IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 12 OF 1991
(High Court Civil Action No. 168 of 1989)

BETWEEN :

FIJI TEACHERS UNION
CHABI RAM — APPELLANTS

-and-

THE PERMANENT SECRETARY FOR EDUCATION
THE PUBLIC SERVICE COMMISSION
THE ATTORNEY GENERAL OF FIJI — RESPONDENTS

Mr. H. M. Patel for the Appellants
Mr. N. Nand for the Respondents

Date of Hearing : 24th February, 1993
Date of Delivery of Judgment : 13th August, 1993

JUDGMENT OF THE COURT

These reasons for judgment are annexed to the judgment of this Court in Civ. App. No. 11 of 1991. The two appeals were heard together, and why we have taken this course is explained at the outset of that judgment. We feel it preferable to do it this way rather than to give a joint judgment applicable to both appeals.

Pursuant to his acceptance of a written offer to join the teaching service of the Ministry of Education dated 2nd January 1970, the plaintiff Chabi Ram was appointed with effect from 2nd February 1970; his commencing salary was $738, and his incremental date was 1st March; he was appointed on a

probationary basis for 3 years, and his instrument of appointment was on the same form as that referred to in the other case. That contained the clause that he was subject to the provisions of the 1964 Leave and Passage Grant Conditions . He annexed to his affidavit what appear to be those provisions, contained in GOs 903-13 (General Orders) (record pp 10-13).

That he was so subject is put in issue in an affidavit by the Director of Industrial Relations, who asserts that the plaintiff came under the provisions of GO 733B. There is, however, no explanation as to when that order came into effect or how it replaced or amended the previous GOs, if it did, or how it came to apply to the plaintiff. The learned trial Judge proceeded on the basis that this was correct. How he reached this conclusion is not stated. We shall come back to this.

It would appear to us that if the 1972 leave and passage regulations and subsequent GOs applied to the plaintiff, then there is a complete lack of evidence as to what his pre-1972 "tour" was, whether he was a permanent officer and, if so, when he became one, if and when he was "required" to transfer to the 1972 conditions (GO 741), as well as an absence of evidence about other matters referred to in the previous case.

The plaintiff, on 25th September, 1981, used the same option form as that referred to in the previous case to elect to receive passages under the same incorrect regulation as in the previous case. It looks as though in it he asserted that his current tour

would end on 1st January 1982, and the option bears date 25th September 1981. As in the previous case, he opted for the full passages for which he would be eligible at the end of his tour, and passages to Auckland in future. He then sought passages to Sydney for himself his wife and child in an application seemingly made on or before 30th October 1981 for a departure on 29th November 1991. It was approved on or about 22nd October 1981, and off they went.

By memorandum dated 15th August 1984 the plaintiff was informed by a senior education officer that he was due for a passage to Auckland during the 1984/85 Christmas vacation (record p 20). So he applied, and was granted passages for the same 3 to Auckland at the end of 1984. He applied again in 1987. By memorandum from the Permanent Secretary of Education dated 23rd November 1987 his application was approved. Due to some delay in the issuing of the passages, he cancelled his plans to travel overseas. By memorandum dated 18th January 1988 the Secretary informed the plaintiff in effect that the position had been "reassessed", that the previous passages had been granted in error, and that, making allowance for long service and other leave entitlements, he had received a net overpayment of $2092.95. He was asked how he proposed to refund it (record p. 23). We do not think it necessary to set out the memorandum. It seems to suggest that a four year tour was completed on 2nd February 1974 and that the plaintiff should have exercised an option for local passages only, presumably pursuant to GO 733B(b). His salary at that date was said to be $1746.

Now, just stopping there, there is no indication of what is meant by the word "tour", except after 1972, when it is defined in GO 722, but the word is used in GO 733B. If it merely means period of service, then that is completed on any date you like to choose. If it means something else - then what? The only reference to a period that could be called a tour pre-1972 is one of 3 years service on a probationary basis. If it means a completed year of service then, for the plaintiff, each year ended on 1st February. But whereas the 1964 Leave and Passage Grant Conditions, which the Director, in his affidavit, asserts did not apply, refer throughout to "completed years of service," GO 733B does not, and refers to "tour". Surely the Court is entitled to infer that this difference is for a purpose. There is no evidence at all. How can a Court hold that the plaintiff was required to do anything after 4 years? As referred to in the other case, in the case of exercise of options (GO 743) the only requirement to exercise options at the end of a tour applied to leave and passage then due, not to future passage or leave. And in the former cases tour was defined as 3 years commencing on appointment (GO 722). In the case of the plaintiff his tour would have finished on 1st February 1973.

