IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

CIVIL APPEAL NO. 56 OF 1976

Between:

RAM KARAN CHETA — Appellant (Original Defendant)

- and -

THE ATTORNEY-GENERAL OF FIJI — Respondent (Original Plaintiff)

Appellant in person
M.J. Scott for the respondent

Dates of Hearing : 10th, 11th March 1977

Delivery of Judgment : 25th March, 1977

JUDGMENT

GOULD V.P.

This appeal is brought from a judgment of the Supreme Court at Suva in an action in which the respondent recovered judgment against the appellant for the sum of $1,043.17. This represented a refund of part of an amount paid by the Fiji Government to the appellant as compensation for leave passage money which he had claimed to be due to him under the conditions of his employment as a Government servant, in respect of leave

passages which he forebore to utilise. The Government said, in effect, that there had been a mistake as to his passage entitlement and he had been overpaid. It has been common ground throughout the proceedings, however, that such defences as mistake and estoppel are not available to the appellant and that the issue between the parties is to be resolved solely by reference to the appellant's conditions of service.

Put as briefly as possible the history of the matter is this. The appellant's service with the Government began in 1943, as a clerk in the Audit Department. He became Senior Examiner of Accounts in 1954. In 1958 his entitlement to leave and passages was governed by the Leave and Passage Conditions of Chapter 10 of General Orders and in particular General Order 1016(b). These have been referred to as the 1951 Leave and Passage Conditions. The appellant of course had taken leave prior to 1958, but in that year he applied for andreceived leave and passages to the United Kingdom. General Order 1016 shows that the provisions of passages for those entitled to overseas leave was normally to Australia or New Zealand except in the case of officers appointed from territories other than Fiji, Australia or New Zealand. The order reads as follows:-

> "1016. An officer in receipt of a salary of over $1,836 a year who has been granted vacation leave overseas shall receive when going on or returning from such leave passages to Australia or New Zealand by

sea, or, if approved by the Chief Accountant, Ministry of Finance, by air, for himself, his wife and children up to a maximum of three adult fares; except that -

(a) an officer whose normal country of residence at the time when he was first appointed to a post in the service of the Government of Fiji, or, in the case of an officer transferred from another Colony, when he was first appointed to a permanent post in the public service of another Colony, was not Fiji, Australia or New Zealand, may be granted passages to and from that country, if it is approved by the Chief Secretary as his normal country of residence outside Fiji; residence in a country for the purpose of education, training or obtaining a professional or other qualification does not by itself constitute "normal residence" in this connexion;

(b) an officer who has had ten or more years' service with the Government of Fiji and is in receipt of a salary of over $2,709 (in respect of serving officers who at 1st April, 1965 were in grades below $1,602) or $2,901 (in respect of officers who were already in grades over $1,602 at that date if in a post not carrying post allowance) or $3,189 otherwise may be granted a passage for himself and his wife and children up to a maximum of three adult fares by sea or, if approved by the Secretary for Public Service, by air to and from the United Kingdom on one occasion during his service, provided that he is due to return to Fiji on the completion of his leave for at least one further tour of service on a permanent basis;

(c) Heads of Departments and senior officers in receipt of salaries of $7,824 a year or more may be granted, upon completion of a minimum tour, passages by sea, or if approved by the Chief Secretary by air, to and from the United Kingdom for himself, his wife and children up to a maximum of three adult fares on every alternate vacation leave;"

The appellant in 1958 had been in Government service for upwards of ten years and had obtained the requisite salary scale, so though his recruitment was from Fiji he was entitled under paragraph (b) of the Order to passages to the United Kingdom, as the rule says - "on one occasion during his service". The appellant duly took this leave and returned to Fiji in October of that year.

