

Supreme Court of Vanuatu
(Mr Justice Cooke)
Civil Case No. 109 of 1988
Hearing: 7 to 10 November 1989
Judgment:

Mr Di Suvero instructed by Mrs S. Bothmann Barlow for Plaintiff.
Mr Sandford for Defendant.

Points of Law:

The Employment Act No. 1 of 1983 (Vanuatu) in particular:
Sections 6, 12, 18, 48, 50, 53 to 57.
The Employment (Amendment) Act No. 33 of 1989.

CASES CITED:

HANLEY v PEASE and PARTNERS LTD (1951) 1 K.B. 698.

BLISS v SOUTH EAST THAMES REGIONAL HEALTH AUTHORITY (1987) COURT OF APPEAL,
20 INDUSTRIAL CASES REPT. 700.

HEYMAN v DARWINS LTD (1942) A.C. 356.

MOSCHI v LEP AIR SERVICES LTD (1973) A.C. 331.

BURNS PHILP (VANUATU) LTD v DONALD JOHN MAKI. APPEAL CASE NO. 8 OF 1988.
VANUATU COURT OF APPEAL.

Dv LETHABY v HORSEMAN ANDREW & KNILL LTD (1975) 1 RLR. 119.

ROBERTSON, G.N.D. KING v CURICOR TRANSPORT LTD (1972) IRLR. 70.

PAYZU LIMITED v SAUNDERS (1919) 2 K.B. 581.

WOODAR INVESTMENT DEVELOPMENT LTD v WIMPEY CONSTRUCTION U.K. LTD (1980)
1 W.L.R. 277.

WOODS v W.M. CAR SERVICES (PETERBOROUGH) LTD (1981) 1 C.R. 666 and 676.

COURTAULDS NORTHERN TEXTILES LTD v ANDREW (1979) L.R.L.R. 84.

BROWNE v DUNN (1984) 6 R.67 H.L.

TEXTS:

CHITTY ON CONTRACTS, 24TH ED. 1977.

CROSS ON EVIDENCE, 3rd Australian Edition.

THE SUPREME COURT PRACTICE 1988 Part 1. 06/2/7 - 06/2/7A - 027/1 - 27/3/2.

JUDGMENT

COOKE CJ: The Plaintiff in this case was engaged by the Banque Indosuez Vanuatu Ltd under a contract of employment on the 30th September 1986 for a period of three years retroactively commencing 1st July 1985 and expiring on the 1st July 1988.

By a letter dated the 14th August 1989 the Manager of the Banque Indosuez confirmed an extension of the contract until 31st December 1988. Certain terms of the contract were modified mainly to provide for a changed remuneration scheme and redefined Plaintiff's position and responsibilities as Chief Executive of a newly formed subsidiary English type Trust Company called INPAC.

On the 28th August 1987, a friend of the Plaintiff was involved in some incident at the old Ballandes' grocery store allegedly altering price labels on French wine. This incident will hereafter be referred to as "The Ballande Incident".

Following this; rumours seemed to circulate about Vila town that the Plaintiff was involved in this. These rumours were obviously heard by many, if not all, the staff of the Bank with the result a petition dated the 9th September 1987 was drawn up by the Bank employees and charged that the Plaintiff during working hours had participated in the Ballande incident. The petition was sent to the Acting Manager of the Bank requesting all light be shed on the incident.

The Acting Manager called the Plaintiff and told her of the petition. She told the Acting Manager that she was totally innocent and had nothing to do with the Ballande incident. Her explanation was accepted by the Acting Manager but he referred the matter to the Manager on his return from Paris on the 19th September 1987.

On the morning of the 21st September the Plaintiff was called to the Manager's office. The Assistant Manager was also present. She stated she was asked to give the Manager details of what happened regarding the Trust Company Inpac since his absence in Paris. She stated she explained the detail of the dealings of Inpac. She said that after reviewing the position

of Inpac, the Manager took from his drawer two letters. This is not disputed. He showed one of them to the Plaintiff.

The Plaintiff stated that the Manager demanded she must sign one of the two letters before she left the office that day. The Manager denies this and said he only requested her to sign one or other of the letters. By the demeanour of the Manager in the witness box I am inclined to believe that he did so demand. The Plaintiff read the first letter and noticed the letter referred to the implication of a third person in the Ballande incident, so she stated she could not sign such a letter but would produce her own letter of innocence.

On the 22nd September 1987 the Plaintiff returned to the Manager's office and was informed of a meeting with the petitioners and he stated she should be present. The Manager stated he gave the Plaintiff the option of attending. At the meeting with the petitioners the Manager indicated that he did not like petitions and stated that he had spoken to the Manager of Ballande and was informed there was no evidence against the Plaintiff having been involved in the Ballande incident. The meeting ended by the petitioners encouraging the Plaintiff to sue the person or persons who started the rumour.

On the 23rd September the Plaintiff saw the Manager in his office. She said when she came into the room, he said, "What do you intend to do." She was not asked to sit down. The Plaintiff said - "I do not understand what you are trying to do - you know I am innocent, why do you keep pressing me to do something?". The Manager did not answer. The Plaintiff then said "the only -- only one who can harm me is you as my employer and you are hurting me". She could see he was angry. The Plaintiff at this juncture broke down and started to cry.

