



THE INDUSTRIAL COURT

ANTIGUA AND BARBUDA

Reference No: C/UD 34 of 2014

WORDSWORTH GIBBS

And

Employee

ANTIGUA ENERGY OPERATORS LTD

Employer

Before:

The Hon. Charlesworth O. D. Brown

President

The Hon. Sir Hayden Thomas

Member

The Hon. St. Lawrence de Freitas

Member

Appearances:

Mr. George Lake of Lake Kentish & Bennett, Attorneys-at-Law for the Employee

Mr. Hugh Marshall Jr of Marshall & Co, Attorneys-at-Law for the Employer

2017: June, 07

2022 June 24

JUDGEMENT

Brown, P:

Background

1. The Employer, a company incorporated in Antigua & Barbuda, is a member of the Wartsila group of companies which carries on business as operators and managers of commercial electricity power plants. At all material times, it was engaged by Antigua Power Company Ltd, to operate and manage two power plants at Crabb's Peninsular in Antigua.
2. The Employee commenced his employment as a Technician with the Employer on or about October 28, 1996. His last position, to which he was promoted in or about June 2011, was "Occupational Health, Safety and Special Projects Manager". As at September 2013, he was earning a monthly salary of \$9,841.04.

3. By letter dated September 09, 2013, the Employer wrote to the Employee:
 - a) Informing him that, pursuant to instructions from its parent company to reduce its staffing costs, the Employer had decided to eliminate his position, thereby making it redundant with effect from September 30, 2013;
 - b) Stating that, based on the review it carried out, it was not then possible to redeploy him to another position;
 - c) Asserting that a final decision had not yet been taken;
 - d) Inviting him to “make any alternative suggestion” no later than September 20, 2013, for his continued employment;
 - e) Relieving him from “active duty” with immediate effect.
4. By letter dated September 20, 2013 the Employee accepted, without prejudice, the severance payment offered by the Employer and thereby effectively reserved his right to commence these proceedings challenging the validity of the purported redundancy.
5. The Employee’s services were terminated on September 30, 2013 on the ground of the redundancy caused by the Employer’s efforts to reduce its operational costs.
6. By his Memorandum of Claim herein the Employee contends that there was no genuine redundancy situation and that he was unfairly dismissed.
7. In response, by its Memorandum of Defence, the Employer contends that there was a genuine redundancy situation by reason of which the Employee was not unfairly dismissed.

The Main Issue

8. The main issue for determination is whether the Employee was unfairly dismissed. This issue has two components, namely:
 - a) Whether there was a genuine redundancy situation; and
 - b) Whether the Employer acted reasonably or unreasonably in dismissing the Employee under the circumstances.

Findings of Fact

9. The Employee filed his witness statement on July 21, 2014 and testified on his own behalf at the trial. A witness statement filed by the late Louis Lowe, Contract Manager, on behalf of the Employer on December 4, 2014, was admitted into evidence but remained untested.

10. Based on the witness statements, the Employee's oral testimony and the documentary evidence, our findings of fact include the following:

- a) At the commencement of his employment the Employee was engaged as a Technician in the electrical generation department of the Employer's business. On or about June 15, 2011, he received a detailed description of his last position. At the date of his dismissal, he had been employed by the Employer for approximately 17 years.
- b) On or about the date of his promotion in June 2011, the Employee received a detailed description of his position. It included 9 Main Responsibilities, one of which was to "perform specific special projects". In addition to his main responsibilities, he had 6 "Development Responsibilities" including one to "advise the Purchasing Department after consultation with the Safety Committee on the type of safety gear to be purchased".
- c) Between July 12 and September 9, 2013, the Employee was absent from work because he was on sick leave due to his medical condition. During that period, he was suffering from hernia and underwent a surgical operation.
- d) Upon his return to work on September 9, 2013, he received the letter bearing that date and informing him that the Employer had decided to eliminate his position on account of instructions from its parent company to reduce staff costs.
- e) Since the Employee was advised that the Employer had already concluded that there was no alternative position for him and removed him from active duty, he formed the view that the Employer's request for his suggestion was a sham.
- f) Prior to receiving the letter dated September 9, 2013, the Employer had not consulted with the Employee and gave him no advance notice or warning of his dismissal.

