

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 4 OF 2010

BETWEEN:

NATASHA KIRWAN

Employee

And

JUMBY BAY ISLAND COMPANY LIMITED

Employer

Before:

The Hon. Philip A. Pilgrim

President

The Hon. Oscar Frederick

Member

The Hon. M. Glendina McKay

Member

Appearances:

Mr. Lawrence Daniels - Attorney-at-Law for the Employee

Mrs. Fidela Corbin-Lincoln of Simon Rogers Murdoch

Attorneys-at-Law for the Employer

2011: April 27

2011: June 16

JUDGMENT

PILGRIM, P

Introduction

- [1] The Employee Natasha Kirwan is twenty-eight years of age. She resides at Paynter's Estate, St. John's in Antigua.

- [2] Jumby Bay Island Company Limited is registered under the Laws of Antigua and Barbuda. It provides utility, security and transportation services for the island of Jumby Bay. In order that these functions are executed it operates two (2) ferries.
- [3] The Employee was employed by Jumby Bay as a 'Mate' from March 9, 2007. In her capacity as a 'Mate' she was responsible for ensuring the boat or ferry is properly tethered at the dock, take care of the guests and their luggage and the partial cleaning and maintenance of the ferry.
- [4] Her hours of work were eight (8) hours per day for a duration of a five (5) day week. She worked different shifts namely 6 am to 2:30 pm, 2:30 pm to 11 pm or the 11:00 to 7 am periods. For her work she earned EC\$1,412.00 every other week.
- [5] Jumby Bay operated two (2) ferries. One of them journeyed from the hotel to Parham. This ferry transported the hotel's staff and collected goods. The other ferry transported the resort's guests and homeowners.
- [6] (a) The Employee worked with Jumby Bay until March 01, 2009. The Employer, by its letter of termination to her dated February 05, 2009, stated *inter alia* as follows:

"Dear Ms. Natasha Kirwan,

Due to the closure of Jumby Bay Resort and reduced ferry operation until the reopening of the resort, it has been decided to make your position redundant and therefore Jumby Bay Island Company Limited will be terminating your employment as of March 01, 2009."

- (b) The Employer paid to the Employee the following sums:
 - (i) Severance pay of EC\$3,388.80,
 - (ii) Vacation pay of EC\$423.60,
 - (iii) Termination notice of EC\$1,412.00,
 - (iv) A gift of EC\$6,675.00 from ***“the House Owners of Jumby Bay.”***

[7] After receipt of the letter of termination the Employee stated that she made applications to the Sandals Resort Watersports, TradeWinds Cruise Club, St. John’s Pilot Station and the Antigua and Barbuda Police Force. She also applied to Gloria’s supermarket and Silverline Supermarket.

[8] She obtained a part-time position in her aunt’s supermarket and bakery in February 2010. She works on weekends. She earns \$100.00 as a result. This business is not expected to operate after April 2011.

Legal proceedings

[9] The Employee commenced legal proceedings by filing a Reference on February 23, 2010. In that Reference the Employee petitioned the Court for a determination of (a) whether or not she was unfairly dismissed and (b) whether or not her position still exists at Jumby Bay.

[10] The Employee’s Memorandum was filed on February 23, 2010. In that document the Employee claims damages ***“for being out of a job for ten (10) months”*** and costs.

[11] The Employer’s Memorandum was filed on April 15, 2010. In that document the Employer states at paragraph 10 that ***“a redundancy situation existed***

which entitled it to terminate the Employee pursuant to Section 58 (1) (c) of the Antigua and Barbuda Code.....”

The issues

[12] The relevant issues are as follows:

- (i) Whether in the circumstances of this case the work which the Employee was paid to do as at March 01, 2009 had ceased or substantially diminished to result in a redundancy?
- (ii) Did the Employer act reasonably or unreasonably in its dismissal of the Employee?
- (iii) If the Employee was unfairly dismissed what is the measure of damages which is due to her?

