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

Judicial Review Case No. 13 of 2015

BETWEEN: **UNION ELECTRIQUE DU VANUATU LTD trading as UNELCO GDF SUEZ**
Claimant

AND: **BOARD OF ARBITRATION**
Defendant

Hearing:	***Friday 2 October 2015***
Judgment:	***Thursday 26 November 2015***
Before:	***Justice Stephen Harrop***
In attendance:	***Mark Hurley for the Claimant***
	Kent Tari (SLO) for the Defendant

RESERVED JUDGMENT OF JUSTICE SM HARROP

Introduction

1. This is a claim for judicial review seeking declarations that certain awards made on 27 February 2015 by a Board of Arbitration in a dispute between the Vanuatu National Worker's Union (representing Jean-Pascal Saltukro) and UNELCO are void and of no effect, and seeking consequential quashing orders.

2. Mr Saltukro was employed by UNELCO from 16 March 2010 but for present purposes the governing employment contract was one dated 10 September 2013. It was of indeterminate duration and his position was administrative officer in the sales department.

3. On 14 April 2014, UNELCO terminated Mr Saltukro's employment purporting to do so pursuant to section 49 of the Employment Act [Cap. 160]. Appropriate payments in lieu of notice were made. Some reasons were provided in the letter of dismissal including that Mr Saltukro, who was a union representative, had interfered with the role of certain officers of

the company, that he was being insubordinate and that he had refused to follow directives from his superiors.

4. Following Mr Saltukro's dismissal and unsuccessful efforts by the Union to obtain his reinstatement, a trade dispute pursuant to the Trade Disputes Act [Cap. 162] arose between the Union on behalf of the Mr Saltukro and UNELCO.

5. On 21 May 2014 the Minister of Internal Affairs pursuant to section 12 of the Trade Disputes Act referred the dispute to a Board of Arbitration.

The Award and the Board's reasoning

6. In an award dated 29 August 2014, which curiously was not issued to the parties until 27 February 2015, the Board made four orders or awards, three of which (nos. 1,3 and 4) are challenged by UNELCO in this claim. These awards were as follows:-

"Award 1: ***Termination of Jean Pascal Saltukro***

On the issue of whether the termination of the employment relationship, between UNELCO (Employer) and JPS (Employee), by UNELCO constitutes a proper and lawful termination of an employment relationship, the Board finds that the termination was not proper and lacking the application of section 49 of the Employment Act of Vanuatu.

Also, the termination of JPS by UNELCO was not done in accordance with the UNELCO Internal Regulations and inconsistent with GDF SUEZ Ethics Charter.

In addition, the termination of JPS by UNELCO was done in relation to actions which JPS carried out while in the course of his duties as a trade union representative having been given that mandate by the employees of UNELCO. Therefore, the cause of termination of JPS was different from insubordination as claimed by UNELCO.

Award 2: ***Claim for Specific Performance as to Reinstatement of Jean Paul Saltukro***

The Board notes that as a remedy sought by VNWU, they have asked for the reinstatement of JPS. This in law is regarded as a remedy of specific performance.

The Board agrees with UNELCO that it is not empowered to do so under the laws of Vanuatu, given that specific performance is not a remedy contained in the Employment Act and also in any other act of general application.

Therefore, the Board awards no specific performance to Jean Pascal Saltukro.

Also because, JPS has already been paid his entitlements by UNELCO thus indicating their intention not to continue with his employment.

Award 3: ***Meeting between VNWU and UNELCO to re-establish good partnership in industrial relations***

The Board Awards and directs that a meeting be held between VNWU and UNELCO, and for this meeting to be chaired by a Senior Labour Officer in the Department of Labour to be appointed by the Commissioner of Labour. This Meeting is for the purpose of re-establishing good partnership in industrial relations between the two parties.

This Meeting may also discuss, as an option, whether UNELCO would consider employing JPS into its organization but within a difference section given his experience, skills and qualification as they are relevant towards the objectives of UNELCO.

This Meeting must take place before 30th April 2015.

Award 4: ***Review and Approval of UNELCO Internal Regulations by a Labour Officer***

The Board Awards that given that UNELCO's services are an essential service in Vanuatu and so to properly carry outs its services it needs to safeguard its industrial relations with its employees. Therefore, a key document of maintaining good industrial relations is the UNELCO Internal Regulations.

