

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REF: NO C/4 of 2020

BETWEEN:

JANIS JAMES

BERNADINE HENRY HUGHES

Employees

and

WEST INDIES OIL COMPANY LIMITED

Employer

Before:

The Hon. Charlesworth O.D. Brown

The Hon. Samuel R. Aymer

President

Member

Appearances:

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

Dr. L. Errol Cort of Cort & Cort, Attorneys-at-Law for the Employer

2021: November 11

2022: February 01,04,10

June 10

JUDGMENT

Brown, P:

Background

1. The Employer was incorporated, and carries on business, under the laws of Antigua and Barbuda. Its principal place of business is situated at Friars Hill Road, from which it provides oil storage facilities and petroleum products to customers in Antigua and Barbuda and other countries in the Eastern Caribbean. It plays a prominent role in the national economy and is widely considered to be a good corporate citizen.



2. At all material times, the employment relationships between the Employees and the Employer were subject to Collective Agreements between the Employer and the Antigua Trades & Labour Union, the last of which is dated November 23, 2016, for the period July 8, 2015 to December 31, 2018 (the Collective Agreement). Article 28 (3) (a) and (b) of that Agreement respectively stipulates that, at all material times, the Employer's Retirement Age was 65 years and that Early Retirement could be agreed at the request of the Employees.
3. The First Employee (Janis James) commenced her employment with the Employer on June 10, 1991. As at May 31, 2018, she was 61 years old and held the position of Accounts Clerk earning a salary of \$4,734.00 per month.
4. The Second Employee (Bernadine Henry-Hughes) commenced her employment with the Employer on August 11, 1977. As at May 31, 2018 she was 60 years old and held the position of Accounts Foreman earning a salary of \$8,210.00 per month.
5. After a series of meetings and an exchange of correspondence between the parties in early 2018, by letters dated April 30, 2018 the Employer notified each of the Employees that: "with effect from June 1, 2018, your position with the company as Accounts Clerk (sic) shall become redundant, and, as a result your employment with the company shall be terminated by reason of redundancy."
6. Being dissatisfied with the termination of their employment, the Employees commenced these proceedings contending that they were unfairly dismissed and are entitled to compensation.

Overview of Opposing Cases

7. In their Memorandum of Claim, the Employees contend that:
 - (a) After 27 and 41 years of service respectively, they had clean disciplinary records and had performed outstandingly during their tenure.
 - (b) Under Article 28 of the Collective Agreement, any agreement for early retirement was wholly at their discretion.
 - (c) In January 2018, the Employer offered them early retirement, which they rejected. Their decision to reject the Employer's offer was an exercise of their right to make decisions in their best interest.

(d) The Employer's decision to make their positions redundant was a direct result of their rejection of the offers of early retirement.

(e) There was no genuine redundancy situation and as a result their dismissals were unfair.

8. By its Memorandum of Defence, the Employer disputes the Employees' claims on the following grounds:

(a) In 2015, after the government became its majority shareholder, it was given a new mandate to carry out departmental restructuring towards greater efficiency. To the desired end, it selected its Accounts and Finance Department for organizational review.

(b) In 2017 its Chief Financial Officer, Carlton Bramble, carried out the review and made certain recommendations, which were accepted by its Board of Directors. One of the recommendations was to make the Employees' positions redundant because their job functions had substantially diminished.

(c) It met with the Employees individually on January 4th and 15th, 2018 to discuss the impending restructuring, to advise them that their positions were scheduled to be made redundant and to indicate its willingness to provide them with early retirement packages as alternatives to redundancy payments.

(d) In addition to meeting with the Employees, it also met with their Union Representative, Ralph Potter, on January 19th, 2018 to discuss the restructuring, the resulting redundancies and its willingness to invite the Employees to consider their option for early retirement.

(e) Following its meeting with Mr. Potter, and an exchange of correspondence between them, the Employees declined the option for early retirement.

(f) In light of the rejection of the option for early retirement, it proceeded with its initial decision to make the Employees' positions redundant and notified them of the same by letter dated April 30th, 2018.

(g) Notwithstanding the computations of severance pay in accordance with the Collective Agreement, it paid the Employees "much more generous compensation packages."

