

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 12 of 2014

BETWEEN:

LYNDON FRANCIS

Employee

and

PUBLIC UTILITIES AUTHORITY

Employer

**Before:**

The Hon. Dr. Hayden Thomas

Chairman

The Hon. Samuel R. Aymer

Member

The Hon. John Benjamin

Member

**Appearances:**

Ms. Kathleen A. Bennett, Attorney-at-Law of Lake & Kentish Chambers for the Employee

Ms. Karen A. de Freitas-Rait Attorneys-at-Law for the Employer

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2015: November 4

2018: May 9

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**JUDGMENT**

THOMAS, C.

**Background**

1. The Employer-Public Utilities Authority, also widely known as Antigua Public Utilities Authority (APUA)-is a Statutory Corporation established under the Public Utilities Act CAP. 359 of the laws of Antigua and Barbuda. It provides utility services of electricity, water and telecommunications to Antigua and Barbuda.



2. The Employee Mr. Lyndon Francis who holds an Electrical Engineering Degree was employed by APUA initially from 1<sup>st</sup> October, 1987 to 31<sup>st</sup> December, 1997 followed by fixed 3-year contracts from 1<sup>st</sup> January, 1998 to 31<sup>st</sup> December, 2012. His last position was that of Electricity Manager.
3. The Employee filed a reference with the Industrial Court on 18<sup>th</sup> March, 2014. It stated that "the issue in dispute between the parties is whether the Employee was unfairly dismissed."

#### The Employee's Case

4. The Employee filed a Memorandum with the Court on 18<sup>th</sup> March, 2014 outlining his case. In summary, it stated the following:
  - (a) Mr. Francis was employed with APUA for 25 years covering the period 1<sup>st</sup> October, 1987 to 31<sup>st</sup> December, 2012.
  - (b) For the last 15 years of his employment - 1<sup>st</sup> January 1998 to 31<sup>st</sup> December, 2012-the Employee held the position of Electricity Generation Manager/Electricity Business Unit Manager /Electricity Manager. He did so under five consecutive 3-year contracts, the last one being for the period 1<sup>st</sup> January, 2010 to 31<sup>st</sup> December, 2012.
  - (c) On 3<sup>rd</sup> October, 2012 he gave notice to the Employer of his desire to continue the employment relationship after the expiration of the contract.
  - (d) In a letter dated 7<sup>th</sup> December, 2012 the Employer informed the Employee that his contract would not be renewed. The Employee considered this notice period of three weeks to be too short considering his "longstanding tenure and senior position." He felt that he was essentially employed for an indefinite period and "had a legitimate expectation of continued employment as he was a longstanding senior employee in good standing with the Employer."
  - (e) The Memorandum further stated that contrary to law and good industrial relations practice the Employer did not seek to meet with the Employee prior to his termination and that no reason was given as to why he was "dismissed". It was felt that the Employer acted unreasonably, harshly, oppressively and in bad faith in its termination of the Employee and that he was unfairly dismissed and is entitled to compensation.

#### The Employer's Case

5. The Employer filed its Memorandum with the Court on 10<sup>th</sup> April, 2014. It stated the following *inter alia*:
  - (a) The original employment, by mutual agreement between the Employer and the Employee, ended on 31<sup>st</sup> December, 1997 and the Employee accepted the

- sum of \$64,062.50 as settlement by the Employer in respect of the original employment period (1<sup>st</sup> October, 1987 – 31<sup>st</sup> December, 1997).
- (b) The Employee was subsequently employed by the Employer under 5 term contracts beginning 1<sup>st</sup> January 1998 and ending on 31<sup>st</sup> December, 2012. These contracts were for periods of 3 years each.
  - (c) By letter dated 3<sup>rd</sup> October, 2012 the Employee gave notice to the Employer that he wished to renew the contract beyond 31<sup>st</sup> December, 2012. In a letter dated 7<sup>th</sup> December, 2012 the Employer informed the Employee of its decision not to renew the contract.
  - (d) The Employee was not dismissed by the Employer but “by the terms of the Relevant Fixed term Contract the Employee’s employment with the Employer came to an end by natural efflux of time upon the expiration of the term specified in the relevant Fixed Term Contract at the time of hire.”
6. There was no dismissal and therefore the Employee was not and could not have been unfairly dismissed as alleged by the Employee. The Employee’s employment came to an end on 31<sup>st</sup> December, 2012.
7. The Employer’s Memorandum further stated that “the Employee was not employed for an indefinite period and had no legitimate expectation of continued employment.” It said that the Employer was under no obligation to meet with the Employee before the expiration of the Employee’s contractual term of employment and was under no obligation to provide reasons for the Employer’s decision not to renew the contract. It said that the Employee’s was not entitled to compensation.

