

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

Claim No. ANUHCV 1997/0387

BETWEEN:

MICHAEL BLACKBURN

- Claimant

and

LIAT (1974) LIMITED

- Defendant

Appearances:

Jerry Seales and Dwight Horsford for Claimant

Eleanor Clarke for Defendant

.....
2004: 7 June & 28 July
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JUDGMENT

[1] The Claimant alleges breach of his contract of employment by the Defendant Company, his employer. The Claimant is employed with the said Defendant as an Aircraft Pilot holding the rank of Captain, and has been so employed as a pilot since the 4th day of July 1978. The Defendant Company is registered under the Laws of Antigua and Barbuda and carries on business as a regional Caribbean airline operator under the popular name "LIAT" from its headquarters or main office which is situate at V.C. Bird International Airport, Antigua.

[2] When the Defendant first employed the Claimant in 1978, he was stationed by the Defendant at its Antigua base and was paid his salary in Eastern Caribbean currency.

- [3] In April 1979 the Claimant was transferred by the Defendant to its Barbados base at his request, on a voluntary transfer. The Defendant kept the Claimant stationed at the Defendant's Barbados base from 1979 until November 1994. While the Claimant was stationed in Barbados the Defendant paid him his salary in Barbados currency, which by October 1994 was approximately BDS\$120,000.00 per annum, depending upon the hours flown by the Claimant. Payment of his salary in Barbados currency was agreed upon between the Defendant and the Leeward Islands Airline Pilot Association (hereinafter called "LIALPA"), the Pilot's Association of which the Claimant is a member. It is common ground between the parties that the terms of the contract of employment between the parties are to be found in the collective agreements periodically negotiated between LIALPA and the Defendant Company.
- [4] The Defendant decided to close, and did close, its Barbados base with effect from about 31 October 1994, and
- (a) transferred the Claimant from Barbados to Antigua, with effect from 11 November 1994, and
 - (b) paid him in Antigua a salary of approximately EC\$120,000.00 per annum, rather than the Eastern Caribbean currency equivalent of the salary of approximately BDS\$120,000.00 per annum which the Defendant had been paying the Claimant immediately prior to transferring him from Barbados to Antigua. In 1994 the exchange rate between the Barbados dollar and the Eastern Caribbean dollar was BDS\$1.00 to EC\$1.35, as it is at present. The Defendant continued to so pay the Claimant until, at his request, he was transferred from Antigua back to Barbados in June 2001, the Defendant having resumed base operations in Barbados.
- [5] The Defendant Company had closed its Barbados base in 1994 for the expressed purpose of effecting cost savings, including cost savings on the salaries of its pilots.
- [6] The Amended Claim Form states:
- "that when the Defendant transferred the Claimant from the Defendant's Barbados base to its Antigua and Barbuda (Antigua) base against his wish, despite his

protests, in November 1994 and, against his wish, despite his protests, varied his payment from \$120,000.00 in Barbados currency per annum to \$120,000.00 in Eastern Caribbean Currency per annum rather than to the Eastern Caribbean currency equivalent of \$120,000.00 in Barbados currency per annum, when the exchange rate between the Barbados dollar (Bdos\$) and the Eastern Caribbean dollar (EC\$) was Bdos \$1.00 to EC\$1.35, the Defendant in effect unilaterally reduced the Claimant's salary by 35%, and this reduction of salary breached the Claimant's contract of employment with the Defendant."

[7] According to paragraph 7 of the Amended Statement of Claim:

"By reason of the wrongful breach by the Defendant of the Claimant's contract of employment the Claimant has suffered loss and damage.

