

THE INDUSTRIAL COURT

REFERENCE NO. 3 OF 1999

BETWEEN:

ST. LAWRENCE DEFREITAS

Employee

and

E. ALEX BENJAMIN LIMITED

Employer

Before:

Mrs. Nelleen Rogers Murdoch - Chairman

Mr. Hubert Hood - Member

Appearances:

Mr. Charlesworth Brown Solicitor for the Employee

Mr. John Fuller Solicitor for the Employer

2001: March 26, 28

August 1

JUDGEMENT

Unfair dismissal - retirement - employee in managerial position with nine (9) years service- initial contract silent on retirement - employee retired at age sixty - employee given approximately 2 ½ months notice of retirement - whether employment indefinite - whether retirement in the circumstances is unfair dismissal.

FACTS:

1. The Employee was employed by the Employer as the operations manager of the Benjies Printery from 1st May, 1989. His letter of employment makes no mention of retirement.

2. On 18th June, 1998 the Employee was given a letter indicating that he had been placed on retirement. The letter was delivered to him approximately 7 weeks prior to his 60th birthday (the date on which he was retired).

CLAIM

3. The Employee claims that he was unfairly dismissed as his letter of employment did not stipulate a retirement date and he was given no reasonable notice prior to being placed on retirement.

EMPLOYEE'S EVIDENCE

4. The Employee's evidence is that he was employed with Benjies Printery from May, 1989 as the Operations Manager. He was first employed from May 1st 1989 on a one year contract ("SLD1"), which contract expired on May 1st 1990. His employment continued with the company after 1st May, 1990 and he was subsequently employed on the permanent staff of the company. His salary on the permanent employment was \$66,000.00 per annum.
5. The terms and conditions of the Employee's employment were contained in a letter dated September 12th 1990 ("SLD2"). The said letter established the Employee's duties to be those he previously performed and other expanded responsibilities including management responsibilities and supervision of staff. His salary was increased and the contract provided for an annual performance review and salary. The letter contains no statement about retirement. His last salary was \$8,055.00.
6. The Employee stated that he worked for nine years with the company until June, 1998 when he was given a memo "SLD4" by Mr. Jerry Benjamin, a director of the company and the person who had overall responsibility for the Printery, indicating that the company was implementing a retirement age policy.
7. The said memo "SLD4" which is dated May 25th 1998, fixed a retirement age of 60, and contained a statement that the company reserves the right to re-employ any individual who reached the retirement age on an individual contract of employment, and indicating that persons over 60 whom the company intended to retain as Employees had entered into mutually

acceptable arrangements with the company. The Employee stated that he received the memo in June, 1998 approximately 11 weeks before his 60th birthday.

8. The Employee stated that prior to receiving this memo there had been no discussions between him and the Employer on the issue of a retirement age. He stated also that in his managerial capacity he had over the years advised the company, specifically Mr. Joseph Benjamin, on Industrial Relations matters, but that the matter of retirement had never been raised with him.
9. He stated that a few days after he received "SLD4" he contacted and spoke with Mr. Joseph Benjamin Chairman and Financial Controller of the company as Mr. Jerry Benjamin was out of the state, and asked him what effect the retirement policy would have on his employment with the company. He stated that Mr. Joseph Benjamin told him that no decision had been taken by the board about his employment, and that Mr. Jerry Benjamin, his immediate supervisor, would address that matter with him upon his return from overseas.
10. The Employee stated that he waited to hear from Mr. Jerry Benjamin on the matter and on 17th June, 1998, he visited Mr. Jerry Benjamin's office shortly after 9:00 a.m. and was given a memo dated 15th June, 1998 by Mr. Jerry Benjamin who commented on handing him the memo that he hoped the Employee would not get sick and have a heart attack.
11. The said memo "SLD5" was a rescheduling of duties at the Printery and was headed "New duties from August 05 1998". The Employee stated that the memo stated that following the Employee's retirement, his duties would be carried out by certain other staff members and the memo listed the duties and the staff members who would perform these duties. The Employee stated that prior to receiving this memo on June 17th he had had no discussions with Mr. Jerry Benjamin and had not been informed that the company intended to place him on retirement. He said that he believed that the said memo had been circulated to other members of staff who were assigned his duties so that other staff members were informed of his retirement before he was informed.