Now, to return to the facts, the memorandum from the Secretary seems to have prompted the plaintiff to commence his action on 11th May 1989. In his originating summons the same declarations and orders as in the previous case were sought. The affidavit of the Director was in terms similar to the previous

one, adjusted to try and deal with the different circumstances. It was equally as unhelpful and equally wrong as its predecessor. We do not think we need to set out any portions of it. The affidavit also sought relief similar to that in the previous case. That is a similar non-compliance with the rules.

Written submissions were made to the trial Judge. As in the previous case he dismissed the plaintiff's originating summons and ordered that there be judgement for the defendants in the form of 3 declarations and an order for costs. Where, in the absence of a counterclaim, there was jurisdiction to make such declarations we do not know. The plaintiff appealed.

As in the other case, the first question is whether, as at 1st January 1972, the plaintiff was eligible for passages or became so eligible after that date (GO 741). Giving the word "tour" the meaning required by GO 722, the plaintiff's tour was completed after 1st January 1972, probably on 1st February 1973.

However, for reasons explained in the other matter, we do not know when the plaintiff became a permanent officer, nor when, if at all, he was "required to transfer to these conditions" (GO 741), or how. If he was a teacher appointed to the permanent establishment on 2nd February 1970, and if GO 733B is to be given the meaning we have ascribed to it, he was not on a salary level sufficient to make him eligible under that Order for overseas passages. As in the other case there is an unverified list

apparently showing the plaintiff's salary level at incremental and other dates. Even if he was appointed to the permanent establishment some time after 2nd February 1970, it does not appear from that list that he reached a salary level sufficient to make him eligible for overseas passages under GO 733B until some time after 1st January 1972. There is no evidence that the plaintiff did reach the necessary salary level.

Because of what we said earlier herein, we have looked at the 1964 Leave and Passage Grant Conditions. Under these, we believe that the plaintiff did not fall into one of the categories there specified at any time before 1st January 1972 that would have made him eligible for overseas passages.

However, that is not the end of the matter. Under regulation 1(a), repeated in GO 720(b), the leave conditions which became effective from 1st January 1972 did not apply to "officers appointed under agreement of service who will be governed by the terms of the agreement" (record pp 50, 32). There is no evidence as to whom this was meant to or might apply, but the plaintiff was appointed under an agreement of service (record p. 29). While that agreement made him subject to the provisions of Colonial Regulations and of General Orders in force "or which may from time to time be promulgated by the Governor," it went on separately to subject him to the provisions of the 1964 Leave and Passage Grant Conditions. The fact that the document draws a distinction between regulations and general

orders on the one hand, which are to apply as promulgated from time to time, and to the 1964 Leave and Grant Conditions on the other, which are not so subject, is a matter that, if this aspect is material, might not justify ignoring. And it is material to this extent. In his application for leave in 1981 and in 1987 the plaintiff claimed that he was serving under the 1964 leave conditions (record pp 18,21). In his 1984 application he also claimed to be serving under the 1964 leave conditions, which, from internal evidence, some person, quite clearly not the plaintiff, has crossed out and substituted for it 1972. The Commission accepted his applications and granted passages. Did it do so under the 1964 conditions, when the Director said they did not apply to him?

Under the 1964 Leave and Passage Grant Conditions an officer was entitled to passages according to his Category, fixed by reference to salary. According to the evidence the plaintiff had become entitled under these conditions to overseas passages by 1st February 1974 (record p. 26). According to the unauthenticated scale of his salary progressions, the plaintiff had qualified by 1st July 1973.

There is no evidence that these 1964 leave and passage conditions were ever abrogated. The plaintiff says that they applied to him - as his agreement specifies - the Director says they did not, and gives no reasons. If it is suggested that the plaintiffs entitlement to passages ceased when he was "required"

to transfer to the 1972 leave conditions (it was not), there is no evidence that he was ever so "required".

Whether or not the 1964 conditions did continue to apply to the plaintiff depended on 3 pre-conditions (1) that GO 733B did not (ii) that he had not been required to transfer to the 1972 conditions (GO 741), and (iii) that he fell within the ambit of GO 720(b). As to (i), the Director says it did (no reasons). As to (ii) no evidence. As to (iii) we do not know.

