

IN THE COURT OF APPEAL , FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0066 OF 2003S
(High Court Civil Action No. 295/2000S

BETWEEN:

HASSAN DIN
FINANCE SECTOR MANAGEMENT STAFF
ASSOCIATION

Appellants

AND:

WESTPAC BANKING CORPORATION

Respondent

In Chambers : Justice Ellis, JA

Hearing: Tuesday 9th day of March 2004, Suva

Counsel: Mr. H. Nagin for the Appellant
Mr. G. Leung & Mr. S. Leweniqila for the Respondent

Date of Decision: Wednesday 10th March 2004

DECISION

This is an application for leave to appeal out of time against the decision of Scott J refusing to make a declaration as to the meaning of a clause in a Collective Agreement between the Union and the Bank defining the quantum of retirement benefits for employees of whom Mr. Din the first plaintiff was one.

The Judgment in the High Court was delivered on 28 August 2003 and sealed by the Bank on the September 2003. The 6 week time for appealing expired on 29 October 2003. This application was filed on 2 December 2003 and so some 34 days out of time.

The reasons for the delay are tendered by the Applicants in the affidavit of Mr. Rae, the Public Relations Officer of a sister Union of the second applicant. He deposes:

"6. I have now been advised by Sir Vijay Singh (our former Solicitor who was instructed to lodge the appeal for the Appellants) that he is suffering from cancer and had to be away at the relevant time in Brisbane, Australia for treatment. He could not, therefore, file the appeal in time. After discovering his illness, he has retired from practice."

Mr. Leung rightly criticises the hearsay and some-what imprecise nature of this information, but taken with the other evidence (which does not contradict what is claimed) I am satisfied the failure to proceed in time was due to the unusual circumstances described.

The Bank opposes the application on the usual basis that is entitled to finality, that the case is not of any general significance, and the applicants ought not in the circumstances be indulged by leave.

The dispute is to the interpretation of clause 8 (vi) of the Agreement which provides

"8 (vi) Retirement Allowance which reads as follows:

A Manager qualifies for retirement allowance at the age of 55 years and after being completed 15 years of service or more as follows:

- | | | |
|--|----------|--|
| <i>(a) For 15 to 19 completed years of service</i> | <i>-</i> | <i>one month salary at the rate payable at the time.</i> |
| <i>(b) For 20 to 30 completed years of service</i> | <i>-</i> | <i>three months salary at the rate payable at the time in addition to (a) above.</i> |

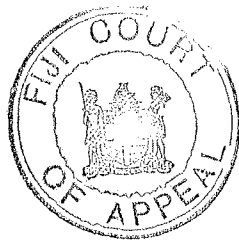
(c) *For over 30 completed years of service*

- *one month salary payable in accordance with the rate payable at the time for each completed year of service in addition to (a) and (b) above and payable up to the age of 55 years."*

The first applicant retired after 34 years service and claims that (c) entitles him to 34 months salary whereas the Bank offers only an extra 4 months. In cash the difference is between a total allowance of \$36,124.87 and one of \$171,595.04. Plainly it is in the Association's interests on behalf of future retiring officer as well as Mr. Din to have the interpretation resolved. It must be in the in the Bank's interest also. Mr. Leung however submits the Bank would prefer to leave the matter for negotiation rather than determination by the Court. I express no view as to the true interpretation, but I am persuaded that a definitive interpretation is needed.

Counsel are agreed on the proper approach the Court should take to the present application. They, have referred me to the leading cases for example *Army v. No. 2 Public Service Appeal Authority [1973] 2 NZLR86* and *National Bank of Fiji v. Gregory Lawlor* FCA Appeal No. ABU0061 of 2000. I agree with Mr Leung that Shameem J. summarized the considerations succinctly in the *Lawlor* case saying relevant considerations include the reasons for the delay in filing, any prejudice to the respondent, the history of the case and the general justice of the matter. All agree it is a wide discretion to do justice.

Taking into account the reasons for the delay and its extent, the position of the respondent, and the significance of the matter in dispute, the fact that the Judgment below did not resolve the dispute and the overall justice of the matter, I consider leave should be granted to appeal out of time. I accordingly extend the time until 31 March 2004. I fix costs of \$300 plus disbursement if any (to be fixed by the Registrar if need be). The incidence of costs can await the outcome of the appeal.



A. A. Ellis

Justice Ellis, JA

Solicitors:

Messrs. Sherani and Company, Suva for the Appellant
Howards, Suva for the Respondent

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