

BETWEEN: EDDIE SILAS
Appellant

AND: PUBLIC SERVICE COMMISSION
Respondent

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Stephen Harrop

Counsel: Edmond Toka for the Appellant
Florence Williams for the Respondent

Date of Hearing: Tuesday 26 March, 2014

Date of Judgment: Friday 4 April, 2014

JUDGMENT

Introduction

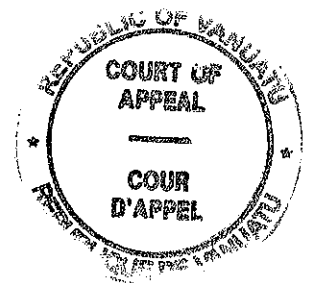
1. In February 2004 Mr Silas was appointed as the temporary Director of National Tourism and Development by the Prime Minister pursuant to Article 57 (4) of the Constitution. On 27 January 2005 Mr Silas' employment was terminated by the Prime Minister effective from 27 February 2005.
2. Mr Silas sued the Public Service Commission in the Supreme Court alleging he had been wrongly dismissed. Various damages were claimed. By the hearing in the Supreme Court the damages claim had been reduced to approximately Vt 14 million.



3. At trial the Judge concluded the Prime Minister's termination was lawful. The Judge said however that Mr Silas was entitled to a severance allowance (pursuant to s. 54 of the Employment Act) of Vt 49,993. There is no cross appeal relating to that award.
4. Mr Silas seeks to extend the time for the filing of his appeal. He says he instructed his former lawyer to appeal and believed he had done so. Judgment was entered on 4 October 2012 in the Supreme Court. The application for leave to appeal was filed on 17 March 2014, seventeen months after judgment and approximately 16 months out of time.
5. Two issues of considerable importance are raised in this appeal. Firstly the use of the Interpretation Act as an aid in interpreting the Constitution. Secondly the status of those persons appointed by the Prime Minister pursuant to Article 57 (4). Are they public servants with the resulting rights and protections given by law? (eg. The Public Service Act).
6. Given the importance of these issues we give the appellant leave to bring this appeal out of time.

Appellant's and Respondent's case

7. The appellant's case is that:-
 - (a) His employment was not lawfully terminated by the Prime Minister.
 - (b) The Prime Minister could only dismiss political advisors (see Article 58 Constitution).
 - (c) The appellant was appointed as a public servant and had security of tenure by Article 57 (5) of the Constitution.
 - (d) The Judge wrongly used s. 21 of the Interpretation Act to interpret Article 57 (4) of the Constitution.
 - (e) The Judge erred in concluding that s. 15 of the Employment Act limited his appointment to no more than 3 years.
 - (f) The Judge erred in concluding there was no probationary period relating to the appellant's appointment.



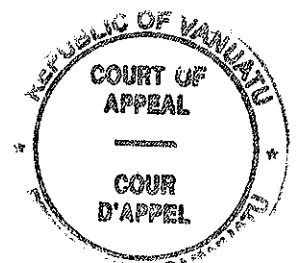
- (g) The Judge erred in refusing to order increased severance under s. 56(4) Employment Act.
8. The respondent supported ground (d) of the appeal but otherwise submitted the Supreme Court's decision was correct.

Background Facts

9. On 10 February 2004 Mr Silas was by letter from the Prime Minister appointed, temporarily, to the position of Director of National Tourism and Development.
10. The appointment was said to be in the exercise of Article 57 (4) powers.
11. The letter said:-
“such an appointment is intended to last until further notice and maybe terminated at anytime by either party giving one month notice to the other of his intentions to do so.”
12. The letter outlines Mr Silas' responsibilities and provided for his terms and conditions of employment. It told him he would be paid at a particular salary scale of the *“Public Service Salary Scales”* and that he would be *“subject to the rules and regulations applicable to the Public Service”* with exceptions.
13. Mr Silas began his employment. In the meantime the permanent position of Director was advertised, applicants (including Mr Silas) interviewed and eventually an appointment made (not Mr Silas).
14. On 27 January 2005 the Prime Minister gave notice of termination to Mr Silas. The original notice had a termination date of 7 February but this was later amended to 27 February to reflect the required one month notice.

The Appellant's case in the Supreme Court.

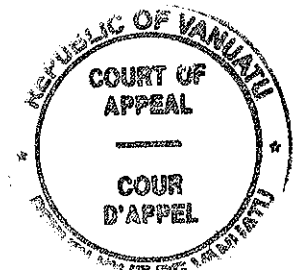
15. In the Supreme Court the key to Mr Silas' case was that by virtue of s. 30 of the Public Service Act he had become a public servant. He therefore had security of tenure and the other benefits that come with such an appointment.



16. Based on the Public Service Act and Employment Act the appellant claimed :
- a) Because he had been employed for more than 6 months he was a permanent employee of the public service (s. 25 Public Service Act)
 - b) Given he was entitled to be paid the salary of his position from the date of his dismissal until he was required by law to retire.
 - c) His employment was wrongly terminated because the dismissal was not pursuant to s. 19 of the Public Service Act.
 - d) The Prime Minister could hire but not terminate employment pursuant to Article 57(4) of the Constitution.

