

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 10 OF 2004

BETWEEN:

**ARIANA REIS AS ADMINISTRATRIX
OF THE ESTATE OF
DUNSTAN NORDE**

Employee

and

CARIBBEAN MARITIME LTD.

Employer

Before:

**The Hon. Genevieve L. I. Benjamin
The Hon. Glendina M. McKay
The Hon. Norris O. Scholar**

**Chairman
Member
Member**

Appearances:

**Sir Keithlyn B. Smith – Antigua & Barbuda Workers
Union, for the Employee**

**Mr. John E. Fuller, Attorney-at-Law appeared amicus
curiae**

2008: November 10

**2009: March 30,
December 22**

JUDGMENT

BENJAMIN, G.:

Retired Officer (now deceased) re-employed annually on seven (7)
written contracts each falling approximately ten (10) days short of one

year, followed by employment on an ad hoc basis – notice of termination – severance/compensation – vacation.

PRELIMINARY

The Employer was the agent of several shipping lines which formerly did business in Antigua and Barbuda. Mr John Fuller Attorney-at-Law appeared as amicus curiae in these proceedings. Counsel informed the Court that Caribbean Martime Limited (**hereinafter sometimes referred to as “the Employer”**) ceased to conduct business in Antigua and Barbuda in or about 2003.

INTRODUCTION

1. Mr. Dunstan Norde, formerly of Carlisle Estate in the Parish of St. George (**hereinafter referred to as “Mr. Norde” or “the Employee”**), obtained employment with the Employer as its Operations Manager of the Shipping Department with effect from September 1983. He retired from this position on May 19, 1994.
2. Mr. Norde was then re-employed by the Employer as manager of shipping operations pursuant to certain written contracts. They were admitted into evidence as follows:
 - May 20, 1994 – May 12, 1995 (AR3A)
 - May 22, 1995 – May 12, 1996 (AR3B)
 - May 22, 1996 – May 12, 1997 (Attached to AR3D)

May 22, 1997 – May 12, 1998 (“ “ AR3E)
May 22, 1998 – May 12, 1999 (“ “ AR3F)
May 22, 1999 – May 12, 2000 (“ “ AR3G)
May 22, 2000 – May 12, 2001 (“ “ AR3H)

3. Prior to the renewal of each contract commencing 1995 a written offer was made to the Employee by the Managing Director of the Employer. These offers sought an indication of the Employee's desire to enter into a new contract of employment. Mr. Norde signified his agreement in the affirmative in each letter. These letters were admitted into evidence as Exhibits as follows:

May 08, 1995 (AR3C)
May 10, 1996 (AR3D)
May 09, 1997 (AR3E)
May 08, 1998 (AR3F)
May 09, 1999 (AR3G)
May 09, 2000 (AR3H).

4. After the contractual arrangements ceased in May 2001, the Employee agreed to provide service to the Employer on an “*ad hoc*” or “*call out*” basis. This was at the discretion of the Employer during the period June to Christmas 2001. This arrangement was based upon specific terms of pay and flexible terms of attendance at the workplace. **(This is acknowledged in Exhibit “AR-4”).**

5. In a written statement dated April 02, 2002, and exhibited as AR-5 the Employee informed the Antigua & Barbuda Workers Union that following his contractual employment he had inquired of the Employer concerning compensation for his years of service between the period 1994 to 2001. This inquiry was met with no response from the Employer.

LEGAL PROCEEDINGS

6. By a Reference filed in this Court on or about June 2004, by the Minister of Labour notification was given of the existence of a trade dispute between the Employee and the Employer. The issue in dispute is stated as *“dismissal”*. However no such issue arises for a determination by this Court.
7. Mr. Norde died on February 08, 2007. The Administratrix of his estate is Mrs Ariana Reis. In this judgment she is also referred to as *“the Administratrix”*. **(A copy of the Letters of Administration was produced and marked as “AR-1”)**
8. At the commencement of this matter, Mrs Reis requested that the Reference be amended to read *“Ariana Reis as Administratrix of the Estate of Dunstan Norde – Employee”*. There was no objection from Mr. Fuller. The Court granted leave to amend as requested.

9. The Employee's Memorandum was filed on September 03, 2007. A Witness Statement on behalf of the Employee was filed on November 10, 2008. Neither Memorandum nor Witness Statement was filed by the Employer.

