Registry

**IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU (CIVIL JURISDICTION)**

**CIVIL CASE NO. 124 OF 2013**

**BETWEEN:** **ROBERT JAMES MAKIN**
Claimant

**AND:** **THE INDEPENDENT FOUNDATION COMMITTEE INC.**
Defendant

Coram: Justice Mary Sey

Counsel: Marie-Noelle Patterson for the Claimant
Nigel Morrison for the Defendant

Date of Hearing: 12 June 2014
Date of Judgment: 13 August 2014

## JUDGMENT

### Introduction

1. The claimant is the former Managing Editor of the defendant, a Charitable Association engaged in delivery, publication and advertising sales of a weekly newspaper in Port Vila, Vanuatu.

2. The claimant seeks severance pay of VT1,283,333 for the period 13 October 2003 until 12 March 2010 on the basis that he was in continuous employment with the defendant as Managing Editor until he resigned.

3. The defendant's case is that from 13 October 2003 until 31 December 2005, the claimant was employed under the Employment Act and from 1 January 2006 he was at his request employed as an independent contractor. Then from 1 January 2007 until 12 March 2010 he was again employed under the Employment Act.

4. The defendant strongly disagrees with the claimant's contention that he was an employee between 1 January 2006 and 31 December 2006. The defendant

submits that the claimant's tenure of appointment was broken in 2006 when he took up the role of contractor for 1 year and signed a contract for that purpose.

5. The sole **issue** for the Court's determination is:

Was the Claimant an employee or independent contractor between 1 January 2006 and 31 December 2006?

**The evidence**

6. When the claimant commenced employment with the defendant in October 2003, he confirmed to Tom Bayer (TB) in annexure "TB1" that he was a Ni Vanuatu citizen. Accordingly, he was employed as a Ni Vanuatu under the Employment Act. No fees or permits were required as they would be for an expatriate.

7. In 2005, TB found the situation to be different when the claimant made him aware that he had applied for and had been granted Australian citizenship which meant the claimant held both Ni Vanuatu and Australian citizenships.

8. At that time dual citizenship was not allowed in Vanuatu so TB and the claimant discussed concerns about the claimant holding two separate citizenships.

9. The claimant in his evidence acknowledged he had a problem and the situation needed to be resolved. Unless he surrendered his Australian citizenship he needed to be employed as an expatriate. He did not wish to surrender his Australian Citizenship as he was born there and had continuing close connections due to an elderly infirmed parent. The claimant said that his mother required him to take back his Australian citizenship so as to keep her out of care.

10. It was determined by agreement between the parties that the solution was for the claimant to become a contractor. He would therefore need to surrender his Ni Vanuatu citizenship and this would be consistent with resolving the

claimant's illegal status. TB said that consequent upon that discussion the contract service agreement dated 7 December 2005 was entered into.

11. Contemporaneous with entering into the contract service agreement as a contractor, the claimant wrote to the Labour Department on 14 December 2005.

12. In that letter (which is annexed to the sworn statement of TB as "TB3") the claimant said inter alia that:

    (i) The newspaper was restructuring and would see more use of consultants hired to carry out particular tasks for a limited time;
    (ii) His own tenure of the editor's position as an employee ceases;
    (iii) He was applying to the Vanuatu Investment Promotion Authority;

13. The letter also discloses in handwriting at the bottom that the claimant was seeking investment approval for residency as an investor on the basis of Alliance Reality valuation of his property for VT12 million as submitted to VIPA.

14. In answer to questions put to the claimant during re-examination, he said "TB3" was written at TB's request because that was the time he was leaving for Australia. He said that TB helped him to prepare his VIPA application and that he simply copied what TB gave him. He said he sent the letter because he was worried about losing his employment and that TB never discussed with him the possibility of being employed with a work permit.

15. The claimant went on to say that he has never understood the terms 'contractor for services' because as an editor he had to work full time. He said no major restructuring took place in 2006 and that no change occurred in the management of the paper and in his work except additional driving on Saturdays. He said the formula about salary structure as proposed in "TB2" was never used and that he received his salary of VT200,000 throughout. The

claimant also said this was the first time he had seen "TB5" which is the VNPF print out of the defendant's March 2006 returns showing that no salary or contributions were paid for him.

16. TB gave evidence on behalf of the defendant. He said he is the Chairman of the defendant. He acknowledged they were experiencing financial difficulties and said it was his idea to hire contractors because employing an expatriate is more expensive than having them provide service as an independent contractor. He confirmed that there was no restructuring as proposed in "TB2" and that Tiffany never took over.

17. TB went on to say the contract for services was entered into to save the Independent Newspaper and that the paper would have closed down if the claimant had not signed the contract.

18. TB denied the assertion that he had written "TB3." He said sometime between 2003, 2004 and 2005 he knew the claimant had problems with two passports and so they asked him to get his VIPA papers. He said there was nothing to approve and that he simply had a copy of the letter.

