

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT



REFERENCE NO. 49 OF 2017

BETWEEN:

JOHN MURPHY

EMPLOYEE

And

CARLISLE BAY RESORT LIMITED

EMPLOYER

Before:

The Hon. Dr. Hayden Thomas

Chairman

The Hon. Samuel R. Aymer

Member

The Hon. John Benjamin

Member

Appearances:

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

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

2017: December 18

2019: August 26

JUDGMENT

Thomas, C.

Background

1. The Employer is a five star hotel situate at Carlisle Bay, Old Road Village, St. Mary's Parish, Antigua.

2. The Employee commenced working with the Employer on March 1, 2015 as its Chief Engineer.
3. The Employee signed a contract with the Employer on February 25, 2015 which outlined the terms and conditions of employment.
4. The contract stated the following *inter alia*:
 - (a) The Employee would be paid a salary of "NET EC\$13, 500.00 per month".
 - (b) A discretionary bonus of up to 8% of the Employee's annual base salary might be payable to him. The calculation of this bonus would be based not only on individual performance and objectives but also on "the performance of the Company and market conditions, criteria of which will be available separately."
 - (c) The Employer would provide a monthly petrol allowance of EC\$800.00.
5. Clause 13 of the contract captioned Termination of Employment states:

"Other than in cases of gross misconduct, notice of termination shall be as follows:

 - (a) ...
 - (b) Following the satisfactory completion of your probationary period either party can terminate the contract by three (3) months written notice to the other, or as mutually agreed...

The Company reserves the right to make you a payment in lieu of notice."
6. On November 28, 2016 the Employee was terminated purportedly on the grounds of redundancy.
7. The Employee's Representative filed a Reference of Complaint with the Court on May 2, 2017 claiming Unfair Dismissal.

The Employee's Case

8. On May 29, 2017, the Employee's Representative filed a Memorandum dated May 26, 2017 with the Court. In addition to the financial information provided above, it also stated:
 - (a) "On November 22nd, 2016, the Employer engaged the Employee in a brief discussion in which he was simply told that they were going to review the structure of the Maintenance/Engineering department. The Employer, however, never gave the Employee any details as to how and when the review

would be carried out neither was he invited to have any input, whatsoever. He was also not told of any particular challenge that would have led to the Employer's decision to restructure the operation. Further, at no time during that brief conversation did the Employer make it known to the Employee that the restructuring exercise could likely affect his ongoing employment at the Resort."

- (b) On 23rd November, 2016, the Employer issued the Employee with a letter signed by Mr. John Rogers the General Manager. It stated:

"Dear Mr. Murphy,

Further to our meeting on 22nd November 2016, this letter is to re-confirm that Management is presently reviewing the Department structure of Carlisle Bay; in particular the structure of the Maintenance/Engineering Department.

As stated in the meeting, this could result in the redundancy of your position, following the conclusion of the review.

*Yours sincerely,
Carlisle Bay Resort Limited.*

... .."

- (c) "The Employer is a member of the Antigua Hotels and Tourists Association and is bound by the Collective Bargaining Agreement between that Association and the Antigua and Barbuda Workers' Union, acting as Sole Bargaining Agent for the Employees of the Resort, other than managerial and confidential staff."
- (d) The Maintenance/Engineering department largely consists of employees that fall within the established Bargaining Unit, and at no time prior to or during the purported restructuring did the Employer notify the Union of such an undertaking which would have, most likely, affected the Unit, as well, if the Employer's action and intentions had been genuine."
- (e) During the purported review for the purpose of restructuring the department, the Employer never once consulted with the Employee as the substantive head of department.
- (f) On November 28, 2016, the Employer called the Employee to the office and issued him a letter of the same date indicating that day would have beer

his last day of work as his position had been made redundant. The letter reads:

"CARLISLE BAY

ANTIGUA

*Mr. John Murphy
Royal Gardens
St. John's*

28th November, 2016

Dear John,

After a full review of the Maintenance Department in accordance with the business needs of the hotel, a decision was taken to make the position of Chief Engineer redundant as it no longer supports the needs of the resort.

This letter serves to confirm your position of Chief Engineer will be made redundant effective today 28th November, 2016. Please find enclosed a cheque in the amount of EC\$56,558.33 representing your full and final payment.