The law

[13] Section C56 of the Labour Code provides as follows:

“C56. Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer; and no employer shall dismiss any such employee without such cause.”

[14] Section C58 (1) (c) of the Labour Code states as follows:

“C58. (1) A dismissal shall not be unfair if the reason assigned by the employer therefor

(a)

(b)

(c) is that the employee was made redundant;

(d)

(e)

Provided, however, that there is a factual basis for the assigned reason.”

[15] Section C 58 (2) of the Labour Code provides as follows:

“The test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably but, even though he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee’s dismissal.”

[16] The term “**redundancy**” is defined at Section 3 as amended by the 1998 amendment to the Labour Code in the following manner:

“redundancy” means a situation in which by virtue of lack of customers orders, retrenchment, the installation of labour saving machinery, an employer’s going out of business, a force majeure, or any other reason, work which a person was last employed to perform has ceased or substantially diminished.”

[17] In *Civil Appeal No. 28 of 2001 Sundry Workers and King’s Casino Limited*, **Byron C. J.** stated as follows:

“I think that the main point of relevance to this case is that it is pellucid that for a redundancy there must be the cause and the effect. The effect being that the work has ceased or substantially

diminished. In the Industrial Court reference No. 20 of 1988 Antigua Workers' Union v Antigua Gases it was pointed out that the definition seems to contemplate the removal of superfluous workers. This could occur even where the tasks or work still exist but the employer requires fewer workers, or there is less work for existing workers..... This brings me to point out, however, that the existence of a cause..... does not mean that any dismissal subsequent to it is fair. The employer must have acted reasonably and the dismissal must be shown to have resulted from the cessation of work or the substantial diminishing of work as a result”

The first issue

Whether in the circumstances of this case the work which the Employee was paid to do as at March 01, 2009, had ceased or substantially diminished to result in a redundancy.

[18] The Employee filed a Witness Statement on April 21, 2011. In that statement the Employee stated at **paragraph [6]** as follows:

“That despite making my position redundant the said company employed the following persons: Floyd Laurent on 25th May 2009, Edbert Lewis on 14th September, 2009, Kaheel Sebastian on 2nd November 2009, Kendrick Jacobs on 23rd November 2009, Shelbert Jacobs on 23rd November 2009 Sumiko Schouten on 1st January 2010 as ‘Mate’”.

[19] The Court's responsibility is to decide whether or not on March 01, 2009, a situation of redundancy existed at the Employer's place of business. No circumstance which took place after the date of dismissal shall be taken into consideration by the Court.

[20] Two decisions are appropriate to illustrate these points made at **paragraph [19]** above. The first is **Portsea Island Mutual Co-Operative Society Limited v Rees [1980] I. C. R. [E.A.T] 261**. In that case **Kilner Brown J** stated at **pages 262 and 263** *inter alia* as follows:

“Now it has been long established, and one has only to turn to the two cases so often cited before us, W. Devis and Sons Limited v Atkins [1976] I. C. R. 196, and Ferodo Limited v Barnes [1976] I. C. R. 439, to see that what an industrial tribunal has to do is to look at the dismissing representative of the employers upon the date of dismissal and to have regard to his knowledge of his reasonable belief, or both, at the time of the act of dismissal.”

[21] The second case is **Linda Richardson and Deep Bay Development Company Limited Ref. No. 7 of 1989**. In that case **Mr. Justice H. S. R Moe** at **page 5** of the Report citing a passage from **Polkey v A. E. Dayton Services Limited [1987] IRLR 503** stated *inter alia* as follows:

“..... the only test of fairness of a dismissal is the reasonableness of the employer's decision to dismiss judged at the time when the dismissal takes effect.”

[22] Mr. Ian Steele is the Services Manager of the Employer. He has been employed with the resort in that capacity since 2004. He is 56 years of age.

He stated at **paragraph [4]** of his Witness Statement filed on April 15, 2011, as follows:

“In June 2008, Jumby Bay Resort closed to facilitate renovation and construction work on its premises. The work was anticipated to last for a minimum of 18 months.”

