

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 39 of 2014

BETWEEN:

DASWORTH SAMUEL

Employee

and

GEORGE RYAN T/A CITY VIEW HOTEL

Employer

Before:

The Hon. Charlesworth Brown

President

The Hon. John Benjamin

Member

The Hon. Megan Samuel-Fields

Member

Appearances:

Mr. Ralph Francis, Attorney-at-Law for the Employee

Mr. Anderson Carty of Antigua & Barbuda Tradesmen & United Workers' Federation, for the Employer

2015: November 26

2016: March 1

2018: August 8

JUDGMENT

Brown, P

Background

1. At all material times the Employer was a businessman carrying on business and trading as City View Hotel situate in the City of St. John's. Apart from accommodation and other traditional hotel services, he also provided meals to guests and customers at his Sapodilla Restaurant on the same premises.
2. The Employee was employed by the Employer as Executive Chef at the Restaurant commencing on or about June 1, 2008 at a monthly salary of \$8,000.00.



3. In response to financial difficulties resulting from a decline in his business leading up to the year 2012, the Employer explored options for improving the performance of the Restaurant. To that end, he held consultation sessions with the Employee and other members of his management team, including his wife, Joycelyn Ryan, who held the position of General Manager.
4. The several consultation sessions between the Employer and his management team culminated with the Employer's letter dated August 15, 2013 whereby the Employer confirmed that, in a meeting two days earlier, the Employee was "given two (2) options to consider in order to keep the restaurant operational for you to maintain employment". The options were: "1. Take a pay cut of 50%" and "2. Lease the restaurant from us to operate on a personal basis".
5. In response, by letter dated August 20, 2013, the Employee rejected both options by stating "Unfortunately, I am in no position to accept either of those options"
6. In turn, the Employer responded to the Employee by letter dated August 30, 2013 stating that "in light of" of his rejection of the options "necessary adjustments" had to be made to its "staff complement...Consequently, we have no choice but to lay you off with immediate effect until meaningful changes are evident in the restaurant operation."
7. By a memo dated August 31, 2013, the Employer notified his staff that one Mr. Bernard Wayland "is presently the chef". By a separate memo bearing the same date the Employer notified his staff that Mr. Wayland "is presently our standby Chef to assist Marjorie when needed"
8. By an Independent Contractor Agreement dated September 9, 2013, the Employer retained the services of Mr. Wayland "for the provision of chef and catering services generally" at a "monthly fee" of \$3,000.00.
9. By letter dated September 11, 2013, the Employee's Attorney-at-Law wrote to the Employer contending that the Employee "has been wrongfully dismissed" and warning that the matter would be referred to the Labour Commissioner if she received no response within 7 days.
10. By letter dated October 24, 2013, the Employer advised the Employee that his position was made redundant and that his employment would cease on November 30, 2013. In that letter the Employer also set out the Employee's

entitlement to severance pay and holiday pay and proposing to pay the total sum of \$48,665.07 by 4 monthly instalments. In the end, the Employee was paid that total sum plus statutory interest, the last installment of which was made on March 6, 2014.

The Opposing Cases

11. On the one hand, the Employee contends that his purported lay-off, based on his rejection of the two options put to him by the Employer, was "illegal, unconscionable and without merit in all the circumstances. Accordingly, he prayed for a declaration that the effect of the letter of lay-off was to dismiss him. Further, the Employee contended that he was unfairly dismissed and is entitled to compensation therefor notwithstanding his receipt of payment purported to be "severance" pay.
12. On the other hand, the Employer contended that the dismissal of the Employee was for just cause in accordance with the relevant laws and that he followed the required due process based on good industrial relations practices. Moreover, the Employer asserted that since there was no unfair dismissal, the claim should be dismissed with an order for costs in his favour.

The Issues

13. Two main issues arise for determination in this Reference
 - (a) Whether a redundancy situation existed.
 - (b) Whether the Employer acted reasonably.

