

**ANTIGUA & BARBUDA
IN THE INDUSTRIAL COURT**



REFERENCE NO.52 OF 2013

BETWEEN

OSBERT FREDERICK

Employee

And

LIAT (1974) LTD.

Employer

Before:

The Hon. Charlesworth O.D. Brown
The Hon. Samuel Aymer

President
Member

Appearances:

Mr. David Dorsett, Ph.D. and Mr Jarid Hewlett of Watt, Dorsett & Company, Attorney-at-Law for the Employee

Mr. Kendrickson Kentish and Ms. Amaya M. Athill of Lake & Kentish, Attorneys-at-Law for the Employer

2016: July 27
2019: July 12

JUDGMENT

Brown, P;

Background

1. The Employer is engaged in the business of transporting passengers by air throughout the Eastern Caribbean. Although its principal place of business is in Antigua, the headquarters for its Commercial Department comprising Marketing, Revenue Management and Scheduling Divisions, is situated in Barbados.

2. The Employee commenced his employment as an Assistant Manager in the Employer's Internal Audit Department on 15th October, 1992. His employment was terminated with effect from 30th January, 2012 on the ground of redundancy, at which date he held the position of Assistant Manager in the Revenue Management Department and was based in Antigua.
3. Sometime before 09th January 2012 the Employee's main duties included work on the Employer's Frequent Flyer Loyalty Program. The administration of that program was transferred to the Commercial Department in Barbados and was eventually outsourced so that the work the Employee was employed to perform ceased or substantially diminished.
4. By letter dated 09th January, 2012, the Employer informed the Employee that the functions he performed as "Assistant Manager Commercial Department" would be made redundant with effect from 31st January, 2012. Upon or soon after his dismissal the Employee received his severance entitlement, pay in lieu of accrued vacation and his portion of the Employer's Pension Fund.
5. In or about the first week of March 2012 the Employer issued an advertisement inviting applications to fill the news positions of Payroll Accountant and Manager, Management Accounting within the company.

The Employee's Case

6. In its Memorandum of Claim filed on 04th September, 2013, the Employee averred that he was never employed as Assistant Manager in the Employer's Commercial Department. Accordingly, the letter terminating his employment is factually untrue as a consequence of which, "no reason or proper reason" was disclosed therein contrary to Section C10 (1) of the Labour Code.
7. Further, the Employee contended that Section C10 (4) of the Labour Code operated to create an estoppel hindering the Employer from introducing testimony at the trial as to the precise reason for the dismissal.
8. Moreover, in his Memorandum of Claim the Employee contended that the Employer being cognizant of the Employee's qualifications in Accounting and Marketing made no effort to find alternative employment for him. In that regard the Employer acted in a manner contrary to good industrial relation practices.

The Employer's Case

9. In its Memorandum of Defence dated 30th January, 2015 the Employer joined issue with the Employee's claim. The Employer's ultimate contention was that the redundancy was genuine and that the Employee was not unfairly dismissed.
10. The Employer contended that the Employee was aware that "Revenue Management" was a department within the Commercial Department based in Barbados. Consequently, after the transfer of the department to Barbados and the outsourcing of the programme the Employee had no real function, as the work he was employed to do had ceased.
11. Further, the Employer pleaded that its advertisements in relation to the vacant positions of Payroll Accountant and Manager, Management Accounting were made subsequent to the dismissal of the Employee. At the date of his dismissal there were no comparable roles within the Employer's business which the Employee could fill. As a result he was not transferred to another department or offered alternative employment.

Trial Limited to Liability

12. After the Employee's testimony at the trial, Dr. Dorsett, having omitted to lead evidence in respect of the Employee's efforts to mitigate his loss after dismissal, submitted that the proceedings should proceed towards the determination of liability only. Although Mr. Kentish initially opposed the application, the Court ruled that the trial be bifurcated in accordance with Dr. Dorsett's submission.

The Main Issues

13. We have identified the main issues as follows:
 - (1) Whether a genuine redundancy situation existed at the material time?
 - (2) Whether the Employer furnished the Employee with a valid statement of the precise reason for his dismissal?
 - (3) Whether the Employer acted reasonably in dismissing the Employee in the circumstances?

The Legal Parameters

14. The statutory framework for the determination of the main issues is largely contained in Sections C 3, C 10 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;

C10. (1) Upon termination by an employer of an employee’s employment subsequent to the expiration of the latter’s probation period, the employer shall, within seven days of termination or notice thereof, furnish to such employee a written statement of the precise reason for termination.

