

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 24 of 2015

BETWEEN:

SUNDRY WORKERS

Employee

And

FINANCIAL SERVICES REGULATORY COMMISSION

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. St. Lawrence DeFreitas

Member

The Hon. Judith Dublin

Member

Appearances:

Mr. Ralph Potter of Antigua Trades & Labour Union, for the Employees

Ms. Leslie-Ann Brisett and Ms. Jasmine Wade, Attorneys-at-Law for the Employer

2017: May 18

2018: June 05

2020: October 09

JUDGMENT

Brown, P;

Introduction and Background

1. The Reference of Complaint in these proceedings, which was filed on May 08, 2015, arose from the second phase of the Employer's restructuring of its operations between January and May 2015 pursuant to its obligations and in the exercise of its powers under Section 39 of the Financial Services Regulatory Commission Act No. 5 of 2013 (the FSRC Act). According to their Memorandum of Claim, the restructuring process adopted by the Employer resulted in the unfair dismissal of three of the Employees and subjected others to an "unfair promotion process" by reason of which they were unfairly demoted.



2. The Employer is a statutory body first established under the International Business Corporations Act Cap 222 and continued under the FSRC Act. Under sub-section 39 (1) of the latter Act, it had a mandatory obligation to revise its organizational structure within 12 months after the date when that Act came into force and from time to time thereafter. In particular, sub-sections 39 (5) and (6) of the Act empowers the Employer to prepare new or revised posts, reassign tasks and terminate the employment of selected employees on the ground of redundancy. Those subsections read:

“(5) Without limitation of the powers of the Commission as an employer, the Commission may, as a result of the adoption of the revised organizational structure

- a) Prepare new or revised posts and job descriptions**
- b) Reassign tasks among employees; and**
- c) Terminate upon at least 60 days’ notice the employment of any member who**
 - i. Holds a post for which there is no equivalent in the new organizational structure; or**
 - ii. Perform tasks which have been reassigned to other employees.**

(6) In the event that an employee’s employment is terminated pursuant to subsection (5) (c) such employee shall be deemed redundant for the purposes of the Antigua & Barbuda Labour Code, Cap.27.”

3. As defined in section C 3 of the Antigua & Barbuda Labour Code (the Labour Code), **“Redundancy”** means a situation in which by virtue of causes such as lack of customers’ orders, retrenchment, any other reason **“work which a person was last employed to perform has ceased or substantially diminished;”**
4. An employee’s statutory right not to be unfairly dismissed is established by Section C 56 of the Labour Code. That section expressly prohibits an employer from dismissing an employee **“without just cause”**. Section C 58 (1) of the Labour Code establishes redundancy as a just cause for dismissal, provided that **“there is a factual basis for the assigned reason”**.
5. Notwithstanding the existence of good cause, the determination of what constitutes an unfair dismissal requires the application of the **test of reasonableness** as provided under Section C 58 (2) as follows:

“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 ...the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee’s dismissal.”

6. Subject to the pertinent provisions of the FSRC Act and the Labour Code, the employment of the Employees is generally governed by the Collective Bargaining Agreement 2012-2014 dated July 23, 2013 then in force between the Employer and the Antigua Trades & Labour Union (the Union). Article 44 sets out the agreed grievance which an employee may take if he feels aggrieved. Article 44 (b) provides as follows:

“ARTICLE 44. GRIEVANCE PROCEDURE AND SETTLEMENT

If an employee has a grievance the following procedure shall be adopted, and each step shall be taken progressively from the earliest opportunity until the matter is satisfactorily settled.

(a) Grievance:

...

(b) Disputes:

- I. The Union may meet with the Commission if no settlement is reached at the preceding stage where appropriate representative of the Commission along with the particular representative of Management (if involved) may attend such meetings.**
- II. If the dispute is not resolved at any preceding stage of this procedure, the matter shall be referred by either party to the Dispute to the Labour Commissioner for conciliation.**
- III. During the stages laid down above there shall be no strike or other form of Industrial Action by the Union or Workers, or any lockout by the Commission.**

7. Prior to its implementation, the restructuring process had been discussed among the Employer, employees and the Union on many occasions in 2014. During that year, the Employer issued memoranda informing the employees in respect of its recruitment and hiring process carried out in Phase 1 of the process. During Phase 2, the Employer determined what conceptualized positions were necessary and which existing ones would be made redundant. To be desired end, it prepared two preliminary versions of its organizational chart before the final draft was settled.