Relevant Statutory Provisions

14. Section C58 (1) of the Antigua and Barbuda Labour Code sets out the potential good cases for dismissal. That section provides that:
"A dismissal shall not be unfair if the reason assigned 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 that there is a factual basis for the assigned reason.**
15. Further section C58 (2) provides that:
"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. In cases where an employer has admitted that he dismissed an employee, the onus is on the employer to establish that the dismissal was not unfair. To that end, the employer must cross two hurdles by establishing as a matter of fact that: (a) a redundancy situation existed at the material time and (b) it acted reasonably.

Whether a Redundancy Situation Existed

17. The key question to be answered here is: Has the Employer discharged his evidentiary burden to establish, on a balance of probabilities, the factual basis for the assigned reason of redundancy? Suffice it to say, after careful consideration of all the witness statements by and behalf of the parties, the documentary evidence and the corresponding oral testimonies, we find that a genuine redundancy situation existed. In our opinion, save to note the steady decline of the Employer's business and its eventual closure in July 2015, no useful purpose will be served to chronicle its demise.
18. Having reached that conclusion, we are obliged to apply the test of reasonableness under section C58 (2) of the Labour Code and determine whether the Employer acted reasonably or unreasonably in dismissing the Employee.
19. It is noteworthy that, in his written submissions, Mr. Ralph Francis, Learned Counsel for the Employee "conceded that "a lack of business", "reduction of customers' orders" do lead to a situation of redundancy. However, he further submitted that there is a duty imposed upon employers to ensure that employees are treated fairly".
20. Mr. Francis' submission is wholly consistent with the following dictum of Mr. Justice H. S. R. Moe, President of this Court as he then was, in **Reference No. 20 of 1988 Antigua Workers Union v Antigua Gases Limited**:
- "Nonetheless, the mere fact that a genuine redundancy does exist does not per se lead to the conclusion that a dismissal was fair; for the determining factor is whether the employer acted reasonably in handling the situation."**

In the case of **Antigua and Barbuda Workers' Union v. Cable & Wireless (Antigua and Barbuda) Limited**, Reference No.66 of 2015, this Court found that the employer

established that a redundancy situation existed. Nevertheless, the dismissals were adjudged to be unfair by reason of the employer's failure to act reasonably in the circumstances. To that end, the Court considered the conduct of the Employer before during and after the redundancy situation came into existence. We will use the same approach in this case.

Whether the Employer Acted Reasonably

21. It is not in dispute that the Restaurant was an important component of the Employer's business which, overall, experienced financial difficulties for a prolonged period. Further, it is not in dispute that the Employee, as member of the management team, was aware of those difficulties and did, at the invitation of the Employer, make recommendations from time to time towards an improvement.
22. It is noteworthy that in the exchanges at or following the periodic management meetings the Employer and his General Manager formed the view that suggestions proposed by the Employee were not feasible. In the exchanges between them, the Employee was told by the General Manager that he was dumb. On another occasion, the Accountant challenge his honesty and told him that he should go back to school. Generally, the Employee felt insulted and embarrassed over a period of time leading up to the termination of his employment. In the circumstances prevailing at that time, he admitted that on two occasions he requested that he be paid off
23. In the letter dated August 30, 2013, laying-off the Employee, the Employer stated: "... we are concerned over the continuous losses being generated in the restaurant as a result of high costs and low volumes. The staff costs account for an average of 36% of the total cost in the last 6 months, 19% of which represents your salary". Further, by his letter dated October 24, 2013, terminating the services of the Employee, the Employer stated "...in the last 12 months, the staff costs account for an average of 50.09% of the total cost, (half) 50.28% of which represents your salary".
24. While obvious questions arise in respect of the use of those statistics and the Employer's related statements, we do not find it necessary to attempt to answer them for present purposes. Suffice it to say, the Employer seems to have attributed relatively heavy and perhaps undue weight to losses from the restaurant compared with losses from his core hotel business.
25. As to the losses sustained by the restaurant compared with those from the hotel, under cross examination, the Employer testified that the genesis of the decline of

his business and the eventual closure of his business was the serious loss of rental income following directly from the loss of the LIAT business. Thereafter, in the words of the Employer, the business became a "millstone around my neck".

