

(4)

ANTIGUA & BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 13 of 1989

BETWEEN:

LIAT (1974) LIMITED	-	Appellant
and		
ROGER GREENIDGE	-	Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Moe
The Honourable Mr. Justice Byron (Acting)

Appearances: A. Jessamy and S. Browne for the Appellant
B. Lake, Q.C., and C. Hill for the Respondent

1990; Nov. 26, 27,
1991; Feb. 25.

JUDGMENT

MOE, J.A.

This is an appeal from a decision of the Industrial Court that the respondent was constructively dismissed by the appellant at the end of December, 1986; that the dismissal was unfair and in circumstances that were harsh and not in accordance with the principles of good industrial relations practice. The Industrial Court awarded the respondent \$325,801.88 compensation and \$20,000 costs. The respondent seeks a variation in the award to include an amount for exemplary damages and also an increase of one of the heads of compensation.

Background

The appellant is an air-line company registered in Antigua and engaged in providing passenger services to various islands of the Eastern Caribbean. The respondent on the 8th November, 1982 commenced a contract of employment with the appellant as a pilot. In order to get that employment the respondent was required to be tested both medically and psychologically by the appellant's doctor and psychiatrist respectively.

On the 8th December, 1985 the respondent was involved in a car accident. He suffered severe concussion, was hospitalized for about
/four days.....

four days and was away from work on sick leave for thirty-seven days; i.e. until the 16th January, 1986. He received a medical certificate dated 18th January, 1986 which certified him fit to exercise the privileges of a commercial pilot until 17th July, 1986, and he resumed duties.

The respondent was given further leave from 20th January, 1986 to the 18th February, 1986, part of which period was to enable him to study for an examination on the Dash 9 Aircraft. He failed this examination three times between February and April. He failed a base check on a flight of the Avro Aircraft on 8th May, 1986. He had failed no such checks before.

The respondent between 9th March, 1986 and 22nd August, 1986 was off on sick-leave for a total of 17 days for either gas pains or chest pains which he explained developed as a result of the diet he took on account of the type of employment.

One of the days respondent was off on such leave was the 6th July, 1986 on which day he was seen at the beach. An explanation was demanded from him and he responded. On 22nd July, 1986 the General Manager/Operations of the appellant wrote the respondent informing him of a report that he had accused the Crew Rostering Manager of jeopardizing his livelihood by reporting his being seen on the beach on 9th March, 1986 and threatened him. An explanation of his actions was demanded. On 25th July the respondent wrote that he was still in shock and amazed at such serious accusations and assured that his explanation would be in by 1st August, 1986. The General Manager/Operations again wrote the respondent on 13th August indicating that no explanation had yet been received and gave him until 18th August, 1986 to respond. The respondent however was on sick leave from 11th to 22nd August, 1986 suffering with chest pains.

The respondent did not turn up for duty on the 22nd August and could not be found. He was given until 29th August, 1986 to explain his absence. On 2nd September the Acting General Manager/Operations wrote the respondent, referring to the matters unanswered and requested replies by the 9th September, 1986. In that letter the Acting General Manager catalogued the respondent's behaviour which was totally unacceptable to the appellant and which constituted serious breaches of normal behaviour expected of their pilots.

On the 9th September, 1986 the appellant received from the respondent four letters, one dated 23rd August, 1986, two dated 8th /September.....

September, 1986, one undated and all relating to complaints against and warning to the respondent. There was also a medical certificate dated 11th August, 1986 for the twelve days absence 11th to 22nd August, 1986.

In one dated 8th September he acknowledged receipt of the General Manager's letter of the 2nd September and apologized for the delay in response to the various matters concerned.

In the letter dated 23rd August, 1986, he chided the Company for not yet complimenting or expressing gratitude to him for working beyond the call of duty on certain occasions, launched an attack on Crew Rostering Manager and advised how the appellant should deal with the Crew Rostering Manager. A postscript to that letter was as follows:-

"THE RICHES OF LIFE

Riches are the friendships and fellowship one makes.
Speaking truths and keeping faith
And learning from mistakes,
Wealth is life's own blessings, peace, happiness and love
And its treasures - true respect for man
And trust in God above."

