

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 1 OF 2003

BETWEEN:

DARREN GEORGE, EDISON THOMAS & ALEXANDER POWELL

Employees

and

LIONEL WALLING t/a ANTILLES TRADING & SHIPPING LIMITED

Employer

Before:

The Honourable Cyril L. Maundy
The Honourable Edward T. Henry
The Honourable Hubert Hood

President
Member
Member

Appearances:

Keithlyn Smith for the Employee
Eleanor Clarke, for the Employee

2004: September 15, 16
2005: January 24, 25 & 26

JUDGMENT

Employer/Company having financial difficulties – Employees laid off without pay for 3 months and on return to work put on a week on/week off roster – at a meeting with the Labour Commissioner parties agreed to severance if certain conditions fulfilled and Employer agreed to work out the entitlements – Employer, on their return failed to pay Severance entitled and Employees were laid off for another 3 months on the same conditions – Employees returned to work at end of lay off period – no

severance pay made to Employees – Employees “walk off” the job and now claim Severance Pay – Employer claim that Employees abandoned their jobs and are not entitled to any relief.

- [1] **Maundy, P.:** This is a claim by the Antigua and Barbuda Workers Union, hereinafter referred to as “the Union”, represented by Keithlyn Smith, the General Secretary, on behalf of Darren George, Edison Thomas and Alexander Powell, for damages, compensation or any other award the Court finds fair and just.
- [2] The case for the Employees is set out in their Memorandum dated January 3, 2003, in which they allege that they were unfairly dismissed by the Employer.
- [3] The Employer denied the allegations of the Employees and in his Memorandum dated February 20, 2003, contend that they were never dismissed but abandoned their jobs and that the claims are without merit. A Collective Agreement between the parties was signed. (See Exhibit LW4).

Historical Background

- [4] Of the Employees, Darren George, who was also the shop steward, commenced working with the Employer on February 2, 1987, Edison Thomas on December 21, 1990 and Alexander Powell on August 20, 1990. At first the relationship between the parties was very pleasant, the Employees performed their duties satisfactorily and there were no complaints or otherwise regarding their work performance.

[5] In 1998 the Employer, whose business was dependent on Contracts, began to experience financial difficulties. It is to be noted that:

- (a) In September 1999 the Employer and the Union had discussions relating to a wage increase and an agreement was reached although the parties are at odds as to what precisely was agreed and no written Minutes were produced in evidence.
- (b) On September 17, 1999 the Employer implemented wage increases and the new wage increases were paid from that date.
- (c) In October, 1999 the Employer and the Union had further discussions concerning the earlier agreement relating to further wage increases but the Employer was, because of its financial difficulties, unable to agree to any further wage increases.
- (d) In or about February 2000, the Union approached the Employer re back-pay for the Employees but the request was denied.
- (e) At a meeting at the Labour Commissioner's office, not to adjudicate on a dispute but to invite the Labour Commissioner to use his good offices to give directions on a claim by the Union for back-pay for the Employees, the request for retroactive payments was unsuccessful.
- (f) The Union then submitted proposals for renewal of the Collective Agreement but these failed.
- (g) On September 15, 2000 the Employees staged a 3 day "sit in".

[6] The Employer continued to be plagued by financial woes and decided to reduce his workforce in order to stabilise his business. Thus, the Employees were temporarily "laid off" for three months on January 15, 2001 for three months (April 15, 2001) and at a meeting at the Labour Commissioner's office it was agreed that if any of the Employees found alternative employment during the temporary lay off, the Employer would make to them, according to the Employer, an ex-gratia payment calculated on their severance pay

entitlement at that date. During this temporary lay off period the Employees asked for and were allowed to work on a "week-on, week-off" basis.

- [7] The Employees were temporarily terminated (laid off) for a second three months and returned and resumed work on April 16, 2001. However, they walked off the job on November 18, 2002.
- [8] On November 22, 2002 the Employer wrote to the Employees informing them that they had abandoned their jobs but they refused to accept the letters.
- [9] During the course of the Hearing it was observed that the proper name heading (title) of the Employers was Lionel Walling t/a Antilles Trading and Shipping and the parties agreed by Consent to amend their Memorandum and Exhibit to so read.

