

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 11 OF 1991

(High Court Civil Action 181 of 1989)

BETWEEN:

FIJI TEACHERS UNION  
VINOD SINGH

APPELLANTS

-and-

THE PERMANENT SECRETARY FOR EDUCATION  
THE PUBLIC SERVICE COMMISSION  
THE ATTORNEY GENERAL OF FIJI

RESPONDENTS

Mr. H. M. Patel for the Appellants  
Mr. N. Nand for the Respondents

Date of Hearing : 24th February, 1993  
Date of Delivery of Judgment : 13th August, 1993

JUDGMENT OF THE COURT

This appeal and another, No. 12 of 1991, were, by request, heard together. They cover a lot of common ground. Rather than repeat that common ground in the reasons for judgment in the other matter, we have thought it preferable to make those reasons for judgment an annexure to these.

The appeal arises from a dispute between a teacher, the second plaintiff (the plaintiff), and the Ministry of Education or Public Service Commission, by one of which he was employed at the relevant time; there are three defendants, but it is adequate to refer to them as "the Commission", and to use that expression to mean the employing authority, whichever it was; nothing turns on this.

The subject matter of the dispute was what were called "leave passages". These were periodic entitlements of civil servants who had reached a certain level of seniority, both as to wage level and period of service, to free travel for the civil servant and his family to New Zealand, Australia or sometimes to Great Britain. The relevant explanations of this system of leave passages will be explained later.

By way of outline it can be stated that the plaintiff, in 1982, applied for and was granted leave passages to Sydney. It seems that we took advantage of them in 1982 and travelled overseas. It seems further that he applied again for such passages in 1985 or 1987, which application was refused. By memorandum dated 18th September 1987, the Secretary for Education stated that the overseas passages that had been granted to the plaintiff in 1982 had been the result of a mistake. The Secretary claimed that the passages had cost (presumably the Commission) \$2178.00; it went on to assert that the plaintiff had been entitled to some long service leave allowance, which presumably had not been paid to him, but that when this entitlement was subtracted from the \$2178.00 paid in error, it still left \$1488.00, which seem it was then claimed was owing by the plaintiff.

By originating summons filed in the High Court on 24th May 1989 the plaintiff sought the following relief:

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- "1. A Declaration Order that the Leave Passages paid or compensated for by the Government of Fiji to the Plaintiff in the past was legally due and payable under the relevant provisions of the General Orders.
2. That the Government of Fiji is stopped (sic) or refrained (sic) from claiming or asking the Plaintiff to refund such payments already made to him pursuant to the General Orders.
3. A Declaration Order that by virtue of the General Order the Plaintiff is now entitle to further Leave Passage which is lawfully due to him under the conditions of employment existing with the Government of Fiji.
4. Such other relief as this Honourable Court may think fit.
5. Costs."

The plaintiff filed two affidavits in support of the originating summons. In the first of those he sought the following orders:

- "(a) A Declaration Order be made against the Defendant that the Defendant has acted against the provisions of leave and passage entitlements which I had opted for;
- (b) That the Defendant be directed to pursue no demand of overpayment;
- (c) That all arrears accrued to me since I exercised my option in 1982 be paid to me forthwith and;
- (d) That the Defendant be further directed to pay in full all future passages due to me in accordance with GO743 (a).
- (e) The Defendants be directed to cease wrongful deduction from my salary and reimburse the amount wrongfully deducted."

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There is no evidence that there are or have been any arrears accrued to the plaintiff. There is no evidence that any deductions, wrongful or otherwise, have been made from the plaintiff's salary; and in no way would it have been possible for a Court to determine anything on the affidavits of the plaintiff and its annexures; they were mis-labeled, and documents were missing. In some respects this was made good by the affidavit in reply filed on behalf of the Commission, but this annexed 37 pages of documents and did not draw the attention of the reader to the relevant portions of them - a great deal was not relevant.

We have drawn attention to this in the hope that it may induce more thought and attention to be given by practitioners to the way in which cases in the High Court are prepared and presented in discharge of the professional responsibility that lies on them.

The affidavit in reply annexed what were claimed to be the various orders and circulars which governed the matter of entitlements to leave passages, and alleged that, having regard to them, the plaintiff had not been entitled to apply for and to be given by the Commission the benefit that it had in fact given him. In paragraph 11 it went on "to pray to this Honourable Court for the following reliefs:-

"(a) A declaration that the leave passage granted to the Second Plaintiff in 1982 was given in error as he was not entitled to the same.

