

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 21 of 2011

BETWEEN:

ANDRE THOMAS

Employee

band

MILL REEF CLUB

Employer

Before:

**The Hon. Charlesworth O.D. Brown
The Hon. Megan Samuel-Fields
The Hon. John Benjamin**

**President
Member
Member**

Appearances:

Ms. Samantha May of May Knight Law, Attorneys-at-Law for the Employee

Ms. Fiona Murphy of Simon Rogers Murdoch, Attorneys- at -Law for the Employer

**2016: October 11
2020: July 24**

JUDGMENT

Brown, P;

Introduction

1. These proceedings were commenced by the filing of the Reference on April 29 2011, approximately 13 years after the dismissal of the Employee. The issues in dispute between the parties were identified by him as “unfair dismissal and adequate compensation”.



2. In answer to the claim, the Employer relies on the equitable doctrine of laches to the effect that the Employee should be precluded from obtaining any relief because of his long delay in commencing and pursuing his claim.

The Opposing Cases

3. The Employee's case, as set out in his Memorandum of Claim and supported by his witness statement, is grounded on the manner of his dismissal by the Employer's Club Manager on or about November 16, 1998. Some salient points of the Employee's case are as follows:

- (1) He commenced his employment on December 18, 1981 as a "Permanent Seasonal Worker" in the position of Porter in the Food Preparation Department. In January 1995, based on his good performance, he was promoted and transferred to the Front Desk Department in the position of Assistant Receptionist and Porter.
- (2) During the course of his employment up to the date of his dismissal, he always wore an Afro hairstyle and braided his hair on numerous occasions. He was always properly groomed. Since it was not offensive to anyone, he received no complaints about his hairstyle.
- (3) On June 12, 1998, the Employer by letter bearing that date under the hand of Collie D. Gardner, Club Manager, confirmed his employment and stated that "he participates in the direct guest contact involved in the routine departure, arrival and inquiry functions of the Clubhouse"
- (4) At the beginning of the 1998 / 1999 annual tourist season the Employee was asked to change his hairstyle and not to report for work with his hair braided.

- (5) On November 13, 1998 the Employee reported for duty with his hair braided as usual. By an unsigned letter bearing that date issued by Greg M. Poirier, Club Manager, he was formally suspended on two grounds. Although unsigned, the letter was admitted into evidence. It reads as follows:

“Dear Mr. Thomas,

I am officially notifying you that you are on full suspension from employment at Mill Reef Club. This suspension started with the day you were sent home for your unwillingness to conform to the grooming standards of the Club. You were also suspended for your disruptive behaviour in the Front Office meeting on our opening day.”

If you are intending to return to work you must meet the following conditions. First you must agree to return to work in full compliance with the grooming standards of the Mill Reef Club. Second, you must agree to conduct yourself in a proper mode of conduct with regards to your cooperation and supportive spirit that the job requires both with the members and fellow employees, including management. Until such an agreement is made, you will be kept on full suspension and face possible termination of employment. We will expect to meet with you or hear from you regarding these conditions by November 18, 1998.

Greg M. Poirier
Club Manager “

- (6) On November 16, 1998 the Employee was summoned to a meeting at which the Mr. Poirier as Club Manager told him that if he did not cease

braiding his hair, his employment would be terminated. Being aware of his constitutional rights, the Employee expressed the view that once his hairstyle was not offensive, he should be allowed to wear his hair as he saw fit.

- (7) As a result of the Employee's insistence on asserting his rights, his services were terminated by letter dated November 16, 1998 signed by Mr. Poirier in his capacity as Club Manager. In part, that letter reads:

"Dear Andre,

Thank you for coming to see me today. I regret that you have made a decision to leave the Mill Reef Club as you have chosen not to conform to the hair grooming standards of the Club. As I stated in a previous letter, the choice was yours to make.

In response to that decision of yours, to not make the necessary changes in your hair grooming, this is official notice of our termination of your employment effective immediately.

Greg M. Poirier
Club Manager

4. The Employee contends that his dismissal was unfair for the following reasons:
- a) He did not choose to leave his job.
 - b) His hairstyle was never offensive or proved to be a discomfort to either his coworkers or the Employer's clientele.
 - c) His dismissal was unfair, harsh and in breach of the Constitution and the Labour Code.

