

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 2 OF 2000

BETWEEN:

JOSHUA SMITH

Employee

and

GEORGE W. BENNETT BRYSON & CO. LIMITED

Employers

Before:

The Hon. Cyril L. Maundy
The Hon. Edward T. Henry
The Hon. Genevieve Benjamin

President
Member
Member

Appearances:

A. Fearon, Attorney-at-Law, for the Employee
Justin L. Simon, Attorney-at-Law, for the Employers

2002: June 10, 11 & 13
December 17, 18 & 19
2003: April 28, 29, 30
July 8

JUDGMENT

Unfair Dismissal – Suspension – Adventist suspended for refusal to work on a Saturday – ship delayed in Port for more than one hour due to failure to obtain clearance – refrigerated container left unplugged – contents of container spoiled.

Historical Background

- [1] **Maundy, P.:** This is a claim for compensation by the Employee, Joshua Smith, against George W. Bennett Bryson & Co. Limited for Unfair Dismissal. The matter was firstly referred to the Labour Commissioner who made a number of recommendations but which were not accepted.
- [2] In his Memorandum dated February 7, 2000 and filed on the said date, the Employee contends that, inter alia, his dismissal was unfair and contrary to the provisions of the Antigua and Barbuda Labour Code, Cap. 27, Laws of Antigua and Barbuda, Revised Edition, 1992, hereinafter referred to as "the Labour Code", harsh, oppressive, contrary to good Industrial Relations and the Rules of Natural Justice and sought an Order that he be paid the two weeks wages that were not paid to him as a result of an unlawful suspension in October, 1992. The Employee also asked for compensation for Unfair Dismissal and exemplary damages.
- [3] In their Memorandum, the Employers, to the extent that the Employee's Memorandum consists of evidential material, hearsay, innuendos and comments, made no admission but contended that the dismissal was as a result of two incidents of gross negligence amounting to conduct in relation to his employment, viz, leaving a refrigerated container unplugged at the Port in St John's for a period in excess of 12 hours, resulting in the contents being damaged and his failure to process clearing documents as a result of which a vessel was delayed for a period in excess of an hour in the Port of St John's. Further, the Employers denied that the Employee was entitled to any compensation or an award of exemplary damages.

- [4] The Employee commenced working with the Employers on February 20, 1979, when he was aged 17 years – there is some conflicting evidence whether he was employed as a Clerical Assistant in the Shipping Department as contended by the Employee or as a Messenger; however, the following year, he was promoted to the position of Shipping Operations Clerk – he did not get any further promotion.
- [5] The Employee's duties were to:
- (a) Clear the ships – on information from his supervisor or the Manager of the Department that a ship was arriving and the day and time of the ship's arrival, the Employee was required to obtain and process the necessary documents.
 - (b) Ensure that the Port charges had been paid (in advance) and the forms stating the particulars of the ship (Form 15 and 16) were completed and taken to the Port. The Employers then took care of the ship until it sailed from the Port e.g. by providing its supplies and stores, obtained medical care for any passenger or crew and repairs, if necessary, to mention but a few. The Employee's duties were summed up by Mr Warren, the Managing Director, as:
 - (i) Advising the Port of the arrival of the vessel.
 - (ii) Preparing documentation in respect of the ship's arrival and ensuring that Port charges are paid in advance.
 - (iii) Ensuring that the Company received a copy of the Manifest to show the number of containers on the vessel.
 - (iv) Clearing the vessel through Customs and Immigration when it arrived.
 - (v) Ensuring that a group of stevedores were available to work the vessel when it arrived.

- (vi) Making sure that the empty containers that were to be loaded back on the vessel were available to be loaded.
- (vii) Preparing and ensuring that the Port clearance documents were available when the ship was ready to sail.
- (viii) Ensuring that the Tally sheets were properly prepared and that the number of containers unloaded and loaded agreed with those on the Tally sheets.
- (ix) Returning the documents to the office.

[6] Between 1980 and October, 1992, the Employee did not have any problems with his work or his Employers; he did not receive any complaints or oral or written warnings.

[7] The first hint of conflict between the Employers and the Employee raised its head in October, 1992, and arose from a request by the Employers that the Employee should "work the boat", Amerikanis, on a Saturday although they knew that he was an Adventist and did not work on Saturdays – prior to this he had never been asked to work on a Saturday – See Exhibit JS1.

[8] As a result of the above the Employee was suspended for two (2) weeks without pay. Adventists were exempt from working on Saturdays under the Collective Agreement between the Employers and the Employee and the Employee refused to "work the boat" – See Exhibit JS3.