Your full and final payment is calculated as follows:

<i>Start date of employment</i>	<i>1st March, 2015</i>	
<i>Monthly rate of pay:</i>	<i>EC\$16,060.00</i>	
<i>Daily rate of pay:</i>	<i>EC\$741.22</i>	
<i>Salary (20 days)</i>		<i>EC\$14,824.62</i>
<i>Travel Allowance</i>		<i>EC\$ 800.00</i>
<i>Vacation (19.63 days)</i>		<i>EC\$14,639.31</i>
<i>Severance pay (1 year 8 months)</i>		<i>EC\$30,514.00</i>
<i>Taxes paid by CB</i>		<i><u>EC\$(4,076.28)</u></i>
<i>Total Amount Due</i>		<i><u>EC\$56,558.33</u></i>

Please return all items including the name badge which have been issued to you to the Human Resources Department.

The full and final payment of the above funds will be made to you in the form of a cheque.

Please sign below to confirm receipt of the cheque payment.

We are deeply appreciative of your service to us within your period of your employment with Carlisle Bay and we wish you every success for the future.

*Yours sincerely,
Carlisle Bay Resort Ltd.
(Sgd.) John Rogers
General Manager*

*Cheque received by:
Signature: (Sgd.) John Murphy
Date: 28/11/16"*

9. The Employee contended that no situation of redundancy existed at the time of the termination of his services and that his duties were still being performed by a manager who had taken them over.
10. The Employee further argued that even if there was a redundancy situation, the Employer did not follow established procedures for dealing with the redundancy consistent with "law, reasonable conduct and good industrial relations practices." Some examples given were that there was no advanced notice or consultations prior to the act of dismissal; there was no claim of financial or significant reduction in business and no discussions concerning alternative employment.
11. The Employee was convinced that the Employer's purported review was "orchestrated as a clandestine plan" to restructure the Employee out of his job position under the guise of redundancy. He contended that his Employer's action was "harsh, oppressive and contrary to good industrial relations practices". He felt that he was unfairly dismissed and was, therefore, entitled to compensation.

The Employer's Case

12. The Employer's Representative filed a Memorandum with the Court on 5th July, 2017. The following is a summary of the salient points put forward:
 - (a) The contract made provision for termination upon the giving of 3 months Notice or by the Employee reaching retirement age (60 years).
 - (b) On or about November 22, 2016 the Employer held a meeting with the Employee advising of its intention to review the organizational structure of the department. The Employee was also advised that this review could result in redundancy for reason of retrenchment.

- (c) The Employee was given an opportunity to forward suggestions but he did not make use of it.
- (d) The Employee was made redundant on November 28, 2016 and this resulted in a saving to the Employer of over \$270,000.00 per year.
- (e) The Employer did not regard the dismissal as being unfair, neither were the procedures regarded as being harmful to the Employee.

The Issues

13. The main issues for determination are:

- (1) Did the Employer act reasonably or unreasonably when it dismissed the Employee on the grounds of redundancy?
- (2) If the Employee was unfairly dismissed, what is the level of compensation which should be awarded to him?

The Legal Parameters

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

"Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer; and no employer shall dismiss any such employee without just cause."

15. Section C 58 (1) of the Code states:

"A dismissal shall not be unfair if the reason assigned by the employer therefor

- (a) ...;*
- (b) ...;*
- (c) Is that the employee was made redundant;*
- (d) ...;*
- (e) ...;*

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

16. C 58 (2) states:

"The test, generally, for deciding whether or not, a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably but, even though he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee's dismissal."

The First Issue

Did the Employer act reasonably or unreasonably when it dismissed the Employee on the ground of redundancy?

17. "Redundancy" is defined in Section C3 of the Labour Code as "a situation in which by virtue of lack of customers orders, retrenchment, the installation of labour saving machinery, and 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."
18. Having carefully considered the definition cited above, we concentrate mainly on the aspect of the purported retrenchment of the Employee and in particular the way in which it was carried out. We studied the written and oral evidence which included the sequence of events leading up to the dismissal.
19. Mention was made by the Employee that on November 22, 2016 the Employer held a brief conversation with him pertaining to a pending review of the structure of the Maintenance/Engineering Department. According to the Employee, the Employer never gave him any details as to how and when the review would have been carried out and he was not asked to make an input in the proposed restructuring. He also said that he was not told that the Company was having "any financial or economic difficulties". No financial statements were presented although the Employer at trial indicated that there was a reduction in income due to lower exchange rates as a result of Brexit discussions in the U.K.
20. On the other hand, on the following day, November 23, there was a follow up letter from the Employer indicating that discussion had taken place and it referred to possible upcoming redundancy of the Employee.

