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IN THE SUPREME COURT OF THE TERRITORY OF PAPUA AND NEW GUINEA } W.S. 82 of 1959 (N.G.)

BETWEEN:

ORAZIO MANGANELLA

Plaintiff.

- and -

CHARLES E. HYLAND

Defendant.

REASONS FOR JUDGMENT.

This was a claim for damages for breach of a contract of employment. A typed document dated 6th August, 1959, which was Exhibit "B", formed the basis of the contract and this document in terms incorporates by reference an undated letter which was Exhibit "A." So far as these documents are concerned there is no dispute as to the terms of the contract or as to its effect, but the Plaintiff claims that it was an oral term of the agreement between the parties that the Defendant at his own expense would supply the Plaintiff for the duration of the contract with furnished accommodation for himself and his wife and family in Lae, suitable to a European tradesman.

In order to establish this additional term the Plaintiff relied on his own evidence as to conversations between the parties. He also sought to imply such a term from the conduct of the parties during a period after the commencement of the contract term, and in addition sought to establish a trade custom under which the Defendant was obliged to supply this accommodation.

Dealing with this last point first, it seems plain on the evidence that I cannot find that any such trade custom subsists. Several witnesses were called and spoke of their experience in relation to the building and contracting trade. I think that the general effect of their evidence can be summed up in this way - that employment conditions in the trade are very uncertain and variable. When a contractor has assured work in hand for some period in the future it is in his interests to secure the best available tradesmen on whatever terms the

circumstances might indicate as appropriate. A tradesman living in the town where he is to be employed does not require accommodation and so no question arises. If the employer finds it necessary to import labour from elsewhere, the employer usually finds it necessary to provide such accommodation as may be practicable. If the employee is urgently needed and stipulates for some special condition of employment, the employer may well find it to his advantage to undertake the additional burden or at least negotiate for some reasonable compromise. The position in practice therefore is that it is quite common for established employers to provide either single men's quarters or married accommodation and other benefits, but these are regarded as matters to be negotiated and covered by the express terms of the contract. There is no clear understanding in the trade as to these matters if the contract does not stipulate for the provision of accommodation. Each major employer appears to follow his own method of resolving difficulties.

Until the trade settles down there can be no general understanding as to the terms of employment which a skilled tradesman might expect to find at any particular time, and I think that it is clear that this question remains very much a matter for negotiation and express agreement in each case. At all events the position has not yet been reached in which the terms of employment are so settled and so extensively observed in practice in the absence of express terms that it would be possible to find a foundation for a binding custom of the trade.

As to the Plaintiff's evidence of an express oral agreement for the provision of accommodation, I am unable to find on the evidence that there was any such express term. There is a conflict of evidence between the parties on this point, and I think that both parties view the issue so subjectively that I cannot place much reliance upon their evidence. Since the dispute has arisen, each party sees only his own side of the argument, and each has given an account of conversations more or less consistent with his own case. Of the two, I would be disposed to prefer the version given by the Plaintiff, but in considering whether he has discharged the onus of proof I must have regard to the conduct of the parties. The difficulty from the Plaintiff's point of view is that a great deal of his evidence was equivocal and the facts on which he relies took place after the main contract was entered into. I would need some clear affirmative indication of an intention to vary the contract at this stage by the addition of further terms.

