

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 48 of 2014

BETWEEN:

ERNEST BENJAMIN

Employee

And

ST. JOHN'S DEVELOPMENT CORPORATION

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Megan Samuel-Fields

Member

The Hon. Judith Dublin

Member

Appearances:

Mr. Kendrickson Kentish of Lake & Kentish, Attorneys-at-Law for the Employee

Mr. Hugh Marshall Jr. of Marshall & Co., Attorneys-at-Law for the Employer

2018: April 04

2021: January 08

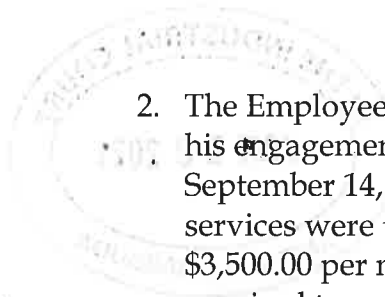
JUDGMENT

Brown, P:

Background

1. The Employer is a body corporate established by section 3 of the St. John's Development Corporation Act, Cap 392 (the Act). It has power to carry out or secure the laying out and development of designated areas within the city of St. John's. It also has the power to appoint and employ workers at such remuneration and on such terms and conditions as it sees fit for the proper performance of its functions. The Minister of Tourism is responsible for the general policy to be followed in the performance of its functions.



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2. The Employee, a retired Permanent Secretary in the Public Service, commenced his engagement as the Secretary to the Employer's Board of Directors on September 14, 2004 and held that position until January 18, 2012 when his services were terminated, at which latter time he was earning a salary of \$3,500.00 per month. His "Job Type" was described a "Full Time" and he was required to report to the Chairman of the Board of Directors. His duties included the attendance at meetings and the recording of minutes of the Board.
 3. By letter dated January 18, 2012 the Employer's Chairman terminated the services of the Employee with effect from January 31, 2012 on the grounds of poor performance and misconduct. We reproduce the substantial parts of that letter as follows:

"...

Dear Mr. Benjamin,

At a recent Board meeting the Directors discussed the manner in which you function as Board Secretary. The consensus is that we are very dissatisfied with your approach to matters as it relates to the SJDC Board and I have been instructed me (sic) to write you.

On many occasions during Board meetings members have expressed their disappointment in the way you have chosen to minute our records and this has not been recorded in minutes. You will also recall that on numerous occasions I have spoken with you regarding the same issues.

Some of our major concerns are that the contents of the minutes in many instances do not reflect the spirit of the meetings and often are a complete misrepresentation of what is stated. Further, board minutes, letters and other confidential pieces of correspondence are being typed by a secretary employed by the corporation who also functions as a secretary for other managers, this has resulted in several embarrassing situations and suspected leakage of information. Additionally, critical information that members have asked to be recorded has been omitted and issues that were never discussed were inserted. Consequently, Directors have over a period of time concluded that your actions were deliberate.

My mandate is to ensure that the SJDC Board functions efficiently and that includes accurate record keeping. In light of all that has transpired, my only option is to relieve you of the duties as Secretary to the SJDC Board effective January 31, 2012. Kindly provide copies of all minutes and

board documents under my tenure inclusive of the draft minutes of January 10, 2012.

On behalf of the Board I wish to express our gratitude for the service you have rendered to the SJDC over the years.

Sincerely,

.....

Sylvester Brown
Chairman
St. John's Development Cooperation

... "

The Opposing Cases

4. The Employee contends that he was unfairly dismissed. The bases for his claim, as stated in his Memorandum of Claim, may be summarized as follows:
 - a) He was never personally, formally or at all issued any written warning specifying allegations of his poor performance.
 - b) He was not given the three months as prescribed by the Antigua & Barbuda Labour Code (the Labour Code) within which to improve his performance.
 - c) The Employer did not give him the opportunity to challenge the allegations of misconduct.
 - d) He was not given particulars of the alleged misconduct prior to his dismissal.
 - e) The Employer's Chairman effected or caused his dismissal for an improper purpose.
5. The Employer disputes the Employee's claim on the following grounds.
 - (a) The Employer was dissatisfied with the Employee's performance
 - (b) The Employee was engaged under a contract for services and not a contract of service.
 - (c) The "disengagement" of the Employee cannot be an unfair dismissal.

The Main Issues

6. The main issues between parties are:

- (1) Whether the Employee was engaged under a contract of service or a contract for services.
- (2) Whether the Employee was unfairly dismissed.

The Evidence

7. In his first Witness Statement filed on October 15, 2014, the Employee stated that, in his position as Secretary, he was responsible for the management of the Employer's Secretariat and performed his duties satisfactorily up to January 31, 2012 when his dismissal took effect.

8. At paragraphs 7 to 11 of his first witness statement, the Employee asserted:

"7. Prior to receiving this letter I had never been informed either informally or formally of any complaints alleged against me in relation to my performance. I had never received a letter about my performance before the said termination letter.

