

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(CIVIL JURISDICTION)**

JUDICIAL REVIEW CASE NO. 13 OF 2013

BETWEEN: MARK BEBE
Claimant

AND: REPUBLIC OF VANUATU
Defendant

Coram: Justice Mary Sey

Counsel: Mrs Mary Grace Nari for the Claimant
Mr Kent Ture Tari for the Defendant

Date of Judgment: 20 July 2014

JUDGMENT

INTRODUCTION

1. On 24 November 2012, the claimant signed a contract of employment with the defendant to work as director-general in the Ministry of Justice for 4 years.
2. On 4 June 2013, the Prime Minister made a decision to transfer the claimant to the Ministry of Lands on the basis that *"it has been decided that the heavy restructuring work at the Ministry of Lands needs a senior Director General of high calibre."*
3. On 2 August 2013, the Prime Minister insisted that the claimant should move to the Ministry of Lands. However, the claimant refused to move and he contended that he has a specific contract with the Ministry of Justice for a specified period of 4 years.

4. On 7 August 2013, the new Minister of Justice, Parliamentary Secretary and other political people had a meeting with the claimant and forcefully told him to leave the office immediately before further steps were taken to change the locks on the gate and office doors.
5. On 8 August 2013, the claimant issued a claim for judicial review challenging his transfer by the Prime Minister and seeking a declaration, a mandatory order and a quashing order. In its defence, the defendant raised the provisions of clause 31 by way of a preliminary bar to the claim. Written submissions were filed and the matter was heard on 28 August 2013. On 30 August 2013, the Court delivered its Ruling in which it declined jurisdiction to hear the claimant's claim.
6. The decision was appealed to the Court of Appeal and that Court in its judgment dated 22 November 2013 ordered remittance back with one issue to be considered.

The Issue

7. The issue is *whether for the purposes of Article 58 (2) of the Constitution a director-general is a public servant*. If he is, the Prime Minister can exercise his power under Article 58 (2). If he is not, the powers of the Prime Minister will be limited.

The Law

8. **Part 1 of Chapter 9 of the Constitution of the Republic of Vanuatu** deals with the public service and governs appointments to and the tenure of public offices. It is necessary for me to set out Articles 57 and 58 in full:

"CHAPTER 9 - ADMINISTRATION

Part I - The Public Service

57. Public servants

10. Sections 17A, 17B and 17C of the **Public Service (Amendment) Act No.1 of 2011** are also central to this case. For ease of reference they are set out below:

"17A. Appointment of a director-general

- (1) *The Minister on the recommendation of the Commission is to appoint a person to be a director-general under a contract of employment for a period of 4 years and the person may be reappointed only once.*
- (2) *The remuneration and allowance of a director-general is to be determined by the Minister after consultation with the commission.*
- (3) *The terms and conditions of appointment of a director-general are to be set out in the contract made between the Minister and the director-general.*

17B. Procedure for making a recommendation

The Commission must, prior to making a recommendation under subsection 17A (1), abide by the following procedure:

- (a) *Advertise the position in a newspaper or other form of media with a wide circulation in Vanuatu; and*
- (b) *Ensure the advertisement allows an applicant a minimum of 2 weeks in which to make an application; and*
- (c) *Provide an address as to where to send the application; and*
- (d) *Convene a panel of 3 independent persons to interview and require the panel, having regard to section 15 (imposing a duty to act as a good employer), to recommend a short list of the most competent and suitable applicants; and*
- (e) *Make recommendation to the Minister from the Short List.*

17C. Grounds for termination of appointment of a director-general

A director general may be terminated by the Minister on any of the following grounds:

- (a) *Serious misconduct as defined in the Staff Manual; or*
- (b) *On account of physical or mental incapacity to carry out his or her official duties efficiently; or*
- (c) *Incompetence as shown in the performance appraisal carried out by the Commission; or*
- (d) *Neglect of duty; or*
- (e) *Bankruptcy; or*
- (f) *Becomes a member of parliament, Local Government Counsel, National Counsel of Chiefs, Municipal Council, or a member of the Public Service Commission, Police Service Commission or Teaching Service Commission".*

