

ANTIGUA & BARBUDA



IN THE INDUSTRIAL COURT

REFERENCE NO. C/UD/ 14 OF 2016

BETWEEN:

NORMA GRANT

Employee

and

BUSINESS SYSTEMS AND SUPPLIES LIMITED

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Samuel R. Aymer

Member

The Hon. Dr Hayden Thomas

Member

Appearances:

Mr. Samuel James and Mr. Simon Leonard of Antigua and Barbuda Free Trade Union,
Representative for the Employee

Ms. Kalisia Marks of Richards & Company, Attorney-at-Law for the Employer

2017: November 15

2019: July 24

JUDGMENT

Brown, P;

Background

1. The Employee is the holder of a Certificate in Business Administration and a Bachelor of Science (Management Studies) degree awarded by the University of the West Indies in August 1990 and September 2005 respectively. She

commenced her employment with the Employer in June 2007 in the position of Maintenance Clerk. Her last position to which she was appointed during her second year of her employment, was that of General Manager's Assistant in which she earned a monthly salary of \$5,500.00.

2. At all material times, the Employer's General Manager was Mr. Patrick Benjamin to whom the Employee reported directly.
3. The Employer did not provide the Employee with a job description or a list of the duties she was required to perform at the commencement of her employment or at any subsequent time.
4. During her tenure, apart from duties directly associated with the Employer's business, the Employee performed "myriad" duties for and on behalf of the following entities, all of which were owned by the Employer, the General Manager and/or his close family members:
 - 1) Signs and Impressions: a department or subsidiary business of the Employer (**SI**)
 - 2) Green Gables: commercial apartment building owned by the General Manager (**GG**)
 - 3) Dot Photo: a department or subsidiary business of the Employer (**DP**)
 - 4) Bencorp Building: commercial property owned by the General Manager and his family (**BB**)
 - 5) Home of Ruby Benjamin: private residential property occupied by the mother of the General Manager (**RB**)
 - 6) Boon's Haven: commercial residential property owned by the General Manager and his family (**BH**)
 - 7) Home of the General Manager: private residential property occupied by the General Manager (**PB**)
5. Clearly, the duties performed on behalf of the Employer and the other entities were amorphous. They may be categorized as follows:

1) Maintaining personnel files:	Employer / SI
2) Payroll	Employer / SI / DP / RB / PB
3) Accounts receivable	Employer
4) Rent collection	GG / BB / BH
5) Utility payments	GG / BB / BH / PB
6. During the last year of her employment the General Manager personally took over the handling of the personnel files and implemented a professional training

programme, including the computerization of several of its internal processes. The Employee was deliberately excluded from the training.

7. On Friday 10th May, 2013 the General Manager orally informed the Employee that he was going to retire in December 2013 and that he was restructuring the company which would make her position redundant with effect from August 31, 2013.
8. On Tuesday 14th May, 2013 the Employer delivered a letter dated May 13, 2013 to the Employee which outlined the information communicated to her the previous Friday. By the said letter the Employer also informed the Employee that a new employee would "be coming in" and that she would have to hand over her portfolio. The letter is reproduced as follows:

"May 13, 2013

Mrs. Norma Grant

...

For record purposes, I confirm my meeting with you on Friday, May 11, 2013, when I disclosed that I will be retiring from the company with an effective date of December 31, 2013. As a consequence the company will be going through major restructuring and your current job position will become redundant from August 31, 2013. Unfortunately, the company does not have any other position to offer you and is obliged to sever your employment from August 31, 2013. As a severance package you will be given one month's salary for every completed year worked. In planning for the transition and in allowing you also to plan your affairs, I am giving you a fairly long notice period.

As you are aware, BSS considers its association with its staff as a strong family bond making it very difficult to part company with any of its employees, but in particular those holding senior positions as you do. However, for the survival and continual growth of the company, the measures mentioned above must inevitably be taken. I am requesting of you, in the interim, to make every effort to bring all your duties up -to-date so that handing over, in due course, can be an easy and orderly matter.

At a later stage and through an appropriate forum, I intend to publicly address the matter of expressing appreciation for your services. Nevertheless, I would still at this time want to thank you sincerely for the many years of your loyal and dedicated service to company.

Yours truly,

.....

