IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal No. 16 of 1984

Between:

VITAFOAM LIMITED Appellant

- and -

FRED BRYSON Respondent

P. Knight for the Appellant
A.B. Ali for the Respondent

Date of Hearing : 17th July, 1984
Date of Judgment : 25 July, 1984

JUDGMENT OF THE COURT

Barker, J.A.

This is an appeal against a reserved judgment of Kearsley, J. delivered in Supreme Court at Suva, on 17th February, 1984. The learned Judge entered judgment in favour of the respondent against the appellant in the sum of $2,836.13¢ and costs.

The grounds of the appeal are as follows :

1. That the Judge was in error in granting leave to the Respondent to adduce further evidence on the question of quantum after the cases for both the Respondent and Appellant had been closed.

2. That the Judge was in error in finding on the basis of the evidence adduced that on the balance of probabilities the Respondent had not received the six monthly cost of living increase to which it was found he was entitled.

The respondent commenced his proceedings on the 18th September, 1981; he sought damages for wrongful dismissal. He had been employed by the appellant as an assistant accountant with effect from 1st February, 1977. He was dismissed by the appellant and paid a month's salary in lieu of notice on 2nd June, 1981.

The appellant's statement of defence set up several allegations of justification but, when the action came to trial on the 3rd November, 1983, counsel for the parties informed the Judge that they had agreed that there were only two issues on which resolution was sought; (a) was the respondent entitled to be paid for weekend work? and (b) was the respondent entitled to be paid a half-yearly cost of living allowance and, if so, how much?

The respondent then gave evidence. He produced the following letter from the appellant dated 12 November, 1976.

"12 November 1976

Mr. F Bryson
C/o Price Waterhouse & Co
SUVA.

Dear Mr. Bryson:

Following yesterday's interview at Price Waterhouse, I am pleased to confirm our offer to you of a

position as an Assistant to the Assistant to the Company Accountant, commencing on the 1st February 1977 at a salary of $3,500.00 per annum.

The normal staff terms and conditions would apply, including salary paid monthly and a six monthly cost of living increase, with the normal working hours of 8am - 4.30pm Mondays to Thursdays, and 8am - 3.30pm Fridays, and a half hour for lunch.

I look forward to receiving confirmation of your acceptance of this position and trust that it will prove to be a mutually beneficial one.

Yours sincerely
VITAFOAM FIJI LTD

G.L. Hart
MANAGING DIRECTOR "

The respondent stated in evidence that he had frequently worked on weekends without any overtime payment. He said he was never paid any "cost of living" adjustment and had expected to be paid an increase based on the consumer price index. He admitted that he was employed as a salaried staff member and not a wages worker and that he received an annual increase of salary of $500 over the term of his employment. In cross-examination, he said that he did not "have a clue" as to whether or not any consumer price increases were part and parcel of the $500 annual increment. He was unable to state what the consumer price index increases were for any of the period of his employment. In re-examination, he stated that the bases of his claim for six-monthly cost of living increases were a) he had never received such an increase and b) the letter obliged the appellant to pay him such increases.

The only other witness called for the respondent was the former pay clerk of the appellant. She spoke of

one member of the appellant's staff who had received half-yearly cost of living increases. She stated that there were no standard annual increases for all employees', any increase was left to the discretion of the manager.

Counsel for the respondent then closed his case. Counsel for the appellant then elected to call no evidence; he submitted to the Judge that it was for the plaintiff to satisfy the Court on the balance of probabilities that the appellant had not been paid the cost of living adjustment and what the cost of living increases were. In his submission, the respondent had not discharged the onus of proof. Counsel tendered by consent the respondent's wages sheet to assist the Judge in relation to any tax calculation.

The Judge then adjourned the case until 7th November, 1983: on that date he adjourned it further to 21st November, 1983, but according to the record the further adjournment was "to enable Mr. Knight to seek instructions as to the quantum of the cost of living increases the plaintiff was entitled to".