In the second letter dated 8th September, 1986 he referred to compliments by management on previous occasions for performance beyond the call of regular duties. He went on to state that because of the stressful nature of his job, he saw no objection to a pilot reporting sick and going to a place of relaxation. His decision to do so on 6th July, 1986 was made as a professional and from good judgment. It is worthy of note that he stated "Flying is not a trivial exercise; to do it right takes time, effort and discipline, money and above all precise skills, both mental and physical". A postscript to this letter was "I am not afraid to face tomorrow, for I have seen yesterday and I love today".

On 12th September, 1986 the Acting General Manager of Operations by letter advised the respondent not to fly any of the appellant's aircraft on the 13th or 14th and requested him to report to the General Manager's office on the 15th. On that date the General Manager informed the respondent of management's decision that the respondent should go to Barbados to be examined by the Company's psychiatrist. On 16th the respondent was informed of an appointment made with the psychiatrist for him. On the 19th the respondent wrote the General Manager requesting the reason for the examination by the psychiatrist and his removal from rostered duty. The respondent refused to undergo the psychiatric examination by Dr. Mahy.

/On 2nd.....

On 2nd October, 1986, the General Manager wrote the respondent requesting him to attend a meeting on 3rd October concerning the appellant's request for a psychiatric examination of him. The respondent was also instructed not to fly any of the appellant's aircraft until the matter had been resolved.

The General Manager wrote a letter dated 10th October, 1986 which stated inter alia:-

"I refer to our meeting in the Personnel Manager's Office last week and would like to reiterate that the Company wishes, that before you return to flight duties, you see a Psychiatrist Specialist.

This decision was taken as a result of what the Company considers to be a marked change in your attitude and behaviour over the last few months as well as a significant deterioration in both your Sickness Record and your flying ability."

By letter dated 23rd October, 1986 the respondent again sought the authority under which the appellant requested the psychiatric examination and details of his actions which prompted the appellant's request. The response of the General Manager/Operations of the appellant is worthy of quotation at length. He wrote-

"I refer to your letter dated October 23 and our conversation in my office when you indicated your refusal to see Dr. Kianes, the Psychiatrist in San Juan.

Firstly, your letter is quite inaccurate in that a full explanation was given to you by both myself and the Personnel Manager (Mrs. Potter) in her office at our meeting of October 3, 1986.

I further outlined my concerns in my letter of October 10, 1986. You ask by what authority I make my request. I am charged, in LIAT, with the responsibility for safety standards as they relate to flying. If I am not happy with an aspect of safety, I am obliged to get it checked out. Whether this relates to a technical matter, a Pilot's flying ability, or a Pilot's state of health is immaterial. What is material is that such doubts must be checked out.

My doubts in your case were raised by:

1. A significant deterioration in your flying ability as indicated in your Training Record.
2. A significant deterioration in your Sick Leave Record.
3. A marked change in your attitude for the worse. The series of letters you wrote in reply to requests for explanations for unacceptable behaviour, were to put it mildly, extraordinary.

/I am not.....

I am not qualified to determine the state of mental or physical health of anyone. I must therefore insist that you attend a Psychiatrist for assessment before recommencing duties. I have gone to considerable lengths to provide an alternative to the Company Psychiatrist at your request. You then refused to attend the alternative doctor I arranged for.

I must now advise you that the Company is no longer prepared to continue paying you until this matter has been resolved to my satisfaction.

Please be advised that effective November 5, 1986, you will not be on LIAT's Payroll until such time as a satisfactory report has been received from either the Company Psychiatrist (Dr. Mahy) or alternatively, a Psychiatrist recommended by the Director of Civil Aviation."

The respondent's solicitors wrote the appellant and the General Manager replied advising that the matter was referred to the Director of Civil Aviation. The solicitors then wrote the appellant advising that the matter must be referred to the Labour Department on the basis of unfair dismissal. The appellant took the position that the respondent was not dismissed constructively or otherwise and some further correspondence passed between the solicitors and the appellant.

