

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 16 OF 1998

BETWEEN:

EDWARD SMITH

Employees

and

STANFORD FINANCIAL GROUP LIMITED

Employers

Before:

Cyril L. Mauncy
Hubert Hood
Genevieve Benjamin

President
Member
Member

Appearances:

Charlesworth Browne, Barrister-at-Law, for the Employee
Justin L. Simon, Barrister-at-Law, for the Employer

2001: February 5 & 6
March 13
May 28

JUDGMENT

Unfair Dismissal- Manager of a bank part of a financial group of companies induced to relinquish his post by a promise from CEO that he will be promoted and appointed Manager of a new company, a brokerage company, to be formed by the group - Employee given time off to study for Brokerage License examination for new company - employee contributed to the increase of the Employer's assets from US\$ 50,000,000.00 to US\$ 500,000,000.00 in about

eight (8) years and the growth and expansion of the business – Employee told by C.E.O. that if brokerage company did not materialise he would be reinstated in his previous position or himself and his family would be relocated to the United States where he would be given a position in one of the Employers' businesses there – Employee was to receive a 10 – 15% salary increase, bonus for 1997 and would have to report to CEO – between giving up his job and formation of brokerage company, Employee was to be employed by Stanford Financial Group Limited – Employee relinquished his position as agreed – formal letter of appointment made no mention of several previously agreed terms and conditions for new appointment – shortly after appointment and without warning Employee asked to vacate his office and had to move to a room that was being used for storage, and was not prepared and was unable to function – Employee had no furniture, no Job Description and no work to do – Employee consistently complained of his situation but these were ignored by Employers – Employee frustrated and humiliated – Employers ignored Employee's repeated cries for dialogue and implementation of promises made – Employee resigned position out of frustration and boredom.

- [1] **MAUNDY, P.:** By a Reference dated and filed on 6th the day of November, 1998, C. Browne, Solicitor for the Employee notified the Court of a trade dispute between the Employers and the Employee. By Memorandum dated and filed on the 6th day of November, 1998, the Employee alleged that he was unfairly dismissed by the Employers on the 7th day of May, 1998, and is entitled to compensation for Unfair Dismissal. In the Memorandum filed on the 19th day of January, 1999, the Employers denied that the Employee was dismissed or that he was entitled to an compensation.

Historical Background

- [2] In 1989 (September) the Employee started working at a bank within the Stanford Group of Companies, Stanford International Bank Limited, formerly Guardian International Bank Limited, as Assistant Vice President. The Employee had founded the bank and in January, 1990, was promoted to Vice President.
- [3] The bank formerly operated out of Montserrat but following the damage done there by Hurricane Hugo in 1989 it relocated to Houston, Texas, and in 1991, in Antigua; the Employee's title was changed to Manager.
- [4] Between 1989 and 1997 the bank experienced immense growth and its assets increased from about US\$ 50,000,000.00 to about US\$ 500,000,000.00 – the staff was increased from about 5 to 25 employees.
- [5] The Employee reported directly to Allen Stanford, the President and C.E.O. of the Employers.
- [6] In 1997 (the first week of November) the Employee was working as Manager of Stanford International Bank at Coolidge Boulevard, Coolidge, Antigua, and was offered a transfer to a brokerage company to be formed. A Brokerage License and a Principal License were required for the new position and the Employers promised to sponsor the Employee as required. The Employee accepted the offer, relinquished his post, and began to prepare (study) for his Brokerage License and Principal License exams and had no substantial job functions although he received a salary pending incorporation of the new company.

