

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT



REFERENCE NO: 10 OF 2013

BETWEEN:

CONROY JOSEPH

Employee

And

FLATPOINT DEVELOPMENT LIMITED t/a EMERALD COVE GROUP
Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. St. Lawrence de Freitas

Member

*The Hon. M. Althea Crick

Member

Appearances:

Mr. Anderson E. Carty and Mr. Leonart Matthias of the Antigua & Barbuda Tradesmen
& United Workers' Federation for the Employee

Mr. Asquith Riviere, Attorney-at-Law for the Employer

2014: May 19, 22, 23

September 23

2015: July 03

JUDGMENT

Brown, P.:

Background

1. The Employer is a company carrying on business in Antigua & Barbuda as developer of properties, including the construction and sale of private villas and residences.
2. The Employee was employed by the Employer as a gardener commencing in June 2009. His wages, based on the rate of \$13.00 per hour, were paid fortnightly.

3. By letter dated December 8, 2011, the Employee was informed that the Employer “will no longer need your service after Thursday 22nd December, 2011.” In the letter the Employer thanked the Employee for his “understanding and collaboration” and stated that it looked “forward (to) hiring (him) again in the near future”.
4. By his Memorandum filed September 16, 2013 the Employee contended that:
 - The Employer had no previous discussion with him about any of its challenges which could have led to his dismissal;
 - Other gardeners who were junior to him retained their employment with the Employer;
 - The Employer had provided no proper or satisfactory reason that would justify the termination of the employment relationship;
 - In the circumstances, the he was unfairly dismissed.
5. The Employer responded with its Memorandum filed on December 11, 2013 in which it contended that:
 - As a result of severe financial constraints the Employer was forced to reorganize its business activities, a part of which involved reducing its overall work force including gardeners;
 - That it was within its rights under statute and in accordance with precedent and jurisprudence to terminate the Employee’s contract;
 - In the circumstances, the dismissal was not unfair.

The Main Issues

6. The main issues for determination are:
 - (i) Whether a redundancy situation existed on the basis of which the Employee was made redundant.
 - (ii) Whether the Employer acted reasonably or unreasonably in dismissing the Employee in the circumstances.

The Evidence

7. In addition to his Witness Statement filed on November 15, 2013, the Employee gave additional oral evidence during examination and cross-examination at the trial. His evidence may be summarized as follows:

- (i) His wages amounted to \$952.00 every two weeks.
- (ii) He received no written statement of the terms and conditions of his employment at the commencement thereof or any subsequent date.
- (iii) Prior to receiving the dismissal letter, he was never informed that his employer was experiencing financial problems.
- (iv) Only one other person received a dismissal letter like the one he received.
- (v) The letter dated December 8, 2011 notifying him that his last working day would be November 22, 2011 was received by him on December 12, 2011.
- (vi) Contrary to what is stated in the letter there was no "understanding and collaboration" between himself and the Employer about the termination of his employment.
- (vii) At the date of termination at least 3 other gardeners, who were junior to him, continued with their employment.
- (viii) After the date of termination he received no offer of further employment from the Employer.
- (ix) At the date of dismissal he was 58 years old.

8. Evidence on behalf of the Employer was given by Junior Dean James, the Employer's Human Resources Coordinator (James). I summarize his evidence as follows:

- (i) At the commencement of his employment in June 2009, the Employee was one of 27 gardeners who were part of the overall non-management work force of 43.
- (ii) As a result of a directive from its Head Office, by December 31, 2010 the Employer had reduced its non-managerial staff to 17 thereby cutting their fortnightly payroll from \$55,591.16 in June 2009 to \$20,423.83..

9. Abiola Henry, the Employer's Accountant (Henry), also testified on behalf of the Employer. She produced financial statements for the 3 years from December 2009 to December 2011 which showed that the Employer experienced financial loss which necessitated the reorganization of its business and the termination of the employment of a number of employees.