- (b) A declaration that the Defendants are entitled to recover the net overpayment in the sum of \$1,488.00 (One thousand four hundred and eighty-eight dollars) being the cost of providing the passage which was in the sum of \$2,178.00 less the value of his leave allowance in the sum of \$690.00.
- (c) A declaration that the Second Plaintiff is not entitled to any future passages under his existing terms and conditions with the Government of Fiji.
- (d) An Order that the Defendants continue to deduct from the Second Plaintiff's salary until the amount is paid in full.
- (e) Such other relief as this Honourable Court seems just.
- (f) Cost of this action."

There was no counterclaim. Paragraph 9 asserted:-

"9. THAT paragraph 7 of the affidavit is admitted, but the said passage granted to the Second Plaintiff was as a result of a factual error in computing his correct leave and passage entitlement."

We draw attention to the provisions of Order 15 rule 2(1) of the High Court Rules:-

"2.-(1) Subject to rule 5(2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; and where he does so he must add the counterclaim to his defence."

Rule 5(2) is not relevant here.

The matter came before Jayaratne J on 1st August 1990. It appears that it was agreed that His Lordship should decide the matter on written submissions. He did so, dismissing the plaintiffs declarations and making declarations as sought by the Commission together with an order for costs. The plaintiff appealed to this Court.

This Court has tried to sort out the position from the almost unintelligible documents that were placed before him, and to explain it. It is by no means sure that it has been able to do so. It has reached the conclusion that the factual result reached by the Judge was the correct one, notwithstanding that the written submissions made to him and to us are singularly unhelpful. We shall deal with what we believe should be the consequences of the factual result in due course.

The plaintiff was appointed a teacher in what was then the Education Department of the Civil Service following his acceptance of an offer made to him in a document dated 28th November 1968. His appointment was on a probationary basis for a period of three years with effect from the date of your appointment", which was 1st January 1969 (record p15). His salary was at the rate of L348 a year "according to a stated scale which is quite unintelligible and was not explained; we presume it does not matter. The document of appointment stated:

"Your incremental date will be 1st January". It went on to state: "If you are confirmed, you will be placed on the pensionable establishment..." (in accordance with a certain pensions ordinance). Clause 6 of the document of appointment provided (record p15):-

"6. You will be subject to the provisions of the Colonial Regulations and of General Orders and Financial Orders now in force or which may from time to time be promulgated by the Governor. You will be subject to the provisions of the 1964 Leave and Passage Grant Conditions."

The 1964 Leave and Passage Grant Conditions, or some of them, were in evidence in the other matter. But they were not put in evidence in the case from which this appeal arose, and did not get a mention there. The only evidence filed on behalf of the Commission stated "that the ... Plaintiff when appointed to the teaching profession and (sic) fell under the 1964 leave and passage conditions under General Order 733B" (record p13). We have accepted this, as did the trial Judge, and proceeded accordingly. We have annexed a copy of GO733B to these reasons for judgment. The first portion reads (record p 16):

"733B:

A teacher appointed to the permanent establishment on or after the 28th September, 1964, employed in a day school:-

- (a) will be required to take his leave annually during the school vacations;

- (b) after serving a minimum tour of four years, will be eligible during any school vacations for passages to the place where he intends to spend his leave in the Colony, subject to the limitations imposed under General Order 754 (a);
- (c) if on a salary of between \$1,243 and \$2,184 if not in a post formerly carrying post allowance \$2,472 otherwise, inclusive, will be eligible during the long school vacation for up to three adult tourist class air passages to Australia or New Zealand at nine-yearly intervals..."

The remaining portion of sub-clause (c) went on to deal with higher salary brackets and shorter intervals between passages. The only General Order 754 (a) that either Court had before it read (record p 29):-

"754 (a) These Orders shall apply to all local teachers except that they will enjoy their school holidays instead of annual leave, vacation leave and long service leave."

We hope they did.

It seems that the plaintiff applied for overseas passages by letter to the Permanent Secretary of Education dated 7th September 1987. He received in reply a memorandum from the Secretary dated 18th September 1987 in the following terms (record p 11):-

"Your letter dated 7.9.87 is acknowledged.

