

VCCI POSITION PAPER ON SEVERANCE ALLOWANCE*



INTRODUCTION

Severance payments are of particular importance in countries, such as Vanuatu, that have no State-funded unemployment benefits scheme. Severance payments ensure that employees whose employment is terminated have some degree of income protection, or “financial cushioning” whilst they look for more work or adjust to no longer earning a wage.

However, Vanuatu’s current approach to severance allowance means that many workers who need financial cushioning when they lose their jobs are not eligible for a severance payment. Further, the current approach to severance allowance hinders the achievement government policies in respect of private sector development and employment growth. Severance allowance inhibits private sector development and the creation of job opportunities by deterring investment and, in some cases, driving businesses to bankruptcy, which removes existing work opportunities altogether. It also reduces job security by pushing people into part time or casual work. This particularly affects low skilled workers, who are already vulnerable.

Employers therefore propose that the law on how employment contracts can be terminated and payments on termination should change. Specifically:

The direct employer’s redundancy payment at the time of termination should be 1 week’s salary per year of service, capped at 3 months; and

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; and

the current severance allowance regime should be removed, with worker’s existing entitlements to severance being frozen at the date of the change to the new unemployment benefits regime.

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It is maintained that this approach will address the negative impacts of the current approach to severance allowance, whilst at the same time increasing job opportunities and job security for workers in Vanuatu and security and coverage of unemployment benefits.

This proposal is easy to implement and can be quickly introduced to improve the law. The concept of an unemployment benefit funded via a pooled contributory fund (or unemployment insurance) may, however, be better for both workers and employers in the long term. In the absence of current and accurate labour market statistics it is difficult to accurately design and cost an unemployment insurance scheme. Employers propose that:

The Vanuatu government explores the feasibility of a pooled unemployment insurance scheme to replace the redundancy and individual VNPF saving account approach that is proposed as an interim measure as a matter of urgency.

Employers are not simply being alarmists about the negative effects of severance allowance on job opportunities and job security. This paper presents evidence for the negative consequences of the current severance allowance regime and explains the changes proposed by employers in more detail.

SUMMARY OF THE LAW ON SEVERANCE ALLOWANCE IN VANUATU

Part XI of the *Employment Act* [Cap 160] establishes the severance allowance regime. When the Act was first passed employees were only eligible for severance pay if they were terminated or retired by their employers after being in continuous employment for more than 1 year.¹ Continuous employment was defined as working for 4 or more days per week.² In 1989 eligibility was extended to include people who had been in continuous employment for more than 1 year but were unable to continue working because they were certified as being medically unfit.³ Eligibility for severance payment was again extended in 1995, to include employees who had been in continuous employment for more than 10 years and who resigned or chose to retire.⁴ In 2009 the period that employees who voluntarily resign must work in order to claim severance was reduced to 6 years.⁵ Eligibility for entitlement to severance allowance is lost if the employee is terminated for serious misconduct.

Until 2009 the amount of severance pay was provided by s 56(2) to be:

(a) for every period of 12 months-

(i) half a month's remuneration, where the employee is remunerated at intervals of not less than, 1 month.

(ii) 15 days' remuneration, where the employee is remunerated at intervals of less than 1 month;

(b) for every period less than 12 months a sum equal to one-twelfth of the appropriate sum calculated under paragraph (a) multiplied by the number of months during which the employee was in continuous employment

In 2008 the government passed an Act changing the amount of severance from 2 weeks salary per year worked to 2 months' remuneration per year worked.⁶ This Act never came into force and was replaced by 2009 reforms which changed the amount of severance to 1 months' remuneration per year worked.⁷

Section 57 allows the employer to make certain deductions from severance allowance if it has taken other measures to provide for income protection on termination.

¹ Section 54(1) of the *Employment Act 1983* read 'Subject to section 55, where an employee has been in continuous employment for a period of not less than 12 months with an employer and the employer terminates his employment or retires him on or after his reaching the age of 55, the employer shall pay severance allowance to the employee.'

² Section 54(2)(a) *Employment Act* [Cap 160].

³ *Employment (Amendment) Act 1989*.

⁴ *Employment (Amendment) Act 1995*.

⁵ *Employment (Amendment) Act 2009*.

⁶ *Employment (Amendment) Act 2008*.

⁷ *Employment (Amendment) Act 2009*.

