

**ANTIGUA AND BARBUDA
IN THE INDUSTRIAL COURT**

REFERENCE NO. 12 of 2003

BETWEEN:

PAUL SAUNDERS

Employee

ANTIGUA POWER COMPANY LIMITED

Employer

Panel:

Mrs. Nelleen Rogers Murdoch (Chairman))

Mr. Edward T. Henry (Member)

Appearances:

Mr. Clare K. Roberts for the Employee

Miss E. Ann Henry for the Employer

Judgment

This is a decision on a preliminary point taken by the Employee in this reference on the date of the trial of the matter. The court on that occasion determined that the employee's submissions on the point failed and indicated that written reasons for the court's decision would follow.

Facts:

The Employee was dismissed by the Employer by letter dated 18th October, 2002. The Employee referred the matter to the Industrial Court alleging that he had been unfairly dismissed. The Employee filed a memorandum indicating that he had received the letter

of 18th October, 2002 dismissing him from his employment. In response the Employer filed a memorandum denying that the Employee had been unfairly dismissed and stating therein the reasons for the dismissal which the Employer considered to be within the requirements of section C59 of the Labour Code.

Employee's submissions

At the trial of matter the Employee took a preliminary point and requested that the court determine the same prior to continuing the action. The Employee submitted that the Employer had given the Employee a letter of dismissal on the 18th October, 2002 on the day of the dismissal but that the Employer had failed to give the Employee a written statement of the precise reasons for the dismissal as the Employer was obligated to do by section C10 of the Labour Code.

The Employee further submitted that as a result of this failure the Employer was estopped from introducing testimony as to the facts which might have been recited in the statement in the proceedings. Since the Employer was thus estopped the Employer had no defence to the Employee's claim and the Employee's claim for unfair dismissal therefore must succeed. The Employee submitted the case of **Berridge and another v Benjies Business Centre (1994) 49 W.I.R. 50** as authority for the point.

Employers Submissions

The Employer responded to the point by denying that the Employer failed to give the Employee a written statement of the reasons for his dismissal, and asserted that the letter of dismissal dated 18th October 2002, which the Employee acknowledged receiving and which the Employer asserted contained details of the reason for the Employee's termination, was the written statement of reasons required by section C10 of the Code.

The Employer further submitted that the Employee after receipt of the said letter of 18th October, 2002 never requested clarification of the reasons given in the letter, and that since the Employer was relying solely on the reasons contained in the letter, the Employer was not estopped from doing so as the letter itself satisfied the requirements of section C10 of the Code.

The Employer further submitted that the case of **Berridge v Benjies** must be distinguished from the present case on the basis of the facts.

Law:

Section C10 of the Labour Code provides as follows:

'C10. (1) Upon termination by an employer of an employee's employment subsequent to expiration of the latter's probation period, the employer shall within seven days of the termination or notice thereof, furnish to such employee a written statement of the precise reason for the termination.

(2)...

(3) An employer who furnishes a statement..... required by section (1), ...shall be conclusively bound by the contents therein in any proceedings testing the fairness of the dismissal...'

Discussion

The preliminary point taken by the Employee essentially concerns the meaning and effect of section C10. As indicated by the Employee, section C10 of the Code has been addressed by the Privy Council in the case of **Berridge v Benjies** and a review of the issues raised in that case would be helpful in determining the present issue. In **Berridge v Benjies**, the court was likewise called upon to determine the meaning of section C 10 of the Code. The provisions were not however identical to the present provisions of the Code and it is instructive for the court to note the differences.

At the time of the **Berridge** decision section C10 provided as follows:

“C10. (1) Upon the termination by an employer of an person's employment subsequent to the expiration of the latter's probation period, the employer shall upon a request being made by the employee within seven days of termination or notice thereof furnish forthwith to said employee a written statement of the precise reason for the action.

(2)....

(3) An employer who furnishes a statement.....required by subsection (1) herein shall be conclusively bound by the contents therein in any proceeding testing the fairness of the dismissal...

(4) An employer who fails to furnish the statement shall be estopped from introducing testimony as to facts which might have been recited in said statement .. in any proceeding testing the fairness of the dismissal...'

In interpreting section C10 (1) of the Code, Byron J.A. in the Court of Appeal in a dissenting judgment held that section C10 (1) required a statement to be furnished on request and made no exception for a case in which reasons had already been given. The Privy Council agreed with Byron J.A.'s interpretation. The Privy Council at page 67 paragraphs A to D of the judgment stated:

“The purpose of section C10 is not merely to ensure that the employee is given reasons for the termination of his employment. It requires those reasons to be given in a form which can readily be identified for the purposes of any subsequent proceedings “testing the fairness of the dismissal”. The reason why they need to be capable of identification as formal statutory reasons is that in such proceedings the employer is “conclusively bound” by the statutory reasons (section C10(3) but not by any other reasons which he may have given. Likewise he is estopped by section C10(4) from introducing testimony of facts which could have been included in the statutory reasons. On the other hand, if there has been no request for statutory reasons within seven days of the notice of dismissal, the employer is not estopped from supplementing or even contradicting any non statutory reasons which he may have given. The statutory reasons are therefore akin to an unamendable pleading which the employer may be required to serve. The pleading function of the statutory reasons makes it impossible for earlier informal reasons to take their place....”