[7] The offer was made on the afternoon of November 3, 1997, via a telephone call from Allen Stanford, who told him that he was to vacate his position forthwith as Manager, "Vice President" with the Employers' predecessor and in consideration for doing so he would:

- (1) be promoted from Senior Vice President within the Group to Senior Vice President, Financial Services Development and be responsible for establishing a new business, viz, "Stanford Group, Antigua."
- (2) receive a higher bonus than that of the previous years.
- (3) give a guarantee that his basic salary and allowances would be increased by about 10 – 15% between \$ 324,000.00 and \$ 351,000.00 per annum.
- (4) continue to report directly to him.
- (5) guarantee, facilitate and finance the Employee's entry into and successful completion of selected courses of studies towards a Brokerage Licence and a Principal's Licence.
- (6) upon completion of the said courses of study grant him an additional bonus of US\$ 25,000.00 by the end of May, 1998. Also, that he would be promoted to President of "Stanford Group, Antigua".
- (7) Becoming President of Stanford Group Antigua, would enable him to obtain shares in the stock of the new company. Also that: in the unlikely event that the new company did not materialise the Employee would have an option to: either
 - (a) being reinstated in his former position as Manager with the Employers' predecessor, or
 - (b) relocated to the U.S.A. with his family and take up a new position in the Group of Companies commensurate with his experience and status.

- [8] During the transition (the period between giving up his post at Stanford International Bank (on October 10, 1997) and the formation of the new company, Stanford Brokerage Limited) the Employee was to be employed by Stanford Financial Group Limited as Senior Vice President, Financial Services Development Limited with a number of benefits – when he offered the Employee the new position Mr Stanford also offered him a number of very attractive terms and conditions and, based on these, the Employee had agreed to termination of his post.
- [9] By letter dated December 1, 1997, the Employee's services as Manager of Stanford International Bank were formally terminated in keeping with the earlier agreement with Mr Stanford – see ES1.
- [10] By letter dated December 8, 1997, the Employers (Stanford Financial Group Limited) confirmed in writing their offer to the Employee of the position of Senior Vice President, Financial Services Development at their offices at Gambles St John's, Antigua, the appointment to be retroactive to December 1, 1997; however, a number of matters that the parties had agreed upon during their discussions and negotiations were omitted therefrom – Exhibit ES2 – the letter was written by Mona Quintyne, the Director of Human Resources.
- [11] The Employee refused the Contract on account of the terms set out in the letter of December 8, 1997, had discussions on the matter with Mona Quintyne, and finally both of them agreed to inform Mr Stanford of the omissions in the Weekly Management Reports they used to make to him.
- [12] On November 3, 1997, the Employee, while in his office, was visited by one, Frans Vingerhoeldt, and told that Mr Stanford had asked him to instruct the

Employee to vacate his office as soon as possible. The employee went to Gamble Medical Centre where Stanford Trust Company Limited has some offices and occupied one that was vacant – the office was used for storage and he had to move crates and other objects as it was not habitable or usable as an office.

- [13] The office was not fitted out, equipped or of the standard of the Employee's previous office.
- [14] At the time when the Employee was ordered to vacate his office he was Senior Vice President, Financial Services Development, had no functions, no Job Description and did not have anything to do. The Employee's status was dramatically reduced – within 24 hours from being the decision maker and responsible for the largest operation in the entire group of companies, supervising 25 employees, he was relegated to a position with nothing to do and no staff (subordinates).
- [15] The Employee remained in the position of Senior Vice President, Financial Services Development until May 7, 1998, hoping that the Employers would implement the promises earlier made to him and continuously asked the Employers to implement the terms and conditions they agreed were to go with the position. As a result of the Employers' failure to respond to his letters and requests and the horrid state to which he was reduced the Employee became frustrated and resigned his position.
- [16] During the above period the Employee communicated regularly with Mr Stanford complained about his situation and asked him to fulfil the terms of their agreement – he sent him memos every week and wrote him two major letters, one of January, 1998, and the other in May, 1998 – See Exhibit ES3.

Mr Stanford ignored the letters and never addressed the Employee's complaints. The Employee used to send a Report to Mr Stanford on the Friday of each week (the weekly report) stating all the developments of that week, including matters that he should know and matters that needed his attention: the company had a back-up system to ensure that the Reports were received by Mr Stanford. In the past Mr Stanford used to respond to the Reports but he did not respond to any of those sent to him by the Employee during this unsettled period (November, 1997, to May 7, 1998).