Mr. Singh, you were appointed to service on 1.1.69. You had completed your tour of four (4) years on 31.12.1972. I have been

informed by the Salaries Section that you were in receipt of a salary of \$1404.00 per annum on 1st January 1973 and as such you were eligible for local passages under the 1964 teachers leave condition (General Order 733 B (b)). You should have exercised your option to transfer into the 1972 leave conditions before proceeding on the 1972 Christmas Vacation and could have either taken full local leave passages or be compensated for it and would have entitled to leave allowance in future.

However, when you exercised your option in 1972, you were granted three (3) adult passages to Sydney costing \$2178.00 in ERROR. Therefore you have been paid \$1488.00 in excess of your entitlement as follows:-

Cost of three (3) adult return passages to Sydney	- \$2178.00
Less Long Service	
L/All. due on 28.1.86	-\$460.00
L/All. due on 28.1.85	-\$230.00
	- \$ 690.00
Total Overpayment	<u>\$1488.00</u>

Hope I have helped you to settle your doubt on the above matter."

We pause here to state four matters.

First, the letter of 7.9.87 would seem to be an application for further passages made by the plaintiff in 1987; this was not revealed in the evidence.

Second, if the completion of 4 years service was the correct date for entitlement for assessing the eligibility for passages (as the Secretary seems to be inferring), and if the figure of \$1404.00 was the correct salary of the plaintiff and if GO733B applied, and if the qualifying salary level for eligibility for

overseas passages was the level at the expiry of a "tour of four years", then it would seem that he qualified for passages under GO733B.

Third, we would assume that the reference in the Secretary's memorandum to the exercise of the option in 1972 is meant to refer to 1982, when the plaintiff in fact exercised his option.

Fourth, the memorandum did not settle any doubt, certainly not ours.

In the only affidavit filed in the proceedings on behalf of the Commission, and sworn by the Director of Industrial Relations, this matter is referred to in paragraph 7(b). We think it relevant to set out the whole of his edifying explanation (record p 13):-

*"7. THAT paragraph 5 of the affidavit is denied and in reply I say as follows:-  
(a) The 1972 leave regulations were introduced vide Department of Public Service Circular No. 44/71, a copy of which is annexed herewith marked 'G'.*

*In terms of the said Circular the Second Plaintiff was allowed to complete the required period of service to be eligible for the grant of local passages under the provisions of General Order 733(b) (1963 edition). At the said time (1/1/72) the Second Plaintiff was in the process of completing this required four year service as from 1/1/69.*

(b) The Second Plaintiff's four years ended on 31/12/72 and in which event he should have exercised his option 28 days before reaching 31/12/72. At the said date he was not in receipt of a salary which would have qualified him for passages to Australia or New Zealand at nine yearly intervals in terms of General Order 733 B as the Second Plaintiff was on a salary of \$1,332 when the qualifying salary for Australian or New Zealand passages was \$1,776.

(c) The Second Plaintiff was only eligible for local passages at the end of his four years as at 31/12/72 or to receive compensation in lieu of it.

(d) The Second Plaintiff was ineligible under the Regulations to delay exercising his option until 18/8/82 and his salary then was no criteria for determining his leave and passage entitlement."

We can add that there is no sworn evidence to explain the discrepancy between his figures and those of the Secretary, and in particular nothing to substantiate the figure of \$1,776 mentioned there.

Now, doing our best to put the pieces together, we believe the picture which emerges is this.

By circular emanating from the Department of Public Service numbered 44; and dated 30th December 1971, new leave regulations were introduced. They applied to serving officers. They commenced on 1st January 1972. It seems they were to be embodied in or become Chapter VII-A of General Orders; it also seems that this substantially occurred and we have before us what appear to

be the relevant parts of such General Orders; they commence at GO720, and appear to end at GO754. Circular 44 states that the regulations apply, so we assume that they applied until so embodied - we do not know when that was. Whenever it was, Part II of what appears to be the Chapter VII-A, headed "1972 Leave Conditions", commences: "The following conditions are a repeat of the 1972 Leave Regulations and are effective from 1.1.72 ...", subject to a 1977 amendment, which does not seem to be material. It probably fixes the embodiment in General Orders as being post - 1977. There is a later 1982 amendment to one of the new GOs, but it does not seem to affect the position.