Section C10 (1) therefore required the employer to furnish formal statutory reasons for the dismissal to the employee. This requirement for formal statutory reasons was triggered by a request of the employee within seven days of notice of the dismissal, and was mandatory on the employer whether or not other reasons had been previously given. The employer was then legally obligated to furnish reasons and was conclusively bound by the reasons so furnished. If the employer failed to provide the reasons upon request,

the employer was then estopped in proceedings testing the fairness of the dismissal from introducing any facts that could have been included in the statutory reasons.

The amended section C10 (1)

Section C 10 (1) of the Labour Code was amended in 1998 by Act No. 14 of 1998 several years after the Privy Council decision. Parliament in its legislative wisdom removed the requirement for formal statutory reasons to be furnished to the employee upon request, and provided that the employer within seven days of a termination must provide the employee with a written statement of the precise reason for the termination. Section C10 (3) remained unchanged in that an employer who provided a statement was conclusively bound by the same, and section C10 (4) likewise remained unchanged in that an employer who failed to provide written reasons was estopped from introducing testimony of facts which could have been included in the statement.

It seems to the court that the purpose of the amendment was twofold: (a) to ensure that the employee was given written reasons for termination without having to request the same; and (b) to bind the employer to the written reasons once given. The employer was also given a period of seven days within which to provide the reasons.

The effect of the amendment to section C10 (1) of the Code is therefore as follows:

- (a) an employer must provide an employee who is terminated with a written statement of the reasons for the termination whether or not the employee requests such a statement;
- (b) the written statement must be provided within seven days of the dismissal;
- (c) once a statement is provided the employer is conclusively bound by the reasons stated therein;
- (d) if no statement is given the employer is estopped from introducing testimony of facts that could have been included in the statement.

It seems to the court that since the requirement for formal statutory reasons on request was specifically removed by the Legislature, that the statement required by section C10 can be either a formal or informal statement, provided as required by the section that (a) it is written and (b) it contains the precise reason for the termination, and (c) it is furnished within seven days of notice of the termination. It also seems to the court that once these conditions of subsection (1) are satisfied, subsection (3) becomes operative and the employer is conclusively bound by the contents of the statement.

In addition it seems to the court that where the conditions of subsection (1) are not satisfied i.e. where no statement is given or where the statement is not written or where the statement does not contain the precise reasons for the termination, or where it is not provided within the seven day time limit, subsection (4) becomes operative and the employer is estopped from introducing testimony of facts which could have been included in the statement.

The letter of 18th October 2002

The employer contends that the letter of 18th October, 2002 contains the precise reasons for the employee's termination and that as such it satisfies the requirements of section C10 (1) of the Code. An examination of the letter indicates that it recites the incident upon which the termination is based, states the misconduct complained about and outlines the reasons why the employee was terminated. The court is therefore of the view that the employer's contention is correct, in that the letter satisfies the requirement of section C10 (1).

It does not seem to the court that section C10(1) requires the reasons to be given to the employee in any particular form, so long as the conditions mentioned in the section are satisfied. Thus an employer could give oral reasons for the termination on the happening of an incident or after the investigation of the same and within seven days of the termination provide written reasons which shall be binding on him. Alternatively an

employer may opt immediately on the happening of an incident to issue a letter of termination containing written reasons for the termination.

The question then to be determined is whether such a letter can be said to satisfy the requirement of being furnished 'within' seven days of the notice of termination. The word 'within' in relation to a period of time is usually used to delimit a period of time inside which certain events may happen, and usually 'within' any number of days after an act is generally understood to be exclusive of the day of the act.

In the context of section C10 (1) this court is of the view that in its ordinary meaning, the term "within seven days of notice of termination" means that the statement required by the section can be provided by the employer from the instant of termination up to and including a period of seven days after the termination not counting in the day of termination itself. It does not seem to the court that it can reasonably be argued that a written statement given at the time of termination falls short of the requirement of section C10 (1). We therefore agree with the employer's contention regarding the letter of 18th October, 2002.

Decision

For the reason stated above the Employee's submissions on the preliminary point are dismissed.

Dated the 3rd day of June, 2006.



Nelleen Rogers Murdoch
Chairman



Edward T. Henry
Member