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MANABOLINA MATAGANADI AND OTHERS

Appellant

and

J. L. CHIPPER & COMPANY LIMITED.

Respondent.

J U D G M E N T.

This is an appeal from the decision of F. J. Winkle Esquire, Acting Stipendiary Magistrate, Rabaul, by which he cancelled the contracts of the Appellants and determined, under Section 47 of the Native Labour Ordinance, the proportions to be paid by the Appellants, by way of liquidated damages. His decision also included a direction that the Respondent employer was under no obligation to return the Appellants to their homes.

In their Notice of Appeal the Appellants set forth the following grounds of appeal:-

1. That the proceedings against each defendant should have been commenced by complaint and not by information.

2. That there was no evidence that the complainant had suffered damage as the result of the alleged refusal to work.

3. That if the learned Magistrate terminated the agreements on the ground that the defendants were exerting a bad influence upon their fellow workers there was no evidence of such bad influence.

4. That if the learned Magistrate terminated the agreements on the ground that the employees had absented themselves from work for a period exceeding seven days there was no evidence that they had so absented themselves.

5. That if the learned Magistrate terminated the agreements on the ground that the employees had not at all times and to the best of their ability performed the duties allotted to them under the agreements, there was no evidence

   (a) that any duties had been allotted to them;

   (b) that they had failed to perform any duties; and

   (c) as to their respective abilities.

6. That if the learned Magistrate terminated the agreements on any ground other than those specified in Section 47 (3) of the Native Labour Ordinance 1950-1955 he was in error in so doing.

7. That the learned Magistrate was in error in terminating the agreements.

8. That the learned Magistrate was in error in ordering that the Complainant should be relieved of its obligation to pay all deferred wages to the Defendants.

9. That the learned Magistrate was in error in ordering that the complainant should be relieved of its obligation to repatriate the Defendants.

10. That the damages ordered by the learned Magistrate were excessive.

To these grounds a further ground was added, by leave at the hearing as follows:-

"That there was no evidence before the learned Magistrate of the amount of the deferred wages."

Counsel for Appellants abandoned grounds (4) and (5). As to ground (1), Counsel announced that in view of Section 241 of the District Courts Ordinance 1924-1947 this ground could not be sustained. "Court," as defined in Section 5 of the Native Labour Ordinance 1950 means in relation to the Territory of New Guinea a District Court established under the District Courts Ordinance 1924-1947 of that Territory. The application for cancellation of the contracts was made under Section 47 of the Native Labour Ordinance, Sub-section (1) of which is as follows:-

"A Court may, at any time on the application of an employer, cancel an agreement."

It was, therefore, a matter heard in the District Court. No form of application is provided, for although 'Court" means the District Court, and matters the subject of an information or complaint should be brought in the terms and manner under the District Courts Ordinance, the proceedings under Section 47 ia an exception being neither the subject of an information or complaint. It seems to me it may be made orally, but I am not concerned with that point here. The fact is that what purported to be an information was laid in each case against the eleven Appellants. Information are laid to commence proceedings for offences under Part XIV of the Ordinance and so would have been the wrong method of commencing a proceeding under Part V which does not relate to offences. These purported informations, however, were in reality not information at all because, by Section 97, only an Inspector or authorised officer may lay a complaint or information. These purported informations, however, were in reality not informations at all because, by Section 97, only an Inspector or authorised officer may lay a complaint or information. These were laid by the labour supervisor of the Respondent Company. What the documents really are can be left to the imagination. In this discussion the documents can be treated as worthless.

These Appellants appeared before the Magistrate voluntarily, eager, it would seem, to have their contracts terminated so that there could be no objection to the jurisdiction of the Magistrate to hear the application even if some written process were necessary and it was defective. R. v. Justices at Goodna and Murphy ex parte Schmidt 1927 S.R.Q. 369.

The Magistrate had, therefore, properly exercised jurisdiction.