(3) An employer who furnishes a statement or certificate required by subsection (1) or (2) respectively, shall be conclusively bound by the contents therein in any proceeding testing the fairness of the dismissal as covered by Part 5 herein of his liability for severance pay covered by Part 4 herein.”

(4) An employer who fails to furnish either the statement or the certificate shall be estopped from introducing testimony as to facts which might have been recited in said statement or certificate, in any proceeding testing the fairness of the dismissal or his liability for severance pay whichever is applicable.

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

...

(c) is that the employee was made redundant;

...

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.”

15. In the exercise of our statutory powers this Court is obliged to have regard for Section 10 (3) of the Industrial Court Act, which 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 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.*

Issue 1: A Genuine Redundancy

16. We have carefully considered the written and oral testimonies of the Employee on the one hand and those of Ms. Julie Reifer-Jones and Ms. Ilean Ramsey on the other hand. On the balance of probabilities, we find as follows:

- (1) On 01st November, 1996 the Employee was promoted to the position of Assistant Manager in the Employer's Marketing Division which was placed under the umbrella of the Commercial Department sometime between 1996 and 1997.
- (2) Apart from the Marketing Division, the Revenue Management and Scheduling Divisions were also under the umbrella of the Commercial Department.
- (3) The Employee's last position was that of Assistant Manager in the Revenue Management division of the Employer's Commercial Department which had its headquarters in Barbados. At all material times he performed his duties as part of that Department.
- (4) Sometime prior to 2008 the Employer transferred its Commercial Department to Barbados. Thereafter, the Employee's duties were mainly in relation to the Employer's Loyalty Program, the administration of which was substantially outsourced leaving the Employee with significantly reduced duties. Those reduced duties were eventually phased out when that program was transferred to the Employer's Call Centre under its Commercial Department. As a result, the work which the Employee previously performed ceased or substantially diminished.
- (5) With effect from 31st January, 2012 the Employee's position became redundant. He was informed of the redundancy by letter dated 09th January, 2012.

- (6) Throughout his tenure the Employer failed to provide the Employee with job descriptions from time to time. In particular, the Employee received no job description for his last position of Assistant Manager in the Revenue Management division.
17. Based on matters aforesaid, we accept the joint submission of Mr. Kentish and Ms. Athill, Counsel for the Employer, that the necessary "cause" and "effect" of the redundancy were clearly established. In that regard, Counsel appropriately relied on the Court of Appeal judgment in Civil Appeal No. 28 of 2001: **Sundry Workers v King's Casino**.
18. In the final analysis of the relevant statutory provisions, the evidence and pertinent judicial pronouncements, we resolve this issue in favour of the Employer. At the material time, immediately before the dismissal of the Employee, there was in existence a redundancy situation. In effect, the Employer met the threshold for lawfully dismissing the Employee on the ground of redundancy.

Issue No. 2: Statement of the Precise Reason

19. In light of the redundancy situation, the determination of this issue turns on the content of the letter of dismissal which reads:

" 09th January, 2012

*Osbert Frederick
c/o LIAT (1974) Ltd.*

...

Dear Mr. Frederick,

RE: Redundancy

This serves as a follow up to our meeting earlier today wherein you were advised that due to restructuring within the organization, the functions which you have performed as Assistant Manager Commercial Department will be made redundant effective 31st January, 2012.

The Company will arrange to pay you all the benefits to which you are entitled. A further correspondence detailing all of your entitlements will be provided under separate cover by January 16th, 2012. Any outstanding debt that you may have with the Company will first be settled before the final funds are disbursed to you.

On behalf of the managements and staff of LIAT (1974) Ltd., I would like to take this opportunity to thank you for the valuable contribution that you have made to the Company over the years.

We wish you all the best in the future endeavours.

*Sincerely,
Ilean Ramsey
Director, Human Resources*

..."

20. Section C 10 (1) requires the Employer to issue a precise statement of the reason for dismissal. In the absence of a valid statement, Section C 10 (4) operates to create an estoppel against the Employer. In the circumstances, the question is: Does the dismissal letter meet the statutory requirement?

21. In his submissions on behalf of the Employee, Dr. Dorsett contended that the dismissal letter does not meet the requirements of Section C 10 (1) of the Labour Code. In particular, he submitted:

" 5. It is submitted that if the employer fails to give a reason as prescribed by C10 then the dismissal will automatically be unfair as the employer will be estopped from advancing a reason at trial, and if no reason (as a matter of substantive law) can be advanced then the position at law is that the employee was dismissed without a reason. Dismissal for no legally cognizable reason is, without more, unfair.