Particulars of Special Damage

- | | | |
|----|---|--------------|
| A. | 1. Partial arrears of salary for the period 1 st November 1994 to May 2001 as per Attachment "A" hereto | \$439,812.60 |
| | 2. Legal Fees incurred as a result of the Defendant's wrongful act | \$ 7,500.00 |
| B | The court will be asked to assess the loss, if any, to the Claimant directly attributed to his inability to make payments on his mortgage which is expressed in the currency of Barbados, which loan was incurred during the period of his employment in Barbados." | |

[8] In the said Amended Statement of Claim the Claimant seeks the following remedies from this Court:

1. "Damages for breach of contract.
 - (1) Special Damages EC\$439,812.60
 - (2) General Damages

2. A Declaration that the Defendant ought to pay to the Claimant his gross salary in the amount of \$120,000.00 Barbados Dollars or its equivalent in Eastern Caribbean Currency.
- 4.(sic) Interest pursuant to Statute.
5. An injunction restraining the Defendant, whether by itself, its servants or agents or otherwise howsoever, from reducing the Claimant's salary by 35% and/or varying the Claimant's contract of employment by failing and/or refusing to pay to the Claimant his gross salary \$120,000.00 in Barbados Currency or its equivalent in Eastern Caribbean Currency.
6. Costs."

[9] Nothing in the pleadings nor the evidence indicates that the claim for "legal fees" is based upon any principle other than the usual discretion vested in the Court to award costs to a successful litigant. This being so, it was inappropriate and improper pleading for the Claimant's solicitors to have included any such quantified legal fees as part of the sums claimed in this case.

[10] In his aforesaid pleadings therefore, the Claimant contends that it was an implied term of the collective agreement, and by extension also an implied term of his individual contract of employment, that the Claimant's gross salary would not be varied or reduced except by agreement and further that, in the event of any transfer of the Claimant by the Defendant from Barbados to Antigua, the Defendant would pay to the Claimant the Eastern Caribbean currency equivalent (ie. converted at the then prevailing exchange rate) of his salary previously enjoyed up to 31st October 1994. To illustrate, using the exchange rate of BDS\$1.00 = EC\$1.35, if the Claimant had been receiving BDS\$100,000.00 while stationed in Barbados, he contends that he should have been paid EC\$135,000.00 after his transfer to Antigua. On the other hand, continuing the illustration, the Defendant submits that payment of EC\$100,000.00 after the transfer to Antigua would be in accordance with the agreed terms of employment, if the Barbados-based pilots' salary had been BDS\$100,000.00 immediately prior to the transfer. It is for this Court to decide which of these rival contentions is correct.

- [11] There can be no doubt that ordinarily an employer cannot unilaterally reduce an employee's remuneration. This is because to do so would normally constitute an attempt to vary one of the important agreed terms of the contract of employment. This principle was held to apply even to Crown servants in the bygone era when such servants were dismissible at pleasure: Nobrega v Attorney-General of Guyana (1967) 10 WIR 187.
- [12] However, the case of Worthington v Robinson (1896) 75 L.T. 446 which was cited in Nobrega illustrates that where alterations of status or duties disadvantageous to an employee are made in a manner that is permissible under the contract of employment, the Court will not find merit in an allegation that there has been a breach of contract. An easy illustration of this principle in the context of remuneration can be found where a contract of employment provides for an hourly rate of pay without prescribing any minimum number of hours. With variations in the number of hours worked, the employee's pay packet will also vary, but reductions in the pay packet from one week to another will not amount to a breach of the employment contract in such circumstances, because the fluctuation in the pay packet is recognized as an agreed possibility under the employment contract.
- [13] It is common ground that the Defendant Company had the lawful authority under the contract of employment to transfer pilots from one base to another, including the transfer of the Claimant from Barbados to Antigua, whether or not a pilot wanted to be transferred. The accepted existence of this contractual right to transfer is not at all surprising, given that the Defendant is and was at all times a regional Caribbean airline operator. The accepted existence of this right to transfer is of crucial importance in this case.
- [14] It would appear that a perceived difference in the cost of living in Barbados in contrast to that in Antigua was the rationale why pilots doing the same job from the Barbados base were paid more (if one converted the currencies at the rate of exchange of BDS\$1.00 = EC\$1.35) than their Antigua-based counterparts. Up to the date of the Claimant's transfer in 1994 no study had actually been completed analysing the relevant considerations pertaining to this issue. The need for such a study was recognised in a letter dated 31st

May 1990 signed by the Defendant Company and LIALPA, which described itself as being a “side letter to” the collective agreement between LIAT (1974) Limited and LIALPA. This study would “examine an alternative method of arriving at an equitable method of payment for pilots”. Implicit in this statement in the said side letter was a recognition that the agreed arrangement for payment of remuneration to the Barbados – based pilots was not one with which all interested parties were entirely happy.