Triable Issues

- [10] The issues here for determination appear to be whether:
 - (i) The Employers were ever severed and made redundant and are entitled to Severance Pay or other award.
 - (ii) The Employees were ever dismissed.
 - (iii) There was an agreement between the parties for the payment of Severance by the Employer and, if so, were there any conditions attached to the Agreements and were the conditions fulfilled (met).

The Arguments

- [11] In his submission Mr Smith asked the Court, inter alia:

- (a) to accept the severance calculations as set out in Exhibit DG1 as prepared by Mr Walling together with interest @ 10% per annum.
- (b) There was no mention of ex-gratia payment before the Employees ceased working with the company.
- (c) The Employees did not abandon their jobs.
- (d) The Employees were good workers, no complaints were ever made against them and it is fair and just to award them full compensation for the period they worked or any other award the Court may consider appropriate.
- (e) The matter should be looked at as a Collective Union matter concerning all three Employees.

[12] It is to be noted that paragraph 12 of the Employee's Memorandum alleged that the Employees had abandoned their jobs and were claiming compensation for Unfair Dismissal.

[13] Miss Clarke disagreed with Mr Smith and in her submission stated as follows:

- (a) There was no agreement to pay Severance.
- (b) Severance Payment was not used in the strict legal meaning since there were no discussions of redundancy nor were any of the employees made redundant – references to severance payments were, in fact, referred to payments based on severance calculations.
- (c) There was not any evidence that the Employees found alternative employment during the lay off period.
- (d) It is not in dispute and, by extension, denied, that the Employer was experiencing financial difficulties and, in these circumstances, why would they have entered into an agreement to pay severance; a reasonable man, in those circumstances, would not have entered into such an agreement.

- (e) What the Employer agreed to was to consider the possibility of making such a payment if the Employees found alternative employment during the lay off period and, at that time, he had the money at his disposal to do so.
- (f) At the meeting of February 22, 2001 when Darren George and Edison Thomas stated that they were frustrated "with the job" and wanted to be severed but when asked what they meant they were unable to explain. At no time did the Employers sever anyone, or "force" them to leave their employment.
- (g) Darren George and Edison Thomas testified that they left the job and did so on November 18, 2002 and of their own accord.
- (h) No determination can be made re Alexander Powell as he did not appear to give evidence or be Cross-examined.
- (i) The Employees are not entitled to the reliefs sought or at all.

[14] In support of her contentions Counsel cited:

- (i) Morris V C.H. Bailey Limited (May 2, 1969) (Court of Appeal).
- (ii) Hackett V Caribbean Examinations Council (1988) 49 West Indian Reports (High Court of Barbados)
- (iii) Labour Law, 3rd Edition by Simon Deaking, Ph.D., Robert Monks Gillian Morris, LL.B., Ph.D.

The Law

[15] The issues raised in this case invite a consideration of certain specific provisions of the Antigua and Barbuda Labour Code, Cap. 27, Laws of Antigua and Barbuda, Revised Edition, 1992, hereinafter referred to as the Labour Code, which justice and fairness demand should be closely considered and analysed and these appear to be:

- (i) Section C.56: The right not to be unfairly dismissed. This section 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.”
- (ii) Section C.57: For the purposes of this part an employee will not be unfairly deemed to have been dismissed if his employment is terminated at the expiration of the term specified at the time of his hire. En passant, it may be observed that the Labour Code requires that an Employer is obliged generally to give advance Notice of a termination, exceptions apart.
- (iii) Section 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:
 - (a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue.
 - (b) committed a criminal offence in the course of employment without the consent, express or implied, of the employer, or
 - (c) behaved immorally in the course of his duties.
- (iv) Section C.3: (Redundancy) – Redundancy means a situation in which by virtue of lack of customers orders, retrenchment, the installation of labour saving machinery, an employer's going out of business, a *force majeure*, or any other reason, work which a person was last employed to perform has ceased or substantially diminished.

