

ASKAN DAS BATRA

v.

THE ATTORNEY-GENERAL

(1993 - 1994) Z.R. 41 (S.C.)

SUPREME COURT
GARDNER, CHIRWA AND MUSUMALI, JJ.S.
5TH AND 31ST AUGUST, 1993.

(S.C.Z. JUDGMENT NO. 12 OF 1993)

Judgment

GARDNER, J.S.: delivered the judgment of the Court.

This is an appeal from a judgment of a High Court dismissing the appellant's claim for a refund for medical expenses.

The facts of the case are that the appellant was employed by the Zambian Government as an accountant with the Ministry of Legal Affairs. In June, 1991, he consulted Dr W. M. Mwansa at the University Teaching Hospital and was diagnosed as suffering from heart disease which he had for a few years. The doctor gave the appellant a letter addressed to whom it may concern in the following terms:

"University Teaching Hospital
P O Box 50001,
LUSAKA.

5th June, 1991.

TO WHOM IT MAY CONCERN

RE: MR A. D. BATRA 67 YEARS

This gentleman suffers from ischaemic heart disease.

Few years ago he underwent coronary angiography in United Kingdom which then showed partially blocked vessels. Recently he has again been experiencing pain especially of exertion. His latest echo showed some heart involvement and with it he has been dipping into heart failure. Mr Batra requires further evaluation in United Kingdom again since facilities are not available locally.

Your help will be greatly appreciated.

Dr .W. M. Mwansa, MD

CONSULTANT PHYSICIAN - MEDICINE."

The appellant, who was suffering some pain, applied to his ministry for leave to enable him to go to the United Kingdom, where his brother was practising as a doctor, in order to have the evaluation referred to by Dr Mwansa. He was granted 30 days' leave, which was referred to as medical leave, and he proceeded to the United Kingdom. His air fare was paid for by the Zambian Government and in his evidence the appellant said that it had cost over two hundred thousand kwacha for him and his wife to fly to London and back.

Counsel for the State indicated to us that the air fares were provided to the appellant as being due to him at the end of his contract, while reference was made by counsel in the Court below to the cost of the air fares having been advanced to the appellant. In London the appellant had the necessary medical evaluation of his condition and received a medical report dated 10th July, 1991, which read as follows:

"Dr Peter Mills FRCP
18 Upper Wimpole Street
London WIM 7TB

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10th July, 1991,

PM/JB
MEDICAL REPORT
Re: MR A. BATRA

I reviewed this patient at the London Independent Hospital on 6/7/91. His angiogram shows a severe and somewhat complex lesion in the right coronary artery and in addition he has appreciable aortic regurgitation. Whilst the aortic regurgitation is not currently causing any adverse effect on left ventricular function it looks as if this would be likely to occur in the foreseeable future.

The patient will be returning to live in Africa and then in India and would prefer to have any cardiac surgery that might be required carried out electively at the present time. In the light of this I think that surgery rather than angioplasty would be preferable to the right coronary artery lesion since he also has an occluded left anterior descending vessel and I have asked Mr Lewis to carry this out on 8th July, 1991.
Peter Mills FRCP."

As a result of the advice he received, the appellant elected to have an operation in London and the operation was successfully carried out. On his return to Zambia the appellant requested the Ministry of Health to reimburse to him the medical expenses which he had incurred together with his travelling expense. The request was refused on the grounds that the appellant had no prior permission of the Permanent Secretary of the Ministry of Health before he went for treatment. The appellant then issued a writ claiming the reimbursement.

At the trial the appellant gave evidence setting out his claim. Dr Mwansa gave evidence that he had advised the appellant to South Africa, and had told him that, since he was 67 years of age, the committee which recommended treatment abroad would not support his claim for medical expenses. This evidence was contrary to the evidence of the appellant who said that he gained the impression that by his letter of recommendation Dr Mwansa was indicating that his treatment abroad would be paid for by the Government. Dr Mwansa also said that the appellant's condition did not require emergency treatment.

