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

Appeals 4 of 1956 (N.G.)

Appellate Jurisdiction.

Mr. Justice Kelly.

NEW BRITAIN ENTERTAINMENTS LIMITED

Appellant

and

V. E. WEBB

Respondent

APPEAL FROM THE DISTRICT COURT AT RABAUL.

JUDGMENT DELIVERED THIS 16TH AUGUST, 1956.

This is an appeal from the decision of G.F. Hall, Esquire, a Stipendiary Magistrate in an action in the District Court at Rabaul wherein, on the 18th April, 1956, the Stipendiary Magistrate gave Judgment in favour of the Respondent in the sum of £150, and costs, £10.18.3.

The Respondent claimed against the Appellant for work done by the Respondent for the Appellant at the Appellant's request, as follows:-

(1)	6 weeks' holiday pay	£72. 0. 0
(2)	Double-time Sundays (24 Sundays at £4.0.0 per day)	£96. 0. 0
(3)	Double-time holidays (17 days at £2.0.0 per day)...	£34. 0. 0
		£202. 0. 0

FIRST CLAIM: The Stipendiary Magistrate found in favour of the Respondent on the claim for 6 weeks' holiday pay, £72. It appears from the evidence that the Stipendiary Magistrate based his finding as to the term of 6 weeks on the evidence of the Respondent on cross-examination, as follows:-

" Q. Was there any discussion on how much leave pay you would be entitled to?

A. No.

Q. How do you base your claim for 6 weeks?

A. I worked two years five weeks period.

Q. How do you get six weeks?

A. All private firms give six weeks, Government three months.

Q. You worked it out as a reasonable assessment but he could have meant one month.

A. Yes. He could have meant anything. "

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On that evidence the Stipendiary Magistrate found that it is the "custom" of the business houses in Rabaul to pay six weeks' holiday pay at the completion of two years' work. No doubt the Stipendiary Magistrate meant to use the word "Usage". Custom is defined in Halsbury's Laws of England 3rd Ed. Vol.11, p.158 paras 294 and 295. Usage is defined in Ibid. p.182, para 338.

The method of proof of usage is laid down in Halsbury's Laws of England 3rd Ed. Vol.11 pp.199 and 200, paras 367 to 369; and more particularly at p.200 - "A usage is not proved merely by bringing the person interested in establishing its existence to give oral evidence of its existence unsupported by any other evidence;" and cases cited thereon.

Apart from that evidence of the Respondent, there was no evidence before the Stipendiary Magistrate on which he could have found any agreement between the Appellant and the Respondent as to any fixed term of holidays on which the Respondent was entitled to be paid any holiday pay. I find accordingly; and on that finding I do not consider it necessary for me to deal with the evidence on the other aspects of that claim. The appeal is allowed on this first claim.

SECOND CLAIM: Double-time Sundays (24 Sundays at £4.0.0 per day)£96.

The Stipendiary Magistrate did not make any specific finding on this claim. But after "splitting the difference" - to use his own words "Allowing for discrepancies on either side on the evidence" - he allowed the claim in part. He must, therefore, have found in the Respondent's favour.

In my opinion there was evidence on which the Stipendiary Magistrate could have found in the Respondent's favour on this claim, and I do not feel disposed to reverse that finding. See Kennedy Allen. The Justices Acts (Q'ld) 2nd Ed. p.312, and cases therein cited.

The Respondent claimed for 24 Sundays. Apparently the Stipendiary Magistrate believed the Respondent's evidence as against that for the Appellant. As the Stipendiary Magistrate had the benefit of having the witnesses before him to note their demeanour and to decide who was right in their evidence, I do not propose over-ruling him in his belief. But the Respondent, on her own evidence, worked on only 20 Sundays. The appeal is disallowed on this claim and the Respondent succeeds on 20 Sundays at £4.0.0 each. £80.

THIRD CLAIM: Double-time holidays (17 days at £2.0.0 per day) £34.

Here again the Stipendiary Magistrate did not make any specific finding. There was much conflicting evidence between the parties on this issue, and here again the Stipendiary Magistrate must have found in the Respondent's favour, as he allowed the claim in part. My comments on the previous claim apply.

But the Respondent admitted that she did not work on 28th December 1953 and 28th December 1954. The Stipendiary Magistrate took these two days into account in arriving at the amount under his Judgment. But he failed to take into account an additional day, 9th September 1954. On the Respondent's cross-examination at p.2 of her evidence -
"Q. No (sic) 9 September, 1954, weren't your holidays then? A. Yes. Q. Then the September holiday should not be shown? A. Yes. Q. We can delete that? A. Yes. "

The appeal is disallowed on this claim and the Respondent succeeds on 14 days at £2.0.0 per day. £28.

In arriving at the amount in favour of the Respondent under his Judgment, the Stipendiary Magistrate deducted £10., a Christmas bonus 1954, and five days' pay from 12th to 17th December 1955. The Respondent ceased work with the Appellant on 12th December 1955 but she was paid to 17th December 1955. However, neither of these amounts were set up in defence by way of set-off, as required by Sec.160 of the

District Courts Ordinance 1924-1952 and Rule 20 of the District Court Rules. Therefore the Magistrate was wrong in deducting these two amounts against the Respondent.

The appeal is allowed on the first claim, £72, and disallowed on the second and third claims. The Respondent succeeds on the second and third claims in the sum of £108. There will be Judgment for the Respondent in the sum of £108, and £10.18.3 costs of the action in the District Court at Rabaul, and her costs on this appeal fixed at £7.7.0.

I assess the Respondent's costs on this appeal on the amount of £108, under the Fourth Schedule, one day at £26.5.0 plus on Judgment £6. 6.0, making £32.11.0; and the Appellant's costs on the amount of £72 under the Fourth Schedule, one day at £18.18.0 plus on Judgment £6.6.0 making £25.4.0; leaving the difference in favour of the Respondent, £7. 7.0.

Before I conclude, I again stress, as I and I am sure my brother Judges have previously stressed, that Magistrates must make their findings of fact. See Keable v. Clancy, 1909 St.R.Qd.345, per Chubb J. at p.353. This applies not only to Magistrates of District Courts but also to all others exercising the functions of a Court. I add further that in my opinion "findings of fact" does not mean merely "bare" findings of fact, but they should be supported by some reasons for such findings of fact.

A. KELLY.

J.

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