- d) The Employer created a situation which resulted in his constructive dismissal.
5. As stated in its Memorandum of Defence, the Employer relies on the equitable doctrine of laches. In essence, the Employer contends that the Employee unnecessarily delayed the pursuit of his claim and thereby caused significant prejudice to the Employer which left it in no position to defend the claim on its merits. The Employer urges the Court to apply the doctrine and deny any relief which it could otherwise grant to the Employee because it would be unfair and unjust to do so in the circumstances.
6. The factual bases of the Employer's defence are as follows:
- a) The Employee's services were "terminated in or around 1998".
 - b) Mr. Poirier, the Club Manager who dealt with the matter "ceased working" with the Employer in or around 2002."
 - c) The Reference was filed on August 29, 2011, approximately 13 years after the dismissal.
 - d) The records regarding the Employee's employment were discarded in keeping with the Employer's policy of discarding records of ex-employees at the expiration of 10 years from the date their employment contract ended.

Equitable Principles

7. In the exercise of its statutory powers this Court is expressly required to have regard for equity. Section 10(3) of the Industrial Court Act, by which this Court was established, provides as follows:

"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 interest of the persons immediately concerned and the community as a whole.
- b) Act in accordance with equity, good conscience and 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.

Clearly, the equitable doctrine of laches falls squarely under the umbrella of those statutory provisions.

8. Both Counsel cited the 1874 judgment of the Judicial Committee of the Privy Council in **Lindsay Petroleum Company V Prosper Anthony Hurd and others** (1874) LR. 5. P.C 221. For convenience, we reproduce the excerpt from that case as quoted by Learned Counsel, Ms. May, on behalf of the Employee, as follows:

“Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct done that which might fairly be regarded as a waiver of it, or where by his conduct and neglect he has though perhaps not waiving the remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In either of these cases, lapse of time and delay are most material. But in every case if an argument against relief, which otherwise would be just is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy.”

9. Further, the following excerpt from I. C. F Spry, *Equitable Remedies* - as quoted by Thomas J. A. at paragraph 40 of his Judgment in Civil Appeal HCUAP 2006/020A - is instructive.

“The defence of laches arises if two conditions are satisfied: first, there must be unreasonable delay on the part of the plaintiff in the commencement or prosecution of proceedings, and secondly, in view of the nature and consequences of that delay it must be unjust in all the circumstances to grant the specific relief that is in question whether absolutely or on appropriate terms or conditions.

In the first place, it must hence be shown the plaintiff has been guilty of unreasonable delay. Prima facie, the time from which the length of delay is judged is the time at which the plaintiff became aware of the existence of the fact that gave rise to a right to equitable relief in question.”

10. In order to properly consider whether the defence of laches is available to the Employer, we must consider all the evidence given at the trial and resolve the issues as formulated by Learned Counsel, Ms. Murphy, on behalf of the Employer, as follows:

- a) “Is the Employee’s delay in bringing his claim unreasonable?
- b) Has the Employee’s delay resulted in substantial prejudice to the Employer?
- c) Is a fair trial of the claim possible in the circumstances”?

The resolution of these issues in favour of the Employer will supersede any consideration of the issues of “unfair dismissal and adequate compensation” and render them redundant.

Was the Delay unreasonable?

11. In his witness statement, the Employee referred to the meeting to which he was summoned on November 16, 1998. He testified that he was aware of his fundamental rights and freedoms guaranteed under the Constitution and that he was also aware of the provision in the Labour Code protecting him from discrimination. Moreover, at the meeting he stated his view that once his braided hairstyle was not offensive and since none of his co-workers or the Employer's guests complained, he should be allowed to wear his hair as he desired.
12. Given his knowledge of the facts and the rights which he knew and asserted, there is no doubt that the Employee knew of his entitlement to the relief which he eventually claimed 13 years later in this Reference.
13. At first blush, it appears that there was inordinate delay in the commencement of these proceedings. Moreover, the court records suggest that the Employee was guilty of further delay by not diligently prosecuting his claim with the obvious result that the trial did not materialize earlier. In particular, the court file shows that almost a whole year passed before compliance with the Registrar's request for the Employee's Memorandum of Claim. Further, the suggestion emerged from his evidence that there was a long gap of approximately 2 years in his communication with his Solicitors immediately before the trial.
14. In the circumstances, we will consider whether the Employee provided any reasonable explanation or excuse for the obvious delay. His witness statement is silent on the reason for the delay. However, his oral testimony is very instructive in that regard.
15. Regarding his circumstances immediately after his dismissal, the Employee testified that after working for over 8 years he received only \$500.00 from the Employer as his share of the "Thrift Fund". He also stated that at that time he "just had a child". Perhaps most instructively, the Employee also testified that after paying to pursue his claim at the Labour Commissioner's office, he "had

nothing left". Further, he stated that as a result of his "financial problems" he "went to England to make a little money".

