ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2004/031

BETWEEN:

MICHAEL BLACKBURN

Appellant

and

LIAT (1974) LIMITED

Respondent

Before:

The Hon. Mr. Justice Hugh A. Rawlins — Justice of Appeal
The Hon. Mde. Justice Ola Mae Edwards — Justice of Appeal [Ag]
The Hon. Mr. Errol Thomas — Justice of Appeal [Ag]

Appearances:

Dr. Francis Alexis and Mr. Dwight Horsford for the Appellant
Ms. Eleanor Clarke Solomon for the Respondent

2007: December 5;
2008: September 16.

Civil Appeal – Employment Law – Contract Law - collective agreement – express and implied terms – remuneration on transfer from Barbados – payment in currency other than Barbados dollars - whether unilateral reduction of salary – section J4 of the Antigua and Barbuda Labour Code Cap.27

The appellant, an aircraft pilot of the rank of captain, was employed since 1978 by the respondent, a regional Caribbean airline (LIAT) with head office at the international airport in Antigua. The terms of the contract of employment between the parties are contained in the collective agreement periodically negotiated between the respondent and the Leeward Islands Airline Pilots Association (LIALPA), of which the appellant is a member. The appellant was, from 1979, based in Barbados and paid a salary of approximately BD$120,000.00. The respondent closed its Barbados base in 1994 and involuntarily transferred the appellant to Antigua where he was paid an annual salary of approximately EC$120,000.00 which valued 35% less than BD$120,000.00. The salary for all pilots was expressed in Eastern Caribbean currency under the collective agreement. However a memorandum of agreement in the form of a side letter signed by LIAT and LIALPA in May 1990, acknowledged the continuation of a longstanding prior arrangement for Barbados based pilots to

be paid their contractual net salary in Barbados dollars while their Antigua based peers received theirs in EC dollars. This practice originated at a time when both currencies were pegged to the pound sterling with the same par value; but an anomaly developed when each currency became pegged to the US dollar causing a currency value differential. The appellant alleged that LIAT had unilaterally reduced his salary by 35% in breach of his contract of employment. The respondent contended that the appellant was aware that his transfer and consequent salary adjustment was in accordance with the collective agreement then in force and LIAT's well-known practice of having differential remuneration packages founded on where a pilot was based. The learned trial judge upheld LIAT's contention and dismissed the appellant's claim. The appellant appealed against this decision.

Held: dismissing the appeal with costs of $15,000.00 in the court below and $10,000.00 as the costs of appeal to the respondent:

(1) As a general rule, an employer's unilateral reduction of an employee's remuneration would constitute a breach of contract. However, where alterations of status or duties disadvantageous to an employee are made in a manner that is permissible under the contract of employment, the employer will not be found to be in breach.

    Nobrega v Attorney-General of Guyana (1967) 10 WIR 187, **Worthington v Robinson** (1896) 75 LT 446 and **Faithhorne v The Territory of Papua** (1938) 60 CLR 772 applied. **Hill v Peter Gorman Ltd.** (1957) 9 DLR (2d) 131 considered.

(2) The appellant's involuntary transfer to Antigua with the consequent alterations in his financial status although disadvantageous to him was made in a manner that was permissible under the collective agreement and was in keeping with the well-known practice of which the appellant was aware. The appellant had no vested contractual right under the terms of that agreement to receive a salary based on the remuneration package for pilots in Barbados after he was transferred to Antigua. There was therefore no basis for interfering with the learned trial judge's findings.

    Keith Robertson v LIAT (1974) Limited Civil Suit No. ANUHCV 1997/0401 distinguished.

(3) A term will only be implied in a contract if it is necessary to do so. The term sought to be implied by the appellant, that he should be paid in Antigua the Eastern Caribbean dollar equivalent of the unit sum of the Barbados dollars that he was paid in Barbados, was not a necessary term which was reasonable and went without saying under the terms of the collective agreement. The respondent could not reasonably have intended this term to form part of their employment agreement without expressly so providing for it would be inconsistent with the terms of the existing collective agreement and in breach of section J4 of the Labour Code. Accordingly, the learned trial judge was correct in holding that such a term could not reasonably have been implied.

