Case No. 2398

Judgment No. (A) 43/76
of the 1st October 1976

JOINT COURT OF THE NEW HEBRIDES

SIONE MAEALIUAKI -v- D.J. GUBBAY & Co (New Hebrides) Pty Ltd.

TRADE DISPUTE JUDGMENT

The applicant's claim against the respondent company, as set out in his letter of 13th January 1976, may be summarised as follows :-

(i)	leave pay unpaid by respondent	$ 1628-00
(ii)	savings to employer on fares not paid	$ 2397-14
(iii)	long service gratuity	$ 1425-00
		$ 5450-14

It was not possible for a fixture to be made before 27 August 1976 at which time the case was part heard then adjourned to today for continuation. Meanwhile the applicant had left the territory and gone to Hawaii to seek fresh employment.

The Court received the report of the Inspector of Labour with the applicant's letter attached, heard evidence from the applicant's wife, Sononifa MAEALIUAKI, and from Neil Henry Bull, Inspector of Labour. The respondent company was represented by Mr. D. HUDSON. No witnesses were called by the defence. Two contracts, one dated 4 November 1968 and the other, 1 February 1974, were submitted in evidence, and today letters dated 1 September 1976 and 16 September 1976 from the Deputy Principal Immigration Officer were received in evidence.

The applicant worked continuously for the company from May 1965 until December 1974. Employment was under a series of two year contracts. The applicant's entitlement under such contracts and under the joint legislation was eight weeks in May 1967, again in July 1969, again in September 1971, again in November 1973 then one month in December 1974. In all the applicant had taken and been paid for 4 weeks' leave in Tonga in September 1970.

The applicant's explanation was that on each occasion when his leave became due and he requested leave he was asked by his employers to postpone leave because of the company's volume of work at the time ; he accepted such postponements on each occasion, since he was reassured by his employer that he would be fully recompensed in due course. The applicant's wife testified that he applied for leave, but on each occasion was told that the job was too important and he was required to stay in Santo and "would receive a good compensation". She said "he was always asked to adjourn his leave".

The foregoing evidence was not contradicted by the defence. In December 1974 the applicant gave notice and his employment ceased in terms of such notice on 13 January 1975.

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The respondent company offered the applicant $1200. He declined and approached the British District Agent in the latter's capacity as deputy Inspector of Labour under section 108 of the Joint Labour Regulation No. 11 of 1969.

In April 1975 the matter came to the Inspector of Labour. He interviewed Mr. GUBBAY of the respondent company towards the end of June 1975. Because of the impact of section 90 of the Joint Labour Regulation the Inspector was of the view that the Company's offer of $1200 more than satisfied its obligation and that there was no question of his instituting criminal proceedings. However he also took the view that the provisions of the Regulation would not necessarily affect civil rights ; he therefore informed the applicant that if the offer was not acceptable to him he could lay the matter before the Joint Court ; conciliation having proved unsuccessful this was done.

Counsel for the respondent submitted that, in the first place, the applicant's claim was barred by section 55 of the Joint Labour Regulation, the expression "wages" including holiday pay in the nature of paid holidays. There being no Joint Legislation equivalent to the provisions of English Law whereby an acknowledgment can revive a limitation period, as the applicant's letter was not received at the Joint Court until 20 January 1976 his claim was out of time.

In the alternative Counsel submitted that under the proviso to section 90 of the Regulation the maximum accumulation which could occur and the maximum which the employee could claim would be three years. The prohibition under section 91(5) was just a prohibition and did not entitle the worker to accumulate beyond three years.

As regards the gratuity Counsel submitted that there was no legal basis for a claim of this nature in the New Hebrides and therefore such claim should fail.

Concerning the air fares Counsel submitted that the applicant was only entitled if the journeys were actually made.

After deliberation the Court gave judgment to the following effect :-

As regards the claim for gratuity although some sympathy might be felt for the applicant and it is clear that the employer has received the benefit of considerable savings on air fares not paid out, nevertheless there being no contractual nor statutory basis for a gratuity that claim is disallowed.

Under section 97 of the Regulation an employee is permitted to avail himself of his holiday entitlement and travel costs within two years from the date he ceased to work for the employer.

In order to satisfy the respondent's liability to repatriate the wife and family of the applicant the respondent is ordered to hold at the disposition of the applicant tickets from Santo to Tonga for the wife and children of the applicant until the expiration of two years from 13 January 1975, that is until 13 January 1977.

.../...

