IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction) **Civil Case No. 210 of 2012**

BETWEEN: ROY ERNST
Claimant

AND: AIR VANUATU (OPERATIONS) LIMITED
Defendant

Hearing: ***Wednesday 15 October 2014***
Submissions: ***Thursday 16 October 2014***
Judgment: ***Friday 17 October 2014***
Before: ***Justice Stephen Harrop***
Appearances: ***Nigel Morrison for the Claimant***
Edward Nalyal for the Defendant

RESERVED JUDGMENT OF JUSTICE SM HARROP

Introduction

1. Mr Ernst was employed as catering manager by Air Vanuatu between 21 April 2005 and 24 November 2010. Air Vanuatu terminated his employment because it considered he had engaged in serious misconduct in two ways: (i) importing goods, two heat sealer machines, for a third party supplier (Tanna Coffee) using Air Vanuatu's importing channels and at its expense; and (ii) removing food and other items from Air Vanuatu's catering centre.

2. On 8 November 2012, Mr Ernst filed this claim denying any serious misconduct and claiming that his termination was accordingly unjustified. He claims Vt 2,007,000 in lieu of notice and as a basic severance entitlement Vt 3,735,250, together with interest and costs.

3. Air Vanuatu maintains that its termination decision was entirely justified because Mr Ernst's actions in these two identified respects amounted to serious misconduct. It therefore denies liability to make any further payment to him. It counterclaims for the

amount still owing for the items taken (Vt 31,000) and for the cost of the two heat sealers which were imported from Australia (a total of AUD$280).

Issue

4. Counsel agree that in these circumstances Air Vanuatu carries the onus of proving on the balance of probabilities that Mr Ernst's actions amounted to serious misconduct: see Government of Vanuatu v. Mathias [2006] VUCA 7.

5. Mr Ernst's claim is limited to contending that he did not engage in serious misconduct. He does not contend that section 50 (3) or (4) of the Employment Act [Cap. 160] apply, i.e. he does not suggest that some other disciplinary action short of termination ought to have been taken, nor does he suggest that he was not given an adequate opportunity to respond to the charges made against him. To use catering terminology, Mr Ernst puts all his eggs in the "no serious misconduct" basket.

6. As a result the issues I need to determine are:
   a) Has Air Vanuatu proved on the balance of probabilities that Mr Ernst, in either or both of the alleged respects, engaged in serious misconduct?
   b) If it has not, to what payments is he entitled?
   c) In relation to the counterclaim is Air Vanuatu entitled to the two payments it seeks?

7. It is convenient to discuss these issues and submissions on them in the context of discussing the evidence relating to these two examples of serious misconduct on which Air Vanuatu relied for its termination.

8. At the hearing on 15 October, Mr Ernst gave evidence in support of his claim. He also called Terry Adlington, the managing director of Tanna Coffee Development Company Ltd for whose benefit Mr Ernst arranged the importation of two heat sealing machines. For Air Vanuatu, evidence was given by Joseph Laloyer, the Chief Executive and by two staff members who worked with Mr Ernst in the catering centre, Emily Guttadauro (nee Korikalo) the deputy manager and Linda Fred the senior administrator/purchasing officer. All witnesses were cross-examined.

The importation of the heat sealers

9. Mr Adlington said that around 2003 to 2005 his company was approached by Air Vanuatu's then catering manager, Danielle Gerard, with a view to improving the quality of the coffee being served on Air Vanuatu's Boeing 737 plane. Tanna Coffee obtained filter material from the United States and a "constant heat sealer" from Australia. Initially Air Vanuatu imported the rolls of filter material which were then passed on to Tanna Coffee to allow them to manufacture and heat seal the "coffee pillow packs" for the airline's exclusive use. Later Tanna Coffee took over the responsibility of purchasing and paying for the coffee filter material.

10. The system worked well until early September 2010 when the thermostat of Tanna Coffee's heat sealing machine blew up and could not immediately be repaired. Mr Adlington contacted PacificRim Trading in Brisbane and provided them with a detailed description of the make and model of the machine that he desperately needed to replace. Tanna Coffee's obligation to supply Air Vanuatu with the pillow packs meant that no time could be wasted obtaining a replacement machine.

11. Mr Adlington contacted staff at Air Vanuatu notifying them of the problem and asking if they had a spare constant heat sealer that he could borrow. He also asked how much coffee stock they had in hand. Mr Ernst responded saying they did not have that kind of heat sealer and asking how urgently the machine was needed. He told Mr Adlington they had very little stock left. Mr Adlington said that if the machine was not obtained quickly then Tanna Coffee would soon run out of its supply.