THE IMPACT OF THE 2008/2009 CHANGES TO SEVERANCE ALLOWANCE: JOB LOSSES, INSOLVENCIES, BUSINESS CLOSURES, LESS SECURE EMPLOYMENT

Job losses

As Vanuatu does not regularly conduct labour market surveys there are no accurate labour market statistics that show the impact of the 2008/2009 employment law reforms on employment or wage levels. Whilst there are no labour market surveys for the relevant period, there are other data sources which give some indication of employment levels before and after the reforms were announced.

As all employees (including public and private sector) who earn more than 3,000 vatu per month are legally required to contribute to the Vanuatu National Provident Fund (VNPF), VNPF statistics give some indication of employment levels. Statistics on the number of employees actively contributing to the VNPF indicate that between quarter 4 of 2008 and quarter 1 of 2009 (the time when a law had been passed to increase severance allowance to 2 months' salary per year worked), the number fell from 22,164 active VNPF contributors to 15,314 active VNPF contributors⁸ - a decrease of 6,850 employees, or more than a quarter of active VNPF members. There can be seasonal variations in employment, there are sometimes issues of non-compliance with VNPF and there was a spike in active VNPF contributors in quarter 4 of 2008. However, if one looks at the average level of contributors from 2008 and 2009, the number still fell from 17549 active VNPF contributors to 15,956 active VNPF contributors⁹ – a decrease of 1593 employees.

The business license database, maintained by the Vanuatu Customs and Inland Revenue Department, records the number of full time equivalent employees engaged in formal sector businesses. It is based on self-reporting by businesses at the time they renew their business licenses, and the self-reported figures are not subject to verification. This data indicates that between 2008 and 2010 the number of full time equivalent local employees in formal sector businesses in Port Vila and Luganville declined 12.6%, from 11,161 to 9,755.

Insolvencies and business closures

The severance allowance changes were “retroactive”, in the sense that employees who had been employed prior to 2008 but terminated after the 2008/2009 reforms would have their severance payment for the full time of employment calculated in accordance with the law at the time of termination.¹⁰ Whilst a responsible employer who has been managing its employment liabilities should

⁸ Reserve Bank of Vanuatu, *Reserve Bank Quarterly Report 1 2011* (2011) Table 46 available at <http://www.rbv.gov.vu/attachments/article/114/Mar%202011%20%28Q1%29%20NUMBER%20OF%20PROVIDENT%20FUND%20CONTRIBUTING%20MEMBERS%20%28FULL%20EMPLOYMENT%29.pdf> (Accessed 15 April 2013).

⁹ Ibid.

¹⁰ *Wilco Hardware Holdings Ltd v Attorney General* [2013] VUCA 12 <http://www.pacii.org>.

have been saving for the potential severance payment, once the 2008/2009 reform came into effect even a responsible employer who had been saving in order to meet severance payments would find its savings short.

Further, the potential liability for severance shows up immediately as a liability on the employer's accounts. The sudden increase in this liability could affect the solvency of businesses, which in turn affects their relationship with lending institutions, which may refuse further lending or call in loans. As explained by the Tom Bayer, who was President of the Vanuatu Financial Centre Association at the time of the 2008 reform:

If a company has a 20 million vatu severance allowance provision in its books now for its staff... it will suddenly go to 80 million. That extra 60 million is an expense this year and must be taken up immediately. This will put many companies into insolvency... and the banks will withdraw their lending facilities as companies will be insolvent.¹¹

Whilst there are no statistics on insolvencies, all foreign investors must apply to the Vanuatu Investment Promotion Authority (VIPA) for approval of new business proposals or for variations on existing businesses. Foreign investors who currently hold VIPA approval and wish to continue operating must apply annually for renewal. These statistics give some indication of business closures amongst one part of the private sector.

Year	Total number of projects approved	Number of renewals approved	% of approvals from previous year that renewed
2006	495	367	85
2007	658	401	81
2008	778	541	82
2009	803	485	62
2010	842	554	69

Table 2.3: VIPA statistics on business approvals and renewals¹²

The statistics in the table above show that between 2008 and 2009 there was a decline of 24.4% in the number of foreign investment businesses that sought VIPA renewals, with only 62% of foreign investment businesses that were approved in 2008 choosing to renew in 2009. This can be contrasted with renewal rates of over 80% between 2006 and 2008.

¹¹Marc Neil-Jones, 'This Bill will cause unemployment if gazetted' *Vanuatu Daily Post* (Port Vila, Vanuatu) 22 November 2008, 4.

¹² Statistics derived from Vanuatu Investment Promotion Authority, 'Vanuatu Investment Promotion Authority FDI Annual Report 2010' (2011) 5, 10.