    Nova Scotia v Emile Elias & Co. Ltd. (1995) 46 WIR 33 and **Reda v Flag Ltd.** (2002) 61 WIR 118 applied. **The Moorcock** (1889) LR 14 PD 64 considered.

JUDGMENT

[1] **EDWARDS J.A [AG.]:** The appellant is an aircraft pilot who holds the rank of captain. He has been employed by the respondent LIAT (1974) Limited ("LIAT") since the 4th July 1978. LIAT is a regional Caribbean airline registered in Antigua and Barbuda. LIAT's headquarters is at the V.C. Bird International Airport in Antigua. Between 1974 and 1994 LIAT had a base in Barbados which it closed in November 1994. The Barbados base was subsequently re-opened years later. The employment relationship between the appellant and LIAT is governed by the current collective agreement existing at any given time, negotiated by the Leeward Island Airline Pilots Association (LIALPA) of which the appellant is a member.

[2] By his amended claim filed on the 24th October 2003, the appellant alleged that LIAT breached his employment contract by unilaterally reducing his salary by 35% when LIAT transferred him in November 1994 from the LIAT base in Barbados where he had been stationed since April 1978, to its Antigua base against his wish; and under protest, varied his annual remuneration from $120,000 in Barbados currency depending upon the hours flown, to EC$120,000 when the exchange rate between the two currencies was Barbados $1.00 to EC$1.35. The appellant claimed EC$439,812.60 for partial arrears of salary, general damages and costs.

[3] LIAT'S defence was that the appellant's transfer was in accordance with the collective agreement then in force negotiated by the LIALPA; that the salary of the appellant was expressed in EC dollars in this agreement; that there existed the well known arrangement of paying Barbados based pilots their salary quoted in the agreement in Barbados currency, while the Antigua based pilots received their quoted salary in Eastern Caribbean currency. LIAT denied breaching the agreement or being liable for any loss or damage to the appellant.

[4] The learned trial judge Ferdinand J [Ag] dismissed the appellant's claim on the 28th July 2004. In his judgment Ferdinand J [Ag] rejected the appellant's pleaded contention that

the contract of employment was subject to an implied term that "in the event of any transfer of the Claimant …from Barbados to Antigua, …[LIAT] would pay to the Claimant the Eastern Caribbean currency equivalent of his salary previously enjoyed up to October 31st 1994."[1] The learned judge found that there was no justification for the appellant to be paid more than his peers in Antigua. He held that LIAT had a right to transfer its pilots between its bases; that there was a well settled practice of LIAT having differential remuneration packages founded on where a pilot is based; that the appellant was aware of the salary changes which occurred whenever a transfer occurred; and that the appellant's knowledge of these things ought reasonably to have influenced his lifestyle and financial commitments in Barbados during the 15 years he was stationed there.

[5] The appellant's notice of appeal filed on the 21st September, 2004 indicates that paragraphs 12, 19, 30 and 31 of the judgment of Ferdinand J [Ag] must be subjected to scrutiny. Five of the 10 grounds of appeal challenge the abovementioned conclusions of the trial judge. The other 5 grounds posit what the trial judge ought to have found in law in favour of the appellant's claim. Many of these grounds overlap. Before considering these grounds the other facts relevant to the appeal must be set out.

The Collective Agreement

[6] The collective agreement which governed the relationship between the parties at the material time was executed by 2 representatives for LIAT and 2 representatives for LIALPA and was dated 14th June 1990. Section 1 Article 8 of this agreement discloses that LIALPA is registered as a trade union under the **Antigua and Barbuda Labour Code** Cap 27 ("the Code").[2] Section 1 Article 3 states that:

> "This Agreement shall apply to all Pilots in the service of the Company and the provisions of the Agreement shall supersede any existing arrangements or agreements, whether written, implied or in common practice, between the Company and the Pilots employed in the service of the Company."

Section 1 Article 8 also states that the provisions of the agreement are binding

[1] Paragraph 10 of the judgment
[2] 1992 Revised Laws of Antigua and Barbuda

upon LIALPA while Article 10 declares that LIAT and LIALPA will not violate the provisions of the agreement.