6. The consequences of giving a false or otherwise inaccurate reason are equally disastrous for an employer. If an employer gives a section C10 reason that is false or otherwise inaccurate, the employer is "estopped from introducing testimony as to facts which might have been recited in said statement ..., in any proceedings testing the fairness of the dismissal..." Dismissal for a false reason is clearly unfair."

22. Following that submission, Counsel put much emphasis on the outsourcing and the transfer of certain parts of the business to Barbados. Accordingly to him, the redundancy situation occurred years before the dismissal of the Employee. As a result, the dismissal was a "tell-tale sign" that the real reason for dismissal was not redundancy. So that the stated reason could not be accurate but was rather a false or inaccurate reason.

23. At paragraphs 17 and 18 of their submissions, Counsel for the Employer shifted from the phase of outsourcing to the later phase of the retrenchment process undertaken by the Employer in the face of its financial challenges existing immediately before the dismissal of the Employee. At that time, he was still working in a limited capacity on the Frequent Flyer Program while assisting in a number of other areas. In their words:

"17 ... Mrs. Reifer-Jones, as the Chief Financial Officer of the Company, in her testimony, gave the most insight as to the financial position of the company and its measures to reduce costs. Mrs. Reifer-Jones spoke to the fact that the company was facing tremendous financial challenges, and that the company took the decision to reduce costs, and one of the ways the company sought to reduce costs was by a reduction in the headcount. In the instant case it is the testimony of Mr. Frederick that he was an active unionist who headed the management staff association of LIAT. Mr. Frederick testified that in that capacity he was aware that LIAT's revenue had suffered a significant downturn.

...

18. The Employer submits that the work that Mr. Frederick was undertaking with the frequent flyer program, up to the time of his termination, had substantially diminished and was not enough to sustain him as a full time Employee."

24. We agree with those submissions. They are consistent with the law and the evidence before us. Dr. Dorsett himself emphasized that the true reason for the Employee's termination was "financial stress facing the Employer on account of market conditions and other circumstances." In our opinion, the financial situation and market conditions led to the retrenchment which is a legitimate "cause" for the redundancy "effect".
25. In the circumstances, notwithstanding the irregularity in the description of the Employee's position, we also resolve this issue in favour of the Employer. The dismissal letter is sufficiently accurate to constitute a valid statement of the precise reason for the dismissal under Section C 10 (1) of the Labour Code. At the trial the Employer merely amplified the stated precise reason of redundancy. Although it might have had, its genesis in the transfer of the Loyalty Program and its outsourcing prior to 2008, the redundancy situation resulting in the dismissal of the Employee did not crystallize until 31st January, 2012.

Issue 3: Reasonableness

26. 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..."

27. 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 ..."

28. 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 if Appeal. Having regard to the principles laid out in the **Compair Maxim case**, we will consider selected actions and omissions of the Employer under several heads as follows:

The Job Description

29. As testified by Mrs. Reifer-Jones, the Employee received no job description for his last position of Assistant Manager, Revenue Management in the Employer's Commercial Department. In her words:

"4. Mr. Frederick's last position within the company was Assistant Manager within Revenue Management. For Employees who were

employed at LIAT many years ago and who were transferred or promoted, there is an absence of documentation throughout the company in relation to job descriptions or updated job descriptions. Unfortunately, there is no job description for Mr. Frederick for his last held position as his promotion to assistant manager was not properly documented. “

30. That state of affairs reflects some degree of negligence or recklessness on the part of the Employer. Similarly, at that point when it determined that it would embark on the restructuring or retrenchment exercise one of its first steps should have been to carefully assess the qualifications and the job functions of at least those who were vulnerable to redundancy. It was unreasonable for the Employer to omit to undertake that exercise. In any event, by failing to provide a job description to the Employee, the Employer was in breach of its statutory obligation under Section C5 of the Labour Code.
31. That omission is particularly more glaring for two related reasons. Firstly, it appears that the state of affairs was fluid, starting with or including the transfer of the Commercial Department to Barbados before 2008. It is clear, that at least by January 2012 the Employer had embarked on a process of “restructuring”. That process in our view, required a mandatory stock taking of its human resources. Either this was not done at all or the Employee was somehow excluded. In either event, the omission of the Employer was unreasonable.
32. Secondly, as evidenced by the emergence of the new positions of Payroll Accountant and Manager, Management Accounting, at the latest by the first week of March 2012, the Employer most likely would have engaged in forward planning before or during the restructuring and retrenchment exercises. It is unlikely that those new positions were conceptualized, or created out of the blue on the 2nd and 8th March 2012 respectively when they were advertised. Again it was unreasonable for the Employer to omit to consider the Employee’s position and his fate without reference to those new or emerging vacancies. Further, this omission is particularly glaring because both new positions required as a main item of qualification, “a degree in Accounting” which the Employee held.

