

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/4 of 2013

BETWEEN:

MARCIA LAKE

Employee

And

CARIBBEAN UNION BANK

Employer

Before:

The Hon. Samuel Aymer

Chairman

The Hon. St. Lawrence DeFreitas

Member

The Hon. Althea Crick (now deceased)

Member

Appearances:

Mr. Stafford Joseph and Mr. Samuel A. James of the Antigua & Barbuda Free Trade Union, Representatives for the Employee

Mrs. Stacy A. Richards-Roach with Ms. Sandy Khouly and Ms. Kivinee Knight of Richards & Company, Attorneys-at-Law for the Employer

2014: March 27

2021: June 11

### JUDGMENT

AYMER, C:

#### Preamble

1. The Employee was employed by the Employer for some 21 months, from November 2005, as a **Customer Service Officer** until she was successfully recruited, via an in-service appointment, to the position of **Executive Assistant** from August 1, 2007.
2. Her salary in this latter position was 'adjusted' to EC\$3,500.00 per month "in accordance with the Bank's salary scale and commensurate with the duties and

responsibilities of the title". She was required to report to the Chief Executive Officer.

3. Her Job Specification is as under:

- a) Completion of secondary school or graduation from a college programme for secretaries
  - b) Computer literacy and ability to operate word processor
  - c) Good grammatical and communication skills
  - d) Ability to keep information confidential
  - e) Previous administrative/ clerical experience
  - f) Ability to perform Assigned duties with minimum supervision.
4. In the latter part of 2012, the Employer sought to effect a lateral transfer of the Employee to a new position in the Bank, pursuant to a comprehensive organisational restructuring. The Employee did not accept the transfer nor the reasons given for it and considered that she was being marginalised as a result of the new arrangement.
5. Consequently, the Employee filed a Reference with the Court on February 26, 2013 in which she claimed *Unfair Labour Practice* by the Employer and sought remedies through the Court.

**The Employee's Claim**

6. In 2012, the Employee took vacation from July 6<sup>th</sup> to August 30<sup>th</sup>. Upon her return the CEO was on vacation and, seemingly, there was no one appointed to act for him. Operational issues which arose out of this situation affected the day-to-day functioning to which the Employee had become accustomed and eventually formed the basis for the subject of this Reference. The Employee alleges that she was prevented from functioning in her executive assistant position, to anyone acting, whether wholly or partially in the CEO position.
7. Between the months of September and November, 2012, several pieces of correspondence were exchanged between the Employee and the Deputy CEO of the Employer Bank, Mr McDavid, in which the Employee sought clarification in what appeared to be a change in her job function and the reason(s) for the change.
8. She was informed of the organisational restructuring that was being undertaken by the Bank as result of which she would be laterally transferred to a newly formed Internal Audit Department in the position of **Verifications Officer**, at no loss to her emoluments; and that she would be provided with a new job description for this position at the appropriate time. Meanwhile she was asked to

continue with some of the general duties she had been carrying out as Executive Assistant, albeit that some of the previous duties would no longer be carried out by her in response to legal restrictions.

9. The Employee was given a list of interim duties to be performed pending the transfer and was informed that she would be provided with necessary training for the new position.
10. The Employee was not in agreement with the new arrangement and on November 28, 2012 she advised the Employer, by letter, that she would be taking legal action on the matter. On December 5, 2012, the Employee's Representative wrote to the Employer requesting a meeting. The requested meeting was held on December 12, 2012.
11. On December 13, 2012 the Employer advised the Employee that, pending her transfer, she should carry out the duties assigned to her, failing which disciplinary action would be taken against her.
12. On December 20, 2012, the Employer and the Employee's Representative met, and on December 24, 2012 the Employee's Representative wrote to the Employer claiming that based on discussions held in the meeting of December 20, the Employer had made the Employee's position redundant and therefore his client was entitled to severance.
13. On December 27, 2012 the Employer denied having made the Employee's position redundant and advised that the Employee was being transferred laterally so redundancy did not arise.
14. On January 1, 2013, the Employee's Representative advised the Employer that the Employee had referred the matter to the Labour Commissioner.
15. On February 19, 2013 the Employer advised the Employee that she would be terminated for cause if she did not carry out the assigned tasks and did not accept the transfer to the position of **Verifications Officer** by February 21, 2013.
16. On March 6, 2013 the Employee responded requesting three (3) days to obtain legal advice and on March 7, 2013 the Employee's Representative advised the Employer that the matter had been filed at the Industrial Court.
17. The Employee did not perform her duties as per amended Job Description nor did she accept the position of Verifications Officer. The Employee was not given a Job Description for the Verification Officer's position until March 2013, but was advised of interim responsibilities in November 2012.

