



ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 19 OF 2015

BETWEEN

SUNDRY WORKERS

Employees

And

ANTIGUA AND BARBUDA TRANSPORT BOARD

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Dr. Hayden Thomas

Member

The Hon. Judith Dublin

Member

Appearances:

Mr. Justin L. Simon QC of Simon Rogers Murdoch, Attorneys-at-Law for the Employees

Mr. Hugh C. Marshall of Marshall & Co., Attorneys-at-Law for the Employer

2017: May 11

2019: September 30

JUDGMENT

Brown, P;

Background

1. The Employer, the Transport Board - referred to in this Reference as Antigua & Barbuda Transport Board - is a statutory body established under the Transport Board Act, 1995. As set out under section 7, its main function generally is to advise the Minister on the ground transportation of persons and goods in Antigua & Barbuda. Its particular functions include the regulation of fares, rates, fees and other charges relating to ground transportation.

2. The Antigua & Barbuda Workers' Union is one of the leading trade unions in Antigua and Barbuda. It is recognized as the collective bargaining agent of the bargaining unit of workers employed by the Employer of which the Employees are members. At all material times, the employment of the Employees was largely governed by the Collective Agreement between the Union and the Employer dated February 13, 2014 (the Collective Agreement).
3. General elections were held in Antigua and Barbuda in June 2014 after which the Employer's Board of Directors was reconstituted in July 2014 and Mr. Dean Jonas, MP, became the new Chairman.
4. The Reference of Complaint commencing these proceedings was filed on 20th April 2015. The main issue in dispute between the parties was identified as "unfair dismissal".
5. The Employees' Memorandum of Claim was filed on 14th May 2015. In it, the Employees contended that they were unfairly dismissed; that the Employer's action was unfair and ran contrary to good industrial relations; and that the Employer acted in breach of Articles 14, 15 and 19 of the Collective Agreement. Those contentions were grounded on the following chronology of events:
 - On 29th September 2014, Mr. Jonas circulated a memorandum outlining the Board's plans to restructure the Employer's operations.
 - By letter dated 30th September 2014, the Employer's Acting General Manager, Mr. Hubert Jarvis, wrote to the Union: "... while we have considered rotation, short days and the like, our recourse is to downsize in a responsible manner. Consequently, some units will be eliminated, employees over 60 years old will be retrenched and departments will be downsized to need rather than want..."
 - By letter dated 30th September 2014, the Union responded to Mr. Jarvis' letter, drew his attention to Article 19 of the Collective Agreement and requested a meeting on Friday 3rd October 2014 to discuss his letter and to make proposals.
 - A meeting was held on 2nd October 2014, at which the matter was discussed, the Union requested the list of employees the Board expected to cut from its workforce. In particular, the Union requested details of the departments and the starting dates of employees over sixty (60) years of age, and the names of all employees that the Employer considered to be superfluous and unproductive.

- On 2nd October 2014, following the meeting, Mr. Jarvis wrote to the Union but did not supply the information requested.
 - By letter dated 6th October 2014 the Union pointed out to the Employer that its letter of October 2nd, 2014 did not properly address the matter and fell short of the Union's request.
 - On 14th November 2014, while at work, the Employees were summoned to a meeting where they were told by Ms. Tiesha York, Human Resources Manager, that they were selected to be dismissed and handed letters to that immediate effect.
6. In response, the Employer's Memorandum of Defence was filed on 25th August, 2015. At paragraphs 3 to 8, it disputed the Employees' claim in the following terms:

"3. The Employees were made redundant solely out of the need of the Employer to reduce it's (sic) Monthly Recurrent Expenditure of as at the time of the Employees terminations was in excess of the Monthly Employers monthly income. Accordingly without making retrenchments decisions that the Employer made the Employer would have gone bankrupt. Thereby resulting in a greater loss of employment and a failure to fulfill the statutory mandate placed upon the Employer.

4. The Employer, having become cognizant of its financial situation namely that the Employer was taking in 38% revenue less than its monthly employment costs, decided to carry out a human resource audit of it's (sic) staffing which accounted for 70% of its expenses.

