

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

Civil Case No. 188 of 2006

BETWEEN: EDDIE SILAS

Claimant

AND: PUBLIC SERVICE COMMISSION

Defendant

Coram: Justice D. V. Fatiaki

Counsel: Mr. S. Stephen for the Claimant
Ms. F. Williams for the Defendant

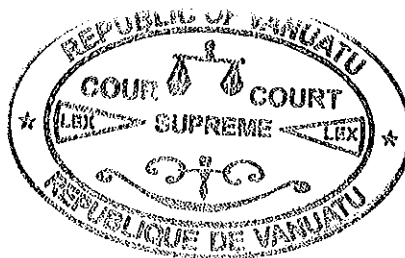
Date of Judgment: 4 October 2012

JUDGMENT

1. This case has its origins in a letter dated **22 January 2004** from the then Minister of Trade, Commerce, Industry and Tourism to the then Prime Minister advising him of the "*utmost importance*" of finalizing the position of Director of National Tourism and Development and recommending the appointment of the claimant in an acting capacity "... *with immediate effect*". The letter was also copied to the chairman of the Public Service Commission.
2. On **10 February 2004** the claimant was appointed by the Prime Minister (**PM**) on a temporary basis to the Public Service position of Director of National Tourism and Development pursuant to **Article 57 (4)** of the **Constitution** which reads:

"The Prime Minister ... may exceptionally make provision for the recruitment of staff for a specified period to meet unforeseen needs.

In urgent cases, the Public Service Commission may after consulting, make such a decision instead of the Prime Minister".
3. The intention of the Article is clear and that is, to ensure that important positions within the Public Service are not left vacant for any considerable length of time and "*to meet unforeseen (manpower) needs*". Furthermore the PM's power to recruit under the Article is meant to be "*exceptionally*" exercised and "... *for a specified period*".
4. It may also be noted that the decision to employ the claimant could have been made by the Public Service Commission (**PSC**) in an "*urgent-case*" and would, of



necessity, have brought the provisions of **Section 30** of the **Public Service Act** into play.

5. The claimant's appointment letter in its relevant parts reads:

"Dear Mr. Silas,

LETTER OF TEMPORARY APPOINTMENT AS DIRECTOR OF NATIONAL TOURISM AND DEVELOPMENT

In exercise of the powers conferred on me by Article 57.4 of the Constitution of the Republic of Vanuatu, I am pleased to approve your appointment on Temporary terms and conditions as Director of National Tourism Development Office in Ministry of Commerce, Industry and Tourism, with effect from the date hereof.

Such an appointment is intended to last until further notice and may be terminated at any time by either giving one month notice to the other of his intention to do so.

You will be responsible to the Director General of the Ministry of Commerce Industry and Tourism be responsible over staff of the National Tourism Development Office.

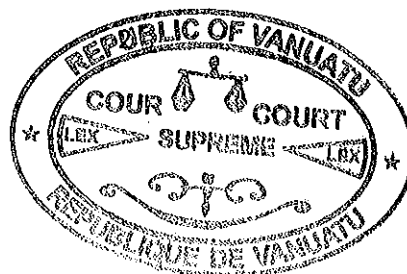
You will be paid at the salary scale P19.1 of the Public Service Salary Scales and would be on annual salary of VT359,984 plus a supplement of VT51,000 per annum to cover the cost of living allowance (COLA).

You are subject to the rules and regulations applicable to the Public Service, with the exemptions in the Staff Manual (Extended Sick Leave, Special Leave etc ...). In addition, temporary officers are not entitled to receive free medical treatment, family and housing allowance or to become a member of any future pension scheme

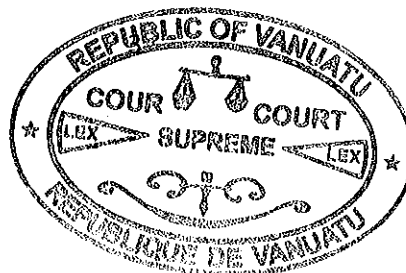
Any question of interpretation should be referred to the Prime Minister's Office for Decision.