Less secure employment

Data from an employer survey conducted in 2014 suggests that a number of employers also changed their employment practices following the reforms to severance allowance. Of the 98 respondents who were in business in 2008, 55 reported one or more negative impacts on staffing.

The negative impacts of the change in severance included:

- 23 reduced the number of staff employed
- 15 increased the number of short term/part time/casual staff, who don't get severance
- 16 changed wages or other conditions of work to make up for increased severance
- 6 started use processes to terminate staff for serious misconduct more
- 17 stopped taking on new staff
- 5 made other changes, including using independent contractors (2)

Of the people who responded that they made no changes to staffing due to the increase in severance, reasons for not making a change included:

- 12 did not know the law had changed
- 5 had already structured their employment so no staff are given severance
- 14 already provided the same or more severance than the law increase
- 12 had other reasons, including only employing family (2), and having no choice but to follow the law (3)

The impact of casualisation

This data suggests that a number of employers, as well as laying off workers, are giving workers less job security by using a more casualised workforce in order to manage severance allowance costs.

It should be remembered that casualised workers are likely to be amongst the lowest skilled and lowest paid workers. There are two reasons for this. First, there is a shortage of skilled labour, which restricts the pool of employees available to fill skilled positions. There is, however, an oversupply of low-skilled employees whose productivity is low, so competition for casual, part time or short term minimum wage jobs is likely to exist. This also makes it relatively easy to find a second employee to share a job that was previously only done by one person. Second, whilst employers can adjust for severance allowance by paying a lower direct wage each week, employers cannot adjust the direct wage below the minimum wage, so have to find other strategies to reduce indirect wage costs for this group of employees.

Whilst using casual workers or part time workers may increase the total number of jobs available as one full time job may be divided into two part time jobs in order for employers to avoid severance allowance benefits, this also pushes people into underemployment, where they work fewer hours for the same hourly wage but receive less weekly take home pay (due to less hours worked) and fewer benefits. Further, using short term contracts does not give the worker any security of job tenure, and makes it hard for workers to make long term plans based on an ongoing, reliable income. These things mean that

casual, short term and part time workers are less able to save, and therefore less able to provide their own financial cushion during unemployment.

This *is not* an argument for simply extending the existing severance allowance coverage. It should be remembered that if direct and indirect wages exceed the productivity of the worker then employment becomes unviable and job losses will occur, so simply extending the existing severance allowance regime to short term, casual and part time workers will not solve problems if the combined costs of direct and indirect wages exceed the productivity of low skilled workers. Instead it will lead to fewer job opportunities being available.

Changes to wages and conditions of work

The data indicates that providing severance allowances may result in employees' direct wage or other conditions being reduced. This might be seen as a problem, particularly as the statutory minimums for annual leave and maternity leave are very generous in comparison to other Pacific countries, so there is little flexibility in adjusting those conditions of work. This means that it is the direct wage that is most likely to be adjusted.

There are public policy reasons for "forcing" employees to save for times when they are not working though. 'Workers are often myopic. They fail to set aside funds for their retirement... and mandatory retirement provisions protect members of society from having to support others that have been improvident.'¹³ The same reasoning can be applied to workers who may fail to set aside funds for periods of unemployment. Severance allowance essentially asks employers to "save" for their employees' unemployment. But, as discussed below, this is often not happening in practice.

Security of severance allowance?

The 2014 survey asked employers what approaches they took to managing severance allowance payment. Responses were:

- 50 paid a lower basic/direct wage
- 34 paid out severance on an annual basis
- 9 kept staff on short term contracts¹⁴
- 13 kept separate savings accounts to cover severance allowance
- 1 had a private pension fund which can be deducted from severance
- 19 took other measures (including accounting measures (3), partial early payments on the employee's request (1) paying out periodically, with a period of more than 1 year (3))
- 59 did nothing

¹³ International Labour Organisation, *Social Security for All Men and Women A source book for extending social security coverage in Vanuatu: options and plans* (2006), 155.

¹⁴ A number of respondents did not answer this question. Based on the responses to changes following the 2008/2009 reforms it is likely that considerably more employers are using this approach.

Lack of savings to pay severance allowance

It is particularly concerning that more than one-third of the employers surveyed have no way of managing severance allowance payments and only 8% had dedicated savings for paying out severance. Staff layoffs often occur when a business is doing badly. This is the time when businesses are most poorly equipped to find the extra money to pay severance allowances. If a business becomes bankrupt and there is not money to pay then workers will not receive any severance allowance, regardless of whether or not they have a legal entitlement to it.

