

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 50 of 2014

BETWEEN:

ICILMA PETERS

Employee

and

CARIBBEAN INTERNATIONAL RESORT SERVICES LTD T/A COCOS HOTEL

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Samuel R. Aymer

Member

The Hon. John Benjamin

Member

Appearances:

Ms. Cicely Charles of Antigua Hotel Management Association, Representative for the Employee

Mrs. Andrea Roberts-Nicholas of Roberts & Co., Attorney-at-Law for the Employer

2015: December 3

2018: August 8

JUDGMENT

Brown, P:

Undisputed Facts

1. The Employee, who previously held the position of Executive Housekeeper at a prominent hotel in Antigua and Barbuda, commenced her employment with the Employer in the position of Front of House Coordinator on December 8, 2011. Her last day at work was June 30, 2013 at which time she was earning a weekly salary of \$1,400.00. She also received a monthly bonus of \$1000.00.
2. The Employee's responsibilities included housekeeping matters including laundry preparation; room maintenance and cleanliness; preparation of work schedules; checking for and reporting on defects, effecting repairs, purchasing



materials, supervising workmen including those in the landscaping department; managing the hotel; conducting interviews; liaising with Human Resource Department; liaising between departments; greeting guests; resolving disciplinary matters; and dealing with customer-service issues.

3. In addition, the Employee was required provide advisory services for Keyona Hotel, an affiliate hotel which was also owned by the Employer. She was required to work at that property approximately 5 times per week on which occasions she performed similar duties to those at Cocos.
4. Notwithstanding the wide varieties of her responsibilities and duties, contrary to section C5 (1) of the Labour Code, the Employee received no written statement of working conditions or a job description from Employer.
5. During the period of her employment the Employee performed satisfactorily and received no complaints about her performance from either the Employer or any of its guests. Her performance at the required level ensured the payment of the said bonus of \$1000.00 each and every month during the period of her employment.
6. By letter dated June 30, 2013 the Employee was advised of the Employer's decision to make her position redundant "due to the fact that it has not produced the results we anticipated". Prior to that date the Employer had no discussion with the Employee about redundancy.

The Issues

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

Whether a Redundancy Situation Existed

8. Section C58 (1) of the 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.

9. 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.**
10. In cases where an employer has admitted that it 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.
11. In the case of **Antigua and Barbuda Workers’ Union v. Cable and Wireless (Antigua and Barbuda) Limited, Reference No. 66 of 2015**, this Court adjudged that the employees were unfairly dismissed. In that case, the employer by evidence established that a redundancy situation existed. Nevertheless, the dismissals were held to be unfair by reason of the employer’s failure to act reasonably in the circumstances.
12. In her submissions, Ms. Roberts-Nicholas quoted the statutory definition of redundancy, referred to in decided cases and submitted that a redundancy situation could arise by way of reorganization where the Employer sets about to terminate the services of superfluous workers. We agree with that submission.
13. After careful consideration of the witness statement of the Employer’s Managing Director and his oral testimony, we are not persuaded that a genuine redundancy situation existed. In other words, the Employer failed to establish a factual basis for the assigned reason of redundancy.
14. In analyzing the evidence to determine whether a factual basis was proved we considered several aspects of the evidence. Firstly, we note that the dismissal letter stated that the Employee’s position was being made “redundant due to the fact that it has not produced the results we anticipated”. That expression by the Employer is paradoxical in light of the fact that at the end of every month during her tenure the Employee received the monthly bonus of \$1000. In that regard, we conclude that the bonus was paid to the Employee “for achieving the agreed guest satisfaction level” as stipulated in the Employer’s letter dated December 8, 2011 confirming the Employee’s employment.
15. Secondly, we note the oral testimony of the Managing Director, Andrew Michelin, to the effect that the Employee’s position “was a new post created in an

effort to boost work and economic productivity". However, according to Mr. Michelin, the Coordinator's post did not yield the desired results. As a consequence, following the dismissal, "the housekeeping, laundry, landscaping and maintenance departments resumed working in tandem" as they did prior to the Employee's employment.

16. In our view, the Employer failed to discharge its obligation to demonstrate the state of affairs immediately before the Employee was employed in order to show how the departments worked in "tandem" and how it intended situation to be improved by the Employee's presence. Moreover, the Employer alleged that the Employee was hired to do a "specific job" and for a "particular purpose", neither of which were established by the evidence. In that regard, the Employer's admitted failure to provide the Employee with a job description detailing her duties was most instructive.
17. At the end of the day, although Ms. Roberts-Nicholas made a valid submission in principle in respect of the incidence of redundancy based on retrenchment resulting from reorganization, the Employer failed to discharge its evidentiary burden in that regard.
18. Importantly, in considering whether a redundancy situation existed, we had regard for the obvious wide scope of the Employee's responsibilities and duties, which were not properly defined. In the circumstances, we conclude that no true redundancy situation was proved by the Employer.
19. That conclusion would be sufficient to substantially dispose of this matter in favor of the Employee. However, we feel constrained to apply the test of reasonableness which becomes paramount in the event that our conclusion above was erroneous.
20. In **Cable & Wireless** case mentioned above, this Court held that notwithstanding the existence of a redundancy situation, the dismissals were unfair. In that regard, the Court considered the conduct of the Employer before during and after the redundancy situation came into existence.