18. The Employer is guilty of unfair labour practices.

### **The Employer's Defence**

19. The Employee was never prevented from carrying out her duties. The CEO was on extended leave and had not yet returned from vacation. No one was appointed to act for the CEO during this interim.

20. The Bank was in the process of reviewing its organisational structure and, consequently, the functions performed within certain job positions. One such change was the offer of a lateral transfer to the Employee to serve as the Verifications Officer within a new Internal Audit Department that was in the process of being created in the Bank.

21. In the meantime, the Employee was asked to continue to report to, and provide secretarial assistance to the Deputy Chief Executive Officer and, substantially, to continue to perform similar functions on a day to day basis in the role of Executive Assistant save and except she would no longer be required to maintain the Board of Director Records, or to disseminate reports, minutes etc for t Board meetings, as these functions will be fully performed by the Corporate Secretary as is required by law.

22. The Employee was issued with an amended list of duties and responsibilities pending the lateral transfer. However, she refused to carry out her duties.

23. The Employer contends that the lateral transfer of the Employee to the Internal Audit Department was in keeping with good industrial practice and that the Employee was not made redundant.

24. The Employer denies that it is guilty of engaging in unfair labour practices.

### **The Issues**

25. The following issues are required to be determined:

- (i) Whether the reassignment of the Employee's duties gave rise to a redundancy situation, by reason of which she is entitled to receive severance pay?
- (ii) Whether the proposed reassignment amounted to a genuine lateral transfer or a demotion?
- (iii) Whether the Employer engaged in Unfair Labour Practices?

**Whether the reassignment of the Employee's duties gave rise to a redundancy situation?**

26. Section C3 of the Antigua and Barbuda Labour Code (Cap 27) defines redundancy as:

*"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".*

27. In answering the question whether a redundancy situation existed, we must first ascertain if the tasks which the Employee performed had "ceased or substantially diminished". The uncontroverted evidence which was agreed by all at the hearing, was that the Bank had been undertaking a comprehensive organisational restructuring, and that in the interim, the Employee was still required to perform functions under her job contract in relation to the Deputy Chief Executive Officer and other managers while the process was still ongoing.

28. Section C (5) (4) of the Labour Code allows an Employer to laterally transfer an employee by changing his general responsibilities and related duties. It is noteworthy that when Learned Counsel asked the Employee during cross examination: *"Do you accept that the Bank has the right to transfer you?"* she replied: *"Absolutely"*.

29. The evidence discloses that the Employee, although complaining that she was underutilized, refused to perform these duties on the basis that she felt she should be paid severance. In fact, up until February 19, 2013, the Employee had neither commenced the temporary duties nor taken up the position to which she had been transferred.

30. The Employee's own testimony demonstrates her misguided position. When asked by Learned Counsel: *"In truth your position was that you were being moved from your position?"* the Employee replied: *"I was concerned that I was being moved without being paid, yes. I was expecting to be paid before I moved to the Verifications Officer's position"*.

31. Consequently, we conclude that:

- (a) The proposed transfer of the Employee from the position of Executive Assistant to Verifications Officer was lawful.
- (b) The reassignment of Employee's duties did not result in a redundancy situation.