[9] By letter dated December 15, 1995, the company wrote to the Employee alleging that the Chief Purser of the Ship, Monarch of the Seas, was dissatisfied with his attending of the vessel, that he had been soliciting assistance from the Staff Captain, crew and Purser to repair his house that was damaged in the hurricane of September, 1995 (Luis) and warned him of

termination if ever there was a repetition; the Employee refuted the allegations and he was never questioned as to whether there was any truth in them – See JS4.

- [10] The Employee was employed by the Company for 17 ½ years.
- [11] During the period of his employment with the Employers, the Employee was never sent on any training or other courses and at times had to do additional duties on his own without any extra remuneration.
- [12] In a letter to him dated February 20, 1996, the Managing Director, John C. Warren, informed the Employee that the M V Panther was in Port from about 10:00am on February 19, 1996, and although he knew it was to unload eleven (11) containers and load most of the empty containers he did not start to get the empties organised until after the ship started to unload the full containers with the result that the ship was delayed as it was not possible to move the equipment that the ship required. Also, when it became time for the ship to depart it was held up for two hours as the Employee had not received the Port Authority clearance and he had to search for someone to sign the documents – he was given a written warning of dismissal – see Exhibit JS5.
- [13] On July 29, 1996, a motor vessel, M V Vanguard, docked at the Port and the Employee, Gary Benjamin, an Operations Clerk, and Edward Pyle, Sales and Operations Supervisor, were assigned to “work” it until it left. Instructions were also given by Mr Nathan Dundas, the Manager of the Shipping Department, to plug in two of the containers, one frozen and one chilled. The Employee and Mr Benjamin started to “work” the vessel at about 10:00am and did not finish until about 1:00am the following morning. The employees failed to plug in the chilled container – as they were going home Mr Benjamin informed the

Employee that the chilled container could not have been plugged in as all the plugs had been used; also, that the cord on the container could not reach the plug from where the container had been left. When the Employee received the information it was after 1:00am and he was not able to do anything about it as all the workers had gone home and the Port was empty (the drivers had left). The container in question could not be moved as it was blocked in by another container and there were no drivers available to move it.

- [14] The Employee was unable to return to work until about 11:00am as he was tired and had to transport his mother to the airport to take a plane to Puerto Rico for an operation. Mr Benjamin arrived at work at about 8:00am but did not plug in the container and it was finally plugged in by Mr Dundas at about 9:30am.
- [15] The container was found to have defrosted and the contents damaged and a large claim for the loss was made to the Employers.
- [16] When it arrived on August 2, 1996, the vessel, Seaward, was unable to dock as the dues had not been paid and the clearance documents had not been provided. As a result of the foregoing the clearance of the vessel was delayed for more than one hour and could have resulted in the loss of the agency and the discontinuation of calls by the ship to Antigua.
- [17] By letter dated August 2, 1996, the Employee was dismissed on the grounds of negligence in relation to the chilled container and negligence in relation to clearance for the M.V. Seaward – See Exhibit JS7.

- [18] When he was dismissed the Employee was paid \$ 40,094.45, but his Thrift Fund was confiscated on the ground that he borrowed a television set from the Employers and had not returned it – this was subsequently resolved.
- [19] Subsequent to the dismissal the Employee was out of work for a year and at the end of which he got a job with an agency @ \$ 700.00 per month – he had made application to several Shipping Agencies including Carib Seas, Francis Trading and Vernon Edwards. Applications were also made to entities outside the Shipping industry e.g. Star Agencies where he works part-time @ \$ 700.00 per month – he now has his own shipping business.
- [20] The Employee said that he was surprised that the container had defrosted and the contents spoiled as he thought that the container had to remain unplugged for at least 24 hours before this could occur.
- [21] The Employee was senior to Mr Benjamin and when he was appointed Operations Clerk he was given a Job Description in which his duties were set out.

Triable Issues

- [22] The principal issues for determination appear to be:
- (a) Was the container plugged in while it was on the vessel until it was unloaded?
 - (b) Was the Employee the senior Operations Clerk attending (working) the vessel "M.V. Vanguard" on which the container in question was loaded?
 - (c) Was the Employee under a duty to plug in the container after landing or to ensure that it was plugged in?

- (d) For how long could the container remain unplugged without defrosting and causing damage to the contents?
- (e) Was clearance of the vessel, M.V. Seaward, the duty of the Employee and was he negligent in connection therewith?
- (f) Was the Employee negligent in relation to the chilled container and clearance of the M.V. Vanguard?
- (g) Was the Suspension fair?
- (h) Was the Employee negligent in failing to inform the Employers on the opening of business on the following morning that the reefer container had not been plugged in.

