

ANTIGUA

IN THE COURT OF APPEAL

Civil Appeal No.6 of 1991

BETWEEN:

LIAT (1974) LTD

Appellant

and

NOVELLA SHEPPARD

Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice
 The Hon. Mr. C. M. Dennis Byron - Justice of Appeal
 The Hon. Mr. Satrohan Singh - Justice of Appeal

Appearances: Mr. A. Jessamy and Mr. J. Simon for the Appellant
 Miss B. Lake QC and Mr. C. Browne for the Respondent

1993: June 9;
 November 22.

JUDGMENT

BYRON J.A.

This is an appeal against a judgment of the Industrial Court dated the 17th April 1991 which adjudged that the respondent was unfairly dismissed and ordered the appellant to pay her compensation in the total sum of \$96,222.31.

The grounds of appeal that were argued came under three main heads.

1. A retrial should be ordered because the court failed to extend to the appellant the opportunity to cross-examine the respondent and her witness, and erred in law in its dealings with applications in that regard.
2. The court erred in law in attaching weight to the medical evidence in the face of discrepancies and thereby made wrong findings of fact.
3. The award was excessive.

The background facts are that the respondent was a single woman employed for about seven years with the appellant, as an accounts clerk. At the termination of her employment her salary was \$1,304.08 per month. In May 1984 a dispute developed when a male senior officer made enquiries about her apparent pregnancy to obtain information

of her proposed dates for maternity leave. She became offended at what the court described as his insensitive remarks. She said her pregnancy was difficult, she did not know her confinement dates, and she did not want her business known. She did not provide the information. She alleged that in late June she made a verbal report that she expected her maternity to be September to October, but the appellant did not admit receiving this information.

On 16th July 1984 she left the State for Canada to receive special medical care on the advice of her doctor in emergency circumstances, without obtaining the prior approval of the appellant.

Dr. Ramsey gave evidence of the circumstances under which he saw her and that it was his opinion that it was incumbent on him to refer her for overseas treatment as a matter of urgency. He issued a medical certificate and wrote three letters in his handwriting to her employer, to the airlines, and to the Canadian Immigration to facilitate her speedy departure. She sent the communications from Dr. Ramsey to the appellant before she left. In Canada she obtained treatment and advice. She had to remain in Canada until after the delivery of her child by an emergency operation on 7th September 1984. She applied to the appellant for special leave to cover her confinement. The appellant never responded to her application and instead dismissed her with effect from 14th August 1984. The reasons for the dismissal appearing in the employer's memorandum (their pleadings in the Industrial Court) was that the respondent was pursuing "a well orchestrated plan to defy the authority of the company".

The court concluded that (i) the appellant did not have any written procedure relating to applications for maternity leave prior to the respondent's dismissal and that no policy regarding it had ever been made known to her. (ii) There were extenuating circumstances leading up to her hasty departure (iii) The efforts she made to notify the appellant were reasonable (iv) She was unfairly dismissed.

The Trial

The proceedings took a long time to come before the court. The actual hearing only commenced on 15th June 1989. Both parties were represented by counsel. The appellant put its case through three witnesses and exhibited documents on 15th and 16th June 1989, and on 6th and 7th November 1989. On 8th November when the respondent was to lead her case there was no appearance by the respondent or its counsel. The court proceeded. The respondent gave evidence and on the adjournment, had not completed her

testimony in chief. The matter came back on for hearing on 15th January 1990. On that day there was again no appearance by the appellant or its counsel. The court's record showed that notification dated 23rd November 1989 had been sent to the appellant and it adjourned and sent a letter to the appellant informing inter alia that hearing would continue at 9.30 am on 16th January 1990.

On 16th January 1990 the appellant appeared by its General Manager, Personnel Department, who applied for an adjournment to 17th January 1990 on the grounds that the appellant's counsel who lives in Trinidad, had been wrongly notified by the appellant that the hearing was scheduled for 17th, 18th and 19th January and that its Industrial Relations Officer who handles court cases was sick.

