Prasad v Morris Hedstrom (Tonga) Ltd (No.2)

Court of Appeal (C.154/91)
Ward CJ, Martin J, Burchett J

11 & 15 April, 1994

Employment - failure to fulfill terms of contract by employer - damages
Leave - entitlement assessed pro rata - distinguished from right to go on leave
Pleading - lack of - but issue raised and argued

The facts are as set out in the report of the case at first instance, immediately above. On appeal from that Judge's findings it was

Held:-

1. The position of company secretary did not entitle the appellant to additional remuneration.
2. On the facts additional superannuation payments were payable by the respondents.
3. The appellant was due holiday pay (reversing the trial judge), leave entitlement in terms of the contract accruing on a pro rata basis (and distinguishing between such entitlement and the right to go on leave which occurred only at the end of a twelve month period).
4. Despite the absence of a formal pleading in the statement of claim, a question of damages for breach of contract was clearly raised made the subject of evidence and argued (on both sides) at trial and it should not have been excluded from judgment because of a technicality of the pleadings.
5. The respondent was in breach of contract for failure to provide a house fit for human habitation to the appellant and (reversing the judge below) damages were payable.

Counsel for Appellant : Mr Taufaetau
Counsel for Respondent : Miss Van Bebber

Judgment

The appellant was employed by the respondent company as its financial controller on a two year contract terminable by either party, under clause 4 of the contract, "by not less than one month's notice in writing ..... or by payment of one month's salary in lieu of notice."

He took up the employment on 12th August 1991 but, by a letter dated 2nd December 1991, his employment was terminated "effective immediately" and he was given one month's salary in lieu of notice.

That letter was not delivered until 5th December and the trial judge found as a fact that his employment should run to that date entitling him to payment for an additional five days.

By clause 3 of the contract the appellant was to be employed as financial controller "but the employer shall have the right to employ the employee on other reasonably kindred work." In October 1991, he was appointed as Company Secretary by the directors and undoubtedly carried out the duties of that office in addition to his duties as financial controller. The appointment carried no additonal remuneration. When he was dismissed by the General Manager, the appellant was not expressly removed as Company Secretary - something that could only be done by the directors.

Much time at the trial and in the judgment was devoted to consideration of whether he had been removed from the Company Secretary's post. The judge found he had not but that, as the post carried no additional remuneration and the appellant had performed no duties in relation to it since his dismissal, no damages would accrue.

That decision is appealed on two main grounds; that the work of Company Secretary was not reasonably kindred to that of financial controller and that, as he was still Company Secretary, he was entitled to reumuneration. We cannot accept either contention and consider the judge wa plainly correct in this part of his findings.

The remaining grounds of appeal relate to alleged breaches of contract by the company of failures by the judge to account for these.

The judge found that the appellant was entitled to payment for the five days from 1 - 5 December including his salary and entertainment allowance. He rejected the claim - the sole basis of the plaintiff's case as originally pleaded - that the appellant was entitled to any payment after 5th December other than one month's salary in lieu of notice. The appellant does not challenge the finding that he has no right to further pay but does challenge the finding that only salary should be paid in lieu of notice.

It is convenient to deal with each topic separately and in a different order to that in which they were advanced at the appeal.

1. **Superannuation** - By clause 2 of the contract the appellant and the company were to contribute to the Fiji National Provident Fund in accordance with the Fiji National Provident Fund Act. Mr Prasad had been recruited in Fiji and had, immediately prior to his employment by the respondents, been working there.

In his judgment, the judge records that "it is now (i.e. 27 September 1993) conceded by counsel that pension fund contributions due under clause 2 have in fact been paid and I am not, therefore, concerned with this issue."

It appears from the documents that the sum was paid at the rate of $85.47 per calendar month and, up to 30th November when they stopped, totalled $612.17. The only point raised by the appellant at this appeal is that, as these should have been paid

at the time they fell due but were not in fact paid until approximately 18 months later, interest will be payable to the FNPF and should have been allowed by the judge.

The figure Mr Taufaeteau tells the Court he is concerned with is the $612.17 already referred to. With respect, that cannot be right. He has failed to take into account the five extra days found by the judge and the payment for the month in lieu which must be due from the respondent. We order that the appropriate payment from 1st December 1991 to 4th February 1992 should be made by the respondents.