Periodic payments of severance allowance during employment

Whilst paying out severance allowance every year (effectively keeping workers on a series of 1 year contracts) gives a bonus, it means that when employment finally comes to an end and workers need the financial cushioning that severance allowance is meant to provide, then there is no severance allowance available. This defeats the purpose of having a severance allowance.

WILL WINDING BACK THE CLOCK TO EARLIER SEVERANCE ALLOWANCE LEVELS ADDRESS THE COSTS OF SEVERANCE ALLOWANCE?

Whilst the severance allowance issue has caused greater issues for the creation of job opportunities and job security since the 2008/2009 reforms a number of commentators had noted that, even prior to the 2008/2009 changes the severance allowance regime in Vanuatu makes the employment of workers more costly.¹⁵ McGavin, when analyzing the likely impact of labour laws in Vanuatu noted that:

legislative provisions of the Employment Act of 1983 for termination of employment, sick leave, annual leave etc reflect – or often exceed – employment conditions in industrial nations and seem inappropriate to the conditions of Vanuatu. Their impact is to inhibit job growth and/or increase non-compliance... [T]his regulatory environment seems unrelated to creating conditions for improved development and use of labour resources – and is thus counterproductive to enhancing the utilisation of labour resources.¹⁶

This is further supported by the comments of a Port Vila employer in 2003:

In the current climate, where half the population is under 15, employment generation would be a foremost objective [for] any government. Why then does it pass policies that would not encourage employment generation?

The labour on-costs to employers are high enough as it is. Here we have 15 public holidays, 21 days sick leave, and 12 days annual leave. Excluding maternity leave... this represents 48 days out of a total of 260 working days or 18.46%. On top of that, severance pay entitlements of 1 fortnights wage for each year of service is another 3.8%. Finally employers have to contribute 6% of employees salaries to the [National Provident Fund].¹⁷

In late 2003 a survey of 120 businesses in Port Vila was undertaken, which asked a series of questions about practices in respect of severance allowance and attitudes towards severance allowance.

Even in 2003 a number of respondents to the question “Do you pay staff severance allowance on termination?” reported that either the question was not applicable, or that they did not pay severance allowance to staff. This was particularly an issue for ni-Vanuatu employers, with 50% reporting that either they did not pay severance or that the question was not applicable.

Not paying severance allowance does not necessarily suggest non-compliance because:

1. A number of respondents had no employees.
2. A number of ni-Vanuatu employers commented that because they only employed family members they did not pay severance allowance but instead gave goods or other payments to

¹⁵ In addition to the sources below see Asian Development Bank, *Vanuatu Economic Performance, Policy and Reform Issues* (1997) at 75 – 77.

¹⁶ Paul McGavin, *Labour resource utilisation in Melanesia* (1997).

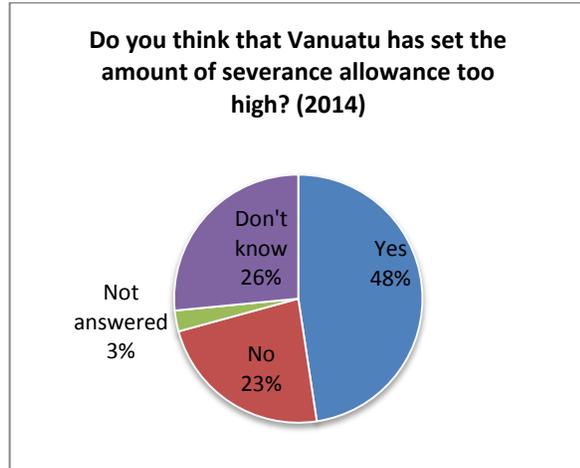
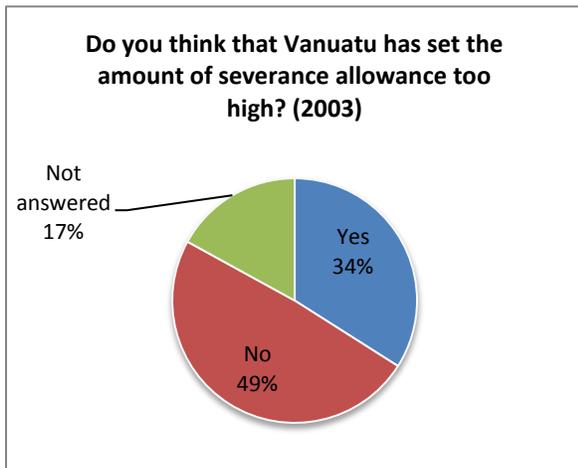
¹⁷ Anon, ‘National Provident Fund’ *Vanuatu Daily Post* 13 November 2003, 4.

help family members, which might be a more favourable benefit pursuant to section 6 of the Employment Act.

