

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA**

CLAIM NO: ANUHCU 2010/0474

BETWEEN:

ROBERT JOSIAH

Claimant

and

STATE INSURANCE CORPORATION

Defendant

Appearances:

Sir Clare Roberts, Q.C. and Ms. Andrea Roberts for the Claimant
Mr. Roger Forde, Q.C. and Ms. Veronica Thomas for the Defendant

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2011: July 12, 13
November 7
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JUDGMENT

[1] **MICHEL, J.:** The State Insurance Corporation is a statutory corporation established as of 1st January 1986 by the State Insurance Corporation Act, Cap. 413 of the Laws of Antigua and Barbuda Revised Edition 1992 (hereafter "the Act"). The Corporation was established primarily to take over and carry on the business of the former State Insurance Department of the Government of Antigua and Barbuda, which Department had itself been established in 1977 partly to take over

and carry on the business of the First Federation Life Insurance Company Limited which had gone into liquidation. The Claimant was employed with the State Insurance Department of the government from its establishment on 1st January 1977 until it transitioned into the State Insurance Corporation on 1st January 1986 when he became an employee of the Corporation. He retired as an employee of the Corporation on his 60th birthday on 6th June 2003 and began receiving a pension from the Corporation in July 2003. As of May 2009 the quantum of the pension paid to the Defendant was significantly reduced from \$6,000.00 to \$2,125.00 per month.

- [2] On 27th July 2010 the Claimant filed a Claim Form and Statement of Claim against the State Insurance Corporation (hereafter "the Defendant") seeking declarations that the Defendant is in breach of its statutory obligation, breach of agreement and breach of trust in refusing to pay the Claimant his government pension and in refusing to properly calculate and pay the Claimant his contributory pension under the Defendant's pension plan, damages arising from the aforesaid breaches and orders commanding the Defendant to pay to the Claimant his government pension and his full pension entitlement under the terms of the pension plan, together with arrears, interest and costs.
- [3] The Defendant filed a Defence on 19th August 2010 joining issue with the Claimant on several of the averments in his Statement of Claim and denying the Claimant's entitlement to the relief claimed by him.
- [4] On 6th October 2010 the Claimant filed a Reply to the Defence joining issue with the Defendant on its Defence, thus bringing "the pleadings" to a close.

[5] After various interlocutory matters were dealt with by the Court, the case came to trial on 12th and 13th July 2011, with three witnesses giving evidence on behalf of the Claimant and two on behalf of the Defendant.

[6] The first witness for the Claimant was the Claimant himself. His evidence as contained in his witness statement was very detailed, but amounted essentially to a claim of entitlement to two pensions upon his retirement at age 60 – a government non-contributory pension to be paid to him by the Defendant and a contributory pension to be paid to him by the trustees of the pension fund established by the Defendant. He claims to be entitled to the first pension by virtue of undertakings made and assurances given to him at the time of his recruitment as an employee of the State Insurance Department in 1977 and at the time of his transition to the State Insurance Corporation in 1986; by virtue too of the provisions of section 10 (1) of the Act, which he interprets as preserving his entitlement to the government pension; by virtue as well of the established government policy to this effect applying to the transformation of government departments into statutory corporations; and by virtue also of the sheer illogicality of giving up a job guaranteeing him a pension at age 60, to which he was not required to contribute, for a job which did not provide for any pension whatsoever. He claims to be entitled to the second pension by virtue of the establishment in 1988 of an employees' contributory pension plan by the Defendant and the payment by him of his contributions to it from then until his retirement in June 2003.

[7] The Claimant claimed that upon his attainment of age 60 in 2003 he was paid his government pension by the Defendant until 2009 when it was stopped and he started receiving the contributory pension from the pension fund, the amount of which pension was much lower than the government pension which he had previously been paid, and the quantum of which contributory pension was

itself even lower than it ought properly to have been, in that he was not paid the enhanced pension to which he and other members of the senior management of the Defendant were entitled.

