

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 12 OF 2017

BETWEEN:

SUNDRY WORKERS

Employees

and

ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. St. Lawrence de Freitas

Member

The Hon. John Benjamin

Member

Appearances:

Mr. Ralph Potter of Antigua Trades & Labour Union for the Employees

Mrs. Carla Brookes-Harris, Ms. Rosanne Kim and Ms. Joy Dublin of the Attorney General's Chambers, Attorneys-at-law for the Employer

2018: March 19

2019: August 26

JUDGMENT

Brown, P;

Background

1. By the Reference filed on 15th November 2017 the Employees identified the main issues in dispute between the parties as follows: "Unpaid Holiday Pay; Unpaid Overtime; Duty Allowance; and Sick Leave."
2. By the Collective Bargaining Agreement between the Government of Antigua & Barbuda and the Antigua Trades and Labour Union on behalf of the government non-established workers dated 05th May 2000 (the Agreement) the

parties agreed to terms and conditions of employment governing the employment of non-established government workers.

3. Clause 24 of the Agreement sets out a list of categories of workers which are governed by it. That list does not include Immigration Officers. However, Clause 24 (20) provides a category of "all other employees included from time to time in Appendix 1 of this Agreement".
4. Clause 25 of the Agreement reads as follows:

"Clause 25

DURATION

- (a) This Agreement shall remain in force from the 1st day of September 1994 until the 31st day of August 1997 and shall continue thereafter until cancelled or amended by subsequent agreement. However, the rates of pay contained in Appendix 1 to this Agreement shall be subject to review not later than 31st December 1996.
 - (b) In the event that any provision of this Agreement is found to be in conflict with any law of Antigua and Barbuda existing or hereafter enacted such provisions shall be subjected to the law"
5. By a subsequent Collective Agreement dated 31st December 2004 (the Second Agreement) the Agreement was amended by the addition of new clauses. However, it confirmed the substantive clauses in the earlier Agreement.
 6. In their Memorandum of Claim filed May 26, 2017 the Employees pleaded:
 - (a) As non-established employees of the government, the Employees were subject to the Agreement.
 - (b) The Immigration Department has refused to honour Clauses 5 and 11 of the Agreement.
 - (c) The Immigration Department has refused to honour Section 15 of the Antigua & Barbuda Labour Code.
 7. Clauses 5 and 11 of the Agreement read as follows:

"Clause 5

PAYMENT FOR PUBLIC HOLIDAYS

Payment for Public Holidays shall be made only if the worker has worked on the scheduled work day immediately preceding, as well as on the scheduled work day immediately following the Public Holiday. Declared Public Holidays shall be regarded as recognized Public Holidays.

Clause 11
SICK LEAVE

- 1) *Any employee who has passed his probationary period shall in any calendar year following the commencement of his employment be eligible for twenty-eight (28) working days sick leave with full pay and an additional three (3) months from 17th February, 1993."*

8. Section C15 of the Labour Code provides:

"Leave Privileges

C 15. (1) If an Employee does not work on a public holiday he shall suffer no loss of pay, that is, he shall be paid the basic wage he would have received for work performed on that day had it not been a public holiday, provided he has worked his scheduled work day immediately before and his scheduled work day immediately after the said public holiday.

(2) If an employee does work on a public holiday he shall be paid, in addition to any wage which he would have received in respect of the public holiday, an hourly rate of not less than 150 per centum of his basic rate per hour worked.

(3) ..."

9. In their prayer for relief the Employees claim orders to the effect that:

- (1) The Immigration Department immediately cease its violation of clauses 5 and 11 of the Agreement.
- (2) The Immigration Department immediately cease its violation of Section C15 of the Labour Code.
- (3) The Employees be compensated for all and any losses of wages, salary, overtime pay and sick benefits which they have sustained as a result of the violations.

10. In its Amended Memorandum of Defence filed on 15th November 2017, the Employer joined issue with the Employees claim on the following grounds:

- (1) Immigration Officers are not covered by the Agreement as Clauses 5 and 11 are not applicable to them.
- (2) The Immigration Department has always complied with Section C15 of the Labour Code.
- (3) The "contractual arrangement" between the Department and the Employees place the Employees in a better position than that stipulated in the Labour Code.

The Main Issues

11. We have identified the three (3) main issues for determination as follows:

- (1) Whether the Agreement applies to Immigration Officers.
- (2) Whether the Immigration Department is in breach of clauses 5 and 11 of the Agreement.
- (3) Whether the Immigration Department is in breach of section C15 of the Labour Code.

Issue No. 1: Whether the Agreement applies the Immigration Officers.

12. Based on the method of appointment and the contents of their letters of appointment, there is no doubt that Immigration Officers are non-established workers employed by the government.

