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

Civil Case No. 167 of 2009

BETWEEN: ALAN BURKE
Claimant

AND: APB CONSULTANCY LIMITED
Second Claimant

AND: AIR VANUATU (OPERATIONS) LIMITED
Defendant

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

Counsels: ***Mr. M. Hurley for the Claimants***
Mr. E. Nalyal for the Defendant

Date of Decision: *14 May 2012*

JUDGMENT

1. This case concerns a claim for breach of an **Employment Contract** and **Consultancy Contract** entered into by the claimants and the defendant company on 2 November 2007 and 1 September 2009 respectively. The lawfulness and validity of both contracts are a primary issue in the case.

2. The claimants say the contracts are valid at inception and binding on the defendant company for its full duration. Whereas the defendant company asserts that they were unauthorized and illegal from its commencement and constituted "*serious misconduct*" on the part of the first claimant.

3. In order to better understand and appreciate the circumstances surrounding the creation and entry into both contracts it is necessary to set out a brief background to the claim.

- **24 June 2005** – **First employment contract** entered between the first claimant and the defendant company for 2 years for the position of **Manager Human Resources**;

- **7 October 2005** – Letter from **Minister of Internal Affairs** (the Minister) to **Commissioner of Labour** directing the issuance of a **Work Permit** for the first claimant after being satisfied "*that a localization plan is now under implementation by the company, with a view to eventually localizing this post*";

- **19 October 2005** – **Work Permit** for first claimant issued with an expiring date of 21 July 2006.

- **2 December 2005** – First claimant enters into a **Sale and Purchase Agreement** to purchase an apartment at **Elluk**;

- **9 June 2006** – **Second employment contract** entered between the first claimant and the defendant company for 2 years for the position of **General Manager Human Resources**;

- **17 July 2006** – **Commissioner of Labour** letter refusing the first claimant's work permit;

- **21 July 2006** – Letter from the **CEO** of the defendant company to the **Commissioner of Labour** confirming inter alia that:

  "*The company's objective remains that the knowledge, skills and experience of Mr. Burke be passed on to a Ni-Vanuatu (designate) under the company localization program. It is however recognized that due to their nature, this will not occur "overnight" but take some time with the right designate*".

- **23 February 2007** – **Memorandum** from the **Minister** to the **Commissioner of Labour** approving the renewal of the first claimant's work permit "*... with a view to the Labour Department considering his status later on in the year*" (whatever that may mean);

- **9 to 19 March 2007** – Series of letters between the **Commissioner of Labour** and the **Chief Executive Officer** (CEO) of the defendant company culminating in the extension of the first claimant's work permit for "*a period of six months only*". The letter also required the submission of a training program that the first claimant would provide to a local counterpart;

- **21 November 2007** – **Third employment contract** between the first claimant and the defendant company commencing on **1 December 2007** for 3 years in the position of **General Manager, Human Resources**; contract signed on **17 January 2008**;

- **25 January 2008** - **Terry Kerr** terminated as **CEO** of the defendant company;

- **4 March 2008**- **Extraordinary Board Meeting** re: Contract renewal for Messrs Dimitri Politis and Alan Burke which: " *resolved to endorse the renewal retrospectively, as the contracts were already signed in January 2008. Board further resolved that in the future all renewal of contracts for senior management positions should be presented to the Board for endorsement before signing*";

- **24 April 2009** – Letter from the **Chairman** Board of Directors of defendant company (the chairman) to first claimant suspending him for 14 days for "*working without a valid work permit*";

- **8 May 2009** – Letter from **Acting CEO** to first claimant continuing his suspension indefinitely "*whilst work continues in getting your Work Permit resolved*" and "*ensuring the continuation of your normal conditions of employment including payment of your salary*"; (in the absence of a valid work permit);

- **14 May 2009** – Letter from the **Chairman** to the first claimant authorizing his return to work "*effective 15.30hours today Thursday 14 May 2009*" (in the absence of a work permit);

  - Letter from **Commissioner of Labour** to defendant company refusing a work permit to the first claimant as **General Manager Human Resources** because "*I am convinced that this position can easily be filled by a local counterpart*";

- **22 May 2009** – Letter from **Acting Principal Immigration Officer** cancelling the first defendant's residency permit to reside and work for the defendant company;

  - Letter of appeal from **Acting CEO** to **Minister of Internal Affairs** enclosing an undated copy of a "*localization program*" for the position of **General Manager Human Resources** with an implementation period of 3 years;

- **7 July 2009** – **Minister** refuses the defendant company's appeal against the **Commissioner of Labour**'s refusal to grant the first claimant a work permit for the third employment contract;

- **9 July 2009** – **Board of Directors** meeting containing the following relevant minute:

  > "*Alan Burke employed by NF as General Manager Human Resources. At the current time all business are being interrogated for their compliance to general labour laws. The refusal to renew Alan's permit has been appealed and the appeal lost ... Legally we would have to pay the contract out anyway so we would be better serving NF by using Alan's skills to locate and train a suitable Ni-Vanuatu designate. Moved to advise Alan, that there is great risk financially to him personally and Air Vanuatu financially and that he should not remain on the premises without a valid work permit to mitigate this exposure*".

