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

Civil No. 17/2276 SC/CIVL

BETWEEN: JOHNSON KALANU and Others
Claimants

AND: PORT VILA MUNICIPALITY
Defendant

Hearing: ***16th August 2018***
Before: ***Justice Chetwynd***
Counsel: ***Mr Malantugun for the Claimants***
Mr Napuati for the Defendant

JUDGMENT

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1. Nine former employees ("the employees") of Port Vila Municipality ("PVM") have commenced proceedings against PVM for unfair or unlawful dismissal. PVM have made an application to strike out the claim. I heard that application on the 16th of August, 2018 and reserved a decision.

2. The facts are straightforward enough. The claim concerns the interpretation of provisions in the Employment Act [Cap160] ("the Act"). In October 2014 Port Vila Municipal Council met and discussed a restructuring exercise. The Council approved the new structure. The staff had had warning of a redundancy exercise because the evidence confirms a letter was written in March 2014 to every employee asking if anyone was interested in taking early retirement or redundancy. The letter asked for those who were interested to write to the Town Clerk's office before the 15th of April, 2015. The letter was copied to the Minister of Internal Affairs (amongst others).

3. In February 2015 the then Town Clerk wrote to the Commissioner of Labour ("the Commissioner") advising him that PVM intended to undertake a restructuring exercise.

4. In April PVM, through the Town Clerk's office, began writing to individual staff members advising them as part of the restructuring exercise that their position in the council had been reviewed and that the council would not be able to continue employing them. The letter contained the following paragraph:-

> *"Please kindly be informed that the Council will pay all your entitlements, namely severance pay as well as, annual leave (if any) and other benefits the Council owes you during your service with the Council. You are to serve your 3 months notice effective from 13th April 2015. Please remain loyal am obligated to your duties and responsibilities."*

The letters are dated 13 April, 2015.

5. On 22nd of May 2015 a further batch of letters was written to individual employees. Apart from the dates the letters were identical to those sent out in April.

6. The claim is based on failure to comply with the law, *"in particular section 67 of the Employment Act [Cap 160]."* [1] It is also said PVM failed, *"to comply with the process set out in the Act of how to conduct a redundancy programme and/or early retirement programme."* [2] What is said to amount to the failure to comply with the law is set out in the claim.[3]

7. Section 67 reads as follows:-

> ***67. Duty of employer to notify Commissioner of certain redundancies***
>
> *(1) Any employer proposing to dismiss as redundant ten or more employees at 1 establishment within a period of 30 days or less shall notify the Commissioner in writing of his proposal at least 30 days before the first of those dismissals is proposed to take place.*
>
> *(2) At any time after being notified under subsection (1) the Commissioner may by written notice, require the employer to give him such further information as may be specified in that notice.*
>
> *(3) If in any case there are any special circumstances rendering it not reasonably practicable to comply with the requirements of this section, the employer shall take such steps towards compliance with such requirements as are reasonably practicable in those circumstances.*

8. The meaning of section 67(1) of the Act is perfectly clear, and in this case as PVM was proposing to dismiss more than 10 employees, it was obliged to notify the Commissioner of Labour at least 30 days before the dismissals took effect. The letter to the Commissioner (see paragraph 3 above) was written on the 25th February 2015. The first batch of letters to the employees was written on the 13th of April 2015.There does not appear to be any dispute that the act of dismissal occurred when PVM sent out the letters and each employee received his or her letter, i.e. on 13th April 2015 or 22nd May 2015. Simple maths determines that PVM did notify the Commissioner in writing at least 30 days before dismissal. In actual fact and allowing 1 day for delivery to the Commissioner, notification was 46 days before the April letter and 84 days before the May letter. There was no failure by PVM to comply with section 67(1) of the Act.

9. What of section 67(2)? That never came into play as it is agreed by all parties the Commissioner did not respond, reply or contact PVM following its letter to him on 25th February. PVM could not respond to something it never received. There was no obligation on PVM other than to notify the Commissioner. That they did.

10. Section 67(3) is of no relevance in this case. PVM had given 30 days notice, had complied with section 67(1), and so there was no need to rely on *"special circumstances"* or for PVM to take *"such steps...as are reasonably practicable".*

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[1] Clause 10 of the Statement of Claim
[2] Clause 11 of the Statement of Claim
[3] Clauses 11(a) to € of the Statement of Claim

11. It is argued by the employees that because the Commissioner did not respond the implication is he did not agree with the re-structuring exercise. Frankly, that is patent nonsense. If the Commissioner did not agree with the exercise he should have contacted PVM and asked for more information. If the claimants are suggesting the Commissioner was wrong to do nothing that is a matter they should take up with the Commissioner. There can be no blame laid at the door of PVM if the Commissioner chose not to do anything after he was notified of the impending dismissals.

12. There are no other provisions in the Act which are specific to redundancy. In other jurisdictions there is extensive legislation dealing with all aspects of the employer employee relationship and it sets out the rights and obligations of all parties. This would include when a redundancy situation arises. In the UK it is the Employment Rights Act of 1996, in New Zealand I believe it is the Employment Relations Act of 2000 and in Australia the Fair Work Act of 2009. The legislation covers the specific provisions of redundancy. In Vanuatu, as there are no such specific provisions (apart from section 67) the Act must treat redundancy as a termination of contract under Part 10. In simple terms, the termination of a contract of employment for reasons of redundancy is effected by the process set out in section 49 of the Act. This seems to me the conclusion reached in other cases in this jurisdiction [4].