[8] The Claimant stumbled somewhat under the weight of some vigorous cross examination by Learned Queen's Counsel, Mr. Roger Forde, and appeared to have made some factual concessions, including that he is not aware and has not seen any provision in the Pensions Acts of Antigua and Barbuda which entitled him to a government pension after having served less than 10 years in the government service; that he agrees that section 10 (1) of the Act does not deal with pensions at all and is merely a vesting provision so that whatever was owned by the State Insurance Department was on the appointed day transferred to the Defendant; that there is no provision in the Act dealing with pensions; that the letter from Dr. Barthley offering employment to him, which offer he accepted, was conveying that if he had entered into any contract with the State Insurance Department the contract would be safeguarded by section 10 (1), but the letter does not say that upon his retirement he will be paid a government pension and in fact does not deal with pension at all; that the pension paid to him from 2003 to 2009 was an interim pension calculated on the formula used to calculate the pensions of non-established government employees and was being paid to him until the pension payable under the pension plan was regularized; that although he stated in his witness statement that the 1999 revision to the pension plan providing for enhanced pensions to senior managers had been sanctioned by the Defendant's Board, he has not seen any Board minutes to this effect.

[9] Although stumbling somewhat, the Claimant did not deviate from his claim of having understood at the time of his transition from State Insurance Department to State Insurance Corporation that he was carrying with him his entitlement to a government pension and that he was so treated by the

Defendant; that upon the establishment of the Defendant's contributory pension plan in 1988 and his payment of his contributions to the plan he became entitled to an additional pension; that he was entitled, as one of the executive managers of the Defendant, to an enhanced pension under the plan.

- [10] The second witness for the Claimant was Cordell Weston, a former Permanent Secretary in the Ministry of Public Works (which Ministry had responsibility for the Defendant) and a former member of the Defendant's Board of Directors from 1998 to 2004. Mr. Weston's evidence, as per his witness statement, was to the effect that the Claimant was entitled to be paid a government pension by the Defendant based on the precedent set by the Board in the case of Dr. Rolston Barthley, the former general manager of the Defendant. He alleged that the Board had given the directive that Dr. Barthley should be paid his government pension because, having carried over his pensionable service, he was entitled to have his government pension paid by the Defendant. He alleged too that the Board was moved by the then current practice and policy of the government and, in the case of the Defendant, by section 10 (1) of the Act as they understood it, that government employees would not lose their pensionable status in the transition from government department to statutory corporation. He alleged also that he was aware that employees transitioned from various government departments to the Antigua Public Utilities Authority and the Port Authority were paid their government pension by the statutory corporations to which they were transitioned. He denied that the pension paid to the Claimant upon his retirement in 2003 was an interim pension or that it was referable to the pension plan, which he alleged was a separate entitlement to be paid from the pension fund, and that the Claimant was entitled to two pensions.

[11] Under cross examination, Mr. Weston conceded that his wife is an employee of the Defendant and is one of the persons who transitioned from the State Insurance Department to the State Insurance Corporation. Mr. Weston did become less confident under cross examination and displayed some uncertainty in his recollection of material details, but he never altered the main course of his evidence as to the Claimant's entitlement to a government pension on transitioning from the department to the corporation, in addition to being entitled to a pension under the Defendant's pension plan.

[12] The third and final witness for the Claimant was Charles Thomas-Watson, who had been the Defendant's financial comptroller from 1st January 1986 until his retirement in 2005. In his witness statement, he stated that he was one of the government employees transferred to the Defendant when it was converted from a department of government to a statutory corporation, as was the Claimant; that they were not paid out for their service with the government department but, rather, their pensionable service was continued; that as employees of the State Insurance Department they were entitled to a non-contributory pension on reaching the retirement age; that the liability to pay the pension was vested in the Defendant by virtue of section 10 (1) of the Act; that it was clear to the government representative, to the Defendant, to the Claimant and to him that his and the Claimant's pensionable rights would be unbroken and safeguarded and that their government pension would be paid by the Defendant.