After a short adjournment the Plaintiff continued - "The Manager was silent, I could see him growing tense" she said, "I said because of your demands on me I have decided to put my complaint in writing against you". She said she was referring to the inappropriate demand put to her by the Manager - his attitude to her. She then said "I will bring the letter the next day". The Manager got angry and said "you are suspended immediately" - he shouted at her. The Plaintiff said "why?". The Manager said she was unable to work - she was not in a condition to work and that what she said about complaining was the proof. The Plaintiff said the meeting ended and she left the Manager's office and went to her own office. That about ten minutes later the Manager opened the door of her office

and rushed in. She was sitting behind her desk. The Plaintiff said "he stood there facing me and said you are suspended immediately, you are forbidden to enter your office, you are forbidden to talk to anyone in the bank. Return all the documents of Inpac - give me back the Bank keys and give me details of your appointments in New Caledonia." The Plaintiff stated she said - "You are suspending me on insupportable and unfair grounds - can you please confirm the reasons in writing". She said his answer was "No". He was very angry - speaking in a loud voice. He was pacing up and down. He had tears in his eyes. The Plaintiff then said - she took the keys out and handed them to him - that he indicated by gesture that he did not want the keys - it was the end of the day. The Plaintiff then told the Manager she would bring a letter the following morning of what she intended to do. The Manager said "Come to my office at 7.30 a.m. - do not go to your office - give me a detailed account of Inpac and the list of your appointments in New Caledonia". After he said the words "Come to my office the next day", he said "I have destroyed bigger people than you and I will destroy you", he then walked out. The Plaintiff said the next day she went to the Manager's office and handed him the letter which read:-

Marie-Noelle Ferrieux,
BP 615,
Port Vila.

23 September, 1987

Mr Ehrentant,
General Manager,
Banque Indosuez Vanuatu,
Port Vila.

Sir,

Following our conversation and the events of the last few days, I have been driven to the point where I am experiencing feelings of deep professional disillusionment and disappointment, allied to feelings of personal insult and outrage.

Until last Wednesday's meeting with Mr Grellier, my situation was one characterised by fulfillment and challenge in my professional career, accompanied by tranquility and happiness in my personal life. My work for the Bank over the last seven years had been acknowledged by successive managers, and Head Office had generously demonstrated their continuing satisfaction with me by successive promotions and increased responsibilities, along with material rewards.

It was especially gratifying to me that all this was taking place in a locality which was to me congenial and interesting, although very far removed from the metropolitan attractions of France and the variety of conventional cultural activities available there, factors that cause many expatriates to regard their time spent here as more of a punishment than a pleasure. As you expressed to me on frequent occasions, you yourself were experiencing regrets over your posting here, and described your wife's reactions as even

more negative, because of the attractions of your previous stay in Yemen. Indeed, you added that you had for several months resisted the Bank's proposal to post you here, and finally Indosuez Paris had to force you to accept the posting.

Only a matter of a month ago, you told me of your proposed visit to France, and to your sick father, and you added, "I may not even come back", in such a manner as to leave me in no doubt that it clearly confirmed the same sentiments expressed to me by you during your brief time here. Furthermore, this desire to move from here was clearly illustrated by your decision to give me a final letter before your departure, outlining the status of INPACT and myself, "so that it will be clear to a new manager if you don't return".

Apparently, you had made no secret of these feelings, for I was troubled to hear, and took active steps to rebut, these sentiments used by outsiders to spread rumours that you would not be here long and that you were having domestic difficulties, etc...

I mention these matters in order to set a clear context of my relationship with the Bank itself and with you personally since your arrival. I have consistently expressed pleasure over your appointment, both to yourself and to others, and have been unwavering in my loyalty and desire to be of any help which my longer service here may be able to provide - a fact that you yourself have generously acknowledged from time to time.

You in turn have expressed pleasure at my promotion and your interest to support and encourage the new INPACT venture in accordance with the wishes and instructions of Indosuez Paris. This has not been an easy task and you are only too familiar with the many discussions between us regarding the level of resistance to co-operation among some members of staff who apparently resented my continuing promotion over them, and insisted on regarding INPACT as contrary to their own interests and the Bank's, as if it were a personal entity created by me and for me, despite Mr Brault's words during his visit to Vanuatu, when he dismissed as invalid all talk of difficulties about appropriate accommodation and facilities for INPACT.

This resistance resulted in many obstructive actions ranging from the petty (such as petulant opposition to the allocation of furniture and office items, etc., to INPACT) to the serious (such as the consistently hostile, unco-operative and unproductive activities of my assistant, Lucie Casabella, which you and I have discussed so often, and whom you described as a thief when you discovered that she had instructed the maintenance man to remove a cupboard from the office basement and take it to her home, and you were obliged to order its return).

I have often wished that you would take action to clarify the muddled thinking of the staff as to the exact position of INPACT and my role in it, as a subsidiary of, and still part of the interest of, the Bank proper, so that there might be an end to their use of this pretext of "separateness" to excuse their reluctance to help, and their insubordination.

Instead, there were recurring instances of your unwillingness to take action which was appropriate or taking actions that could only weaken my position, such as occurred when I made the stupid error shortly after your posting here of presenting you with a staff petition for the replacement of a photocopying machine, after months of frustration over Mr Darondeau's refusal to consider it, instead of speaking to you directly. This is the only instance on which you correctly had occasion to find fault with me, but even then you handled your rebuke to me with such unwarranted severity in front of junior staff that you felt obliged immediately after, when alone with me, to attempt to excuse your imbalance by declaring in a laughing and flirtatious manner that you, "had to sacrifice me a little to show them that everything was not only in my favour,

and thus diminish their jealousies".

That incident, at the beginning of your posting, should have made me vigilant about these unbalanced tendencies, but I had hoped that you would become more secure the longer you stayed, and would not require these defense mechanisms. That rebuke from you was a valuable lesson to me regarding the wisdom of the direct approach when expressing a grievance, and you insisted on manifesting your indignation with the following words before the whole staff: "Do not in any circumstances present me with a petition, but come to see me to discuss your complaints".

Consequently, I was astonished that despite your categorical order, you not only agreed to receive a groundless and malicious petition, but acted upon it, and a few days later, in my presence, you displayed an attitude of conciliation and weakness towards the staff by stating exactly the opposite: "Anyway, the form which a complaint takes is not important, it is the content which matters", and this, despite the disreputable content of this petition and the pusillanimous conduct of the staff in not bringing it to my attention before remitting it to you. You doubtless did not fail to observe Mr Thierry Frey's specious excuse for not having questioned me or informed me of what was being planned: "We did not want to upset her"! Astonishing duplicity for a senior executive - and you did not even challenge him on this.