Consultation

33. It is noteworthy that in the dismissal letter dated 09th January, 2012 the Employer stated that it was a follow-up to a meeting earlier the same day whereby the Employee was advised that his position would be made redundant 3 weeks later. Having regard to the Employee’s long tenure and senior position, the very limited notice of his impending redundancy was unfortunate. We accept his testimony that prior to the meeting he had “no inkling” about the impending

redundancy of his position. In the circumstances, we have no doubt that the Employee received no reasonable notice of his dismissal.

34. As to the Employee's knowledge of the restructuring programme, the evidence of Ms. Ramsey suggests that he knew of it since towards the end of October 2011 and that he attended a meeting in Barbados at the end of January 2012. We note that his knowledge and attendance at the meeting were in the capacity as Chairman of the LIAT Management Association. Taken at its highest level, that knowledge which the Employee had does not constitute consultation. The only consultation which the Employer had with the Employee was that on the morning of 09th January, 2012 shortly before receiving his dismissal letter.
35. In the circumstances, we conclude that there was no or no adequate consultation with the Employee about the Employer's restructuring program. Most significantly, the evidence discloses that at no time before 09th January, 2012 was it brought home to the Employee that the restructuring would have affected him in particular in the manner it did.
36. In any event, we are concerned that there was no "fair consultation". The Employee should have been consulted at a much earlier stage and provided with sufficient information to allow him reasonable time to respond, for whatever it was worth, to the Employer's proposal for the redundancy of his position.

Selection for and Notice of Redundancy

37. The process of the selection of the Employee for redundancy appears to have been over-simplified. The Employer contended that the Employee became redundant because the Frequent Flyer Program had been outsourced and that he did not have much to do. Apart from that simple approach, and asserting that there was no vacancy or available position for him, it appears that the Employer did not do a thorough assessment of the skills and capabilities for which it had a continuing need, before selecting the Employee for dismissal. Moreover, there is no sufficient evidence that the Employer specifically considered, as it should have, such matters as the Employee's relative qualifications, experience, general competence, work ethic and overall conduct during his tenure.
38. In any event, the Employee had no adequate warning or notice of his redundancy. The Employer's evidence that the Employee attended a meeting on 29th January, 2012 as Chairman of LIAT Management Association, which was originally scheduled for a few months earlier, did not suffice in the circumstances, to bring home to the Employee that his position was in jeopardy. At the end of the day, we are not convinced that out of the Employer's 625

employees, the Employee was the only or most suitable selection for redundancy.

39. The lack of consultation and adequate notice is particularly critical because after the transfer of the Commercial Department and the outsourcing of the Frequent Flyer Program the Employee continued to work for over 4 years with no apparent hint that his employment was in jeopardy. Apart from being contrary to good industrial relations practices, the treatment meted out to the Employee smacks of disrespect and callousness. In any event, we conclude that the omission of proper consultation was an unreasonable omission on the part of the Employer.

Alternative Employment

40. Further, we are not satisfied that the Employer made any or any sufficient attempts to find alternative employment for the Employee within its organization. Taking into account his qualifications, long tenure and the then subsisting restructuring process, it did not suffice to say in relation to the newly advertised positions, as Ms. Ramsey did at paragraph 14 of her Witness Statement that:

"14. At the time of dismissal these positions were not available and there were no comparable roles available within the Company. Therefore, Mr. Frederick was not offered alternative employment and was not transferred to another department within the company."

41. In that regard, the authors of **Blackstone's Employment Law Practice : 2014**, Oxford University Press, assert that:

"The employer also has a duty, if someone is provisionally selected for redundancy, to see whether there is any other role which might suit that particular employee, not only with the employer but also with any associated company of the employer. If this requirement is ignored, a dismissal is normally rendered unfair. If there are jobs, even if they are of lower status or carry lower wages than those which apply to the employee's present job, the prospect of moving to the alternative employment should nevertheless be raised..."

42. In the circumstances, the Employer's omissions and actions in relation to its consideration of retaining the services of the Employee or offering him alternative employment were also unreasonable. We are not convinced that the Employer discharged its duty to explore the possibility of identifying another

suitable role for the Employee within its organization even at a lower salary or with a lower status.

Conclusion

43. Having regard to all these circumstances we conclude that the Employer failed the test of reasonableness. Thus, we declare that notwithstanding the existence of the redundancy situation, the dismissal of the Employee was unfair. He is entitled to compensation to be assessed by the Court on a date to be fixed by the Court Office.

Dated this 12th day of July, 2019



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Charlesworth O.D. Brown
President



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Samuel Aymer
Member

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