

IN THE EMPLOYMENT RELATIONS COURT AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 19 of 2019

BETWEEN: **BANK OF BARODA**

APPELLANT

AND: **SURESH CHAND**

RESPONDENT

Appearances:

Mr. Noel. Tofinga for the Appellant.

Mr. A. Singh for the Respondent.

Date/Place of Judgment:

Wednesday 31 July 2024 at Suva.

Coram:

Hon. Madam Justice Anjala Wati.

JUDGMENT

Catchwords:

Employment Law – Appeal – Interpretation of the Collective Agreement on the worker’s entitlement to be paid for long service leave when he has not utilized it within a given timeframe- is it just and equitable for the employer to refuse to pay for the long service leave.

Cause and Background

1. The Bank appeals against the decision of the Tribunal on its findings that it should pay to the worker Suresh Chand 6 week’s long service leave as per his entitlement under the Collective Agreement within 28 days.
2. Clause 8 (viii) of the Collective Agreement stipulates the worker’s entitlement. It speaks of long service leave and reads as follows:

“Long Service Leave

<i>Years of Continuous Service Completed in Bank</i>	<i>Long Service Leave Entitlement</i>
<i>10 Years</i>	<i>2 Weeks on Full pay</i>
<i>15 Years</i>	<i>4 weeks on Full pay</i>
<i>20 Years</i>	<i>2 Weeks on Full Pay</i>
<i>25 Years</i>	<i>5 Weeks on Full pay</i>
<i>30 Years</i>	<i>1 week on Full Pay</i>

The Long Service Leave shall be in addition to Annual Leave and such shall be availed within 2 years of it falling due at a mutual convenient date.”

3. The worker had been given his 2 weeks long service leave after completing 10 years of service. He did not take his 4 weeks leave with full pay after completing 15 years of service and 2 weeks leave on full pay after completing 20 years of service.
4. When he applied on 19/01/2017 for 4 weeks of long service leave, the employer wrote back and said that under the relevant clause of the Collective Agreement the worker failed to avail the leave within 2 years of it falling due and as such cannot make a claim for leave after that.

The Tribunal’s Findings

5. The Tribunal referred to the provision of the contract and stated that key phrase in the provision was “*at a mutual convenient date*”. The Tribunal said that leave could not be unilaterally withdrawn without any mutual agreement between the parties.

6. The Tribunal stated that the drafters of the Collective Agreement understood the pressure of working within the Banking sector. They understood that it may not be possible at all to take long service within the two years. This is evidenced by the insertion of the phrase “*at a mutual convenient date*”.
7. The Tribunal further found that the Collective Agreement was silent on the consequences of not taking the annual leave within the specified two years. It found that annual leave accrues to an employee after years of services to the employer. It is recognition of loyalty and trust between the parties. The employee earned this entitlement after an extended period of service. It is not justifiable for the employer to refuse him this entitlement.

The Appeal and Analysis

8. The ground of appeal raised by the Bank is as follows:

1. *The Tribunal erred in fact and in law when it noted that clause 8(viii) of the Collective Agreement between the Union and the Bank stated that:-*

“Long service leave shall be in addition to Annual Leave and such leave shall be availed within 2 years of it falling due at a mutual convenient date.”

Then assumed the intention of the drafters of the Collective Agreement without any given evidence to consequently conclude that:-

“...they understood that it may not be possible at all to take long service leave within 2 years.”

And then ordered the employer to pay the Grievor Long Service Leave entitlement despite the said Grievor not availing the said leave within the stipulated 2 years without any regard to the

legal precedent approach of interpretation that “words should be given their natural and ordinary meaning”.

9. I do not have a different view from that of the Tribunal. The relevant clause states that leave shall be used within 2 years at a mutually convenient date.
10. It was for both parties to work out a mutually convenient date within 2 years when the leave became due as to when the worker ought to proceed on leave. It is not only for the worker to comply with that provision. The employer had to also ensure that there was compliance of the provision.
11. Both parties did not come to an arrangement and so the Bank cannot arbitrarily forfeit a right that has accrued under the contract.
12. The Bank is the employer. It ought to have made arrangements within the 2 years for the worker to go on leave. The onus fell equally and squarely on the employer too. A suitable date ought to have been worked out based on the needs of both the parties.
13. Further, the Collective Agreement does not state that failure to use the leave as specified results in forfeiture of leave.
14. If that was the agreement, then the worker ought to have taken responsibility to take advantage of the benefit or else he would have been at the receiving end.
15. In absence of a clear provision that the right is forfeited, it is unfair to decline to pay the worker his entitlement. He has worked for the period he ought to have been on leave and enjoyed his time. The Bank has benefited from his service. To avoid and decline to pay is a contractual unjust enrichment.
16. Indeed the worker cannot ask for leave as he has not utilized it within 2 years but he is entitled to be paid for his service for the leave period.

17. I do not find any error in the Tribunal's interpretation of the Collective Agreement.

Final Orders

18. I dismiss the appeal and order the Bank to comply with the orders of the Tribunal with 4% post judgment interest from 11 July 2019 (date of Tribunal's judgment) to 1 April 2021 (date of appeal hearing). The period of interest is 2 years.
19. The above order shall be complied with within 21 days.
20. The worker shall have costs of the proceedings in the sum of \$3,500 to be paid within 21 days.



A handwritten signature in blue ink, appearing to read "Anjala Wati", is written above a horizontal dotted line.

Hon. Madam Justice Anjala Wati

Judge

31.07.2024

To:

1. ***Mr. Noel Tofinga for the Appellant.***
2. ***Fiji Bank & Finance Sector Employees Union for the Respondent.***
3. ***File: Suva ERCA 19 of 2019.***