Assuming that they did apply, or at any rate were not displaced by GO 733B, there are two ways in which they could have operated to give the plaintiff an eligibility for overseas passages. They could have given him an eligibility which he had achieved at the time of the coming into effect of the 1972 leave conditions, if the latter applied to him. In our opinion he did not qualify on that basis at that time. They could have given him an eligibility because they continued to apply to him after that time; if so he achieved an eligibility not later than 1974, probably in 1973.

It may be true to say that the 1964 Leave and Passage Grant Conditions under which the plaintiff was employed were amended in 1972 (record p 7). It is the fact that the plaintiff exercised an option in 1981, which he says was pursuant to General Order 743 (ibid). But whether, if the plaintiff's employment continued to be governed by the 1964 Leave and Passage Grant Conditions

after 1972, and he alleges that it was still so governed as late as 1989 (record p. 7), that nevertheless gave him an entitlement under GO 743(c) was not mentioned. In other words, if the 1964 conditions continued to apply to the plaintiff after 1972 by virtue of the application of GO 720(b), then quite clearly the other provisions of the 1972 conditions did not. That meant that the plaintiff was not in a position to exercise any option, or take advantage of any of the passages available under GO 743. The plaintiff did not even suggest that he was, in 1982 or afterwards, exercising any right that he might have under any of the ten 1964 conditions, or that he had complied with the requirements of those conditions that would enable him successfully to do so. He was seeking to exercise rights, if any, given him under GO 743. Indeed, in his affidavit in support of the originating summons he swears, in paragraph 6 (record p. 7):

> 6. *ON the 25th of September, 1981 pursuant to the provisions of the General Order 743 (a), (b) and (c) I exercised my option which was accepted by the Ministry of Education .....*

As we have said, if GO 743 applied the plaintiff was not eligible.

We have not overlooked what appears to be a submission made to the Judge and to this Court that the proviso to GO 743(c), namely that an officer was entitled to exercise an option to

receive overseas passages "provided that the officer was eligible for overseas leave under his pre-1972 Conditions", imported some form of future entitlement, such as "provided that an officer at some time in the future was eligible for overseas leave under his pre-1972 Conditions," or 'became so eligible. We simply say that we do not agree, and that such an interpretation seeks to import a concept contrary to the whole idea for the 1972 Leave and Passage Conditions. Those Conditions did away with overseas passages as an entitlement for officers, but sought to preserve any rights to such passages that might have already accrued to an officer when he became subject to the new regulations, ie. when they came down on him on 1st January 1972, or before being required to transfer to them (GO 741). Those officers who, at the relevant point of time, were already eligible for overseas passages under the pre-1972 leave conditions that up to then had applied to them, did not lose that right upon becoming entitled to long service leave under Categories A and B of the new Conditions. To us this is quite clear. In so far as any other view might have been expressed by J.T. Williams in a decision in an arbitration matter No. 8 of 1986 we do not agree with it.

All this adds up to the conclusion that for reasons other than those expressed by the Director and adopted by the Judge, the plaintiff made out no case for relief, and his originating summons should have been dismissed.

It also adds up to the fact that the respondents made out no case for relief. The grounds for seeking it in the affidavit from the Director were wrong. These is not enough material to establish that the Commission was entitled to succeed on any other because it had not shut off the possibility of passages having been correctly given to the plaintiff on the basis that the 1964 Leave and Passage Grant Condition did apply to him, as he claims was the case.

More importantly, perhaps, by failure to comply with the High Court Rules, there was no jurisdiction in the Judge to make the orders that he did in favour of the respondents. There was no originating process which might have given him that jurisdiction. Having refused to give any relief to the plaintiff, that was the end of the matter.

If a mistake was made, it was made by the Commission in allowing the passages. If no mistake was made, then it had no right to require repayment of the cost of the passages.

As in the previous case we were very tempted to make orders requiring the respondents to pay the whole of the costs. However, the plaintiff chose to bring an action, and failed in the High Court and on appeal. We believe the proper order is to order each side to pay its and their own costs both here and in the High Court.

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Mr. Justice Michael M. Helsham
President Fiji Court of Appeal

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Sir Moti Tikaram
Resident Judge of Appeal

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David Fatiaki
Judge of Appeal