

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 49 OF 2015



BETWEEN:

LESTER JONAS

Employee

and

JUMBY BAY ISLAND COMPANY LTD.

Employer

Before:

The Hon. Dr. Hayden Thomas

Chairman

The Hon. Samuel R. Aymer

Member

The Hon. Judith Dublin

Member

Appearances:

Mr. Samuel A. James of the Antigua and Barbuda Free Trade Union for the Employee

Mr. Justin L. Simon QC, with him, Ms. Fiona Murphy of Simon Rogers Murdoch,

Attorneys- at -Law for the Employer

2016: November 14, 28, 29

2019: March 25

JUDGMENT

THOMAS, C:

Background

1. The Employer, Jumby Bay Island Company Limited, is a company registered under the Laws of Antigua and Barbuda. It provides utility, security and transport services for Jumby Bay situate on Long Island in the State of Antigua and Barbuda.

2. The Employee Lester Jonas, was employed by the Employer as Security Manager with effect from May 3, 2010 and his services were terminated on February 19, 2015 on the grounds of redundancy.
3. The letter of termination states:

"JUMBY BAY

JUMBAY BAY ISLAND COMPANY LTD

18 February, 2015

Mr. Lester Jonas

Gunthorpes

Antigua

Dear Mr. Jonas

Management has undertaken a review of the operation of the security department over the past 12 months in view of the concerns that have arisen over the period regarding among others (a) inadequate island surveillance; (b) numerous thefts of both large and small assets; (c) issues of road safety. These matters pose significant risks to both external and internal guests and potentially expose the company to severe reputational risk.

As a result of the review management has concluded that there exists in the security department as structured certain inadequacies which management has concluded needs to be addressed to facilitate a change and reduce the significant risk to which the company has been exposed.

In order to achieve this objective management has determined on a re-organization and restructuring of the security department which we believe will not only enable management to save significant costs but will enable the company to better ensure the safety and security of all guests and employees. A new structure of the department will therefore be put into place within the next month.

This structure involves the streamlining of functions and deploying staff in a manner that increases supervisory manpower and streamlines the accountability of the supervisors to one entity.

To this end the decision has been taken to eliminate the position of manager of security, and to appoint four supervisors who will report directly to the director of security. Management believes that the increase in supervisory personnel would permit specific tasks to be assigned based on specific areas of specialization thus streamlining the department's functions. The effect will also be to ensure that there is enhanced record keeping and statistics, and enhanced reporting.

In view of the above circumstances management advises that your position of manager of security will become redundant with effect from 19 February 2015. In keeping with sections C 40 and C 42 of the Labour Code you will be paid your severance:

- One month's pay in lieu of notice
- Severance accrued at one month for each year worked
- Accrued vacation up to and including February 2015
- Prorated salary up to and including 19 February 2015 (14 days)

Less all applicable taxes

In addition to the above, and to assist you during your transition to further alternative employment, management has determined to make an ex gratia payment to you equivalent to three months salary less all applicable taxes.

Management thanks you for your years of service with the company and wishes you all the best in your future endeavours.

Sincerely yours,

(Sgd.) Ian Steele

Island Services Manager"

I, Lester Jonas, confirm receipt of this letter of redundancy

(Sgd.) Lester Jonas

4. A cheque in respect of the total sum of ninety seven thousand, three hundred and seven dollars and forty one cents (\$97,307.41) for the above was paid to the Employee. The Employer's Financial Controller in her Witness Statement stated that this sum included outstanding salary of \$10,316.50 (gross) for the month of February, outstanding vacation pay of \$1,892.34, notice pay of \$11,141.50, severance pay of \$55,707.50 and an ex gratia payment equivalent to three months' salary (with taxes deducted) in the sum of \$33,424.50.
5. The Employee, through his representative, filed a Reference with the Industrial Court on September 14, 2015 claiming that he was unfairly/wrongfully dismissed by his Employer. He claimed:
 - (1) There was no legitimate case of redundancy and that he was unfairly dismissed
 - (2) He was entitled to compensation for unfair dismissal including immediate loss, future loss, manner of dismissal and loss of protection
 - (3) Unpaid allowances
 - (4) He was entitled to be compensated for work done on public holidays and for overtime work done on his scheduled off days.