12. The Employee stated that despite the fact that he had no heart attack, he was hurt and embarrassed at the manner in which the Employer had handled this matter and that he went home quite upset and disturbed. He later wrote to the Employer on 18th June, 1998 expressing his concerns about the fact that he had received a memo dated 25th May, 1998 explaining a retirement age policy, he had enquired about its effect on his employment, he been told that Mr. Jerry Benjamin would contact him on the matter and was then given a memo which was already sent to other staff indicating that he had been retired. The Employee indicated that he considered this a cruel and unusual way to inform him of his retirement date and indicated that he considered that the document had effectively terminated his employment on or before 5th August, 1998.
13. The Employee stated that he received a letter from Mr. Jerry Benjamin dated 18th June, 1998 "SLD7" advising him that he should proceed on retirement on 10th August, 1998 (his 60th birthday) and indicating that he should take all vacation leave due to him prior to that date and requesting him to liaise with Mr. Jerry Benjamin for the purpose of having his vacation leave approved. He was also advised that the directors had approved an ex gratia payment to him in the sum of \$37,781.26 to be paid to him in monthly instalments at his salary rate for the period August, 1998 to December, 1998.
14. The Employee gave evidence that he received from the Employer the sum of \$37,781.26 from August to December, 1998 and that he subsequently contacted his solicitors to make a claim for unfair dismissal as he considered that he had been unfairly dismissed.
15. The Employee gave evidence that since 10th August, 1998, his effective date of termination he tried to find employment but was not very successful. He stated that immediately after he was retired he went into a business selling windows and doors from a Barbadian company. This employment was not very lucrative and he earned between \$25,000.00 and \$30,000.00 per year. He continued in this business until September, 1999 when he was employed with the Antigua Sun Printing Limited on a six month contract. From his employment selling windows and doors his expenses were about \$15,000.00 to \$18,000.00 per year so that his net earnings averaged \$11,500.00 per year. From September, 1999 to March,

2000 while working with the Antigua Sun he earned \$8,000.00 per month. Since March, 2000 he has tried to continue the business but his earnings have been negligible. He also gave evidence that he has tried to find other employment but that despite the fact that he is qualified, potential employers seem to consider the fact that he had been retired with some disfavour. He stated that on one occasion he got a reaction which suggested that his qualifications were good but that the employer wanted a younger person.

16. In addition to his salary the Employee stated that he had the benefit of two insurances at the company and from a 10% discount to which company employees were entitled when purchasing from the company's pharmacy. He stated that he saved on average \$500.00 per year from the discounts. He was also entitled to benefits from a medical insurance which covered his family and which included dental and visual coverage and that he benefitted to the extent of \$1,000.00 per year on this policy.
17. The Employee stated that since the end of the 6 month contract he has returned to selling windows and he has been unable able to find other employment. The Barbados company also has now appointed an established business as the agent for its windows and doors so that his earnings are even less.
18. The Chief Establishment Officer in the Government, Mrs Eusalyn Lewis was also called to give evidence. She stated that there was a mandatory retirement age for the Government of Antigua and Barbuda which was fixed at 60 pursuant to The Pensions Act, Cap. 311. This age is statutory mandated for civil servants, and has been so since 1980. She stated that the Act permitted voluntary retirement at 55 and that persons were also permitted to apply to the Governor General to be retired at 50. She also stated that this Act applied only to established workers as a different practice was employed for non-established workers. She also stated that pursuant to the Civil Service Regulations a notice of at least 12 months was required to be given to persons who were due to reach retirement age and that the practice was adhered to in that notices were issued by the Permanent Secretary so that the Establishment Division would ensure that all affected officers would have been given one year's notice in advance.

With respect to non-established workers 60 was treated as necessary though not a mandatory age and in such cases the officer would usually request retirement rather than be mandated to retire.

EMPLOYER'S EVIDENCE

19. The Employer's evidence was given by Mr. Joseph Benjamin the Chairman and Financial Controller of the Employer company. Mr. Benjamin did not in his evidence deny any of the particulars given by the Employee regarding his terms and conditions of employment, or his benefits under the employment contract, neither did Mr. Benjamin refute in any material particular the evidence of the Employee on the circumstances surrounding his retirement from the company.
20. Mr. Benjamin stated that in May, 1998 the company's directors took a decision after careful consultation with other businesses in Antigua to establish a retirement age policy. He stated that the matter had been under consideration for several months as the company felt that the average age of the staff made that time the most appropriate time to institute the retirement age policy. He stated that several other significant employers in Antigua with a sizeable number of staff had instituted a retirement age policy and that the age had been set at 60. He also stated that 60 was the established retirement age for government workers and that government employed a significant number of employees.
21. Mr. Benjamin further stated that the board having determined that there would be a retirement age, met with staff and informed them officially of the decision. He identified two persons who were immediately affected by the policy. The first was his personal confidential secretary, who was given a gratuity and who was retired at her request. The second person was the Employee.
22. Mr. Benjamin stated that the company in view of Mr. DeFretias' intended retirement had to put certain arrangements in place for the printery to continue smoothly. As a result Mr. Jerry Benjamin the managing director of the printery issued an internal memo to staff informing them of that arrangement. Mr. Benjamin stated that he was not himself consulted on this memo informing the staff.