THE EMPLOYEE'S CLAIM

10. In the "*Employee's Memorandum*" the following claims were made "*for the new period of employment with the Company.*"

"Notice of termination;

Severance/ Compensation for years of service (7yrs x 1mth for each year of service);

Vacation pay due for six years."

THE EVIDENCE OF THE ADMINISTRATRIX

11. Mrs. Reis gave evidence. She stated that she is the daughter of Dunstan Norde, late of Carlisle Estate in the Parish of St. George.

12. Mrs. Reis stated *inter alia* as follows:

"I have never known my father to work anywhere else in his life. He was working in stevedoring all his life. That was with Stephen R. Mendes, and then with Caribbean Maritime when they changed."

13. Mrs Reis claimed certain sums of money in her Witness Statement
These are as follows:

Notice of Termination	\$ 5,353.01
Severance/ Compensation for	
Years of service (5,353.01 x 7)	\$ 37,471.07
Outstanding vacation pay for the period	
1985 to 2001 (5,353.01 x 16)	<u>\$ 85,648.16</u>
	<u>\$128,472.24</u>

14. The Administratrix continued to give her evidence *inter alia* in the following manner:

“I am claiming from 1994 because this is what my dad told me about. I am not aware that he retired from Caribbean Maritime Services. He told me that he did not get any holiday pay. It is correct that he made no claim until 2001. In my Witness Statement I claimed from 1994, but I am claiming vacation pay from 1985.”

15. The Court is grateful to Mr. Fuller, Attorney-at-Law for the production of the documents and letters which are more specifically referred to at paragraphs [2] and [3] of this judgment. Mrs. Reis agreed with the contents of these documents. The Court allowed Mrs. Reis to admit them into evidence accordingly.

16. (i) Mr. Fuller, Attorney-at-Law, also assisted the Court in the production of a document dated April 02, 2002. This was written by Mr. Norde prior to his death. It provides the Employee's

account of his retirement, subsequent re-employment and his claims against the Employer. It was admitted into evidence as “AR-5”.

(ii) In “AR-5” the Employee, prior to his death, wrote as follows:

“Date: April 2nd, 2002

WORKER’S STATEMENT

Dunstan Norde’ vs Caribbean Maritime Service Ltd. (CMS)

I was employed with Caribbean Maritime Services Ltd as Operations Manager of the Shipping Department in September 1983. I continued in that position until I reached age 60 on 19th May, 1994 when I was officially considered retired. I was offered and accepted employment in the same capacity with effect from May 20th, 1994. I continued in the same capacity as Operations Manager carrying on the same duties and basically under the same terms and conditions of employment.

By letter dated May 10th, 2001 I was informed that on May 12th 2001, the contract with CMS would be terminated. I was told that I should not return after 12th May until I heard from them. I then inquired about my terminal benefits for period May 1994 to May 2001. I was told to collect whatever was due to me at the end of May, 2001. When I received the envelope, I discovered that it was just the salary for the month of May. No terminal benefits for the period May 1994 to May 2001 was given. I spoke

to Mr. Steve Mendes on the matter and told him that I am of the view that I was entitled to compensation for my years of service. Mr. Mendes reply was that the documents revealed that I had an arrangement with them. I then informed Mr. Mendes that I was not satisfied and that I would take the matter further. I was about to leave Mr. Mendes' office, he called out to me and said remember that you are still engaged on an ad hoc basis. I retorted that all I was concerned about was what was going to happen to my years of service from May 1994 to May 2001. I was never able to reach a settlement with CMS on this matter and the adhoc arrangement which came into effect sometime in June 2001, was discontinued in January 2002.

My last salary with respect to my contract of service with CMS was approximately \$5,353.01.

"I maintain that I am legally entitled to compensation for my years of service and therefore claim the following:

Notice of termination *= one month's salary*

Compensation for the years of service
(7yrs x 1 month for each year) *=7 x 1month's salary*

Vacation pay due for six of the seven
years (only took vacation once) 1994
to 2001. Was never paid in lieu. *=6 x 1month's salary*

*Outstanding vacation pay for the
period 1983 – 1994. Took vacation =11 x 1month's salary
one year only during this period.
Was never paid in lieu."*

*Signed,
(Sgd) Dunstan Norde
Mr. Dunstan Norde"*

THE ISSUES

17. The issues to be determined are as follows:

- (i) Was the Employer required to give to the Employee notice that his services would not be required beyond the end of 2001?
- (ii) At the end of the seven (7) contracts of employment between the years 1994 and 2000 was the Employee entitled to a severance payment?
- (iii) Is the Employee entitled to payment in lieu of vacation leave and if so, for what period of time?