The Arguments

[23] In his submission, Mr Fearon asked the Court to find that the Employee was not Negligent as alleged or at all and that the dismissal was unfair. Counsel contended that, among other things:

- (a) The Suspension was contrary to the provisions of the Labour Code and the Employee is entitled to his salary for the two weeks when he was suspended.
- (b) It took about 24 hours for a reefer container to defrost.
- (c) Reefer containers had previously been left unplugged for more than 12 hours without defrosting and damage to their contents and it was not unusual for them to be left at the Port unplugged for more than 12 hours.
- (d) Gary Benjamin and the Employee were assigned to "work" the vessel but they had separate functions, were not assisting each other and the Employee was not responsible for the plugging in of the reefer container.

- (e) Although the Employee was senior to Gary Benjamin, Benjamin did not report to him or look to him for guidance.
- (f) It was of no significance that Employee was senior to Gary Benjamin in years; Benjamin was given the task of plugging in the containers and the Employee had completed his tasks without incident.
- (g) When the Employee was informed that the container had been left unplugged the Port had already been closed.
- (h) The Employers failed to produce any documentary evidence of the claim made against them by the consignees of the container and the evidence of Nathan Dundas on this point should be rejected.
- (i) The Ryan Recorder shows that at no time did the temperature go below 40°F, was as high as 60°F and 40°F to 50°F throughout the voyage. Also, that it reached its highest peak when it was left unplugged at the Port.
- (j) The container had not started to defrost when it was plugged in.

[24] Mr Simon asked the Court to find that the dismissal was not unfair and that the Employee had been negligent both in relation to the chilled container as well as clearance of the M.V. Panther for which he had been given a written warning by Mr Warren and M.V. Seaward. Counsel submitted that, inter alia:

- (a) The Employee failed to perform his duties satisfactorily following an earlier warning on February 20, 1996, by the Managing Director.
- (b) The Suspension and allegation of undue and unwarranted pressure by the former Manager, Mr Jeffrey, did not play any part in the decision to terminate the employment and should be disregarded and discounted.
- (c) The Employee's duties included the preparation and delivery of port clearance documents and supervising the entry in the Tally Sheet and these were not disputed.

- (d) The reasons for the failure and delay with regard to the M.V. Panther, alleged by the Employee were never brought to the attention of the Employers and in his evidence he admitted that he forgot to collect the clearance documents.
- (e) The dismissal was precipitated by:
 - (i) Failure to plug in or ensure that a reefer with chilled vegetables was plugged to an electricity socket following its offloading from the M.V. Vanguard.
 - (ii) Failure to obtain prompt clearance of "M.V. Seaward" by securing the delivery of the necessary documentation and cheque.
 - (iii) The above failures coming after the warning previously given in February, 1996, alleging negligence by the Employee in the performance of his duties.

The Law

- [25] The Law relating to Suspension and Dismissal is set out in the Antigua and Barbuda Labour Code, Cap. 27, Laws of Antigua and Barbuda, Revised Edition, 1992, ("the Labour Code") as follows:
- (a) An employer may suspend an employee but a Suspension for an indefinite period shall be unlawful.
 - (b) By Section C 56 every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by the employer and no employer shall dismiss any such employee without just cause.
- [26] Section C 58 (1) provides that a dismissal shall not be unfair if the reason assigned by the employer therefor:

- (a) Relates to misconduct of the employee in the job within the limitations of Section C.59 (1) & (2).
- (b) Relates to the capacity or qualifications of the employee to perform work of the kind he was employed to do within the limitations of Section C. 59(5).
- (c) Is that the employee was made redundant.
- (d) Is that the employee could not continue to work in the position he held without contravention (on his or the employers part) of a requirement of law; or
- (e) Is prolonged illness or some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held.

Provided however that there is a factual basis for the assigned reason.

- [27] Section C 58 (2) lays down the test to be applied in determining whether a dismissal is reasonable.

The Decision

- [28] When determining whether a Dismissal is Unfair great care has to be taken to arrive at a decision in keeping with the evidence as otherwise an innocent employer can be called upon to, inter alia, pay compensation, sometimes substantial, to a guilty employee and suffer double jeopardy. On the contrary, an innocent employee who was wrongfully thrown out of a job can be deprived of his equity in his job and his livelihood; he may have bills to be paid and other expenses, some critical, e.g. house rent, a mortgage, hire purchase payments and school fees, to mention but a few. And there is no guarantee that he will find another job or be able to start his own business or both within a reasonable time. An innocent employee may have to suffer the

hardships, inconvenience and sacrifices associated with unemployment. Further, Antigua and Barbuda is a very small State with but a very limited job market. The foregoing factors have compelled such persons to emigrate.