On the 21st November, 1983, counsel again attended before the Judge. Mr. Knight stated that he had been unable to obtain instructions. The appellant had ceased business operations in Fiji. The Judge then indicated that for reasons he would give in due course, he found a) the respondent had failed to establish an entitlement to be paid for working on weekends and b) the respondent was entitled to receive but did not receive, half-yearly cost of living increases mentioned in the letter. According to Mr. Knight (and agreed to by Mr. Ali) the Judge contemplated whether he had the power to call evidence: on 21st

November, 1983, he decided that he did not have this power; he therefore adjourned the case further to the 25th November, 1983, to enable the parties to adduce evidence on the question of quantum.

On the 25th and 28th November, 1983, the Judge heard evidence from a teacher of economics at the University of the South Pacific as to publicly notified cost of living increases over the relevant period: the witness made calculations that the sum of $2,836.13¢ should have been paid to the respondent over the course of his employment under this heading. Counsel for the appellant acknowledged that the Judge offered him the opportunity of calling witnesses as to quantum. He did not do so.

On the 17th February, 1984, Kearsley, J. delivered a reserved decision. He considered that the respondent was candid and transparently honest. He dealt with the question of his claim for annual increments thus (referring to the statement in re-examination noted earlier).

> "I think that the assumption which the plaintiff expressed in that answer was reasonable. If the annual increments had incorporated cost of living increases, that is to say if the defendant company had, instead of making cost of living increases half yearly as promised in the letter, included such increases in the annual increments, those increments would, I think, have reflected variations in cost of living increases and consequently would themselves have varied in amount. In fact, they did not vary - the amount was always $500. It also seems to me that, if the promise to make half yearly cost of living increases had been honoured at all, there would actually have been half yearly increases. In fact, the plaintiff's salary was increased annually."

For reasons which are unnecessary to relate, the Judge went on to dismiss the respondent's claim for payments for weekend work: no appeal is brought against that finding. He recorded Mr. Knight's submission that, even if the respondent had satisfied the Court that he was entitled to half-yearly cost of living increases which he had not received, he had failed to discharge the onus of proving how those increases should have been calculated.

The Judge then recorded that at the hearing on 21st November, 1983, Mr. Knight had informed him that he had been unable to obtain instructions because the appellant had ceased operations in Fiji. The Judge then observed that the respondent then had been placed "in the position of being unable to obtain from the other side information he would normally have been able to obtain by interrogatory about the defendant company's normal method of calculating half-yearly cost of living increases".

With respect to the learned Judge, such a statement was not entirely correct. The respondent could have sought the issue of interrogatories prior to the hearing: the appellant would have had to respond to them whether it had an office in Fiji or not. It could have sought discovery also whether the appellant conducted business here ot not. The learned Judge should more properly have noted that it was the responsibility of counsel for the respondent to have led proper evidence in support of his client's claim not only on liability but also on quantum. There was no duty on the appellant - (the defendant in the Court below) - to provide evidence on anything.

Dealing with the second ground of appeal first; we do not think that, on the evidence placed before him,

the Judge was in error in finding, on the balance of probabilities, that the respondent had not received the six-monthly cost of living increases to which he was found to have been entitled. There was the evidence of the respondent himself, which the Judge was entitled to accept, that he had not received the increases. Although there was a suggestion that these increases had been included in the $500 annual salary increment, there was no proof that such had been the appellant's intention.

In the absence of any contrary suggestion in the evidence, the inference was available that the annual increment was paid to recognise the respondent's good work and to compensate him for working on weekends. The appellant might have been able to have called evidence which could have cast doubt on the inferences drawn from the uncontested evidence of the respondent. In this regard although onus of proof overall rested on the respondent (the plaintiff) the evidential burden on this point shifted to the appellant (the defendant). The concept of the shifting evidential burden has often been articulated; for example, see the judgment of Bowen L.J. in Medawar v. Grand Hotel Company (1891) 2 Q.B. 11, 23. It had relevance in this case. For these reasons we disallow the second ground of appeal.

However, the first ground of appeal has caused us more concern. It is a trite rule of practice that, in the absence of any agreement to the contrary, the plaintiff must adduce all his evidence on both liability and quantum before his case is closed. In complicated cases where the assessment of damages requires protracted evidence from experts, the parties frequently agree that there be a trial first on the question of liability; alternatively, the Court may be asked so to order. The basis for either

approach is that, if there is no liability shown, then both sides will be saved the cost and trouble of proving quantum. Also in such circumstances, parties quite frequently agree that, if liability be found, damages be assessed by some court official or other official referee.