Employer's Submissions

10. Learned Counsel for the Employer, Mr. Asquith Riviere, filed submissions on behalf of the Employer in support of its case. He submitted that having been given the statutory period of notice under section C9(3) of the Antigua and Barbuda Labour Code (the Labour Code), the Employee was fairly dismissed.
11. Mr. Riviere also relied on Section C 58 (1) (e) of the Labour Code and submitted that the state of affairs amounted to "some other substantial reason" which justified the dismissal. Counsel submitted that the Employer's deteriorating financial health as shown in its continuing loss of revenue resulting from the lack of customer's orders was sufficient ground for the dismissal. In making his submissions, Counsel referred to the financial statements admitted into evidence.
12. Importantly, Mr. Riviere conceded that the Employer failed to give advance notice of the redundancy to the Employee and failed to consult with him in relation thereto. However he maintained the firm view that given the factual circumstances affecting the Employer's business, the dismissal was not unfair.
13. Perhaps more importantly, Learned Counsel cited the following two References determined by this Court, in which it considered the issue of redundancy: **Reference No. 20 of 1988: Antigua Worker's Union v Antigua Gases** and **Reference No. 14 of 1990: Peter Tonge v St. James' Club**. In both cases this Court highlighted the requirements of fairness and reasonableness on the part of employers when dealing with redundancy

situations. Counsel submitted that the latter case should be favourably considered in favour of the Employer in this Reference.

14. In relation to his submissions regarding the possible awards that could be made in this Reference, Mr. Riviere cited and relied heavily on the decision of the Court of Appeal in **Antigua Village Condo Corporation v Jennifer Watt, Civil Appeal No. 6 of 1992.**

Employee's Submissions

15. Mr. Anderson Carty filed submissions on behalf of the Employee in which he asserted that the Employee was unfairly dismissed.
16. In his submissions, Mr. Carty carefully highlighted the evidence of James and Henry. He referred to the financial statements and noted the several inconsistencies in them which neither James nor Henry could properly explain. In his view, those statements were inconsistent with proper financial accounting procedures.
17. Mr. Carty noted that although the gardeners and other non-management staff did not account for the "bulky payroll", it appeared that the directive from the head office to reduce the payroll was directed at them exclusively and did not include management and professional staff.
18. Importantly, Mr. Carty placed a lot of emphasis on the Employer's failure to follow good and well settled industrial relations practices. In effect, Mr. Carty's main submission was that the Employer failed the test of reasonableness under Section C 58 (2) the Labour Code.

Redundancy

19. Section C3 of the Labour Code defines Redundancy as follows:

" '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;"

Reason for Dismissal

20. Section C58 (1) of the Labour Code provides:

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) ...

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

Reasonableness of the Decision to Dismiss

21. Section C58(2) of the Labour Code provides:

"2) The test generally, for deciding whether or not a dismissal was fair is whether or not, under the circumstances, the employer acted unreasonably or reasonably.....and the test shall be whether the actual circumstances which existed.....would have reasonably led to the employee's dismissal"

Analysis

22. Naturally, I approach this analysis in the context of the peculiar facts and circumstances of this Reference. The following are important to note:

- (1) The Employee was 58 years old at the date of his dismissal. In that regard, I bear in mind that the "normal" retirement age Antigua and Barbuda is 60 years .
- (2) At the commencement of his employment the Employee was given no written statement of the terms and conditions of his employment.
- (3) There is no evidence of a Retirement Age Policy dictating a compulsory age of retirement. As a result, the Employee would have been entitled to continue

in his employment past age 60 provided that he remained physically fit and competent to perform his duties.

- (4) At the commencement of his employment the Employee was one of 27 gardeners, which group constituted approximately 63% of the overall non-management staff. At the date of his dismissal there were 16 gardeners making up over 94% of overall non-management staff.
- (5) In the dismissal letter the Employer falsely asserted that the Employee had “collaborated” with the Employer and had expressed his “understanding” of the redundancy situation whereby he was being made redundant.