- [15] The Claimant’s circumstances demonstrate one reason why the arrangement (of paying the same unit sum but in the currency of the pilot’s base) may have resulted in hardship. As the Claimant pleaded in paragraph 4.2 of his amended statement of claim:

“On being transferred to Barbados in 1979 the Claimant acted on and managed and arranged his business and other affairs on the basis that his salary would be in Barbados currency or its equivalent, and up to November 1994 received a gross salary of Bds\$120,000.00 per annum or thereabouts depending on hours flown by the Claimant.”

The Claimant further stated in his witness statement:

“While in Barbados I altered my lifestyle and financial commitments”.

I have no doubt that this plea and statement of the Claimant are both entirely truthful.

- [16] If the Eastern Caribbean dollar and the Barbados dollar had maintained the same currency parity, this case would in all likelihood never have been brought. However, they did not. Some time after the Claimant went to Barbados in 1979 the relative values of the two currencies became approximately BDS\$1.00 = EC\$1.35.

- [17] As the Claimant states in his witness statement filed on 8 July 2002, he was aware that “throughout the entire period all pilots based in Barbados received the same dollar amount as received by pilots based in Antigua irrespective of the exchange rate between the Eastern Caribbean Dollar and the Barbadian Dollar”.

- [18] Under Article 1 of Section IX of the collective agreement, the Defendant Company's expressed right to transfer pilots is not unfettered. Transfers must be "in accordance with considerations of qualifications and the rules of seniority". Other provisions of the collective agreement set forth a bidding system which gave senior pilots certain preferential treatment. The Claimant availed himself of this system and in these proceedings voices no complaint over the fact of transfer as such. Neither does the Claimant complain about the application of the relevant rules of seniority and preferences to him, as regards his transfer from Barbados to Antigua.
- [19] The Claimant should have remained mindful at all times of the Defendant Company's accepted contractual right to transfer pilots from one base to another. This acknowledged right to transfer, coupled with the fact that if such transfer is between Barbados and Antigua it would affect what salary a transferred pilot was paid, ought reasonably to have influenced the "lifestyle and financial commitments" adopted by the Claimant.
- [20] It is clear from the correspondence and evidence that the Claimant did not wish to leave the Barbados base. However, as his Counsel articulated, staying in Barbados was not an option open to him, because the Defendant's Barbados base was being closed.
- [21] Mention is made in the Claimant's evidence that the Claimant would have preferred to "opt for a redundancy" ... "in preference to accepting the position in Antigua". No doubt because it had work which the Claimant was competent to perform from its Antigua base, the Defendant Company was not willing to regard the Claimant as redundant, and did not do so.
- [22] It is settled law that a term will only be implied in a contract if it is necessary to do so: "The test of implication is necessity." per Sir Denys Williams CJ in Bank of Nova Scotia v Emile Elias & Co Ltd. (1995) 46 WIR 33 quoting with approval Lord Scarman's judgment in the Privy Council case of Tai Hing Cotton Mill Ltd. V Liu Chong Hing Bank Ltd. [1986] AC 80. Lord Scarman also referred therein to a "an observation by Lord Salmon in the

Liverpool case to the effect that the term sought to be implied must be one without which the whole transaction would become inefficacious, futile and absurd". The Privy Council has recently applied this test of necessity in Reda v Flag Ltd (2002) 61 WIR 118.

