

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

**Judicial Review**  
**Case No. 16/519 SC/JUDR**

**BETWEEN: CASIDY VUSILAI, KOLEN IOAN, PAKOA  
JOEL SIRI, TONY NAPLAUI, AUSTIN  
LEO, PAKOA KALO LUI, RAMOND  
WILLIE, ROBERT ORDETTE, TELMA  
REGINALD, ROBIN TAMATA  
REGINALD, JACK ROBERT**  
*Claimants*

**AND: PUBLIC SERVICE COMMISSION**  
*First Defendant*

**AND: REPUBLIC OF VANUATU**  
*Second Defendant*

**Hearing: 16<sup>th</sup> June 2017**

**Before: Justice Chetwynd**

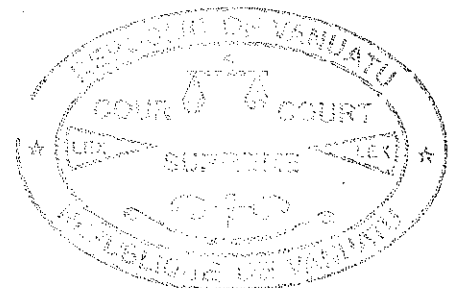
**Counsel: Mr. Tari for the Claimants  
Mr Aron for the Defendants**

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## **JUDGMENT**

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1. All the Claimants work at Vila Central Hospital ("VCH"). They do not occupy what some would perhaps regard as the most glamorous posts in the medical profession such as surgeons, doctors or nurses; they work as plumbers, electricians, drivers and clerks. They are nonetheless doing work which is as essential as that done by the surgeons, doctors and nurses. Casidy Vusilai is an accountant. He started work at VCH on 11/2/2010. Kolen Ioan is a plumber and he started work at VCH on 8/3/2010, Pakoa Joel Siri is a senior biomedical electronics technician. He began working for VCH on 12/7/2010. Tony Napulau is an electrician who started working at VCH on 8/3/2010. Austin Leo is a senior STP officer and began working at VCH on 14/12/2009. Pakoa Kalo Lui is a senior oxygen plant and medical gases officer who began work on 1/5/2011. Raymond Willie is a groundsman and he started work at VCH on 3/1/2010. Robert Ordette is an accounts clerk and cashier who started work at VCH on 17/11/2009. Thelma Reginald began working as a clerk on 8/3/2010. Robin Tamata was engaged as a driver and is now listed as an ambulance driver. He and Jack Robert, another driver, began work on 17/5/2011.



2. This case has arisen because the claimants have all been employed on a temporary basis since the date of their first employment as set out above. They say the decisions by the First Defendant, the Public Service Commission ("PSC"), to employ them on a temporary basis for more than six months are ultra vires. They want the PSC to make them permanent employees.

3. The functions of the PSC are set out in Article 60 of the Constitution and include the appointment, promotion and discipline of public servants. There can be no doubt it is the PSC which has made the decisions complained of and who can make the decision the claimants want.

4. There are further provisions in the Constitution which are relevant to this case. They all appear in Chapter 9 of the Constitution under the heading Administration. Part I has the sub heading, Public Servants. By Article 57 of the Constitution public servants are guaranteed certain rights and protections.

5. There is no definition of a public servant in the Constitution, or anywhere else for that matter, but public service used to be defined in the now repealed Public Service Act [Cap 129] thus :-

*"Public Service" means the service of the Republic in any capacity other than as a judge, or member of the armed forces, police or teaching services";*

Public Service is **now** defined in section 2 of the current Public Service Act [Cap 246] as:-

*"The "Public Service" comprises those persons employed in the ministries, departments, State appointed offices, agencies and instruments of the Government of Vanuatu as are designated by the Prime Minister pursuant to an enactment."*

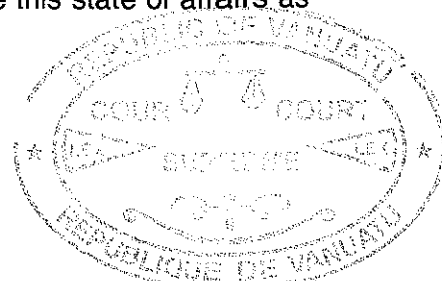
An employee is defined in section 5 of the Public Service Act as:-

*"employee" means a person employed in the Public Service on a permanent basis"*

In the Schedule to the Interpretation Act a public officer is described and defined as:-

*"a person in the service of the Government whether or not appointed by the Public Service Commission"*

6. It would appear there are certain tensions between the provisions of the Constitution and the definitions found in other legislation. All the claimants are in the service of the Government. However, they are not employees (because they are not employed on a permanent basis) and therefore cannot be in the Public Service. They are however employed in the Ministry of Health and so must be part of the Public Service. They are all in the service of the Government and so must be public officers. Those of you familiar with Joseph Heller's novel will recognise this state of affairs as a Catch 22 situation.



7. These issues were discussed in the *Bebe* case<sup>1</sup> with reference to the earlier case of *Attorney General v. Kalpokas* [1999] VUCA 4 but those cases can be distinguished because they dealt with Senior Public Servants. There is a degree of irony present here in that the Respondent in the *Bebe* case was the signatory of many of the agreements the defendants seek to rely on.

