

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO.: 21 OF 2002

BETWEEN:

LEMOTH BRYAN

Employee

and

WILFUR SECURITY LIMITED

Employer

Before:

The Hon. St. Lawrence de Frietas	-	Chairman
The Hon. Norris O. Scholar	-	Member
The Hon. Jessie F. Kentish	-	Member

Appearances:

Mr. Charlesworth Brown, Attorney-at-Law for the Employer

No appearance on behalf of the Employer

2007: September 10
2008: December 11

JUDGMENT

Unfair Dismissal or Redundancy Condition – Employee a supervisor with Security Company – Employee temporarily terminated after 6 years of employment - employee paid Severance pay.

1. De Freitas, Chairman: By reference filed 29th July 2002 the employee, Lemoth Bryan has asked the court to determine – “Whether he was unfairly dismissed and is therefore entitled to compensation”.

2. By his Memorandum filed with the court on the 29th July 2002 the employee Mr. Lemoth Bryan asserts that he was employed by Wilfur Security Ltd., a company carrying on business as a provider of security services.

3. The employee gave evidence that he commenced his employment with the employer on the 3rd day of June 1995 as a supervisor with responsibilities that included the administration of the day to day operations of the company and delegating work and providing training to the staff. He performed his duties until his services were terminated on or about 23rd April 2001. At the time of his termination the employee supervised some 79 subordinates and apart from the General Manager, he was the most senior employee of the employer at the time of his lay-off. He was the only employee to be terminated.

4. His agreed base salary was EC\$1100.00 per week (\$4766.66 Per Month), with a traveling allowance of EC\$150.00 per week (650.00 Per Month). He stated that he was entitled to 21 vacation days per year and that his working hours were anytime, “all the time, and 24 hours a day”

5. The employee claims that he was unfairly dismissed in circumstances which were contrary to good industrial relations and is claiming compensation for (a) Loss of Protection, (b) Immediate Loss of Earnings, (c) Future Loss of Earnings, (d) Manner of dismissal, (e) Exemplary Damages, (f) Vacation pay.

6. The case for the Employer is set out in the Employer's memorandum filed with the court on 22nd June 2004. The employer acknowledges that it is a company duly incorporated under the Laws of Antigua and Barbuda with its principal office situated at Dieppe Bay St. John's, Antigua and it carries on business as a security services provider. It was contracted by The Antigua Resorts, the owner of the St. James Club and the Royal Antiguan hotels to provide security services for these properties

7. The Employer further admits that the Employee was employed as a supervisor and that he supervised the staff at the Royal Antiguan Hotel. It deny that he Employee was the most senior person who worked with it after the General Manager, and asserts that it employed another supervisor who worked at the St. James Club. The employee worked at the Royal Antiguan Hotel. The Employer admitted that on or about the 23rd April 2001 that the employee was terminated.

8. The Employer denies that the employee was unfairly dismissed.

9. The Employer contends that sometime in March 2001 the owner of the Royal Antiguan Hotel and the St. James Club requested a 30% discount in

the cost of the services they provided and that it obliged the request and granted the discount.

Employers Absence

10. When the matter was heard before the court, neither the employer nor anyone acting on its behalf appeared. This was a matter that was pending before the court since the year 2002 and there had been several delays granted to the company over the period. The employer was duly advised by the registrar of the court by letter dated 23rd August 2007 that the matter was set to be heard on September 10th and 11th, 2007.

Effects of Further Delay

11. The court accepted the submission that the employer was given adequate and sufficient notice of the hearing. The court also took judicial notice that there was in fact, a great delay in excess of six (6) years that had already elapsed since the termination of the employee. The court's view was that it was entitled to consider the effects that any further delay in the commencement of these proceedings would have on either of the parties to the dispute. It was the court's view that to delay the commencement of this matter because of the absence of the employer, under the circumstances, would constitute an injustice to the employee.

12. The Industrial Court Act (Cap 214) Section 8(1): states inter alia

“The Court -----shall have all such powers, rights and privileges as are vested in the High Court on the occasion of an action.”

13. Part 39.4 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 confers the power to proceed with a trial in the absence of a party to it.

14. The Industrial Court Act (Cap 214) Section 11: further states

“In addition to the powers conferred on it under the foregoing provisions of this part, the Court may-

(a) Proceed to hear and determine a trade dispute in the absence of any party who has been duly summoned to appear before the Court and has failed to do so.