The question of interest was not raised at the trial and we have not been told the rate of interest that will accrue. In the circumstances, although the sum should be payable, we have insufficient information to make an award.

2. **Holiday Pay** - Clause 10 of the contract provides:

> "The employer will grant the employee holiday leave on the basis of twenty-eight consecutive days on full pay for each completed twelve months of continuous service.
>
> Salary for the period of holiday leave due at the end of the contract will be paid at the time of the employee's departure overseas.
>
> If the employee wishes to spend his annual holidays at the place of his engagement, the employer will pay for the cost of economy class return air fares for the employee, his wife and dependent children under 18 years of age."

The appellant has already been paid in advance against his entitlement for 8 days holiday and the respondent counterclaimed for the return of that sum.

The judge found that, "under clause no holiday pay is due until there has been one years continuous service. That is how I read that clause . . . . The plaintiff is not entitled to the Holiday Pay paid to him. The defendant is entitled to reclaim this sum."

With respect we do not consider that is a correct interpretation of that clause. It is important to distinguish between the entitlement to holiday leave and the right to go on leave. The latter is only allowed at the conclusion of twelve months service; the second paragraph of clause 10 refers to "annual holidays". The entitlement is quoted "on the basis of" 28 days for each completed 12 months. We consider that entitlement accrues pro rata to the portion of the twelve month period served. When, as here, the contract is terminated prematurely, the appropriate entitlement has been earned and is due.

The sum is not great. Approximately 9 days entitlement has been accumulated and it is accepted he has had pay for 8 of those. We shall award a round figure of $75.00 for the remaining day.

3. **Entertainment** - By clause 14 of the contract the employee was to receive an entertainment allowance of $1000 per annum to be paid monthly in arreas.

The judge correctly added an amount to the extra five days but incorrectly read the clause as giving $1000 per month and arrived figure of $150. The correct figure for those days is $12.50 and the appellant's award must be adjusted accordingly.

It is also urged by the appellant that we should find he is entitled to entertainment allowance for the month's pay in lieu.

That is not correct. Clause 14 clearly refers to payment of one month's salary in lieu of notice. By clause 1, salary is $24000 per annum and does not include allowances.

4. **Vehicle** - The same principle applies to the vehicle allowance under clause 13 which provides the appellant with a motor vehicle for use on business and private purposes with running costs to be borne by the employer.

We accept allowance must be made for the extra five days but the appellant points out that, had he been given one month's notice rather than payment in lieu, he would have retained use of the car including his personal use. We appreciate the force of this argument but we consider this is, again, a matter of interpretation of the contract between the parties and we have found only salary is payable.

It is different in relation to the five days and the appellant was entitled to the vehicle during that time. However, Miss Van Bebber tells the Court the car was not immediately returned. We have no evidence of this except that Mr Prasad told the trial Court and it was accepted that he only received his notice of dismissal on the 5th December. It seems unlikely, therefore, that he would have given up the car before that date and so we make no allowance for this sum.

5. **Accommodation** - This is the final ground of complaint by the appellant and the one of most substance in pecuniary terms.

Clause 8 of the contract states:

"The employer will provide a house free of rent to the employee during the period of this contract" and then goes on to specify the minimum hard furniture.

It is clear from the transcript that witnesses called by both sides referred to the fact that the appellant was put in a house by the company that was accepted by the judge as being, "in effect, unfit for human habitation." The company paid a rental of $450 per month for this and the appellant was assured it was only temporary. Indeed the evidence showed the General Manager tried unsuccessfully to find more suitable accommodation but, in the end, the appellant in frustration arranged and paid for suitable accommodation he had located at $500 per month and moved in one month prior to his dismissal.

Curiously, the judge failed to mention this at all in his judgment. It is right to say the pleadings had not made a claim for damages for the failure to comply with clause 8 but it had plainly been raised as an issue at the trial.

Following delivery of the judgment, the judge heard counsel on costs and then delivered a separate judgment on costs. A substantial portion on that judgment deals with the question of accommodation. The judge brings it in with the statement that "in determining what an appropriate order of costs should be. I also take note of the fact....." and then sets out the accommodation issue including an evaluation of the evidence and his conclusions. Despite the opening sentence, he does not relate it to the question of costs and, indeed, we would have been surprised if he had. It has the unfortunate apperance of being an attempt to remedy an inadvertent omision from the judgment. We will, however, consider it as part of the findings and judgment of the case.

