LAMCO J. V. OPERATING COMPANY, by and thru its General Manager, Appellant, v. **JAMES BAMKAR** and **THE BOARD OF GENERAL APPEALS OF THE MINISTRY OF LABOUR,** Appellees.

APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: October 19, 1983. Decided: December 21, 1983.

1. A manager's check issued as the penalty to indemnify an appellee in an appeal bond, need not be issued in the name of the appellee, but its issuance in the name of the sheriff of the court is sufficient.

2. He who is silent when he should speak assents.

3. An employee is entitled to receive from his employer a retirement pension on retirement from an undertaking at the age of sixty (60), and if such employee has completed at least fifteen years of continuous service, or he may retire at any age after he has completed at least twenty-five (25) years of continuous service in such undertaking.

4. Not all illegal dismissals are intended to avoid payment of pension..

Co-appellee James Bamkar brought action of wrongful dismissal against the appellant company after co-appellee' s name was dropped from the payroll for unexcused absences. The hearing officer and the Board of General Appeals found the dismissal to be wrongful and ruled in favor of the appellee. On appeal to the Circuit Court for the Sixth Judicial Circuit, the ruling of the hearing officer and the Board of General Appeals in favor of Co-appellee Bamkar was affirmed. From this judgment, a further appeal was taken to the Supreme Court. The Supreme Court held that wrongful dismissal was established since the absences were not unexcused, but it ruled that the award given to Co-appellee Bamkar was in excess of that allowable under the Labor Practices Law since the co-appellee was a wage earner rather than a salary employee. The Court therefore affirmed the judgment but with the modification that the award be reduced from $18,513.60 to $3,344.64, being payment for two years based upon calculations made by the Court from the last hourly wage of the co-appellee.

Benjamin M Togbah appeared for the appellant. Moses Agbaje appeared for the appellees.

MR. CHIEF JUSTICE GBALAZEH delivered the opinion of the Court.

This appeal grew out of an industrial dispute between the Lamco J. V. Operating Company, now appellant, and one James Bamkar, co-appellee herein, and emanated from the People's Civil Law Court for Montserrado County with the co-appellee as plaintiff. From the records certified to us for review, the following facts constitute the subject matter:

In May 1975, Mr. James Bamkar, co-appellee herein, was employed by Lamco, the appellant, in its maintenance department as a mechanic. After three years of employment, coappellee reported sick in December 1977 and was treated at the appellant's hospital until January 24, 1978. An authenticated hospital entry on a medical chart certified to this Court indicates that the patient, co-appellee, was neurotic and psychosomatic at the time of his treatment at management's hospital.

The ailment was indeed a very serious one, for according to Webster's Third New International Dictionary (unabridged 1966) at page 1521, a neurotic is "an emotionally unstable individual or one affected with a neurosis." The same text also goes on to define a psychosomatic at page 1834 as "one who evidences bodily and mental symptoms as a result of mental conflict."

According to the records certified to us, it would appear that Mr. Bamkar's health condition did not improve by January 24, consequently, he was granted "sick-in-quarters leave" by appellant to last from that date January 24 to February 24, 1978, in order to receive further treatment. While co-appellee was on the "sick-in-quarters leave", he sought a native traditional medical assistance outside management's hospital and remained thereat until June 1978 for additional four (4) months. During the period, co-appellee received his full wages and a month thereafter, before his name was deleted from appellant's payroll for alleged unexcused absences amounting to 108 days. Appellant however, did not deny the "sick in quarters leave" given coappellee, but merely contended that absences beyond February 24, 1978, were unexcused; while Dr. Golafalie at appellant's hospital issued a general notice denying ever authorizing any patient, including co-appellee to seek medical attention from a native doctor.

Co-appellee, however, maintained that his absence was not unexcused, and that Dr. Golafalie had asked him to seek treatment from a native doctor considering the nature of his ailment and the fact that he actually needed further medical attention at the time of leaving the company's hospital. He further produced a letter from his native doctor addressed to appellant's doctor in charge. The letter reads:

"Zorgowee Town Nimba County Liberia June 4, 1978 Doctor-in-charge Lamco Dispensary Yekepa, Nimba County Dear Doctor:

The bearer of this letter Mr. James Bamkar, an employee of Lamco who resides in Yekepa came to me on January 24, 1978 with a complaint of an (open moor). I have been treating him since that time till now which I find him trying.

