**Employers’ position paper on the Employment Relations Bill (June 2012)**

**DRAFT: August 2015 (Note: this position was rejected after further consultations)**

**About this paper**

This paper is a concise statement of the position of employers’ as tripartite partners, on the Employment Relations Bill (ERB). The paper begins by stating the employers’ broad policy position on employment law reforms. It then provides the employers’ position in respect of specific content issues in the ERB.

This position paper is a brief. Further material, containing more detail, is available from the Vanuatu Chamber of Commerce and Industry (VCCI), as underlined below.

This position paper is based on extensive consultation by the VCCI about the ERB with employers in Vanuatu. It is largely based on results of the Employers’ Survey conducted by the VCCI in 2014. Three hundred and seventy three (373) businesses, from every province in Vanuatu, responded to this survey, with 156 businesses answering a long form of the questionnaire that asked for opinions on employment laws. In this report where statements about the percentage of employers are made, this means the percentage of respondents to the survey, or employers who responded to the survey. Following this survey a series of consultations in Port Vila and Santo were conducted to refine positions. Fully detail of data collection, data analysis and reasons for assuming positions is contained in the Employer Survey report.

There are many drafting issues in the ERB. These drafting issues were presented by employers in a technical appendix on the ERB at the December 2014 Tripartite Labour Advisory Council (TLAC) meeting.

The Tripartite Labour Advisory Council agreed to a schedule of meetings in December 2014, with weekly meetings to be commenced in late January. None of these meetings were held before Cyclone Pam affected Vanuatu. Following discussions with workers in June, to further the process employers have developed a draft Employment Contracts Bill. The Employment Contracts Bill is largely based on the ERB, and addresses drafting issues in the ERB. The Bill is accompanied by an explanatory note that explains each section and how it changes current employment laws.

**Employers’ policy position**

Employers agree with the intent of the ERB, as stated in paragraph A of the long title of the ERB:

An Act to provide for a legislative framework which promotes the well-being and prosperity of all people in the Republic of Vanuatu by –

(A) Creating a fair and optimum working environment through the maintenance of minimum and acceptable labour standards that are fair to both workers and employers, with the view to building productive and sustained employment relations;

Employers want a fair, workable situation that will lead to employment growth and private sector led development for the good of all of Vanuatu.

This intent reflects the principles of decent work, which employers are committed to. Employers are also conscious of that:

Three elements are essential to the achievement of decent work objectives: the need for jobs, the honouring of core labour standards, and the pursuit of further improvements in job quality…[but] beyond some point the achievement of one of these objectives may come at the expense of another.(Gary S Fields, ‘Decent work and development policies’ (2003) 142(2) *International Labour Review* 239, 240.)

Social partners acting to create employment laws and policies that further the decent work agenda have a responsibility to ensure that measures to promote the creation of jobs do not undermine job quality, but at the same time that measures to improve job quality do not come at the expense of job creation. The ERB needs to reflect this delicate balance in a manner which is appropriate for Vanuatu’s social and economic context.

Employers are concerned that the current law discourages growth of secure full time employment opportunities through setting high level of benefits (including annual leave, sick leave, maternity leave and severance). This is particularly bad for the large number of young school leavers and female workers seeking employment. Work with generous conditions and benefits for the small number of skilled workers, but no work or precarious work for the vast majority of low-skilled workers is not decent work and is not in the best interests of the well-being of all people in Vanuatu. Social partners should work together to ensure that the ERB avoids this outcome.

Employers maintain that both employers and workers need to engage in a process of “give and take” in order to arrive at a fair outcome that will promote the well-being of all people in Vanuatu and be realistic for the Vanuatu context.

Realistic employment law which promotes decent work should be based on the following principles:

* The law should comply with all ILO Conventions that Vanuatu is a party to (including the fundamental Conventions);
* The law needs to be easy to understand and use;
* The law should be flexible enough to fit a variety of employment situations;
* The law should minimise red tape for businesses;
* Benefits should be at a similar level to other Pacific countries;
* The law should reduce/remove politicisation of minimum wage reviews and other aspects of labour relations;
* The law should not stop small ni Vanuatu entrepreneurs from being able to grow and develop their businesses.

*The employers’ position is that the current draft of the ERB does not meet these principles and needs to be refined.*

### Preliminary issue: the structure of the ERB

Considerable uncertainty remains about the ERB, with only 29% of employers supporting the introduction of a new ERB. In contrast 37% support keeping but amending the Employment Act.

One reason for this is a concern about the length of the ERB. Employers, and particularly small, primarily ni-Vanuatu, business operators are concerned about the length of the ERB. Employers who have seen the ERB are immediately put off by its size. Employers are used to having employment laws in separate Acts.

Irrespective of the content, the approach of combining the Employment Act, the Trade Disputes Act, the Trade Unions Act and the Minimum Wages Act into one single law makes the law intimidating and inaccessible.

Further, following Cyclone Pam, all businesses are facing a period of uncertainty. Revising existing laws to introduce some of the principles currently contained within the ERB helps to reduce uncertainty.

*The employers’ position is that the ERB should be separated out into separate Acts. At the very least there should be a division into 2 parts:*

* *The Employment Contracts Act, which should regulate the content of individual employment contracts.*
* *The Labour Administration, Minimum Wages and Industrial Relations Act which should regulate labour administration, minimum wages and industrial relations.*

*It would also be possible to separate labour administration, minimum wages and trade disputes into separate Acts, as is the current drafting approach in Vanuatu law. Separation may be desirable if stage by stage reform of industrial relations is desired, or if tripartite parties can only agree on some aspects of law reform.*

**Content: rights provisions**

Employers acknowledge the Vanuatu is a party to the main International Labour Organisation Conventions in this area, the Equal Remuneration Convention 1957 (Convention 105), the Discrimination (Employment and Occupation) Convention 1958 (Convention 111) and the Worst Forms of Child Labour Convention 1999 (Convention 182). Employers also acknowledge Vanuatu’s commitments under other Conventions, including the Convention on the Elimination of Discrimination Against Women, the Convention on the Rights of Persons with Disabilities and the Convention on the Rights of the Child.

There is concern, particularly amongst ni-Vanuatu employers operating smaller less formal businesses, as to how the child labour provisions of the ERB will fit with the realities of work provided as part of usual family practices or customary practices. For instance, children may accompany parents to work, particularly in agriculture.

*The employers’ position is to accept the rights provisions of the ERB, with simplified/clarified drafting in some areas, and an express acknowledgement that the child labour provisions do not prevent children from accompanying parents or guardians to work.*

**Content: formation of employment contracts**

The main differences between current law and the ERB in relation to formation of employment contracts are: (1) that more contracts need to be in writing; (2) that new definitional categories of contract – full time, part time and casual – are created; and (3) that provisions to help clarify the common law in respect of the use of independent contractors are included.

The majority of employers (82%) agree that having more contracts in writing is a good proposal. However, given literacy rates, and also current practices regarding contracting, with 52% of businesses currently not using written contracts, a more gradual shift to written contracts is proposed.

*The employers’ position is that the current requirements for when contracts should be in writing should kept and expanded to include a requirement that contracts must be in writing if requested by the employee.*

The majority of employers (61%) agreed that clearly recognising casual workers is a good thing. The definition of casual workers, full time workers and part time workers was not, however, clear. These definitions were also used for the purposes of leave entitlements, but not for the purposes of termination, making it very difficult to determine obligations under the ERB.

*The employers’ position is that casual workers be defined using the Australian common law approach, of being in irregular employment on demand by the employer. To prevent potential abuse any casual worker who works systematically and continuously for 6 months should be deemed to no longer be a casual worker.*

Employers agree that independent contract arrangements cannot and should not be used to avoid employment benefits. Drafting does not, however, require courts to consider standard practice in Vanuatu.

*The employers’ position is that the ERB provisions on determining independent contractor status be refined to also require courts to look at industry practice.*

**Content: termination and payments on termination**

The ERB radically departs from current law in respect of termination in that it only allows termination of contracts for cause. The trade-off for greater job security is that payments on termination are also modernised, with payments only becoming available for redundancy.

The majority of employers (64%) agreed with this shift in approach.

*The employers’ position is that the ERB approach of moving to termination for cause should be accepted, with drafting clarified.*

The ERB provides that the amount of payment on redundancy is 4 week’s salary for the first year of service, and 2 week’s salary for subsequent years of service, capped at 6 months. Employers are concerned about this level of payment, as redundancy can be difficult for businesses as they are being asked to pay when they are struggling and there is a real risk that they do not have money to pay. Reducing the amount of payment in this situation helps to keep struggling businesses going. Benchmarking against other recent Pacific employment law, Fiji’s Employment Relations Promulgation provides 1 week’s redundancy per year of service.

It should be noted that employers are not averse to paying severance allowance is some form, with 62% agreeing that, in the absence of other social security, employers contributing to severance allowance is a good thing. However, problems exist with the amount of severance and clarity of severance provisions and 55% of employers reported changes to hiring practices or staffing levels due to severance allowance changes in 2008/2009. There are also practical problems in relation to businesses that have to terminate staff due to poor performance either being unable to pay severance allowance or “going under” due to a combination of poor performance and the cost of severance. Employers were asked to consider whether a regular payment into VNPF, with early draw down of a portion of VNPF being possible on termination of employment was preferable to severance allowance. 54% of respondents agreed this was a preferable approach, although many employers were also hesitant due to concerns about management issues within VNPF.

*The employers’ position is that the amount of redundancy should be 1 week’s salary per year of service, capped at 6 months. Further, VNPF should increase by 4%, to be shared equally by employers and workers, with the VNPF Act being amended to allow for early withdrawals of this component of VNPF in the event of unemployment and also provide for better oversight and management of the VNPF. This combination of redundancy and VNPF payments should replace the current severance allowance regime.*

**Content: leave benefits**

The leave provisions in the ERB are similar to current law. The ERB simplifies annual leave by setting a flat rate, provides sick leave and maternity leave at an increased rate. Major changes in the ERB are that it provides annual leave and sick leave on a pro rata basis to part time employees, it provides compassionate leave, and it creates a statutory obligation to pay people double time for public holidays that they work and their normal rate of pay for public holidays that they do not work.

Employers are concerned about current leave levels in Vanuatu, which increased in 2009. Current sick leave and annual leave rates are the highest in the Pacific region. More than one third of businesses that were in operation in 2009 reported changing hiring practices or reducing staff in 2009 due to annual leave and maternity leave changes. A further 20% had already structured employment to minimise these costs or were not aware of changes, so were not affected. This suggests current employment laws hinder the government policy of promoting secure employment growth through private sector led development. Setting benefits at a fair level that promotes secure employment growth must therefore be kept in mind.

The ERB increases eligibility for annual leave and sick leave by extending it to part time employees, and decreases eligibility for maternity leave by removing it from casual workers. The ERB does not, however, clearly define part time or full time employees and, despite lots of discussion employers could not identify definitions that would be easy to apply. Further, 44% of employers were concerned that pro rata leave entitlements would be difficult to manage and 59% preferred keeping the current law on eligibility for leave. Whilst the current law is not clear (entitlements for leave strictly apply if someone has worked for 22 days or more per month) the most usual practice is that employers provide leave if a worker works 4 or more days per week (the definition used for severance allowance entitlements). Using this definition effectively and consistently extends leave entitlements to some part time workers. Further, employers should be advised through the Employer’s Guidebook to consider providing leave to part time workers by contract.