Submissions

11. The claimant submits that he has been given a 4 year contract to serve the Republic as director-general under the Ministry of Justice and that he is not a public servant and therefore the Constitutional provision under Article 58 (2) does not apply to him and the purported "transfer" was improper.
12. The claimant further submits that since his contract of employment was signed by the Prime Minister and not by the Public Service Commission, he is not a public servant. To buttress her argument, the claimant's counsel, Mrs. Nari, cited the Court of Appeal decision in **Silas v Public Service Commission** [2014] VUCA 9 and counsel submitted that Mr. Silas whose appointment letter was signed by the Prime Minister was not a public servant.
13. The claimant also contends that for him to be employed in the Ministry of Lands he would have to enter into another employment contract with that Ministry and that he cannot use his present contract which is specifically for the Ministry of Justice.
14. For its part, the defendant submits that the position of director-general existed prior to the amendment of the Act in 2011. Further, that Parliament exercised its powers under Article 16 (1) of the Constitution to amend the Act thus providing for the position of a director-general to be on contractual basis with a new status and regime under sections 17A, 17B and 17C of the **Public Service (Amendment) Act No.1 of 2011**.
15. Mr. Kent Tari referred the Court to the judgment of Chief Justice Lunabek in **President of the Republic v Speaker of Parliament** (2012) VUSC 183 [Constitutional Case No. 12 of 2011] where His Lordship said:

"It is common ground that until the Bill is enforced the current directors-general appointed under s.18 (1) of the Act, were holders of public offices in the Public Service and were persons engaged in the service of the Government in a civil capacity as senior public servants. Thus, their appointment, whether initially or on promotion or transfer and their removal and discipline, were within the exclusive

power of the Public Service Commission as provided by Article 57(5) of the Constitution."

16. Finally, the defendant submits that because the Public Service Act provides for the public service, directors-general are deemed to be considered as public servants under the Act and for the purpose of Article 58 (2) of the Constitution. Further, the defendant submits that since under section 5 of the Act "director-general" means "the head of a ministry," that envisages that directors-general are senior public servants.
17. Therefore, it is the defendant's contention that the Prime Minister can exercise his power under Article 58 (2) of the Constitution to transfer a director-general to other posts of equivalent rank.

Consideration of the issue

18. The issue posed for determination concerns the status of the claimant who was appointed as a director-general by the Prime Minister on 24th November 2012. Is he a public servant to whom Article 58 (2) of the Constitution applies?
19. It is timely to reproduce relevant portions of the terms and conditions of the claimant's contract of employment below:

"CONTRACT OF EMPLOYMENT

OF

DIRECTOR GENERAL

AN AGREEMENT made on the 24th day of November 2012.

BETWEEN: *The PRIME MINISTER of the Government of the Republic of Vanuatu care of the PRIME MINISTER'S OFFICE, PMB 9053, Port Vila, Efate, Republic of Vanuatu (hereinafter called the "Employer")*

AND: *MARK BEBE, care of the MINISTRY OF JUSTICE, PMB 9048, Port Vila, Efate, Republic of Vanuatu (hereinafter called the "Employee")*

WHEREAS:

- A. *The Employer wishes to employ the Employee as the DIRECTOR GENERAL of the Ministry;*

- B. *The Employee is desirous of obtaining employment as the DIRECTOR GENERAL of the Ministry;*
- C. *The Parties agree that the employment of the Employee by the Employer shall be made subject to and in accordance with the terms and conditions set forth hereunder.*

NOW THEREFORE IT IS HEREBY AGREED AS FOLLOWS:

1. DEFINITIONS AND INTERPRETATIONS

1.1 DEFINITIONS

1.1.1 *Where used in this Contract, the following terms have the following meanings:*

"Chairman" means the Chairman of the Public Service Commission;

"Classified material" means the classified material as defined in the Official Secrets Act [CAP 111];

"Commencement date" means the date on which this Contract is executed between the Parties;

"Commission" means the Public Service Commission;

"Manual" means the Public Service Staff Manual;

"Minister" means the Minister responsible for Justice;

"Ministry" means the Ministry of Justice; and

"PLAS" means Planning long Acting Short.

