1949

*Oct. 19, 20
*Dec. 22

AMBROSE A. PAOLI (PLAINTIFF) .... *Appellant;*

AND

VULCAN IRON WORKS LIMITED (DEFENDANT) .... *Respondent.*

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Master and Servant—Contract—General hiring—Increase in salary—Illegality—Effects of Wartime Salaries Orders as to salary increase—P.C. 1549, 4356.

Action by appellant seeking arrears of salary for the years 1944, 1945 and part of 1946 pursuant to a contract whereby he was to receive $7,500 per annum. Up to 1942, he had been paid $400 monthly and annual

*PRESENT:—Rinfret C.J. and Kerwin, Rand, Estey and Locke JJ.

bonuses. A new arrangement confirmed in writing as follows was then made: "Your remuneration, including bonus, for the fiscal year 1942 will not be less than $7,500." The approval of the Salaries Controller for the increase, required by the Wartime Salaries Order P.C. 1549 amended by P.C. 4356, was sought but was obtained only as from January 1, 1943. In 1942, he received $400 a month and was given $2,700 for the year and similarly in 1943. The lump sum at the end of 1944 was only $2,000. And for 1945, he received nothing above his monthly $400 and was notified towards the end of that year that his position was abolished.

Held: That, this being a contract of general employment, the increase sum became a term of the contract and could not be altered until the contract was validly altered.

Held also: That, as there was no evidence that the contract was intended to be put into effect without the permission required by the Wartime Salaries Order, although the increase was agreed between the parties before this permission was sought, it must be assumed that the parties intended to comply with the law.

APPEAL from the decision of the Court of Appeal for Manitoba (1) affirming, Coyne and Adamson JJ. A. dissenting, the judgment of Williams C.J. K.B., dismissing an action for arrears of salary.

C. E. Finkelstein and *I. Nitikman* for the appellant.

W. P. Fillmore, K.C., for the respondent.

The judgment of The Chief Justice, Kerwin, Rand and Estey JJ. was delivered by

RAND J.:—The memorandum which accompanied the application by the company in April, 1943, for approval of an increased salary for the appellant confirms beyond doubt the substance of the latter's evidence. What it shows is that in order to retain his services it was willing to guarantee that his earnings would be $7,500.00 a year, a figure which he accepted, although the offer from the Rubber Company which he disclosed was for permanent employment at $8,500.00 per annum. The manner in which the $7,500.00 was to be treated in the accounts of the company appears likewise from the memorandum. In 1940 the company had, in addition to the basic wage of $4,800.00, distributed a bonus to the appellant of $1,000.00. For 1941 it had given him $1,700.00, but the Income Department, in view of the salary order effective from November 1, 1941, reduced this item to $1,00.00 as being

(1) [1948] 2 W.W.R. 495; [1948] 4 D.L.R. 361.

1949

PAOLI v. VULCAN IRON WORKS LTD.

Rand J.

the maximum allowable. The application specified $6,500.00 as salary but contemplated the continuance of the $1,000.00 as a guaranteed bonus. Although asked for as of January 1, 1941, the approval ran only from January 1, 1943.

The appellant's employment was general. What was sought was an increase in salary; but once the salary was increased it became a term of the contract until in a valid manner the contract in that respect was altered. It is said that because the consensus for an increase had been reached in June, 1942, and was to be retroactive to January 1 of that year, the contract was illegal. I must confess to great difficulty in appreciating the grounds for that view. It was illegal only on the assumption that it was intended to be put into effect and carried out without relation to approval. There is no evidence of this one way or another, and in its absence I assume that these parties intended to comply with the law of the country. That this is so is fully confirmed by the fact of the company's application. There was some delay, it is true, but no point is made of it and a sufficient explanation seems to appear by inference from matters which were mentioned in the evidence. The fact that the increased sum had been paid for 1942 although not authorized for that year is, apparently, thought to have invalidated everything that followed from the date of approval. But the payment of salary was here a distributive provision accompanying the employment as from month to month subject to a reasonable notice of termination. The intention of both parties was continuously and currently speaking in affirmation of its terms. When, therefore, January 1, 1943, appeared, the terms of increase became valid and the subsequent payment to the appellant for 1943, according to the approval, furnished conclusive evidence that as from the beginning of that year and thereafter until validly modified the remuneration had become $7,500.00.