[23] Mrs. Fidela Corbin-Lincoln Counsel for the Employer referred the Employee to **paragraph [4]** of Mr. Steele’s Witness Statement. The Employee stated that she accepted that the resort was closed in 2008 for renovation and construction work to be done on its premises for 18 months.

[24] Mr. Steele in his Witness Statement at paragraph 5 stated as follows:

“The closure of the resort meant that the number of persons coming to Jumby Bay would be reduced and consequently there would be a reduction in services which needed to be provided by Jumby Bay Island Company. More particularly, the closure of the resort meant that a significantly reduced number of persons would need to be transported to and from Jumby Bay by the ferries operated by Jumby Bay Island Company.”

[25] Counsel for the Employer referred to **paragraph [5]** of Mr. Steele’s Witness Statement to the Employee. The Employee’s response was that she admits the contents of that paragraph.

[26] Mr. Steele in his Witness Statement at **paragraph [6]** stated as follows:

“After the closure of the resort, Jumby Bay Island Company in recognition of the fact there would be a reduction in the ferry

service, requested all the ferry staff to take their annual vacation and thereafter to work 3-4 days a week in the interest of staff retention.”

[27] The Employee in answer to Counsel for the Employee stated that she admitted the contents of that paragraph. She further stated that she and other employees proceeded to take vacation leave.

[28] At **paragraph [7]** of Mr. Steele’s Witness Statement he stated as follows:

“In February 2009, JBIC did a further assessment of its services and it became evident that given the reduction in the number of persons requiring transportation to and from Jumby Bay, the work which the ferry staff were employed to carry out had diminished so significantly that there was no longer a need to operate 2 ferries. The operation of both ferries was unsustainable.”

[29] Mr. Steele’s evidence at **paragraph [8]** of his Witness Statement stated as follows:

“JBIC thus took the decision to make some members of the ferry crew redundant. In arriving at the decision the employment history of the ferry service staff was considered and it was decided to adopt the approach of ‘last in first out’ to identify ferry staff to be made redundant.”

[30] As a consequence of the decision made by the Employer at **paragraph [29]** above, Jumby Bay made four (4) staff members redundant. One of these was the Employee. In making its decision the Employer made redundant these

four (4) persons in accordance with certain criteria.

- [31] Mr. Steele in his Witness Statement stated that in June 2008, the Employer demolished the existing forty (40) rooms which comprised the resort. Jumby Bay is a separate island. It is not attached physically to Antigua and Barbuda. These elements require the operation of ferry services.
- [32] In answer to Mr. Daniels Attorney-at-Law for the Employee, Mr. Steele stated that at February 05, 2009 the operation of both ferries was unsustainable hence the need to operate one ferry.
- [33] In further answer to Mr. Daniels, Mr. Steele stated that none of the owners of the thirty (30) private homes on Jumby Bay did not visit their properties during the early part of 2009 and for through the Easter period of the same year.

The Employee's submissions

- [34] It is most unfortunate that Mr. Daniels Attorney-at-Law for the Employee did not read the Antigua and Barbuda Labour Code (Amendment) Act, 1998. Learned Counsel defined the term redundancy as follows:

“Redundancy” means a situation in which by orders, retrenchment, the installation of the installation of labour saving machinery, an employer’s going out of business, a force majeure, or any other reason, tasks which a person was last employed to perform no longer exists.”

(The emphasis of the underlined words is Counsel’s.)

[35] It is indeed a very sad day when an Attorney-at-Law is not aware of the definition of redundancy.

[36] Mr. Daniels in accordance with his definition of the term redundancy at **paragraph [34]** above made the following submissions.

(i) *“.....one can see that the tasks which the Employee was employed to perform must have ceased to exist in keeping with the definition of redundancy.”*

-See paragraph 4 of his submissions.