The evidence before the Court is that the applicant has left the New Hebrides and gone to Hawwaii. There is no evidence that respondent company has paid or contributed to such travel costs. In fact the correspondence from the Deputy Principal Immigration Officer suggests that the contrary was the case ; the applicant changed employment to a Mr. Alb. PERRONET who deposited $ 215. The applicant reimbursed Mr. PERRONET then on the applicant leaving the territory, the $ 215 was refunded to him. The respondent company has not therefore yet met its obligation to repatriate the applicant to Tonga (any further travel to Hawaii of course being his own responsibility) the current price of a single adult air passage from Santo to Tonga is 21900 FNH and the applicant is entitled to judgment for the equivalent of this amount.

As to the alleged limitation under section 55 of the Regulation submitted by the defence, because such section refers to wages and because there is a specific section, 97, relating to holiday entitlement and because such section 97 does not impose a one-year time limit, the Court finds in favour of the applicant, that is, the claim is not statute barred.

Section 90 of the Regulation is considered by the Court to have no application to this claim. The section must be read as a whole. It covers entitlement to paid holidays in two sets of circumstances, namely (a) the case of a worker employed on contract for a specified period (as was the case of the applicant) and (b) a worker engaged for an unspecified period. There follows a proviso commencing with the words "Provided that such worker" and containing a right for the worker at his own request to accumulate entitlement for a maximum of two years, then this in turn is followed by a further proviso for such period to be extended to maximum of three years by agreement with the employer. Clearly the second proviso applies only after a worker has exercised his rights under the first proviso, then both provisos apply only to the worker, i.e. "such worker", as is affected by section 90 (b) and whose holiday entitlement is inferred by the law (there being no specified contractual period) to arise after the worker has been working for the same employer for one year. There is therefore no statutory bar under section 90 preventing the applicant obtaining judgment for paid holidays after three years.

Considering all the evidence before the Court in this particular case the defence of limitation should not be available. The uncontradicted evidence is that, if there had been a breach of Section 91(5) of the Regulation, any such breach was at the instigation of the employer. It would be inequitable for the Court to give a judgment whereby a guilty employer should benefit from his own breach of law at the expense of his employee. In terms of the contracts available and on the uncontradicted evidence received the applicant is entitled to the paid leave as claimed. Furthmore the Court cannot ignore the basic responsibility under Part IV of the Regulation for an employer to pay his worker his dues. The claim for $ 1628 for leave pay is therefore allowed.

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The amounts making up such leave pay have been due for long periods, namely

$ 280 since May 1967
$ 368 since July 1969
$ 440 since September 1971 (reduced by $200 since September 1970)
$ 440 since September 1973
$ 300 since December 1974

The respondent company is civilly liable under the various contracts to make the foregoing payments as well as being under statutory liability to pay. In order for the Court to award this applicant here and now an amount which will represent today what is due to him it is necessary for interest to be calculated from the times the various amounts became due from the respondent to the applicant up to today. Judgment is therefore given, as follows :-

10 % simple interest on $ 280 from May 1967 to September 1976 (9 years 4 months).....	$ 261
10 % simple interest on $ 368 from July 1969 to September 1976 (7 years 2 months).....	$ 263
10 % simple interest on $ 440 from September 1971 to September 1976 (5 years).....	$ 220
10 % simple interest on $ 440 from November 1973 to September 1976 (2 years 10 months).....	$ 125
10 % simple interest on $ 300 from December 1974 to September 1976 (1 year 9 months).....	$ 52
	$ 921
Less 10 % simple interest on $ 200 from September 1970 to September 1976 (6 years).....	$ 120
	$ 801

The respondent's offer of $ 1200 is no answer to its liability to pay the foregoing interest.

Finally it is apparent that the applicant has been involved in expense to bring this claim and it has cost money for his wife to travel to Vila to give evidence. The Court accordingly allows the applicant costs, $ 200.

To sum up, judgment is given in favour of the applicant against the respondent company, as follows :-

Leave pay.....	1628 - 00
Interest thereon.....	801 - 00
Equivalent of claimant's passage to Tonga.....	219 - 00
Costs.....	200 - 00
	2848 - 00

In addition the respondent company is ordered to hold at the disposal of the claimant tickets from Santo to Tonga for the claimant's wife and children until 13 January 1977.

GIVEN at Vila the first day of October, one thousand nine hundred and seventy-six.

L. CAZENDRES
French Judge

R. M. HAMPSON
Acting British Judge

P. de GAILLANDE
Acting Registrar