

BETWEEN: Tony Kanegai
Appellant

AND: Telecom Vanuatu Limited
Respondent

Date of Hearing: 4th May 2021

Before: Hon. Chief Justice Vincent Lunabek
Hon. Justice Raynor Asher
Hon. Justice Richard White
Hon. Justice Oliver A Saksak
Hon. Justice Dudley Aru
Hon. Justice Viran M Trief

Appearances: P Fiuka for the Appellant
J Malcolm for the Respondent

Date of Decision: 14 May 2021

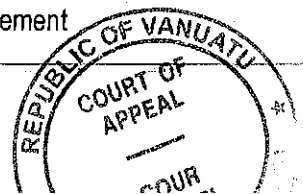
JUDGMENT

Introduction

1. The appellant appeals the judgment of the Court below dismissing his claim for payment of three (3) months' notice and overtime following his early retirement by Telecom Vanuatu Limited (TVL).

Background

2. Mr Kanegai began his employment with TVL as a technician on 31 August 1989. The TVL Internal Regulations set out the terms and conditions of his employment.
3. On the 11 July 2011 all TVL staff including Mr Kanegai were informed by email that their working hours were increased to 40 hours per week or 8 hours a day. Subsequently this was incorporated into the Internal Regulations. The provisions relating to overtime were also amended to reflect this change. The provisions relating to resignation remained the same.
4. Mr Kanegai continued to work until January 2015 when his early retirement was first raised with him by Mr Bheekhoo the TVL Chief Executive Officer. Discussions on his early retirement



occurred on a number of occasions after that until 25 June 2015 when he received a letter notifying him of his early retirement. The letter reads:

"25 June 2015

Mr Tony Kanegai
C/ Telecom Vanuatu Limited
Port Vila

Re: EARLY RETIRMENT

Dear Mr Tony

Refer to our early discussions regarding the above, please find below TVL's personal proposal for your early retirement effective the 30 June 2015.

Outstanding leave 51.25 days	Vatu 591.346
Severance	Vatu 6.457.500
VNPF 4%	Vatu (23.654)
Severance partly paid	<u>Vatu (1.929.293)</u>
	Vatu 5.095.899

Telephone Bill if you have will be deducted on your salary
The payment will be settled by 30 June 2015.

Please send us your response within three working days as from today

Yours faithfully
(signed)

Prakash Bheebhoo
The Company
Telecom Vanuatu Limited"

5. Mr Kanegai's employment came to an end on 30 June 2015, five days after receiving his letter. At the relevant time his salary was VT 250,000 per month.
6. Following receipt of his letter Mr Kanegai raised the issue of three months' notice with TVL without success which led to the filing of his claim on 28 June 2018. Relevant provisions of the Internal Regulations which were later amended in 2011 as referred to above provide as follows:-

"Clause 6 – Standard Working Hours

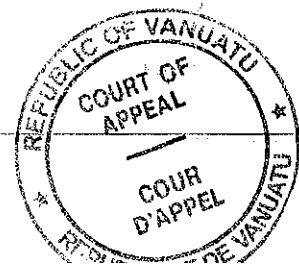
The weekly working hours consist of 36 hours and a quarter , that is five days of 7 hours and a quarter , each working day.

Clause 13.1.2 – Overtime

Overtime is any time worked in excess of the 36 hours ¼ per week in any one month based on that particular month.

In such a case the formula for calculating remuneration is as follows

1 h overtime equals $H \times 150 \%$.



Clause 13.1.3 – Conversion of overtime hours to leave

7 and a ¼ man hours are equal to 1 leave day. The day must be taken within a financial year. Such leave shall not be accumulated or accruable from one year to the next

Clause 32 – Resignation

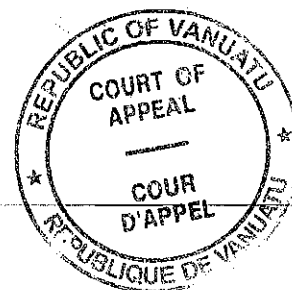
32.1 Any employee wishing to resign shall give due notice to the Management in accordance with section 49 of the Employment Act No 1 of 1983.

Severance payment entitlement is due only after 10 years of continuous service with the company except in the case of dismissal for professional default or conduct."