26. The Employer also stated that the major loss in his business came from the hotel itself and not the restaurant. Given that backdrop, the Employer's emphasis of the apparent burden on the business resulting from the losses in the restaurant and the Employee's relatively high salary is questionable.
27. In considering the redundancy situation, we are mindful of the general importance of the consultation process in cases of redundancy. That process is particularly crucial in this Reference. There is no doubt that the Employee was consulted at an early stage and thereby had early notice of the possibility of redundancy.
28. It is a part of the Employer's case that for most of the period between 2011 and 2013, most of his employees had reduced working hours with the majority of them working an average of only 24 hours per week.
29. It appears that the Employer was also acutely aware of the disproportionate amount of salary paid to the Employee vis-à-vis other restaurant / kitchen staff. In particular, according to the Employer, the total amount of salaries and wages paid by the Employer between September 2012 and October 2013 was equivalent to 35% of the total revenue earned by the business, of which 19% was paid to the Employee alone.
30. It is understandable that the Employer sought to reduce the disproportionate amount of revenue expended on the Employee's salary. At first blush, it was reasonable for the Employer to propose that the Employee should accept a 50% reduction of his salary. However, in our opinion, the Employer erred in a significant manner, in the then on-going consultation process, when he introduced the option for the Employee to lease his restaurant and operate it as his own business. The latter "option" was clearly outside the scope of the employer/ employee relationship.
31. To make matters worse, the Employer married the two "options" and by letter dated August 15, 2013 formally presented them for the Employee's consideration **"in order to keep the restaurant operational and for you to maintain employment"**. Rubbing salt into the wound, the Employer required the Employee to respond on the same date when the two options were formally put to him.

32. The Employee responded by letter dated August 20, 2013 rejecting the two options. The Employer, in turn, responded by letter dated August 30, 2013 laying off the Employee.
33. We are mindful of the nature of the Employer's business and its objectives in light of its prolonged financial difficulties. However, given the Employer's previous practice of reducing the hours of work for his staff, we are obliged to also consider whether the Employee himself should have been offered a reduced work-week. We are of the opinion that, in the circumstances, the Employer should have considered reducing the Employee's responsibilities and duties, offering him a new position, if possible, with a reduced salary and fewer hours of work.
34. In that regard, we note the hasty engagement of Mr. Wayland. For present purposes, it is not necessary to determine whether he was engaged as an Executive Chef, a Chef or a Standby Chef. What matters most is the apparent indispensable role played by the Employee and that there was no one else competent to discharge his duties and responsibilities. It was clear that at the time of dismissing the Employee, the Employer well knew that he had to find a replacement.
35. Further, the two memos issued by the Employer on August 31, 2013 leave no doubt that he was still committed to "satisfying the needs" of his "guests and customers", "improve the quality of service offered", and "attain and reach" his "goals". Those phrases and clauses, unfortunately, convey the impression that the Employee's performance was unsatisfactory in that there was a need to improve the quality of service offered by the restaurant and that certain goals were not attained and reached by the Employee.
36. In our opinion, the Employee received no or no adequate formal notice of the then impending redundancy. Formally notifying him of the two options in order to maintain his employment and requiring him to respond on the very day he received the letter is wholly inappropriate and unacceptable.
37. For the avoidance of doubt, we note that we severed and carefully considered the nature and effect of the "two options". We find that the letter putting the two options to the Employee was in effect putting one "option" only. That "option" was tantamount to an ultimatum to the Employee that he must accept a 50% pay-cut in order to maintain his employment.