Over these last months, I have patiently controlled feelings of exasperation and frustration, and have told myself that your aversion to take more decisive action and to give a clear lead was partly the caution associated with being "new" and partly the need for some personal popularity arising from these feelings of alienation and career disappointment which you had expressed.

We have repeatedly discussed particularly the serious matter of the actions of my Number 2 in persistently undermining me and countering my wishes, which she could have continued to do only because she thought she was "safe" in some way, confident of support above me.

I have been reluctant to believe that this was so, and have checked my own reactions to ensure that no suggestion of paranoia was present in my judgements, but regrettably, your astonishing actions and decisions of the last two days have dramatically illustrated your deep and damaging ambivalence, leading you to rush into successive steps which are hurtful to me in the short term and, more important, potentially damaging to the Bank's interests in the long term.

I do not propose to comment further than I have already done on the irrelevancy of whatever it is alleged that my personal friend, Mr Patterson, may or may not have done in his entirely private life. Everything I am about to write must be understood in the clear context of what you now know to be indisputable, and what I told Mr Grellier last week was indisputable, that I am entirely innocent of, and equally indifferent to, the totally false charges raised against me by a scandal-mongering group of malicious and disaffected employees.

What I am indifferent to, and what I will not tolerate further without maximum protest at the highest level, is successive imprudent, immature and humiliating demonstrations of inappropriate victimisation and petty indignities due to the actions of my superior, apparently stampeded into successive follies arising from what I can only assess as some compelling need to seek approbation in entirely inappropriate ways from even the junior employees, even if it means, as it has in this situation, the forcing of a completely innocent and senior employee of honourable record into situations of profound humiliation for the Bank's true interest as well as for herself.

As I have said, I have given this whole matter the most careful thought in order to be assured that I am not mistaken in my analysis of what is actually going on

.../7

here, and why you are intent on rushing from what I see as one ill-advised action to another in what is essentially a simple and clear situation, capable of having been resolved far earlier by appropriate decisive and mature measures.

I shall try to clarify the reasons for my anger and disappointment by outlining the course of action which I think you would have been wise to take, rather than the frantic one on which you are apparently embarked, driving you to the ultimate folly on Tuesday morning of astounding your employees as well as myself by asking them - your subordinates - in my presence what they were advising you to do, and what decisions and actions you should take.

What Head-Office would think of such a scenario I tremble to imagine. Your resentment about being posted here is one thing, but to so recklessly and needlessly diminish the dignity and authority of your position by such sycophancy is another step entirely. That moment revealed to me what appears to be the true source of the unease I have been increasingly feeling over the lack of real support for INPACT and myself against serious staff misdemeanours, and I realised that your domestic difficulties with Head-Office over your posting here might be responsible for having affected your ability to act wisely, and thereby you were reacting by being pushed into actions damaging to the Bank's best interests, in some kind of subconscious striking-out in retaliation for your deep disappointment and anger.

The more I thought about your efforts to humiliate me, even though I had done nothing to lose your trust, the more I recalled these clear expectations you expressed regarding the possible outcome of your visit to France, namely, that you would be freed from this posting to Vanuatu. It followed from that that your present behaviour could be explained by the thwarting of that hope, perhaps following some event while you were in France, causing you to return here in a resentful turmoil of mind, leading you in turn to strike out against me as a convenient scapegoat, one who embodies the opposite of yourself - i.e. - contented with her professional and personal situation in Vanuatu.

This would also explain your wish to compensate for these feelings of impotence to change the decision of Indosuez Paris about your posting here by asserting your authority in inappropriate and illogical ways, and I happened to provide you with a convenient and easy target.

If this is so, you have made a false judgment which is leading to catastrophe.

Consequently, I asked myself why you had avoided following the course which I should have thought obvious to anyone with mature experience:

1. When the petitioners asked to see you why did you not
 - (a) remind them immediately of your categorical and stern order:
"Do not present me with a petition; in any circumstances come to see me directly" or
 - (b) ask them the simple and obvious elementary question: "Have you asked Marie-Noelle if this is true?"
2. Consult with your deputy, Mr Grellier, as to what he knew, when he would have informed you of my innocence, which he did not seem to doubt.
3. If you did that, and he reassured you, why did you prepare, and attempt to have me hurriedly sign "before you leave this office" two grave documents, one of which was my resignation and the other a shameful and unwise concoction purporting my innocence, which was unhesitatingly described by the spokesman of the conspirators, Mr Thierry Frey, as "odious" at that open meeting you had so misguidedly called?
4. After I insisted on taking this unbelievable document home, why did you not wait till I responded to it before calling a meeting of these petitioners which you required me to attend despite my protests, and where you exposed to all this dangerous and confidential document - the very document whose confidentiality you had emphasised to me the day before?

- Why did you think it appropriate and wise to force me into a position of being "on trial" in front of these false petitioners at that meeting by instructing me there to make a statement to "justify" myself?
6. Why; instead of debasing yourself and your position by asking these junior staff for their advice, were you not wise enough or strong enough to say, even when you knew for sure of my complete innocence:
- "I want to deal with this matter once and for all. I made the mistake of permitting you to present the petition at all after giving you specific orders about how to approach me with grievances. Secondly, I erred in assuming that you must have already taken the elementary step of confirming with Marie-Noelle that the charge was true. It turns out that you did not have the integrity to do this and you have misled me. This whole matter is a mountain made from a molehill, and has been up out of all proportion by your idle and malicious gossip against the interests of Marie-Noelle and the Bank. From now on I shall be watching you all closely and shall take action to ensure total commitment and appropriate behaviour from you, such as Marie-Noelle has done both towards me and the Bank"?