[7] The law governing collective agreements is the Code. Section C7 states that:

> "It shall be lawful for an employer and employee to enter into an individual contract of employment, covering terms of employment, but – (iii) any provision thereof which, to the employee's disadvantage, conflicts with the terms of a collective bargaining agreement in effect between the employer and a trade union which is the sole bargaining agent of the bargaining unit of which the employee is a part, within the definition of section J4, shall be null and void."

[8] Section J4 of the Code provides that a registered trade union designated or selected for such purposes by a majority of the employees in a unit appropriate for collective bargaining purposes shall be the sole representative of all the employees in employment in the said unit for the purposes of collective bargaining in respect of working conditions therein. Provided, however, that any individual employee, or group of employees, or any trade union so requested by an employee in the bargaining unit shall have the right at any time to present grievances to an employer and to have such grievances adjusted, without the intervention of the sole bargaining agent, so long as the adjustment is not inconsistent with the terms of a currently effective collective agreement between the employer and the sole bargaining agent; on condition that the sole bargaining agent is given the opportunity to be present at such adjustment to ensure consistency with the terms of the agreement.

[9] Section K26(3) provides:

> "Where a collective agreement executed between…[the employer and registered trade union] contains a provision which (however expressed) states that all of the agreement is intended to be legally enforceable, the agreement shall be conclusively presumed to have been intended by the parties thereto to be a legally enforceable contract."

[10] At page 6 of the agreement, the basic pay scales for captains is set out in EC dollars. The allowances for pilots are expressed in US dollars. Section 1 Article 5 states:

> "Perquisites, allowances, gratuities and payments of all kinds shall be standard to all permanent Pilots in relation to their grade of employment and in accordance with the terms of this Agreement."

[11] The appellant was transferred from the Barbados base in accordance with Section IX of

the collective agreement. In Section IX Article 1 states that LIAT retains the right to transfer pilots while Article 3 states that on transfer by the Company of a pilot to a new station, the Company shall provide transfer expenses where transfer is involuntary i.e. not as a result of a successful bid. Under Article 3 (a), 3 transfer expenses will also be paid by LIAT "where a Pilot can bid for repatriation to a station from where he was transferred originally on an involuntary basis. If a Pilot does not exercise this bid, he will be deemed to have forfeited his right for paid repatriation." The bidding rules are stipulated in Section XII of the agreement.

[12] Article 1 states:

> "The intention is to enable Pilots to have opportunities in keeping with their seniority in operating aircraft of their choice from bases of their selection within the limitations of this Agreement."

[13] Article 2 sets out the conditions under which the bidding rules will apply.

[14] Article 2(a) states:

> "A Pilot who is awarded a position that he bid for, shall remain on the aircraft type for a minimum of five (5) productive years except under the following conditions:
> 1. Where further promotion is involved;
> 2. Where repatriation is involved under section IX Article 3(a);
> 3. A Pilot will be able to bid for a change of type if there is a change of base involved after (2) productive years. However, he shall not be able to bid for a further change of base for a period of five years unless there is promotion to a higher grade than he previously held;
> 4. A Pilot may bid for a change of base to operate the same aircraft type."

The Appellant's Transfer

[15] Prior to the appellant's transfer, he wrote a letter dated 10th October 1994 to Captain Lester Lewis who was LIAT's Aircrew Manager in Barbados in response to LIAT's Invitation: Information # 56/94 for pilots in Barbados to offer a bid. This letter that was tendered in evidence referred to Information# 56/94. The appellant in this letter referred to LIAT's Posting List which showed the position each pilot occupied, and the position BAe 748 BGI. It may be inferred from this letter and the appellant's testimony that

LIAT's Information # 56/94 had stated that this position which the appellant held was being abolished. The appellant wrote:

> "Acceptance by me of a bid award for any of the remaining positions would involve financial hardships on my part to effect transfer to Antigua, the pursuit of expanded professional qualifications, different and increased flight and duty-time limitations and reduced salary. Further, Section XII, Article 2 (a) of the Memorandum of Agreement …imposes an obligation on The Company to keep me operational on the BAe 748 for five years subsequent to my command on that type and imposes no obligation on me to bid off…. I have been initially advised that the changes imposed by the new crew requirements and your information # 56/94 amounts to an offer to vary the terms and conditions of the contract. Accordingly I hereby bid for a Dash 8 captain's position if I am unable to retain my present position. This bid is with the clear understanding that it does not amount to any waiver and is without prejudice to the rights to argue that the changes amount to an offer to vary the terms and conditions of my contract which I need not accept and/or which are so fundamental as to amount to a termination of any present contract and an offer of re-employment under new terms and conditions which I am not obliged to accept.
>
> It is further with the clear understanding that in preference to accepting the position in Antigua, I opt for redundancy which is inclusive of prompt settlement and in full, of all entitlements."

[16] The appellant submitted a qualified bid which LIAT accepted but not on the terms the appellant requested. He was not given the option of redundancy apparently because the Section XV Article 1 circumstances did not exist. On the 1st January 1995 the appellant wrote to LIAT expressing strong protest about the 35% reduction in the value of his salary which he perceived to be a cut in salary that he had not agreed to.

Variation of the Agreement

[17] Chief Pilot, James Murray, testified that a side letter signed by the managing director of LIAT and the chairman of LIALPA dated 31st May 1990 was attached to the 1990 and other subsequent agreements. This side letter states that it is a memorandum of agreement between LIAT and the Airline Pilots in the service of LIAT. It provides as follows:

> "IT IS AGREED by Company and Association that for the duration of this Contract salaries and Pension will be paid in E.C dollars. The present arrangement for the Barbados Base where the deductions are made in E.C. Dollars/Pension, Social Security and Medical Benefit and the net paid in BD Dollars will continue. It is also

agreed in principle that a study will be commissioned subject to Agreement on the Terms of Reference, to examine an alternative method of arriving at an equitable method of payment for Pilots."

[18] Mr. Murray, explained that the arrangement referred to in the said letter was that all salary deductions were made at source in EC currency based on the EC dollar unit salary and the net figure was paid to the Barbados pilots in the currency of Barbados. No currency exchange took place. Mr. Murray deposed in his witness statement that: "This matter was always a bone of contention within the pilot body between the pilots of the respective bases and that prompted the side letter."[3]

[19] Mr. Osmond Lake, who was at the time of trial the director of flight operations at LIAT, was also a pilot with LIAT for the past 30 years. His testimony supplied the rationale for the custom referred to in the side letter. In 1974 the Barbados currency and the Eastern Caribbean currency were each pegged to the pound sterling with the same par value. Because of this the custom was for LIAT to pay pilots their salary in the currency of the territory where they were based. This practice continued even after the Barbados currency, and subsequently the Eastern Caribbean became pegged to the US dollar resulting in a currency value differential with the Barbados dollar valuing more than the EC dollar. The continuation of the practice caused an anomaly since the salary figure of pilots based in Barbados was higher in value against the US dollar than their peers based in Antigua, hence the side letter's quest to find an equitable method of payment for pilots.

The Custom in Operation

[20] Mr. Lake testified that prior to the appellant's transfer in November 1994 LIAT had transferred several pilots from the Barbados base back to the Antigua base with a salary payment based on the figure quoted in the agreement in EC dollars with the knowledge and approval of LIALPA. However it became clear from the evidence of Mr. Ricardo Sealy, a chief pilot with another airline who formerly had been employed with LIAT between 1978 and 2000 as a pilot, that the circumstances of their transfer were dissimilar

to the appellant's. The evidence does show, as submitted by Dr. Alexis, that the pilots that Mr. Lake referred to were pilots who requested their transfer to Antigua. Their transfers were voluntary while the appellant's was involuntary.

