

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 44 OF 2016

BETWEEN

PHILMORE ATHILL

Employee

And

BRITT ANTIGUA LIMITED

Employer

Before:

The Hon. Charlesworth O.D. Brown

The Hon. John Benjamin

The Hon. Judith Dublin

President

Member

Member

Appearances:

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

Mr. Charlesworth C. M. Tabor, Attorney-at-Law for the Employer

2017: November 11

2020: July 10

JUDGMENT

Brown, P;

1. The Employer was duly incorporated in Antigua & Barbuda as a unit of Café Britt, a specialty travel retailer with over 50 stores in 5 countries. It operates a retail store at the V.C. Bird International Airport with a bonded warehouse which is subject to the control of the Comptroller of Customs.
2. The Employee commenced his employment with the Employer on December 11, 2009 as it Restock Supervisor. His last monthly salary was \$3,651.20 plus a monthly commission of \$208.00 and a garbage disposal allowance of \$400.00. Up



to January 15, 2015, his duties included the provision of Customs brokerage services and his regular hours of work were 6:00 a.m. to 12:00 p.m.

3. The Employee was dismissed by letter dated September 07, 2015, the relevant part of which reads:

“ ...

Dear Mr. Athill

Subject: Employment

Britt Antigua Limited is restructuring its warehouse and inventory operations to increase productivity and efficiencies. Under the new structure the volume of inventory will be significantly reduced, hence activities will be less and thus require fewer employees. On account of the restructuring your current position as RESTOCK SUPERVISOR is now redundant. The redundancy means that your employment with Britt Antigua Limited as of September 7, 2015 is terminated.

...”

4. It is important to note that upon his dismissal the Employee was paid one month's salary in lieu of notice, his "severance" entitlement of \$11, 627.67 and his vacation entitlement.
5. Having regard to his statutory right not to be unfairly dismissed, the two main issues arising from the dismissal are:
 - (1) Whether a genuine redundancy situation existed at the time of the Employee's dismissal.
 - (2) Whether the Employer acted reasonably when it dismissed the Employee.

The Opposing Cases

6. The chronology of events according to the Employee and the grounds of his claim of unfair dismissal, as expressed in his Memorandum of Claim and witness statement, may be summarized as follows:
 - (a) Prior to June 01, 2015, the Employee warned the Employer that it was in "persistent breach" of certain Customs Regulations. The Employer refused to correct the breach as a result of which "constant conflict" ensued between the Employee and the Employer's Operations Managers. Despite his stated

objection, the Employer repeatedly forced the Employee to breach the Customs Regulations.

- (b) By letter dated June 01, 2015 the Employer unilaterally changed the Employee's hours of work. He objected to the change after which the Employer treated him in a "rather indifferent manner".
- (c) In a letter dated June 26, 2015 the Employer notified the Employee that they were removing the responsibility for customs brokerage from his duties "effective January 15, 2015". The Employee formed the view that that action by the Employer was in response to his stance regarding the alleged breach of the Customs Regulations. On the same date, the Employee also received a warning letter regarding his unauthorized modification of a document.
- (d) By letter dated July 7, 2015 the Employee pointed out the specific provision of Customs Act 1993 of which the Employer was in breach. By a separate letter also dated July 07, 2015 the Employee objected to the issuance of the warning letter and requested that it be removed from his file.
- (e) By letter dated August 20, 2015, the Employer thanked the Employee for his letter regarding the breach and stated that it was "in the process of restructuring and re-organizing its warehouse department to include procedures and processes to be in compliance with the Antigua and Barbuda Customs Regulations".
- (f) By letter dated August 21, 2015 the Employer wrote to the Employee complaining of a "negative difference" of US\$ 24,605.52 and US\$977.00 in its physical inventories for "7th - 9th August, 2015" and "October 16, 2014" and concluded that the same was "a significant infraction" of his duties and contrary to "company policy". By the same letter the Employee was suspended with pay for 14 days commencing August 24, 2015 to facilitate an investigation.
- (g) The Employee contended that the said letter of suspension contained a "material error" by referring to him as "Restock Supervisor", which position had been earlier made redundant, rather than his correct title of "Warehouse and Logistics Supervisor".
- (h) The Employee heard nothing from the Employer during the 14 days of his suspension. Upon his return to work on September 8, 2015 a letter of dismissal dated September 07, 2015 was delivered to him. In it, the Employer stated that his position of "Restock Supervisor" was made redundant and that his services were terminated with effect from September 07, 2015.