It was not until January of 1945 that any intimation was given of a change in that arrangement. The employee had been paid throughout all the period in instalments of $400.00 a month and in that month the balance of $2,700.00 became payable. That amount had been paid in January, 1944, but in January, 1945, only $2,000.00 was forthcoming. It was attempted to be justified on the ground

that the entire increase over $4,800.00 was to be supplied out of bonus determinable by the company. This, of course, would have been an illegality and would have contradicted the express representation of the company and its request in its application, and, as well, the approval. Although it does not appear in evidence, its accounts for 1943 and 1944 properly prepared would show the basic rate of $6,500.00 as salary paid, and the sum of $1,000.00 in the one case and $300.00 in the other as bonus.

The appellant protested the reduction from $2,700.00 to $2,000.00, but continued to work throughout 1945 and to the middle of February, 1946. From December 1, 1945, until termination, he was paid $315.00 a month. The intimation in January, 1945, that the $2,700.00 would be reduced to $2,000.00 meant that the company would thereafter pay him at the rate of $6,800.00 a year rather than $7,500.00, and I think, in the circumstances, it must be implied that if he was not prepared to accept that reduction he could take the intimation as a notice of ending his engagement. As he kept on working, it must be presumed to have been on the footing of that reduced remuneration.

The result is that there is owing to him for 1944, $700.00, for 1945, $2,085.00, and for 1946, $377.49. He is therefore entitled to recover a total of $3,162.49.

The appeal must be allowed and judgment entered for that sum with costs in all courts.

LOCKE J.:—The appellant was employed by the defendant company in the year 1934 as manager of its Mining and Contracting Machinery Department and acted as such until the year 1938, when he was appointed sales manager, and his remuneration which had formerly been by way of a salary and commission was changed to a straight salary of $400.00 a month. After the commencement of the war in September, 1939, the defendant company undertook certain war work for the Government and for the years 1940 and 1941 the appellant was paid in addition bonuses of $1,000.00 and $1,700.00 respectively. Apparently the term of the employment was not specified between the parties. These added payments were apparently simple gratuities and were authorized by resolutions of the directors passed at meetings held on February 5, 1941, and

1949
PAOLI
v.
VULCAN
IRON
WORKS
LTD.

Locke J.

February 6, 1942. No new arrangement was made between the parties at the end of the year 1941 but the appellant remained in the defendant's employ and was paid salary at the same rate as that paid to him in the previous year. In June 1942, according to the appellant, he received an offer of permanent employment with the Dominion Rubber Company at $700.00 a month and communicated this fact to two of the directors of the company by name Condy and Waldon. He says that Condy then offered on behalf of the defendant to pay him a fixed salary of $7,500.00 a year if he would stay with the company, this to be made retroactive to January 1, 1942, an offer which he then accepted. Condy denies making this offer and says that what he had offered was for the year 1942 only and this was "a remuneration including bonuses of not less than $7,500." At the trial the plaintiff put in evidence the minutes of a meeting of the directors held on June 30, 1942, at which Condy, Waldon and J. D. McDonald, the president, were present, when a resolution proposed by Waldon and seconded by Condy was passed to the effect that the appellant's "remuneration, including bonus for the fiscal year 1942, be not less than $7,500." and on September 5, 1942, a letter signed on behalf of the defendant by McDonald was sent to the appellant reading: "Your remuneration, including bonus for the fiscal year of 1942 will not be less than $7,500.00 and this has been confirmed by the directors."

No explanation has been advanced as to why, since the respondent had by the verbal agreement made in June obligated itself on its own showing to pay the appellant remuneration of not less than $7,500.00 for the year 1942, the expression "bonus" was used. In the ordinary sense of the word, it means a gift or gratuity. The Oxford Dictionary defines it "a boon or gift over and above what is normally due as remuneration to the receiver and which is therefore something wholly 'to the good'," which is, I think, the sense in which it is commonly used. However, apart from the question of the alleged illegality of the contract to which I will refer later, I think in the result the matter is not important since upon the respondent's own showing it was obligated by agreement to pay the appellant remuneration of $7,500.00 for the year 1942. At