*The employers’ position is that entitlement to leave should remain as it is in the current law, with current law being clarified.*

The ERB sets annual leave at 20 days a year and also provides compassionate leave of 3 days per year. Survey results on the length of leave indicated that 42% did not agree with the length of annual leave and 48% did not agree with compassionate leave.. During discussions it became clearer that 20 days leave, plus 3 days compassionate leave (which currently is absorbed into annual leave) is considered too long. Benchmarking against Samoa and Fiji, both of which have revised employment laws in the past 10 years, 10 days annual leave is standard. Employers in Vanuatu recognise that Vanuatu has historically provided more generous leave. 15 days was therefore proposed as a medium position between the ERB proposal and regional benchmarks. The drafting of leave provisions was found to be overly complex. Employers were also concerned about the lack of clarity in eligibility for compassionate leave and also felt that over-regulation reduces the development of personal relationships between the employer and employee. Instead, employers should be advised through the Employer’s Guidebook to consider providing compassionate leave.

*The employers’ position is that the amount of annual leave should be set at 15 days per year and that provisions for taking annual leave should largely be based on current law.*

*The employers’ position is that compassionate leave should not be a statutory entitlement.*

The sick leave provisions were supported, with 60% of employers agreeing with the length of sick leave in the ERB. Accumulation of sick leave was, however, not supported by 50% of employers, with concerns that it would be difficult to manage, particularly for less formal businesses. In consultations employers thought that accumulation of sick leave is something that should, instead, be promoted through the VCCI Employer’s Guidebook as one way of structuring contracts to discourage abuse of sick leave by employees.

*The employers’ position is that whilst the sick leave provisions are broadly agreeable accumulation of sick leave for up to 3 years will be difficult to manage and should not be a statutory requirement.*

The broader protections for women in respect of termination due to pregnancy were supported. However, employers did not support increasing the length of maternity leave, with 55% saying it should remain at 12 weeks. Employers were also very hesitant about supporting the payment on maternity leave being 66%. As part of a separate social protection policy paper employers were also interested in pursuing a national maternity insurance scheme, which would increase security of maternity benefits.

*The employers’ position is that whilst provisions about maternity leave are broadly agreeable the maternity leave benefits should be paid for a period of 12 weeks, at a rate of 66% of usual remuneration.*

*The employers’ position is that the Vanuatu government should continue to explore the feasibility of a national maternity insurance scheme for workers.*

The ERB made considerable changes in respect of pay on public holidays. At the moment, whilst the law is not drafted entirely clearly, only workers who work on public holidays are entitled to get paid for them. In practice this only affects workers whose wage is calculated hourly or daily. Payment for work on a public holiday is time and a half for overtime only – meaning that if workers work their regular hours on a public holiday there is no clear statutory entitlement to a public holiday loading. The lack of clarity in current law made survey responses slightly unclear, but about 44% did not support the public holiday proposals in the ERB. This area particularly affects tourism, and tourism operators disagreed with proposals more strongly. During discussions the need for incremental change that clarifies the current law was stressed.

*The employers’ position is that the current law regarding work on public holidays should be retained and clarified, with workers paid at 1 ½ times the usual rate of pay for normal hours, with an option for taking a day in lieu instead.*

**Content: transition provisions**

There were no questions in the survey about transition provisions. Instead this was the subject of discussions during consultations. Clear transition provisions that crystallise current allowances and transition contracts from the Employment Act conditions to the ERB conditions ensure employees do not lose entitlements that are already earned and also simplify what law applies to all contracts.

*The employers’ position is that entitlements under the currently law should be crystallised when the new law is introduced and that, unless the contract specifies otherwise, the conditions of the new law should govern contracts.*

**Content: labour administration, dispute resolution and collective industrial relations**

There were considerable concerns about the workability of proposed ERB changes in respect of establishing a mediation service, employment tribunal and employment court, with only one third of employers thinking it sounded workable. It also was thought that the current reconciliation service, arbitration tribunal and Supreme Court can work quite well, and more attention should be given to how to make current structures work better. Most employers do not have direct experience of collective industrial relations. A consultation just with employers that have collective agreements was held. These employers thought the current law can work quite well and found the ERB provisions to be complex and unworkable. There were also concerns that the ERB forced employers into collective bargaining, in violation of the constitutional right to freedom of association. Whilst the ERB was not rejected outright, further consideration of these parts of the ERB are needed.

*The employers’ position is that whilst current provisions around the Tripartite Labour Advisory Council are acceptable, they may be refined following tripartite discussion.*

*The employers’ position is the approach to dispute resolution outlined in the ERB will be costly and difficult to implement in Vanuatu, and must be considered further by tripartite partners.*

*The employers’ position is the approach to collective bargaining outlined in the ERB interferes with freedom of association of employers, and must be considered further by tripartite partners.*

**Content: minimum wage setting**

Minimum wage setting provisions were considered in consultations and as part of analysis of drafting. There are concerns that the drafting is very unclear and allows for greater politicisation of minimum wage setting, which is not a desirable outcome.

*The employers’ position is that the content of the ERB allows for politicisation of the minimum wage setting process and that the current law should be retained until further consideration is given to these provisions.*

**Other issues: Vanuatu National Provident Fund**

An issue that frequently arose during consultations was the payment of Vanuatu National Provident Fund contributions for casual workers, who may only be working for 2 or 3 days in a month and want the full benefit of their wages. A number of small ni Vanuatu businesses also noted that they were not yet paying VNPF because the business is not strong enough.

When the VNPF Act was introduced the minimum wage was 7,000 vatu per month. The obligation to contribute to minimum wage once an employee earned 3000 vatu per month, was 43% of minimum wage.

Raising the threshold will mean developing businesses will not have to break law but can be transitioned in when their employment situation is more regular. Casual workers who need all the money they earn will not be encouraging employers to break law.

*The employers’ position is that the threshold for compulsory contribution to VNPF to be 40% of minimum wage.*

**APPENDIX 1**

**Employers Proposed Employment Contracts Bill: Explanatory notes/questions**

**Preliminary matters**

The name change has been suggested to avoid confusion with the Employment Relations Bill (ERB) and the Employment Act (EA). The final name is not really important.

The long title has been shortened from the ERB as the ECA is narrower in focus than the ERB.

**Part I: Preliminary matters**

This is adapted from the ERB. Following Vanuatu drafting practice there is no need for a short title and commencement has been moved to the end.

*Section 1* is an interpretation section. This was not in the EA, and has been simplified from the ERB. It may be able to be shortened further. The only major deletion made is to the definition of remuneration – as the definition changed the current Vanuatu approach to remuneration under the EA and VNPF Act. Remuneration is now not used as a term in the ECA – with wages and benefits being used when a broader definition than wages is required.

The definition of casual worker is probably the most significant definition. As casual workers are not subject to part IV (restriction on termination) and do not get annual or sick leave it is important to have this defined.

*Section 2* is the eligibility section. Although some small ni-Vanuatu employers wanted *wantoks* to be excluded from coverage of the ECA, this goes against the fundamental principles of the ECA. Instead small semi-formal businesses can use casual workers and still stay within the law.

**Part II: Fundamental principles and rights at work**

This is taken from the ERB, with some editing to simplify a bit. Some of the drafting is still a bit ugly, but employers had, broadly accepted that these provisions were acceptable and/or necessary as part of Vanuatu’s obligations under various international Conventions it is party to, so nothing major has changed.

*Division 2 and 3* have been moved up from later sections so that all the big rights provisions/changes are grouped together. Penalties provisions are now all in section 66 rather than being scattered through the ERB, which led to inconsistency.

*Section 13(4)* expressly permits children to accompany parents to work. This has been done to address the concern that it is quite common in Vanuatu children to go to work with parents, particularly in rural agricultural undertakings. This provision is drafted so that employers can contractually prevent parents from allowing children to come to work.

**Part III: Formation of contracts of employment**

The ERB was complex in this area. In accordance with employer requests to ensure the new law was simple Part III is largely based on EA, with some additions to improve fairness (contract to be in writing if the employee asks, provision regarding trying to avoid employment obligations by using independent contracts) from the ERB.

*Section 22(2)* requires the court to consider usual industry practices in determining whether a person is an independent contractor or an employee. This, combined with the clearer definition of casual workers, should allow for recognition of *wokmak* situations in agriculture.

*Section 23* follows the current EA, but clarifies drafting. It also expands the requirement for contracts to be in writing by allowing workers to require employers to give them a written contract. An optional pro forma is provided in the first schedule.

*Section 24* has been moved from the termination provisions of the ERB to formation of the contract as it deals with matters of contract formation. This deals with classification of contracts – see in particular section 24(1) which provides 4 categories of contracts.

*Section 24 (3)* aims to deal with the potential problem of classifying a regular worker in an ongoing employment relationship as a casual worker.

*Section 24(4) & (5)* have been added with the aim of stopping employers from using fixed term contracts to avoid obligations under the ECA.

*Sections25 and 26* were not in the ERB but were in the EA and are useful to retain.

*Section 27* keeps but clarifies the existing EA probation provisions. Whilst probation period are not automatically included in fixed term contracts it is now clear that they can include a probation clause.

**Part IV Termination of contracts of employment**

In accordance with survey and consultation results the ERB approach of termination for cause or redundancy only has been kept. Drafting has been clarified however and there has been restructuring.

Part 1: Termination of employment by the employer for cause

*Section 28* sets out the termination regime with different processes for: ending contracts of indefinite duration and early termination of fixed term contracts; allowing fixed term contracts to expire; and ending casual contracts.

*Section 30* has used drafting from the EA. It is more favourable to workers than what was in the ERB, but is also clearer and more familiar to employers.

*Division 2* deals with redundancy, and provides for a redundancy payment on termination. Severance allowance is removed altogether – the transition provisions regarding severance are found in section 65.

*Division 3* has been added from the EA as there were no provisions about termination of a contract by a worker.

**Part V: Payment of wages and wages protection**

This Part is based on the ERB, but drafting has been clarified.

*Sections 42 and 43* are more prescriptive than the current EA about contents of wages statements and wage records.

*Section 44* clarifies deductions and retains the right to deduct for damage cause by willful misconduct. Requiring employers to deduct union dues on request of the worker has been removed due to strong lack of support by employers.

**Part VI: Hours of work and overtime**

This Part follows the ERB but has been modified to retain more flexibility for employers and allow for “zero-hours” contracts, where the employer does not guarantee any particular number of hours a week. This is a particular issue for the construction industry.

*Section 45* has simplified the EA considerably.

*Section 48 and section 49* have tried to capture the concerns of employers regarding the ERB. Work during usual hours on public holidays will be paid at time and a half. Overtime on public holidays is paid at double time, as doing 1.5 times the initial overtime rate of 1.25 gets complex to calculate. Flexibility for providing time in lieu instead is provided.

**Part VII: Holidays and leave**

*Section 50* provides eligibility for annual and sick leave. Survey and consultation results indicated a desire to keep eligibility for leave as it currently is. As the law is currently somewhat unclear I have used usual practice of a person who is not casual and works for 4 or more days per week, for determining continuous employment.

*Sections 51 – 54* keep the drafting of the EA in respect of annual leave as it is clearer than the ERB, with the amount of leave becoming a flat rate of 15 days per year.

*Section 55* comes from the ERB and requires workers to take all annual leave within a specified time. Transition provisions in respect of this are found in section 70(2).

*Section 56* adopts the drafting of the ERB in respect of sick leave with the accumulation of leave provisions deleted.