15. It was felt that under the circumstances it was necessary to proceed in order to do justice to both parties.

16. The court has remained mindful that since the employer was absent and therefore unavailable to present its case that it had to ensure that any evidence given by the employee was subject to additional scrutiny and had to be examined and analyzed more closely.

Issues

17. The matters for determination would appear to be

1. Whether or not a redundancy condition existed.
2. Was the dismissal unfair

18. Notwithstanding that the Employee was employed by letter dated June 3rd 1995, his starting date was set as May 22nd 1995". He was assigned to work at the Royal Antiguan Hotel as a supervisor. By letter dated October 3rd 1995 the employee was offered a salaried position on completion of his probation period. His probation period ended on October 16th, 1995

19. Mr. Bryant further told the court that he was terminated by letter dated April 23rd 2001, and that at the time of his termination his position remained that of a 'Supervisor. He also told the court that there was no other employee "between himself and the General Manager" and that there were no other persons severed or dismissed at the time he was.

20. Mr. Bryant gave evidence that he was not consulted about the possible termination.

21. Notwithstanding that the employer was not represented at the hearing this court in an effort to ensure that no injustice was done, has utilized every opportunity to address the concerns of the employer. In this regard the Court gave special attention to whatever reasons were given for the Employers action as appeared in the Employers Memorandum.

22. The employer sought to establish the reason for terminating the contract of the employee as being the result of its accepting a 30% discount for its services from its contractor who operated the Royal Antiguan Hotel and the St. James Club. (See Employer's Memorandum)

23. The reason given for the termination is further recited in a letter dated April 23rd 2001 and received in evidence. The letter stated inter alia, “the Hotel, which have contracted with us to provide security services, have written to Wilfur informing of serious financial problems.” The letter continues “they have requested a non-negotiable 30% reduction in the cost of security of each property. The company has given due and careful consideration to the foregoing and in our best interest, has acceded to the said request”.

24. After discussing some difficulties that the Contractor company was having, the letter continued “a decision has been taken to temporarily terminate (lay-off) your employment with the company with effect from May 1st, 2001, until further notice, in accordance with section C42 (2) b of the Antigua & Barbuda Labour Code”.

25. The employer appears to conclude that these circumstances created a **redundancy** condition whereby the employee could be terminated “in accordance with section C42 (2) b of the Antigua Labour Code” (See letter of termination.

26. The Labour Code at section C42 (1) states

Subject to the other provisions of this section, simultaneously upon the termination of employment of any employee entitled to severance pay under section C40 the employer shall remit to that employee severance pay computed in accordance with section C41.

27. The Labour Code at section C42 (2) states

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) -----

(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'.*

28. Section C40 of the Labour code states :

"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 the said employment by employer for reasons of redundancy".

29. Section C 3 of the said Labour Code defines the meaning of redundancy as follows:

"redundancy" means a situation in which by virtue of lack of customer's orders, retrenchment, the installation of labour saving machinery, and 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 diminished."

30. The employee gave evidence that he received and accepted severance pay in four installments. The first amount was received from "**Wilfur**

Security” dated June 24th 2002 and addressed to his attorney. Another letter dated December 23rd 2002 again addressed to his attorney was this time received from “**Antigua Resorts**” with a further installment. A third installment was received from “**Wilfur Security**” by letter dated February 11th 2003 and a fourth installment, indicating “final cheque for terminal benefits owed” came from “**Antigua Resorts**” by letter dated March 7th, 2003

31. The employee gave evidence that it was a Mr. Bob Barrett who was the “force” behind the Royal Resort (operators of the Royal Antiguan Hotel and the St. James Club) and Wilfur Security Ltd”.

32. The court is cognizant of the statutory responsibility as required in Section 10 (3) (b) of the Industrial Court Act Cap 214 which requires the Court to

“act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations and in particular, the Antigua and Barbuda labour code.

33. Section C58 (1) of Labour Code provides inter alia that:

A dismissal shall not be unfair if the reason assigned by the employer therefor

(a) -----

(b) -----

(c) *is that the employee was made redundant.*

(d) -----

(e) -----

Provided, however, that there is a factual basis for the assigned reason.

34. Section C58 (2) provides;

“The test, generally, for deciding whether or not a dismissal was unfair is whether or not , under the circumstances, the employer acted unreasonably or reasonably but, even though he acted reasonably , if he is mistaken as to the factual basis for the dismissal , the reasonableness of the dismissal shall be no defence , and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee’s dismissal.”