When the conversations took place and temporary

arrangements were made (for example, arrangements for accommodation at Qantas Mews) the Plaintiff was in fact in urgent need of accommodation for his family and the Defendant responded by helping him. The Plaintiff's case might have received substantial support by any evidence that the Defendant had in fact paid for the accommodation, tending to show that the Defendant was acting under some obligation to do so. Unfortunately for the Plaintiff's case the final dispute emerged before the Plaintiff received a statement of account in settlement of his wages and contra-accounts. In the meantime the Plaintiff had been without money except for amounts advanced by the Defendant to enable him to carry on, and when the first account was rendered the Defendant debited to the Plaintiff all those items for accommodation which he had previously paid. The Plaintiff therefore can gain no support from the fact that the Defendant paid them in the first instance. Similarly the fact that the Defendant told the Plaintiff that he had previously been holding rented accommodation for the Plaintiff, and the Defendant's offer of unsuitable accommodation at the factory premises, and other efforts to solve the Defendant's problems, are all equivocal. The only inference that I can draw is that the Defendant was willing to co-operate and be helpful to the Plaintiff, so that the Plaintiff would settle down satisfactorily, but I cannot derive from this evidence any affirmative indication that in the final accounting the Defendant was to be liable.

I think the true position then is that I must hold that the Plaintiff has not satisfied me that it was a term of the contract that the Defendant would provide accommodation as alleged in paragraph 1(b) of the Statement of Claim.

I now come to the question of breach of contract. The Plaintiff alleges that he was summarily dismissed without cause. On this point the Defendant's evidence was not at all convincing. Some of his explanations were quite unacceptable, and although he was, I think, quite frank in answering questions, I think his answers were strongly conditioned by a determination that the Plaintiff was in the wrong. This led the Defendant into relying on allegations of misconduct on the part of the Plaintiff which must have been quite without foundation. For example, he made some serious complaints about the Plaintiff's alleged wrongful use of his motor truck. It is quite plain that the Plaintiff continued to use the truck with the Defendant's knowledge and consent and that it was convenient to both parties that he do so.

It became apparent to the Defendant that although he

had prospective work coming in, the actual work in hand had not come up to expectations, and he did not really require the Plaintiff's services for the time being as urgently as he had thought he would. Another factor was that he found it possible to employ a qualified tradesman to do much the same work at a lower rate, and without any difficulties arising over accommodation. Possibly with local labour available he could employ men at casual rates to suit his own requirements and without any long term obligation. I think in addition that both he and his wife had become considerably irritated by the Plaintiff, probably because the Plaintiff had become something of a nuisance to them.

I think it is clear that when the Defendant went along to the place where the Plaintiff was living, accompanied by a police officer who had come at the Defendant's request in order to keep the peace, the Defendant intended to take the initiative and terminate the employment. It is equally clear that when he arrived on the premises he received a very hostile reception, and that his decision to remove the items of furniture which he had previously lent the Plaintiff took the Plaintiff and his family entirely by surprise. I think that he knew very well that this would happen, and that that was the specific reason for asking a police officer to be present. Subsequently when it appeared to be necessary for the Defendant to justify his action, he sought to show that it was really the Plaintiff who terminated the employment by staying away from work and sending a message through a native employee, who was not called as a witness, that he was not coming back to work. The Defendant also sought to rely on various breaches of duty as justification for his termination of the agreement, and his attitude in these matters has not been consistent.

I do not accept this evidence. I do not doubt that the Defendant felt at the time that he had reason for doing what he did, but looking at the conduct of the parties after the event, I think that the conclusion is clearly indicated that it was the Defendant who terminated the contract and not the Plaintiff, and that at the time of the termination the Defendant was not justified in doing so.

I now come to the question of damage.

The Plaintiff is entitled to any loss which he may have suffered by reason of his inability to obtain employment during the remainder of the term of the contract at rates as favourable as those provided for in the contract. He is not entitled to compensation for lack of provision for accommodation.

In this case I think that I cannot arrive at the quantum of damages by simply deducting from the amount provided in the contract the amount at which the Plaintiff is at present employed. It is characteristic of the present unsettled labour conditions in the Territory that an employee may be remunerated according to a widely varied scale depending on the standards which he wishes to observe. At present the Plaintiff is employed by the Department of Works, and although he is receiving a lower wage, he is obtaining the benefit of regulated hours, provision of more or less suitable accommodation for a single man and facilities provided by his employer, a provision for six weeks leave on full pay with appropriate fares after two years' service, and provision for payment for overtime worked. Although it appears that he is paying mess fees, the fact that he is accommodated in a mess is one which is likely to be to his economic advantage. His present fortnightly pay amounts to £41.14.0. for eighty hours work.