The record disclosed no report of any effort through the appellant's daily airline services between Trinidad and Antigua, or otherwise, to procure the attendance of their counsel after receiving the letter of 15th January 1990; that the 17th was not available for hearing, and that it was probable that any postponement would be until mid-February at the earliest.

The court did not accede to the application and proceeded with the hearing. The respondent completed her evidence, and called one witness Dr. Ramsey. The appellant who present by its General Manager, Personnel Department, did not cross-examine either witness, but requested that they be recalled for cross-examination on 17th January 1990. The court rejected the application heard the final address of counsel for the respondent, and reserved judgment. Counsel for the appellant on a subsequent date sought leave to cross-examine the witnesses and the President of the court who had not been a member of the tribunal which heard this case replied indicating that the request would not be granted.

The Industrial Court Act 1976. Section 8(1) provides for the court to have such powers as are vested in the High Court of Justice on the occasion of an action. It therefore has an inherent power to adjourn or refuse to adjourn the hearing of any matter in order to do justice between the parties. (**Hinckley and South Leicestershire Permanent Benefit Building Society v Freeman [1941] ch.32**). This power is further spelt out in Order 35 of the Rules of the Supreme Court which specifically confers the power to proceed with a trial in the absence of a party to it.

The exercise of this power is open to review on appeal but as it is a matter of discretion the Court of Appeal will be slow to interfere unless it is satisfied that an injustice is done to one or other of the parties. See **Maxwell v Keun et al (1928) 1 K.B. 645**.

The court did not purport to give written reasons for this decision and the only one to be gleaned from the record was a comment on the discourtesy of the appellant's counsel. In considering, however, whether any injustice was done to the appellant by this decision, it is necessary to consider the factual background just recounted. It raises issues of significance that either must have been or ought to have been considered by the court in refusing the adjournment.

I have come to the conclusion that there was reason for the refusal of the adjournment. A comment on the discourtesy of the appellant's counsel was the only reason for the refusal on the Record of Appeal, but I would list the factors which have impressed me.

1. The Conduct of the Appellant and its Counsel

It would not be usually the case that the discourtesy of counsel could have an effect on the justice between the parties. In this case, however, it went beyond that, because the discourtesy included the behaviour of the appellant itself. Moreover, the appellant's reasons for the adjournment was based on its allegation that the non-appearance on 15th January 1990, was due to its own default. In addition, the sequence of events raises the issue of deliberate absenteeism and contemptuous disregard for the court, either of which could have frustrated the completion of the trial within a reasonable time. The appellant's plight was, therefore, brought on by its own misconduct.

2. The Effect of Further Delay

The court itself must have been embarrassed and the dispensation of justice adversely affected, by the great delay as over five years had already elapsed since the dismissal of the respondent, and the court was entitled to consider the expedition of the proceedings and the prejudice the respondent would suffer by further delay as important factors, which would weigh against the granting of the adjournment.

3. The Justice of the Case

The court had heard the appellant's case in full and the respondent's evidence, and was therefore well situated to determine the value of cross-examination having regard to

the nature and extent of controversy revealed by the evidence. In my view the refusal to adjourn did not have the effect of denying the appellant an opportunity of presenting its case because it had already done so nor was there any apparent prejudice to the justice of the case, by the failure to cross-examine as the testimony of the respondent and her witness did not raise matters of great factual controversy or matters which had not been previously dealt with in the proceedings (written and oral).

In my view, any adjournment given in the circumstances of the case would have been unfair to the respondent and would have constituted an injustice to her. Therefore, it would seem to me that the interest of justice required a refusal of the application for the adjournment.

Counsel for the appellant complained that he applied to reopen the hearing and the President of the court who was not part of the tribunal in their case, wrote him dismissing his application without there being any hearing by the court.

My ruling that the court exercised a judicial discretion in refusing the application for the adjournment, and that it was in the interests of justice to do so, makes consideration of the further complaint somewhat irrelevant. In any event, counsel for the appellant did not provide any authority or show the existence of any procedural provisions that entitled or enabled him to require the court to hear him on that issue which it had already ruled on. In my judgment the court had no obligation to rehear or readjudicate on the issue of the adjournment or the cross-examination of the respondent's witness, and its failure to do so could not, therefore, vitiate the trial.