(c) The Employee is not entitled to any Severance Pay.

**Whether the Proposed Transfer amounted to a Genuine Lateral Transfer or Demotion?**

32. As stated earlier in Paragraph 27 supra, an employer is allowed to laterally transfer an employee by changing the general responsibilities and related duties of an employee, but must do so under terms and conditions which conform to the provisions of the Code. This was generally accepted by all parties.
33. The position like the one in which the Employee had initially been hired, was that of a support position to other employees. The Employee's Job Specification at paragraph 3 supra, clearly supports this assertion.
34. Further, the Employee accepted that she was being laterally transferred. During her examination-in-chief, she stated **"I was seeking to clarify the lateral transfer in my mind...After I was told that I would be trained, I was fine with the transfer"**. Moreover, during cross examination, she stated that she agreed **"absolutely"** that the Bank had the right to transfer her.
35. From the Employer's perspective, Mr Mc David's testimony was convincing. When asked by learned Counsel: "What do you understand by a lateral transfer?" he replied: *"... the affected employee would perform functions at a similar level of responsibility: i.e. the value of the contribution by the Employee to the Organisation would equate... ..The level of support would have an economic value to the Bank. So, one looks at economic contribution and, in our estimation, we considered that the level of contribution in the lateral transfer would have similar contribution."*
36. In addition, several pieces of correspondence from Mr. McDavid to the Employee sought to confirm the sentiments expressed at trial and to allay other concerns she may have had. It was confirmed that she would receive the same salary as in her previous assignment and that she would receive the relevant training to prepare her to perform in her new role.
37. Having regard to the above, the Court is of the view that the lateral transfer offered to the Employee was genuine and that the Bank operated within the Law in making such a transfer. No attempt was made to demote the Employee.

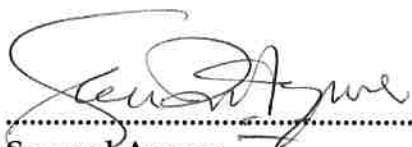
**Whether the Employer Engaged in Unfair Labour Practices?**

38. The Employee stated that she had no work to do when she returned from vacation and that most of the functions she used to perform as Executive Assistant no longer existed. Further she stated that the Deputy Executive Officer referred to her

substantive job as a “dead end position”; a comment with which the Employee was not comfortable and concluded that a redundancy situation had been created.

39. This “dead end” comment was acknowledged by the Deputy CEO, Mr. McDavid, and explained to the Employee as well as at the trial. Mr McDavid explained that by “dead end position” it was meant that there was not much scope for career advancement and growth in the position of Executive Assistant and in fact, this is the normal interpretation that would normally be ascribed to such a phrase.
40. During the trial the Employee claimed to “have just realized” that the new position that was being offered, was below that of Executive Assistant. She stated at the trial: *“it did not enter my mind that the Verifications Officer’s position was lower than that of the Executive Assistant”*. When asked by learned Counsel if there was anything before the Court to substantiate that the Verifications Officer’s position was lower, the Employee replied: *“Not before the Court, but I know”*.
41. Reference has already been drawn, at paragraph 27 above, to Section C (5)(4) of the Labour Code which allows an Employer to make lateral transfers within certain provisions of the Code. So that a genuine lateral transfer could not be seen as ‘unfair labour practice’.
42. There is nothing before the Court to suggest that the Employee was required to do anything which did not conform to the provisions of the Labour Code.
43. Neither the Labour Code nor the Industrial Court Act define unfair labour practices. The Court is therefore guided by Section 10(3) of the Industrial Court Act and in the exercise of its powers is required to *“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”*.
44. Having regard therefore to the totality of the evidence in this case, this Court is of the view that the Employer’s action did not amount to “unfair labour practices”.
45. For the reasons stated above, the Employee’s claim is hereby dismissed.

Dated this 1<sup>st</sup> day of June, 2021.



Samuel Aymer  
Chairman



St. Lawrence DeFreitas  
Member