- (h) As their Union Representative, Mr. Potter provided it with Releases acknowledging payment in full satisfaction of any claim arising from the Employees' employment and absolving it from any further liability.

The Main Issue

9. Given an employee's right not to be unfairly dismissed as established under Section C56 of the Antigua and Barbuda labour Code (the Labour Code), the good causes for dismissal under section C58 (1) and the test of reasonableness under Section C58 (2), the main issue for determination is whether the Employees were unfairly dismissed. That main issue has two components:
- (a) Whether there was a genuine redundancy situation at the material time; and
 - (b) Whether the Employer acted reasonably or unreasonably under the circumstances when it terminated the services of the Employees.

Was there a Genuine Redundancy Situation?

10. Under Section C58 (1) of the Labour Code, Redundancy is potentially a good cause for dismissal provided that the Employer discharges its evidentiary burden of establishing the factual basis for the same.
11. The legal parameters within which the component issues are to be resolved were underscored by this Court at paragraphs 26 to 30 of its judgment in Reference No. 66 of 2015; **Antigua & Barbuda Workers Union v. Cable & Wireless (Antigua & Barbuda) Ltd.**, as follows:

[26] Section C3 of the Antigua and Barbuda Labour Code (the Labour Code) provides a definition of redundancy 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;”

[27] An employee's statutory right not to be unfairly dismissed is established by Section C56 of the Labour Code:-

“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.”

[28] As to what constitutes a good cause for dismissal, Section C58 (1) of the Labour Code provides:

C58 (1) A dismissal shall not be unfair if the reason assigned by the employer therefor

“(a)

(b)

(c) is that the Employee was made redundant;

(d)

(e)

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

[29] The determination as to what constitutes an unfair dismissal requires the application of the test of reasonableness as provided in Section C58(2) of the Labour Code 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 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. ”

[30] The Industrial Court being a creature of statute is clothed with specific statutory powers under the Industrial Court Act. Section 10(3) provides:

“Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall-

- a) Make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;**
- b) 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“**

Factual Basis for Redundancy

12. As to the factual basis for the redundancy in this Reference, suffice it to say, we found Mr. Bramble to be a credible witness in so far as he testified on behalf of the Employer in respect of his review and his recommendations, which were accepted by the Employer, to render the Employees’ positions redundant. Accordingly, we summarize our key findings of fact as follows:

- (a) In or about 2015, pursuant to a mandate from its shareholders, the Employer selected its Accounts and Finance Department, for which Mr. Bramble had assumed responsibility in December 2015, for organizational review.
- (b) The review was carried out by Mr. Bramble two years later, in 2017, after which he made recommendations for restructuring towards greater efficiency. The recommendations included: streamlining the approach to management of the Employer’s finance functions and asset-management; automating the pertinent financial procedures and processes, which hitherto were significantly performed manually; and realigning the human resources within the department accordingly.
- (c) Mr. Bramble considered the specific job functions of the Employees, the nature of the tasks assigned to them, the quantum of work which they were required to perform on a day-to-day basis, their qualifications, training and competence and concluded that there were certain inefficiencies and security concerns which needed to be addressed.
- (d) Mr. Bramble’s recommendations were accepted by the Employer’s Board of Directors. In order to improve efficiency and address its security concerns, the Employer introduced new technology, installed certain computer programmes, redeployed some of its other employees and reassigned selected duties which were previously performed by the Employees, to them.

- (e) Ultimately, the decision was made to make the Employee's positions redundant because their job functions were substantially diminished as a result of the restructuring process.

13. We have carefully considered the opposing submissions of Mr. Potter and Dr. Cort on behalf of the parties. Mr. Potter's spirited submissions in respect of the non-existence of a redundancy situation are noteworthy. He emphasized the following:

- (a) At the two meetings held with the Employees individually on January 4th and 15th 2018, there was no mention of redundancy. The Employer merely informed the Employees of its intention "to send them on early retirement".
- (b) In the two letters to the Employees respectively dated January 19th and January 8th 2018, absolutely no mention is made of redundancy.
- (c) The Employer's focus, both orally and in writing, was clearly its attempt to convince the Employees to consent to early retirement although they had not applied for the same as required under the Collective Agreement.
- (d) In the Employer's charts showing the Roles Assignment before and after the restructuring, it is abundantly clear that "cashiering and payroll duties" as well as the "filing of invoices and other departmental documents", previously carried out by the Employees, continued undiminished and were being carried out by other workers. In one instance, the work previously carried out by the First Employee was split among four others.
- (e) After the dismissal of the Employees, the Employer increased the number of workers in the Department from 7 to 10. That fact is a clear indication that the work which they were employed to perform had not substantially diminished.
- (f) The evidence reveals that there was no cessation or diminution of the work such as to meet the statutory definition of redundancy.

