

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CENTRAL DIVISION**  
**CIVIL JURISDICTION**

Civil Action No. HBC 327 of 2023

**BETWEEN:**

**MISAELE DRIUBALAVU**

**PLAINTIFF**

**AND:**

**MINISTRY OF EDUCATION, HERITAGE AND  
ARTS**

**DEFENDANT**

Date of Hearing : 3 April 2024  
For the Plaintiff : Mr. Keteca. I  
For the Defendant : Mr. Naidu. Y  
Date of Decision : 23 May 2024  
Before : Waqainabete-Levaci, SLTT Puisne Judge

**JUDGEMENT**

**(APPLICATION FOR STRIKING OUT PURSUANT TO ORDER 18 R. 18 (1))**

**PART A – BACKGROUND AND APPLICATION**

1. By way of Writ of Summons, the Plaintiff/Respondent claims for arrears of salaries owed to him whilst he was in employment from 29 September 2003 to 31 December 2012 with the Ministry of Education as the Director/CEO of the National Substance Abuse Advisory Council (NSAAC). He later retired on 31 December 2015.

2. The claim by the Plaintiff/Respondent is that despite his promotion from Senior Education Officer to Director/CEO of NSAAC he was not paid for the difference in salary upon appointment.
3. Thereafter, the Defendant/Applicant sort for Striking out of the matter by Summons relying on the following grounds:
  - (a) Discloses no reasonable cause of action as it is statute barred pursuant to section 4 (1) (a) of the Limitation Act 1971;
  - (b) is frivolous and vexatious;
  - (c) causes prejudice, embarrassment and delays the fair trial of the action; and
  - (d) is otherwise an abuse of the process of the Court.
4. In his Affidavit, the Plaintiff/Respondent deposed that he is entitled to the arrears in salaries and that the claim accrued from 2017. He had made submissions to the Defendant/Applicant and it took nearly two years to await a response prior to instituting these proceedings.
5. The Plaintiff/Respondent deposed in his Affidavit that -
  - (i) From the date of his promotion from Senior Education Officer to Director/CEO NSAAC on 29<sup>th</sup> September 2003 until 2013, he was given grade SSO1 level pay of a Principal Administrative Officer, and not the salary as per his contract.
  - (ii) That after 2013 his salary was upgraded and he was partially backdated for the difference in his salary.
  - (iii) He only knew that he would not be able to obtain the difference in his salary on 1 November 21 March 2018 in a correspondence from CEO NSSAAC, who had obtained legal advise from the Attorney General.

## **PART B: SUBMISSIONS**

6. In their submissions, the Defendant/Applicant relies upon the Claim by the Plaintiff/Respondent that outlines the orders sort refer specifically to the dates 29 September 2003 to 31 December 2012. In their written submission, in accordance with section 4 (1) of the Limitations Act, the Claim which was filed some 10 years ago, is now statute barred.

7. Counsel referred to two cases one of which I cite as follows: Nicholls -v- Suva City Council [2020] GJHC 624; HBC 169 of 2018 in which Nicholls, an employee who was terminated on 15 March 2011 filed her action on 8<sup>th</sup> of June 2018 which was 8 years after termination from when her case in the Employment court was terminated by virtue of the Essential National Industries (Employment) Decree 2011. It was held that the termination of proceedings in the Employment Court of the High Court did not extend the period to which the action should be brought, there was still two years left for the period to expire which the Plaintiff had failed exploit until after the expiry of the period of claim.
8. The second reason why the Applicant/Defendant is seeking orders for striking out is that the action is frivolous and vexatious and an embarrassment to fair trial. Referring to Arun Lal Seth -v- Kamal Chand Seth, Director of Lands and Attorney General HBC 183 of 2009 in which Tuilevuka J determined that striking out of pleadings will not be exercised for disclosing no reasonable cause of action unless on the pleaded facts cannot succeed in law.
9. In response the Plaintiff/Respondent argued that the Plaintiff was a career civil servant who was appointed to the position of Director on a contract. However he failed to obtain his salary based on the agreed position. The Plaintiff now claims for the arrears in pay backdated to him. The claim was forthcoming to him only after the matter was dealt within the Ministry and he was later advised in 2018. Hence the reason why the Plaintiff/Respondent's claim is within the time period of 6 years under the Limitation Act.
10. In response the Applicant/Defendant argued that the monies accrued from 2013 and the receipt in the response in 2017 did not change when the monies became accrued.