This kind of wisdom and courage from you would have put an end to this whole sorry and disreputable conduct of your staff, and prevented you from running around trying to decide and get advice from your subordinates as to whom you can sue or even as to whether you can bring a suit through Ballande. I tried in vain to advise you from the beginning to be sure of your legal ground before taking any of the misguided and foolish actions you were proposing, since it was obvious that you knew neither whom you could sue or for what, or even if you were able to sue.

It was, and is, obvious to me that nobody of any significance was stupid enough to attempt to attack the Bank on an issue like this which had nothing whatever to do with the Bank. Of course, gossips are glad to talk empty trash at every opportunity. You do not have to live long to realise that Ballande's is a valuable customer of the Bank, and only on Tuesday this week I placed with amicable success the possibility of negotiating a contract which I was handling for the Prime Minister.

Three weeks ago their manager, Mr Jouandon, was entirely mannerly and appropriate in his conversation with me, and he clearly accepted my statement that I was not in any way involved and that he must take the matter up with Mr Patterson. He obviously had no difficulty with this logic, and yet I was obliged to listen to you talking about requiring Ballande to sign a paper that I am innocent. It appears to me that the Bank cannot require Ballande to do what they have no need or desire to do and what would bring them no advantage whatsoever, and nothing should be done to threaten the profitable and friendly relationship which exists between us.

Nor can you successfully sue Mr Patterson, who has done nothing against the Bank or against me, and why would you want to? Neither can you bring a complaint against anyone on my behalf, since no one has harmed or could harm my interests except you, as my superior, with your actions.

It appears to me that no action can now be profitably taken except the long over-due and necessary dismissal of Mrs Casabella, whom I as well as you regard as a source of much continual mischief, and who has been a principal conspirator throughout, and her replacement by a competent experienced and trustworthy assistant manager of my choice, as recommended in our agreements.

Thereafter, a strong disciplinary hand is required on the staff thereby introducing caution and order into a situation which has threatened to get totally out of control.

As for the gossip incident, I have lived in Vanuatu long enough to know that it will be yet another of these "nine day wonders" created by scandal-mongers, and

will soon disappear entirely. The same kind of things have all happened many times before you came, with other staff, executives and managers of the Bank, and will no doubt continue to happen long after you have gone.

The actions which you have taken, along with those you have not taken, have done me great wrong, far in excess of what any gossips could have dreamed of accomplishing, and I am writing this letter to outline all that I have endured, and am enduring, as a result of your actions and attitudes, which come very close to violation of my civil and legal rights as a senior employee of a French company, and if the appropriate steps are not initiated by the end of this week to resolve these complaints, which I have been forced to present in this manner, I shall be obliged to pursue redress through higher channels to the utmost of my ability.

Yours respectfully,

Marie-Noelle Ferrieux

Having read through that letter of the Plaintiff, I am of the opinion that she did her best to convince the Manager, that as far as she was concerned, all was well; she was totally innocent and would he please turn back from destroying her engagement with the Bank before it was too late, stressing her total loyalty over the years to the said Bank. To me it seemed to be a letter which should have warned any employer that re-assessment of the situation should be made immediately before the matter got out of hand. This letter seemed to have little or no effect on the Manager. He read the letter and made no comment. She asked him if he had any comment and he replied "what do you want me to say" in a gruff voice. She said - "I want you to stop hinting that in some way I am guilty of something. I want you to stop making my work impossible". She said she asked for a reply to her letter. He did not lift her suspension. She never received a reply to her letter. That subsequently she went home, she could not work - she was suspended. She received letters calling her back to work. She said she did not return as she was scared, especially the last two meetings with the Manager - his attitude got worse day after day. He seemed to be angry at those meetings - he seemed out of control and on the verge of tears. She said she did not know what to expect would happen if she returned - she had been suspended and it had not been lifted. Because of this, her work conditions were destroyed. It seemed there was no limit to his reaction. She said - "I was physically afraid".

Most of this evidence was denied by the Manager but I carefully observed the Plaintiff in the witness box and also the Manager when he gave evidence and I must say I was very impressed by the Plaintiff when she gave evidence and was of the opinion that she spoke the truth. I regret to say I was not impressed with the Manager. He was excited when questions were asked of him and after four days' hearing of this case I was satisfied he was not telling the whole truth.

On the 24th and 25th September 1987 the Manager sent letters to the Plaintiff, in effect ordering her back to work as if nothing had happened. It seems to me that the Manager could so easily have said, "Your suspension is lifted, return to work". He did not do so here. I am asked to treat the letters of the 24th, 25th September 1987, as the lifting of the suspension. In my opinion, I am unable to place that construction on the letters.

The Plaintiff did not return to work because she stated she was now afraid of the Manager. Her position in the Bank was not conducive to good harmony between herself and the Manager and being suspended, she was prevented from doing so.

The Plaintiff wrote to the Manager and to the Bank's headquarters in Paris complaining against the attitude and conduct of the Manager towards her. She repeated she was innocent and had done nothing wrong and until this was confirmed and acted upon by the Manager she was unable to continue in her position of employment which demanded a high degree of trust and co-operation from all elements of the Bank.

Under Article 8 of the Employment Contract there was an express term of the contract that summary dismissal by the employer could only occur "in the event of grave professional negligence".

Under Article 3 of the Employment Contract and final paragraph of the contract extension letter of 14th August 1987, I agree with the submission of Counsel for the Plaintiff that it is an implied term of the contract that the Defendant should not, without reasonable cause, conduct itself in a manner calculated to damage or destroy the relationship of confidence and trust between the contracting parties.

The matter came to a climax on the 30th October 1987; the Plaintiff continuing her insistence on her rights, a meeting was held in the presence of the Manager, his attorney, the Plaintiff and a Mr Durkin who was advising her. There the Defendant made it clear through the Manager that under no circumstances would the Plaintiff be re-employed by the Defendant because of her letters complaining of the Manager's conduct to the Headquarters of the Bank in Paris.