### The Main Issues

8. (a) Was the Employee employed by the Employer for an indefinite period of time?
- (b) Was there a legitimate expectation that the Employee’s employment would continue beyond 31<sup>st</sup> December, 2012?
- (c) Was the period of notice of termination given by the Employer in keeping with the terms of the contract?
- (d) Was the Employer under any obligation to meet with the Employee before the expiration of the Employee’s contractual term of employment or to provide reasons for its decision not to renew the contract?
- (e) Was the Employee unfairly dismissed?
- (f) If the Employee was unfairly dismissed, what is the level of compensation to which he is entitled?

## The Law

9. Section C56 of the Antigua and Barbuda Labour Code states:

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

10. C57 of the said Code states:

**"For the purposes of this part, an employee will not be deemed to have been dismissed unfairly if his employment is terminated at the expiration of the term specified at the time of his hire."**

11. C58 (2) states:

**"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."**

## The First Issue

Was the Employee employed by the Employer for an indefinite period of time?

12. The Employee's Witness summary dated December 11, 2014 filed with the Court on December 12, 2014 and in sworn testimony indicated that he was continuously employed by APUA for 25 years from 1<sup>st</sup> October, 1987 to 31<sup>st</sup> December, 2012.
13. For the last 15 years from 1<sup>st</sup> January, 1998 to 31<sup>st</sup> December, 2012 service was provided by way of five consecutive 3-year contracts. During this period he served as Electricity Manager and gave "continuous and unbroken service" Mr. Francis stressed that there was no break in employment before he became Manager. He regarded it as a transition and not a break. He said that he was essentially employed for an indefinite period. He felt that given his longstanding tenure and very senior position, three weeks' notice of termination was grossly insufficient.
14. Mr. E. Martin, General Manager, in his testimony felt that a person employed on numerous consecutive contracts could be regarded as a permanent employee.

15. Counsel for the Employer in her cross-examination pointed out—and the Employee accepted – that he (the Employee) received compensation of \$64,062.50 for the first 10 years of service.

16. Counsel for the Employee submitted that by giving Mr. Francis five consecutive 3-year contracts, APUA showed a clear intention to retain Mr. Francis as an employee for an indefinite period.

17. On the other hand, in the Employer's legal submissions submitted December 18, 2015 the Employer contended that :

The Employee's initial 10-year employment (October 1, 1987 to December 31, 1997) came to an end by mutual agreement when the Employee agreed to accept new employment as a manager under fixed term contracts i.e. contracts of employment for specified periods of time. It should be noted as mentioned earlier that he was paid by APUA \$64,062.50 which in essence was "severance payment calculated on the basis of one month's salary for each year of service".

18. Following this, the Employee was employed and re-employed each time under terms of five 3-year contracts. It is also noteworthy that at the end of each contract the Employee received 12.5% of salary as gratuity. He also got the opportunity to re-negotiate salary increases. The Employer's counsel also asserted:

"There is no provision in law that prevents an employer from employing an employee on successive fixed term contracts and it is neither logical nor lawful to assert that a fixed term employment somehow transforms into indefinite employment merely because an employee contracts to work under a number of successive contracts over several years. Employment for a fixed term (in this case the three years specified in the First contract from 1<sup>st</sup> January, 2010 through 31<sup>st</sup> December, 2012) is exactly that – namely employment for a specified term, at the end of which the employment relationship automatically ends. The parties may be at liberty to enter into another subsequent contract if they wish, but there is no obligation to do so."

19. In arriving at a decision on this issue we have taken into account the Employer's Counsel's position which states:

"An employee cannot practically or logically be employed by the same employer both indefinitely and on a fixed-term contract. It has to be one or the other. So once the Employee signed the First Contract, his prior indefinite employment had to have come to an end. Payment of "compensation" or severance in respect of that prior indefinite employment period is further evidence that such employment

in fact came to an end on 31 December, 1997. Thereafter from 1<sup>st</sup> January, 1998 the Employee was employed under the terms of the First Contract.”

20. We have carefully considered all the points raised by the two parties on this issue. These include the fact that the Employer paid the Employee and he accepted the amount of \$64,062.50 at the end of the first 10 years of employment and subsequently 12.5% gratuity at the end of each 3-year contract. Further, the Employee negotiated substantial increases after each 3-year contract. We conclude that the Employee was not employed by the Employer for an indefinite period. Clearly, if the Employee was employed indefinitely there would have been no need to have fixed 3-year contracts. It would have to be one or the other, not both.

We conclude that the Employee was not employed by the Employer for an indefinite period of time.