- **9 & 10 July 2009** – **Hawkes Law** invoices for incorporating **APB Consultancy Ltd.** (the second claimant) and obtaining business licence, residency permit renewals and change of status;

- **10 July 2009 –** Letter from **Acting Principal Immigration Officer** cancelling first claimant's residency permit with effect from **21 July 2009**;

  - Certificate from the **Acting CEO** that "(the first claimant) *is the current General Manager Human Resources*";

- **17 July 2009 –** Letter from **Acting Principal Immigration Officer** rejecting first claimant's application for a new residency permit on the basis that it "*is null and void due to the disqualification of your appeal to Minister of Internal Affairs for work permit*".

- **19 August 2009** – Second claimant receives **VIPA** approval;

- **25 August 2009** – Second claimant receives a **Business Licence**;

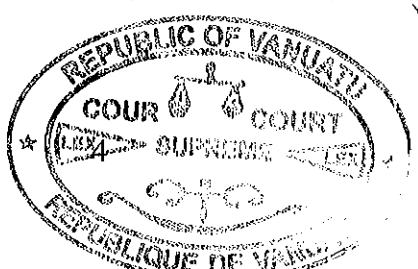
- **1 September 2009**–Second claimant enters into a **Consultancy Contract** with defendant company on the basis that:

  > "*The conditions provisions and remuneration to the consultant shall be in total accordance with all those conditions and provisions as stated in the employment contract of Alan Burke dated 21 November 2007*".

- **8 September 2009 –Staff Notice** issued by **Acting CEO** advising of the hiring of second claimant to provide professional and business services to the defendant company;

- **30 September 2009- Board of Directors** meeting which contains the following relevant minutes:

  > "*After reviewing General Managers contract the Board resolved to terminate the General Manager Human Resources position occupied by Alan Burke, based on the following facts:*
  >
  > - *The airline did not respect the Labour Laws as far as expatriate employees employment were concerned and instead force the system by offering jobs despite numerous calls from the Labour office;*
  > - *He did not respect previous Board directive to suspend him from the work place and return to work despite holding (no sic) proper work and residency permits;*
  > - *He went around the system and got a licence and work permit and a consultancy private company instead to retain his job without the prior approval of the Board;*



It was also revolved (sic) a formal letter of termination be issued to Alan Burke immediately on the ground of gross misconduct.

The Board resolved that any future contract for management level must be presented to the Board for endorsement prior to the issue of formal contract to the designated officer. Contracts for pilots and engineers must also be presented to the Board for information." (**cf:** earlier resolution of 4 March 2008)

- **1 October 2009** – Letter from **Chairman** to first claimant terminating his contract with defendant company on the basis that:

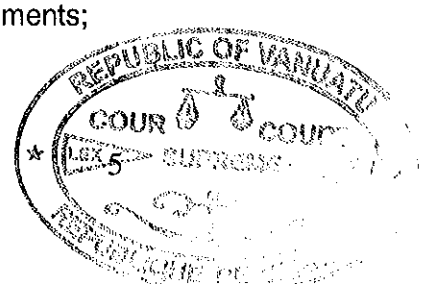
  "This new contract arrangement (i.e. the Consultancy Contract) has not been approved or authorized by the Board. You are therefore informed that your contract with Air Vanuatu is terminated (sic) forthwith. As General Manager Human Resources, you should know you have committed a substantive breach of the contract by contracting another arrangement to return to your job".

- **5 October 2009** – **First claimant's** detailed response to the Chairman's termination letter rejecting and refuting any suggestion of acting *"... under-handedly against the Board and company as a whole ..."*;

- **6 October 2009** – First claimant's letter to the **Chairman** seeking payment of legal entitlements including –

  - *"Payment out of the 'contract' to its expiry 30 November 2010;*
  - *Payment of three (3) months in lieu of required notice;*
  - *Payment of all outstanding annual leave accruals;*
  - *Severance payment of one (1) month salary per each year of service back to 24 June 2005;*
  - *On-going staff travel entitlements as stated in the 'contract';*
  - *Also, if and when required, Air Vanuatu to pay all reasonable repatriation costs for my family and myself back to Australia".*

- **8 October 2009 to 9 November 2009** – Various correspondence including emails and letters between the first claimant and officials of the defendant company including the Chairman; and **Advantage Management Consultancy** (AMC) dealing with various matters including:
  - proposals for settling the claim;
  - possible consultancy opportunities with **AMC**;
  - payment of annual leave accruals and severance pay entitlements;



- **27 November 2009** – Claimants issued a **Supreme Court claim** for outstanding entitlements under the third **Employment Contract** dated **27 November 2007** and a **Consultancy Contract** dated **1 September 2009**, including, an order pursuant to **section 56 (4)** of the **Employment Act**; Damages for loss of reputation; pain, suffering and humiliation to be assessed and costs;

- **4 January 2010** – Defendant company filed a defence denying liability and asserting that the first claimant's employment contract of **27 November 2007** "*had ended by operation of law on 7 July 2009*" and the purported **Consultancy Contract** "*was invalid and unlawful and of no effect*" as the first claimant '*had no work permit, no residency permit and he could not continue in employment with the defendant under the employment contract disguised as the consultancy contract*".

