

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 3 of 2015

BETWEEN:

VANCIA HADE

and

DIOCESE OF THE NORTH EASTERN CARIBBEAN & ARUBA

Employee

Employer

Before:

The Hon. Charlesworth O.D. Brown

The Hon. Samuel Aymer

The Hon. Judith Dublin

President

Member

Member

Appearances:

Mr. Anderson Carty and Mr. Audley Joseph of Antigua and Barbuda Tradesmen
United Workers Federation for the Employee.

Mr. Loy Weste and Mrs. Lisa Weste of Thomas & Company Attorneys-at-Law for the
Employer

2016: October 27

2020: July 10

JUDGMENT

Brown, P;

Introduction:

1. In light of the pleadings, the evidence at trial and the closing submissions of the parties the primary issues for determinations are:
 - (1) Whether a genuine redundancy situation existed at the material time?
 - (2) Whether the Employer acted reasonably or unreasonably when it dismissed the Employee?



Backgrounds Facts

2. The Employee commenced her employment on January 17, 2011 as a Youth Worker under a fixed term contract which expired on January 30, 2012. Thereafter, she continued her employment in that position as a permanent employee until her services were terminated by letter dated January 16, 2014. During her tenure she earned a salary of \$2,800.00 per month and a travelling allowance of \$200.00 per month.
3. Paragraphs 3, 6 and 8 of the agreement dated January 17, 2011 under which the Employee was first engaged provided that:

“3. The Employee will be required to undergo training which will assist in executing the Youth Ministry Program”.
6. The employee shall be entitled to 21 days holiday with pay per year ... to be taken at such times as may be agreed with the employer.
- “8. The duties of the Employee pertain to youth related matters in the Diocese and will include those given by the Diocesan Youth Director, the Diocesan Bishop and the Diocesan Secretary.”
4. On January 18, 2011 the Employer’s Youth Director resigned and migrated overseas. That position remained vacant until June 2013 when it was filled by Father Reid Simon who became the Employee’s immediate Supervisor.
5. For the ensuing period of approximately 6 months serious differences surfaced between the Employee and the Youth Director which affected the relationship between them to the point where in December 2013 he told her words to the effect that if she had a problem meeting his requirements she could take her bag and leave.
6. On or after January 16, 2014 when the Employee was due to travel overseas on approved vacation leave, a letter terminating her services bearing that date was delivered to her. By that letter the Employee was advised that her position would be made redundant with effect from March 18, 2014.

7. Excerpts from the letter terminating the Employee's services are as follows:

"16th January 2014

Dear Ms. Hade,

We are writing to inform you that the position of Diocesan Youth Worker, a post which you have held from 17th January 2011, is being made redundant as Tuesday 18th March 2014.

There have been recent changes in the Youth Ministry in the Diocese and the operations of the Youth Department, and therefore this is but one of a few decisions which has to be made.

We would like to extend our thanks for your involvement in the Diocesan Youth Ministry over the past years.

..."

8. It is important to note that, as foreshadowed in her dismissal letter, under cover of the Employer's letter dated 18th March 2014, the Employee received the sum of \$10,042.68 as her final payment. That amount included payment in lieu of 8 outstanding vacation days, a refund of her pension contribution and "Redundancy Pay" for her 3.25 years of service in the sum of \$9,100.00

Redundancy & Unfair Dismissals

9. Redundancy is defined in Section 3 of the Antigua & Barbuda Labour Code (the Code) as follows:

"Redundancy means a situation in which by virtue of lack of customer's 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."

10. Under Section C 56 of the Code an employee has the right not to be unfairly dismissed.

"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."

11. Under Section C 58 of the Code an employee may be dismissed by reason of a genuine redundancy.

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

(a) ...

(b) ...

(c) Is that the employee was redundant;

(d) ...

(e) ...

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

(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."

12. The Employee's Memorandum of claim is grounded on section C 56. In particular at paragraphs 17 to 21 of her Memorandum of Claim she contends:

"17. In January 2014, the Employee applied for annual vacation leave as she had yet another medical appointment in Trinidad for a follow-up visit and for, further treatment. She explained the reason for her leave application to the Employer. The Employer, unhesitatingly, approved the said leave."

"18. However, on the day before the Employee was scheduled to travel, the Youth Director summoned her to the office and gave her a letter of termination dated January 16th, 2014, on grounds that her position would be redundant as of Tuesday 18th March 2014."

"19. There had been no prior discussions or consultation with the Employee in relation to this action."

"20. The Employee was shocked by the decision of her Employer and particularly, in light of the serious nature of her medical situation and, further, the fact that she knew that most of her duties would require continuous performance and some were, in fact, now being performed by other persons in the office."

"21. We contend that the act of the Employer to dismiss the Employee under the circumstances, which it did, amounts to a most grievous, vindictive and abusive act and must be frowned upon and strongly condemned by the court at the subsequent hearing of this reference."