[29] The Employee, in his evidence, said that he was surprised that the container should have defrosted and the contents spoilt within the period it was unloaded and when it was plugged in, less than 12 hours, and that normally a chilled container could remain unplugged for 24 hours without harm to the contents. Also, that during the 17 years he worked there chilled container had remained unplugged at the Port for similar periods without any damage to the contents. The foregoing suggests that the container must have been unplugged while aboard the vessel. It would appear that there is an error in the Employee's evidence as even though Mr Benjamin, at one stage, supported the 24 hour theory in cross-examination this was changed to 12 hours.

[30] It is to be noted that the Ryan chart that accompanied the container recorded the temperature from the point of loading and this shows that the container was plugged in while on board the ship and the major rise in temperature occurred while it was left unplugged at the Port. However, the chart also shows that from the time it was loaded onto the ship the temperature was above the maximum efficiency advised – See the “Ryan Recorder” – Exhibit ND6. When the refrigerator was loaded onto the boat the temperature was recorded at 70° and throughout the journey it was never below 40° - it appears it was at 45° when it was unloaded (at the end of the journey) and the temperature went up to 80°.

[31] The Employee denied he was a Senior Operations Clerk and that it was his responsibility to see that the container was plugged in before leaving the Port

or at the earliest opportunity thereafter. It is an inescapable fact that the Employee and Mr Benjamin were assigned to work the vessel on the date in question and this included the unloading of reefer containers and having them plugged in where necessary or required and the loading of the empty containers. On his own admission the Employee started working with the company in 1979 and was appointed an Operations Clerk in about 1980. Mr Benjamin, on the other hand, started working with the company in 1996. Even if he was not specifically so addressed, in view of his years of service and experience, the Employee can be regarded as senior to Mr Benjamin and as such expected to act with greater responsibility which included either plugging in the chilled container itself or ensuring that it was plugged in, in view of the consequences if it were not; alternatively, if there was no possibility of the container being plugged in on the night in question the Employee should at least advise Mr Dundas or some other member of staff of the situation and request that the issue be dealt with at the earliest possible moment, i.e. most expeditiously: this is so even if he had a personal emergency and had to transport a family member to the airport to catch a flight to Puerto Rico for a surgical operation as he testified. I believe the Employee could have alerted the office at a reasonable time – he did not alert anyone and it was not until 10:30am that he saw and spoke with Mr Dundas, i.e. after he had reported for work and after Mr Dundas had summoned him to a meeting to explain why the container was not plugged in the night before.

- [32] With regard to the clearance of the vessel, Seaward, preparation of the clearance documents and the Port Authority cheque, if these were part of the duties of the Employee and within his Job Description, as Senior Operations Officer and his years of experience it would have been his duty to ensure that they had been done before the vessel's arrival and thereby prevent any delay in port. The tasks were never done. But the Employee contended that he was

not told by Mr Dundas or Mr Pile at any time to work the boat or was assigned to it. He added that he was on holidays at the time. Some support for this is to be found in the evidence of Gary Benjamin who testified that he was the one assigned to that vessel and no one else was assigned with him. Further, that it was his duty to present the documents but did not do so as he did not have any transport.

The above must be read in conjunction and side by side with the testimony of Mr Dundas who said that a single person was never assigned to work a boat. Also, it is somewhat curious that the Employee admits that he was at work clearing the Vanguard on July 29 – he strongly contends that the delays were not attributable to him as he was but accidentally on the premises on the day in question as he had given Mr Benjamin a ride to work and proceeded to prepare the documents and clear the boat as an act of voluntary assistance only. The chart shows that the Employee was not on vacation on August 2, 1996 – See Exhibit ND3.

If he was assigned to the boat and failed to have it cleared in time, in my view, the Employee would have had to carry the blame for the delay as he was the longer serving operations clerk, more experienced and thus, expected to play the senior rôle and shoulder the principal responsibilities. Information re the arrival of boats are given prior to their arrival and a possible explanation was that the Employee was on vacation when this information was given and so did not know of it, if his explanation is to be believed.