4. The foregoing chronology is conveniently encapsulated in a statement of **Agreed Facts** filed by the parties and from which I extract the following:

> "*1. The defendant employed Alan Burke in accordance with written employment contracts entered into on the following dates:*
>
> *(a) 24 June 2005 (commencing 24 June 2005 for 2 years);*
>
> *(b) 9 June 2006 (commencing 1 June 2006 for 2 years); and*
>
> *(c) 21 November 2007 (signed on 17 January 2008) (commencing 1 December 2007 for 3 years).*
>
> *1. The defendant applied for and obtained an original work permit on or about 21 July 2005 and subsequent renewals for Mr. Burke, the last of which expired on or about 16 September 2007.* (during the duration of the second contract)
>
> *2. Mr. Burke continued to work as the defendant's General Manager Human Resources from 16 September 2007 until he was suspended by the defendant's letter dated 24 April 2009 for a period of 14 days.*" (a period of 19 months)

5. **Agreed facts 1 (b)** and **(c)** above raises several "*unusual*" features about the claimant's employment contracts, including, the timing of the second and third employment contracts which were entered into long before the expiry of the preceding contract. For instance, the **second contract** was entered into before half the term of the first contract had expired and extended beyond the term of the work permit granted for the first contract. The **third contract** was drawn up

barely five (**5**) months after the second contract was signed and when it still had nineteen (**19**) months to run.

6. It is not entirely clear why there appears to have been an unseemly rush to enter into the second and third employment contracts. In this regard, I note that **Clause 14** of **contracts (1)** and **(2)** allows for variations to be made to the employment contracts "*during its term by a way of letter from the Managing Director countersigned by the employee*".

7. In the claimant's case after an initial refusal, he received a work permit issued to him for his first employment contract covering the period **21 July 2005** to **21 July 2006**. Thereafter he received a **single** extension (after undergoing an appeal process) for "*a period of 6 months only*" (*see:* **Commissioner of Labour's** letter of **16 March 2007**). This extension expired on **16 September 2006** during the currency of the second employment contract and several months **before** the date of the third employment contract. There is no record after that date of the first claimant being granted a further extension to his work permit. Indeed, the converse is reinforced by the cancellation of the first claimant's residency permit on **22 May 2009** and the **Minister's** letter of **7 July 2009** upholding the **Commissioner of Labour's** refusal of a work permit to the claimant.

8. A comparison of the first claimant's three (3) employment contracts discloses the following significant "*differences*":

(a) Remuneration (Clause 3)

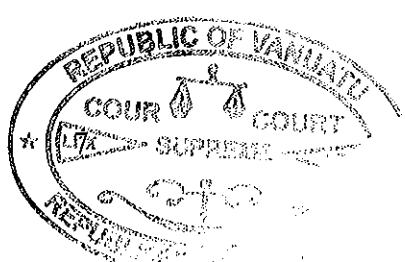
- Contract (1) – **VT600,000** (inclusive of overseas allowance)
- Contract (2) – **VT797,000** (inclusive of overseas allowance);
- Contract (3) – **VT883,500** to be reviewed on 1 December 2008;

A comparison of **Contracts (1)** and **(2)** indicates that other than a change of title in the first claimant's position from "***Manager Human Resources***" to "***General Manager Human Resources***" and the removal of any mention of a disentitlement to a severance allowance in **Clause 3** of the second contract, the most apparent difference is in the level of remuneration.

That difference when extended to **Contract (3)** represents a salary increase of **47%** over a period of **30 months** with a further review within 12 months of the third contract being signed.

9. In this regard the then **CEO**, **Terry Kerr** deposes that:

"*by June 2006, the defendant decided to abolish the overseas allowance to expatriate employees so that all managers whether Ni- Vanuatu or expatriate were paid at the same salary level. For those reasons I signed the Employment contract between the defendant and the first claimant dated 9 June 2006.*"



10. However, despite the so-called decision to abolish the overseas allowance, the second employment contract clearly states in identical terms to the first employment contract when an overseas allowance was paid:

> *"The remuneration of the Employee shall be VT797,000 (inclusive of Overseas Allowance) and shall be subjected to review in accordance with Company policy as approved by the Board of Directors."*
>
> (my underlining)

11. Plainly the first claimant continued to receive an overseas allowance as part of the remuneration under the second contract inspite of its claimed abolition.

12. In this latter regard too, there is no evidence disclosed of any minutes or a Board resolution which endorses a policy decision "*to abolish the overseas allowance to expatriate employees*" as there should have been, if indeed, such a policy had been adopted or existed.

13. Whatsmore the "*reasons*" advanced for entering into a new second contract does not explain why the variation clause could not have been invoked to effect the remuneration policy change to the first contract for the remainder of its term.

(b) Other Employment benefits (Clause 3)

- Contracts (1) and (2) identical, no changes;
- Contract (3) increased benefits from **4** to **6** altered as follows (with the old benefits in square brackets):

"*(i)* ***Provision of Fully Maintained Operational Vehicle*** [in lieu of a Petrol Allowance per company policy]

(ii) ***All Telephone Expenses Totally Reimbursed*** [in lieu of a Telephone Line Rental as per company policy]

(iii) ***Provision of a Company Mobile Telephone*** [completely new benefit]

(iv) ***Company provided Medical Health Cover with Aon Risk Services*** [in lieu of Medical Insurance coverage per company policy].

(v) ***Staff Travel Entitlements in accordance with the Employers Staff Travel Policy Manual*** *with an added rider that "If for whatever reason Mr. Burke should leave the employment of Air Vanuatu (Operations) Limited Mr. Burke's Staff Travel Entitlements will remain*" [completely new clause].

