

Original

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 07 of 2006

BETWEEN:

FITZ ARTHUR BOSTIC Employee

and

STANFORD DEVELOPMENT CO. LTD Employer

Before:

The Hon. Philip A. Pilgrim	President
The Hon. Genevieve L.I. Benjamin	Member
The Hon. Samuel R. Aymer	Member

Appearances:

**Mrs. Eleanor R. Solomon of Clarke & Clarke –
Attorneys-at-Law for the Employee
Mrs. Stacy A. Richards-Anjo of Richards & Co. –
Attorneys-at-Law for the Employer**

2009: March 24

May 20

July 29

JUDGMENT

PILGRIM, P:

[1] Fitz Arthur Bostic or Arthur Bostic was born in Barbados. He is a qualified building contractor. He has worked in the construction industry in Barbados from 1980 to 2002.

- [2] The Employee's Memorandum was filed by his Attorneys-at-Law on March 03, 2006. At **paragraph [1]** it states as follows:

"The Employer is a company duly incorporated under the laws of Antigua & Barbuda with its registered office situate at Cort & Cort 44 Church Street, St. John's Antigua."

- [3] The Employer wrote a letter to the Employee on March 18, 2003. It was an offer of employment. The period of employment was effective from April 01, 2003 to March 01, 2004. The terms were fully explained in that letter. These terms were accepted by the Employee. He signed the letter of employment on March 20, 2003. This was the Employee's first contract of employment.
- [4] At the expiration of the first contract of employment, the Employee's contract of employment with the Employer was renewed for the period April 01, 2004 to July 01, 2004. This was done in accordance with a letter from the Employer to the Employee dated April 06, 2004. It is to be presumed that the terms contained in the first contract of employment continued in this second contract of employment.
- [5] After the second contract of employment came to an end on July 01, 2004, the Employee continued to work for the Employer upon oral terms.

- [6] By letter dated May -2, 2005 the Employer dismissed the Employee. **Paragraph [2]** of this letter stated as follows:-

“In this regard, this serves to advise you that you are being severed effective Monday May 02, 2005.

You will be compensated with the full accumulated severance earned to date, pay in lieu of notice and any accrued vacation time.”

- [7] The Employer’s Attorney-at-law filed her Written Submissions on June 16, 2009. In this document she submitted at page 1 *inter alia* as follows:.

“No evidence has been led by the Employer to refute the averments of the Employee on the issue of unfair dismissal; for the purposes of these submissions we will not address the court on that issue.”

- [8] Such an admission by Counsel is truly rare. It must be commended and encouraged.
- [9] The Employee submits that at the time of his termination he earned a gross monthly salary of \$17,000.00. No evidence was produced to substantiate this. However his pay slip for the month of January 2005 revealed that he worked for a gross monthly salary of \$16,413.50 and a net monthly salary of \$15,059.22.

- [10] After his dismissal, the Employee obtained employment with Geotech Company Limited on May 18, 2005. He works for a monthly salary of \$8,000.00.

LEGAL PROCEEDINGS

- [11] As a consequence of being dismissed the Employee commenced legal proceedings against the Employer. The Employee filed his Reference on March 03, 2006.
- [12] The Employee's Memorandum was filed on March 03, 2006. The Employer's Memorandum was filed on February 23, 2009.
- [13] The Employee filed his Witness Statement on April 30, 2009. A Witness Statement of Mr. Jerome Jenkins on behalf of the Employee was also filed on April 30, 2009. No Witness Statement was filed on behalf of the Employer.
- [14] This matter came up for hearing on May 20, 2009. The Employee gave evidence. In summary he relied upon his Witness Statement. He was cross-examined by Counsel for the Employer.
- [15] Mr. Jerome Jenkins also gave evidence. He relied upon his Witness Statement. He too was cross-examined by Mrs. Stacy Richards-Anjo, Attorney-at-Law for the Employer.