- [23] The test endorsed by the aforesaid decided cases contrasts with that stated in paragraph 4.6 of the Claimant's Supplemental Written Submissions filed on 9 June 2004:

"It is hereby argued that it is as a matter of law and general approach that Courts should imply a term into a contract if it is reasonable in the circumstances to impose such a term. The Courts have held without hesitation that such implied terms similar to the one advocated here are necessary to imply especially in circumstances where the contract of employment have (*sic*) not been negotiated with the individual employer but result from negotiations with a representative body."

- [24] However, no possible justification in principle has been advanced as to why the Claimant should be paid 35% more than his colleagues who were, at the material time, doing precisely the same work as he was and also based in Antigua. That the Claimant had a mortgage and other financial commitments in Barbados could not justify such a pay differential during the period when the Claimant was no longer based in Barbados. It would neither be fair nor reasonable to imply a term that had such an effect into the Claimant's employment contract, and as has been indicated earlier the test for any implication is even stricter, being based on necessity rather than reasonableness. The implied term contended for by the Claimant does not satisfy the test of necessity. Perhaps even more importantly, such an implied term would run counter to the agreed terms of employment between the Defendant Company and its pilots, including the Claimant, as is revealed by the settled practice described in Mitchell J's judgment in Robertson v LIAT (1974) Limited, Civil Suit No ANUHCv1997/0401.

- [25] In Robertson v LIAT (1974) Limited Mitchell J. dismissed a claim brought by a pilot whose salary had been reduced after his transfer from the Barbados to the Antigua base. The

three main issues raised on the pleadings in Robertson were identified in Mitchell J's judgment as being:

- a. "Whether the reduction of the Claimant's salary as Captain of the Avro aircraft effected on his transfer from the Barbados base to the Antigua base constituted a breach of his employment contract and was therefore illegal;
- b. Whether the Defendant Company was justified in appointing the Claimant to the rank of First Officer of the Dash-8 aircraft with a commensurate reduction in his salary; and
- c. Whether the suspension without pay of the Claimant for a two-week period in October 1997 due to his late operation of a flight on August 15 1997 was justified."

[26] The similarities between Robertson's case and the present are apparent from the following extracts from the judgment of Mitchell J. :

"In May 1974, the Claimant had transferred from the Defendant's base in Antigua to the base in Barbados. The Agreement between the Association and the Company was that a pilot's salary was designated in EC dollars. In the year 1974, the Barbados and the EC dollars had been on par, both linked to sterling. In the year 1975, the Barbados dollar was pegged to the US dollar at the rate of B\$2.00 to US\$1.00. In the year 1996, the EC dollar was pegged to the US dollar at the lower rate of EC\$2.7 to US\$1.00. From the year 1975, the Barbados dollar was worth some US\$.50 cents , while from the year 1976 the EC dollar was only worth some US\$.37 cents, so that payment of the same number of dollars in Barbados currency was worth more in foreign exchange than the same number expressed in EC dollars. While in 1974 when the Claimant went to live in Barbados there had been no differential between the two currencies, by the year 1994 when he returned to Antigua there was a significant differential. By agreement between the Association and the Defendant Company, the pilots in Barbados were paid in Barbados dollars while those in Antigua were paid in EC dollars, the specific

number of dollars being identical in each case. The rationale was that the cost of living in Barbados was higher than in Antigua. The arrangement was that if a pilot was transferred from the Antigua base to the Barbados base he was paid in Barbados dollars while he was employed in Barbados, even though his salary entitlement continued to be designated as EC dollars. If the pilot relocated back to Antigua and Barbuda, his salary resumed being paid in EC dollars. If the pilot relocated back to Antigua and from Barbados, his salary resumed being paid in EC dollars. That is, the number of dollars remained the same whether he was in Barbados or in Antigua, only the currency in which it was paid changing. Over the years, several of the Defendant Company's pilots were transferred with the knowledge and approbation of the Association back to the Antigua base from the Barbados base with their salaries being paid in each case in EC dollars after the transfers.

