IN THE MAGISTRATE COURT OF
THE REPUBLIC OF VANUATU

Civil
Case No. 24/ 2930

BETWEEN: **DOVAN ANOL LULU**
Port Vila

Claimant

Public Solicitor's office,
Port Vila, Efate

Claimant's lawyer

AND: **BRAMLEY CONSTRUCTION LIMITED**
Port Vila

Defendant

Date of hearing: *30 April 2025*

Before: *Magistrate P. Toaliu*

Copy: *Vira. H of the Public Solicitor's office for the claimant*

N H Bramley of Bramley Construction

Decision on leave to file claim out of time

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1. The claimant filed a claim on September 17, 2024 along with an application for leave to file claim out of time.

2. The defendant filed a response and a sworn statement responding to the claim and claimant's application for leave to file claim out of time on October 11, 2024.

3. The application for leave to file claim out of time must be considered.

REPUBLIC OF VANUATU MAGISTRATE COURT REPUBLIQUE DE VANUATU

REPUBLIQUE DE VANUATU MAGISTRATE COURT REPUBLIC OF VANUATU

Background

4. The claimant commenced employment with the defendant in 2009 as a painter.

5. He last turned up to his place of employment on October 2, 2015, and on October 19, 2015, his employment was terminated.

6. In November 2015, the claimant filed a complaint to the Department of Labor in Port Vila. Subsequently a round table meeting was organized was held in that same month between the defendant and the Labor Department on behalf of the defendant where the defendant rejected any entitlements claimed by the claimant. No resolution was reached during the meeting.

7. According to the claimant, there was no progress from 2019 to 2021 due to the Corona Virus Epidemic.

Submissions

8. The claimant submitted in his application for leave to file claim out of time that after his termination, there was no progress in pursing his case from 2019 until 2021 due to the Corona Virus Epidemic.

9. The defendant submitted that the claim is significantly out of time and should not be allowed considering the provisions of the Employment Act and Limitation Act. The claimant filed his claim 9 years after termination of his employment.

Consideration

10. I consider the relevant provisions of the Employment Act and the Limitation Act.

11. Section 3 of the Limitation Act states:

3. Limitation of actions of contract and tort and certain actions

(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say –

(a) actions founded on simple contract or on tort;

(b) actions to enforce a recognizance;

(c) actions to enforce an award, where the submissions is not by an instrument under seal;

(d) actions to recover any sum recoverable by virtue of any Act, other than a penalty or forfeiture or sum by way of penalty or forfeiture:
Provided that –

REPUBLIC OF VANUATU
MAGISTRATE COURT
REPUBLIQUE DE VANUATU

(i) in case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contact or such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years; and

(ii) nothing in this subsection shall be taken to refer to any action to which section 5 applies.
(2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.

(3) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued:

Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

(4) An action shall not be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

(5) An action to recover any penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any Act shall not be brought after the expiration of two years from the date on which the cause of action accrued:
Provided that for the purposes of this subsection the expression "penalty" shall not include a fine to which any person is liable on conviction of a criminal offence.

(6) Subsection (1) shall apply to an action to recover seamen's wages, but save as aforesaid this section shall not apply to any cause of action within the jurisdiction of the Supreme Court which is enforceable in rem.

(7) This section shall not apply to any claim for specific performance of a contract or for any injunction or for other equitable relief, except in so far as any provision thereof may be applied by the court by analogy in like manner as has, prior to the commencement of this Act, been applied.

12. Section 20 of the Employment Act states:

20. Period of limitation

No proceedings may be instituted by an employee for the recovery of remuneration after the expiry of 3 years from the end of the period to which the remuneration relates.

REPUBLIC OF VANUATU
MAGISTRATE
COURT
REPUBLIQUE DE VANUATU

13. The claimant claims for unpaid entitlements to which the defendant denies due to the termination of his contract.

14. In *National Bank of Vanuatu v Leiasmanu Cullwick* [2002] VUCA 39, the Court of Appeal interprets and sets the scope of section 20 of the Employment Act. In relation to this, the court states that:

In our opinion s.20 is limited in its operation to periodic payments that become due to employees during the currency of a contract of employment. The expression covers ordinary wages paid periodically whilst an employee is at work but extends to include annual leave and sick leave payments that become due whilst the contract of employment remains on foot: see s.31.

15. On the question of whether the time bar in s.20 is mandatory or discretionary, the Court further gave opinion that:

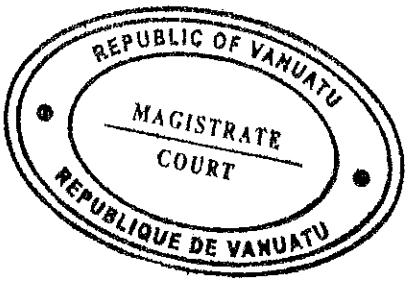
In the context of the Employment Act we are unable to think of any reason why the time limit in s.20 would be merely discretionary. Why should the time limit apply to some payments of remuneration, but not to others, or to some employees and not to others? Further, if the time limit was intended to operate in some but not all situations, it could be expected that Parliament would have given an indication of the factors which should influence the exercise of the discretion and of the purpose that the discretion was intended to achieve. The absence of the indication of this kind lends weight, in our view, to the conclusion that s.20 should be construed as imposing a mandatory time limit. However, as we have already explained, the mandatory time limit only applies in respect of "remuneration".

16. Considering this interpretation, the claimant's claim of annual leave payment, public holiday and notice payment fall under the heading of renumeration and are therefore barred by s.20.

17. I will now address the claimant's claim for a severance payment, which is not considered part of 'remuneration' under this interpretation. The claimant is not restricted by Section 20 of the Employment Act from pursuing this claim.

19. Section 3 of the Limitation Act on the other hand imposes a six-year limitation period for contract actions. This means that any simple contract-related claims must be filed within six years from the date the cause of action arose.

20. The claimant's employment was terminated on October 19, 2015, yet he did not file his claim until 2024, which is three years beyond the required six-year filing period.



21. The claimant attributes his failure to file within the six-year period to the defendant's lack of response to letters from the Vanuatu National Workers Union and the impact of the COVID-19 pandemic from 2019 to 2021.

22. I am unable to accept the claimant's reasons for failing to file his claim within the six-year limitation period from when the cause of action arose. Despite the Covid-19 epidemic within the period of 2019 – 2021, the courts were still operational and legal services were still available.

23. There is no explanation for the claimant's delay in filing between 2017-2018 and again from 2021-2023.

24. The claimant's claim for severance pay out of time is barred by section 3 of the Limitation Act.

Order

25. The claimant's application for leave to file claim out of time is hereby denied.

26. The defendant is entitled to cost of VT10,000 payable within 30 days.

DATED at Port Vila this 30 Day of April 2025

BY THE COURT

REPUBLIC OF VANUATU MAGISTRATE COURT REPUBLIQUE DE VANUATU

Magistrate