

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF APPEAL

CIVIL APPEAL NO. 23 OF 2001

BETWEEN:

BANK OF ANTIGUA

Employer/Appellant

and

ERROL WILLIAMS

Employee/Respondent

Before:

The Hon Sir Dennis Byron

Chief Justice

The Hon. Mr. Ephraim Georges

Justice of Appeal [Ag.]

The Hon. Mr. Brian Alleyne S.C.

Justice of Appeal [Ag.]

Appearances:

Dr. L. Errol Cort for Employer/Appellant

Ms. E. Ann Henry with Ms. Debra Burnette for Employee/Respondent

2003: February 14;
March 31.

JUDGMENT

[1] **GEORGES, J.A.[AG.]:** The Appellant/Employer is and was at all material times a commercial bank operating within the jurisdiction of Antigua and Barbuda with its head office situate at 1000 Airport Boulevard, St. George's, Antigua together with two branches, one at Nelson's Dockyard, English Harbour and the other at the corner of High & Thames Streets in the City of St. John's, Antigua.

[2] The Respondent/Employee [Mr. Williams] commenced employment with the Appellant/Employer [the Bank] on 1st January, 1992 as Assistant Manager pursuant to a written contract of employment and from June 1995 he became the person in charge of the management of the High & Thames Streets branch.

- [3] At all material times, Mr. Kenny Byron was the Manager of the Bank's banking operations and Mr. Williams reported directly to him. Mr. Byron was in effective his boss.
- [4] Mr Williams testified that on 28th August, 1995, he telephoned the Chairman of the Bank, Mr. Allen Stanford at his office in Houston, Texas to discuss the foreclosure and sale of his residence in Houston, Texas and that Mr. Stanford invited him to travel to Houston soonest to discuss the matter.
- [5] Mr. Williams thereupon promptly flew to Houston on 31st August, 1995 without notifying, Mr. Byron. The express permission/authority of the Manager, Mr. Byron was needed before any employee, could travel overseas on Bank business. This was established procedure known to and previously followed by Mr. Williams. Further, it was not disputed that Mr. Williams was not on vacation during the relevant period of his absence from Antigua between September/October, 1995.
- [6] Indeed the Court found as a fact that in leaving his post and traveling to Houston in the manner and the circumstances which he did, Mr. Williams had "either a lapse in judgment [sic] or [committed] a deliberate act resulting from disharmony between himself and Mr. Byron." The learned President *travele* such behaviour as "indeed strange".
- [7] Mr. Williams further testified that he had originally intended to spend only three days in Houston [from 31st August, 1995 to 3rd September, 1995] and he in actual fact purchased a 4-day ticket but ended up staying thirty-seven [37] days in Houston – which appears to be stranger yet – until his services as Assistant Manager of the Bank were terminated on 6th October, 1995 by a hand-delivered letter signed by M. Margaret Stein, Director Human Resources Stanford Financial Group Company ["Stanford"] of which the Bank was an affiliate. These are legally two separate and distinct legal entities with the latter being under the umbrella of the former and subject to its control and direction.

[8] Mr. Williams employment with the Bank was in effect terminated [i.e. without notice] summarily in circumstances in which the Court held were unfair and tantamount to a constructive dismissal of the employee.

[9] In this regard the first two paragraphs of the letter of termination are instructive and read thus:

“Dear Errol:

I understand, based on your recent communications with Allen Stanford, you decided it would be necessary to return to the U.S. to reduce the constant stress you experienced working in Antigua. In addition, I understand that personal matters require your return to Houston and/or Miami. As a result, effective this date, your status as Assistant Manager of the Bank of Antigua, is terminated.

In view of your decision, we made every effort to find a place for you within Stanford Financial Group Company, including the possibility of an internal audit position. Unfortunately, the position requires fluent bilingual skills. At this time there is no position available which is suited to your background and skills.”

The termination package follows in paragraph 3 under five heads which resulted in Mr. Williams receiving EC\$92,333.38 including 3 months’ salary to 31st December, 1995 vacation pay and severance pay. His outstanding indebtedness on two credit cards totaling US\$14,351.47 was liquidated by Stanford and the balances on his personal loans to the Bank were to be liquidated by six fortnightly deductions from his pay.

[10] By section C. 58[2] of the Labour Code. Cap 27 of the Laws of Antigua and Barbuda Revised Edition 1992 [“the Code”] the test generally for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted 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.