19. TB went on to say that the possibility of obtaining a work permit for the claimant was considered but not followed because of the expense for the Independent Newspaper. He said it was a difference in cost and that he saved on work permit and residency permit in average of about VT250,000 and that if they had spent that amount they would not have been in existence. He went on to say that it was an advantage to keep everyone working.

20. The witness vigorously denied Mrs. Patterson's assertion that the change of the claimant's status to independent contractor may have been done intentionally to deny the claimant his entitlement to severance. TB asserted that by then the requisite period for severance was 10 years and neither of the parties knew in 2005 that in 2009 the law would change to only requiring 6 years continuous service to give rise to severance entitlement.

21. TB further denied counsel's suggestion that the defendant took advantage of the claimant to push the contract for services on him. He said there was no confrontation and that it was the claimant's choice to sign the contract.

**Discussion**

22. The Contract Service Agreement (Exhibit "A" to Robert James Makin's sworn statement filed 14 February 2014) is central to this case. For ease of reference relevant clauses of the agreement are set out below:

***"THE INDEPENDENT FOUNDATION***

***CONTRACT SERVICE AGREEMENT***

1. ***Principal:*** *The Independent Foundation ("the Independent")*
2. ***Contractor:*** *Bob Makin ("Contractor")*
3. *This Agreement is NOT SUBJECT TO THE Provisions of the Employment Act [Cap. 160] as both parties agree that the relationship between the parties is not that of Employer and Employee.*
4. ***Service begins:*** *1 January 2006*
5. ***Type service provided:*** *Editing, writing and directing ("the Services")*
6. ***Position Title:*** *Editor*
7. *(not presently relevant)*
8. " "
9. " "
10. ***Payment Terms:*** *Payment shall be at the rate of two hundred thousand Vatu (Vt200,000) per month.*
    *An advance of up to Vt100,000 will be paid to the Contractor on the 15th of each month, or the last business day prior to the 16th, if the 15th is not a business day.*
11. ***Office Hours:*** *Whilst the official Office hours are 7:30 a.m. to 5.00 p.m. from Monday to Friday and access to the office is always possible during those hours, the Contractor is not required to be in attendance during those hours, or any particular hours.*
12. *(not presently relevant)*
13. " "
14. ***Restraint of trade:*** *The Contractor, not being an employee, is unrestricted in his activities and the Independent has no authority to direct the activities of the Contractor, but the Contractor agrees he will not, without the written consent of the Independent, accept any work or retainer from another newspaper or publisher in Vanuatu whilst this contract continues in force.*

15. ***Business License:*** *Not being an employee, the Contractor is responsible for his own Business License.*

16. *(not presently relevant)*
17. *" "*
18. *" "*

*Agreed*

*Agreed*
*The Independent Foundation*

*Contractor----------*
*Bob Makin*

*per----------*
*Thomas M. Bayer*
*Acting Committee Chairman"*

23. The claimant contends that at the time he signed Exhibit "A" he thought he was getting a continuation of his job as an employee. He further contends that, irrespective of the terms set out in their written agreement, he was not operating an independent business for his own account. Rather, that he was working as an employee in the defendant's business and for the defendant's benefit.

24. Mrs. Patterson submitted that "the court must look at the substance, not the label." Further, that the legal status of an independent contractor or of an employee is not determined solely on the basis of the parties' declaration as to their intent and that such determination must be grounded in the objective reality of the parties.

25. Counsel further submitted that the fact that a contract was signed voluntarily by the claimant describing him as a "contractor" is not sufficient to qualify the legal relationship between the parties as that of an independent contractor arrangement. Counsel also argued that this contract which the claimant agreed he signed for the period of 1 January 2006 is in reality an employment agreement disguised as a contract for service, a practice known in other jurisdictions as "*sham contracting*".

26. For his part, Mr. Morrison submitted that the foregoing statement may be accurate when the relationship between the parties is being reviewed and

defined by a third party because the parties to a "sham contract" cannot hide behind it to avoid legal liabilities to third parties, most commonly tax authorities.

27. Counsel further submitted that what Mr. Makin now proposes is a quite different situation in which he seems to be saying that he willingly and for good legal and personal reasons signed as contractor with the Independent but now wishes to step away from that contract as he finds it does not ultimately benefit him.

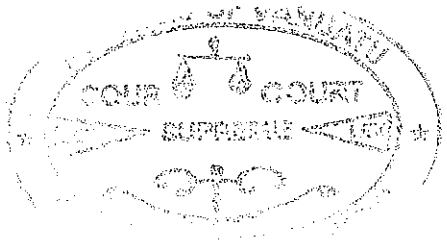
28. The definition of "sham" was articulated by Lord Diplock in **Snook v London & West Riding Investments** [1967] 2 QB at 801:

> *"It is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create".*

29. In **Sharment Pty Ltd v Official Trustee in Bankruptcy** (1988) 18 FCR 449 the Australian Federal Court, after reviewing the authorities on the concept of a sham, said per Lockhart J that: —