5. Following receipt of the Audit Report the Employer elected to implement a retrenchment and restricting (sic) exercise aimed at reducing dramatically the recurrent employment costs of the Employer. Based upon the report The Employer formed the clear view that inefficient management personnel as well as overstaffing were two of the main areas which needed the most urgent attention to reduce recurrent employment cost of the company.

6. Contrary to the assertions of the Employee the terminations resulting from the retrenchment and reorganization were solely due to reduce the payroll cost of the Employer; especially due to the reduced or diminishing revenue. In the circumstances the Employer denies the allegations of the Employees that there was no consultation. The Employer was not obliged nor required by law to give to the Employees Representative names of

persons it was contemplating terminating. Even if the Employer was so obligated its failure so to do does not render its terminations unfair or unlawful.

7. The Employer contends that the retrenchment brought the employee/employer relationship to an end. In the circumstances, the employee was paid all equity in the employment relationship that was due for the period he worked. All previous gratuities were paid in prior contracts served. In the circumstances the Employee is not entitled to any further payments of compensation of any kind whatsoever.

8. In the circumstances, the Employer disputes that there is any unfair dismissal of the employee. Section C3 of the Antigua and Barbuda Labour Code categorizes Retrenchment as a Redundancy and Section C58 states that dismissal due to redundancy cannot be unfair."

The Main Issues

7. Based on those pleadings the main issues before this Court for determination are:
- (1) Whether there was a genuine redundancy situation at the date of dismissal of the Employees.
 - (2) Whether the Employer acted reasonably or unreasonably under the circumstances when it dismissed the Employees.

The Legal Framework

8. We will determine those issues within the legal parameters established by (1) the Labour Code; (2) the Collective Agreement; (3) judicial precedents; and (4) the Industrial Court Act.

The Labour Code: Redundancy and Unfair Dismissals

9. Section C3 of the Antigua and Barbuda Labour Code (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;"

10. An employee's statutory right not to be unfairly dismissed is established by Section C56 of the Labour Code:-

"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."

11. As to what constitutes a just cause for dismissal, Section C58 (1) of the Labour Code provides:

"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"

12. The determination as to what constitutes an unfair dismissal requires the application of the test of reasonableness as provided in Section C58(2) of the Labour Code as follows:

(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. "

The Collective Agreement: Selected Articles

13. For present purposes, certain provisions of the Collective Agreement are very instructive. Firstly, we note the statement in the preamble that "it is the purpose and interest of the Board and the Union to establish their consensus...which are deemed necessary for advancing the welfare both of the employees and the Board for improving the employer/ employee relationship, to secure prompt and fair disposition of employee grievances ...". In addition, we note the provisions of Articles 14, 15 and 19.

"ARTICLE FIFTEEN- JOINT CONSULTATION

It is agreed that there shall be established a Joint Consultative Committee, which shall consist of five (5) persons; two {2} of whom will represent the Union and the other three {3} will represent the Board; one of whom will be the Committee's chairperson. The committee will meet on matters of mutual interest when, as often as is necessary.

ARTICLE NINETEEN- ANOMALIES

Any re-organization or amalgamation which would have the effect of varying the terms and conditions of employment of employees covered by this Agreement, shall be subject to negotiations with the Union."

ARTICLE FOURTEEN - TEMPORARY LAY-OFF

In the event that adverse conditions or developments in the operations are considered by the Board to warrant an unusual reduction in the labour force, the Board agrees to consult with the Union so that positive steps may be taken to avert or minimize, as far as possible, the effects of reduction by adopting any reasonable appropriate measures, without prejudice to the efficient and economic operations of the service."

Judicial Precedents: Trade Unions, the Burden of Proof and Reasonableness

14. In addition to the foregoing parameters, we are also guided and constrained by judicial authorities established by this Court and the Courts above. Firstly, the significance of the involvement of trade unions and the terms of the pertinent collective agreements were emphasized in Reference No. 54 of 2013: **Michael Blackburn v. LIAT (1974) Ltd.** For present purposes, we will highlight the following excerpts from that case:

"46. The Code expressly recognizes the critical role of trade unions in several of its sections. In particular, section A 3 of the Code comprises expressions of the underlying national policy which must be used in the interpretation of its several provisions. Ultimately, in so far as they advance the interests of workers by collective bargaining, trade unions play an important role in advancing the overall socio-economic development of Antigua and Barbuda.

