

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 26 OF 2013

BETWEEN

ICILMA FRANCIS-PIGOTT

and

Employee

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LTD

Employer

Before:

The Hon. Charlesworth O.D. Brown
The Hon. Dr Hayden Thomas
The Hon. Judith Dublin

President
Member
Member

Appearances:

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

Mr. Justin L. Simon QC, with him, Ms. Fiona Murphy of Simon Rogers Murdoch,
Attorneys- at -Law for the Employer

2015: November 3
2019: May 24

DECISION ON APPLICATION TO STRIKE OUT REFERENCE

Brown, P;

Introduction

1. The Employer's application to strike out this Reference was filed on 27th October, 2015 and heard at the commencement of proceedings on 03rd November, 2015, the date fixed for trial. The application was supported by an affidavit sworn by Ms. Vanereen McKenzie, a Court Clerk in the Chambers of Counsel, which raised issues of law based on the information and advice of her principals.



2. Towards the end of his Submissions learned Queen's Counsel, Mr. Simon, referred to other jurisdictions in which the term "Unfair Labour Practices" is used in statute and undertook to provide the Court with copies of the relevant sections. Having heard the submissions of Counsel for the Employer and the Employee's Representative, the Court reserved its decision.

The Application

3. By its application the Employer applied for an order (a) striking out the Reference; and (b) declining jurisdiction to hear this Reference. The application listed 7 grounds which essentially assert that the Employee's Claim of "Unfair Labour Practice" is not sustainable because the laws of Antigua & Barbuda do not include any right of action for such a complaint. As a result, being a creature of statute, this Court has no jurisdiction to hear and determine the Employee's claim. Accordingly, this Court should decline to exercise its jurisdiction and strike out the Reference.
4. In her Affidavit in Support, Ms McKenzie relies largely on the information and advice received from her principals. She deposed that:

"

- (1) *The main contention of the Employee, as disclosed in her Memorandum of Claim and Witness Statement, is that the Employer is guilty of an Unfair Labour Practice for not promoting the Employee to a position in which she acted in excess of 6 months.*
- (2) *Although the Antigua & Barbuda Labour Code establishes the statutory right not to be unfairly dismissed which carries with it the right of action for unfair dismissal, there is no corresponding or similar right not to be subjected to Unfair Labour Practices. Thus, according to Ms. McKenzie, while this Court is given specific jurisdiction to make orders and awards in relation to complaints of unfair dismissal, it has no jurisdiction to make any award or order in respect of Unfair Labour Practices.*
- (3) *In the circumstances, "the Employee's Reference to the Industrial Court in this matter is erroneous in law since it is based on a right or cause of action which is unknown to the local law." As a result, "the Industrial Court has no jurisdiction to hear the matter raised---and the Court should --- decline to exercise jurisdiction and should strike out the Employee's Reference in its entirety"*

The Dispute

5. In its Reference filed on 18th March, 2013 the Employee identified the issue in dispute between the parties to be: "Unfair Labour Practice". In her Memorandum of Claim, she states:

"37. We therefore aver (sic) that the employer acted deliberately prejudicial, bias and unfair, in that they denied the employee, who was eminently qualified and had successfully acted for more than ten (10) months, a fair opportunity to fill the vacant post of Head of Corporate Banking, as advertised on April 4th 2007"

"38. Therefore, in keeping with the law and acceptable industrial relations practice within the State, we contend that the employer is guilty of engaging in an "Unfair Labour Practice."

6. On the other hand, by its Memorandum of Defence filed on 19th January, 2015 the Employer set out its version of the factual background and averred that:

"41. Paragraph 37 of the Employee's memorandum is denied in its entirety. The Employer reiterates the matters averred in paragraphs 38 to 40 above and states that since it was under no legal equitable or other duty to confirm the Employee in the position in which she had acted merely by virtue of the fact that she had acted in the position for a period of excess of 6 months, the failure to so confirm her was neither prejudicial, deliberately prejudicial, biased or unfair."

"42. The Employer denies the contention in paragraph 38 that its failure to confirm the Employee in the substantive position of Head of Corporate Banking in which she had acted for period in excess of six months in circumstances where it had no legal equitable or other duty or obligation so to do means that it is guilty of engaging in an unfair labour practice."

7. The Employer's application to strike out the Employee's claim is clearly and specifically foreshadowed by paragraph 43 of its Memorandum:

"43. In addition the Employer states that the complaint of unfair labour practice against the Employer is not a complaint that can be made by the Employee in the circumstances since such a claim by an employee is unknown to local law as not being provided for by either the Labour Code or the Industrial Court Act. The Employer further contends that if it is guilty of engaging in an unfair labour practice (which is categorically denied), the Industrial Court has no jurisdiction to hear the complaint since the claim is unknown to the local law and no remedies are provided

either in the Labour Code or in the Industrial Court Act for such a complaint."

