IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

Claim No. ANUHCV2002/0218

BETWEEN:	JAMES LOWHOY	- Claimant
	and	
	LIAT (1974) LIMITED	- Defendant

Appearances:

E. Ann Henry for the Claimant

Nelleen Rogers-Murdoch for the Defendant

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2004: July 19 & 30

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JUDGMENT

[1] FERDINAND, J. (Ag.): The Claimant seeks redress from the Court, essentially at this stage, requiring the Defendant, his employer, to reimburse him monies deducted from his salary by the Defendant to pay for certain training received by the Claimant.

[2] By Order of the Court dated 20th September 2002 made pursuant to Part 21 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("CPR 2000") the Claimant was appointed a Representative Claimant in these proceedings on behalf of 20 other named pilots employed by the Defendant Company who are in a similar situation to the Claimant in so far as the issues in this case are concerned. This is therefore a representative action and the Court's judgment herein will bind everyone whom the Claimant represents: see Rule 21.3 (1) of CPR 2000.

[3] The Claimant applied to the Defendant for employment as an airline pilot in or about June 2000. During discussions prior to the Claimant becoming employed by the Defendant the Claimant was told, in effect, that he would not obtain employment with the Defendant

unless he agreed to pay certain monies to the Defendant reflecting part of the cost of his training to be certified as a Dash-8 aircraft pilot. The Defendant required the Claimant to sign certain documentation evidencing this obligation to be undertaken by the Claimant, and the Claimant did so sign an Agreement and a promissory note.

[4] According to the signed Agreement dated 20 June 2000 the Claimant agreed to pay to the Defendant Company EC$19,500.00 in installments of $500.00 basically each month for three years as reimbursement for part of the cost of the pilot training arranged for the Claimant by the Defendant Company. The Agreement further stated that the actual cost of the said training was EC$45,000.00 and if the Claimant "voluntarily quit" his service with the Defendant before the expiration of three years of continuous employment with Defendant, he agreed to pay a total of $45,000.00, towards which he would receive credit for any monthly installments already paid by him.

[5] Under the Agreement the Claimant would not be liable to pay the Defendant for the cost of his training if:

(a) he was unable to successfully complete the training to work as a pilot for the Defendant, or

(b) he was terminated by the Defendant within three years of his employment, save that installments already paid prior to such termination would be kept by the Defendant.

[6] The collective agreement between the Defendant and its pilots represented by their Association, the Leeward Islands Airline Pilots Association ("LIALPA"), stipulated in Section V11, Article 2:

"Article 2

(a) Pilots shall, at the Company's expense, including the payment of examination fees, undergo such courses of instruction as may be required by the Company's Operations Manual. The Pilot's entitlement to Leave or days off shall not be prejudiced by his undergoing such course or courses of instruction.

(b) In the event that it is subsequently determined that the course of instruction was inadequate, the Company shall be responsible for additional training, including the payment of one re-sit.

(c) The Company shall not be responsible for expenses related to upgrading of a Pilot's personal Licence (e.g. from Commercial to ATP) or re-sits of any examinations, except as provided for in (b) above.

Article 3

The Company shall provide full training facilities for type conversion, including training in the use of any specialised equipment or techniques and adequate route familiarization. The Company shall also provide facilities for the renewal of Instrument Ratings."

[7] The evidence is that prior to the employment of the Claimant by the Defendant, the Defendant did not ordinarily arrange training via a simulator in Canada. The cost of such simulator training was higher than the local training methods previously utilized by the Defendant Company which involved use of its own "live aircraft". In addition to being more expensive, simulator training required the Defendant Company to pay cash up front to meet the cost of such training.

[8] The fact that the Defendant Company faced financial difficulties and its aim of creating disincentives for pilots to receive expensive initial training and then leave the Company to work for its competitors was discussed with the Claimant (and other job applicants) as the reason for requiring the signed commitments to repay some training costs.

[9] In this representative action the Claimant seeks orders from the Court relieving the Claimant and the other representative parties from what, on the face of it, are contractual obligations to repay certain training costs to the Defendant Company. The Claimant attacks the contractual obligations on two grounds. First, the Claimant submits that he was induced to sign the contract promising to repay as a result of false representations made to him by the Defendant's management. The second legal basis on which the purported contractual obligation is challenged is grounded in Section C7(iii) of the Antigua and Barbuda Labour Code, Cap. 27.

[10] The false representations alleged by the Claimant are said to arise from the fact that the Claimant was told that it was a condition precedent of the Defendant agreeing to employ the Claimant that he first sign the individual agreement to repay the training costs. This was alleged to be a false representation in that, according to the Statement of Claim:

(i) "Prior to the date on which the Defendant entered into the Agreement time *(sic)* of entering into the Contract *(sic)* with the Claimant, the Defendant had entered into a Collective Agreement with the Leeward Islands Airline Pilots Association (hereinafter referred to as "LIALPA") and the said Collective Agreement was in full force and effect as at the date on which the Defendant entered into the Contract with the Claimant. It was a term of the said Collective Agreement that the same would apply to all Pilots in the service of the Defendant from its effective date, namely, the 23rd August, 1996.