- (i) The Employee contends that a redundancy situation did not exist at the time of his dismissal and that his services were terminated because of his refusal to be a party to the continued breach of the Customs Regulations.
7. The Employer's case, as set out in its Memorandum of Defence and supported by the witness statement of Dr. Errol Samuel, may be summarized as follows:
- (a) "The Employee was made redundant since the Employer no longer operated the bonded warehouse." As part of its restructuring and re-organizing its warehouse, the company ended the operation of a bonded warehouse as a consequence of which the Employee's services were no longer necessary.
 - (b) "With respect to the suspension, this resulted from the Employee's insubordination to management and an apparent discrepancy in the physical inventory at the warehouse."
 - (c) Nothing of significance turns on the title of the Employee's position. Whatever the job title was, he was "the Supervisor of the warehouse with the termination of the operation of the bonded warehouse...supervision of its operations would become unnecessary hence the redundancy."
 - (d) Before the termination of his customs brokerage services the Employee had flexible hours of work. Afterwards, he was required to be at the store during standard working hours from 9:00 a.m. to 5:00 p.m.
 - (e) The Employee's allegations of the Employer's breach of Customs Regulations commenced only after he was relieved of his duties of Customs Brokerage.
 - (f) During his suspension, the investigation commenced. However, as a result of the Employer's new global operations, which included the establishment of a central warehouse in Panama, there was no need for the Employee's services. Accordingly, goods from Antigua Warehouse was shipped back to Panama on 12th August, 2015.
 - (g) It was as a result of the change in the Employer's operations that the position of Warehouse and Logistics Supervisor became redundant and there was no position to which the Employee could be assigned.

- (h) "While this development and the circumstances surrounding the manner in which Mr. Athill was made redundant are quite unfortunate, there was really no other course of action that was available to the company. Established redundancy procedures were followed. There was no comparable position in the company that fits Mr. Athill's competence and experience." Accordingly, the Employee's suspension and dismissal through redundancy cannot be challenged.

The Approach towards Resolution

8. This Court's approach towards the resolution of issues arising in claims of unfair dismissal involving redundancy was reconfirmed in its recent Judgment in References No. 17 of 2015: Patricia Julian v. Antigua & Barbuda Transport Board and No 33 of 2015: Hudson Joseph v Antigua & Barbuda Transport Board which were heard together. The legal framework as established by the Antigua & Barbuda Labour Code, judicial precedents and the Industrial Court Act was outlined. We do not think that it is necessary to repeat it here. Suffice it to say, we will pay particular attention to the Employer's burden of proving that both the suspension and the dismissal were not unfair.
9. The substance of the Employee's lengthy witness statement is largely a mirror reflection of his Memorandum. It formed the basis of the chronology stated at paragraph 5 above. In his oral testimony, he amplified selected aspects of his statement and otherwise maintained his position.
10. After confirming the content of his witness statement, the Employee attacked the nub of the employer's ground for his dismissal. He testified that the Employer "still operates a bonded warehouse today and at the time of my dismissal up to today". Under cross examination, he maintained that, "It is not true that Britt no longer requires a bonded warehouse."
11. Evidence was given on behalf of the Employer by Dr. Errol Samuel, the President of Profiles Consulting Incorporated which provides the Employer with consultancy services. In that capacity, Dr. Samuel asserted that although he was not employed by the Employer as one of its managers, he was in a position to give evidence on its behalf because he had sufficient knowledge of the Employer's operations in respect of its human resources, industrial relations and accounting services. In his relatively short witness statement, he did not respond to or address many of the assertions in the Employee's witness statement.