### **The Second Issue**

Was there a legitimate expectation that the Employee’s employment would continue beyond 31<sup>st</sup> December, 2012?

21. Counsel for the Employee’s closing submission made on 27th November, 2015 stated that “the Employee would have legitimately and reasonably expected his employment to continue after 31<sup>st</sup> December, 2012 based upon the Employer’s practice over the preceding 15 years of allowing him to continue working after the contract had expired (with little or no notice of renewal)”. This was so because although there was a provision in the contract for a notice period of 6 weeks to be given by the Employer if the Employee’s contract was to be renewed, this was never complied with. In fact, according to the Employee, in most cases he was allowed to continue working after his contract expired. Because of this practice, the Employee said that he was not alerted to the possibility that his contract was not going to be renewed. At first blush this is understandable. Let us, however, examine the matter further.
22. Clause 17 of the final contract dated 31<sup>st</sup> December, 2009 addresses the question of re-employment thus:

#### **“17 RE-EMPLOYMENT**

**17.1 Should the Employee be desirous of continuing this employment relationship after the expiration of this Agreement he shall, not less than three (3) months prior to the completion of this tour of service, give written notice to the Employer of his intention and the Employer may thereupon decide whether**

it will offer him any further employment. The Employer shall provide written confirmation, if granted, that the Employee's contract will be renewed at least six (6) weeks prior to the expiration of this Agreement.

**17.2 The Employee recognizes and accepts that upon this Fix Term Contract coming to an end the Employer is under no legal obligation to extend or renew the terms herein contained. The Employee further agrees that if this Agreement shall expire by efflux of time and shall not be renewed then the Employee shall have no legal claim for Unfair Dismissal."**

23. Counsel for the Employee submitted that the established practice of the Employer "essentially varied the terms of the contract." In support of this submission Counsel cited the case of *City & Westminster Properties (1934) Ltd. v Mudd* [1958] 2 ALL ER 733 at 743 as an authority that a contract can be varied by the conduct of the parties. This case involved new terms for a contract between a landlord and a tenant. In particular, it dealt with a request by the tenant for insertion of a clause giving permission for use of premises for dwelling in a basement shop in addition to its use for business. It is my opinion, however, that this is of little help to us in this case since it is a completely different scenario. In the present case, it is fair to say that the Employee should have realized that despite what happened in the past, the reply could always have been either in the affirmative or negative. It is unfortunate that on this occasion, the reply was in the negative.

24. We think it is useful to cite here a case similar to this one heard in the Eastern Caribbean Supreme Court in May, 2011 between **Ian Charles and the Board of Governors of the H. Laverty Stout Community College BVIHCV2010/0049**. The learned High Court Judge Justice Indra Hariprashad-Charles in her judgment commented *inter alia* as follows:

[25.1] "The claimant was first employed as a Graphic Artist in the Desktop Publishing Department of the defendant's College. His contractual appointment took effect from 17 October 2005 for a period of two years with an option to renew ("the First Agreement"). The First Agreement came to an end by effluxion of time. The claimant was paid his full salary and allowances.

[25.2] By letter dated 9 January 2008 the defendant offered the claimant the position of Manager, Desktop Publishing ("the Second Agreement"). He accepted the offer. The Second Agreement took effect from 17 October 2007 and was for a period of two years. It contained no renewal clause. The agreement contained a termination clause that the employment may be terminated without cause by three months notice on either side.

[25.3] Nine days before the Second Agreement was to automatically terminate by effluxion of time, the defendant informed the claimant that his contract will not be renewed.....The claimant sued the defendant seeking damages for wrongful dismissal....."

[25.4] He argued that it was a legitimate expectation that three months' notice or alternatively, reasonable notice would be given prior to the expiration of the agreement and in the absence of a notice, he expected the agreement to be renewed.

[25.5] It was pointed out, however, that the Second Agreement was a fixed-term contract as it was for a specific period of time, i.e. two years with a definite expiry date. It was also held that "the allegation of the claimant that he had a legitimate expectation that he would receive three months' notice or reasonable notice prior to the expiry of the Second Agreement was bald and unsubstantiated." Based on the Court of Appeal case of *Josie Rowland v The Environment Agency* [2004] 3 WLR 249 Counsel for the Employer submitted that "a legitimate expectation claim can properly only be brought on Judicial Review before the High Court." It was also noted that "though an employee's expectation may be relevant, a claim of unfair dismissal cannot be grounded upon a legitimate expectation".

We concur with this statement and rule that this matter should have no bearing on the outcome of this case."

### The Third Issue

Was the period of notice of termination given by the Employer in keeping with the terms of the contract?