23. He stated that Mr. DeFreitas was informed by circular memo in June, 1998 ("SLD5") and that the memo came to his hands prematurely and was not intended to offend. He also stated that the company had apologised privately to the Employee and had offered to do so publicly if Mr. DeFreitas wished. He stated that after the circular memo the Employee was subsequently officially informed and refused to accept his retirement. He was however requested to take his accumulated vacation and was paid a gratuity of over \$37,000.00 which represented just under 5 months salary.
24. The witness stated that since that time no one at the company has retired and that the age policy affected only one other person who was made redundant when the company's business was temporarily closed as a result of a fire on the premises.
25. On cross examination Mr. Benjamin was asked specifically about the manner in which the Employee's retirement has been effected. He stated that the Employee was treated the same as any other employee would have been (with respect) as he felt that all employees deserved respect. He stated that it was not the company's policy to consult with persons in management more on matters that affected them than with staff at a lower level as this depended on the nature and subject matter of the problem.
26. The witness admitted that the Employee's employment letter did not contain a statement as required by section C4 and C5 of the Labour Code setting out the term of the employment, and agreed that the employer was obliged to indicate a term. He initially disagreed that if the employer failed to fix a term that it was indefinite as all employment must come to an end. When pressed he however agreed that if no notice was put into the employment contract that the employment must be indefinite.
27. Mr. Benjamin agreed that there had been no consultation with the Employee when the circular letter was issued in May 1998, although he was aware that the policy would have affected several employees including Mr. DeFreitas. He disagreed that at the time Mr. DeFreitas got "SLD4" in early June 1998, that his functions had already been divided up as this was a memo to all staff of the general policy. The June memo "SLD5" given by the general manager spoke specifically to the Employee's retirement.

28. The witness also indicated on cross examination that his personal secretary had been rehired by the company after her retirement. He stated that this opportunity was also available to Mr. DeFreitas but that he made no request for continuation of employment. He stated that despite the fact that he was aware from his discussions with the Employee in May, 1998 that the Employee was concerned about his position that no specific request for new employment was ever made.
29. Mr. Benjamin stated that to his recollection it was 2 ½ months before Mr. DeFreitas' retirement when the age policy was issued. He admitted that Mr. DeFreitas raised concerns with him in May after the issue of "SLD4" but stated that he did not recall telling Mr. DeFreitas that Jerry Benjamin would get back to him, his recollection was that he advised Mr. DeFreitas to contact Mr. Jerry Benjamin on the issue of the retirement. He also initially denied that SLD5 was issued while the Employee was waiting to hear from the Employer, but on further cross examination by Mr. Brown admitted that chronologically it was true to say that while he was waiting to hear from the company it was announced to the staff that he was retired.
30. Mr. Benjamin also stated that it was not correct to say that he had relied on the Employee in industrial matters. It was true to say he had consulted with the employee as he does have certain expertise in these matters. He admitted however that despite that expertise the company did not consult with him on the retirement policy prior to it being announced to the staff in a circular in May 1998.

EMPLOYER'S SUBMISSIONS

31. Mr. Fuller for the Employer stated that the law very wisely implied certain terms in contracts to provide for those occasions when certain things are left unexpressed in arrangements between contracting parties. He stated that the employment letters issued to the Employee in May, 1989 and September, 1990 contained certain express terms, in addition to which

express terms are terms implied by law or necessity. He states that the employment contract was clearly not a contract for life although it was clearly also not a fixed term contract in the sense that on the face of it duration was given.

