The Independent State of Papua New Guinea v. Hodson

Supreme Court
3 April 1987
Kidu C.J., Kapi Dep. C.J., Barnett J.

Employment law – contract of employment – demotion to position of lesser responsibility without loss of salary – whether beach of contract – measure of damages – damages for distress and disappointment.

The respondent, an Englishman, was hired, in the United Kingdom, to take up a responsible position in Papua New Guinea. A written contract of employment was signed, in the U.K., that Hodson was to be "Chief Investigations Officer" in the Department of Finance, office of Taxation. When he arrived in Papua New Guinea, Hodson found that he had been relegated to the lower position of supervisor, albeit without any loss in remuneration. The respondent sued for breach of that contract of employment and succeeded in the National Court. The appellant appealed against the finding of breach, and against the award of damages, while the respondent cross-appealed on the National Court's finding that there was no negligent misrepresentation by the State. [The judgment of Los J., in the National Court, is reported as *Hodson* v. *Independent State of Papua New Guinea* at [1985] P.N.G.L.R. 303.]

HELD: The decision of the trial court that the State had committed a fundamental breach was affirmed, but the assessment of damages was remitted to the trial court for re-assessment. The cross-appeal failed.

(1) The breach by the State went to the heart of the contract – the respondent was not permitted to occupy and perform the duties of the office that were contracted for: *l.* 130, per Kidu C.J.

(2) Although clause 4(2) of the contract allows the employer to transfer an employee to some "other capacity" there must be ground or reasons for such a transfer: *l.* 140, per Kidu C.J., *l.* 300, per Kapi Dep. C.J.

(3) The quantum of damages should be recalculated to make proper provision for income tax deduction, proof of distress as a head of damages, and reassessment of whether interest ought to be awarded for the loss of future earning: *l.* 200 per Kidu C.J., *l.* 350, per Kapi Dep. C.J.

(4) There was no evidence of negligent misrepresentation: *l.* 200, per Kidu C.J., *l.* 360, per Kapi Dep C.J.

Cases referred to in judgment:
Archer v. *Brown* [1985] Q.B. 401; [1984] 3 W.L.R. 350; [1984] 2 All E.R. 267
Aspinall v. *Government of Papua New Guinea (No. 2)* [1980] P.N.G.L.R. 50
Aundak Kupil v. *Independent State of Papua New Guinea* [1983] P.N.G.L.R. 350

Cox v. *Phillips Industries Ltd.* [1976] 1 W.L.R. 638; [1976] I.C.R. 138; [1976] 3 All E.R. 161
Cybula v. *Nings Agencies Pty. Ltd.* [1981] P.N.G.L.R. 120
Jarvis v. *Swans Tours Ltd.* [1973] 1 Q.B. 233; [1972] 3 W.L.R. 954; [1973] 1 All E.R. 71
Meaney v. *Hastings Deering (Pacific) Ltd.* [1979] P.N.G.L.R. 170
Thompson v. *Faraonio* (1979) 54 A.L.J.R. 231

OBSERVATION: The High Court of New Zealand, in *Vivian* v. *Coca Cola Export Corporation* [1984] 2 N.Z.L.R. 289, usefully reviewed cases where mental distress caused by breach of an employment contract was claimed. The result in *Vivian* followed the rule laid down in *Addis* v. *Gramophone Co. Ltd.* [1909] A.C. 488. Damages for mental distress for loss of employment were awarded in *Horsburgh* v. *N.Z. Meat Processors Union* [1988] 1 N.Z.L.R. 698, but there the defendant was the union which forced the dismissal.

J. Goodman and *L. Karri* for the appellant/cross defendant
J. Ryan for the respondent/cross appellant

KIDU C.J.

Judgment:

This is an appeal against the whole of the National Court judgment on the matter. The cross-appeal by the respondent is based on the contention that the National Court erred in its decision that there was no negligent misrepresentation.

Breach of contract

Mr Hodson, an Englishman, applied for the position of Chief Investigations Officer in the Office of the Chief Collector of Taxes in the Department of Finance. He was interviewed by Mr Obara, an officer attached to the Papua New Guinea High Commissioner's office in London. Subsequently he was told by Mr Obara that he had won the position and a contract was signed.