The employment for which the Plaintiff bargained with the Defendant is scarcely comparable. He was to get £7. per day but the hours were not regulated, and on several occasions at least he worked quite long hours. This was a constant risk because when the Plaintiff was engaged in concreting work he would have to continue to work on the last section until the surface had jelled to a sufficient consistency to enable him to complete the required surface treatment, otherwise that section of the work would be spoiled. Accordingly a fortnight's work would normally amount to a great deal more than eighty hours.

The Plaintiff in his letter to the Defendant said that he did not want "holidays or anything like" that, and stated that he would pay all the fares for himself and his family. It is clear that he was bargaining for the lowest conditions of employment which would yield him the highest possible amount of cash. He was not at all concerned with the living standards of his family, and it was his wife who fixed the barest minimum in this respect by refusing to live in the old boy-house at the factory, in most uncongenial surroundings and without anything like adequate facilities for reasonable comfort. The accommodation actually obtained was in an old shop, affording the barest shelter and little or no comfort, and it is not at all surprising that after a little experience in those premises, and particularly after the Plaintiff's dismissal by the Defendant, the Plaintiff's wife and family

went down to Brisbane, where they have so far remained without any apparent intention of coming back to endure any more of the treatment they received. I think that the Plaintiff's only concern was to get as much money into his hands as he possibly could. If his wife and family had had a greater share in the money produced by the conditions which they had to endure, the Plaintiff's position might have been more satisfactory. At all events, he now finds himself employed under very much better conditions, with advantages which, if he uses them properly, will make up most of the difference in cash receipts. In fixing damages I must take this into account. I cannot fix the cash value of the benefits which he has enjoyed with complete precision, for the evidence does not give me any precise way of assessing these advantages.

It seems to me that provision of leave pay and fares, without taking into account any provision for his wife or family, which is a matter of uncertainty on the evidence, would leave the Plaintiff with advantages worth at least £250. over a period of two years. His prospective earnings, on double-time rates for overtime worked beyond the first two hours, is likely to be of substantial value in the course of a year. His present employment therefore ought to be worth not less than £50. per fortnight, with his obligation to work limited to something fairly close to eighty hours over that period.

Under his contract with the Defendant the Plaintiff's normal expectation would be £84. cash and no additional benefits, for twelve days work involving an actual working time of something fairly close to one hundred and twenty hours. Thus on a broad comparison on a basis of time worked, his cash receipts for one hundred and twenty hours actual working time have diminished by something like £9. I must allow for the fact that he was willing to work longer hours for the sake of making more money and that it was the Defendant's action which forced him to take his present employment, but at the same time the evidence does not show whether he is prepared to supplement his present reduced cash income by some sort of gainful employment or enterprise outside his shorter working hours. I contemplate that in all probability his present employers would not allow him to take on a second job, but the evidence does not show whether there might be some other means open to him of producing additional income.

Altogether I think I must assess the Plaintiff's loss fairly broadly upon the view that he is really about £10.

per fortnight worse off than before, making the best adjustment I can for differences in terms of employment. The period of his loss is two years, less the twenty-seven days during which he was employed. The Plaintiff is also I think entitled to nominal damages for the inconvenience and incidental losses which he suffered when he was unreasonably deprived of furniture and other items previously provided by his employer and without any notice. In all I fix the damages at £550.

There will be judgment for the Plaintiff for £550. with costs to be taxed.

At the request of Counsel I intimate, in case it may be necessary for me to give a Certificate to this effect, that this was a case in which it was proper for Counsel to travel from Port Moresby for the hearing at Lae and that an appropriate Circuit fee should be allowed.

CHIEF JUSTICE.
10/6/60.