8. Disputes arose between the parties in respect of the Employer's handling of the process during the second phase.

The Opposing Cases

9. On the one hand, in their Memorandum of Claim, filed on June 22, 2015, the Employees expressed selected facts and advanced the following contentions:
 - a) During discussions among the Employees, the Employer and the Union between 2013 and February 2015, it was agreed among them that the process would not result in the termination of employment of any of the members of the Bargaining Unit of which the Employees were a part.
 - b) At a meeting held on February 11, 2015 the Employer informed the Union that the restructuring would result in the redundancy of some positions. In response, by letter dated February 25, 2015 the Union wrote to the Employer outlining a number of concerns and expressing suggestions which, in the Union's view, "would have resulted in a smooth, transparent and fair process".
 - c) As a result of the Employer's disregard for the Union's suggestions, by letter dated March 10, 2015 the Union wrote to the Labour Commissioner requesting his intervention. In compliance with that request, a hearing was scheduled for May 5, 2015 at the Labour Department but the Employer failed or refused to attend.
 - d) In light of the Employer's no-attendance at the meeting with the Labour Commissioner, and its then continuing pursuit of the restructuring process while the Labour Commissioner's report was pending, the Union filed its Reference of Complaint in this Court on May 08, 2015. It raised the issues of "unfair dismissal", "unfair promotion process" and "demotion".
 - e) Notwithstanding the filing of the Reference and the prompt service of the same on the Employer within an hour after filing, and while the Labour Commissioner's report remained pending, the Employer advanced the restructuring process by physically relocating some employees; issuing letters of redundancy to some and issuing new job descriptions and assignments to others.
 - f) In the circumstances the Employees contend that:

- (i) The terminations of the employment of Ms. Nicole Buntin, Ms. Jeanette Thomas and Ms. Candida Etinoff were unfair.
- (ii) The restructuring process and the resulting job classifications and assignments resulted in the demotion of some employees and left others in untenable situations.
- (iii) The Employer acted in breach of Articles 37 and 38 (Vacancies / Promotion and Retrenchment) of the Collective Agreement.

10. On the other hand, by its Memorandum of Defence, filed on July 25, 2014, the Employer disputes the Employees' claim on the following grounds:

- a) As early as June 4 and November 26, 2014 the Employer communicated to its staff and the Union that the placement of "all other staff within the new organizational chart" would follow the "completion of the recruitment and hiring process" in Phase 1 and that Phase 2 would involve the "review of the organizational structure for all other positions".
- b) Pursuant to its statutory power to restructure itself and based on the necessary positions as conceptualized, a total of three (3) versions of the organizational chart were prepared and made available to the Union as part of its conciliatory efforts to determine the best way forward. The Employer also issued memoranda to all its employees updating them about the restructuring process and the revisions of the organizational chart.
- c) The Employer denies that it "largely ignored" the suggestions of the Union and contends that, to the contrary, it accommodated the Union by utilizing a "combined approach" to the necessary appointments and reassignments.
- d) As to the meeting with the Labour Commissioner, the Employer asserted that its non-attendance was due to logistical and communication issues. Further, it requested that the meeting be rescheduled for a later time the same day but its request was declined.
- e) As to the commencement of proceedings in this Court, the matters related to Ms. Buntin, Ms. Thomas and Ms. Etinoff were finally decided prior to the filing of the Reference.
- f) In finalizing the restructuring of its operations, the Employer took into consideration the need to reshape and re-engineer its operations for greater efficiency. It objectively selected the jobs it advertised with a

view to creating a more progressive organization. In the process Article 39 (Job Security) of the Collective Agreement was fully applied to ensure a fair legal process.

- g) The restructuring did not render the continued employment of any employee untenable. Moreover, the Employer complied with Articles 36, 39 and ensured that the terminations of employment were conducted in accordance with the Labour Code. As a result of which there was no unfair dismissal, unfair promotion, hiring or demotion.

The Main Issues

11. The main issues emerging from the pleadings are:

- (1) Whether a genuine redundancy situation existed at the material time.
- (2) Whether the Employer acted reasonably or unreasonably in dismissing Ms. Buntin, Ms. Thomas and Ms. Etinoff.

Issue 1: Was there a Genuine Redundancy Situation?