Dr Chirwa, Acting Deputy Director of Medical Services at the Ministry of Health, gave evidence that there was an Ad Hoc committee which reviewed all cases requiring treatment abroad. He said that the committee made recommendations for treatment abroad where such treatment could not be carried out in Zambia and, where it was considered that a patient had no funds, the committee could recommend payment of funds by the ministry. He said that where patients had their own funds they assisted in obtaining foreign exchange to enable them to pay for their own treatment abroad, but he knew of one case where patients who had paid for their own treatment abroad had received reimbursement from the ministry. Dr Chirwa gave evidence that there were insufficient funds to send all deserving patients abroad and that there was such a long waiting list of such patients that some died before they could be sent abroad.

At the trial, counsel for the appellant argued that the appellant was entitled to payment of his medical expenses under the provisions of general order No. 179 of the conditions of service of Zambia civil servants. Although the appellant had given evidence that he was entitled to

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free medical in Zambia or abroad no contract was put forward on his behalf to support any special conditions of service.

The learned trial judge found that no special conditions of service had been put forward on behalf of the appellant and held that, as he had not applied for permission from the Ad Hoc committee for treatment abroad, he was not entitled to claim any reimbursement.

Before this Court, Mr Chomba on behalf of the appellant has maintained that the appellant is entitled to costs of his medical treatment abroad in accordance with the provisions of general order No. 179 which reads as follows:

"The Permanent Secretary, Ministry of Health, in exceptional circumstances, may authorise that an officer or a dependant of an officer be sent for specialist medical or dental treatment outside Zambia, provided he is satisfied that such treatment cannot be obtained in Zambia and is necessary for the officer's or the dependant's recovery. In such cases, the Permanent Secretary, Ministry of Health, will direct the country and medical or dental institution to which the officer shall be sent and the Government will bear all the treatment, medical or dental and subsistence costs involved. The Government will similarly bear the transport and subsistence costs for the wife, husband and parent or other close relative of the patient if the Permanent Secretary, Ministry of Health, is satisfied that it is essential for the patient to be accompanied by a member of his or her immediate family."

In particular Mr Chomba argued that the appellant came within the terms of that order because the essential factors entitling an officer to medical treatment abroad were present, namely that:

- (a) the case was exceptional;
- (b) the appellant could not be treated in Zambia;
- (c) the treatment abroad was necessary for his recovery and he required treatment.

He maintained that the appellant's conduct in having the operation abroad when he was there was reasonable having regard to the advice he received. Mr Chomba argued that having satisfied the conditions of general order 179 the appellant was entitled to receive the costs of treatment abroad. It was further argued that because the learned trial judge had found in favour of the appellant in respect of all the conditions referred to in general order 179 the appellant was entitled as of right to payment for his treatment abroad, and his right should not be defeated merely because he failed to follow the correct procedure in applying to the Ad Hoc committee before he left. In his written submissions, Mr Chomba drew our attention to the appellant's evidence as follows:

"Under my contract I was entitled to free medical treatment. My entitlement is four hundred thousand kwacha to this day for the whole contract."

It was argued that, despite the absence of any document setting out the appellant's terms and conditions of service, the Court should have accepted the appellant's uncontroverted evidence.

Finally, Mr Chomba argued that the Court should have found that Dr Mwansa's letter was authority for the obtaining of treatment abroad at Government expense.

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In reply Mr De Silva argued that general order 179 did not entitle the appellant to payment for treatment unless he was authorised by the Ad Hoc committee; without such authorisation none of the other arguments could support the appellant's claim.