12. Mr Ernst decided to facilitate the importation of two heat sealing machines at the cost of AUD$140 each from PacificRim Trading. Air Vanuatu already had an order of other items coming from PacificRim Trading and Mr Ernst decided to add the heat sealers to the Air Vanuatu invoice. Mr Adlington had explained that there would be some delay in his clearing the heat sealers through Customs. Mr Ernst could do this more quickly through Air Vanuatu and agreed to do so with a handling a fee being charged to Tanna Coffee of Vt 4,000 to Vt 5,000. He says he would normally have contacted his Manager Dimitri Politis for approval to this unusual step but he was away at that time so he went ahead.

13. Ultimately the heat sealers imported were, despite Mr Adlington's clear instructions to PacificRim, of the wrong type. Mr Ernst told him that the sealers should be returned to the catering centre because they also used such machines for sealing plastic cutlery bags. Air Vanuatu's current machines would soon need replacing.

14. Mr Adlington tried without much success to use the new machines for a week or two but ultimately he says it was three or four weeks before they were returned to Air Vanuatu.

15. Mrs Guttadauro says that on 11 November 2010, the day when Mr Ernst received his *"letter of allegation"* from Air Vanuatu and when he was suspended: *"Mr Ernst rang me and asked me to call Tanna Coffee (Mr Terry Adlington) to ask him to return the two heat sealer machines back to the catering centre as soon as possible."* She further says that Mr Adlington delivered the two heat sealers back on 12 November 2010 but she cannot be sure at what time because he did not come into the office at the catering centre to do so. From other evidence it appears that they may have been delivered to the Chief Executive's Office; certainly they ended up there and stayed there for quite some time according to Mr Laloyer.

16. Mr Ernst disputes what Mrs Guttadauro says about his request to her. He says that he asked her to contact Mr Adlington *to check that the heat sealers had been returned* because he was not sure whether they had been or not.

17. As Mr Morrison elicited in cross-examination, although Mrs Guttadauro apparently made an oral statement about relevant events to those investigating this transaction at around the time of it, she did not make a written statement and it was not until nearly three years later, on 27 September 2013, that she signed her written statement as correct. In these circumstances I am not prepared to find that Mrs Guttadauro's recollection is correct and that Mr Ernst's is not, so as to reflect adversely on his credibility. The difference between the versions is fairly subtle. In any event I do not consider that the timing of the return of the machines is critical: the real question is whether what Mr Ernst arranged amounted to serious misconduct.

18. Mr Laloyer in his evidence made it clear that this was totally unacceptable conduct so far as he as Chief Executive was concerned. He explained that there were a number of risks to the company's licensing entitlements as well as financial risks of penalties being imposed by Customs for using its systems and special privileges for the benefit of a third party. I understand and accept his concerns as entirely legitimate from the company's perspective.

19. The question here though is whether what Mr Ernst did in the prevailing circumstances amounted to serious misconduct. I am not satisfied that it did. This is fairly seen, as Mr Laloyer accepted in answer to a question from me, as a practical attempt by Mr Ernst to act in Air Vanuatu's best interests in a situation of some urgency. At stake was the company's reputation, for at least the international passengers on a few flights, in relation to the supply of coffee, a basic service for any airline to provide. He did not take this action for any personal gain nor would he have taken it at all had Air Vanuatu not been in a better position to obtain the heat sealers, which were desperately needed, than Tanna Coffee was. It was a one-off import of two relatively cheap items.

20. I note too that these were items that the company itself could well have been importing for its own purposes in relation to cutlery bags. Further, when the relationship with Tanna Coffee began, initially Air Vanuatu imported filter material for Tanna Coffee's use, so there was a precedent for this, even though neither Mr Ernst nor Mr Laloyer may have realised it at the time.

21. There was obviously a close and good working relationship between Mr Ernst and Mr Adlington. In that context it was entirely natural for Mr Ernst to take the initiative he did: he was not only helping Air Vanuatu ensure the supply of coffee sachets was maintained, but also helping Tanna Coffee to avert a breach of its supply contract. This is an example of how suppliers and customers should work together when an unexpected problem arises. This was not an importation for a company with which Mr Ernst was personally associated or one having nothing to do with Air Vanuatu; quite the contrary.

22. Mr Ernst recognised that this was an unusual situation and that he ought to obtain his Manager's approval for what he decided in the exercise of initiative to do to address the problem. Unfortunately Mr Politis was away. In those circumstances, Mr Ernst ought to

have sought approval from a more senior manager but his failure to do that is not in itself misconduct.