- 12. Given the stated purposes for which the FSRC Act was passed, there can be no doubt that Section 39 of that Act codified preexisting rights of the Employer to rearrange or restructure itself as it saw fit, subject always to the relevant provisions of the Labour Code, especially those regarding unfair dismissals generally and redundancy situations in particular.
- 13. It is noteworthy, but not surprising, that under Article 1 of the Collective Agreement it was agreed that the operations of the Employer and the assignment and direction of its employees, including the control of its activities, the maintenance of efficiency and the assignment of work to its employees are the exclusive functions of the Employer's management team.
- 14. Further, it is instructive that the Employer was established in 1983 under the International Business Corporates Act, Cap 222 which provided "a regime of corporate law to govern the operations of international business corporations". The FSRC Act repealed a part of that Act and provided for the preservation and continuation of the Employer.
- 15. As we understand it, Section 39 of the FSRC Act effectively counterbalances or mitigates the potential rigours of the direct application of Sections 58 of the Labour Code. In the ordinary course of things, given an employee's right not to be unfairly dismissed, an employer who admits that it dismissed an employee has the heavy burden of proving that the dismissal was not unfair under section C 58. The operation of Section 39 of the FSRC Act tends to lighten that burden on the Employer to adduce cogent and convincing evidence that it discharged its

statutory obligations under the Labour Code and met its contractual obligations under the Collective Agreement.

16. The facts as we have determined them on the balance of probabilities, include the following:

- (a) The restructuring of the Employer pursuant to Section 39 of the Financial Services Regulatory Commission Act was a continuation of the process which started prior to 2013.
- (b) The express policy underlying the restructuring process was to make the Employer “more efficient and cost effective”
- (c) The restructuring exercise was carried out in two phases, the first of which involved the reorganization of the management staff which was completed by the end of December 2014. That was followed by the second phase which involved the restructuring of the various departments of the Employer’s operations.
- (d) By the end of Phase 1 in December 2014, the Union and the Employees were all adequately informed of the Employer’s approach to the restructuring exercise.
- (e) The Employer’s Gaming Department was staffed by employees transferred from the Interactive Gaming and Wagering Division of the Antigua and Barbuda Free Trade Zone in 2001. At that time, 93 Gaming Licences were regulated by the Employer. That number was reduced significantly to 30 by 2007 and further reduced to 13 in 2014. The reduced number of licences inevitably resulted in a significant reduction in the Employer’s revenue. The reduced number of licences also resulted in a substantial diminution in the number of tasks and the overall volume of work which was required to be done within the Gaming Department.
- (f) After its careful analysis of the staff requirements of the Gaming Department, the Employer made certain remedial policy decisions in an effort to streamline its staff towards greater efficiency.
- (g) Taking into consideration, the details of the staffing requirements as determined by the respective heads of departments, including the Director of Gaming, the Employer decided as a matter of policy, that the positions held by Ms. Buntin, Ms. Thomas and Ms. Etinoff would be made redundant.

(h) Although they were entitled to do so, the Employees did not individually avail themselves of the agreed Grievance Procedure set out in Article 44 of the Collective Agreement.

17. In his closing submissions on behalf of the Employees, Mr. Ralph Potter, Senior Industrial Relations Officer of the Union submitted that no redundancy situation existed in relation to the three Employees. In addition, he submitted that the "process used in the termination of the Employees as flawed, unreasonable and unfair". Ultimately, he submitted that "It is clear that the terminated employees were unfairly terminated in that their job functions still existed in total or substantially, the method by which they were chosen were not fair and reasonable, the rules of notice were in all cases were breached and there was no meaningful discussion or arrangement with them".
18. On the other hand, in her submissions, Learned Counsel, Ms. Leslie-Ann Brisett focused on the Employer's statutory mandate under section 39 of the FSRC Act to declare redundancies and terminate the employment of selected employees during the restructuring process. Her view is that when Parliament mandated the restructuring process, it did so in order to increase the Employer's efficiency and profitability in the face of existing inefficiency and the presence of superfluous workers.
19. In resolving the first issue, we remind ourselves of the provisions of section C 58 (1) of the Labour Code and refer to our findings of fact above. In the final analysis, having regard to the effects of the pervasive global recession and the international meltdown of the Stanford operations, we conclude that on account of the substantial diminution in the number of tasks and the corresponding volume of work as at the commencement of the second phase of restructuring in early 2015, there existed a genuine redundancy situation within the Employer's Gaming Department.

Issue 2: Did the Employer Act Reasonably?

Hearing Before Labour Commissioner

20. At first blush, it would appear that the Employer's failure or refusal to attend the hearing before the Labour Commissioner on May 5, 2015 was unreasonable. However, we have noted the Employer's evidence that its failure to attend was due to communication and logistical challenges. Further, we also note that, according to Mr. Lewis, an unsuccessful attempt was made to reschedule the hearing for later the same day.