By letter dated 29th December, 1986, the General Manager of the appellant wrote the respondent and inter alia:- (1) recalled reference of the matter to the Director of Civil Aviation; (2) informed that "The Director of Civil Aviation has now written to us and has indicated the following; "The authorities expect that the Company, as a responsible organization, will ensure that related doubts are dispelled before returning the pilot to active duty"; (3) stated "It must be obvious to you that we cannot allow you to fly again without a check nor can we continue to pay you without any work on your part. I have therefore taken the step, regretfully, of taking you off the payroll from tomorrow, December 30, 1986."

In a letter dated 22nd January, 1987 the respondents solicitor indicated (1) that the letter of the 29th December, 1986 was received by the respondent on the 14th January, 1987; (2) the respondent was unable to accede to the request contained in the letter. Enclosed with that letter was a medical certificate dated 20th January, 1987. They expressed the hope that the matter is finally out to rest and Mr. Greenidge will be reinstated in his post without any loss of pay, allowances and benefits.

The respondent did not receive any salary after that for the month of December, 1986. He instructed his solicitors to refer the matter

/to the Labour.....

to the Labour Commissioner which they did by letter dated 12th February, 1987, claiming reinstatement.

The Industrial Court found that the appellant did not renew the work permit of the respondent which would have permitted the respondent a non-national to perform duties during the year 1987. Further that the appellant did not issue the respondent with a new Identification Card for the period 1st October, 1986 to 30th September, 1987. From those two facts and the fact that the appellant failed to pay the respondent the contractually agreed remuneration after the 31st December, 1986, the Industrial Court concluded that the respondent was dismissed by the appellant at the end of December, 1986. It did not find that the respondent was estopped from claiming dismissal at the end of December, 1986 by virtue of receiving benefits from the appellant during the year 1987. The Industrial Court was of opinion "if the employee refused to accede to a request to be psychiatrically examined and the employer has no inherent power to compel him to undertake such an examination then the employer will have to act on the basis of those facts which are at his disposal. The employer cannot insist on the examination".

The Industrial Court found that the appellant acted unreasonably by suspending the respondent from his duties from September, 1986 to December, 1986. That the employer relying on his layman's assessment of the employee questioned the mental capacity of the employee and demanded that he be medically examined. Further that the employee under circumstances of extreme duress was required to submit himself to psychiatric examination by the Company's psychiatrist Doctor Mahy in Barbados and Doctor Kianes in Puerto Rico without giving the employee an explanation as to the reason why he should undergo this examination. That when the employee was finally dismissed because he failed to comply with the employer's requests he was dismissed in circumstances that were harsh and not in accordance with the principles of good industrial relations practice and entitled to substantial compensation.

Several grounds of appeal were filed and argued but such of them as it is necessary to advert to will be dealt with as the appeal is considered in relation to the three issues:- (1) Was there constructive dismissal of the respondent; (2) if so, was the dismissal unfair, and if so (3) compensation and/or damages.

Constructive Dismissal

One complaint is against the decision that the respondent was dismissed. The Industrial Court found that there was no term of the respondent's contract which permitted the appellant to have the

/Respondent.....

respondent on employment without pay. The respondent's position is that failure to pay him wages was a breach of a fundamental term of his contract which amounted to a repudiation of his contract. It was argued by Counsel for the appellant that non-payment of wages to an employee may be on account of any of a number of reasons - e.g., the employee may be on leave without pay or on suspension without pay. While that contention may be sound in the circumstances of a particular case, the appellant did not seek to show that in the instant case, refusal on the part of the appellant to pay the respondent wages under his contract of employment was not in breach of a fundamental term of his contract.

There being ample evidence on which the Industrial Court could come to its finding, that finding ought not to be disturbed.

The appellant's real challenge on this issue of constructive dismissal was that the evidence does not show that the respondent affirmed any repudiation of his contract but shows rather that the respondent obtained benefits consistent only with the continuance of his contract of employment i.e., he had not treated his contract as discharged. The Industrial Court did not make any specific finding or ruling on the point whether there had been any affirmation of the repudiation. While that Court did find that the respondent enjoyed benefits from the appellant during the year 1987 it took the position that those benefits having been enjoyed after December, 1986 did not preclude the respondent from claiming dismissal from the end of December, 1986.