We have to examine these 1972 leave provisions introduced by the regulations and embodied in General Orders because Circular 44 had this provision in it (record p 33):-

"SERVING OFFICERS ON PRE-1972  
CONDITIONS

3. The new Regulations shall apply to serving officers also and there are provisions for compensation for leave and passages foregone. A copy of the option form in respect of Regulation 21 is also enclosed. As will be noted, officers are required to exercise their options at any time after the 1st January, 1972, but at least 28 days before applying for their leave and passages under their pre-1972 conditions.

....

6. A more detailed set of conditions in respect of teachers will be issued shortly."

The option form (record p 51) contained the following relevant provisions:-

"I will be eligible for vacation leave at the end of my current tour on \_\_\_\_\_ and I wish to exercise my option under Regulation 21 of the 1972 Leave Regulations as follows:

(a) Leave

I wish to take my full leave at the end of my tour.

I wish to accept compensation in accordance with the 1972 Leave Regulations.

(b) Passages

I wish to take the full passages for which I will be eligible at the end of my tour.

I wish to accept compensation in accordance with the 1972 Leave Regulations."

Regulation 21 is embodied in GO 743, and we will come to that. The "more detailed set of conditions" does not rate a further mention. The difficulty that this option presents we will return to.

It is probably relevant to mention here that the plaintiff used the option form on 18th August 1982, and indicated his choice as follows: (record p 10).

" a) Passages

*I wish to take the full passages for which I will be eligible at the end of my tour.*

....

b) Future Passages or Leave Allowance

*I wish to receive passages to Auckland, New Zealand, in future."*

....

It was obviously an official form. The fact that it offered the officer an opportunity to "exercise my option under Regulation 20 of the 1972 Leave Regulations ....", a regulation that had nothing to do with options, we suppose is immaterial.

The 1972 Leave Regulations and equivalent General Orders applied to a great variety of categories of leave for various categories of officers. GO 741, with its heading, has (record p 25):

**"Special Provisions for Officers Serving on Pre-1972 Leave and Passage Conditions**

*741. Permanent Officers: 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 1 January 1972 will be permitted to enjoy the leave and passages for which he may become eligible at the end of his tour.
- (b) An officer who may be on vacation leave on 1 January 1972, will be permitted to enjoy another tour of service under his former leave and passage conditions.
- (c) An officer in (a) above whose vacation leave has been deferred with the approval of the Public Service Commission before 1 January 1972, for more than six months, will be allowed leave and passages under his former conditions in respect of one additional tour; provided that if he exercises his option to be compensated for leave and/or passages in respect of his current tour he shall not be allowed leave and passages in respect of an additional tour.

G.Os 742 and 743 provided:

*"Compensation for Serving Officers*

742. For the purpose of compensation, an officer's leave and passages shall be determined at the end of his tour provided that in the case of an officer allowed to serve another tour under his former conditions in accordance with G.O. 741(c) above, his eligibility shall be determined at the end of the additional tour.

*Compensation Options*

743. An officer will be required to exercise the following options on or after 1 January 1972, but not later than 28 days before he is due for his next leave and passages. These options shall be irrevocable :

*Leave:*

- (a) To take his full leave at the end of the tour which he is still serving on 1 January 1972, or to accept compensation in accordance with these Orders.

**Passages:**

(b) To take his full passages at the end of the tour which he is still serving on 1 January 1972, or to accept compensation in accordance with these Orders.

**Future Passages or Leave Allowance:**

(c) To receive up to three adult economy class return passages for himself, his wife and children below the age of eighteen years to Auckland, New Zealand, every alternate tour on becoming entitled to long service leave under Categories A and B provided that the officer was eligible for overseas leave under his pre-1972 Conditions, and every tour when Leave Allowance is payable under Categories C and D; or to receive Leave Allowance under these Order. Further, any officer under Category B who was eligible for Australasian passages every tour under his pre-1972 conditions shall enjoy such eligibility every tour as for officers falling under Categories C and D.

**Accumulated Leave:**

(d) To receive compensation for any accumulated leave either immediately or at the end of his tour which he is still serving on 1 January 1972."

Categories of officers, from A to D in ascending order of salary range, were set out in GO 723. "Tour" was defined in GO 722, as meaning "a period of resident service of three years commencing on the appointment or after the expiry of a grant of vacation leave", (record p 19). As mentioned earlier, the plaintiff used the official option form, after the expiry of 13 years from appointment, to exercise his option to take the full passages for which he was entitled at the end of his tour, and to receive passages to Auckland in future.