On 9 April 1984 Mr Hodson arrived in Papua New Guinea and to his amazement he was told by the Chief Collector of Taxes that he was not to be Chief Investigations Officer as another person had been recruited from New Zealand for the job. (This person had yet to sign a contract.) Mr Hodson was relegated to one of the lower positions of supervisor. He challenged this, although he did perform the functions of the position, by signing any documents as Acting Supervisor. The Public Service failed to rectify the matter to Mr Hodson's satisfaction and consequently he sued.

The appellant contends that there was no breach of contract by it as the contract allowed it to use Mr Hodson at any other capacity so long as his salary remained the same. Clause 4 of the contract reads:

> The employee agrees to serve the employer in the office and in the Public Authority described in the schedule hereto. *The Employee agrees to serve in such other capacity* or in such other Public Authority or in such locality as the employer may determine, but in no event shall the remuneration payable to the employee under cl. 7.1 of this agreement be reduced.

It must be emphasized from the outset that the reason Mr Hodson was demoted (without loss in pay) before he arrived at the office of the Chief Collector of Taxes was not because he was not qualified for the job he had contracted for, but because the Chief Collector, contrary to a perfectly valid contract, refused to allow him to perform the duties of that office as he had decided that another person, a New Zealander, was to be engaged for the position.

Mr Hodson understood that under clause 4 of the contract he could be located in another position but it is quite clear from the evidence that he did not expect that clause 4 was to be utilized before he arrived in Papua New Guinea or on his first day at work.

The learned trial judge has set out in his judgment his views on the reasons for the existence of clause 4 of the contract. I have no quarrel with these reasons one way or the other. Also there may be other reasons. But for purposes of this case I consider one thing very clear and that is that clause 4 was not meant to be used to stop a person from getting a particular position he or she had contracted for and was not meant to be used by the employer or its servants or agents to manipulate non-citizen officers of the Public Service.

Clause 4 of the contract says three things very clearly:

(1) That the employee will serve in the office and Authority described in the schedule to the contract.
(2) That the employee will serve in such other capacity or in such other Public Authority or in such other locality as determined by the employer.
(3) That if (2) applies the employee will not lose any remuneration.

There is therefore no doubt about it. When a person enters into an employment contract with the State it is understood that when he arrives in Papua New Guinea he will first serve in the office described in the contract. In the case of Mr Hodson the schedule to the contract he signed reads, inter alia, as follows:

1. CLAUSE 4 CHIEF INVESTIGATIONS OFFICER
LEVEL 21
DEPARTMENT OF FINANCE
(OFFICE OF TAXATION).

So under the contract he executed, Mr Hodson was to commence employment in the Taxation Office as a Chief Investigations Officer and the State was obliged under the contract to allow him to commence work in that position. I consider that the terms of the contract are clear and that it is only after the employee has commenced work that the employer can consider utilizing clause 4 unless, of course, the employee has agreed to clause 4 being utilized before he takes up his post. There is no evidence that Mr Hodson agreed to any such thing.

I support the finding of the learned trial judge that there was a breach of contract by the appellant although my reasons are different from those of his Honour. The breach went to the heart of the contract – i.e. the appellant had decided not to permit the respondent to occupy and perform the duties of the office that he (the respondent) had contracted for.

Of course if clause 4(2) is utilized it must be on grounds or for reasons which are reasonable and/or justifiable – e.g. urgent requirement for the services of the employee in another office or the position is to be localized by appointment of a

properly qualified citizen. Clause 4(2) cannot be read to mean that a contract officer in the public service can be moved from an office or position or job he has contracted for without reasons. Such a construction would result in possible abuse of clause 4 and cause injustice to such employees. Employees would be moved at the mere whims of agents of the State to offices, authorities or positions where their qualifications and expertise would be of little or no use.

One example is sufficient. It would be contrary to the intent of clause 4 for the appellant or its agents and/or servants to allocate a contract officer who is a specialist in taxation law to an administrative office or position in the Department of Education, unless the employee agrees to such a course of action.