32. In such a case Mr. Fuller submitted that it would not be good industrial practice for employees to each have a different term of duration of employment based on his or her physical or mental attributes. This he stated would result in chaos and in a certain inability on the part of an employer to plan. It was therefore ridiculous to suggest that the law required this interpretation. It was better industrial practice in his view to imply a term uniformly to employees in respect of what the length of the employment should be since such an implication is fairer and provides for better industrial relations.
33. Mr. Fuller referred to the evidence of the Chief Establishment Officer in which it was stated that established offices numbering some 3000 were governed by the Pensions Act Cap. 311. Pursuant to the Act he stated retirement was permitted between 50 and 60 depending on the circumstances, and the mandatory retirement age was 60. He further mentioned that by the Social Security Act all employees in Antigua and Barbuda are pensionable upon reaching the age of 60.
34. He argued that the Employer had a relatively young work force and was faced with workers who were approaching age 60. He admitted that the Labour Code was silent on the matter of a retirement age, but that was a lacuna in the law which should be dealt with on the basis of what was reasonable in the circumstance.
35. Mr. Fuller submitted that employers could not reasonably be expected to have a work force work indefinitely. This particular Employer decided in the interest of planning for its employees to declare a retirement age. That it may have been unilateral, is correct but it was the reasonable thing to do particularly in light of the careful consultation with other companies and the fact that its implementation at that time would have been least disruptive to the Employer's business.
36. Mr. Fuller submitted that the Employee's contention that he should have been allowed to work until he chose to retire is not tenable as the

suggestion that employees be allowed to work until they choose to retire is ridiculous and would lead only to chaos. There was therefore an imperative on the part of every employer to plan not only for himself but also for its employees.

37. He further submitted that Parliament had not in its wisdom fixed a mandatory retirement age for private industry, nor had it provided for compensation for employees when they are old. There was no concept of indefinite employment or permanent employment to be terminated at the employee's choosing. The Employer in that case had treated the Employee correctly by retiring him at 60 and then giving him an ex gratia payment of not less than 5 months salary when in fact they had no legal obligation to pay him. The Employer was not obligated to negotiate terms and conditions of retirement with Mr. DeFreitas as this would not have been good industrial practice. The law, Mr. Fuller stated implied a term of retirement and that in all the circumstances it was not unreasonable to fix the age at 60. As such the Employer acted with good industrial relations and did not unfairly dismiss the Employee.

EMPLOYEE'S SUBMISSIONS

38. Mr. Brown for the Employee submitted that the Employer had failed to discharge the burden on him to prove that the dismissal was fair in the circumstances. He stated that the Employer could discharge this burden only by reference to statute, the common law, the contract between the parties, or case law. Since the Employer was unable to refer to any of these to discharge the burden, the court must conclude that the dismissal was unfair.
39. He further submitted that the employer/employee relationship was grounded on the contract between the parties and that it was not denied that the contract contained no term as to the duration of the employment. In that case Mr. Brown submitted, the period of employment must be taken to be indefinite and the Employee was therefore entitled to remain in the employment so long as he remained physically and mentally fit to perform his job satisfactorily. The Employer would then be entitled

should he fail to perform to terminate him under section C16 of the Labour Code. Since the Employee was physically and mentally fit to continue his employment he was entitled to expect to continue his employment up to at least age 65.

40. Mr. Brown also submitted that in the absence of an express term in the contract re the duration of the employment, the Employer was not entitled to unilaterally introduce a retirement age and compel the Employee to comply. He stated that the principles of natural justice dictate that any employer acting fairly ought to have consulted with the employee particularly a senior employee in the employee's position, and after reasonable consultation, that a retirement age should be agreed upon. Should the parties fail to reach agreement, he submitted, they should seek to resolve the issue by arbitration conciliation or declaration by the court. The employer should in no event impose a retirement age.
41. Mr. Brown contended that while it may be commendable for the Employer to establish a retirement age policy, since there was no policy prior to the Employee being retired, the Employee was entitled to a certain amount of reasonable notice of the Employer's intention. He invited the court to consider the evidence of the Chief Establishment Officer which indicated that public servants were in practice given one year's notice of impending retirement, where there was a compulsory retirement age. Mr. Brown submitted that the Employee in this case ought to have been given at least twice the amount of notice given in the public service.
42. On the question of reasonable notice Mr. Brown referred the court to Halsbury's Laws of England Vol.16, para. 570 which indicates that in such circumstances reasonable notice is required. He submitted that the court should have regard to the common law period of notice in assessing what was fair and that a minimum of 24 months notice ought to have been given to the Employee.
43. Mr. Brown urged the court to disregard the Employer's contention that the provisions of the Social Security Act Cap. 408 which established a scheme of payments for persons aged over 60 and retired and the Pensions Act, Cap. 311 showed that a retirement age of 60 was acceptable, and contended that the imposition of that age on the Employee was a unilateral

variation of his contract which flies in the face of sections C4 and C5 of the Labour Code which deal respectively with discrimination based on age and the duration of the employment. He stated that if the provisions of the Social Security Act must be regarded then care must be taken to distinguish between a "pensionable age" created by the Act, and a retirement age.