16. He testified that he travelled to England in 2010 and remained there until 2012. He explained that his trip to and sojourn in England were wholly funded by a lady named Samantha Brown. He acknowledged that he spent 12 years in this jurisdiction before his claim was filed. His explanation for the delay was because he had "financial problems" and "did not have money to pay his Solicitors.
17. Further, the Employee emphatically denied that he was "lackadaisical". He testified that upon returning to Antigua in 2012 he left his telephone contact numbers at the Chambers of his solicitors and thereafter did casual work, like cutting grass and trimming hedges to make ends meet.
18. Although the Employee's evidence regarding his financial problems is sketchy, based on our assessment of his oral evidence and his general demeanor, we are not inclined to agree with Ms. Murphy's submission that the delay was due to him being "lackadaisical and indolent". At the end of the day, although we would have preferred it to be more fulsome, we find that his explanation is plausible.

Did the Delay Result in Prejudice to the Employer?

19. The Employer's evidence, as given by Ms. Ephraim, Human Resource Manager, is to the effect that:
 - (a) She commenced her employment in May 2007 and has no knowledge of material information surrounding the dismissal.
 - (b) Mr. Poirier, The Employer's Club Manager who issued the suspension and dismissal letters, ended his tenure in or about 2002. As at the date of trial there were no employees who had knowledge of the circumstances surrounding the termination of the Employee's employment.

(c) As a matter of policy, the Employer had discarded the relevant records upon the expiration of 10 years after the termination of the Employee's services.

(d) As a result, the Employer had no information on the basis of which it could substantially respond to the Employee's claim.

20. As to the availability of witnesses to testify on behalf of the Employer, Counsel for the Employer questioned Ms. Ephraim about the Employer's attempts to contact Mr. Poirier. She did not have any documentary evidence of such attempts but stated that the Club used Mr. Poirier's "contact information" but was unable to reach him.

21. On behalf of the Employee, based on his earlier testimony, Learned Counsel suggested to Ms. Ephraim that Mr. Gardner, who held the position of Club Manager in June 1998 and was still employed as a Manager, should have been required to give a witness statement and testify at the trial. In response, Ms. Ephraim testified that "attempts were made to get Mr. Gardner to be a witness in this matter. He did not provide a witness statement regarding the specifics".

22. We believe that it will be useful to remind ourselves of the gist of the Employee's evidence regarding Mr. Gardner. In response to questions put to him by the Court, the Employee asserted that of the 8 years he worked for the Employer, 4 of them from 1994 to 1998 were spent working directly with Mr. Gardner immediately before his dismissal. He continued to explain that Mr. Gardner knew the duties he had to perform and knew the relevant rules governing the performance of those duties. More specifically, the Employee testified that: "I did not work with Mr. Poirier the year that I was terminated. Mr. Gardner would know more about me than Mr. Poirier".

23. As to the Employer's policy of discarding employees' records on the expiration of 10 years after the termination of their employment, Ms. Ephraim's testimony would have been more convincing if she had produced supporting documentary evidence and/ or provided a rationale for the same and/ or given details of its implementation.
24. In the final analysis, it is our opinion that, although the Employer might have suffered some degree of inconvenience as a result of the delay, the extent of the prejudice, if any, which it suffered was largely self-inflicted. At the very least, the Employer should have been mindful that the Employee had pursued his claim of unfair dismissal at the Labour Department and that the dispute remained unresolved.
25. Further, we reject the Employer's contention that at the date of trial there were no employees with knowledge of the circumstances surrounding the Employee's dismissal. On the evidence, we find that Mr. Gardner, who held the position of Club Manager at least up to June 12, 1998, would have been at least a useful witness, if not a crucial one, for the Employer.
26. In the circumstances, we do not agree with Ms. Murphy's submission that the inordinate delay on the part of the Employee in commencing and prosecuting his claim was so prejudicial that it left the Employer in no position to properly respond to it. On the facts, determined largely from the Employee's uncontroverted evidence, it is clear that the delay was not as severely prejudicial as the Employer would have us believe.
27. In conclusion, we would resolve the issues identified at paragraph 10 above in favour of the Employee on the following grounds:
- a) Although the commencement and prosecution of the Employee's claim was unusually protracted, on the facts of this case, the delay was not beyond the limits of acceptability such as to render it unreasonable.