14. While we acknowledge the validity of Mr. Potter's submissions, we note that he focused largely on the descriptive nature of the work which the Employees performed. In our view, he omitted to have sufficient regard to the wider context in which the question of redundancy should be considered. In that regard, it is well settled that the statutory definition of redundancy should be construed liberally to allow employers relatively unfettered reign in the organization and conduct of their business.

15. The upshot of a more liberal construction challenges the nub of Mr. Potter's submission that in order for a genuine redundancy situation to arise in this case, the functions which the Employees performed must have literally ceased or substantially diminished. In our estimation, the restructuring and reorganization processes were triggered by the Employer's need to increase efficiency and economize its finance and accounting

processes. They were based on a commercial business decision. There is no evidence that the restructuring exercise was unduly fanciful or staged as a sham with any malicious intention. As we understand it, the reorganization of the work did not arise from a literal cessation or diminution of the functions of the Employees, it had more to do with the Employer's deliberate choices as to efficiency with which those functions were performed and their alignment with others within the Department.

16. In considering whether there was a genuine redundancy, we are persuaded by the submissions of learned Counsel, Dr. Cort, that the restructuring and reorganization and resulting redundancies are crucial areas of ownership and managerial prerogatives. In this case, the Employer exercised that prerogative to improve efficiency in the conduct of its business. Based on its need for improved efficiency, the Employer's requirement for the Employees to carry out the work they previously performed had "ceased or substantially diminished".
17. Notwithstanding Mr. Potter's submissions, we are convinced that a genuine redundancy situation existed in the Finance and Accounts Department of the Employer's business as at January 4, 2018. On the balance of probabilities, we find that the restructuring process did result in greater efficiencies and the alleviation of the Employer's security concerns while at the same time altering and substantially diminishing the work which the Employees were previously employed to perform.
18. In the circumstances, there is no need to examine the details of the mandate given to the Employer by its shareholders. Similarly, for the purpose of determining whether there was a genuine redundancy situation, there is no need to consider the extent and timing of the review process or the implementation of the recommendations for the restructuring. Such matters, subject to the test of reasonableness which we will apply below, are squarely within the purview of the Employer.
19. In the final analysis, we are satisfied that the Employer has discharged its evidentiary burden of establishing a clear causal link between the restructuring process and the resulting redundancies of the Employees' positions. Accordingly, we resolve the first component of the main issue in favour of the Employer. Subject to the test of reasonableness, there was a genuine redundancy situation which could potentially justify the dismissals of the Employees.
20. Given that conclusion, the resolution of the main issue of unfair dismissal must necessarily turn on the reasonableness or unreasonableness of the Employer's actions in the circumstances. Thus, apart from concluding that there was a potentially good cause for the dismissals, it is imperative that we consider the conjoint effect of the outcome of

the application of the test of reasonableness under section C58 (2) of the Labour Code. Needless to say, **“the mere fact that a genuine redundancy does exist does not, per se, lead to a conclusion that a dismissal was fair”**

Did the Employer Act Reasonably or Unreasonably?

21. As was done in the **Workers’ Union case** (supra), our application of the test of reasonableness will be within the foregoing legal parameters and grounded on the factual matrix derived from the evidence elicited at the trial. An appropriate starting point is the examination of the following chronology as gleaned from the evidence.

2015 Unbeknownst to the Employees, the Employer’s Accounts and Finance Department was selected for organizational review.

November/ December 2017

Unbeknownst to the Employees, the Review was carried out by the Chief Financial Officer and recommendations were made to and accepted by the Employer’s Board to make the Employees’ positions redundant.