13. In response, at paragraphs 1, 48 and 49 of its Memorandum of Defence the Employer contends.

"1. The Employee was employed by the Employer as a Diocesan Youth Worker on or about the 17th day of January 2011 on a one-year fixed term Contract. A copy of the said contract is exhibited in the Employer's Exhibit Bundle of Documents as "DNECA 1" for identification. Thereafter, the Employee continued in the post of Youth Worker until such time as her Employment was brought to an end for reasons of redundancy as at the 18th day of March 2014."

"48. The Employer states that the Employee's termination was fair and just on grounds of redundancy. The Employee is therefore not entitled to any compensation or at all."

"49. It is further denied that the same constitutes an unfair dismissal of the Employee. The Employer had sufficient grounds to terminate the Employee on grounds of redundancy. The Employer therefore states that the Employee is not entitled to the relief claim or at all."

14. The main aspects of the legal framework within which redundancy cases must be determined were substantially laid out in this court's recent judgment in Reference No 17 of 2015 and No 33 of 2015. **Hudson Joseph v. Antigua and Barbuda Transport Board** and **Patricia Julian v. Antigua and Barbuda Transport Board**. In those References which were heard together, it was noted that once an employer relies on a redundancy as a just cause for dismissal it must first discharge the burden of proving that a genuine redundancy situation existed. Secondly, the employer must prove that it acted reasonably.

15. As to the definition of redundancy, it is well settled that a redundancy situation may result from the removal of superfluous workers as would occur during a retrenchment exercise or from a reorganization of the existing work in such a way that the same work requires fewer employees.
16. In analyzing the Employer's case in this Reference, the starting point must be the duties which the Employee was hired to perform. Logically, once those duties are clearly defined, the next point for analysis would be whether the Employee was retrenched because she became superfluous or whether the Employer reorganized the work so that it could be performed by other workers without the Employee's input.
17. In dealing with the duties as the starting point, we are keenly aware that the evidence discloses no training of the Employee as required in paragraph 3 of the employment agreement. Secondly, we have no clear evidence of the duties assigned to the Employee including those given by the Youth Director, the Bishop or the Secretary. Yet, it is common ground that the Employee carried out or was required to perform duties in some shape or form from in January 17, 2011 to March 18, 2014, a period of approximately three and a quarter years. Of that total, she carried out duties or was required to carry out duties for approximately two and a half years without the supervision of the Youth Director who was not appointed until June 2013.
18. The Employee's evidence is that she did not receive a "written job description" However, she said that, "my duties and responsibilities were mainly of an administrative and clerical nature, which are associated with executing the Diocese Youth Ministry Programme within the Secretariat." Further, she testified that "The Diocese Youth Ministry was responsible for planning and conducting and was required to prepare and present an annual report on all such activities executed under the Programme."
19. In the absence of a job description or the Employer's list of duties the Employee prepared her own list comprised of 18 "bullet" points which was admitted into evidence. She was cross examined extensively on this and stood her ground. Ultimately, the Employer's key witness, Father Reid Simon, admitted or did not deny 14 of the 18 duties listed by the Employee. He conceded that those duties would still be required to be performed after the dismissal of the Employee.
20. Father Reid Simon's testimony was particularly instructive. At paragraph 7 of his witness statement he stated that, "over a period of time it became patently obvious to the Employer that the post of Diocesan Youth Worker held by the Employee was an obsolete post which was not necessary for the purpose of carrying out the Youth Ministry Programme". Later, at paragraph 25 he stated,

"in essence, the Employee had no work to do." Further at paragraph 29 he testified that, "The Employee therefore served no purpose". "The Employee's post was therefore superfluous and unnecessary as there were no tasks for her to perform."

21. Notwithstanding Father Reid Simon's assertions, we find that the Employer has failed to clearly establish (a) precisely what the Employee's duties were and (b) that she had become "superfluous". In coming to that conclusion, we have taken into account the departure of the Youth Director on January 01, 2011, one day after the Employee commenced her employment. However, according to Father Reid Simon, the Employer continued to pay him for an additional 6 months. In the circumstances, we are inclined to accept the Employee's testimony that after the predecessor Youth Director left his position, she "became responsible for most of the duties" previously carried out by him in addition to her "substantive duties."
22. In relation to the position of Youth Director, Father Reid Simon asserted that it was an important position which was integral to the work of the Diocese. Yet, in what he described as a "self-indictment" on the church, it is clear that the position was left vacant for 2.5 years, for 6 months of which his predecessor was still being paid.
23. In the circumstances, the Employer having provided no or no sufficient evidence of a reorganization, has failed to prove that the Employee had become superfluous. In that regard, we accept her evidence that "the duties and responsibilities of the Youth Worker continue to require daily performance and therefore could not be made redundant, neither had my duties diminished in any way". Further, we accept the Employee's testimony that after his appointment in June 2013, the Youth Director directly sidelined her and brought in new workers to perform some of the clerical duties which she previously performed. In that regard, we have noted at paragraph 18 above Father Reid Simon's concession that the duties which he admitted were performed by the Employee still subsisted after her dismissal.
24. Quantitatively, most of Father Reid Simon's oral and written testimony leaves a strong hint of subordination and performance issues between himself and the Employee. However, for present purposes, it is not necessary to determine any of them.
25. In conclusion, we find that the Employee was not superfluous and the work she performed was not so reorganized as to render her position redundant within the statutory meaning. As a result, we find that there was no genuine redundancy situation.