May I take this opportunity to wish you all the best in this new appointment'.

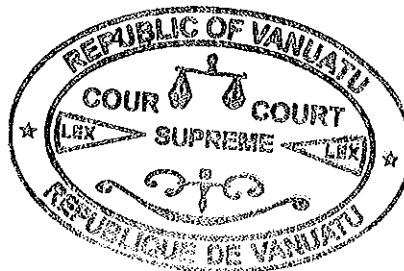
6. Although the appointment appears to be for an indeterminate period **Section 15** of the **Employment Act** limits its maximum duration to 3 years.
7. On **27 March 2004** newspaper advertisements were placed calling for applications for the position of the Director of the National Tourism Development office. The claimant, who was then acting in the position, registered his interest in an application dated **5 April 2004**. By letter dated **24 June 2004** the claimant was invited to attend an interview at the Public Service Commission conference room.



8. It is not entirely clear why, but by letter dated **18 October 2004** (i.e. 4 months after the interviews were conducted for the substantive post) the **PSC** advised the then **PM** that it had appointed a **Mr. Nikki Robert Avio** to act for 6 months as Director of National Tourism Development Officer "... following the cessation of Mr. Eddie Silas' temporary appointment". The **PSC** also requested the **PM** "... to terminate the appointment of Mr. Silas by providing him with one month's notice or under the circumstances a month's salary in lieu of notice".
9. By letter dated **25 January 2005** the then Prime Minister terminated the claimant's appointment as Director of National Tourism and Development "... effective of close of business, Monday 7 February 2005". On its face the termination letter was in breach of the claimant's appointment letter which required the "... giving of one months notice ..." of termination.
10. On realizing the error, by letter dated **1 February 2005** the claimant's effective termination date was extended to "*Sunday 27 February 2005*".
11. Much was made of this "error", but, I am satisfied that it was a genuine typographical mistake which was corrected within time and, in any event, it is common ground that not only was the claimant paid his salary until 27 February 2005, he also continued to work and occupied his office until then. Nothing turns on this error which may be put to one side.
12. On **12 October 2006** the claimant issued a Supreme Court proceedings claiming damages for unjustified dismissal. The bare claim merely averred the fact of the claimant's appointment and his termination and nothing else. Subsequently the claim was amended on 26 January 2006 and on 27 October 2008.
13. This latter further amended claim pleaded inter alia:
 - (a) Contravention of **Sections 16, 17, 19A and 19B** of the **Public Service Act** and **Sections 49 and 50** of the **Employment Act**;
 - (b) Termination without proper notice under the **Employment Act**; and
 - (c) Failure to properly consider and decide on the claimant's formal application for the position when it was advertised in the news media.
14. I can deal briefly with (c) which is based on the fact that the claimant's application for the substantive post of Director of National Tourism and Development was unsuccessful. In particular the claimant avers that "... he has never received any formal letter from the defendant giving reasons for not being finally chosen for the post."