44. The Court was also asked to take cognisance of the fact that the only reason for the Employee's dismissal was his age suggesting that the Employer had offended against section C4 of the Code which protects employees from discrimination on the basis of age. He stated that the court must take notice of the Employee's reasonable expectation re his retirement. His expectation was to work until the age of 65.
45. The reasonableness of the Employer's action was also something which the court should address and Mr. Brown submitted that the Employer's action were so unreasonable that they suggested bad faith. He drew the court's attention to the fact that the Employee had a recognised expertise in industrial relations and had been consulted by the Employer on these matters in the past, but had not been consulted on a matter that affected him personally. He asked the court to draw the conclusion that the Employer in choosing not to mention so significant change of policy to the Employee was acting in bad faith.
46. Mr. Brown urged the court to find that the dismissal in all the circumstances was unfair, to find that in the circumstances 60 was not a reasonable age of retirement for the Employee, and that even if it were, to find that the Employer's handling of the situation was contrary to good industrial practice. The court was asked to find that in the absence of a contractual provision, express or implied, or by statute, the imposition of mandatory retirement was unfair and that the court should award compensation for the unfair dismissal.
47. On the matter of compensation Mr. Brown urged the court to make an award for loss by reason of manner of dismissal for a period of 10 months, to award for immediate loss for 24 months, i.e from the date of filing to the date of trial, for future loss having regard to the reasonable expectation of the Employee that he would work until age 65, and for the loss of his fringe benefits.

48. Mr. Brown provided the court with several cases and useful materials on the matter of the “normal” retirement age which the court found to be very instructive, and for which the court is grateful. Among the materials cited were Aderman: The Law of Unfair Dismissal 2nd ed.; Levitt: The Law of Dismissal in Canada 2nd ed., paras. 601 and 605.3; and Halsbury’s Laws of England 3rd ed., Vol.16 para. 570. The court was also referred to the cases of **Gatherer v Gomez** (1992) 41 WIR 68; and **Patel and Nagesan** [1995] ICR 988.

ISSUES

49. Several issues were raised during this case, including the question of a mandatory retirement age, the application of the Social Security Act to a retirement age and the applicability of the Pensions Act to the present issue. This court after careful consideration of the evidence and the arguments, is of the view that there are three main issues which need to be addressed to dispose of the issues raised herein. All sub issues raised during the case will be disposed of as part of the three main issues as follows:
1. (a) Was the Employee’s contract a contract of indefinite duration?

(b) Was the Employee entitled if his contract was of indefinite duration to continue to work until he desired at age 65 so long as he was physically and mentally fit?
 2. (a) Was the Employer entitled if it desired, to bring a contract of indefinite duration, to a finite duration, by the introduction of a retirement age policy?

(b) If (a) above is in the affirmative, what are the circumstances in which the Employer could validly do so?
 3. Did the Employer in this case, in introducing a retirement policy, act in a manner that did not offend against the Labour Code?

LAW

50. The provisions of the law applicable to this case are found in sections C4(1) and C5(1)(d) of the Labour Code.

Section C4(1) provides:-

“No Employer shall discriminate with respect to any person’s hire, tenure, wages, hours, or any other condition of work, by reason of race, colour, creed, sex, age or political beliefs.

Provided however, that this shall not be construed as forbidding the taking of personnel actions genuinely related to that person’s ability to discharge the duties of the employment in question.”

Section C5(1)(d) of the Code provides:-

“Every person who employs another shall, within ten days of such employment, furnish such employee with a written statement which shall set forth....

(d) the term of employment, if other than indefinite.....”

The general law of employment and other principles relating to retirement are also applicable and will be cited where appropriate.

DISCUSSION

Main Issues

51. The first issue for determination is whether the contract between the Employer and the Employee was an indefinite one. Section C5(d) of the Code in its terms recognises that an Employer may engage an Employee on a contract for a fixed term or a contract for an indefinite term. Where no fixed period is mentioned in the contract then the term must be taken to be indefinite. What does indefinite mean in the context of an indefinite employment? The word indefinite in this Court’s view is to be given its ordinary meaning of “without being determined by time limit”. In that case the Employee’s employment was to be without time limit since from its inception the Employer had imposed no time limit.