7. The primary Judge noted that it was not disputed that the appropriate amount of notice or payment in lieu of notice was VT 750,000. The issue was whether Mr Kanegai was entitled to be paid the notice period.
8. The primary Judge accepted that negotiations about Mr Kanegai's early retirement begun in January 2015 and he continued to work and was paid accordingly until his retirement in June. The primary Judge found that *"TVL effectively gave Mr Kanegai more than 3 months notice of his ceasing employment , through discussions had in January and February 2015 with Mr Bheekhoo."*
9. Regarding the issue of overtime, the primary Judge noted that this was a matter raised for the first time in the claim. The primary Judge found at paragraphs 37 to 39 that:
 37. *The first inkling TVL had that there was an issue with the change of working hours came when Mr Kanegai's claim was filed in the Supreme Court almost 3 years after he had left TVL's employ .*
 38. *There is no impediment in law to TVL altering the terms and conditions of employment. Staff can object if they so choose, or negotiate better remuneration if warranted. Nothing of that sort appears to have followed the change of working hours.*
 39. *On that basis alone Mr Kanegai's claim for overtime has no merit."*
10. The primary Judge dismissed the claim on the basis that Mr Kanegai was not entitled to any payment for the notice period or for overtime.

Discussion

11. The appeal in summary raises the two main grounds. First whether Mr Kanegai was entitled to be paid overtime and secondly whether he was entitled to be paid 3 months salary in lieu of notice.



Three (3) Months Notice

12. The TVL Internal Regulations recognised that an early termination of employment requires the giving of notice in line with s 49 of the Employment Act.

13. Section 49 relevantly provides :

49. Notice of termination of contract

(1) *A contract of employment for an unspecified period of time shall terminate on the expiry of notice given by either party to the other of his intention to terminate the contract.*

(2) *Notice may be verbal or written, and, subject to subsection (3), may be given at any time.*

(3) *The length of notice to be given under subsection (1) –*

(a) *Where the employee has been in continuous employment with the same employer for not less than 3 years, shall be not less than 3 months;*

.....

(4) *Notice of termination need not be given if the employer pays the employee the full remuneration for the appropriate period of notice specified in subsection (3).*

...."

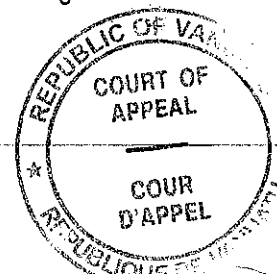
14. Mr Fiuka submitted that TVL did not comply with s 49 of the Act by giving the appropriate notice. Mr Kanegai was only given 5 days after receiving his letter of retirement. Similarly it was submitted that negotiations as found by the primary Judge could not constitute notice for the purposes of s 49.

15. Mr Malcom conceded that no notice was given by TVL in compliance of s 49. In addition he accepted that the correct amount to be paid in lieu of notice was VT 750,000.

16. We note the respondent's concession and on that basis allow the appeal on that ground.

Overtime

17. The primary Judge accepted that the issue of overtime was raised for the first time in Mr Kanegai's claim filed some three years after Mr Kanegai had ceased employment with TVL. And it was open to him to object to the new working hours but no steps were taken. We agree with the primary Judge and note that there was no evidence of objections raised to the new working hours or attempts to renegotiate terms of employment when the new working hours were first introduced.



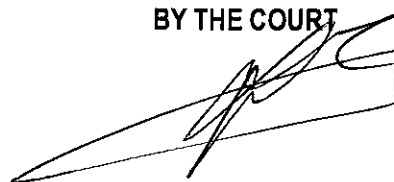
18. Mr Fiuka conceded that as a matter of contract Mr Kanegai by his conduct accepted the new working hours by continuing to work until his employment came to an end.
19. We dismiss this ground of appeal on that basis.

Result

20. The appeal is allowed in part. The appellant is entitled to :
- a) 3 months payment in lieu of notice in the sum of VT750,000;
 - b) With interest at 5% per annum from 30 June 2015; and
 - c) Costs on a standard basis to agreed or taxed by the Master.

DATED at Port Vila this 14th day of May, 2021

BY THE COURT



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Hon. Chief Justice, V. Lunabek

