

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 42 OF 2015

BETWEEN

JULIE OSBORNE

Employee

And

ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Employers

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Megan Samuel-Fields

Member

The Hon. John Benjamin

Member

Appearances:

Ms. Kathleen A. Bennett of Lake & Kentish, Attorneys-at-Law for the Employee

Mrs. Carla Brooks-Harris, Ms. Alicia Aska and Ms. Rose-Anne Kim of the Attorney General's Chambers, Attorneys-at-Law for the Employers

2016: November 03

2019: September 13

JUDGMENT

Brown, P;

Background

1. In her Reference of Complaint filed on 24th July 2015 the Employee identified the issue in dispute between the parties to be "Whether disciplinary action was unfairly taken against the Employee."
2. Paragraph 9 of the Employee's memorandum of Claim filed on 24th July 2015 reads:



"9. The Employee contends that the Employer's unfair disciplinary action against her and her subsequent unfair treatment have caused her to suffer a loss of chance/opportunity for promotion, for which she should be compensated. The warning letter that was also wrongly issued to the Employee should be removed from her file."

3. By its Memorandum of Defence filed on 21st September 2016 the Employer joined issue with the Employee's Claim. Paragraph 9 of its Memorandum reads:

"9. Paragraph 9 of the Employee's Memorandum is denied and the Employer wishes the Employee to prove the contents of paragraph 9. The Employer contends that the employee's claim of unfair disciplinary action against her is barred by virtue of laches and in any event the warning letter has expired and therefore is of no effect."

4. In her closing submissions filed on 16th November 2016 Ms. Kathleen Bennett, Counsel for the Employee, identified the issues as follows:

"ISSUES

6. Was the warning letter dated 18th June 2007 wrongly issued to the employee?

7. Did the employee suffer a loss of opportunity for promotion due to subsequent unfair treatment by the employer? "

5. In her closing submissions filed on 10th November 2016 Mrs. Carla Brooks-Harris, Counsel for the Employer, submitted as follows:

"ISSUES

2. The issues for determination by the Industrial Court are:

- i. Whether the warning letter dated 18th June, 2007 was wrongly issued to the Employee.*
- ii. Whether the Employee was treated unfairly by the Employer and as a result suffered a loss opportunity or chance to be promoted."*

The Legal Framework

6. Being a creature of statute, this Court's jurisdiction is substantially limited by the provisions of the Industrial Court Act, Cap. 214, and the Antigua and Barbuda Labour Code, Cap 27, of the Laws of Antigua and Barbuda. In that regard, it is trite to say that rights of employees which this Court upholds or protects are derived from express statutory provisions. It follows logically that this Court has no jurisdiction or power to deal with matters which have no basis in the statutory provisions of the said two Acts.

7. Section B (9) (1) of the Labour Code sets out the following main categories of statutory rights which may be protected and enforced, based on which “questions, petitions, charges or complaints” may be filed by employees towards remedies for their infringement:

- (1) The right to severance pay under Part 4 of Division C;
- (2) The right not to be unfairly dismissed or suspended under Part 5 of Division C;
- (3) The right to Representation of their choice under Division J; and
- (4) The protection of Self Organizational Rights under Part 1 of Division K.

We hasten to add that several ancillary or supplemental statutory and common law rights arise from or are associated with those categories.

8. In Reference No. 26 of 2017: **Icilma Francis-Piggott -v- First Caribbean International Bank** (the Francis-Piggott Case) the Employee identified the issue between the parties as “Unfair Labour Practices”. The Employer filed a preliminary application, the nub of which was stated at paragraph 3 in the Court’s Decision as follows:

“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.”

9. In light of that decision, although no similar application was made in the instant case, we are obliged to consider whether this Court has the jurisdiction to determine the complaint now before us as formulated by the parties respectively and reproduced at paragraphs 4 and 5 above.

The Francis-Piggott Case

10. We are of the opinion that this Court’s decision in **the Francis-Piggott Case** is most instructive and should be applied towards the determination of this matter. In that case Learned Counsel for the Employer noted that there was no mention of the term “unfair labour practice” in statute law in Antigua and Barbuda. In that regard, he highlighted subsection 7 (1) of the Industrial Court Act, Cap. 214 (the Act) which establishes the jurisdiction of the Court. He also 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.

11. In addition, learned Counsel also submitted that “unfair labour practices” are neither expressly nor impliedly addressed in the Act. In support of his submissions, Counsel 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 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. In relation to the Antigua and Barbuda Labour Code (the Labour Code), Learned Counsel also noted that unlike those establishing a right not to be unfairly dismissed, there are no corresponding provisions bestowing on an employee the right not to be subjected to unfair labour practices.
13. Learned Counsel also submitted that, like a complaint of a denial of natural justice, the employee’s 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. Counsel’s further submissions in the **Francis-Piggott case** and this Court’s response are summarized in the following excerpts from that decision:

“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 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.

...

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."

...

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 that 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."

15. Having regard to the evidence before us in the instant case, the issues as formulated by both Counsel, their respective submissions and this Court's decision in **the Francis-Piggott case**, we are constrained to conclude as follows:

Conclusion

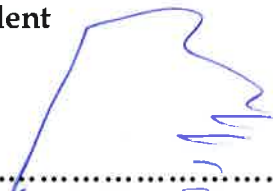
16. Upon application of the Francis-Piggott case, we conclude that the Employee has no statutory right not to be "wrongly issued" with a warning letter. And in any event, no remedy is prescribed in the Labour Code or the Industrial Court Act for the wrong issuance of a warning letter, per se.

17. In addition, we conclude that the Employee has no statutory right to "fair treatment", per se. And in any event, no remedy for unfair treatment is prescribed in the Labour Code or the Industrial Court Act.
18. Further we conclude that the Employee has no right to an opportunity for advancement or a promotion, per se. And in any event, no remedy is prescribed in the Labour Code or the Industrial Court Act for denial of an opportunity for advancement or a denial of promotion.
19. In the final analysis, although we would be obliged to consider the issues in this matter under the umbrella of a claim of unfair dismissal or suspension, we have no jurisdiction to determine this matter on its merits as it stands before us. Accordingly, we are constrained to dismiss the Employee's claim for want of jurisdiction.
20. In closing, for the avoidance of doubt, we emphasize that we are constrained by existing provisions of the Labour Code and the Industrial Court Act. In that regard, we also emphasize that the wrong issuance of a warning letter, the loss opportunity for promotion and other kinds of unfair treatment may be critical ancillary issues for determination in the context of unfair dismissals and the denial of other statutory rights, the main categories of which are listed at paragraph 7 above. Needless to say, any expansion of this Court's jurisdiction and / or powers, such as a right not to be unfairly treated, are matters squarely within the exclusive purview of Parliament.

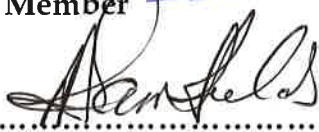
Dated the 12th day of September 2019



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Charlesworth O.D. Brown
President



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John Benjamin
Member



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Megan Samuel-Fields
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