A

## FIJI GAS COMPANY LIMITED

*v.*

B

## THE SECRETARY FOR LABOUR

[SUPREME COURT, 1975 (Williams J.), 10th November]

Appellate Jurisdiction

*Workmen's compensation—personal injuries received by employee in motor accident whilst driving employer's van to his home from work—whether injuries received in accident arising out of and in the course of his employment—Workmen's Compensation Ordinance (Cap. 77) s. 5(1).*

C

*Master and servant—personal injuries received by employee in motor accident whilst driving employer's van to his home from work—whether injuries received in accident arising out of and in the course of his employment—Workmen's Compensation Ordinance (Cap. 77) s. 5(1).*

D

In normal circumstances, an employee travelling in his employer's van to and from work is not then in the course of his employment unless he is obliged by the terms of his employment to make the journey in that vehicle. In the present case, it was in the appellant's interests that the respondent should travel to his place of employment and home in the van to enable him to fulfil his duties efficiently. Consequently the respondent was driving the van in the course of his employment when the accident occurred.

E

Cases referred to :

*St. Helens Colliery v. Hewitson* [1924] A.C. 59.
*Lancashire & Yorkshire Railway v. Highley* [1917] A.C. 352.
*Blee v. L.N.E.R.* [1938] A.C. 126.
*Vandyke v. Fender* [1970] 2 All E.R. 335 ; [1970] 2 Q.B. 292.
*Davidson v. M'Robb* [1918] A.C. 304.

F

Appeal against an award made to an employee by the Magistrate's Court under the Workmen's Compensation Ordinance.

*B. C. Patel* for the appellant.
*M. J. Scott for* the respondent.

WILLIAMS J. : [10th November 1975]—

G

This appeal is brought by an employer, " FIJI GAS CO. LTD. ", against an award made to an employee by the Magistrate at Lautoka under the Workmen's Compensation Act, Cap. 77.

The employee, SUBRAMANI SWAMY, was the employer's local branch manager.

No evidence was tendered by the employer at all. The only evidence as to conditions, hours of work, the duties, obligations and the general responsibilities

H

of the employment were tendered by the employee.

During 19½ years with the employer he worked for many years as a fitter and maintenance man before being made branch manager in 1968. He looked after the branch's books, bank statements and stock ; supervised five other

employees and also carried out maintenance work and made deliveries. In order that he could carry out those duties some form of transport or conveyance was necessary. He covers the western side of the island which represents quite a large area and could entail a considerable amount of travelling.

His evidence reveals that the branch office in Lautoka operated during the usual kind of office hours i.e. approximately 8 a.m. to 3 p.m., Monday to Friday. But of course it would be unusual to find that they were never late in opening or never late in closing; or to find that the closing of the door did not necessarily signify that all the staff had ceased their labours as from that instant.

The employee stated that he was obliged to send a report to the head office at Suva as soon as possible after the end of each month.

He also stated that from time to time he was called out from his home to attend to equipment. Again that kind of duty is one which would necessitate some readily available transport for conveying himself and his equipment.

It is not surprising therefore to note that his evidence referred to a motor van provided by the employer for the use of the manager in carrying out his duties. He used the van for travelling from his home 5 miles away to the Lautoka office; for travelling to areas where he was called upon to do installation and maintenance work and for attending to problems of maintenance when he was called out from his home. There were two other vans in use which suggests that the work in general entailed carriage and transport of this kind.

The foregoing description of the employee's work and responsibilities has not been disputed by any evidence tendered by the employer.

The incident giving rise to the claim for compensation was a motor accident in which he was involved when driving his employer's van on the evening of Sunday 2nd September 1973. The employee says that he had been in the Lautoka office for the greater part of that day preparing the monthly report for August 1973. He elected to do this office work on the Sunday so as to be free to do other work on the Monday. It was when he was driving home that the accident occurred.

The learned Magistrate took the view that the accident and injuries to the employee arose out of and in the course of his employment and allowed the claim. The employer appealed. His appeal was worded as follows:—

> "The learned Magistrate erred in law and in fact in holding that the accident arose out of and in the course of his employment."

The claim is made under the Workmen's Compensation Act, Cap. 77, s. 5(1) the relevant portion of which reads:—

> "5(1). If in any employment personal injury by accident arising out of and in the course of the employment is caused to the workman, his employer shall, subject as hereinafter provided, be liable to pay compensation....."

The very matter for determination was whether the injury arose "out of and in the course of" his employment. The very matter which the Magistrate decided was that the injury arose out of and in the course of his employment.