15. There is nothing in the **Public Service Act** which requires the Public Service Commission to either acknowledge any application for a post in the Public Service or to give reasons for its decision for not appointing any particular applicant to the position of Director (see: **Section 18** of the Act).
16. In my view there can be no legitimate expectation to be appointed to a position in the Public Service whether or not the applicant has been performing the same role prior to his application.
17. Even if there was any substance in this aspect of the claim, the appropriate procedure to challenge the decision of a public body such as the Public Service Commission is by way of judicial review and not by way of an ordinary civil claim taken almost a year after the challenged decision was made and without including the incumbent Director as a party to the proceedings.
18. As to **(a)** and **(b)** above the relevant sections of the **Public Service Act** [CAP. 246]. **Section 16** was repealed on 31 August 2000 and **Section 17** is entitled: Application to Public Service. **Sections 19A** and **19B** refer to the **PSC**'s power of appointment and removal of Director Generals and Directors in the Public Service and, although not pleaded, **Section 18** states that the appointment or promotion of a director-general or director "... *must be made by the Commission*".
19. In similar vein **Sections 49** and **50** of the **Employment Act** are entitled: Notice of Termination of Contract and Misconduct of Employee respectively. In this regard a notice of termination was given to the claimant and there is no suggestion of misconduct on the claimant's part. In simple terms, the claimant was terminated in accordance with his letter of appointment.
20. It is difficult to understand how any of the above provisions has any relevance to the claim but I shall deal with it on the basis that the parties accept that it raises three (3) issues for determination (see: para 2 of claimant's counsel's reply to the defendant's response to claimant's supplementary legal submissions dated 14 November 2011), namely:
- (1) Termination without notice;
 - (2) Termination by someone (the Prime Minister) other than the defendant (The Public Service Commission); and
 - (3) Employment in excess of 6 months in breach of the Public Service Act;
21. I have already dealt with issue **(1)** above and therefore dismiss it as wholly unmeritorious. Issue **(2)** is also without merit and is completely answered by the provisions of **Section 21** of the **Interpretation Act** [CAP. 132] which provides:



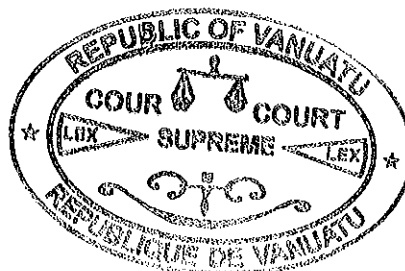
"Where an Act of Parliament confers power on any authority to make any appointment that authority shall also have power (subject to any limitations or qualifications which affect the power of appointment) to remove, suspend, reappoint or reinstate any person appointed in the exercise of the power".

(my underlining)

22. I accept that the claimant's appointment letter makes reference to the claimant being "... *subject to the rules and regulations applicable to the Public Service ...*" but that does **not** negate the applicability of the provisions of **Section 21** of the **Interpretation Act** nor does it transform the claimant's appointment into one made by the **Public Service Commission (PSC)** under **Section 30** of the **Public Service Act**.
23. In my view the reference to Public Service "*rules and regulations*" is a convenient "*short-form*" without having to set out all the applicable terms and conditions of employment of a temporary salaried employee within the Public Service. In this regard, **Section 30 (2A)** of the **Public Service Act** emphasizes that "... a *temporary salaried employee is not a person employed in the Public Service on a permanent basis*". Furthermore, given that the claimant was appointed by the Prime Minister under **Article 57 (4)** of the **Constitution** and **not** by the **Public Service Commission** as he could have been, I do **not** accept that the claimant's appointment has a probationary element in it, or is limited to a term of 6 months in accordance with **Section 30 (2)** of the Act.
24. Accordingly, I determine the above issues **(1)**, **(2)** and **(3)** in the defendant's favour. This disposes of the claimant's original claim.
25. Somewhat belatedly during the course of the trial the claimant was granted leave to amend his claim to include a new cause of action claiming underpayment of salary but confined to a period of three (3) years back-dated from the date of the institution of proceedings in accordance with the statutory limitation under **Section 20** of the **Employment Act**.
26. As the Court of Appeal relevantly observed in **Tabouti v. Health Department [2010] VUCA 7** in allowing a claim for the underpayment of salary in that case:

"We are satisfied that although the purported annulment of the appellants' permanent appointment was unlawfully effected without proper notice and in breach of the Public Service Staff Manual, nevertheless, by section 20 of the Employment Act [CAP. 160] any claim for the unpaid difference in salary between the appellant's daily-rated wage and his entitlement as a permanent employee is necessarily limited to the 3 years preceding the 19 June 2007 when recovery proceedings were first instituted by the appellant."

