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

Civil Appeal
Case No. 20/1009 CoA/CIVA

BETWEEN: **Anniva Tarilongi**
Appellant

AND: **Vanuatu National Provident Fund**
Respondent

Date of Hearing: ***13 July 2020***

Before: ***Justice B. Robertson***
Justice J. Mansfield
Justice D. Aru
Justice G. A. Andrée Wiltens
Justice V. M. Trief

In Attendance: ***Mr J. Ngwele for the Appellant***
Mr G. Blake for the Respondent

Date of Decision: ***17 July 2020***

JUDGMENT

A. Introduction

1. This appeal by leave concerns the entitlement of the Appellant Ms Tarilongi in the circumstances in which her employment with the Respondent Vanuatu National Provident Fund ("VNPF") was terminated.

2. The main facts are not in dispute.

3. Ms Tarilongi was employed by VNPF as its General Manager commencing on 25 February 2011 pursuant to a written contract of employment. The employment was for a period commencing on 25 February 2011, and clause 3 continued that it: "shall (subject as hereinafter provided)" continue for a period of 5 years expiring on 25 February 2016, unless reappointed under the relevant terms of the Vanuatu National Provident Fund Act [CAP 189].

4. Clause 13 of the contract dealt with termination. Clause 13.1 said that the employment may be terminated (by the Board of VNPF) at any time by either of the parties on 3 months' notice. Clause 13.2 provided for the Board of VNPF to terminate the employment without notice if the Board found Ms Tarilongi guilty of misconduct, provided that she had been given an opportunity to answer any allegations made against her before the Board's decision.

5. Clause 13.1 is the critical provision of the contract for the purposes of this appeal. It provides:

> *The Employment may be terminated by the Board at any time by either of the parties hereto giving to the other not less than three (3) months prior written notice of termination.*

6. By letter dated 14 August 20012 the Board of VNPF suspended Ms Tarilongi from her employment duties until completion of a full investigation of certain matters concerning Ms Tarilongi. Ms Tarilongi ceased performing her duties at the time, but continued to receive her entitlements under the contract. She was then awaiting the outcome of the investigation referred to in that letter, and the opportunity to respond to any allegations of misconduct on her part. The investigation was never completed, and so Ms Tarilongi was at no time confronted with any allegations of misconduct to respond to.

7. On 17 January 2013, by letter of that date, the Board of VNPF terminated the employment of Ms Tarilongi under clause 13.1 of the contract. No reasons for the termination were given. On its face, clause 13.1 does not require any reasons. It is simply a mutual entitlement to terminate the employment on 3 months' notice.

8. Ms Tarilongi was paid 3 months' salary and other entitlements, in lieu of her serving out the period of 3 months' notice. There is no dispute that Ms Tarilongi received the appropriate amount to cover 3 months of salary and other entitlements.

9. There is also no dispute that, but for the earlier letter of suspension of 14 August 2012, the Board was entitled to terminate her employment in that manner. Indeed, it is worthy of comment that Ms Tarilongi equally could have given to VNPF written notice of termination under clause 13.1 of the contract at any time during the period of the employment.

B. The Issues at Trial

10. In essence, Ms Tarilongi's claim was that (i) the suspension of her employment meant that VNPF could not exercise its apparent entitlement under clause 13.1 of the contract to terminate her employment on 3 months' notice; and (ii) that she was entitled to be notified the outcome of the investigation referred to in the letter of suspension, and to respond to it, before her employment could be terminated at all. The consequence would be that the termination of her employment on 17 January 2013 (or, with the 3 months' notice period on 17 April 2013) was ineffectual and that she was entitled to continue to receive her salary and other entitlements under the contract until the expiration of the 5 year period (as the investigation results were never presented to her for comment).

11. She had a fall back contention that the giving of 3 months salary and other entitlements in lieu of 3 months' notice was not....and that she should have been allowed permitted to return to work and to work until 17 April 2013. It is not clear what entitlement Ms Tarilongi claimed as a result of being given 3 months' payment in lieu of notice.

12. It is hard to conceive that she could lose and maintain an entitlement to salary after 17 April 2013, as she was paid fully up to that date in any event.

13. The primary judge was asked to address 4 questions which, it was said by counsel, would resolve the issues in the case.

14. The first issue was whether the suspension of Ms Tarilongi affected the right of VNPF to terminate her employment under clause 13.1 of the contract.

15. The second question was whether Ms Tarilongi's employment was lawfully terminated by VNPF relying on clause 13.1 of the contract, by being paid 3 months pay and other entitlements at the time of the notice, rather than having to work out that period. It was argued that paying 3 months' salary entitlement in lieu of requiring Ms Tarilongi to work out her 3 months period of notice was simply not available.

16. The primary judge decided both questions adversely to Ms Tarilongi. That meant that the termination on 17 January 2013 was valid and effective.

17. The third question was based on the conclusion that the employment of Ms Tarilongi was not lawfully terminated and concerned the amount of damages. It did not arise to be answered as the primary judge did not find that the employment was not lawfully terminated.

18. The fourth question was whether Ms Tarilongi, in the event that her employment was lawfully terminated, had received her full entitlements. The primary judge decided that she had received her full entitlements in the payment in lieu of notice. That is not an issue on the appeal.

19. The full reasoning of the primary judge has not been set out at this point. That is because the first and second questions equally arise on the appeal. Our answers to them accord with those of the primary judge and for the same reasons as those of the primary judge.

C. The Grounds of Appeal.

20. As just foreshadowed, the two grounds of appeal concern whether the suspension of the employment of Ms Tarilongi affected the entitlement of VNPF to terminate her employment on 3 months' notice under clause 13.1 of the contract; and secondly, whether the employment of Ms Tarilongi was lawfully terminated.