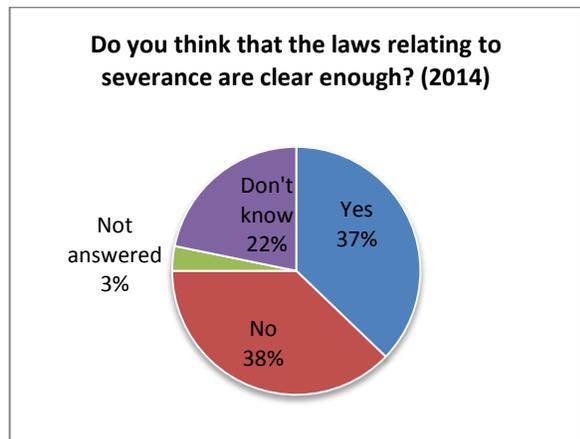
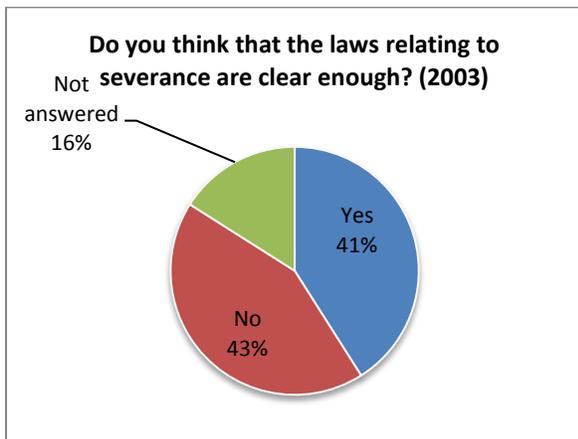
3. 7.5% of employers in 2003 said they used short term or casual workers in order to avoid severance payments.
4. 9% of employers in 2003 reported paying people out every year as a way of managing the severance allowance build up.

It does suggest that, even in 2003, with lower levels of severance allowance, a number of businesses were seeking other ways to manage this payment.

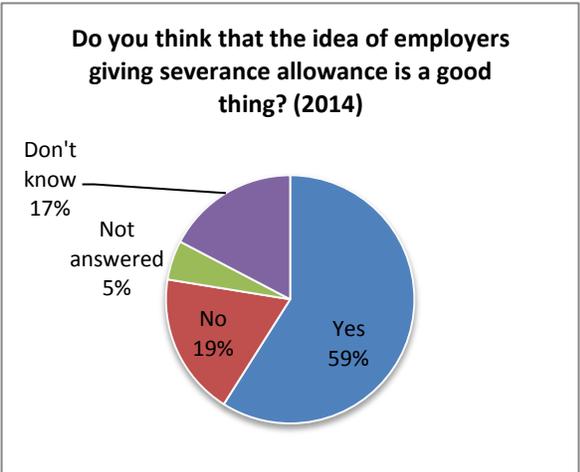
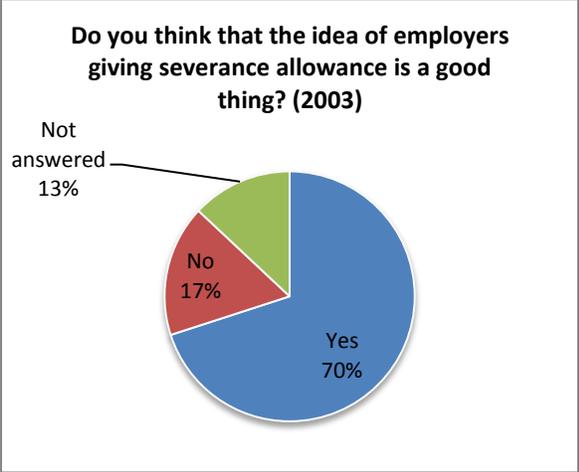
Attitudes towards severance also revealed many employers had concerns in 2003. As the charts below indicates there were some concerns about the amount of severance allowance even in 2003, with about half of responding thinking that severance was too high, or choosing not to answer the question. Unsurprisingly, considerably fewer people in 2014 thought that the amount of severance was set at the right level (22% in 2014 as compared to 49% in 2003).



Even in 2003 there were concerns about the clarity of the law, with only 41% agreeing that the laws were sufficiently clear.



