

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

**Civil  
Case No. 20/57 SC/CIVL**

**BETWEEN: Cynthia Kammy Ala, Murielle Herbert,  
Shamilia Bule, Joseph Robert, Manen Mala,  
Anna Stephens**  
*Claimants*

**AND: Vanuatu National Provident Fund**  
*Defendant*

**Coram: Justice Aru**

**Counsel: Mr. J. Tari for the Claimants  
Mr. D. Yawha for the Defendant**

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**JUDGMENT**

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**Introduction**

1. This is a claim filed by 6 former staff members of the Vanuatu National Provident Fund (VNPF) claiming constructive dismissal from their employment.

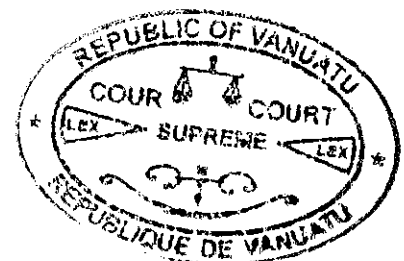
**Background**

2. A brief background of their employment with VNPF is set out in the claim as follows:-

Mrs Cynthia K Ala  
Position: VNPF Board Secretary  
Date started: 13/3/06  
Suspended: 11/10/19  
Resigned: 10/10/19

Mrs Muriel Herbert  
Position: Manager Internal Audit  
Date started: 16/6/07  
Suspended: 11/10/19  
Resigned: 10/10/19

Mrs Shamila Bule  
Position: Senior System Administrator  
Date started: 10/7/08  
Suspended: 10/10/19  
Resigned: 7/11/19



Mr Joseph Robert  
Position: Manager ICT  
Date started: 9/2/05  
Suspended: 20/9/19  
Resigned: 7/11/19

Mrs Manen Mala  
Position: Manager Legal  
Date Started: 13/3/06  
Suspended: 20/9/29  
Resigned: 7/11/19

Mrs Anna Stephens  
Position: Executive Assistant to GM  
Date started: 14/8/17  
Suspended: 20/9/19  
Resigned: 7/11/19

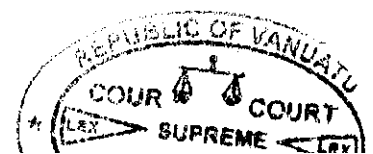
3. As employees of the VNPF, the General Orders (Terms and Conditions of Employment) for Employees of the VNPF formed part of their terms and conditions of employment.

#### **Application to strike**

4. Following the filing of a defence basically denying any constructive dismissal, the defendant filed an application to strike out the claim. That application is supported by a sworn statement of Mr Parmod Archary, General Manager of VNPF and two sworn statements from Mr Willie Ben Karie, member of the VNPF Board and Chairman of the Disciplinary Committee.
5. Three main grounds are advanced in the application. First that the nature of the claim is constructive dismissal, but the entire evidence shows that the claimants refused to attend any disciplinary hearing and tendered their resignations for reasons that the disciplinary process was delayed. Second, it is alleged that the claim is an abuse of process and the entire claim has no course of action and should be struck out.
6. In *Noel v Champagne Beach Working Committee* [2006] VUCA 18 the Court of Appeal confirmed that the Supreme Court has an inherent jurisdiction to strike out a pleading but "*the jurisdiction should be exercised sparingly and only in a clear case where the court is satisfied that it has the requisite material; the claimants case must be so clearly untenable that it cannot possibly succeed: Electricity Corp Ltd v Geotherm Energy Ltd [1992] 2 NZLR 641.*"
7. If I am satisfied that the claim is so clearly untenable that it cannot possibly succeed then I must strike it out.