- [11] The main thrust of the Appellant's case as forcefully articulated by Dr Cort is that when Mr. Williams left Antigua on 31st August, 1995 for Houston he did so without the express permission of his immediate superior, the Manager of the Bank Mr. Kenny Byron contrary to the established policy and procedures of the Bank of which Mr. Williams was well aware and his prolonged absence abroad was neither vacation nor special leave. Mr. Williams claimed that it was special leave.

The Appellant's contention in essence is that Mr. Williams had absented himself from his post without leave (AWOL) and in the interim period had taken steps to find another job in the US attempted to purchase another house there and resettle himself and his family. He had no intention of continuing to work in Antigua and had by his conduct had efficiently "severed" himself from the job. Whilst on this point, I pause to observe that the learned President stated at paragraph 46 of his judgment that:

"It must be noted that Mr Byron admitted in Cross-Examination that a few days after the Employee's departure Mr Stanford had called him and told the Employee to come to Houston and to take as long as necessary to get his domestic affairs sorted out."

I have searched in vain to find anything of this kind in Mr. Byron's evidence save that in-chief [lines 3 and 4] Mr. Byron testified that:

"I heard he had left Antigua in a discussion, the chairman [Mr Stanford] told me a few days after he [Mr Williams] left the Island".

There is nothing relating to the Chairman telling Mr. Williams to come to Houston and to take as long as necessary to get his domestic affairs sorted out.

- [12] As stated at paragraph 4 above the evidence shows that following a telephone conversation with Mr. R. Allen Stanford Chairman and Chief Executive Officer of Stanford in Texas, Mr. Williams at the invitation of Mr. Stanford flew to Houston to

discuss the matter of the foreclosure and sale of his house in Katy Texas. For that purpose he had purchased a 4-day return ticket. His stay in Houston was however prolonged for 37 days until 6th October, 1995 when his services as Assistant Manager of the Bank were terminated.

[13] The ostensible reason for his termination (see paragraph 9) was that Mr. Williams had decided to return to the US to reduce the constant stress which he had been experiencing in Antigua in addition to which personal family matters seemed to favour the move. The Court however found no evidence of such “constant stress” notwithstanding uncontroverted evidence that:

- (i) Mr Williams' house in Katy Texas had recently been foreclosed and sold for non-payment of the mortgage instalments.
- (ii) His eldest son was unhappy in Antigua and had returned to Texas in May, 1995 and was living with friends.
- (iii) His wife and two other children followed in July, 1995 and were not in proper accommodation.

[14] Further as Dr Cort pointed out that by memo dated July 13, 1995 addressed to R. Allen Stanford Mr. Williams threatened “to file suit in Houston and locally against Kenny Byron charging sexual harassment” and went on to catalogue a litany of complaints and other matters relating to his status etc with which he was dissatisfied. He also demanded a company vehicle. There is no indication that that memo was copied to Mr. Byron. The evidence also reveals that his own secretary [Caroline King] had accused him of sexual harassment. Indeed as learned Counsel submitted there had been a build-up to the scenario which ensued after 28th August, 1995.

[15] In paragraph 42 of his judgment the learned President wrote that:

“It was indeed strange that Mr Williams should have left his post and traveled to Houston without informing Mr Byron his superior officer And makes one wonder whether it was a lapse in judgment (sic) or a deliberate act resulting from disharmony between himself and Mr Byron.”

[16] It is even stranger still to note that someone with managerial responsibility for a branch of the bank should have left his post intending to be away for merely 3 days ending up being away for a total of 37 days without any explanation to his immediate superior officer Mr. Kenny Byron. The Court incidentally notes that Mr. Byron had been appointed Manager of the Bank on June 6 1995 – a factor which one senses may have exacerbated Mr. Williams’ evident resentment of Mr. Byron’s authority. This I see as a plausible explanation for his “strange” behaviour. For someone in his position Mr. Williams conduct clearly in my view betrays a singular lack of fidelity loyalty and commitment which an employee ordinarily owes to his employer. And that factor is further underscored by the fact that following the widespread destruction wrought by Hurricane Luis on Antigua a few days after Mr. Williams’ departure for Houston when his critical support as part of the Bank’s management team would doubtless have been needed. He continued to remain in Houston and Mr. Williams’ claim that whilst in Houston he assisted with the restoration of the Bank’s credit card operations over an extended period is I hold grossly exaggerated since the evidence shows that those operations were restored and had become operational within a matter of days of passage of the hurricane to wit from September 8, 1995.

