

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

Civil Case No. 178 of 2009

BETWEEN: HARRISON WILLIE
Claimant

AND: MIRVAC HOTELS PTY LIMITED trading as
THE SEBEL (VANUATU)
Defendant

Coram: Justice D. V. Fatiaki

Counsels: Mr. J. I. Kilu for the Claimant
Mr. J. Ozols for the Defendant

Date of Decision: 4 October 2013

JUDGMENT

1. On 2 June 2007 the Claimant was employed by the defendant company as Food & Beverage Duty Manager at the Sebel Hotel in downtown Port Vila. On 7 July 2008 the claimant's employment contract was renewed for a further 2 years until 2 June 2010.

2. The employment contract contained a termination clause as follows:-

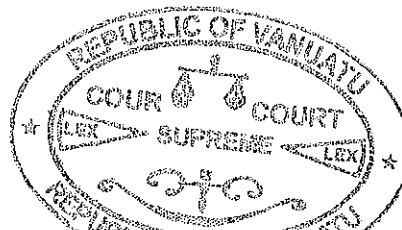
"The agreement may be earlier terminated with two (2) weeks notice by the employee (sic) or upon illness or incapacity that prevents Employee from substantially performing assigned duties for an extended period of three (3) months or, by breach of agreement by employee or, without notice for any gross misconduct".

(my underlining)

3. By letter dated 20 May 2009 the claimant's employment was terminated "... for theft which constitutes gross misconduct". The evidence of theft is said, in the letter, to be recorded in "... casino surveillance video footage that clearly indicate you receiving cigarettes from the Lobby Bar area without payment."

4. This "evidence" is more clearly described in a sworn statement of **Bernie Millman**, the Manager of the defendant company who was also responsible for all of the hotel's surveillance equipment at the relevant time. He deposed in a sworn statement dated 29 February 2012 (almost 3 years after the event!) as follows:

"According to the surveillance cameras and my recollection of the events the incident occurred on the Saturday prior to 20 May 2009. The surveillance tapes of the time showed that the barman handed a packet of cigarettes from the dispenser to Peter Mansen who in turn handed them to the claimant. ..."



5. In this regard **Rule 11.5** of the **Civil Procedure Rules** relevantly states:

"(3) a sworn statement may refer to a thing other than a document (an 'exhibit');

(4) The sworn statement must state whether the exhibit may be inspected.

(5) The party making the sworn statement must ensure that the exhibit is available at reasonable times for inspection by other parties."

6. Plainly, the "surveillance tapes" referred to in the above sworn statement are an "exhibit" and should have been "available for inspection" by the claimant if desired and requested as occurred in this case. Unfortunately, despite counsel's best efforts including a court order for the "Defendant to provide claimant a copy of surveillance tape by 11 April 2012", neither the claimant nor the court was ever provided with a copy of the surveillance tape.

7. The defendant's failure to comply with the Court's order to furnish the claimant with a copy of the surveillance tapes was a matter upon which the court had power to give judgment against the defendant upon a proper application being made by the claimant (see: Rule 18.11). Fortunately no application was filed.

8. Furthermore and adding to the court's difficulties, defence counsel inexplicably failed to appear on the trial date which was earlier fixed for "Monday 4 June 2012 at 9:00 am at Dumba" on 7 May 2012 in the presence of defence counsel.

9. In this latter regard **Rule 12.9** of the **Civil Procedure Rules** relevantly states:

"If a defendant does not attend when the trial starts:

(a) The court may adjourn the proceeding to a date it fixes; or

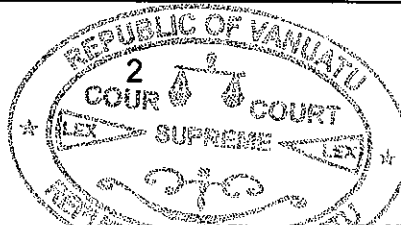
(b) The court may give judgment for the claimant; or

(c) The claimant, with the permission of the court, may call evidence to establish that he or she is entitled to judgment against the defendant".

10. In the present case 'option (c)' was adopted in the absence of any explanation or request from defence counsel for an adjournment of the trial. The claim was also outstanding since 9 March 2011 and the claimant's witnesses were all present and ready for the trial to commence. Accordingly the claimant and his witnesses gave evidence and counsel closed the claimant's case.

11. The claimant's evidence about the incident is as follows:-

"5. Sometime in or about the end of April and the beginning of May, 2009, I was told by Peter Mansen, who is one of the Defendant's employees,



that a guest had given him a packet of cigarettes as a tip and that I could have it and so I accepted the offer.