[21] As for Captain Keith Robertson who like the appellant was transferred involuntarily to Antigua on the 1st December 1994 upon the closure of the Barbados base, his action Suit No. ANUHCV 1997/0401 turned on his demotion to the rank of co-pilot following his failure to pass the conversion training tests to captain the Dash-8 aircraft. As co-pilot of the Dash-8 his monthly salary went from that of a captain in Barbados earning Barbados $8160.00 to EC$8,160.00 in Antigua to EC$5,428.00; and his claim was for loss of income of $198,000.00 for his demotion to co-pilot. Mr. Robertson had also reserved "the right without prejudice to any variation of the terms and conditions" of his contract .[4]

[22] Mr. Sealy, who in the past had held the positions of council member, vice chairman, secretary and chairman for the LIALPA, testified that in 1995 when he was chairman of LIALPA his "…Association could identify no contractual agreement or any valid amendment thereto, allowing for such a pay cut under the conditions that applied to Captain Blackburn….LIALPA had no record of persons being involuntarily transferred from Barbados to Antigua with a pay cut, where such persons protested and stated their preference for severance." I shall now turn to consider the grounds of appeal.

Grounds (g) to (i)

[23] Ground (g) alleges that the learned trial judge erred in law in proceeding on the bases reflected at paragraph 19 of his judgment where he stated:

> "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."

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[3] Record of Appeal, page 48, paragraph 7

[4] See **Keith Robertson v LIAT (1974) Limited**: Civil Suit No. ANUHCV 1997/0401: Judgment of Mitchell J delivered 2 /12 /02.

[24] Ground (h) contends that the learned judge erred in law in failing to hold that there was no evidence that there was anything unreasonable in the lifestyle and financial commitments adopted by the appellant in Barbados during the 15 years LIAT kept him stationed in Barbados. The reasonableness of the lifestyle and financial commitments of the appellant was never an issue in the case. In my view the learned judge correctly omitted to consider this.

[25] At paragraph 30 of the judgment the learned judge said:

> "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 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."

Ground (i) complains that the learned judge erred in law in making the underlined finding.

[26] It was submitted, that the trial judge, ignored the unchallenged and important evidence of Mr. Sealy, which established that the appellant could not have anticipated a reduction of salary because never before at LIAT had there ever been such a reduction of salary consequent upon a pilot's involuntary transfer after the pilot had requested to be made redundant. Learned counsel Dr. Alexis submitted that there was therefore no evidence to warrant the judge's conclusion that the appellant should have anticipated a pay cut and prepare for it while based in Barbados.

[27] Learned counsel Ms. Clarke Solomon, submitted that the 1990 collective agreement and the evidence of the appellant at pages 24 to 27 and 39 of the record shows that the appellant was aware that LIAT was contractually entitled to transfer pilots between Antigua and Barbados which would result in known salary changes.

[28] The appellant's evidence was that when he was transferred to Barbados in 1978 he

received an increase in salary as he was paid the same dollar figure in Barbados dollars and the difference was a significant 35%. He was a part of the negotiating team for the 1990 collective agreement. Prior to LIAT signing it, it would have obtained a majority vote. He admitted that throughout his employment it was agreed that the numerical figure would be the same as regards pilots in Barbados and Antigua but it would not be the same value. Although he was aware that Barbados based pilots were paid the same dollar sum in Barbados dollars as their counterparts get in EC dollars in Antigua he did not completely accept the practice and he would expect to be paid the same salary he received in Barbados on transfer even if he had only spent one month working in Barbados, where his transfer is at the behest of LIAT.

[29] It is obvious from paragraphs 20, and 29 of the judgment that the learned trial judge did consider and appreciate the evidence that the appellant's transfer was involuntary although he did not expressly refer to the evidence of Mr. Sealy. The agreement itself provided for the involuntary transfer of pilots although it did not specifically spell out the closure of a base as a circumstance that would precipitate an involuntary transfer. It was therefore within the contemplation of the parties and reasonably foreseeable that an involuntary transfer back to the Antigua base would be on the terms specified in the agreement; this is manifest in the appellant's response to LIAT's Information # 56 / 94. He stated in this response that acceptance of a bid award for any of the remaining positions [including the Dash 8 captain's position which ultimately was awarded to him on his qualified bid] would involve financial hardships on his part to effect transfer to Antigua, the pursuit of expanded professional qualifications and among other stated things "**reduced salary**".[5] Since the appellant knew of the salary differential between Barbados and Antigua, and would have been familiar with the terms of the agreement as one of the negotiators, in all the circumstances, and having regard to the evidence, it was reasonable in my view for the learned trial judge to have made the observations at paragraphs 19 and 30 which are the subject of grounds (g) and (i).

