IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 188 of 2006

BETWEEN: EDDIE SILAS
Claimant

AND: PUBLIC SERVICE COMMISSION
Defendant

Coram: ***Justice D. V. Fatiaki***

Counsels: *Mr. S. Stephen for the Claimant*
Ms. F. Williams for the Defendant

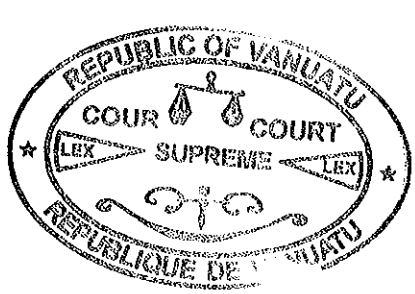
Date of Decision: *16th September 2011*

FURTHER RULING

1. On 29 March 2010 this Court in a fairly comprehensive ruling granted the claimant's application to amend his pleadings to include a new cause of action for underpayment of salary extending over a period of about 7 years from 1 August 2004 until 1 August 2011. A detailed set of directions were made to ensure that the pleadings and the evidence in the form of additional sworn statements were in place before 3 May 2010 when the matter was to be called for further directions.

2. On 3 May 2010, the defendant was granted further time to file a sworn statement ordered on 29 March. The matter was then adjourned to 26 May 2010. On this date claimant's counsel sought further time to file a response to the defendant's sworn statement and this was filed on 11 June 2010. A pre-trial conference was then fixed for 18 June 2010 when it was hoped to fix new trial dates for the continuation of this part-heard matter. On 18 June 2010 defence counsel indicated that she had 3 witnesses to call and claimant's counsel wished to recall the claimant at the continuation date which was fixed for 22 July 2010.

3. On 19 July 2010 the defendant filed an application for leave to amend its defence to the amended claim to raise a limitation defence pursuant to Section 20 of the Employment Act [CAP. 160]. Written submissions were ordered from both parties on 22 July 2010 and the matter was adjourned to 6 September 2010 to review the submissions on the limitation argument. On 6 September 2010 the Court ordered that the defendant (applicant) file and serve a reply submission by 20 September 2010 and thereafter the Court would deliver its ruling on notice on the defendant's limitation defence.



4. The defence submission is a short one to the effect that even though a claim may be amended to set up a new "*cause of action*", that new "*cause of action*" is nonetheless subject to any applicable statutory limitation period such as, under **Section 20** of the **Employment Act** [CAP. 160] which clearly states:

> "*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 of which the remuneration relates.*"

5. In this regard defence counsel's brief submission is that the insertion of a time-barred "*cause of action*" in an existing claim should **not** be allowed, and, in any event, does **not** prevent it from being time-barred.

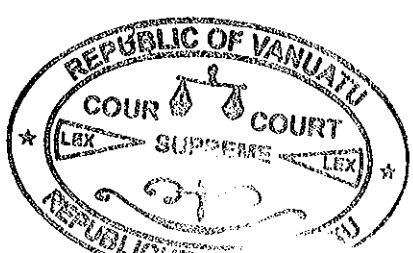
6. Claimant's counsel's response to the submission is dual-pronged as follows:

   (a) Section 20 was previously interpreted to apply to the "*institution*" of proceedings for remuneration ie. matters not previously heard before the Court and/or matter reviving, reinstituting a time-barred claim; **and**

   (b) The limitation under Section 20 of the Employment Act (given the use of the word '***may***') should not be construed as imposing a mandatory bar. Accordingly, the Court can apply its discretionary power to extend limitation periods pursuant to Section 15 of the Limitation Act No. 4 of 1994 (as amended) which is necessary in order to attain justice.

7. I now proceed to deal with the claimant's responses. As to **(a)** above Section 20 is clear in its reference to the "*institution*" of proceedings which, in the absence of a definition, should be given its ordinary meaning of starting or commencing a proceeding. In this regard **Rule 2** of the **Civil Procedure Rules (CPR)** makes it clear that a Supreme Court proceeding is started by filing a claim in an office of the Supreme Court anywhere in Vanuatu. That occurred in the present case, on **14 September 2006** ie. 18 months after the claimant's termination and well within the 3 year limitation period prescribed in Section 20 of the Employment Act for the institution of the claim. The original claim as pleaded and later amended, sought general damages for unlawful dismissal as well as various entitlements under the Employment Act [CAP. 160].

8. I am therefore satisfied that the existing proceedings were "*instituted*" within time. Furthermore, the amendment (**not** institution) of the original claim to include a new cause of action is permitted under the **CPR** and was allowed by order of the Court. Such amendment is **not** precluded by the existence of a limitation period, especially, if the same has not been



raised as a ground for opposing the application to amend as it should have been. Nor in my view, does the amendment of a claim to include a new "*cause of action*", make such amendment the "*institution*" of a new proceeding in terms of Section 20 of the Employment Act.

9. I turn next to **response (b)** above, which is clearly pleaded in the amended defence to the claimant's further amended claim and is directly raised as a ground for striking out the amended claim. I also note the claimant's submission relying on the brief decision in **Joe Bong v. Wan Smol Bag Theatre** [2001] VUSC 129 in which the Chief Justice said:

> "*Section 20 is not a mandatory provision. The Court can use its discretionary power when the circumstances of the particular case at hand so warrants in order to do justice which is the situation in the present case.*"

10. Although **Section 20** uses the word "***may***". In its context, that word of choice refers and relates back, in my view, to the "*institution*" of proceedings by an employee. It has **no** bearing on either the length of 3 year limitation period imposed by the Section other than to signify the date from which the limitation period commences, **or** the prohibition of proceedings "*instituted*" **after** the expiry of the limitation period which permits of no exception.

11. The matter is laid to rest however, by the later decision of the Court of Appeal in **NBV v. Cullwick** [2002] VUCA 39 where the Court in allowing the Bank's appeal said:

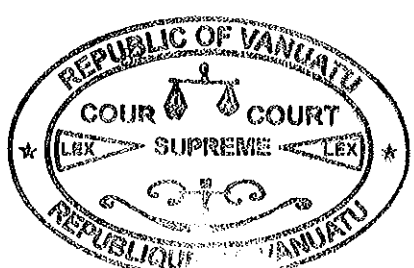
> "*... The terms of Section 20 also indicates that this section is limited in this way. The time limit is against the institution of proceedings 'for recovery of remuneration'".*

and later,

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

12. Earlier in its judgment the Court noted:

> "*... that the time limit in Section 20 is not one that can be extended under the discretionary power to extend limitation*



periods contained in Section 15 of the Limitation Act No. 4 of 1994 (as amended)".

And finally, as to the mandatory nature of Section 20 the Court of Appeal said:

> "*In the context of the Employment Act we are unable to think of any reason why the time limit in Section 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 were 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 ..... The absence of any indication of this kind lends weight, in our view, to the conclusion that Section 20 should be construed as imposing a mandatory time limit.*"

13. In light of the foregoing I uphold the defendant's submissions but limited to the claim for unpaid wages that occurred after **14 September 2003** ie. for the period of 3 years back-dated from the date of the "*institution*" of proceeding. In other words any under-payment earlier than 14 September 2003 is caught by the mandatory prohibition under Section 20 of the Employment Act and is accordingly disallowed.

14. The defendant having succeeded in its application in part, is awarded the costs of this application to be taxed if not agreed. I shall now hear counsels as to the continuation of the trial of this part-heard matter.

DATED at Port Vila, this 16th day of September, 2011.

BY THE COURT

D. V. FATIAKI
Judge.

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