THE ISSUES

[16] The matters to be determined are as follows:

- (i) **On or about April 27, 2005 did a contract of employment exist between the Employee and the Employer?**
- (ii) **If a contract of employment did exist as at 16 (1) above, was it breached by the Employer and if so, what is the measure of damages to which the Employee may be entitled?**
- (iii) **What is the measure of damages to which the Employee may be otherwise entitled?**

EMPLOYEE'S WRITTEN SUBMISSIONS

[17] Mrs. Eleanor Solomon, Attorney-at-Law for the Employee made a number of submissions. In summary her submissions are as follows:

- (i) **That “the Employee had the legitimate expectation that he would be employed by the employer for a period of three years (2005-2008) and acted on this expectation.”** She relied upon **Leacock v Attorney-General (2005) 68 WIR 181** and **Kent Garment Factory Ltd v Attorney General (1991) 46 WIR 177**

- (ii) That the Employee is entitled to an award of exemplary damages. Learned Counsel cited **Chapter 11 of McGregor on Damages- 17th edition Sweet & Maxwell, London 2003**
- (iii) A claim for the loss of the wife's income, for expenses incurred as a consequence of renovating the Employee's father's dwellinghouse, and loss of income for the period 2005-2008 were also claimed on behalf of the Employee.

EMPLOYER'S WRITTEN SUBMISSIONS

[18] Mrs. Richards-Anjo, Attorney-at-Law for the Employer made the following submissions:

- (i) The Employee's loss of Equity should be compensated for a period of two (2) years and one (1) month.
- (ii) No award should be made to the Employee for the period 2005 to 2008 with regard to the Guiana Island and Maiden Island projects.
- (iii) No award should be made for:
 - (a) any loss sustained by the Employee's wife;
 - (b) any lost rental income;
 - (c) any renovation expenses;

THE FIRST ISSUE

On or about April 27, 2005 did a contract of employment exist between the Employee and the Employer?

[19] The Employee asserts that **“On or about 27th April, 2005 the said Allen Stanford had given the Employee assurances that the Employee would be employed as Project Manager for a period of 3 years from May 2005 on two specific projects namely the Guiana Island Project and the Maiden Island Project. Based on those assurances the Employee made preparations to relocate his family and incurred substantial expenses in doing so.”**

- see the Employee’s Memorandum at **paragraph [14]**.

This assertion is also reproduced by the Employee at **paragraph [24]** of his Witness Statement.

THE LAW

[20] Not one relevant case was cited by Mrs. Eleanor Solomon, Attorney-at-Law for the Employee so as to assist the Court to determine this issue. Instead Counsel cited public law cases and in particular judicial review authorities which, with the greatest respect, have no application in this Industrial Court. This Court has no jurisdiction to hear any public law matters. For the following reasons the **Leacock and Kent Garment Factory Ltd** cases are very inappropriate to cite in this Court. Since these authorities are the main foundation for the massive loss which the

Employee claims he has incurred, I shall now deal with the doctrine of **‘legitimate expectation’**.

[21] Firstly, what is the doctrine of **‘legitimate expectation’**?

Numerous textbook writers have written about this doctrine. It has been referred to in many cases. Professor Albert Fiadjoe, Professor of Public Law, Faculty of Law, Cave Hill Campus, UWI in his book entitled **“Commonwealth Caribbean Public Law, Third Edition, Routledge- Cavendish, London 2008 at pages 267 and 268 stated *inter alia* under the heading “The Doctrine of Legitimate Expectations, Origins and Evolution”, as follows:-**

“The principle of legitimate expectation has been aptly described by Robert Thomas as one that concerns the relationship between public administration and the individual. It seeks to resolve the basic conflict between the desire to protect the individual’s confidence in expectations raised by administrative conduct and the need for administrators to pursue changing policy objectives. The principle means that expectations raised as a result of administrative conduct may have legal consequences. Either the administration must respect those expectations or provide compelling reasons why the public interest must take priority. The principle therefore concerns the degree to which an individual’s expectations may be safeguarded in the face of a change of policy which tends to undermine them. The role of the administrative court is to determine the extent to which

the individual's expectation can be accommodated within changing policy objectives.

Review for legitimate expectation is thus designed to ensure a harmonious marriage between the policy objectives of the State and the expectations of the individual.”(The emphasis is the Court's).

