

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 52 of 2015

BETWEEN:

RUTH JOHN

Employee

and

KELVIN JOHN & HONORA JOHN

Employer

Before:

The Hon. Dr. Hayden Thomas

Chairman

The Hon. Samuel R. Aymer

Member

The Hon. Megan Samuel-Fields

Member

Appearances:

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

Mr. Loy Weste and Mrs. Lisa M. John-Weste, Attorneys-at-Law of Thomas, John & Co. for the Employer

2015: November 4

2018: May 9

JUDGMENT

THOMAS, C:

Background

1. The Employee Ruth John was employed by the Employers Kelvin John and Honora John in May, 2005 as a maid in their home at Friar's Hill Development, McKinnon's and was responsible for cleaning, folding clothes, ironing and cooking. She was contracted to work for five days per week from 8:00 a.m. to 4:00 p.m. daily. Her initial wage was \$350.00 weekly and this was increased in January, 2009 to \$450.00 less statutory deductions. The Employers provided breakfast and lunch daily for the Employee. The Employers stated that they



enjoyed a pleasant and warm relationship with the Employee throughout her entire employment.

2. In her Witness Statement submitted to the Court on January 19, 2016 the Employee stated that she went on thirteen (13) weeks Maternity Leave commencing April 24, 2015 and was scheduled to return to duty on July 27, 2015.
3. The Employers terminated the Employee's services in a letter dated July 27, 2015. It stated:

"July 27, 2015

Ms. Ruth John

Grays Farm

St. John's

Antigua

Dear Madam,

It is with sincere regret that we inform you that effective immediately, your post as Helper - Monday to Friday from 8:00 am to 4:00 pm - is made redundant.

We have enclosed the calculation of the redundancy package along with a cheque of EC\$11,388.12 in full settlement of the payment. Kindly note that you are not required to return to work tomorrow.

We wish you all the best in your future endeavours.

Yours faithfully,

(Sgd.) Kelvin John

(Sgd.) Honora John

Employer

Employer"

4. An attachment to the letter of termination gave details showing how the calculation of the redundancy package was determined as follows:

"RUTH JOHN Redundancy Pay Calculation from May 2005

10 years 2 months (Weekly Pay - \$450.00)

Redundancy	Pay	(No	Deductions)
EC\$10,980.00			

<u>1 Week Notice Pay</u>	EC\$450.00
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Less Deductions

Medical Benefits \$15.75

Education Levy 8.13

Social Security 18.00

.....

41.88

.....

EC\$ 408,12

.....

Net Pay
11,388.12"

EC\$

5. The Employee, in her Memorandum dated November 13, 2015, admitted receipt of the above letter with the enclosed cheque of \$EC 11,388.12.

Legal Proceedings

6. In a Reference filed with the Court on September 17, 2015, the Employee claimed "Unfair Dismissal".

An Employee's Memorandum dated 12th November, 2015 was filed with the Court on 13th November, 2015.

The Employers' Memorandum in response dated 4th December, 2015 was filed with the Court on December 7, 2015.

The Employee's Witness Statement dated 31st December 2015 was filed with the Court on 19th January, 2016.

The Employers' Witness Statements dated 28th December, 2015 were filed with the Court on 29th December, 2015.

Issues

7. The following are the main issues identified:
- Did a redundancy situation exist at the time of the Employee's dismissal? If so, did the Employer act reasonably or unreasonably in dismissing the Employee?
 - If the Employee was unfairly dismissed what is the level of compensation to which she is entitled?

Legal Framework

8. Section C 56 of the Antigua and Barbuda Labour Code (The Labour Code) establishes the statutory right of an employee not to be unfairly dismissed. It states:

"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 just cause".

9. Section C 58(1) states: "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."

10. C 58(2) establishes the test of reasonableness which an employer must apply in order to justify a dismissal. This section states:

"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."

11. Section C 3 of the Labour Code (Interpretation) defines redundancy thus:

"redundancy" means a situation in which by virtue of lack of customers' orders, retrenchment, the installation of labour savings 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 diminished; "

12. Section C 40 of the Labour Code states:

"Every employee whose term of employment with an employer and his predecessors has in aggregate exceeded one year is entitled to severance pay upon termination of said employment by employer for reasons of substantially redundancy."

13. Section C 41 outlines how Severance Pay should be computed. It states:

“Severance pay shall consist of at least one day’s pay, at the employee’s latest basic wage, for each month or major fraction thereof of his term of employment with his employer for reasons of redundancy.”

14. C 10 (1) states “upon termination by an employer of an employee’s employment subsequent to the expiration of the latter’s probation period, the employer shall, within seven days of the termination or notice thereof, furnish to such employee a written statement of the precise reason for the termination.”
15. (2) The employer shall, upon request of the terminated employee furnish a certificate specifying the dates of his engagement and termination and the type of work on which he was employed.
16. (3) An employer who furnishes a statement or certificate required by subsection (1) or (2) respectively, shall be conclusively bound by the contents therein in any proceeding testing the fairness of the dismissal as covered by Part 5 herein of his liability for severance pay covered by Part 4 herein.
17. (4) An employer who fails to furnish either the statement or the certificate shall be estopped from introducing testimony as to facts which might have been recited in said statement or certificate in any proceeding testing the fairness of the dismissal or his liability for severance pay whichever is applicable.”

