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

Civil Case No. 186 of 2009

BETWEEN: JOHN D. WARMINGTON

Claimant

AND: SILVER PACIFIC AUTUMN HOTEL LIMITED trading as LE LAGON HOTEL

Defendant

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

Counsel: *Mrs. M. N. F. Patterson for the claimant*
N. Morrison for the defendant

Date of Judgment: *1 August 2014*

JUDGMENT

1. The claimant **John D. Warmington** ("*Warmington*") is a former Chief Financial Officer of the defendant **Silver Pacific Autumn Hotel Limited** ("*SPAH*"), trading as **Le agon Hotel** ("*Le Lagon*") in Port Vila, Vanuatu. He brings this claim for AUD$78,760.46 for breach of his employment contract.

2. A written agreement setting out the terms of his employment, dated 17 May 2006 was signed by both parties ("*the employment contract*"), and Warmington commenced his employment on 26 June 2006. The original term of employment was for two (2) years but there were later extensions to the original term the effect of which was to extend the employment contract to 26 June 2010.

3. On 24 September 2009 Warmington requested a day in lieu of work done on public holidays. In the exchange of emails that followed a disagreement arose between Warmington and the Group President of Le Lagon, Richard Chiu, about whether the day could be taken in lieu, or rather as against annual leave. Warmington believed that it was a term of his employment that when circumstances arose requiring him to work on public holidays or Sundays, he would "*... apply for leave, and get my salary payments approved by Tammie Tam, a director of the defendant. She also approved my time in lieu, when claimed*".

4. Chiu took the position that it was a fundamental basis of employment that employees could not take days of holiday in lieu of extra days worked. He took the view that not only should Warmington not take such days as holidays in the future, but that Le Lagon would deduct time taken in lieu from his annual leave entitlements.

5. The dispute escalated. From Warrington's perspective he was being asked to forego 55 days of accumulated time in lieu that he was entitled to, and this was a breach of the employment contract. Chiu made it clear that the issue was "*not negotiable*" and that the Le Lagon position had to be accepted or that Warmington should resign. Warmington would not back down.

6. On 1 October 2009 a letter was sent to Warmington from the Vice President of **Warwick International Hotels** ("*WIH*") advising interalia that his employment "*... will be terminated on 31.12.09 giving you a notice period of three months instead*".

7. On 29 October 2009 Warmington's lawyers wrote to Le Lagon advising that he would waive the last month of the notice period and would cease work on 30 November 2009. Warmington ceased working for Le Lagon on that date.

8. The parties have not been able to agree on Warrington's financial entitlements following his termination, and they are the subject of this proceeding.

The issues

9. The issues were agreed in submissions at the end of the trial as follows:

   (1) Was the Defendant, Silver Pacific Autumn Hotel Limited, ("*SPAH*") in breach of section 49 of the Employment Act [CAP. 160]?

   (2) Was Warmington in breach of Clause 4 of his contract by claiming days in lieu for weekend worked [overtime]?

   (3) Was Warmington in breach of Clause 5 of his contract by claiming in lieu days for Public Holidays worked?

   (4) Did the letter of termination dated 1 October 2009 give Warmington a right to severance?

   (5) If severance is payable, on what remuneration amount should it be calculated?

   (6) Is Warmington entitled to be remunerated for the 5 days in lieu claimed in the absence of contractual provisions?

(7) Is Warmington entitled to other heads of Damages as listed in Annexure AD of 2A?

10. These issues overlap, and in particular the first issue gives rise to questions that also arise in the fourth issue.

First issue – was the Defendant liable to pay the December 2009 salary payment?

11. Section 49 of the Employment Act provides:

> ***"49. Notice of termination of contract***
>
> *(1) A contract of employment for an unspecified period of time shall terminate on the expiry of notice given by either party to the other of his intention to terminate the contract.*
>
> *(2) Notice may be verbal or written, and, subject to subsection (3), may be given at any time.*
>
> *(3) The length of notice to be given under subsection (1) –*
>
> *(a) where the employee has been in continuous employment with the same employer for not less than 3 years, shall be not less than 3 months;*
>
> *(b)* (irrelevant for present purposes)
>
> *(4) Notice of termination need not be given if the employer pays the employee the full remuneration for the appropriate period of notice specified in subsection (3)."*

It may be immediately noted that the section applies to both "*employer*" and "*employee*" and where a notice is given, employment "*shall terminate on the expiry of the notice*" and not before. Alternatively, an employer may opt-out of the notice requirements by paying the full salary for the required notice period.

