

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 1 of 2010

BETWEEN:

SUNDRY WORKERS

Employees

and

ANTIGUA COMMERCIAL BANK LTD.

Employer

Before:

***The Hon. M. Althea Crick**

Chairman

The Hon. Samuel R. Aymer

Member

Appearances:

Sir Keithlyn Smith of The Antigua and Barbuda Workers Union for the Employee

Sir Clare K. Roberts, QC of Roberts & Co. for the Employer

2012: April 2

2015: June 12

JUDGMENT

Aymer, Member

Background

1. The Antigua and Barbuda Workers' Union (the Union) is the sole bargaining agent for the employees at the Antigua Commercial Bank Limited (the Bank), a commercial bank which operates in Antigua and Barbuda.
2. The Union commenced legal proceedings by filing a Reference on January 18, 2010 and Employees' Memorandum on April 13, 2010. In the Memorandum, the Union claimed that the Bank, unknown to the Union, unilaterally altered information contained in an appendix (Appendix 1(c) hereinafter referred to as "The Appendix") to the Collective Agreement dated November 19 2009 which was subsequently certified by the Labour Commissioner.
3. The Appendix formed part of the Collective Agreement and contained a schedule of the salary scales for employees for 2005/2008.

4. The Union requested that the Court order the Bank to replace The Appendix in the Agreement, which was signed by both parties, with one the Union claims was *agreed in principle* on November 6, 2009.
5. Witness statements for the Honourable Chester Hughes and Leonart Mathias were filed on February 28 and April 02, 2012 respectively.
6. The Bank's Memorandum was filed on October 22, 2010. In it, the Bank contended that the new salary scales contained in The Appendix were duly negotiated, agreed and signed by the Union and the Bank and certified as a lawful contract under the provision of Section K25 (2) of the Antigua and Barbuda Labour Code (the Labour Code); that the Collective Agreement is therefore a legally enforceable contract to its full extent; that in any event the Union had the opportunity to review the Agreement before it was signed; and that it was unreasonable to ask the Court to amend the certified Agreement by replacing the final document with one that was *agreed in principle*.

The Issues

7. The relevant issues are as follows:
 - (i) Does the Court have the legal authority to order the replacement of the salary scales contained in the certified Collective Agreement with those agreed to in principle on November 6, 2009?
 - (ii) Were the salary scales contained in The Appendix to the certified Collective Agreement duly negotiated and agreed to by both parties?
 - (iii) Did the Union have a responsibility, before signing the Agreement, to ensure that the salary scales were identical to those it had *agreed to in principle*?

The Union's Submissions

8. It is the Union's submission that by November 6, 2009 an agreement was reached, in principle, in respect of salary scales for employees of the Bank. Dr. Austin Josiah, the Bank's lead negotiator, penned the words '**Agreed in Principle**' on the face of a document titled "Salary Ranges" 'to be inserted in the 2005/2008 Collective Agreement'

9. The Union contends that the draft agreement which was presented by the Bank to the Union for its consideration on November 11, 2009, included the agreement, as noted in paragraph [8] above, which was labelled 'Agreed in Principle'.
10. The Union further **submitted that this is supported in** an email dated June 11, 2009 and sent by Dr. Josiah to the Honourable Chester Hughes, Leonart Matthias, Thomas Greenaway and Arlene Martin, which stated, *inter alia* "The 2005/8 Negotiations conclude today as per presented scales and 9% increase...." a clear indication that negotiations were completed and the salary scales to be used were those agreed to *in principle*.
11. As a counter to the Bank's claim that negotiations continued after November 11, 2009 when the draft agreement was submitted, the Union pointed to a number of discrepancies in a number of items which the Bank claimed to have been negotiated subsequently. These "subsequent negotiations", the Union contends, were fabrications by the Bank and in one case, was simply verification by the Bank of an issue already negotiated.
12. The Union referred the Court to Section K4 (3)(a) of the Labour Code. This section defines "**to bargain collectively**" as "*....the performance of the mutual obligation of the employer or his representative and the sole representative of the employees in the bargaining unit to meet at reasonable times and confer **in good faith** (emphasis by the Court) with respect to wages, hours, and other terms of condition of employment; to execute a written contract incorporating any agreement reached, if requested by either party; and, a written contract having been executed, to discuss any question or interpretation thereof.*" It is the Union's contention that the Bank did not "confer in good faith" when it unilaterally altered the salary scales already negotiated and agreed to in principle.

