Privy Council Appeal No. 36 of 1991

Arthur Cole and Others *Appellants*

v.

George Bennett Bryson and Co. Ltd. *Respondents*

FROM

THE COURT OF APPEAL OF ANTIGUA AND BARBUDA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND FEBRUARY 1993

Present at the hearing:-

LORD TEMPLEMAN
LORD BRIDGE OF HARWICH
LORD OLIVER OF AYLMERTON
LORD JAUNCEY OF TULLICHETTLE
LORD WOOLF

*[Delivered by **Lord Bridge of Harwich**]*

The proceedings giving rise to this appeal are a test case to determine the basis of calculation of the pension payable to waterfront workers under the terms of a non-contributory pension scheme comprised in a collective agreement dated 20th July 1987 between the members of the Antigua Shipping Association and the Antigua Workers Union. The appellants are former employees of the respondent company who have retired and are entitled to pensions in accordance with the agreement. The terms of the pension scheme are set out in a schedule to the collective agreement, paragraph 3 of which provides:-

> "The amount of pension will be calculated according to the length of service and the retirement rate of pay of the employee, which shall be the average weekly rate for the last year of employment or for the last three years prior to retirement, whichever is the greater, as here set out.

	Years of Service		
	20 years and under 25 years	25 years and under 30 years	30 years and over
Percentage of payment weekly retirement rate"	25%	35%	45%

[6]

The point at issue is how the "average weekly rate" which is to determine the "retirement rate of pay" is to be calculated. The appellants contend that the basis of the calculation is the worker's total earnings for the last year or the last three years before retirement, as the case may be, divided respectively by 52 or 156. The employers contend that the total for the one year or three year period of which the weekly average is to be taken is limited to earnings which were themselves based on an hourly rate of pay and, in particular, excludes earnings referrable to "royalties" payable for the loading and unloading of container ships.

The appellants failed before the Industrial Court, whose decision was affirmed by the Court of Appeal. In accordance with the judgment of the Board delivered on 1st February 1993 in *Sundry Workers (represented by the Antigua Workers Union) v. The Antigua Hotel and Tourist Association* (Privy Council Appeal No. 35 of 1991) an appeal lies to Her Majesty in Council in such a case under section 122(1)(a) of the Constitution of Antigua and Barbuda where "the matter in dispute ... is of the prescribed value or upwards". It is common ground that this condition is here satisfied.

Appeal from the Industrial Court to the Court of Appeal lies only on the grounds specified by section 17(1) of the Industrial Court Act 1976. The only ground here invoked is under section 17(1)(d) "that any finding or decision of the Court in any matter is erroneous in point of law". It is also right to refer to section 9(1) of the Act which provides:-

> "9.(1) In the hearing and determination of any matter before it, the Court may act without regard to technicalities and legal form and shall not be bound to follow the rules of evidence stipulated in the Evidence Ordinance, but the Court may inform itself on any matter in such manner as it thinks just and may take into account opinion evidence and such facts as it considers relevant and material, but in any such case the parties to the proceedings shall be given the opportunity, if they so desire, of adducing evidence in regard thereto."

The Industrial Court, presumably in reliance on this provision, received some evidence indicating the parties' subjective opinions of the effect of the agreement they had made, which was not strictly relevant or admissible. But at the end of the day both the Industrial Court and the Court of Appeal directed themselves in accordance with the conventional and well established principles governing the interpretation of contractual documents. Accordingly the sole question for their Lordships' determination is whether the Industrial Court and the Court of Appeal construed paragraph 3 of the pension schedule to the collective agreement correctly. If they misconstrued it, the decision of the Industrial Court was erroneous in point of law and should have been reversed.

Clause 1 of the collective agreement is entitled "Wages" and reads:-

> "a) The rates of wages for workers covered by this Agreement shall be as shown in the Schedule of Wages attached to this Agreement.
>
> b) These rates represent a general increase of 15% during the first year, 8% on the then existing rates during the second year, and 7% on the then existing rates during the third year of the Agreement.
>
> c) The rates shown are without prejudice to certain specific items which received special consideration."

The schedule referred to lists 12 categories of hourly paid workers and sets out, in three columns, the basic hourly wages for each category payable for the three years from 20th July 1987 reflecting the percentage increases referred to in clause 1(b). Clause 2 prescribes the hours of the "normal working day" as from 7.00 a.m. to 12.00 noon and 1.00 p.m. to 4.00 p.m. on Mondays to Fridays. Clause 3 provides for overtime to be paid at the rate of time and a half, double time or triple time, according to circumstances, for work outside the hours of the normal working day on Mondays to Fridays and for work on Saturdays, Sundays and public holidays. It appears at one time to have been contended for the respondents that the "average weekly rate" on which the pension was to be based should be calculated by reference to the basic hourly rate of pay alone. But this basis of calculation was never adopted by the employers in practice, is clearly unsustainable and was not argued before their Lordships.