The plaintiff's affidavit states that at the end of 1982 he "received leave and passage in accordance with my leave and passage conditions" (record p 8). It appears he was given 3 passages to Sydney. He goes on to state that his application for similar leave and passage was rejected; presumably this was in September 1987; whether it was also an application for passages to Sydney we do not know. For good measure the plaintiff added that his salary at the time he exercised his option (1982) was \$9690.00.

The first matter to be decided is whether the plaintiff was entitled to the passages that were given to him in 1982, seeing that the grant of them was claimed by the Secretary to be the error which prompted the demand for re-payment of money.

Taking first of all the Secretary's memorandum of 18th September 1987, it seems that he was of the view that GO 733B applied to the plaintiff, at least so far as paragraph (b) of it was concerned. The memorandum made it quite clear that the plaintiff was entitled, after service for 4 years, ie. as and from 1st January 1973, to local leave under that Order. What is meant by the next portion viz:

*"You should have exercised your option to transfer into the 1972 leave conditions before proceeding on the 1972 Christmas Vacation and could have either taken full local leave passages or be compensated for it and would have entitled to leave allowance in future."*

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We have no idea, and it was not explained to the trial Judge or to us. In fact the 1972 leave conditions were applied to the plaintiff and everyone else first by means of the 1972 Leave Regulations, and then by the GOs, "repeated" in GOs 720 et seq, which came into force some time in or after 1977; the only option was that referred to in regulation 21 repeated in GO 743 (set out above), which gave an option to take leave, or passages, or accept compensation. In so far as the regulation and GO 743 specifies the time for exercise of any option, it requires such exercise "on or after 1st January 1972 but not later than 28 days before he is due for his next leave and passages" (emphasis added). What is meant by "due for his next leave and passages" we have no idea, seeing that GO 733B, if it applied, gave him only an eligibility after 9 years, and there were other GOs specifying when a teacher could and could not take leave (eg. not in holidays); and, in any event, this was his "first" leave and passages. So far as the evidence goes, the plaintiff exercised his option after 1st January 1972 and 28 days before he was "due" for his "next" (first) leave and passages. The reasoning expressed in the memorandum, so far as we have been able to understand it, is, in our opinion, dubious, to say the least. We shall come to an examination of GO 733B later.

Turning to the so-called explanation given by the Director of Industrial Relations in his affidavit, which we have set out in full above, the position becomes no clearer. The Circular there referred to is the one we have quoted from (44 of 1971) and

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which enclosed the Leave Regulations 1972. Assuming it was correct to say that the plaintiff was, before 1st January 1972, subject to GO 733B, and was in the process of completing 4 years service, then subject to problems we shall later discuss, it would seem that he should have exercised an option to take passages within the Colony (GO 733B(b)), if that amounted to "his full leave at the end of the tour which he is serving on 1 January 1972" (GO 743). On the above reasoning, it would seem also that the plaintiff should have exercised such an option on or after 1st January 1972 but not later than 28 days before the end of a minimum tour of 4 years, which latter would have taken place on 31st December 1972. It seems that what the Director is saying in the quoted extract is that failure to do this meant that any right under GO 733B was lost, including any right to take passages after the expiry of 9 years. If this is what is meant, it was never explained to the Judge or to us.

For various reasons we think this reasoning was also flawed, to say the least, and we shall come to that. The salary level quoted by the Director is not supported by any evidence. However, among a number of documents that seem to be attached to the plaintiff's written submissions to the trial Judge, there is a sheet showing the salary progression of the plaintiff since the date of his appointment. It lists a starting salary on 1/1/69 of \$696. It will be recalled that the plaintiff's document of appointment showed his salary in pounds, but we assume this is a correct translation. It will also be recalled that the

plaintiff's "incremental date" was 1st January. The list indicates that as at 1/7/72 the plaintiff's salary was \$1332, and as at 1/1/73 was \$1404. These are the figures referred to in the Secretary's memorandum of 18th September 1987 and the Director's affidavit, both earlier referred to. We shall return to them.