Counsel for the respondent pointed (i) to the letters of the 22nd January, 1987 wherein the respondent asked to be reinstated, and (ii) his letter to the Labour Commission referring the matter of his dismissal to the Labour Commissioner and claiming reinstatement.

In my view the steps taken by the respondent show that he regarded himself as dismissed and sought reinstatement. There was clear and unequivocal acceptance by the respondent of the repudiation of the contract by the appellant and he acted accordingly.

Unfair Dismissal

Since in this case the contract of employment was terminated by the respondent's acceptance of the appellant's repudiation of the contract, the question for the Industrial Court was whether in the circumstances the appellant acted reasonably or unreasonably in taking the offending action. The Industrial Court, in determining this issue did refer to section 60(2) of the Antigua Labour Code which provides:-

/"The test.....

"The test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted reasonably or unreasonably but, even though he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee's dismissal."

There is no question here of the appellant being mistaken as to the basis for the offending conduct. That conduct was taken in December, 1986 because the respondent refused to take the psychiatric examination which the appellant requested since September, 1986.

The Industrial Court evidently misdirected itself when it found that the respondent was required to submit to a psychiatric examination without giving him an explanation as to the reason why he should undergo such an examination.

From the outline above it will be seen that in the letters dated the 10th October, 1986 and the 28th October, 1986, the General Manager stated the appellant's concern about the respondent's flying ability and the facts which prompted those concerns or doubts.

The Industrial Court appears to have also misdirected itself as follows:

"In our opinion if the employee refused to accede to a request to be psychiatrically examined and the employee has no inherent power to compel him to undertake such an examination then the employer will have to act on the basis of those facts which are at his disposal. The employer cannot insist on the examination."

The appellant complains that the Industrial Court misdirected itself or erred in law in holding that the appellant had no inherent power to compel the respondent to undergo a medical examination. The ground of appeal was in terms of a medical examination but the submissions were related to the question of psychiatric examination. Counsel for the appellant submitted that all relevant decided cases indicate a right on the part of an employer to have an employee examined provided there are reasonable grounds for so doing. He contended that the right was particularly pertinent in the circumstances of this case. He referred to four cases decided in Canada:

Re United Automobile Workers and Studebaker Packard
of Canada Ltd. 1960, Vol. 11 Labour Arbitration Cases 139;

Re Martindale Sash & Door Ltd., Vol. 1 Labour Arbitration
Cases 324;

/Re Firestone....

Re Firestone Tyre & Rubber & United Rubber Workers
1973, Vol. 3 Labour Arbitration Cases 12;

Re Niagara Board of Commissioners of Police and Police
Association 1975, Vol. 9 Labour Arbitration Cases 272.

Submission by Counsel for the respondent was that the question whether there is a right in an employer to submit an employee to psychiatric evaluation is to be determined by reference to the law as set out in the Antigua Labour Code and no other because that Code is declaratory of the law governing Industrial Relations in Antigua. The submission continues that the Code does not specifically provide for this right of an employer nor was such a right part of the collective agreement between the appellant and the respondent.

It seems to me a matter of good sense that an employer should be able to ensure that an employee is mentally fit to perform the duties required to be performed where such fitness is relevant to the particular duties to be carried out. The relevancy would of course depend on the particular contract of employment. But it is not only good sense, it is a matter of law.

Considering the matter from the point of view of an employer's obligation and correlative liability, I would first observe that at common law an employer has a duty to employ competent staff; see *Wilson & Clyde Coal Co. Ltd., v English* (1938) A.C. 57, *Winter v Cardiff R.D.C.* (1956) 1 All E.R. 819. Competent clearly embraces fitness both in body and mind. It seems to me therefore that if there is reasonable grounds for believing that an employee is no longer competent (physically or mentally fit) the employer should surely have a right to have a medical opinion on the matter. In *Re Martindale Sash & Door Ltd.*, (supra) the Board of Arbitration reviewed the law on the question whether an employer can unilaterally require medical examinations of his employees and reached the following conclusions with which I agree:-

- (1) At common law, the employer did not generally have the right to insist that an employee submit to a medical examination.
- (2) The common law principle has been modified by general labour arbitration jurisprudence so that an employer now seems to have a limited right and duty to demand that an employee undergo a medical examination if he has reasonable and probable grounds for suspecting that the employee (i) is a source of danger to himself, other employees, or company property; or (ii) is unfit to perform his duties.