- [17] On the morning of November 3, 1997, when Mr Frans Vingehoedt, arrived at the Employers' principal business place at Coolidge with the instructions from Allen Stanford and took control of the business, a notice was circulated to the staff that the Employee had been re-assigned. The Employee had no knowledge that he had been re-assigned.
- [18] By letter dated December 1, 1997, the Employee's services with the Employers' predecessor were formally terminated with immediate effect as previously agreed (See ES1).
- [19] In breach of their agreement the Employers failed to, inter alia, pay the agreed bonus increases, increase the Employee's Salary, facilitate the agreed course of study, sponsor the Employee to sit the exams for the Brokerage License and the Principal's License and other matters previously agreed.
- [20] By letter dated May 12, 1998, Solicitors acting for the Employee, Lake & Kentish, wrote to the Employers claiming compensation for Unfair Dismissal but invited the Employers to dialogue with them in connection with the matter – See ES17.

- [21] By letter dated May 21, 1998, the Employers denied that the Employee was Unfairly Dismissed. The matter was referred to the Labour Commissioner but the parties failed to arrive at a settlement and so the Employee decided to seek compensation in this Court.
- [22] The Employee completed the course of studies for the Brokerage License examination but did not sit the examination as to do so he had to have a sponsor and the Employers declined to sponsor him.
- [23] Specific letters by the Employee (Reports) were made dated December 12, 1997 (ES5), December 24, 1997 (ES8(1)), January 16, 1998 (ES8(3)), January 23, 1998 (ES8(4)), February 13, 1998 (ES8(5)), March 13, 1998 (ES8(6)), January 13, 1998 (ES9), January 26, 1998 (ES10), March 27, 1998 (ES11), the Employee had complained about his position, the way he was being treated, that he had no Job Description, that he was not being given any work to do, that Mr Stanford failed to implement the terms and conditions agreed with him before he relinquished this post and which induced him to give up his post as Senior Vice President of Stanford Financial Group Limited.
- [24] By letter dated May 7, 1998 (See ES12) the Employee had again written to Mr Stanford and complained about the failure to implement the previously agreed terms and conditions of his employment, his dissatisfaction with the manner in which his matter was being handled, that he had not been assigned any tasks since November, 1997, that he has not been advised of matters related to the brokerage project, his failure to re-instate him in his previous post and that it appeared that plans regarding the brokerage company were not really meant to include him and the real intent was to

move him out of the way and the tactics employed by him over the last several months since November, 1997, were to frustrate him into leaving his employ.

- [25] The Employee, as a result of the frustration, had been compelled to leave the employment on May 7, 1998 – he was paid his salary up to May 15, 1998.

Triable Issues

- [26] From the evidence the issues to be determined seem to be:
- (a) Did the Employers provide the Employee with a written statement of the terms and conditions of employment
 - (b) Was there a breach of Contract by the Employers
 - (c) Was the breach a fundamental breach
 - (d) Was the Employee Constructively Dismissed
 - (e) Did the Employee mitigate his loss

The Arguments

- [27] Counsel for the Employee, Charlesworth Browne, contended that, inter alia:
- (a) By their conduct, the Employers repudiated the Contract of Employment and brought the relationship to an end.
 - (b) The Employee was induced to relinquish his position with Stanford Financial Group (the predecessor) by representations made to him by the predecessor employers, which were never fulfilled.
 - (c) The Employee was Constructively Dismissed.
 - (d) The Employee is entitled to compensation for Unfair Dismissal.

- [28] In his submission Mr Browne asked the Court to find that:

- (a) Under the Labour Code, Cap. 27, the Employee has a right not to be Unfairly Dismissed.
- (b) The Employee's evidence was un-controverted.
- (c) The Employee was constructively dismissed.
- (d) The Employers, by their conduct, repudiated the contract of employment.
- (e) The Employee was forced to terminate his services with the Employers on May 7, 1998, because of the treatment to which he was subjected.
- (f) The Employee's length of service, past record and relationship with the Employers are important elements for consideration by the Court when examining the conduct of the parties.
- (g) The Employers' failure to honour their obligations in full led, eventually, to the termination of the agreement in May, 1998.
- (h) The Employee and Mr Stanford came to an oral agreement whereby the Employee would vacate his position as General Manager of Stanford International Bank and take up a new appointment as Senior Vice President of Stanford Financial Services Development with effect from November 4, 1997.
- (i) The Employers never fulfilled their promises to the Employee (their side of the bargain).
- (j) The Employers failed to honour their obligations in full and this eventually led to the termination of the agreement.
- (k) The Employee was constructively dismissed.
- (l) The Employee persistently sought, through his weekly reports, to dialogue with Mr Stanford hoping to get him to honour his obligations or at least communicate with him but Mr Stanford maintained a cold silence and refused even to acknowledge the several

communications from the Employee and this would have caused anyone in the Employee's position to become bored and frustrated.

- (m) For six (6) months the Employee had no Job Description and was not assigned any tasks whatsoever, in breach of the Common Law obligation of an employer to provide work for an employee.
- (n) The Employers' conduct demonstrated an intention not to be bound by the oral contract of employment and to get rid of the Employee.
- (o) The Employers did not act reasonably re the Employee or in the best interests of good industrial relations.

[29] In support of his contentions Mr Browne cited the following:

- (1) Woods V V.M. Car Services Limited (Peterborough) Limited (1982) 1CR666
- (2) Western Excavating (ECC) Limited V Sharp (1978) All ER 713
- (3) John E. McGlyne – Unfair Dismissal Cases 2 Ed. 1979 paragraphs 100 – 128 esp. 100, 109, 112, 116, 118, 120, 127
- (4) Halsbury's Laws of England 4th Ed. 1976 vol. 16 – paragraphs 573, 615, 616
- (5) Stephen D. Anderman – The Law of Unfair Dismissal 2nd Ed. 1985 pages 63 – 73 and 82 – 94

[30] In his submission Mr Simon asked the Court to reject the Employee's claims and submitted that:-

- (a) It is an established principle of the law of compensation that an employee so claiming must firstly establish that he has suffered pecuniary loss as a result of the unfair dismissal and that he was worse off in respect of his remuneration package (actual and potential) subsequent to his alleged unfair dismissal

- (b) Even if the court were to hold that the Employee was in fact unfairly dismissed (which is denied) the Employers contend that the Employee, given the particulars of his alternative employment, did not suffer loss and would not, therefore, be entitled to any compensation in respect of future loss, loss of fringe benefits and loss of pension rights.
- (c) There was no annual pension and no pension scheme in place and these should be rejected.
- (d) On July 9, 1998, the Employee was appointed Receiver-Manager of American International Bank Limited (in Receivership) and admitted, under Cross-Examination that his remuneration there was "in excess of his salary and allowances at Stanford Financial Group Limited" and based on a percentage of assets realised. In fact, the Employee admitted swearing an Affidavit on June 23rd, 1999, in which he stated that he had, "actually drawn US\$ 509,956.15 and EC\$ 72,492.00 based on assets of US\$ 11,950,245.96 (of the bank) realised to date. No loss was suffered in respect of Future Loss and Loss of Fringe Benefits. Also, the projection of four (4) years loss is arbitrary and unreasonable and must be rejected in the circumstances.
- (e) The Employee is not entitled to 35 days vacation. Counsel conceded that the Employee was entitled to the 5 days claimed for the period January to May, 1998, but rejected the claim for 30 days (for the period 1996 to 1997) – the Employee has been unable to state how many days vacation he took in 1997 and he has no record thereof. Finally said Counsel, the Employee's entitlement was to eleven (11) days only.
- (f) The Employee was not dismissed but walked off the job, i.e. he abandoned the job.

- (g) 20 (a), (e), (f), (g), & (h) are devoid of substance while given the timeframe for establishment of the brokerage business.
- (h) To be able to claim Constructive Dismissal the Employee has to establish that:
 - () There was a breach of Contract by the Employers
 - (i) the breach was sufficiently important to justify the resignation or must have been the last of a series of incidents which justified his leaving
 - (ii) He left the employment in response to the breach and not for any other reason
 - (iv) He did not delay too long in terminating the Contract in response to the Employers' breach

[31] There was no breach of any fundamental term of the Employee's Contract in the evidence or on the pleadings.