Grounds (a) to (f)

[5] See paragraph 15 of this judgment

[30] Grounds (a), (b) and (c) contend in substance that the reduction in the value of the appellant's salary by 35% without his consent upon an involuntary transfer from Barbados to Antigua was a unilateral reduction in remuneration and a unilateral variation of one of the important agreed terms of the contract of employment. Ground (c) also alleges that the learned trial judge failed to apply to the appellant's contract of employment the principle that ordinarily an employer cannot in law unilaterally reduce an employee's remuneration. The judge did apply the principle at paragraphs 11 and 12 of his judgment, but his conclusions did not favour the appellant's claim .[6]

[31] Ground (b) in effect contends further that LIAT's right to transfer the appellant involuntarily did not carry with it the right to cut his salary without his consent.

[32] Ground (a) urges that the trial judge erred in law in holding that the appellant could not in law complain about the unilateral reduction in his salary because LIAT had a right to transfer its pilots between its bases. A close look at the judgment shows that the learned trial judge made no such observation, holding or explicit finding. Paragraphs 12 and 31 of the judgment are also referred to in ground (a).

[33] Ground (e) complains that the judge erred in law in failing to hold that there was no evidence that the appellant's involuntary transfer with a reduction in his salary was done with the knowledge and approbation of the appellant or his bargaining agent LIALPA. Although the appellant may not have approved of the well settled practice whereby LIAT paid pilots the identical figure quoted in the agreement in the currency where the pilot was based, without reference to dollar value, there was ample evidence from which the learned judge could hold that the appellant knew that his salary in Antigua would be as stated under the agreement in the event he was transferred involuntarily. The significance and impact of his disapproval would of course depend on the success of the appellant's contention that LIAT unilaterally varied the employment agreement.

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[6] See paragraphs 30 to 31 of this judgment for the judge's application of the principle.

[34] Ground (f) alleges that the trial judge erred in law by failing to hold that there was no evidence of any practice whereby LIAT had transferred any of its pilots from Barbados to Antigua against his wish and reduced his salary despite his stated preference for severance. The fact that the involuntary transfer of the appellant from Barbados to Antigua on the closure of LIAT's base, with the resultant financial consequences which the appellant objected to had no precedent in LIAT's history, and that the appellant's protest to these predictable consequences may have been a "first" for LIAT, this in my view would have had little or no impact on the trial judge's decision in light of the terms of the collective agreement and the judge's exclusion of the implied term pleaded by the appellant. As to whether the judge erred in this exclusion, this is the subject of another ground to be considered later.

Unilateral Reduction of Salary

[35] At paragraph 11, the learned judge accepted that the law was that ordinarily an employer cannot unilaterally reduce an employee's remuneration which is an important agreed term. **Nobrega v Attorney-General of Guyana.**[7] Then at paragraph 12 the learned judge stated:

> "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 ."

[36] There were other cases referred to by counsel for the appellant two of which underscore the universally accepted common law principles that the essence of a contract is mutuality and that generally one party cannot unilaterally vary a contract.[8] Others demonstrate the circumstances under which an employer may be justified in reducing an employee's salary unilaterally and are exceptions to the rule[9]. The appellant's case cannot be treated as an

[7] (1967) 10 W.I.R. 187

[8] See **Guyana Sugar Corp. v Teemal** (1983) 35 W.I.R. 239; **Hill v Peter Gorman Ltd.** (1957) 9 DLR (2d) 131;

[9] Where the employee is demoted: **Robertson v Liat** See Fn 2 and para 20 of this judgment; where there is statutory dispensation: **King v A.G.** (1992) 44 W.I.R. 52; where there is a generally disclosed policy : **Williams v A.G.** Civ App Dominica No 29 of 2004 19/6/06

exception to the rule.