23. Given the evidence in this Reference, I am inclined to find that, on a balance of probabilities, a redundancy situation existed at the date of the Employee’s dismissal. The situation arose out of the decline in the demand for the Employer’s properties which led its “head office” overseas to issue a directive to the Employer to reduce its payroll. In that regard, I rely on the pertinent evidence of James and Henry.

24. Having said that, I hasten to add that I am not convinced that the financial statements reflect a true and accurate picture of the financial state of the Employer prior to, at or after the date of dismissal. Many serious questions arise as to their accuracy, consistency and completeness. Neither James nor Henry was in a position to adequately assist the Court in making sense of the several line items from one year to the next. As a result the financial statements are of very limited use for present purposes. Accordingly, I accept Mr. Carty’s adverse assessment in relation to the several inaccuracies and inconsistencies in the statements. It is not necessary to give details of them here.

25. Mr. Riviere, cited Reference No. 20 of 1988: *Antigua Workers Union v Antigua Gases Limited* in support of his submissions. In that case, this Court considered the statutory definition of “Redundancy”, as it then was. At page 2 of the judgment, Moe, P stated:

“ What the definition seems to contemplate therefore is that redundancy may occur as a result of retrenchment which itself is ordinarily defined as removing what is superfluous, or reducing the amount or economizing. Thus

the situation can arise where the tasks or work still exists but the employer requires fewer employees or there is less work for existing employees....Redundancy may also arise because the work has been reorganized thus requiring fewer employees to do the same work or it may be because of the introduction of labour-saving devices. Thus re-organization which results in a reduced workforce is a redundancy....”

Continuing at page 3 of the judgment, the Learned President stated:

“Nonetheless the mere fact that a genuine redundancy does exist does not per se lead to the conclusion that the dismissal was fair; the determining factor is whether the employer acted reasonably in handling the situation.”

26. In that case, The Learned President went on to suggest that in cases of redundancy, the guidelines laid down in the U.K. case of **Williams v. Compair Maxim Ltd. (1982) I.C.R. 156** should be followed as a matter of good industrial relations practice. In that regard, employers should establish selection criteria such as attendance records, job performance, length of service and the needs of the business, which should be objectively applied. He concluded that the application of the criteria depends on what is desirable or practicable in a given situation.

27. Further, in the **Antigua Gases** case the Learned President referred to the decision of the House of Lords in **Polkey v A. E. Dayton Services Ltd.** where Lord Mackay stated:

“An industrial tribunal is not bound to hold that a procedural failure renders the dismissal unfair: it is one of the factors to be weighed by the industrial tribunal in deciding whether or not the dismissal was reasonable.....the only test of fairness of a dismissal is the reasonableness of the employer’s decision to dismiss judged at the time at which the dismissal takes effect.”

28. It is clear that in this Reference, and in all claims of unfair dismissal generally this Court’s assessment of the reasonableness or unreasonableness of the of Employer’s conduct is paramount. In other words, the critical question is not limited to the existence

of the redundancy per se, but must extend to the reasonableness of the dismissal in the circumstances.

29. It follows that, in discharging his burden of proof, the establishment of the existence of a redundancy situation is only the first step to be taken by the Employer. Once that threshold is met the more crucial task for the Employer lies in passing the test of reasonableness set out in section C58 (2) of the Labour Code.

30. In the **Polkey case**, Lord Bridge approved the guidelines established in the **Williams case** and said:

“ In the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimize redundancy ...”

31. In considering redundancy dismissals, **John Bowers and Carol Davis** in their treatise **Termination of Employment**, 5th Edition at paragraph 4.3.2 with express reference to the **Williams case**, assert that:

“Generally, in order for a dismissal to be fair, an employer will need to do the following:

- give as much warning as is reasonable in the circumstances...**
- establish criteria for selection which so far as possible are objective**
- select employees for redundancy in accordance with the criteria**
- carry out reasonable and meaningful consultation with affected employees**
- consider alternative employment. “**

32. With that background I now turn to the statutory test of reasonableness under section C 58 (2). I am of the firm view that, given the circumstances in this Reference, the reasonableness or unreasonableness of the Employer's action in dismissing the Employee must turn on the application of the above stated guidelines from the **Williams case**.