As we have stated, it is clear the appellant did not raise the issue in the pleadings. The case as presented there was a claim for loss of future salary and allowances. The judge took the view that, as it was not raised in the pleadings, he could not consider it. It is, as he correctly points out, the duty of the counsel to plead the case correctly and failure to do so may result in the claim being refused. However, the purpose of pleadings is to make clear the case your opponent must

answer so the correct issues may be tried.

If, despite inadequate pleadings, an issue is clearly raised and is understood by the opposing party to be raised and then dealt with, it should not be excluded because of technicality of pleadings.

The record makes it apparent that this was accepted as an issue by both parties. The appellant and his witnesses dealt with it at the outset. One of those witnesses dealt with this topic exclusively. Two of the respondent's witnesses were called in relation to the house only and one of those was examined on commission some weeks before the trial. During his evidence the standard of the house was raised and, whilst he may have been called also in relation to the appropriate rent allowance in the loss of earnings claim, the standard was clearly already in issue. We might also ask, if it had not been clearly accepted as an issue at the trial, how the evidence of quality of the house would have been relevant and admissible.

Certainly the judge found the evidence sufficient to make a finding. He noted the plaintiff's claim that the house was not up to the standard required under the contract and said:

> "There was evidence to the contrary which I did (he was, as stated above, writing after his judgment had been delivered) not accept. I had no hesitation in believing the plaintiff in this regard."

He continued a little later:

> "No doubt a case could have been made out for damages for breach of contract for the inconvenience caused in having to live in such unsatisfactory conditions. I would have excepted to find such a case pled by the Plaintiff and had it been, an award of damages therefor would have been granted, at or about 2,000 pa'anga mark. The plaintiff's counsel thought his pleadings entitled him to make such an award. They do not."

With respect, his findings of fact demonstrate such a case was made out. The appellant made out a case and the judge should have considered it. The appellant's evidence was that the rent for suitable accommodation was $500 per month. He paid the month's rent for the accommodation he found and it should be considered appropriate for the three months he was accommodated in unsuitable premises.

Miss Van Bebber valiantly suggests that, from that sum, should be deducted the $450 paid by the employer and that, anyway, the state of the market for rental accommodation in Tonga made it impossible to find suitable accommodation.

We do not accept either argument affects the issue. The fact the respondent paid $450 per month for the inadequate accommodation is irrelevant. What they failed to do was to provide suitable accommodation. Whatever they paid, the fact remains the accommodation was substandard and they must stand the cost.

As to the second point, when the respondent recruited the appellant, he was in Fiji. There is no evidence he knew of the problems in Tonga but the respondents, a Tonga-based company, clearly knew or should have known. They chose, with that knowledge, to make it a term of the agreement and they are bound by it.

We consider the judge was wrong to exclude this part of the claim presented in the Court and we award the appellant $3500 damages for the breach.

The appeal is allowed to this extent. The judge awarded $300 salary for the five extra days in December and entertainment allowance for the same period which

we have corrected to $12.50.

From that was to be deducted $133.79 overpayment, which has not been appealed, and the $516.13 advanced from the appellant's holiday entitlement. We have found he was entitled to holiday pay and so the latter sum does not need to be repaid.

Therefore we set aside the order of Dalgety J and order as follows:

The appellant is entitled to payment of the following sums:

Salary (1-5 December 1991)	300.00
Entertainment Allowance (1-5 December 1991)	12.50
Holiday pay	75.00
Accommodation	3500.00
	3887.50

From that must be deducted the overpayment of $133.79 leaving a total sum payable by the respondent of $3753.71. We also order that any outstanding payments to the Fiji National Provident Fund up to the 4th February 1991 be paid by the respondent.

The judge ordered the appellant to pay two thirds of hte respondent's costs. Clearly, the appellant did not succeed on a very substantial part of his claim and the parts on which he did succeed were not, or were not adequately, pleaded. However, he was successful in part and is entitled to some of his costs. We add that this was a case where payment into court by the respondent might have saved them costs. In the circumstances we consider the respondent must pay one half of the appellant's costs in the court below and the whole of appellant's costs in this court. We assess at the latter at $750.