*Patrick Benjamin
General Manager"*

9. On two occasions during the month of June 2013 the Employer instructed the Employee to prepare a list of all her duties some of which were earmarked to be handled by the "new employee".
10. The Employer created the new position of Human Resources Officer / Internal Auditor and hired the new employee, Karen Ho, to fill it. At the commencement of Ms. Ho's employment she worked with the Employee during the months of July and August 2013.
11. On August 31, 2013 the Employer presented the Employee with a Hallmark greeting card congratulating her on her "retirement". The card was endorsed by three members of the Employer's Management team including the General Manager and the new employee. The card contains the following expressions on its cover and inner pages as follows:

[COVER PAGE]

"Congratulations on Your Retirement"

[INNER PAGE]

"NORMA, (manuscript)

*This is the time to celebrate
All that you've accomplished-
The goals you've met,
The friends you've made,
The lives you've touched.
And this time to look ahead
To all the good things
In store for you.*

Here's to you as you retire!"

12. As certified by Mr. Benjamin in his letter of recommendation dated May 13, 2013, during her tenure the Employee became “very experienced” and had been “exposed to many facets” of the employer’s business. In particular, “as part of her duties, she was responsible for Accounts Receivable, Accounts Payable, Payroll, Costing, Maintaining Staff Records and Preparing and Submitting all Government Statutory Returns”. Moreover, the Employee was a “very dedicated, hardworking, loyal and confidential employee”.
13. During the entire course of the Employee’s employment, the Employer had no retirement age policy and never communicated anything to the Employee at any time in that regard.

The Employee’s Case

14. In her Memorandum of Claim filed on February 23, 2016 the Employee pleaded that “the Employer acted unreasonably when it chose to terminate the Employee’s employment without just cause as a result of which the Employee was unfairly dismissed”. The grounds of her claim are as follows:
 - (a) During the last year of her employment the Employer instituted professional payroll training but excluded the Employee therefrom.
 - (b) During the last year the Employee experienced stress during the course of her employment due to the “less than satisfactory” manner in which Mr. Benjamin spoke to her and made derogatory remarks about her in the presence of other staff.
 - (c) For the first time during her tenure the Employer questioned her performance and stated that she did not know what she was doing, while pressuring her to collect small amounts of outstanding debt.
 - (d) The negative and stressful behaviour of the Employer ceased as soon as Mr. Benjamin told her that her position would become redundant.
 - (e) The Employee was the only staff member whose position became redundant because of the restructuring of the business.

The Employer’s Case

15. By its Memorandum of Defence filed on 25th April, 2013 the Employer maintained that the Employee’s position became redundant. It also disputed the Employee’s Claim on the following grounds:
 - (a) The taking over of the personnel files by Mr. Benjamin was done in anticipation of his retirement so that he could put certain things in order.

- (b) The introduction of software to manage cheque and cash payments as well as the computerization of the payroll system were all done in preparation for his retirement.
- (c) The management of both computerized systems were assigned to the Accountant who dealt with other accounting functions. As such, the changes were part of the restructuring process and were not designed to exclude the Employee.
- (d) It was necessary to reprimand the Employee from time to time but it was never done in a derogatory manner.
- (e) The Employee did not always perform satisfactorily but was often careless and made several errors to the financial detriment of the Employer.
- (f) The Employee was never treated unfairly at any stage of her employment.
- (g) Although the Employer had no retirement age policy it was common knowledge that the retirement age in Antigua is 60 years.
- (h) The Employee was aware that the restructuring of the company was inevitable and was cognizant that her work load had diminished substantially after the electronic systems were introduced and the number of actual hours she worked had decreased significantly.

The Main Issues

16. The two main issues arising in this Reference are:

- (1) Whether a redundancy situation existed as at August 31, 2013?
- (2) Whether the Employer acted reasonably in dismissing the Employee?

The Statutory Framework

17. The statutory framework for the determination of these issues is largely contained in Sections C 3, and C 58 of the Antigua & Barbuda Labour Code as follows:

“C3. In this Division, unless the context otherwise requires

“redundancy” means a situation in which by virtue of lack of customer 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; “

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

...
(c) is that the employee was made redundant;

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

"C 58 (2) 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."

18. In addition to those provisions, in the exercise of our statutory powers we are also obliged to have regard for the following provisions of section 10 of the Industrial Court Act:

"10(3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its power shall-

- (a) Make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;*
- (b) Act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code.*

The Evidence

19. The Employee testified on her own behalf. She amplified and was cross examined on her Witness Statement filed on February 23, 2016. Her testimony largely reflected the facts stated in her Memorandum. In particular, the Employee's testimony emphasized that the Employer failed to substantiate that a redundancy situation existed, as a result of which she was unfairly dismissed.
20. Under cross examination, the Employee outlined her "myriad" duties for the several entities to which she provided her services. She maintained that as at August 31, 2013 the work she was required to perform had not ceased or substantially decreased.
21. In his testimony on behalf of the Employer, Mr. Benjamin stated that he prepared the document showing the duties of the new position of Human Resources Officer / Internal Auditor . When it was put to him, he did not agree that there

was no genuine redundancy and/or that the Employee was being made redundant because she was approaching the age of 60 years.