52. The second question that arises is, should an employee where no time limit is included in a contract be permitted to work until he wanted, in this case until age 65? The answer to this question in the Court's view is that an employee in these circumstances was entitled to continue to work until such time as (a) he chose to cease, (b) it was clear that he was no longer capable of performing the functions for which he had been hired. Should he not be able to perform an employer would be entitled to terminate the employment for unsatisfactory performance pursuant to section C59 of the Code, or pursuant to section C16 (ii) of the Code which permits termination due to extended leave taken as a result of illness.
53. The next question is whether the Employer was entitled to bring a contract of indefinite duration to an end by the establishment of a retirement age policy. Mr. Fuller submitted that an employer was entitled to impose a retirement age in the interest of planning for his business. It cannot be denied that an employer is entitled in the interest of planning for his business and indeed for his employees to establish a retirement age policy where contracts of employment are issued to a number of employees at the time of hire with no fixed date of termination of the employment. The Employer's evidence was that the company's staff would be affected by the retirement age policy on average some 20 odd years after the policy had been instituted as the average age of the staff was around 40. So long as members of staff did not protest the establishment of the policy, and arguably even where they disagreed, the period of 20 years notice of the policy would clearly be enough notice of the date of termination for the affected employees.
54. This Court is of the view however that the relevant question is not whether an employer is entitled, in the interest of planning, to establish a retirement age policy, but rather, what are the circumstances in which an employer may establish a retirement age policy where no time limit is fixed for the termination of employee contracts? The answer to this question would be, we suggest, that an employer could do so-
- (a) where there is mutual agreement between the employer and employee as to such a time; and

(b) in the absence of agreement, where a sufficient amount of notice is given to the employee to preclude him from asserting that the policy could not be taken to affect him.

55. In the instant case the evidence of the Employee uncontroverted by the Employer is that there were no discussions with him on this question prior to him receiving a circular notice to the staff generally about the retirement age policy. There was clearly then no mutual agreement between the parties on the matter when there was not even initial discussions.
56. In addition to the absence of mutual agreement was there sufficient notice of the policy to preclude the employee from asserting that the policy ought not to affect him? This court cannot say what period of notice would be adequate in all circumstances, but it is quite clear that in the present circumstances notice of 2 ½ months is clearly insufficient.
57. The third question is, did the Employer, in implementing the retirement age policy against the Employee, terminate the employment for good cause in accordance with sections C58 and C59 of the Labour Code, in other words, is a retirement age policy good cause for dismissal pursuant to the provisions of the Labour Code?
58. Section C57 of the Code provides that an employee will not be deemed to have been dismissed unfairly if the employment is terminated at the expiration of the term specified at the time of his hire. The Employee was terminated at 60 which time was not specified at the time of his hire. The court apprehends that where a time is not specified at the time of hire an employee will not be held to be unfairly dismissed if there was an agreement subsequent to the date of his hiring that the employment will be terminated at a date certain in the future. This is by mutual agreement.
59. In the instant case there was no date specified at the time of hire, neither was there mutual agreement. The Employer established the retirement age policy and advised the Employee that as a result of the policy he was to be retired.

60. Section C58 of the Labour Code sets out the test for measuring whether there is a good cause for dismissal. The reasons assigned by the section include (a) misconduct, (b) capability or qualifications of the employee to perform the tasks required, (c) redundancy, (d) the continued employment contravening the law, (e) prolonged illness, or (f) some other substantial reason of a kind that would entitle a reasonable employer to dismiss an employee holding the position the employee held. The present termination does not fall within any of the categories mentioned at (a) to (e) above, and it can hardly be asserted that reaching the age of 60 is a substantial reason that would cause a reasonable employer to dismiss an employee in a managerial position without other reasons. The Employer has therefore not terminated the employment for good cause within section C58 of the Code.

Secondary issues

61. It was contended by Mr. Fuller for the Employer that the law implied a term of retirement in the contract of employment since to suggest that each Employee could be allowed to work until he chose to retire would be ludicrous. It was also contended that since the law implied a retirement age that it was reasonable to fix the age at 60 since this was the age established for civil servants by the Pensions Miscellaneous Act Cap. 311.
62. This court does not accept the contention that since there was no retirement age in the contract that such a term is to be implied. In the first place there was nothing to suggest that the dealing between the parties would warrant such an implication. Secondly, the court is in general reluctant, and wisely so, to create terms or impose conditions in contracts which the parties have not themselves included, and when terms are implied, there are generally terms that are necessary to give efficacy to the contract. Implying a term of retirement in the present contract is not necessary to give efficacy to the same. In addition the suggestion that the retirement age to be implied should be 60 underscores the danger of the court imposing terms and conditions on parties to the agreement, for to determine that 60 is a reasonable age would be to imply not only a retirement age but to further imply what that age was.