[13] Mr. Thomas-Watson stated too in his witness statement that in 1988 a contributory pension plan was set up between the Defendant and its staff for the purpose of providing pension benefits for employees of the Defendant; that the pension plan was revised in 1999 by Buck Consultants of Toronto, Canada, by virtue of which revision members of the senior management of the Defendant,

like the Claimant, would contribute 5% of their monthly salaries instead of 3% and would receive an enhanced pension; that the enhanced aspect of the pension plan was accepted by the Board and acted on by the Board by making the additional contribution from management's salary; that it was clear that the contributory pension was separate and apart from the government pension to which employees like the Claimant were entitled.

[14] Under cross examination, Mr. Thomas-Watson reiterated that he had brought a claim against the Defendant similar to the one brought by the Claimant. He also made some factual concessions under cross examination, but he too never conceded that the Claimant was not entitled to a non-contributory government pension payable by the Defendant and a contributory pension payable under the Defendant's pension plan.

[15] The first witness for the defence was Mr. Pedro Corbin, the Chairman of the Defendant's Board of Directors since May 2004. In his witness statement, he stated that when the Defendant was established as a corporation in 1986 all of the employees of the State Insurance Department, including the Claimant, were given the option to remain with the government in the civil service or to accept offers of employment with the Defendant; that the Claimant indicated his acceptance of the offer of employment to him by signing and returning to the Defendant a copy of a letter addressed to him by the Defendant's general manager, Mr. Rolston Barthley, dated 21st February 1986, containing the offer to him of employment by the Defendant with effect from 1st January 1986; that as an employee within the civil service of Antigua and Barbuda, the Claimant's entitlement to a pension was as prescribed by the Pensions Act, Cap. 311 of the Laws of Antigua and Barbuda Revised Edition 1992 (hereafter "the Pensions Act") but, at the time he was offered

employment with the Defendant, he had not met the requirements that would have made him eligible to receive a pension from the government.

- [16] On the issue of the revised pension plan, Mr. Corbin stated that in 1988 the Defendant's Board of Directors established a pension plan for the Defendant's employees and pension rules were drafted in that same year, but a trust deed was not prepared until September 2008; that various factors contributed to the delay in the proper set up of the pension plan, but the plan did take effect from January 1988 and the Claimant participated in it from its inception; that under the plan each of the Defendant's employees contributed 3% of his or her monthly salary to the plan and the Defendant contributed approximately 6.7%; that at the commencement of the pension plan it was administered by the executive managers of the Defendant, who in 1999 purported to revise the plan and to provide for enhanced contributions by them and enhanced pensions to them upon their retirement; that the executive managers who were involved in this purported revision of the pension plan and who would have been the sole beneficiaries of the revision were Mr. Rolston Barthley, the General Manager at the time, Mr. Charles Thomas-Watson, the then Accountant, Mr. Dalmer McCoy, the then Manager-General Division and the Claimant, the then Deputy General Manager and Manager-Life Division; that under the purported revision, the monthly contributions of these executive managers would increase from 3% to 5%, with improved benefits of up to a maximum of 90% of their salaries; that there are no records of the Defendant or its Board to indicate that this purported revision to the pension plan was ever presented to or approved by the Board, as would be required by section 15 (2) (c) of the Act; that after it came to the attention of the Defendant's Board that there had been a purported revision of the pension plan by the executive managers, the Board made a decision (as reflected in the minutes of its meeting of 23rd October 2002) that all its employees should contribute 3% of their salaries to the pension plan, no contributor to the plan

should be considered as superior and all contributions paid in excess of 3% were to be refunded; that the Claimant had made enhanced contributions to the pension plan of 5% of his salary from January 1999 to October 2002 and in June 2007 he was refunded the sum of \$8,874.71 representing a refund of the additional 2% contribution which he had made from 1999 to 2002; that from November 2002 until his retirement, the Claimant's contribution to the pension plan was 3% of his salary.