Taking first GO 733B, it applies to a teacher appointed to "the permanent establishment" on or after 28th September 1964. We assume that the word "permanent" was used with a purpose and had a meaning. Whether it was one to be contrasted with "temporary"; or some other officer, we simply do not know - there is no evidence. It will be recalled that the appointment of the plaintiff was "on a probationary basis for a period of three years" with effect from 1st January 1969. Whether he was appointed to the permanent establishment as from that date and so fell within the ambit of GO 733B, or whether, if not, he was later appointed to the permanent establishment, and, if so, when we have no idea. The terms of GO 733B(e) and (f) might tend to indicate that the Order was only intended to draw a distinction between permanent and temporary, but we are not prepared to guess. Both the Secretary and the Director make it clear that GO 733B applied to the plaintiff, but not when. The order applies to a teacher appointed to the permanent establishment, but in two sub-clauses deals with temporary teachers. But that is only one of the peculiarities. That is the first matter.

The second matter is that GO 733B, was intended to take effect on appointment to the permanent establishment for all teachers, if that took place on or after 28th September 1964. It says so. It operated on a teacher as at the date of his or her appointment, provided it was on or after that date. If a teacher had been appointed to the permanent establishment before 28th September 1964, then he or she was presumably governed by whatever orders or regulations applied to such a situation. So that a post-September 1964 permanent appointee was (a) required to take annual leave during school vacations; (b) was eligible, after 4 years, to passages within the Colony; and (c) if appointed on the appropriate salary level, eligible for overseas passages. We do not believe that paragraph (d) of GO 733B created any exception, although it is as unclear as other aspects of the evidence. We believe it was intended only to refer to teachers in boarding schools, and the problem created by school vacations in those institutions (notice that it refers to "school holidays"); the reference to a permanent teacher "serving on the staff of the Approved School under the 1964 conditions", and what follows, makes no sense to us at all. Paragraphs (e) and (f) refer to "temporary teachers" and "teachers appointed on a temporary basis" (quaere - any difference?) and seems to include them as teachers "appointed to the permanent establishment". (see introduction to GO 733B)

However, we might say that if an appointment is to be given to the purpose of a teacher in a boarding school, it is to be considered as a permanent appointment.

Just turning aside for one moment, the plaintiff was appointed as from 1st January 1969 on a probationary basis for a period of 3 years. If he was, as such, appointed to the permanent establishment, the evidence does not disclose what sort of "tour" he was on, or at what stage he had served "a minimum tour" of four years; one might be excused for thinking his original "tour" was 3 years, and came to an end on 31st December 1971. If that be so, what "tour" he was serving on 1 January 1972 (see GO 743) presumably stated on that day. We shall return to this.

One thing does appear to us to be clear. If GO 733B(c) is not to be read as meaning "on appointment", as we have said, then it has nothing to do with the lapse of 4 years, if that is what is being suggested by the Secretary and/or the Director. If that Order should be read as meaning "upon reaching a salary of between ....." then not only does that conflict with the words "if on a salary " (emphasis added), but why not word it to read "upon reaching a salary of ..... be entitled to ....." and so on; the salary bracket has no purpose unless that Order is read as we believe it should be. For the purposes of this case, we doubt if it makes any difference.

However, we might point out that if any credence is to be given to the figures of salary progression of the plaintiff (not in evidence), then the plaintiff would, under this reading of

GO733B, have been eligible for passages to Australia or New Zealand at nine year intervals as from 1st July 1972, six year intervals as from 1st April 1975 and three year intervals as from 1st January 1976. We doubt if this is what was intended.

The word "eligible" is not a term of art, and holds no mystery. It means having a present advantage that can be capitalised on in the future.

As has already been noted, the 1972 Leave Regulations and the later General Orders came down upon serving officers, and affected their leave entitlements. We must now turn to those. Although regulation 1(a) and GO 720 state (record pp 35 and 18)

**"APPLICATION**

1. The following Regulations will come into effect from 1st January, 1972, and will apply to every officer except -

- (a) officers appointed under agreement of service who will be governed by the terms of agreement

....."

and although the plaintiff was appointed under an agreement of service, that agreement made him subject to regulations and General Orders which may from time to time be promulgated.

GO741 has already been set out herein. There is absolutely no evidence about when, if ever, or how, permanent officers were required to transfer to the 1972 leave conditions, or whether the

plaintiff did so, and if so, when. The Circular 44 of 1971 indicated that the new regulations would apply to serving officers, and would be brought into effect as from 1st January 1972. Regulation 1 (repeated in GO 720) so brought them into effect, but also excepted (record p 35):

*"(a) officers appointed under agreement of service who will be governed by the terms of the agreement"*

(see also record p 18). The plaintiff was appointed under an agreement for service dated 28th November 1968. So .....?