63. With respect to Mr. Fuller's suggestion that the Pensions Miscellaneous Act is relevant to the issue, and should be regarded in determining what is a reasonable age, the court is of the view that this Act clearly does not apply. The Act expressly applies to civil servants in the employ of the Government of Antigua and Barbuda. The Employee is not a civil servant, the Employer is not the Government. As this court is not aware of any rule of law or principle of interpretation that would require it to apply the provisions of a statute to a class or category of persons excluded from the application of the statute we find the Pensions Act does not apply to the issue.
64. On Mr. Fuller's submission that the Employee became pensionable under the Social Security Act at age 60 and that therefore it was to be inferred that employees are intended to be retired at age 60 is also not tenable. The Social Security Act establishes a scheme whereby a person who has made contributions from his earnings for a period of time prior to 60 is entitled upon reaching that age to receive from the said scheme a monthly return or pension based on the contributions which were made on his behalf over the years. There is nothing in the Social Security Act that precludes a person over the age of 60 from continuing an employment, nor does the Act contain any provisions restricting the grant of the said pension or allowance if a person over 60 continues to work. We therefore conclude that this Act too, is not relevant to the present issue. This court accepts Mr. Brown's submission on this point that the Act establishes a pensionable age and not a retirement age.
65. Mr. Brown during the course of his arguments submitted that the Employer if he wished to establish a retirement age policy ought in the interest of good industrial relations to have given the Employee notice of the institution of the said policy in order to permit him to get his affairs in order and to suitably arrange his financial commitments. He urged the court to find that a reasonable period of notice would have been 24 months taking into consideration the fact that the practice in the civil service was to give employees who were due to retire a notice of at least 12 months duration of the impending retirement. This court accepts Mr. Brown's submission that the Employer should have given the Employee notice of the retirement, but declines to use the notice practiced by the Civil Service as the standard applicable to the present case.

66. At common law under the law of wrongful dismissal which is akin to the law of unfair dismissal in certain respects, in the absence of a contract for a definite period of employment, the law implies an indefinite employment subject to termination upon reasonable notice. Thus damages for wrongful dismissal included an award for notice where the dismissal was done without notice. What was reasonable notice however was left to be decided on the individual merits of each particular case. In the Canadian case of **Bander v Globe Mail Ltd. [1960] OWN . p. 253**, Chief Justice Mc Ruer stated that:

"The reasonableness of the notice must be decided with reference to each particular case having regard to the duration of the employment, the length of service of the servant, the age of the servant, and the availability of similar employment, having regard to the experience, training and qualifications of the servant".

67. This principle seems to the court to be the correct premise upon which to decide what would have been a reasonable period of notice for the Employer to give the Employee in respect of the retirement age policy in this case. Using this principle and based on the Employee's evidence of the difficulties he has found obtaining other employment, the court finds that a period of at least twelve months would have been reasonable notice to the Employee in the present case. The court is nevertheless mindful of the statutory requirement in section C9(3)(e) of the Labour Code pertaining to notice of termination, and will therefore use the twelve months notice period as a basis for calculating only the award for lost benefits.

CONCLUSION

Based on the reasons above the court finds as follows:

1. (1) The Employee's contract was a contract of indefinite duration which entitled him to continue working either until he chose to cease voluntarily or by mutual agreement between himself and the Employer, or until he was no longer capable by reason of illness or otherwise of performing his duties.

- (2) The Employer was entitled to establish a retirement age policy where the Employee's contract contained no termination date by either (i) mutual consent or (ii) by giving the Employee reasonable notice that his employment would be terminated by the establishment of the policy.
- (3) The implementation of a retirement age policy without the agreement of the Employee and without reasonable notice was a unilateral alteration of the terms and conditions of his employment contract to include a compulsory retirement clause.
- (4) That "compulsory retirement" the reason for which the Employer terminated the services of the Employee is not pursuant to section C58 of the Labour Code a good cause for dismissal where such a term was not included in the initial contract of hire or subsequently agreed between the parties.
- (5) That the Employer having dismissed the Employee for reasons which are not "good cause" must be taken to have breached the Employee's right not to be dismissed without just cause.
- (6) That the dismissal was unfair and that the Employee is entitled to compensation therefor.

AWARD

68. The Employee's compensation will be considered under the established heads i.e basic award for loss of protection of employment, immediate loss, manner of dismissal and future loss. The Employee also gave evidence that he was entitled to certain benefits as a result of the employment and this will also be considered in the award for compensation.

Loss of Protection of Employment

69. The Employee's evidence is that he was in a management position and that he had worked with the Employer since 1989. His first contract was for a one year term from 18th May, 1989. Thereafter he worked from 1st

May, 1990 to his retirement date 10th August, 1998, a period of eight years and three months. The Employee being in management position is entitled to one month's pay per each year of employment as severance pay. His severance is therefore calculated at the rate of $8.25 \times \$8,055 = \$64,453.75$.