The Bank's Submissions

13. It is the Bank's submission that, while the salary scales in question were initially agreed to *in principle*, changes were made to the scales in subsequent negotiations with the shop steward and the lead negotiator.

14. The Bank further submits that in any event the Union had ample opportunity to read the final document before signing it. Indeed, changes were made to the document on the day of the signing.
15. Additionally, given that the Union admits that the salary scales was the most important part of the Agreement, it is not credible that the Union simply trusted the Bank on such an important component of the document. Further, Dr. Josiah's evidence is that the salary scales were brought to the attention of the lead negotiator by a shop steward on the day of the signing, but his objection was overridden by the lead negotiator.
16. In the circumstances, the Bank contends, the Union cannot now plead *non est factum*. "The Union cannot plead incompetence or carelessness in not reading the document before signing it."
17. The Bank cited the case of **Saunders (Executrix of the Estate of Rose Maude Gallie, Deceased) v Anglia Building Society** 1971 AC, 1004 as well as **United Dominions Trust Ltd. v Western B. S. Romanay (Trading as Romanay Car Sales), Third Party C.A. (1976)** in support of its pleadings against the use of *non est factum* by the Union.

The Law

18. It is the Union's claim that the Bank unilaterally altered the salary scales contained in The Appendix to the collective agreement. It is worthy of note that the Labour Code clearly defines unilateral action. In Section K2 unilateral action is defined thus,

"unilateral action", in a bargaining relationship, means action taken by one of the parties thereto covering any condition of work or term of a collective agreement without negotiating about such action, at least to a point of impasse, with the other party.
19. As detailed in paragraph 12 above, the Labour Code defines what it means "to bargain collectively". Key to this definition is the requirement that parties "*confer in good faith.*"
20. **Saunders (Executrix of the Estate of Rose Maude Gallie, Deceased) v Anglia Building Society** is the case law on which the Bank relied in addressing the question of *non est factum*. Megaw L. J. in **United Dominions Trust v Western (C.A.)** stated,

"However, in Gallie v Lee [1971] A.C. 1004 the House of Lords had the opportunity of considering the whole question of what is sometimes referred to as the doctrine of non est factum.....In Gallie v Lee their Lordships laid down, if I may respectfully say so, definitively the principles applicable where somebody has signed an agreement which is in fact of a different legal effect from that which the person signing it had thought that it was at the time when he signed it."

The First Issue

Does the Court have the legal authority to order the replacement of the salary scales contained in the certified Collective Agreement with those agreed to *in principle* on November 6, 2009?

21. The Bank makes the argument that the Court is not empowered to order the replacement of the salary scales contained in the certified Collective Agreement with those agreed to in principle on November 6, 2009. It relies on Section K25 (2) of the Labour Code which states:

" (i) With respect to all collective agreements filed by registered agents under section H8 (9) it shall be the duty of the Labour Commissioner.....to analyse said agreement to ensure that the provisions thereof are not inconsistent with the provisions of this Code.

(ii) Should he find one or more provisions of any such agreement to be inconsistent with any provision of the Code, he shall so inform the filing bargaining agents.

*(iii).....(iv).....
.....(v).....
....."*

22. The Court agrees with the Bank that Section K25 (2) of the Labour Code tasks the Labour Commissioner with ensuring that a collective bargaining agreement filed with the Department of Labour conforms with the provisions of the Code. The Labour Commissioner's power is limited to ensuring this compliance before certifying the agreement as a lawful contract.

