

TRINIDAD AND TOBAGO
ST No. 3 of 2003

IN THE INDUSTRIAL COURT
(Special Tribunal)

Between

ESTATE POLICE ASSOCIATION OF TRINIDAD & TOBAGO,
(Party No. 1)

and

LEVER BROTHERS WEST INDIES LIMITED
(Party No. 2)

Coram:

H.H. Mr. Cecil O. Bernard	-	Chairman
H.H. Mr. G. Baker	-	Member
H.H. Ms. J. Rajkumar-Gualbance	-	Member

Appearances:

Mr. D. Mendes, S.C.	-	for Party No. 1
Mr. A. Des Vignes Attorney at Law	-	for Party No. 2

JUDGMENT

Dated: December 12, 2005

Delivered by H.H. Mr. Cecil O. Bernard

Mr. Mustapha Ramjohn (the Constable) was employed as a security officer by Lever Brothers West Indies Limited (the Company) from October 1980 until his services were terminated on the grounds of redundancy on June 23, 2002. At that date he held the rank of Estate Corporal and, by reason of the Supplemental Police Act, Chapter 15:02, was a member of the Estate Police Association (the Association) which pursued this dispute on his behalf.

The Association contended that the Company's dismissal of the Constable was effected in circumstances that contravened the principle of last in first out and that it was, consequently, harsh and oppressive and not in accordance with the principles of good industrial relations practice.

Initially the matter was handled on behalf of the Company by Mr. George Bell, Human Resources Officer but after Mr. Bell left the employ of the Company Mr. des Vignes appeared for the Company.

Mr. des Vignes immediately conceded that the dismissal of the Constable was effected in circumstances that were not in accordance with the principles of good industrial relations practice and proposed that the tribunal should proceed, based on such *viva voce* evidence as was considered appropriate, together with submissions from the Parties, to an assessment of compensation; a proposal which found favour with Mr. Mendes.

The Constable was examined and cross-examined as to his financial situation since his dismissal, his efforts to obtain employment, his having found and left a number of jobs and his present employment. He was forty-six (46) years old and in receipt of a salary of six thousand and eighty dollars (\$6,080) per month when his services were terminated. In addition he was a member of the Company's health plan and 3% of his basic pay was deposited on his behalf into his credit union account. When he worked certain shifts he was paid a shift bonus.

The Constable had no disciplinary matters during his employment and believed that he would be required to retire at age sixty (60). He told the Court that after his dismissal he was so traumatized that he was unable to go anywhere. As he put it "I just stayed home lying around." It was some five months before he was able to seek other employment, which he succeeded in getting at a salary of two thousand seven hundred dollars (\$2,700) per month. He remained in that job for two months then found another job in which he was paid three thousand dollars (\$3,000) per month. After spending two months in that job he secured employment at another company at a salary of two thousand, seven

hundred and sixty dollars (\$2,760) per month. He remained in that job from June 2003 until February 2005 when he went to work with Coosal's Group Security as an Estate Inspector at a salary of four thousand, five hundred and sixty dollars (\$4,560) per month.

In cross-examination the Constable admitted that when his employment was terminated he was paid the sum of one hundred and thirty thousand dollars (\$130,000) in severance payment and that during the initial five months after his dismissal he lived off that sum and other sums which he had in savings, but denied that his failure to seek employment during that period had anything to do with the fact that he had money available on which to live. He explained his failure to seek employment for some five months by saying that he was too ill psychologically to perform in a job. He did not consult a doctor about the state of his health but relied on counselling from his religious leader.

The Constable admitted that prior to his dismissal he was aware that the Company wanted to reduce its workforce by way of voluntary separation but because he had not applied for such separation and because he was not "last in" he considered his position safe and was shocked by the turn events took.

On behalf of the Association Mr. Mendes submitted that the Court was not limited in making its award to considerations of contract where the proper measure of damages would be based on a failure to give adequate notice. In this particular case the award of compensation was at large and should be determined on the basis of the loss suffered by the Constable, including the loss of his job itself (in which Mr. Mendes contended that the constable had property), the loss of self-esteem, the bewilderment of the Constable at the manner of his dismissal, his general loss of earnings as opposed to his loss of earnings between his dismissal and his finding a new job, his loss of earnings between his dismissal and the date of the court's award and an element of future loss of present as well as enhanced earnings through promotion, etc., to the age of retirement.

Mr. des Vignes submitted that the Court was obliged to take into account the sum paid to the Constable following his dismissal and to deduct from any global award the sum he already received.

Mr. des Vignes conceded that dismissal in the circumstances of this case would produce on someone in the position of the Constable a measure of stress but Mr. des Vignes was not convinced that such a person could reasonably become immobilized to the extent of being unable for some five months, to seek employment and if he did become immobilized he should establish that fact by medical evidence. In the absence of such evidence the duty to mitigate his loss required the Constable to seek employment as soon as reasonably possible. For the Constable to defer this obligation of mitigation would break the chain of causation at some point beyond which the Company's responsibility would not extend.

Mr. des Vignes referred the Court to Trade Dispute No. 119 of 1993 between Seamen and Waterfront Worker Union and the Port Authority of Trinidad and Tobago and Trade Dispute Nos. 240 to 266 of 1999 between the Public Services Association and the National Insurance Property Development Corporation.

In both cases a significant number of workers was retrenched in circumstances where, to use the words of the judgment in TD 240 to 2966 of 1999,

“it was found that the manner in which (certain workers) were retrenched was tantamount to their being dismissed.”