The Employer's Submissions

8. Learned Counsel for the Employer highlighted subsection 7 (1) of the Industrial Court Act, Cap. 214 (the Act) which establishes the jurisdiction of the Court. He noted that there was no mention of the term "unfair labour practice".
9. Further, Counsel referred to and relied on subsections 10 (1), 10 (4) and 10 (5) of the Act which deals with powers of the Court. He submitted that, as expressed in those subsections, the Court's jurisdiction is limited to matters which deal with trade disputes, trade unions and complaints brought in accordance with the Act, and other matters referred to it under the Act.
10. In addition, learned Counsel also submitted that "unfair labour practices" are neither expressly nor impliedly addressed in the Act.
11. In support of his submissions, Mr. Simon cited the landmark judgment of the Court of Appeal in Suit No. 21 of 1993 **Universal Caribbean Establishment v. James Harrison (the Harrison case)** in which the appellant challenged the jurisdiction of the Court to hear matters not involving trade disputes. He noted that the Court of Appeal held that matters of unfair dismissals were included in the terms "any matter" or "other matters" and as such were within the purview of the jurisdiction of this Court.
12. As to the Antigua and Barbuda Labour Code (the Labour Code), Mr. Simon also noted that unlike those establishing a right not to be unfairly dismissed, there are no provisions bestowing on an employee the right not to be subjected to unfair labour practices.
13. Learned Counsel also submitted that, like an employee's complaint of a denial of natural justice, his complaint of unfair labour practices, in the absence of any express statutory provisions, must be pinned to a substantive claim like unfair dismissal and cannot be pursued on its own.
14. In his submissions, Counsel also attacked the formulation of the Employee's claim. He noted that there is nothing in the law giving an employee the right to a particular position. Based on its own observation and assessment, an employer has the absolute discretion as to which employee should be promoted to fill a particular position.

15. Finally, Counsel submitted that unlike in Antigua and Barbuda, statute in some other jurisdictions such as the South Africa, Canada and the United States of America, expressly define or explain the term “unfair labour practices”. In those jurisdictions an employee has the statutory right not to be subjected to unfair labour practices.
16. In the premises, the Employer contended that the Employee’s complaint of “unfair labour practices” is unknown to the Labour Code and the Industrial Court Act, as a result of which, her Memorandum of Claim should be struck out.

The Employee’s Submissions

17. In his response to the Employer’s submissions, Mr. Carty relied on the **Harrison case** in opposing the application to strike out. His main submissions were grounded on his view that the question of this Court’s jurisdiction was settled by that judgment which confirmed that its jurisdiction went beyond that of unfair dismissal.
18. In more general terms, Mr. Carty submitted that the Employee has certain rights which are enshrined in legislation. In addition, he stated that there are settled customs and practices within the industry which protect those rights, some of which are expressed and others are implied.
19. Further, Mr. Carty passionately submitted that this Court was created to protect the rights of both parties to the employment relationship. According to him, it is undeniable that this Court should hear all complaints connected with that relationship because under Sec 7 (1) (c) of the Act it has the jurisdiction to hear and determine “any complaints”. In that regard, he also submitted that this Court must rely on its own judgment, to which end it should consider “common law practices” and industrial relations.
20. In addition, Mr. Carty also submitted that the Employer’s “recruitment policy” and the “acting policy” form part of the contract of employment. And that the proper execution of those policies should not result in unfair treatment to any employee.
21. According to Mr. Carty, Section 10 (3) (b) of the Act is critical in so far as it mandates the Court to have regard for equity and good conscience and the substantial merits of this particular case.

Statutory Jurisdiction: The Harrison Case

22. It cannot be disputed that, being a creature of the Industrial Court Act, this Court's jurisdiction is limited by the provisions of that Act.
23. As submitted by Counsel, in the **Harrison Case** the Court of Appeal dealt with the issue as to whether this Court has jurisdiction to hear and determine matters not involving trade disputes. In approaching the resolution of that issue, Chief Justice Byron, as he then was, adopted Counsel's description of the Industrial Court Act as *"amorphous piece of legislation, poorly drafted, creating jurisdiction not in a precise methodological and linear fashion, but obliquely and by disorganized composition"*.
24. On that premise, the Court of Appeal considered Section 7 of the Act, with express provisions regarding its jurisdiction; applied the relevant principles of interpretation; considered other particular provisions of the Act and construed it as a whole. At the end of the day, the Court of Appeal determined that this Court has jurisdiction to hear and determine individual complaints of unfair dismissal.
25. For present purposes, it will suffice to quote the following excerpts from pages 10/11, 12 and 13 of the Court of Appeal judgment: At pages 10 and 11 under the heading "Individual access to the Industrial Court" the Chief Justice stated:

"In dealing with the specific question raised, that is, whether the court has jurisdiction to hear an individual employee claim for unfair dismissal where it is not part of a trade dispute, it may be useful to consider firstly, whether an individual employee can bring an unfair dismissal claim under any circumstances."