(ii) *“Therefore it is respectfully submitted that it cannot be said that the task the Employee was employed to perform no longer exists in view of the Employer’s action.”*

-See paragraph 5 of his submissions.

(iii) In Mr. Daniels final submissions at **paragraphs [9] and [10]** he states as follows:

“It is respectfully submitted that all the Employee was required to prove was that the position of ‘Mate’ existed as of the date of redundancy and this was clear from the evidence of Mr. Ian Steele at all material times. The Employee was not laid off but rather, was made redundant.”

(iv) *“We respectfully submit that the Employee was unfairly dismissed under the guise of redundancy.”*

[37] At **paragraph [6]** of his written submissions, Mr. Daniels did submit that *“the work which the ‘Mate’/Employee was last employed to perform still substantially existed.”* Counsel cited **Paulette Matthews v Antigua and Barbuda Port Authority Board of Commissioners ANUHCV 2005/0129**. That case involved its own set of facts. It is of no general application to the facts of this case.

The Employer’s submissions

[38] Mrs. Fidela Corbin-Lincoln of Simon Rogers Murdoch, Attorney-at-Law made the following submissions:

- (i) The Employer’s evidence and the Employee’s response to that evidence at **paragraphs [22] to [27]** above is uncontested evidence which shows the basis of the Employee’s termination.
- (ii) The work which the Employee was last employed to do had substantially diminished due to the closure of Jumby Bay Resort. As a consequence a redundancy situation existed at the date of termination.
- (iii) The closure of Jumby Bay Resort was the ‘cause’ and the ‘effect’ was that there was a significantly reduced number of persons who would need to be transported to and from Jumby Bay by the ferries which were operated by the Employer. This required a reduced ferry service and consequently less staff to carry out the reduced functions.

Discussion

- [39] Mr. Daniels definition of the term 'redundancy' is false. The term is correctly defined at **paragraph [16]** above. Consequently, I reject Mr. Daniels submissions that no redundancy situation existed because it cannot be stated that the task which the Employee was last required to perform no longer exists.
- [40] What I am required to consider is whether or not the work which the Employee was last employed to perform has ceased or substantially diminished.
- [41] The Employee in answer to Counsel for the Employer did agree with the contents of **paragraphs [4] to [6]** of Mr. Steele's Witness Statement filed on April 15, 2011. These statements are outlined at **paragraphs [22], [24], and [26]** above.
- [42] The ferries were required to operate in accordance with three (3) shifts per day. These were from 6 am to 2:30 pm, 2:30 pm to 11 pm and 11 pm to 7 am.
- [43] At the date of the Employee's dismissal by letter dated February 05, 2009, the necessity to transport guests, staff and goods from Parham to and from the resort was significantly reduced. One ferry was required and not two of them. In these circumstances the work which a 'Mate' was required to perform had substantially diminished. A situation of redundancy did exist.

The second issue

Did the Employer act reasonably or unreasonably in its dismissal of the Employee?

[44] **Paragraph [9]** of Mr. Steele's witness statement provides the list of employees of the Employer and other relevant information as at December 2008. The details which are contained therein are as follows:

Surname	First Name	Start Date	Department
ARMSTRONG	Kevin	3-Apr-06	Ferry Mate
BOLAND	Bernard	15-Dec-02	Ferry Captain
DANIEL	Bernard	15-Dec-02	Ferry Supervisor
EDWARD	Trent	15-Dec-02	Ferry Captain
FRANCIS	Conroy	15-Dec-02	FerryAsst. Supervisor
GARDNER	Jason	15-Dec-02	Ferry Mate
GLASGOW	Clarence	15-Dec-02	Ferry Captain
JACOBS	Roger	15-Dec-02	Ferry Mate
KIRWAN	Natasha	19-Mar-07	Ferry Mate
MARTIN	Marlon	15-Dec-02	Ferry Mate
MATTHRAY	Bernard	3-Apr-06	Ferry Mate
ROBERTS	Enos	15-Dec-02	Ferry Captain
SIMON	Omar	15-Dec-02	Ferry Captain

[45] At **paragraph [6]** of Mr. Steele's Witness Statement he stated as follow:

"After the closure of the resort, JBIC in recognition of the fact that

there would (be) a reduction in the ferry service, requested all the ferry staff to take their annual vacation and thereafter to work 3-4 days per week in the interest of staff retention.”