- [33] To be negligent in relation to his duties it has to be shown that the Employee failed to do something that he was required to do or to have done so recklessly or without reasonable care, i.e. such care as was to be expected from someone in his position. This would include failure to show that the container had been plugged in at the earliest possible time after it was unloaded from the vessel and to obtain clearance of the ship before it arrived

at the Port of St John's and thereby avert the delay, in my view, these were acts of Negligence but they were not conclusively proved as attributable to the Employee and, in the circumstances, I would hold that the dismissal was not fair. But the Employee contributed to the Negligence re the chilled container by failure to inform his superior of this within a reasonable time and I would assess his liability at 33 1/3%. It should be observed that temperature recommendations under the Ryan Code were exceeded from the time of loading to discharge of the vessel and seemed to have escalated while the container was left unplugged at the Port.

[34] With regard to the Suspension, Section C4 of the Labour Code forbids discrimination on various grounds, including Religion and a Suspension based on this ground will not be maintained. The Employee was a member of the Adventist Faith, which believes that Saturday is the Sabbath day and the day of rest and when he declined to work the vessel on a Saturday but to go to Church instead the Employee was carrying out the teaching of his Religion. Thus, to impose a Suspension upon the Employee in the circumstances is in conflict with the above provision of the Labour Code and cannot stand. The Employee is thus entitled to his salary for the two weeks during which he was suspended without pay.

[35] With regard to the Television set there is no evidence to support any of the allegations, one would accept that if the Employee was indebted to the Employers for a Television Set then they are entitled to their money. No evidence has been given of the market value of the Television Set.

[36] Subsequent to the dismissal the Employee did not remain at home and "put up his feet" but endeavoured to find new and alternative employment and

eventually started his own business and I am, therefore, satisfied that he mitigated his loss.

The Award

[37] At the time of delivery a clerical error was discovered in the calculations and I would invoke Section 25(3) of the Industrial Court Act and rectify same as follows:

On his dismissal the Employee received:

(a)	Basic Award (17 ½ months @ \$ 1,989.83).....	\$ 34,822.03
(b)	Car Allowance (2 days).....	\$ 24.19
(c)	Vacation Pay (39 days).....	\$ 3,581.69
(d)	Christmas Bonus.....	\$ 839.98
(e)	Pay in lieu of Notice.....	\$ 1,989.83
		\$ 41,257.72

He was entitled to have received in addition

(a)	Overtime pay for the last month of his employment.....	\$ 228.00
(b)	2 weeks' suspension pay for October 1992.....	\$ 918.38
		\$ 1,146.38

A victim of Unfair Dismissal is eligible for compensation under the established heads:

- (a) Basic Award – The Award is one month's pay for each year of service or substantial part thereof. In this instance the amount of the Award shall be 17½ x \$ 1,989.83 totaling \$ 34,822.03 (which he received).
- (b) Immediate Loss – I would award 3 months pay i.e.
- | | |
|----------------------|-------------|
| \$1,989.83 x 3 | \$ 5,969.49 |
|----------------------|-------------|

Car Allowance i.e. \$ 275.00 x 3	\$ 825.00
Overtime pay i.e. \$ 228.00 x 3	\$ 684.00
	<u>\$ 7478.49</u>
	=====

- (c) Manner of Dismissal – No Award.
- (d) Future Loss – The Employee obtained a job at Jasco Agency @ \$ 700.00 per month after a year which was a loss of \$ 1,289.83 x 6 = \$ 7,738.98.

It has already been said that the Employee was contributorily negligent to the extent of 33 1/3 %. This amount I would deduct from the amounts listed at paragraphs (b) and (d) immediately above, i.e. \$ 7478.49 + \$ 7,738.98 = \$ 15,217.47 - \$ 5,072.49 = \$ 10,144.98.

To this is to be added overtime pay for the last week of service and the 2 weeks' suspension pay in October, 1992, i.e. \$ 228.00 + \$ 918.38 = \$ 1,146.38 = \$ 11,291.36.

Conclusion

- [39] The Employer shall pay to the Employee the sum of \$ 11,291.36 payment to be made by the 7th day of November, 2003. There shall be no Order as to Costs.

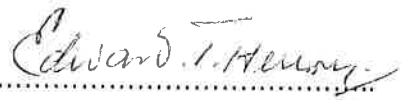
DATED the 22nd day of

September 2003

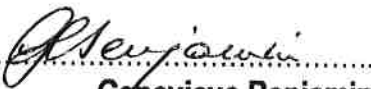


Cyril L. Maundy
 President

I concur


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Edward T. Henry
Member

I concur


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Genevieve Benjamin
Member