(vi) ***Other Staff Benefits as per existing Staff Policies and Procedures Manuals***".

(c) Work and Residency Permits (Clause 8)

- Contract (1) and (2) – identical, no change, and reads:

  "*This agreement shall not come into force until such time as the Employee has all necessary approvals to live and work in Vanuatu. All applications required to allow the employee to live and work in Vanuatu shall be the responsibility of the employer and shall be paid for by the employer*".

- Contract (3) – the only comparable clause reads:

  "*The costs for the issuance of both Work and Residency Permits to the employee will be borne by the employer. For eligible family members residing in Vanuatu the costs of issuance of residency permits will be borne by the employer. The employee will be responsible in advising the employer at least ninety (90) days prior to the expiration of all work and residency permits*".

  (my underlining)

Plainly this Clause which was consistent with the requirements of the relevant legislation governing Work Permits was meant to protect both the first claimant and the defendant company from contravening the law.

The reason(s) why this important "*condition precedent*" was removed from the third employment contract is not entirely clear but, if the first claimant is to be believed, then it was "*done under the direction of the CEO Mr. Terry Kerr*".

This removal constitutes a significant watering down of the effect of **Clause 8** and is an indication of the lax attitude of the first claimant and the CEO towards the necessity to obtain a work permit for the claimant before taking up or continuing employment with the defendant company.

(d) Cessation of Agreement upon Withdrawal of Work/Residency Permit Approval (Clause 9)

- Contracts (1) and (2) identical, no change;
- Contract (3) completely omitted;

This clause is closely related to **Clause 8** (above) and was clearly intended to deal with the frustrating event that the employment contract was rendered incapable of performance owing to the withdrawal of the employee's approval to live or work in Vanuatu.

In such a circumstance the employee's entitlements were "*at the sole discretion of the Employer*" or, if the withdrawal was the fault of the employer, then the

employee would be entitled to all statutory entitlements payable under the **Employment Act**.

The complete omission of this Clause in **Contract (3)** resulted, in part, in the removal of the Employer's unfettered discretion to pay the employee upon such an event occurring.

(e) Summary Termination by Employer for "*serious misconduct*" (Clause 12)

- Contracts (1) and (2) identical, no change;
- Contract (3) completely omitted.

This Clause was plainly intended to recognize the employer's right to summarily terminate the employment contract for "*serious misconduct*" as defined. The complete removal of this Clause in **Contract (3)** means that the employer's right to summary dismissal is constrained by the provisions of **Section 50** of the **Employment Act** which permits summary dismissal for "*serious misconduct*" only after a hearing and as a last resort. [*see:* **Subsection (3) and (4)**]

This highlighted difference in the claimant's third contract is further accentuated by the inclusion of unaltered **Clauses 8, 9** and **12** in the employment contracts of the **General Manager Flight Operations** (dated 19 March 2008) and the **General Manager Engineering (Airworthiness Controller)** (dated 27 July 2007). Both contracts were executed during the first claimant's time as **General Manager**, **Human Resources** and occurred before and after the drawing up of the claimant's third employment contract which omitted all 3 clauses.

Noticeable also by their absence, in both General Manager's contracts, is a clause recognizing their right to a severance allowance in similar terms to **Clause 14** of the claimant's third contract **and** a termination clause that even remotely resembles **Clause 11** in the claimant's third contract.

(f) Mutual Termination by Notice (Clause 15)

- Contract (1) and (2) – identical, no change and reads:

  "*This contract can be terminated by either party providing to the other not less than 3 months notice in writing or payment in lieu thereof*".

- Contract (3) clause re-numbered "**11**" and altered as follows:

  "*The Employee may terminate this Employment Contract, prior to its expiration date by giving a minimum of three (3) months notice, or payment in lieu of such notice, to the Employer. The Employer may terminate this Employment Contract by paying out the*

outstanding remuneration entitlement of this Employment Contract to expiration date being 31 December 2010".

(my underlining)

No mention is made of the Employer's right to summarily terminate for "*serious misconduct*" and the Employer's previously mutual right to terminate by providing 3 months notice in writing or payment in lieu [*as per clause 15 in Contracts (1) and (2)*] has been completely omitted. The right to terminate by notice was retained however for the employee.

With those omissions, the employer lost its previously unconditional right to terminate the claimant's contract (without cause) upon written notice or upon payment of 3 months salary. It was now replaced by an emasculated right predicated upon "*... paying out the outstanding remuneration*".

(g) Severance Payment (Clause 14)

- Contracts (1) severance expressly excluded in **Clause 3**;
- Contract (2) no mention at all of severance;
- Contract (3) included in a completely new personalized **clause 14** which reads:

  "*The Employee shall be entitled to severance payment equivalent to one (1) month salary per each year of service commencing from the date of initial employment, being 24 June 2005 to the end of his Employment Contract*".

14. In light of the foregoing "*differences*" I am left with the distinctly unfavorable impression that the first claimant was given "*carte blanche*" to draft his third employment contract which resulted in a contract that was heavily weighted in his personal favor. Furthermore, despite the denials of **Terry Kerr** and the first claimant that the third employment contract was drafted in a hurry, I note that **Clause 1** incorrectly identifies the first claimant's position as "**General Manager Airports**" and **contract (2)** contains a six month probation period in identical terms to that contained in **Clause 2** of the first employment contract although the first claimant had by then, already completed 11 months employment.