*Section 57* adopts the drafting of the ERB in respect of maternity leave but retain the length of leave as being 12 weeks. The timing of taking maternity leave is more flexible, and allows women to work up until broth and take more leave after birth. There is a split in opinion as to whether the payment should be 10% or 66%. The ECA, as drafted, provides 66%. The nursing provisions from the ERB, which reduce nursing allowances from current levels, has been retained.

**Part VIII: Repatriation**

This has been excluded from the ERB, which left the power in the hands of the Minister to make Orders. The provisions from the EA have been retained.

**Part IX: Miscellaneous**

*Section 66* deals with offences and is modelled on the EA. Penalty levels have been taken from the ERB, except that imprisonment for breaches has been removed and the penalty is not only a fine and/or compensation to the worker. Section 66 allows the court to order compensation directly to the worker, thereby avoiding duplicate civil proceedings.

*Section 67* is taken from the ERB and exempts the employer from some prosecutions.

*Section 68* is taken from the ERB. It reverses the usual burden of proof in some civil proceedings and, in particular, creates an incentive for employers to move to written contracts.

*Section 69* retains the time limits on instituting proceedings found in the ERB.

*Section 70* is different from the ERB in that it provides that, after 6 months, if no other agreement has been reached, individual contracts come under the ECA.

*Section 71* crystallises severance allowance, at a rate of 2 week’s pay for employment prior to 26 October 2009, when the amendments came in, and 1 month’s pay from 26 October 2009 to a specified date. It still allows for deductions pursuant to the EA. It also allows for monthly payments of severance.

It should be noted the employers’ position also recommend increases to VNPF to replace severance allowance.

*Section 72* deals with repeals and savings and comes from the ERB. Collective contracts will continue in force.

*Section 73* Regulations are from the ERB, but I have restricted powers of the Minister further.

**Part X: Tripartite Labour Advisory Council**

Structurally Parts IX and X come at the end as they may be transferred to a Labour Administration Act, or similar, in the future. Part IX comes from the current EA/ERB, as no tripartite discussion on alternative structures has been reached. Modification of this area should be left for discussion on labour administration.

**Part XI: Appointments, powers and duties of officers**

This part comes from the ERB.

*Sections 86 – 87* allows labour officers to issue demand notices and also sets up an appeals process. Most offences only occur in the event that a demand notice is not complied with.

**APPENDIX 2**

**EMPLOYER’S PROPOSED DRAFT**

**EMPLOYMENT CONTRACTS BILL 2015**

**JUNE 2015**

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**A BILL**

**An Act to repeal the Employment Act [Cap 160] and to provide for a legislative framework which promotes the well-being and prosperity of all people in the Republic of Vanuatu by –**

1. **Creating a fair and optimum working environment through the maintenance of minimum and acceptable labour standards that are fair to both workers and employers, with the view to building productive and sustained employment relations;**
2. **Assisting in the prevention and elimination of discrimination in employment.**

**­­­­­­­­­­­­­­­**

ENACTED by the Parliament of the Republic of Vanuatu –

***PART 1 – PRELIMINARY***

***1. Interpretation***

In this Act, unless the context otherwise requires –

 “birth” means the issue of a child or children, whether alive or dead, and for the purposes of this Act birth occurs on the actual day of birth, and when two or more children are born occurson the day of the birth of the last born of such children;

“casual worker” means a worker who works without fixed hours or has an irregular pattern of employment and who only works on demand by the employer;

 “Commissioner of Labour” means the Commissioner of Labour responsible for employment relations matters;

 “child” means a person who is under the age of 18 years;

“collective bargaining” means meeting and negotiating with a view to concluding a collective agreement or reviewing or renewing an agreement;

“contract of employment” means a written or oral contract, whether expressed or implied, to employ or to serve as a worker whether for a fixed or indefinite period, and includes task or piecework or a contract for services determined by the Tribunal to be a contract of employment;

“contract period” means the period of time or number of days or hours to be worked for which expressly or by implication a contract of employment is made;

“Council” means the Tripartite Labour Advisory Council established under section 70.

“day” means a period of 24 hours beginning and ending at midnight;

“disability” means physical disability or impairment, physical illness, intellectual or psychological disability or impairment or the presence in the body of organisms capable of causing illness.

 “discrimination” means any distinction, exclusion or preference based on a prohibited ground set out in section 4(3), which has the effect of nullifying or impairing equality of opportunity or treatment in employment and occupation.

“domestic worker” means a person employed in connection with the work of a private dwelling-house and not in connection with a trade, business or profession carried on by the employer in the dwelling-house such as a cook, house worker, child’s nurse, gardener, laundry worker, security officer, or a driver of a vehicle licensed for private use;

“duress”, in a worker’s employment, means if that worker’s employer or a representative of that employer directly or indirectly -

1. makes membership of a union or a particular union a condition to be fulfilled if that worker wishes to retain his or her employment;
2. makes non-membership of a union or a particular union a condition to be fulfilled if that worker wishes to retain his or her employment; or
3. exerts undue influence on that worker, or offers, or threatens to withhold, or does withhold, a monetary incentive or advantage to or from that worker, or threatens to or does impose a monetary disadvantage on that worker, with intent to induce that worker –
	1. to become or remain a member of a union or a particular union;
	2. to cease to be a member of a union or a particular union;
	3. not to become a member of a union or a particular union;
	4. in the case of a worker who is authorised to act on behalf of workers, not to act on their behalf or cease to act on their behalf;
	5. on account of the fact that the worker is, or, as the case may be, is not a member of a union or a particular union, to resign or leave from any employment;
	6. to participate in the formation of a union; or
	7. not to participate in the formation of a union;

“employ” in relation to an employer means to use the services of a person under a contract of employment;

“employer” means a corporation, company, partnership, incorporated association or individual by whom a worker is employed under a contract of employment; and includes –

1. the Government;
2. other Government entities;
3. a local authority;
4. a statutory authority;
5. the agent or authorised representative of a local or foreign employer;

“employment” means the performance by a worker of a contract of employment;

“family” means the spouse or partner, dependent or any child of a worker;

“foreign contract of employment” a contract of employment made within the Republic of Vanuatu, and to be performed wholly or partially outside the Republic of Vanuatu and any contract of employment with a foreign state;

“HIV/AIDS screening” includes measures whether direct (HIV testing) or indirect (assessment of risk-taking behaviour), or asking questions about tests already taken or about medication to determine whether a worker has the condition;

"hours of work" means the time during which a worker is at the disposal of the employer and does not include rest periods during which he is not at the disposal of the employer.

“indirect discrimination” means any apparently neutral situation, regulation or practice which in fact results in unequal treatment of persons with certain characteristics that occurs when the same condition, treatment or criterion is applied to everyone, but results in a disproportionate impact on one or more persons on the grounds set out in section 4(3) and is not an inherent requirement of the job;

“labour inspector” means a labour inspector designated for the purpose of this Act;

“labour officer” means a labour officer designated for the purpose of this Act;

“local authority” means a municipal town council or a provincial authority;

"medical practitioner" means a medical practitioner registered as a health practitioner under the Health Practitioners Act, to practice medicine and/or surgery;

‘minimum wage’ means the minimum sum payable to a worker for work performed or for services rendered during the worker’s normal hours of work, whether calculated on the basis of time or output;

“Ministry” means the Ministry responsible for the administration of this Act;

“month” means a calendar month or a period commencing on a date in a calendar month and expiring on the day preceding the corresponding date in the succeeding calendar month;

“oral contract” means a contract of employment which is not evidenced in writing;

“outworker” means a person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired or adapted for sale in the person’s own home or on other premises not under the control or management of the person who gave out the materials or articles;

“piece work” means any work the pay for which is fixed at a rate based on the output of units of work, payable at a set monetary amount for each unit of work

“piece worker” means any worker who undertakes piece work;

“public authority” includes a Ministry or a Department of Government or a local authority or a commercial statutory authority or a government commercial company or a government company;

“public holiday” means a public holiday declared pursuant to the Public Holidays Act [ Cap 114];

“redundancy” means the dis-establishment of a job for economic, technological, structural or other operational requirements of an [enterprise](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s12.html#enterprise) but does not include the dis-establishment of a job at the conclusion of a fixed-term contract of employment;

“representative of a union” includes a person authorised or recognised, either expressly or impliedly, to represent the union or some of the members of a union, whether as a worker or otherwise.

“ship” includes a boat, vessel, hovercraft or waterborne craft of any kind, but does not include a naval ship;

“Vanuatu Chamber of Commerce and Industry” means the National Council of the Chambers of Commerce and Industry established under the *Chambers of Commerce and Industry of Vanuatu Act* 1995.

“wage period” means the period in respect of which wages earned by a worker are payable;

“wages” means the salary which is payable to a worker for work done in respect of the worker’s contract of employment but does not include ⎯

1. the value of a house, accommodation or the supply of food, fuel, light, water or medical attendance, or amenity or services;
2. a contribution paid by the employer on the employer’s own account to a pension fund or provident fund;
3. a travelling allowance or the value of a travelling concession;
4. a sum payable to the worker to defray special expenses incurred by the worker by the nature of the worker’s employment; or
5. a gratuity payable on discharge or retirement;

“week” means a period of 7 consecutive days;

“worker” means a person who is employed under a contract of employment, and includes an apprentice, learner, domestic worker, part-time worker, casual worker, piece worker or outworker;

“workplace” means any place, whether or not in a building or structure, including a ship, vehicle or aircraft, where workers are required to work;

“written contract” means a specified contract of employment which is required to be made in writing in accordance with section 23;

 “year” includes a period commencing on a date in a calendar year and expiring on the day preceding the corresponding date in the following calendar year.

***2. Application***

(1) Subject to subsection (2) this Act applies to all employers and workers in workplaces in the Republic of Vanuatu, including the Government, other Government entities, Vanuatu Mobile and Police Forces, local authorities and statutory authorities, except where expressly stated.

(2) Where a worker’s employment is covered by this Act and any of the:

 (a) *Public Service Act*;

 (b) *Police Act*;

 (c) *Teaching Service Act;*

(d) *Nurses Act*;

 (e) *Judicial Services and Courts Act*;

(f) *State Law Office Act;*

(g) *Public Prosecutor Act;* or

 (f) *Maritime Act,*

then subject to subsections (3) and (4), if any inconsistency arises between one or more provisions of this Act and one or more provisions of any of the abovementioned Acts the relevant provisions in the abovementioned Acts will apply.

(3) Where the meaning of any provision in the above mentioned Acts can be interpreted consistently with this Act, that meaning shall be preferred.

(4) The Minister may, by Order, exempt certain categories of workers from all or part of this Act.

(5) Part 2 of this Act applies to all persons without exception notwithstanding subsections (2) and (3).

***3. Language***

 Where in this Act any record or document is required to be kept, that record or document must be in either English, French or Bislama. A record or document in any language other than English, French or Bislama will not satisfy the requirement for maintenance of such a record or document under this Act.

***PART 2 – FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK***

***DIVISION 1: Fundamental principles and rights at work***

***4. Fundamental Principles and Rights***

1. No person shall be required to perform forced labour, which means all work or service that is exacted from any person under the threat of any penalty and is not offered voluntarily. Forced labour does not include –
2. any work or service exacted in accordance with compulsory military service laws for work of a purely military character;
3. any work or service which forms part of the normal civic, traditional or religious obligations;
4. any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the work or service is carried out under the supervision and control of a public authority and that the person is not hired to or placed at the disposal of private individuals, companies or associations;
5. any work or service exacted in cases of emergency, such as war, calamity, threatened calamity, fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstances that would endanger the existence or well-being of the whole or part of the people of the Republic of Vanuatu;
6. communal services of a kind performed by members of the community in the direct interest of the community in accordance with their rules or customary practices.