[37] Learned counsel Dr. Alexis, urged the court not to approach the issue as a question of conversion as in real terms the appellant suffered a reduction in his salary. The appellant pleaded and testified about the Barbados exchange rate to the EC dollar and the effect of the exchange rate on his income in EC dollars after his transfer. In my view these are strong circumstances showing that it is impossible to completely adopt the approach advocated by appellant's counsel.

[38] Dr. Alexis argued also that on the facts of the appellant's case there was no legal justification for LIAT to reduce the appellant's salary and the trial judge ought to have applied the decision in **Nobrega** and **Hill v Peter Gorman Ltd.** and conclude that LIAT could not do as it did. In **Nobrega** the issue was whether the government could lawfully reduce the salary of an employee (a teacher) without her consent. The Guyana Court of Appeal held that the government could not unilaterally alter the terms of employment.[10] Stoby J.A (at page 195 A-B) relied on the case **Faithhorne v The Territory of Papua**[11] as being the authority for the proposition that a right to dismiss does not include a right to reduce salary. The following statement of Cummings J.A. is still relevant though the appellant's case involved a transfer and not dismissal. He said (at page 206G-H):

> "To say, therefore, that the right to reduce pay logically follows the right to dismiss is a *non sequitur*. In my view in order to justify a reduction in pay - well intended compromise though it may be on the part of the [employer] - there must be an enabling term in the contract or provision in a relevant statute; failing either of these, any variation of the contract must be mutual."

[39] The Canadian authority **Hill v Peter Gorman Ltd** was an action to recover withheld commission. The trial judge found that the plaintiff had never agreed to have his commission reduced by a reserve for bad debts and ordered that the plaintiff recover from his defendant employer the sum of $1134.11. On appeal the Ontario Court of Appeal by a majority affirmed the judgment for the plaintiff. McKay J.A. in his majority judgment said at pages 131 to 132:

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[10] The case eventually went to the Privy Council where it was held that the school teacher had been effectively dismissed

> "I am respectfully of opinion that it cannot be said, as a matter of law, that an employee accepts an attempted variation simply by the fact alone of continuing in his employment. Where an employer attempts to vary the contractual terms, the position of the employee is this: He may accept the variation expressly or impliedly in which case there is a new contract. He may refuse to accept it and if the employer persists in the attempted variation the employee may treat this persistence as a breach of contract and sue the employer for damages, or while refusing to accept it he may continue in his employment and if the employer permits him to discharge his obligations and the employee makes it plain that he is not accepting the variation, then the employee is entitled to insist on the original terms. I cannot agree that an employer has any unilateral right to change a contract or that by attempting to make such a change he can force an employee to either accept it or quit."

[40] Learned counsel Ms. Clarke Solomon, laid much stress on the contractual provisions and the original reason for the currency difference in the remuneration package. This did not depend on changes in the value of the currency but on where the pilot was based, she argued. This was the finding of the trial judge at paragraph 31 of the judgment. It must be stated at this point that this finding was the subject of ground (j) which alleged:

> "The learned trial judge erred in law in failing to direct himself properly or at all on the implications of his ruling at para. 31 of the Judgment, that there was a well-settled practice of LIAT having differential remuneration packages founded on where a pilot is based."

[41] In my judgment this complaint cannot succeed, having regard to the evidence of Mr. Osmond Lake previously stated at paragraph 19 above.

[42] Furthermore counsel Ms. Clarke Solomon, submitted that the agreement provided for voluntary and involuntary transfer to LIAT's bases; and LIAT was simply complying with the agreement by paying the sum designated in EC dollars for a captain of the appellant's status under the agreement. There was therefore no unilateral variation of the agreement by LIAT and the learned judge properly applied the principles in the authorities cited.