47. In conjunction with particular employers, trade unions routinely contribute to the establishment of standards higher than the minimum ones established under the Code. We accept this as the norm and note that, as part of their fundamental structure, collective agreements routinely include the application of the principles of natural justice."

15. As to the burden of proof, at paragraph 31 of its Judgment in Reference No. 66 of 2015 **Antigua & Barbuda Workers' Union v. Cable & Wireless (Antigua & Barbuda) Ltd** (the Cable & Wireless case), this Court emphasized the burden on the Employer as follows:

"31. Having made the assertion and declared its right to dismiss the selected employees, the onus is on the Employer firstly to establish that a redundancy situation existed. In order to discharge this burden the Employer must prove the factual basis as required under section C58 (1) of the Labour Code."

16. As to retrenchments, in Reference No. 20 of 1998: **Antigua & Barbuda Workers' Union v. Antigua Gasses**, (the Antigua Gases case), it was held:

"What this 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. ..."

17. The requirement for reasonableness on the part of the Employer when handling a redundancy was underscored in that case in the following terms:

"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 Maxam 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. But the E.A.T. (Employment Appeal Tribunal) has also re-emphasized ... that failure to act in accordance with one or more of the guidelines ...does not necessarily render a dismissal unfair. The principles are not hard and fast rules to be applied in all cases. Their application depends on what is desirable or practicable in a given situation."

18. The requirement for reasonableness was further highlighted in Civil Appeal No. 28 of 2001 **Sundry Workers v. Kings Casino Limited**, Chief Justice (as he then was) Sir Dennis Byron 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 ...”

19. Based on case law, textbooks have also emphasized the requirement for reasonableness in cases of redundancy. For example, **Harvey on Industrial Relations and Employment Law**, Vol.1 Butterworths Issue 191, February 2008 at paragraph 778 asserts:

“And even if there is a genuine redundancy situation, the law of unfair dismissal still asks the question of whether the employer acted reasonably in treating redundancy as a sufficient reason for the dismissal in all the circumstances of the case”.

The Industrial Court Act: Statutory Powers

20. The Industrial Court, being a creature of statute, is clothed with specific statutory powers under the Industrial Court Act. When exercising our powers, the Court is expressly required to have regard for the principles and practices of good industrial relations. Section 10(3) provides:

10 (3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers 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.**

21. We will consider the two main issues in the context and within the parameters of the stated legal framework.

Issue 1: Was there a Genuine Redundancy Situation?

22. In accordance with the relevant statutory provisions, the settled approach of this Court in cases of redundancy is to consider the written, oral and documentary evidence of the parties and determine on the balance of probabilities whether a

genuine redundancy situation existed at the material time. In that regard, as we have noted above, the onus is on the Employer to prove the factual basis for its assertion of the assigned reason as required under section C58 (1) of the Labour Code.

23. Ms. Marvell Samuel, who worked in the Traffic Warden Department, and Ms. Sheredith Williams, a Terminal Attendant, testified on behalf of the Employees. Their Witness Statement were filed on May 14, 2015. Under oath they both confirmed and stood by their written evidence which may be summarized as follows:

- (a) On 14th November 2014 at 9:40 a.m. and 12:00 noon they were respectively summoned to a meeting at the Employer's Head Office.
- (b) Upon arrival at the Head Office they were required to wait in a room along with other employees.
- (c) Neither Ms. Samuel, Ms. Williams nor any of their co-workers present knew why they were summoned to the meeting.
- (d) Eventually both Employees were handed letters dated 14th November, 2014 which informed them respectively that the Employer was "retrenching" them with immediate effect.
- (e) Neither Ms. Samuel nor Ms. Williams was given any warning of or explanation for their retrenchment.