That said, it is important to note that employers are *not* opposed to the concept of severance in some form. Between 2003 and 2014 there was very little change in the number of employers who answered no to a general question on whether the idea of employers giving severance allowance was a good thing.



HOW TO MOVE FORWARD?

In December 2014 the Vanuatu Tripartite Labour Advisory Council endorsed a consensus policy position on social protection. This recommendation in respect of unemployment was:

Explore the feasibility of moving to a higher VNPF contribution in replacement of severance allowance payments, with early withdrawal of some VNPF in the event of unemployment.

The rationale for this recommendation was:

Both workers and acknowledge that the current severance allowance approach is reducing growth in secure long term employment and often does not provide an “unemployment buffer”, particularly where the employer is insolvent so cannot pay and/or manages severance by keeping people on fixed term contracts and regularly paying out severance allowance.

Whilst moving to a savings-type approach addresses many of these issues whilst avoiding the risks and administrative burdens of moving to a pooled state funded unemployment benefit, concerns about the ability of the VNPF to be able to administer such a scheme need to be addressed.

Employers have used this recommendation and the current draft Employment Relations Bill (ERB) to develop an option that will address the negative impacts of the current approach to severance allowance, whilst at the same time increasing job opportunities and job security for workers in Vanuatu and security and coverage of unemployment benefits.

The ERB’s approach to termination

Currently Vanuatu’s law allows termination at will (for no reason) by giving notice. The termination regime proposed in the ERB is significantly different. It only allows employment to be terminated by the employer because of:

- expiry of the term of the contract,
- poor performance of or serious misconduct by the worker, or
- changes in business circumstances which mean that fewer workers are needed (redundancy).

This change, whilst it increases administrative burdens for employers and makes employment less flexible, does provide workers with more job security.

The 2014 employer survey indicated that employers are willing to give up some flexibility in termination of employment order to improve job security for workers, in return for also modernising the provisions in respect of severance allowance, with 62% agreeing to this.

On the basis of this data, and follow up consultations, employers accept Part VII, of the ERB, with the provisions on severance allowance removed, and drafting clarified. Two particular areas to clarify, in order to ensure that workers are fairly protected are:

- the definition of casual workers, in order to ensure that people under contracts for an indefinite duration are not “mislabelled” casual in order to avoid the termination regime; and
- situations in which successive ongoing fixed term contracts can be used, in order to ensure that fixed term contracts are not misused in order to avoid the termination regime.

The following is suggested as a way of clarifying the existing drafting in the ERB in order to address these two issues:

1. 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.

The ERB approach to payments on termination

Changes to payments on termination have been a major “sticking point” in developing the ERB and the current draft of the ERB contains two options to consider as part of ongoing negotiations: the existing severance allowance provisions and redundancy provisions. It is helpful to go back to the original draft of the ERB to clearly see the proposed changes to payments on termination under the new termination regime.

The original draft of the ERB gives workers a payment of 1 week's salary per year worked only when they are terminated due to redundancy in replacement of severance allowance. Redundancy payments are available to workers whether they work full time or part time, so the incentive to casualise the workforce in order to avoid payments is removed. The current draft of the ERB provides 4 weeks' salary for the first year worked and 2 weeks' salary for subsequent years worked as a redundancy payment. The maximum payment is capped at 6 months' salary.

In the Pacific region only Fiji and Solomon Islands provide redundancy payments in law. In Solomon Islands the amount of the redundancy payment is 2 weeks' salary per year worked. In Fiji the amount of the redundancy payment is 1 week's salary per year worked. Solomon Islands law was made in 1981, and Fiji's law was made in 2007. Compared to these benchmarks the redundancy payment proposed in the ERB is generous.