[17] As to the Claimant's retirement, Mr. Corbin stated that on 6th June 2003 the Claimant attained the retirement age of 60 years, having by then worked with the Defendant for 17 years; that by that date the review and regularization of the pension plan directed by the Board to be undertaken by a pension committee had not yet been completed and a decision was taken by the Board to pay a pension to the Claimant from the Defendant's funds using the formula which applied to non-established government employees and that once the issues with the pension plan were resolved and the Claimant's pension entitlement was determined then the appropriate reconciliation would be made and the Defendant would be refunded by the pension fund the amounts which it had disbursed; that this decision was communicated to the Claimant by letter dated 16th February 2006; that this decision was in keeping with the precedent set by the previous Board in handling pension payments to Dr. Barthley and Mr. Thomas-Watson who had both attained retirement age before the review of the pension plan was completed; that under the terms of the pension plan the Claimant would have been entitled to have his years of pensionable service calculated from 1st January 1986, but the Board decided as a goodwill gesture to include his years of service with the State Insurance Department; that all pension payments to the Claimant until July 2007 were paid from the funds of the Defendant and not from the pension fund, because the pension plan had not yet been regularized; that the payments were made to the Claimant on the basis that they were

interim monthly pension payments under the pension plan; that the pension plan was regularized in 2007 and thereafter pension payments were paid out of the funds of the pension plan; that in February 2009 Prescience Insurance Consultants and Actuaries informed the Defendant that they had determined the Claimant's pension entitlement to be \$25,500 and the trustees of the pension plan, who took over the administration of the pension plan upon the execution of the trust deed in September 2008, decided that the Claimant would begin to receive his pension, as determined by the actuaries, as of 1st May 2009; that the Claimant was informed of this by letter dated 5th March 2009 and from May 2009 his pension payments of \$2,125 per month were paid to him out of the funds of the pension plan.

[18] Mr. Corbin asserted in his witness statement that no representation was ever made to the Claimant by the Defendant that pension payments were being made to him on behalf of the government as its pension or as the Defendant's contribution to any pension due to the Claimant by the government; that based on the Defendant's records, at no time did the Defendant promise, agree or represent to the Claimant that it would pay him a government pension, nor did it ever pay him a government pension; that all of the pension payments made to the Claimant were payments made pursuant to his entitlement under the Defendant's pension plan; that no provision was ever made in the Defendant's accounts for any liability in respect of government pension.

[19] Mr. Corbin concluded his witness statement with the assertion that the Defendant was not in breach of any agreement with the Claimant, is not liable for the payment of any pension to the Claimant, save and except the pension due to him under the pension plan, and never represented to the Claimant that it would be liable for the payment of any pension other than the pension under the pension plan.

[20] Under cross examination by Learned Queen's Counsel, Sir Clare Roberts, Mr. Corbin testified that when he assumed the chairmanship of the Defendant's Board in May 2004 that it was his first involvement in the management of the Defendant and whatever he said about events prior to May 2004 would be based on his reliance on minutes and other documentation which, to the best of his knowledge, are in the bundle of documents before the Court. He testified that there is an outstanding claim by the estate of Dr. Barthley in relation to pension from the Defendant; that Dr. Barthley received a pension until his death; that it is his understanding that the pension paid to Dr. Barthley was paid as an interim pension. He did concede under cross examination that his allegation that the executive managers of the Defendant were the sole beneficiaries of the purported 1999 revision of the pension plan was not quite correct because the benefits would have been increased by 100% for everybody, but it was only the executive managers who would have benefited from the enhanced pension.