Two letters of the 3rd and 6th November 1987 were posted by the Defendant to the Plaintiff purporting to dismiss her on the grounds that her 'unjustified absence' and other 'unnamed actions' constituted 'serious misconduct' under the laws of Vanuatu. Nothing was produced in evidence to show such was a fact. The

position now is that the Plaintiff sues for breach of contract; the Defendant denies the breach, counterclaiming for several items of damage.

Counsel for the Plaintiff submitted:-

"From the Plaintiff's evidence it appears the suspension was the combined result of her refusal to sign the Bank Manager's "letter of innocence", her refusal to take other action, such as commencing a lawsuit against the rumour mongers, and her decision to complain about the Bank Manager's mishandling of the entire affair. In the absence of a specific contract provision or statutory authority an employer has no right to treat an employee in this fashion. LETHABY v. HORSEMAN ANDREW & KNILL LTD. (1975 Eng. Ind. Trib 1) I.R.L.R. 119 significantly, the Defendant did not, in accordance with the well established rule of BROWNE v. DUNN (1894) 6 R. 67 (HL) confront the Plaintiff with a different version during her cross examination. Accordingly, the Defendant should suffer the BROWNE v. DUNN penalty of not being able to rely on contradictory evidence. CROSS ON EVIDENCE (3rd Austin Ed 1986) Byrne and Heydon, para. 9.61 - 9.66."

I agree with this contention.

At the meeting of the 30th October, the Bank Manager admitted the Plaintiff was suspended but thought that as it was not in writing it was of no value to the Plaintiff. This, of course, is not so in law.

Counsel for the Plaintiff submitted:-

"What~~ever~~ may have been the evidence, by their pleadings the Defendant has admitted the Plaintiff's version and is therefore bound by those pleadings. The Defendant's "Defence and Counterclaim" para. 13, particular 5, specifically admits Plaintiff's allegations of her suspension alleged in the Statement of Claim, para. 6 (5).

It is fundamental that a pleading can admit a fact. Order 27, Rules of Supreme Court, Engl. 19⁸⁸ in THE SUPREME COURT PRACTICE 19⁸⁸76 at Section 27.1."

Again the Plaintiff's Counsel submitted:-

"Defendant's asserted justification for its suspension should not be accepted by the Court.

The Defendant, through its pleadings and the evidence of the Bank Manager sought to justify its suspension because of the alleged "disharmony at the workplace" by Plaintiff allegedly threatening and insulting other Bank employees.

Significantly, the Assistant Bank Manager, who was also the Personnel Manager, a witness called by Defendant, gave evidence that for a two week period between the time of a meeting between himself and Plaintiff in mid September 1987

until 21 September there was no staff disharmony and that during the critical days of 21, 22 and 23 September there was "no disruption" amongst the staff over this matter.

Although the evidence showed that most of the Bank's employees remain in the Bank's employ, none of them were called to give evidence for the Bank on the question of either "disharmony", "friction" or "tension". None of these employees who had allegedly been threatened by the plaintiff: Marcel Sam, Virginia Assanouma and Lucie Casabella, were, for instance called. The normal adverse inference against a party not calling a witness who would otherwise have been expected to give evidence in its favour should be applied here. JONES v. DUNKEL (Aust. H. Ct) (1959) 101 CLR 298.

On the basis of the adverse inference, and on the evidence of both the Plaintiff and of the Assistant Bank Manager, the evidence of the Bank Manager on the question of any alleged "disharmony" caused by the Plaintiff should be rejected.

The credible evidence shows therefore, there was no justification for the suspension.

The suspension destroyed the conditions of trust and confidence guaranteed to the Plaintiff as both express and implied terms of the contract.

Plaintiff's "conditions" for her re-employment which were in essence the re-creation of a workplace environment where trust and confidence were restored were never met by Defendant.

Indeed, on the evidence, it appears that Defendant consulted (JLE Examination in Chief) counsel on 24 September 1987, the day after Plaintiff was suspended, and from that point onward sought to create a legal position which would extricate it from the implications of its hasty, ill-advised and untenable "suspension" and consequent contract repudiation.

The Defendant Bank Manager's dispatch of a letter requiring Plaintiff's attendance at work, which letter then in turn provided the basis for the Bank's subsequent "dismissal" of Plaintiff, ingenious as it might have been in its attempt to construct a legal defence, should however be seen in its true light; as a disengenuous attempt to hide the true character of the suspension under the cloak of a "return to work" order.

The Bank Manager's letter requiring Plaintiff's attendance at work some two hours after the Manager had concluded that her presence at the workplace would still be detrimental for both her and her colleagues, can only be seen as confirming his earlier high handed breach of contract. Not only was the "return to work" letter a transparent attempt to salvage an untenable legal position, but given that Plaintiff was on her annual leave at the time, it had no force and effect. (Ex. 14 Leave Advice). Such leave, according to the Bank's Personnel Manager, had to be proposed by the employee and could only be changed

by mutual consent of the Bank and the employee; no evidence of either such a proposal or consent was ever offered."

The Plaintiff was absolutely positive that the Manager suspended her and indeed the Defendant in evidence agreed such was the case. Again such was admitted in the pleadings hence I find that the Plaintiff was indeed suspended on the 23rd September 1987 and that such suspension constituted an unfair dismissal. From the evidence before me it is clear that she was dismissed (Robertson v Curicor Transport Ltd (1972) Engl. Ind. Trib.) Ind. Rel. Labour Reports 70.

I must now consider whether the Bank Manager can be accepted as a witness of the truth.

