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Judgment No. 73

IN THE SUPREME COURT OF THE
TERRITORY OF PAPUA AND NEW GUINEA

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B E T W E E N :

RONALD OTTO

Plaintiff

- and -

ANDERSONS PACIFIC TRADING CO. LTD.

Defendant.

J U D G M E N T.

In this case the Plaintiff claims the sum of £807.0.0 for work done as an engineer for the Defendant Company, and such claim arises out of a verbal contract alleged to have been made between the Plaintiff and A.W. Anderson, the Managing Director of the Defendant Company, about the month of September, 1951.

It appears that the Plaintiff commenced to work for the Defendant Company in August, 1951, as an engineer in connection with the Company's Freezing Works, Dry Dock, and the operation of small ships. As remuneration, he was to receive the sum of £80 per month with a house, refrigerator and light free of charge, but without payment for overtime in connection with this employment.

The Defendant Company had purchased a Japanese vessel, the "Naruta", a casualty of war, lying partly submerged in Simpson Harbour. At the time when the Plaintiff became an employee of the Defendant Company, it was not known to him that it was intended to salvage the vessel. A few days after he commenced working for the Company, he was put on to the work of preparing equipment to be used in the salvaging operations. This work was carried out in the dry dock. It was intended that A.W. Anderson, with other assistance, would carry out the salvage work, but some difficulty occurring soon after this work was started, brought the Plaintiff into the actual salvaging operations.

After working overtime for about 30 or 40 hours, the Plaintiff had a conversation with A.W. Anderson. This conversation took place in the lounge of the Plaintiff's house when Mrs. Otto, the wife of the Plaintiff was present.

The words of this conversation form the verbal contract between the Plaintiff and the Defendant Company, so it is alleged by the Plaintiff.

Plaintiff said to Anderson - "I do not want to go on working overtime on the 'Naruta' because the job is dirty and dangerous, specially at night". Anderson said - "Well, we have got to get this 'Narute' floated and I will compensate you for your working and loyalty. I might even start you off in a garage, or you might get £5,000 for your work, but at least you will not get less than £1 per hour overtime. "

With that, the Plaintiff continued to work on the recovery of the "Naruta" and he did so work up to May, 1953. The vessel was raised and

put up for auction, but not sold at a bid of £25,000, naturally, because this bid was a dummy bid.

That there was a contract made for the payment to the Plaintiff of overtime worked on the "Naruta" at the rate of £1 an hour there is no doubt. It was not indeed an excessive rate, considering the skill of the Plaintiff and the dangerous and dirty nature of the work. The Plaintiff's evidence as to the conversation which constituted the contract is borne out by the Plaintiff's wife, who was present at the time. She appeared to me to be a truthful witness.

The Plaintiff's account of the contract is supported when one considers that the work of salvage was not in contemplation when the Plaintiff was engaged as a mechanical engineer for the Company, and also when one considers that the work was of a special nature, and apart from the duties which he was engaged to perform. It could not have been included in the ordinary overtime pertaining to the various duties to perform which he was originally employed and for which he was not to be paid.

The evidence of the verbal contract to pay overtime worked on the salvaging of the "Naruta" is, however, not refuted. It may be true that A.W. Anderson was unfortunately, through adverse circumstances, unable to be present to give evidence, but the fact remains that the evidence of the contract is not contradicted. The fact of the contract must, therefore, be accepted, since there is nothing in the evidence to displace it.

The next matter for consideration is as to whether the amount claimed is correct and whether the hours were worked.

As to the second part, there is no doubt that the vessel was raised to a floating condition such as to make it possible to offer her for sale. No one disputes that the Plaintiff worked with others in the business of raising the vessel. It is not disputed by evidence that the Plaintiff did not work during the hours claimed for. From the nature of the operation, Plaintiff had to work through the hours claimed for, according to his evidence. There is no evidence which discloses that the Plaintiff was a dishonest workman who loafed on a job for which he was to receive £1 per hour.

As to whether the amount claimed is correct, one can only take the figures supplied in the amended particulars as to the number of hours worked. As A.W. Anderson has made the contract for the payment of over-time, it was incumbent upon him to check the hours recorded by the Plaintiff, if thought necessary. Not having done so, it must be taken that the hours claimed for are correct, as shown in the amended particulars, unless there is an inconsistency between the figures in the particulars and the diary entries.

The claim is for 807 hours worked. Plaintiff says he gave A.W. Anderson this figure several times, and he also told Mr. Sholle, the Manager. In the amended particulars the number of hours worked is shown

as $823\frac{3}{4}$. There appears to be a difference between the number of hours worked as disclosed in the amended particulars and the diary entries for the month of October, 1952. According to the particulars, Plaintiff worked 108 hours, while the diary entry for this month is 88 hours. This reduces the claim by 20 hours to $803\frac{3}{4}$ hours. That is the only discernable discrepancy, and there is nothing to show that the other figures are not correct.

I find that there was a verbal contract made between the Plaintiff and the Defendant Company under which the Plaintiff was to receive remuneration for his work in salvaging the vessel, "Naruta," in the form of overtime at the rate of £1 per hour.

I also find that the number of hours worked was $803\frac{3}{4}$ hours, representing the sum of £803.15.0 and I give judgment for the Plaintiff in this sum with costs.

A/C.J.