The letter from the President of the court, could not have the effect of an order of the court (despite its language dismissing the application). It does not form part of the decision of the Industrial Court under appeal and could not have any effect on the outcome of this appeal.

It is my view that all the grounds of appeal which purport to impeach the fairness of the trial should be rejected.

The Medical Evidence

Dr. Ramsey signed a medical certificate which was dated 14th July 1984 and certified that he had seen the respondent on 16th July 1984. In his evidence he indicated that he saw the respondent on the 16th July 1984, and because of the urgency of her

condition and it being a Saturday he was obliged to write letters by hand to facilitate her speedy departure. The evidence revealed that the 16th was a Monday. In his evidence the doctor also said that his records showed that he had seen her on both 14th and 16th of July 1984, as well as on other occasions.

The respondent in her evidence said that she saw Dr. Ramsey on the 14th and he gave her the letters and the medical certificate, which she dispatched by hand to LIAT and left the island on Monday 16th July 1984. It was suggested that the discrepancy, as a matter of law, diminished the weight that could be attached to the doctor's evidence and that the court should not have relied on it. However, in rejecting this ground of appeal, I do not think that I need to say more than that, the court clearly expressed its confidence in Dr. Ramsey's truthfulness and credibility supported as it was by the certificates from the medical experts in Canada, and in my view the existence of the discrepancy as to the dates in the circumstances of the case is a minor one and does not justify the finding that the court's conclusion as to its reliability may have been wrong.

The Award

The court detailed its award as follows:

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| 1. | Loss of protection (basic award) at the rate of one day's pay
for each month worked | \$3,533.63 |
| 2. | Immediate loss of earnings being the equivalent of 51 months
pay | \$66,508.08 |
| 3. | Back pay due for (7) months | \$9,780.60 |
| 4. | Fringe benefits | |
| | (a) loss of pension benefits | \$10,400.00 |
| | (b) loss of rebated travel benefits | <u>\$6,000.00</u> |
| | | <u>\$99,222.31</u> |

The appellant conceded the entitlement to compensation under each of the heads but has challenged the amount of the award.

Loss of Protection

The submission of the appellant was that this award should be pro-rated by 50%. Counsel seemed by inference to be adopting the position in **Norton Tool Co. Ltd. v T 1973 All E.R. 183** when Sir John Donaldson in discussing the application of this head of compensation in England justified an award of 50% of the accrued rights on redundancy. This submission was not based on any assertion of contributory default and the evidence and findings of the court below would seem to exclude this consideration.

In Antigua the practice has become accepted that the loss of protection (basic award) is the full equivalent of the employee's entitlement to a statutory redundancy payment as set out in Section C44 of the Antigua Labour Code which reads:

"C44 - Severance pay shall consist of at least one day's pay, at the employee's latest basic wage, for each month or major fraction thereof of his term of employment with his employer and any predecessor-employer."

In this court the principle has been adopted in many cases and I will refer to **Antigua Commercial Bank v Mary White** Antigua and Barbuda Civil Appeal No.1 of 1988, where Bishop J.A. stated at p.43:

"Under loss of protection in respect of unfair dismissal or dismissal by reason of redundancy, learned counsel for the respondent did not advance a specific argument; and I can find no justification for differing from the view of learned counsel for the appellant, to the effect that in Antigua, it is the accepted practice to award persons in management, the equivalent of one month's salary for every year of employment. Under this head therefor I would award \$3,500.00."

It is clear that this practice applies to all employees whether management or not or whether monthly paid or weekly paid I will refer only to the Industrial Court itself in the case of **Shirley Dailey v West Indian Oil** Antigua & Barbuda Industrial Court reference 32 of 1991 where the award of the court included:

"(d) Loss of Protection in respect of Unfair Dismissal or dismissal by reason of redundancy:

It is our understanding that in Antigua it is the accepted practice to award a weekly employee one (1) day's pay for every month of employment."

For my part I think the position is well settled and I would rule that the award should stand in accordance with the accepted practice.