(2) No child shall be permitted or required to engage in child labour in contravention of Part 2 Division 3 of this Act.

(3) No person shall discriminate against any worker or prospective worker, either directly or indirectly, in respect of recruitment, training, promotion, wages, terms and conditions of employment, termination of employment or other matters arising out of the employment relationship, on any of the following grounds, whether actual or perceived: ethnic origin, race, colour, gender, sex, sexual orientation, religion, political opinion, national extraction, social origin, age, marital status, pregnancy, social class, economic status, family responsibilities, state of health including real or perceived HIV / AIDS status, trade union membership or activity, or disability.

(4) Workers and employers have the right, in accordance with Vanuatu law, to establish trade unions or employer organizations respectively, in co-operation with others, and without any discrimination, for the protection of their economic and social interests, and to join any such trade union or employer organization of their choice.

 (5) Trade unions and employer organizations have the right to join federations of industrial organizations and international industrial organizations, and to affiliate with, participate in the affairs of, or contribute to and receive financial assistance from those federations and international industrial organizations.

(6) Except as provided by Vanuatu law no person shall prohibit any worker or employer from being or becoming a member of any trade union or employer organization.

(7) No employer may directly or indirectly submit a person to duress with respect to their trade union membership or activity.

(8) Workers, their representative trade unions, employers, their representative employer organizations, have a right to bargain collectively in accordance with Vanuatu law.

***DIVISION 2 - EQUAL EMPLOYMENT OPPORTUNITIES***

***5. Discrimination in employment matters***

(1) If an applicant for employment or a worker is qualified for work of any description, an employer or a person acting or purporting to act on behalf of an employer must not ⎯

1. refuse or omit to employ the applicant on work of that description which is available;
2. offer or afford the applicant or the worker less favourable terms of employment, wages, conditions of work, or other fringe benefits, and opportunities for training, promotion, and transfer that are made available to applicants or workers of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description;
3. terminate the employment of the worker, or subject the worker to any detriment, in circumstances in which the employment of other workers employed on work of that description would not be terminated, or in which other workers employed on work of that description would not be subjected to such detriment; or
4. retire the worker, or to require or cause the worker to retire or resign, subject to any written law or contract of employment imposing a retirement age,

by reason of any of the prohibited grounds of discrimination set out in section 4(3) or by reason of the worker’s involvement in the activities of a union.

(2) For the purposes of subsection (1), a worker is deemed to be involved in the activities of a union if, at any time within 12 months before the action complained of, that worker -

1. was an officer of a union or branch of it, or was a member of the committee of management of a union or branch, or was otherwise an official or representative of an organisation or branch;
2. had acted as a negotiator in collective bargaining;
3. had represented a union or branch of it in negotiations between employers and workers;
4. was involved in the formation or proposed formation of a union;
5. had made or caused to be made a claim for some benefit of a collective agreement or individual contract of employment either for that worker or any other worker or had supported the claim, whether by giving evidence or otherwise;
6. had submitted another employment grievance to that worker’s employer; or
7. had participated in a strike.

***6. Exceptions in relation to inherent requirements of the position***

(1) Subject to this section, this Act does not prohibit any distinction, exclusion or preference made based on an objective assessment of the worker or job applicant’s individual capacity to perform the inherent requirements of a particular job.

(2) The inherent requirements of a particular job may include but are not limited to the worker or job applicant’s individual capacity to –

* 1. perform the tasks or functions which are a necessary part of the particular job; or
	2. meet productivity and quality requirements for the particular job; or
	3. work effectively in the team or other type of work organisation concerned with that particular job; or
	4. work safely in carrying out that particular job.

(3) The exception to prohibited discrimination set out in subsection (1) will not apply where reasonable accommodations could be made to allow a worker or job applicant to perform the inherent requirements of a particular job.

***7. Exceptions in relation to special measures***

(1) A person does not discriminate against another person by taking a special measure for the purpose of promoting or realising substantive equality for members of a group with a particular attribute.

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(2) A special measure must-

 (a) be undertaken in good faith for achieving the purpose set out in subsection (1); and

 (b) be reasonably likely to achieve the purpose set out in subsection (1); and

 (c) be a proportionate means of achieving the purpose set out in subsection (1); and

 (d) be justified because the members of the group have a particular need for advancement or assistance.

 (3) A person who undertakes a special measure has the burden of proving that the measure is a special measure.

(4) On achieving the purpose set out in subsection (1), the special measure shall ceases.

***8. Definition of sexual harassment***

1. “sexual harassment” means when a worker is sexually harassed in his or her workplace, or places where workers are gathered for work-related purposes including social activity, when an employer or its representative or a co-worker –
2. makes a request of a worker for sexual intercourse, sexual contact or any other form of sexual activity which contains an implied or overt –
	1. promise of preferential treatment in that worker’s employment;
	2. threat of detrimental treatment in that worker’s employment; or
	3. threat about the present or future employment status of that worker;
3. by the use of a word (whether written or spoken) of a sexual nature or materials of a sexual nature;
4. by physical behaviour or gestures of a sexual nature; or
5. creates an intimidating, hostile or humiliating work environment by conduct, word or both on the basis of gender,

that subjects the worker to behaviour which is unwelcome or offensive to that worker (whether or not that is conveyed to the employer, its representative or the perpetrator) and which is either repeated or of such a nature that it has a detrimental effect on the worker’s employment, job performance or job satisfaction;

(2) For the purposes of this section “detrimental effect” includes the creation of an environment which affects a worker’s physical, emotional or mental health and well-being;

***9. Prohibition of sexual harassment***

(1) Sexual harassment is a form of sex discrimination prohibited under section 4(3) of this Act.

(2) If the employer fails to take the reasonable steps necessary to prevent sexual harassment of the employer’s worker by another of the employer’s workers, the employer is liable under this section, together with a worker who sexually harasses another worker.

(3) Where a complaint of sexual harassment has been made by a worker under this section, the worker’s previous sexual experience or reputation must not be taken into account by the employer or a court or tribunal.

***10. Definition of victimisation***

(1) A person victimises another person if the person subjects or threatens to subject the other person to any detriment because the other person, or a person associated with the other person-

 (a) has made a complaint of unlawful discrimination or sexual harassment against any person under this Act; or

 (b) has given evidence or information, or produced a document, in connection with any proceedings under this Act related to unlawful discrimination or sexual harassment.

(2) In determining whether a person victimises another person it is irrelevant-

 (a) whether or not a factor in subsection (1) is the only or dominant

 reason for the treatment or threatened treatment provided that it is a

 substantial reason;

 (b) whether the person acts alone or in association with any other person.

***11. Prohibition of victimisation***

A person must not victimise another person as defined in section 10.

***12. Discriminatory advertising and testing of workers***

(1) An employer must not-

 (a) publish or display; or

 (b) authorise the publication or display of-

A job advertisement or other notice that indicates, or could be reasonably

understood as indicating, that the employer intends to engage in any conduct

that would contravene section 6(3).

(2) Where:

(a) a contract of employment requires a worker to undergo a medical examination as a condition of employment; or

(b) a medical examination is required during the course of a worker’s employment

It is prohibited that the medical examination comprises or includes screening for HIV/AIDS status, sexually transmitted diseases or pregnancy.

***Division 3 - CHILDREN***

***13. Minimum age for employment***

(1) A child under the age of 14 must not be employed or work in any capacity, except in light work as prescribed by section 14.

(2) The minimum age for employment applies to all types of work including domestic work, work in family undertakings, work in agriculture, work as a self-employed person, work as an apprentice, and maritime work.

(3) Work engaged in by a child under the age of 14 in schools, as part of an authorised programme of education, will not contravene this section.

(4) Nothing in section 13 or section 14 prohibits children accompanying their parents or guardians to work, so long as the parent’s or guardian’s place of work is not likely to jeopardise the child’s health, safety or morals.

***14. Minimum age for light work***

(1) A child aged 12 or 13 must not be employed or work in any capacity, except in light work that:

(a) is unlikely to be harmful to the health and development of the child;

(b) will not affect the child’s school or vocational training attendance;

(c) will not affect the child’s ability to benefit from schooling or vocational training; and

(d) complies with the prescribed requirements for light work.

***15. Minimum age for hazardous work***

(1) A child under the age of 18 must not engage in any hazardous work or work that which by its nature or the circumstances under which it is carried out is likely to jeopardise the child’s health, safety or morals.

***16. Prohibition of the worst forms of child labour other than hazardous labour***

(1) The engagement of any child under the age of 18 in the following worst forms of child labour is prohibited:

(a) all forms of slavery or practices similar to slavery;

(b) sale or trafficking of children;

(c) debt bondage and serfdom;

(d) forced or compulsory labour;

(e) compulsory recruitment of children for use in armed conflict;

(f) use, procuring or offering of a child for prostitution;

(g) use, procuring or offering of a child for the production of pornography or for pornographic performances;

(h) use, procuring or offering of a child for illicit activities; and

(i) use, procuring or offering of a child for the production or trafficking of illegal drugs.

***17. Employment of persons under 18 on ships***

(1) Subject to subsection (2), a child shall not be employed on any kind of work on a ship unless certified by a medical practitioner to be fit for such work.

(2) In urgent cases, a labour officer or labour inspector may permit the engagement of a child to work on a ship without prior medical examination, and in such case the employer shall at their own expense have the child medically examined at the first place of call at which there is a medical practitioner, and should such practitioner not attest the child as fit for the work, the employer shall at their own expense return the child as a passenger to the port or place where the child was engaged, or to the child’s home, whichever is the nearer.

***18. Obligation to establish age of child worker***

(1) In any proceedings in respect of an offence under Part II Division 3 of this Act, the obligation to establish the age of the alleged child worker rests with the employer.

(2) Where in any proceedings in respect of an offence under Part II Division 3 of this Act, an employer is unable to establish the age of the alleged child worker, the Court may itself determine the age of the child.

***19. Register of child workers***

(1) For each worker under the age of 18 an employer must:

(a) keep a register of the child’s name, date of birth, sex, occupation, employment status, hours of work, school or vocational training attendance, rate of pay, employment commencement and termination dates; and

(b) produce the register for inspection when required by the Commissioner of Labour, labour inspector or a labour officer.

***20. Trade union rights for children***

(1) A child who is 12 years or over has the right to join a trade union and to vote in elections of that trade union.

***PART 3 – FORMATION OF CONTRACTS OF EMPLOYMENT***

***21. Employment to be in accordance with this Act***

(1) No person may employ a worker and no worker may be employed under a contract of employment except in accordance with this Act.

(2) 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 workers concerned than those provided for in this Act.

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***22. Misrepresenting employment as an independent contracting arrangement***

(1) An employer that employs, or proposes to employ an individual, must not represent to the individual that the contract of employment under which the individual is, or would be employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.

(2) In any employment dispute where the Court must determine whether an employment relationship existed or would have existed, it must consider all relevant matters including usual industry employment practices and whether the worker or potential worker would have:

1. carried out the work under the instructions or control of another party;
2. been integrated in the organization of the enterprise;
3. performed the work solely for the benefit of another person;
4. carried out the work personally;
5. had specified working hours or working duration;
6. had a specified workplace;
7. had their tools, materials, machinery and travel expenses provided by the person requesting the work;
8. received periodic remuneration;
9. received some payment in kind;
10. had an entitlements to leave; and
11. had an absence of financial risk from the work.