Decision

35. The Court has made a careful examination of the evidence in this case. The employer by its memorandum and by the letter of dismissal of the employer has put much emphasis on its claim that it accepted a 30% discount for security services at the request of its contractor. The employer submits by its Memorandum, that this circumstance created a redundancy situation whereby it could dismiss the employee in accordance with section C42 (2) b of the Antigua Labour Code, Cap.27.

36. The Employee’s evidence is that he was the only supervisor assigned to work at the Royal Antiguan Hotel immediately under the General Manager.

That he was also the only person to be severed or dismissed at the time he was. The employer's position is that it employed a second supervisor who was assigned to work at the St. James Club.

37. Notwithstanding the company's claim that it had to "make substantial cost and other adjustment", there is no evidence or indication that any retrenchment existed in the workforce or any labour saving device installed in the work place. The 38 subordinates which the employee was employed to supervise at the Royal Antiguan Hotel were neither dismissed nor severed. All remained in place and the work which the employee was last employed to perform had neither ceased or diminished, there may have been a lessening of the Employers' business but the task which the employee was employed to perform continued to exist. - See -----*Civil Appeal No. 6 of 1992, Antigua Village Condo Corporation and Jennifer Watt at page 3.* The Court does not agree that the discount offered by the employer to its Contractor resulted in the condition of redundancy being satisfied neither in accordance with C3 or C58 (1) (c) of the Labour Code. The consequence therefore is that this Court finds that the Employee was unfairly dismissed.

38. Section C56 of the Antigua Labour Code (Cap 27) states as follows:

"Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by the employer and no employer shall dismiss any such employee without just cause."

Mitigation

39. The employee gave evidence that he tried to find work when he was dismissed. He said that he applied to “Special Security,” and to “Antigua Brewery” two companies in Antigua, without any success. He further gave evidence that he was without work for 35 Months.

The Award

40. The principal remedy for unfair dismissal is compensation under the established heads and we make the following awards:

a) **Basic Award:** The employee worked for the employer for a total of 6 years. His last rate of pay was \$1,100.00 per week (\$4,766.66 per month) His entitlement is therefore $\$4,766.66 \times 6 = \$28,599.96$

b) **Immediate loss:** The employee was without work for some 35 months; he gave evidence that he tried to find work when he was dismissed – that he applied at “Special Security” and “Antigua Brewery” “without any success. However it is believed that with more diligent effort he should have been able to find new employment or made an effort to start his own business within 4 months. The award is therefore $\$4,766.66 \times 4 = \$19,066.64$

c) **Manner of Dismissal:** No Award. There is no evidence to establish that the dismissal made the employee less employable or would make him a prime candidate for dismissal if employed.

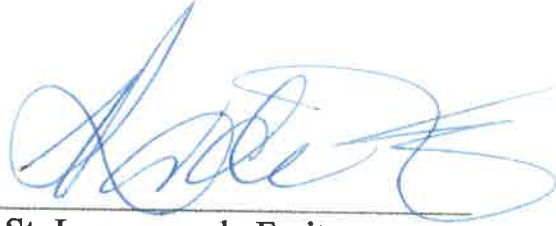
- d) Future Loss:** The employee obtained employment with the government of Antigua at a salary of \$2,600.00 per month. He suffered a monthly loss of \$2,166.66. We make an award of $\$2,166.66 \times 4 = \$8,666.64$, however, a deduction of 10% pursuant to the guidelines set out in the Jennifer Watt case (Civil Appeal no. 6 of 1992) is required. The net award is \$7,799.98
- e) Vacation Pay:** The employee gave evidence that he was entitled to 21 days vacation at a daily rate of \$159.00 per day $\times 21 = \$3,339.00$
- f) Travel Allowance:** The Employee gave evidence that he was paid \$150.00 per week (\$650.00 per month) for travel. As a result of his unfair dismissal he was denied the continuation of this allowance which was a part of his wages. We therefore make an award for $\$650.00 \times 4 = \$2,600.00$

The Order

41. The court hereby orders that the employer, Wilfur Security Ltd pay to the employee the sum of \$61,405.58 as compensation less any sum paid previously to the said employee as severance pay. This payment is to be made by the // *14* day of *Jan* 200*9*

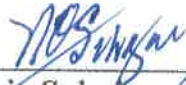
42. There shall be no order for cost.

DATED this 11th day of Dec. 2008



St. Lawrence de Freitas
Chairman

I concur



Norris Scholar
Member

I concur



Jessie Kentish
Member