The Court in these cases made awards of eighty-five percent (85%) in TD 119 of 1993 and ninety percent (90%) in TD 240 to 266 of 1999 respectively in excess of the sums paid to the workers as severance benefits. Mr. des Vignes submitted that awards that amount to between three and four years' salary are excessive and suggested that in this case a reasonable approach would be to look at what the worker has earned over the last three years, i.e. approximately one hundred and thirty thousand dollars (\$130,000) and to

add to that an award of compensation of seventy-five thousand dollars (\$75,000), making a total of two hundred and five thousand dollars (\$205,000) which would equate roughly to three years' salary in the position from which he was dismissed. Mr. des Vignes asked the Court to not follow the "tariff" of 85 - 90% used in TD 119 of 1993 and TD 240 to 266 of 1999.

Both attorneys expressed the view that disparity in awards made by the Court in similar cases made it difficult to advise clients as to the likely outcome in any particular matter; Mr. des Vignes complaining that attorneys were put in a difficult situation in advising employers of the extent of their exposure in dismissal cases. It was suggested that this was an appropriate case in which the Court should take the opportunity to elaborate on the grounds on which awards are made.

The Court recognizes the validity of the complaint that in the absence of a "tariff" it was difficult for parties to forecast the likely quantum of an award. However, predictability of such quanta may encourage employers, those few who may not apply the highest standard of ethics in the conduct of their affairs, to dismiss employees not on the basis of fairness but on the basis of economic calculations. In the view of the Court each case must be determined on its own merits and in determining compensation for dismissal each worker's situation must be viewed in the light of the particular circumstances of his or her own dismissal.

It is not through timidity that the Court seeks to avoid setting out precise grounds with exact percentages for its awards. The Court does so as a means of keeping faith with the provisions of section 10 (3 to 6) which require the Court to not set a tariff outside of which its awards may be open to challenge. The Court must leave open the possibility of doing equity where special circumstances surrounding a dismissal may require a departure from the beaten path.

There is already a tariff set by section 18 of the Retrenchment and Severance Benefits Act, 1985 for the legitimate retrenchment of workers. What we are being asked to do is

to set a tariff for their illegitimate retrenchment or illegitimate dismissal on the ground of redundancy. To do so would be to substitute judicial precision for the deliberate legislative imprecision of section 10 (3 to 6) which read as follows:

- “ (3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall –
- (a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;
 - (b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations.
- (4) Notwithstanding any rule of law to the contrary, but subject to subsections (5) and (6), in addition to its jurisdiction and powers under this Part, the Court may, in any dispute concerning the dismissal of a worker, order the re-employment or re-instatement (in his former or a similar position) of any worker, subject to such conditions as the Court thinks fit to impose, or the payment of compensation or damages whether or not in lieu of such re-employment or re-instatement, or the payment of exemplary damages in lieu of such re-employment or re-instatement.
- (5) An order under subsection (4) may be made where, in the opinion of the Court, a worker has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice; and in the case of an order for compensation or damages, the Court in making an assessment thereon shall not be bound to follow any rule of law for the assessment of compensation or damages and the Court may make an assessment that is in its opinion fair and appropriate.
- (6) The opinion of the Court as to whether a worker has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice and any order for compensation or damages including the assessment thereof made pursuant to subsection (5) shall not be challenged, appealed against, reviewed, quashed or called in question in any court on any account whatever.”

To attempt to set a tariff, with heads of damages broken down into percentages for each such head would run counter to the intent of the legislation, which is not to say that the Court is entitled to act by whim or to determine the quantum of an award by tossing a coin. The Court does keep in mind the level of awards made in similar cases, departing from those levels where special circumstances peculiar to a particular case may make such departure necessary. In addition the Court considers a wide range of matters under the umbrella of the term "fair and just" as used in section 10 (3) (a).

Without attempting to be exhaustive it would be fair to say that among the matters we considered in arriving at the quantum of compensation for this Constable in this particular case were:

- level of awards in roughly similar cases,
- the age of the Constable, his length of service and the quality of his service (approximately twenty-two (22) years, unblemished),
- the efforts, if any, made by the Constable to mitigate his loss,
- the loss of a reasonable expectation of continuity in his job, given good behaviour,
- the loss of pension rights,
- whether psychological harm to the Constable, if established, would be a proper head of compensation,
- any benefits already received

These considerations, appropriate we think, in the circumstances of this case, may not be appropriate in other cases and we are not attempting to enumerate heads of compensation that must be followed in any other case. It will be appropriate, for example, in most cases of dismissal, to consider whether the worker's conduct contributed to the dismissal or whether the allegation against a worker had permanent and damaging effect on his or her character. All we say is that the matters we set out above were among those which we considered in this case.

Having taken these matters into account we wish to point out that the sum already paid to the Constable as severance benefits we regard as compensation for his past service. The award which we make now represents damages for his dismissal from a job in which he had a reasonable expectation of continuing, that dismissal being effected in circumstances that were harsh and oppressive and not in accordance with the principles of good industrial relations practice.

We consider fair and appropriate in this case an award in the sum of two hundred thousand dollars (\$200,000) as damages to the Constable. The said sum of two hundred thousand dollars (\$200,000) is to be paid to the Constable by the Company within thirty (30) days of the date of this judgment.

Cecil O Bernard

G. Baker

J. Rajkumar-Gualbance