The Magistrate appears to have terminated the contracts for two reasons. The first was, as he puts it in his reasons for judgment, "the unexplained persistent and willful refusal of the defendants to work." The second was that "the defendants exerted a bad influence on their fellow workers." With regard to the second, exerting a bad influence upon his fellow workers." I can not agree with the interpretation put upon the expression by the learned Magistrate. Exerting a bad influence is an active process and is used in a transitive sense. If during a period of their common employment an employee neglects his work, employs "go slow" tactics, is disobedient or insubordinate or his conduct is reprehensible in other respects or he counsels his fellow workers to do anything of the sort and there is proof of whatever it may be, then I think his contract may be cancelled on the ground that he has become a nuisance in that his conduct

is affecting the rest of the labour adversely. But if he had never done any of these things, but suddenly left his place of employment and run away, I do not see how it can be said that he is exerting a bad influence upon his fellow-workers. It is an intransitive act which might afterwards have turned out to be a bad example but no more.

The first ground upon which the Magistrate founded his termination of the contracts was, as he put it, "the unexplained persistent and wilful refusal of the defendants to work." Unlike the matter just dealt with, this was not a ground set out in Section 47 Sub-Section (3). The four grounds for cancelling a contract set out in Sub-Section (3) are however illustrative and not restrictive because of the preliminary words "without in any way limiting the grounds on which a Court may cancel an agreement under this section the following shall be deemed to be sufficient grounds for such cancellation"; then follow the four grounds.

It would, therefore, be within the power of the Court to consider other grounds submitted, but subject, I think, to their comparative quality with the four given for its guidance. The Magistrate accepted a ground not included among the four, viz. "the unexplained persistent and wilful refusal of the defendants to work."

The significance of this ground seems to be greater than its nearest equivalent among the four illustrations, that is "(c) that the employee has absented himself from work for a period exceeding seven days."

I am invited to find that refusal to work is covered by the provisions of Section 51 Sub-Section (2) paragraph (b). "Refusal by the employee to perform work lawfully allotted" which is a ground for variation only and, therefore, cannot be a ground for cancellation.

The facts here do not disclose that it was a refusal to perform work lawfully allotted and which could have been a matter for variation to relieve the employer of his obligations to pay the whole or part of the deferred wages with a continuance of the agreement. It was not a refusal to perform work lawfully allotted, for no work had been allotted to them. It was a refusal to work at all any more, accompanied by a wish to have their contracts terminated. In the circumstances, a variation would have been nugatory. Refusal to work is a common law ground for the termination of a contract of service. Without a limitation being placed upon him, I do not see why the Magistrate should not import a sound common law ground upon which to terminate an agreement under the Ordinance. I do not see that he was fettered by the Ordinance. In my view, the learned Magistrate was correct in terminating the agreements upon the ground of refusal to work.

The remainder of the grounds set out in the Notice of Appeal, which are relevant, relate to the matter of damages.

By Section 47 where an agreement is cancelled, the Court shall determine what proportion of the wages, including deferred wages held on behalf of the employee shall be paid to the employee and what proportion, if any, of wages shall be paid to the employer by way of liquidated damages.

In the first place, it must be taken that the Section means what it says and the proportion arrived at is liquidated damages.

There is a difference between the conception of this statutory imposition for breach of contract and the provision of liquidated damages between parties to an ordinary contract because in place of a sum certain stipulated in the ordinary contract the amount of the liquidated damages is to be fixed by the Court upon a breach.

The term "liquidated damages" is used in three Sections of the Ordinance, in Sections 47, 48 and 51. In each of these Sections it has the same meaning. In each Section the quantum is to be determined by the Court.

To arrive at a proportion, the Court should have before it as evidence the amount of the sums due to the employee and these are ascertainable from the contracts. There is nothing to show that these contracts were before the Magistrate as evidence and that he placed reliance upon them in his determination, although he gives the numbers of them in his Order.