1. The Defendant gave me the impression that he was attempting to extricate himself from a delicate situation brought on by numerous rumours and statements made to him by many persons both at the Tennis Club and elsewhere. He seemed to have convinced himself that the rumours were true and attempted to justify the action taken by him. He said he told the petitioners that the Ballande Manager had said he had no evidence against the Plaintiff whereas in Court that Ballande's Manager told him he had no formal evidence against the Plaintiff.
2. In the pleadings of the Defendant, paragraph 13 (1), in particular that "the Plaintiff refused to either confirm or deny those allegations" both his evidence, ^{and} Mr Grellier's and the Plaintiff's state that the Plaintiff from the very inception categorically denied any allegation of impropriety.
3. In paragraph 13 of his defence in which he claimed the petitioners' meeting "was held at the request of all senior staff including the Plaintiff" the evidence of the Plaintiff was that she was surprised at such a meeting and the Defendant actually agreed in evidence that the Plaintiff never requested such a meeting.
4. He changed his evidence relating to when he arranged to have the letter requiring the Plaintiff back to work from not less than two hours after the 24th September meeting to a time overnight or a day later.
5. The Defendant's statement that he suspended the Plaintiff because of her purported inability to carry out her work yet hours later wanted her back at work.

In view of the above matters and the general demeanour of the Defendant in

The witness box I entertained grave concern as to the truth of his evidence, so much so that I reject it as the whole truth.

Contract extension to 31st December 1988

Under cross examination the Manager conceded there had been an earlier draft copy which he had agreed with the Plaintiff. That he made "corrections and modified words" and had read it "carefully".

He said in cross examination that the final draft reflected his thinking. That he read it and made no corrections.

The letter, Exhibit 2, from the Defendant was accepted by the Plaintiff - she typed the draft. She established an office for trust operations - Impact and then we have the letter from the Defendant, Exhibit 12, of 10th November, 1987, which reads as follows:-

Banque Indosuez Vanuatu,
P.O. Box 29,
Port Vila.

10 November, 1987

Miss M.N. Ferrieux,
P.O. Box 615,
Port Vila.

Miss,

The delay of 7 days to reflect, mentioned in our letter of 3/11/87 has expired for a week, and we do not seem to have received your resignation letter. We therefore confirm your dismissal without notice nor indemnities, taking effect from the above-mentioned date.

According to the terms of Articles IV, V, VII, VIII and IX of the employment contract signed on 30/9/86 between Banque Indosuez Vanuatu and yourself, and taking into account the conditions contained in the letter which we forwarded to you on 14/8/87, we shall pay you the following sums:

1 - Airline ticket. One-way Vila/Paris on UTA

ie: 254,800

 = VT84,933

3

2 - Annual leave from December 1986 to October 1987 ie: 22 days

ie: 360,253

 x 22 = VT330,242

24

For your part you will have to reimburse to Banque Indosuez Vanuatu the ongoing .../15

loan contracted to you and becoming immediately repayable and about which we have noticed that you have diverted the object of its use, which constitutes a fault of the greatest gravity:

- a) 11 June 1986 for an amount of VT2,000,000
object: purchase of land
balance as of today VT501,389 in principal and interest to 10/11/87
- b) in July 1987 for an amount of VT1,000,000
object: payment of land charges
used until today up to VT760,000
increased with the interest owing until today ie: VT14,323

On receipt of this letter, therefore, please present yourself at Banque Indosuez Vanuatu in order to receive the balance of all accounts concerning you after having paid the debit balances of your accounts in our bank and also having proceeded with the reimbursement of your above-mentioned loans and advances, remit to us all keys and documents still in your possession and give us an account of the ongoing business when you left your post.

Finally, we wish to know the steps that you ought to have undertaken already, in order to free by 3/12/87 the company housing put at your disposal.

Yours faithfully,

Banque Indosuez Vanuatu

R. Grellier

J.L. Ehretrant

*The Manager, under cross examination, agreed that Exhibit 12 reflected the understanding for indemnity payment under both the contract and the contract extension letter, Exhibit 2. In Exhibit 12 the words "and taking into account conditions in the letter forwarded to you on the 14th August 1987". This in my opinion constitutes a firm and convincing evidence of the Defendant's acceptance and actions upon the contract extension.

The amount of the remuneration claimed under the contract extension, Exhibit 2, is a three months' premium payable semi-annually, or three such three months premiums. The Plaintiff's evidence was clear on this matter. In her evidence, she said that the trust company Inpact was not expected to make a profit in the first or second year and therefore the three month semi-annual premiums instead of a share of profits was accepted by the Plaintiff.

The repudiation by the Defendant entitles the Plaintiff to damages.
Counsel for the Plaintiff has submitted in clear terms the application of the Bliss case to this case.

I accept his submissions entirely and set them out as follows:-

.../16

the application of Bliss:

BLISS v. SOUTH EAST THAMES REGIONAL AUTHORITY (1987) Eng. Court of Appeal, 20 I.C.R. 700 should, if it is submitted, be followed in this case. The factual situation in Bliss and herein are strikingly similar and the rules of law that apply under the common law of contract are the same.

An analysis of Bliss and the case under consideration reveals these analogies:

A.

1. Bliss Plaintiff was a highly respected professional, a consultant orthopaedic surgeon, "a man of great professional skill", a man who had worked at the hospital for 10 years.
MNF v BIV Plaintiff was a highly respected professional, a senior bank executive, who had worked for the bank for 7 years.
2. Bliss The dispute between Plaintiff and a colleague (Mr Hay) arose, prompting the latter to write in complaint to the regional authority.
MNF v BIV Dispute arose at a shop near to Defendant's premises, prompting colleagues to write a "petition" of complaint against Plaintiff.
3. Bliss Staff resentment was a background factor (especially one Mr Hay).
MNF v BIV Staff resentment was also part of this case, acknowledge by JLE in the Monday 21/9/87 meeting, and by RG in his c/x ("I could feel it").
4. Bliss A hospital committee "considered plaintiff's conduct".
MNF v BIV JLE himself investigated the complaints against the plaintiff.
5. Bliss After considering the report on the plaintiff and certain correspondence defendant wrote to the plaintiff "requiring him to undergo a psychiatric examination by a consultant of its choice".
MNF v BIV After investigating the complaint from colleagues against the plaintiff, the defendant demanded that the plaintiff "sign one or other of two letters I have prepared for you".
6. Bliss Plaintiff refused to undergo said exam.
MNF v BIV Plaintiff refused to sign either of said letters.
7. Bliss Defendant suspended plaintiff, forbidding him entry to the hospital where he worked.
MNF v BIV Leading on from the original demand to sign said letter, defendant suspended plaintiff, forbidding her from entering her office in the bank.
8. Bliss Defendant wrote asking plaintiff to return to work.
MNF v BIV Defendant wrote asking plaintiff to return to work.
9. Bliss Plaintiff refused to comply, claiming repudiation of contract by way of breach of trust and confidence.
MNF v BIV Plaintiff refused to comply claiming repudiation by way of breach of trust and confidence.