Anyway, assuming that the plaintiff was a permanent officer, and assuming that the 1972 leave conditions applied to him, as the Director asserts, and assuming that they operated on him as from 1st January 1972, he, if his current tour of service would have been completed after 1st January 1972, was permitted to enjoy the leave and passages for which he might become eligible at the end of his tour (GO 741). Giving "tour" the meaning required by the regulations and general orders to be given to it, the plaintiff commenced his current tour of service on 1st January 1972; that is when the provision came into force. If the plaintiff did not become a permanent officer until after completion of his probationary term, his appointment as such was on a salary of \$1404; as such he was entitled to overseas passages in accordance with GO733B(c). If he became a permanent officer upon his engagement as at 1st January 1969, he did not

qualify. We simply do not know which is the correct assumption to make.

We turn now to GO743 (regulation 21), which is set out earlier herein, and deals with options. The first option (a) was to take his full leave at the end of the tour he was serving on 1st January 1972; for reasons given earlier, that appears to be 31st December 1974; it is to be noted, en passant, that the order or regulation did not permit him to exercise that option by 1st January 1972, and he had to exercise it before 3rd December 1974. In fact he did not exercise any such option. The option form which he filled in 1982 made no provision for exercising this option, no doubt because the provision had become out of date and redundant by then.

Turning to GO743(b) (regulation 21(b)) namely "Passages", the plaintiff purported to exercise an option to take his full passages (see earlier); he purported to do so in 1982. But if we are correct in our interpretation of the general orders and regulation, he had to do so at the latest by 3rd December 1974. So the option was not exercised. Why the provision enabling this option to be purportedly exercised was retained in the form after 1974 we do not know.

The plaintiff also exercised his option to receive future passages pursuant to GO 743(c) (regulation 21(c)). On our interpretation of this provision it gave the plaintiff a right

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to receive three passages to Auckland provided (i) he had, by the time of exercise of option, become entitled to long service leave under one of the Categories and (ii) he was eligible for overseas leave under his pre-1972 Conditions. By "overseas leave" we assume the order and regulation meant passages. By "pre-1972 Conditions" may be meant "1964 Leave and Passage Grant Conditions" (see the plaintiff's document of employment); but, as earlier mentioned, it seems to be assumed that GO 733B was applicable. We also mention that GO 743 appears to have been amended in 1982, but as far as we can make out, the amendments have no bearing on this case.

The following matters can be noted concerning GO 743 (regulation 21). Firstly the option did not have to be exercised within any time except "not later than 28 days before he is due for his next leave and passages". We are not required to work out when the plaintiff became so entitled, if he did. It may depend on when he reached a certain Category, or it may not. If he was entitled, he certainly did not have to exercise it before 31st December 1972, as is suggested, or before 3rd January 1974. If he had to exercise it at some time referable to GO 733B, well, so be it.

Secondly, we have no idea, even with the assistance of the unauthenticated wage details of the plaintiff, what Category the plaintiff fell into or when. This might have a bearing on whether he was entitled to passages to Australia as distinct from Auckland.

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Thirdly, and most importantly, there was not before the Court the information that would enable a finding to be made as to whether or not the plaintiff was eligible for overseas passages.

Fourthly, there was and is no material before the Court that would enable it to say whether the plaintiff was, in 1982, entitled to long service leave. If his period as a probationary officer is to be taken as forming part of his entitlement, then GO 726 (which differs from regulation 5) may be relevant. This may have no bearing on when the plaintiff became a permanent officer.

We have not overlooked G0716.

The conclusion of this tortuous examination of the documents that were put in evidence, which were never explained to the Judge nor had the relevant portions extracted - nor to this Court, is that the reasoning of the Secretary and the Director of Industrial Relations for reaching the conclusion that the plaintiff was not entitled to the passages that were given to him were wrong. On the material that was before the Court, it is impossible to determine whether the plaintiff was right or wrong.

If, by commencing an action, the plaintiff took it upon himself to satisfy any onus of proof, he failed. Equally, if the Commission sought to establish that it acted correctly, it failed. The result is that all the orders made in the High Court will be vacated, and otherwise the appeal will be dismissed.

