) If an employer illtreats an employee or commits some other serious breach of the terms and conditions of the contract of 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 is a general restatement of the position at common law, save that it is more favourable to an employee in that he may terminate the contract for" ill treatment " or "...some other serious breach of contract of employment...", which may not amount to a repudiatory breach at common law. It makes clear there some action by the employee is required; and subsection (2) draws attention to the consequence of delay.

In this case Miss Ferrieux succeeds in her common law claim and it is not necessary to consider the Employment Act except as to damages.

Should there be a new trial?

Mr Maconachie urges us to send the case back for retrial on the basis that the real issue (whether Miss Ferrieux accepted the repudiation) was not fully investigated. We think that would be inappropriate. The basic facts have been established by the trial judge. What happened after repudiation is recorded in the agreed correspondence and the minute of the meeting on 30 October. It is not now a question of whom to believe. It is a question of inferences to be drawn from established facts and in that situation we are as well placed as the trial judge. We have had the benefit of argument from Counsel on the issue. It would be unfair to both parties to expose them to a further trial when the matter can be determined here.

Conclusions

Before applying the law to the facts we make two general points. First, the authorities tend to refer to the injured party being required to choose between acceptance of the repudiation and affirmation of the contract. We think that terminology unfortunate. Any principle of law has to operate in the real world. In many cases of dismissal it is obvious that the employer is not prepared to have the employee back. It is unreal to say that the employee must choose between acceptance and affirmation. In reality he has no choice. But acceptance of the inevitable is still acceptance. The issue is not "which did he choose?" but "did he accept the repudiation?" Evidence which suggests

that he tried to keep the contract alive is merely evidence against such acceptance.

In practice an employee who cannot go back is forced to take some step (such as not returning to work, or taking another job) from which a court will readily infer that he has accepted the employer's repudiation.

Secondly, we have been referred to a number of cases which suggest that the employee must accept the repudiation within a limited period. We do not think that those cases establish any principle. Undue delay in taking any positive step is simply evidence suggesting that the repudiation has not been accepted.

The Manager's actions - the act of repudiation - made continuance of Miss Ferrieux's contract impossible unless something changed. He was not dealing with an office girl. He was dealing with a senior experienced officer holding a responsible post. The relationship of trust and confidence was destroyed. Miss Ferrieux was entitled to treat the contract as ended. As the correspondence shows she did not want to do this. She wanted to return to her job. But before she could do so she needed to know that the trust and confidence would be restored. Changes would be required. To ascertain whether this would be possible she needed a reasonable time to negotiate. Her letters refer to "... appropriate steps...", "measures" and "the minimum effective procedure."

She could not be expected to work again with the Manager. It was not unreasonable in the circumstances to

enquire whether she could work under someone else. To pursue these enquiries she needed time. Her enquiries were still continuing when the parties met on 30th October, and she was told that the bank would not have her back. It was only then that she would have known that there was no possibility of returning. Her lawyer then stated that she would take legal action. That statement may be taken as acceptance of the repudiation. Certainly Miss Ferrieux's letter of 6th November to head office is such an acceptance.

Mr Maconachie points to references in her letters to work required to be done for clients of the bank, her request to exercise an employee's right to buy shares, and her attempt to preserve her concessionary mortgage as an employee. He argues that by these letters she is shown to have affirmed the contract. If so, she could no longer accept the repudiation. We are unable to accept that interpretation. The letters were written at a time when it was still open to Miss Ferrieux to accept the repudiation. It was reasonable for her to attempt to preserve her rights as an employee in the mean time.

We are satisfied that Miss Ferrieux accepted the repudiation at the latest in her letter of 6th November, 1987. It follows that the appeal on liability fails.

Damages

The bank challenges only three of the heads of damage allowed by the Chief Justice.

1. The 13 months claim

This was awarded under clause 4(c) of Miss Ferrieux's contract which provides:

> "4(c)" End of the year bonus.
> The executive, if her services are recognised as satisfactory, will benefit from a double month payment. This renumeration is being granted as a bonus and does not constitute a right..."

On the face of it this payment is purely discretionary. Miss Ferrieux gave evidence that the payment is a traditional practice which was always observed. The Manager simply said "The 13 month (payment) still operates for some people." There was no independent evidence that this is an established custom.

The issue here is not whether she would probably have been paid the money, but whether she was entitled to it. Damages must be assessed on the assumption that the party in breach would have so arranged its affairs as to pay the the innocent party the smallest possible sum. An apparently discretionary payment may be shown on the facts to be an entitlement (see, e.g. Powell v Braun [1954] 1 All E.R. 484). But in this case there was insufficient evidence to establish that Miss Ferrieux was entitled to such a payment and it must therefore be disallowed.

2. Severance Pay

The Chief Justice awarded this pursuant to sections 54 and 56 of the Employment Act (as amended). The relevant parts read:

Severance Allowance

54 "(1) Subject to section 55 where an employee has been in continuous employment for a period of not less than twelve months, with an employer on a contract of employment entered into before or, on or after the date of commencement of this Act, and -

(a) the employer terminates his employment;

The employer shall pay severance allowance to the employee..."