The Board Awards and directs that UNELCO immediately send a copy of its UNELCO Internal Regulations of October 2001 to the Department of Labour and for a Labour Officer designated by the Commissioner of Labour to review and propose recommendations for changes and updates to UNELCO. This Review is to take no more than 2 months.

After which UNELCO is to incorporate the recommended changes where it sees fit and keeping in line with its internal policies, and to produce a 2015 version of the

UNELCO Internal Regulations. This 2015 version must be produced within 2 months from the date of receiving the recommendations for change from the Department of Labour.

The 2015 version should then be circulated for consultation and discussion to all of UNELCO's employees and for this consultation period to take only 1 month. After which UNELCO should then forward a 2015 version of its Internal Regulations to the Department of Labour for approval as per section 75 of the Employment Act of Vanuatu."

Was Award No. 1 lawfully made?

7. In this claim, which is defended by the Board of Arbitration, the key question is whether Award No. 1, under which the Board found that Mr Saltukro's termination was not proper, falls foul of section 19 of the Trade Disputes Act which provides:-

"No award or settlement resulting from any arbitration or conciliation proceedings shall be made which is inconsistent with any written law."

UNELCO says that award No. 1 was inconsistent with a written law, namely section 49 of the Employment Act. The Board denies that it was.

8. The reasoning behind the Board's decision is set out on pages 14 and 15 of its award. The relevant reasons are:

"The question which the Board finds important to consider is not so much whether UNELCO is entitled to rely on section 49 of the Act, but whether in adopting the provisions of section 49 it did so in a manner which was lawful and proper. While any individual or corporation in Vanuatu is entitled to use the Employment Act to guide its actions in an employment relationship, it does not mean that it does so in a prejudicial manner.

When UNELCO first offered JPS a contract of an unspecified period of time, on 10th September 2013, the only reference to the Employment Act was in relation to overtime. There was no mention in the contract that in the event of termination, Part 10 of the Act, or specifically section 49 would apply. In the letter terminating the employment of JPS, dated 14th April 2014, section 49 (4) was specifically mentioned most likely in relation to JPS being paid out his entitlements by UNELCO. In the

Defence to Points of Claim by UNELCO's legal counsel, dated 18th June 2014, he pointed out that termination of JPS by UNELCO was done in accordance with section 49.

In the Board's view, a proper manner within an employment relationship is for both parties to have an equal amount of knowledge as to the terms and conditions of the employment. In other words, a normal level of transparency ought to exist so that both the employer and the employee are aware of the applicable rules, laws and administrative requirements. It can be deduced from the facts that while section 49 of the Employment Act was eventually going to be the method upon which UNELCO was to rely upon to terminate one of its employees, that respective employee had not knowledge when accepting his contract of employment that section 49 was to be used to determine the end of his employment.

(ii) ***Does the Employment Act [CAP. 160] apply to contracts of employment by UNELCO or the employment relationships between UNELCO and JPS, if at all?***

In considering the proposition by UNELCO, through the earnest submissions of its legal counsel that it is entitled to rely on section 49 of the Employment Act, a fundamental question of application of law now arises. The Board notes that under section 6 of the Act, it reads:

> 6. *Effects of custom, agreement etc.*
>
> *Nothing in this Act shall affect the operation of any law, custom, award or agreement which ensures more favourable conditions in any respect to the employees concerned than those provided for in this Act.*

Given section 6 of the Act, and gathering from the facts of this trade dispute and referring to certain employment related documents of UNELCO, it seems that UNELCO by virtue of offering JPS more favourable conditions through the contract of employment dated 10th September 2013, has in face caused the Employment Act not to have effect and application into any matter arising within the context of the employment relationship that it has with JPS.

Given that the paramount argument of UNELCO is this trade dispute is that it is entitled to terminate the employment relationship it had with JPS because by law,

under section 49 of the Employment Act, it could exercise that right of an employer as granted by statute. While that may be so, it is difficult to see how UNELCO could overcome section 6 because it has definitely offered JPS through a contract of employment more favourable conditions than those provided for the Employment Act of Vanuatu.

Both VNWU and UNELCO did not make any submissions on the application and effect of section 6, but given that it is part of the employment law regime in Vanuatu, the Board has a duty to consider this sub-issue at it relates to the principal issue at hand.