12. Given that Warmington had been continuously employed by Le Lagon for "*not less than three years*", he was entitled to three months notice of termination from his employer.

13. Le Lagon gave three months notice by letter dated 1 October 2009 that the claimant's contract of employment was to terminate on 31 December 2009.

14. The question is: whether Warmington when he advised that he would leave a month earlier and did so, waived his right to three months notice and with it his December

2009 salary? Mrs. Patterson submits that he did not, relying on **Section 53(1)** of the Employment Act, which provides:

> *"If any employer ill-treats an employee or commits some other serious breach of the terms and conditions of the contract of employment, the employee may terminate the contract forthwith and shall he entitled to his full remuneration for the appropriate period of notice in accordance with section 49 without prejudice to any claim he may have for damages for breach of contract."*

The Section clearly enables an "*employee*" who is being ill-treated by his employer or where the employer commits some other serious breach of the employment contract, to "*terminate the contract forthwith*" without losing his monetary entitlement under **Section 49** (*ie:* in the claimant's case to 3 months remuneration).

15. The present issue is whether the claimant is entitled to a December salary payment. That turns on whether he has served the three months notice through December, or for some other reason, was entitled to a months pay when he had ceased to work for Le Lagon on 30 November 2009.

16. Mrs. Patterson argues that Warmington would have worked the notice period, but for his employer making this impossible by asking him to **(1)** vacate his office; **(2)** be on notice at home; **(3)** hand over the files and office keys including PMS studies; **(4)** go on additional overseas missions; and furthermore by **(5)** suspending his reporting lines; **(6)** forbidding him from informing the rest of the staff of the termination; and **(7)** not giving any directive to financial controllers working under him. She submits that he was ill-treated and his terms of employment were seriously breached. These are important factors, relevant to later issues of whether or not Warmington is entitled to a severance award under **Section 56(4)**.

17. Although the claimant seeks to rely on **Section 53** in support of this claim for his December salary, the evidence does not support the claim. It may be noted that the claimant did not (as he was entitled to) terminate his contract "*forthwith*", on the contrary, he gave his employer a month's notice and continued to work and was paid for the month of November during a period when he claims he was being ill-treated.

18. The question that naturally comes to mind is – if the claimant truly was being ill-treated by his employer, why then did he not end the relationship immediately and record his reasons for doing so in his own termination letter.

19. Despite the fact that Warrington's employment was (wrongly) terminated entitling him to three months notice, I do not accept that any of the alleged conduct by Le Lagon after the giving of the notice of termination amounted to ill treatment or a serious breach of the terms and conditions of his employment.

20. Needless to say some restriction of normal duties was inevitable given that Warmington was leaving on less than cordial terms. Travel had always been part of his employment, and was referred to in the job description. The proposed missions all arose out of his duties and were not in my view "*beyond the norm*". Warmington could have seen out his employment doing the travel and otherwise working at home, but instead, he deliberately chose not to. He was not prohibited from going into his office, providing he communicated his intention to do so.

21. In his own words in an email of 22 October 2009 Warmington said:

> *"I have decided I do not wish to stay until 31 December and I want to get on with other things. I have checked with Juris* (his then counsel) *and it is my prerogative to do so. I will waive the notice period not worked."*

22. This is a telling statement indicating that, at the relevant time, he saw his departure as something he wanted to do and not something forced on him by ill treatment. His lawyer in the letter of 29 October 2009 also wrote: "*My client proposes to waive the last month of the notice period*", (my emphasis). In using the word "*waive*" his lawyer also re-enforces the claimant's free choice.

23. Mrs. Patterson eschewed a submission that Warrrington had been constructively dismissed, but she relied on **Section 53(1)** of the Act. Given the way in which she couched her submission, she was in my view effectively arguing constructive dismissal as well as a breach of **Section 53(1)**. For the reasons I have given, in my view, the actions of Le Lagon towards Warmington during October and November 2009 did not amount to ill-treatment or some serious breach of the terms and conditions of the contract of employment in terms of **Section 53(1)** or supported a constructive dismissal.

24. Therefore I conclude that the actions of Le Lagon in the months following the giving of the notice were not unreasonable in the circumstances.