23. Mr Ernst himself probably did not realise, as Mr Laloyer does, what adverse consequences might flow to the company as a result of this action. I infer that he saw it as a practical step which would not harm the company in any way but rather would assist it . He also arranged to charge a handling fee. I am not satisfied that this conduct on a one-off occasion amounts to serious misconduct which would justify termination. Indeed, as I understood Mr Laloyer's evidence he accepted that in isolation it would probably not justify termination but rather it was the combination of this with the unlawful removal of food items which justified the company's decision.

The removal of food and other items from the catering centre and not paying promptly for them

24. When Mr Laloyer became Chief Executive in September 2009, he had considerable concern about the way in which various parts of the company's operation were functioning. He initiated during 2010 an in- house audit and engaged external consultants PriceWater houseCoopers to undertake a forensic financial analysis. That was how he became aware of the "heat sealer" issue. In addition, however, Mr Laloyer learned that Mr Ernst had removed food items which had been imported for the company's use in its catering operations for his personal use. Mr Laloyer regarded this as a fundamental breach of Mr Ernst's responsibility as manager of the catering centre. There was further and understandable concern about why payment for some of the items taken was still outstanding nearly two years later.

25. In his response letter of 14 November 2010, Mr Ernst emphasised that what he had done followed a transparent process and that he had never hidden the removal of these items nor intended not to pay the account. He explained that when he began at the catering centre there was an accepted culture of the catering manager taking champagne, red wine and food with no record of this. In addition, staff were allowed to take "old food" items home again with no control. Pilfering was, as Mr Ernst described it "a huge issue" and that was not something unique to Air Vanuatu's catering centre but was reflected in the hospitality

industry throughout Vanuatu. Mr Ernst knew this very well having owned and operated a local restaurant for some 15 years.

26. Mr Ernst said that when he was appointed, some four years before Mr Laloyer became Chief Executive, his brief at the request of the then Chief Executive Officer Terry Kerr was to stop all pilfering and to take control of the catering centre including working within the budgets that were set by the accounting section.

27. As a result Mr Ernst set up a system similar to that which he had operated at his former restaurant. If any item was to be removed by a staff member then a removal chit had to be filled out and then signed as approved by management. This system applied to Mr Ernst as well as everybody else. Mr Ernst arranged for a security guard to be placed at the door and anyone removing items from the premises had to show the security guard the completed chit which the guard then passed on to the office. Mr Ernst said this system applied to anything at all such as empty plastic bottles, empty oil drums, chicken or fish bones. In order for anything to be removed there needed to be two signatures or approvals.

28. Mr Ernst accepted in cross-examination that Air Vanuatu's Code of Conduct catering required him to act ethically, honestly and in the best interests of the company at all times. He considered the system he had created was transparent and in accordance with this obligation. He had to report to his manager, Mr Politis and also to the then budget controller, Mr Holstein. He is adamant that he did not realise he was doing anything wrong and that it was an entirely transparent and documented system of which the then Chief Executive Mr Kerr and Messrs Politis and Holstein were well aware. None of these witnesses was called by Air Vanuatu to dispute what Mr Ernst said. I understand that none of them is still with the company and that Mr Politis is no longer in Vanuatu but with modern technology that is no great impediment.

29. Mr Ernst accepted that some of the items he removed were not *"old food"*. He also accepted there were occasions when his workload was very intense when he took food from the catering centre for his personal use. He also accepted that he would sometimes remove prawns to take them home to test their self- life. He explained that a food item

taken from the freezer has a four-day life span involving thawing, preparation and then waiting for loading into the aircraft. With prawns he was concerned to ensure that they were safe to eat within a three- or four-day timeframe and decided it was appropriate to test this himself at home. He did not wish to do this at the centre in case the prawns became mixed with others which were being used for preparation of meals. He accepted these were not leftovers but he said he paid for everything he removed and was doing this for the benefit of the company.

30. Mr Ernst was adamant that nothing was ever removed without it being recorded and with his responsibility to pay for it being reflected in invoices prepared by accounts.

31. Mr Ernst accepted that he was at fault for not having paid off his account sooner. At the time of the allegation being made there was Vt 51,000 owing and although the evidence is somewhat unclear it appears that at least some of this may have been owing for up to two years.

32. When Mr Ernst became aware of the case being mounted against him following receipt of his letter of allegation and suspension, he immediately gave Vt20,000 cash to Mrs Guttadauro and asked her to backdate the receipt of that payment to 2 November, some 9 days earlier. That duly occurred.

33. Mr Ernst accepts that this was *"a moment of madness"*. He knew that his failure to pay the money would be used against him and he tried to make the situation look a little better than it really was. There was and remains a balance of Vt 31,000 still outstanding, which he accepts he must reimburse.