15. **Agreed fact 1 (c)** also raises an "*unusual*" sequence about the third employment contract which is dated **21 November 2007** with a commencement date of **1 December 2007** but was not signed until **17 January 2008** i.e. almost 2 months after its creation, or a month after its commencement, and 5 months before the expiration of the second contract and all of this occurred during a time when the CEO and the first claimant knew that there was **no** valid Work Permit authorizing the taking up or continuation of the first claimant's employment with the defendant company.

16. Between **Agreed facts 1 (b)** and **1 (c)**, a period of **19 months**, nothing much is known about the actual status of the first claimant's work permit which expired on **16 September 2007** during the pendency of the second employment contract. However, the suspension letter dated **24 April 2009** referred to in **Agreed Fact**

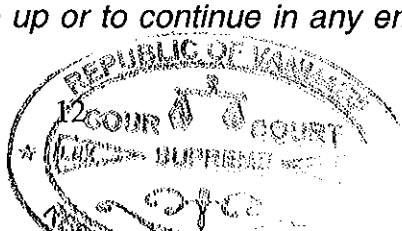
(3) mentions a notice from the **Labour Department** that the first claimant was "*an illegal employee ie. working without a valid work permit*". The first claimant also admitted that he had continued working after September 2007 "*... under direction of the CEO pending the appeal on my work permit*".

17. **Section 2** of the **Labour (Work Permit) Act** [CAP. 187] states:

> "*(1) It shall be an offence for any non-citizen worker to whom this Act applies to take up or to continue in any employment in Vanuatu, without first having obtained a work permit or, where such permit has been issued, otherwise than in accordance with the conditions thereof.*
>
> *(2) Every employer who wishes to employ any non-citizen worker shall make application for a work permit to the Commissioner of Labour in the form and manner prescribed in Schedule 1.*
>
> *(3) The Commissioner of Labour may issue work permits valid –*
>
> *(a) where the employment is not the subject of a written contract, for 2 years;*
>
> *(b) where the employment is or is to be the subject of a written contract, for 3 years or the duration of the contract, whichever period is the less.*
>
> .....
>
> *(5) An employer who wishes to retain the services of an employee in respect of whom a work permit has been issued beyond the expiry of the period for which such permit is valid, shall make application ... to the Commissioner of Labour not less than 60 days prior to the date of expiry of such permit.*
>
> .....
>
> *(10) It shall be a condition of the issue of every work permit or its renewal ... that the employer shall train a citizen worker.*
>
> .....
>
> *18 (2) Any person convicted of an offence against the provisions of this Act .... shall be liable in the case of a first offence to a fine not exceeding VT 100,000 ...*"

18. For present purposes it is only necessary to highlight some of notable features of the above provisions including:

- It is a criminal offence punishable with a fine of **VT100,000** for a non-citizen worker "*... to take up or to continue in any employment*" without a valid work permit;



- The expression "*to take up*" employment includes in my view, the entry into and the performance of a contract of employment; and *"to continue"* employment refers to an existing employee continuing in the same position with the same employer;

- A work permit must be "*obtained*" (past tense) before taking up **or** continuing employment;

- The word "*first*" serves to emphasize when the work permit must be obtained **ie.** before taking up or continuing employment;

- The wording of the relevant **Application form** and the use of the phrase "*who wishes to employ*" clearly refers to a prospective employer and reinforces the time when the work permit must be applied for;

- The training of a citizen worker is a statutory condition of every grant or renewal of a work permit to a non-citizen worker.

19. From the foregoing it is possible to confidently draw the following conclusions:

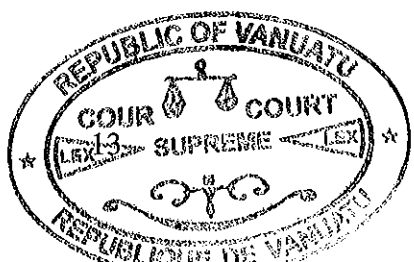
- Employment of a non-citizen without a valid work permit is a criminal offence and any employment contract entered into without a valid work permit is illegal, void and unenforceable;

- A new work permit is required for every contract of employment entered into between an employer and an existing non-citizen employee if the employment contract supersedes or replaces an earlier contract for which a work permit was granted, and the replacement contract has a different (ie. later) commencement and expiry date;

- Failure to train a citizen worker during the duration of a work permit constitutes a breach of the work permit.

20. In arriving at these conclusions I am guided by the observations of **Lord Russel of Killowen CJ** when he said in **Attorney General v. Carlton Bruce** [1988] 2QB 158 at p. 164:

> "*The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject viz. to give effect to the intention of the Legislature, as that intention is to be gathered from the language employed, having regard to the context in connection with which it is employed (and once ascertained) ... It is not open to the court to narrow and whittle down the operation of the Act by consideration of hardship or business convenience, or the like.*"



In the context of the present case, I am also mindful of the rule of law enunciated by **Baron Parke** when he said in **Cope v. Rownlands (1936) 46 R. R. 532** at p. 539/540:

> "*It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by statute, though the statute inflicts a penaly only, because such penalty implies a prohibition and it may be safely laid down notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract?*"

21. In this latter regard the **Labour (Work Permit) Act** besides having a revenue-collecting purpose, also has, a discernible protective or public policy purpose, namely, the prevention, in the public interest, of the uncontrolled employment of non-citizen workers in Vanuatu and, further, in ensuring that citizen workers will be trained to eventually take over the positions for which non-citizen workers are granted work permits.