8. In any event, the claimants seem to have arrived at the situation we find in this case because the PSC say it was, at the time the claimants were first employed, in some way constrained from permanently employing them. This is described in the sworn statement of Jacques Gedeon, the Acting Secretary of the PSC, filed on 19<sup>th</sup> July 2016. It is explained that back in 2009 the PSC had not "...approved the current structure for Vila Central Hospital..." However, the hospital, "... was in need of supportive staff and administrative staff..." and so PSC decided to, "...engage temporary salaried employees and daily rated workers pursuant to sections 30 and 31 of the Public Service Act".

9. It is not entirely clear to me what PSC are actually saying in this regard, it is perhaps a reference to Article 57(3) of the Constitution. It states that:-

*"No appointment shall be made to a post that has not been created in accordance with a law".*

The suggestion seems to be PSC could not make permanent appointments because there was no approved staff structure or establishment. There is no explanation where this requirement comes from and there does not seem to be any such requirement in the Public Service Act. The defendants do not explain why they say they were legally unable to permanently employ the claimants. The defendants do not give any reasons why they say there was no other option but to resort to sections 30 and 31.

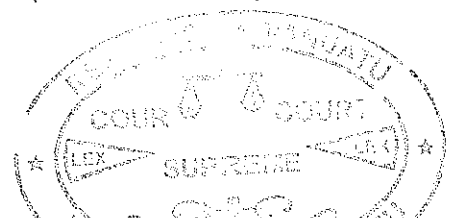
10. It is necessary to consider the provisions of the Public Service Act the PSC seek to rely on. Section 30 states:-

***"30. Temporary salaried and contract employees***

*(1) The Commission may engage such temporary salaried employees as may from time to time be required and may dismiss a person so engaged with not less than 1 week's notice, or, in the case of misconduct or inability, without notice. No action shall lie in any Court in respect of the dismissal of any temporary salaried employee except in the case of a breach of the Commission's obligation to act as a good employer, during the course of the employment.*

*(2) Temporary salaried employees may be employed for a period not exceeding 6 months and shall be paid such remuneration and be subject to such*

<sup>1</sup> *Republic of Vanuatu v Bebe* [2014] VUCA 29; Civil Appeal Case 29 of 2014 (14 November 2014)



*conditions of employment as may be determined by the Commission.*

*(2A) To avoid doubt, a temporary salaried employee is not a person employed in the Public Service on a permanent basis.*

*(3) Where due to the nature of the employment (such as short-term specialist services) to be performed, and where it is inappropriate for that person to be employed on a permanent basis, the Commission may employ persons pursuant to a contract of employment.*

*(4) The contract may in the discretion of the Commission, exclude the person so employed from being subject to this Act or from provisions of this Act."*

11. Section 31 provides:-

**"31. Daily rated workers**

*(1) Where any work required to be done by a ministry does not warrant the employment of permanent staff by reason of its temporary, fluctuating, or special nature, the Commission, after consulting and taking into consideration the views and requirements of a director-general affected may authorise the engagement of daily rated workers by the ministry or department.*

*(2) Daily rated workers may have their employment terminated in accordance with the Employment Act [Cap. 160] by the Commission or in the case of misconduct or inability without notice.*

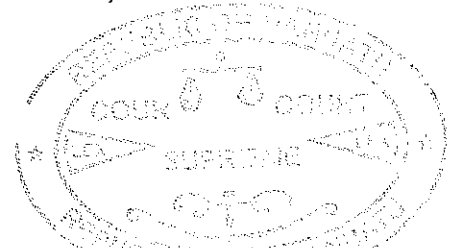
*(3) Subject to any enactment or award or settlement providing for the same, the wage rates and conditions of employment of daily rated workers shall be as determined by the Commission.*

*(4) In the employment of daily rated works, the Commission must comply with its obligation to act as a good employer and the appeal provisions provided in this Act shall be available to any such daily rated worker."*

12. There is no question that the Constitution allows PSC to make temporary appointments. Article 57(4) is quite explicit:-

*"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.*

*In urgent cases, the Public service Commission may, after consulting the Ministers responsible for finance and public administration, make such a decision instead of the Prime Minister"*



13. How Article 57(4) should be interpreted was considered in the Court of Appeal case *Silas v PSC*<sup>2</sup> :-

**"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:-

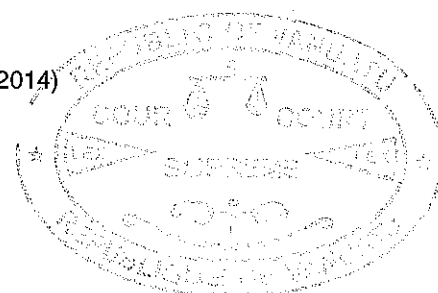
"The Prime Minister or the Chairman of a Local Government Council may, exceptionally, make provision for the recruitment of staff for a specified period to meet unforeseen needs."

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.

<sup>2</sup> *Silas v Public Service Commission* [2014] VUCA 9; CAC 08 of 2014 (4 April 2014)



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.