12. Not surprisingly, the evidence of the Employee conflicted with that of Dr. Samuel. In particular, the latter stated that "Because of new facilities the company no longer needed a bonded warehouse. There was no need for a bonded warehouse as originally set up."
13. Further, Dr. Samuel testified that he "did not know" and was in no position to state the duties of the Warehouse Supervisor. Although he agreed that the position was different to that of Restock Supervisor. According to Dr. Samuel the whole operation of the Employer's business involved a "back & forth" in the positions. He testified that it was difficult to apply labels to the position of the Employee. However, in response to a suggestion put to him under cross-examination, he agreed that the Employee was the "Warehouse Supervisor" and had signed documents as such. Most instructively, Dr. Samuel testified that "I agree the Employee did not hold the position of Restock Supervisor. I would say that the Employer got it wrong. The position of Warehouse Supervisor is not redundant." He also testified that he could not say if the "names" of those positions were used interchangeably.
14. In the circumstances, we are inclined to conclude that the Employer's reliance solely on the testimony of Dr. Samuel was misguided. In our estimation, he was in no position to provide the required cogent evidence to establish the existence of a redundancy situation and thereby discharge the evidentiary burden on the Employer. However, we are obliged to carefully consider the following aspects of the closing submissions which were grounded on the documentary evidence before us.

The Closing Submissions

The Position of Warehouse Supervisor

15. In his closing submissions Mr. Carty contended that although he was hired as "Restock Supervisor" in 2009, the Employee was promoted sometime in 2011 to the position of "Warehouse and Logistics Supervisor". On the other hand, in his closing submissions Learned Counsel, Mr. Tabor, contended that the "job titles were used interchangeably and the duties were the same".
16. In order to resolve the obvious conflict, bearing in mind the Employer's evidentiary burden, we carefully considered the oral and documentary evidence. Firstly, we note that in its undated document entitled "Standard Procedure for Product to be returning to Warehouse" the Employer referred to separate areas as "At the Store" and "At the Warehouse". In the latter, there is a clear reference to the "Warehouse Supervisor" while in the former there were several references to the "Restock Supervisor".

17. Further, in several of its letters the Employer referred to the Employee as Warehouse Supervisor and often required his signatures as an endorsement in that capacity. That is evident in its letter dated 1st June, 2015 and two others dated 26th June, 2015 the Employer expressly required the Employee's endorsement as "Warehouse Supervisor". Moreover, in two of his letters dated 7th July, 2015 the Employee signed in his capacity of "Warehouse Supervisor".
18. Secondly, by its letter dated 17th February, 2013 the Employer confirmed the Employee's employment as Warehouse and Logistics Supervisor. Most strikingly, in its letter dated 9th June, 2015 by which it revised the Employee's job responsibilities, the Employer stated you will continue in your substantial position as Warehouse Supervisor as per your contract dated 11th December, 2009.
19. In his oral testimony, the Employee gave convincing details of the logical differences between the posts of Restock Supervisor and Warehouse and Logistics Supervisor. His evidence was in stark contrast to that of Dr. Samuel (referred to at para. 12 above) who testified that as a consultant and advisor to the Employer, he acknowledged the specific duties of the Restock Supervisor but testified that "I do not know the duties of the "Warehouse Supervisor". However, he admitted that the positions were different but stated that he was in no position to "argue or deny" that the Employee's descriptions were in fact true.
20. Taking the evidence as a whole, we find that the Employee's true position at the date of his dismissal was in fact Warehouse Supervisor.

The Bonded Warehouse

21. In his "statement of facts" Mr. Tabor emphasized at the onset that "the Employee was dismissed as a result of redundancy since the Employer no longer operated a bonded warehouse." Again, in considering that submission, we noted the oral and documentary evidence before us.
22. According to the Employee while giving evidence at the trial, "the Employer still operates a bonded warehouse today - at the time of my dismissal up to today". On the other hand, Dr. Samuel testified that "Because of the new facilities, the company no longer needed a bonded warehouse because it had international operations it would bring things straight from Panama and keep them at the store. There was no need for a bonded warehouse as originally set up."