We would like to order the respondents to this appeal to pay the whole of the costs - both in the High Court and in this Court. The reasons for taking the action that was taken, and for claiming a return of money were totally flawed; to do this after the relevant authority had supposedly made an error in allowing the passages, if indeed any error was made, and to seek repayment of a paltry sum might give us good reason to do so. To this can be added that the respondents sought declarations and orders in a manner that was impermissible and which would have entitled the unfortunate trial judge to refuse to make them or require them to be put into proper form.

No doubt the plaintiff brought these proceedings because he believed, or was told, that he was being denied his rights. However, he did not, in his case or upon the whole of the material, establish any right to relief nor succeed in his appeal. In all the circumstances we believe the proper course is to order that each party bear its or his own costs both in the High Court and in the Court of Appeal.

The formal orders will be :

1. Order that the declarations and orders made in the proceedings in the High Court be vacated
2. Otherwise appeal dismissed
3. Order each party to pay its or his own costs both in the High Court and in this Court.

*Michael M. Helsham*  
 .....  
 Mr. Justice Michael M. Helsham  
President Fiji Court of Appeal

*Moti Tikaram*  
 .....  
 Sir Moti Tikaram  
Resident Judge of Appeal

*Daniel V. Fatiaki*  
 .....  
 Mr. Justice Daniel V. Fatiaki  
Judge of Appeal

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This is the annexure marked B  
 referred to in the Affidavit of Napoleoni  
Maseneva  
 sworn before me this  
2nd day of August 1989.

Sei  
 A Commissioner for Oaths

### 733B-734

#### 733 B:

A teacher appointed to the permanent establishment on or after the 28th September, 1964, employed in a day school:—

- (a) will be required to take his leave annually during the school vacations; (1-7-33)
- (b) after serving a minimum tour of four years, will be eligible during any school vacations for passages to the place where he intends to spend his leave in the Colony, subject to the limitations imposed under General Order 754 (a);
- (c) if on a salary of between \$1,243 and \$2,181 if not in a post formerly carrying post allowance, \$2,472 otherwise, inclusive, will be eligible during the long school vacation for up to three adult tourist class air passages to Australia or New Zealand at nine-yearly intervals; if on a salary of between \$2,581 and \$3,306 inclusive, similar passages at six-yearly intervals; if on a salary of \$3,138 or more, similar passages at three-yearly intervals. Such passages will not be granted until three years have elapsed since return from leave after the last local passage grant. Provided that a teacher who does not wish to travel to Australia or New Zealand may apply for local passage grants under the terms of (b) above;
- (d) (i) a teacher on the permanent establishment employed in a boarding institution who is not required to remain on duty during school holidays will be eligible for leave in accordance with (a) and (b) above;
- (ii) a teacher on the permanent establishment in a boarding institution who is required to remain on duty during the school holidays will be eligible for leave at the appropriate rates set out under the 1964 Leave and Passage Grant conditions with appropriate passage grants. In the case of a teacher on the permanent establishment serving on the staff of the Approved School under the 1964 conditions, earned leave shall be calculated at the rate of twenty-four days per annum if his salary is less than \$1,248 per annum.
- (e) a temporary teacher appointed on or after the 28th September, 1961 (including female teachers reappointed after resignation on marriage) whether employed in a day or a boarding school, regardless of salary or length of service, will be eligible for leave as under (a) and (b) above;
- (f) teachers appointed on a temporary basis will be eligible for up to three \$30 passage grants after each period of four years completed service, to any part of the Colony (excluding Rotuma.)

#### Leave For Sporting Tours.

734. Officers who are selected to be managers or members of overseas sporting tours will normally be granted leave on the following conditions provided that the sporting team is representing the Colony as a whole:—

- (a) in the case of officers whose leave earning rate is 14 days a year (in which case they would not be eligible for local leave), the whole period of the absence should, in all cases, be regarded as duty leave, but should not be leave-earning service;
- (b) in other cases—that is, officers whose leave-earning rate is more than 14 days a year—the period of absence which should be regarded as duty leave should not exceed 60 days, this period to absorb any local leave for which officers may be eligible. In respect of any period in excess of 60 days the following formula should apply:—
  - (i) in the case of officers who earn leave at the rate of 28 days a year (or one month a year under the 1933 conditions) half the period of absence in excess of the 60 days should be regarded as duty leave and half as a debit against earned or future vacation leave;