***23. Form of contract***

(1) Subject to subsection a contract of employment may be made in any form, whether written or oral

1. The following contracts must be made in writing:
2. a contract of employment for a fixed term exceeding 6 months; and
3. a contract of employment making it necessary for the worker to reside away from his ordinary place of residence shall be in writing and
4. a contract of employment that the worker has requested to be in writing.
5. Contracts that are made in writing pursuant to section 23(2) shall state the names of the parties, the nature of employment, the amount and the mode of payment of wages, and, where appropriate, any other terms and conditions of employment including housing, rations, transport and repatriation.

(a) The Department of Labour shall make available a pro-forma contract according to the First Schedule to this Act exemplifying the manner in which a written contract of service may be drafted.

**24. Presumption as to indefinite duration**

(1) All workers, regardless of whether they work on a full time or part time basis, shall be employed under one of the following types of contracts:

 (a) a contract for an indefinite duration, which has no specified end date; or

(b) a contract for a fixed period, which terminates at the end of that fixed period unless otherwise renewed; or

(c) a contract for a fixed task, which terminates upon completion of the fixed task unless otherwise renewed; or

(d) a casual contract, which terminates at the end of each working shift unless otherwise renewed.

(2) Unless otherwise specified, each party to a contract is conclusively presumed to have entered into a contract for an indefinite duration.

(3) Any worker engaged under a casual contract who works on a regular and systematic basis for a continuous period of more than 6 months shall be presumed to have entered into a contract for an indefinite duration.

(4) Any worker engaged on a fixed period or a fixed task contract whose contract expires and who continues working and being paid without the negotiation of a further contract shall be presumed to have entered into a contract for an indefinite duration.

(5) Any worker engaged on a fixed period or a fixed task contract whose contract is renewed more than 3 times shall be deemed to have entered into a contract for an indefinite duration.

Provided that, if the employer can prove that the fixed term or fixed task contract terms are being used due to legitimate operational needs of the business, rather than to avoid obligations arising out of employing a worker on contract for an indefinite duration, then this presumption shall not apply.

**25. Contracts exempt from stamp duty etc.**

Contracts of employment shall be exempt from stamp duty and any other taxes or levies.

**26. Transfer of contract**

The transfer of any contract of employment from one employer to another shall not be binding upon the worker except with the worker's consent which in the case of a written contract must be in writing:

Provided that if a change occurs in the ownership of an undertaking as a result of a sale thereof as a going concern, inheritance, formation of a company or similar cause every contract of employment valid at the time of the change taking place shall remain in force between the worker and the new employer.

***27. Probationary period***

(1) Every contract of employment for an unspecified period shall be subject to a probationary period of 15 days. This period may be increased to a maximum of 6 months, including renewals, by agreement between the parties to the contract.

(2) Contracts for a fixed period or a fixed task may also contain a clause relating to a probationary period.

(3) During the probationary period a contract of employment may be terminated by either party without notice at any time.

***PART IV – TERMINATION OF CONTRACTS OF EMPLOYMENT***

**Division 1 – Termination of Employment by the Employer for Cause**

***28. Termination only for valid reason***

(1) A contract of employment of indefinite duration or a contract for a fixed period where that fixed period has not yet expired, or a contract for a fixed task where that fixed task has not yet expired shall not be terminated unless there is a valid reason for such termination. A reason will only be valid if it:

1. was due to serious misconduct of the worker and section 30 has been complied with; or
2. relates to the worker’s capacity or conduct and sections 31 and 32 have been complied with; or
3. was due to the genuine redundancy of the worker’s position and Part IV Division 2 and section 32 have been complied with; and
4. is not an unlawful reason under section 29 of this Act.
5. Expiry of contracts for a fixed period or a fixed task is permitted, and expiry of a contract is not classified as termination.
6. Contracts engaging a worker on a casual basis can be terminated at any time by either party at the end of each working shift.

***29. Unlawful termination***

(1) Subject to subsection (2), termination of a contract of employment for an unlawful reason will not constitute a valid reason for the purpose of section 28(1).

(2) Unlawful reasons for termination of a contract of employment include the following reasons and reasons similar to the following reasons:

1. any prohibited ground of discrimination set out in section 4(3);
2. temporary absence from work because of illness or injury;
3. trade union membership or participation in trade union activities outside working hours or, with the [employer](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s12.html#employer)'s consent, during working hours;
4. non-membership of a trade union;
5. the filing of a complaint, or the participation in proceedings, against an [employer](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s12.html#employer) involving alleged violation of laws or regulations or recourse to competent administrative authorities;
6. absence from work during maternity leave; and
7. any action taken to claim rights or entitlements administered by the Vanuatu National Provident Fund.

***30. Summary dismissal***

(1) In the case of a serious misconduct by a worker it shall be lawful for the employer to summarily dismiss the worker without notice and without compensation in lieu of notice.

(2) Serious misconduct in the course of employment includes but is not limited to the following circumstances or circumstances similar to the following circumstances –

1. engaging in reckless conduct that is a serious and imminent risk to the health or safety of another person;
2. theft or fraud by the worker;

(d) violence or the assault of another person or threats of violence;

1. deliberate falsification of skills or qualifications during the employment application or promotion process;
2. being under the influence of intoxicating liquor or a drug (except a drug administered by, or taken in accordance with the directions of, a person lawfully authorised to administer the drug), to the extent that a worker is unable to undertake their duties or poses a risk of harm to himself or others;
3. Conduct of such a nature that it would be unreasonable to require the employer to permit the worker to continue in their employment during the notice period due to a breakdown in the necessary relationship of mutual trust and confidence.

(3) Dismissal for serious misconduct may take place only in cases where the employer cannot in good faith be expected to take any other course.

(4) Unless it would be unreasonable to require the employer to do so, no employer shall dismiss a worker on the ground of serious misconduct unless he has given the worker an adequate opportunity to answer any charges made against him.

(5) An employer shall be deemed to have waived his right to dismiss a worker for serious misconduct if such action has not been taken within a reasonable time after he has become aware of the serious misconduct.

***31. Termination for reasons related to capacity or conduct***

1. For the purposes of this section capacity or conduct means;
2. the ability of a worker to perform the duties for which they were hired to a satisfactory level that would be reasonably expected by an employer; or
3. the behaviour by a worker that would reasonably be expected by an employer in the workplace.
4. To constitute a valid reason for the purpose of subsection 28(1)(b), prior to termination of the contract of employment for reasons of capacity or conduct, the worker must have been:
5. warned about any unsatisfactory capacity or conduct; and
6. provided with an opportunity and reasonable assistance to improve their capacity or conduct; and

(c) given a reasonable opportunity to respond to any issues raised about their capacity or conduct; and

1. afforded a reasonable opportunity for a representative, or trade union representative, to be present or represent their interests with respect to a proposed termination; and
2. notified of the reason for the termination; and
3. provided with notice of termination in accordance with section 37.

**Division 2 – Redundancy**

***32. Termination for reasons of genuine redundancy***

(1) Before a worker’s contract of employment is terminated by reason of redundancy, an employer must:

 (a) comply with the requirements for the provision of information and consultation set out in section 33;

(b) comply with the requirements for the provision of redundancy pay set out in section 34; and

(c) comply with any requirements with respect to redundancy under any applicable collective agreement or under any contract of employment; and

(d) comply with the notice provisions set out in section 37.

(2)  Termination of a contract of employment for [redundancy](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s12.html#genuine_redundancy) will not constitute a valid reason for the purpose of subsection 28(3)(c) if it would have been reasonable in all of the circumstances for the worker to be redeployed in a similar or equivalent position within:

          (a)  the [employer](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s12.html#employer)'s [enterprise](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s12.html#enterprise); or

          (b)  the [enterprise](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s12.html#enterprise) of an [associated](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s12.html#associated_entity) [entity](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s12.html#associated_entity) of the [employer](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s12.html#employer).

(3) For the purposes of subsection (2), in determining whether an alternative position is similar or equivalent to the worker’s existing position, consideration should be given to the duties, wages and benefits, responsibility level and location of the two positions.

***33. Provision of information and consultation***

If an employer contemplates the termination of one or more worker’s contracts of employment by reason of redundancy, the employer must ⎯

1. as early as possible, consult with workers and their representatives, on measures to be taken to avert or to minimise the terminations and on measures to mitigate the adverse effects of any terminations on the workers concerned, such as action to attempt to find alternative employment or retraining; and
2. not less than 28 days before the proposed date in which the terminations take place, provide the workers, their representatives and the Commissioner of Labour with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.

***34. Redundancy pay***

(1) Subject to this section, if an employer terminates a worker’s contract of employment for reasons of redundancy, the employer must pay to the worker 1 week’s wages as redundancy pay for each completed year of service.

(2) Notwithstanding subsection (1) and a worker’s length of service, an employer is not required by this Act to pay any worker more than 6 months wages as redundancy pay.

(3) A worker is not entitled to the payment specified in subsection (1) unless the worker has completed at least one year of service with the employer.

 (4) Subject to subsection (5), a worker is not entitled to the payment specified in subsection (1) if the employer obtains and the worker accepts, suitable alternative employment for the worker, and the new employer provides the worker with continuity of service.

(5) A worker’s entitlement to redundancy pay in accordance with subsection (1) is maintained until the worker signs a written contract of employment with the new employer accepting the alternative employment.

(6) Notwithstanding subsection (2), nothing in this Act prevents an employer giving to a worker a redundancy payment in excess of that required to be given by this Act.

(7) For the purposes of section 308 of the Companies Act, Cap. 191 redundancy pay shall be deemed to be wages.

**Division 3: Termination of employment by the worker**

***35. Termination of the employment by the worker by notice***

(1) A worker may terminate a contract of employment for an indefinite duration by giving notice to the other party to the other of his intention to terminate the contract.

(2) A worker may only terminate a contract of employment for a fixed period or a fixed task if the contract expressly permits termination of the employment contract by giving notice.

(3) Unless otherwise specified in the contract notice may be verbal or written, and, subject to subsection (4), may be given at any time.

(4) In the absence of any provisions in the contract of employment, the length of notice to be given under subsection (1) shall be determined by section 37.

(5) If a worker fails to give to the employer appropriate notice under this section, the employer may deduct from the worker’s entitlements the sum required for the period of notice.

***36. Breach of contract by employer***

(1) If an employer ill treats a worker or commits some other serious breach of the terms and conditions of the contract of employment, the worker may terminate the contract forthwith and shall be entitled to his full wages and other benefits for the appropriate period of notice in accordance with section 37 without prejudice to any claim he may have for damages for breach of contract.

(2) A worker shall be deemed to have waived his right under subsection (1) if he does not claim it within a reasonable time after he has become aware of his being entitled thereto.

**Division 4: Further provisions**

***37. Provisions as to notice***

(1) In the absence of a specific written agreement as to notice between the parties to the contrary, notice to be given when an employment contract is terminated in accordance with section 31, section or section 35 or 33 is as follows ⎯

1. if the worker has been employed for less than one year, by one week of notice;
2. if the worker has been employed for more than one year but less than three years, by two weeks of notice;
3. if the worker has been employed for more than three years but less than five years, by three weeks of notice; or
4. if the worker has been employed for more than five years, by four weeks of notice.

(2) Unless otherwise provided in this Act the notice required under subsection (1) may be given orally or in writing.

(3) A worker given notice of termination by his or her employer in accordance with this section, shall be provided with a reasonable amount of time off work at times convenient to both parties and without loss of pay, so that the worker may look for other employment.

(4) Payment in lieu of notice may be provided, at the employer’s discretion.