13. Be that as it may, we are guided by the Ruling of Remy J. in Claim No. ANUHCv 2011/0201: **Antigua Trades & Labour Union v. the Attorney General**, wherein she referred to the Agreement dated 05th May, 2000 as the "first agreement" and the Second Agreement dated 31st December, 2004 and held:

"In the view of the Court, the fact that a (previous) Labour Commissioner has signed the Collective Bargaining Agreement referred to in Paragraph 28 above combined with the fact that the Claimant has been paid monies by the Government Treasury on behalf of the Non-Established Workers for the period 2007 to 2010, created or encouraged a belief on the part of the Claimant that it was entitled to act as the sole bargaining agent or the designated bargaining agent for Non-Established Workers of the Government of Antigua and Barbuda. The Claimant has acted on that belief in its dealings with the relevant Government Department. It would be unconscionable to allow the absence of "certification" to prevent the Claimant from instituting the present claim."

14. For convenience, we adopt the reasoning of Remy J and find that, based on the settled course of conduct between the parties, it would be unconscionable to uphold the Employer's contention that the Agreement does not apply to Immigration Officers. Accordingly, notwithstanding the absence of Appendix 1 or any other document naming the Immigration Officers as a category of workers covered by the Agreement, it would be unconscionable to hold that Immigration Officers do not fall under the umbrella of the Agreement as

submitted by Ms. Dublin. In the circumstances, we reject that and other pertinent submissions on this issue made on behalf of the Employer.

15. It is clear that there is an urgent need to amend the Agreement by adding Appendix 1 or some other mutually agreed document expressly recognizing Immigration Offices as a category of workers.

Issue No. 2 and 3

16. As a matter of convenience, we will deal with the second and third issues together. We have carefully considered the oral testimonies of Mr. David Ramsey and Ms. Nikisha Hamilton-James given on behalf of the Employees and that of Ms. Juliette Simon on behalf of the Employer. We have also carefully considered the contents of the relevant documents admitted into evidence. Generally, we find the witnesses to be largely credible.
17. We accept Mr. Ramsey's evidence, repeated by Ms. Hamilton-James, as stated at paragraphs 9 and 10 of their Witness Statements. We reproduce the same as follows:

"9. For the duration of my employment the immigration department have refused to pay for overtime work done by the immigration officers. The department have also refused to honour clause 11 of the Collective Bargaining Agreement between the government as the employer of its non-establish employees (of which immigration officers are a part) and the Antigua Trades and Labour Union. The immigration department have also refused to pay immigration officers for work done on public holidays as stipulated in clause 5 of the collective Bargaining Agreement and Division C18 of the Antigua and Barbuda Labour Code.

10. Many discussions between the Antigua Trades and Labour Union and the Immigration Department over the years have only resulted in the immigration department and the Ministry under which the department falls refusing to pay for overtime work, and to honour the requirements of the Collective agreement and the Antigua and Barbuda Labour Code with respect to sick leave and public holiday pay."

18. In the premises, our findings of fact include the following:
 - (a) When Immigration Officers work overtime hours, they are not paid any overtime pay. Instead they are awarded days off or "lieu days" for having worked late.

- (b) When Immigration Officers work on a public holiday, instead of receiving public holiday pay, they are awarded two "lieu days". Prior to January 1, 2015 they received one "lieu day".
- (c) The Immigration Department does not pay overtime to the Employees.
19. As to the practice awarding lieu days as aforesaid, Ms. Dublin submitted that the practice is carried on with the consent of the Employees. In that regard, she contended that the Immigration Officers are in a better position because of the awards of lieu days instead of overtime and public holiday pay. That submission is not supported by the evidence of the Employees. Moreover, any such arrangement should be formally agreed with the Union in its capacity as the sole bargaining agent for the Employees. Accordingly, we are not persuaded that the practice actually makes them better off.
20. On the balance of probabilities, we find that from time to time the Employees become entitled to overtime and public holiday pay but do not receive the statutory payments to which they are entitled. In the circumstances, we also resolve the second and third issues in favour of the Employees. We find that the Immigration Department has been acting in breach of section C15 of the Labour Code and clauses 5 and 11 of the Agreement.
21. In the circumstances, we are persuaded by Mr. Potter's submissions and will grant the remedies which he claimed on behalf of the Employees as follows:

Declaration

22. It is hereby declared that:

- (1) Immigration Officers are non-established employees of the government of Antigua and Barbuda.
- (2) The Collective Agreement dated 05th May 2000 and the amending Collective Agreement dated 31st December 2004 cover Immigration Officers as non-established employees of the government of Antigua and Barbuda.
- (3) From time to time, the Immigration Department has acted in violation of section C15 of the Labour Code and clauses 5 and 11 of the Collective Agreement thereby depriving the Employees of portions of their wages, salaries, overtime pay, public holiday pay and other benefits to which they are entitled.