Warning of Redundancy

33. It is clear that the Employee received no advanced warning of impending redundancy or the actual redundancy situation as at the date of receipt of notice of his dismissal. Mr. Carty underscored this aspect of the testimony of the Employer's witnesses. In his submissions, Mr. Riviere conceded this point. The position of the Employee is unlike that of the employee in the **Antigua Gases Case** who was "not unaware of the Company's financial straits." Similarly, in **Reference No. 14 of 1990, Peter Tonge v St. James' Club**, also cited by Mr. Riviere, "the employee was notified of the intended dismissal immediately following the meeting of the company at which the decision was taken."

The Pool for Selection

34. The Employer's financial statements as admitted into evidence, if they were not deliberately designed or intended to do so, they did in fact tend to paint an inaccurate and confusing state of affairs. Whatever the motive behind their design and content, they served to raise crucial lingering questions about the Employer's selection process.
35. It appears that the gardeners, employees at the lowest end of the spectrum of employees, were unreasonably singled out with a view to effect the desired 60% reduction of overall payroll costs. In the final analysis, there is no evidence that any other categories of management or non-management employees were targeted for redundancy to achieve the desired reduction. This appears to be strange, given what Mr. Carty referred to as the "miniscule contribution" of the wages of gardeners to the overall payroll costs.
36. In fact, as pointed out by Mr. Carty, between 2010 and 2011 while the non-management payroll was being considerably reduced, the overall payroll jumped from \$672,560.00 to \$1,307,308.00. Further, the statements showed that over the same period miscellaneous expenses jumped from \$6,000.00 to \$58,000.00. The statements were riddled with obvious anomalies which the Employer's witness appeared to be in no position to explain.

The Criteria for Selection

37. The Employer has failed to establish that it had any or any clear criteria for selection of employees for redundancy. Nowhere in the testimony of either James or Henry was any attempt made on behalf of the Employer to establish that it even attempted to assess the performance, attendance, conduct or any other objective criteria as the bases for selection among the gardeners or any other category of employees.

The Selection Process

38. The Employer's implementation of the selection process is also obviously faulty. It is not disputed that the Employee had seniority of tenure among the available pool of gardeners. In addition, it was conceded by the Employer that at least 3 other gardeners who were junior to him remained on the job after the Employee was dismissed. In summary, I find that the Employer not only failed to establish clear objective criteria, it also failed to adopt a rational and consistent selection process.

Consultation

39. In his closing submissions, Counsel also conceded that the Employer failed to consult with the Employee at any stage in the process leading up to or at the point of termination. There is no evidence of any consultation, formal or informal, with the Employer's employees or any of them. This omission on the part of the Employer is clearly contrary to good industrial relations practices and amounts to another component of unreasonableness in the particular circumstances. It is noteworthy that, contrary to what is stated in the dismissal letter, there was no "understanding and collaboration" between the parties.

Alternative Employment

40. In the **Peter Tonge case** this Court noted that: "Also it was shown that the employee was not trained for and could fill any other position in the company". In this Reference no similar evidence was adduced on the basis of which a similar conclusion could be reached. Further, it was not disclosed on the evidence that there were no alternative duties which the Employee was capable of performing "given the nature of his line of work and (his) skill sets".

Reduced Hours of Work

41. It is very instructive to note that in answer to a question put to him by the Employee's Representative during cross examination, James testified that given his many years of experience in the hotel industry, he was familiar with procedures that should have been implemented when austerity measures became necessary. He conceded that none of those procedures were considered or implemented by the Employer. In that regard, Mr. Carty mentioned or alluded to options such as a system of reduced hours of work, work on a rotation basis, the application of the last-in / first-out principle and so on.

