

IN THE EMPLOYMENT RELATIONS COURT
AT LAUTOKA

ERCC No. 01 of 2021

BETWEEN : DR. NARENDRA REDDY

PLAINTIFF

AND : THE UNIVERSITY OF SOUTH PACIFIC

DEFENDANT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. S. Nand for the Plaintiff
Mr. F. Hanif for the Defendant

Date of Hearing : 28 July 2022

Date of Decision : 23 October 2023

DECISION

EMPLOYMENT

Claim for unused annual leave – Strike out – Whether claim statute barred – Fraud – Sections 4 and 15 of the Limitation Act 1971 – Order rule 18 (1), High Court Rules 1988

The following cases are referred to in this decision:

1. *Attorney General v Shiu Prasad* [1972] 18 FLR 2010 (3 November 1972)
 2. *Steiner v Steiner* [2014] FJHC 834; HPP 7.2013 (14 November 2014)
 3. *Agar v Hyde* [2000] 201 CLR 552
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1. The plaintiff was employed as an associate professor of the defendant's school of management and public administration within the faculty of business and economics. After leaving employment in July 2011, he filed action to recover compensation for unused annual leave. The claim is based on breach of contract, negligence and fraud. He has asked for damages and for payment of lost allowances and benefits.
2. In his statement of claim, the plaintiff stated that although he was entitled to 30 days annual leave every year, he was unable to take leave from 2002 to 2006 because of the defendant's administrative requirements.
3. The plaintiff says that he was appointed acting head when the head of the department, Dr. R. D Pathak, went on annual leave in 2003. Therefore, the plaintiff says, he was compelled to hold his annual leave during the time. He said the same thing happened in 2004, 2005 and 2006. As a result, the plaintiff said he accumulated 91 days leave for the period 2002 to 2006.
4. The plaintiff stated that although the defendant initially agreed to pay his accrued annual leave, it did not settle his leave entitlement, notwithstanding his several requests while in service and also after resignation.

5. The plaintiff said that the defendant later maintained that only 60 days of leave could be accrued after the 3 year contract and any accrued leave which is more than 15 days must be approved by the vice chancellor.
6. By statement of defense filed on 17 February 2021, the defendant denied the allegations, and pleaded that the plaintiff's causes of action have not accrued within six years before the commencement of the action as required by section 4 of the Limitation Act 1971.
7. The defendant also filed a summons to strike out the plaintiff's statement of claim on 31 March 2021. The defendant applied to have the writ of summons and statement of claim be struck out for being frivolous, vexatious and an abuse of the process of the court as the causes of action are barred by section 4 of the Limitation Act.
8. In support of the application to strike out the action, the defendant's manager employment relations, Pita Bulamainaivalu, deposed an affidavit stating that at the date of filing, the plaintiff's writ and statement of claim was nine years out of time and that, therefore, the plaintiff's claim should be struck out as it is statute barred.
9. The plaintiff filed an affidavit in opposition and said he tried to exhaust the avenues available to him and pursued his grievance in terms of his employment contract. However, he states, the defendant took a long time to respond to the matters raised by him.
10. The plaintiff said he exchanged emails with former deans of his department, professors Jeff Born and Biman Prasad. He disclosed those emails together with emails exchanged with the defendant's human resources personnel
11. The plaintiff said that Dr. R. D Pathak, the head of the school for whom he acted, has fully endorsed the reinstatement of his annual leave. He said that his immediate supervisor and dean, Dr. Biman Prasad also endorsed his leave by letter dated 30 June 2015.

12. The plaintiff said he complained to the ministry of employment, productivity and industrial relations in 2013 as the defendant failed to make payment in lieu of his leave. He said the ministry took three years to complete its investigation, and replied by letter dated 25 August 2016.
13. By its letter, the ministry informed the plaintiff that the process involved in the accumulation of leave was not correctly followed by his supervisors resulting in loss of annual leave entitlement. The letter also stated that his claim of non-payment of annual leave is void, and advised the plaintiff that his case will be closed. The plaintiff said that he explored all possible avenues to recover his annual leave dues and that he filed action after his case was closed by the labor office.
14. The plaintiff states that his claim is based on fraud, and that this places the action under section 15 of the Limitation Act. Therefore, it was submitted, the period of limitation did not begin to run until discovery of the fraud.
15. Section 4 (1) of the Limitation Act says that an action founded on a contract or tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. The defendant submits that the claim filed on 22 January 2021, in respect of annual entitlements from 2002 to 2006, is barred by the Limitation Act.
16. The defendant says although the plaintiff has pleaded fraud and relied on section 15 of the Limitation Act, the issue is whether the elements of fraud have been sufficiently pleaded to get within the limitation period. The defendant says no act of dishonesty was pleaded in the statement of claim, and that the labour ministry's letter dated 25 August 2016 did not allege fraud.
17. The defendant submitted that the plaintiff's unused annual leave did not accrue and was, therefore, forfeited as there was no endorsement of unused annual leave into the next year. The defendant submitted that such an endorsement was an administrative requirement for unused leave to be carried forward.

18. Courts have proceeded on the basis that the jurisdiction to strike out proceedings should be very sparingly exercised and only in exceptional cases. In *Attorney General v Shiu Prasad*, the Fiji Court of Appeal made this observation, and added that the jurisdiction should not be exercised where legal questions of importance and difficulty are raised.¹
19. Ordinarily, the limitation period is calculated from the date on which the cause of action arose. The plaintiff says the cause of action accrued after he received the labour department's letter dated 25 August 2016. A considerable time had passed since he received that letter, and the delay in filing action is not clearly explained. Moreover, the plaintiff places reliance on fraud as a cause of action. The particulars of the fraud though are not set out in the clearest terms in the statement of claim.
20. Nevertheless, in the circumstances, the question of limitation must be determined on the basis of the evidence given by the parties; a decision based on the pleadings alone will not be just in this case. The defendant has not established beyond doubt that the plaintiff's claim is statute barred. Therefore, it is best that the matter proceeds to trial so that all issues can be determined after evidence is led on behalf of the parties.
21. In *Steiner v Steiner*², Mutunayagam J referred to the decision in *Agar v Hyde* in which the High Court of Australia said:

“It is of course well accepted that a courtshould not decide the issues raised in those proceedings in a summary way except in the clearest of cases. Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way and after taking advantage of the usual interlocutory processes”.³
22. In view of the foregoing, the court declines to strike out the plaintiff's action.

¹ *Attorney General v Shiu Prasad* [1972] 18 FLR 2010 (3 November 1972)

² [2014] FJHC 834; HPP 7.2013 (14 November 2014)

³ [2000] 201 CLR 552 at 575

ORDER

- A. The defendant's summons to strike out is struck out.
- B. The defendant is to pay the plaintiff costs summarily assessed in a sum of \$1,000.00 within 21 days of this decision.

Delivered at **Suva** on this **23rd** day of **October, 2023**.



A handwritten signature in blue ink, appearing to read "M. Javed Mansoor".

M. Javed Mansoor
Judge