- [22] Secondly in **R (Bibi) v Newham London Borough Council** [2002] 1WLR 237 Schiemann LJ stated at page 244 paragraph [19] *inter alia* as follows:

“In all legitimate expectation cases....three practical questions arise. The first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do.”(The emphasis is the Court's).

- [23] It is in this **public law** context that the High Court in Barbados was asked to determine whether or not Mr. Leacock was entitled to certain legitimate expectations. **Sir David Simmons CJ** (who sat as an additional judge of the High Court) commenced the judgment by stating *inter alia* as follows:

“This is an application for judicial review made by Police Constable 1024 Pearson Leacock (Mr. Leacock) under the Administrative Justice Act against the Attorney-General in her representative capacity under the Crown Proceedings

Act. The official against whom complaint is made is the Commissioner of Police, Mr. Darwin Dottin (The Commissioner)."(The emphasis is the Court's)

- [24] The learned Chief Justice explained the doctrine by reference to the **GCHQ case [1984] 3 ALL E.R.935**. He cited Lord Fraser at page 944. Lord Fraser stated *inter alia* as follows:

"Legitimate, or reasonable, expectation may arise from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."(The emphasis is the Court's).

- [25] Having found that Mr. Leacock had established a certain regular practice of the office of the Commissioner of Police, the learned Chief Justice therefore held that the applicant's legitimate expectation had been disappointed. A declaration was made to this effect.

- [26] In **O'Reilly v Mackman [1983] 2 A.C. 237** Lord Diplock stated *inter alia* at page 275 as follows:

"In public law as distinguished from private law, however, such legitimate expectation gave to each appellant a sufficient interest to challenge the legality of the adverse disciplinary award made against him by the board...."(The emphasis is the Court's).

- [27] In **Kent Garment Factory Ltd** (op cit) George C explained the doctrine of legitimate expectation at page 187 *inter alia* as follows:

“It is a concept that is based on the....necessity for, propriety and good faith on the part of a public official or authority towards a citizen...”(The emphasis is the Court’s).

- [28] Counsel for the Employee ought to have been aware of the nature of the concept of legitimate expectation. It was explained by Lord Hope of Craighead in **HMB Holdings v Cabinet of Antigua and Barbuda** (2007) 70 WIR 130 at 145. He stated at paragraph [31] *inter alia* as follows:

“Then there is legitimate expectation as an additional ground of review. As Lord Fraser of Tullybelton explained in Attorney-General of Hong Kong v NgYuen Shiu [1983] 2 AC 629 at 636, the concept of legitimate expectation is capable of including expectations created by something that falls short of an enforceable legal right, provided it has some reasonable basis. But if the public body has done nothing or said nothing which can legitimately have generated the expectation that is contended for, the case must end there.”(The emphasis is the Court’s).

- [29] No evidence was led in this case which shows that the Employer is *“a public official or authority.”* On the contrary in accordance with paragraph [1] of the Employee’s Memorandum, the Employer *“is a company duly incorporated under the laws of Antigua & Barbuda with (its) registered office situate at Cort and*

Cort 44 Church Street, St. John's, Antigua.” The registration of this company therefore clearly implies that it is a private company as opposed to a public body.

- [30] In all of the circumstances of this case, the authorities cited by Counsel for the Employee in support of his claim under this heading are of no assistance whatsoever. They clearly reveal a complete misunderstanding of the relevance of public law cases which have no place in a discussion of private contract law rights. It is to a discussion of the private law of contract to which an analysis of the Employee's rights, I shall now address.

THE LAW OF CONTRACT

- [31] The learned authors Ian Smith and Gareth Thomas in their book entitled *Smith & Wood's Employment Law, Ninth edition, Oxford University Press, London 2008* state the law with regard to a contract of employment at page 90 *inter alia* as follows:-

“A contract is an agreement by which two or more persons agree to regulate their legal relationships recognized and generally speaking, enforced by the law. Before the law will recognise an agreement as a contract certain essential conditions must be fulfilled. They are as follows:

- (i) *One party must agree expressly or implicitly to perform an undertaking and the other party must agree to accept such performance, that is to say, there must be offer and acceptance.*

- (ii) *The agreement must be supported by consideration or entered into according to certain prescribed forms.*
- (iii) *Both parties must be persons whom the law acknowledges as competent to enter contracts; they must have capacity.*
- (iv) *The objects of the contracts must be legal.*
- (v) *Both parties must intend that the agreement shall give rise to a legally recognised obligation.”*

[32] In **Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd** [1965] 2 All E.R. 65 at page 67 Lord Denning MR stated the law of representations or “assurances” in the following manner.

“Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is prima facie ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on.”

[33] In **Gill et al v Cape Contracts Ltd** [1985] 1RLR 499, O’Donnell L.J. in delivering the judgment of the High Court stated at page 500 *inter alia* as follows:

“What the court must consider is whether a representation was made by the defendants. If it was made, was it made in the knowledge that the plaintiffs would act upon it, and was it intended that they act upon it. If it was made with that knowledge, and that intention, then it is a warranty, sounding in damages, if broken.”

- [34] Was a representation made by the Employer to the Employee? If so, what was it? What is the state of the evidence? The Employee’s evidence is that he **“received assurances that (he) would be employed as Project Manager on those projects.”** He refers to Guiana Island and Maiden Island. There was no evidence proffered to substantiate this bald assertion. His own witness Mr. Jerome Jenkins in answer to Mrs. Richards-Anjo stated *inter alia* as follows:

“The land on Guiana Island was not owned by Stanford Development Company Limited.”

- [35] No evidence was led as to the terms of the contract between the two parties. What were the Employee’s obligations? What was his salary? Was there a superior officer to whom he should have reported? What was the commencement date of the contract?
- [36] In all of the circumstances of this case, I am quite satisfied that the Employer made no representations or assurances to the Employee with regard to an offer of employment on either Guiana Island or Maiden Island on or about April 27, 2005 or at all. There was no

offer made by the Employer. There was therefore no acceptance by the Employee.

I therefore hold that no contract of employment existed between the two parties on or about April 27, 2005 or in fact at all with regard to Maiden Island or Guiana Island.

ISSUE NO. 2:

If a contract of employment did exist as at 16 (1) above, was it breached by the Employer and if so, what is the measure of damages to which the Employee may be entitled?

[37] The Employee requests this Court to believe that he acted upon certain “**assertions**” between April 27, 2005 and May 02, 2005 when he was dismissed. This is a period of five (5) days. What is the state of the evidence between this period?

[38] The Employee asserts that he “*had to renovate (his) father’s dwelling house in Barbados. He spent approximately Bds\$27,000.00 on those renovations.*” If copies of certain cheques attached to the Employee’s Witness Statement verify such expenditure for the relevant period, they clearly do not. Firstly, they are for the benefit of June-Ann Bostic. Secondly, they do not relate to any period between April 27, 2005 and May 02, 2005.

[39] In addition the Employee produces a quotation from Mr. Otho Blackman dated November 18, 2005 for renovation work “*to be carried out*” upon a house located at Rockley New Road, Christ

Church. At the end of the document the letter writer states as follows:

“We are taking the opportunity to submit a quotation for \$24,500.00 for carrying out the proposed work and hope our figure falls within your limit. Should you have any queries please feel free to contact the undersigned.

Regards

Otho Blackman”

- [40] This quotation was for a time which was subsequent to the Employee's dismissal on May 02, 2005. The Employee's claim for loss of renovation expenses is clearly unfounded.
- [41] The Employee claims loss of rental income. He states that he received \$4,500.00 for rental income of his dwelling house in Barbados. He was required to rescind the contract due to his wife having to return to Barbados to take up residence in the same house as a result of his dismissal.
- [42] No evidence was produced of any lease between the Employee and A.T. & T? For what period was the occupancy? There was produced a copy of an Agreement dated April 15, 2005 between Mr. Arthur Bostic and one Dave Parris. The rent to be paid was \$2,000.00 per month. Was this the lease between himself and A.T. & T? I do not know. Having produced no such lease, the claim under this heading also fails.