#### *Abuse of process*

8. The first limb of Mr Yahwa's argument under this ground relates to the application of Civil Procedure Rules-r 3.2 - Adding and removing parties, r 3.3 - Joining and

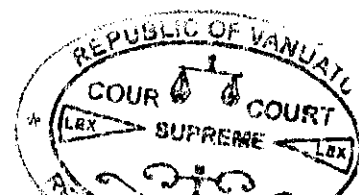


separating claims and r 3.4 – Consolidating proceedings. Rule 3.3 is of more relevance for consideration of the application and more particularly sub-rule (2) which states:-

*“(2) The court may order that several claims against the one person be treated and heard as separate proceedings if:*

- (a) the claims can be more effectively dealt with separately; or*
- (b) for any other reason the court considers the claims should be heard as separate proceedings.”*

9. Mr Yahwa submits that the claim can effectively dealt with if they are heard as separate proceedings but not in the current form. He submits that it is an abuse of process for the claimants to file their claims as a single claimant for reasons that each of the claimant's facts are different and not the same .Each one held a different position with different responsibilities and privileges that go with the job. They had different salary scales relative to their positions and each served a different number of years with the VNPF. It was submitted that each claimant resigned for different reasons and each was charged for different disciplinary offences.
10. It was also submitted that they were not all charged with the same offence therefore each one should have filed a separate claim so that it can be more effectively dealt with.
11. Mr Tari on the other hand submits that the claimants have a common question of law which is constructive dismissal and the fact that they were suspended for reasons which were without basis.
12. The claimant's employment history as set out in their claim, shows that each started their employment with the VNPF on different dates and each held a different position. They were suspended for different reasons relative to their positions and resigned on different dates. Mrs Ala and Mrs Herbert were suspended on 11 October 2019 and resigned on 10 October 2019. Mrs Ala was suspended basically for acting in breach of the staff code of conduct and unauthorized disclosure of information whilst Mrs Herbert was suspended for breaches of the staff code of conduct and acting irresponsibly as a senior officer. They both gave a three months' notice effective from the date of their resignation. In their resignation letters Mrs Ala apologised for her actions if she had offended anyone whilst Mrs Herbert felt that as an auditor she could no longer do her work independently.
13. Mrs Bule was the only one who was suspended on 10 October 2019 for breaches of the staff code of conduct. Her resignation was with immediate effect from 7 November citing reasons of unfairly delaying her suspension and unfair treatment by Mr Achary. Other staff who tendered their resignations on the same date with immediate effect were Mr Robert and Mrs Mala. Mr Robert referred to breaches of his contract by Mr Achary as the reason for his resignation. Mrs Mala complained of Mr Achary's leadership and the delays in disciplinary hearing as the reasons for her resignation. Both Mr Robert and Mrs Mala were each suspended for different reasons. Mr Robert for acting without authority but he was suspended with pay. Mrs Mala was suspended without pay for non-performance of her duties as in house Counsel and being negligent.



14. Mrs Stephens was suspended for acting without authority in her position. She tendered her resignation on 1 November 2019 with effect from the same day. Her reasons for doing so were delays in the disciplinary hearings and she complained of Mr Achary's actions towards her.
15. The evidence highlighted above indicates that the case will be more effectively dealt with as separate cases.

*No constructive dismissal*

16. Mr Yahwa argues that there is no cause of action for constructive dismissal. Mr Tari on the other hand submits that the ill treatment substantiating the course of action is the suspension without pay, delays in the disciplinary hearing and furthermore the suspensions were issued as a result of the claimants providing information to the Ombudsman.
17. It is pleaded at paragraph 3 of the statement of claim that the claim is for constructive dismissal and employment entitlements as a consequence of that decision. The first prayer for relief is constructive dismissal in relation to the suspension without pay and without due process. In *Auckland Shop Employees Union v Woolworths (NZ) Ltd [1985] 2 NZLR 372* the New Zealand Court of Appeal described some instances that could constitute constructive dismissal in the following terms:-

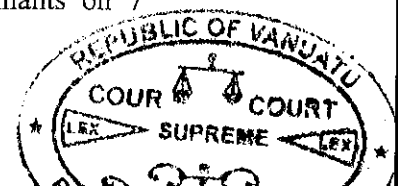
*"Where an employer gives a worker an option of resigning or being dismissed or where an employer has followed a course of conduct with the deliberate and dominant purpose of coercing a worker to resign ... or where a breach of duty by the employer leads a worker to resign ..."*

18. The position in Vanuatu was stated in more general terms in *Ahelmahalalah v Republic of Vanuatu* [2018] VUCA 16 where the Court of Appeal said:-

*"...at the heart of the doctrine of constructive dismissal is the concept of repudiation of contract; conduct which shows the employer no longer intends to be bound by one or more of the essential terms of the contract..."*