[46] Mr. Steele also stated at **paragraph [10]** of his Witness Statement as follows:

“Pursuant to the decision to adopt the ‘last in, first out approach’ and on the basis of the above employment record and staff performance, the employees Kevin Armstrong, Trent Edwards, Simon Omar and Natasha Kirwan were identified as the employees to be terminated. Consequently, the company terminated the Employee’s employment by letter dated 5th February, 2009 and with effect from 1st March, 2009 on the basis of redundancy.”

[47] The Employee’s payment of severance and vacation pay were pursuant to a collective bargaining agreement between the two parties. This is referred to at **paragraph [11]** of Mr. Steele’s Witness Statement.

The Employee’s Submissions

[48] Mr. Daniels submits that even where a genuine redundancy does exist, this does not in itself lead to the conclusion that the dismissal was fair. According to him **Williams v Compair Martin Ltd. [1982] I. C. R. 156** seeks to establish certain selective criteria which can be objectively checked against certain matters. These include attendance records, job performance, length of service, and the needs of the business.

[49] Mr. Daniels also cited **Richardson v Deep Bay Development Co. Ltd. Reference No. 7 of 1989**, a decision of this Court. In that case **Mr. Justice H. S. R. Moe** at pages 4 and 5 of the judgment stated *inter alia* as follows:

“But the E. A. T (Employment Appeal Tribunal) has also re-emphasised in the Grundy (Teddington) Ltd. v Plummer & Salt [1983] IRLR 98 that failure to act in accordance with one or more of the guidelines in Compair Maximum does not necessarily render a dismissal unfair. The principles in Compair are not hard and fast rules to be applied in all cases; their application depends on what is desirable or predictable in a given situation. Perhaps the two main obligations resting upon an employer proposing to dismiss an employee for redundancy are to make reasonable efforts, where practicable to find the employee suitable alternative employment in the business and to consult with him and give him reasonable warning of impending redundancy.”

[50] Mrs. Fidela Corbin Lincoln for the Employer cites **British Leyland (UK) Ltd. v Swift [1981] IRLR 91 (CA)** to state that the correct test for the Court to utilize is to determine if it was reasonable for the employers to dismiss the employee as opposed to whether or not the court would have dismissed the employee.

[51] Learned Counsel submits that the Employer acted reasonably in its dismissal of the Employee for three reasons. Firstly, the Employer implemented alternative working structures as an initial response to the changed circumstances in an attempt to retain staff prior to its decision to terminate certain employees.

[52] Secondly, in accordance with the 'last in, first out' principle the Employee was fairly selected for redundancy. Learned Counsel cites **British Aerospace Ltd. v Green** [1995] IRLR 433. In that case Lord Justice Waite stated at page 434 *inter alia* as follows:

“So in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of him.”

The Law

[53] In the **British Aerospace Ltd.** case (op cit) Lord Justice Waite stated at page 434 as follows:

“The legal and procedural background

(i) The test of fairness

“It has been accepted from the outset of the unfair dismissal jurisdiction that the concept of fairness, when applied to the selection process for redundancy is incapable of being expressed in absolute terms. There are no cut and tried formulae and no short cuts. The recognised objectives include the retention within the reduced workforce, once the redundancies have taken effect, of employees with the best potential to keep the business going and avoid the need for further redundancies in the future; as well as the need to ensure that qualities of loyalty and long service are recognised and rewarded. These are objectives which are liable to conflict with each other.”

[54] (i) In **B L Cars Ltd. v Lewis** [1983] IRLR 58 (EAT) the Employment Appeal Tribunal held that the Industrial Tribunal is required to determine whether the selection of the employee was “*one which a reasonable employer could have made*” and not the question “*Would we have made that selection*”.