Therefore a purported ground of appeal which simply states that the Magistrate erred in finding that the injury arose out of and in the course of the employment does no more than say the Magistrate's decision was wrong. It would be similar to an appeal alleging that the Magistrate was wrong in finding the accused guilty of the offence charged, or in finding adultery proved against the respondent. It is not a ground of appeal but merely a written disagreement with the finding. The appellant has to set out his reasons (ie. his grounds) for asserting that the Magistrate erred in law.

I indicated at the outset of the hearing that this was not a ground of appeal and I allowed an adjournment for about ¾ hours whilst Mr B. C. Patel set out his grounds of appeal. They now appear as follows :—

1. That the learned trial Magistrate erred in law in holding that the accident occurred in the course of employment of the respondent in that :—

(*a*) because the respondent was returning home after doing work for his employer the journey back to his house was in the course of his employment,

(*b*) because the respondent had the use of the company van the accident occurred in the course of his employment.

2. That the learned Magistrate erred in law in entering judgment for the applicant without finding that the accident arose out of as well as in the course of employment.

One must look at the meaning of the expressions " arising out of the employment " and " in the cause of the employment ". There must have been hundreds of cases in which the meaning to be attributed to these words has been considered by courts in U.K. and in the Commonwealth as a whole. The wording of corresponding statutes and ordinances in the Commonwealth, like the wording in our Ordinance, follows the wording of the English Workman's Compensation Act.

The industry of Mr Scott, Crown Counsel, who appeared for the Secretary for Labour produced 31 authorities and the endeavours of counsel for the appellant added considerably to that list. One authority which has been repeatedly quoted with approval by numerous courts is the House of Lord's decision in *St. Helens Colliery v. Hewitson* [1924] A.C. 59.

The expression " arising out of " was explained by Lord Wrenbury at p. 91, where he said,

" In matters physical a plant arises " out of " a seed—a vessel may be wrecked " out of " the violence of the waves. In matters metaphysical a motor accident may arise " out of " the carelessness or " out of " the inefficiency of a driver. The words indicate an origin, a source or a cause. It has been said that the expression " arising out of the employment " applies to the employment, as such, to its nature, its conditions, its obligations and its incidents. I am disposed to agree with this if the wideness of the language does not lead to uncertainty in meaning. A first step is to ascertain whether the accident had its origin in the employment and therefore arose out of it. "

In another House of Lords case, *Lancashire & Yorkshire Railway v. Highley* [1917] A.C. 352, Lord Sumner said,

" There is one test which is at any rate always applicable, because it arises on the very words of the statement, and it is generally of some assistance. It is this—Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury. "

In *St. Helen's Colliery v. Hewitson* (*supra*) Lord Atkinson said at p. 75,

" I think the words " arising out of " suggest the idea of cause and effect. "

He went on to suggest that the effect of the employment must have been to cause the injury sustained.

The expression " in the course of "—his employment, was also considered in *St. Helen's Colliery v. Hewitson* (*supra*). Lord Atkinson said at p. 76, A

> " .....the words " in the course of his employment " means while the workman is doing what he is employed to do, i.e. discharging the duties to his employer imposed upon him by his contract of service. The word " employment " in this connection must cover and include the things necessary and incident to the employment.—. "

The explanation has been approved repeatedly. It was approved by Lord Atkin, in *Blee v. L.N.E.R.* [1939] A.C. 126 at 131, who also quoted Lord Dunedin's words in *Davidson v. M'Robb* [1918] A.C. 304, B

> " In my view ' in the course of employment ' is a different thing from " during employment ". It connotes to my mind the idea that the workman or servant is doing something which is part of the service to his employer or master. No doubt it need not be actual work, but it must, I think, be work or the natural incidents, connected with the class of work. " C

Those are the principles which have to be applied to this case.

The employee in this case clearly had no specially defined hours of employment e.g. 8 a.m. to 5.00 p.m., outside of which he could never claim to have been employed. He was made responsible for the management and control of his employer's business in the western section of Viti Levu. In an executive position of that nature it would not be possible to adhere to strict hours, and D there is not the slightest suggestion from the employers to the contrary. He had a manager's van supplied by the employer, and having regard to the nature of his duties, the fact that he was supplied with a van and not a car, is in itself a significant factor. A van would be better suited for making deliveries and for carrying the equipment necessary for doing maintenance work and installations.