EMPLOYEE'S WRITTEN SUBMISSIONS

18. On behalf of the Employee Sir Keithlyn Smith made the following submissions:-

- (i) With regard to the payment of severance, Sir Keithlyn Smith stated that although the Employer *“carefully did not allow Mr. Norde’s contracts to run to an anniversary date the same employer provided the same contract to the same employee to do the same work in each contract.”* He contended that the Employer’s action is proof that the contracts were designed to deprive the Employee of accrued benefits. The Employee, he said, is entitled to these benefits under section C40 of the Antigua and Barbuda Labour Code.
- (ii) With respect to vacation leave Sir Keithlyn Smith implored the Court to accept Mr. Norde’s assertion that he did not receive vacation or payment in lieu thereof for the period 1994-2001.
- (iii) The Court’s attention was drawn to section C 36 (i) of the Antigua and Barbuda Labour Code which imposed a duty on the employer to maintain accurate records of employees including all leave taken. It was submitted that it was the responsibility of the Employer to refute any such claim with documentary evidence.

19. Sir Keithlyn Smith submitted that based on his last salary of \$5,353.01 the Employee is entitled to the following awards:

- (i) Severance Pay -- \$37,471.07
- (ii) Vacation Pay -- 37,471.07

(iii) Notice Pay -- 5,353.01

EMPLOYER'S SUBMISSIONS

20. Mr. Fuller, Attorney-at-Law submitted that Mr. Norde retired from his employment in May 1994. He was re-employed by the Employer from May 1994 to May 2001 pursuant to seven successive contracts. They *“were individual contracts of employment for less than a year each.”* Each individual contract provided that Mr. Norde be granted four (4) weeks’ holiday with pay.
21. Mr. Fuller further submitted that Mr. Norde received all of his benefits – *“vacation and everything when he retired on 19th May, 1994, albeit after his 60th birthday. Subsequent to his retirement he was re-employed on contracts of employment for a year less a day, and, of course, during that time he was given his holiday.”*
22. Mr. Fuller cited the judgment of the **Court of Appeal** in the case of **St. Lawrence DeFreitas vs E. Alex Benjamin Ltd. - Reference No. 12 of 2002**. The Court received no assistance from this case as it dealt with an employer’s ability to fix retirement age for his/her employees and the requisite notice period to be given to the employees.
23. Mr. Fuller submitted that there was never a complaint from the Employee until a year after his employment ceased when he *“decided he had not received holiday pay for nearly twenty (20) years.”*

24. Mr. Fuller further submitted that it was *“extremely unlikely that a manager holding a high position would not have been paid his holiday pay and not said anything about it.”*
25. According to Mr. Fuller he submitted that when an employee reaches his age of retirement there is no provision for an employee to receive any benefit other than the contractual employment terms. He added that *“it is a matter of law that after retirement severance is not paid.”* No cases were cited in support of this proposition.
26. In conclusion Mr. Fuller further submitted to the Court that Mr. Norde’s estate is not entitled to anything.

THE LAW

27. The law relating to this case is to be found in the Antigua and Barbuda Labour Code (Cap 27) herein referred to as *“the Labour Code”*, and the Antigua and Barbuda Industrial Court Act (Cap 214), herein referred to as *“the Industrial Court Act”*, both of the Revised Laws of Antigua and Barbuda.

THE FIRST ISSUE

Was the Employer required to give notice to the Employee that his services would not be required beyond the end of 2001?

28. Section C57 of the Labour Code provides as follows –

“C57. For the purposes of this Part, 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.”

29. The Employer’s letter dated May 10, 2001 (AR4) is very clear that –

- i) the Employee was employed on a fixed term basis ending on May 12, 2001;
- ii) the contract would not be renewed;
- iii) in response to the Employee’s stated desire to continue in the service of the Employer *“until Christmas of the year 2001”*, the Employer agreed *“starting in June 2001, to utilize (the Employee’s) services on an “ad hoc” or “call out” basis”* subject to certain stated conditions.

The Employee signified his agreement with these terms at the end of the stated letter.

30. The Court finds that the contract and letter referred to at paragraph [29] were so specific regarding the end of the Employee’s services that no further notice of cessation of the employment was required.

THE SECOND ISSUE

At the end of the seven (7) contracts of employment was the Employee entitled to a severance payment?