We are next concerned with what are called the 1957 Leave and Passage Conditions which appear as General Orders 900-938 in Chapter 9. They were expressed to apply to every officer who elected to accept them and to every officer who was appointed to the permanent establishment on or after the 1st June, 1957. It is common ground that the appellant at the material time feel within category D, to which G.O. 908 applies. Paragraph (b) of that order makes similar provisions as to the country of recruitment as was contained in G.O. 1016. It reads :-

"(b) on taking the leave earned after a tour the officer shall be granted first class passages for himself and his wife and children up to a maximum of three adult passages, to his country of ordinary residence,

> as decided at the time of re-cruitment or, where his ordinary residence is the Colony, Australia or New Zealand, to Australia or New Zealand."

We have omitted two provisos which had no relevance. Paragraphs (c) and (d) of the Order read:-

> "(c) where an officer, not ordinarily resident in the United Kingdom, has reached a salary of $3,696 a year and has completed not less than ten years' service a passage grant to the United Kingdom may be granted once, after completing a tour of service, irrespective of the place of ordinary residence.
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> (d) where an officer not ordinarily resident in the United Kingdom, has reached a salary of over $7,824 he may have alternative leaves (i.e. every second leave after becoming so entitled, commencing with his second leave) to the United Kingdom irrespective of his place of ordinary residence;"

We would interpolate here that, owing to the out of date nature of the copies of the General Orders exhibited to the Court we cannot be sure of the accuracy of the figures quoted as salary grades or maxima; nothing however turns on this. In his Respondent's Notice Mr. Scott has relied upon General Orders 935 and 936, which fall within the 1957 Leave and Passage Conditions. They were not discussed by the learned Judge in his judgment and we will return to them at a later stage.

The appellant took some leave after electing to accept the 1957 Conditions and then we come to the application from which this litigation stems. The appellant

was promoted to the post of Chief Examiner of Weights and Measures as from the 1st January, 1969, and his salary during 1972 was $4,071 per annum. In June 1972 the appellant applied for vacation leave under G.O. 908(c) (supra), including three first class return passages to the United Kingdom, and this application was approved on the 21st June, 1972. Before this, namely on the 1st January, 1972 new conditions had come into force and they applied, with some exceptions which are not relevant, to every officer, without giving him the privilege of "opting", for the new conditions as a whole. These are called the Leave Regulations, 1972.

Though, as we have said, the 1972 Regulations were of general application, there were some exceptions, such as Regulation 19(a) which reads:-

> "19. Before being required to transfer to these conditions, permanent officers will be allowed the following:
>
> (a) An officer whose current tour of service will be completed after 1st January, 1972 will be permitted to enjoy the leave and passages for which he may become eligible at the end of his tour."

This applied to the appellant, but under Regulation 21 he was required, not later than 28 days before he was due for his leave and passages in 1972 to elect whether he would take the full leave and the full

passages or accept compensation in accordance with the Regulations. The appellant elected to accept compensation for both, and also to accept Leave allowance under the Regulations in lieu of accepting passages to Auckland. This leave/headed "Compensation for Passages allowance is determined under Regulation 26 which is Foregone". The Regulation reads:-

"26. Compensation for passages foregone in respect of an officer's last tour under his former conditions shall be as follows:

Eligibility under former conditions	Officer who elects to receive passages to Auckland - Reg. 21(c)	Officer who elects Leave Allowance -
(a) Passages to UK and return every tour	50% of his eligibility	75% of his eligibility
(b) Passages to UK and return every alternate tour	50% of $\frac{\text{UK + Australasian eligibility}}{2}$	75% of $\frac{\text{UK + Aust.}}{2}$
(c) Passages to UK and return once only provided the passages are due at the end of tour which he is serving on 1.1.72 or in the case of Reg.19(c).	50% of $\frac{\text{UK Eligibility}}{2}$	75% of $\frac{\text{UK Eligibility}}{2}$
(d) Passages to UK once only but at a future date provided the officer is in the salary scale qualifying for such passages, by end of tour which he is serving on 1.1.72 or in case of Reg. 19(c).	50% of $\frac{\text{UK Eligibility}}{4}$ PLUS 50% of Australasian Eligibility	75% of $\frac{\text{UK Eligibility}}{4}$ PLUS 75% of of Australian

It is clear from the copy of the voucher in the record that when the compensation of $2,408.18 was granted to the appellant it was under heading (c) above.