8. I had never been afforded the opportunity to respond and/or challenge the said allegations of misconduct or poor performance. I have never been shown particulars of the said misconduct or poor performance prior to my dismissal.

9. In fact, none of the opportunities that should have been afforded to me under the Labour Code were offered. I have, therefore, been denied due process.

10. I am of the firm belief that the Chairman dismissed me for an improper purpose, in that, after my dismissal the chairman hired his fiancé/ wife to fill my position.

11. I therefore contend that the Chairman's decision to terminate my employment as Board Secretary was unfair and unlawful. "

9. In his second witness statement filed January 22, 2016, the Employee referred to his job description which was attached thereto. He testified that his work was controlled by the Employer's Board and he was supervised by the Chairman. Further, the Employee testified that he had an office, inclusive of office furniture and equipment, provided by the Employer at the Employer's premises at Heritage Quay. Moreover, the Employee asserted that, as the Employer's full-time worker, he supervised and appraised two of the Employer's supporting staff members and kept personnel files for them.
10. The Employee also testified that he was replaced as Secretary to the Board of Directors by the Chairman's wife, Joan Brown.

11. Under cross examination, the Employee confirmed his evidence-in-chief and maintained his position as set out in his Witness Statement. He also testified that during his tenure he was never re-appointed but decisions were taken to continue his appointment.
12. As to the statutory basis for his appointment, he stated that the performance of his duties was not governed by any express provisions in the Act. He said that he was required to report to the Board which approved his only vacation period of one week.
13. The Employee also testified that, apart from the duties referred to in his witness statements, he carried out other duties as listed in his job description.
14. Finally, in response to a question put to him under re-examination, the Employee testified that, as a retired civil servant, he made no statutory contributions for Medical Benefits, Social Security and Education Levy.
15. It is most instructive that the Employer called no witness so that there was no evidence of its own on which it could rely to discharge its evidentiary burden of proving that the dismissal was not unfair.

Discussion

16. Learned Counsel, Mr. Marshall, commenced his oral submissions after trial by asserting that the contract between the Employee and the Employer is illegal. In his spontaneous response, learned Counsel, Mr. Kentish reminded him that the proper procedure dictates that an amendment should have been made to the Employer's Memorandum of Defence to foreshadow that assertion. Ultimately, Mr. Marshall submitted that as a result of the contract being illegal, this Court cannot lend assistance to either party in these proceedings.
17. In the alternative, Mr. Marshall submitted that, based on section 2 of the First Schedule of the Act, the Employee could not have been employed for periods in excess of three years at a time. Accordingly, the Employee has no claim in respect of a period of employment going beyond 19 months, since his subsisting contract at the date of his dismissal could not have commenced any earlier than September 14, 2010.

Accordingly, Counsel submitted that given the Employee's monthly salary of \$3,500.00, his daily rate of basic pay was \$161.54. As a result, any award for loss

of protection from unfair dismissal to the Employee should not exceed \$3,069.76 being the equivalent of one day's pay for each month of employment.

18. Further, Mr. Marshall pointed out that, under paragraph 4 of the First Schedule, the Minister has the power to revoke the appointment of any member of the Employer if he thinks it expedient to do so. On that premise, he submitted that the Employee merely served at the pleasure of the Board and the Employer was not under any obligation to guarantee his tenure under a contract of employment.
19. In his response, Mr. Kentish drew the Court's attention to section 6 of the Act which empowers the Employer to appoint such persons, including a secretary, as it sees fit to discharge the proper performance of its functions. Further, Mr. Kentish referred to section 2 of the First Schedule, which limits the appointment of "members" to three years, and pointed out that the term "member of the Corporation" does not include the Secretary, which position the Employee held.
20. Mr. Kentish also cited the judgment of the UK Court of Appeal, Civil Division in **Hughes et al v Asset Manages Plc** (1995) 3 All ER.669 as applied in **Kenneth Meade et al v Cleveland Seaforth et al** Claim No. ANUHCV 2016/0565 and contended that there was no illegality as a matter of law in the appointment of the Employee.
21. Having regard to those authorities and the provisions of the Act, we are persuaded by Mr. Kentish's submissions and hold that there is no illegality that would deprive us of jurisdiction to determine the Employee's claim.
22. As to the re-appointment of the Employee during his tenure, learned Counsel also referred to the minutes of the meeting of the Employer's Board of Directors held on September 20, 2011 at which the decision was made to approve his appointment as Board Secretary with effect from July 01, 2011 at the monthly salary of \$3,500.00 (without the payment of the bonus which he previously received at the end of each year of service) "**for a period of two (2) years - July 01, 2011 to August 31, 2013**".
23. As to whether the Employee was engaged under a contract of services; Mr. Kentish relied on the judgment of High Court of Barbados in **Sagicor Insurance Company v Livingstone Carter et al**, Nos. 1050, 1051, 1052 and 1053 of 2006 in which Simmons CJ, applied the several recognized tests, including the control test, the organization/integration test, the economic/business reality test and

the multifactor test and the mutuality of obligations test and concluded that the Defendants were all employed under contracts of service.

