ANTIGUA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 2 of 1987

BETWEEN:

SUNDRY WORKERS - Employees/Appellants

and

THE ANTIGUA HOTELS AND TOURIST ASSOCIATION MEMBERS - Employers/Respondents

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Mr. Justice Moe

Appearances: Justin Simon for the Appellants
Time Kendal and Ann Henry for the Respondents

1988; Feb. 23,
June 6.

JUDGMENT

SIR LASCELLES ROBOTHAM, Chief Justice

THE BACKGROUND

On 13th November 1986, in accordance with section 19 of the Industrial Court Act (4 of 1976) notification of a trade dispute between the Antigua Workers Union representing Sundry Workers (the employees) and the Antigua Hotels Association (the employers) was referred to the Industrial Court of Antigua and Barbuda. The reference arose out of a breakdown in negotiations for a new collective agreement and in particular in relation to the application of clause 14(2) of the current agreement, which was in the following terms:-

> "In each member hotel the whole of the 10% service charge collected, shall go into a gratuity fund and shall be distributed to the employees; the distribution to the various employees being at the discretion of management, and there shall not be a deduction of any kind whatsoever in respect of disciplinary action. Gratuities shall not constitute part of the employee's basic wage."

The employers in their memorandum submitted to the Industrial Court stated:-

> "Clause 14(2) - Gratuity Fund and Tipping
>
> The Association is seeking an amendment to the clause so as to provide a 10% retention of service charge for administrative and allied purposes. This claim is based on the history of the operation of the service charge which shows that the operation of the service charge creates hardship on the employers.
>
> Evidence will be led in support of the claim."

The employees' memorandum stated:

> "Clause 14(2) - Gratuity Fund and Tipping
>
> The Union workers contend that there is no justification for an amendment to clause 14(2) of the current agreement on the grounds that:-
>
> (a) It was never the intention of both parties that gratuity fund and service charge would be subject to deductions for the said purpose;
>
> (b) the amendment sought would be ultra vires the provisions of the Antigua Labour Code vis-a-vis deductions and therefore illegal;
>
> (c) the figure of 10% is an arbitrary one; and
>
> (d) hardship to the employers for operating this fund cannot be substantiated."

The matter was duly heard by the Industrial Court with evidence and addresses coming from both sides. It is not necessary to go into the evidence. Suffice it to say that on 16th February 1987 the Industrial Court handed down a Judgement which stated:-

> "For reasons already mentioned we are of opinion that the request of the employers is not unreasonable and we would allow the Association 10% retention of service charge collected. We order accordingly."

This decision of the Court as it then stood could not stand side by side with the provisions of clause 14(4) of the said Collective Agreement which reads:-

> "There shall be no deduction from the gratuity fund, for the purpose of administering the said fund."

The Court therefore proceeded to order that:-

> "In the light of our decision above, it is ordered that clause 14(4) in the existing agreement be deleted."

It is worthy of note however at this stage that although the Court swept away this preclusion clause, nothing was done about the provision in clause 14(2) mentioned above which provided that "THE WHOLE of the 10% service charge collected shall go into a gratuity fund and shall be distributed to the employeess (emphasis added). The dilemma therefore did not appear to have been resolved, but it is of no moment for the purpose of the appeal which turns solely on a question of Law. There has been no appeal against the reasonableness of a retention assessed at 10%, a figure which in any event I consider to be very much on the high side, if not totally unreasonable.

THE GROUNDS OF APPEAL

(1) That the Industrial Court erred in law in holding that gratuities are not wages as defined by the Antigua Labour Code - 14 of 1975 - as amended.

/(2) The Industrial..

(2) The Industrial Court was wrong in law to hold that the service charge referred to in Clause (14(2) of the collective Agreement could or ought not to be considered a gratuity.

(3) That the Industrial Court was wrong in Law to allow an amendment to the Collective Agreement which would in effect allow the respondent to retain 10% of the service charge collected.

THE RELIEF SOUGHT

That the order of the Industrial Court that clause 14(4) of the Collective Agreement be deleted, be set aside, and a finding that clause 14(2) of the Collective Agreement cannot be amended to provide 10% retention of service charge to be substituted therefor.

COUNSEL'S SUBMISSIONS

Counsel for the appellant started out by submitting that the issue before this Court was whether or not the 10% service charge collected by the hotel employer and placed in a fund called the gratuity fund for distribution to their employees can be said to be a part of the employees' wages. Clause 14(2) of the agreement states that gratuities shall not constitute part of the employee's basic wage. It was therefore necessary to examine the structure of the Antigua Labour Code 14 of 1975 (hereinafter the Code) and the definitions of "wages" and "basic wage". A5 of the Code headed DIVISION A - "Declaratory" reads:

> "In this code unless the context otherwise requires or the particular DIVISION otherwise specifies:-
>
> "wages" means any money or other thing paid or contracted to be paid, delivered, or given at periodic intervals, as recompense, reward, or remuneration for services or labour done or to be done."

DIVISION C is headed - "Basic employment" - C3 reads:-

> "In this Division unless the context otherwise requires,
>
> "basic wage" means that part of an employee's remuneration for services which is payable in money, for his normal hours of work;
>
> "gross wage" means the total remuneration for services rendered in money, in kind, and in privileges or allowances, including gratuities and premium pay.

If Counsel said, it came under the heading of wages, then the deduction is not permitted under the Code. He agreed that gratuities did not form part of an employee's basic wage, as defined, but further submitted that it did form part of his gross wages also as defined and was therefore "wages", as also defined in the Declaratory DIVISION A of the Code.

/I continued.....

He continued by saying that the Industrial Court fell into error in accepting the submission of the employer's representative that tips or gratuities are not wages. In doing so reliance was placed on the case of Cofone v Spaghetti House Ltd (1980) ICR 155 EAT. This report was not available and only an extract of the case as it appears in Mainly on Industrial Relations and Employment Law Vol. 1 paras. 929 and 930 was produced.

Cofone's case centered around the requirement by law of the employee being entitled to an itemised pay statement "at or before" every payment of wages on salary. This was held to be an absolute right. The extract on the decision in Cofone's case is as follows:-

> "Cofone had to pay to the Manager £8.50 per week out of tips he received. He then tried to claim back the £8.50 as an unnotified deduction.
>
> HELD:- The tips were not wages for the purpose of the itemised pay statement; they were not payable by the employer to the employee and in any case it would be impracticable for the employer to include them in the pay statement since he did not know what they were. The tribunal had found as a fact that the £8.50 was payable out of Cofone's tips as opposed to his regular pay. Therefore the £8.50 was not paid out of wages. Therefore it was not necessary to show it was a deduction from wages in the itemised pay statement.....it was not an unnotified deduction."

The Antigua Labour Code has a similar provision whereby permissible deductions are to be documented, and given to the worker.

The Industrial Court relied on Cofone's case and accepted the submission of Counsel for the employers that tips and gratuities are not wages. I am in agreement with Counsel for the appellant that the Court fell into error when it held that gratuities were not wages. Cofone's case was no authority for such a finding.

Counsel for the employers submitted that the parties here were engaged in negotiating a collective agreement and they failed. The dispute was then referred to the Industrial Court for settlement of the outstanding items and when this was done the agreement as settled by the Court became the agreement that determined the conditions of employment of every worker employed within the bargaining unit. He referred to section 10(2)(b) of the Industrial Court Act which allows the Court in the exercise of its powers to

> "act in accordance with equity, good conscience and the substantial merits of the case before it having regard to the principles and practices of good industrial relations and in particular the Antigua Labour Code."

He further submitted that wages were defined in 3 places namely in A5 and C3 (above) and there is a distinction between all three. In A5 [illegible]

means, and I quote him, "a consideration moving from the employer to the employee". I cannot accept this as Counsel was thereby reading into the section something which was not there.

Mr. Kendal for the respondent then went on further to submit that the crucial point was whether or not the parties were free in a collective agreement where there is no infringement of the labour code (emphasis mine) to agree that in order to compensate for the expenses incurred in administering this service charge fund a retention of 10% in favour of the employers was allowed for covering operative and allied expenses. The Court he said accepted that there was expense involved, and there is no provision in the code which says the parties could not agree to what they want. He ended his submission by saying:-

> "I agree that if it is in conflict with the Code it cannot be done. Once there was material before the Court based on the guidance provided by the Act upon which they could find as they did, then this Court should be very reluctant to interfere - Thomas v Thomas (1947) A.C. 484 - I have no quarrel if the agreement is in collision with the Code. If it is then it cannot stand."

This was a proper approach by Mr. Kendal, so we move to the crucial question. Is the agreement in breach of the Code?

CONCLUSIONS

It might help in placing the entire matter in a proper perspective by looking at what existed before there was any collective agreement. Free tipping of workers at that period by guests was a voluntary act on the part of the guest. It is notorious that only visible employees such as chamber maids and waitresses were tipped and whether it was ever shared with those behind the scenes, we do not know. 1 This was an inequitable situation so when the collective agreement was first being formulated, it proposed in clause 14(1) under the heading of GRATUITY AND TIPPING:

> "(1) It is agreed that the decision as to whether there should be a 10% service charge or free tipping in a hotel is management prerogative, but no alternative shall be introduced until after due notification to and consultation and/or negotiations with the Union."

Thus was spawned a more equitable system of tipping and 14(2) (above) stated that the whole of the 10% service charge collected should go into a gratuity fund and shall be distributed to the employees, without any deduction of any kind in respect of disciplinary action. All employees participated except managers, assistant managers, chefs and accountants who were excluded and still are excluded from the distribution. (Clause 3). No deduction from the fund was allowed for the purpose of administering the said fund (clause 14(4). This gratuity fund was to be distributed as far as practicable on appropriate each week. clause 14(7)

Clauses 14(5), (6), (8) and (10) governed the administrative conditions of the operation of the fund.

It cannot be refuted that as far as the employees were concerned, they regarded these disbursements from the gratuity fund as a part of their weekly remuneration. The definition of "wages" in the declaratory part A5 is any money or other thing paid or contracted to be paid, delivered, or given at periodic intervals, as recompense, reward, or remuneration for services of labour done or to be done. This definition in my view is wide enough to cover monies received from the gratuity fund and I cannot as Mr. Kendal suggests read into it the implication that it means a consideration moving from the employer to the employee.

I am also unable to accept his submission that there are 3 different definitions of wages as they appear in A5 and C.32. The definition in A5 is a general definition to be applied in all cases where the word "wages" is used in the Code unless the context otherwise requires or the particular Division otherwise specifies.

C.32 gives definitions of basic wage and gross wage. These definitions are to be applied in that division headed Basic Employment unless the context otherwise provides. The definition of gross wage includes gratuities and allowances. These 2 definitions in my view, amount to no more than a breakdown of categories of wages, and are embraced by the general definition of wages in the Declaratory section A5.

Having decided that the gratuity is part of the employee's wages the next question is:- Is the proposed retention of 10% of this gratuity fund by the employer for administrative purposes in breach of the Code? It is most certainly forbidden by clause 14(4) of the Collective Agreement and the Industrial Court having come to the decision which it did, this clause had to be deleted. The fact that clause 14(2) remained intact and that this clause provided that the <u>whole</u> of the 10% service charge collected should go into the gratuity fund and be distributed to the workers, seems to have been overlooked.

Section C.32 deals with allowable deductions: (a) allows a tax rate on other deductions allowed by law; (b) allows a deduction for money advanced by employer by way of loan; (c) allows the actual or reasonable estimated cost of the employer of material, tools, etc., supplied to the worker at his request; (d) allows membership subscriptions. There are others but nowhere therein is any allowable deduction of the nature sought by the respondents here.

To put the matter beyond doubt, C 36(1)(b) makes it an offence for any employer to make any deduction from the wages of any workman, or receive any payment from any workman contrary to the provisions of section C 32.

/It follows.....

It follows therefore that the allowable deductions in C 32 are exhaustive, and that no deduction outside the scopeof that section can lawfully be made from the employees' wages.

I am of the opinion that the amendment being sought by the respondent is not permissible in law and that the appeal must be allowed and the decision of the Industrial Court set aside.

For the removal of any doubt, clause 14(4) of the Collective Agreement is restored as prayed.

L.L. ROBOTHAM,
Chief Justice

E.H.A. BISHOP,
Justice of Appeal

C.C.R. MOE,
Justice of Appeal.