### **PART C: LAW AND ANALYSIS**

11. Section 4 of the Limitation Act stipulates the time limitations for bringing an action founded on contract. The provision reads as follows:

*Limitation of actions of contract and tort, and certain other actions*

4.-(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-

(a) actions founded on simple contract or on tort;

(b) actions to enforce a recognizance;

(c) actions to enforce an award, where the submission is not by an instrument under seal;

(d) actions to recover any sum recoverable by virtue of any Act, other than a penalty or forfeiture or sum by way of penalty or forfeiture:

12. From the Writ of Summons and Statement of Claim which was poorly drafted, the Plaintiff/Respondent seeks a declaration that there was a breach of an implied and express contract and wrongful assessment of salaries. This is not contested by the Plaintiff/Respondent that as a result of the breach, the Plaintiff/Respondent seeks the outstanding arrears as well damages to be assessed and awarded to him.
13. The Court is mindful that the claim is based on common law principles and no reference has been made to the Employment Relations Act which was in existence after 2007, a portion of the period in which the Plaintiff/Respondent now claims.
14. The Plaintiff/Respondents filed submissions on the basis in which their claims was based and relied upon the case of Bikram Chand -v- Public Service Commission and Attorney General of Fiji HBC 0048/1995 here Justice Finnigan held that the cause of action arose 11 years ago when the Plaintiff was served with a written letter rendering him to have deemed to have resigned from 21 January 1994. The action was more than 10 years old when the Writ was issued on 22 February 1995. The trial was conducted in April of 2004, and the judgment for damages was delivered in March of 2005. The Court held that the claim fell within the ambit of common law principles and found no evidence of a written contract of employment.
15. Hence because he has relied upon the claim based on his contracted period of service, section 4 (1) of the Limitation Act requires that all actions based on contract be brought within 6 years when the matter accrued.
16. Seneviratne J in the case of Nicholls -v- Suva City Council CA 169 of 2018 held that even an action in the Employment Court which was dismissed does not extend the period of limitation and thus the Plaintiff had only 2 years subsisting to bring a claim in common law from when his matter in the Employment Court was dismissed.
17. In this instance, the Plaintiff/Respondent argued that he opted to file an action after the Ministry refuse to re-pay him for his arrears in 2018 based on their own legal advise.

18. However if the dates are noted, the plaintiff/respondent relied upon the dates between 2003 and 2011 although he was later paid some of the arrears in 2013.
19. Therefore it was quite clear that in 2013 he was aware that there were still monies owing against him for his employment contract with the Public Service Commission that he could have filed a claim for. Thus the cause of action arose in 2013.
20. The Plaintiff/Respondent awaited 9 years later to file the claim. The delay in the legal advice does not in any shape or form extend the date in which the cause of action was accrued. The date of the cause of action accrued is in 2013 and not 2018 as he claimed.
21. The Court finds that the claim is statute barred in light of the provisions of section 4 of the Limitation Act.
22. The requirement for actual or constructive knowledge of a prospect to success is only required to be considered for a leave application to extend the time limitation. In this instance this is not the case.
23. Therefore the Court finds that there is a basis to strikeout the application as there is no reasonable ground to seek this action in Court given that it is statute barred.
24. The Court will impose costs summarily assessed against the Plaintiff/Respondent.

**Orders of the Court:**

25. **The Court orders as follows:**

*(a) That the Writ of Summons is dismissed;*

*(b) Costs of \$300 is imposed against the Plaintiff/Respondent.*



A handwritten signature in blue ink, appearing to be "Ms Senileba LTT Waqainabete-Levaci". The signature is written over a horizontal dotted line.

Ms Senileba LTT Waqainabete-Levaci

Puisne Judge