

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 12 OF 2002

BETWEEN:

E. ALEX BENJAMIN LIMITED

Appellant

and

ST. LAWRENCE DEFREITAS

Respondent

Before:

The Hon. Mr. Albert Redhead
The Hon. Mr. Adrian Saunders
The Hon. Mr. Ephraim Georges

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. J. Fuller for the Appellant
Mrs. K. De Freitas-Rait with Mr. C. Browne for the Respondent

2003: May 27; 28;
September 16.

JUDGMENT

- [1] **SAUNDERS, J.A.:** This case raises some novel and interesting legal issues. They concern the right of an employer to institute a retirement age policy for its employees and the consequences for employees should there be unilateral implementation of such a policy. We were told that this was the first time that such a matter had arisen for adjudication in this Court.
- [2] The facts are not in dispute. The appellant, Mr. St. Lawrence DeFreitas, was employed by the respondent, E. Alex Benjamin Limited ("the employer"), as Operations Manager at a salary of \$8,055.00 per month. In May, 1998 the

employer published a Memorandum to its employees stating that it had decided to establish a retirement age policy for all of its employees. The age for retirement was to be fixed at 60 but the company reserved the right to re-employ persons aged beyond 60 years.

[3] Mr. De Freitas was going to attain the age of 60 in August of that year. He was naturally concerned about this new policy. No prior discussion had been held with him. He inquired orally as to how the policy would affect him. He was advised that specific discussions would be held with him on the matter. No such discussions ever took place. Instead, a few weeks later, the employer issued a circular dated 15th June, 1998 and titled "New Duties from August 5th, 1998". The circular read: "Following the retirement of the Operations Manager Larry DeFreitas, duties will be performed by the following as stated below....". The document then disclosed the names of the persons to whom all of Mr. DeFreitas' duties were to be re-assigned.

[4] It was through this circular that Mr. DeFreitas learned, for the first time, that he was definitely to be retired. He was handed his copy of the circular by one of the directors of the company. Mr. DeFreitas probably received his copy after other fellow-employees would have seen the document. At the time of handing it to him the director expressed the hope that Mr. Lawrence did not get sick and have a heart attack.

[5] The employee felt deeply hurt and dismayed by this turn of events. He immediately penned a letter of complaint to his employers. He noted that

"....This was a severe, cruel and unusual way of informing me of what appears to be my pending "retirement date" without any discussions whatsoever, after I had given in excess of some nine years loyal and efficient service.

It would appear that this document has worked to effectively terminate my employment and dismiss me on or before August 5, 1998 and in any event no later than August 5, 1998.

I must advise you that this unseemly treatment has caused, and will continue to cause me much mental, physical and financial difficulty for some time."

- [6] His letter was delivered to the employer on 18th June, 1998. That same day, he was handed a letter, addressed personally to him, informing him that a decision had been taken that he should proceed on his retirement on August 10th on which date he would have attained his 60th birthday. He was also told that the directors had approved an *ex gratia* payment to him in the amount of \$37,781.26 or approximately four and a half months' wages.
- [7] Mr. De Freitas was dissatisfied. He sought legal representation. His solicitors wrote a letter before action to the employer. The contents of this letter are important because, in my view, they serve to highlight the legal issues originally joined between the parties. In the letter, the solicitors stated that Mr. DeFreitas reasonably expected to continue in his employment until at least age 65 and they requested that the company should therefore re-consider its position and permit him to continue on until that age; that in any event the notice period of six weeks is inadequate; and that alternatively, negotiations should be held between the parties with a view towards arriving at a mutually acceptable period of notice or payment in lieu thereof together with an *ex gratia* payment. The letter ended with a threat to institute legal action for unfair dismissal if the employer insisted on proceeding along the course it had set for itself.
- [8] It took the company a month to respond. When it did, its Chairman politely declined the requests made by Mr. De Freitas' solicitors. The suggestion that his dismissal could be considered unfair was flatly rejected. That same day, by letter addressed to him, the employer, belatedly but profusely, expressed regret for the premature release of the circular. The company offered publicly to apologise if Mr. De Freitas so required.

- [9] The employee referred the matter of his termination of service to the Industrial Court. He claimed that he was unfairly dismissed and as such, was entitled to compensation. Alternatively, he contended that he had not received adequate or sufficient notice or payment in lieu of notice.
- [10] In a long and reasoned judgment the Industrial Court held that the appellant's employment was of an indefinite duration and that he should have been permitted to work until he chose to cease or it was clear that he was no longer capable of performing the functions for which he had been hired. The Court also held that an employer may establish for its workers a retirement age policy provided it did so with mutual agreement with its employees or in the absence of same by giving the employee reasonable notice that his employment would be terminated by the establishment of the policy. The Court consciously omitted to state what period of notice would be adequate but opined that in the present circumstances 2½ months was insufficient. The Court then went on to ask itself whether Mr. De Freitas' employment had been terminated for good cause in keeping with the Labour Code. The Court looked at the relevant sections of the Labour Code and found that "compulsory retirement" could not qualify as being a "good cause".
- [11] The Industrial Court then proceeded to give its views on a number of what it referred to as secondary issues. Principal among these was whether there was an implied term in every contract of employment for an indefinite duration that the employee should retire at a particular age. Counsel for the employer had strenuously advanced this point of view and had marshaled a considerable body of evidence to establish that a reasonable retirement age in Antigua was 60 years. The Court rejected the notion that it should imply any such term. The Court reminded itself that terms are generally implied to give efficacy to the contract between the parties and held that it was not necessary to give efficacy to this contract for one to imply a term as to retirement age.