[21] The second and final witness for the defence was Nathaniel "Paddy" James. In his witness statement he stated that he served as Deputy Chairman of the Defendant's Board and also Chairman of the Pension Committee from October 2002. He stated that, as an employee of the State Insurance Department, the Claimant's entitlement to pension would have been as prescribed by the Pensions Act, but that - at the time of his employment with the Defendant - the Claimant had not met the requirements of the Pensions Act and regulations made under it to have become entitled to receive a government pension. He stated also that in 1988 the Defendant established a pension plan for its employees under which the employees contributed 3% of their monthly salaries and the Defendant contributed 6.7% and that the Claimant participated in the pension plan from its inception.

[22] Mr. James stated in his witness statement that the Board became aware in October 2002 that the Defendant had borrowed \$650,000 from the pension plan in order to settle insurance claims arising from Hurricane Luis in 1995 and Hurricane George in 1998; that when this was coupled with the fact that there were several claims made against the funds of the pension plan by past and present employees of the Defendant, the Board took a decision that no further money was to be withdrawn from the funds of the pension plan until the plan was regularized and the issues resolved and that, in the interim, all money due to be paid from the funds of the pension plan would be paid by the Defendant. He stated that when the Claimant reached the retirement age, the review and regularization of the pension plan had not been concluded and so a decision was taken by the Board to pay the Claimant a pension from the funds of the Defendant using the formula applicable to non-established government employees; that once the pension plan issues were resolved and the Claimant's pension was determined, then the appropriate reconciliation would be made and the Defendant would be refunded out of the pension fund the amounts which it had disbursed; that this decision was in keeping with the precedent which had been adopted by the Board in handling pension payments to Dr. Rolston Barthley and Mr. Charles Thomas-Watson, both of whom had attained retirement age before the review of the pension plan was completed.

[23] Under cross examination, Mr. James testified that the pension paid to Dr. Barthley was merely a convenient way of computing a pension using a method that was used by statutory corporations which did not have pension plans and that, as a matter of fact, he recommended this to be done; that statutory corporations did not pay a government pension but they used the same formula to pay pension; that the Defendant had a pension plan but it was not in operation and so the same formula was used to calculate the pension. He testified that Dr. Barthley probably had a case

against the Defendant for the enhanced part of his pension and, further, that Dr. Barthley may well have had such a case.

[24] Written closing submissions were filed by both parties on 4th August 2011, as per the deadline established at the pre-trial review on 17th June 2011.

[25] Having reviewed the totality of the evidence in the case, including the documents disclosed by the parties, and having perused the written closing submissions of the parties, together with the accompanying authorities, and having considered relevant case law, the following conclusions have been arrived at:

1. The Claimant and the Defendant did enter into a contract of employment with effect from 1st January 1986 under terms and conditions which included the payment by the Defendant to the Claimant - upon the Claimant attaining the agreed retirement age of 60 years - of a non-contributory pension paid by government to its retired employees (referred to as a "government pension"). Both parties appeared to be consensus ad idem on this, with the Defendant – represented by its general manager, Dr. Rolston Barthley – intending to so convey by reference to section 10 (1) of the Act. There is no other reason for Dr. Barthley to have made reference to section 10 (1) in his letter to the Claimant other than to convey to the Claimant his understanding that this provision provided for the transfer to the Defendant of the right which the Claimant had as a public officer to receive a government pension upon his attainment of the retirement age of 60. It does not matter that the Claimant - not having served 10 years in the public service or attained the age of 60 by the date of his transfer from the State Insurance Department to the State Insurance Corporation - had not by then become entitled to be paid a

pension, what was transferred to the Defendant was the Claimant's entitlement as a public officer to the receipt of a government pension upon his attainment of the retirement age or, put differently, his accrued pension rights. All the facts suggest that the Claimant too was clearly under the impression - upon agreeing to be transferred to the Defendant's employ - that he was carrying with him his entitlement to a pension upon his attaining the age of retirement. The defence did not attempt to controvert this, but only to establish that the Claimant was mistaken in this impression. That other public officers who had transferred from the public service to statutory corporations - like from the electricity, telephone and water departments of government to the Antigua Public Utilities Authority and from the harbour department to the Antigua Port Authority - had received a government pension from the statutory corporations to which they were transferred was another factor which contributed to the understanding and agreement of the parties to the Claimant's contract of employment that it was a term of the contract of employment that he was entitled to a government pension from the Defendant equivalent to the pension paid to other public officers transferred from government departments to statutory corporations.