the expiration of that year the respondent paid to the appellant the sum of $2,700.00 which, with the $400.00 monthly payments that had been made, brought his remuneration to the amount agreed upon, and there was no discussion between the parties as to the terms of the employment at the commencement of, or indeed at any time during, the following year. During that year the appellant received monthly cheques of $400.00 and in January 1944 was again paid a sum of $2,700.00 as the balance of his remuneration for 1943. It is to be noted that while the gratuities paid to the appellant in respect of the years 1940 and 1941 had been dealt with by resolution of the directors and the amount of his remuneration for the year 1942 approved by the resolution of June 30 in that year, no such resolution was passed in respect of any part of the $7,500.00 paid him in the year 1943. By an application dated April 14, 1943, the respondent applied to the Salaries Controller appointed under the provisions of the Wartime Salaries Order for permission to pay the appellant an increased rate of salary and in a memorandum submitted with the document the following appears: "As indicated on the W.S. 2 Form recently submitted by us, Mr. Paoli has been offered a position in the east for (sic) $8,500.00 a year and he will only agree to stay with our company provided his salary is adjusted to $7,500.00." The application was signed on behalf of the company by Harold O. Jones, the acting secretary-treasurer. According to the president of the company, he knew of the application being made, read it over before it was filed and approved of it in his capacity as president and a director. Jones says in explanation of the terms of the balance of the memorandum that as submitted by him to the Department the application was to approve an increase as from the 1st of January, 1941, and that it was for this reason that he referred to the disallowance by the Inspector of Income Tax of $700 of the bonus paid to the appellant in 1941 and to the further fact that he asked that approval be given to Paoli's salary for the year 1941 at $5,500.00 per annum and for 1942 at $6,500.00 per annum. According to Jones, the application which was approved by the Salaries Controller as from January 1, 1943, was changed in the office of the Controller so that it appears on its face

1949

PAOLI v. VULCAN IRON WORKS LTD.

Locke J.

that the respondent asked for approval as from that date. The president, however, says that he knew that they were applying to fix the appellant's salary at $7,500.00 from January 1, 1943. The proper interpretation of this document is, in my opinion, that the respondent sought and obtained the approval of the Salaries Controller to the payment of $7,500.00 as the appellant's annual remuneration for his services commencing January 1, 1943. The application was made under the provisions of the Wartime Salaries Order P.C. 1549 and P.C. 4356, the former of which by sec. 5 (*b*) provided that application for permission to pay increased salaries under the provisions of the Order should be submitted by the employer to the Minister of National Revenue on the prescribed form, setting forth the facts which, in the opinion of the employers, warranted that proposed salary adjustment.

The appellant continued in the employ of the respondent in the same capacity after the end of the year 1943 without any discussion as to the terms of his employment and it was not until either the end of December 1944, as stated by Jones, or in January of 1945, as stated by Paoli, that it was suggested that he was entitled to less than $7,500.00 for the year 1944. The appellant had been paid $400.00 monthly as in the years 1942 and 1943 and says that in January of 1945, when he expected to receive the balance of $2,700.00 he was paid only $2,000.00 by Jones. He says that he objected to the reduction claiming that he had a contract for a salary of $7,500.00 and saying that he intended to get the balance and, in addition to speaking to the secretary, also spoke to the general manager about the balance owing to him. The latter, Mr. John M. Isbister, had recently been appointed to his position and, according to the appellant, disclaimed any knowledge of a contract and said that he would take the matter up with Mr. Condy. Later, Paoli says that when he talked with the president the latter referred him to Condy since he said it was he who had made the arrangement. According to Jones, it was in the latter part of December that he told Paoli that his bonus for the year 1944 had been settled at $2,000.00 and that the latter merely said that if the "other boys" were being reduced he had no objection. The appellant says that several times during the year 1945 he brought up

the matter of the $700.00 which he claimed remained unpaid in respect of the year 1944 but got no satisfaction. In the meantime, he received monthly payments of $400.00 until November 19, 1945, when he was informed by Isbister that the position of sales manager had been abolished and that Paoli was to take over his old job as manager of the mining and contracting machinery department and when the latter asked him what about his contract Isbister replied that he did not know what arrangements had been made with Condy. For the month of November he was paid $400.00: this was reduced to $315.00 for the month of December and for January 1946. Early in February of that year he informed Isbister that he intended to leave and the latter told him he had better leave at once, which he did after receiving another half month's salary at the rate of $315.00.

The real point of difference between the evidence of the appellant and of Condy as to the arrangement made orally in June of 1942 is that the appellant claims that it was then agreed that he would receive a straight salary of $7,500.00 a year while Condy contends that the arrangement was that the company would pay him not less than $7,500.00 including bonuses for the year 1942. This, the respondent contends, meant merely that the arrangement made contemplated that at the expiration of the year 1942, if his services were retained, his remuneration would be $400.00 a month, plus such gratuity, if any, as the respondent might choose to give him. It seems to me that it is highly improbable that under the circumstances then existing Paoli would have accepted any such arrangement. He had been offered a permanent position with a large company at $8,400.00 a year and would be most unlikely, in my opinion, to accept any such arrangement as the respondent contends was made. I think the terms of the application made to the Salaries Controller on April 14, 1943, confirm the appellant's version of the arrangement. The memorandum dated and speaking as of April 14, 1943, after referring to the offer received by the appellant from Dominion Rubber Company Limited said that the appellant "*will* only agree to stay with our company provided his salary is adjusted to $7,500.00," showing beyond doubt, in my opinion, that it was the understanding of the acting

