TILE UNITED STATES TRADING COMPANY (USTC), Appellant, v**. WALTER B. WRAY**, **SR.**, and **PHILIP G. WILLIAMS**, Labor Relations Officer, Ministry of Labour, Appellees.

MOTION TO DISMISS APPEAL FROM THE NATIONAL LABOUR COURT, MONTSERRADO COUNTY.

Heard: October 1993. Decided: February 1994.

1. It is improper for the court to render decision on an issue touching on the merits of the case that has not been argued or passed upon by the lower court.

2. The Supreme Court, in a motion to dismiss, cannot consider or decide on an issue that has been raised in the appeal.

Co-appellee Walter B. Wray, Sr. obtained two judgment awards against the appellant in the National Labour Court, from which appellant appealed. While the appeal was pending, appellees filed a motion to dismiss the appeal contending that the appeal bond was insufficient and therefore defective because it did not specify the particular currency for which the bond was tendered. The Supreme Court held that the basis of the motion involved the issue of parity between the Liberian and United States currencies, which was not raised and argued in the trial court, and hence, could not be raised at the appellate level. The Court therefore *denied* the motion and remanded the case for determination of this issue.

H Varney G. Sherman for the respondent/appellant and *Eugene D. M Freeman* for the movant/appellee.

MR JUSTICE HNE delivered the opinion of the Court.

The co-appellee, Walter B. Wray, Sr., instituted an action of unfair labour practice against the United States Trading Company, the appellant. He had worked for the Company for twenty (20) years as of July 2, 1990.

The records show that towards the end of 1988, the said appellee, Walter B. Wray, along with some senior employees of the appellant company appealed to the appellant to pay them a portion of their salaries in United States Dollar to enable them to meet some obligations in the United States since it was difficult for them to obtain U.S. Dollars locally in view of the scarcity of that currency on the Liberian

market. The appellee and other junior and senior staff employees received their salaries in Liberian Dollars.

After some consideration, the appellant granted their request to an extent of 25% of their net monthly salaries on a one to one parity, that is L$1 to U$1. This was effected by the establishment of a bank account at Bank One in Akron, Ohio, U. S. A. by each of the employees concerned, including Walter B. Wray, the appellee, into which 25% of each employee's net monthly salary was transferred. The establishment of the accounts was carried out under the auspices of the appellant company. The employees were issued checkbooks with which they drew checks on the said bank accounts. As a result of the Liberian civil conflict, the appellant was forced to shut down its operations on July 2, 1990. It later decided to pay off its employees under Redundancy Regulation No. 8 of the Ministry of Labour and made redundancy payments of one month for each year of service.

The appellant wrote a letter dated October 14, 1991 to its employees, including the appellee, informing them of the redundancy action. The letter also offered each employee 21/2 (two and one-half months) salary as *ex gratia* payment, in addition to the redundancy compensation. Pursuant to this decision, payment or redundancy compensation was made to the employees on or about October 22, 1991.

The appellee was earning a salary of $1,240.00 per month. Having a tenure of twenty (20) years service, he was paid $20,065.82 as redundancy compensation.

Subsequently, the appellee claimed that 25% of this amount should be paid to him in U.S. dollars because 25% of his net monthly salary was paid in U. S. dollars. Upon complaint to the Ministry of Labour, the hearing officer not only found that the appellee was entitled to twenty-five (25%) of his redundancy compensation in U. S. dollars, but ruled that the appellee was dismissed to avoid the payment of pension because another person had been hired by appellant to perform the functions of appellee instead of re-hiring appellee. On this ground the hearing officer awarded the appellee five (5) years pay with 25% thereof to be paid in U. S. dollars. Upon appeal to the labour court, the ruling of the hearing officer was affirmed. The appellant thereupon prosecuted the present appeal before us.

The appellant takes the position that there is no basis for the award of five years pay for reason of an attempt to avoid the payment of pension because, other than the evidence of twenty (20) years service by the appellee, no evidence was introduced as to his age.

Secondly, the appellant maintains that the 25% payment of net monthly salary in U. S. dollars was merely an assistance which could be withdrawn at any time, which appellees were aware of. Consequently, it did not form part of his salary to apply to redundancy compensation.
This presents us with really two issues that we are to consider:

1. Whether there was any showing of an attempt to avoid the payment of pension to warrant the hearing officer's award of five years salary to the co-appellee for that reason?

2. Whether the 25% of the co-appellee's net salary, which was transferred in U. S. dollars to his account in Bank One, Akron, Ohio, should form part of his redundancy compensation?

The co-appellee contends that another person was hired in his place by the appellant instead of giving him preference as required in instances of redundancy, and as assured by the appellant itself. He says that on this account, the appellant's aim was to avoid the payment of pension. We do not think that the appellee produced any probative evidence to support this contention. On the contrary, the testimony introduced by the appellant tends to establish that the job of the appellee had not been filled by the appellant.

Further, there is no evidence regarding the age of the appellee to show that he was potentially due for retirement at the time of his redundancy. The appellant itself set the criteria that the employees who were within three (3) years of retirement and those eligible for retirement as of July 2, 1990 would be allowed to retire and receive their pension.

The penultimate paragraph of the appellant's letter of October 14, 1991 to its employees states: "This letter applies to all USTC employees except those eligible to retire or those within three (3) years of retirement as of July 2, 1990. Those employees will receive a separate letter offering retirement." This does not manifest an attempt to avoid the payment of pension.

The co-appellee relied on the *case United States Trading Company Redundant Workers v. United States Trading Company Management,* 33 LLR 180 (1985), decided by this Court at its March Term, 1985, to support the trial court's decision for five years pay. In that case there were fourteen (14) workers who had served for 20 - 24 years, and four (4)

workers who served for 20-27 years. As to the fourteen (14) workers, it was ruled that they should be paid three years' salary each, and the four (4) workers be paid five years' salary each.

In the 1985 case, the management said that the employees had requested in writing a lump sum payment in lieu of pension, but such writing was not produced. That case and the present one are not analogous, in our opinion, because in the 1985 case the four (4) employees had served 25-27 years and had achieved retirement tenure. In the instant case, the appellee had not.

We therefore hold that the records do not support an attempt on the part of the appellant to avoid the payment of pension. The award of five years' pay by the hearing officer affirmed by the Labour Court on that basis is thus overruled.

After granting the appellee's request to pay a portion of his salary in U. S. dollars, the appellant, from the latter part of 1988, paid 25% of the appellee's net monthly salary in U. S. dollars up to the time of his redundancy. Countering the appellee's claim on the point, the appellant says that this did not form part of the appellee's remuneration but was an assistance which the appellant reserved the right to withdraw at will. We are led to conclude that in their employer-employee relationship, the payment to the appellee by the transfer of 25% of his net monthly salary in U.S. dollars to his account in Bank One, Akron, Ohio, U. S. A., constitutes a part of his total remuneration for his services.

The 25% U.S. dollars component of co-appellee's remuneration should therefore have been made a part of his redundancy action. However, we do not think that this is significant to the determination of this case.

Taking into account all that we have said, the judgment of the National Labour Court is hereby reversed. The appellant should pay to the appellee 25% of his redundancy pay of $20,065.82 in U. S. dollars, that is U.S. $5,016.45. The appellee shall refund to the appellant the amount of L$5,016.45 for the said amount of U. S. $5,016.45 since it constitutes 25% of the redundancy compensation already paid to him in Liberian Dollars. This is in keeping with the method in which he was paid his net monthly salary. Costs are assessed against the appellant. And it is so ordered.

Judgment affirmed with modification.