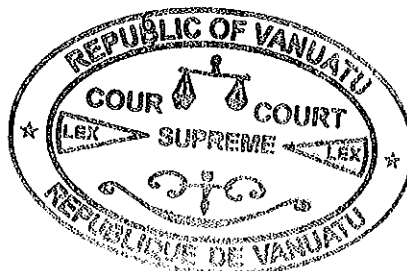
(my underlining)



27. In support of his claim for underpayment of salary the defendant produced two (2) sworn statements dated 12 April 2010 and 11 June 2010, respectively [Exhibits C (1) and C (2)]. The claimant was also cross examined on his evidence. He was adamant that he never received the PM's letter correcting his termination date until 12 May 2009 (ie. 3 years after he had instituted proceedings). He accepted however that he continued to work and was paid his salary up till his last day in office which was **27 February 2005**.
28. The defendant also produced in evidence a calculation sheet purportedly prepared by some unidentified officer of the PSC in relation to a "Former Director Eddy Silas T" of the National Tourism Development Office, which showed a salary scale of "P20.1", with a monthly salary of "VT56,367" and an annual salary of "VT1,465,542".
29. I do not accept that the "calculation sheet" has any relevance or application to the claimant's terms and conditions of appointment which are clearly set out in his appointment letter viz salary scale "P19.1 ... annual salary of VT359,984 (sic) plus a supplement of VT51,000 per annum" to cover costs.
30. The defendant's extrapolations within the said "calculation sheet" and in his claim is for "11 years" being from the time he claims his appointment became "permanent" (after the expiration of a 6 month probationary period) until his retirement date of 1 August 2011.
31. Such a claim blithely ignores the expressly temporary nature of the defendant's appointment and, more importantly, the legal effect of the notice of termination which brought the defendant's employment contract to an irreversible end on 27 February 2005.
32. In **Robertson v. Luganville Municipal Council** [2001] VUCA 14 the Court of Appeal in rejecting a submission that a "permanent" engagement in an employment contract was intended to be ongoing, subject only to termination on reasonable notice, said:

"In our opinion having regarded to the context in which the letter of 26 October 1999 was written 'permanent status' described the status of an employee whose employment is continued after the successful completion of a period of probationary service. In this sense the Town Clerk's letter confirmed that the appellant had become a 'permanent' employee. However it does not follow that the appellant's employment thereafter was to continue for ever. Such an interpretation would be contrary to common sense and to clause 9.4 of the Staff Regulations which allows for termination of an officer on giving notice."

(my underlining)



33. *A fortiori*, where a notice of termination in accordance with the appointment letter has actually been served on the officer concerned as occurred in the present case.
34. In **Robertson**'s case (*ibid*) the Court of Appeal also rejected "a common misunderstanding about contracts of employment" when it said:

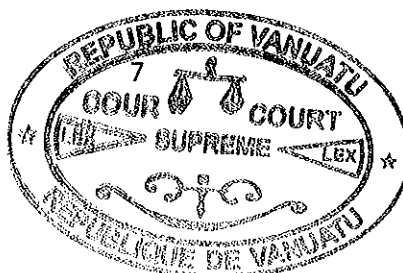
*"Although with other contracts the general rule is that a purported termination that is ineffective in law does not bring the contract to an end, and that rights may continue to accrue under the contract until it is lawfully terminated, that rule is modified in contracts of employment. Contracts of employment are subject to an exceptional principle, sometimes referred to as 'no work, no pay'. The most comprehensive statement of this principle is that of Dixon J in *Automatic Fire Sprinklers v. Watson* [1946] HCA 25; [1946] 72 CLR 435 at 465 who said that a contract of employment:*

'is commonly understood as involving no liability for wages or salary unless earned by service, even though the failure to serve is a consequence of the master's wrongful act. It is, of course, possible for the parties to make a contract for the payment of periodical sums by the master to the servant independently of his service ... But, to say the least, it is not usual. The common understanding of a contract of employment at wages or salary periodically payable is that it is the service that earns the remuneration and even a wrongful discharge from the service means that wages or salary cannot be earned however ready and willing the employee may be to serve and however much he stand by his contract and decline to treat it as discharged by breach.'

