

ANTIGUA

IN THE COURT OF APPEAL

Civil Appeal No.2 of 1992

Between:

**THE ANTIGUA WORKERS UNION
(SUNDRY WORKERS)**

Appellant

and

**JOSEPH DEW DIVISION OF
DANTZLER WEST INDIES LTD**

Respondent

Before: The Hon. Mr. C. M. Dennis Byron - Justice of Appeal
The Hon. Dr. Nicholas J. O. Liverpool - Justice of Appeal
The Hon. Mr. Satrohan Singh - Justice of Appeal

Appearances: Mr. Justin Simon for the Appellant
Mr. Sydney Christian for the Respondent

1993: June 10;
November 22

JUDGMENT

BYRON J.A.

This is an appeal against the decision of the Industrial Court dated 12th December 1991 which declared in effect that Section C45(2) of the Antigua Labour Code 1975 legally entitled the respondent to implement a program for temporary termination, or laying off its employees by rotation, for periods of less than thirteen weeks without having to pay severance pay. The proceedings had been commenced by the respondent to seek the declaration made by the Court in an effort to settle a trade dispute with the appellant, as the bargaining unit representing its employees.

The background facts were not in dispute and the only witness before the Industrial Court was Mr. Noel Walling Director/Secretary of the respondent. On 8th January 1991 the respondent held a meeting with the appellant to explain its weakened financial position and discuss remedial measures. On 28th January 1991 the respondent served notice on its employees that a program of temporary termination would be implemented. On 16th February 1991 three employees were laid off for a period of two months, on 1st March 1991 two were laid off for two months. By the time the matter came to trial eighteen employees had been temporarily terminated but they were all back at work.

On 26th April 1991 the employees went on strike in opposition to the program which they contended was unlawful, unfair industrial practice, and either unfair dismissal or dismissal on the grounds of redundancy entitling them to compensation.

The grounds which the appellant argued raised questions of statutory interpretation and could be summarised as follows:

That the Industrial Court misinterpreted the meaning of

- (1) The word "redundancy" as defined in section C3 of the Antigua Labour Code
- (2) Section C45(2) of the said code in holding that
 - (a) The phrase "temporary termination" bore the same meaning as "temporary cessation of work" in the U.K. Law under E.P.C.A. Sch.13 paragraph 9(1)(b)
 - (b) It provided an exception to the entitlement to severance pay
 - (c) It permitted a program of temporary termination or laying off by rotation

The Meaning of Redundancy

The Industrial Court did not specifically define redundancy or discuss its application to the facts of this case. Its ruling seemed to be based on the assumption that the employees were redundant. The term is defined in Section C3 of the Labour Code as follows:

"A situation in which, by virtue of a lack of customers orders, retrenchment, the installation of labour-saving machinery, an employer's going out of business, a force majeure, or any other reason, tasks which a person was last employed to perform no longer exist."

The language is clear and unambiguous and the words must, therefore, be given their natural and ordinary meaning. I can readily adopt counsel for the appellant's imagery by describing the definition as having two limbs both of which must co-exist, the first as a cause and the second as its result. It follows, therefore, that a situation of redundancy could not exist where the employee's tasks are still there to be performed on termination of his employment.

This same conclusion has already been reached by this court in **U.S. Navy Facility v Lewis and Another** [1983] 31 W.I.R. 191 in which Sir Neville Peterkin stated at 194-195:

"But the essence of the matter is the true construction of the word "redundancy" as defined in the Antigua Labour Code. Where it is unambiguous, as in the instant case, the court's duty is to give the words their natural and ordinary meaning having regard to the context in which the words are used. Accordingly, I would hold that a pre-requisite to a redundancy situation is the non-existence of the tasks, and that the appellant in the instant matter has failed to overcome that hurdle."

