

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 22 OF 2013

BETWEEN:

METTE STAPLETON

Employee

and

HALL CONSTRUCTION LIMITED

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. St. Lawrence de Freitas

Member

The Hon. Samuel Aymer

Member

Appearances:

**Mr. Anderson E. Carty of Antigua & Barbuda Tradesmen & United Workers' Federation
for the Employee**

Miss. E. Ann Henry QC of Henry & Burnette, Attorneys-at-Law for the Employer

2014: October 22

2015: May 08

JUDGMENT

Brown, President

Background

1. The Employer is a construction company carrying on business in Antigua and Barbuda.
2. The Employee was employed by the Employer as a Mason at the daily rate of \$140.00.
He received no written statement of the terms of his employment.



3. The type of work the Employee was required to do and the nature of the Employer's business made the Employee's services itinerant. As the need arose, he provided his services at particular job sites from time to time.
4. The Employer kept records of the hours worked by the Employee and the amounts paid to him on a weekly basis.
5. On October 10, 2008 the Employee was laid off until further notice. A few weeks later he was paid notice pay, the equivalent of one week's wages. The Employer also paid the sum of \$15,481.95 to the Employee, inclusive of severance pay (\$14,420.00) and statutory interest in respect of 103 months of employment. In its calculations, the Employer excluded periods of lay-off and other periods when the Employee did not work.
6. By letter dated January 13, 2009 the Employee, through his Representative applied a selected severance formula and claimed severance pay in the sum of \$29,073.33. By letter dated February 17, 2009 the Employee reduced its demand to \$21,079.08.
7. By letter dated January 14, 2009, more than 3 months from the date of the last lay-off, the Employer wrote to the Employee requesting that he return to work on January 19, 2009.
8. The Employee did not return to work. Despite negotiations between the parties and a conciliatory hearing at the Labour Department, the dispute between the parties as to the quantum of severance pay due to the Employee remained unresolved. The matter was referred to this Court for determination.

The Pleadings

9. By his Memorandum filed on March 1, 2014 the Employee contended that the method of the Employer's calculation of his severance pay entitlement was erroneous. He asserted that the total period of service for the purpose of severance calculations should include all periods of lay-off.

10. The Employee's position is grounded on the decision of the Court of Appeal in **Civil Appeal No. 2 of 1992: Antigua Workers Union v Joseph Dew– Division of Dantzler West Indies Ltd.**
11. For its part, the Employer asserted that, by virtue of Section C47 of the Antigua and Barbuda Labour Code and Section 7 of the Industrial Court Act, the Employee was "estopped" from proceeding with the Reference.
12. The Employer also contended, in the alternative, that periods of lay-off should not be considered periods of service for the purpose of calculating severance pay. Accordingly, the Employer maintained that the amounts paid to the Employee were correctly calculated.

The Main Issue:

13. The main issue to be resolved by the Court is whether the Employee was paid the quantum of severance pay to which he is entitled.

The Evidence

14. The salient points of the Employee's evidence are as follows:
 - his employment commenced in June 1996.
 - periods of lay-off should not be deducted from the total period of his employment for the purposes of determining his severance entitlement.
 - he is entitled to an outstanding balance of severance pay with interest.
15. On the other hand, the Employer's evidence included the following:
 - the Employee's employment commenced on 18th August 1997.
 - the information which formed the basis of its calculation of the Employee's severance pay were the written records of the Employer.
 - the period for calculation of severance pay should not include the periods of lay-off.

Estoppel

16. At the commencement of the trial, learned Queen's Counsel, Miss. Henry, made a brief submission in respect of the issue of estoppel which was raised in the Employer's Memorandum. She questioned whether this Court has jurisdiction in relation to the determination of severance pay. However, upon hearing the Court's view, Counsel conceded that there was a subsisting dispute between the parties in respect of which the Court had jurisdiction.

Resolving the Main Issue

17. It was common ground that the Employee's services were not provided continuously. There were many periods of lay off during which the Employee was free to find work as a freelance mason. He admitted that he did find work from time to time for which he was paid at a daily rate or on a job-by-job basis.
18. In order to determine the main issue two questions must be answered: Firstly, what was the commencement date of employment? Secondly, should periods of "lay off" be included in the total period of employment for the purpose of calculating severance pay.
19. As to the commencement date of the Employee's employment, I weigh in the balance the evidence of the Employee on the one hand and that of the Employer on the other hand. The evidence of the Employer is clearly based on written records which I accept as accurate. The Employee admitted that he kept no written record of the days he worked for the Employer. As a result, he relied on his memory which appeared to be less than vivid in relation to dates. In the final analysis, I prefer the evidence of the Employer's two witnesses, Susan Hall and Vernon Hall, regarding the actual periods of work which commenced on 18th August 1997 and amounted to 103 months over the ten year period.
20. As to whether the periods of lay off should be included in the calculation of severance pay, I will consider **Civil Appeal No. 2 of 1992: The Antigua Workers Union (Sundry Workers) v Joseph Dew Division of Dantzler West Indies Ltd.** and **Reference No. 6**

of 1997: Matthew Joseph v Hall Construction, relied upon by the Employee and Employer respectively.