22. At the trial the following witnesses gave evidence and were cross-examined:

For the claimants

(1) **Alma Edwin** an employee of **Hawkes Law** who produced various invoices dealing with the setting up of the second claimant "*for Mr. and Mrs. Burke*";

(2) **Alan Norman Burke** the first claimant who produced two sworn statements dated **27 July 2010** and **25 October 2010** respectively; and

(3) **Terry Kerr** who was the **CEO** of the defendant company at the relevant time produced a sworn statement dated **1 November 2010**;

For the defendant

(1) **Joseph Laloyer** the existing **CEO** of the defendant company who produced a sworn statement dated **17 September 2011**;

(2) **Charles Daliure Lini** who was the **Chairman** of the defendant company's Board of Directors during the relevant period;

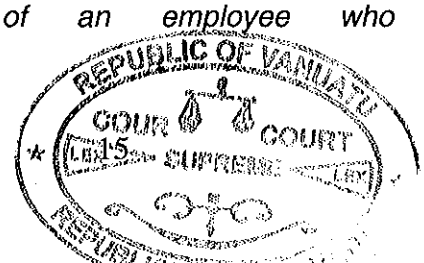
(3) **Reynolds Boeson** who replaced the first claimant as the defendant company's **Manager Human Resources** produced a sworn statement dated **8 November 2010**; and

(4) **Lionel Kaluat** the **Commissioner of Labour**.

23. During the trial, the claimants successfully sought the amendment of the claim by adding an additional head of relief for repatriation entitlements. Despite defence counsel's objection, I was satisfied that the amendment of the heads of relief did not give rise to any new factual issues in the case in so far as a repatriation entitlement has consistently been a part of the claimant's contracts of employment with the defendant company. I was also satisfied that despite the lateness of the application to amend (during the trial but before the claimant's evidence) no prejudice would be caused to the defendant by granting it. Finally, I note that defence counsel did not cross-examine any of the claimant's witnesses on this aspect of the claim as he could have done if it was being seriously challenged.

24. **Sections 58** and **59** of the **Employment Act** [CAP. 160] provides:

> "***58. Employee's right to repatriation***
>
> *(1) Subject to section 63 every employee whose ordinary place of residence is more than 50 kilometers away from his place of employment and who has been brought to the place of employment by the employer or his agent shall have the right to be repatriated at the expense of the employer to his place of origin or engagement, whichever is nearer to the place of employment, in the following cases –*
>
> *(a) on the expiry of the term of contract;*
>
> *(b) in the case of a termination of a contract when the employee has become entitled to a paid annual leave;*
>
> *(c) in the case of a breach of contract or a serious offence committed by the employer;*
>
> *(d) in the case of the termination of a contract due to the inability of the employee to complete the contract owing to sickness or accident.*
>
> *(2) The right of an employee under subsection (1) shall lapse if not used by him within 6 months from the date at which he becomes entitled thereto.*
>
> ***59. Repatriation of employee's family***
>
> *(1) Where the family of an employee has been brought to the place of employment by the employer or his agent in the circumstances mentioned in section 58 the family shall have the right to be repatriated as provided in that section whenever the employee is repatriated or in the event of his death.*
>
> *(2) The expression "family" in subsection (1) means the wife and the dependent minor children of an employee who reside with him."*



25. On a literal and fair reading of the above provisions, the second claimant company would **not** be entitled to claim for "*repatriation*" which, in my view, can only have application to natural persons (as employees) and the members of their nuclear family.

26. As for the first claimant, it is common ground that he was initially recruited on his first contract from **Brisbane, Australia** and therefore his "*place of origin*" for that contract was clearly more than 50 kilometers away from his place of employment in **Port Vila, Vanuatu** and, as such, he would have been entitled to be repatriated at the expense of his employer (the defendant company) at the end of the contract if he uses or attempts to exercise his right of repatriation within 6 months of the date of entitlement.
[*see*: **Naunga v TVL (2011) VUCA 11]**

27. Subsequent events however, including the entry into two (2) successive supervening employment contracts whilst the first claimant was residing in **Port Vila** and still working for the defendant company, means that the first claimant was recruited locally for those later contracts and, therefore, could **not** be described at the time of entering into those contracts, as "*an employee whose ordinary place of residence is more than 50 kilometers away from his place of employment and who has been brought to the place of employment by the employer*". Both of these requirements are pre-requisites to a claim for repatriation under **section 58**.

28. Accordingly, both claimants are not entitled to repatriation expenses and this additional head of relief is hereby dismissed.

29. It is common ground that the first claimant personally drafted his second and third employment contracts and, although he was aware at the time that he only had a **Work Permit** valid for **6 months** which had expired on **16 September 2007,** nevertheless, the third contract was apparently prepared, commenced, and executed "*because we were still going through the appeal process under the direction of CEO*".