26. In conclusion on that issue, the learned Chief Justice held:

"In my view, the legislation clearly envisages that an individual employee can be party to a trade dispute or any other matters."

27. Further, at page 13 under the heading "Jurisdiction for unfair dismissal" the learned Chief Justice concluded that:

"The necessary result of that view is the jurisdiction conferred by section 7 (1) (c) empowers the Court to hear any disputes concerning the dismissal of an employee... I would therefore conclude Section 7 (1) (c) gives jurisdiction to hear cases for unfair dismissal in cases other than trade dispute matters."

28. It is clear that the judgment of the Court of Appeal, when read in its proper context, supports the Submissions of Learned Counsel and not those of Mr. Carty. In that regard, it cannot be over-emphasized that the Court of Appeal Judgment was premised on the existence of an employee's right not to be unfairly dismissed, as provided in Section C 56 of the Labour Code.
29. Thus, the nub of Mr. Simon's submissions is that, in the absence of such a right in respect of labour practices, the employee has no good basis for his claim. Counsel emphasized that in Antigua & Barbuda employees have no distinct statutory right to fair labour practices. Stated differently, in Antigua & Barbuda employees have no express statutory right not to be subjected to unfair labour practices.
30. As submitted by Counsel, the sections of the statutes furnished by him show that the position is different in South Africa, Canada and the United States of America. In the case of South Africa, under Section 23, of Chapter 2 of the South Africa Bill of Rights, under the heading "Labour Relations", it is provided that:

"23 (1) Everyone has the right to fair labour practices."

31. Further, Chapter VIII of the South African Labour Relations Act, 1995, is entitled "Unfair Dismissal and *Unfair Labour Practice*." Subsection (2) of Section 186 provides:

"Unfair Labour practice" means any unfair act or omission that arises between an employer and an employee involving-

Unfair conduct by the employer relating to the promotion, demotion, probation... or training of an employee or relating to the provision of benefits to an employee..."

It is also noteworthy that Section 193 stipulates the remedies available where the employer is guilty of unfair labour practices.

32. Further, the Labour Relations Act of South Africa also provides that:

"Unfair Labour Practice" means any failure to act or unfair act of an employer towards a worker concerning:

- *Promotion, demotion, trial periods, training or benefits*
- *..."*

33. Similarly, under the Canada Labour Code (R.S.C 1985) and the Federal Service Labour Management Relations Statute 5 USC in the United States of America,

there are definitions and/or explanations of "Unfair Labour Practice" and related stipulations as to an employee's rights in respect thereof.

34. We accept as a matter of fact that the term "Unfair Labour Practices" is not defined or explained in either the Industrial Court Act or the Labour Code. Moreover, as submitted by Counsel, unlike the jurisdictions mentioned above, there is no statutory right not to be subjected to "unfair labour practices". And even if such a right could be implied at common law, there exists no remedy under the Act for its breach.
35. It is also noteworthy that learned Queen's Counsel asserted the notion of natural justice at common law is an important component in the consideration of an unfair dismissal. However, the statutory provisions do not include a right to natural justice so that a complaint of the denial of natural justice without more cannot stand on its own and is not sustainable by itself in this Court of limited statutory jurisdiction. The same logic applies to the complaint of Unfair Labour Practice. Both a complaint of denial of natural justice and one of unfair labour practice involve substantially procedural issues. They can be the genesis or the foundation of support or be part of a claim of unfair dismissal or unfair suspension but cannot stand on their own.
36. In passing, it may be useful to note that this Court does not have the "wide and all-encompassing" jurisdiction which the High Court has. It cannot be over-emphasized that the jurisdiction of this Court is limited by the Act. We hasten to add that the issue of "unfair labour practice" would have been a nice one for consideration, if and only if, the situation had somehow morphed into a complaint of constructive unfair dismissal grounded on an allegation of breach of the fundamental implied term of "reasonableness" and or that of "trust and confidence."

Conclusion

37. For the reasons stated above, we are of the opinion that we have no jurisdiction to hear and determine the complaint of "Unfair Labour Practice" per se. In the circumstances, we will grant the application and strike out the Employee's claim.

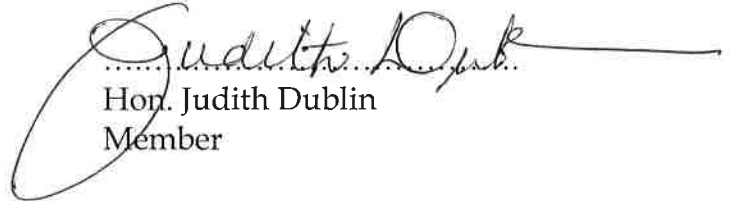
Dated the 24th day of May, 2019



Hon. Charlesworth O.D. Brown
President



Hon. Dr. Hayden Thomas
Member



Hon. Judith Dublin
Member