> *"A sham is ... for the purposes of Australian law, something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not. It is something which is false or deceptive and the High Court went on to say that: —*
>
> *"Important to this description is the idea that the parties do not intend to give effect to the legal arrangements set out in their apparent agreement, understood only according to its terms. In Australia, this has become essential to the notion of sham, which contemplates a disparity between the ostensible and the real intentions of the parties. The courts must therefore test the intentions of parties, as expressed in documentation, against their own testimony on the subject (if any) and the available objective evidence tending to show what that intention really was."*





30. In the United Kingdom case of **Bridge v Campbell Discount Co Ltd** [1962] AC 600, Lord Devlin said that: —

> *"When a court of law finds that the words which the parties have used in a written agreement are not genuine, and are not designed to express the real nature of the transaction but for some ulterior purpose to disguise it, the court will go behind the sham front and get at the reality."*

31. Judging from the plethora of case authorities, it seems clear to me that the notion of "sham" envisions a disparity between the apparent and the real intentions of the parties. Consequently, if the words used in a written agreement are not genuine, the judicial remedy will be to acknowledge the real legal relationship between the parties and ignore the apparent transaction.

32. In this present case, Mrs. Patterson has submitted that Exhibit "A" was in reality an employment contract for essentially the same terms as the Service Agreement annexed to Mr. Makin's sworn statement as Exhibit "B" and that the claimant has continued to be employed by the defendant, performing same duties, in same designation and receiving the same salary.

33. On the contrary, it seems obvious to me that this Contract Service Agreement (Exhibit "A") can be contrasted with the parties' Service Agreement (Exhibit "B") and seen to be entirely different. More significantly, the agreement is specific in its terms which include the following:

    (i) The claimant is named as "contractor";
    (ii) The Agreement is expressed as not being subject to the Employment Act and the parties agreeing that the relationship is not that of employer/employee;
    (iii) There are no fixed hours of work.
    (iv) The contractor is required to obtain his own business licence.

34. I find that the words which the parties have used are genuine and I do not in any way view the transaction as "sham contracting." The evidence of the

claimant's personal history at the material time was entirely relevant to him becoming a contractor and corroborates the need for him to become same. Moreover, I find no disparity between "the ostensible and the real intentions of the parties" as stated in **Sharment Pty Ltd v Official Trustee in Bankruptcy** referred to earlier on in this judgment.

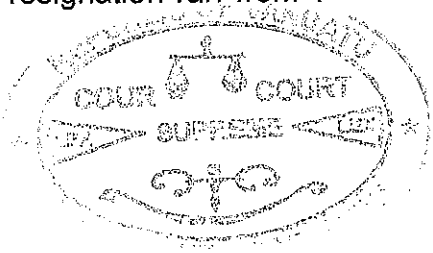
35. Furthermore, as submitted by Mr. Morrison, the Agreement is signed by the claimant and in the absence of compelling contrary evidence should be binding on him. Besides, there is no plea of non est factum which is not surprising as the claimant's first language is English and he is well educated being a newspaper editor. I accept counsel's submissions that these were two independent, intelligent parties who had not been coerced into signing the Agreement.

36. I also find that by contractual agreement entered into and for mutual benefits, which were fully considered before the contract was executed, the parties determined to change their relationship from employer/employee to one of principal and contractor between 1 January 2006 and 31 December 2006. The relationship was expressed from an agreement entered into and that status was corroborated by other documents including those from the claimant himself. Moreover, the fact that the defendant did not pay and the claimant did not receive VNPF contributions during 2006 (as evidenced by "TB5") is further corroborative of their intentions to treat the contract as a contract for services, not of service.

37. I am equally satisfied that various pieces of evidence before the Court confirm that the claimant was a contractor and not an employee. For all intents and purposes, I am inclined to accept Mr. Morrison's submission that it was a "win win" situation which suited both parties at the time. Thus, by entering into the contract as an independent contractor the claimant preserved his job and his income whilst the defendant avoided the costs of employing an expatriate.

38. The claimant seeks severance pay of VT1,283,333 for the period 13 October 2003 until 12 March 2010. However, what I have gleaned from the evidence is that the claimant's continuous service prior to voluntary resignation ran from 1





January 2007 until 12 March 2010. By the time the claimant commenced work as a contractor in January 2006, he had been employed by the defendant for less than 3 years. At that time, the law required 10 years continuous service to give rise to entitlement to severance. That would have required more than 7 years further service. In fact it would have required service beyond the claimant's actual termination of his employment in 2010.

39. As TB said in his evidence, neither of the parties knew in 2005 that in 2009 the law would change to only requiring 6 years continuous service to give rise to severance entitlement. In 2010, when the claimant left of his own volition, he had only completed 3 years and 3 months continuous employment. If he had stayed for a further 2 years and 9 months he would have achieved the now legal threshold. It is simply unfortunate that the claimant did not continue to work and meet the threshold to give him entitlement to severance.

40. In the circumstances, the claimant's claim fails and it is hereby dismissed with costs to the defendant on the standard basis to be taxed if not agreed.

**DATED at Port Vila, this 13th day of August, 2014.**

**BY THE COURT**

**M.M.SEY**
**Judge**