

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 9 OF 2015

BETWEEN

ALBERT GEORGE

Employee

And

CORTSLAND HOTEL

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Judith Dublin

Member

Appearances:

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

Dr. L. Errol Cort of Cort and Cort, Attorneys-at-Law for the Employer

2016: November 24

2019: August 16

JUDGMENT

Brown, P;

Background

1. The Employee commenced his employment with the Employer, a small family operated hotel, in 1986 when he was 39 years old. His duties included those of a general construction worker, a gardener, a porter, a pool deck cleaner and other duties involving manual work.
2. By letter dated 20th June, 2014, when the Employee was over 64 years old the Employer formally notified him that it was dissatisfied with his work



performance. Prior to receiving the letter the Employer had on several occasions orally complained to the Employee about his unsatisfactory performance.

3. By letter dated 19th September, 2014, when the Employee was less than one month from his 66th birthday the Employer wrote to him notifying him of the termination of his employment with effect from 28th September, 2014 on the grounds of his unsatisfactory performance and misconduct.
4. By letter dated 25th September, 2014 the Employer retracted its said letter of termination as a result of which the Employee continued in his employment in the usual manner up to 26th September, 2014.
5. By letter dated 26th September, 2014 the Employer informed the Employee that he would be placed on retirement from 6th October, 2014. The retirement of the employee was to take effect when he was 5 days away from his 66th birthday. We reproduce that letter as follows:

"26th September, 2014

Mr. Albert George

Dear Mr. Albert George,

Given that you have passed the age at which your social security pension commenced and having regard to the natural decline overtime of your ability to carry out the magnitude of strenuous manual labour that effective performance of your employment duties requires, we hereby inform you that you will be placed on retirement as of Monday 6th October, 2014. Your last working day will therefore be Friday 3rd October, 2014.

Your vacation entitlement will be calculated and paid to you accordingly.

Thank you for your service, and best wishes on your retirement.

*Yours truly,
Juanita Cort
Proprietor"*

The Opposing Cases

6. On the one hand, by its Memorandum of Claim filed on 23rd March, 2015 the Employee:

- (a) referred to the said letters dated 20th June, 2014, 19th September, 2014, 25th September, 2014 and 26th September, 2014; and
 - (b) asserted that it was not aware that the Employer had a retirement age policy and contended that “having regard to the law, natural justice and the tenets of good industrial relations practices, the Employer’s action amounts to (an) unfair dismissal.
7. On the other hand, by its Memorandum of Defence filed 24th April, 2015 the Employer maintained that its decision to terminate the services of the Employee was made in light of:
- (a) his attainment of pensionable age of 60 years over 5 years earlier on 11th October, 2008;
 - (b) “particularly having regard to the age, physical incapacity, demanding nature and magnitude of the prescribed manual work and the inability of the Employee to perform or adequately perform his tasks, the Employer decided to officially retire the Employee”
 - (c) “the Employee was aware that the Social Security pensionable age of 60 years is and was the official retirement age as applied by the Employer; and
 - (d) the Employer’s mandatory retirement age is 65 years and any employee working beyond that age did so on a month to month or week to week basis provided that he is physically and mentally able to perform his duties satisfactorily.
8. In the circumstances, the Employer denied that the Employee was unfairly dismissed and urged the Court to dismiss his claim.

The Main Issues

9. The main issues arising for our determination are as follows:
- (1) Whether the Employee was unfairly dismissed?
 - (2) Whether the Employee was given adequate notice of his imposed retirement?

Issues No. 1: Unfair Dismissal?

10. We accept that the Employer wholly retracted its termination letter three days before the dismissal was due to take effect. In our opinion, as a result of the

retraction, the grounds of unsatisfactory performance and misconduct as good causes for the dismissal as set out in the warning letter were no longer being pursued by the Employer. And the "Employee continued his employment with the Employer without any break in his term of employment."

11. Thus, it is not necessary for us to consider and determine: whether there was a sound factual basis for the assigned reason for the dismissal of the Employee and whether the Employer acted reasonably in the circumstances.

Issue No. 2: Reasonable Notice of Retirement

12. In his submissions on behalf of the Employee, Mr. Carty submitted that the outcome of the Employer's Claim turns on unfair dismissal and not retirement. In that regard he referred to the judgment of the Court of Appeal in **Civil Court of Appeal No. 12 of 2002 E Alex Benjamin Limited v. St. Lawrence Defreitas** where at paragraph 1, Saunders J.A. summarized "some novel and interesting legal issues" to be concerned with "the right of an employer to institute a retirement age policy and the consequences for employees should there be a unilateral implementation of such a policy."
13. Notwithstanding the precise choice of words, it is clear to us that what the Employer did in the matter before us was tantamount to the unilateral implementation of such a policy. In fact, at paragraphs 20 and 22 of its Memorandum, the Employer averred that "the Employer decided to officially retire the Employee." and that the "Employee was retired with effect from 3rd October, 2014."
14. Moreover, at paragraph 23 of its Memorandum, the Employer also stated that "the Employee was aware that the Social Security pensionable age of 60 years is and was the official retirement age as applied by the Employer. Further, the Employer asserted that its "mandatory retirement age is 65."
15. Based on the foregoing pleadings it is clear that the Employer grounded its position on the existence of a retirement age policy or practice. In other words, the Employer's position is that it was merely implementing a preexisting policy or practice.
16. On the premise that the Employer effected the dismissal pursuant to its subsisting retirement age policy or practice, we are mindful that at paragraph 13 and 14 of its judgment, the Court of Appeal found it to be "unfortunate" that "the Industrial Court treated the case as an ordinary case of unfair dismissal". We are guided by that dictum and will refrain from that treatment in the instant case. Instead, acknowledging that the implementation of a retirement policy "is

neither unreasonable nor unfair” we will direct our attention to the adequacy or inadequacy of the notice to the Employee of the existence of the policy/practice and its the implementation or introduction.