When properly used clause 4 very clearly empowers the State to re-allocate the employee to a lower position so long as there is no loss in remuneration.

I support the finding of the learned trial judge that there was a breach of contract by the appellant.

Damages

The respondent claimed

> damages for breach (of contract) including the cost of returning to the United Kingdom and loss of superannuation and other benefits suffered by reason of entering into and performing the contract so far as the defendant would allow, particulars of which are set out in cl. 5(c) hereof.

But the superannuation and other benefits claimed (referred to as U.K. forfeitures) were disallowed by the learned trial judge and there is no appeal against that part of the decision.

So the damages awarded were those flowing from the contract. These were entitlements for the rest of the contract period – salary, gratuity, school fees, settling out allowance, leave pay and accommodation allowances.

The respondent was paid all entitlements as contracted for up to the time of the trial. So up to the time of the trial he had not incurred any financial losses under the contract.

According to the respondent his total entitlements under the contract for three years amounted to K114,372.00, a figure which the appellant did not dispute at the trial. But I am not sure whether income tax on the salary of K21,720.00 per annum and the yearly gratuity of 24 per cent of the salary was deducted when this sum was computed. Also there is no evidence as to the actual amounts claimed for school fees, leave pay, value of housing etc.

To the K114,372.00 was added 8 per cent for 202 days from the date of the issue of the writ to the day the trial commenced. I query the legality of the interest awarded. As the damages awarded represented future earnings (the respondent had been paid in all entitlements up to the date of the trial) the interest award was improper. Interest in respect of damages incurred up to the trial and judgment are awarded on the basis that the plaintiff has to be compensated for being kept out of money theoretically due to him at the date the cause of action arose: see *Thompson* v. *Faraonio* (1979) 54 A.L.J.R. 231; *Meaney* v. *Hastings Deering (Pacific) Ltd.* [1979] P.N.G.L.R. 170; *Aspinall* v. *Government of Papua New Guinea (No. 2)* [1980] P.N.G.L.R. 50; *John Cybula* v. *Nings Agencies Pty. Ltd.* (1981) P.N.G.L.R. 120; *Aundak Kupil* v. *Independent State of Papua New Guinea* [1983] P.N.G.L.R. 350. His

Honour, the learned trial judge, did not consider whether this was a proper case for the award of *interest.*

Damages for *distress, frustration, etc.* are part of general damages. But the matter was not raised by the plaintiff at the trial. So the appellant was not afforded an opportunity to make submissions on the matter. Section 59 of the Constitution requires that at least fairness be observed. It might be that the K6000.00 awarded was the proper amount but the appellant ought to have been given an opportunity to make submissions. There are no actual figures in Papua New Guinea. But in the United Kingdom the amount usually awarded under this head of damages is about £500.00: see *Archer* v. *Brown* [1985] Q.B. 401; [1984] 3 W.L.R. 350; [1984] 2 All E.R. 267; *Cox* v. *Phillips Industries Ltd.* [1976] 1 W.L.R. 638; [1976] I.C.R. 138; [1976] 3 All E.R. 161 and *Jarvis* v. *Swans Tours Ltd.* [1973] 1 Q.B. 233; [1972] 3 W.L.R. 954; [1973] 1 All E.R. 71.

It is for the foregoing reasons that I have decided that the assessment of damages ought to be remitted to the learned trial judge for proper assessment. Of course there are other factors to be considered by the trial judge, such as the likelihood of Mr Hodson getting a job back in his country.

Cross-appeal

As to the cross-appeal I support the trial judges' findings that there was no negligent misrepresentation by the State. The facts in the transcript of evidence speak for themselves.

KAPI DEP. C.J.

This is an appeal from a decision of the National Court. This was an action for damages. The claim was based on two alternative actions,

(1) that there was a breach of contract of employment or alternatively
(2) that there was negligent misrepresentation by the State.

The National Court held that the State had breached the terms of the contract and held that the respondent was entitled to terminate the contract and awarded damages accordingly. However, on the alternative claim, the Court found that there was no negligent misrepresentation by the State.