AMOUNT OF SEVERANCE ALLOWANCE

56. (1) Subject to the provisions of this Part, the amount of severance allowance payable to an employee shall be calculated in accordance with subsection (2).

(2) Subject to subsection (4) the amount of severance allowance payable to an employee shall be-

(a) for every period of 12 months-

(i) half a month's remuneration, where the employee is remunerated at intervals of not less than 1 month;

(ii) 15 days' remuneration, where the employee is remunerated at intervals of less than 1 month;

(b) for every period less than 12 months, a sum equal to one-twelfth of the appropriate sum

calculated under paragraph (a) multiplied by the number of months during which the employee was in continuous employment.

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

(7) For the purpose of this section the remuneration which shall be taken into account in calculating the severance allowance shall be the remuneration payable to the employee at the time of the termination of his employment.

We have had considerable difficulty with section 56(4). In this context, we take "shall" to mean "must". So that where a court finds that a dismissal was "unjustified" it is obliged to make an award under this head, subject to a maximum figure. But the Act gives no guidance as to how that award is to be assessed, whether it is intended to be punitive or merely compensatory, what considerations are to be taken into account, or whether it is additional to or to be set off against any award of damages at common law. We must try to extract those guidelines from general principles and from the rest of the Act.

The Act read as a whole provides certain minimum standards for employees. It does not affect any law, custom, award or agreement which ensures more favourable conditions. (section 6)

The intention of Part XI, which deals with severance allowances appears to be no more than to ensure that at the end of his employment an employee will receive, in one way or another, a minimum sum calculated according to his length of service. We say "in one way on another" because under section 57 the employer may deduct from severance allowance certain other payments made by him for the benefit of the employee.

It is well established at common law that on wrongful dismissal an employee cannot be awarded aggravated or punitve damages. Nor can he be awarded damages for any difficulty he may have in obtaining fresh employment. (Addis v Gramophone Co Ltd [1909] A.C. 488.) It is argued for Miss Ferrieux that section 56(4) overrides that rule and provides statutory authority for such awards.

If a statute is intended to change the existing law it must say so in clear terms. If the draftsman had intended to exclude such well established principles we would expect him to say so much more clearly. The subsection can, and therefore should, be interpreted in accordance with the law as it was before the Act was passed.

In our view section 56(4) does not give the court power to award a sum akin to aggravated or punitive damages, or for loss of career prospects. It merely enables the Court to compensate an employee for any special damage which he has suffered by reason of an unjustified dismissal, if the

basic severance allowance is insufficient for that purpose. The law presumes that a person should not be compensated twice for the same wrong, so that any award under this statutory head must be set off against any award of damages at common law.

The Chief Justice appears to have awarded damages under this head by reason of the manner of the dismissal. In our view that is not permissible and only the basic severance allowance should be paid.

In addition to her salary Miss Ferrieux received other benefits. For the purpose of calculating the allowance the Chief Justice interpreted "renumeration" to include "all allowances", by which we take him to mean the value of all additional benefits. Mr Maconachie for the bank argues that the allowance should be calculated only on salary.

"Remuneration" is not defined in the Act. Section 16(2) says that part of remuneration may be paid in the form of allowances, but only with the written approval of a labour officer. Section 16(8) refers to payment of "...remuneration and allowances..." which suggests that they are different things. Section 17 refers to receipts for remuneration, which are only appropriate to payments of money.

The term should be given the same meaning throughout the Act. In many places "remuneration" clearly means "payment in money." Accordingly we hold that "remuneration" for the purpose of section 56(2) means salary only.

In this case severance allowance would be, as calculated by the bank, 587,128 Vatu and 11303.31 FF. But as this sum is exceeded by Miss Ferrieux's common law damages, the actual figure is academic.

Career Damages

The Chief Justice awarded damages for loss of future opportunities, in particular difficulty in obtaining future employment. Such damages cannot be awarded at common law, and we have held that section 56(4) of the Act does not give the court that power.

Accordingly the award under this head must be set aside.

The appeal is allowed to the extent that damages are reduced from 18,477,870 VT and 221,772.76 FF by:

(i) 13th month claim	531,738 VT	10,236.96 FF
(ii) Severance allowance	4,179,843 VT	58,068.39 FF
(iii) Career damages	7,000,000 VT	
	11,711,581 VT	68,305.35 FF
to	6,766,289 VT	153,467.41 FF

As each party has been partially successful in this appeal, we make no order as to costs. The order for costs in the court below stands.

Dated at Port Vila, this 23rd day of October, 1990.

REPUBLIC OF VANUATU COUR D'APPEL — COURT OF APPEAL REPUBLIQUE DE VANUATU

Mr Justice G. Ward	Mr Justice G. Martin	Mr Justice E. Goldsbrough
Court of Appeal Judge	Court of Appeal Judge	Court of Appeal Judge