

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 6 OF 2007

BETWEEN:

**ANTIGUA TRADES & LABOUR UNION
(For and on behalf of the Employees)**

Employee

and

THE ATTORNEY GENERAL

Employer

Before:

The Hon. Philip Pilgrim

President

Dr. Hayden Thomas

Member

Mrs. Jessie Kentish

Member

Appearances:

**Mr. Cosbert Cumberbatch of Cumberbatch and Associates
Attorney-at-Law for the Employees**

**Mr. Justin Simon Q.C; Attorney General, Attorney-at-Law
for the Employer**

**2012: July 23, 26
November 16**

JUDGMENT

PILGRIM P.

BACKGROUND

- [1] This matter is of some vintage. It involves several former Employees who were employed by a former government administration in various capacities. I shall refer to them sometimes as “**the said Employees**”. The said

Employees obtained employment in many instances after they had reached an advanced age.

- [2] All of the Employees have submitted through Mr. Cosbert Cumberbatch their Attorney-at-Law that a General Election was held in Antigua & Barbuda sometime in March 2004. They further state through Counsel that after the said General Election their employment was terminated by the new government administration.
- [3] The pleadings in this matter were amended so that the Court could understand the issues which were required to be determined.
- [4] Mr. Cumberbatch for the said Employees and the Honourable Attorney General Mr. Justin Simon Q.C. in person pursuant to the Crown Proceedings Act Cap. 121 of the Laws of Antigua & Barbuda appeared before me on July 23 and 26, 2012. At this hearing, both parties identified these said Employees whose matters needed to be resolved. In addition, two (2) precise issues for determination were identified by both parties. This exercise resulted in a Consent Order made on July 26, 2012. It was filed on September 11, 2012.
- [5] In accordance with the said Order, Written Submissions were filed by Mr. Cumberbatch on September 10, 2012. The Attorney General filed his on October 03, 2012. No cases or legal authorities were cited by either party.

The issues

The issues to be determined are as follows:

- i. **Whether Charles Willock and Joycelyn Attley are entitled to a payment of interest upon severance?**
- ii. **Whether Lestroy Warner, Jeremiah Butler, Austin Scotland, Archibald Mullin, the Estate of Gwendolyn Tonge, Rupert James, the Estate of Bill Abbott are entitled to be paid a gratuity and/or a pension in accordance with the provisions of the Pension (Non-Established Government Employees) Act Cap.310 of the Laws of Antigua & Barbuda?**

The first issue

Whether Charles Willock and Joycelyn Attley are entitled to a payment of interest upon severance?

The law

[6] There is in operation in Antigua & Barbuda a statute which is entitled **The Pension (Non-Established Government Employees) Act Cap.310 (the Act)**. It came into operation on September 12, 1967. In accordance with the Act a *“non established employee”* is defined as follows:

“non-established employee” or “employee” means a person employed by the Government on a week to week or month to month basis and whose wage or salary is paid from or out of a vote in the official Estimates of Antigua & Barbuda other than a Personal Emoluments vote.”

[7] Section 5 of the said Act states as follows:

“5. No pension or gratuity shall be granted under this Act to any non-established employee except on retirement from Government in any one of the following cases-

(a) after having attained the age of fifty-five years;

(b) on his compulsory retirement where his services are no longer required by the Department or Ministry or Government in which he is employed;

(c) on medical evidence to the satisfaction of the Cabinet that he is incapable by reason of infirmity of mind or body of continuing in such employment.”

[8] Section 7(1) of the said Act states as follows:

“7. (1) Subject to the provisions of this Act every non-established employee in Government employment for a continuous period of ten or more years, or for periods amounting in the aggregate to ten or more years, may be granted on retirement a pension at the annual rate of one-fiftieth of fifty-two times his weekly wage at the time of his retirement for each complete year of his employment.”

The case of Charles Willock

[9] Mr. Willock was born on December 19, 1925. He resides at Paynters in the parish of St. John. A Witness Statement was filed on his behalf on January 31, 2008. In that statement he deposed that he commenced working with the Government of Antigua & Barbuda as a Non-Established worker on June 01, 1995. He was 70 years of age.

- [10] The Claimant was first assigned to the Ministry of Health as supervisor of the Home Help Programme up to January 31, 1997.
- [11] On February 01, 1997 Mr. Willock was appointed in the position as Youth Mobilization Officer attached to the Ministry of Youth and Sports. According to him he was served with a letter of termination by the new administration dated July 09, 2004. He stated that he was given 79 days vacation and pre-retirement leave of 28 days. He ceased to work on December 08, 2004.
- [12] On July 26, 2012 both parties agreed that Mr. Willock was entitled to be paid severance in accordance with an Agreement between the Government of Antigua & Barbuda and the Antigua and Barbuda Trades & Labour Union.