23. In order to resolve the clear contradiction, we considered the express documentary evidence in the Employer's letter dated 6th November, 2015, two months after he alleged occurrence of the redundancy. In that letter to the Comptroller of Customs the Employer stated: "we are doing an inventory of our warehouse to be verified by Customs shortly so we can compare the Customs entries to paid duties on the remaining stock in our warehouse and so begin the process of operating the warehouse as duty paid". According to that letter, (a) the Employer was then doing an inventory, (b) which inventory would have to be verified by customs (c) the Employer would then compare the custom entries to paid duties (d) thereafter, the Employer would begin the process of operating the duty paid warehouse.
24. On the evidence, the question of the operation of the bonded warehouse was not as "crystal clear" as submitted by Mr. Tabor. On the balance of probability, we find that the Employer was still in fact operating its bonded warehouse at least up to 22nd November, 2017, over two years after the Employee's dismissal.
25. In his Submissions, Mr. Tabor urged the Court to find that there was a "diminution" of the tasks which the Employee performed. However, we note that the Employer has not proved that the work which the Employee was last employed to perform had in fact "substantially diminished".
26. In effect, the Employer has failed to prove the existence of the restructuring process much less that it had the necessary effect of "substantially diminishing" the work which the Employee was last employed to perform.

Breach of the Customs Act

27. In his closing submissions Mr. Carty submitted that the Employee's refusal to continue to breach the Customs regulation was the "catalyst" that led to his dismissal. In that regard, the evidence shows that the issue of the Employer's breach of the Customs (Control and Management) Act 2013 was first formally raised by the Employee in his letter dated July 7, 2015.
28. In its response to that allegation, by letter dated August 20, 2015 the Employer did not deny the allegations. To the contrary, the Employer stated that as part of its restructuring and reorganizing process it would include procedures and processes in its warehouse department in order "to be in compliance" with the "Customs Regulations".
29. We find that the Employee's allegation was substantiated by the copy of the receipt dated September 9, 2015 for the payment of the fine of \$25,000.00

imposed by the Customs and Excise Department on the Employer under the Act for "Fraudulent Evasion" and "Removing Locks, Seals and Marks".

Reasonableness

30. In his written Submissions, Mr. Tabor reminded the court of the test of reasonableness under Section C 58(2) of the Labour Code and referred to the principles outlined in the case of **Williams v Compair Maxam Ltd** [1982] UK EAT 372. In particular, he referred to the requirements for a warning; consultation; selection criteria; and alternative employment.
31. It is noteworthy that Dr. Samuel accepted the suggestion put to him under cross examination that the Employer's business had expanded. He could not say what the floor space was in 2009 when operations started or the increased size when the operations were relocated in 2015. He conceded that at the latter date the Employer had more facilities.
32. Further, in addition to its expanded operations, we will also take into consideration the several components of the Employer's business ranging from duties and responsibilities "at the store" and "at the warehouse". In that regard, we note Dr. Samuel's testimony that: "no one had any discussions with the Employee regarding redundancy. No redundancy procedures were followed."
33. Learned Counsel, Mr. Tabor, submits that in the circumstances of this particular case, the Employer's failure to give a warning of redundancy or to consult with the Employee did not render the dismissal unfair. On the facts of this case, we reject that submission for the following reasons.
34. The dismissal on the ground of redundancy followed significant changes in the duties and responsibilities of the Employee. They included the increases in his emoluments, the unilateral change in his working hours, the discontinuance of his customs brokerage services; the expansion of the business; the change in operations involving the closure of the bonded warehouse.
In our view, all of the above are critical bases for giving reasonable notice of and consulting with the Employee about redundancy and the possibility of alternative employment.
35. Further, as to reasonableness, we have noted the timing of the dismissal. It came at the end of the period of the two-week suspension when the Employer expressly stated its intention to undertake an investigation. The Employee was specifically required to make himself available for interviews during the suspension period. Moreover, the Employer expressly anticipated his

cooperation with the investigation during the period August 24, 2015 to September 7, 2015.

36. We note the wide scope of the Employee's duties as "Restock Supervisor" as quoted in the Employer's letter dated August 21, 2015 included:

- "Physical Control of all shipments either imports or exports, and
- Manage all administrative/logistics features of the company's internet systems (inventory, queries, devolutions)."

Needless to say, we find it difficult to accept that all those duties and the relevant work could have "substantially diminished" as submitted by Learned Counsel.