31. Mr. Fuller's submission that a retired employee is not entitled to any benefits nor to severance pay was not substantiated by reference to any authority.

32. The Labour Code does not discriminate against retired officers. In the interpretation clause at section A5 the term "**employee**" is defined in the following manner, namely:

"...any person who enters into or works under or stands ready to enter into or work under a contract with an employer, personally to perform any services or labour, whether the contract be oral or written, expressed or implied; and the term includes a person whose services or labour have been interrupted by a suspension of work during a period of leave, temporary layoff, strike, or lockout, as well as an apprentice whose services or labour may be designed primarily to train such apprentice; but the term does not include established employees of the Government;"

33. Section C40 of the Labour Code further provides as follows:

"Every employee whose term of employment with an employer and his predecessor has in aggregate exceeded one year is entitled to severance pay upon termination of said employment by employer for reasons of redundancy."

34. (i) No provision was made in any of the contracts for the period 1994 to 2000 for the payment of a gratuity, an ex-gratia award or any other compensation at the completion of the contract.
- (ii) No evidence was adduced to show that it was the Employer's intention to deprive the Employee of a severance payment. It was most probable that the Employer wished to retain Mr. Norde's services as a retired employee pursuant to short term contracts as opposed to a new continuous period of employment and the Court so finds.
- (iii) Mr. Norde, as a retiree of the Employer, accepted the terms of each contract for seven years. He signified this acceptance by signing each contract, none of which contained a provision for severance/compensation.
35. The Court finds that the Employer was therefore under no obligation to pay severance/compensation at the completion of any or all of the contracts.

THE THIRD ISSUE

Is the Employee entitled to pay in lieu of vacation leave, and if so for what period of time?

36. Mrs. Reis in her Witness Statement and in her evidence claimed payment in lieu of vacation leave for the period 1985 to 2001. However, the Employee's Memorandum claimed at paragraph 8 "*Vacation pay due for six years*" and at paragraph 9 "*severance and*

other benefits for the new period of employment with the Company.”

It is in this regard that the Court has given consideration to this latter, post-retirement period only.

37. In the document dated April 2, 2002 “**AR-5**” which Mr. Fuller produced (see paragraph 16 above) the Employee claimed that he took vacation leave once only during the period 1994 to 2001. He claimed pay in lieu of vacation leave for six years.

38. (i) The contracts for the years 1994 to 1997 all provided at clause 6 as follows:

“Employee shall be entitled to four (4) weeks vacation paid.”

(ii) The three contracts for the years 1998 to 2000 provided –

“The employee shall be entitled to four weeks vacation paid, which must be taken.” (The emphasis is the Court’s)

39. It is not known in which year the Employee enjoyed vacation leave. However it is more likely than not that some occurrence triggered the change in the contract clause dealing with vacation leave in 1998. Was it the Employee’s application for leave? Was it a reluctance, or refusal, by the Employee to take leave? The Court does not know.

40. Mr. Fuller was able to produce the documents exhibited as **AR3-A** to **AR3-H**, **AR4** and **AR5**. No evidence was produced which was contrary to the Employee’s claim. Such evidence may have included a cancelled cheque, a response to the Employee after his inquiries or such other relevant evidence.

41. In the absence of such evidence the Court accepts the Employee's claim to pay in lieu of vacation leave for six years. Mrs. Reis as the Administratrix of the Estate of the Employee is entitled to six years vacation payment.

THE AWARD

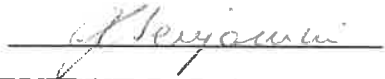
42. Throughout the hearing of this case and in all the pleadings the Employee's monthly salary is stated as \$5,353.01 per month. This may have been his net monthly salary at some point, as the gross salary provided in the 1994 to 2000 contracts range from \$4,665.30 in 1994, to \$5,457.74 in 2000.

43. In accordance with the findings of this Court at paragraph 41 above, the award is to be made is as follows:

Notice pay	- Nil
Severance pay/Compensation	- Nil
Pay in lieu of Vacation Leave	
$(\$5,457.74 \times 12 / 52) \times 4 \times 6$	- \$30,227.48

44. The Employer shall pay to the estate of the Employee the sum of \$30,227.48 on or before the 31st day of January, 2010.
45. There shall be no order as to costs.

Dated the 22nd day of December, 2009



GENEVIEVE L. I. BENJAMIN
Chairperson

I agree



GLENDINA M. McKAY
Member

I agree



NORRIS O. SCHOLAR
Member