26. Notwithstanding that conclusion, and in the event that there was any semblance of a redundancy situation, we will consider the reasonableness of the Employers actions in the context of the statutory test under section C 58 (2) of the Code.

The Employer's Unreasonableness

27. On the basis of her evidence and that of the Youth Director we find the Employee did perform duties even though they were not clearly defined by the Employer. In the circumstances, the Employer's failure to issue a written job description is an element of unreasonableness. Moreover, in our view, a cloud of unreasonableness covered the Employer's actions from the date of the Employee's hiring up to the date of her dismissal. The following aspects will suffice to underscore our conclusion.
28. Firstly, the Employer provided the Employee with no training or supervision to assist her in the performance of her duties, as required under the initial employment agreement. In any event, the absence of a job description is in direct contravention of Section C 5 of the Labour Code.
29. We find that at the very commencement of her employment the Employer unreasonably left the Employee to work without the supervision or direction of the predecessor Youth Director, although he continued to receive his salary for an additional six months after his departure. In the absence of any evidence regarding any supervision given by the Diocesan Bishop or the Diocesan Secretary, it is safe to conclude that the Employee worked largely without supervision and did perform some, if not all, of the duties previously carried out by the predecessor Youth Director.
30. Secondly, the Employer failed or refused to deal with the obvious concerns regarding the discerned hints of insubordination and/ or poor work performance and/ or frequent absences. In fact, a very substantial portion of Father Reid Simon's testimony was concerned with those issues. It is significant that as at December 2013, he held the firm view, as expressed to the Employee, that if she had a problem with his supervisory role, she could "take her bag and leave".
31. Thirdly, it was unreasonable for the Employer to deliver its letter of termination to the Employee on the very day she was about to embark on approved annual vacation to which she was expressly entitled under the employment contract, To make matters worse, the Employer well knew that her vacation was taken at that time to facilitate her follow-up medical appointment in Trinidad. Apart from

being a bad industrial relations practice, which we frown upon, effecting the dismissal at that time smacks of an uncaring and insensitive Employer.

32. Fourthly, as an instance of unreasonableness, we find that the Employer failed to inform or consult with the Employee in respect of its alleged "financial; difficulty" which required "personnel changes in the Youth Department." In effect the Employer failed to warn the Employee of any general or specific possibility of the redundancy of her position. Further, there is no evidence that the Employer implemented or even considered an overall retrenchment or reorganization programme in light of its "financial difficulty" before dismissing the Employee.
33. Fifthly, it is clear that the Employer failed to offer the Employee any alternative employment whether on a full-time or part-time basis, although it admitted that it hired at least one new employee on a "part-time basis".

Resolution

34. Our conclusion above that there was no genuine redundancy situation, is buttressed by our finding, for the reasons stated above, that the Employer acted unreasonably in the circumstances when it dismissed the Employee. Accordingly, we declare that the Employee was unfairly dismissed and is entitled to compensation which we assess as follows:

Compensation

35. For the reasons stated above, we award compensation as follows:

(a) Payment in Lieu of Notice

We award the equivalent of one month's pay in the sum of \$2,800.00

(b) Loss of Protection from Unfair Dismissal

For her 3.25 years of service, we award the sum of \$9,100.00 (\$2,800.00 x 3.25)

(c) Immediate Loss

The Employee's evidence is that she found work overseas. There is no evidence of any attempts to find alternative employment in Antigua and Barbuda. In the circumstances, an award of \$8,400.00 being the equivalent of 3 months salary.

(d) Fringe Benefits

Under this head, we award the sum of \$600.00, being the equivalent of 3 months travelling Allowance.

Order

36. Given the amounts she received from the Employer under the various heads referred to at Paragraph 8 above, we order that:

- 1) The Employer do pay to the Employee the sum of \$9,000.00, as compensation for her unfair dismissal no later than July 31, 2020.
- 2) There shall be no order as to costs.

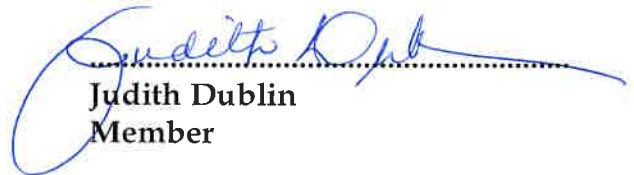
Dated this 10th day of July, 2020



Charlesworth O.D. Brown
President



Samuel Aymer
Member



Judith Dublin
Member