2. The quantum of the government pension payable to the Claimant is in accordance with the formula used for the calculation of pensions under the Pension (Non-Established Government Employees) Act, Cap. 310 of the Laws of Antigua and Barbuda Revised Edition 1992, consistent with the formula used by other statutory corporations for payment of non-contributory pensions to public officers transferred to the statutory corporations.
3. The Claimant is also entitled to a contributory pension under the Defendant's pension plan independent of his entitlement to the government pension. The Claimant's entitlement to the contributory pension arises by virtue of the plan having been established for all employees of

the Defendant and the Claimant having paid his contributions to the pension plan from its inception in 1988 until his retirement from the Defendant in 2003.

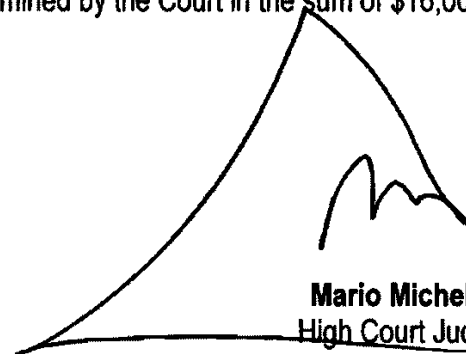
4. The Claimant is entitled to a contributory pension at the same rate of pension as applied to all employees of the Defendant, as there is no evidence or no evidence which satisfies the Court on a balance of probability that the Defendant ever agreed to the so called enhanced pension which the executive managers of the Defendant appeared to have engineered for themselves. As the Chairman of the Defendant's Board testified, it is the Board which - in accordance with section 15 (2) (c) of the Act - would have had to approve the revised pension plan providing for the enhanced pension, and the Board did not do so. No evidence given by the Claimant or his witnesses proved otherwise to the satisfaction of the Court. The statement by the Claimant and Mr. Thomas-Watson that the Board implemented the 1999 revision by making deductions from the salaries of the executive managers on the bases of the enhanced contributions is of no help when one considers that it is the general manager and the financial comptroller – and not the Board - who would have been responsible for making deductions from the salaries of employees and these offices happen to have been occupied by the Claimant and Mr. Thomas-Watson.
5. There is no evidence of any breach of trust by the Defendant to the prejudice of the Claimant. In fact, there is no evidence by the Claimant even of the existence of a trust during the course of his employment with the Defendant which was capable of being breached by the Defendant.
6. There is no evidence of a breach of contract by the Defendant, but only of a misperception and consequent misapplication by the Defendant of certain of the terms of the Claimant's contract of employment with the Defendant, for which the Claimant will be compensated by the Court's

award of retroactive payment by the Defendant to the Claimant of the unpaid amount of his non-contributory pension from May 2009 to the present time and his contributory pension from July 2003 to April 2009, with interest.

7. The Claimant is also entitled to his costs.

[26] The Court accordingly makes the following orders:

1. That the Defendant shall pay to the Claimant a monthly pension calculated in accordance with the Pension (Non-Established Government Employees) Act from May 2009 until his earthly demise, with interest at the rate of 5% from the due date of each payment to the actual date of payment.
2. That the Defendant shall cause to be paid to the Claimant a monthly pension calculated in accordance with the Defendant's 1988 Pension Plan from July 2003 to April 2009, with interest at the rate of 5% from the due date of each payment to the date of actual payment.
3. The Defendant shall pay to the Claimant costs determined by the Court in the sum of \$16,000.



Mario Michel
High Court Judge