This may be an appropriate place to mention that the respondent has not sought to put any reliance upon provisions of the various sets of General Orders preceding the 1972 Regulations (e.g. G.P. 901) that nothing in the regulations should give an officer any right to leave, passages or other privileges. This may be because the 1972 Regulations provide, more realistically, that leave and other conditions "shall be deemed to be the right of officers" (Reg.2).

The appropriate officials of Government, having discovered what they believed to be their error, wrote to the appellant on the 11th January, 1973, stating that the $2,408.18 paid, was erroneously based on three first class air fares compensation to the United Kingdom, under Regulation 25 of the 1972 Regulations, but should have been $592.80 based on fares to Sydney "as your United Kingdom's entitlement was once-in-a-lifetime, and this has been utilised by you in 1958". The question for the learned Judge in the Supreme Court was therefore, what were the passages which the appellant would have become eligible for at the end of his tour current at the 1st January, 1972, which, by Regulation 19, he would be "permitted to enjoy". The learned Judge's view was that this hinged upon the interpretation and construction of the two sets of

Leave and Passage Conditions of 1951 and 1957, both of which had applied successively to the appellant.

The learned Judge's view was that G.O. 908(c) was a provision identical in effect with G.O. 1016(b) restricting officers under either order from becoming eligible for United Kingdom passages more than once. The essence of the learned Judge's reasoning was -

1. That the change from 1951 to 1957 conditions did not alter in any way the appellant's status or category. The fact that the required salary scale under the 1957 conditions was somewhat higher was not material to this.

2. The period qualification of the entitlement was exactly the same in each case - ten years' service. G.O. 908(c) did not use such words as "a further period of ten years' service since the last occasion" in relation to those who had already enjoyed the privilege.

In argument before this Court the appellant appeared in person and was clearly very well versed in matters appertaining to General Orders and Government Procedures. He argued first that G.O. 908(c) was the condition which regulated the matter from the time he had elected to adopt the 1957 conditions. It's requirements were clear and he fulfilled them i.e. he had reached the requisite salary scale, he had completed ten years' service and he had completed his relevant tour of service. If it was not intended that the new

conditions gave an officer a new accrued right there should have been a proviso stating that.

The appellant claimed that there was no relevance in the learned Judge's argument that he had been granted no change of status or category. He pointed out that he had been from time to time in different salary scale categories and in the 1951 conditions G.O. 1037 required that an officer had to spend at least one half of his leave in the country to which the passage was granted; under the 1957 conditions no such provision applied to the appellant. In 1960 and 1969, the appellant had received promotion only the second of which qualified him for United Kingdom leave under the 1957 conditions. The appellant, on the general constructions question, also instanced the case of an officer who had qualified for and taken leave under the 1951 conditions and then resigned. If he re-joined under the 1957 conditions could he not qualify again with a further ten years' service?

We do not find the construction of these General Orders a straight forward task. They are not, or have not been in the past, the same as regulations made under statutory authority, but are more in the nature of instructions and conditions evolved by a giant corporation for the regulation and guidance of its staff. By virtue of section 17(3) of the Public Service Act, 1974, they are part of the conditions of service, but are for the internal use, guidance, assistance and general conduct of employees. Hence we think

that any purely legal approach to their construction could be too cramping; considerations arising from the common sense of an employer-employee situation could well be relevant.