The case of Joycelyn Attley

- [13] Ms. Joycelyn Attley was born on December 16, 1944. She resides at Villa Area, in the parish of St. John. On March 01, 1997 she commenced employment with the Government attached to the V.C. Bird International Airport.
- [14] The former Employee stated that for over the period of eight (8) years and two (2) months she held the post of Store Clerk.
- [15] Ms. Attley indicated that she was served with a letter of termination dated May 12, 2004. According to her she was never paid the severance which was

due to her in accordance with the Collective Agreement. This sum was estimated by her to be \$17,087.04.

[16] With regard to both of these Claimants Mr. Cumberbatch submits that there was no evidence that there was a date of recall given at the time they were served with their letters of termination. As a consequence Mr. Cumberbatch is of the view that these two Claimants should be paid interest upon their severance at the rate of ten percent (10%) per annum from the date of termination to the date of actual payment.

[17] Mr. Cumberbatch cited Section C42 of the Labour Code. It states as follows:

“C42. (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 C41.

(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, (b) be six months or more in the future, severance pay shall be payable on the date of the original termination;

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.

(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.”

[18] Mr. Simon Q.C. for the Crown stated that at no time was the termination of any of the two employees said to be temporary. He submits that there is no basis for an award of interest to be made to any of the two Claimants.

[19] Mr. Cumberbatch also submitted that this Court may award the two Claimants interest in accordance with Section 27 of the Eastern Caribbean Supreme Court Act, Cap. 143 of the Laws of Antigua & Barbuda.

[20] In addition, on or in the alternative Mr. Cumberbatch invites the Court to have regard to section 7 of the Judgment's Act Cap. 227 of the Laws of Antigua & Barbuda in the award of interest to the two Claimants.

[21] Although it was not identified as an issue in the Consent Order of July 27, 2012, Mr. Cumberbatch stated that his submissions with respect to interest upon the severance payment awards for the two Claimants should also be

applied to the former Employees whose names are particularized in the second issue.

- [22] Mr. Simon Q.C. stated that this Court has no power to award interest on judgments awarded either expressly or by reference to other legislation.

Discussion - the legislation cited

- [23] Cap. 143 of the Laws of Antigua & Barbuda with respect deals with matters which are heard in the High Court or the Court of Appeal. Section 27 of Cap. 143 provides specifically for *“proceedings for the recovery of any debt or damages, in the High Court or the Court of Appeal,....”*

- [24] Whilst the Industrial Court may in certain circumstances exercise jurisdiction which is akin to the High Court, the Industrial Court Act Cap. 214 of the Laws of Antigua & Barbuda contains no provision which empowers it to award interest similar to the High Court which is empowered so to do pursuant to Section 27 of Cap. 143.

- [25] Mr. Cumberbatch also stated that the Order of the Industrial Court of July 26, 2012 in relation to the said Employees is a judgment made in accordance with the Judgments Act Cap. 227 of the Laws of Antigua & Barbuda. Accordingly I may award interest at the rate of five (5) per centum upon this Judgment in accordance with Section 7 of Cap. 227.

- [26] I find no merit in this submission for the following reasons. Firstly, I agree that the Consent Order is a judgment. However, in accordance with Section 8 of Cap. 227, it is Mr. Cumberbatch’s duty to **“enter up”** the judgment and

file it *“in the High Court.....signed by the proper Officer of the Court where such judgment has been obtained”*. This has not been done to date.

[27] Secondly, even if the first condition at paragraph [26] was satisfied, the power to award interest *“at the rate of five per centum per annum from the time of the entering of such judgment”* devolves upon the High Court and not the Industrial Court.

-See section 7 of Cap.227

Discussion-Section C42 (1) of the Labour Code

Statutory interpretation

[28] Paragraph 1372 of Volume 44(1) of Halsbury's Laws of England states as follows:

“Ascertaining the legislator's intention. “The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, concerning it as a whole and in its context, and acting on behalf of the people. The meaning of an enactment that corresponds to this intention is known as its legal meaning. The legal meaning may or may not correspond to the grammatical or literal meaning.”

[29] *“Nature of the legal meaning. The legal meaning of an enactment that is the meaning that corresponds to the legislator's intention is the meaning arrived at by applying to the enactment, taken with any other relevant and admissible material, the rules, principles, presumptions*

and canons which govern statutory interpretation. These may be referred to as the interpretative criteria, or guides to legislative intention.”