Immediate Loss

70. This loss is calculated from the date of termination to the date of the hearing and includes an amount for notice. The relevant period is therefore 32 months. The Employee was not given the statutory notice required by section C9(3)(e) of the Code so he is awarded one month's notice in the amount of **\$8,055.00**. In addition the Employee indicated that he mitigated his loss since his employment in that he worked selling windows for a Barbados company from which his net average earnings for the first year was \$11,500.00 per year from the period August, 1998 to September, 1999. He states that after September, 1999 he was employed on contract with the Antigua Sun at the rate of \$8,000.00 per month, for a period of six months.
71. Since the Employee clearly mitigated his loss he will be awarded compensation for immediate loss for a period of 9 months in the sum of **\$72,495.00**. The amounts which the Employee earned in this period in mitigation will not be deducted from this sum since his actual loss during the period far exceeds the amount awarded.

Lost Benefits

72. The Employee gave evidence that he benefitted from certain discounts at the company's pharmacy in the amount of \$500.00 per year, and that he was entitled to benefits from a medical insurance which included his family. He benefitted from this insurance to the extent of \$1,200.00 per year. This court is of the view that had the Employee not been unfairly dismissed, and had the Employer given reasonable notice, estimated by this court at twelve months, the Employee would have benefitted for at least one more year from both the discount and the medical insurance. As such the court will award the amount lost for the said year based on what is assessed as reasonable notice. The Employee is therefore awarded the amount of **\$1,500.00** under this head.

Manner of Dismissal

73. The Employee was dismissed in circumstances which are not in keeping with good industrial practice. Mr. Brown submitted that the Employer had acted in bad faith with the Employee which submission this court is reluctant to uphold. Nevertheless an examination of the general memo to all staff "SLD4" establishing the policy, and "SLD5" the memo announcing the Employee's retirement and the reassignment of his functions, shows either a lack of awareness of industrial matters or at best an insensitivity to handling such matters. The May 25th memo, "SLD4" stated at paragraphs 4 and 5 that the company reserved the right to enter individual contracts with affected employees and that those employees over the age of sixty whom the company *intended to retain* had already entered into mutually acceptable arrangements. The Employer made no offer of new employment to the Employee, and even after "SLD5" had been issued made no effort despite its apology to discuss a mutually acceptable alternative. The inference can be drawn that in May, 1998 when "SLD4" was written, the Employer *had no intention of retaining* the Employee, having already decided to put him on retirement, and was either careless or insensitive as to the effect it would have on the Employee.
74. The award for manner of dismissal is stated not to be based on the hurt feelings of the employee but must be based on whether the manner of dismissal makes the employee less attractive to future employers. In the instant case the Employee gave evidence that he attempted to mitigate but the fact that he was retired had, to use his words, "sinister connotations", as he sensed and on at least one occasion it was commented that he was qualified but too old. This court is of the view that the effect of the dismissal, though not done in a manner which caused public humiliation, is such that he is rendered unattractive to future employers by virtue of his age, a position he would not have been in but for the unlawful dismissal. As such the court will award the Employee the equivalent of six months earnings for manner of dismissal in the amount of **\$48,330.00**. This court is aware that this case is not the usual type of situation in which an award is made for manner of dismissal. The court nevertheless feels that it is not precluded from considering the "effect" of the dismissal as an integral part of the manner of dismissal.

Future Loss

75. The Employee is now retired at age sixty and it is not likely that he will find employment in the near future from which he would earn that which he earned in his previous employment. His evidence shows that he is considered skilled but his age is a negative factor when he seeks employment. In these circumstances and in view of the cautions expressed in **Jennifer Watt v Antigua Village Condo** an award of two months earnings in the amount of **\$16,110.00** will be made.
76. This court in making this award is very cognisant of its duty under the law, to make such awards as it considers fair and just, based on the substantial merits of the case and in particular having regard to the Labour Code. The award herein has been made by this court using its discretion, and having particular regard to the interests of both the Employee and the Employer, and the community as a whole.
77. The total award for the Employee is therefore **\$204,888.75**. From this amount is to be deducted the sum of **\$37,781.26** which the Employer paid to the Employee as an ex gratia payment. The Employer is therefore to pay to the Employee the sum of **\$167,107.49** on or before 30th June, 2002.

Signed:

N. Rogers Murdoch
Chairman

Leconcur:

Hubert Hood
Member

Dated the 7th day of June, 2002.