23. The Court, however, has no such limitation in its powers in respect of a collective bargaining agreement. Section 7 (1) (a) of the Industrial Court Act states,

"The Court shall have jurisdiction -

(a) to hear and determine trade disputes referred to it under this Act;

(b)

(c) to hear and determine any complaints brought in accordance with this Act as well as such matters as may from time to time be referred to it under this Act."

24. Section 10 (1) (a) states,

"The Court may in relation to any matter before it -

(a) make an order or award (including a provisional or interim order or award) relating to any or all of the matters in dispute or give a direction in pursuance of the hearing or determination;

(b)....."

25. Further, Section 15 (2) states,

"Where there is any question or difference as to the interpretation or application of the provisions of a collective agreement any employer or trade union having an interest in the matter or the Minister may make application to the Court for the determination of such question or difference."

26. It is therefore the Court's ruling that Sections 7 (1) (a), 10 (1) (a) and 15 (2) of the Industrial Court Act, taken collectively, empower the Court to determine if all or any part of a collective bargaining agreement is enforceable.

The Second Issue

Were the salary scales contained in The Appendix to the certified collective agreement duly negotiated and agreed to by both parties to the agreement?

27. It is the Union's contention that no further negotiations occurred after the agreement in principle was signed on November 11, 2009. Consequently, any change to the Appendix was made unilaterally by the Bank and ought not to be considered a legitimate part of the Agreement which was subsequently certified by the Labour Commissioner. The Bank insists that even after the signing of the agreement in principle changes were agreed and made to the document. One such change was made to The Appendix in question.

28. It appears from the evidence that further discussions between the parties did occur after the agreement in principle was signed. What the Court has to determine is whether or not these discussions included an agreed amendment to the salary scales.
29. The Court is inclined to believe that the Union, at some stage after the signing of the agreement in principle, became aware that a change had been made to the salary scales. Dr. Josiah's evidence is that on the day of the signing of the agreement, one of the shop stewards present attempted to bring the 'offending' appendix to the attention of the Union negotiator, the Honourable Chester Hughes, but he dismissed the attempt. **This was not refuted by the Union.**
30. The evidence therefore suggests that a representative of the Union was aware of an amendment to The Appendix and attempted to have the matter addressed before the signing. This does not, however, mean that any change/amendment to The Appendix was negotiated. The Union insists that a change to The Appendix agreed in principle was not negotiated; the Bank insists that a change was negotiated after the signing of the agreement in principle.
31. The evidence of the Honourable Chester Hughes is that after the signing of the agreement in principle on November 6, 2009, the Bank submitted a draft agreement which was received by the Union on November 11, 2009. The Union vetted the document noting six points of concern. The Appendix was not one of the concerns. Consequently, the Union concluded that the final agreement contained The Appendix as negotiated in the agreement in principle and the agreement draft subsequently submitted by the Bank.
32. In the House of Lords case of **Gallie v Lee** case Lord Reid stated inter alia, ..***"there must be a heavy burden of proof on the person who seeks to invoke this remedy (non est factum). He must prove all the circumstances necessary to justify its being granted to him, and that necessarily involves his proving that he took all reasonable precautions in the circumstances.....certainly not where his reason for not scrutinising the document before signing it was that he was too busy or too lazy. In general I do not think he can be heard to say that he signed in reliance on someone he trusted"***.

33. In the same Case, Lord Hodson stated: *“Want of care on the part of the person who signs a document which he afterwards seeks to disown is relevant. The burden of proving non est factum is on the party disowning his signature; this includes proof that he or she took care. There is no burden on the opposite party to prove want of care”*.

34. Neither party was able to adduce sufficient evidence to convince the Court that its position should prevail.

The Third Issue

Did the Union have a responsibility, before signing the agreement, to ensure that the salary scales were identical to those it had agreed to in principle?

