
**IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU**
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 23/820 COA/CIVA

BETWEEN: **NADIA KANEGAI DIDOU**
Applicant

AND: **VANUATU NATIONAL PROVIDENT FUND**
Respondent

Date of Hearing **9 November 2023**

Coram: **Hon. Acting Chief Justice Oliver A Saksak**
Hon. Justice Dudley Aru
Hon. Justice Viran M. Trief
Hon. Justice Mark O'Regan
Hon. Justice Richard White
Hon. Justice E.P. Goldsbrough
Hon. William K. Hastings

Counsel: **Tari, K.T. for the Applicant**
Blake, G. for the Respondent

Date of Judgment: **17 November 2023**

JUDGMENT OF THE COURT

1. Nadia Kanegai Didou (the Applicant) began a civil claim against the Vanuatu National Provident Fund (the Respondent) for wrongful dismissal in 2013. That dismissal occurred in January 2013 after a suspension in August 2012 pending an investigation into complaints against the applicant. Those proceedings were brought to an end by an order made on 31 January 2022, striking out those proceedings under the Civil Procedure Rules No. 49 of 2002 (CPR), Rule 9.10 (2) (d). The applicant wishes to appeal against that order. She filed a notice of appeal on 2nd June 2023 together with an application to extend the 30-day period fixed by Rule 20. As the strike out order is interlocutory, the applicant needs leave to appeal (Rule 21 (1) of the Appeal Rules). The applicant filed an application for that leave on 19 June 2023. These are the matters which are before this Court.

Proceedings in the Court below

2. In the Court below, a defence and counterclaim were filed. The matter proceeded as expected until it was stayed pending the determination of a similar claim brought by another person, also dismissed from employment, against the same Respondent for similar reasons (the *Tarilongi* case). The parties



decided that this case should await the determination of an appeal in the *Tarilongi* case before further steps were taken. Counsel then instructed agreed that this was an appropriate course and an efficient use of Court time given that the other matter would essentially decide this matter.

3. The earlier case was determined on appeal in July 2020 in *Tarilongi v VNPF* [2020] VUCA 32, after which counsel acting for the Respondent wrote to then counsel for the Applicant asking him to file the proposed Notice of Discontinuance. That was never done. Indeed, no step was taken in these proceedings until, of its own motion, the Court below brought the proceedings to an end by striking out the claim.
4. This procedure was adopted given the provisions of the Civil Procedure Rules No. 49 of 2002 (CPR). CPR Rule 9.10 allows a claim to be struck out without notice if no step has been taken in the proceedings for six months. No step had been taken since the order staying the proceedings pending the disposal of the *Tarilongi* case. After that case was determined on appeal in July 2020, and no notice of discontinuance was given, no further steps were taken.

The Appeal

5. Counsel on this appeal submitted that the Court below should have listed the matter for a further Conference after the completion of the *Tarilongi* appeal. We disagree. It is for the parties to take steps in the proceedings, not for the Court to do so.
6. In this Court, counsel now acting for the Applicant takes a different view on the similarity of this case with *Tarilongi*. He submits that the two employment contracts differ in a material aspect, namely, the termination clause. In this case, the termination clause in the employment contract provides: - "It is understood that after successful completion of your six (6) months probation, one month's notice will be given, should either party wish to terminate this contract". In the *Tarilongi* case the termination clause was expressed as follows: - "the employment may be terminated at any time by either of the parties on 3 months' notice".
7. Given the differences, counsel asserts that the proceedings should be re-instated to allow the matter to be determined after trial. There has been no trial of this claim or counterclaim, given the order made in January 2022.

Discussion

8. We are satisfied that the order was made correctly under the Rules and therefore turn to consider whether it should, for any reason, be set aside. In that regard, in addition to the delay period, consideration must be given to the prospects of success and potential prejudice to the Respondent.
9. The Applicant outlines the delay between making the order in January 2022 and the present application in June 2023 in her sworn statement. The main reason suggested for the delay is that



previous counsel did not tell the Applicant of the making of the order. This is not supported by any evidence from that former lawyer, nor is there any waiver of legal privilege that might allow him to file his own material in support or opposition. The reasons for the delay are not strong because they are unsupported. We, therefore, turn to the question of prospects of success.

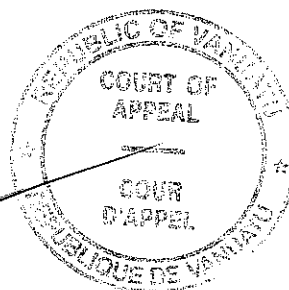
10. It was correct for the present counsel to assert that this case is different from *Tarilongi* in a material aspect. In this case, as is evident, the employment contract provides for each party to give one month's notice of termination after the initial probation period is satisfactorily completed. The applicant wishes to contend that, upon proper construction, this clause allowed termination by either party on one month's notice at the end of her period of probation but not thereafter. In our view, that construction is barely tenable.
11. Prejudice is another matter that may be considered. In this case, there appears to be no prejudice to the Respondent save the inevitable prejudice of having an uncompleted matter open on the file and in the accounts.
12. The long delay and the lack of any real prospect of success suggest that this order striking out the claim should remain.

Decision

13. The application for enlargement of time and the application for leave to appeal against the striking out order are dismissed.
14. Costs of and incidental to this appeal are to be paid by the Applicant to the Respondent in the sum of VT75,000.

DATED at Port Vila this 17th day of November, 2023.

BY THE COURT



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Hon. Acting Chief Justice Oliver A. Saksak