When there is a number found to have committed the same breach of their contracts at the same time, it seems a capricious way of awarding damages by taking the whole of their wages held without knowing the amount held on behalf of each one. The Court must follow the principles of law governing contracts of service unless the enactment provides otherwise.

In assessing the amount of the liquidated damages by striking a proportion, there must be evidence of damage suffered. It it were not so, then the awarding of a proportion would be in the nature of a fine, the maximum of which would be the whole of the wages held on behalf of the employee. If it is to be regarded as a fine, then one would expect to find the provision in that part of the Ordinance dealing with offences. But it is not so found, and to treat it as such is a reversion to the old Native Labour Ordinance by which a breach of the contract of service was made an offence, carrying fines and/or imprisonment. That is something which the legislature sought to alter, and has indeed altered, in the present legislation dealing with native labour. In the present case they would be most arbitrary fines.

It was said that the whole scope of the Ordinance is to protect the native employee. While it is designed to protect the native employee, it is also planned to preserve a proper relationship between master and servant.

In arriving at an assessment, or proportion, if you like, upon a cancellation under Section 47, the Court should not proceed in a manner unrestrained when in the opposite case where an employer is involved and a cancellation is ordered under Section 48 it is necessary to arrive at a sum to be paid by a consideration of the damage he has suffered. A Court making a determination under Section 48 could not, I feel, be in a position to arrive at a proper sum to be paid by way of liquidated damage without evidence of damage. How else could the Court arrive at a proper measure of damages? The restraint put upon the Court under Section 48 should also be put upon the Court in dealing with the proportion under Section 47.

> "The damages to which a master is entitled are such as are the reasonable and probable consequence of the servant's breach of contract, including any expenses which he may be compelled to incur. If the contract of service is expressed in writing and specifies a sum payable by the servant in the event of a breach of contract, the master is entitled to recover that sum, provided that from the language of the contract it is clear that it is a genuine pre-estimate of the loss likely to be sustained by the master, and that the parties intended it to be payable as liquidated damages and not as a penalty."
> Halsbury 2nd Edition, Vol. 22, p. 161 para. 273.

In dealing with an ordinary contract of service in which it is claimed that, although there is a sum for liquidated damages stipulated in the contract it is not a genuine pre-estimate of the damage, the Court would ignore the stipulated sum and treat it as if it had never appeared in the contract.

In a consideration by the Court under Section 47 where there is no sum, the Court should treat the question in the same way as if it were a sum ignored where the Court is making an estimation of liquidated damages in the case of an ordinary contract of service.

So here where there is no sum fixed to be payable upon a breach there must be a genuine pre-estimate of the loss likely to be sustained by the employer.

In the case under review, the incongruity of the determination must be apparent. For the same breach, one is to lose £66. 6. 0. while another will forfeit the sum of £10. 3. 4. Can it be said that the reasonable and probable consequence of the breach by native labourer "A" losing £66. 6. 0. with two months to run for the completion of his contract, flows equally with the breach by native labourer "B" losing £10. 3. 4. with four months of his contract left uncompleted? I think not.

That all these eleven labourers committed a breach of the same nature at the same time is not a reason for considering them collectively. Each individual case should be considered on its merits in the assessment of damage.

It has been suggested that in considering the proportion by way of liquidated damages, the availability of replacements, the recruitment expenses lost or saved by the determination, and the number of days actually lost on account of the breach should be taken into account, but this may not be an exhaustive list.

The question of whether the employer should be under any obligation to return the employee to his home is one for the Court to determine upon conditions which may vary. It might relate to the assessment of damages and it might not. The labourer might wish to take other employment in the same locality when the order for relief would be a mere formality and one could give other instances. While I am of the opinion that the Magistrate was acting within his powers in cancelling the agreements under Section 47 of the Native Labour Ordinance, the case should go back to him for a genuine pre-estimation of the damages for the determination of the proportions to be paid.

I make no order as to costs.

(Sgd.) Ralph T. Gore

28/6/57.