Resolution

11. As was done in Reference No 66 of 2015: the **Antigua & Barbuda Workers Union v Cable Wireless (Antigua & Barbuda) Ltd** and more recently in Reference No 4 of 2020: **Janis James and Bernadine Henry Hughes v West Indies Oil Company Limited**, the component parts of the main issue must be resolved within the **statutory**

legal framework of the Antigua and Barbuda Labor Code (the Labour Code) and the Industrial Court Act.

12. The definition of redundancy as provided under section C (3) of the Labour Code is as follows:

“Redundancy” means a situation in which by virtue of lack of customers’ 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;”

13. Under section C 58 (1) of the Labour Code, redundancy is potentially a good reason for a dismissal of the Employee provided that there is a factual basis for the same. However, even if there was a genuine redundancy, the final determination of the main issue turns largely on the application of the test of reasonableness as provided in section C 58 (2). It is well settled that the provisions of both subsections must be applied conjointly.

14. Section C 58 (1) provides:

“A dismissal shall not be unfair if the reason assigned by the employer therefor

“...

(c) is that the Employee was made redundant;

...

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

15. Section C 58 (2) provides:

“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. ”

16. The onus of proving that the dismissal was not unfair is on the Employer. In this case, it must first prove the factual basis of the redundancy. And, secondly, it must also prove that it acted reasonably under the circumstances.

Was There a Genuine Redundancy Situation

17. Save that the Employer was one of its members. There is no sufficient information regarding the “Wartsilla Group of Companies”, The evidence does not expressly disclose that the Employer was a subsidiary with an obligation to comply with the policy directives of any particular principal company within the Group. To compensate for that omission from the Employer’s evidence, in our discussion below, we will refer to the principal company as “Wartsilla” and treat the Employer as its subsidiary.
18. Given the nature of commercial corporate business operations, it is expected that Wartsilla and the Employer were “always trying to find ways to cut costs”. However, the Employer’s evidence does not disclose that any time frame was stipulated regarding any particular effort or directive in or around 2013 when the Employee’s position was declared redundant. Further, the evidence does not reveal the genesis of the decision of Wartsilla to implement particular costs and savings measures. There is nothing to suggest that Wartsilla specifically decided and directed that the Employee’s position be eliminated by a stipulated deadline. Accordingly, in the absence of pertinent evidence, we assume that the decision to select the Employee’s position, in particular, for redundancy and the time frame for its implementation were left to the Employer’s discretion.
19. Further, the evidence does not disclose the “general occupational and management structure” of the Employer. As a result, we do not have a full appreciation of the role of the Employee and his department vis-à-vis other departmental managers and their departments. As to the Safety Committee, apart from the Employee’s responsibility to advise the Purchasing Department on the types of safety gear to be purchased, we do not have evidence regarding its precise functions and why it had become defunct sometime before June 2013. In addition, we have no evidence that any other department or worker was marked by the Employer for reorganization or redundancy due to the implementation of cost-saving measures.
20. We have carefully considered the contents of the Employer’s letter dated September 9, 2013, giving the Employee notice of the imminent redundancy of his position. At first blush, the Employer’s statement of the reasons for the redundancy appears to be logically valid. However, the stated reasons were too bald to properly discharge the Employer’s evidentiary burden. They required amplification. In that regard, it is unfortunate that Mr. Lowe passed away before the trial and no other witness testified on behalf of the Employer to substantiate his assertions and perhaps influence the weight which we have given to his witness statement.