[43] In applying the principles affirmed in **Nobrega** and **Worthington v Robinson** the trial judge did not specifically state that the salary that the appellant was receiving upon being transferred from Barbados to Antigua in the specified circumstances was permissible

[11] (1938) , 60 C.L.R. 772

under the contract of employment. However, this may be inferred from his findings at paragraphs 18,19, 20, 30 and 31. From the judgment it may be deduced that the core of his decision was that the salary of EC$120,000 per annum paid to the appellant after he was transferred to Antigua did not constitute any change in the terms and conditions of the collective agreement. To use the learned judge's approach at paragraph 12 of his judgment,[12] the change in the appellant's place of work and any alterations in his financial status though disadvantageous to the appellant was made in a manner that was permissible under the collective agreement .

[44] In my view, the appellant had no vested contractual right under the terms of the existing agreement to receive a salary based on the remuneration package for pilots based in Barbados after he was transferred to Antigua. Any other interpretation of the collective agreement would seem to run counter to the objective of the agreement which was to guarantee all pilots at the appellant's level equal pay for the same amount of hours flown. The learned judge obviously appreciated this in his statement at paragraph 24 where he wrote:

> "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."

[45] There is therefore no basis for interfering with this finding of the trial judge in my view. I now move on to the final ground of appeal.

The Implied Term

[46] The written submissions and arguments before us can be disposed of relatively quickly. This ground (d) suggests that the judge erred by failing to hold that it is not necessary to imply into the contract of employment a term to the effect that it is permissible in law for LIAT to reduce the appellant's salary unilaterally without his agreement or

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[12] See paragraph 35 of this judgment.

consent, by transferring him from Barbados to Antigua and applying the device of paying him as pleaded. Dr. Alexis argued that LIAT had implied that term to escape its obligations. Ms. Clarke Solomon countered that LIAT never pleaded that it was necessary to imply the term alleged in ground (d); and the learned judge made no such implication since the terms of the agreement spoke for themselves. I agree with counsel for LIAT.

[47] The object of this ground became evident in paragraph 5.6 of the written submissions of counsel and the arguments advanced by learned counsel Dr. Alexis. Their real contention was that the judge ought to have implied a term that the appellant should be paid in Antigua the EC dollar equivalent of the unit sum of Barbados dollar that he was paid in Barbados. This is the implied term that was in fact pleaded.

[48] Paragraph 22 of the judgment reflects that the learned judge considered the principles relevant to this issue where he stated: "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.** 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… "an observation by Lord Salmon in the *Liverpool* case to the effect that the term sought to be applied 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." The learned judge quite correctly in my view, rejected the submission of counsel for the appellant that it is 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 judicial statements of Bowen J in **The Moorcock**[13] which originally asserted and justified the implication of a term in the contract on the basis of what a reasonable man from the very nature of the contract would infer, have long since been amplified, and the test is that stated by the learned judge.

[13] (1889) L.R. 14 P.D. 64

[49] The term sought to be implied by the appellant is not a necessary term which was reasonable and went without saying under the terms of the collective agreement. LIAT could not reasonably have intended it to form part of their employment agreement without saying, because it would be inconsistent with the terms of the existing collective agreement between LIAT and LIALPA and also in breach of section J4 of the Code. Although it was for LIAT and LIALPA to agree on terms which reflect the economic realities and seek the means of alleviating any income loss suffered by pilots based on currency disparity and differences in the cost of living at the base where they are stationed, the side letter which clearly expressed the intention of the parties also militated against the court raising the implication pleaded by the appellant. The learned judge was not in error when he rejected such an implication, though at paragraph 24 he inappropriately referred to the settled practices described in Mitchell J's judgment in **Robertson v Liat** when justifying his rejection of the implied term.

[50] As for the other submissions of the appellant's counsel regarding the untenable findings of the trial judge, these in substance were no different from those raised in relation to the grounds of appeal.

[51] The conclusions I have reached for all of the grounds of appeal result in the appeal being dismissed with costs of $15,000 in the court below as agreed at the start of the trial; and the costs of appeal being $10,000 which is two thirds of the costs below pursuant to CPR 65.13 (b).

Ola Mae Edwards
Justice of Appeal [Ag.]

I concur.

Hugh A. Rawlins
Justice of Appeal

I concur.

Errol Thomas
Justice Appeal [Ag.]