... The Claimant had meanwhile during the intervening 20 years settled down with his family in Barbados, and with the aid of a bank loan had acquired a house and incurred other social and financial obligations. The re-location to Antigua would have necessitated great disruption in his social life and, in particular, if he was to receive his salary in the same number of EC dollars as he had previously received in Barbados dollars, would result in an effective salary cut of some 35%. One problem that the parties faced was that the Agreement did not provide for the situation of a transfer from one base to another. In particular, it did not provide for the situation where one base closed and there was only the other base remaining."

- [27] Notwithstanding several common features, Robertson's case is distinguishable from the instant case in at least two respects. The dismissal of Robertson's claim was primarily grounded on the fact that his status and salary were both reduced as a result of his failure to successfully undergo retraining to enable him to captain Dash-8 aircraft.

"Of all the converting pilots from Barbados, only the Claimant [ie. Robertson] had experienced this difficulty in passing the conversion courses": per Mitchell J.

Secondly, the learned trial judge in Robertson stated:

“The Claimant took the option of re-locating to Antigua by way of what in the business is called a written ‘bid’ dated 10 October 1994, and in which he described his situation as an ‘involuntary transfer’. He took the further precaution of noting towards the end of the bid that he reserved ‘the right without prejudice to any variation of the terms and conditions’ of his contract. The exact meaning of this cryptic quote is not known and was not explained.”

[28] There were factual issues as to what was actually specifically agreed between the parties in *Robertson’s* case. The Court there accepted the contentions of the Defendant Company on those issues. I cannot be certain of the extent to which Mitchell J’s decision was influenced by those factual issues, or by the lack of detailed explanation as to the aforementioned “cryptic quote.”

[29] For the foregoing reasons I hold that the judgment in *Robertson’s* case did not definitively decide or determine the same issue that arises in this case. Here there is no failed retraining course involved and no consequential reduction in status. I also consider that Captain Blackburn made it as clear as he could in his communication to the Defendant Company that his transfer was not a voluntary or consensual act on his part. His transfer to Antigua from Barbados was manifestly not something Captain Blackburn chose or opted to do.

[30] Again I emphasise that no valid reason has been advanced by the Claimant as to why he should have been paid 35% more than his colleagues during the time when the Claimant was based in Antigua. The fact that the Claimant incurred mortgage obligations in Barbados is not a principled basis, much less a necessary one, on which to base any such salary differential. The incurring of such a liability was a choice made by the Claimant who was at all times aware that his employer was contractually entitled to transfer pilots between bases, and that when such transfers took place between Antigua and Barbados there would be known salary changes.

- [31] No evidence was led as to whether the cost of living differential between Antigua and Barbados resulted in a net benefit, generally, being enjoyed by the pilots in one or other of those islands. This Court cannot assume, without evidence, that the Antigua-based pilots were generally at a disadvantage based on their remuneration. Although the Claimant must have considered himself to be at an economic disadvantage, this may very well have been due to the “lifestyle and financial commitments” voluntarily adopted by the Claimant while he was stationed in Barbados. The Claimant’s choices in this regard could not operate so as to fetter the Defendant’s accepted right to transfer its pilots between its bases, nor the well-settled practice of having differential remuneration packages founded on where a pilot is based. The existence of this established practice is reflected in the evidence in this case as well as in Mitchell J’s judgment in Robertson’s case earlier quoted.
- [32] During the testimony in this case it was said that the study contemplated by the aforementioned side letter has been completed. This may therefore result in some new arrangement, considered to be ‘a more equitable method of payment’ (to use the language of the witness Osmond Lake), being agreed upon between the Defendant and its pilots.
- [33] Be that as it may, for the reasons aforesaid, the Claim herein is dismissed and the Claimant is ordered to pay the Defendant’s Costs in the sum of \$15,000.00 as agreed at the start of this trial.

J EMILE FERDINAND
High Court Judge (Acting)