35. The Court carefully considered the Bank's argument that the Union cannot rely on the plea of *non est factum*. In the words of Viscount Dilhorne in the case of **Gallie v Lee**: *“It is, I think, clearly established that the plea of non est factum cannot succeed if the signer of the document has been careless.”*

36. Shop steward Leonart Matthias in his testimony under cross examination made the point that the Union **trusted that the Bank in good faith had made the corrections at the draft stage**. In his own words *“I did not read through the Agreement of 19th November. I simply trusted that the corrections had been made”*. (Emphasis is the Court's). In this regard, the Court paid particular attention to the following words of Viscount Dilhorne in the case of **Gallie v Lee**. He stated:

“Is it possible to define what will amount to a lack of care in the signing of a document? While I agree with Lord Denning that a man who signs a document without reading it, whether he does not read it because of the trust he places in another or on account of pressure of business, cannot, if of full age and understanding, repudiate his signature by reliance on the plea non est factum. I do not think it can be said that in every case failure to read a document by a literate person amounts to carelessness.”

“In every case the person who signs the document must exercise reasonable care, and what amounts to reasonable care will depend on the circumstances of the case

and the nature of the document which it is thought is being signed. It is reasonable to expect that more care should be exercised if the document is thought to be of an important character than if it is not."

37. What are the circumstances of the case in respect of reasonable care taken by the Union? What are the facts? Both parties agree that on November 6, 2009 an agreement in principle was signed by both parties. The Appendix of salary scales formed part of the document signed. Changes were subsequently made to the agreement in principle and a draft agreement, which was vetted by the Union, was submitted by the Bank and received by the Union on November 11, 2009.
38. The Union, in signing the final Collective Bargaining Agreement on November 19, 2009, signed with the belief that the salary scales appendix contained therein was identical to the one contained in the agreement in principle and the draft agreement which it had vetted.
39. Was it reasonable for the Union to rely upon the assumption that no change had been made to The Appendix? Was the Union careless in not ensuring that the appendices in all the documents agreed? It is the evidence of the Honourable Chester Hughes that, "Salary scales was the focus of negotiations" and, "We had the opportunity to read the agreement before we signed it." Shop steward Leonart Matthias agreed with Counsel for the Bank that the salary scales was "an important negotiating point".
40. Did it amount to carelessness on the part of the Union not to ensure that salary scales, as enshrined in the final Agreement, were identical in every respect with the scales contained in the agreement in principle and the vetted draft agreement? We think it did. The agreement as a whole was an important document and the salary scales Appendix a critical component of it. The Union should have exercised care in ensuring the accuracy of the final Agreement before appending its signature.

Conclusion

41. In arriving at our conclusion we have considered, *inter alia*, the demeanour of the witnesses, the cases and authorities cited and the submissions made by both sides. We have sought to act in accordance with equity, good conscience and the substantial merits of the case, having regard to the principles and practices of good industrial relations, and particularly, the Antigua and Barbuda Labour Code and to arrive at a decision which is fair and just having regard to the interests of the persons immediately concerned and the community as a whole.
42. It is the Court's conclusion that the Union, given its critical role as the sole bargaining agent for the employees of the Employer, a large financial institution on the island, had a responsibility to ensure that it signed a collective bargaining agreement which was in keeping with the terms and conditions it had negotiated. The Court finds that the Bank is correct in its argument against the application of the *non est factum* doctrine. The Union is bound by the Agreement that it has signed and which was subsequently certified by the Labour Commissioner.
43. Consequently, the Union's request that the Court orders that Appendix 1(c) of the certified Collective Agreement be replaced with The Appendix contained in the agreement in principle signed on November 11, 2009 is denied. There shall be no order as to costs.

Dated the 12th day of June, 2015


HON. SAMUEL R. AYMER
MEMBER

***The Honourable M. Althea Crick, who presided as Chairman at the trial of this Reference, having prepared the first draft of this judgment, died on 29th November 2014 before settling this final version.**