10. Bliss Disciplinary charges brought against plaintiff by defendant
MNF v BIV Plaintiff threatened with dismissal, but invited to resign.
11. Bliss Plaintiff brought action for breach of contract.
MNF v BIV Plaintiff brought action for breach of contract.

In some ways, the facts here are more favourable to plaintiff than they were for Bliss:

1. Bliss Suspension was lifted.
MNF v BIV Suspension was never lifted, in addition the suspension was first denied in the meeting of 30/10 before being admitted in the counter claim.
2. Bliss Plaintiff's salary was never stopped.
MNF v BIV Plaintiff's salary was stopped at the end of the month in which suspension occurred, in fact only several days after the suspension.
3. Bliss Disciplinary charges against plaintiff were dismissed, and his suspension was lifted.
MNF v BIV Defendant's own investigation of plaintiff's conduct (carried out before the suspension) revealed "no evidence" against her, yet dismissal threats continued, and plaintiff's suspension was never lifted.

B. Plaintiff never affirmed the contract.

s 18 (2) of the Vanuatu Employment Act specifically provides that the acceptance of any benefits under a contract shall "not be held to imply renunciation" of any claim to damages.

Furthermore Bliss, supra, specifically reversed the trial court on this point holding that even salary collected for a period of over two months after suspension would not constitute an affirmation of the contract. Bliss, supra at 716.

Both on the authority of Bliss and s 18, defendant's submission on this point should be rejected."

If one follows the Court of Appeal in the Bliss case, the Manager here in requiring the Plaintiff to sign only his letter of innocence which involved a third party which no right thinking person, in my opinion, could possibly sign 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 authority 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 contract, was so fundamental as to constitute a repudiation of the contract of employment.

Northern Textiles Ltd v Andrew (1979) 1 R.L.R. p. 84, that any breach of an implied term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee was a fundamental breach amounting to a repudiation since it necessarily went to the root of the contract.

If ever there was a breach of such a term going to the root of the contract, it happened in this case. Accepting the words of Browne Wilkinson J. it would be difficult, in this particular area of employment law, to think of anything more calculated or likely to destroy the relationship of confidence and trust which ought to exist between employer and employee than, without reasonable cause, to require a senior bank officer to sign a letter which implicated a third person and a possible innuendo that she was implicated, as the third party was a boyfriend. The Manager, in a fit of rage because the Plaintiff wanted him to accept her letter of innocence, suspended her, told her to hand over her keys, and not to talk to the rest of the staff. Two letters were sent to her to return to work but the damage was done and she did not return because the suspension was not lifted and the Manager by his action, without reasonable and proper cause, in my opinion, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between Plaintiff and the Manager of the Bank and was a fundamental breach amounting to a repudiation of the contract as it went to the root of the contract.

I accept the Plaintiff's version of her suspension which happened on the 23rd September 1987. The Plaintiff told the Manager he was the person who was 'damaging' her and that she was putting her complaints in writing. The Manager then suspended her and confirmed this suspension later in her room in the Bank. On the following morning the Manager made no attempt to lift the suspension. Indeed at the meeting of the 30th October 1987 between the Manager, his legal adviser, the Plaintiff and a Mr Durkin, the Plaintiff expressed the view that there was no suspension because it was not in writing and again in his evidence the Manager admitted the suspension. Further the Defendant in their pleadings have admitted the Plaintiff's version and is bound by such. The Defendant's "Defence and Counterclaim" paragraph 13, particular 5, specifically admits the Plaintiff's allegation of her suspension alleged in the statement of claim, paragraph 6 (5).

It is fundamental that a pleading can admit a fact, see Order 27, Rules of the Supreme Court, England, 1988, The Supreme Court Practice 1988 at 27/1

I cannot accept the Defendant's justification for the suspension being based on alleged "disharmony at the bank" by the Plaintiff allegedly threatening and insulting other Bank employees. There was no evidence produced in Court to substantiate this allegation. Accordingly, the evidence shows there was no justification for the suspension. I am completely satisfied on the credible evidence and the Defendant's admission in its pleadings, that the Plaintiff was suspended on the 23rd September 1987 and that such suspension constituted unfair dismissal.

I am further satisfied from the evidence that the contract extension to 31st December 1988 was proved by the Plaintiff. Again, following the decision in the Bliss case where in my opinion the facts are similar and the rules of law that apply under the common law of contract are the same, the Plaintiff is entitled to recover damages. Indeed, under the Vanuatu Employment Act, section 53, the Defendant's conduct constituted a breach of contract entitling the Plaintiff to sue for damages. I accept the Plaintiff's Counsel's submission. Mr Di Suvero submitted:-

"Section 53 (1) of the Employment Act provides that:

- (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.

Under Section 53 it is submitted either "ill treatment" or a "serious breach" of the conditions by an employer entitle the employee to view the contract as at an end. Vanuatu law thus imposes an even higher standard of contract performance from an employer than under the common law of contract. "Ill treatment" or "serious breaches" which might not rise to the level of common law "fundamental breaches" may nevertheless provide an employee with the basis of taking the employer's actions as having ended the contract.