Whilst he was working in the office on Sunday 2nd September, he was E clearly engaged in performing his actual employment and not on a task related to it or " incidental to it. " The issue to be decided is whether he was in the course of his employment when he was driving the van homewards from the office. In the normal course of things an employee cannot be said to be in the course of his employment when he is not yet at work and is simply on his way to work. That is apparent from the decisions in the cases I have quoted, apart from many others. However, the same authorities lay down that F there are circumstances in which the employee can claim to be engaged in the course of his employment when he is only travelling to or from his work. Such circumstances include those where the employee is following a route or travelling by a means which is essentially the only route or means by which he can arrive at his place of work e.g. a miner riding down the mine shaft in a lift ; travelling in the boat provided by an employer to a worksite on an G island. In those circumstances he has no choice ; it is something which is dictated to him by reason of his employment. The cases also show that if the employer dictates the route and or mode of travel to be adopted by the employee then the latter is proceeding in the course of his employment in obeying those instructions. In *Van Dyke v. Fender* [1970] 2 All.E.R. 340, Lord Denning summed up the decisions in the following terms,

> " The two leading cases most apposite for present purposes are *St. Helen's Colliery v. Hewitson & Weaver v. Tredegar*. They show to my mind H quite conclusively that when a man is going to or coming from work, along a public road, as a passenger in a vehicle provided by his employer,

A he is not then in the course of his employment, unless he is OBLIGED by the terms of his employment to travel in that vehicle. It is not enough that he should have the right to travel in the vehicle, or be permitted to travel in it. He must have an OBLIGATION to travel in it. Else he is not in the course of his employment. That distinction must be maintained, for otherwise there would be no certainty in this branch of the law. ''

In the instant case the questions for the Magistrate was whether the employee was obliged to travel by the employer's van to and from the B Lautoka office. On that Sunday, like any other day, whether it was an accepted working day in the general sense or not, the employee was '' on call '', that is to say, he was available for work. I do not mean that he had to stand-by and limit his area of relaxation to his home so that he would be there whenever he was needed. People with gas appliances which go wrong may find it very inconvenient, and also expensive in the case of industrial premises or commercial premises such as hotels, to have to wait for the start of a normal working day C before someone comes to attend to their needs. If the employee had received a call for maintenance on Sunday, whilst at the office, it would have been his duty to answer it, and for that purpose he would have had to take the kind of tools and equipment necessary to carry out the work. Had he travelled to work by some means other than the van it would have been difficult if not impossible to answer the call, without first going home to collect the van.

D There could be no point in his proceeding home on the Sunday evening in some other kind of conveyance and leaving the van garaged at the office or other premises in Lautoka. By doing so he could have found himself unable to attend an urgent request which could have been made that very evening. I feel his employers would quickly ask what was the point in providing the van and allowing him to take it home if he was going to leave it at work and make it impossible for him to attend customers ' urgent requirements.

E In my view it was in the employer's interest that the employee should travel home in the van. I feel he was, at the time of the accident, doing that which was, to use Lord Dunedin's words supra, '' something which is part of the service to his employer ''. I am not suggesting that the terms of employment were such that in order to fulfill the conditions thereof the employee had to have the van constantly at his side, so to speak. As I see it, the fact that the employee was on call does not mean that he was not F entitled to freedom of movement during his leisure periods, to visit places of entertainment and to travel away from his home in the course of his social activities. He is not bound to travel to such places in the van in case he receives a call. Perhaps it would not be possible to locate him anyway, but on his return home a message requesting assistance could be waiting his attention and once he received the message he would be obliged, by the terms of his employment, to attend to the request. It would demonstrate inefficiency G and a lack of zeal if the van were not at his home to enable him to answer the request.

I am not intending to say that if the employee attended a wedding he would be obliged to take the van to the wedding in case he received an urgent call. If he did travel to a wedding in the van, I am not suggesting that he could claim to be using it in the course of his employment, on the ground that he H would need it if he were called upon whilst at the wedding. The places from which he is most likely to proceed in response to calls are from the office in Lautoka or from his home 5 miles away in Drasa. One would expect the van to be at either of these places according to where the employee happened to be.

Therefore I feel that in taking the van to the employer's office when actually going to work, or in returning from the office to his home in the van after finishing work in the office, the employee is doing something which is for the benefit of his employers and which is connected with his work. He is ensuring not only that he will be available but that he will have the means, provided by his employer, to respond to the call suitably equipped to do his job.

Accordingly I am of the view that the Magistrate's finding that the employee was driving the van in the course of his employment when the accident occurred, is correct.

The appellant's last ground of appeal was that the Magistrate made no finding that the accident arose out of the employment. It was not submitted that there was no evidence on which he could base that finding. I feel it would be a brave person who would not say that one of the inherent dangers in driving a motor vehicle was that of being involved in an accident. It was part of the employee's duty to drive a motor van. It follows that the accident and consequential injury arose out of the employment.

I uphold the decision of the Magistrate and the appeal is dismissed with costs to the respondent.

*Appeal dismissed.*