Whether the Employer Acted Reasonably

21. In our opinion, given the level and scope of what was required and expected of the Employee, her letter of employment dated December 8, 2011 was woefully inadequate as a substitute for the mandatory statement of working conditions required under Section C5 of the Code. We have noted how much that failure of the Employer militated against the required proof of a redundancy situation. By extension, we are of the opinion that the absence of a proper job description in

the particular circumstances is a fundamental element of unreasonableness which we have to take into account when applying the test of reasonableness.

22. Secondly, we are mindful of the importance of the consultation process in cases of redundancy. In this Reference, the absence of a proper consultation process is not in dispute. We emphasize here that in light of what was required and expected of the Employee in the position she held, her responsibilities and the duties she performed, it was imperative that she should have been consulted. Needless to say, the consultation process should have involved early notice of the redundancy and, possibly, the Employee's input.
23. Thirdly, we considered whether the Employee was the proper person to be selected for redundancy. We are mindful of the stated small size of the Employer's business and its objectives referred to Counsel's submissions. However, we are not convinced that the Employer acted reasonably in selecting the Employee for redundancy in the circumstances. In our view, the Employer should have done all or at least one of the following:
 - (a) Advise the Employee of the need to improve her performance within a particular time frame in order to achieve the desired results.
 - (b) Consider reducing the Employee's responsibilities and duties, offering her a new position if possible with, perhaps, even a reduction of her salary and hours of work.
 - (c) Keeping the Employee employed in her position and consider making some other position or positions redundant.
24. Fourthly, the question of alternative employment must be considered. The considerations as to the selection of the Employee for redundancy also apply to the issue of alternative employment. We are not satisfied that the Employer applied its mind, as it should have, to the possibility of offering alternative employment. Moreover, it appears that the Employer did not even contemplate offering the Employee alternative employment at its affiliate Keyona Beach Hotel, where she was responsible for some aspects of its administration.
25. Fifthly, as stated above, it is not disputed that the Employee received no or no adequate notice of her then impending redundancy. Terminating her services on the very day she received notice of the redundancy is wholly inappropriate and unacceptable.
26. In the final analysis, we conclude that, quite apart from failing to establish a factual redundancy situation, the Employer failed the test of reasonableness under Section C 58 (2) of the Code. As a result, we find that the dismissal of the Employee is unfair.

The Award of Compensation

27. By reason of her unfair dismissal, the Employee is entitled to compensation which we assess as follows:

(a) Notice Pay

We award the Employee the equivalent of one month's pay in lieu of notice. Accordingly, **the award under this head is \$6,066.67**. She received \$1,400 leaving a **balance of \$4,666.67**.

(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 work. Given her weekly salary of \$1,400, her monthly entitlement was \$6,066.67 $\{(\$1,400 \times 52) \div 12\}$. Under this head, **we award compensation in the sum of \$9,100.01** $(\$6,066.67 \times 1.5)$. Under the head "Severance Pay" the Employee received \$8,400.00 leaving a **balance of \$700.01**.

(c) Immediate loss of earnings

The Employee found new employment 5 months after her dismissal at a reduced salary of \$3,000.00 per month. In the circumstances, based on her diligent efforts to mitigate her loss, we award the sum of \$30,333.35 $(\$6,066.67 \times 5)$ for the five-month period immediately after dismissal. Further, we award an additional sum, based on the difference between her old salary and the new one, for a period of 3 months. As a result, we make an additional award of \$9,200.01. **The total award under this head is in the sum of \$39,533.36.**

(d) Fringe Benefits

- (i) "The Bonus": It is not in dispute that the Employee received the agreed "monthly bonus" of \$1,000.00 without any formal assessment. Save for the stipulation in the employment letter that that sum would be paid "for achieving agreed guest satisfaction level", the evidence discloses no other criteria. In the circumstances, despite the use of the word "bonus" we treat this amount as a monthly allowance. Accordingly, we make the inference that the required guest satisfaction level was achieved. We have no evidence to suggest that the position would have changed in the 5 month period immediately after the Employee's dismissal. In the circumstances, **we award the sum of \$5,000.00** being the equivalent of the monthly bonus for the 5 month period during which the Employee suffered immediate loss.

- (ii) As to "Service Charge", it was a term of the employment agreement that the Employer would be paid the equivalent of 5 service charge points with an average of \$80-\$100 per point. Applying an average of \$90.00 per point the Employee's average weekly earnings for service charge was \$450.00 (\$90x5) or \$1,950.00 per month. Accordingly, **we award the sum of \$9,750.00** representing the loss of service charge entitlement for the 5 month period immediately after dismissal.

28. Summary of Awards

The awards made to the Employee may be summarized as:

(a) Pay in lieu of Notice (balance)	\$ 4,666.67
(b) Loss of Protection (balance)	700.01
(c) Immediate Loss	39,533.36
(d) Fringe Benefits	
(i) Bonus	5,000.00
(ii) Service Charge	<u>9,750.00</u>
Total	\$59,650.04

29. Order

1. The Employer shall pay the total sum of \$59,650.04 to the Employee in full settlement of her claim.
2. The said sum of \$59,650.04 must be paid to the Employee no later than September 15, 2018.

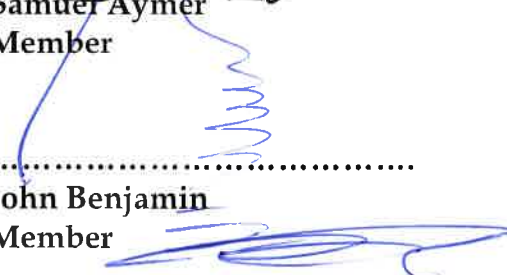
Dated the 08th day of August, 2018



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President



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