22. In the final analysis, Mr. Benjamin's testimony established the following undisputed facts:

- (a) In 2013, when he was 74 years old, he decided to retire from the position of General Manager. As a result, he set about to restructure the business to ensure its continued growth.
- (b) As a part of the restructuring process, the Employer computerized its cheque and cash payments as well as its payroll systems.
- (c) The Employer excluded the Employee from its professional training and computerization processes.
- (d) The Employer decided to create the new position of Human Resources Officer/ Internal Auditor and abolish the Employee's position of Assistant to the General Manager.
- (e) Subject to the computerization process, the duties previously performed by the Employee were redistributed among the other staff members including the Human Resources Officer / Internal Auditor.

Resolving the Issues:

Issue 1: The Redundancy Situation

23. Having regard to the evidence and applying the "cause" and "effect" approach utilized by the Court of Appeal in Civil Appeal No. 28 of 2001: **Sundry Workers v Kings Casino**, we first asked ourselves: what caused the state of affairs? Secondly, we asked the question: what was the effect resulting from the cause?
24. While we wholly accept Mr. Benjamin's evidence as to the rationale for initiating the restructuring of the Employer's business, we are not convinced that the process resulted in a genuine redundancy situation. In other words, neither the retirement of Mr. Benjamin nor the computerization process caused the cessation or the substantial diminution of the work performed by the Employee.
25. Although the impending retirement of Mr. Benjamin and the restructuring process resulted in the abolition of the position of Assistant to the General Manager and the creation of the new position, they did not have the effect of creating a redundancy situation as at August 31, 2013.
26. In our opinion, the state of affairs, as engineered by the Employer, was most likely motivated by its conclusion that the Employee's services would be terminated in any event upon her attainment of the "normal" retirement age.

That conclusion is supported by the Employer's deliberate exclusion of the Employee from its professional training and computerization processes.

27. In the premises, upon our careful consideration of the written and oral evidence of the Employee and Mr. Benjamin as well as the documentary evidence, we agree with the closing submissions of Mr. James and Mr. Leonard that no genuine redundancy situation existed as at 31st August 2013. There was no good or sufficient factual basis for the establishment of redundancy as a valid reason for the dismissal of the Employee under section C 58 (1) of the Labour Code.
28. For completeness, notwithstanding our conclusion that there was no genuine redundancy, we will apply the test of reasonableness under section C 58 (2) of the Labour Code. In that regard, being guided by selected landmark judgments, it is our opinion that the statutory test of reasonableness is paramount in redundancy cases such as this one.

Issue 2: Reasonableness

29. Historically, in redundancy cases, whether or not a dismissal is unfair does not turn solely on the existence of a redundancy situation. In the judgment of this Court in Reference No. 20 of 1988: **Antigua Workers' Union v Antigua Gases Limited**, President H. S. R. Moe (as he then was) asserted:

"Nonetheless the mere fact that a genuine redundancy does exist does not per se lead to the conclusion that the dismissal was fair; for the determining factor is whether the employer acted reasonably in handling the situation. When, therefore, redundancies are being considered it might be regarded as good industrial relations practice to follow the guidelines laid down in Williams V Compair Maxim Ltd. 1982 1.C.R.156. In particular, the employer should seek to establish selection criteria which can be objectively checked against such things, inter alia, as attendance records, job performance, length of service, needs of the business..."

30. More recently. In the **Kings Casino case** (referred to at paragraph 18 above), Chief Justice Sir Dennis Byron (as he then was) stated:

"I think that the main point of relevance to this case is that it is pellucid that for a redundancy there must be cause and effect. The effect being that the work has ceased or substantially diminished....This brings me to point out, however, that the existence of a cause, such as a hurricane, does not mean that any dismissal subsequent to it is fair. The employer must have acted reasonably ..."