21. It is instructive that, according to Mr. Lewis, "the Labour Commissioner's conciliation report was generated on May 7, 2015 and reached the Commission on May 11th 2015". We have noted that Ms. Buntin was given written notice of the termination of her employment by letter dated April 30, 2015 in which the effective date of redundancy was stated to be May 8, 2015. She also received a letter dated May 8, 2015 by which her services were finally terminated the same day, Ms. Etinoff's letter of dismissal with immediate effect was also dated May 8, 2015 May 8, 2015 to take effect the same day. In the case of Ms. Thomas, her letter of termination was dated May 15, 2015 and took effect the same day.
22. It is unfortunate that while the Employer awaited receipt of the Labour Commissioner's conciliation report it proceeded with the restructuring process by terminating the employment of the three above named Employees. Those actions by the Employer are most unreasonable. We strongly condemn the Employer's conduct in that regard as a flagrant demonstration of bad faith. Ultimately, the Employer demonstrated scant regard, disrespect and discourtesy for and towards the office of the Labour Commissioner.
23. Moreover, the Employer's actions in dismissing the three Employees is in principle contrary to the position it had earlier agreed with the Union under Article 44 of the Collective Agreement. Under that Article, set out in part at paragraph 6 above, the Employer had expressly agreed not to effect any "lockout" while the matter remained pending before the Labour Commissioner. In our opinion, the combined effect of the dismissals was similar or tantamount to a lockout.

Industrial Court Proceedings

24. Further, we note that the above stated part of Article 44 is in effect a voluntary agreement between the parties to the similar effect as section 20 (1) of the Industrial Court Act. That section provides as follows:

"No employee may go on strike or take part in a strike and no employer may declare a lockout or take part in a lockout while proceedings in relation to a trade dispute between such employee and such employer are pending before the Court.."

That aspect of the Agreement demonstrates that the parties appreciated the that its main purpose, like that of the statutory provision, was to create a stay on further actions by either party pending determination of the dispute by the Labour Commissioner in the first instance, or subsequently by this Court.

25. It is our further opinion that the Employer's conduct in proceeding with the restructuring process generally and dismissing or giving effect to the dismissals of Ms. Buntin, Ms. Thomas and Ms. Etinoff, after being served with the Reference herein on May 8, 2015, was similar or tantamount to a lockout contrary to section 20 of the Labour Code. There can be absolutely no reasonable explanation, justification or excuse for such conduct. In any event, we strongly condemn the Employer's conduct in the face of the commencement of proceedings in this Court.
26. In the normal course of things, in considering the test of reasonableness, we would be guided by the principles established by the leading case of **Williams v. Compair Maxam Ltd. 1982 I.C.R.15**. The principles set out in that case are all largely grounded on natural justice and the principles and practices of good industrial relations". However, given our conclusions above, we do not find it necessary to apply those principles to the facts of this case.

Conclusion

27. As to the issue of whether a redundancy situation existed, we find Ms. Brisett's closing submissions, filed on behalf of the Employer, to be generally more persuasive than those of Mr. Potter, filed on behalf of the Employees. And we conclude that a genuine redundancy situation resulted from the Employer's discharge of its obligations and the exercise of its powers under section 39 of the FSRC Act.
28. As to the issue of reasonableness, we find that the Employer's conduct after the commencement of proceedings before the Labour Commissioner and in this Court to be most unreasonable. Accordingly, the Employer has failed the test of reasonableness under section C 58 (2) of the Labour Code. As a result, we declare that Ms. Buntin, Ms. Thomas and Ms. Etinoff were unfairly dismissed and are entitled to compensation.
29. The issues of an "unfair promotion process" and "demotion" fell away as they were not pursued by the Employees during the trial.

Compensation

30. We note that each of the Employees was paid their "severance" entitlement and 2 months pay in lieu of statutory notice together with their outstanding vacation pay. In the circumstances, we make no award for Notice Pay and Loss of Protection from unfair dismissal. However, based on the available sketchy

evidence regarding their efforts to mitigate, we award each of the Employees the equivalent of 4 months salary under the heading of "Immediate Loss".

31. Accordingly, we order as follows:

- (1) The Employer shall pay the following amounts to the Employees, respectively, as compensation for their unfair dismissals:

Nicole Buntin \$ 28,018.60 (\$7,004.65 x 4)

Jeanette Thomas \$14,737.20 (\$3,684.30 x 4)

Candida Etinoff \$13,474.24 (\$3,368.56 x 4)

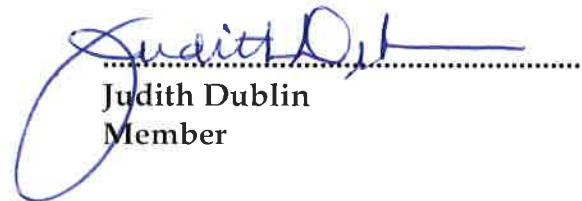
- (2) Payment of the said sums shall be made no later than November 30, 2020.

- (3) No order as to costs.

Dated this 09th day of October 2020


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Charlesworth O.D. Brown
President


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St. Lawrence DeFreitas
Member


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Judith Dublin
Member