(5) If payment is made in lieu of notice the payment must include the wages and benefits that would have been payable to the worker if the worker had worked during the period of notice.

***38. Further provisions as to termination of contracts***

(1) Upon the termination of a contract of employment, the employer must pay to the worker all wages and benefits then due to the worker by the end of the following working day.

(2) Upon termination or expiry of a worker’s contract, the employer must provide a certificate to the worker stating the nature of employment and the period of service.

(3) Where the termination of the contract of employment is at the employer’s initiative the employer must, provide the worker with a valid reason, in writing, for the termination at the time he or she is terminated.

***PART V - PAYMENT OF WAGES AND WAGES PROTECTION***

***39. Payment of wages***

(1) Payment of wages must be at intervals that are reasonably appropriate to the nature of the contract of employment and in any event must not be less frequent than:

(a) twice a month for workers whose wages are calculated by the hour, day or week; or

(b) once a month for workers whose wage is fixed on a monthly, annual, piece work, fixed work or fixed task basis.

1. Subject to subsection (3), wages must be paid to a worker in cash.

(3)  An employer may,—

 (a) with the written consent of a worker; or

 (b) on the written request of a worker,—

pay to that worker by postal order, money order, specified cheque, or lodgement at a financial institution to the credit of an account standing in the name of that worker or in the name of that worker and some other person or persons jointly, any wages that have become payable to that worker.

***40. Interest on advances***

An employer must not make a deduction by way of discount, interest or similar charge on account of an advance of wages made to a worker in anticipation of the regular period of payment of the wages.

***41. Wages statement***

(1) When paying a worker at regular intervals in accordance with section 39, an employer must provide the worker with a written or electronic statement containing the following particulars in respect of the relevant wage period ⎯

1. the worker’s name;
2. the nature of employment or job classification;
3. the days or hours worked at normal rates of pay;
4. the rate of wages;
5. the wage period;
6. the hours of overtime worked during a wage period and the rate of wages payable for the overtime;
7. the gross earnings of the worker;
8. Allowances, loadings or other sundry payments due to the worker;
9. deductions made from the gross earnings of the worker;
10. the net amount due to the worker after all deductions have been made in respect of each wage period;
11. employment number, Vanuatu National Provident membership number, taxation identification number or any other form of identification; and
12. any other prescribed information.

 (2) In addition to the requirements for the provision of a wages statement set out in subsection (1), an employer must inform a worker whenever any changes to the conditions related to that worker’s wages take place.

1. An employer that contravenes subsections (1) or (2) commits an offence.

***42. Wages and time record***

(1) An employer in relation to any worker employed under a contract of employment under this Act, must keep a wages and time record showing, for each worker ⎯

1. the name of the worker;
2. the date of birth;
3. the worker’s address;
4. the kind of work on which the worker is usually employed;
5. the contract of employment or collective agreement under which the worker is employed;
6. the classification or designation of the worker according to which the worker is paid;
7. their hours of work;
8. the wages paid to the worker each week and the method of calculation; and
9. other prescribed particulars.

***43. Inspection of wage records***

An employer must, upon request made at any reasonable time by a labour officer or labour inspector, produce for inspection by that officer or inspector every wages and time record that is, or at any time during the preceding 6 years was, in use under this Act in respect of a worker employed by that employer at any time in those 6 years.

***44. Authorised deductions from wages***

(1) Subject to this section, an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.

(2) Subject to subsections (3) and (4), an employer may deduct from the wages of a worker ⎯

1. an amount due to be paid by a worker in respect of any tax, or other deduction imposed by law;
2. with written consent, an amount due by the worker;
	1. under a provident fund, school fund, pension fund, sports fund, superannuation scheme, life insurance or medical scheme, credit union, trade union, co-operative society or other funds or schemes of which the worker is a member; over-payments made during the immediately preceding 3 months by the employer to the worker by the employer’s mistake; and
3. with prior written approval of a labour officer, an amount to compensate for any loss or damage to materials or other property of the employer caused by the wilful misconduct or negligence of the worker.
4. Any other lawful deduction at the request in writing of the worker.

 (3) An employer must deduct from the wages of a worker any voluntary contributions to the Vanuatu National Provident Fund that the worker requests, in writing, be made.

1. Deductions made under subsections 2(b), (c) or (d) shall not exceed one third of the worker’s wages for that pay interval.

Where the deduction is being made with the written consent of the worker or on the written request of the worker for the purposes of paying to a third party, the employer must pay the amount so deducted to the person empowered to collect the amount or entrusted with the management of the fund, scheme, trade union or cooperative society;

***PART VI - HOURS OF WORK AND OVERTIME***

***45. Hours of Work***

(1) Subject to subsections (2) and (3), a contract of employment must fix at not more than 44 the maximum number of hours (exclusive of overtime and break times) to be worked in a week by a worker bound by that contract.

(2) If the number of hours (exclusive of overtime and break times) fixed by a contract of employment, to be worked by a worker in a week, is as prescribed by subsection (1), the parties must fix the daily working hours so that those hours are worked on not more than 6 days of the week and do not exceed more than 10 hours on any day.

(3) The maximum hours worked by a worker per week may be varied by a ministerial Order or employment contract provided that -

(a) if a worker can be required to work overtime the situations in which overtime can be required and provisions for giving notice of when overtime will be required are clearly defined; and

(b) any variation to the number of hours worked does not pose a risk to the health or safety of a worker, or to the safety of any other person, taking into account the nature of the worker’s job and the need for all workers to be provided with adequate time for leisure and rest; and

(c) overtime is paid with respect to hours in excess of that set out in section 45(1).

***46. Meal and tea breaks***

Every worker who works for more than 6 consecutive hours in 1 day shall be entitled to a break of one hour for a meal and a tea break of 20 minutes, or two tea breaks of 10 minutes each.

***47. Overtime pay***

If work is carried out in excess of the hours of work specified in section 45, the worker shall be paid at the following overtime rates:

(a) for the first 4 hours, at a minimum rate equal to one-and-a-quarter times the normal hourly rate;

(b) for work in excess of 4 hours, at a minimum rate equal to one-and-a-half times the normal hourly rate;

(c) for work in excess of the normal weekly hours of work that is carried out between 8 pm and 4 am, a minimum rate equal to one-and three-quarter times the normal hourly rate for these time periods.

***48. Work on public holidays***

(1) Except where he voluntarily undertakes so to do no worker shall be required to work on a public holiday.

(2) Subsection (1) shall not apply in relation to persons employed in –

(a) undertakings engaged in the transport of passengers or goods by road, sea or air, including the handling of passengers or goods at docks, quays, wharves, warehouses or airports;

(b) undertakings of public utility including provision of water or gas, generation or supply of electricity, postal and telecommunication services, sewerage and similar services;

(c) hotels, guest houses, bars, restaurants, clubs and similar establishments;

(d) theatres and places of public amusement;

(e) establishments for the treatment and care of the sick, infirm, destitute or mentally unfit;

(f) newspaper and' radio broadcasting undertakings;

(g) animal husbandry;

(h) any other work approved, on the application of an employer, by a labour officer for the purpose of this subsection, having regard to the requirements of the proper management of the undertaking and the convenience of the public.

***49. Pay for work on public holidays***

(1) Subject to subsection (3) a worker whose wage is calculated on a piece work, hourly or daily basis and who works on a public holiday at the request of, or with the agreement of, the employer, shall be entitled to be paid at a rate equal to one-and-a-half times the normal hourly rate.

(2) If a worker works overtime on a public holiday he or she shall be entitled to be paid at a rate of two times the normal hourly rate.

(3) A worker and employer may agree that the worker shall be granted an equivalent period of time off work on another day working on a public holiday instead of being paid a higher rate for work on a public holiday.

***PART VII - HOLIDAYS AND LEAVE***

***50. Continuity of employment***

(1) For the purposes of this part a worker is engaged in continuous employment if he or she works for 4 or more days per week.

(2) For the purposes of this Part, employment is deemed to be continuous, a worker’s contract of employment is terminated and the same worker re-engaged in the same workplace within a month of termination.

(3) For the purpose of this section there shall be included in the period of continuous employment any periods of absence from work caused by –

(a) an accident at work duly certified by a recognised medical practitioner;

(b) illness arising from employment duly certified by a recognised medical practitioner;

(c) maternity leave up to a period of 12 weeks;

(d) illness duly certified by a medical practitioner up to a period of 3 months.

***51. Paid annual holidays***

(1) Every employer shall grant to a worker who has been in continuous employment for more than 1 year leave on full pay at the rate of 1.25 working days per month for each year of employment.

**52. Manner in which annual leave to be taken**

(1) The annual leave shall be taken in one period or if the employer and the worker so agree, in not more than 2 separate periods.

(2) If the employer and the worker so agree, the annual leave or either of its parts, may be taken wholly or partly in advance before the worker has acquired entitlement thereto.

(3) The date of the annual leave shall be fixed by the employer, who shall in so far as it shall be practicable in the circumstances of the undertaking, comply with the worker's request in this respect.

**53. Wages during annual leave**

The employer shall pay to the worker during the annual leave wages at least equal to the worker's average wage for the 12 months preceding the commencement of the leave:

Provided that such wages unless the parties otherwise agree need not include any bonuses, overtime pay, expatriation allowances or reimbursement of expenses.

**54. Entitlement when contract terminated**

If a contract of employment terminates before the worker has acquired entitlement to annual leave, an allowance calculated on the basis of the entitlement provided for in section 29 shall be paid in the place of leave:

Provided that if the contract has been broken by the worker such allowance shall only be payable on condition that the worker has completed at least 6 months service, and, that in the case of hourly or daily paid workers 1 month service shall mean not less than 22 days' work carried out within the month.

***55. Paid holiday to be given within certain period***

(1) A worker is entitled to all leave earned, and such leave must not be forfeited.

(2) If an employer elects to close a section or sections of the employer’s establishment for a fixed period in any year, all or part of the paid annual holiday may, by agreement between the parties, be taken before the completion of the year in respect of which the paid annual holiday may be due.

(3) Notwithstanding subsection (1), an employer may agree in writing with all or any of the workers that paid annual holidays may be deferred and accumulated over a period not exceeding 4 years, provided that one week’s leave must be taken after the completion of each year of service.

***56. Sick leave***

(1) Where a worker who has completed more than 3 months continuous service with the same employer and who is incapable of work because of sickness or injury, the worker is entitled to paid sick leave of not less than 10 working days during each year of service.

(3) For a worker to be entitled to sick leave, the worker must ⎯

1. as soon as reasonably practicable notify the employer of his or her absence and the reason for it; and
2. produce, if requested by the employer, a written certificate signed by a medical practitioner, certifying the worker’s incapacity for work.

(4) A medical practitioner who knowingly issues a medical certificate to a worker whom the medical practitioner knows is capable of work commits an offence as does the worker who sought the medical certificate.

***57. Entitlement to maternity leave***

(1) A woman employed in a workplace for a period of at least 12 months before the date of giving birth and who expects to give birth is entitled to maternity leave for a period of 12 consecutive weeks provided that she furnishes to her employer a certificate from a medical practitioner or registered nurse confirming her pregnancy and specifying the expected date of delivery of a child.

(2) All maternity leave shall be paid at a rate of pay not less than 50% of the wage and other benefits the woman would have earned had she had been at work.

(3) A woman may take maternity leave at any time before or after confinement provided that at least 6 weeks of her maternity leave is taken immediately after the birth of a child.

