

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

Civil Case No. 14/279 SC/CIVL

**BETWEEN: ETIENNE KOMBE**  
Claimant

**AND: ELECTORAL COMMISSION**  
First Defendant

**AND: REPUBLIC OF VANUATU**  
Second Defendant

Hearing: 1<sup>st</sup> April 2016  
Before: Justice Chetwynd  
Counsel: Mr. lauma for the Claimant  
Mr. Kalsakau for the Defendants

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**Judgment**

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1. Mr Kombe was on 27<sup>th</sup> November 2012 appointed by the then Prime Minister as Acting Principal Electoral Officer. The appointment was for a period of 1 year. During his appointment there appears to have been a change of Governments and the "new" Prime Minister revoked the original appointment. That was on 4<sup>th</sup> May 2013. That Prime Minister appointed Mr Kombe as the Director of the Government Remuneration Tribunal. He did so on 4<sup>th</sup> May 2013 and the appointment was to 27<sup>th</sup> November 2013.

2. On 16<sup>th</sup> May 2013 Mr Kombe's appointment as Director of the Government Remuneration Tribunal was revoked. His Acting appointment as Principal Electoral Officer was revived on the same date. On 31<sup>st</sup> May 2013 the Acting appointment was once again revoked. No other appointments were made. He ceased attending work from 31<sup>st</sup> May.

3. Mr Kombe filed a claim in September 2014 in which he says he was unlawfully terminated. He claims damages. At first glance and because the basic facts were agreed, this appears to be a case about quantum rather than liability. However, there appears to be no dispute that Mr Kombe, despite the revocation of his temporary appointment on 31<sup>st</sup> May, continued to receive his full salary until July. He was later paid the remainder of his salary to November 2013. Given that his appointment was only for one year the question is, has he been paid all he is entitled to? The question is therefore initially one about liability. If the answer to the question is yes, the Claimant *has* been paid all he is entitled to then there is no need to consider quantum. If the answer is no then the issue becomes one of quantum.



4. As to the answer to the initial question, it is to be found in the Court of Appeal case *Silas v. Public Service Commission* [2014] VUCA 9; CAC 080/2014 (4 April 2014). There is no issue between the parties in this case that the Claimants' appointment was made by the Prime Minister pursuant to Article 57(4) of the Constitution. The consequence of that finding was set out by the Court in *Silas*. It said:-

*"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.*

*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."*

The Court went on to say:-

*"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."*

The Court's conclusion was:-

*"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."*

5. The Claimant was temporarily employed by the Prime Minister from 27<sup>th</sup> November 2012 for one year. That was the total extent of his employment. There is no suggestion that his employment was extended beyond 27<sup>th</sup> November 2013. His entitlement, by way of remuneration was 12 months salary. The evidence confirms that Mr Kombe was paid until July 2013 and later was given an LPO for VT820,975. The attachments to the sworn statement of Mr Martin Tete filed on 2<sup>nd</sup> February 2016 (in particular annexures MT7 to MT9) show how the figure of VT820,975 was calculated. I accept those calculations are correct and show that Mr Kombe, the Claimant, received 12 months salary from the Government.

6. The Claimant submits that somehow, and because the only reason the Defendant paid the VT820,795 was because his lawyers wrote to them, he is entitled



to further sums. There is no doubt there was some delay in paying the VT820,795. The Claimant should have been paid on 27<sup>th</sup> November 2013 but was not paid until 20<sup>th</sup> August 2014. The Claimant is therefore entitled to interest on the amount of unpaid salary for that period.

7. Mr Kombe also claims he is entitled to his annual leave. I do not believe there is any dispute that is so even though *Silas* makes clear the Claimant's employment was outside the scope of the usual public service terms, or as the Court in *Silas* put it, "*It will stand aside from ordinary public service appointments provided for in Chapter 9 Part 1.*" The Claimant's argument is he is entitled to so many days paid leave which days would be **additional** to his term of employment. That cannot be correct. His entitlement may be to paid leave but that does not create extra days to be tacked on to his contractual period of employment. During the term of his employment he was entitled to days off for which would be paid. He was not entitled to "extra" days holiday which would be tacked on to his term of employment. In this case the Claimant was paid for a full years employment although he did not attend work for the full year. He ceased actual work in May 2013 but was paid up to 27<sup>th</sup> November 2013. The Claimant is not entitled to further payments in respect of his annual leave. He has in actual fact had far more paid leave than he was entitled to but that situation has arisen through the "fault" of the Defendants and he is under no obligation to repay anything.

8. The Claimant also claims severance pay. According to Section 54 of the Employment Act [Cap 160] severance pay is due to an employee if he has been in continuous employment for not less than 12 months. The order Gazetted as No. 166 of 2012, appoints the Claimant as, initially, Acting Principal Electoral Officer for a period of 1 year. The Claimant is deemed to have been in continuous employment for not less than 1 year even though he has not been required to attend work. It is clear from the decision in *Silas* in the Supreme Court that the otherwise "extraordinary" appointment by the Prime Minister did not displace the provisions of Section 54. The Court of Appeal did not interfere with that decision. The Claimant is therefore entitled to 50% of a months salary as severance pay as set out in section 54 of the Employment Act.

9. In all the circumstances I find that the Claimant is entitled to more than just the bare minimum of 12 months salary. He is entitled to interest (see paragraph 7 above). I see no reason why the interest should not be at the rate set out in Section 56(b) of the Employment Act even though that section deals with interest on severance pay. The Claimant is entitled 273 days (the number of days from 27<sup>th</sup> November 2013 to 20<sup>th</sup> August 2014) interest at 12% per annum on VT820,795. That is  $((VT820,795 \times 12\%) \div 365) \times 273$  or VT73,710. He is also entitled to interest at the judgment debt rate on the sum of VT 73,710 from the date of filing the claim until payment. The Defendant is also entitled to one half of a months salary as severance pay or VT45,978. He is entitled to interest on that sum as set out in the Employment Act, that is interest at 12% from the date the payment was due (27<sup>th</sup> November 2013) until actual payment.



10. As the Claimant has not totally succeeded in this claim and bearing in mind the original claim was for a sum in excess of 6 Million Vatu, I will make no order for costs.

Dated at Port Vila this 23<sup>rd</sup> day of May 2016

BY THE COURT

  
David Chetwynd

Judge