(ii) At the time of the Claimant's signing the Contract on the 20th June, 2000 the Defendant had a contractual obligation in the said Collective Agreement with all Pilots in its employ, by Section VII, Article 2 (a) and Article 3, to pay all costs associated with such training as required by the Company's Operation Manual.

(iii) Included in the categories of Pilots to which the said Collective Agreement applied was the category of Trainee Pilot into which category all Pilots were placed upon their employment with the Defendant, and in particular, into which category the Claimant was placed on his employment with the Defendant on the 21st June, 2000.

(v) the training, the costs for which he had agreed to reimburse the Defendant, was the same training as was bound to be paid by the Defendant in accordance with the said Collective Agreement with all Pilots in its employ, including Trainee Pilots."

[11] At trial, the Claimant also contended that the Defendant failed to disclose to the Claimant the existence or material terms of the collective agreement between LIALPA and the Defendant Company, and that such failure, in the circumstances of the case, entitled the Claimant to avoid the contractual commitments which he signed.

[12] Under cross-examination the Claimant repeatedly answered that he "could not recall" or "did not remember" certain matters which one would have expected him to answer definitively, in light of the evidence in his witness statement. The Claimant's witness Captain H. Michael Blackburn testified that he had written a letter dated 7 July 2003 after he had read the witness statement in this matter signed by Captain George Arthurton. Under cross-examination Captain Blackburn acknowledged that Captain Arthurton's witness statement was dated 27 February 2004. Although Captain Balckburn then sought to correct his earlier testimony by proffering a different account as to when he had heard Captain Arthurton's remarks which influenced the contents of his letter to Captain DaSilva, this contradiction damaged Captain Balckburn's credibility with the Court in this case. For the foregoing reasons, whenever the evidence of the Defendant's witnesses conflicts with that of the Claimant or of Captain Blackburn, this Court prefers and accepts the evidence of the Defendant's witnesses.

[13] In contrast to the Claimant and Captain Blackburn's testimony, the testimony given by the witness Ewing Dorsett generally impressed the Court as being a truthful and accurate account.

[14] I do not accept that the Claimant was told by any employee of the Defendant Company of any fact that was inaccurate in relation to the collective agreement between LIALPA and the Defendant Company. I also find as a fact that it was made clear to the Claimant as to what the contractual commitments were that he was in fact being called upon to sign.

[15] Even if the Claimant had not been told of the detailed terms of the collective agreement between LIALPA and the Defendant, this would not entitle him to avoid the contractual obligations that he signed. This is because, as the Defendant's counsel has submitted, the law only places a duty of disclosure on certain classes of contracting parties, and an employment contract does not fall within those categories.

[16] For the foregoing reasons I hold that the Claimant is not entitled to set aside or avoid his obligations under what I will refer to for convenience as "the individual contract" (to distinguish it from the collective agreement, most terms of which also applied to the Claimant after he became employed by the Defendant Company).

[17] I move now to consider the second ground on which the individual contractual obligations to repay the training costs is attacked, namely Section C7 (iii) of the Antigua and Barbuda Labour Code. Section C7 (iii) reads as follows:

> " It shall be lawful for an employer and employee to enter into an individual contract of employment, covering terms of employment, but- …
>
> (i) ….
>
> (ii) ….
>
> (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 unit of which the employee is a part, within the definition of section J4, shall be null and void."

[18] The Claimant's counsel contended, *inter alia*, that:

(a) LIALPA was recognized by the Defendant as being the sole agent for negotiating agreements with the Defendant Company on behalf of the pilots;

(b) the Defendant Company's management initiated discussions with LIALPA concerning the new policy of seeking repayment of the training costs because this policy was a departure from the terms of the collective agreement in force, and the Defendant wanted LIALPA's approval of this new policy;

(c) the individual agreement dated 20 June 2000 "would have no life outside of the employment relationship and as such, it must be treated as a part of the employment contract this triggering the application of Section C7 (iii) of the Antigua *(sic)* Labour Code;" and

(d) the new policy was disadvantageous to the pilots who were employed on the basis of it.

[19] As a general rule, at common law intended parties to an employment contract are legally at liberty to agree upon such terms as they deem appropriate. Section C7 (iii) of the Antigua and Barbuda Labour Code curtails this common law freedom to contract. The restrictions imposed by Section C7 have a number of elements. One such element is that the person who the Section protects must be an "employee." It is common ground that the Claimant satisfied this element because at the time he signed the individual contract of employment he undoubtedly fell within the Labour Code's definition of an "employee" as being "any person who enters into or works under or *stands ready (my emphasis)* to enter into or work under, a contract with an employer, personally to perform any services…."