6. I now do not recall the exact date on which I took the packet of cigarettes, but it was about 2 or 3 weeks before my termination.
7. On the night that I took the cigarettes, I was the duty manager. My shift had ended and I was waiting for the 3 am bus to go home when I picked the packet of cigarettes from Darol at the bar counter.
8. The packet of cigarettes had been received by Peter Mansen from a guest as a tip. Mansen offered it to me and I accepted to take the packet of cigarettes. Mansen then left it in Darol's care at the bar to pass it on to me if he (Mansen) was not around when I came to get it. Peter Mansen is Darol's supervisor at the bar.
9. **Although I had accepted it from Mansen, it was in fact Darol who actually handed the packet to me over the bar counter.**
10. Some 2 to 3 weeks later, on 20th May, 2009 I was summonsed to the General Manager's office and there I was accused with allegations of having stolen the packet of cigarettes from the Defendant's bar.
11. The General Manager said they had video footage of me stealing the packet of cigarettes from the bar, but I strongly denied the allegations.
12. I did explain to the General Manager that I did not steal the packet of cigarettes, and that it was a tip from a guest who had given it to Mansen, who then left it with Darol at the bar to hand it over to me.
13. Despite my explanations of being innocent, the General Manager terminated me on the spot. ...
14. Although I did not steal the packet of cigarettes and have worked in the hospitality industry for a long time with a good name in the industry, I was not given a warning or a disciplinary punishment. I am not admitting in any way that I stole the cigarettes, but it seems too extreme to terminate anyone for a packet of cigarettes especially when I totally denied the allegations.
15. In his letter dated 12th August, 2009, the General Manager said that he had no other choice but to have to terminate me in order to send a message to other staff not to steal from the Defendant. ...
17. Since I disputed stealing the packet of cigarettes, the Defendant should have suspended me and conducted a proper investigation to find out the real truth before he can take a decision. He did not do this, but simply terminated me on the spot. If he had done so, he would have got confirmation from Peter Mansen and Darol that the packet of cigarettes is infact a tip from a customer."

(my underlining)

12. In confirming the claimant's evidence, **Peter Mansen** who was the Bar supervisor at the relevant time deposed in a sworn statement dated 9 December 2009 (7 months after the alleged incident):



“3. I want to inform the Supreme Court that I was terminated because of the packet of cigarette that I ordered Mr Darol (staff of Sebel) to give to Mr Harrison Willie. ... Accordingly to my recollection, I am clear in my mind that I was the one who received this present or packet of cigarette that was paid for by a guest of the Defendant.

4. ... the guest had specifically offered this packet of cigarette to me after paying and I entered the record of that particular cigarette and I left the cigarette and called Darol (after some time) that I have already informed Mr Harrison of this packet of cigarette and if Mr Harrison comes over to ask for this packet of cigarette, and if I am not around, then I want you to give him the packet of cigarette that had already been paid for by the guest.”

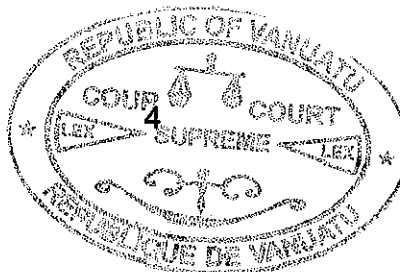
(my underlining)

13. For this part **Darol Garae** who was the Bar Attendant on the relevant night confirms that it was he who gave the packet of cigarettes to the claimant following advice from Peter Mansen his immediate supervisor.
14. In the absence of defence counsel neither the claimant or his two (2) witnesses namely, Peter Mansen and Darol Garae were cross-examined on their sworn statements which, if accepted, were fully exculpatory of the claimant stealing the packet of cigarettes.
15. Additionally, the sole witness for the defence namely, **Bernie Miller** did not appear to testify. He was not required for cross-examination however, and therefore his evidence (as contained in his sworn statement) was untested. This led to claimant's counsel seeking the exclusion of the sworn statement in its entirety or, at least, paragraph 5 (set out at paragraph 4 above).
16. Notwithstanding the above, the Court refused to strike out the singular sworn statement filed on behalf of the defendant. The sworn statement is the most detailed evidence of what was revealed in the 'surveillance tapes'.
17. In this regard the sworn statement (of a person who viewed them) states:

“The surveillance tapes of the time showed that the barman handed a packet of cigarettes from the dispenser to Peter Mansen who in turn handed them to the claimant ...”