(4) For the purposes of this section, if a woman is absent from work for a period of more than 12 consecutive weeks she is not entitled to wages in respect of the days in excess of 12 weeks except by way of agreement with her employer.

(5) A woman who returns to her employment after maternity leave– must be appointed to the same or equivalent position held prior to proceeding on maternity leave, without any loss of salary, wages, benefits or seniority.

(7) For the purposes of nursing a child during her working hours, an employer shall allow a woman worker nursing breaks of:

 (a) one hour for every four hours worked, where the child is aged up to 6 months; and

 (b) half an hour for every four hours worked, when the child is aged between 6 and 12 months .

(8) Nursing breaks for the purposes of subsection 7 shall be counted as hours worked for the purposes of calculating wages.

***58. Restriction on termination***

(1) An employer must not terminate a woman’s employment by reason of being pregnant.

(2) No employer shall give notice of dismissal to a woman who is absent following taking maternity leave and who remains absent as a result of an illness arising out of pregnancy or childbirth that is certified by a medical practitioner rendering her unfit to work, provided that such absence shall not exceed 3 months.

(3) If a woman is terminated under subsection (3) she is deemed to have been employed up to and including her period of maternity leave for the purpose of determining her period of employment under this Part.

***59. Record of leave and entitlement***

**(**1) An employer employing any worker must at all times keep a record showing in the case of each worker ⎯

1. the name of the worker;
2. the dates of the commencement and termination of the worker’s employment;
3. all leave entitlements;
4. the dates on which all leave is taken; and
5. the amount paid to the worker in respect of the leave to which the worker is entitled.

(2) The record of paid leave may be incorporated in the wages record that the employer is required to keep under this or any other Act.

**PART VIII – REPATRIATION OF WORKERS**

**60. Worker's right to repatriation**

(1) Subject to section 63 every worker whose ordinary place of residence is more than 50 kilometres away from his place of employment and who has been brought to the place of employment by the employer or his agent shall have the right to be repatriated at the expense of the employer to his place of origin or engagement, whichever is nearer to the place of employment, in the following cases–

1. on the expiry of the term of contract;

(b) in the case of a termination of a contract when the worker has become entitled to a paid annual leave;

(c) in the case of a breach of contract or a serious offence committed by the employer;

(d) in the case of the termination of a contract due to the inability of the worker to complete the contract owing to sickness or accident.

(2) The right of a woker under subsection (1) shall lapse if not used by him within 6 months from the date at which he becomes entitled thereto.

**61. Repatriation of worker’s family**

(1) Where the family of a worker has been brought to the place of employment by the employer or his agent in the circumstances mentioned in section 58 the family shall have the right to be repatriated as provided in that section whenever the worker is repatriated or in the event of his death.

(2) The expression "family" in subsection (1) means the wife and the dependent minor children of a worker who reside with him.

**62. Proportional payment of travel costs**

When a contract is terminated for any cause other than those provided for in section 58 or by reason of a serious offence committed by the worker the employer shall bear travel costs proportionate to the length of the worker's service in respect of both the journey to and from his place of employment.

**63. Means of transport**

The means of transport shall be determined by the worker's position in the undertaking in accordance with the local usage:

Provided that the employer shall ensure that the worker and his family are transported in reasonable comfort and safety.

**64. Subsistence during repatriation**

(1) Subject to subsection (2) and to section 60 the expenses of repatriation shall include–

1. the cost of travelling and reasonable subsistence expenses during the journey;

(b) reasonable subsistence expenses during the period, if any, between the date of the expiry of the contract and the date of repatriation.

(2) The employer shall not be liable for subsistence expenses in respect of any period during which the repatriation of a worker has been delayed –

(a) unreasonably by the worker's own choice;

(b) for reasons of force majeure, unless the employer has been able during that period to use the services of the worker at the rate of remuneration applicable under the expired contract.

**65. Exemption from employer's duty to repatriate**

Notwithstanding anything contained in the other sections of this Part an employer shall not be liable for the costs of repatriation or subsistence expenses if it is proved to the satisfaction of a labour officer–

(a) that the worker has signified, in writing or otherwise, that he does not wish to exercise the right to repatriation;

(b) that the worker has been settled, at his own request or with his consent, at or near the place of his employment;

(c) that his contract has been terminated owing to a serious breach thereof by the worker;

(d) when the contract has been terminated otherwise than by reason of the worker's inability to complete the contract owing to sickness or accident and the labour officer is satisfied that–

(i) in fixing the rate of the remuneration proper allowance has been made for the payment of the costs of repatriation by the worker;

(ii) that suitable arrangements have been made by means of a deferred pay system or otherwise to ensure that the worker has the funds necessary for the payment of such costs.

**PART IX – MISCELLANEOUS**

***66. Offences***

(1) Any person who contravenes or fails to comply with any demand notice made by the Commissioner or a labour officer pursuant to section 80 shall be guilty of an offence.

Penalty: A fine not exceeding VT 250,000.

(2) Any person who –

(a) contravenes the provisions of section 4(1) which relates to forced or compulsory labour or section 12 which relates to discriminatory advertising and testing or Part II Division 3 which relates to the employment of children; or

(b) obstructs the Commissioner or a labour officer in the exercise of his functions under this Act; or

(c) knowingly makes a statement false in any material particular when required to make a statement under this Act; or

(d) makes, or knowingly allows to be made, any entry in a record required to be kept by an employer which he knows to be false or misleading in a material particular;

 shall be guilty of an offence, even in the absence of the issuance of a demand notice pursuant to section 86.

Penalty: A fine not exceeding VT 1,000,000.

(3) Where, in the course of criminal proceedings against an employer in respect of any offence under this Act, it is proved to the satisfaction of the court that a sum of money is owing by the employer to his worker due to breaches of this Act or an employment contract, the court, instead of, or in addition to dealing with that person in any other way, may, on application, make a compensation order requiring him to pay that sum to the worker.

(4) An order made under subsection (3) shall be suspended –

(a) in any case until the expiration of the period prescribed by law for the giving of notice of appeal against a decision of the court;

(b) where notice of appeal is given, until the date of the determination or abandonment of appeal.

(5) Where an order is made against an employer under subsection (3) –

(a) the order shall cease to have effect if he successfully appeals against his conviction of the offence or, if more than 1, all the offences, of which he was convicted in the proceedings in which the order was made;

(b) he may appeal against the order as if it were a part of the sentence imposed in respect of the offence or, if more than 1, any of the offences, of which he was so convicted.

(6) The court, in determining the appropriate level of criminal penalty to apply, shall take account of any order made pursuant to subsection (3) and the impact of any penalty on the ability of the employer to continue operating and providing employment.

(7) In the event that a compensation order is made under subsection (3) the worker shall be barred from taking civil proceedings seeking compensation for the matters covered under the compensation order.

***67. Exemption of employer on conviction of actual offender***

(1) If –

1. an employer is charged with an offence under any of the provisions of this Act, the employer is entitled, upon information duly laid, to have any other person whom the employer alleges to be the actual offender charged and brought before the Court at the time appointed for hearing of the charge; and
2. after the commission of the offence has been proved, the employer proves to the satisfaction of the Court that the employer has used due diligence to enforce the provisions of this Act; and
3. that other person has committed the offence in question without the employer’s knowledge, consent or connivance,

the other person must be convicted of the offence and the employer must be exempt from the penalty.

(2) If, at the time of investigating the offence, a labour officer or labour inspector is satisfied that, the employer has used due diligence to enforce the provisions of this Act and another person has committed the offence, the labour officer or labour inspector must proceed against that other person other than the employer.

***68. Burden of proof in civil proceedings***

1. In any civil dispute about the application or interpretation of a worker’s contract of employment, should that contract not be in writing and signed by the worker and the employer, then the employer bears the burden of establishing the terms and conditions of that contract of employment .

(2) In any civil dispute where a worker alleges that his or her contract of employment was terminated for an unlawful reason, the burden of proving the existence of a valid reason for the termination shall rest on the employer.

(3) In any civil dispute where a worker alleges that an employer has discriminated in relation to employment matters and thereby breached section 5(1) the burden of proof is on the employer to establish that its actions were not by reason of any of the prohibited grounds of discrimination set out in section 4(3) or by reason of the worker’s involvement in the activities of a union.

***69. Time for instituting proceedings for offences***

Notwithstanding anything in any other written law, criminal or civil proceedings for a breach of this Act must be instituted within the period of 12 months after the act or omission alleged to constitute the breach except that the Court may grant leave to extend such period for a further 6 months.

***70. General transition provisions in respect of conditions of individual contracts***

(1) Unless specific transition provisions are provided in this Act, conditions of employment contracts that were governed by the Employment Act [Cap 160] of Vanuatu shall continue in effect for a period of 6 months after the Employment Contracts Act comes into force. After 6 months, if no other agreement has been reached between the employer and the worker, the conditions of the Employment Contracts Act shall be deemed to be part of the conditions of the employment contract.

Provided that no worker can be required to continue working under changed conditions of work and no worker shall be penalised for terminating an employment contract early if he does not agree that conditions of the Employment Contracts Act shall be deemed to be part of the conditions of his employment contract.

(2) In the event that the worker had accumulated more than 4 years of annual leave prior to the commencement of this Act he shall be required to take all accumulated leave within 1 year, except that with the written permission of a labour officer the period to take all accumulated leave may be extended by agreement of the employer and the worker.

***71. Transition provisions in respect of severance allowance***

(1) Any worker that would have been entitled to severance allowance under the Employment Act [Cap 160] if the employer terminated the worker’s employment on XXX DATE shall have the severance allowance they would have been entitled to on XXX DATE fixed.

(2) The calculation for the fixed severance allowance shall be:

(a) For continuous employment prior to 1 October 2009, 2 weeks’ wages per year worked

(b) For continuous employment from 2 October 2009 to XXX DATE, 1 months’ wages per year worked and 1/12 of 1 month’s wages for every partial year worked

(3) The worker is entitled to his fixed severance allowance payment under section xxx regardless of which party terminates the contract and any subsequent reasons for termination.

(4) The fixed severance allowance payment shall be paid in a lump sum at the time the worker’s employment is terminated, provided that, with the written permission of the Commissioner of Labour, the fixed severance allowance payment may be paid by instalment at a rate that is no less than 1 month’s wages per instalment and may commence prior to the employment being terminated.

 (5) Where wages are fixed at a rate calculated on work done or includes any sum paid by way of commission in return for services, the wage shall, for the purposes of this section, be computed in the manner best calculated to give the rate at which the worker was being paid over a period not exceeding 12 months prior to XXX DATE.

 (6) For the purposes of this section the wage which shall be taken into account in calculating the severance allowance shall be the wage payable to the worker on XXX DATE.

(7) Deductions from severance allowance that would have been permitted under section 67 of the *Employment Act* [Cap 160] continue in force, and include any gratuity payments, annual pensions and contributions into pension funds made after XXX DATE.

***72. Repeals, consequential amendments and savings***

(1) The repealed Employment Act (Cap. 160) is repealed.

(2) At the commencement of this Act, the existing members of the Council appointed under the Employment Act (Cap. 160) continue in office under the same terms and conditions as if they were appointed under this Act as members of the Council.

(3) At the commencement of this Act, any subsidiary legislation made under the Acts repealed under subsection (1) continues as if it were made under this Act to the extent that it is not inconsistent with this Act.

(5) At the commencement of this Act, the Commissioner of Labour appointed under the Employment Act (Cap 160) continues in office under the same terms and conditions as if appointed under this Act as the Commissioner of Labour.