/ (3) If an....

- (3) If an employee refuses to submit to a medical examination, or refuses to produce a medical certificate when the conditions in (2) prevail, then the employer has just cause to discharge the employee.

The position was reiterated in *Re Firestone Tyre & Rubber & United Rubber Workers* (supra) where the board stated:-

"There is no doubt an employer has both the entitlement and the obligation to satisfy itself as to the fitness of its employees to carry out the tasks to which they will be assigned. What is proper will depend, in each case, on the nature of the work, and the circumstances to which it is to be performed."

There is evidence that mental fitness is a relevant consideration to this employment under review. The respondent was psychiatrically examined for the purpose of obtaining the contract. The right to have an employee examined does not exist only at the time of appointment. In *Re Niagara Board of Commissioners of Police* (supra) the Board stated:-

"It has long been established.....that an employer may set as a qualification for continued employment, the condition that an employer be physically fit for the task which he is to undertake and indeed, that in an appropriate case, an employer may discharge an employee who has ceased to meet this qualification of fitness for employment."

The principles of law above stated are not made inapplicable by the Antigua Labour Code set out in Act No. 14 of 1975. In the first place that Act brings together legislation applicable and in the second place in section A 10 recognizes that there is other law that can apply, e.g. the Common Law.

I would hold that the Industrial Court erred in holding that the appellant had no power to request the psychiatric examination.

The next question is whether there were reasonable grounds for so requesting. Appellant's counsel pointed to the whole record of the respondent commencing with the car accident on the 8th December, 1985 and up to the refusal to be psychiatrically examined as late as December, 1986. Submission for the respondent was that even if there was a right to request the examination, the events advanced by the appellant do not justify the request.

The appellant had before it the fact that the respondent for a brief period was not in charge of his mental faculties having suffered severe concussion during a car accident following which he was on sick leave. After his return from sick leave the appellant observed, a change in the respondent's attitude to staff, a change in his veracity,

/increased....

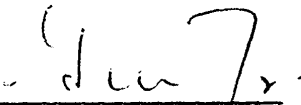
increased sick leave, his extraordinary replies, with poetic postscripts, to the appellant's letters and a deterioration in his flying ability. In my view all of these things provided sufficient basis for the appellant to feel that more probably than not something was wrong and that there should be a check whether it was so or not.

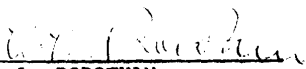
Reasonableness of Conduct

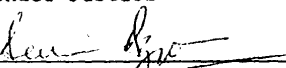
There was a submission on behalf of the respondent that even if there was justification for requesting the examination after the receipt of medical certificate in October, 1986, there was no justification for insisting thereafter that the respondent go for a psychiatric examination. I do not understand that examination by a physician satisfies the requirement of an examination by a psychiatrist. The appellant's request for the examination was in the middle of September, 1986. The appellant by letter of 28th October, 1986 proposed to remove the respondent from the appellant's payroll as from 5th November, 1986 but did not do so. The appellant referred the matter to the Director of Civil Aviation who replied inter alia "The Authorities expect that the Company (the appellant) as a responsible organization, will ensure that related doubts are dispelled before returning the pilot (the respondent) to active duty". The respondent himself said in evidence the Laws of Antigua impose a duty on him as a pilot to ensure that he is sound both mentally and physically.

It seems to me that the appellant bent over somewhat to give the respondent an opportunity to have an examination the result of which would have let both the appellant and respondent know whether they could discharge their respective obligations to the flying public. The respondent did not get the examination which was reasonable for the appellant to have requested and insisted upon.

On a consideration of all the circumstances I do not find that the appellant acted unreasonably when it repudiated its contract with the respondent. I would allow the appeal set aside the decision of the Industrial Court and order that the dismissal of the respondent as of the 31st December, 1986, was not unfair.


 G.C.R. MOE,
 Justice of Appeal


 L.L. ROBOTHAM,
 Chief Justice


 C.M.D. BYRON,
 Justice of Appeal (Acting)