31. The latter decision was recently applied by this Court in Reference No. 66 of 2015: **Antigua & Barbuda Workers Union v. Cable & Wireless (Antigua & Barbuda) Limited**. The application of the statutory test of reasonableness prescribed in Section C 58 (2) of the Labour Code, was subsequently approved by the Court of Appeal.
32. Having regard to the principles laid out in the **Compair Maxim case**, we will consider the following selected actions and omissions of the Employer. For convenience, we will analyze the reasonableness of the Employer's decision to dismiss the Employee on the ground of redundancy under the following heads:
- (a) The Employer's approach to the restructuring;
 - (b) The Employee's duties, job description;
 - (c) The new position: Human Resources Officer / Internal Auditor.
 - (d) Consultation;
 - (e) Notice and warning;
 - (f) Selection of Employee;
 - (g) Alternative employment

The Employer's Approach to Restructuring

33. In our opinion, apart from Mr. Benjamin's then impending retirement, the Employer's decision and the process of restructuring was influenced by its knowledge of the age of the Employee. Mr. Benjamin testified that although the Employer had no retirement age policy "it is common knowledge that the retirement age in Antigua is 60 years."
34. The decision of the Employer to make the Employee's position redundant, as formally communicated to her by letter dated 14th May, 2013, was made when the Employee was two months away from her 60th birthday.
35. The greeting card reproduced at paragraph 17 above to the Employee upon the redundancy of her position on August 31, 2013 expressly congratulated her on her retirement. In fact, it was headed "Congratulations on Your Retirement". Further, the card was specifically personalized with the addition of the Employee's first name in manuscript above the inscription on the inner page of the card ending with the words "Here's to you as you retire!"
36. Having regard to the surrounding circumstances, including the Employer's awareness of the Employee age and the normal age of retirement in Antigua and the presentation of the greeting card to her, a clear inference could be drawn to the effect that the Employer was of the opinion that the Employment relationship

would be terminated in any event on or about the attainment of the Employee's 60th birthday. And that nothing could be done about it.

37. In relation to the Employer's dealings with her over the period immediately before the redundancy situation was communicated to her, on the balance of probabilities, we find that the Employer most likely caused the Employee to feel stressed and pressured because of Mr. Benjamin's utterances to her and the general manner in which he spoke to her. In that regard, we found the Employee to be a credible witness.
38. While we make no judgment about the exercise of the Employer's discretion in composing the "myriad" duties of the Employee and directing how she should discharge the same, it is our opinion that the Employer should have been mindful to approach restructuring process with adequate circumspection but did not do so.
39. Having regard to all surrounding circumstances leading up to the announcement of the redundancy situation to the Employee on May 10, 2013, we find that the Employer, being most likely influenced unduly by its knowledge of the Employee's age, acted unreasonably towards her and otherwise approached the restructuring process in an unreasonable manner.

The Employee's Duties/ Job description

40. We have noted at paragraphs 4 and 5 above that the Employee's duties were amorphous. On first principles, a reasonable employer embarking on a restructuring exercise ought to have at least attempted to better rationalize or condense the Employee's duties. In our opinion, as they existed at the material time, the duties should have been better streamlined and codified to inform the restructuring process as a whole and the potential selection of the Employee for redundancy, in particular. Moreover, a streamlined and properly codified list of duties could have assisted both parties in a potentially productive consultation process.
41. We find that the Employer did instruct the Employee to prepare a list of all her duties. According to the Employee, she did not comply immediately, but she did eventually do so upon being asked a second time. In relation to that request, Mr. Benjamin conceded that the Employee had no job description. Although, he could not recall that he asked her to prepare a list of her duties, we find that he did do so.
42. Again, we find it unreasonable that the Employer was engaged in the restructuring process, which turned out to result in the redundancy of the

Employee only, without her detailed job description. Moreover, we find it most unreasonable that the request to the Employee to prepare the list came after her redundancy of her position was previously announced. In our estimation, the list of duties should have been an important tool to inform the restructuring process generally and the potential redundancy of the Employee, in particular.

43. In passing, we note the lack of the job description and list of duties effectively amounted to the Employer's breach of its statutory obligation under Section C5 (1) and/or (4) of the Labour Code.
44. The breach of that section of the Labour Code, apart from being unlawful, was illogical and unreasonable in light of the Employer's then known intention of (a) creating a new position of Human Resources Officer / Internal Auditor (b) redistributing some of the duties of the Employee to other existing positions.

The New Position

45. We have noted that the substantive duties associated with the new position of Human Resources Officer / Internal Auditor to a large extent embodied several of those previously carried out by the Employee. While the creation and naming of a new position was squarely within the purview of the Employer, we are of the opinion that the creation of that the new position was directly inimical to the continued employment of the Employee.
46. In the final analysis, in light of the Employee's academic qualifications and hands-on experience relative to those of the new employee, and the redistribution of some of the Employee's duties to her, we are not persuaded that the creation of the new position was reasonable in the circumstances.