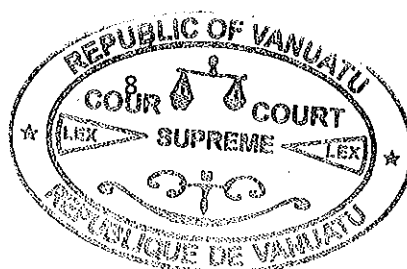
An employee who is wrongfully dismissed cannot recover wages after the date of his dismissal. The employee may have other remedies based on breach of contract, but in the present case the appellant's employment was terminated lawfully (so) that question does not arise".

(my underlining)

35. Likewise in the present case, the claimant's termination by the Prime Minister was lawful with effect from 27 February 2005 and, therefore, there can be no claim for wages thereafter and extending until the claimant's retirement age. In this regard it may be noted that the "Additional Damages" subheading in **paragraph 8** and all items listed below that heading in the further amended claim which comprised the "extrapolations" referred to in **para 29** above, were all struck out at a conference on **1 April 2009** with the agreement of counsel for the claimant.
36. In its defence the **PSC** produced the sworn statements of **Kanam Wilson Naploui, Jack Loughman and Leon Rantes** [Exhibits D (1), (2) & (3) respectively].




37. They deposed to the circumstances of the claimant's appointment and termination and, more particularly, to the payment of his salary up to 27 February 2005. I am satisfied that the sworn statements and annexures provides a complete answer to the claim both in its original form and to the added claim for underpayment of wages. However **Kanam Wilson Naploui** also deposed that, as a temporary salaried employee, the claimant was not entitled to any severance in accordance with the Public Service Staff Manual which applied to his appointment. I cannot agree.
38. The entitlement to severance allowance is governed by the **Employment Act** and, subject to the employer agreeing to more favourable conditions for an employee (see: **Section 6**), the Act applies generally to "*public servants and to the Government ... in Vanuatu*" (see: **Section 76**). In short the provisions of the **Employment Act** cannot be waived or ignored.
39. In this latter regard **Section 54** of the **Employment Act** provides:
- "(1) Subject to Section 55, where an employee has been in the continuous employment of an employer for a period of not less than 12 months commencing before, on or after the date of the commencement of this Act, and –*
- (a) The employer terminates his employment;*
- ...
The employer shall pay severance allowance to the employee under Section 56 of this Act."*
40. The relevant undisputed facts of this case are that the claimant was appointed on **10 February 2004** and ceased employment on **27 February 2005** after he had continuously employed "*for a period of not less than 12 months*". Furthermore, it is not suggested that the claimant was terminated "*for serious misconduct*" or was "*recruited outside Vanuatu and is not ordinarily resident Vanuatu*" (see: **Section 55**).
41. In the circumstances, the claimant was entitled to severance allowance calculated at the rate of "*(i) 15 days remuneration, where the employee is remunerated at intervals of less than 1 month*" for every period of 12 months, being a sum of **VT49,993**.
42. Although there is a claim for an increased severance under **Section 56 (4)** of the **Employment Act**, given the court's earlier finding that the claimant's termination was "*lawful*", there is no legal or factual basis for awarding such a claim which is accordingly dismissed.



43. In conclusion, judgment is entered for the claimant in the sum of **VT49,993** together with interest calculated at the rate of **5% per annum** from **27 February 2005** in accordance with **Section 56 (5) and (6)** of the **Employment Act**.
44. The claimant is also awarded costs summarily assessed at **VT50,000**.

DATED at Port Vila, this 4th day of October, 2012.

BY THE COURT


D. V. FATIAKI
Judge.