-See paragraph 1373 of Halsbury’s (op cit)

[30] “Doubt as to the legal meaning. If, on an informed interpretation, there is no real doubt that a particular meaning of an enactment is to be applied, that meaning is to be taken as its legal meaning. If there is a real doubt, it is to be resolved by applying the interpretative criteria.”

-See paragraph 1374 of Halsbury’s (op cit)

[31] “Plain meaning rule. It is a rule of the common law, which may be called the plain meaning rule, that where, in relation to the facts of the instant case, the enactment under inquiry is grammatically capable of one meaning only, and on an informed interpretation of that enactment, the interpretative criteria raise no real doubt as to whether that meaning is the one intended by the legislation, then the legal meaning of the enactment is taken to correspond to that grammatical meaning, but that in any other case the basic rule of statutory interpretation is to be applied.”

-See paragraph 1391 of Halsbury’s (op cit)

[32] In *Pinner v Everett* [1969] 3 All E.R. 257 at pages 258 and 259 Lord Reid stated the principle as follows:

“In determining the meaning of any word or phrase in a statute the first question to ask is what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that

meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, then it is proper to look for some other possible meaning of the word or phrase. We have been warned again and again that it is wrong and dangerous to proceed by substituting some other words for the words of the statute.”

- [33] What are the operative components of an Act? Halsbury’s (op cit) at paragraph [1258] state *inter alia* as follows:

“The operative components of an Act are the sentences that constitute Parliament’s pronouncements of law. The operative components normally consist of sections and schedules, either of which may incorporate a proviso or a saving and which are often called ‘enactments’.”

- [34] Paragraph [1261] of Halsbury’s (op cit) refers to the operation of a proviso. It states *inter alia* as follows:

“1261 - The proviso. A proviso is a formula beginning ‘Provided that...,’ which is placed at the end of a section or subsection of an Act.....and the intention of which is to narrow the effect of the preceding words. A reference to a section includes any proviso to the section, since the proviso forms part of the section.”

- [35] What then is the natural or ordinary meaning of the Proviso in Section 42 (2) (b) of the Labour Code in its context? Section (42) (1) of the Labour Code relates to the termination of an employee for reasons of redundancy who

may be entitled to severance payment in accordance with Section C 40 of the Labour Code.

[36] The proviso at Section 42 (b) of the Labour Code does not relate to Section 42 (1). It appears to be that the proviso at Section 42 (b) which provides for the payment of interest at the rate of ten percent per annum on the amount of the severance pay due applies in specific circumstances.

[37] These circumstances are as follows namely (a) where the employee's termination is stated as temporary; (b) if the employee is not recalled to work after three (3) months have passed from the termination which said termination has no date of recall.

[38] **Neither of the two Claimants presented their letters of termination. Mr. Willock stated that upon receipt of his termination letter dated July 09, 2004 he "was given 79 days vacation and pre-retirement leave of 28 days and (he) ended (his) work in that position on the 8th of December, 2004."** These set of circumstances do not appear to be reflective of a temporary termination. In these circumstances I hold that Mr. Willock at age 78 was permanently terminated with no intention in 2004 to be recalled.

[39] I also hold that in May 2004 Ms. Attley was permanently terminated with no possibility then of being recalled.

[40] In the circumstances of this case the words which appear in Section 42 (2) (b) of the Labour Code must be given their natural and ordinary meaning.

No interest upon severance is payable where the employee has been permanently terminated.

[41] **The answer to the first issue is that neither Charles Willock nor Joycelyn Attley is entitled to a payment of interest upon any severance which is due to them.**

The second issue

Whether Lestroy Warner, Jeremiah Butler, Austin Scotland, Archibald Mullin, Rupert James or the Estates of Gwendolyn Tonge, and Bill Abbott are entitled to be paid gratuity and/or pension in accordance with the provisions of the Pension (Non-Established Government Employees) Act Cap.310 of the Laws of Antigua & Barbuda?

[42] Mr. Cumberbatch Attorney-at-Law for the former Employees submits in summary as follows. The Claimants have all worked for more than 10 years continuously in non-established positions. They were compulsorily retired. As a result of these two circumstances they *“qualify for a pension on the basis of the provisions of Cap.310....”*

[43] Mr. Simon Q.C submits that as all of the Claimants commenced their employment after attaining 55 years the question of retirement does not arise in accordance with Cap.310.

[44] The submissions by Counsel are at variance with each other. They *“each contend for a different legal meaning of the disputed enactment in its application to the facts of the instant case.”*

-See Halsbury's Laws (op cit) at paragraph 1377.