I would please like him now to resume duty. At the mean he can do less work until free from sick pains. Thank for your cooperation.

Yours, Blamo Karneh Blamo Karneh"

The records showed that management refused to honour the letter of excuse from Mr. Karneh, the native doctor, because co-appellee was not previously excused by appellant. As a result, co-appellee' s services were terminated by appellant. Co-appellee then filed this complaint against appellant for wrongful dismissal before the hearing officer in Yekepa, Nimba County.

The hearing officer, after an investigation of the matter, declared co-appellee' s dismissal as illegal and wrongful, and ordered that appellant reinstate appellee or pay him two years and three months pay. To this decision, appellant excepted and appealed to the Board of General Appeals, Ministry of Labour, for a review. The Board of General Appeals affirmed the hearing officer's ruling with modification that appellant pay co-appellee three months salary or reinstate him. Management again took exceptions and appealed to the Sixth Judicial Circuit Court, Montserrado County. The judge also modified the decision of the Board of General Appeals and awarded appellee $18,513.60 plus reinstatement. The appellant has charged the trial judge with many reversible errors for which it excepted, and perfected its appeal, and now before this Court for a final review on a six-count bill of exceptions contending that co-appellee terminated his own services and consequently the dismissal was not wrongful or illegal, and that the trial judge was without legal authority to both award payment and reinstatement of the co-appellee.

However, when this appeal was called for hearing, appellees moved the Court to dismissal appellant's appeal for they contended that the bond was insufficient and defective because the manager's check which was tendered by appellant as the penalty to indemnify appellee was issued in the name of the sheriff instead of the appellees. The appellant strongly resisted and contended that he had indeed complied with the legal requirements of law relative to the taking and perfection of an appeal. And, hence, the motion should be denied. The motion was heard and denied in the minutes of court because the same was not in conformity with the Civil Procedure Law, Rev. Code 1: 51.16.

From these sets of facts, the following issues present themselves for our final determination:

(1) Whether or not appellee's dismissal was wrongful?

(2) Whether or not appellant's action in dismissing co-appellee was to evade his pension scheme?

(3) Whether or not the trial judge was correct in awarding co-appellee both compensation and reinstatement?

The primary issue for determination is whether the dismissal of co-appellee was proper and justified. It is true that in the industrial world of today, industrial leaders are plagued by rampant absenteeism to their detriment. To combat this situation, various disciplinary measures have been adopted, including loss of jobs. However, since both employees and

employers have property interest in their endowments, some caution should be taken in how one's occupation is taken away.

Counsel for appellant strongly argued and maintained that coappellee terminated his own services as no permission was ever granted him to seek medical attention from a native doctor. Conversely, there is also no evidence to show that such permission was not given, notwithstanding the company continued to pay co-appellee who had taken leave from work, according to appellant, without excuse. Furthermore, management never wrote the co-appellee any warning letter or notice of dismissal as is required by law. Labour Practices Laws, 18-A: 1508(d).

This Court has no quarrel with the position that the company's doctor is competent to declare a worker to be "sick-inquarters" and probably, only the doctor may declare that some particular malady has been cured or a condition adequately removed to enable a previously indisposed worker to return to work. However, the conduct of the appellant in paying co-appellee while he was undergoing treatment at the native doctor's place, and the fact that no warning or notice of dismissal was served him during the entire period, are clear indications that they sanctioned co-appellee's decision to take off to cure himself. Consequently, appellant should not have refused the letter co-appellee brought from his native doctor regarding his treatment.

There being no evidence to indicate that appellant required appellee to report back to the clinic upon the expiration of the days given him, and since no provision was made by appellant in this regard should it be assumed that the appellant left that discretion to appellee to fmd himself other means from which he could obtain a cure? Granting that the appellant did not grant permission to co-appellee to see a native doctor, it did not also provide a remedy for appellee's illness since appellant's doctors could not arrest the malady. A helpless patient has a fundamental right to seek medical attention from any source in order to obtain relief and a cure. 16 AM. JUR. 2d. Contracts, § 357, p. 683, fn. 7. The Court is of the opinion that a native doctor's treatment could be as useful for certain ailments as much as western medical treatments once it is effective. Furthermore, assuming it was improper for co-appellee to have taken off without permission, the continued payment of his wages by the company during his absence from work, and the fact that no notice of dismissal was served on him even after absenting himself beyond the time limit, showed that co-appellee had obtained an implied permission for his absence and that the company "sick-inquarters" declaration of January 1978 was tantamount to a constructive notice. He who is silent when he should speak is deemed to have assented to the matter about which he was silent. Clark v. Lewis, 3 LLR 95 (1929). For that matter, a person cannot object to a thing to which he has consented. Although mere silence, as a general rule, does not amount to an assent, yet, when