25. Warmington chose to go early because as matters developed through October 2009 it suited him to do so. He clearly had lost confidence in his employer and was angry, his girlfriend did not want him to travel, and there may have been other factors that arose which persuaded him that it was better to go. On this point I did not find his explanation as to why he left to be either complete or convincing. I am satisfied that it was not because of any breach of Le Lagon's employment obligations during the three month period rather it was a considered decision and a voluntary choice made by the claimant.

26. Warmington fails on this first issue.

Second issue – Was Warmington entitled to claim 20 days in lieu for weekend work?

27. Clause 4 of the Employment Contract states:

> *"Office Hours"*
>
> *Due to the nature of your position, your office hours are varied depending on operation needs. You will be on duty five days a week and have two days off per week which change depending on worked requirements. No overtime payment will be made."*

28. It is clear from the wording of the Clause that the claimant did not work regular "*office hours*". Furthermore his office hours were dependant on operational needs and his two days off per week could "*change depending on work requirements*". Strictly speaking, the Clause does not prohibit overtime work or, for that matter, compensation by way of days in lieu for any extra days worked.

29. Furthermore nowhere in the Clause is there any mention of the "*two days off*" being a weekend or a Saturday and Sunday. Indeed the clause, as drafted, assumes that the "*two days off*" would be variable so long as it followed five days of work. The clause is also unclear as to whether the five day week or "*two days off*" are to be consecutive days. Plainly, despite the correspondence and defence counsel's submissions, the claimant's "*office hours*" remained highly flexible.

30. It was made clear in the correspondence leading up to the claimant's employment contract that he would only work five days a week, and not six. It is submitted for Le Lagon that it was fundamental to the employment obligation that Warmington could not work on weekends and public holidays and then claim days in lieu as this struck at the heart of the five day employment week that had been so carefully negotiated. His claims were seen as a "*ploy*" to escape the rigor of the arrangement that he would be paid for only five days a week.

31. It is submitted for Warmington that the clear stipulation that no overtime payments would be made was specifically varied by open arrangement with the directors with whom he was dealing. In terms of the weekend work it was changed in accordance with Clause 4: "*depending on working requirements*", so that he did work on weekends and public holidays, and was to get days of holiday in lieu.

32. The words of Clause 4 contemplate a variation of office hours "*depending on operation need*". Warmington provided a detailed statement set out in chart form the

approval(s) that he got when he applied for days in lieu. He has therefore provided evidence of specific "*one-off*" arrangements for him to take days as holidays, approved by a director Ms Tammie Tam and, on occasions, by Richard Chiu. Of the twenty (20) days claimed, seventeen (17) were approved by personal action sheet ("*PAS*") and three, verbally. I accept his evidence on this.

33. There was no contrary evidence from Ms. Tam, Chiu or other directors. The only statement from the defendant was from Stephen Linch, a Vice-President based in Paris who did not dispute what Warmington said about the contractual variations, instead he focused on the contractual terms.

34. Warmington has proved that his contract was varied by the arrangements he made in the course of his employment. I am also satisfied that Le Lagon is estopped by its actions in agreeing to Warmington taking days in lieu from now denying his right to take them. However, I do not base my finding on estoppel.

Third issue – Was Warmington entitled to claim for 34 days in lieu of public holidays worked?

35. Clause 5 of the employment contract provided:

> *"You are entitled to gazetted holidays which and whenever possible should be taken on the actual public holiday, but should you be required to work, time off in lieu will be given which it must be taken within the year the holiday occurs"*

On the face of the clause the claimant was entitled to claim and be given: "*time off in lieu*" if he worked on gazetted public holidays. Strictly speaking, there is no need to seek approval to work on public holidays so long as the claimant was "*required to work*" due to the exigencies and requirements of his employment at the time. A *fortiori* where the only person "*on the ground*" so to speak, was the claimant and his superiors were based outside Vanuatu, all in different time zones.

36. Warrington's evidence was that all days taken "*in lieu*" were approved either by a director of Le Lagon, by personal action sheet, emails, by later ratification sent to Tammie Tam or verbally approved from Tammie Tam On occasions they were in a different year.

37. It is correct as submitted by Mr. Morrison that there had been a hard negotiation about Warmington only working five days a week. But if the directors were prepared to allow him from the outset, to take "*time off in lieu*" and agreed to what he claimed, that constitutes, in my view, an oral variation of the agreement which binds Le Lagon.