1949
PAOLI
v.
VULCAN
IRON
WORKS
LTD.
Locke J.

treasurer and of the president, who saw the application before it was filed, that the then existing arrangement with Paoli was to pay him remuneration at the rate of $7,500.00 a year. The fact that the directors at the meeting held on June 30, 1942, chose to use the word "bonus" in referring to part of the appellant's promised pay and that that expression was used in the letter of September 5, 1942, does not appear to me to affect the matter. The point was that his remuneration for the year was fixed at $7,500.00. No part of the remuneration for 1942 was in any sense a gratuity since the company, assuming the agreement was enforceable, was obligated to pay it. The fact that the word "bonus" for the purposes of the War Salaries Order was defined to include such payments as a share of the profits payable pursuant to a contract appears to me to be aside from the point. If it was intended that after the expiration of the year any payment beyond $4,800.00 annually was to be made, if at all, in such amount as the respondent might decide upon, I would have expected that, in making the oral agreement with Paoli, Condy would have so stipulated and that the minutes of the directors' meeting would have so stated.

It is the remuneration to be paid to the appellant for the years 1944 and 1945 with which we are concerned. As to the year 1942, the agreement to pay him $7,500.00 whether by way of salary or partly as salary and partly a sum called a bonus, was an increase in the appellant's salary rate and subject to the approval of the Minister and that approval was not given. The respondent applied for and obtained permission to pay $7,500.00 annually commencing January 1, 1943, on the faith of the statements made in its letter to the Salaries Controller of April 14, 1943. The appellant was aware at about the time it was made of the application for this approval. It is perfectly clear, in my opinion, that both parties understood that from January 1, 1943, the respondent would pay the appellant a remuneration at the rate of $7,500.00 and while evidence as to an express agreement, apart from that made in June 1942, is lacking, such a contract should be implied from the conduct of the parties. The respondent paid the appellant on this basis for the year 1943 and continued him in its employ throughout the year 1944

and until November 19, 1945, when he was informed by Isbister that his position had been abolished, which was tantamount to a dismissal. No other notice of the termination of the contract was given. The statement made by Jones that Paoli's remuneration had been fixed at $6,800.00 for the year 1944 did not either terminate the contract or alter its terms. The statement was made in regard to the year past and was not, in my opinion, in any sense an offer in respect of the year 1945. For the appellant it was contended by Mr. Finkelstein that the hiring was a general one and that it is to be presumed accordingly that it was a yearly hiring but, since there is here no claim for damages for wrongful dismissal, I think the result is the same whether this be the true view of the position or whether the engagement was indefinite as to time and one which could have been terminated by either side on reasonable notice. In respect of the year 1944 the respondent paid the appellant a total remuneration of $6,800.00 only. Jones says that Paoli said that he had no objection to this reduction: Paoli denies this and upon this issue I think his denial is to be accepted. In my opinion, the situation on November 19, 1945, when Isbister informed the appellant that his position had been abolished was the same as had existed in the years 1943 and 1944 but, since the appellant elected to remain in a different capacity after December 1, accepting a salary of $315.00 which Isbister informed him was all the company intended to pay, in the absence of a claim for damages for wrongful dismissal, the claim should be restricted to the period terminating December 1, 1945.

The learned trial Judge was of the opinion that the agreement made between the parties in June 1942 was unenforceable on the ground of illegality, considering that it was forbidden by the Salaries Control Orders-in-Council P.C. 9298 and 1549. As to this, I think it must be assumed that the arrangement was made subject to the approval of the Minister and that it was contemplated that the employer would comply with the requirements of the Orders-in-Council and ask for the necessary approval. I see nothing unlawful in such an arrangement though, of course, no part of the increased remuneration could be lawfully paid until that permission was obtained. I do

1949
PAOLI
v.
VULCAN IRON WORKS LTD.
Locke J.

not, however, consider that this affects the matter to be decided here. The amounts paid in the year 1943 were lawfully paid under the contract which, in my opinion, should be implied from the conduct of the parties and as to them there is no dispute. The agreement under which the appellant was employed in 1944 and 1945 until December 1st was not that made in June of 1942 but that to be implied in respect of the year 1943 under the circumstances above referred to. That agreement required the payment of remuneration at the rate of $7,500.00 a year until it was terminated on December 1st, 1945. I agree with Adamson, J.A., that the appellant is entitled to recover the sum of $3,175.00 and would allow this appeal and direct that judgment be entered for that amount, with costs throughout.

Appeal allowed with costs.

Solicitor for the Appellant: *I. Nitikman.*

Solicitors for the Respondent: *Fillmore, Riley & Watson.*