Consultation

47. Consultation may be a critical prerequisite for the implementation of a redundancy programme. The absence of a fair consultation could by itself render a dismissal unfair. In our opinion, given the Employee's age and all the other surrounding circumstances, a fair consultation process was particularly crucial.
48. It is not in dispute that when the Employer first informed the Employee that the position would be made redundant, her immediate reaction was to remind Mr. Benjamin that her salary from her position was her only means of support. In response, Mr. Benjamin promptly responded by telling her that nothing could be done to avoid the redundancy.

49. We interpret the Employee's response to be a plea for keeping her employment or avoiding the redundancy. At that point a reasonable reaction from the Employer should have been to explore possibilities for avoiding the redundancy. In our estimation, the Employer should have provided the Employee with information about its proposed restructuring, indicate to her how her remaining duties would thereafter be carried out and give her an opportunity to respond within a reasonable time.
50. In our opinion, bluntly telling the Employee that nothing could be done was unreasonable. In the circumstances, it may be surmised that the Employer's unreasonableness in this regard was motivated largely by its position in relation to the Employee's impending 60th birthday.

Warning and Notice of Redundancy

51. The evidence discloses that the Employee received both the warning and notice of her redundancy at the same time. Ideally, the warning of the redundancy should be given prior to the actual notice of her dismissal. In our estimation, the Employee was not given adequate advance warning and notice, having regard to her age and the other surrounding circumstances.

Selection of the Employee

52. There no evidence that the Employer considered anyone else for redundancy. To the contrary, the Employee's position was the only one marked for redundancy. A reasonable employer should have explored whether there were any alternative candidates for redundancy. In that regard, we have noted Mr. Benjamin's testimony that: "Other employees were affected by the restructuring exercise, in that their duties were revised". We are not persuaded that upon a proper revision of all the relevant duties, the selection of the Employee for redundancy was the most reasonable option or even within the band of reasonable options.

Alternative Employment

53. Under this heading, we again underscore the Employee's academic qualifications and experience as well as the "myriad" and amorphous nature of her duties. We are not satisfied that the Employer was sufficiently diligent in making efforts to find alternative employment for her either within its own business or with any of its affiliates who benefited from her services. In fact, we find that the Employer made no effort at all to find alternative employment for the Employee.

Conclusion as to Liability

54. In the premises, the pertinent submissions of Mr. James and Mr. Leonard are more persuasive than those of Ms. Marks. Having regard to all the circumstances, quite apart from our finding that there was no genuine redundancy situation, we conclude that the Employer acted unreasonably in dismissing the Employee. In other words, it failed the statutory test, as a result of which we declare that the dismissal was unfair. Accordingly, the Employee is entitled to compensation which we assess as follows:

Compensation

55. We assess the compensation to which the Employee is entitled as follows:

Immediate Loss

The Employee, who was 64 years old and still unemployed at the date of trial, testified that in her effort to find alternative employment, she made over 60 unsuccessful applications. We are persuaded that her efforts were diligent and that she had "given it her all" up to two and a half years after her dismissal. In our estimation, the Employee's age had a natural negative effect on her prospects for employment. However, we are of the opinion that if she had lowered her sight after the first 6 months, she should have been able to find employment paying approximately one half of her previous salary.

In the circumstances, **we award the total sum of \$66,000.00 under this head** which sum is comprised as follows: A first component in the sum of \$33,000.00 ($\$5,500 \times 6$), being the equivalent of six times her previous full salary, is awarded for the first 6 months after her dismissal. The second component in the sum of \$33,000.00 ($2,750 \times 12$), being the equivalent of 50% of her previous salary for the ensuing 12 months.

Future Loss

Based on the facts of this case we make no award under this head.

Exemplary Damages

We find that the dismissal was harsh, oppressive and contrary to the principles and practices of good industrial relations. Moreover, our careful consideration of the evidence has led us to the conclusion that the Employer, being mindful that it had no retirement age policy, engineered the restructuring process to rid itself of the Employee under the guise of redundancy. Accordingly, it would be fair and appropriate to make an award of exemplary damages. In the circumstances, **we award the sum of \$5,000.00 under this head.**

Order

56. The Employer shall pay to the Employee the sum of \$71,000.00 as compensation for her unfair dismissal. Payment of that sum must be made to the Employee no later than August 30, 2019.

Dated this 24th day of July 2019



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Charlesworth O. D. Brown
President



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Samuel R. Aymer
Member



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Dr. Hayden Thomas
Member