24. Upon application of the several tests referred to in the **Sagicor case** and in light of the Employee's uncontroverted evidence and his job description in particular, we find that the Employee was engaged under a contract of services. In the circumstances, subject to our determination of the extent of his tenure, we find that the Employee was unfairly dismissed and is entitled to the compensation therefor.
25. Under section 2 of the First Schedule to the Act, the appointment of members of the Employer must be for periods not exceeding 3 years. No similar limitation has been brought to our attention in respect of officers, servants and agents appointed under section 6. The terms and conditions of employment are at the discretion of the Employer.
26. As evidenced by the Executive Director's letter dated January 21, 2005, the Employee's first monthly salary was fixed at \$3,000.00 "effective September 9, 2004". In addition, he also received a "10% bonus of salary earned at the end of each year of service". At the Board meeting held on June 24, 2009 it was acknowledged that at its earlier meeting in September 2007 the Board had approved his re-appointment for "a further period of three years with effect from September 01, 2007". Thus, the Employee was employed for a second period of three years from September 01, 2007 to August 31, 2010. During that second period of employment, he was paid an increased monthly salary of \$3,500.00 together with the said 10% bonus.
27. It appears that the Employee continued his employment after August 31, 2010. However, there is no evidence that this was formalized, approved or ratified until the Board Meeting on September 20, 2011 when the decision was made to discontinue the payment of the bonus and approve his continued employment for an additional "two (2) years - July 01, 2011 to August 31, 2013" at a salary of \$3,500.00 per month.
28. The minutes reveal that prior to its decision in September 2011 to appoint him for a further term, the Employee was asked to vacate the meeting to allow the Board to deliberate on the matter. After the deliberations the Employee was requested to re-join the meeting, he was offered the position at the said salary without the bonus which he received earlier. He then unsuccessfully attempted to negotiate with the Board for higher salary. Eventually, the Employee accepted the offer. Thus, his last period of fixed term employment was significantly different to the preceding one in that it included no payment of the bonus.

29. The Employee's testimony is that he worked for a continuous period from September 14, 2004 to January 31, 2012, a total of approximately 7 years and 5 months. However, we were not satisfied that his employment was of an indefinite duration. To the contrary, evidence of the Board decisions show that he was expressly employed for three fixed terms:
- (1) September 09, 2004 to August 31, 2007
 - (2) September 01, 2007 to August 31, 2010
 - (3) July 01, 2011 to August 31, 2013

Compensation

30. The starting point for our assessment of compensation is the Employer's decision, as recorded at paragraph VII of the minutes of the meeting held on September 20, 2011, to re-appoint the Employee as Board Secretary for the period from July 01, 2011 to August 31, 2013 at a salary of \$3,500.00 per month. As a result, at the effective date of his dismissal, there was an unexpired portion of the fixed term between January 31, 2012 and August 31, 2013, a total of nineteen months.
31. Clearly, the Employee lost his protection against unfair dismissal. He received no adequate notice of the termination of his employment and was not paid his salary beyond January 31, 2012.
32. Further, under the circumstances, the dismissal was harsh and oppressive with a blatant disregard for the fixed term period of employment, the relevant provisions of the Labour Code and the principles and practices of good industrial relations. Moreover, it is not in dispute that in effecting the dismissal the Employer's Chairman was improperly motivated by his desire to benefit his wife.
33. In assessing the compensation to which the Employee is entitled, we must take into account his loss of contractual salary for the unexpired portion of the fixed term, subject to his obligation to mitigate his loss. However, the Employee gave no or no sufficient evidence of his efforts to mitigate his loss after his dismissal. In our estimation, as a retired Permanent Secretary, he should have been able to find alternative employment approximately 6 months after his dismissal. In the circumstances, we would award him the sum of \$21,000.00 (6 x \$3,500) for the first 6 months after his dismissal. Thereafter, with diligent efforts, we estimate that he should have earned approximately \$1,500.00 per month from alternative employment. Accordingly, we award the sum of \$26,000.00 (13 x \$2000) for the remaining 13 months portion of the unexpired term.

34. In the circumstances, having regard for the foregoing exceptional reasons, we award compensation and costs as follows:

(a) Payment in Lieu of Notice	- \$ 3,500.00
(b) Loss of Protection (7 months service July 1, 2011 to January 31, 2012)	2,041.67
(c) Loss of Contractual Salary (January 31, 2012 to July 31, 2012)	
6 months @ \$3,500.00	- 21,000.00
(August 01, 2012 to August 31, 2013)	
13 months @ \$2,000.00	- 26,000.00
(d) Exemplary Damages (2 months' salary)	- 7,000.00
(e) Costs	- 2,500.00
Total	<u>\$62,041.67</u>

Order

35. In the premises, we order that the Employer do pay the total sum of \$62,041.67, inclusive of costs, to the Employee no later than February 12, 2021.

Dated this 08th day of January, 2021


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


.....
Megan Samuel-Fields
Member


.....
Judith Dublin
Member