(ii) In approaching their decision, the Industrial Tribunal would have to consider the criteria that were adopted and whether the employers had demonstrated that they had fairly applied those criteria to this redundancy.

[55] Having considered the authorities **Judge Peter Clark in Mugford v Midland Bank plc** [1997] IRLR 208 at page 211 summarized the position with regard to consultation as follows:

(1) “*Where no consultation about redundancy has taken place either with the trade union or the employee the dismissal will normally be unfair, unless the industrial tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.*

(2)

(3) *It will be a question of fact and degree for the industrial tribunal to consider whether consultation with the individual and or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.”*

(a) The Employee's selection

[56] In the text book untitled “A Practical approach To Employment Law” authored by **John Bowers Q.C** seventh edition, Oxford University Press, 2005, the author states as follows at page 269

“(d) Last in first out: this is the criteria most often advocated by unions, but employers are often redundant to accede to it on the ground that after a redundancy, it will leave them with the oldest and least fit workers. The Court of Appeal commented in Bessenden Properties Ltd. v Corness [1977] ICR 82, that it is generally regarded as fair to retain the services of that employee who has been longest in service.”

[57] The Employee was one of four other employees who was selected for redundancy based on an acceptable trade union principle commonly referred to as ‘**last in first out**’. This criteria took into consideration the employment record and staff performance of the Employee and three other employees. It was shown to be equally applicable to all four employees. One of them was a Mate and two were Ferry Captains. They were the four last employees to be employed by the Employer. In the circumstances of this case the selection of the Employee was one which a reasonable employer could have made.

(b) Alternative employment

[58] The Witness Statement of the Employee at **paragraph [13]** states as follows:

“That employment as Mate is difficult to come by save and except when there is the annual sailing week, you may obtain employment for two weeks of that season”.

[59] In the circumstances of this case in light of the Employee's evidence it would have been difficult for the Employer to seek to obtain alternative employment as a Mate for the Employee.

(c) Consultation

[60] The Employee agreed that after the resort was closed, the Employer requested all staff including herself to take their annual vacation. They complied with this request. After this, all employees worked for 3-4 days per week *"in the interest of staff retention"*.

[61] No evidence was led of any discussions between the Employer and the Employee as to why she was required to (a) take her annual holiday and (b) work for a shortened week.

[62] The Employee received three sums of money to which she was entitled from her Employer. She was entitled to no more than these three (3) sums. In addition she also received EC \$6,675.00 as a gift from the Home Owners of Jumby Bay.

[63] Having examined the matter of consultation in this case it appeared to be tenuous at best. However, I am required to look at the overall picture up to the date of termination.

[64] Having done so I note that the Employee was granted a gift of EC \$6,675.00 which is much larger than the monies to which she was entitled as a consequence of the redundancy. A finding of unfair dismissal in her favour would have resulted in an award not significantly greater than the gift of EC

\$6,675.00. She would have received that extra payment and would have been able to invest it in some manner as to obtain a return on that investment.

[65] The lack of effective consultation in this case when compared with the gift of EC \$6,675.00 which the Employee received, does not render the Employee's dismissal to be unfair.

[66] In the circumstances of this case the Employer acted reasonably in its dismissal of the Employee.

The third issue

If the Employee was unfairly dismissed what is the measure of damages which is due to her?

[67] In light of my findings at **paragraphs [43] and [66]** above there is no need to determine this issue.

Disposal

[68] The Reference is dismissed. There shall be no order as to costs.

Dated 16th day of June, 2011

A handwritten signature in black ink, appearing to read 'Philip A. Pilgrim', written over a horizontal line.

PHILIP A. PILGRIM

President

I agree

A handwritten signature in black ink, appearing to read 'M. Glendina McKay', written over a horizontal line.

M. GLENDINA MCKAY

Member

I also agree



OSCAR A. FREDERICK

Member