37. The Employee's dismissal occurred on precisely the last day of his suspension for a reason totally unrelated to that for which he was suspended without any word as to the outcome of the investigation and without any invitation for the Employee to have an input therein. That action by the Employer is glaringly unreasonable. Further and in any event, as to the abruptness of dismissal, in our estimation, it is most unlikely and improbable that the developments leading to the Employer's declaration of redundancy could have developed within that relatively short two week period of the suspension.

38. In the final analysis, the Employer has failed to prove the "cause" that there was a genuine restructuring of its "warehouse and inventory operations". Moreover, it has failed to prove the "effect" that the "volume of inventory (was) significantly reduced resulting in the requirement for "fewer employees". Ultimately, the Employer failed to prove that the Employee's position of "Restock Supervisor" became redundant because the work that he was last employed to perform ceased or substantially diminished.

Resolution

39. For the reasons stated above we would resolve this Reference in favor of the Employee on the ground that the Employer has not discharged its evidentiary burden in that it failed:

- (a) to establish a genuine restructuring process.
- (b) to prove that the effect of any reorganization was the substantial diminution of the work that the Employee was employed to perform;
- (c) To act reasonably in dismissing the Employee in the manner it did in the circumstances.

40. Based on our final analysis, we declare that the Employee was unfairly dismissed and is entitled to compensation.

Compensation

41. We award compensation under the following heads;

(a) Pay in lieu of Notice

As Notice Pay, we award the sum of \$3,651. 20, being the equivalent of one month's salary.

(b) Loss of protection from Unfair Dismissal

An employee who is paid monthly and is unfairly dismissed is entitled to a basic award for the loss of protection at the rate of one month's pay for each year he worked. Since the Employee worked from December 2011 to September 2015, **we award the sum of \$20,994.40** ($\$3,651.20 \times 5.75$).

(c) Immediate Loss

Under this head **we first award the sum of \$14,604.80** being the equivalent of his salary for a period of 4 months immediately after his dismissal. **In addition, we award the sum of \$3,651.20**, the equivalent of 50% of his salary for the following 2 months. **The total award under this head is \$18,256.00.**

(d) Fringe benefits

Under this head we award the sum of \$1,248.00, being the equivalent of 6 months commission.

(e) Exemplary Damages

Although the Employer attempted to justify the dismissal on the ground of redundancy, it made no attempt to directly refute the Employee's evidence that he was dismissed 'for his refusal to be party to the continued breach of Customs Regulations". In the circumstances, we accept the Employee's assertion and accept Mr. Carty's submission that the Employee's refusal to continue to breach the Regulations was the catalyst that led to his dismissal. At the end of the day, we find that the manner and circumstances of the dismissal were harsh and oppressive. For the stated reasons, **we award exemplary damages in the sum of \$20,000.00.**

Costs

In our opinion, the circumstances of dismissal generally and the breach of the Customs Regulations in particular comprise exceptional reasons justifying an award of costs. We fix the quantum of costs at \$2,500.00

Order

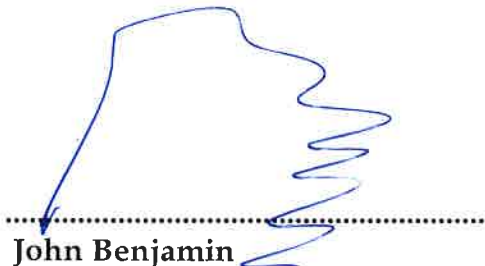
42. In the premises, we order that:

- (1) The Employer do pay to the Employee
 - a) the total sum of \$48,870.73 as compensation for his unfair dismissal.
 - b) Costs in sum of \$2,500.00
 - c) Payment of the aggregate sum of \$51,370.73 must be made on or before July 31, 2020.

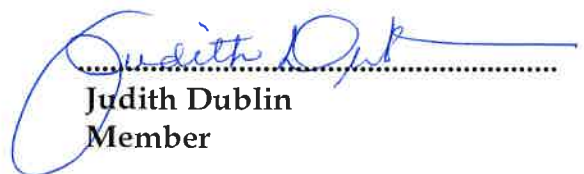
Dated this 10th day of July, 2020



Charlesworth O.D. Brown
President



John Benjamin
Member



Judith Dublin
Member