The First Issue

Did a redundancy situation exist at the time of the Employee’s dismissal? If so, did the Employer act reasonably or unreasonably?

18. The following points were raised by the Employers to prove that a redundancy situation existed and that they acted reasonably in terminating the employment of the Employee:
1. There was a reduction in the workload due to the fact that two children had left home which means that of the three bedrooms in the house, there were now two less bedrooms to clean and less clothes to wash, iron, fold and put away.
 2. A dryer was purchased and, therefore, there was less clothes to hang out on the clothes line.
 3. Financial hardship was now being experienced because of a downturn in the Antiguan economy which resulted in reduced income from the law practice of the

main Employer. There was also reduced rental income and increased expenditure because of contributions to aged family members.

4. There was increased expenditure due to expenses incurred including tuition, accommodation and travel by the Employers' son following his admission to University.

19. The Employee disagreed that there was any diminution of work. The Employer, however, noted that the Employee often only had work for about three to four hours leaving her with time to relax and look at television.

20. The Employers emphasized that they had previously mentioned to the Employee the difficulties they had been experiencing which might lead to their "parting ways". In a sworn Witness Statement, Employer Kelvin John stated *inter alia*:

"I had personally told Ruth John on several occasions of my financial difficulties as a self-employed individual, and the main breadwinner of my home. In addition to me telling her that I was unable to take a salary on several occasions, Ruth John was also aware, and informed by my wife and me that because of our financial difficulties, three (3) Employees were made redundant in February, 2013 at my Law Firm."

He said that he discussed and informed Ruth John of these matters "on an open and upfront basis, because my wife and I and Ruth John enjoyed that type of working relationship at our home and we spoke about unlimited topics in the kitchen..... As such for approximately 2 years, Ruth John was made aware of my financial difficulties."

21. Ruth John, on the other hand, said that prior to a meeting held on July 28, 2015, the Employers never told her at any time that they were having financial issues and/or that they were contemplating the possibility of making her position redundant. She further stated that her duties were carried out by someone else after her termination.

22. The Employee further said that she found it strange that she was not called out to work by the Employers when her Maternity Leave ended. It seems clear to us, however, that it was her responsibility instead, to contact the Employers to inform them of her pending return. The Employers emphasized that there was always a cordial work relationship throughout the Employee's employment. Gifts, for example, were presented at various occasions. These included a refrigerator, stove, living room couch sets and bonuses. The evidence was uncontroverted.

23. The question as to whether or not a true redundancy existed was examined to determine whether the action taken by the Employers was in keeping with the requirements laid down in Section C3 of the Labour Code. The Employee, for example, accused the Employers of employing someone else to do her work. She was, however, unable under cross-examination to verify this. In our view, based on the evidence outlined, the work which the Employee was first employed to perform had diminished substantially and therefore a true redundancy existed.

24. Did the Employer act reasonably or unreasonably?

In considering this matter, we referred to a judgment delivered on 12th November, 2012, in this Court by Philip Pilgrim in the case Ref. No. 19 of 2011, *Steve Austin vs Horizons Supplies Ltd.* In Paragraph 47 (a) the President stated the following:

"In *Mark Azille and Courts (Antigua and Barbuda Ltd.)* Ref. No. 27 of 2003 I stated at Paragraph [61] inter alia as follows:

"In a claim for unfair dismissal which is based upon the existence of a redundancy situation such a claim involves three (3) inherent matters whether they are pleaded or not by either party. It is the duty of the Industrial Court to consider these three (3) matters. This principle is well founded in the case law." In summary, the three matters are described thus:

- (1) The employer must select the employee fairly who it desires to make redundant.**
- (2) The employer should consult and give him reasonable warning of impending redundancy.**
- (3) The employer should make reasonable efforts to find suitable alternative employment for the employee in the business where possible.**

25. In the present case, the question of selection of the employee mentioned in (-) above does not apply since the Employee was the only one performing the duties of a household help. The matter of consultation was dealt with earlier. Taking everything into consideration, particularly the good working relationship which both parties agreed existed, we are of the view that the Employee was told earlier by the Employers of their financial difficulties and of the possibility of the upcoming redundancy. The Employee gave evidence that she knew of redundancies which had previously occurred at the Employer's Law Firm. With respect to (3) above, it is clear that there was no suitable alternative employment in the household to which the Employee could have been assigned.

The Second Issue

26. In the premises, we are of the view that the dismissal was not unfair.

27. Was the Employee properly compensated?

At the termination of the Employee's employment, the Employer issued to her a cheque in the sum of \$11,388.12 as detailed in Paragraph 4 above. This was in respect of Redundancy pay calculated as Severance Pay for 10 years, 2 months service and Notice Pay of 1 month in lieu of notice. The Employee confirmed receipt of the cheque. We are of the view that the amount paid was in keeping with the norm.

The Third Issue

28. Are there other amounts due as a result of the termination?

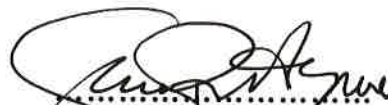
In Paragraph 26 above we ruled that the dismissal was not unfair, therefore no damages are due to the Employee.

29. The Reference is dismissed and there is no Order as to costs.

Dated the ¹⁴9 day of May, 2018.



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Dr. Hayden Thomas
Chairman



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Samuel R. Aymer
Member



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Megan Samuel-Fields
Member