38. It follows that the Employer's letter dated August 30, 2013 is misguided and misleading in so far as it maintains that the Employee's refusal of the two options meant that he "failed to secure continued employment".
39. Based on the oral and documentary evidence before us, we find that the Employee was not offered the opportunity of working reduced hours at a reduced salary. Moreover, the Employee was not offered the opportunity to enter into a part-time arrangement similar to that under which Mr. Wayland was engaged. It is not in dispute that the option to accept the 50% pay cut would require him to continue working full time.
40. As to the option for the Employee to lease the restaurant, it appears that that was effectively an attempt by the Employer to ease the weight of the "millstone" around his neck. Clearly, had that option been exercised, the Employer would have successfully flipped the redundancy situation into an income generating arrangement whereby he would benefit from the payment of rent by the Employee.
41. In the final analysis, given the particular circumstances, we conclude that the Employer failed the test of reasonableness under Section 58 (2) of the Code. As a result, we find that, notwithstanding the redundancy situation, the dismissal of the Employee was unfair, harsh and oppressive.

Declaration

42. In the premises, we declare that, by reason of the Employer's failure of the test of reasonableness under Section C58 (2) of the Labour Code, the Employee was unfairly dismissed with effect from November 30, 2013 and is entitled to compensation.

The Award of Compensation

43. In dealing with compensation, we are mindful of our statutory obligation under Section 10 (3) of the Industrial Court Act to make an award in relation to the dispute before us as we consider to be **"fair and just having regard for the interests of the persons immediately concerned and the community as a whole"**. Moreover, we are specifically obliged to **"act in accordance with equity, good conscience and the substantial merits of the case before us"**.
44. Based on the Employee's his prayer for relief in his Memorandum, the evidence adduced at trial and Counsel's written submissions. We award as compensation as follows:

(a) Notice Pay

A monthly paid employee who is unfairly dismissed is entitled the equivalent of one month's pay in lieu of notice. Accordingly, **the award under this head is \$8,000.00.**

(b) Loss of Protection from Unfair Dismissal

Under this head the Employee is entitled to compensation equivalent to severance pay at the rate of one month's salary per year of employment. Given his monthly salary of \$8,000.00, and that he worked from June 1, 2008 to November 30, 2013, (a total of 5 years and 6 months) **we award compensation in the sum of \$44,000.00 (\$8,000x5.5)**

(c) Immediate loss of earnings

Given the Employee's obligation to mitigate his loss, there is no or no sufficient evidence to ground an award of compensation under this head or in respect of future loss of earnings.

(d) Exemplary Damages

Having regard for the Employer's conduct in dealing with the redundancy situation, we are of the opinion that an award of exemplary damages is warranted. In general, we take into consideration the serious breaches of the principles and practices of good industrial relations. Further, we note our earlier conclusion that the dismissal was harsh and oppressive. In particular, we are mindful of the following aggravating factors: a) the humiliation and embarrassment suffered by the Employee, b) the nature and content of the ultimatum put to the Employee, c) The Employer's attempt to flip the redundancy situation into an income-generating opportunity for his own benefit. In the circumstances, **we award exemplary damages in the sum of \$20,000.00.**

(e) Net Compensation

The total award to the Employee is \$72,000.00. Following his dismissal, he received the total sum of \$50,109.51 as his final payment of which \$6,276.40 was holiday pay leaving the balance of \$43,833.12 as "severance pay" with interest. As a result, **the net amount of compensation due to him is \$28,166.89.**

(f) Costs

For the exceptional reasons which ground our award of exemplary damages, **we also award of costs in the sum of \$5,000.00**

45. Order

1. The Employer shall pay the total sum of \$33,166.88 to the Employee in full settlement of his claim.
2. The said sum of \$33,166.88 must be paid to the Employee no later than September 15, 2018.

Dated the 28th day of August 2018



Charlesworth O. D. Brown
President



John Benjamin
Member



Megan Samuel-Fields
Member

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