[45] "Where the application of one of the opposing constructions of an enactment would produce an adverse result (that is one detrimental to the subject or the state), that is a factor against that construction, and indicates that the court should curtail the application of the enactment, narrowing its operation and effect, a process known as strict construction."

-See Halsbury's Laws (op cit) paragraph 1379.

[46] (a) In the text book entitled "Statutory Interpretation" authored by Francis Bennion, 4th edition, Butterworths London, 2002 the learned author states at Section 197 under the heading "The commonsense construction rule" as follows:

"It is a rule of law....that when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, the court should presume that the legislation intended commonsense to be used in construing an enactment."

(b) The learned author cited **Barnes v Jarvis [1953] 1 All E.R. 1061**. In that case **Lord Goddard C J** stated *inter alia* at page 1063 as follows:

"One has to apply a certain amount of commonsense in construing statutes to bear in mind the object of the Act,..."

[47] At page 473 of **F. Bennion** op cit the learned author also stated as follows:

"Drafters silence. When a particular matter is not expressly dealt with in the enactment this may simply be because the drafter

thought that as a matter of commonsense it went without saying. Drafters are often silent on points of detail, simply because it is not possible to express every aspect of a matter. Common sense may be needed in working out the detail.”

[48] (a) At **page 501** under the heading entitled “**Section 202. The ‘context’ of an enactment, F. Bennion op cit states as follows”**

“For the purpose of applying the informed interpretation rule, the context of an enactment comprises, (in addition to) the other provisions of the Act containing it,... the provisions of other Acts in pari materia, and all facts constituting or concerning the subject matter of the Act”.

(b) **F. Bennion** cites the dicta of Viscount Simonds in **A.G v Prince Ernest Augustus of Hanover [1957] 1 All E.R. 49**, at **page 55 (HL)** where he stated as follows:

“...it must often be difficult to say that any terms are clear and unambiguous until they have been read in their context... the elementary rule must be observed that no one should profess to understand any part of a statute before he has read the whole of it. Until he has done so he is not entitled to say that it, or any part of it, is clear and unambiguous.”

The facts

[49] The Claimants Messrs Warner, Butler, Scotland, Mullin, James, and the Estates of Bill Abbott, and Gwendolyn Tonge prior to his and her death commenced their employment as non-established employees at ages 62, 61, 63, 56, 56, 69 and 70 respectively.

[50] Acts which are in *pari materia* are Acts “*which deal with the same subject matter on the same lines*”.

-See Bennion op cit at pages 514 and 515

[51] Cap. 310 provides for the payment of pensions and gratuities in certain circumstances to non-established employees who are employed by the Government.

[52] There is in existence the Pensions Act Cap. 311 of the Laws of Antigua & Barbuda. This piece of legislation was first passed in April 1948. It provides for *inter alia* the payment of pensions and gratuities to public officers “*who have been in the service under the Government.*”

[53] The age of retirement of a civil servant is clearly set out at Section 8 of Cap. 311. It states as follows:

“8. (1) An officer shall retire from the public service on attaining the age of sixty years.

(2) An officer shall retire from the public service on or after attaining the age of fifty-five years, if he opts to retire at that age.

(3) An officer shall retire from the public service at the age of fifty years, if he applies in writing to retire at that age and the Governor-General acting on the advice of Cabinet grants the application.”

[54] The circumstances in which a pension may be granted to public servants who work in the public service are provided for in Section 6 of Cap. 311. It states as follows:

“6. No pension, gratuity or other allowance shall be granted under this Act to any officer except on his retirement from the public service in one of the following cases-

(a) on attaining the age of sixty years, or on or after attaining the age of fifty-five years, if he opts to retire at that age; or on or after attaining the age of fifty years, if he requests to retire at that age and the Governor-General acting on the advice of Cabinet grants his request.

(b);

(c);

(d) on compulsory retirement for the purpose of facilitating improvement in the organization of the department to which he belongs, by which greater efficiency or economy may be effected;

(e) on medical evidence to the satisfaction of the Governor-General that he is incapable by reason of any infirmity of mind or body of discharging the duties of his office and that such infirmity is likely to be permanent;

(f).....;

(g)

[55] Section 12 of Cap.310 provides as follows:

“If an employee to whom a pension has been granted under this Act is re-employed by the Government, the payment of his pension may, if the Cabinet thinks fit, be suspended during the period of his re-employment”.