21. In the circumstances, we have carefully considered the submissions of Mr. Lake, learned Counsel for the Employee, in respect of the Employer's evidentiary burden of establishing the factual basis for the redundancy. We agree with his submission that the Employer's evidence is "lacking" because it does not disclose any sufficient particulars of the reasons for the retrenchment of the Employee.
22. Further, we agree that a "safety regime" was crucial for the proper conduct of the Employer's business. In that regard, we accept the Employee's testimony that the Safety Committee had been defunct for many years prior to the establishment of his position in June 2011; that his position was established to allow him to step into the breach and discharge the prior responsibilities of the Safety Committee; and that the Committee had been reconstituted, without his knowledge, while he was on sick leave. In the circumstances, the Employer has failed to sufficiently explain and justify the retrenchment and the consequential reorganization of its operations.
23. It is noteworthy that learned Counsel, Mr. Marshall, emphasized the legitimacy of retrenchment for the purpose of reducing costs. While we agree with that as a general proposition, on the facts of this case, it cannot diminish the Employer's duty to discharge its evidentiary burden. At the end of the day, the Employer has not established a *bona fide* retrenchment process as the cause giving rise to a genuine redundancy situation.
24. In the final analysis, we are inclined to conclude that the appearance might have been given that the Employer was acting capriciously in declaring that the Employee's position had become redundant. We find that there was no genuine redundancy. However, for completeness and in the event that we are wrong, we will go on to apply the test of reasonableness as set out in section C 58 (2) of the Labour Code

Did the Employer Act Reasonably?

25. At the outset of our analysis of this component, we believe that it is important to note that the Employer's position, based on the UK authorities cited, is not as clear-cut as Counsel would have us believe. In fact, Counsel may be wholly misguided. In the United Kingdom, the determination of the issue as to whether an employee was dismissed "for redundancy" turns on the construction of express statutory provisions defining when an employee "shall be taken to be dismissed by reason of redundancy...". There are no identical or similar statutory provisions in our law. Thus, we are constrained to resolve the issue within our legal framework, as is.

26. Our legal framework compels us to apply the test of reasonableness. Accordingly, the reasonableness or unreasonableness of the Employer's conduct will be examined, having regard to the statutory test and the principles and practices of good industrial relations, under the following selected headings:

Notice and Warning of Redundancy:

27. The Employee was a manager who had given 17 years of continuous service with the Employer. It cannot be overemphasized that he received notice of the redundancy on September 9, 2013, the very day he returned to work after being absent on sick leave for the preceding two months. Clearly, he had no or no adequate advance notice or warning that his position was marked for redundancy. And there was no evidence of any urgency from the Employer to justify an abridgement of the Employee's right to reasonable notice.
28. There can be no doubt that the Employer's failure or refusal to give any or any adequate notice, in the circumstances, is unreasonable. It is our opinion that the 19 days' notice he received was woefully inadequate and is tantamount to no notice at all.
29. To make matters worse, the Employer's action in confronting the Employee with its decision to terminate his services upon his return from sick leave and immediately relieve him from active duty was unconscionable. In our opinion, a period of at least 3 months' notice would have been reasonable to allow the Employee reasonable time to consider his options, seek alternative employment or otherwise plan his future.

Consultation

30. As a general rule, when an employer is considering the retrenchment of workers or is otherwise engaged in the restructuring or reorganization of its business, it should engage in fair consultation with the affected workers. One of the main objectives of consultation should be the avoidance of the dismissal of any employee, if possible, because of redundancy.
31. The consultation process should be timely and fair with the result that the affected employees are given:
- a) As much notice or warning as possible so that they are put in a better position to consider their options going forward.
 - b) Adequate details of the restructuring, reorganization or retrenchment process so that they may fully appreciate the reasons for the redundancy and the related actions contemplated by the employer.

- c) A reasonable opportunity to comment on and make suggestions in relation to the action being contemplated by the employer with a view to averting any consequential dismissals.
32. On the facts of this case, it's abundantly clear that the consultation process was neither fair nor timely. It is obvious that the disclosure to the Employee of the redundancy was blunt and abrupt, coming in the manner and at the time that it did on the day of his return to work after his 2-month absence on sick leave.
33. Moreover, it is noteworthy that the Employer had already done its assessment without the benefit of any input from the Employee and merely informed him that it was not possible to "transfer" him to another department. Further, it is also noteworthy that the Employer invited the Employee to make an "alternative suggestion" for his continued employment within a mere 10 days. In the circumstances, it is not surprising that the Employee considered the invitation to be a sham and rejected it.
34. At the end of the day, taking into consideration the Employee's position, his long tenure and his absence on sick leave over the preceding two months, there was virtually no fair consultation. What the Employer did was a mere semblance of consultation, which was, by far, too little too late.
35. As with the absence of reasonable notice, we find that the absence of fair consultation, in the circumstances, is a clear element of unreasonableness. And the Employer has advanced no mitigating facts or circumstances to justify its failure in that regard. Moreover, the facts suggest that fair consultation could have made a difference by possibly averting the dismissal.