The respondent in this case was hoisted on its own petard, so to speak, by the unchallenged evidence of its Director/Secretary who said in cross-examination:

"The option of permanent termination did not present itself as viable as it would involve settlement payments, and there was also the question of the work to be done. The duties were still there to be performed by those temporarily terminated. The program was primarily to lessen expenses and reduce costs..... There was a proper redundancy situation in case of those permanently terminated. No redundancy situation yet exists with those temporarily terminated."

It is clear therefore on the facts of this case no redundancy situation existed with regard to the employees who were temporarily terminated.

Meaning of Section C45(2)

Section C45 provides as follows:

"(1) Subject to the other provisions of this section, simultaneously upon the termination of employment of any employee entitled to severance pay under section C43, the employer shall remit to that employee severance pay computed in accordance with section C44.

(2) If the termination be stated as temporary, no severance pay need be remitted to the terminated employee at the time

of termination: Provided however that -

- (a) where the date of recall, if one is given at the time of termination, be six months or more in the future, severance pay shall be payable on the date of the original termination;
- (b) if no date of recall is given at the time of termination, severance pay shall be payable when and if, after three months from the termination, the employee shall not have been recalled; in which case, interest at the rate of ten per cent per annum on the amount of severance pay due shall be payable for the interval between the original termination date and the date of actual payment.

(3)"

The Industrial Court considered section 45 and the appellant referred to the following section of the judgment of the Industrial Court and submitted that it included erroneous conclusions of law which led to the order complained of in this appeal.

The Court stated:

"First of all it must be borne in mind that severance pay is payable only in redundancy situation and it seems that what is contemplated by Section C45(2) of the Antigua Labour Code is to provide an exception to the payment of severance pay in those circumstances where there is temporary termination or lay-off.

Although the Antigua Labour Code does not define termination it would seem within this context the expression 'temporary termination' would carry a connotation somewhat akin to that of 'temporary cessation of work' as used in U.K. Law under E.P.C.A. Sch.13 paragraph 9(1)(b) and the question as to whether there has been a temporary cessation of work must remain one of fact as promulgated by the House of Lords in the celebrated case of **Ford v Warwickshire County Council** [1983] 1 C.R. 273. What precisely is 'temporary cessation or termination' has received elaborate attention from the House of Lords in **Fitzgerald v Hall, Russell & Co Ltd** [1970] A.C.

984 where it was enunciated that this particular matter should be looked at like a historian looking backward, rather than like a journalist, recording a chronicle of present or future events. In this same case their Lordships decided that if an employee was dismissed for reason or redundancy and was then re-engaged at a later date, there was a fair presumption that his absence during the intervening period had been temporary."

In the case of **Fitzgerald v Hall, Russel & Co Ltd** [1974] A.C. 984, Lord Upjohn who delivered the leading judgment for the majority described the issue as follows:

"The whole issue in this appeal is whether, upon the true construction of that Schedule, in computing the amount of the redundancy payment to which the appellant is entitled in respect of his dismissal in December, 1976, the period of his continuous employment began in July, 1958, or only in January, 1963."

It is to be noted that the Court was determining whether the employee's "continuous employment" could have included a period of some four and a half years when he was absent from work.

Lord Upjohn after considering relevant statutory provisions and cases defined "cessation of work" as follows:

"In my opinion, the words 'absent from work on account of a temporary cessation of work, mean that he was laid off or dismissed because his employer had no longer work available for him personally any longer."

It is noted that this definition of cessation of work only requires proof of the second limb of the definition of redundancy in Section C3 of the Antigua Labour Code; that is the non-existence of tasks.

Then he defined "temporary" at p.1003 Letter E-G:

"So the question - was the cessation temporary? - in most cases cannot be answered as at the time of dismissal as in every case where this problem arises there will have been a re-engagement, you must look at the original dismissal with hindsight, that is to say, with knowledge of all that has

happened since the original dismissal until the second dismissal, and then decide whether in all the circumstances of the case the original dismissal can properly be described as due to a temporary cessation of work."

In this definition, the issue whether cessation is temporary is discretionary and is to be determined on the facts of the case, and not at the time of the original dismissal but only on the second dismissal.

