C9a : (10)

ANTIGUA & BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL No. 8 of 1989

BETWEEN:

ANTIGUA WORKERS UNION - Appellant

and

GEO W. BENNETT BRYSON & CO. LTD.

Before: The Honourable Mr. Justice Bishop - Chief Justice (Acting)
The Honourable Mr. Justice Moe
The Honourable Miss Justice Joseph (Acting)

Appearances: Dr. F. Ramsahoye, Q.C. and R. Francis for the Appellant
T. Kendall, Q.C. and Miss E. A. Henry for the Respondent

1990; Feb. 26
June 11.

JUDGMENT

BISHOP, C.J. (Acting)

On the 25th April 1989, the Industrial Court dismissed a claim brought by the Antigua Workers Union on behalf of Arthur Cole and others, as employees, against George W. Bennett Bryson & Co. Ltd., as employer, wherein the Court was asked to order that the employees were entitled to receive or continue to receive pensions with the royalty on containers included in the calculation of their pensions, and, that those employeees be paid such royalties. Interest on all monies short-paid to the employees and costs were also sought.

The Industrial Court had before it for consideration (a) memoranda from employers and employees; (b) evidence on oath adduced by each side and (c) the Collective Agreement made in 1987 between the said parties. In its judgment that Court reviewed the respective cases and ended thus;

> "Accordingly, after having carefully scrutinised the whole Collective Agreement and having weighed and scrutinised all the evidence before us, we are of the opinion that there is no merit whatsoever in the Union's claim. Therefore this claim is herewith dismissed. We make no order as to costs."

The following clauses of the Collective Agreement were relevant to this Appeal:

/"1. Wages....

"1. Wages

a) The rates of wages for workers covered by this Agreement shall be as shown in the Schedule of wages attached to this Agreement

b) .....

c) The rates shown are without prejudice to certain specific items which received special consideration.

34. Containers

a) .....

b) A royalty of $75.00 will be paid for each 20 foot and $95.00 for each 40 foot lift on/lift off container of cargo discharged or loaded. The total royalties will be equally divided between the gang of workers unloading the containers.

35. Pension Scheme

A Pension Scheme shall be operated as stated in the Schedule covering this subject."

The Wages Schedule showed the rates at which monthly and hourly paid workers earned or were paid, under four columns (headed Old Rate; From 20. 7.87; From 20.7.88; From 20.7.89).

The Pension Schedule described it as a non-contributory pension scheme for waterfront workers and emphasised that it was not intended to afford full subsistence but rather, to be "of some help to a worker in his old age". The scheme comprised seventeen paragraphs of which the following was pertinent to the vital issue in this appeal -

"3. The amount of pension will be calculated according to the length of service and the retirement rate of pay of the employee, which shall be the average weekly rate for the last year of employment or for the last three years prior to retirement, whichever is the greater, as here set out

	Years of Service		
	20 and under 25 years	25 and under 30 years	30 years and over
Percentage of payment of weekly retirement rate;	25%	35%	45%

Clearly then, calculation of pension was based upon (1) the length of service of the waterfront worker, and (2) the average weekly rate, for either the last year of employment or the last three years before retirement.

/Learned Counsel....

Learned Counsel for the appellant submitted that the issue between the parties concerned the interpretation which ought to be given to paragraph 3 of the Pension Schedule to the Agreement. He contended that "pay" meant "earnings" or all monies received by the worker for services rendered under his contract of employment and "average weekly rate" meant "average weekly rate of earnings".

Dr. Ramsahoye submitted further that (i) royalties were wages under the Antigua Labour Code, section A 5; (ii) royalties paid under Clause 34 of the Collective Agreement were earnings and clearly fell within the provisions of paragraph 3 above; (iii) unless there was a clause in the Collective Agreement expressly excluding royalties from the calculation, they must be included in the Pension calculation of the worker; (iv) it was immaterial, for the purposes of paragraph 3, that (a) royalties were first payable after the introduction of the Pension Scheme and (b) payment for containers was a matter which should be given special consideration.

In support of his arguments and submissions, Counsel cited PENN V. SPIERS & POND LIMITED (1908 1 K.B. 766 - a case in which "tips" were taken into account in estimating the average weekly earnings of a deceased workman under the Workman's Compensation Act, 1906 in England; TSOOKKA & OTHERS V. POTOMAC RESTAURANTS LIMITED (1968) 3 ITR 259 - a case dealing with the calculation of redundancy payments due to employees of a restaurant; THE QUEEN V. POSTMASTER GENERAL (1876) 1 Q.B. 658 - where the term "annual emolument" was interpreted insofar as it was used in a particular statute; HOTEL BILTMORE & ORS V. CENTRAL PROVIDENT FUND BOARD (1972) 2 M.L.J. 232 - where the issue was whether "service charges" were "wages" as defined in the Central Provident Fund Act, section 2; WROTTESLEY V. REGENT STREET FLORIDA RESTAURANT LTD. (1951) 1 All E.R. 566 where "tips" paid into a pool became the joint property of all those entitled to share in the pool, and for the purposes of S.9(2) of the Catering Wages Act 1943, the share which each waiter received from that pool could not be taken into account in calculating the remuneration he was paid; and CALVERT (INSPECTOR OF TAXES) V. WAINWRIGHT (1947) 1 All E.R. 282, a case in which "tips" given by passengers to a taxi driver, who received a definite wage, were held to be assessable to tax under Schedule E to the Income Tax Act, 1918.

Mr. Kendall, for the respondents, submitted that the reasoning of the Industrial Court was impeccable and the appeal ought to be dismissed. He drew attention to the following paragraphs in the

/Memorandum of.....

Memorandum of the Employee:

> "3. .....It is a requirement of the agreement that in the assessment of an employee's pension all monies earned under various categories of work, including royalty on containers were to be used to arrive at the appropriate pension rate each employee would be paid.
>
> 4. It was to the Employees' knowledge and belief, that at all material times, the said earnings of royalty on containers were being included in the said compensation for pension purposes. Further it had been expressed to the employees by the late Henzell Lake, former paymaster of the Employer, that in calculating pension, monies earned as royalty were included in the said calculation.
>
> 8. The Employees will show that.....the introduction of work on containers took the place of loose cargo which was shipped and discharged from the hold or hatch of the ship and that earnings received for work by employees for loose cargo were subject to calculation for pension, and that royalty pay on containers is a nomenclature, and substitute for said earnings which used to be paid for hold cargo."

Counsel urged that the first quoted paragraph did not state the true position, and that the allegations in the other paragraphs were not established by evidence. He referred to the evidence and in particular to that part of the cross-examination of Keithlyn Smith, General Secretary of the Antigua Workers' Union, which the Industrial Court regarded as compelling, and reproduced in its judgment "in toto". Counsel also urged that the Collective Agreement did not deal with "earnings" but with "rate". In his opinion, the evidence quoted by the Court below put to rest the allegations in paragraph 4 of the Employees' Memorandum. Mr. Kendall contended that rates of pay were mentioned several times in the Collective Agreement and wherever referred to, the same meaning was intended. He cited in support, Clauses 2 (Hours of Work), 3 (Overtime), 4 (Public Holiday pay) and argued that "rate" connoted a sum of money in relation to a fixed period of time - per month, per hour. On the other hand, "wages" were separate and distinct from "rates". Counsel submitted that the Collective Agreement made a distinction between rates of wages and perks or fringe benefits.

As far as Clause 34(b) of the Agreement was concerned, Mr. Kendall stressed that the royalties came from a 'pot' which was shared among the stevedores involved. There could be no fixed or pre-determined sum of money for any worker because the amount

/depended.....

depended upon the number of workers involved. Again, there was no mention of a fixed period, such as per hour, per week or per month, for off loading. Consequently, there was no question of a rate.

Counsel also sought to distinguish the cases used by Dr. Ramsahoye (see above) and he urged that they provided no assistance. In Mr. Kendall's view, rates of wages or rates of pay could only mean the rates set out in the Schedule, augmented by the higher rate paid for overtime work.

Finally, learned Counsel quoted paragraph 16 of the Pension Schedule -

> "In determining any question arising in connection with any matter in respect of pension, the records of the Company shall be final" -

and he submitted that (1) this paragraph was agreed to by the parties and (2) after 23 years of calculating the pensions, without complaint, the Antigua Workers' Union (A.W.U.) was now claiming to be under the impression that royalties were included in the calculation of pensions under the Agreement.

In his reply, Dr. Ramsahoye submitted that paragraph 16 of the Pension Schedule meant that the figures recorded in the books as monies earned by a worker were to be final and accepted by the worker, but it did not mean that when the calculation for pension purposes was not correct, the worker was obliged to accept the figures of the company. Counsel also assisted us by analysing the testimony of Keithlyn Smith.

It will be helpful, I think, to quote that part of the evidence of Keithlyn Smith to which the Industrial Court referred.

> "The Pension Scheme was in force for a long time before I was in the Union, about over 23 years. Royalties came into force some time in the Sevnties. Neither of the contracting parties could have contemplated royalties. When the Pension Scheme was agreed upon, no royalty was in existence. Even when the royalties were introduced, the wording of the Pension Scheme was not altered. It remained the same. There were alterations in wages guaranteed payments and other items. Before royalties the stevedores were guaranteed four hours per day. After royalties, they were guaranteed eight hours per day. If there is overtime, the rate

/of pay....

> of pay is altered. It is paid for at a higher rate. I improved the Pension Scheme. If I wanted to improve on the meaning of rates of pay, I would have chosen other words. The figures supplied by the Employer were for information and for us to check them. I was involved with the stevedores for about twenty years. I have seen several figures for the stevedores over that time. None of these figures was questioned before those of Mr. Cole. He retired around October 1986....."

It is clear that before and after the introduction of Royalties, the Pension Schedule remained unaltered in so far as the calculation of pensions was concerned. There were alterations of other aspects, and the General Secretary was clear that if he wished to make alterations for the improvement of the scheme after the payment of royalties was introduced, he was in a position to do so.

The Court below also referred to the evidence of Arthur Cole to the effect that Cutie Benjamin's assistant checked the figures and found them to be wrong. The Court pointed out that it was deprived of the benefit of testimony of that assistant. Again, the Court below permitted the Union's representative time to call the paymaster of the Company to testify about the records of the Company. Although the witness attended Court and the records were available, the Union's representative did not examine the paymaster on the records - a position which the Court "found to be significantly strange". It was open to the Industrial Court to look at the failure to call Cutie Benjamin's assistant and the failure to produce the Company's records, and to construe them - in the absence of any explanation for these failures - in a manner unfavourable to the appellant.

George Walter, a former General Secretary of the A.W.U. testified that he held that position from 16th May 1967 until December 1969 and during that period he re-negotiated the contract between the Union and George W. Bennett Bryson & Co. Ltd. on several occasions. He negotiated the contract in respect of cargo coming in containers. He also negotiated several pension schemes and pensions were "based on annual wages which were a percentage". He said he had never heard the term "royalties" being used during the time that he conducted negotiations. This witness also said:

> "Most of the time we would have to rely on the Company's figures and we would have to go in and check their wages over the last three years,

/I think. .....

> I think. Whenever I did this the wages shown on the sheet would tally with the wages shown on the roster, and the workers would receive their pensions according to contract....."

Kenrick Isaac, Personnel Director of George W. Bennett Bryson & Co. Ltd., and who had been in charge of and dealing with staff matters for about fifteen years, told the Court below that throughout that time, the basis for calculating the pensions of stevedores excluded not only the bonus paid at Christmas, but also royalties. He confirmed that until the point was raised on behalf of Arthur Cole, he had never known it to be raised on behalf of any stevedore; and he explained the position with respect to wages and with respect to royalties.

In my view, the evidence upon which the Industrial Court was asked to consider the issue failed to show that it was to the employees' knowledge or belief that at all material times, the royalties paid in respect of containers were included in the computation pensions; nor did it establish that the late Henzell Lake, former paymaster of the Company, expressed to any employee that, in calculating pension, monies earned as royalties were included in the calculation (see paragraph 4 of the Employees' Memorandum). I agree that the evidence elicited in the cross-examination of Keithlyn Smith was cogent and indicative of the fact that inclusion of royalties in the calculation of pensions was neither contemplated nor claimed by the Union until the singular occasion in 1986. (See also testimony of Kenrick Isaac).

In construing the Collective Agreement for the purposes of this case, the Industrial Court referred to pertinent clauses and applied the principle of law stated in ATTORNEY GENERAL V McDOOM (1960) L.R.B.G. 127 at page 175 by Marnam, J. In my view, this was the correct approach for the construction of the relevant part of the Collective Agreement. Clause 1(a) thereof made it clear what rates of wages were for workers covered by the Agreement. Sub-clause (c) left no doubt that there were specific items which were given special consideration. Clause 34 dealt specifically with containers and sub-clause (b) set out the payment for each lift on/lift off container of cargo discharged or loaded. As I understand it, this payment was distinguished from wages. Clause 35 referred to the existence of a pension scheme and advised that it ought to be operated as provided for in the Pension Schedule. Paragraph 3 of this Schedule informed how the

/amount.....

amount of pension would be calculated and I have already referred to the essential factors employed in the calculation. The retirement rate of pay was clearly defined and the tabulation showed the percentages of payment of weekly retirement rate for three categories of worker: 25% where there was 20 and under 25 years of service, 35% for those who had given 25 and under 30 years of service, and 45% for workers with service for 30 years and over.

With respect, I find no difficulty in holding the view that royalties referred to in Clause 34(b) were and are not to be included in computing pensions for the workers covered by the Collective Agreement and I agree with the Industrial Court which found no merit in the Union's claim.

I would therefore dismiss this appeal and make no order as to costs.

E.H.A. BISHOP,
Chief Justice (Acting)

G.C.R. MOE,
Justice of Appeal

MONICA JOSEPH,
Justice of Appeal (Acting)