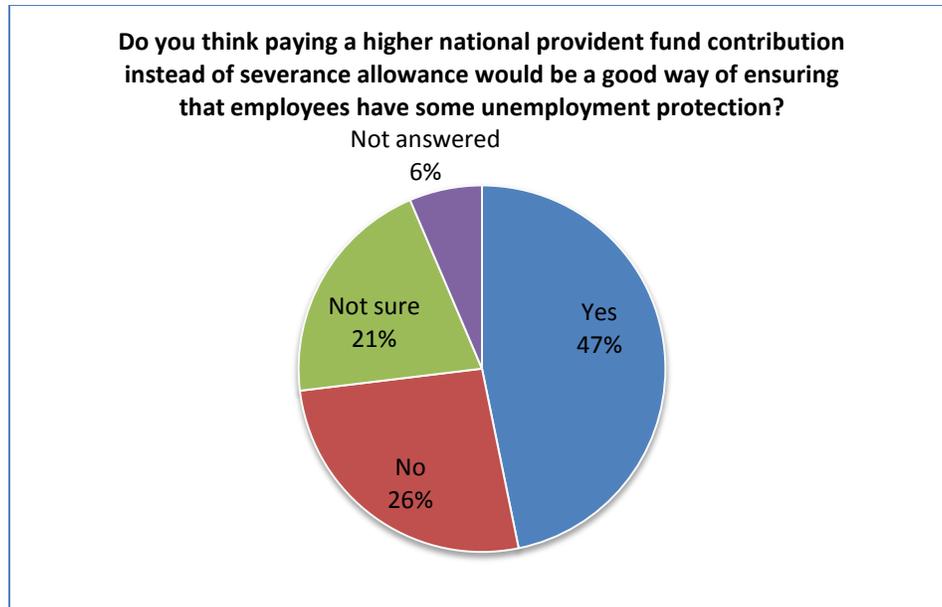
Redundancy can be difficult for businesses as the usual reason redundancies occur is because the business is struggling. There is a real risk that they will not have the money to pay a large termination payment at this time. Having a smaller redundancy payment helps to keep struggling businesses going, and means that the law does not effectively remove job opportunities by forcing businesses to close down.

In order to promote continued job opportunities employers propose that the redundancy payment should be 1 week's salary per year worked, capped at a maximum of 3 months' salary. This will ensure that employer's whose businesses are already precarious are not crippled by redundancy payments.

Is redundancy enough?

As discussed above, employers are not averse to paying severance allowance in some form, and can see that having access to money during periods of unemployment is a good thing. In light of the numerous problems associated with having to pay the current severance allowance the 2014 survey asked employers to consider whether a regular payment into VNPF, with the VNPF Act being amended to allow for early draw down of a portion of VNPF on termination of employment and unemployment, was preferable. As the table below indicates, this proposal met with support from about half of the employers who answered the question. Many of those that either did not like the proposal or were not sure had concerns about the stability in the management of VNPF, instead of concerns about the general approach, which gets employers to contribute monthly.

These concerns were also reflected in the social protection paper, with workers in particular being worried about the security of their money inside of VNPF.



If concerns about the management of VNPF can be addressed, and the VNPF Act can be amended to allow for early withdrawal of a portion of VNPF or no more than 4% in the event of unemployment, there are many benefits of this approach for both employers and workers, including:

- Employers are not faced with large severance bills at end of employment – instead they “pay as they go”, which reduces the incentive not to employ staff due to severance and increases job opportunities.
- The disincentive caused to foreign investors by being the only country in the Pacific with severance allowance is removed. As all Pacific countries have national provident funds a payment into the VNPF is not a comparative disadvantage. Increasing foreign investment in turn increases job opportunities.
- The risks of workers receiving no money at all if the employer becomes bankrupt are removed, increasing security of unemployment benefits.
- The split scheme (of redundancy + VNPF) is a benefit to workers as more workers, including casual workers, short term workers and part time workers, become eligible for access to an unemployment payment.
- The current incentive to casualise employment is removed, increasing job security for workers.
- If workers move straight from one job to another and do not need to access an unemployment benefit, their savings on retirement will be larger.

The amount that VNPF should increase by proposed by employers is 4%, to be shared equally by employers (2%) and workers (2%). 4% is approximately 2 week’s salary per year. Employers will also be liable for 1 week’s redundancy payment for each year worked. This amount, and the division, is proposed because:

- There needs to be a ‘give and take’ between employers and workers. Employers are giving more job security to workers, and are ensuring more workers have access to unemployment in return for a level of payments that is lower for some, but not all, workers, than currently, but is higher than what it was prior to 2009 on a total payroll basis.
- In countries where unemployment benefits are state funded (so the state provides unemployment insurance), employees indirectly contribute through paying income taxes,. To require employees to contribute to their own unemployment savings is conceptually no different from requiring employees’ to pay an income tax which covers a range of benefits, including state funded unemployment insurance.

What about existing severance allowance?

Workers currently expect to receive severance allowance, and their wage and benefits packages may have factored this into account. In fairness there needs to be transition provisions that protect those existing benefits.

