MIKA (JOHN FAAUSUSU) v POLYNESIAN AIRLINES (HOLDINGS) LIMITED

Court of Appeal Apia
Morling, Ward, Muhammad JJ
12 November, 13 November 1992

EMPLOYMENT LAW - entitlement to long service benefits - interest on sum claimed.

HELD: The Appellant was entitled to long service benefits as claimed and to half of the interest on such sum from 1985.

Fepulea'i for Appellant
Kamu for Respondent

Cur adv vult

The appellant John Faaususu Mika appeals against the judgment of Ryan C.J. of 16 December 1991. The Appellant who was Plaintiff in the action was given a judgment for a lesser amount than he had claimed and was denied the interest, as he had claimed, on the amount of the judgment. These are the two points which were raised on the appeal.

When the appeal was called on for hearing counsel for the respondent (who did not appear at the trial) gave notice that he proposed to argue a number of points which had not been raised in argument before Ryan C.J. He submitted that injustice to his client would result if he were not permitted to argue these points. We refused leave for the new matters to be argued. No cross-appeal had been filed and, moreover, the Appellant had no opportunity at the trial of dealing with the matters intended to be argued.

The substantial point which counsel for the respondent wished to argue was that the Appellant's claim was based on an industrial award, the Clerical Employees Award, which was inapplicable to the Appellant's employment with the respondent. However, it seems almost certain that even if the Appellant did not have the benefit of that award, he would have had the benefit of some other award with no less long service leave benefits. Hence, we did not think any real injustice would be suffered by the respondent by our refusal to allow a cross-appeal to be filed out of time and the new matters to be argued.

There is little dispute on the facts of the case. Briefly, the Appellant was employed by the respondent in 1965. For domestic and medical reasons he took two years off work in 1971-1972. he returned to his employment with the Respondent in 1973 and remained with it until 1985. He received a letter from his employer dated 25 September 1979 to the effect that his absence of 2 years was to be treated as leave of absence. The relevant part of the letter read as follows:

> "I sought advice from Mr R. Poole in regards to your break in service, and it is his understanding that the then General Manager had granted you a leave of absence for that period because of urgent family medical commitments. It was from there that you were finally offered the job of Sales Representative in New Zealand, when I took over from you as Operations Supervisor.
>
> For this reason there was no break in your service and your official year of employment is 1965".

When he retired from the respondent's service in 1985 the Appellant made a claim for a long service leave payment. He claimed that under the Clerical Employees Award he was entitled to payment in respect of 60 days leave, that being the entitlement of an employee who had worked for his employer for over 20 years and under 21 years. However, the Respondent asserted that he was entitled to a payment in respect of only 48 days leave, that being the entitlement of an employee who had served for 18 years. In effect, what the Respondent did was to calculate the Appellant's period of employment without regard to the period in 1971-1972 when the Appellant was not actually working for it.

The Chief Justice held that the fact that the Respondent had agreed to treat the service of the Appellant as continuous should not entitle him to the same benefits as if he had worked continuously from 1965 to 1985.

However we think the inescapable conclusion from the letter of 25 September 1979 is that the Appellant was treated by his employer as having been employed continuously from 1965 to 1985. The words "there was no break in your service" can only mean that the service was regarded as continuous. Accordingly, we think the first ground of appeal is made out and we find that the Appellant is entitled to a payment calculated on a 60 day basis. We calculate this sum at NZ$7632.

The second ground of appeal is that the learned Chief Justice was wrong in not granting interest on the amount due to the Appellant. It is clear that the Appellant became entitled to leave or pay in lieu thereof in 1985. He was denied interest on the basis that he had been "dilatory in the extreme in filing his

claim." We cannot find any basis in the evidence for such a finding. In fact in paragraph 10 of the Statement of Claim it is asserted:

> "That despite various letters from the Plaintiff's previous solicitors, the Defendant company have not paid out the Plaintiff's settlements."

In the statement of defence the Respondent accepted this allegation. We think it is incorrect to conclude from this that the Appellant had been extremely dilatory. The Respondent, by not accepting any liability, deprived the Appellant of the use of his money for a long time and prima facie he is entitled to interest. However it is clear that although the Appellant was in possession of the letter of 25 September 1979 he did not disclose it to the Respondent in 1985 or for a long time thereafter. We feel that had he done so this matter may not have come to Court or that the Respondents may have at least made some offer of a compromise. Therefore some responsibility for the failure of the Respondent not to pay promptly must fall upon the Appellant himself.

We think a fair way of apportioning the blame for the delay is to give the Appellant one half of the full interest which he claims. On the basis of information given to us by counsel, we calculate that full interest on the amount of NZ$7632 from 1985 to date would be approximately NZ$3675. Approximately one half of this sum is NZ$1850. We add this last-mentioned sum to the amount of NZ$7632 and arrive at a total verdict of NZ$9482. The appeal is allowed. There will be judgment for tha Appellant in that sum. The Respondent must pay the costs of the appeal, which we fix at $750.00.