1.2 INTERPRETATIONS

1.1.2 *In this Contract, unless the context otherwise requires:*

(a) Heading are for convenience only and do not affect the interpretation of this Agreement.

(b) Words importing the singular include the plural and vice versa;

(c) a reference to a Schedule is a reference to the Schedule to this Agreement;

(d) general words in this Agreement shall not be given a restrictive meaning by reason of their being preceded or followed by words indicating a particular class of acts, matters or things or by examples falling within the general words;

(e) a reference to a document includes an amendment or supplement to or replace or novation of, that document but disregarding any amendment, supplement, replacement or novation made in breach of this agreement.

(f) A reference to a party to any document includes that party's successors and permit assign.

2. APPOINTMENT

2.1 *The Employer agrees to employ the Employee and the Employee agrees to serve the Government of the Republic of Vanuatu as the DIRECTOR GENERAL of the Ministry;*

2.2 *The Employee's term of employment is for a period of 4 years commencing on the date of the execution of this Contract.*"

The document was

"EXECUTED as a contract]

BY the Employer, the **PRIME MINISTER,**]

PRIME MINISTER

MELTEK SATO KILMAN LIVTUNVANU

for and on behalf of the Government of

the Republic of Vanuatu]

In the presence of:

Chris Tavo

Name of Witness

Signature of Witness

BY the Employee, **MARK BEBE**]

In the presence of:

_____ "

Name of Witness

Signature of Witness

20. It is noteworthy that under the definition section of the employment contract "*Ministry means the Ministry of Justice.*"

21. It is also pertinent to note that the employment contract is for a specified period of 4 years and nowhere in the document has the issue of transfer been stated.

22. In order to place the references to the employment contract of the claimant in context, I go back to the judgment of Chief Justice Lunabek in **President of the Republic v Speaker of Parliament** (ibid, at page 7). It seems clear to me that before the amendment of the Public Service Act "*the current directors-general appointed under s.18 (1) of the Act, were holders of public offices in the Public Service and were persons engaged in the service of the Government in a civil capacity as senior public servants.*"

23. It is also equally clear to me that with the legislation of the **Public Service (Amendment) Act No.1 of 2011**, the position of directors-general has now been distinctively established under sections 17A, 17B and 17C with a different regime of appointment and termination from an ordinary public servant.
24. Thus, in respect of the appointment of a director-general, section 17A provides that *"the Minister on the recommendation of the Commission is to appoint a person to be a director-general under a contract of employment for a period of 4 years and the person may be reappointed only once."* Whereas appointments to the Public Service are dealt with under section 23 of the **Public Service Act [Cap. 246]** which specifically states that *"any appointment to or within the Public Service is to be made by the Commission."* Moreover, under section 5 of the Act, "employee" means a person employed in the Public Service on a permanent basis.
25. In this present case, Mr. Bebe's employment contract was signed by the then Prime Minister, Mr. Sato Kilman, and not by the Public Service Commission. Furthermore, Mr. Bebe's conditions of service are regulated by the said contract covering a specified period of "4 years in the Ministry of Justice." This undoubtedly puts the said employment contract in a different category outside the ambit and exclusive power of the Public Service as provided by Article 57 of the Constitution.
26. I therefore accept the claimant's submissions that he is not a public servant and that the Constitutional provision under Article 58 (2) does not apply to him. In my considered view, the claimant is right. He is not a public servant. In reaching this conclusion, reliance is placed on the recent decision of the Court of Appeal in **Silas v Public Service Commission** (*ibid at page 5*) where the Court pronounced that *"the appointee is not part of the Public Service given the appointing authority is the Prime Minister."* I fully adopt this decision and, needless to say, I am bound by it.

27. Accordingly, in answer to the question posed for determination, I find that for the purposes of Article 58 (2) of the Constitution a director-general is not a public servant.
28. The claimant is entitled to costs against the defendant on the standard basis. Such costs shall be taxed failing agreement.

DATED at Port Vila, this 20th day of July, 2014

BY THE COURT


M.M. SEY
Judge