Whilst Hansards do not record parliamentary debate about the passage of the Employment (Amendment) Bill 2009 they do record debate on the Employment (Amendment) Bill 2008. This debate suggests that the intention of Parliament was to have the increase in severance come into effect as of January 1 2009. The matter was raised during the First Reading. During the Committee stage The Hon. Ralph Regenvanu ‘insisted that a date commencing 1 January 2009 must be stated’.¹⁸ The Hon. Minister for Internal Affairs Patrick Crowby insisted that the provision remain as it was. The Hon. Minister of Finance Sela Molisa then agreed with Regenvanu ‘but explained that the change to the date could be done administratively by the Minister concerned’.¹⁹ There was no further debate, and the amendment was approved.²⁰ The Bill then entered the second reading stage and the Hansard records that the Bill was passed unanimously.²¹ Whilst the Court subsequently interpreted the legislation to be retroactive, it did not refer to parliamentary debates at all. A clear transition provision would enable the retroactivity issue to be addressed by Parliament.

On the basis of the original parliamentary intent, and the need to resolve the burden that retroactive severance places on employers, employers propose that a transition provision that crystallises the severance allowance for each worker that would have been entitled to severance allowance under the Employment Act had the employer terminated their employment on a date to be set by law. The amount should be calculated as:

- 2 weeks’ salary per year worked for all employment prior to 1 January 2009; and

¹⁸ Vanuatu Parliament Hansard, Second Ordinary Session of 2008.

¹⁹ Ibid, 15.

²⁰ It is not clear whether the approval was unanimous or on division, as paragraphs 68, 69 and 70 of the Hansard conflict, *ibid*.

²¹ Ibid. It can be noted that media reports indicated that at least 2 MPs abstained. (See, for example, Graham Crumb, ‘Just Desserts- Reprise’ (30 November 2008) <http://scriptorium.imagicity.com/2008/11/30/just-desserts-reprise/> (Accessed 10 June 2015).)

- 1 months' salary per year worked, with a pro rata payment for partial years worked for all employment from 1 January 2009 to the date set by law.

This means that some workers terminated between October 2009 and the date set by law receive a windfall, and some employers who terminated staff during this period are disadvantaged, as compared to those receiving or paying severance allowance under the proposed transition regime. It does, however, ensure that existing businesses that are currently struggling with the retroactive severance allowance are put into a position where it is easier for them to continue to operate and provide job opportunities. Of course, employers will be able to voluntarily pay a higher amount as well.

In order to ensure clarity and certainty workers become entitled to this crystalised amount regardless of the subsequent circumstances of termination.

In order to help employers to manage severance allowances, provision for paying severance in installments, and beginning to pay severance whilst the worker is still employed should be included. The existing deductions from severance allowance permitted by section 57 must also be continued in order to respect the savings measures that some employers have already put into place.

A suggested draft of transition provisions is:

1. 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 January 2009, 2 weeks' wages per year worked

(b) For continuous employment from 1 January 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 1(1) 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 57 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.

(8) For the purposes of section 1(7) gratuity payments shall include all gratuities paid during the course of employment.

CONCLUSION

This paper has shown the cost of the current severance allowance regime on the creation of secure job opportunities for ni-Vanuatu workers.

If Vanuatu chooses not to reform its severance allowance then foreign investors can, and will, choose to leave Vanuatu, to the detriment of workers looking for jobs. It is also important to remember that the private sector in Vanuatu is not only made up of foreign owned businesses. Instead, the vast majority of businesses are owned and operated by ni-Vanuatu, and do not use formal employees. For Vanuatu to truly achieve private sector led development and employment growth laws must enable local ni-Vanuatu owned and operated businesses to grow and move into the formal sector. Severance allowance currently creates a major barrier to the formalisation of employment by ni-Vanuatu employers.

The employers' position on the ERB, presented to the Tripartate Labour Advisory Council in December 2014 began by stating that agree with the intent of the ERB, as stated in 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.

The employers' proposal in respect of severance allowance will promote the well-being and prosperity of all people in the Republic of Vanuatu. It will address the negative impacts of the current approach to severance allowance, whilst at the same time increasing job opportunities and job security for workers in Vanuatu and security and coverage of unemployment benefits. It is also straightforward to implement.

The employers' proposal also respects previous tripartite discussions in respect of social security and unemployment benefits and other work done to modernize Vanuatu's employment laws.

The employers' proposal also recognizes that in the medium to long term it may be better for Vanuatu to move to unemployment insurance paid from a pooled contributory fund. Such a scheme was first proposed in the 2006 ILO publication on *Social Security for All Workers*. Designing such a system may be complex and difficult, particularly in the absence of accurate labour market statistics. However, the feasibility and costs and benefits of such a scheme, should continue to be explored as part of the ongoing process of continuing to improve Vanuatu's employment laws and creating a fair and optimum working environment that is fair to both workers and employers.