(my underlining)

This unequivocal statement on oath by **Bernie Miller** the hotel official “responsible for supervision of all the surveillance equipment both within the Casino and at the hotel” of the sequence of handling of the cigarette packet ie. from barman to Mansen to the claimant, materially differs from the “findings” of a **Labour Officer's** report on the incident dated 7 August 2009 (3 months after the incident) which is heavily relied upon by the defendant and wherein is stated:



“... the video footage and the camera detail shows that Peter Mansen wasn't the one who gave the cigarette to Mr Harrison. The person who gave the cigarette to Mr Harrison is Mr Darol who was also on shift at that time.”

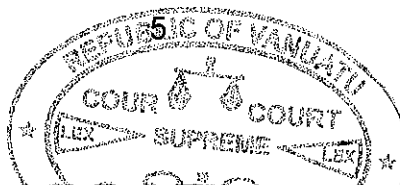
(my underlining)

The “*unequivocal statement*” is also directly contradicted by the sworn statement of **Darol Garae** who swears:

“...it was me who gave the packet of cigarettes to the claimant and as a result, Mr Harrison was terminated and Peter Mansen was also terminated and also myself.”

(my underlining)

18. Finally, on the basis of Peter Mansen's sworn statement he was not present at the time Darol Garae handed over the cigarette packet to the claimant and this puts further doubt as to what is actually shown in the defendant's undisclosed surveillance tapes.
19. In light of that material conflict in the evidence and in the absence of the surveillance tape which the defendant has failed to disclose, I prefer and accept the evidence of the claimant and Darol Garae and I reject the untested, uncorroborated evidence of Bernie Millman not only as to the contents of the surveillance tape, but also, his bare assertion that the 3 staff under surveillance (including the claimant) “... *acknowledged the accuracy of the surveillance cameras*” without viewing the tapes.
20. Needless to say, even if the defendant's surveillance tapes clearly and accurately recorded the persons and the handling sequence of the cigarette packet, that footage, alone, does not establish that the receipt of the cigarette packet by the claimant constituted theft or was an “*instance of dishonesty*” entitling the defendant to terminate the claimant's employment contract for “*gross misconduct*” without notice and without payment of severance.
21. Furthermore, I do not accept the defendant's assertion in its letter to claimant's counsel dated 12 August 2009 that: “... *We could have not been expected in good faith to have taken any other course.*” Indeed even accepting that suspicious circumstances were revealed in the surveillance footage, given the corroborated detailed denial of any dishonesty on the claimant's part in receiving the cigarette packet, a responsible and fair employer would in my view, have suspended such a senior, highly commended employee and either conducted its own verification of the claimant's explanation or handed the matter over to the police to investigate and prosecute if there was sufficient evidence to establish the theft.
22. Instead, the defendant's senior management in their collective wisdom (and haste) acted as investigator, prosecutor and judge in breach of its own “*culture*” and “*core values*” and also, of the provisions of the **Employment Act**.
23. If I may say so it is difficult to accept that the requirements of **Section 50 (3)** and **(4)** of the **Employment Act** were satisfied in this case where the claimant



was without warning, called to a meeting with management, orally told of the allegations against him for the very first time and despite the claimant's detailed denial, was terminated on the spot.

24. In my view the "serious misconduct" contemplated by **Section 50** of the **Employment Act** is proven or established misconduct **NOT** merely suspected or alleged. Furthermore, dismissal for misconduct is a punishment of last resort and, lastly, the requirement that an employee be given "... an adequate opportunity to answer any charges made against him ...", assumes that the employer laying the charge, has an open-mind without a pre-determined conclusion. Were it otherwise, the requirement would be relegated to an ineffective formal step in an employee's dismissal for (unproven) serious misconduct which is hardly consistent with the requirements of natural justice.
25. Having said that, there is not the slightest doubt in my mind that an employee who commits theft is guilty of "serious misconduct" irrespective of the value of the stolen item or the position held by the employee.
26. As for the circumstances surrounding the claimant's dismissal and its aftermath, I can do no better than to refer to his sworn statement of 4 December 2009 where he states:

"7. After he had terminated my contract he then asked me of whether I have anything to say in response to what he has said. I told the GM in the presence of the other officers that I am sorry to hear my termination on an issue involving the cigarette that I have not explained to him yet but he has already terminated my contract.

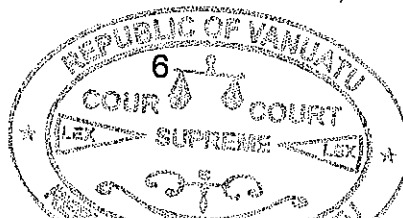
8. ...
9. ...