13. Section 49 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).

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[4] See for example *Jeremiah v Tafea Provincial Government Council* [2011] VUSC 102; Civil Case 49 of 2010 (17 June 2011); *Naunga v Telecom (Vanuatu) Ltd* [2011] VUCA 11; Civil Appeal 30 of 2010 (8 April 2011); *Kelep v Sound Centre* [2008] VUSC 13; Civil Case 37 of 2007 (14 April 2008)

14. Section 49 cannot be clearer. There is no suggestion or evidence that any of the claimants had a contract for a specified time. PVM as employer was entitled to give notice at any time (see section 49(2)) and it would be effective provided the periods of notice given were in accordance with 49(3). It can be seen from the letters of 13th April and 22nd May (see paragraph 4 above) the claimants were all given 3 months notice. They were treated as all having been employed for a period of not less than 3 years in accordance with section 49(3)(a). None of the claimants were dismissed for cause i.e. in accordance with section 50 of the Act.

15. Section 54 of the Act is then brought into play. The section requires an employer who terminates an employee's employment to pay severance pay. There are provisions in the section to protect an employee who resigns in good faith, to account for retirements, to provide for employees who can no longer work due to ill health, those who work shorter than normal hours of work and employees who are on a lawful strike. Section 55 excludes some employees, most importantly no severance pay is due to an employee terminated for misconduct.

16. The amount of severance pay is mainly dependent upon length of service. Section 56 contains clear directions on how to calculate the amount of severance pay due and allows a Court to award interest on monies due on termination but not paid until later. It is important to note there are no separate provisions in the Act for the calculation of, or the payment of, any sums due specifically in respect of redundancy.

17. There is no evidence, indeed no submissions, the amounts paid to the claimants were calculated other than in strict accordance with sections 54, 55 and 56 of the Act.

18. The claim seems to be based on the penalty provision in section 56(4). That allows a Court to award up to 6 times the "proper" amount of severance pay if it finds that the termination was unjustified. In the case of *Naunga v Telecom (Vanuatu) Ltd* cited previously [5] the Court of Appeal pondered the question of whether a lawful termination could nonetheless be held to be unjustified. There is no help in the legislation as to the meaning of unjustified. As there was a concession in the *Naunga* case that the terminations were lawful and as the point was un-argued the Court declined to deal with that question.

19. To my mind, for the lawful termination in this case to be found to be unjustified there would be need for evidence of unfair selection for redundancy. Examples would be on a par with those set out in the Employment Rights Act from the UK. Under that Act unfair selection for redundancy involves selection based on such things as gender, marital status, sexual orientation, race, religion, age, membership or non membership of a trade union or exercise of statutory rights. There is no suggestion of any such biased selection in this case. The main contention is that PVM said there was to be a restructuring and therefore a need for redundancies whereas after that supposed restructuring the claimants say there were more people employed by PVM.

20. In *Tafea* Fatiaki J stated:

[5] Paragraph 12 footnote 4

*"Plainly, dismissal by reason of redundancy is **not**, per se, an illegal or unauthorized activity and necessarily involves a mass termination of employees by the one employer."*

He then set out comments by "... *the learned author of Marken, McCarry and Sappideen's The Law of Employment (4th edn)"*

"Redundancy is a relatively recent social and industrial phenomenon. It is not a concept known to the common law of contract. It is not a ground for summary termination. Therefore, the employer must give the employee proper notice of termination of the contract of employment. The classic definition of 'redundancy' ... was given by Bray CJ in R v. Industrial Commission of South Australia Ex parte Adelaide Milk Supply Co-op Ltd. (1997) 16 SASR 6 where his Honour said (at p.8):

"... the concept of redundancy ... seems to be simply this, that a job becomes redundant when the employer no longer desires to have it performed by anyone. A dismissal for redundancy seems to be a dismissal, not on account of any personal act or default of the employee dismissed or any consideration peculiar to him, but because the employer no longer wishes the job the employee has been doing to be done by anyone".

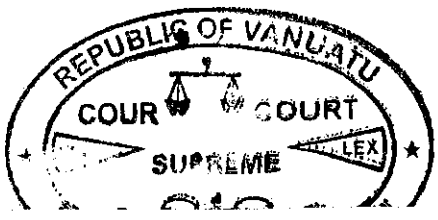
A redundancy may arise as a result of a restructure in order to increase competitiveness or profitability of the business. It has been accepted that an employee's position is redundant where the duties that go to make up that position are split up and spread amongst other employees ... Ryan CJ in the Industrial Relations Court of Australia in Jones v. Department of Trade and Minerals (1995) 60 IR 504 ... said

".... it is within the employer's prerogative to rearrange the organizational structure by breaking up the collection of functions, duties and responsibilities attached to a single position and distributing them among the holders of other positions including newly-created positions"".

Fatiaki J then concluded:

*"In the final analysis, the decision when? and how? to restructure and what redundancies (if any) should occur within the organizational restructure are solely for the employer to make as it sees fit, and, it is **not** for the Court or the redundant employees to second-guess or undermine the restructure on the basis of some perceived unfairness in its implementation."*

21. I agree with what His Lordship says. The Court in this present case is being asked to second guess PVM's motives and/or methods in the restructuring exercise. There is no evidence of unfair selection, there is no suggestion there was any malice involved in the selection for redundancy. In the circumstances of this case the terminations cannot be described as unjustified. The claim is bound to fail and although a Court should be slow in dismissing a claim at an interlocutory stage there is nothing the claimants can say or do to bolster their case. The claim is dismissed.



22. I have not heard from the parties on costs but I see no reason why the normal rule should not apply and costs follow the event. The claimants shall pay the defendant's costs, such costs to be taxed on a standard basis if not agreed.

DATED at Port Vila this 23rd day of August, 2018.
BY THE COURT

.....
David Chetwynd
Judge

REPUBLIC OF VANUATU
COUR COURT
LEX SUPREME LEX
REPUBLIQUE DE VANUATU