25. Clause 2.1 of the final contract under the heading "2. Term of Employment" states the following:

**"Employment will commence on the 1<sup>st</sup> day of January 2010 and will continue for 3 years subject to the rights of the Employer to terminate the Employee prior to the expiration of this period in accordance with this Agreement and the Antigua and Barbuda Labour Code."**

26. The Employee's closing submission contends that on 3<sup>rd</sup> October 2012, the Employee gave notice to the Employer that he desired to continue his employment relationship after the expiration of his contract on 31<sup>st</sup> December, 2011. The Employer, however, replied by letter only on 7<sup>th</sup> December, 2012. The letter states:

**"December 7, 2012**

**Mr. Lyndon Francis  
Manager  
Electricity Business Unit  
A.P.U.A.  
Cassada Gardens  
ST. JOHN'S**

**Dear Mr. Francis:**

**Contract Renewal**

**In response to your letter of October 3, 2012 on the above subject matter, please be informed that the Board of Commissioners at its Meeting held on Thursday December 6, 2012 decided not to renew your Contract which expires on December 31, 2012.**

**The Board of Commissioners wishes to thank you for the services you provided to the Authority over the past three (3) years of your Contract and wish you success in your future endeavours. The Human Resources Department will ensure that you receive all entitlements due to you under your existing contract.**

**Sincerely.  
(Sgd.) L.W. Johnson  
CORPORATE SECRETARY**

**cc Mr. Clarvis Joseph, Chairman, Board of Commissioners, APUA  
Mr. Esworth Martin, General Manager, APUA**

**Mr. Rodney Simon, Human Resources Manager, APUA"**

27. It is necessary to refer once more to the requirements laid down in Section 17.1 of the contract of employment re the question of re-employment. It stipulates that the Employee should give not less than three (3) months notice to the Employer prior to the completion of this tour of service of his desire to continue the employment relationship. It also provides for the Employer to give "written notification if granted that the Employee's contract will be renewed at least six (6) weeks prior to the expiration of this Agreement." While it is true that the Employee was slightly late with his request for renewal of the contract it is also true that the Employer should have responded in a more timely manner instead of the three (3) weeks in which he did.
28. Although in my opinion there is no legal obligation for the Employer to give notice when it has no intention to renew the contract, the Employee should have been treated with more courtesy and respect especially considering his seniority. From the strictly legal standpoint, however, since the contract had come to an

end in keeping with Section 17.2, the Employer was under no legal obligation "to extend or renew the contract."

#### The Fourth Issue

Was the Employer under any obligation to meet with the Employee before the expiration of the Employee's contractual term of employment or to provide reasons for its decision not to renew the contract?

29. The short answer is that there was no legal requirement for the Employer to meet with the Employee or to provide reasons before the expiration of the Employee's contract for its decision not to renew the contract. He should, however, have been treated with more respect as mentioned earlier, bearing in mind his long service to the institution. This would have been in the interest of good industrial relations.

#### The Fifth Issue

Was the Employee unfairly dismissed?

30. In this regard, we refer again to Section 17.2 of the Contract of Employment made between the Employer and the Employee dated 31<sup>st</sup> December, 2009. It states, as cited earlier"

**"The Employee recognizes and accepts that upon this Fix Term Contract coming to an end the Employer is under no legal obligation to extend or renew the terms herein contained. The Employee further agrees that if this Agreement shall expire by efflux of time and shall not be renewed then the Employee shall have no legal claim for unfair dismissal."**

31. The Employer's position is further strengthened by Section C57 of the Labour Code which states that "..... an employee will not be deemed to have been dismissed unfairly if his employment is terminated at the expiration of the term specified at the time of his hire."
32. In this case, the Employee worked for a specific period i.e. from 1<sup>st</sup> January, 2010 to 31<sup>st</sup> December, 2012 in accordance with the terms of the fixed term contract which came to an end by the effluxion of time. In my opinion, therefore, the action taken by the Employer cannot be regarded as an unfair dismissal.
33. In the similar case cited earlier between **Charles and Board of Governors of H. Lavity Stout Community College, BVIHCV2010/0049**, Eastern Caribbean Supreme Court, the judge ruled that Mr. Charles was not wrongfully dismissed.

The Sixth Issue

34. If the Employee was unfairly dismissed what is the level of compensation to which he is entitled?

Since it is decided that the Employee was not unfairly dismissed it follows that no compensation is applicable. The case is, therefore, dismissed.

35. There is no order made with respect to cost.

Dated the <sup>th</sup> 9 day of May, 2018.



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**Dr. Hayden Thomas**  
**Chairman**



.....  
**Samuel R. Aymer**  
**Member**



.....  
**John Benjamin**  
**Member**