Consideration of the above Issues

The question of redundancy

6. Section C 3 of the Antigua and Barbuda Labour Code defines "Redundancy" as follows:

"Redundancy" means a situation in which by virtue of lack of customer's orders, retrenchment, the installation of labour saving machinery, an employer's going out of business, a *force majeure*, or any other reason, work which a person was last employed to perform has ceased or diminished".

7. Section C 58.(1) of the Labour Code states "A dismissal shall not be unfair if the reason assigned by the employer therefor

(a)

(b).....

(c) is that the employee was made redundant.

(d).....

(e).....

Provided, however, that there is a factual basis for the assigned reason".

8. The Employee's Representative argued that no redundancy situation existed, for as stated in the dismissal letter, "the duties as Security Manager still exist and are now being carried out by a newly employed Director of Security, Supervisors and Administrator".

9. The Employee's Representative also emphasized inter alia that:

(a) It would appear that the new Director of Security was introduced to force the Employee out and to replace him.

(b) This must be seen against the backdrop that they wanted to demote the Employee. When this failed they employed someone to be senior to him and then unlawfully made his position "redundant". Prior to his termination he was never told of any situation which may affect his continued employment. There was no consultation.

10. The arguments put forward to prove that there was no redundancy were persuasive. Indeed, in the written final submissions made on behalf of the Employer, Counsel for the Employer stated: "The Employer concedes in light of the definition of "redundancy" as per Section C 3 of the Antigua and Barbuda Labour Code, that the termination does not meet the statutory requirement. The termination can therefore be declared to be unfair, and that the Employee would be entitled to compensation in respect thereof." This is very much in keeping with the Court's decision on the matter. What is now left to be determined by the Court

is the quantum of compensation that should be paid to the Employee for his unfair dismissal.

11. With respect to the above it should be pointed out that certain payments have already been made by the Employer as per the termination letter and as detailed earlier in Paragraph [4] These are as follows:

One month's pay in lieu of notice.

Severance accrued at one month for each year worked.

Accrued vacation up to and including February 2015.

Prorated salary up to and including 19 February, 2015.

The letter also stated: "In addition to the above, and to assist you during your transition to further alternative employment, management has determined to make an ex gratia payment to you equivalent to three months salary less all applicable taxes".

Immediate Loss

12. The Employee has made a claim for payment of six months' salary under each of the two heads Immediate Loss and Future Loss. He pointed out that the Company had actually received legal advice to this effect following a request made by the newly employed Director of Security. The recommendation was that the Company would have to pay the Employee:

"(a) Severance at the rate of one month per year of service

(b) 6 months immediate loss

(c) 6 months future loss."

13. With respect to Immediate Loss and Future Loss, Counsel for the Employer in his Final Submissions conceded that the Employee is rightfully entitled to compensation under these heads but went on to state that "the Employer, however, strongly resists the claims made for 6 months in each case."

14. In summary, this resistance was based on the following grounds:

In the Court of Appeal judgment in the case **Antigua Village Condo. Corporation v Jennifer Watt - Civil Appeal No. 6 of 1992** - on appeal from the Industrial Court, paragraph [13], Chief Justice Sir Vincent Floissac noted:

“An unfairly dismissed employee is obviously entitled to compensation for immediate loss of earnings (i.e. loss of earnings between the date of the dismissal and the date of the trial or judgment)..... But during the pre-trial period, the employee is under a duty to take proper and reasonable steps to obtain other suitable employment and thereby mitigate the loss of earnings during that period... ..” and in paragraph [15]: “Where therefore the trial commences several months after the dismissal and the Employee has failed to mitigate the pre-trial loss of earnings, the Court should make an appropriate deduction from the compensation for that loss”.