[32] The Employee was not entitled to any costs.

[33] In support of his contentions Mr Simon relied on the following:

- (a) Norton Tool Co. Ltd. V Tenison (1973) 1 AER 1983
- (b) Civil Appeal No 6 of 1992 – Antigua Village Condo Corporation V Jennifer Watt
- (c) Western Excavating (ECC) Ltd V Sharp (1978) 1 AER 713
- (d) Civil Appeal No 14 of 1993 – Phillip Abbott V LIAT (1974) Ltd
- (e) Danzlear Dublin V Royal Bank of Canada, Ref No. 15 of 1983
- (f) Theodore Isaac V Savoy Resorts Reef – Ref No. 25 of 1990

The Law

[34] The rights and duties of employees and employers are contained in the Antigua and Barbuda Labour Code, Cap. 27, Laws of Antigua and Barbuda, Revised Edition, 1992, hereinafter referred to as “the Code” which is the pillar of our Labour Law and the “bible” thereof. In the case of the Employee “the Code”:

- (i) protects an employee against unfair dismissal once he has completed his probation, i.e. the first three (3) months of his employment – See Section C.56 which provides thus, “Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer; and no employer shall dismiss any such employee without just cause.” The Employer is not denied a right of dismissal, however, dismissal must be fair and for a just cause and these are two of the questions that the Court will ask itself.
- (ii) The Code is not a “Worker’s or Employee’s Code” designed to promote the rights or claims of employees but also gives certain rights of dismissal to the Employer who may dismiss without penalty if he acts in accordance with its provisions. Thus, under Section 56 the Employer may dismiss with impunity where the Employee has not completed his probation (3 months employment) or where the dismissal is fair or there is a just cause.
- (iii) Section C.57, C.58 and C.59(1) permit the employer to terminate the services of an employee without liability in the specific circumstances stated therein. These Sections provide thus:

(i) C.57: An employee will not be deemed to have been dismissed unfairly if his employment is terminated at the expiration of the term specified at the time of his hire."

(ii) C.58(1), A dismissal shall not be unfair if the reasons given by the Employer therefor:

(a) relates to misconduct of the employee on the job, within the limitations of Section C.59 (1) and (2);

(b) relates to the capability 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 on the employer's 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.

(iii) C 59(1) "An Employer may terminate the employment of an employee where the employee has been guilty of misconduct in or in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes but is not limited to situations in which the employee has

conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue.”

[35] En passant it may be observed that as a general rule Dismissal/Summary Dismissal should not be invoked for a first “offence” unless it falls within one of the exceptions, viz, gross misconduct or where the employee was caught in flagrante delicto. Further, there should be an investigation where a wrong is alleged against the employee who must be given an opportunity to answer the allegation against him.

[36] Costs should only be awarded in exceptional cases.

The Decision

[37] In this matter Mr Simon provided some strong arguments in an attempt to persuade the Court to dismiss the Reference and careful consideration was given to his contentions. At the same time, Mr Stanford, the principal party for the Employers, never appeared to give evidence and thus the Court was deprived of the opportunity to hear the Employers’ account of what happened and so be in a better position to arrive at a fair and just determination of the matter. Of course, I have not allowed the non-appearance of Mr Stanford or anyone else to be interpreted as guilt or to mean that on that basis or because of that failure the Employee’s evidence should be accepted without scrutiny and despite any inconsistencies therein. To my mind the whole of the evidence has to be examined and analysed and this is what was done.