- b) The prejudice, if any, suffered by the Employer because of the Employee's delay was largely self-inflicted. In any event, we find that any resulting prejudice was not so substantial as to prevent the Employer from disputing the Employee's claim on its merits.
- c) In our opinion, notwithstanding the protestations of the Employer, a fair trial of the Employee's claim was still possible in the circumstances.

28. For the reasons stated above, the Employer cannot avail itself of the doctrine of laches to preclude the Employee from obtaining the relief to which he is entitled on the particular facts of this case. For the avoidance of doubt, we hasten to add that our approach and conclusion are not of general application. Each case turns on its own facts.

The Alternative Defence

29. We now turn to the Employer's alternative defence, as stated in its Memorandum, that the Employee's claim was statute barred under the Limitation Act No 8 of 1997. In dealing with that contention, it is sufficient to note that by the date of trial the Court of Appeal, in dismissing Civil Appeal **ANUHCVP 2013/0014, Hawksbill Hotel V Dale Abraham**, held that that Act created no limitation period for the commencement of unfair dismissal claims.

Reasons for and Circumstances of the Dismissal

30. We accept the Employee's evidence that throughout the course of his employment he always had an Afro hairstyle and often braided his hair. It appears that his hair became an issue after Mr. Gardner was replaced by Mr. Poirier as Club Manager sometime after June 12, 1998. Neither the suspension nor the dismissal letter mentions any change in policy regarding grooming standards. Further, neither letter explains why the Employee's Afro or braided

hair were no longer acceptable. Moreover, there is no indication of the nature of the “disruptive behaviour”.

31. In any event, the Employee was suspended on an undisclosed date prior to November 13, 1998 not only because of his failure to conform to the undisclosed “grooming standards” but also because of his undisclosed “disruptive behaviour”. The suspension was for an indefinite period until (a) he met the grooming standards and (b) he agreed to conduct himself in a “proper mode”. November 18, 1998 was stated as the date by which the Employer expected to hear from the Employee or have a follow-up meeting with him.
32. The letter of dismissal was issued on November 16, 1998 after the Employee went to see Mr. Poirier. It does not address the issue of the Employee’s conduct but focuses entirely on his failure to conform to the grooming standards. In the letter, the Employer took the position that the Employee made a choice not to conform to the required standards and thereby had decided to quit his job. As a result, the Employer purported to merely respond to the Employee’s decision by giving him “official notice of the termination of (his) employment”.
33. In our estimation, the Employer had no good basis for its conclusion that the Employee had decided to leave his employment. More importantly, we accept the Employee’s evidence that he “never decided or chose” to do so.

Concluding Declarations and Directions

34. Having regard to the written, documentary and oral evidence before us, as well as the Employer’s failure to challenge the claim on its merits, we are of the opinion that the justice of this case demands that we declare that the Employee was unfairly dismissed and is entitled to compensation.

35. Unfortunately, the evidence discloses no or no sufficient bases on which we could reasonably determine the quantum of compensation. As a result, the justice of this case further demands that we also make the exceptional further declaration that these proceedings be reopened for the limited purpose of taking evidence and hearing submissions in respect of the quantum of compensation payable to the employee.

36. For the reasons stated above, we declare, order and direct as follows:

- (1) The Employee was unfairly dismissed and is entitled to compensation.
- (2) The proceedings herein are hereby reopened for the limited purpose of determining the quantum of compensation.
- (3) For the said limited purpose, the parties are at liberty to file additional witness statements and submissions no later than August 15, 2020. Any such witness statements and submissions must be promptly served on the other party.
- (4) The assessment of compensation will be held during the second half of August 2020 on a date to be fixed by the Court Office.

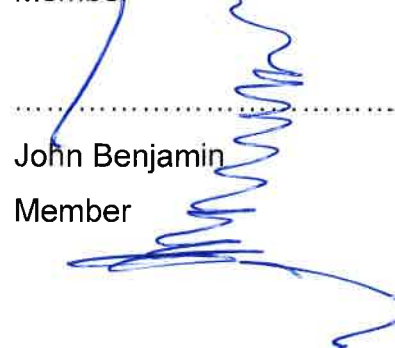
Dated this 24th day of July 2020



Charlesworth O. D. Brown
President



Megan Samuel-Fields
Member



John Benjamin
Member