Plaintiff submits that Defendant "ill treated" or committed serious breaches by any or all of the following acts:

- (i) the compulsion to sign either "alternative" letter on Sept 21 when

the employer was well aware of her innocence;

(ii) publicly humiliating her at the "petition meeting", calling on her to "justify" herself when the employer had already revealed Plaintiff's accuser had said he had "no evidence" against her;

(iii) arbitrarily refusing to accept her own "letter of innocence" as a complete discharge of the employer's request from her of a declaration of innocence;

(iv) insisting on her "taking some action" such as instituting a law suit against the rumour-mongers;

(v) physically threatening her;

(vi) threatening to "destroy" her;

(vii) suspending her when she was on annual leave;

(viii) ordering her to "return to her post" while she was on such leave;

(ix) suspending her without just cause;

(x) and destroying the relationship of trust and confidence at the workplace promised to her both as express and implied term of the contract and its extension.

Under Subsection 2 of Section 53, failure to take immediate action is not to be held against the employee. The fact the Plaintiff sought a resolution of her position through a series of communications with the Head Office in Paris and also at a local meeting as late as October 30 is not, therefore, to be held against her. In effect, it is respectfully submitted, Vanuatu's Employment Act thus provides greater protection to employees than under the underlying common law of contract.

Plaintiff's conduct in complaining about the employer does not constitute "serious misconduct"

Defendant stated that one basis for their discharge of the Plaintiff was her letters of complaint both to Paris and to her local employer. Her good faith in making such complaints was never challenged. (See Defendant Submission No. 3).

Under Section 50 (2) (c) of the Vanuatu Employment Act such complaints cannot provide the basis of a "serious misconduct" discharge. The Defendant thus used an impermissible ground to exercise its claimed right to dismiss Plaintiff.

Under Section 50 (4) of the Employment Act the dismissal was "unjustified"

Section 50 (4) provides that a dismissal on the grounds of serious misconduct is unjustified if done without "an adequate opportunity to answer any charges". The section implies both that there should be charges and an opportunity to answer them.

Here when Plaintiff was suspended she was not notified of the charges and even when she repeatedly demanded that they be provided to her in writing, none

were given to her. She certainly never had an "opportunity to answer".

I accept the Plaintiff's Counsel's submission as to damages and interest.
He states:

"A. Loss of Career Damages

Defendant's Bank Manager conceded on cross examination that Plaintiff's discharge was a "serious setback", that it "injured her career", "harmed her development" and that it would be a "grave mark against her".
Such concessions amply justify Plaintiff's loss of career damages in the amount claimed.

B. Interest

Interest should be awarded on the recovery of damages "at such rate as it (the Court) thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment."

Law Reform (Miscellaneous Provisions) Act, 1934, Engl.; The Supreme Court Practice (1988) Engl. Section 6.2.7.

Although there is no such thing as a "correct rate" of interest, the rate in each case should be "realistic". Id at section 6.2.7A."

I consider 15% on the damages is correct with effect from the date of her filing her statement of claim i.e. 15 July 1988.

Regarding the Counterclaim by the Defendant for the loans contracts, it is my opinion that the Defendant renounced such by its conduct.

Two staff loans were provided to the Plaintiff whilst employed by the Bank. It is clear that these loans were in an employer-employee relationship. Such being the case the Defendant by severing the relationship unlawfully, repudiated the terms of the loan contracts. It follows that the obligation to pay interest was also discharged. The Defendant by dismissing the Plaintiff made it impossible for her to repay the loan and interest charges. Chitty on Contracts, 24th Ed. 1977 at 1487 and as an alternative Chitty at 1488 and 1504.

I therefore enter Judgment for the Plaintiff. Turning to the claims made by the Plaintiff, I will deal with them item by item.

Item 1 - Salary:

I have held that the contract continued until 31/12/1988. The Plaintiff's claim for

3,998,035VT is awarded less 1,981,911VT earned meanwhile.

2,016,124VT & 76,777.20FF

Item 2 - Electricity and water:

The claim of 172,651VT is allowed.

172,651VT

Item 3 - Retirement:

The claim of 319,042VT and 6142.20FF is allowed.

319,042VT & 6142.20FF

Item 4 - 13th month claim:

In my opinion this claim is valid and I award the same.

531,738VT & 10,236.96FF

Item 5 - End of contract bonus:

This claim is allowed.

939,315VT & 18,083.59FF

Item 6 - Travel claim:

This claim is allowed.

340,000VT

254,000VT

Item 7 - Medical insurance and dental bill:

If the Plaintiff incurred any medical or dental expenses she is entitled to the same.

Item 8 - Participation in Impact's results:

I have held that the letter of the 14th August is a contract and accordingly the Plaintiff is awarded the sum claimed.

2,392,821VT & 46,066.32FF

Item 9 - Severance pay:

In my opinion and reading Section 16 with Section 53 of the Employment Act, remuneration includes all allowances. I agree therefore that Plaintiff's claim with medical and dental expenses if any, is a correct claim. I consider Plaintiff was harshly treated by Defendant in wrongfully dismissing her and I award severance pay for three years commencing when she entered in Bank in 1981. (Employment Amendment Act 33 of 1989).

4,179,843VT & 58,068.39FF

Item 10 - Loss of annual leave:

The amount claimed is awarded.

332,336VT & 6398.10FF

Item 11 - Damages:

I consider that the loss of future opportunities, entitlements, profit sharing and benefits in a large Bank like Indosuez should be considered. Plaintiff was loyal member of the staff. She had been sent on a study trip to European countries in February to April 1987 to study the Bank's European trust operations as a prelude to her initiation of Inpact's activities. By the action of the Defendant it would seem that Plaintiff is prevented from ever receiving a post with an authorised Bank. I consider the sum of seven million Vatu (7,000,000VT) is not excessive and I award her that sum as damages.

7,000,000VT

Total :

18,477,870VT & 221772.76FF

Item 12 - Counterclaim:

I award the Defendants the sum of 1,386,462VT ~~de~~s Bank loans with staff interest.

Costs are awarded to the Plaintiff.

Dated at Vila this 12th day of January, 1990.

Frederick G. Cooke

Frederick G. Cooke

CHIEF JUSTICE