- (v) Section C.40: (Severance Pay) – Every employee whose term of employment with an employer and his predecessors has in aggregate exceeded one year is entitled to severance pay upon termination of said employment by employer for reasons of redundancy.
- (vi) Section C.41: Severance pay shall consist of at least one day's pay, at the employee's latest basic wage, for each month or major fraction thereof of his term of employment with his employer and any predecessor-employer.
- (vii) Section C.42 (1): Subject to the other provisions of this section, simultaneously upon the termination of employment of any employee entitled to severance pay under section C.40, the employer shall remit to that employee severance pay computed in accordance with section C.41.
- (viii) Section C.42 (2): If the termination be stated as temporary, no severance pay need be remitted to the terminated employee at the time of termination:

Provided however that:

- (a) where the date of recall, if one is given at the time of termination, be six months or more in the future, severance pay shall be payable on the date of the original termination;
- (b) if no date of recall is given at the time of termination, severance pay shall be payable when and if, after three months from the termination, the employee shall not have been recalled;

in which case, interest at the rate of ten per cent per annum on the amount of severance pay due shall be payable for the interval between the original termination date and the date of actual payment.

- (ix) C.42 (3): After such payment with interest has been made, if the employee is recalled to his past or substantially equivalent

employment, or is again hired by the same employer, he shall be considered to be newly hired and his term of employment, for subsequent severance pay purposes, shall be considered to have commenced on the date of recall or rehire.

Decision

- [16] After listening to the testimony of the two Employees who were present and gave evidence at the Hearing, the third not appearing, it appeared they had made out a case but the testimony of Mr Walling was very different from theirs. Each party had a different view of what precisely happened, the Employees contended that they were severed whereas Mr Walling maintained that this was never the case but that they had “walked off”, that is, abandoned the job. This crucially important issue was not fully ventilated.
- [17] It is the contention of the Employees that they were dismissed by the Employers and that the dismissal was unfair under Section C.56 of the Labour Code an – Employee who is dismissed without just cause (unfairly) is entitled to compensation for unfair dismissal. But was there a dismissal at any stage or at all? It is true that the Employees ceased working with the Employers but this was not as a result of anything said to them by the Employers.
- [18] One has had to look closely at the part played by Dr Austin Josiah, the Commissioner of Labour, in this matter and, to my mind, when he intervened Dr Josiah was using his good offices to try and bring about an amicable resolve of the dispute and was acting *amicus curiae*. To my mind he had assisted the Employers to recoup monies owed to them by the Government so as to pay the severance pay owed to the Employees. The legislation does

not make any provisions for a Severance Pay fund to which Employers are required to contribute, as in some jurisdictions and, thus, the payment of Severance Pay can be a serious problem to Employers.

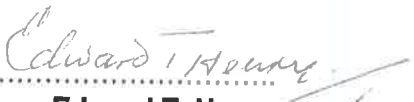
- [19] The monies which were calculated as payable to the Employees was to be payable in the event that they were severed but there was no severance – before they were severed the Employees left their employment on their own accord.
- [20] It is true that generally there is no rule of law that compels a person to work, exceptions apart, and a person is generally at liberty to “walk off” a job or refuse his labour at any time and such acts can be damaging to an Employer who may be left with grave difficulties and lose contracts.
- [21] Neither party made any reference to whether the acts of the Employers amounted to Constructive Dismissal and failure to pay the calculated entitlement was deliberately delayed by the Employer so as to cause the Employees to become frustrated and leave on their own accord (down tools). Liability for Constructive Dismissal is recognised by the Court but I believe it should be handled gingerly as the Court may appear to be making Law, the function of the Legislature. There being no claim, evidence or reference to Constructive Dismissal by the parties I do not consider it appropriate to make any ruling on it.
- [22] In arriving at a decision I carefully considered the evidence of the parties, the provisions of the Labour Code and the Industrial Court Act and endeavoured to arrive at a decision that is fair, just and in the interests of equitable and good industrial practice and with regret the Claim is hereby dismissed.

[23] There shall be no Order as to Costs.

DATED the 20th day of May, 2005


Cyril L. Maundy
President

I concur


Edward T. Henry
Member

I concur


Hubert Hood
Member