Applying the Test of Reasonableness

42. I conclude that the underlying principles and decisions of the **Williams case** as approved by the House of Lords in **Polkey case** and applied by this Court in the **Antigua Gases** and the **Peter Tonge cases** are applicable to this Reference. As a result, I find that the main issue as to whether the Employer acted reasonably or unreasonably should be resolved in favour of the Employee.
43. In other words, notwithstanding my finding that a redundancy situation existed as defined in Section C3, the overriding determining factor is the application of the test of reasonableness under Section C58 (2) of the Labour Code. Upon application of the test, I conclude that the Employer acted unreasonably in handling the redundancy situation. Accordingly, the Employee was unfairly dismissed and is entitled to compensation.

The Awards

44. The heads under which awards may be made are well settled. I make the following awards:

(1) Loss of protection from unfair dismissal

An employee who is unfairly dismissed is entitled to compensation under this head, the measure of which is the equivalent of severance pay. Since the Employer has, already made severance payment to the Employee, I make no further award under this head.

(2) Immediate Loss

Compensation under this head covers the period of loss between the date of dismissal and the date of trial. The amount awarded is subject to the Employee's duty to mitigate his loss. He testified that he tried to find work at several institutions but was unable to do so. In completing several job application forms, he was required to state his age. He also testified that he eventually attempted to find work using his weed-eater but had only limited success.

In the circumstances, since the Employee earned \$952.00 per fortnight, I award the sum of \$12,376.00, the equivalent of 6 months wages ($\$952.00 \times 26 / 2$) for the first 6 months of unemployment.

I take notice of the prolonged periods of drought from time to time in Antigua. I estimate that after the first 6 months of unemployment, the Employee earned an average of approximately \$400.00 per fortnight. I also award him the fortnightly sum of \$552.00, being the difference between his earnings from using his weed eater and his previous fortnightly wages ($\$952 - \$400$) for the ensuing 6 months. As a result, I make the additional award of \$7,176.00 under this head.

Further, I reckon that after the first year of "unemployment" the employee should have been in a better position to increase his earnings, from freelance landscaping or similar activities, to approximately \$750.00 per fortnight for the succeeding 30 months up to the date of judgment. Accordingly, I award the fortnightly sum of \$202.00 ($\$952 - \$750$) for that period resulting in an additional award of \$13,130.00 under this head .

The resulting total award for Immediate Loss is **\$32,682.00.**

(3) Future Loss

Under this head, I take into account the real likelihood that the Employee's continued employment past age 60. Further, I accept Mr. Carty's submission as to the likely effect of his reduced earnings over the past 3 years on his Social Security pension. In the circumstances, I award the sum of **\$5,252.00**, representing the said fortnightly sum of \$202.00 for an additional 12 months under this head.

(4) Manner of Dismissal

The evidence discloses no good basis for an award under this head.

(5) Exemplary Damages

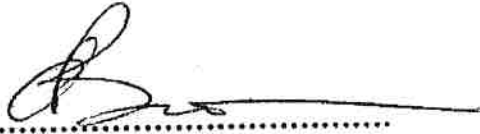
After careful consideration, I find no reasons to justify an award of exemplary damages in this case.

(6) Costs

The evidence in this Reference disclose no exceptional reasons for an award of costs.

45. For the reasons stated above, I order that the Employer shall pay to the Employee the total sum of **\$37,934.00 (Thirty Seven Thousand Nine Hundred and Thirty Four Dollars)**. Payment must be made no later than the 31st day of July, 2015.

Dated the 03rd day of July, 2015



Hon. Charlesworth O.D. Brown

President

I agree



Hon. St. Lawrence de Freitas

Member

***The Honourable M. Althea Crick, Member, died on 29th November 2014 before settling the final draft of this Judgment.**