14. I make no excuses for citing such a large excerpt from the Court of Appeal decision. In doing so I am reminded how provisions of the Constitution should be interpreted. I am reminded I must not use "Ordinary statutes" as "interpretive aids". It has been said many, many times but the excerpt above reinforces the fundamental point that, "The Constitution is the Supreme Law of Vanuatu, above all other laws." The excerpt also reminds me that, on the other hand Ordinary statutes are subject to The Supreme Law.

15. The defendants rely on sections 30 and 31 of the Public Service Act. There is no doubt that those sections do allow the PSC to engage, "temporary salaried employees as may from time to time be required" and "daily rated workers". However, that must be in circumstances envisaged by Article 57(4), otherwise the employment will be subject to the other recruitment provisions of Part 1. That conclusion would seem to flow from the decision of the Court of Appeal:-

*"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."*



16. The defendants have produced no evidence of exceptional, urgent or unforeseen circumstances. All they say is that there was no approved staff structure for the staff needed in the medical sector in Shefa Province but that as they needed the staff they made temporary appointments. There is no explanation given as to why there was no approved staff structure. Rather than approve a structure it seems to me they decided to take on staff and ignore or otherwise circumvent the security of tenure provisions of the Constitution (Article 57(5)). Appointments on that basis would be ultra vires because they were not made on urgent unforeseen grounds.

17. If I am wrong and PSC can engage temporary staff without the need to have regard to Article 57(4) then the provisions of sections 30 and 31 need to be considered more closely.

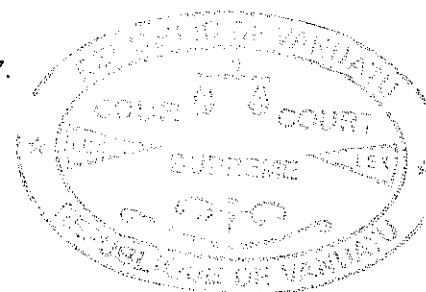
18. Section 30 envisages temporary employment not exceeding six months. The defendant's argument is that they renewed contracts every six months therefore the claimants were never employed for more than 6 months at a time. The defendants agree they renewed contracts several times and they do not dispute all the claimants have been employed in the same role since the commencement of the first contract. They do not dispute contracts were renewed on largely the same terms. There is no complaint about the claimants work and there is no suggestion the claimants have been anything other than loyal public officers. There is no hint there has been any misconduct by the claimants. However PSC apparently are arguing that even though this state of affairs has existed for 6 years, or longer in some cases, the claimants have only been temporarily employed for less than six months. That is not the attitude of a "good employer". That smacks of exploitation.

19. As for section 31, it may (ignoring the Article 57(4) objections) be appropriate for situations, *"where any work required to be done by a ministry does not warrant the employment of permanent staff"*. The evidence in this case shows PSC accept there is a need for permanent staff and that situation has existed since at least 16<sup>th</sup> June 2015 when PSC, *"...approved the Shefa Province and Vila Central Hospital Structure..."*<sup>3</sup>. There is no explanation about any earlier structure and PSC have never denied that it recognised the need for staff in 2009<sup>4</sup>. The proposition being canvassed seems to be that despite being incapable, for some unstated reason, of being able to "approve" a structure of public servants necessary to properly operate a hospital; and this for a period in excess of 6 years, PSC is entitled to fall back on a dubious scheme using a provision which is limited to where there is a situation of a, *"temporary, fluctuating, or special nature"*. Again, that seems to me to be a case where the PSC has forgotten its duty, as set out in section 31, where, *"in the employment of daily rated works, the Commission must comply with its obligation to act as a good employer."*

20. The PSC has treated the claimants abysmally and continues to discriminate against them. It makes a distinction that these employees are administrative, whatever that means, and they must apply for their job; whilst others who were in the same situation with temporary contracts have been employed without that requirement. It cannot be the case that the claimants are unqualified; they would have to have been qualified to have been taken on in the first place. The PSC have not established any

<sup>3</sup> See paragraph 3 of the sworn statement of Jacques Gedeon filed 14<sup>th</sup> June 2017.

<sup>4</sup> See the sworn statement of Jacques Gedeon filed 19<sup>th</sup> July 2016



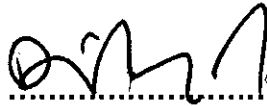
valid reason why the claimants were not taken on as permanent staff when the staff structure was approved in June 2015.

21. As the decisions made to temporarily employ the claimants was ultra vires the powers of the PSC those decisions are quashed. It would cause considerable hardship to the claimants if the case was left like that and so it is ordered that all the claimants (even those that may have subsequently left the public service) shall be deemed to have been permanently employed as public servants from the date of their first engagement (see paragraph 1 above). They shall be treated as entitled to all the usual emoluments and entitlements of permanently employed public servants from the date of their first employment.

22. The claimants are also entitled to their costs, such costs to be taxed on a standard basis if not agreed.

**Dated at Port Vila this 29<sup>th</sup> day of June, 2017.**

**BY THE COURT**



**David Chetwynd  
Judge**