15. Counsel went on to state that no evidence was led by the Employee of his attempts to seek alternative employment and no applications to other employers were produced. It should be noted, however, that Mr. Jonas in his oral evidence did state that he had sent out several job applications including letters to the Government of Antigua and Barbuda and the American University of Antigua and Barbuda (AUA) and also that he had an interview with the Eastern Caribbean Amalgamated Bank (ECAB). He said that up to the date of trial he was still unemployed.

16. Now Section 10 (3) of the Industrial Court Act CAP 214, No. 4 of 1976 makes the following provision:

“(3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall –

- (a) make such order or award in relation to a dispute before it as it considers fair and just having regard to the interests of the persons immediately concerned and the community as a whole;
- (b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code.”

In this regard, amounts awarded by this Court have varied for the most part from 3 to 12 months.

17. In the instant case, the Employee only produced anecdotal statements in support of his attempts to mitigate his immediate loss. Taking all factors into account, including the nature of his employment and the state of the market for such skills, we are of the opinion that the Employee ought ordinarily to have found alternative employment within six months of his dismissal. However, having taken into account the Employer's submission through his counsel as well as the Employee's obligation to lower his sight if he does not find initially employment at the same level of his previous employment, we are of the view that he should be paid under the head of Immediate Loss an amount equal to six months at full salary with a further three months at 50% of his salary. Counsel for the Employer referred to the fact that an ex gratia award equivalent to three months salary was paid to the Employee (See Paragraph [11] above) and requested that this be taken into consideration in the calculation of the award under this head. This Court did in fact make such an adjustment in calculating Immediate Loss as shown in the case Ref. No.11 of 1991 John Molyneaux vs Cove Hotels (Antigua) Ltd. A similar approach is taken in this case.

Future Loss

18. Having regard to our award under Immediate Loss, we make no award under this head.

Manner of Dismissal

19. Under this head, consideration is given as to whether or not the manner of the Employee's dismissal has had the effect of reducing his potential for re-employment. The Employee has argued that this has been his experience due mainly to the content of the termination letter. For example, he pointed out that the letter expressed concerns about inadequate island surveillance, numerous thefts of both large and small assets as well as having issues of road safety. These, it was felt, posed significant risks to both external and internal guests and potentially exposed the company to "severe reputational risk". The Employee stated that these statements affected his reputation. On the other hand, Counsel for the Employer argued that no evidence was provided in support of the Employee's claim and denied that these statements in the letter had the effect of preventing him from obtaining a job in the Security field.

20. The Employee's Representative has requested an award of six months of salary under this head while Counsel for the Employer has suggested that no award should be made. After a thorough examination of the facts presented we have concluded that the statements in the letter of dismissal could not have had such a negative effect on the Employee's re-employment. We therefore rule that no award should be made under this head.

Additional Claims

(i) Unpaid allowances

21. The Employee queried the method used in calculating his base salary and allowances. To get a better understanding of the situation it is necessary to consider the history leading up to it along with the explanations presented by both parties to the Court.

22. The Employee contended in his oral and written testimony that on April 27, 2010 he received an email from the CEO of Jumby Bay Island Company, Ltd. (JBIC) - the Employer - which outlined his (the Employee's) Terms of employment. Among other things it stated:-

His hiring date would be May 3, 2010

His Monthly Salary would be EC\$9,000.00 as for all other JBIC managers

Annual Bonus Target: 10%

Taxes to be deducted by JBIC payroll and remitted to the appropriate bodies as for all JBIC managers.

23. The email also stated "As we will be standardizing our Human Resources programs in the next few months, I am pleased that you have agreed to work on the basis of this document until such time as a standard management letter of employment is created. These terms will then be included in your letter of employment. Lester, please advise me if there are any omissions or corrections."

24. The formal Contract of Employment was signed by Mr. Jonas on 8th January, 2013.
Some of the details are:

“Position: Security Manager

Reports to: JBIC General Manager

Place of work: Jumby Bay Island, Antigua

Date of commencement: 03 May, 2010

Probation: Not applicable

Compliance with Company Policy and Procedures: Will be expected to comply with all policies and procedures as established by the Employer or as may be modified or implemented from time to time.

Hours of work: Contracted hours will be a minimum of forty (40) hours per week plus an unpaid meal break. Due to the nature of the position and responsibilities, may be required to work outside of the contracted working hours.