24. Mr. Carlton Brodie, the Employer's Financial Controller, testified on behalf of the Employer. His Witness Statement was filed on 10th September 2015. Under oath, Mr. Brodie also confirmed and stood by his written evidence which may be summarized as follows:

- (a) In September 2014 when he made his presentation to the Board about its financial position the Employer was in a "dire financial state". At that time, the latest audited financial statement was for the year 2005.
- (b) By the year 2013 the Employer's financial position had become unsustainable. For the years 2011 to 2013 the "employee cost" to the Employer increased steadily and its expenditure consistently outweighed its revenue as shown in the following table:

Year	Revenue \$	Expenditure \$	Employee Costs \$
2011	6,005,587.00	10,638,791.00	5,308,956.00
2012	6,304,379.00	11,488,673.00	8,280,887.00
2013	6,611,739.00	11,838,586.00	9,043,553.00

- (c) The Employer was also carrying the burden of repayment of two loans, one of which was granted to the central government by the Finance and Development Company to the tune of \$50 million. The Employer's monthly obligation on that loan was \$600,000.00. The Second loan was a mortgage facility in the sum of \$30 million granted by the Antigua Commercial Bank for the construction of the Employer's new headquarters. The Employer's monthly obligation on that loan was in the sum of \$275,000.00.
- (d) The Employer's "dire financial position was due mainly to the fact that the Antigua and Barbuda Transport Board (the Employer) was "grossly overstaffed." At that time, its staff complement was 238.
- (e) In 2013, when staff costs were highest, it was projected that they would consistently increase. While it was obvious by that time that "staff cuts" had to be made to safeguard the Employer's survival, it did not have the political will to do so at that time with elections then due in the following year, 2014.

Resolution

- 25. Having regard to the legal framework outlined at paragraphs 5 to 14 above, we will first consider the "situation" of "redundancy" as defined in the Labour Code.
- 26. The essence of a redundancy situation is the cessation or the substantial diminution of the "work which a person was last employed to perform". That essence arises from or is the consequence of certain events such as the closure of a business, the installation of labour saving equipment, a retrenchment process and so on. Accordingly, it is not unusual for declarations of redundancy to be made immediately before or simultaneously with the event which triggered the situation.
- 27. In the instant case, the pleadings convey a retrenchment exercise rolled up with a consequential redundancy situation. We proceed on the basis that the 13 Employees became redundant as a consequence of the retrenchment exercise. In other words, the Employer's case, as we understand it, is that as a result of the retrenchment, the "work" which the Employees were "last employed to perform has ceased or substantially diminished." The "cause" is the retrenchment and the "effect" is the redundancy.
- 28. In the premises, having assigned redundancy as the reason for the dismissals under section C58 (1), the onus is on the Employer to prove its "factual basis". In addition to proving the existence of the redundancy situation, the Employer also

has the obligation to prove that it acted reasonably under Section C 58 (2) of the Labour Code.

29. As to the factual basis, we find that the situation came into existence upon the cessation or substantial diminution of the work the Employees were employed to perform, which resulted spontaneously from the retrenchment. In that regard, Mr. Brodie's evidence is conclusive as we find him to be an honest and credible witness.
30. In our view, we need not concern ourselves with the underlying reasons for the Employer's "unsustainable" financial position which made "staff cuts" necessary to safeguard its survival. Be those as they may, we are satisfied that the Employer has established reasonable grounds for the retrenchment process.
31. Accordingly, we resolve the first issue in favour of the Employer. There was in existence a redundancy situation spontaneously occasioned by the retrenchment exercise undertaken by the Employer. For completeness, we note that that resolution is not inconsistent with the closing submissions of both Counsel.
32. Given that outcome, the issue of reasonableness, which we will now consider, becomes paramount.

Issue 2: Did the Employer Act Reasonably or Unreasonably?

