

IN THE COURT OF REVIEW

CIVIL JURISDICTION

ACTION NO. 15 OF 1973

BETWEEN : DONALD CAMPBELL DUNCKINY

APPELLANT

AND : THE COMMISSIONER OF INLAND REVENUE

RESPONDENT

Mr Airey for the Appellant
Mr Scott for the Respondent

Hearing: 20th February 1974

JUDGMENT OF ROTHWELL, J

Appellant was employed under Agreement with the Government of Fiji in various post from April 2, 1969 to August, 15 1972. Paragraph 7 of the Appellant's Agreement of Service made standard provision for vacation leave at the rate of 4 days for each completed month of service. Under the terms of the Agreement the appellant was entitled to commence vacation leave on April 2, 1971 but by agreement between the appellant and the appropriate officer of Government it was arranged that appellant should defer his leave until some time in 1972. In pursuance of this agreement he commenced his leave on August 16, 1972 having then completed 40 months of resident service. This extended period included the 2 years service provided for originally by the Agreement of Service and also the extension of that period as provided for by clause 2(2) of the Agreement.

Clause 7 of the Agreement provided that:

“Subject to his work and conduct being satisfactory the officer shall be entitled to vacation leave and that vacation leave shall be calculated at 4 days leave for each completed month of service”

Mr Scott for the respondent says that the condition of work and conduct being satisfactory results in impossibility of calculation the amount of leave to which an officer is entitled until completion of the period of service which results in that entitlement. He says that the basis of 4 days leave for each completed month is merely a basis of computation to be adopted when leave actually accrues and does not result in leave accruing monthly throughout the term of service. At this point it is appropriate to comment that the appellant's satisfactory work and conduct was established **ex post facto** and resulted in the leave accruing by consent of both parties.

When appellant completed his term of service for the time being on August 16, 1972, his leave entitlement was computed and he temporarily left Fiji but returned to duty under a new Agreement which came into force on September 13, 1972. A substantial portion of his leave had obviously not been taken as such, and as a result he received payment from the Government of a lump sum in lieu of leave.

In due course he filed a return of income which resulted in a assessment by the Commissioner in which the amount of the lump sum payment was added and assessed on the basis of income for that year. The appellant objected to this assessment. His objection was dismissed and he now appeals on the ground that he should have been taxed on the several portions of leave salary which he contends accrued from year to year during the currency of hi term of service instead of on one lump sum.

Appellant's Agreement of Service, by the provisions of clause 2(1)(e) imports into the Agreement the provisions of the General orders of the Government of Fiji relating to officers in the service of Government. It is now necessary to examine the effect, if any, of General Orders on the Agreement of Service, the leave conditions contained therein, and the question of tax liability.

General Orders 700 to 832 inclusive relate to all matters of leave in the ordinary sense, that is, leave which results in physical absence of the officer from service. Order 833 is in the following terms:

“Compensation for Leave Foregone

833, General Provisions – The following provisions will be applied in the case of officers who have accepted these conditions:-

- (a) on each occasion on which vacation leave is granted such officer will be eligible to be granted a sum equal to basic salary for the period by which his leave entitlement under these regulations is less that the leave (excluding travel leave) which would have been carried had the officer remained on his former leave conditions;
- (b) the rate of salary for compensation purposes will be the basic salary payable to the officer on the date on which his leave begins and will not include any other allowances whatsoever;

- (c) the amount payable shall be said in full to the officer before his departure on leave;
- (d) such officer who has deferred leave to his credit shall be required to commute up to 60 days of such deferred leave on the terms set out in (a) to (c). Deferred leave cannot be enjoyed except as provided in G O 834 below. Unexpired leave cannot be carried forward for compensation except when an officer has been recalled from leave with the prior approval of the Chief Secretary;
- (e) for the purpose of calculation of compensation a month will be reckoned as 30 days,”

The opening sentences applies the provisions of the Order in the case of officers “who have accepted these leave conditions”.

Order 833 provides for a set of conditions quite foreign to the conditions applying to physical absence from service covered by Orders 700 to 832 inclusive. Appellant was entitled to physical leave to the extent of 160 days but for various reasons which are not pertinent, he expressed a desire to alter his entitlement. On February 1, 1972 in a memorandum to the Secretary for the Public Service he said:

“Your application for 28 days leave from the 18th August 1972 has been approved Your will commence a fresh tour from the date of your resumption o duty”

Appellant took his reduced leave and on September 13, 1972 he commenced service under a new Agreement. All the provision of Order 833 were put into effect bun none of them applies to appellant’s position.

Mr Scott apparently contends that to obtain the benefit of the provisions of Order 833 it is necessary for an Officer to sign some form of acceptance or to say to somebody, “*I accept the above conditions set out in order 833*”. This contraction clearly set be supported. Acceptance by conduct is much more common by any other type of acceptance. Prior to his memorandum of January 1, 1972, the appellant was entitled to 160 days physical. He had reasons for wishing to vary that position, to his rights as set out in Orders 700 to 832 inclusive and the incapable conclusion is that his memo dated February 1, 1978 as the acquiesces in the new arrangement by the Secretary for the Public Service in his reply of February 7, 1972, created acceptance by the officer and acquiescence by Government not his physical absence from service was right which he disbanded and that his rights would then be calculated by the Provisions of Order 833. His acceptance by implication of the positions of Order 833 affords the only possible explanation for the lump sum payment and the manner in which it was made.

This position now imports the provision of Order 835 which is set out hereunder and which require no comment.

“835. Income Tax on – For income tax purposes the amount of compensation will be regarded as unread over the whole of the officer’s regarding tour, and assessment will be re-opened as found necessary for each year.”

A particular code relating to these circumstances is imported into the contract which the appellant had with the Government of Fiji which of course is the employer, the legislator of the General Orders, and the taxing authority.

There will be an order that the Commissioner amend his assessment by dividing the lump sum as provided for by Order 835 and issue new assessments. In case any matters of difficulty should arise from this process, leave to apply is reserved to both parties.

The appellant will be awarded costs against the respondent -\$35 and disbursements as as certified by the Registrar.

E F ROTHWATH
JUDGE