The State has appealed against the decision on the basis that it has not breached the terms of the contract. The respondent has cross-appealed on the basis that the National Court was wrong in concluding that there was no negligent misrepresentation on the part of the State.

Mr Brian Hodson, a U.K. citizen was recruited by the Public Services Commission to work in the Taxation Office, Department of Finance in Port Moresby. He signed a contract of employment for the position of Chief Investigations Officer – Level 21. Upon arrival in Port Moresby, he was assigned to work not as Chief Investigations Officer but as Supervisor Investigations, a position subordinate to a Chief Investigations Officer.

Breach of contract

Central to the issue of whether or not there was a breach of contract, is the proper construction of the terms of contract of employment, in particular, clause 4 of the contract. It is in the following terms:

4. The employee agrees to serve the employer in the office and in the public authority described in the schedule hereto. The employee agrees to serve in such other capacity or in such other public authority or in such locality as the employer may determine, but in no event shall the remuneration payable to the employee under cl. 7.1 of this agreement be reduced.

This is a standard contract used by the State in recruiting overseas workers. Essentially, the clause provides as follows:

(1) That the employee agrees to serve in the office and in the public authority referred to in the contract – In this case, it is the Chief Investigations Officer and in the Department of Finance (Office of Taxation).
(2) The employee agrees to serve in
  (a) such other capacity;
  (b) such other public authority; and
  (c) such other locality as the employer may determine.
(3) Whatever the employer may determine as in 2(a), 2(b) and 2(c), the remuneration payable shall remain as contracted in the contract.

In the instant case, it is necessary to give a proper construction to the words "such other capacity". However, in order to appreciate the true nature of this clause, it is necessary to construct the whole clause including such phrases as "such other public authority" and "such locality".

The phrase "such other capacity" is used to mean such other office or position other than the one contracted for. I am sure that the employer may determine that the employee be engaged in a position either equivalent to or higher than the one contracted for. The question is, whether, the employer under this clause is entitled to determine that the employee be employed in a different capacity or position which is lower than the position contracted for. Reading the whole clause, there can be no doubt that the words "such other capacity" also includes a capacity which may be less than the position or office contracted for. This construction can be inferred from the words:

> ... but in no event shall the remuneration payable to the employer under cl. 7.1 of this agreement be reduced.

These words would be rendered meaningless without this construction.

Under the contract, the phrase "such other public authority" is used with the same meaning as in the Public Employment (Non-Citizen) Act (Ch. No. 398). In accordance with this Act, "public authority" means the Parliamentary Services, the Police Force, Teaching Services Commission and any other body declared to be a public authority by the Minister. This means that a person who is contracted to work in a position in the Public Services Commission may be assigned to do equivalent work or similar work in any of these authorities.

The words "such locality" obviously mean any locality throughout Papua New Guinea. A person may be recruited on a contract for a position in Port Moresby but the employer may determine that he may be required to work in Wabag or Daru. It is clear from the construction of this clause that the employer is given much discretion in these matters. The standard contract has been prepared to give the employer the upper hand. For example, the employer is given power even to determine the contract by reasons of,

(a) change in the Constitution, see 10.1.1 of the contract;
(b) best interests of Papua New Guinea, 10.1.2; and
(c) in preference for a Papua New Guinean to be employed in such positions, 10.1.3

It seems to me clause 4 is clear in what it states. It is of course not in the best interest of employees but they are entitled either to take it or leave it.

It is not difficult to imagine the reasons for giving such discretion to the State in the contract. I would imagine that the purpose of this is to give the State a wide discretion to utilize all skilled workers recruited from overseas so as to be easily shifted to areas which need their experience.

