

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL.

INDUSTRIAL APPEAL No. 14 of 1992

BETWEEN:

JOLLY BEACH HOTEL

(Employer/Appellant)

and

SAMUEL SIMON & ELIJAH FARQUHAR

(Employees/Respondents)

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

Appearances: Mr. John E. Fuller for the Appellant
Mr. Steadroy C.O. Benjamin for the Respondents

1993: June 10;
November 22.

JUDGMENT

LIVERPOOL, J.A.

During the hearing of this appeal learned Counsel for the appellant abandoned the appeal in so far as it concerned the respondent Samuel Simon. At the end of the hearing we intimated that the appeal against the decision in favour of the respondent Elijah Farquhar should be dismissed, for reasons which we would subsequently deliver. This we now do.

Mr. Elijah Farquhar worked as a gardener with the Jolly Beach Hotel for a number of years. Sometime in 1989 he was paid off and offered a new contract. Under this new arrangement he wore the hotel's uniform; carried the hotel's identification card which contained a copy of his photograph; used their tools on the job; punched in an attendance card when he started work in the morning, and punched out on completion of his day's work on a clock which belonged to the hotel; he was supervised by the Hotel's head gardener; and the hotel paid his wages on a regular basis fortnightly.

On 16 April, 1991 Mr. Farquhar was on his way home from work. He was stopped by Assistant Superintendent of Police Foster Lynch and asked to open a bag which he was carrying. On inspection the bag contained eight (8) rolls of toilet paper and five (5) boxes of facial tissues. After an investigation Mr. Farquhar was arrested for receiving those articles, and later released on bail. On 15 May, 1991 the matter came up before Magistrate Cosbert Cumberbatch at the Magistrate's Court at Bolans. No evidence was offered by the prosecution and the case was dismissed. In the words of the Assistant Superintendent "....the matter was withdrawn at

the request of [the Hotel]". The certified extract from the Court's register reveals that no evidence was offered, and the case was dismissed.

Mr. Farquhar returned to work on 16 May, 1991, and was told by Mr. John Love, the head gardener, that he had been dismissed and that he should return the uniform and his identification card. The matter was referred to the Labour Commissioner on the same day; an employee's memorandum was filed before the Industrial Court on 29 October, 1991, and a memorandum on behalf of the employer was filed on 27 February, 1992. In its memorandum the sole ground relied upon by the employer was that Mr. Farquhar was not an employee of the hotel at the relevant date (16 May, 1991); and was not and could not have been dismissed from the employ of the employer as alleged or at all.

The Industrial Court reminded itself of the difficulty recognised by Denning L.J., in *Stevenson Jordan and Harrison Ltd. v Macdonald and Evans* (1952) 1 T.L.R., in determining between a contract for service and a contract for services; and having applied the tests in *Young and Woods Ltd. v West* (1980) IRLR 201; *Narich Ltd. v Commissioner of Pay Roll Tax* (1984) ICR 286; and *Lee v Chung* (1990) IRLR 236; it found that Mr. Farquhar, contrary to the assertion contained in the employer's memorandum was indeed an employee of the hotel at the time of his dismissal. The court then went on to consider whether the employee was unfairly dismissed, and stated:

"In its Memoranda, the Employer gives no reasons for their dismissal and the General Manager of the Hotel at the material dates stated under cross-examination that no reasons for their dismissals were given because the Hotel did not wish to block their future. The circumstances surrounding their dismissals appear somewhat unfortunate; but the Employer has not satisfied this Court that it acted reasonably or within good industrial relations practices in the termination of the employment of these Employees. We therefore consider their dismissals to be unfair and the Employees are entitled to compensation....."

Compensation for Mr. Farquhar was assessed at \$23,254.75 to be paid by the employer not later than 23 July, 1992.

The employer appealed on the ground that the Industrial Court erred in law in failing to find that the employee was fairly dismissed; and prayed for an Order that the order for payment of compensation be set aside and that the costs of the appeal be paid by the respondent. Learned Counsel argued that although the employer had given no reasons for the dismissal, the Industrial Court was wrong in finding that the employer had not acted in accordance with good industrial practices in dismissing the employee.

Section C9(1) of the Antigua and Barbuda Labour Code provides that an employer may, without advance notice, terminate the employment of any person who has engaged in misconduct related to his work. It was argued on behalf of the appellant that the employee had done acts of a kind which amounted to misconduct related to his work, and which could justify the employer in saying that the contract of employment could no longer continue; and further that

there was an agreement with a Mr. Marshall who had interceded on behalf of the appellant that the appellant would not take the matter of his dismissal further and the employer would not state reasons for the employee's dismissal which would block his chances of obtaining future gainful employment. The appellant denied that he had asked anyone to intercede on his behalf, and in cross-examination the representative of the employer admitted that Mr. Farquhar was never himself present at or privy to such discussion.

Section C10 which has a direct bearing on this matter states -

"(1) Upon the termination by an employer of any person's employment subsequent to the expiration of the latter's probation period, the employer shall, upon a request being made by the employee within seven days of termination or notice thereof furnish forthwith to said employee a written statement of the precise reason for the action."

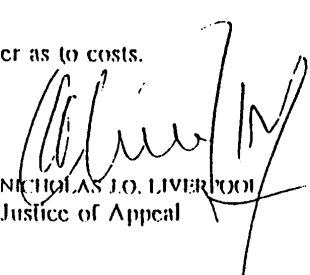
(2) The employer shall, upon request of the terminated employee furnish a certificate specifying the dates of his engagement and termination and the type of work on which he was employed.

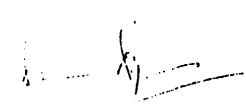
(3) An employer who furnishes a statement or certificate required by subsection (1) or (2) respectively, shall be conclusively bound by the contents therein in any proceeding testing the fairness of the dismissal as covered by Part 5 herein or his liability for severance pay covered by Part 4 herein.

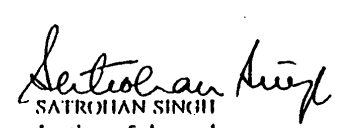
(4) An employer who fails to furnish either the statement or the certificate shall be estopped from introducing testimony as to facts which might have been recited in said statement or certificate, in any proceeding testing the fairness of the dismissal or his liability for severance pay whichever is applicable."

The employer having given no reasons for Mr. Farquhar's dismissal; I am of the view that the Industrial Court had no alternative but to arrive at the conclusion which it did. Consequently I find that the decision of the Industrial Court was not erroneous in point of law.

Both appeals are therefore dismissed, but there will be no order as to costs.


NICHOLAS J.O. LIVERPOOL
Justice of Appeal


C.M. DENNIS BYRON
Justice of Appeal


SATISHAN SINGH
Justice of Appeal