[17] A brief chronology of the events, which occurred in Houston shows that on September 2, 1995 Mr. Williams had his first and only meeting with Mr. Stanford in which he was asked to prepare a plan for a house which he presented to Maggie Stein the Director of Human Resources. The plan showed how a mortgage could be obtained and the loan serviced. Mr. Williams applied to Loan Partners for a mortgage on September 11, 1995 but proved to be ineligible because inter alia of his poor credit rating whereupon Stanford agreed to assist him but this never got beyond the stage of negotiations.

[18] I pause here to observe that Mr. Williams attributed (and the Court accepted) the loss of his house in Texas to breach by Standford of its undertaking to see that the

employee's house was rented and the mortgage payments met. Clause 3.04 of the Agreement of Employment dated 1st January 1992 however clearly states that:

"The Employer will provide overseer property services for the Executive's current Katy, Texas residence for a period of time not to exceed two years. These services shall include the generation of tenant searches, the arrangement of building repairs and periodic property inspections. All costs for repairs and maintenance will be borne by the Executive."

By the date of foreclosure the two-year overseer services of the property by the Employer had long expired. Moreover there never was an obligation for Stanford "to see that the house was rented and mortgage payments met." Furthermore, writing to Maggie Stein on September 24, 1995 Mr. Williams acknowledged:

"I have just discovered that the mortgage companies which we have approached to finance purchase of the home we are looking at require that we give them certain documents that we cannot give them at this time. For example, they want to see W2's for 1993 and 1994, tax forms, letters from landlords etc. Also, because we lost the first house since we could not keep payments on it while living in Antigua with its high cost of living, this has affected our credit in the U.S."

[19] On the said September 2, 1995 Mr. Stanford asked Jim Davis, the Vice Chairman of the Group to find Mr. Williams a job. The only job then available was that of Internal Auditor at a substantially reduced salary to his Antigua salary. This he later accepted in principle by memorandum dated September 13, 1995 "subject to terms and conditions of work, salary and so on."

[20] Meanwhile Mr. Williams continued to report daily to Stanford's offices in Houston and occupied initially the office of a Mr. Arnold Knocks who was on vacation and on his return Mr. Williams used the Coffee Room as no office was assigned to him. Throughout he evidently had no job there and played no role at Stanford. He however continued to be accommodated at the hotel into which he had checked in on his arrival and Stanford picked up the tab including the cost of a rental car and phone calls until September 29, 1995.

[21] On that selfsame day Mr. Williams addressed a memorandum to R. Allen Stanford which reads:

“In order to reduce expenses, I have turned in the rental car and I will be checking out of the hotel tomorrow. I have made other living arrangements which will be substantially cheaper.

I have indicated to Mr. Davis a willingness to accept the Internal Audit position and look forward to getting fully involved in this as soon as I get my family settled. Things are complicated somewhat by the fact that all our furniture, car, and other personal property are still in Antigua.

I believe the emergency conditions which necessitated communication between myself and Credomatic on credit card matters have ended and I have requested that direct contact be made with BOA in this regard. I will, however, continue to assist out of this office to the extent needed.”

[22] To my mind that note for all intents and purposes is the clearest indication that Mr. Williams was prepared to quit the Antigua job without notice to the Bank. All that was left was to dispose of or make other suitable arrangements in respect of his car and furniture and tie up loose ends in Antigua. He was as it were fully prepared to jump ship. But meanwhile he was in a hiatus and one may well wonder for how much longer he intended to remain in Houston. Doing what? He clearly was not on vacation or on special leave as he claimed. Who had granted or authorized it? And why did he purchase only a 4-day return ticket in the first place? He was in a veritable limbo. He certainly had no permanent lien on the Antigua job. In my view by his inordinate absence from his job without any accountability to the Bank he had by his conduct all but repudiated his employment agreement with the Bank. And whilst it is recognized that workers do have rights, employers also have rights and their own interests to protect.

[23] But alas the plan backfired and the situation came to a head when on October 6, 1995 Margaret Stein the Director of Human Resource informed Mr. Williams by hand-delivered letter that the internal audit position which was available [and on which he had evidently pinned his hopes] was no longer available to him as the position required fluent bilingual skills. Colloquially speaking the rug had been pulled from underneath his feet and there was no safety net in place.