17. In our view, the Employer having invoked retirement as the basis for the termination of the Employee’s services, we are obliged to shift our focus away from the usual consideration of good cause for and the reasonableness of the dismissal. To do otherwise would be to run afoul of the approach clearly delimited by the Court of Appeal.
18. It is noteworthy that the Employer by its pleadings and related evidence sought to justify its dismissal of the Employee on the ground that “it was clear that he was no longer capable of performing the functions for which he had been hired”. Be that as it may, we are of the opinion that the overriding consideration should be the adequacy of the notice of retirement.
19. In his closing submissions on behalf of the Employer Dr. Cort firstly emphasized the Employer’s view that the Employee’s work performance had deteriorated to the point where he was no longer capable of adequately performing his duties. Interestingly having done so, and having laid the foundation of retirement as the basis for the dismissal, learned Counsel took a U-turn and sought to justify the dismissal as it would have done in “an ordinary case of unfair dismissal. This U-turn, in our view, is untenable.
20. In the circumstances, we focus on what we consider to be learned Counsel’s most pertinent submissions under this heading “Common Law Application”. In that regard we think it is not pivotal to determine whether the Employee’s performance had deteriorated as a result of age or any other reason. We are obliged to focus on the adequacy of the notice of retirement.
21. We are mindful of the reminder given by Singh JA in **Civil Appeal No 1 of 1993 Julie Saunders et al v St. Kitts Sugar Manufacturing Corporation**, case that “each case will have to be determined having regard to its own circumstance”. Having noted that, we have carefully considered the several authorities submitted by Dr. Cort and find them to be largely distinguishable from the case now before us.
22. In his judgment in the **Julie Saunders case**, Singh JA considered whether six months’ notice was reasonable notice given the circumstances in that case.” In his view, the Court should consider several factors including the employee’s qualifications, the length or duration of his employment, the responsibilities he

had and the reasonable length of time it would take for him to obtain alternative employment

23. In that case, the deceased, on whose behalf these claim was pursued, was 56 years old and had given 34 years of service. In the end, having asserted that the issue of reasonable notice was a matter of law, he concluded that: "Having regard to the age, expertise, length of service and other qualities of this appellant already mentioned, I am of the firm opinion that reasonable notice in these circumstances should be ten months".

24. In the **DeFreitas** case Saunders JA cited the Canadian case of *Brown v Coles* (1986) 5 BCLR (2d) 143 for the express purpose of noting the approach taken by the British Columbia Court. The focus of that Court was the reasonableness of the length of notice. The learned Justice of Appeal adopted that approach. In the end, he was guided by the Industrial Court's view that "at least 12 months' notice should have been given". Ultimately, Saunders JA concluded that:

"In light of Mr. De Freitas' age and the fact that he had, in his words, given in excess of nine years loyal and efficient service to the company, I would agree that twelve months' notice would have been appropriate".

25. In the present case the Employee had given 28 years of service. His perceived lower station in life was wholly counterbalanced by his long tenure. Moreover, as to his knowledge of the Employer's policy or practice regarding retirement, we accept the Employee's evidence that neither at the commencement of his employment nor at any subsequent date was he informed of the existence or introduction of any such policy. Accordingly, we conclude that his retirement was imposed and find that he had no notice of the Employer requirement for him to retire with effect from 06th October, 2014 when he was almost 66 years old.

26. Given the circumstances, the principles and practices of good industrial relations should leave no doubt that it was desirable for the parties to mutually agree the date and other terms of the Employee's retirement. In our opinion, the employee's expectation of a "golden handshake" was not unreasonable.

27. In the absence of agreement, we will determine reasonable notice with particular reference to the Employee's long tenure, the wide range of his duties, his age and the likelihood of finding similar employment after his imposed retirement.

28. At this point, we find it convenient to remind ourselves of our mandate under Section 10 (3) of the Industrial Court Act, which provides:

“(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.”

29. Having regard to all the circumstances and our mandate under Section 10 (3) of the Act, we are of the opinion that a period of at least 12 months would have been reasonable notice to the Employee of his imposed retirement.

The Award

30. In the premises, assuming that no further statutory deductions were made for social security and medical benefits after October 2008, we award the Employee the sum of \$21,320.00 being the equivalent of 12 months or 52 weeks pay (\$410x 52) in lieu of notice.

31. It is ordered that the Employer shall pay to the Employee the said sum of \$21,320.00 as payment in lieu of notice of his imposed retirement. Payment of that sum must be made no later than September 20, 2019.

Dated this 16th day of August, 2019



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



.....
Judith Dublin
Member

Handwritten notes and signatures, including the name "J. H. H. H." and a signature.