We will deal first with the argument that the appellant's own evidence was that he was entitled to free medical treatment and, that, as there was no evidence to contradict this, he should be regarded as having a contract to that effect. Despite the appellant's evidence the whole of the respondent's case was that the appellant was not entitled to free medical treatment abroad under the provisions of general orders 173 and 174, which provide that where an officer is travelling on duty outside Zambia and requires medical attention, he must meet the cost of treatment himself and then apply for a refund to his ministry. The reference to four hundred thousand kwacha entitlement is not clear but in itself could not possibly support the appellant's claim. It was for the Court to decide whether the appellant was entitled to free medical treatment abroad, and the appellant's statement with regard to this was evidence upon which the case could be decided. Without more specific evidence it was no more than a statement of the appellant's claim and, presumably, what he thought was his entitlement. In the absence of specific conditions of service other than those contained in the general orders no other conditions could be considered either in this Court or in the Court below. This ground of appeal must fail.

Counsel relied on general order 179 as entitling the appellant to succeed in his claim. Mr Chomba argued that, even though the wording of the order is the Permanent Secretary "may" authorise overseas treatment, the appellant came within the provisions of the order and therefore it was mandatory for him to be sent overseas for treatment at Government expense.

The general order is a term of the contract between the appellant and the Government and it is our duty to construe the order so that it gives effect to the intentions of the parties. We will deal first with the meaning of "exceptional circumstances". The later proviso that the Permanent Secretary must be satisfied that the treatment cannot be obtained in Zambia and is necessary for the officer's recovery is a *sine qua non* in every case of consideration, and the fact that an applicant comes within that proviso does not in any way make him an exceptional case. We construe the reference to exceptional circumstances as an indication that there is no general rule by which the Permanent Secretary is bound. The use of the word "may" is also an indication that the order did not intend to bind the Permanent Secretary or the Government. There is nothing to suggest an intent that the word should have a mandatory effect. The result of this construction is that we find that it was not the intention of the parties to find the Government to authorise and pay for overseas medical treatment. The wording of the order makes it quite clear that the intention was to provide *ex gratia* facilities in some cases at the discretion of the Government through the Permanent Secretary. The existence of an Ad Hoc committee, which could make recommendations, was an internal arrangement in order to enable the Permanent Secretary to make the difficult decisions as to which parties should benefit. It was quite clear from the evidence of Dr Chirwa that not all deserving cases could be

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catered for under the *ex gratia* scheme and for this reason there was no intention to make it a contractual liability for the Government to provide funds for overseas treatment. Where it was intended that there should be entitlement to free medical services this was made quite clear, as in general order 166 which reads as follows:

"Officers and their dependants are entitled to free medical and dental attention from non fee paying wings and Government health institutions".

There the word "entitled" has been specifically used.

As we see it, the appellant seems to have misunderstood the situation as being that, although he would in the ordinary way be entitled to Government funds for overseas treatment, he lost that entitlement by having failed to go through the correct channels of applying to the ad hoc committee before he left the country. If this had been the case it would have been completely wrong to deprive the appellant of a right to which he was entitled for a pettifogging bureaucratic reason. However, that was not the case. There never was an entitlement in the first place and the evidence of Dr Mwansa indicated that because of his age the appellant could not in any event have been considered for an *ex gratia* grant. Whether this provision was unfair or not does not concern us. We are only concerned with the consideration of whether or not there was entitlement.

So far as Dr Mwansa's letter is concerned, Mr Chomba argued that this was clearly taken as an undertaking by Dr Mwansa that the Government would pay for the overseas treatment. Although Dr Mwansa was a member of the ad hoc committee dealing with recommendations for overseas treatment he was not held out as having authority to commit the Government financial liability and, in any event, the wording of the letter asking for "to whom it may concern" to help the appellant could not possibly be considered as an undertaking or authorisation for payment for the overseas treatment. Mr Chomba has most persuasively argued that the appellant's is a deserving case and we agree with him that the appellant did act reasonably by choosing to have an operation in London whilst he was there.

However, the appellant has failed to establish that he had any legal entitlement in this case and the appeal is dismissed.

The learned trial judge in the Court below saw fit to make no order as to the costs, and we agree that, as this issue has not been decided before in this Court and it is one of general interest to all Government employees, there should be no order for costs of this appeal.

Appeal dismissed.