taken together with other circumstances, as in this case, silence is seen as warranting a conclusive presumption that assent has been given. The Court maintains that in view of what has been outlined above, the co-appellee's health not having improved at the end of the period given by appellant, it must be concluded that the "sick-in-quarters leave" was still in force and therefore co-appellee's dismissal was thus improper, unjustified and, hence wrongful.

The second issue for determination is whether or not appellant's act of dismissing co-appellee was to evade pension payment. Appellant strongly contended that the co-appellee had only been in its employ barely three years and was employed when he was twenty years old in 1975 after which he terminated his own services by reason of his protracted unauthorized absences. Therefore, there was no question of avoiding the payment of pension. According to the Labor Practices Law, 18-A: 2501 (as amended May 1, 1963), "an employee within the application of this chapter is entitled to receive from his employer a retirement pension on retirement from an undertaking at the age of 60, and if such employee has completed at least fifteen years of continuous service, or he may retire at any age after he has completed at least twenty-five years of continuous service in such undertaking." In this regard, the facts showed that co-appellee' s dismissal was not done by appellant to evade pension payment since co-appellee was even less than twenty-four years old and had served appellant for only three years. Not all illegal dismissals are intended to avoid pension scheme. Subsection 9 of the Labor Practices Laws, 18-A: 1508, provides that where wrongful dismissal has been alleged and proven, an amount to be paid to the employee should not be more than two (2) years pay unless there is a showing that the dismissal was done to avoid the payment of pension. The relevant portion of that law is herein quoted for clarification:

"...length of service; but in no case shall the amount awarded be more than the aggregate of two years salary or wages of the employee computed on the basis of the average rate of salary received 6 months immediately preceding the dismissal; however, if there are reasonable ground to effect a determination that the dismissal is to avoid the payment of pension, then the Board may award compensation, of up to but not exceeding the aggregate of 5 years salary or wages computed on the basis of the average rate or salary received 6 months immediately preceding the dismissal..."

Therefore, the judge of the trial court was in error when he awarded appellee $18,513.60 calculated both on the basis of $1.33 hourly rate and for five (5) years. The records in this case stand aloof without a simple evidence tending to show that the rate per hour was $1.33 but instead it shows that the hourly rate of co-appellee was $0.67 cents. Therefore, the co-appellee' s compensation should be calculated on the basis of $0.67 an hour for the 2 years.

With reference to issue number three, the appellant argued that the trial judge erred when he ruled that co-appellee be paid and reinstated. In this connection, the Labour Practices Law prohibits the imposition of double penalty, that is, compensation

and reinstatement. It provides that where an award is made for the illegal dismissal of an employee, there can be no re instatement. Section 9 of the Labour Practices Law, 18-A, says:

"Wrongful dismissal. Where wrongful dismissal is alleged, the Board of General Appeals shall have power to order reinstatement, but may order payment of reasonable compensation to the aggrieved employee in lieu of reinstatement. The party against whom the order is made shall have the right of election to reinstate or pay such compensation...."

This Court is of the opinion that the co-appellee, being a wage earner, should be paid wages based on his daily earning at the time he was granted "sick-in-quarters leave" multiplied by two years; that is, sixty-seven cents times eight hours a day times twenty-six days a month times twelve months times two years ($0.67 x 8 x 26 x 12 x 2 = $3,344.64), or be reinstated.

In view of the facts, circumstances and the laws cited, we have no other choice but to affirm the decision of the Board of General Appeals with the modification that $3,344.64 be paid to co-appellee by appellant instead of $18,513.60, or he be reinstated, with costs against appellant. And it is so ordered.

Judgment affirmed with modification.