[24] Let me however hasten to say that in that regard the absence of good faith on the part of Stanford in their dealing with Mr. Williams is plainly obvious for it must have been well within their knowledge when the position was first canvassed with Mr. Williams that one of the essential criteria for the post was that the candidate should possess fluent bilingual skills. He was as it were led up the garden path by them. For that reason it is my considered opinion that he was constructively dismissed.

[25] That said, it cannot be gainsaid that Mr. Williams is at all blameless. For he was in a very real sense, the architect of his own misfortune for having left his post with the Bank in the manner and for the extent of time which he did, which as it turned out covered a very critical period. As a responsible Manager it behoved him to return to Antigua with some measure of dispatch rather than “abandon the job” in pursuit of the illusory Jason’s golden fleece elsewhere. He could not very well eat his cake and have it.

[26] In the final analysis he found himself between a rock and a hard place. He was veritably stranded, as I see it, in a situation, which in no small measure was plainly of his own making. For that reason, I would allow the appeal in part by varying the award in the following manner:

- (i) Basic award (severance) EC\$68,250.38 – no change
- (ii) Immediate loss EC\$86,211.00 as reduced to \$43,105.50
- (iii) Future loss EC\$35,457.75 reduced to \$17,723.87

The cut off period in respect of heads [ii] and [iii] above has been reduced to three [3] months instead of six [6] months thus making a grand total of \$129,079.75 [instead of \$189,919.13] less the package of EC\$93,256.89 paid on termination leaving a net amount recoverable of **EC\$35,842.86**.

In reducing heads [I] and [ii] of the award by three months instead of six account is taken of the fact that Mr. Williams was paid three months' salary on termination and his indebtedness on his credit cards which stood in excess of US\$10,000.00 was paid by Standford.

[27] As regards the order for costs in the sum of US\$10,000.00 it is my considered view that having regard to all the circumstances that award is unjustified and ought to be rescinded and I so order.

[28] In arriving at this conclusion I am guided by the speech of Lord Fraser in **G. v G.** (Minors: Custody Appeal [1985] 1 WLR 647 at 652 cited with approval by Brooke L.J. in **Tanfern Ltd v Cameron McDonald** [2000] 1 WLR 1311 paragraph 32 to the effect that:

“...the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible.”

Similarly it is my considered view that the award of exemplary damages in the sum of US\$15,000.00 [EC\$40,500.00] is in the circumstances unjust and unwarranted and I would accordingly rescind it also.

[29] In the result it is hereby ordered that the Employer shall pay to the Employee the sum of \$35,842.86 by 30th April 2003, with five per cent [5%] interest from date of judgment to date of payment.

[30] Before parting it would be remiss to fail to mention that learned Counsel for the Appellant at the close of his submissions informed the Court that on 7th September 2001 the President read a typewritten judgment in open court and informed Counsel that a copy could be collected by them from the Registrar.

- [31] Not having received a copy of the said judgment by the week ending 14th September 2001, inquiries were made and Appellant Counsel's clerk was informed that the draft judgment was still with the President. On 28th September 2001 following further inquiries the said clerk was told that the judgment was being photocopied and would be available on Friday 28th September 2001.
- [32] Not having received a copy that day the said clerk called the Court on Tuesday 2nd October 2001 only to be told that the judgment would be ready by Friday 5th October 2001. When the clerk telephoned the Court on the morning of 4th October 2001 she was then advised that the judgment was still with the President.
- [33] On that said day Appellant Counsel related how his attention was drawn to an article in the Daily Observer of even date captioned: "Bank of Antigua misses first payment to former Assistant Manager."
- [34] Inquiries of the court revealed that a copy of the judgment had in actual fact been given to Respondent Counsel and that it was later retrieved so that certain changes could be made to it. What those changes were have never been revealed. Learned Counsel voiced strong protest with what had occurred.
- [35] In my view if this complaint is true such an irregularity is most deplorable and the practice should be condemned. It certainly does not and cannot engender confidence in or enhance the justice system. It ought never to recur.

Ephraim Georges
Justice of Appeal [Ag.]

I concur.

Sir Dennis Byron
Chief Justice

I concur.

[Sgd.]
Brian Alleyne, SC
Justice of Appeal [Ag.]