33. As was the position in the **Cable & Wireless case**, having resolved the first issue in favour of the Employer, we are obliged to apply the test under section C 58 (2) of the Labour Code. The key question becomes: Did the Employer act reasonably or unreasonably in dismissing the Employees in the circumstances? More precisely, the issue is whether the dismissal of the Employees fell within the range of conduct which a reasonable employer should have adopted.
34. The principles set out in the **Compair Maxam case**, all of which are grounded on the "principles and practices of good industrial relations", were largely applied in the **Cable and Wireless case**. We will adopt the same approach and consider the Employer's conduct under the following heads;

Fair Selection

35. The Employer's evidence does not disclose any criteria for the selection of any of the Employees for retrenchment/ redundancy. In his testimony, Mr. Brodie emphasized that the general thrust of the Employer's position was that "staff cuts" were necessary in light of its dire financial position caused in part by gross over- staffing. However, no basis was disclosed for the selection of the

Employees out of the Employer's full contingent of 238 workers. In that regard, his words under cross examination were: "I have no idea how the Employees were selected (for dismissal)".

36. In the absence of any pre-established criteria or adequate explanation as to why the Employees were selected, it would be virtually impossible for the Employer to prove that the dismissals were reasonable. In fact, as noted by learned Counsel for the Employees, the Employer's 2014 Efficiency Study Report discloses absolutely no basis for the selection of the Employees. It is noteworthy that at paragraph 28 of his report Dr. Josiah stated that:

"A review of the qualification and experience of some employees seemed to point in the direction that there are employees in some positions who may perform better in different positions."

37. At the end of the day, the Court is left with no idea of the basis on which the Employees were selected. Accordingly, we conclude that selection was based on some undisclosed criteria or was otherwise arbitrary and random. In that regard, we note that the workers dismissed range from a Cleaner to an Accountant. In selecting them for redundancy, the Employer apparently did not rely on any data regarding their performance, date of hiring, or any other criteria. Its evidence disclosed no systematic determination of which of its workers were "superfluous" or "unproductive" and/ or whether any of the Employees fell in those categories.
38. In the circumstances, based on the evidence before us, we are inclined to conclude that the process of selection of the Employees for retrenchment was illogical and unreasonable for want of fairness and objectivity. The Employer seemed not to have rational process much less an agreement with the Union in that regard. In the end, the Employer acted in breach of the fundamental guiding principles set out in the **Compair Maxam case**.
39. There is no doubt that one of the principles in group redundancies requires the Employer to satisfy us that it was reasonable to dismiss each of the Employees on the ground of redundancy. Even if we may be satisfied that the dismissal of some employees was inevitable, it is critical to consider the means by which the Employees were selected and the steps taken by the Employer in dismissing them rather than others.
40. As to the savings effected by the retrenchment process, Mr. Brodie testified that they were a mere "drop in the bucket". Further, we note that two of the workers who were retrenched were recalled the very day of their dismissal. Moreover, we note that the Employer's evidence discloses that immediately after the

Employees were retrenched, new workers were hired and some new positions were created. The state of affairs at the end of the process resulted in Mr. Brodie's testimony that after the dismissal the Employees, the Employer was still "grossly over-staffed". Further, he testified that, as at the date of trial, the retrenchment of staff over 60 years of age had not been effected; that unproductive units remained open; and that the overall retrenchment process was still under review.

Consultation

41. As pointed out by Mr. Simon in his Closing Submissions, Article 19 of the Collective Agreement provides:

"Any reorganization or amalgamation which should have the effect of varying the terms and conditions of employment of employees covered by this Agreement, shall be subject to negotiations with the Union."

This article clearly places a mandatory obligation on the Employer to initiate and provide adequate information for the negotiation process. From this perspective, the communications between the Employer and the Union do not reveal sufficient disclosure on the part of the Employer.

42. In that regard, we note the contents of the initial correspondence passing between the Employer and the Union. It is most instructive to note that after the foundation for proper consultation was laid by the Chairman's memorandum the Union reasonably requested particulars of the individuals selected for retrenchment. Unfortunately, by failing to provide the same, the Employer aborted this process.
43. By his memorandum, the Chairman first issued notice of the Employer's intention to implement some key components of its "action agenda". These were stated to include:

1. "Restructuring of the organization in keeping with the legal requirements of the ABTB, the Collective Agreement governing staff in the bargaining unit and the Labour Code of Antigua and Barbuda
2. Consultations with key stakeholders including staff, bargaining agents, providers of goods and services and financiers, to redefine the path to a more efficient operated organization.
3. Identification and implementation of more income generating initiatives/projects which will place the ABTB on a better financial footing.