21. In the former case, **Civil Appeal No. 2 of 1992: The Antigua Workers Union (Sundry Workers) v Joseph Dew Division of Dantzler West Indies Ltd.** the Appellant appealed against the decision of this Court which held that Section C 42(2), legally entitled the Respondent to implement a program of temporary termination, or laying off its employees by rotation without having to pay severance pay.
22. Byron J. A., as he then was, considered the definition of “redundancy” under section C3 of the Labour Code and the evidence in that case, on the basis of which he concluded at page 3 of his judgment that “**no redundancy situation existed with regard to the employees who were temporarily terminated**”.
23. Further, at page 6 of his judgment, the learned Justice of Appeal considered the provisions of Section C42 (2), and concluded that “**‘termination’ is defined by its context in C42) of the Antigua Labour Code to mean dismissal of an employee, entitled to severance pay, for reasons of redundancy.**”
24. As to the meaning of “temporary”, Byron J.A. noted that the specific provisions of C42 (2) (a) and (b) left no room for the exercise of any discretion. Simply stated: Section C42 (1) provides for the payment of severance pay simultaneously upon termination because of redundancy. However, the payment of severance pay may be postponed upon a temporary termination because of redundancy.
25. It follows that if after the re-engagement of a temporarily terminated employee, within the periods specified in C42 (2), he is subsequently terminated because of redundancy, he would not lose his accrued benefits and his employment would have to be regarded as continuous.

26. In allowing the appeal, Byron J.A. asserted that, on the facts of the case, **“the ruling of the Court below, that C42(2) permitted the temporary termination of employees, or laying off by rotation without the payment of severance pay is therefore quite untenable, because the provisions of that section only apply in situations of redundancy”**.
27. In other words, Section C42 (2) does not entitle an employer to implement a program of temporary termination or lay off by rotation without the payment of severance where there is no situation of redundancy.
28. In Reference No. 6 of 1997: **Matthew Joseph v Hall Construction**, the employee was a mason employed on various construction sites for approximately 17 years until his services were terminated in 1996. While on sick leave in July of 1996, the employee was advised by the employer not to return to work until he was recalled. He was never recalled after that date.
29. In his evidence, the employee stated that when things were slow he did work for other persons on his own as a sideline. For itself the employer stated that the employee never worked full time because the employer did not always have work for him. Accordingly, the employee was laid off from time to time during which periods he did his own side line work.
30. On the facts of that case, Rogers Murdoch, Chairman, as she then was, at pages 4 and 5 of her judgment found that the employee was unfairly dismissed. In determining the amount of compensation to which he was entitled, the Court took **“notice of the practice in the construction industry and accepts that because of the nature of the industry the employee would in all likelihood not have been working a five day week every week with the employer for 17 years and accepts that during those times the employee would be otherwise employed.”**

31. The Court further accepted that the employee worked for the employer approximately 70% of the time each year and prorated his severance entitlement to 8.4 days per year instead of the statutory 12 days.
32. Given the main issue to be resolved in this Reference, the latter case of **Joseph** is clearly applicable. I adopt the premise stated by the Chairman as to the relevant practice and the nature of the construction industry in Antigua and Barbuda. **The Workers Union Case** provides no assistance to the Employee.
33. Based on the facts and the authorities cited, I accept learned Queen's Counsel's concluding submission on behalf of the Employer that the Employee received his severance pay with interest in full so that there is no balance due and owing to him. Accordingly, the Employee's claim is dismissed.
34. Finally, I find that no exceptional circumstances existed to justify an award of costs.

Dated the 08th day of May, 2015

I agree

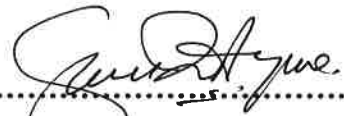

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CHARLESWORTH O.D. BROWN
PRESIDENT


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ST. LAWRENCE DE FREITAS
MEMBER

I also agree


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SAMUEL AYMER
MEMBER