The present case was not one of those which called for separate trials on liability and damages. It was a perfectly straightforward case.

Mr. Knight stated from the bar that one of the factors in his decision not to call evidence was that the respondent had not discharged the onus of proving quantum of damages, even if the Judge were to hold that there was liability. The record shows that Mr. Knight made the submission that there was no proof of the quantum of cost of living increases.

If the Judge at that stage had indicated to counsel that even if liability were proved, there was no proof of quantum and had at that stage allowed the respondent to call evidence on quantum then we think any prejudice to the appellant could have been met by an award of costs. However, the Judge reserved his decision on the whole case and then, wrongly in our view, asked counsel for the defendant to adduce evidence as to quantum: later he adjourned the hearing again to enable the parties to produce evidence on quantum but that was after he had indicated his view as to liability.

We think that the decision taken by Mr. Knight not to call evidence was proper and of a kind a barrister frequently has to make in the course of a trial. He was

entitled to rely on the rule that a plaintiff must prove all his case. The only aspect which further concerns us is that Mr. Knight stated that he had no witness presently available.

The rule is stated in Halsbury 4th Ed. Vol. 17 para. 18: the author notes that not only may rebuttal evidence sometimes be called by a party after he has closed his case, but also a Judge may allow further evidence of a non-rebuttal nature to be called, if he considers it necessary in the interest of justice.

In Doe d. Nicoll v. Bower (1851), 16 Q.B. 805 further evidence was permitted after the parties had closed their cases and before summing-up. It was held admissible: no injustice had been caused. Here, of course, no injustice would have been caused if the Judge had let in the evidence before he had made up his mind about liability so that the defendant could decide, on the basis of the whole of the plaintiff's case, whether or not to call evidence on liability or quantum or both.

Again, in Halsbury (4th Ed.), Vol. 37 para. 483 the learned author refers to the characteristic mode of trial as "one continuous episode in which all the matters in dispute between the parties will be completely and finally determined"; an order for the separate trial on separate issues is said to be regarded as a departure from the norm; generally speaking such an order should only be made in exceptional circumstances and on special grounds which would normally depend upon convenience and the saving of expense.

The discretion of a Judge to admit further evidence after a party has closed his case is referred to also in Phipson on Evidence (13th Ed.) para. 33-92. The normal situation where such further evidence is admitted is where rebuttal evidence ought properly to be given or where some genuine surprise to the plaintiff emerges from the defendant's evidence.

The normal situation where it is proper for a Judge to exercise his discretion to admit evidence after a party has closed his case just did not arise in the present case. Whilst we have considerable sympathy for the respondent, who appears from the meagre evidence given to have been entitled to his award of damages, the fault for his not sustaining his award on appeal must flow from the decision on his counsel not to call evidence of quantum as part of his case.

Such evidence was readily available: it was found after the Judge had urged that it should be called. Counsel had a 'last chance' when this omission was drawn to his and the Judge's attention in the submissions of counsel for the appellant. It would probably not then have been too late for quantum evidence to have been given: if an adjournment had then been granted for that reason, it might have been possible for Mr. Knight to have brought any witnesses as to liability. Mr. Knight acknowledged that he did not have any witnesses present and that he would have had to have sought an adjournment.

In all the circumstances, we can see no reason why the Judge took it upon himself to bolster up the plaintiff's case after it had closed. There was no reason

for not observing the established rule that the plaintiff must prove his case both as to liability and as to quantum. The appeal must be allowed on the first ground.

In the circumstances of one ground failing, we make no order as to costs.

At the conclusion of his judgment, Kearsley, J. declined to deduct tax from the amount awarded to the respondent. In case it is of assistance in other cases, we record that he was quite correct in this approach. We adopt the reasoning of the majority of the New Zealand Court of Appeal in North Island Wholesale Groceries Ltd. v. Hewitt (1982) 2 NZLR 176. The Court there dealt at length with the topic of deducting income tax from damages awarded for wrongful dismissal; it concluded that a defendant was not entitiled to this benefit and that the liability of a plaintiff to pay tax on the award would depend on his individual taxation situation. We prefer this approach to contrary one shown in Shove v. Downs Surgical PLC, (1984) 1 All E.R. 7.

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