The language of C45 is plain and unambiguous and when the words are given their natural meaning in the context in which they are used, they differ considerably from the definitions of the U.K. which appear in the passages from the judgment of Lord Upjohn on which the Industrial Court seemed to have relied.

The first point to be made is that the effect of the phrase in C45(1) "upon termination of employment of any employee entitled to severance pay under Section C43" must be to limit the application of the provision to persons whose employment (i) has exceeded an aggregate of one year and (ii) has been terminated for reasons of redundancy, as provided in Section C43 which reads:

"Every employee whose term of employment with an employer and his predecessors has in aggregate exceeded one year is entitled to severance pay upon termination of said employment by employer for reasons of redundancy."

In section 45(2) the context of the phrase "the termination" requires it to be read as referring to the entire phrase in 45(1) that is to say "the termination of employment of any person entitled to severance pay under Section C43". In my judgment therefore, "termination" is defined by its context in C45 of the Antigua Labour Code to mean dismissal of an employee, entitled to severance pay, for reasons of redundancy.

The second point is that the meaning of "temporary" is defined in the specific provisions of the proviso which leave no room for the exercise of any discretion. Temporary means under:

- 45(2)(a) a period of less than six months where a date for return to work is stated at the time of termination of employment, and
- 45(2)(b) a period of less than three months where no date is so fixed.

Further a termination cannot be temporary unless at the time of the termination it is so stated, and the issue will be settled at a date no later than three months after the termination.

It is clear, therefore, that the provisions of Section C45 prescribe a different meaning to "temporary termination" than the meaning of "temporary cessation of work" in the U.K. (as explained by Lord Upjohn), and consequently the Court misdirected itself when it equated the two differing legal positions.

Section C45(1) provides for the payment of severance pay to redundant employees simultaneously upon the termination of employment. Section C45(2) provides that where there is a temporary termination on the ground of redundancy the employer does not have to pay severance pay at the time of such termination.

I disagree with the Industrial Court that this provides an exception to the payment of severance pay in those circumstances where there is a temporary termination or lay-off. The section cannot bear the meaning that an employee would lose his rights to severance pay when his employment is stated to be terminated temporarily on the ground of redundancy. It merely varies the time for payment of severance pay on redundancy where the termination is stated to be temporary, so that in such cases it is not necessary to pay it simultaneously upon the termination of employment. The section ensures that the question posed in *Fitzgerald v Hall, Russel & Co Ltd* supra could never arise, because a lay-off for four and a half years could not be temporary under C45(2) and the liability to pay severance pay would have arisen simultaneously with the original termination.

If there was a re-engagement under the circumstances and within the periods specified in C45(2) then the context requires that, if he was subsequently terminated on the ground of redundancy, for the purpose of computing severance pay, the employee would not lose his accrued benefits and his employment would have to be regarded as continuous.

The short answer to this appeal is that on the facts the respondent did not purport to terminate the employment on the ground of redundancy and there was in fact no situation of redundancy. The ruling of the Court below, that C45(2) permitted the temporary termination of employees, or laying off by rotation without the payment of severance pay is therefore quite untenable, because the provisions of that section only apply in situations of redundancy.

Argument was advanced on the question whether the termination constituted unfair dismissal entitling the employees to compensation. The Industrial Court did not consider or rule on this question, and this seemed due, to some extent at least, to the manner in which the case was conducted in that no evidence was adduced which could have led to any awards in favour of the relevant employees. In my view it would therefore be premature, inappropriate and probably prejudicial to further dealings or proceedings for us to consider or rule on this question at this time.

I would allow the appeal, set aside the order of the Industrial Court and declare that Section C45(2) of the Antigua Labour Code does not entitle the respondent to implement a program of temporary termination or lay off by rotation without the payment of severance pay where there is no situation of redundancy.

Costs to the appellant.

I concur.

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C. M. DENNIS BYRON
Justice of Appeal

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NICHOLAS J. O. LIVERPOOL
Justice of Appeal

I concur.

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SATROHAN SINGH
Justice of Appeal