D. Consideration

21. Counsel for Ms Tarilongi argued that, by reason of the suspension notice, clause 13.1 of the contract was not available to be used until she had received notice of the outcome of the proposed investigation and had the opportunity to have her response considered by the Board of VNPF. To make out that proposition it was necessary to argue that there was an implied term in the contract that, once an investigation was proposed, the operation of clause 13.1 was suspended until the investigation was completed and, if it were adverse to Ms Tarilongi, until she had been given a reasonable opportunity to respond to it.

22. Counsel sought some support for his proposition from sections 6 and 48 of the Employment Act [CAP 163]. Neither of those sections assists the contention. Relevantly, section 6 simply ensures that favourable contractual terms are not diminished by any provision of that Act.

Section 48 provides that a contract of employment terminates on the last day of the period agreed in the contract. In this case, that is a period of 5 years, but subject to either Ms Tarilongi or VNPF exercising termination rights under clause 13.1. They do not provide any basis for the suggested implied term of the contract.

23. We share the view of the primary judge that there is no foundation for implying into the contract of employment the implication referred to.

24. Clause 13 is clear. Clause 13.1 allows for termination on 3 months' notice, at the option of either the employer or at the option of the employee. Clause 13.2 separately allows for termination without notice at the option of the employer, but with a procedural fairness process built in. There is no specific provision for suspension. It is easy to assume that the suspension in the present case was a step before, and supporting, the procedural fairness process contemplated by clause 13.2 before the possibility of termination without notice. The two alternatives are not interrelated. They are independent. There is no reason to infer that the letter of suspension somehow abrogated the right of termination by either the employer or by the employee. The termination of Ms Tarilongi's employment was an exercise of the contractual right under clause 13.1.

25. It is not suggested by counsel for Ms Tarilongi that, in the routine case, there is any specific procedural fairness requirement to be implied before the exercise of the right of termination under clause 13.1. That was an appropriate position to adopt. The position is clear, as the words are clear. The same position applies when exercising the statutory right of termination on notice under section 49 of the Employment Act. *Kalambae v Air Vanautu (Operations) Limited* [1024] VUCA 34 confirms that. Section 48 of the Employment Act does not assist the contention on behalf of Ms Tarilongi as it merely says that a contract of employment shall terminate on the last day of the period agreed in the contract. The last day agreed in the contract in the present circumstances is the period of 5 years as shortened by any termination under clause 13 of the contract.

26. The present circumstances do not suggest any different construction of clause 13.1, so as to support the implication of some form of implied term limiting the circumstances in which termination by notice under clause 13.1 may be effected at any time. The agreed facts are that there is no investigation; there is no report of an investigation; and there is no disciplinary charge or implication of misconduct against Ms Tarilongi in the use of clause 13.1 to terminate the contract.

27. The words of clause 13.1 are clear. They require nothing to be added to make them effective. There is no reason shown to suggest that, in their clear terms, they do not represent the intention of the parties. See generally the decision of the High Court of Australia in *Commonwealth Bank of Australia v Barker* [2014] HCA 32; (2014) 253 CLR 169, which reaffirmed the well-known words of Mason J in *Codelpha Construction Pty Ltd v State Rail Authority of New South Wales [1984] HCA 24* ; (1982) 149 CLR 337 at 345.

28. The second submission of counsel for Ms Tarilongi was twofold. The first aspect can be readily dismissed. It is said that the termination was in reality a termination under clause 13.2 of the contract rather than under clause 13.1. That is transparently not correct. The notification itself is sufficient basis to reject that proposition. In oral submissions, that contention was not pressed.

29. The second aspect of the submission of counsel for Ms Tarilongi was that the termination was not effective because 3 months' notice of termination was not given, but instead the termination was instantaneous with the notice on 17 January 2013 and the payment of 3 months' salary and other entitlements in place of the notice period.

30. In our view, as the primary judge concluded, the proper analysis of what happened is that the termination notice of 17 January 2013 gave 3 months' notice of termination, but VNPF then paid out Ms Tarilongi with 3 months' salary and entitlements without requiring her to work out that period by attending at work.

31. That analysis is consistent with common practice. The primary judge referred to a number of decisions where that analysis is adopted. We note the following referred to by his Lordship: *Central Manufacturing Company Ltd v Kant* [2003 FJSC 5; *Sanders v Snell (1998) 196 CLR 329; Wallace v United Grain Growers Ltd.*

32. Upon that analysis, the second ground of appeal is not made out.

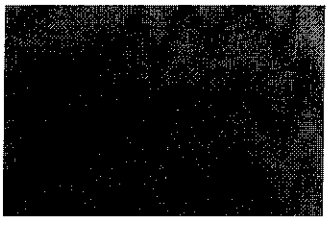
33. We add, as the primary judge did, that in any event, as it is accepted that VNPF could at any time give 3 months' notice of termination under clause 13.1 of the contract (as indeed could Ms Tarilongi), and she would then have had to work out the 3 month period with no payment at the end of it apart from existing entitlements, she could not prove any real consequential loss because she was given 3 months' salary and entitlements at the time of the notice on 17 January 2013. No reliance was placed on section 56(4) of the Employment Act in her pleadings, and on the material provided we see no basis upon which that section could have been involved.

E. Result of the appeal

34. The appeal is dismissed. Ms Tarilongi must pay to VNPF its costs of the appeal which we set at VT 75,000. That is to be paid within 21 days.

Dated at Port Vila this 17th day of July 2020

BY THE COURT



.....
Justice B. Robertson