(iii) ***Should the Board of Arbitration be persuaded to follow the precedent set in Kelep v. Sound Centre [2008] VUSC 13***

The Board has been assisted by legal counsel of UNELCO with the submission that the law in Vanuatu as regards the application of section 49 of the Employment act has been settled in the case of Kelep v. Sound Centre [2008] VUSC 13. The Board has consulted this case but actually does not find it relevant to be applicable to the trade dispute at hand given that the context of Sound Centre in 2006 in highly different to that of UNELCO in 2014. While the case of Kelep also deals with section 49 of the Employment Act, the road taken by the case of Kelep is totally different to that of Jean Pascal Saltukro. Also, as Employers, it is difficult to compare Sound Centre to UNELCO. As such, while the discussion by the Court in the case of Kelep is useful and forms a relevant precedent, the Board does not think it is persuaded to follow strictly the precedent set because of the difference and nature of the facts in this trade dispute."

9. As can be seen, the first point made by the Board was that because there was no reference to section 49 of the Employment Act in Mr Saltukro's employment contract dated 10 September 2013, UNELCO could not rely on section 49 to terminate his employment.

With respect, this reasoning is clearly wrong in law.

10. The long title to the Employment Act says that it is: *"To provide for the general principles relating contracts of employment and matters incidental thereto."* Self-evidently the Employment Act applies to all contracts of employment and every citizen of Vanuatu must

be deemed to know or to be able to find out the relevant provisions of the Employment Act. The generality of the Employment Act's provisions mean that particular employment contracts do not need to include the extensive details relating to matters which are already covered in the Act. Rather, as was the case here, relatively brief written employment contracts may be prepared because the underlying principles covering all employment contracts need not be restated. That is because everybody, whether employer or employee, is bound by the Act. If the approach of the Board were correct then it would mean that if UNELCO had committed a gross breach an Employment Act provision which was not mentioned in their employment contract, then Mr Saltukro would not be able to hold UNELCO to account.

11. In short, Mr Saltukro (and indeed any other employee in Vanuatu) is deemed to know, because section 49 of the Employment Act is part of the law of Vanuatu, that it may be invoked by his employer at any time to terminate his employment with appropriate notice. Equally, every employer is deemed to know that any of its employees may at any time give notice of termination under s.49. The Board's observation about there needing to be "an equal amount of knowledge" on the part of each party is correct; but its conclusion that there was inequality of knowledge here is not. Everyone in Vanuatu is deemed to know the laws of Vanuatu. Society and the Rule of Law would break down if a citizen could claim not to be responsible for his actions, or those of others affecting him, through ignorance of civil or criminal law.

12. There was no obligation for UNELCO's contract with Mr Saltukro to mention the Employment Act, either generally or as to any particular provision. It governs and effectively forms part of all employment contracts in Vanuatu, both oral and written and as a citizen Mr Saltukro is deemed to have known that.

13. The second ground on which the Board considered that UNELCO was not entitled to rely on section 49 was because of the effect that it considered section 6 of the Employment Act had.

14. Section 6 provides: *"Nothing in this Act shall affect the operation of any law, custom, award or agreement which ensures more favourable conditions in any respect to the employees concerned than those provided for in this Act."*

15. The Board considered that Mr Saltukro's contract contained more favourable conditions than the Act. It did not explain which were the more favourable conditions in his contract which meant that section 49's impact was affected in this way. Mr Tari was unable to point to any such condition.

16. It is to be noted that section 6 can only apply to override the otherwise applicable provisions of the Act in a clear case. Implication or inference is not enough. That follows from the use of the word "ensures".

17. Section 49 of the Employment Act provides as follows:-

> *"**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) in every other case –*
> >
> > > *(i) where the employee is remunerated at intervals of not less than 14 days, shall be not less than 14 days before the end of the month in which the notice is given;*
> > >
> > > *(ii) where the employee is remunerated at intervals of less than 14 days, shall be at least equal to the interval.*
>
> *(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)."*

18. As will be seen s.49 deals with termination of employment contracts on the expiry of a notice given by either party to the other. In the event of a termination by the employer, section 49 (4) provides that no notice need be given if the employer pays employee the full remuneration for the appropriate period of notice specified in subsection (3).

19. The only way in which from an employees' perspective the operation of section 49 could be excluded by the operation of section 6 would be if either the employment contract provided for a greater length of notice or if it provided that even if the employer had paid the full remuneration required, a period of notice was still required.

20. Mr Saltukro's employment contract is relatively brief (two pages) and there is nothing in it touching the termination of the contract or the extent of notice required under section 49. In short, there is nothing in the employment contract which even comes close to "**ensuring** [Mr Saltukro has] more favourable conditions" in relation to notice of termination of contract than those provided in section 49.