It is clear from clause 4 of the contract that the employer has a wide discretion in determining that the employee serve in such other capacity or other public authority or such other locality. The only remaining question to my mind, relates to the circumstances under which the employer may exercise this right. Can the employer exercise this right on any ground whatsoever? It is possible to construe clause 4 of the contract so as to conclude that the employer may be entitled to exercise this discretion on any grounds whatsoever. I am inclined not to adopt this construction because it is contrary to commonsense and justice. For example, it would be unjust if the employer exercised the right to employ the employee in another capacity simply because he has ginger hair or simply because he is an Englishman. It is not possible to list exhaustively all the circumstances under which the employer may exercise this discretion. However, these circumstances must relate to the question of work and employment. This may include such considerations as qualifications and ability to perform work well and policy questions relating to employment by the State. The trial judge discussed two circumstances under which the employer may exercise the discretion. It appears from the trial judge's judgment that he confined the application of clause 4 to these circumstances only. With respect, I cannot agree with this. There are many other circumstances relating to the question of employment which may form the basis for the exercise of this discretion by the employer. It is not necessary to list exhaustively all the circumstances. However, as I have stated before, the circumstances must relate to the question of work or employment.

The question in this case is, whether, or not, the employer has exercised his discretion reasonably in determining that the respondent be employed as a Supervisor Investigations rather than Chief Investigations Officer as originally contracted for. From the evidence, it cannot be doubted that the respondent has qualifications as well as work experience in this field of work. The State failed to call any evidence relating to the question of work and no circumstances have been set out which formed the basis of the action of the employer in the instant case. There was some attempt during the trial by counsel for the State to point out that the respondent may not have the proper qualifications. However, he was not successful in his attempts during the trial. If anything, it appears from evidence that it was Mr Lohberger, who raised objections to the respondent being employed in the position that was contracted for, on the first day of his reporting for work in Port Moresby. Mr Lohberger was not called to give evidence at the trial. In the absence of any evidence, I can only assume that the exercise of the discretion to place the respondent in another capacity was unreasonable and unjust. The appellant, therefore, breached clause 4 of the contract and the respondent was entitled to treat

the contract at an end. I would dismiss this ground of appeal.

I have read the draft judgment of the Chief Justice in relation to the use of clause 4 of the contract before a person has actually taken up the position contracted for and I agree with his conclusions.

Assessment of damages

Two complaints are made against the assessment of damages. First, the amount of damages flowing from the breach was not supported by evidence. It is submitted that no basis has been shown for the total amount of entitlements of K114,372.00.

There is some dispute between the parties as to the nature of the document which contained the total amount of damages. It was admitted in evidence. On the one hand, the appellant submits that this document constituted an amended statement of claim and it was for the respondent to prove by evidence the amounts stipulated. The State submits that he failed to do this and therefore failed to prove his damages and the trial judge was in error when he awarded damages.

On the other hand, the respondent has submitted that this document constituted evidence of the calculation made by the respondent and the appellant did not question the figures.

After much consideration, I have come to the view that the whole question of assessment of damages was not satisfactory. The proper basis of the calculations was not led in evidence and the appellant did not object or question the admissibility of the document. It is apparent from the evidence that the calculations gave no allowance for tax deductions. I would allow the appeal and order a retrial on proper assessment of damages.

The second complaint on damages relates to the head of damages for distress. This matter was not argued at all before the National Court. The trial judge determined this matter on his own initiative. It is clear from the pleadings that this issue was not pleaded. The issue which should have been argued before us was whether, in order to determine the issue, it is necessary to plead the issue in the statement of claim or whether it is a head of damage which directly arises out of breach of contract and therefore does not require pleading. The issue was not fully argued before us.

In this respect I would allow the appeal and direct that the issue be properly argued before the National Court.

In respect of the cross-appeal, there is no evidence to suggest that there was any misrepresentation. The evidence shows that the respondent was well aware of the employer's right to employ him in such other capacity. I would dismiss this ground of appeal.

BARNETT J.

I have had the opportunity of studying the judgment of his Honour the Chief Justice and I concur with his findings as to the breach of contract by the appellant.

I also concur that the assessment of damages ought to be remitted to the trial judge and with his reasons for that course of action.

Orders

(1) We dismiss the appeal in respect of the finding that there was breach of contract.

(2) We allow the appeal against the assessment of damages and remit the matter to the trial judge for re-assessment.

380 (3) We disallow the cross-appeal.

(4) We make no orders for costs.

Reported by: L.K.