34. Accordingly, quite apart from whether or not the system he instituted was appropriate and approved by his manager and the previous CEO, Mr Ernst accepts he was in breach of his own system by not promptly paying for goods taken. He also accepts that he attempted to deceive the company by the backdating.

35. Mr Laloyer, understandably, is adamant that any food purchased by the company for its catering centre is to be used solely for the benefit of that centre and not for the personal benefit of any staff member. He did not know of the system being operated by Mr Ernst and therefore did not approve it. Had he been asked to approve it, it is very clear that he would not have done so and would have put a stop to the system which had been operating for some years before his arrival.

36. The first issue to be considered is whether Mr Ernst's use of the chit system itself was serious misconduct on his part. I am not satisfied that it was because his purpose in instituting this system, ironically enough, was to address and remedy an out of control operation under which pilfering had been rife. Significantly it was a system endorsed by the then Chief Executive, by Mr Ernst's immediate manager and another senior staff member from the accounting section. In short, the company must be taken to have accepted and indeed approved Mr Ernst's conduct so far as it related to use of the system itself. The company cannot claim that conduct which it earlier endorsed is now in the eyes of new management serious misconduct.

37. That however leaves the key question of whether *the way* Mr Ernst used the chit system, his failure to make payment promptly for items taken and his attempt to deceive his employer about the Vt20,000 payment made on 11 November amount to serious misconduct.

38. In my view the critical point in relation to the *"food issue"*, against the background of the chit system being approved by management prior to Mr Laloyer's arrival, is that whether it was right or wrong with hindsight, Mr Ernst did nothing underhand or deceitful in relation to the taking of the food or in accepting his responsibility to pay for it.

39. What he took was documented and an invoice was raised which he was liable to pay. He certainly ought to have repaid the Vt51,000 balance far earlier. I agree with Mr Nalyal's submission that the combination of the deceitful backdating and the failure to pay voluntarily for up to two years justify the strong suspicion that were it not for the investigation the debt may never have been paid. However there is no suggestion he actively attempted to avoid his responsibility to pay for it. If the accounting section had

chased him up there is no reason to think he would not have paid. His debt was "on the books" and there to be seen and pursued by the accounting section. It may well be that the many problems with the company at that time included the chasing up outstanding accounts and perhaps the performance of Mr Politis.

40. I am prepared to accept that Mr Ernst's undoubtedly inappropriate and dishonest decision to backdate the invoice for the Vt 20,000 payment on 11 October resulted from a degree of panic on his part at his longstanding employment being under threat. But the fact of the payment is not in doubt, only its timing was sought to be masked. If he had made an attempt to destroy the invoice or any other record that he had taken the food and was liable to pay for it, or if he had fabricated records to show full payment had been made, then I would have taken a very different view of his conduct. However, he had already paid for a good proportion of the debt (his estimate of the value of food and other items he took and was liable to pay for over the period this system was operating was between Vt100,000 and Vt120,000). He promptly paid the Vt 20,000 when he realised the matter would become an issue and he has never suggested that he is not liable to pay the balance of Vt31,000.

41. Certainly the backdating of the invoice was misguided and deceitful but it had no impact on the extent of Mr Ernst's financial obligation to the company. Again, if he had prepared a false statement indicating that he had paid the Vt 20,000 or the Vt 51,000 when he had not done so that most certainly would have been serious misconduct.

42. Standing back, I have reached the view that the chit system however Mr Laloyer might now regard it, was one which was accepted by management at the time it was implemented and never revoked including in the 14 months or so that Mr Laloyer was Chief Executive prior to the termination. He does not appear to have been aware of it until the investigation revealed it. Mr Ernst developed the system because he believed that it would be, and that it was in practice, a suitable way to address a significant problem which he had been mandated to overcome. Management at the time endorsed his system.

43. The evidence, particularly the absence of any from Mr Politis, does not allow me to conclude (and the onus is on Air Vanuatu to prove this) that *the way* Mr Ernst used the system was not acceptable to Mr Politis, to the accounting section and indeed to the Chief

Executives during the relevant period. That indeed includes Mr Laloyer who (I accept through lack of awareness) also did not change the system or its use before terminating Mr Ernst's employment. It cannot therefore amount to serious misconduct warranting dismissal by the company which allowed and endorsed his conduct.