21. On November 28, 2016, the Employer issued a letter to the Employee indicating that he was being made redundant with effect from that very date. It is noted that only six days elapsed between the initial discussion and the termination. This time frame certainly cannot be regarded as being reasonable.
22. The Employee contended that he was not aware that anyone else in the hotel was affected by the purported restructuring. He felt that no situation of redundancy existed at the time of his dismissal and that his duties were being performed by someone who had worked under him. The Employer gave evidence that the management of the department was taken over by the Assistant to the General Manager who was assisted by one Mr. Ivan King who had been an assistant to the Employee. The Employer asserted that there was a redundancy due to retrenchment which made the dismissal fair. He also asserted that some managers had been previously made redundant.
23. Now, it is accepted that an Employer has the right to restructure its business, if required, in order to make it viable. We reiterate, however, that in the present case the period of consultation with the Employee was unreasonably short. This is particularly so against the backdrop of Clause 13 (b) of the contract which stipulates that " ... either party can terminate the contract by three (3) months written notice to the other, or as mutually agreed". Moreover, no attempt was made by the Employer to explore the possibility of offering the Employee alternative employment.
24. Taking everything into consideration which included the very short notice of retrenchment following discussion, failure of the Employer to give the Employee three months written notice prior to the termination as provided in the contract, lack of financial statements and failure to offer alternative employment, we are of the view that the Employer did not follow accepted procedures in dealing with the purported retrenchment and redundancy. It failed to prove that this was a genuine case of redundancy and was therefore a good cause for dismissal. In the circumstances we agree that the Employee was unfairly dismissed.

The Second Issue

If the Employee was unfairly dismissed, what is the amount of compensation which should be awarded to him?

25. The Employee was deemed to have been unfairly dismissed and should therefore be awarded reasonable compensation as detailed below:

(a) Basic Award

This is equivalent to Severance pay. The Employee worked from March 1, 2015 to November 28, 2016 i.e. for 1 year and 9 months or 1.75 years. His salary at the time of termination was EC\$16,060.00. The award under this head is calculated on the basis of 1 month for each year of service to be $\$16,060.00 \times 1.75 = \$28,105.00$

(b) Immediate Loss

The Employee is expected to mitigate his loss. At the trial, he said that he tried to do so by doing odd jobs as a pilot, engineer and ship's captain. He also said that he sent out applications to other companies but was unsuccessful. Nothing by way of documentation was, however, provided in support of these statements. In the circumstances, we would limit the award under this head to the equivalent of one month's salary in the sum of \$16,060.00.

(c) Manner of Dismissal

We are not of the view that the Employee's Manner of Dismissal affected his ability to obtain a new job. We therefore do not feel justified in awarding any damages under this head.

(d) Future Loss

In the Employer's Written Submissions, it was noted that there was no evidence of alternative employment or diminished earnings on which to base a calculation of future loss. We agree with this submission and make no award under this head.

(e) Notice Pay

An award of three (3) months pay in lieu of Notice is due pursuant to Clause 13 (b) of the contract of employment. This is calculated to be $\$16,060.00 \times 3 = \$48,180.00$.

(f) Exemplary Damages

We do not make any award under this head.

(g) Vacation Pay

In the Employer's letter to the Employee dated 28th November 2016, final payment with respect to Vacation Pay was calculated to be 19.63 days, equivalent to \$14,639.31. The Employee, however, stated at trial that he was entitled to more vacation pay. According to clause 9 of the employment contract, annual holiday i.e. Vacation Pay should be paid at the rate of 20 days for the first year and this would be increased by 1 day per year for subsequent years. Based on this, we calculate that the Employee would now earn 21 days of vacation per year. An extra amount due is therefore calculated to be : $(21 - 19.63) \times \$741.22 = \$1,015.47$

26. The question arose pertaining to payment of a Bonus to the Employee. Clearly, however, payment of a bonus to Employees was at the sole discretion of the Employer as indicated in Clause 7 of the contract. We are satisfied that no award is payable under this head.

Net Award

27. The total amount due is \$93,360.47. An amount of \$56,558.33 was already paid by cheque as per the Employer's letter dated November 28, 2016. This, of course, must be deducted. The net amount due is therefore \$36,802.14.
28. This amount of \$36,802.14 shall be paid by the Employer to the Employee not later than September 30, 2019.
29. There will be no Order with respect to Costs.

Dated this 26th day of August, 2019.



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Dr. Hayden Thomas
Chairman



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Samuel Aymer
Member

.....
John Benjamin
Member



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