[20] This Court also accepts that the provision for repayment of the training costs stipulated in the Claimant's individual contract of employment ought to be regarded as one "which, to the employee's disadvantage, conflicts with the terms of" the collective agreement between the Defendant Company and LIALPA. Although the cost, method of payment by the Defendant, and the manner of conducting the training obtained by the Claimant differed from that which was previously granted to LIAT pilots or applicants, the collective agreement did not limit its scope to any particular cost level or to any particular place or manner of training.

[21] LIALPA and the Defendant Company acknowledge in the collective agreement that LIALPA is "the sole agent for negotiating Agreements with the (Defendant) Company on behalf of the Pilots ….": see Section 1, Article 1 of the Collective Agreement. The immediately preceding paragraph of the collective agreement states:

> "This Agreement is made and entered into by and between LIAT (1974) Ltd. (hereinafter referred to as "The Company") and the Airline Pilots in the service of the Company as represented by the Leeward Islands Airline Pilots Association (hereafter referred to as the "Association")."

[22] It is therefore expressly stated in the opening paragraph of the collective agreement that LIALPA only embraces "Pilots in the service of the Company." There is no evidence

before the Court that the Claimant or any of the other pilots covered by this action were members or a "part of" LIALPA at the date on which they signed their individual contracts of employment. It may be that LIALPA's constitution does not permit such membership, but this Court is not in a position to make any determination in that regard.

[23] What is clear is that one of the elements of Section C7 (iii) which must be satisfied if its protection is to be triggered is that the collective agreement, (what may be described as "the overriding collective agreement") must be one which is "in effect between the employer and a trade union which is the sole bargaining agent of the bargaining unit <u>of which the employee is a part</u> …."

[24] The evidence which this Court accepts is that when the Defendant Company's management mentioned the proposed new policy to Captain Blackburn and Captain Cameron in their capacity as representatives of LIALPA, the response initially received was that the new policy could not affect pilots already in the employ of the Defendant Company because the collective agreement provided otherwise.

[25] It appears that some members of LIALPA later voiced the view that the new policy of reimbursement of training costs, whether partial or total, as provided for in the individual contracts of employment amounted to unfair impositions on new pilots rather than a reasonable response to the past exodus of trained pilots and the Defendant Company's financial difficulties. The Claimant's witness Ewing Dorsett testified that almost a month before he signed the individual contract to repay, the Defendant Company's management had discussed with him, *inter alia*, concerns about the Company's financial position, concerns about the cost of training pilots who left the Company very shortly after receiving expensive training at the Company's expense, and the proposed new policy to address these concerns. He said he understood that the new policy would require him to sign a commitment to reimburse the cost of certain training and he was willing to do this. Dorsett testified that he later felt that he was being "pulled in two directions" because he felt that his signing of the individual contract to repay was "not viewed in a good light" by some of

the members of LIALPA. It is not the role of this Court to judge the reasonableness or otherwise of the "new policy" introduced by the Defendant Company.

[26] A Court ought not to expand the scope of operation of legislation beyond the language used by Parliament. Parliament must be taken to have given due and deliberate consideration to the issues involved and to have decided as a matter of policy upon the scope of operation of Section C7 (iii) of the Antigua and Barbuda Labour Code. On its present wording as interpreted by this Court, Section C7 (iii) creates an incentive for persons to join trade unions even prior to becoming employees in a particular enterprise. It may be that this was one of the objectives of Parliament when it enacted Section C7 (iii) in the terms in which it did.

[27] A more extended or more restricted scope of operation of Section C7 (iii) could have economic consequences that could not only affect individual workers (or potential workers) and individual employers' enterprises, but also the wider economic environment and investment climate in Antigua and Barbuda. These are matters that Parliament would no doubt have considered in framing the legislation in the terms in which it did. Consideration of such matters and the statutory formulation of what is regarded as an appropriate legislative policy is the constitutional role of Parliament. In contrast, the role of the Courts as the judicial branch of Government is to give effect to the legislative expressions of Parliament as reflected by the actual words used in the statutory provision being applied. Parliament is at liberty to amend legislation at any time if a judicial interpretation of same does not accord with the current views of Parliament, given the policy considerations.

[28] Only in exercise of its constitutional responsibility to pronounce void any legislation that is in conflict with the Constitution can the Court refuse to give effect to legislation. This case does not involve any exercise of such power of judicial review of legislation and the Court must apply the legislation as it is worded.

[29] This Court must therefore interpret and apply the provisions the Labour Code as enacted by Parliament. As has been earlier indicated, one of the elements mandated by Section C7 has not been satisfied in the circumstances of this case and accordingly the Claimant's case founded on Section C7 is therefore dismissed.

[30] The Claimant is ordered to pay the Defendant's Costs in the sum of $25,000.00 as was agreed by Counsel at the trial.

J EMILE FERDINAND
High Court Judge (Acting)