Some reliance was placed, for the respondents, on the terms of clause 1(c). But their Lordships think the sole purpose of this sub-clause is to make clear that the basic rates of pay set out in the wage schedule are subject to adjustment in the various special circumstances for which provision is made in later clauses and that this sub-clause sheds no light on the meaning of paragraph 3 of the pension schedule.

Clauses 17, 18 and 19 provide for rates of pay to be enhanced by stated percentages for work which involves handling dangerous cargo, hot cement or refrigerated cargo. Clause 29 provides for certain annual incentive bonuses quantified by a percentage enhancement of "basic pay". But sub-clauses (b) and (c) of clause 29 provide as follows:-

> "(b) For the purpose of this clause, basic pay will be the normal hourly rates multiplied by the number of hours worked up to a maximum of 8 hours per day.

(c) Overtime hours and hours worked on Saturday and Public Holidays will be counted as straight time and be included for the purpose of (b) above."

As with overtime rates, there appears to have been no dispute in practice that the enhanced rates of pay under clauses 17, 18 and 19 and the annual incentive bonuses payable under clause 29 were all to be taken into account for the purpose of calculating the "average weekly rate" under paragraph 3 of the pension schedule.

The question in dispute centres upon clause 34 headed "Containers", which provides as follows:-

"(a) When Roll-on/Roll-off containers ships are being unloaded; 21 men will be employed and be guaranteed 12 hours pay at the prevailing rate (premium rates on a Sunday, Saturday Public Holiday), provided work is actually done on the ship. Should the worker be called and the ship does not arrive, Clause 6(b) will apply (eight (8) hours at prevailing rate).

(b) A royalty of $75.00 will be paid for each 20 ft. and $95.00 for each 40 ft. lift on/lift off container of cargo discharged or loaded. The total royalties will be equally divided between the gang of workers unloading the containers.

(c) A premium of $11.00 will be paid for each container stacked two (2) high and $22.00 for each container stacked three (3) high. Those premiums will only apply to containers stacked two and three high and not to those containers on deck, and will also apply to containers consigned to Antigua.

(d) A royalty of 4 hours pay (at Longshoremen rate) will be paid for each container unloaded for Antigua. The total amount to be divided between the Longshoremen gang.

(e) A premium of $22.00 will be paid for each container not consigned to Antigua which it is necessary to shift so as to be able to unload the containers consigned to Antigua.

(f) The Union shall have the right to re-open the question of a royalty on Roll-on/Roll-off container for the third year of this Agreement."

It is common ground that this clause which appears in the 1987 collective agreement or a clause similar to it was first introduced as a result of negotiations between the union and the employers into an earlier collective agreement sometime in the 1970's when enhancement of the port facilities in Antigua made possible the use of container ships. Its evident purpose was to mitigate the loss of earnings which dock workers would otherwise sustain from the reduction in the volume of work required in the loading and unloading of loose cargo. It is again common ground that at the time of

the introduction of the clause the relevant provision in the pension schedule which had appeared in earlier collective agreements remained unaltered.

It is to be observed that the basis on which workers are to be paid under clause 34 differs according to whether the container ship on which they are working is roll-on/roll off or lift on/lift off. In the case of the former a member of the gang is guaranteed 12 hours pay at the prevailing rate though the number of hours worked may be less than 12. In the case of the latter a member of the gang receives his share, as appropriate, of the royalties and premiums payable under sub-clauses (b), (c), (d) and (e) in addition to his wages at the appropriate hourly rate for the hours actually worked. Put shortly, the worker's earnings when working on lift on/lift off container ships are a compound of hourly rates and piece rates.

Accordingly, the question for determination is whether in clause 3 of the pension schedule, read in the context of the collective agreement as a whole, the "average weekly rate" is to be the weekly average of total earnings over the relevant period of one year or three years or only of those earnings which have been quantified by reference to an hourly rate of pay in contrast to earnings quantified by reference to a piece rate of pay. With all respect to the view taken by the courts below it seems to their Lordships that the latter interpretation imposes a wholly artificial limitation on the scope of clause 3 for which they can find no warrant either in the language or in the context of the clause. The "retirement rate of pay" is to be a weekly sum of which the pensioner will receive a given percentage according to his length of service. But the calculation of that weekly sum can only be arrived at by taking a total figure for the period of one year or three years and dividing it by the appropriate number of weeks. What the worker receives as his share of royalties or premiums in the course of the year is just as much part of his pay as amounts calculated at hourly rates for hours worked. In their Lordships' judgment the total figure from which the weekly average rate is to be calculated is the total amount of pay or earnings of all kinds which the worker has received in the relevant period as remuneration for his work.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed and that it should be declared that on the true construction of clause 3 of the pension schedule to the collective agreement dated 20th July 1987 the average weekly rate there mentioned is the weekly average of all earnings received by the pensioner in the relevant period of one year or three years including sums paid by way of royalty or premium pursuant to clause 34 of the agreement. The respondents must pay the appellants' costs before the Board.