[56] Section 12 of Cap.311 states as follows”

“12. If an officer to whom a pension has been granted under this Act is appointed to another office in the public service, the payment of his pension may, if the Governor General thinks fit, be suspended during the period of his re-employment.”

[57] The pensions and gratuities which are paid for by the Government of Antigua & Barbuda to both types of employees who work for the same Government is provided for in both pieces of legislation. In this regard the Latin word *par* or *paris* which means equal is applicable to an understanding of the issue to be determined.

[58] Mr. Simon Q.C. correctly states the concern which needs to be addressed to determine the second issue. At **page 5** of his Written Submissions, the learned Attorney General states as follows:

“The issue for determination is whether a non-established employee who commences his/her employment after attaining the age of fifty-five years is entitled to a pension upon completing ten or more years of service?”

[59] Unlike Cap. 311, there is no provision in Cap. 310 which clearly states the age at which a non-established employee may retire.

[60] It seems to me that the draftsman of Cap. 310 omitted to include a section which provides for a retirement age of a non-established employee. This could easily have been done by an examination of Cap. 311. It is therefore necessary and vital in these circumstances that Parliament should amend the legislation accordingly.

[61] (a) Three of the non-established employees in this matter were previously employed by Government before taking up their appointments. In addition, they were in receipt of a pension as a result of their prior employment. They are Mr. Warner, along with Mr. Abbott and Ms. Tonge prior to their deaths.

(b) Mr. Warner was previously employed as a Teacher and Superintendent of the Medical Benefits Scheme, Mr. Abbott (prior to his death) as a Casino Inspector in a non-established capacity and Ms. Tonge (prior to her death) as a non-established Director of Women's Affairs.

[62] The philosophy of an employment relationship between an employee and an employer must be that there does exist a fixed day when the employee first commences his employment with the employer and a fixed day when he

should retire from being employed. The writer of Ecclesiastes states the principle at Chapter 3 verse 1 in the King James version of the Bible in the following manner:

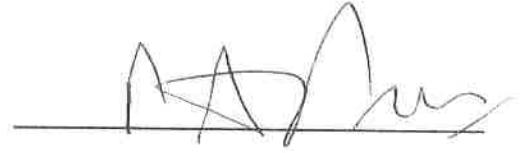
“To everything there is a season, and a time to every purpose under the heaven.”

[63] (a) In the circumstances of this case I hold that a non-established employee may be entitled to a pension or gratuity if he completes his employment in Government for a continuous period of 10 or more years or for periods amounting in the aggregate to 10 or more years, prior to his 55th birthday. To put it another way, the employee must have commenced his employment before he has attained his 55th birthday and at age 55 must have already been in employment for the past 10 years or for periods amounting to an aggregate to 10 or more years. So the employee would be barred from receiving a pension or gratuity if he commences employment as a non-established employee for the government if he has already attained the age of 55 years. This is especially so, since no provision exists in Cap. 310 for him to retire after age 55. If Parliament meant that a non-established employee may therefore be employed by Government after age 55 and be entitled to a pension or gratuity after being employed for 10 or more years or for periods amounting in the aggregate to ten or more years it should have made provision for this occurrence.

(b) In arriving at this finding I derive some comfort from a reading of the following two cases.

- [64] In **Dixon v London Production Tools Ltd. et al** [1980] I R L R 385 (EAT) the Employment Appeal Tribunal dismissed an employee's appeal when it held that the employee was excluded from making a complaint of unfair dismissal by the provisions of section 64 (1) (b) of the Employment Protection (Consolidation) Act because he had attained the age of 65 when he was dismissed.
- [65] Similarly in **Brooks v British Telecommunications plc** [1992] I.R.L.R. (CA) the Court of Appeal upheld the Industrial Tribunal's finding that it was entitled to find that when the appellants were dismissed, the normal retirement age for relevant employees was 60, notwithstanding that in the past it had been the practice to retain such employees beyond age 60, subject to their fitness and efficiency. The employees having reached the normal retirement age of 60 were precluded from claiming that their dismissals were unfair.
- [66] In principle these decisions at **paragraphs [64] and [65]** above appear to be consistent with the decision to which I have come in this case.
- [67] As each of the affected Employees had each commenced their employment as non-established Employees after the age of 55 with no provision for them to retire at an age after 55 none of them are entitled to be paid a gratuity or pension in accordance with the provisions of Cap. 210.
- [68] The respective References are dismissed. No order as to costs is applicable.

Dated the 16th day of November 2012



PHILIP A. PILGRIM

PRESIDENT

I agree



DR. HAYDEN THOMAS

MEMBER

I also agree



JESSIE F. KENTISH

MEMBER