38. I have no difficulty in finding that an employment contract of this type in a 24 hour operation in the hospitality industry, involving a senior executive who is closely inter-acting with absentee directors as part of his employment, can be so varied by agreement. Ms Tam was informed of what was happening and her actions when she specifically approved the days in lieu, or on other occasions did not object, must be seen in context as specific tacit variations of Clause 5. I note on a number of occasions, the signatures of directors were given agreeing to the days taken.

39. It is correct as Mr. Morrison has pointed out that there is no written confirmation for all of the days taken. However, it is not unexpected that as a pattern of taking days in lieu developed, not every day orally approved would be documented. Insofar as there is a credibility issue here, I accept the evidence of Warmington as to the variations allowing him to take the extra "*in lieu*" days. He struck me as a careful person who valued his reputation and integrity, and I do not think that he lied to the Court.

40. Conversely, I got the distinctly unfavourable impression that Le Lagon's stance and attitude was arrived at belatedly after approvals had been given at the relevant time(s) when the "*in lieu*" days were claimed and worked.

41. It was suggested in submissions that there may have been a "*mistake in law*" when the days were taken, but I see this as a "*red herring*". As a matter of fact there is no evidence of mistakes by the Le Lagon directors as to what they were agreeing. Indeed they did not give evidence on the point as might be expected if they did not agree. Warmington was entitled to act on their agreement in good faith. There was no mutual mistake at the time of the employment contract, and indeed, it is my view, that Chiu decided to go back on what had been agreed.

42. The extra days taken were accepted and approved and, viewed objectively, were permissible contractual variations. Given that they were agreed to, it is not fatal in my view, that some of the days were taken more than a year after the public holiday had occurred.

43. I accept however that one (1) day must be deducted when Warmington was in fact absent from work in Mexico on holiday, as I think he may have been mistaken as to his right to take that time. But otherwise the variations are proved. I therefore find that Warmington was entitled to claim for 33 of the days worked "*in lieu*".

Fourth issue – entitlement to severance payment

44. Section 54(1) of the Employment Act provides:

"54. Severance allowance

(1) Subject to section 55, where an employee has been in the continuous employment of an employer for a period of not less than 12 months commencing before, on or after the date of commencement of this Act, and –

a) the employer terminates his employment; or
b) .... (not relevant)
c) ...
d) ...

the employer shall pay severance allowance to the employee under section 56 of this Act.

For the purpose of this subsection, "medical practitioner" means a medical practitioner registered as a health practitioner under the Health Practitioners Act, to practice medicine and/or surgery".

(my underlining)

45. Plainly the section makes provision for the payment of a severance allowance where an employee has been in the continuous employment of an employer for a period of not less than 12 months and "*the employer terminates his employment*". **Section 56** provides for the amount of severance allowance being half a month's remuneration where the employee is remunerated at intervals of not less 1 month, and where the termination was "*unjustified*" **Section 56(4)** provides, for an additional award of up to 6 times the amount of severance allowance calculated in accordance with the section.

46. I have allowed Le Lagon to argue specifically that the employment contract was in fact terminated by Warrington. I see no prejudice to him in allowing this, as there is no doubt as to the facts of his letter of termination and the surrounding circumstances, and the entitlement to severance has always been denied. It is correct that Le Lagon had earlier admitted that it sent out its letter of termination to take effect on 31 December 2009, but that is not inconsistent with Warmington then effectively terminating his employment prior to that date. Warmington himself pleaded in his latest amended claim at paragraph 9 that the 1 October 2009 letter "*... purported to terminate the contract with effect from 31 December 2009*" (my emphasis).

47. This is not a case where Le Lagon terminated Warrington's employment immediately. It intended to but was stopped by Warmington. I have already found at **paras. 6 & 13** (above) that Warmington was given three months notice of termination by Le Lagon,

but chose to terminate his employment himself prior to the notified termination date of 31 December 2009, by himself resigning effective from the end of November.

48. I have found that this was not a constructive dismissal. I consider that Le Lagon was in the wrong in its belated complaint that Warmington should not have been taking days "*in lieu*". However, Warmington chose to leave early for his own personal reasons. In those circumstances, Le Lagon did not terminate Warmington's employment. Warmington terminated his employment, and he must live with the consequence that in doing so he lost any right to a severance payment. I am fortified by the words of **section 49(1)** which clearly states that where a termination notice is given, the contract of employment "*... shall terminate on the expiry of the notice*".