- [12] On the basis of the above findings the Court concluded that Mr. De Freitas had been unfairly dismissed and awarded him compensation under the following heads:

Loss of Protection of employment	- \$64,453.75
Immediate Loss	- \$72,495.00
Lost Benefits	- \$ 1,500.00
Manner of Dismissal	- \$48,330.00
Future Loss	- \$16,110.00
Less monies paid to the employee	\$37,781.26

The Court made the resultant total \$167,107.49. I make it \$165,107.49 but the difference is unimportant. The employer has appealed the decision to award Mr. De Freitas the above sums and the same arguments that were canvassed in the Court below were advanced before this Court.

- [13] I agree with the Industrial Court, for the reason given by that body, that it was unnecessary and unwise to imply into all employment contracts of indefinite duration a term that such contracts would end with the retirement of the employee. To do so would also require one to go a step further and prescribe a universal retirement age. While I admire Mr. Fuller's industry in placing before the Court a mass of evidence to support his view that such an age should, in Antigua, be fixed at 60, I think this is a matter which is better left to the parties themselves or to Parliament.
- [14] It seems to me however that having rejected this argument the Industrial Court treated the case as an ordinary case of unfair dismissal. I think this was unfortunate. First of all, counsel for the employer has conceded that the implementation of a retirement policy *per se* is neither unreasonable nor unfair. One only has to have regard to the letter before action to appreciate that at the outset, Mr. De Freitas himself rightly placed emphasis on the inadequacy of the notice to him of the intention to introduce a retirement policy.

[15] The Court below, in my respectful opinion, adopted the wrong approach in holding that there was here an unfair dismissal on the basis that compulsory retirement is not specified as a "good cause" for dismissal pursuant to section C58 of the Labour Code. The Labour Code simply does not address this issue of retirement. The logical extension of the Industrial Court's decision, were it to stand, must be that even where an employer had given several years' notice to all its employees that it desired to introduce a compulsory retirement policy, if any employee were not in agreement, then that employee could successfully argue, upon being terminated on his attaining the specified age, that he was unfairly dismissed because compulsory retirement is not specified as a good cause for dismissal. I don't think that the Court below intended that consequence. Nor do I consider that such a result would be in keeping with the policy objectives that inform a Labour Code that strives to achieve the highest standards of industrial conduct.

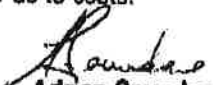
[16] A situation not very dissimilar to what transpired with Mr. De Freitas occurred in the case of *Brown v Coles*¹, a case from the Canadian province of British Columbia. The appellant, a Mrs. Brown, had worked for five years with her employer. At the time of her hiring there was no mandatory retirement policy. A little more than one month before she was about to retire, the employer announced a new policy under which all employees would have to retire at age 65. When Mrs. Brown became 65 she was forcibly retired although she had indicated that she would like to stay on for an extra year. She brought action. The Court held that the *ex post facto* requirement for retirement after 65 years of age was not one which could take effect without giving reasonable notice to Mrs. Brown. Taking into consideration her age, the fact that she had worked over five years for this employer, and that she was holding a responsible job, the Court awarded her five months' salary in lieu of notice.

[17] I cite the above case not so much for the award made there but instead for the approach taken by the British Columbia Court. That Court focused on the

¹ (1986) 5 B.C.L.R. (2d) 143

reasonableness of the length of notice. The Industrial Court itself, in the present case, adverted to this issue of notice and found, at paragraph 67 of the judgment, that "a period of at least twelve months would have been reasonable notice to the employee in the present case." The Court however, in rendering its award, neglected to stay with the issue of notice. Instead, the Court opted to determine the complaint on the basis of whether there was or was not an unfair dismissal.

- [18] In all the circumstances, I would quash the decision of the Court below and substitute it with a finding that Mr. De Freitas had been retired but in circumstances where it was obligatory for his employers to have first given him reasonable notice. As regards the length of notice that should have been given, I would be guided by the Industrial Court's view that a period of at least 12 months should have been given. The period of 12 months is also in line with the judgment and approach of Singh, JA in *Julie Saunders et al v St. Kitts Sugar and Manufacturing Corporation*². In light of Mr. De Freitas' age and the fact that he had, in his words, "given in excess of some nine years loyal and efficient service to the company", I would agree that twelve months notice would have been appropriate.
- [19] I therefore order that Mr. De Freitas should be paid by the company the sum of \$8,055.00 X 12 i.e. \$96,660.00, less the sum of \$37,781.26 paid *ex gratia*, making a grand total due to him of \$58,878.74. I would make no order as to costs.


Adrian Saunders
Justice of Appeal

I concur.


Albert Redhead
Justice of Appeal

I concur.


Ephraim Georges
Justice of Appeal [Ag.]

² St. Kitts Civil Appeal No. 1 of 1993