30. Likewise, when asked about the various changes he made to the third contract, he said they were made "*under direction of CEO*". I was unimpressed with the first claimant. He struck me as conveniently evasive and less than truthful. He appeared intent on shifting responsibility for his actions to others when they were clearly to his considerable personal benefit and to the defendant company's (his employer) disadvantage even to the extent of denying knowledge of the details of the **Labour (Work Permit) Act** which was an important legislation within his core responsibilities as **General Manager Human Resources** of the defendant company.

31. I do not accept that he honestly believed as **General Manager Human Resources** that the convenient "*directions of the CEO*" was a good or sufficient excuse or justification to ignore the clear requirements of the relevant applicable legislation which he would have been familiar with as **General Manager Human Resources**.

32. Significantly, nothing is deposed by **Terry Kerr** about the circumstances surrounding his signing of the third employment contract "*a week before leaving the office*". However he admitted, in cross examination, to signing the contract knowing that the first claimant's work permit had expired. Earlier, when pressed about the three different dates of the third employment contract he could offer no explanation. He accepted that at the time of signing the third contract he knew the first claimant only had a 6 month extension to his work permit valid to **September 2007**, but he considered that was "*more than enough time to get back to the Minister for another extension*".

33. In this latter regard there is no evidence that any application was ever directed to be lodged for the third employment contract by **Terry Kerr** as CEO of the defendant company between September 2007 and 25 January 2008 (4 months), for the "*extension*" of the first claimant's already expired work permit.

34. If I may say so, the signing of the third employment contract when there was no valid work permit in existence authorizing the continued employment of the first claimant is a clear indication of the attitude of the then **CEO Terry Kerr** towards the requirements of the **Labour (Work Permit) Act.**

35. I was unimpressed with **Terry Kerr** who struck me as cavaliar in his attitude towards the work permit requirements of the **Labour Department** which he considered something of an inconvenience and a formality which could be ignored with impunity and in flagrant disregard of the law, content in the knowledge that it was the duty of the Labour Department to enforce the law and that the defendant company, as the employer, would ultimately bear the responsibility for any breaches of the law.

36. In both instances, considering the seniority of their positions within the defendant company, I do not accept that either witness honestly believed that the lodgment of an appeal against the refusal of a work permit or the mere existence of a desire to retain an employee's services, was a sufficient reason for the non-citizen employee concerned, to continue to work without a valid work permit for a period of 19 months.

37. A similar attitude was also displayed towards the localization of the claimant's position which was an ever–present concern of the **Commissioner of Labour**. By this, I mean, that the statutory condition was paid "*lip service to*" in the correspondence to the **Commissioner of Labour** but no serious effort was made to address the concern or to localize the first claimant's position. I can do no better than to repeat the words of **Terry Kerr** who said in this regard:

> "*Broadly speaking the localization plan I was not ofay with. I was trying to merge 2 companies and didn't have time to give localization a priority*".

38. Additionally, **Terry Kerr** deposes to being "*aware that the first claimant was responsible for training Mr. Reynold Boeson*". I have no hesitation however, in preferring the evidence of **Mr. Boeson** who firmly denied that he "*was ever*

supervised or trained by Mr. Burke" and further, that " *there is no training program for me or any other Ni-Vanuatu, during Mr. Burke's tenure*".

39. On the first claimant's part as head of **Human Resources** which would be more directly concerned with implementing the defendant company's localization plan/policy, his attitude is best summed up in his email of **8 October 2009**, which was copied to seven expatriate employees of the defendant company and which reads:

> "*Just some news, I am no longer with Air Vanuatu. Left last Friday (02nd) – well terminated really.*
>
> *A long long story but in brief very political and somewhat personal – basically I had the wrong colour face according to some Parliament Ministers. They want the locals – Ni-Vanuatu – to fill these positions, despite the fact that they have no idea and never will, which history has proven …*"

40. I remain entirely skeptical about the reason(s) advanced for the hurried extensions of the first claimant's first and second employment contracts long before their expiry dates and where the replacement contracts were heavily weighted in the claimant's favour and in the case of the third employment contract, was completely unsupported by a valid subsisting work permit or even an application for the grant of one.

41. With the foregoing in mind I can deal briefly with the **Agreed Issues** in the case as follows:

> "*1. Did the Employment Contract between the Defendant and the First Claimant dated 21 November 2007 end on 7 July 2009 when the Minister of Internal Affairs advised the Defendant that is appeals against the refusal to grant a work permit renewal and residency permit for the First Claimant were refused?*
>
> *2. If not, when did the Employment Contract dated 21 November 2007 end?*
>
> *3. What are the First Claimant's entitlements arising from the Employment Contract dated 21 November 2007?*
>
> *4. Was the Consultancy Contract entered into between the Defendant and the Second Claimant dated 1 September 2009 valid?*
>
> *5. If so, are the parties to that Consultancy Contract bound by "the Conditions, Provisions and Remuneration" as stated in the Employment Contract of Alan Burke dated 21 November 2007?*
>
> *6. What are the Second Claimant's entitlements arising from the Consultancy Agreement?*

7. *Is the Employment Contract dated 21 November 2007 and/or the Consultancy Contract dated 1 September 2009 invalid by reason of the involvement of the Defendant's previous lawyers?*"

At the outset I observe that **issue (7)** was not pressed by the defendant company and accordingly may be left to one side.

42. It is convenient to consider **issues (1), (2) and (3)** together as they concern the third employment contract. The issues appear to be framed on the assumption that the third employment contract was valid at inception. Such an assumption is wholly misconceived and is contrary to the provisions of **section 2** of the **Labour (Work Permit) Act** which renders the taking up of the contract, in the absence of a valid work permit, illegal and unenforceable and I so find.