*(emphasis added)*

19. The General Orders referred to above not only form the terms and conditions of employment of VNPF employees but also set out a process for dealing with matters of discipline. Clause 17.3 sets out the disciplinary offences. Where there is a serious breach of discipline (clause 17.4) an employee may be suspended with or without pay (clause 17.5); and when there is a decision to lay disciplinary charges against an employee he or she must be given seven (7) days to respond (clause 17.6).
20. The evidence is Mrs Ala and Mrs Herbert were suspended on 11 October 2019. Mrs Bule was suspended on 10 October 2019 Mr Robert, Mrs Mala and Mrs Stephens were all suspended on 20 September 2019. With the exception of Mr Robert who was suspended with pay, the others were suspended without pay. The suspensions were made pursuant to clause 17.5 of the General Orders and each claimant was given seven (7) days to respond. Mr Robert responded within time but did not respond to the allegations against him. Counsel responded on behalf of all the claimants on 7

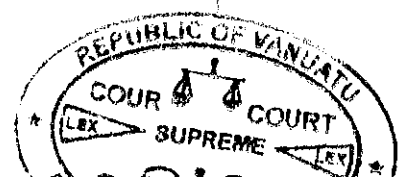


November 2019 denying in general the allegations against each claimant and advising that formal responses were prepared ready for the disciplinary hearing.

21. In the same letter of response, Counsel also advised that some of his clients have resigned and others will do the same in due course not to avoid the disciplinary hearing but given that their suspensions without pay were for too long and their families were suffering and they needed to find alternative employment. Mrs Bule, Mrs Mala, Mrs Stephens refer to the delay in disciplinary proceedings as the reasons for their resignation. Mrs Ala and Mrs Herbert resigned by giving three (3) months' notice. Finally only Mr Robert raised issues of breach of contract in his letter of resignation.
22. Counsel responded on behalf of his claimants approximately a month later despite each being informed in their letters of suspension that they were to respond within seven (7) days.
23. Prior to receiving the claimants' response, on 16 October 2019, Mr Karie as the chairman of the Disciplinary Board by notice informed Ms Mala that her disciplinary hearing was scheduled for 29 October 2019 at 2 pm. She turned up with Counsel but was informed that the hearings could not proceed due to criminal proceedings issued against Mr Achary by the Ombudsman in PI Case No 19/2873 **PP v Parmod Achary** and Mr Achary was ordered not to interfere with any prosecution witnesses.
24. The criminal case resulted from investigations by the Ombudsman into some VNPF matters and the claimants were interviewed as part of those investigation therefore they were potential witnesses.
25. The disciplinary hearings therefore could not proceed and were postponed pending conclusion of the criminal case. Mr Robert was notified to appear before the disciplinary committee on 30 October 2019 at 2 pm and Ms Stephens was notified to appear on 31 October 2019. None of them attended.
26. On the 27 January 2020, Mr Darval Simon of the Ombudsmans Office informed Mr Achary by the letter as follows:-

*"From this week onwards the office of the Ombudsman will be summoning staff of the VNPF few of which the ombudsman believes on reasonable grounds they have the information this office requires to finalise the investigations. As such you are required not to obstruct or interfere with any summons issued to any VNPF staff to appear before the Ombudsman for questioning."*

27. As a result of the investigations and the ongoing criminal case which was given a second trial date on 24 and 25 March 2020 it was impossible to conclude the disciplinary hearings. Mr Karie says that these circumstances prolonged the conclusion of the disciplinary hearing.
28. The delays in conducting the disciplinary hearings were not of the employer's doing but were beyond its control. In addition the claimants contributed to the delay in their disciplinary hearings as they were required to respond to the allegations against them within seven (7) days and did nothing therefore it could not be said that that the VNPF



engaged itself in conduct which shows that it no longer intended to be bound by the essential terms of its contract with each claimant.

**Result**

29. For the above reasons I am of the view that the claim as pleaded is so clearly untenable that it cannot possibly succeed and must be struck out. The claim is struck out. The defendant is entitled to costs fixed at VT 25,000.

DATED at Port Vila this 3<sup>rd</sup> day of February, 2021  
BY THE COURT

.....  
D. Aru  
Judge