Remuneration: As of 1st April 2012, you shall be remunerated at the rate of XCD 104,124.00 per annum which will be paid by direct credit monthly into your nominated bank account. All bonuses, incentive, vacation, sick and other applicable benefits will be paid based on total remuneration package including Travel, Housing and Utility allowance but excluding insurance.

Benefits:

Insurance Plan:

Health, optical, dental, life and long-term disability benefits will be provided for you. You will become eligible for this benefit as of 1st January 2012, pending approval plan underwriters.

Bonus: In this position, you will be eligible for an annual performance based bonus equal to a maximum of 1 month of your salary. This bonus will be paid at the end of the fiscal year.

Travel Allowance:

As of 1st April 2012, the Company will provide a monthly travel/petrol taxable allowance to the value of XCD 750.00. It will be paid monthly in arrears to your nominated bank account by direct credit on the last working day of each month and is subject to current and future income tax deduction.

Housing and Utility Allowance: As of 1st April 2012, the Company will provide a monthly housing taxable allowance in the value of XCD 750.00 and a monthly Utility allowance to the value of XCD 325.00. It will be paid monthly in arrears to your nominated bank account by direct credit on the last working day of each month and is subject to current and future income tax deduction.

Taxes and Deductions: Your wages shall be subject to current and future statutory deductions for the amount of any contribution which the Employer is, by law, obliged to deduct.

Duration: This contract is open-ended and has no set termination date.

Declaration and Signature:

Having read and fully understood this document you indicate your agreement with the Terms and Conditions of Employment contained therein by signing in the space below and dating accordingly.

On behalf of JBIC:

(Sgd.) L. DEVIN

Date

Employee's Signature: (Sgd.) LESTER JONAS

Date: 08 - 01 - 2013"

25. The Employee contends that when monthly Travelling, Housing and Utilities allowances were granted by the Employer with effect from 1st April, 2012, these should have been added to the Employee's existing salary. He requested that this be implemented by the Employer but it refused to do so. The Employee said that as a result he lost \$ 65,700.00.

26. The Employer, through its Financial Controller, argued that when the Employee commenced his employment his gross monthly salary was \$9,000.00. After the relevant statutory deductions were made the Employee received a net monthly salary of \$7,638.54. He subsequently received increments and by January, 2012 his monthly gross salary had increased to \$10,502.00. After relevant deductions his net salary was \$8,862.67.
27. The Government of Antigua and Barbuda in April, 2012 reviewed its schedule of non-taxable allowances and provided a specified threshold for these allowances. The Employer said that following this it sought advice from its accounting partner, Grant Thornton. Based on this advice, the Employer undertook a restructuring of its tax position with a view to availing its managers "of the benefits that could be derived from the Government's reviewed schedule, while ensuring that there was full compliance with the new tax regime".
28. With effect from 1st April, 2012 the Employer restructured the Employee's remuneration to his benefit. The restructuring was effected by adjusting the gross salary of each manager to reflect a lower taxable gross pay and to reflect the excess on the existing gross salary as non-taxable allowances as described earlier. His net take-home pay was then higher since "his statutory deductions were only applied to his base or basic pay". Tax advisors to the two parties respectively gave conflicting views as to the interpretation to be given to the new government income tax policies implemented following its March 16, 2012 Pay As You Earn (PAYE) System Employers Guide. Suffice it to say, there was no indication from the Employee that the Inland Revenue Department (IRD) disapproved of the salary adjustment.
29. The Employee said that he was not pleased with this new arrangement since this could have implications for his retirement benefits. He was advised that those benefits would not be affected and in any future computation his gross salary would be used. He agreed that he did sign the contract but that he did so under duress for fear of losing his job. The Employer, however, denied this accusation. It stressed that "At no point during my discussions or meeting with the Employee was it stated, suggested or intimated in any manner that the Employee's continued employment would be threatened if he refused to sign his revised contract".