49. The pre-requisite in **Section 54(1)(a)** of the employer terminating the employment has not therefore arisen.

50. Needless to say, as a matter of common sense, an employment contract does not terminate when notice is given, if the date for termination is in the future. The contract subsists until the time specified. That common sense principle must also apply to the claimant's contract of employment which continued to subsist until the notice expired. Warmington may now regret his decision to terminate early, but he must live with the consequences. There is no indication of unfair pressure to leave early. He had legal advice at the time.

Fifth issue – Amount of severance

51. It is not necessary to consider the amount of any severance payment given my conclusion that none is payable. If I am wrong however, I record that I would have seen this as a termination of moderate gravity of an employee of three years experience in a middle to higher management position. He was wrongly given notice of termination but he was not treated with any degree of malice or high handedness. It would have warranted a multiplier of one (1) under Section 56(4).

52. I would fix the "*remuneration*" that would form the basis for calculating severance at the salary of **AUD$111,400** agreed and paid. The fact that the total package with benefits was described as being worth AUD$150,000 cannot change the legal character of the payments received. Warmington is bound by the division of salary and benefits that he accepted and were in the contract.

53. However, for the reasons given, there is no entitlement to severance and no need to do a severance calculation.

Sixth issue – Is Warmington entitled to be remunerated for 5 days in lieu?

54. The sum of $3,461 is claimed for time in lieu of public holidays not taken.

55. I have accepted Warmington's evidence on the issue of there being an agreement that days could be taken "*in lieu*", and the five days claimed are consistent with that evidence.

56. I find this claim proven. He is entitled to the **AUD$3,461.00**.

Seventh issue – Other claims

57. The other claims include annual leave of **AUD$30,987.63**. There is no doubt this is payable and due in accordance with Sections 29 and 30 of the Employment Act, and Clause 6 of the contract. I do not consider that there is anything in the contract that requires an employee to take annual leave within the same year as the year when the leave is acquired given the circumstances I have outlined earlier.

58. I also consider that the further sum of **AUD$768.46** to make up the 2009 remuneration entitlement is proven, as is the unpaid expense claim of **AUD$391.00**. However, Warmington fails in his claim for the deduction of a fine of AUD$597.65 as he endorsed that deduction himself and has had the benefit of it, and cannot get a reimbursement for a payment for his benefit.

Conclusion

59. Warmington succeeds on his claim that he was entitled to the days in lieu, and the counterclaim fails. I find that most of the days in lieu were expressly authorized. These can be seen as variations of the employment contract, and those that were not specifically authorized came within the ambit of the contractual variation.

60. He is entitled also as a corollary to be paid salary for days in lieu not taken because of his early contract termination. The letter terminating his employment on the basis that he had wrongly taken or claimed these days "*in lieu*" was unjustified and a repudiation of the employment contract. There is therefore to be no set-off against his claim for annual leave.

61. The corollary is that Warmington was entitled to rescind the employment contract himself, which he did by terminating it on 30 November 2009. However in doing so, consciously or not, he brought his employment contract to a premature end, and of his

own volition. He is not therefore entitled to an extra months pay to take him to the date of termination proposed by Le Lagon on 31 December 2009.

62. More significantly, Warmington's deliberate termination of his employment contract meant that he lost the right to claim severance on the basis that termination was by his employer. While Le Lagon was in breach of the employment contract and was a repudiating party in November 2009, it was Warmington who chose to bring the contract to an end on 30 November 2009.

63. Warmington succeeds in his claims for the other heads of damage, but not in his claim for the money used to pay the fine.

Summary

64. Warmington is entitled to damages from Le Lagon in the sums of AUD$ (30,987.63 + 2,945.21 + 768.46 + 391.00) = **AUD$35,092.30**.

65. He is also entitled to interest on these sums at the rate of **5% per annum** from 30 November 2009 being my assessment of a fair rate.

66. He fails in his claim for a severance payment and for reimbursement of a fine paid of **AUD$597.00**.

Costs

67. On the face of it the claimant is entitled to a payment of half of his costs from Le Lagon as he has succeeded in the claim, to be taxed if not agreed. I so order.

DATED at Port Vila, this 1st day of August, 2014.

BY THE COURT

D. V. FATIAKI
Judge.