The Supreme Court Judgment

17. In The Supreme Court Judgment, the Judge concluded that with the aid of s. 21 of the Interpretation Act, Article 57(4) could be interpreted as empowering the Prime Minister to terminate an appointment made under Article 57(4).
18. The Judge noted that s. 21 of the Interpretation Act provided that where an Act of Parliament confers power on any authority to make an appointment it carries an equivalent power to remove. This with the assistance of s. 21 the Judge concluded the Article 57(4) power of recruitment included a power of termination. He therefore rejected the plank on which the appellant's case had been built – that the Prime Minister had no power to terminate his employment.
19. The Judge however concluded that s. 54 of the Employment Act applied to Mr Silas and that, having worked for more than 12 months, he was entitled to a severance payment of VT49,993.



Use of Interpretation Act in Interpreting the Constitution.

20. As we have noted the Judge in the Supreme Court used s. 21 of the Interpretation Act to assist in interpreting Article 57(4). This was the wrong approach to interpreting the Constitution. The Constitution is the Supreme Law of Vanuatu, above all other laws. It must be interpreted in its own right. The starting point is obviously the Constitution and the ending point of the interpretation exercise of a provision of the Constitution is also the Constitution itself. The use of an ordinary statute to interpret the Constitution undermines the Constitution as Supreme Law. Ordinary statutes cannot be used as interpretative aids when interpreting the provisions of the Constitution. This is consistent with the decisions of this Court in *Tari v Natapei* [2001] VUCA 18; *In re the Constitution, Kalpokas v Hakwa* [2002] VUCA 12 and *Hakwa v Masikevanua* [2002] VUSC 92 and others.

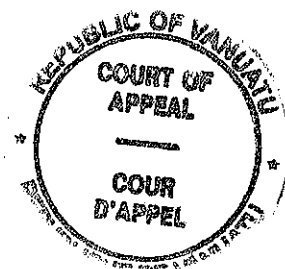
Article 57(4)

21. The Constitution of the Republic of Vanuatu is, by Article 2, Supreme Law. Chapter 9 (which incorporates Article 57) is concerned with, at Part 1, the Public Service. Articles 57 to 60 identify the obligations and broadly the terms and conditions of employment of Public Servants.
22. Article 57(4) provides:-
“The Prime Minister or the Chairman of a Local Government Council may, exceptionally, make provision for the recruitment of staff for a specified period to meet unforeseen needs.”
23. In urgent cases the decision may be made by the Public Service Commission.
24. The use of the word “*exceptionally*” in Article 57(4) illustrates that such a recruitment is to be an exception to the rules of recruitment provided for in Part 1. This logically follows. The appointment under Article 57(4) is a temporary one for unforeseen needs. Part 1 is concerned with long term employment with the public service with security of tenure (Article 57(5), (8)), by citizens of Vanuatu (Article 57(2) who owe their allegiance to the Constitution (s. 57(11)). The use of the word *exceptionally* illustrates that the appointment under Article 57(4) will not be subject



to the other constraints of Part 1. It will stand aside from ordinary public service appointments provided for in Chapter 9 Part 1.

25. Consistent with this view of the Article 57(4) power is that the Prime Minister can hire temporary staff and terminate their employment. The power to terminate (effectively to end the temporary employment) is an appropriate corollary of the Prime Minister's power to hire temporary staff. Article 57(4) is concerned with hiring staff for a "*specified period*". The Prime Minister is to decide when the specified period of employment will end and so will have the power to terminate the temporary employment.
26. Counsel for the appellant submitted that in the terms of employment under Article 57(4) the Prime Minister was obliged to particularise the start and end dates of the employment. This, the appellant submitted would give meaning to "*specified period*" in Article 57(4). No such specified period had been nominated here.
27. We disagree. In the letter of appointment the Prime Minister specified that Mr Silas' appointment would end when either party gave one month notice. This was a "*specified period.*" Further the nature of appointments pursuant to Article 57(4) for unforeseen needs will typically mean that on appointment a termination date will not be known. The facts in this case illustrate the point. It could not be precisely known when a new permanent head of the Department would be appointed.
28. We are satisfied therefore that a Prime Ministerial appointment pursuant to Article 57(4) is an appointment outside the Public Service and that Article 57(4) gives the Prime Minister the power to hire and terminate.
29. Finally this interpretation of Article 57(4) and the surrounding provisions is consistent with the broader constitutional position of the Public Service. The Public Service Commission is free from any political interest when it appoints public servants. This ensures an apolitical public service free to give Ministers of the Republic independent advice. Article 57(4) allows for a Prime Ministerial temporary

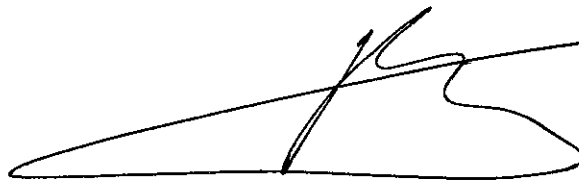


appointment when unforeseen circumstances arise. The appointee is not part of the Public Service given the appointing authority is the Prime Minister.

30. We therefore agree with the decision in the Supreme Court. The appeal is dismissed. The appellant must pay the respondent's costs on a standard basis.
31. For the reasons given the appeal is dismissed.

Dated at Port Vila this 4th day of April, 2014

BY THE COURT



Chief Justice Vincent Lunabek