4. More prudent, conservative and efficient use of the financial resources of the ABTB ensuring that there is value for money for goods and services procured.
5. Where required, re-assignment of staff into areas of need and posts suited to their competencies and skills"

44. The Chairman's request for the cooperation and patience of the staff is noteworthy. His request was followed by a letter dated 30th September, 2014 from the General Manager, Mr. Jarvis, to the Union giving notice that it was "crucial for the Employer to retrench staff within one week to bring the situation into balance..." In particular, Mr. Jarvis stated that as a consequence, "some units will be eliminated, employees over 60 years old will be retrenched and departments will be downsized..."

45. Both the Chairman's Memorandum and the General Manager's letter are important and commendable in so far as they gave notice of the Employer's broad policy objectives. However, they obviously lacked the specificity for meaningful negotiations with the Union. Therefore, it is not surprising that by letter dated 30th September, 2014, the Union reminded the Employer of Article 19 of the Collective Agreement and requested an urgent meeting by 03rd October, 2014.

46. The desired meeting between the Employer and the Union was convened on October 02, 2014 at which the Union requested "the complement of staff to be retrenched." By letter of the same date, the Employer notified the Union that its "staff complement is 238" and identified the following groups of workers for retrenchment:

- " ...
- Retrenchment of line staff over 60 years old - 12 employees
 - Retrenchment of superfluous and unproductive staff - still under review
 - Closure of unproductive units - 14 employees"

47. As also noted by learned Counsel, neither the Employer's letter nor its evidence at trial placed any of the 13 Employees in any of those three categories. In effect, the information provided by the Employer, in response to the Union's request, was far too generalized. As a result, not surprisingly, the Union's response pointed out the omissions in the Employer's letter. In particular, the Union noted that:

"The (Employer's) letter did not advise us of the number of employees that were to be cut in order to bring the cost of wages to 38% It did not

tell us the name and start date of employees over 60 years of age and the department they work in. Your letter made mention of superfluous and unproductive staff of which we are not aware, so we are also requesting the departments and the persons who are unproductive.

Your letter went on to make mention of unproductive units and you have given the amount of workers who will be sent home, yet you failed to mention to which of the units refer."

48. Thus, in our view, the stage was clearly set for (1) the provision of additional information by the Employer to the Union and (2) the consultation and negotiation process under Article 19 of the Collective Agreement. Unfortunately, the Employer did not provide the required additional information and the desired consultation and negotiations never materialized.
49. We are mindful that a lack of consultation will not necessarily render a dismissal, based on redundancy, unfair. However, in our opinion, the lack of consultation or sufficient consultation in the instant case is an indication of unreasonableness on the part of the Employer.
50. As to what constitutes "fair consultation", we are guided by the statement of the meaning adopted by Glidewell LJ in the United Kingdom case of **R v. British Coal Corporation** [1974] IRLR 72 as follows:

"Fair consultation means:

- (a) consultation when the proposals are still at a formative stage;**
- (b) adequate information on which to respond;**
- (c) adequate time in which to respond;**
- (d) conscientious consideration by an authority of the response to consultation.**

Another way of putting the point more shortly is that fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely"

51. As a result, not only did the Employer fail to honor its obligations to consult or negotiate in good faith, it specifically acted contrary to Article 19 of the Collective Agreement. The total effect is that the Employer failed to observe important components of good industrial relations practice.

Warning and Notice of Redundancy

52. In the **Compair Maxam** case the first of the principles which employers should seek to observe is: "... to give as much warning as possible of impending redundancies"

53. In our estimation, at best, the Chairman's memorandum could only serve as a very general and vague notice of the possibility of retrenchment and consequential redundancies of all the Employer's workers. In our opinion neither that Memorandum nor the Employer's subsequent letters dated September 30 and October 30 could suffice as adequate warnings of "impending redundancies". And even if they were, the evidence discloses that the individual Employees received absolutely no notice of actual redundancy. The fact of their selection for redundancy was not brought home to the two Employees who testified until they were abruptly summoned to the group meeting on November 14, 2014 and served with the respective letters of dismissal with immediate effect. Obviously, by that time the Employer's "action plan" was in full motion. Needless to say, the Employees had no time to consult with the Union and to consider alternative solutions or alternative employment.