(6) The Commissioner of Labour and any officer appointed under or for the purposes of administration of the Employment Act (Cap. 160) are deemed to have been appointed for the purposes of this Act.

(7) Unless otherwise provided in this Act a contract of employment or collective agreement that is valid and in force at the commencement of this Act continues to be in force after the commencement of this Act and to the extent that it is not in conflict with this Act is deemed to be made under this Act and the parties to the contract or collective agreement are subject to and entitled to the benefits of this Act.

***73. Commissioner of Labour may call for information***

The Commissioner of Labour may, in writing, require an employer to provide written information necessary for the effective administration of this Act, including returns and statistics on employment and other related matters, whether periodically or otherwise. An employer who contravenes this section commits an offence.

***74. Regulations***

(1) The Minister may, on advice of the Council, make regulations to give effect to the provisions of this Act, and in particular to make regulations for any of the following purposes —

(a) providing for the particulars to be contained in written contracts of service, for all other matters relating to their making, enforcement, transfer and cancellation;

(b) prescribing forms and notices with respect to the issue of demand notices by labour inspectors;

(c) prescribing the requirements for light work for children, including the permissible times and hours of work, the activities that may be carried out and the conditions under which these activities may be performed.

(d) prescribing and periodically update by Order the types of hazardous work that children under the age of 18 are prohibited by from engaging in.

(e) prescribing the records, registers, books, accounts and other documents to be kept and the information or returns to be rendered by employers and other persons in respect of workers including working children;

 (f) regulating the enlisting, recruitment, engagement and the embarkation of workers to be employed under foreign contracts of service;

(g) the provision of forms, notices and other matters relating to applying for and taking paid maternity leave;

1. prescribing procedures for authorisation of recruitment agents and private employment agencies for local or overseas employment;
2. prescribing forms for the purpose of this Act;
3. regulating the employment conditions of seafarers;
4. prescribing standards in respect of sanitary facilities and first aid facilities;
5. regulating work stores.

***75. Commencement***

(1) This Act commences on a date or dates appointed by the Minister by notice in the *Gazette*.

(2) The Minister may appoint different dates for the commencement of different provisions of this Act.

***PART X - TRIPARTITE LABOUR ADVISORY COUNCIL***

***76. Establishment***

The Tripartite Labour Advisory Council is established.

***77. Objectives***

The objectives of the Council are to:

1. make recommendations for the resolution of social, economic and labour issues; and
2. ensure active consultation with tripartite constituents on the development, adoption, implementation and regulation of International Labour Standards.

***78. Composition***

(1) The Council consists of the following members appointed in writing by the Minister:

(a) the Commissioner of Labour, who is the chairperson of the Council; and

(b) three Government representatives nominated by the Minister of Internal Affairs upon the advice of the Commissioner of Labour; and

(c) three members nominated by the Vanuatu Council of Trade Unions; and

(d) three members nominated by the Vanuatu Chamber of Commerce and Industry.

The Minister must appoint the members nominated under subsection (1) within 28 days of receiving the nomination.

(2) The members appointed under paragraphs (1)(c) and (1)(d) are to nominate respectively from amongst themselves two members to be the vice-chairpersons of the Council.

(3) The appointment of the members must be published in the Gazette.

***79. Sitting allowance***

Members of the Council are entitled to a sitting allowance as may be determined from time to time by the Minister.

***80. Functions of the Council***

(1) The functions of the Council are to consider and make recommendations or proposals to the Government on:

 (a) any legislation or legislative amendment on any of the following areas before it is introduced in Parliament:

 (i) labour; or

 (ii) employment; or

 (iii) industrial relations; or

 (iv) working conditions; or

 (v) wages; or

 (b) any policy measures or programmes that affect:

 (i) labour; or

 (ii) employment; or

 (iii) industrial relations; or

 (iv) working conditions; or

 (v) wages; or

 (c) the establishment and functioning of national bodies responsible for:

 (i) vocational training; or

 (ii) occupational safety and health; or

 (iii) productivity; or

 (d) the ratification, implementation and denunciation of:

 any Conventions and recommendations of the International Labour Organization; or any other international labour standards

 (e) the reports to the International Labour Office regarding ratified conventions; or

 (f) proposals of matters to be discussed at the International Labour Conference of the International Labour Organization or resolutions or conclusions adopted by the International Labour Conference, or issues addressed by other tripartite regional or international conferences; or

 (g) the implementation and evaluation of technical cooperation activities of the International Labour Office; or

 (h) the promotion of a better understanding in the community of Decent Work and the activities of the International Labour Organisation; or

 (i) other matters connected with the employment of workers or industrial relations referred to it by the Commissioner of Labour.

(2) make recommendations to the Minister on the setting of the Minimum wage consistent with its minimum wage functions pursuant to the Minimum Wage Act.

(3) In addition to subsection (1), the Council may also carry out studies on issues related to:

 (a) labour; or

 (b) economic and social affairs.

***81. The Council may determine its own rules and procedure.***

Subject to this Act, the Council may determine its own rules and procedure.

***PART XI - APPOINTMENTS, POWERS AND DUTIES OF OFFICERS***

***82. Appointments***

1. Within the Ministry, there shall be a Commissioner of Labour and such other labour officers and labour inspectors as shall be necessary or expedient for the purposes of this Act, who shall be public servants.
2. Labour inspectors appointed in accordance with subsection (1) shall have sufficient stability of employment, independent of changes in government and improper external influences, to ensure independence and impartiality in their functions.

***83. Administration of this Act***

(1) The Commissioner of Labour, labour officers and labour inspectors are responsible for the administration of the provisions of this Act.

(2) The Commissioner of Labour must provide a certificate of designation to an officer appointed for the purposes of this Act.

(3) When exercising any function under this Act, an officer designated under subsection (2) must, if required by a person affected by the exercise of such function, produce the certificate of identity to that person.

***84. Powers and functions of labour officers and labour inspectors***

(1) The functions of the Commissioner of Labour, labour officers or labour inspectors are to:

(a) ensure compliance with the provisions of this Act;

(b) advise and assist employers and workers on particular or general employment relations matters under this Act;

(c) provide information, advice, awareness or training to employers and workers or their organizations on matters under this Act; and

(d) publish an annual labour inspection report including statistics on inspection visits, recorded breaches of the Act and penalties issued.

(2) The functions of the Commissioner of Labour and labour officers may also include formulating enterprise or national policies, codes and strategies on employment relations matters.

***85. Right of entry and inspection***

(1) The Commissioner of Labour, a labour officer or labour inspector may at any time -

1. enter, inspect and examine a workplace where or about which a worker is employed or where there is reason to believe that a worker is employed;
2. require an employer or a trade union as the case may be, to produce any worker employed by the employer and any documents or records which the employer is required to keep under this Act or any other documents or records relating to the employment of the worker;
3. interview the employer or a worker on a matter connected with employment or this Act, and may seek information from any other person whose evidence is considered to be necessary; or
4. inquire from an employer or a person acting on the employer’s behalf regarding matters connected with the carrying out of this Act.

(2) The Commissioner of Labour, labour officer or labour inspector,

(a) must not enter a private dwelling house without the consent of the occupier; or

(b) without the consent of the occupier, may enter a private dwelling house that there are reasonable grounds to believe is a workplace, with an order for daytime entry made by the Industrial Registrar on a date when the occupier could reasonably be in attendance; or

(b) on the occasion of a visit or inspection, must notify the employer or the employer’s representatives of his or her presence, unless the Commissioner of Labour, labour officer or labour inspector considers that such notification may be prejudicial to the performance of his or her duties.

(3) The Commissioner of Labour, a labour officer or labour inspector may copy or make extracts from a document or records in the possession of an employer which relate to a worker.

(4) The Commissioner of Labour, a labour officer or labour inspector must make known to the employer and a representative of workers, or trade union (as the case may be) any action required as result of any inspection of a workplace.

**(**5) It shall be an offence for any person –

(a) to refuse to comply with a request of a labour officer or labour inspector; or

(b) make a false statement to a labour officer or labour inspector; or

(c) prevent a labour officer or labour inspector from undertaking any functions.

***86. Demand Notices***

(1) A labour officer or labour inspector may, issue a demand notice where the labour officer or labour inspector believes on reasonable grounds that an employer is failing, or has failed to comply with any provision of this Act.

(2) A demand notice for the purposes of subsection (1) must state:

(a) the relevant provision of the Act that the labour officer or labour inspector reasonably believes that the employer is failing or has failed to comply with; and

(b) the reasons for the labour officer or labour inspector’s belief that the employer is failing, or has failed to comply with the provision; and

(c) the nature and extent of the employer’s failure to comply with the provision; and

(d) the steps the employer must take to comply with the provision; and

(e) the date before which the employer must comply with the provision.

(3) In setting the date pursuant to section (2)(e) the employer must be given reasonable time to comply.

(4) An employer may, within 28 days of the demand notice being issued to them, lodge an objection to the notice with the Commissioner of Labour.

(5) In considering an employer objection lodged in accordance with subsection (4), the Commissioner of Labour must determine—

(a)  whether the employer is failing, or has failed, to comply with the specified provision of the relevant Act; and

(b) the nature and extent of the employer's failure to comply with the provision; and

(c)  the nature and extent of any loss suffered by any worker as a result of the employer's failure to comply with the provision (if applicable).

(6) The Commissioner of Labour may vary, or rescind the demand notice as he thinks fit.

***87. Enforcement of demand notice***

The Commissioner of Labour, or a labour officer or labour inspector authorised in writing by the Commissioner of Labour, may recommend that the Director of Public Prosecutions institute criminal proceedings in respect of failures to comply with a demand notice or other offences, as provided in section 60(2).

***88. Interests and confidentiality***

(1) The Commissioner of Labour, labour officer or labour inspector,

1. must not have any direct or indirect interest in a workplace under his or her supervision, for the purposes of applying the provisions of this Act;
2. must not make use of or reveal, including after leaving Government service, any manufacturing or commercial secrets, working processes or confidential information which may come to his or her knowledge in the course of his or her duties; or
3. must treat as confidential the source of a complaint bringing to his or her notice a defect or breach of legal provisions relating to conditions of work and the protection of workers while engaged in his or her work, and must give no intimation to the employer or the employer’s representative whether a visit or inspection was made in consequence of the receipt of a complaint from within the organisation or workplace.

(2) A person who contravenes subsection (1) commits an offence.

***89. Protection against civil and criminal proceedings***

No action or proceeding, civil or criminal, lies against the Commissioner of Labour or a labour officer, labour inspector or body established by or under this Act, for anything done or omitted in good faith in the exercise or purported exercise of a function under this Act by the Commissioner of Labour or the labour officer, labour inspector or body.

**SCHEDULE 1**

This pro forma provides a basic structure for an employment contract. Employers should delete the sections that are not relevant and fill in as much information as possible.

**Introductory matters**

Name of Employer:

Name of Worker:

Position Description / Inherent Requirements of Position:

Place of Work:

Employment type (contract for an indefinite duration/fixed period contract/fixed work contract/casual contract):

Start date and, if applicable, end date:

Probation period:

**Hours of work**

Usual hours of work:

When overtime may be worked:

**Remuneration**

Wages/Salary:

Overtime payments:

Allowances:

Deductions (including VNPF):

Time and place of payment of wages/salary and allowances:

**Leave entitlements & other benefits**

Annual leave:

Sick leave:

Maternity leave:

Other Entitlements:

**Termination**

How the contract can be terminated:

(For fixed period/fixed work contracts) how the contract may be renewed:

Signed by:

Employer: Worker:

Date: