IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL
ANGUILLA CIRCUIT
(Civil)
A.D. 1998

CIVIL APPEAL NO. 5 OF 1998

BETWEEN:

CERISE BANKS **Respondent/Appellant**

and

EXECUTIVE AIRLINES INC. **Applicant/Respondent**

BEFORE: THE HON. MR. SATROHAN SINGH JUSTICE OF APPEAL
THE HON. MR. ALBERT REDHEAD JUSTICE OF APPEAL
THE HON. MR. ALBERT MATTHEW JUSTICE OF APPEAL (AG.)

APPEARANCES: Mr. Keithley F.T. Lake, Mr. Kenneth Porter with him for the Appellant
Mr. Gerald A. Watt Q.C. of the Antigua Bar, instructed by Mitchell's Chambers, Miss Josephine Gumbs with him for the Respondent

[May 12: 25: 1999]

JUDGMENT

SATROHAN SINGH JA

On October 11, 1996, **American Eagle**, an airline also known as Executive Airlines Inc. (the respondent), unfairly dismissed the appellant, an employee of theirs for some nine years. The issue of her dismissal went to the **Industrial Tribunal of Anguilla (the Tribunal).** The Tribunal, acting under the provisions of Section **16 of The Fair Labour Standards Ordinance 1988 (the Ordinance)** found unfair dismissal, and awarded the appellant **compensation** totalling **$399,923** with costs, computed as follows:

"Computation:

1.	Actual Loss of wages - 11 Oct. to *5* March 1997 22 weeks at EC$625 per week. EC$13,750 less 50% reduction		EC$6,875.00
2.	Future loss of wages - 3 years 3 yrs. At EC$30,000 = EC$90,000 less 50% reduction		EC$45,000.00
3.	Loss of other benefits		
	(a)	private medical insurance (not assessed)	
	(b)	travel benefits -D2= US$25,200) I. -D3= US$16,000) = US$41,200X3	EC$331,248.00
	(c)	Gains-sharing EC$600 p.a. x 3 years	1,800.00
4.	Statutory benefits		
	(a)	Statutory Notice -4 weeks	2,500.00
	(b)	Redundancy (no evidence adduced)	10,000.00
	(c)	Costs	2,500.00

Total EC$399,923"

The employer (respondent), unhappy with this judgment of the Tribunal, moved the High Court of Anguilla, by way of **Certiorari** proceedings to have the same quashed. **Saunders J** heard the matter, **confirmed** the Tribunal's finding of unfair dismissal, but **quashed** the Tribunal's Award of compensation for **future loss of wages, future loss of travel and gains sharing benefits** and **redundancy.** The learned judge **confirmed** compensatory benefits under the heads of **loss of wages** and the **statutory termination notice.** He then referred the matter back to the Tribunal for a reassessment of compensation in the light of his views on the law as stated in his judgment. **Saunders J** also quashed the order of costs made by the Tribunal and made no order as to the costs of the **Certiorari** proceedings.

The employee (the appellant), now the unhappy person, appealed to this Court to restore the orders made by the Tribunal. The respondent filed a "respondent's notice." But, at the hearing of the appeal, gave a somewhat disinterested challenge to the judge's

order refusing it costs in the Court below. It also did not pursue its challenge against the judge's confirmation of the $2,500 award of the Tribunal in respect of the statutory termination notice.

The real issue in this appeal is whether upon a proper interpretation of **S16 of the Ordinance,** there was room for an award of **(1)** future loss of wages and **(2)** future travel and gains sharing benefits. **Saunders J** found against the appellant on this question. I therefore now address that issue.

SECTION 16: ITS INTERPRETATION:

The relevant portion of **S16** that requires interpretation is **sub-section (3)**

which provides as follows:

> "(3) Where the Tribunal orders that compensation be paid, it shall take into account **inter alia**
> (a) any holiday with pay earned, but not yet taken:
> (b) any wages lost by the employee, on account of the dispute, up to the date of determination of the issue by the Tribunal;
> (c) the termination notice to which the employee would have been entitled; and
> (d) The employment category of the employee, his seniority and the ease or difficulty with which he can secure alternative employment."

The troublesome part of this section, was the meaning of or application of the phrase **"inter alia"** to the rest of the subsection. The learned judge used as an aid to assist in his interpretation, the maxim **expressio unius est exclusio alterius.** He gave no reasons for utilising this maxim, but, at the end of the day, his interpretation left the words **"inter alia"** in the provision with no meaning. Both Mr. Watt and Mr. Lake agreed that the learned judge used the wrong maxim and that he should have applied the **ejusdem generis** rule.

The maxim **expressio unius est exclusio alterius** is a concept of statutory

construction for the principle that where one thing is expressed the other is necessarily excluded. It is a principle that is applied to words of exception. Where an act sets out specific remedies, penalties or procedures, it is presumed that other remedies, penalties or procedures that might have been applicable are by implication excluded. **[See Bennion, Statutory Interpretation (Butterworths)** 1984, P 844 - 850 and **Felix -v- SHIVA [198213 All ER** 263. The maxim would not apply where there are general words followed by a list or class or genus of items or where its application, having regard to the subject matter to which it is applied, leads to inconsistency or injustice **Dean -v- Weisengrund (1955) 2 All ER 438 and Blacks Law Dictionary** Sixth Edition p 283.

I am satisfied that the judge erred when he applied the **Expressio Unius** principle in the **general way** in which he so applied it. With such a general application in the context of this legislation, the words **"inter alia"** therein became nugatory and had no meaning. That in my view, would have created an injustice to the employee and an inconsistency with the spirit of the provision. By its very name, and when read thoroughly, the Ordinance, despite its limitations when compared with Labour Ordinances in other jurisdictions e.g. Antigua, was intended to be employee friendly.

There is a presumption that words are not used in a statute without a meaning, and that effect must be given to all the words used, since the legislature is not deemed to use words unnecessarily. It is a rule of law that the legislature intends for the interpreter of an enactment to observe the maxim **ut res magis valeat quam pereat** [that it may become operative rather than null], so that he must construe the enactment in such a way as to implement rather than defeat, the legislative intention **[Bennion p 270, 271]**. The legislature does not act in vain. Where one construction would render words used by the legislature irrelevant or nugatory and another would give effect to those words,

the construction which will effect rather than frustrate the will of the legislature is what is preferred.

In interpreting **S16 (3) of the Ordinance,** and more specifically, the meaning or application of the words **"inter alia" therein,** I would adopt a common sense approach to construction so that the will of the Legislature could be realised. I would firstly utilise the **expressio unius principle**, but only in a limited way, to give effect to the intention of the legislature, that compensation under **S 16 (3)** was intended to be limited to the four heads mentioned therein at (a), (b), (c) and (d). However, in order not to make the phase **"inter alia"** therein nugatory, I would make use of the **ejusdem generis rule**, to give it meaning by applying it within the walls of heads (a), (b), (c) and (d).

It is my considered opinion that upon a careful reading of the statute and upon a comparison of the same with comparable legislation in other parts of the region, that even though the intention of the legislature appears to be to limit the heads of compensation to the heads stated therein, by its use of the phrase **"inter alia",** it did not leave the respective heads in a straight jacket, so to speak. It permitted those heads to be widened to include other benefits of the same genus applying the **ejusdem generis rule** e.g. **Under S 16 (3) (a)** "any holiday with pay earned..." could be read to include any holiday with pay earned **and a passage entitlement,** if that were the original package.

The doctrine of **ejusdem generis** is only part of a wider principle of construction, namely, that where reasonably possible, some significance and meaning should be attributed to each and every word and phrase in a statute. There must however be a clearly ascertainable genus **[See Brownsea Haven Properties Ltd -v- Poole Corporation (1958) Ch 574.** I now address the disputed awards.

FUTURE LOSS

Under the head of **Future Loss,** Queen's Counsel Mr. Watt contended that this was not covered by any of the four heads of compensation under **s 16 (3)**. I do not agree. In my opinion, when **S 16 (3) (d) told** the Tribunal to consider the employment category of the employee, his seniority and the ease or difficulty with which he can secure alternative employment, that these considerations would only be applicable to a determination of future loss. It is conceded by Mr. Watt that these considerations are not relevant to a determination of compensation under heads **16 (3) (a), (b) or (c).** If therefore they also do not apply to future loss, then **(16) (3) (d)** will have no meaning. That could not have been the intention of the legislature. I therefore now examine the award of the Tribunal under this head.

In assessing future loss the Tribunal **"guessed"** a multiplier of 3 (or 3 years) based on job conditions in Anguilla for an employee of the status of the appellant, an airline station agent with nine years experience. They recognized that the employee did not show that she mitigated her loss. In my judgment, based on awards given by this Court in **Liat -v- Shephard** Civil Appeal 6 of 1991 and **Antigua Village -v- Watt** Civil Appeal 6 of 1992 both out of Antigua, and the lack of evidence on mitigation, I consider the guesstimate of 3 years over-generous. I suggest one year which equals $30,000 for future loss of wages. No scaling down is necessary because of the shortness of the period.

Under this head, Mr. Lake sought to latch on to wages, the fringe benefits of gains sharing and travel benefits in order to place them under **16 (3) (d).** Whilst I might agree with learned counsel, that these "fringes" might have enticed the appellant to accept the job on the salary offered, I do not consider fringe benefits to be wages as contemplated by **S 16** of the **Ordinance.** However, utilising the **ejusdem generis**

principle, I would consider them as other items of future loss in the contemplation of **S 16(3) (d).**

Addressing these benefits, the Tribunal awarded $1800: and $331,248 respectively based on the appellant's previous gains sharing benefits and travel habit. I agree with the trial judge in quashing these awards. No concrete evidence was led to permit of a quantification of any of these awards. In my opinion, when the Tribunal acted on previous gains or travel habit without more, they arrived at their quantum on a hypothetical or speculative basis. That is not legally permissible. Had the appellant given some evidence of travels she had planned or undertaken during the year after her dismissal, that would have assisted in arriving at a quantum. As I understand the system, the employee only receives the benefit of the rebated travel when she actually travels. If she does not travel, she does not receive the benefit. Similarly, with gains sharing, unless there was some evidence to show that the respondent made or projected future profit, there would be no gains to share. Concrete evidence is necessary to make awards under these heads. Awards under these heads should not be made on guesstimates from previous behaviour alone.

REDUNDANCY:

I agree with the trial judge in quashing the redundancy award of $10,000. I do so for two reasons. Firstly, where a dismissal is for a cause other than redundancy, the concept of redundancy cannot surface. Secondly, the transcript before the Tribunal disclosed no evidence to support an award under this head.

S 16 (3) (b): LOSS OF WAGES:

I can find no reason or evidence that could justify the Tribunal halving its award under **S 16 (3)** (b) for loss of wages up to the date of the determination of the issue by the Tribunal. In my judgment, the appellant was entitled to her full wages for this period which I quantify at $13,750 and I so order. I now address the issue of costs.

COSTS:

The Tribunal awarded costs against the respondent. That order was quashed by the trial judge. There is no appeal from that. In the certiorari proceedings the judge made no order as to costs. Mr. Watt stated that he was not making a "big thrust" for his costs in the Court below. That being so, he has virtually abandoned his respondent's notice. Given these circumstances, I do not propose interfering with the orders on costs made by the trial judge on the proceedings in the High Court and before the Tribunal.

Learned Queen's Counsel has asked for the costs of this appeal. He is entitled to his costs. As a result of this appeal, the award of the Tribunal has been reduced from $399,923 to $46,250 or by approximately 88%. The certiorari proceedings therefore, to that extent, have, to all intents and purposes, on the issue of quantum only, been successful. This appeal concerned quantum only. I therefore consider the respondent entitled to 88 % of its costs in this Court.

I would make one final observation in this matter before I conclude. Despite my opinion earlier mentioned that the Ordinance was intended to be employee friendly, it is my view, that when compared with Labour Ordinances in other jurisdictions, the degree of that friendliness is not enough to satisfy the requirement of just compensation for an aggrieved employee. This case is a typical example. I share the view of the Tribunal that this appellant was not only unfairly dismissed but that her dismissal was done in a high handed manner. I also consider the reason for her dismissal, because she refused to

disclose to her regional manager a confidential telephone number of her immediate boss who was on holiday, to be frightening.

Unfortunately, because the Tribunal is Statute bound, and has to deliberate within its statutory parameters, no award could have been made, not only for the manner of her dismissal which really shrieks out for an award, but also for what the Tribunal might have considered to be just and equitable, as could be found in the English legislation **[See Norton Tool Co. Ltd. -v- Tewson (1973) 1 AER 183]** Or, for what the Tribunal might have considered to be fair and just having regard to the interests of the persons immediately concerned and the community as a whole as provided for by the **Antiguan Legislation Cap 214.** In the Antigua law, the Industrial Court is empowered 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." That Court could also consider the payment of damages or even exemplary damages and also make provisions for the award of costs.

Had the Anguilla Ordinance provided for these wide and employee friendlier benefits, the appellant herein might have been leaving this Court with the very wide smile she must have had when she left the precincts of the Tribunal on March 5th 1997. I would suggest that the legislature have a second look at the Ordinance in the light of comparative regional legislations.

CONCLUSION:

The trial judge in his judgment referred the matter back to the Tribunal for reassessment. I propose quashing that order. We are statutorily powered to make any order that the Tribunal could have made. In order to save time and costs, I propose making the final order here.

The appeal is allowed in part. The award of the Tribunal under the heads of Travel Benefits, Gains sharing and Redundancy are quashed. The appellant will have compensation as follows:

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1.	Actual loss of wages	13,750
2.	Future loss of wages	30,000
3.	Statutory notice	2,500
	Total	46,250

The respondent's notice is dismissed.

The respondent will have 88 % of the costs of the appeal to be paid by the appellant, and the appellant 12% to be paid by the respondent. The appellant will have her costs incurred by the respondent's notice. The costs will be taxed if not agreed.

SATROHAN SINGH
Justice of Appeal

I concur

ALBERT REDHEAD
Justice of Appeal

I concur

ALBERT MATTHEW
Justice of Appeal (Ag.)