Re-employment and Alternative Employment

54. The following aspects of the Employer's own evidence are most instructive:

- Firstly, Dr. Josiah's Efficiency Study Report states that his review of the qualifications and experience point in the direction that "there are employees in some position who may perform better in different position."
- Secondly, the Chairman's Memorandum pointed to the key aspects of the Employer remedial action agenda to include "when required, the re-assignment of staff into areas of need and positions suited to their competencies and skills.

55. However noteworthy those pronouncements of broad policy objectives, the Employer led no evidence proving its effort to re-deploy or reassign the Employees to the more suitable or optional positions within the Employer's organizations in accordance with the competencies and skills so that they could perform better towards the desired improvement in the Employer's overall efficiency.

56. The instant case is one of those where we are obliged to place great weight on the Employer's observance of natural justice and the principles and practices of good industrial relations. We hasten to add that there is no "one size fits all" approach. As stated by Wilkson Browne in the **Compair Maxam** case "... it

would be impossible to lay down detailed procedures which all reasonable employers would follow in all circumstances: the fair conduct of dismissals for redundancy must depend on the circumstances of each case.”

57. Needless to say, given our findings in respect of this issue, we are of the view that the Employees’ closing submissions are, by far, more persuasive than those of the Employer.

Conclusion

58. In the final analysis, upon careful consideration of the evidence within the legal framework outlined above, and having particular regard to the principles and practices of good industrial relations, we conclude that the actions of the Employer, taken as a whole, were not within the range of conduct which a reasonable employer should have adopted. In effect, the Employer has failed the test of reasonableness under section C 58 (2) of the Labour Code: it has failed to discharge its burden of proving, on a balance of probabilities, that it acted reasonably in the circumstances. As a result, we are constrained to determine this Reference in favour of the Employees.

59. In the premises, we declare and order as follows:

- (1) The Employees were unfairly dismissed and are entitled to compensation to be assessed by the Court, if not agreed.
- (2) If the quantum of compensation for each of the Employees is not agreed within a reasonable time, then the parties are at liberty to file and serve additional witness statements and submissions towards an assessment of the same.
- (3) If necessary, the assessment of compensation and the determination of the issue of costs, if any, will be held on a date to be fixed by the Court Office.

60. In making that declaration and order, we were mindful that the two Employees who were called as witnesses testified as to their efforts to mitigate their loss resulting from their dismissals. However, we will refrain from making any awards to them at this stage in the absence of similar evidence from the other Employees. If necessary, we would prefer to make awards to all of them at the same time.

61. Finally, given the further delay and additional costs that are likely to be incurred from further court proceedings, and bearing in mind the letter and spirit of the Collective Agreement, we strongly urge the parties to engage in negotiations towards a "sensible and realistic" agreement as to the compensation payable to the Employees. As always, we trust that good sense and reason will prevail.

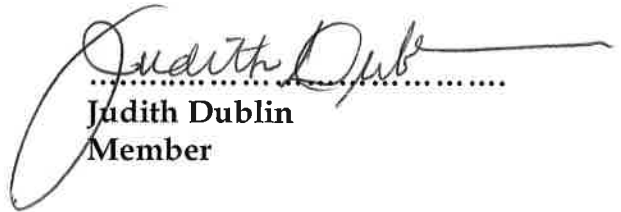
Dated the 38th day of September 2019



Charlesworth O.D. Brown
President



Dr. Hayden Thomas
Member



Judith Dublin
Member

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 19 OF 2015

BETWEEN

SUNDRY WORKERS

Employees

And

ANTIGUA AND BARBUDA TRANSPORT BOARD

Employer

JUDGMENT

Hon. Charlesworth O.D. Brown, President
Hon. Dr. Hayden Thomas, Member
Hon. Judith Dublin , Member