44. My assessment, and I understood Mr Laloyer to accept this in answer to a question from me, is that if on investigation it had been found that the food Mr Ernst had taken had been fully paid for at the time, then it would not have been used as a basis for his termination. Mr Laloyer clearly and understandably decided that a firm response to the findings of the PriceWaterhouseCoopers investigation was required. In part I conclude that the decision to terminate Mr Ernst was a manifestation of the need to react to wider problems revealed by the investigation which were unrelated to him. Mr Laloyer decided to send a strong deterrent and exemplary message to others in the organization that the slightest impropriety would not be tolerated.

45. I therefore conclude that neither basis for the termination amounted to serious misconduct which justified dismissal without notice and compensation.

Conclusions and result

46. I find that Air Vanuatu has not discharged the onus on it to prove serious misconduct on the balance of probabilities.

47. I add that even if I had concluded there was serious misconduct, I would still have upheld Mr Ernst's claim because I do not consider that termination by the company was the correct response to his conduct. Even though s 50(3) was not pleaded, I consider I would still have had to apply the law. Other courses were clearly open to the company. Mr Laloyer declined Mr Ernst's several requests for a meeting to discuss what had arisen so these options do not appear to have been considered.

48. Mr Ernst had an unblemished record with the company and at least in his view had substantially improved the systems and revenue for the catering centre. Against this background his conduct should have been addressed by some form of disciplinary action

short of termination. Mr Laloyer, in wishing to send a deterrent message could have made an example of him to all staff in the catering centre. Having seen Mr Ernst give evidence and read his communications with the company before and after termination, it appears to me that he is likely to have responded in a positive manner to an opportunity to work under a new regime instituted by Mr Laloyer. He is also likely to have been chastened by a written disciplinary warning and not offended again. He does not appear to be vindictive towards the company. For example, he does not seek a multiplier on his severance payment under s56(4) as he might have done.

49. Mr Ernst is accordingly entitled to judgment on his claim against Air Vanuatu. There is no dispute that he is entitled therefore to the payment due for termination without notice under section 49 (3) (a) namely Vt 2,007,000.

50. In addition, Mr Ernst is entitled to a basic severance pursuant to section 56 (2) (a) and section 54 (1) (a) in the sum of Vt 3,735,250.

51. As I have mentioned, Mr Ernst does not seek a multiplier pursuant to section 56 (4) but he does seek interest and costs, the former under section 56 (6) of the Act. As to interest, I award 12% per annum on each of the above sums from 24 November 2010 to the date of judgment.

52. Mr Ernst is entitled to costs on the claim which may be taxed if they cannot be agreed.

53. As to the counterclaim, Mr Ernst accepts that Air Vanuatu is entitled to Vt 31,000 under paragraph 1 of the prayer for relief. The defendant will therefore have judgment for that amount.

54. For the cost of the two heat sealers Air Vanuatu seeks judgment for AUD$280. It does so on the basis that it did not order the heat sealers for its benefit and should not have to pay for them. I agree. It was merely an accommodation by the company through Mr Ernst's actions to assist Tanna Coffee. The heat sealers were imported for its benefit and at its cost including an agreed handling fee. Apparently an invoice was raised for Tanna Coffee to pay but this was not produced in evidence and as far as I know it has in any event not been

paid. In these circumstances, I consider Mr Ernst should meet this cost although obviously it would be fair if he is later reimbursed by Tanna Coffee.

55. If Tanna Coffee had imported the heat sealers directly as it was originally intending to from PacificRim Trading, it would have had to pay for the heat sealers which arrived, although ultimately because they were not the kind required no doubt some arrangement would have been reached with PacificRim Trading. However, the reality here is that Air Vanuatu paid for the heat sealers and although Mr Adlington returned them in November 2010 because Mr Ernst believed they could be used by the company, it seems that they have not in fact been used. I therefore do not see why Air Vanuatu should be left having to bear the cost of them. In equitable terms what should happen is that Mr Ernst should reimburse Air Vanuatu, Tanna Coffee should reimburse Mr Ernst and then take the matter up with PacificRim Trading which sent heat sealers at odds with the careful description Mr Adlington gave them. Given the sums involved, it may well be that one or more parties simply do not bother to pursue this but as between Mr Ernst and Air Vanuatu, it is Mr Ernst who should meet the cost.

56. There will therefore also be included in the counterclaim judgment the sum of AUD$280.

57. I do not consider that costs should be awarded to Air Vanuatu on the counterclaim since the main award is one which was never disputed by Mr Ernst. Both claims were closely tied in with the substantive claim and it could not be said that additional costs were incurred by Air Vanuatu in advancing its counterclaim.

58. Finally, I thank counsel for filing their succinct and helpful submissions promptly after the hearing so as to permit the consideration and release of this judgment prior to my departure on leave and while the case was still fresh in my mind.

BY THE COURT