23. In light of those declarations, we will revisit the evidence before us with a view to assessing the losses suffered by the Employees and making appropriate awards of compensation. At first blush, it is clear that the evidence does not disclose the necessary particulars to allow us to make individual awards to the Employees. However, taking September 1, 1994 being the commencement date of the Collective Agreement, we should be in a position to fix formulae of general application to all the Employees.

Compensation for the First Period

24. It is common ground that between September 1, 1994 to January 14, 2015 when the Employees worked on public holidays the Employer paid them their regular pay and granted each of them one "lieu day". The "lieu day" was granted in lieu of the statutory payment of 150 per centum under section 15 (2) of the Labour Code. In other words, while the Employees were entitled to 1.5 days' pay in addition to their regular pay, they were "compensated" instead with one lieu day, leaving half a day or one half of a day's pay outstanding. **In effect, the Employer owes each of the Employees the equivalent of one half of a day's pay for each public holiday worked during the First Period.**

Compensation for The Second Period

25. It is also common ground that with effect from January 15, 2015 the Employer increased the "lieu day" entitlement from 1 to 2 days. This practice was continuing up to the date of trial. In effect, during the Second Period, apart from paying them their regular pay, the Employer is "compensating" the Employees with an additional two "lieu days". This means that the Employer is trading 2 lieu days or 200 per centum for the statutory entitlement of 150 per centum or one and a half days' pay. **Clearly, in this regard, the Employees may be better off provided always that the Union, as Bargaining Agent, formally accepts that arrangement, across the board or as an option, on their behalf for the Second Period.** In the circumstances, given the "lieu days" which have already accrued, no compensation is payable to the Employees for work done on public holidays during the Second Period in the absence of a written agreement with the Union.
26. Based on the evidence of Mr. Ramsey, we have noted the difficulty the Employees experience in benefitting from their "lieu days" in that they have not been able to actually utilize them as days off from work. According to Mr. Ramsey, he has accrued lieu days dating back to 2012 which remain unused. We accept Mr. Ramsey's evidence as representative of the overall state of affairs. In our opinion, that state of affairs is untenable. And the Employer should take immediate steps to rectify it.

Overtime Pay

27. Like all other Non-Established Workers, Immigration Officers are entitled to overtime pay under Clause-3 of the Collective Agreement. In that regard, the Counsel underscored the lack of evidence provided by the Employees to substantiate their claim regarding overtime pay to which they are entitled. In our estimation, the lack of detailed evidence in the circumstances will not defeat the Employees claim. It should be safe to assume that the Employer's has been keeping records of the overtime hours worked by the Employees.

Sick Leave Pay

28. As to sick leave, there is no doubt that, as non-established workers, the Employees' entitlements are governed by clause 11 of the Collective Agreement. There is no evidence to justify the Employer's failure to comply.

Order

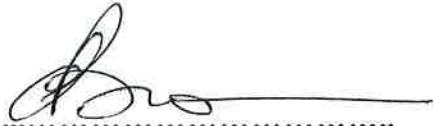
29. In the circumstances, it is hereby ordered that:

- (1) The Employer do immediately pay to each of the Employees the equivalent of one half of a day's pay, at the current rate, for each public holiday worked during the First Period from September 1, 1994 to January 14, 2015,
- (2) The Employer do immediately cease and desist from granting 2 "lieu days" for work done by the Employees on public holidays, unless the Employer and the Union agree in writing to that arrangement.
- (3) Pending agreement, if any, the Employer do pay to each of the Employees who work on a public holiday their regular pay plus 150 per centum of their regular rate in accordance with section C(15)(2) of the Labour Code and clause 5 of the Collective Agreement.
- (4) The Employer do immediately pay to each of the Employees the equivalent of his current day's pay for each day of his accrued but unutilized "lieu days" for the period January 15, 2015 to date.
- (5) The Employer do immediately pay to each of the Employees all outstanding payments for overtime work done between September 1, 1994 to date in accordance with clause 3 of the Collective Agreement.

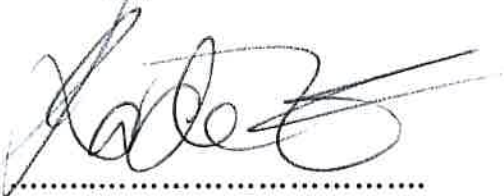
(6) The Employer do immediately pay to each of the Employees all outstanding wages and salaries which were withheld in violation of Clause 11 of the Collective Bargaining Agreement.

30. In closing, we urge the parties to engage in further negotiations towards a further amendment of the Collective Agreement to include the express recognition of Immigration Officers as a category of workers under Clause 24 of the Collective Agreement.

Dated the 26th day of August, 2019



.....
Hon. Charlesworth O.D. Brown
President



.....
Hon. St. Lawrence deFreitas
Member



.....
Hon. John Benjamin
Member