On this approach, we think the view of the learned Judge that the 1951 and 1957 conditions should be read together, (or, we would prefer, in the light of each other) must necessarily be correct. Ideally the matter could have been put beyond all doubt by the provisos suggested on the one side by the learned Judge and on the other by the appellant. But neither of these appear and we think the learned Judge was right to look at the whole pattern of what was done. There can have been no possibility, in our opinion, that the 1957 conditions were intended to bring in the right to more than one United Kingdom leave during the service of those officers in the relevant category. It must be remembered that the 1957 conditions would apply to new officers appointed after those conditions were brought into effect, as well as, at their option, to officers already serving. But nothing in the 1957 conditions gave the new officers any more than one such leave, after ten years. They might carry on for twenty years but would receive no more than one entitlement - this though, on the appellant's submissions, they would be working with those who had a double entitlement. The appellant's point concerning an officer who might leave and rejoin Government service, might conceivably result in an anomaly but no more.

Those who would favour the appellant's argument are also faced with difficulty when the ten year service qualification is considered. If the right to the United Kingdom leave is to arise out of the 1957 conditions simpliciter, as is being claimed, officers who had already served ten years under the 1951 conditions and had taken their United Kingdom leave, could claim leave again at the end of their first tour under the 1957 conditions, provided they were on the appropriate salary. There can have been no such intendment. And no where is there to be found anywhere in the two sets of leave conditions any words which in the remotest degree indicate any intention on the lines of one United Kingdom leave for each ten years' service.

As to the learned Judge's second point concerning lack of change of status or category we think he was referring to the similarity of patterns between the two sets of conditions. There was no change in the approach in principle, only in detail. Had, for example, Fiji recruits been separated from those from Australia or New Zealand, and given a different country by which to assess passage money, that might import a change in principle indicating a different method of treatment of these recruits. This would be something more clearly originating from the new conditions. We think there is a measure of support for the learned Judge's view of this aspect of the matter but it is not of great moment.

As we mentioned earlier, Mr. Scott

in his respondent's notice has relied upon General Orders 935 and 936, which are part of the 1957 conditions, in conjunction with regulation 26 of the 1972 Regulations, as precluding the appellant from succeeding on the appeal. General Order 935 merely makes it clear that the appellant falls within the terms of General Order 936. Paragraph (a) of the latter (preceded by the subhead - General reads:-

> "936. General - (a) Such officers, except those who come under category (A) of these regulations (G.O.905), will be permitted to retain the entitlement under their former leave and passage conditions as to the country to which leave passages would have been granted had the officer remained under those conditions. Such passages will, however, be in accordance with the grade of accommodation for which provision has been made in this Part of the leave regulations. Save that an officer in Category (B) who was formerly eligible for a passage to Australia or New Zealand will retain that eligibility, and will not be subject to the limitation of $100 set out in G.O. 906(b);"

Paras (b) to (f) relate to compensation for reduced leave (not passage) entitlement if suffered in comparison with former leave conditions. Regulation 26 of the 1972 Regulations has already been set out, and relates to compensation for passages foregone in respect of an officer's last tour under his former conditions. In view of our opinion that the appeal must fail for the reasons given above, it is not necessary to express any concluded opinion as to this submission. The "former leave and passage conditions" referred

to in G.O. 936(a), were those of the 1951 conditions. So far as the appellant is concerned he had no further entitlement thereunder to United Kingdom leave. There was nothing for him to retain. His right to Australian leave was similar, "as to the country concerned," to what was provided by the 1957 conditions. The "former conditions" mentioned in Regulation 26, are of course the 1957 conditions. As at present advised we see nothing in these particular provisions which either helps or hinders the case for the respondent.

For the reasons we have given, the appeal is dismissed. In the Supreme Court, as the matter originated in a mistake on the part of the respondent no order was made to costs. The costs of the appeal however must follow the event, and we order the respondent's costs of the appeal to be paid by the appellant.

(Sgd.) T.J. Gould
Vice President

(Sgd.) Charles C. Marsack
Judge of Appeal

(Sgd.) T. Henry
Judge of Appeal