Alternative Employment

36. The evidence discloses that the Employee commenced his employment as a "Technician in electricity generation" in October 1996. The reconstituted 6-member Safety Committee which took over the role to "observe occupational safety issues" included five "Plant Technicians". Although there is no direct evidence on this point, it is safe to assume that the Employee was competent to perform in that or any similar capacity. Although we have no evidence of the number of technicians employed by the Employer, their specific roles and their tenures, we are not satisfied that the Employer did enough to find alternative employment for the Employee in either of the two plants it was engaged to operate.

Selection of the Employee

37. Further, the Employer has not convinced us that it applied any objective criteria in selecting the Employee for redundancy from among its overall staff complement. There is no evidence that

it even considered the well-known principle of “last in, first out” or the option of “bumping” another worker in any of its departments in favour of the Employee. In our view, it was not sufficient to ground the redundancy of the Employee’s position solely on the fact that he had no other employees reporting to him. Moreover, it was not sufficient to merely say that there was no alternative position for the Employee in its “new organizational structure”. We do not know either the old or the new organizational structure. On the totality of the evidence, we are not satisfied that the Employer made any sufficiently diligent efforts to avert the dismissal of the Employee.

Conclusion and Declaration

38. For the reasons stated above, we conclude that the Employer has failed the test of reasonableness. Its actions in dismissing the Employee, as it did, were not within a band of reasonable actions which a reasonable employer should have taken in the circumstances. Accordingly, **we declare that the Employee was unfairly dismissed and is entitled to compensation.**

Compensation

39. We assess compensation under the usual headings as follows:

A. Payment in lieu of Notice (Notice Pay)

The Employee was paid the equivalent of one month’s salary under this heading. Since this payment is in accordance with the Labour Code, we make no award under this heading.

B. Loss of Protection from Unfair Dismissal (Basic Award)

The measure of compensation under this heading is the equivalent of severance pay. Since the Employee received his severance pay and made no claim for any additional amount, we make no award under this heading.

C. Immediate Loss

- (i) Subject to the discharge of his obligations to mitigate, the Employee is entitled to receive compensation for the loss he suffered between the date of his dismissal and the date of judgement. We are not convinced that he made diligent efforts to find alternative employment. In the circumstances, we will adopt a commonsense approach **and award the sum of \$59,046. 24, the equivalent of his full salary for the first 6 months after his dismissal.**
- (ii) From our perspective, if the Employee made diligent efforts, he should have been able to find alternative employment after those first 6 months. For present purposes, we fix his earnings at \$5,000.00 per month during the second 6-month period after his dismissal.

Accordingly, we award the additional sum of \$29,046.24, being the equivalent of the difference between his former salary and the amount he should have been earning for the second ensuing period of six months: $(\$9,841.04 - 5000) \times 6$.

D. Future Loss

We make no award under this heading.

E. Exemplary Damages

For the reasons stated above and taking into account Mr. Lake's emotive words in his submissions in relation to the whopping claim under this heading, we conclude that the dismissal was harsh and oppressive. In that regard, **we award exemplary damages in the sum of \$20,000.00.**

40. In the premises, we order that the Employer shall pay compensation in the total sum of \$108,092.48 to the Employee for his unfair dismissal in two installments as follows:
- (1) The sum of \$50,000.00 together with the accrued bank interest thereon - held in account no. 41204912 in the name of the Employer at the Old Parham Road Branch of CIBC FirstCaribbean International Bank pursuant to the Order herein dated March 27, 2015 - no later than July 02, 2022.
 - (2) The balance of the said judgment debt, being the said sum of \$108,092.48 less the amount paid under paragraph (2) of this Order, no later than July 31, 2022.

Dated this 24th day of June 2022.



Charlesworth O. D. Brown
President



Sir Hayden Thomas
Member



St. Lawrence de Freitas
Member