- [43] The Employee also claims the loss of the wife's income which she would have earned had she otherwise remained in her employment in Barbados. The evidence in his Witness Statement is as follows:

“I discussed the move with my family and my wife agreed that she would resign from her job. She did so. She resigned in or around February 2005 and at that time her salary was \$3,000.00 per month. She remains unemployed since that time up to today. She would have earned the sum of Bds\$108,000 for a period of three years.”

- [44] He was cross examined by Mrs. Richards-Anjo, Counsel for the Employer upon this matter. The Employee stated *inter alia* as follows:

“My wife left her employment in February 2005 in Barbados. She had open heart surgery in January 2005. She worked right up to the week just before she had surgery. She came to Antigua & Barbuda right after she had surgery. The surgery was successful. I wrote a letter to the Employer in January 2005. In that letter I said that my wife could no longer work because she was sick.”

- [45] The letter which was elicited in cross examination by the Employer's Counsel is dated January 06, 2005. It was written by the Employee to the Employer. It was admitted as **“AB – 1.”**

[46] It is very unfortunate that Mr. Bostic did not produce a copy of this letter in his documents filed in this Court. Alternatively, some reference to it by the Employee would have been preferable.

[47] In his letter to the President of Stanford Development Co. Ltd the Employee states *inter alia* as follows:

“My wife can no longer work because of her deteriorating condition, and at present is awaiting surgery.

I am beseeching you Mam, to please look into this matter which seems to be tossed to and fro because of someone’s incompetence, but at the same time could deprive two beautiful children...of a beloved mother and myself of a dear wife with whom I have shared twenty six beautiful years of marriage.”

[48] The Employee had the benefit of two written contracts of employment. The third contract of employment was oral in nature. There were no designated specific written contractual terms for which he was in a position to state to his wife that they existed. In addition he himself specifically informed the Employer in writing in January 2005 that his wife *“can no longer work because of her deteriorating condition, and at present is awaiting surgery....”*

[49] In light of the Employee’s admission, it does not appear that his wife resigned as a consequence of any firm offer of employment which he obtained from the Employer. She simply resigned because of “her deteriorating condition.” Any claim for a loss sustained by her is clearly unsustainable.

[50] In all of the circumstances of this case, the Employee's claim for (a) loss of his wife's income, (b) renovation expenses, (c) rental income and (d) loss of income for the period 2005 to 2008 with respect to the two projects is hereby dismissed.

THE THIRD ISSUE:

What is the measure of damages to which the Employee may be otherwise entitled?

[51] An Employee who has been unfairly dismissed may be entitled to certain awards under specific headings. The relevant headings are as follows:

(a) Basic Award

An award under this heading is similar to that of severance. He worked with the Employer for two (2) years and one (1) month. His last net monthly salary was \$15,059.22. His entitlement is $(\$15,059.22 \times 2) + (\$15,059.22 \times 1.0/12)$. This amounts to \$16,314.15. He was previously granted \$25,650.00. A sum is therefore not due to him under this heading.

(b) Immediate Loss

No evidence was led with respect to the efforts which the Employee made to mitigate his loss. However he obtained alternative employment on May 18, 2005. He earns a monthly salary of \$8,000.00. He is entitled to 17 days salary. This amounts to \$8,416.65.

(c) **Manner of Dismissal**

The evidence does not support the grant of an award under this heading.

(d) **Future Loss**

The Employee avers that he earns a monthly salary of \$8,000.00. Prior to his dismissal he earned a net monthly salary of \$15,059.22. Using a figure of \$7,059.22 I award him a period of two (2) months loss under this heading. A ten per centum reduction from this figure warrants an award of \$12,706.60.

(e) **Notice Pay**

The sum awarded under this heading is \$15,059.22. He was previously granted \$12, 825.00. The net award is \$2,234.22.

(f) **Exemplary damages**

No evidence was led to warrant an award under this heading.

Conclusion

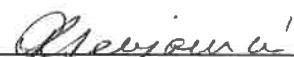
[52] The Employer shall pay to the Employee **\$23,356.47** on or before August 31, 2009. There shall be no order as to costs.

Dated this 29th day of July 2009



PHILIP A. PILGRIM
President

I agree


GENEVIEVE L. I. BENJAMIN
Member

I also agree


SAMUEL R. AYMER
Member