10. I want to describe the way in which I was asked to leave the hotel premises by saying that I was escorted like a criminal or prisoner by security guard and F&B Manager and into the personal room of the staff, I was watched over by the security guard and the F&B Manager while I unlocked my drawer and also put on my personal clothes and hand over the uniform to the security guard and I was further escorted from the staff room or changing room to the main road outside the defendant's building and then the security guard and the F&B Manager stopped a service bus and put me into the service bus and the security guard and F&B Manager returned back to the business premises of the defendant."

and in his sworn statement of 20 June 2011:

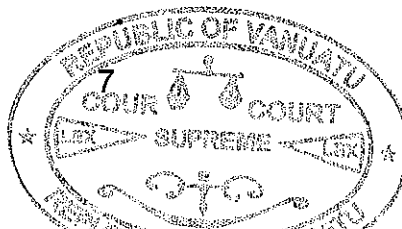
"28. Not only that the defendant has totally ruined my career and my future in the hospitality industry with the termination for a packet of cigarettes, but I have learnt that word has spread to other hospitality industries about my alleged stealing making it very difficult for me to obtain any similar job.

29. On Monday 29th June, 2009 myself and my brother Ian Willie went to see the Manager for Nirvana Restaurant, Chris Adams, because I



was to speak to him about a job he had offered me while I was still employed at the Sebel Hotel. It was only 9 days after my termination.

30. I was shocked to hear from him that he already knew about my termination for stealing at the Sebel Hotel. He then told me that he did not have any job for me at the Restaurant.
 31. After we left Nirvana Restaurant, we went to Emily's Takeaway, Snacks and Coffee Shop near the Parliament House and I spoke to the owner, Bob about a job offer he had made to me earlier while I was still employed at the Sebel Hotel.
 32. I was shocked to hear from Bob that he also knew about my termination from Sebel Hotel for stealing. He said the information he heard was that I was not only terminated for stealing a packet of cigarettes, but that I was terminated for also stealing VT2 million from Sebel Hotel. I asked where he got the information from and Bob said the news has spread around town.
 33. Bob told me he had no job for me at his takeaway shop after I had explained the whole situation to him.
 34. I searched around for a job, but could not find one.
 35. I eventually got a job at Wilco Hardware's Coffee Shop and commenced work there in October, 2009 at a salary of VT350 per hour. Annexed hereto and marked "HW6" is evidence of my employment at Wilco Hardware Coffee Shop.
 36. I worked there until 15th January 2011 when I got another job as the Cooking Instructor for the Correctional Services Department at a salary level of VT102,900 per month. I am currently still employed at the Department of Correctional Services. Annexed hereto and marked "HW7" is my employment contract."
27. In light of the foregoing I find in the words of **section 56 (4)** of the **Employment Act** "... that the termination of the claimant's employment was unjustified ..." and in breach of **sections 50 (3) and (4)** and I **ORDER** the claimant be paid by way of additional compensation, a sum equal to **four (4)** times the severance allowance payable to him .
28. In the circumstances I uphold the claim and award the claimant the following:
- (1) Under clause 5 of the claimant's employment contract
2 weeks wages ie. VT(90,112+2) **VT45,056.00**
 - (2) Damages for breach of contract (limited to 9 months)
VT(90,112 x 9 months) **VT811,008.00**
 - (3) Loss of VNPF contributions



- | | | |
|-----|---|------------------------------|
| | VT(90,112 x 14 x 4%) | VT50,462.00 |
| (4) | <u>Loss of Annual Leave (12 days per year)</u> | |
| | VT(2,816 x 14) | VT39,424.00 |
| (5) | <u>Under section 56 (2) Employment Act (as amended):</u> | |
| | VT(90,112 + 90,112 ÷ 12 x 11) | VT172,714.66 |
| (6) | <u>Under section 56 (4) Employment Act</u> | |
| | VT(172,714.66 x 4) | VT690,858.64 |
| | | ----- |
| | TOTAL – | <u>VT1,809,523.30</u> |
| (7) | <u>Under section 56 (6) Employment Act</u> | |
| | Interest of 10% per annum on the total sum awarded in (5) and (6) above with effect from 20 May 2009 until fully paid | |
| (8) | Costs on a standard basis to be taxed if not agreed. | |

DATED at Port Vila, this 4th day of October, 2013.

BY THE COURT


D. V. FATIAKI
 Judge.