30. The Employer denied that at any time any mention was made of any entitlement of the Employee to allowances over and above the amounts that were now reflected as allowances because of the reduction of his base salary to permit him to receive the benefit of the government's reviewed tax structure. The Financial Controller, moreover, denied that there was any suggestion, intimation, or any statement in any discussions between the Employer and the Employee that the Employer had agreed to increase the Employee's salary above the gross that he was then earning by payment of allowances. It said that consistent with all managerial staff, the Employee's gross salary was simply adjusted to permit him a benefit.
31. The Employer has emphasized that the Employee has enjoyed the benefits for almost three years i.e. April 2012 to February 2015 without any objection and that the Employer derived no benefit from the changes in the Employee's salaries. It stated that all of the other managers accepted the adjustments but that the written queries made by Mr. Jonas only arose following his termination. It should be mentioned here, however, that the indication is that he had previously discussed the matter with the Employer.
32. Taking everything into consideration, we are of the view that there was nothing out of order with the new salary arrangement made by the Employer and are therefore compelled to dismiss the Employee's claim for additional allowances to his salary.

(ii) Overtime/Off days

33. The Employee claimed that during the course of his employment he worked an average of 900 hours overtime accrued in excess of the eight hour workday. He also said that he worked on his off days quite regularly. He said that he worked an equivalent of 100 of his off days which should be calculated as double and so would amount to 200 days at the regular daily rate. He mentioned that these issues were addressed in the Company handbook which was applicable to all staff. The Employer, however, referred back to the Employee's contract as mentioned in paragraph [24] above which stressed that due to the nature of the Employee's position and responsibilities, he may be required to work outside of his contracted working hours.

34. The question of pay was not addressed although it is often the practice for managers to be remunerated at a high enough salary level to take care of, among other things, overtime work and days off. It is also instructive to note that the Memorandum of Agreement between Jumby Bay Island Services Ltd. and the Antigua & Barbuda Workers' Union (on behalf of the Security Employees) Clause 12 3 b does refer to Overtime. Clause 4 captioned "Application of Agreement" however was careful to state "The provisions of this agreement shall apply to all employees of the Company other than Managers and any other employee(s) who satisfy both of the following conditions, namely

(a) have management status as agreed by both parties.

(b)"

35. It is here also necessary to point out that in addressing the question of overtime and premium pay, Clause 1.8.1.3 of the handbook stipulates that "All overtime must be authorized in advance by your manager". It could be inferred therefore that overtime pay does not apply to managers. In any case, no record was produced in this regard and the 900 hours overtime and the 100 days off said to have been worked are clearly "guesstimates". Moreover, under cross-examination during trial, the Employee conceded that the issue pertaining to underpayment was never raised with Human Resources Management. It should be stressed that the other managers worked under the same conditions.

36. We conclude that if payment for overtime and off days was intended for the employees and other managers this benefit would have been negotiated and included in the contract or memorandum of agreement. We therefore feel obliged to deny the Employee's request in this reference.

(iii) **Public Holiday Pay**

37. The Employee also claimed pay for public holidays worked. Again, while line staff is eligible for this benefit in accordance with the Labour Code and Memoranda of Agreement generally, in the case of managerial staff this would normally need to be negotiated by contract. The Employee's contract did not address this issue and therefore there is no authority to make this request enforceable.

Summary of Final Awards

38. The following are the final calculations of the awards:

Immediate Loss	6 months @ \$11,141.50	\$66,849.00
	3 months @ \$ 5,570.75	\$16,712.25
Future Loss		-
Manner of Dismissal		-
		\$83,561.25
Less ex gratia award previously paid		<u>\$33,424.50</u>
Net amount due		<u>\$50,136.75</u>

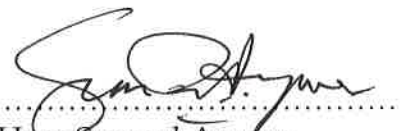
39. There is no order with respect to costs.

40. The total amount of \$50,136.75 shall be paid on or before April 30, 2019.

Dated this 25th day of March, 2019.



.....
Hon. Dr. Hayden Thomas
Chairman



.....
Hon. Samuel Aymer
Member



.....
Hon. Judith Dublin
Member