43. **Issues (4), (5) and (6)** deal with the purported **Consultancy Contract** between the second claimant company and the defendant company. I say "*purported*" advisedly because, although the contract is described as a "***CONSULTANCY CONTRACT***", its terms and conditions are described as being:

> "*3. The conditions, provisions and remuneration to the consultant shall be in total accordance with all those conditions and provisions as stated in the Employment Contract of Alan Burke dated 21 November 2007*".
> (my underlining)

44. I have already found that the said "*Employment Contract*" is in breach of the **Labour (Work Permit) Act** and is therefore illegal and unenforceable. The question then is:

"***Does the incorporation of the Employment Contract into a Consultancy Contract of the second claimant company render it legal and enforceable and beyond the purview of the Labour (Work Permit) Act?***"

45. In **Massey v Crown Life Insurance Co.** [1978] 2 ALL ER 576 **Lord Denning MR** said:

> "*The law as I see it, is this: if the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label on it ...*".

46. More trenchantly **Megaw LJ** said in **Ferguson v John Dawson & Partners (Contractors)** [1976] 1 WLR 1213**:**

> "*My own view would have been that a declaration by the parties even if it be incorporated in the contract, that the workman is to be, or is to be deemed to be, self-employed, an independent contractor, ought to be wholly disregarded – not merely treated as not being conclusive – if the remainder of the contractual terms,*

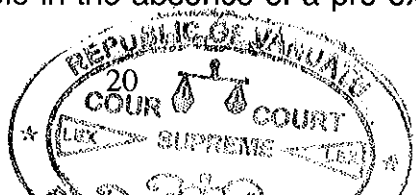
governing the realities of the relationship, show the relationship of employer and employee."

47. In this latter regard an examination of the terms and conditions of the above-mentioned (third) Employment Contract reveals numerous Clauses that can have no possible application to a limited liability company including, medical health cover; sick and annual leave entitlements; severance payments; provision of medical certificates and undergoing medical examinations and repatriation, to name a few. The Employment Contract also requires the employee to "*devote the whole of his time and attention to the business of the (defendant) company*" and payment of remuneration is to be in the form of a monthly salary with a fixed review date. The position of **General Manager Human Resources** also reports to the **CEO** of the defendant company and is responsible for the integral function of "*the implementation and maintaining of all Human Resources related matters within Air Vanuatu (Operations) Limited*".

48. Recently in **Guy Benard v Republic of Vanuatu** Civil Appeal Case No. 05 of 2012 the Court of Appeal in upholding the appellant's submission that he was an "*employee*" not a "*consultant*" of the VMA relevantly observed at (**para 25**):

> "*The content of the contracts point strongly toward Mr. Benard's status as an employee. Mr. Benard's contract of employment contained these terms amongst others:*
>
> **(a)** *salary was paid monthly and subject to review;*
> **(b)** *an entitlement to annual leave on pay;*
> **(c)** *an entitlement to sick leave;*
> **(d)** *particular work hours were identified requiring Mr. Benard's sole devotion to his position;*
> **(e)** *an entitlement to compensation for overtime;*
> **(f)** *an entitlement to housing and vehicle allowance;*
> **(g)** *there was agreed liability by the VMA as his employer for workmen's compensation with respect to any liable accident or injury.*
>
> *Typically a contractor would be paid for the work done. A contractor would not therefore be expected to receive paid annual leave or sick leave. Nor would a contract for services be expected to cover an employer's liability for workmen's compensation.*
>
> *These factors all strongly point toward Mr. Benard as an employee rather than a contractor.*"

49. In light of the foregoing and the admitted fact that the incorporation of the second claimant company was seen as a "*means*" to enable the continued employment of the first claimant by the defendant company in the same position and under the same terms as the third employment contract, I have no hesitation in holding that the **Consultancy Contract** was in reality and in effect, an employment contract within the ambit of the **Labour (Work Permit) Act** and accordingly was illegal, void and unenforceable in the absence of a pre-existing valid work permit



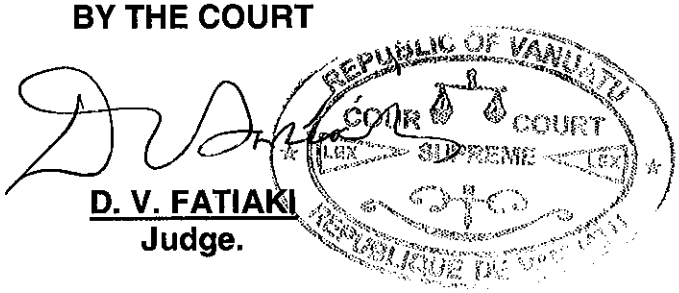
authorizing the first claimant "*to take up*" the employment contract with the defendant company.

50. The answer to **issues (4)**, **(5)** and **(6)** is: No, the Consultancy Contract was in breach of the **Labour (Work Permits) Act** and was therefore invalid and unenforceable.

51. All **Agreed Issues** having been determined against the claimants the claim is dismissed with costs in favour of the defendant company to be taxed if not agreed.

DATED at Port Vila, this 14th day of May, 2012.

BY THE COURT



D. V. FATIAKI
Judge.