Immediate Loss

Under this head an employee is entitled to loss of earnings or benefits from the date of dismissal to the date of assessment subject to the employee's duty to mitigate. In this

case the appellant obtained employment 51 months after her dismissal and the court awarded her a sum equivalent to her earnings for that period. The well settled law is that in order for an employee who has been unfairly dismissed to discharge the duty to mitigate his loss, he must make reasonably diligent efforts to find employment at a comparable standard.

The period of 51 months is so long that it raises by itself the issue of mitigation, and it was the duty of the court to determine whether in the context of the relevant circumstances the respondent's inability to find employment was related to the quality of her efforts in that regard. The court did not specifically discuss or rule on the issue of mitigation although there was an inferential ruling in its finding that the appellant had been "unable to find employment" for the 51 month period.

Counsel for the appellant argued that the finding was untenable and the period allowed should be 12 months. Counsel for the respondent argued that there was proof of actual loss with evidence of failed attempts to obtain employment and that the court confronted with such should not conjecturise.

In considering the issue of mitigation, the evidence revealed that between the date of her dismissal on 14th August 1984 and her employment at Nicholson's Travel Agency on 14th November 1988, she made 6 or 7 unsuccessful applications for employment. The evidence was that she was not a specially skilled employee. Her job was as an accounts clerk and her salary indicated that she held a junior grade.

Neither party adduced evidence on the job market and there was no evidence before the court other than the unsuccessful attempts made by the respondent in her search for employment. I have been unable to accept that evidence of 6 or 7 unsuccessful attempts to obtain employment over 51 months could constitute reasonably diligent attempts to find employment at the level of non-specialised work as an accounts clerk.

The court cannot be debarred from exercising an objective approach merely by proof of actual loss because its duty must include considering the issue of mitigation as well.

In my view the extent of the failure to mitigate is sufficiently substantial to warrant at least halving the award under this head. In the circumstance I would halve the award under this head to account for the respondent's failure to mitigate and vary the award from \$66,508.00 to \$33,254.00.

Back Pay

The court awarded back pay from January to August a period of 7 1/2 months. But counsel for the appellant rightly pointed out that the court calculated not the unpaid increase of \$100.00 per month due to her but the entire increased salary of \$1,304.08 part of which she had already received. We therefore vary this award from \$9,780.60 to \$750.00.

Fringe Benefits

(a) pension rights

It has been accepted that one method of assessing loss under this head is to calculate it in terms of the loss of money already contributed to a pension scheme the employee being entitled to the value of the employer's contributions as well as his own up to the date of the dismissal increased by compound interest from the date of payment. *Copson v Eversure Accessories Ltd* (1974) I.C.R. 636.

The problem in this case is that there was insufficient evidence for the court to make an accurate calculation. The appellant gave no evidence on the issue and the evidence of the respondent was that the employer contributed 5% of her salary to its pension scheme. She gave no evidence as to what if any sum she contributed. The existence of a pension fund into which contributions were paid requires an award under this head and the court arrived at a guesstimate.

A rough computation of the 5% employer's contribution over the seven years of her employment increased by compound interest up to the date of assessment some twelve years after the commencement of her employment could not produce a figure below that at which the court arrived. I cannot say that the figure arrived at is unreasonable having regard to the evidence.

(b) rebated travel

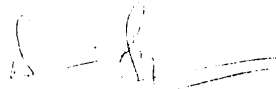
The respondent adduced evidence on the value of her rebated travel. The appellant did not address this issue in its evidence. It would seem that there was an adequate basis for the figure arrived at by the court although it was based not on any precise form of

calculation but on a guesstimate.

I would not interfere with this award.

In summary the award is therefore reduced by \$42,284.60 to \$56,937.71.

I would therefore dismiss the appeal, vary the award of the court below to \$56,937.71 and award costs to the respondent.

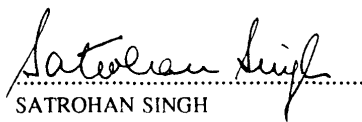


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C. M. DENNIS BYRON
Justice of Appeal



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SIR VINCENT FLOISSAC
Chief Justice

I concur.


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SATROHAN SINGH
Justice of Appeal

I concur.