21. The Board erred in law in interpreting and applying section 6 in the way it did.

22. I am therefore satisfied the Board was incorrect in both aspects of its reasoning about section 49. In short, I find that the Board acted in breach of section 19 of the Trade Disputes Act because its award No. 1 was inconsistent with a written law, namely section 49 of the Employment Act. Section 49 applied to Mr Saltukro regardless of whether it was mentioned in his employment contract and its application was not affected by section 6.

23. That is sufficient to determine the claim. Award No. 1 was unlawful having been made in breach of section 19 and a declaration to that effect and a quashing of that award must follow.

24. For the Board, Mr Tari accepted that if this were the Court's conclusion then it followed that awards No. 3 and 4 must also be quashed. I agree and order accordingly.

25. For completeness, I note that the Board was referred by Mr Hurley to the decision of this Court in *Kelep v. Sound Centre* [2008] VUSC 13. The Board found, as noted in paragraph

8 above, that this case was distinguishable on its facts and need not be followed. This finding too, was incorrect and an error of law.

26. While it is correct that the facts in the *Kelep v. Sound Centre* case were different, the principle confirmed by that judgment is as Justice Tuohy stated at paragraph 34:-

> *"Under s. 49 either party may terminate the contract by giving the notice required of his intention to terminate the contract (or, if the employer, by paying the full remuneration for the notice period in lieu). Whether it be the employer or the employee who terminates the contract, no reason for termination is required. On the other hand, under s. 50 only the employer is able to terminate the contract by dismissal of the employee, it may only be done if there is serious misconduct by the employee, and it may be done without notice and without compensation. In addition, the other subsections of s. 50 provide various protections for the employee including the right to be heard in relation to any charges against them."*

27. In that case Justice Tuohy found that there had been a termination by notice under section 49, not a summary dismissal under section 50 and that meant that the employee's claim could not succeed because he was asserting it was a dismissal for serious misconduct under section 50. As Judge Tuohy observed at paragraph 37: *"..... the defendant's motive for exercising its contractual right is not legally relevant. What is important is what contractual right it purported to exercise."*

28. This approach was reflected in my own judgment in *Kalambae v. Air Vanuatu (Operations) Ltd [2014] VUSC 139*, a judgment issued on 29 September 2014 which was upheld by the Court of Appeal in *Kalambae v. Air Vanuatu (Operations) Ltd* [2014] VUCA 34, a judgment issued on 14 November 2014. I note that the two *Kalambae* judgments were both issued after the date of the Board's award, although long before it was issued, so these authorities were not drawn to its attention. They are however to the same effect as the *Kelep v. Sound Centre* case although neither judgment refers to it.

29. Although in this case some reasons suggesting misconduct were given in the letter of termination issued to Mr Saltukro, it expressly referred to section 49(4) as the basis for the termination and was accompanied by the requisite payment in lieu of notice. To adapt

Justice Tuohy's words, UNELCO's motive for exercising its contractual right was irrelevant; what mattered was the contractual right it was purporting to exercise. That was under s.49, not s.50. In these circumstances, there was no basis for the Board in its Award No.1 to find Mr Saltukro's termination to be *"not proper and lacking the application of section 49 of the Employment Act of Vanuatu."*

Utility of Declaratory Relief

30. Given that Mr Saltukro is no longer employed by UNELCO, I raised with Mr Hurley the issue whether, even if one or more aspects of the award were found to be unlawful, there was any practical purpose in granting the declarations and quashing orders sought. He submitted that these were more than hypothetical questions because if Award No.1 were allowed to stand it might be the basis for other employees of UNELCO to take similar action during arbitration proceedings. If awards 3 and 4 were allowed to stand, that would or might interfere with UNELCO's rights as an employer and would compound the consequences in relation to award 1. Mr Tari responsibly accepted that if the grounds of judicial review were established then the Board could not oppose the making of declarations and appropriate quashing orders. I accept these orders are of utility and justified.

Result

31. I uphold UNELCO's claim in all respects and make a declaration that Awards 1, 3 and 4 of the Board of Arbitration Award between Vanuatu National Workers' Union (duly representing Jean Paul Saltukro) and Union Electrique du Vanuatu Ltd delivered on 27 February 2015 are void and of no effect. I also quash each of those Awards.

32. The Board must pay UNELCO's costs of and incidental to this claim on a standard basis with such costs to be taxed if they cannot be agreed.

BY THE COURT

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX REPUBLIQUE DE VANUATU