- [38] None of the Employee's evidence has been rebutted by evidence to the contrary nor did the Cross Examination adduce any reply that negated the principal contentions of the Employee.
- [39] In arriving at a decision I carefully considered the evidence of the Employee and that of the Employers' witness, the contentions of Counsel, the decided cases, the works of authority cited, the relevant provisions of the Antigua and Barbuda Labour Code and the Industrial Court Act, Cap. 214, Laws of Antigua and Barbuda, Revised Edition, 1992, and after much thought I find for the Employee and that it was a case of Constructive Dismissal, that the dismissal was unfair and that he is entitled to compensation for Unfair Dismissal. To my mind, there was a fundamental breach of the contract between the Employers and the Employee, a breach which went to the very core thereof. The Employee was abandoned by the Employers who gave him no Job Description, and no work to do, and ignored all his representations, thereby causing boredom and frustration to set in to an employee who previously controlled a workforce of twenty-five (25) persons and had built up the Employers' business to a multi million dollar enterprise, amongst several other major matters, and failed and/or refused to answer the Employee's weekly requests for dialogue, fulfilment of the terms agreed for his resignation as Manager of Stanford International Bank Limited and his new appointment as Senior Vice President, Stanford Financial Services Development.
- [40] It is interesting to note that the brokerage company which the Employee was to manage was never incorporated, nor did the Employers sponsor the Employee to sit the Brokerage Licensing Exam as promised so that the Employee was unable to obtain a Brokerage License or the Principal's License – no reasons for these were ever conveyed to the Employee and he was left in total darkness and isolation – "he was sent to Coventry".

- [41] From my calculations the Employee was entitled to half a month's holiday pay.

The Award

- [42] A person, a victim of Unfair Dismissal is entitled to compensation within the usual heads as follows:

- (a) **Basic Award for Loss of Protection:** The Award under this head is calculated similarly to Severance Pay and in the instant case is one month's pay for each year of service. The Employee worked with the Employers from September, 1989, to May 14, 1998, and his salary at the time of dismissal was \$ 21,375.00 per month so that the amount recoverable is \$ 21,375.00 x 8 years and 8 months i.e. \$ 185,250.00.
- (b) **Manner of Dismissal:** I make no award. No evidence was adduced to show that the dismissal made the Employee less employable or if employed, a prime candidate for dismissal.
- (c) **Immediate Loss:** The Employee was dismissed on May 7, 1998, (he was paid until May 14, 1998) and took up new employment on July 10, 1998, and was thus unemployed for approximately 2 months so that the Award here is \$ 42,750.00.
- (d) **Future Loss:** No Award – in his new position the Employee is receiving an increase in remuneration.

- [43] A dismissed employee is also entitled to the fringe benefits lost by the dismissal and in the instant case, these are as follows:

- (a) 2 months unlimited use of the company car @ \$ 1,520.00 per month, i.e. \$ 3,040.00

- (b) Group Health Insurance for two months @ \$10,000.00 per annum = \$1,667.00
- (c) Golf Club Membership for two months @ \$1,500.00 per annum, i.e.
 $\$125.00 \times 2 = \$250.00$
- (d) Gym Membership for 2 months @ \$1,500.00 per annum = \$250.00
- (e) Mortgage interest for 2 months @ 50% of \$124,416.00 = \$62,208.00
- (f) Annual Bonus \$21,375.00
- (g) Holiday Pay of \$10,687.50

[44] The sum total of the Award is thus \$327,477.50.

Conclusion

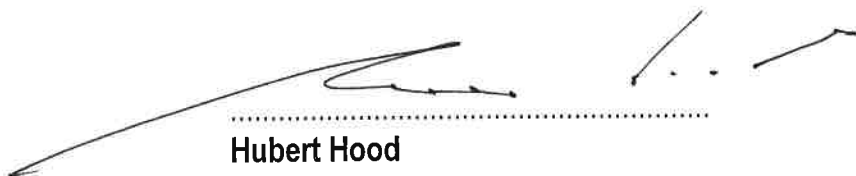
- [45] The Employee was constructively dismissed, the Dismissal was Unfair and the Employers will pay to the Employee the sum of \$327,477.50, payment to be made by the 30th day of September, 2001
- [46] There shall be no order as to costs.

DATED the 3rd day of September, 2001.



Cyril L. Maundy
President

I concur



Hubert Hood
Member

I concur



Genevieve Benjamin
Member