January 4th, 2018

At a meeting convened by the Employer, the Employees were individually offered the option to take early retirement.

January 15th, 2018

At further meetings convened by the Employer with the employees individually, it repeated its offer of early retirement first made on January 4th, 2018.

January 19th, 2018

The Employer met with Mr. Potter, the Employees’ Union Representative mainly to discuss the Employer’s offer of the option for early retirement.

January 29th, 2018

The Union Representative sent an email to the Employer noting that the “concepts of severance and also retirement” are not the same and seeking clarity of the Employer’s position.

February 9th 2018

In response to that of the Union, the Employer sent an email to the Union advising that the Employees’ positions were being made redundant and that “separation” packages were being offered to them.

March 1st, 2018

At a meeting between the Employer, the Employees and their Union Representative, the Employees rejected the option for early retirement.

April 30th, 2018

The Employer formally notified the Employees that their positions “shall become redundant” with the result that their employment “shall be terminated by reason of redundancy” with effect from June 1st, 2018.

May 31st, 2018

Upon reading the terms of their individual “Payment and Individual Statement” endorsed with a “Release Agreement”, which had been prepared by the Employer, the Employees requested that they be revised and amended. Amended terms were agreed between the parties, after which the Employees received their separation packages and delivered the “Release Agreement” as signed by Mr. Potter on their behalf.

22. Given that chronology of facts, we will discuss the Employer’s actions with particular consideration of selected elements of reasonableness having regard to the guidelines set out in well known authorities of **R. v British Coal Corporation [1974] IRLR 72** and **Williams and Others v Compair Maxam Ltd. [1982] UK EAT 372**, which were applied and followed by this Court in the **Workers’ Union case**.

Contextual Approach to the Dismissals

23. At first blush, given its position as a prominent employer in Antigua and Barbuda for over 40 years and the prevailing circumstances between 2015 and April 30, 2018, it was the duty or responsibility of the Employer to have regard for:
- (a) The relevant provisions of the Labour Code;
 - (b) The sacred role of trade unions generally and its engagement with the Antigua Trades and Labour Union in particular;
 - (c) All relevant provisions of the Collective Agreement then in force;
 - (d) Basic principles and practices of good industrial relations;
 - (e) The established retirement age of 65 years;
 - (f) The Employees’ ages of 61 and 60 years;
 - (g) The Employees’ long tenures of 27 and 41 years;
 - (h) The timing of the decision to review the Department, the actual review, and the implementation of the ensuing recommendations;
 - (i) The likely impact of the implementation of the recommendations on the Employees.
24. Given its special context, the Employer should have been wary or circumspect in its handling of the unfolding situation. There is no doubt in our minds that the situation required the Employer to act reasonably, as any reasonable employer would do, and be especially mindful that it was a sensitive matter requiring delicate treatment.

Warning and Notice of Redundancy

25. By way of analogy, in terms of typical seasonal weather announcements, a “hurricane season”, followed by a “hurricane watch” should have been declared by the Employer as early as 2015 when the mandate was given to restructure the Financial and Accounts Department. In other words, it would have been appropriate for the Employer to give the Employees and their Union, if not all the workers in that Department, early indication of the possibility of redundancies in the Department. In our view, pending the review and restructuring processes and the likelihood of a “redundancy season”, the Employees should have been put on a “redundancy watch” sometime in 2015.
26. In relation to the actual implementation of the review process which was completed “in or around November / December 2017”, by which time the Employees would have been on an extended “redundancy watch”, the Employer had a further and better opportunity to give early notice or warning of possible redundancies. If they had done so, they would have made at least partial amends for not doing so two years earlier in 2015.
27. Continuing with the analogy, even if the Employees were not aware that they were in a “redundancy season” and had not been put on a “redundancy watch”, certainly by December 2017 when the recommendations for the redundancies were made and accepted, the Employer was in a clear position to issue a “hurricane warning”. Such a warning would advise the Employees that a certain redundancy situation was on its way and heading directly towards them with an anticipated devastating effect.
28. Certainly, by the start of January 2018, the Employer was in a clear position to issue unequivocal notices to the Employees of the date or approximate date when their positions would become redundant. In terms of the analogy, this would be the stage when the meteorologists would be duty bound to repeat and reinforce the earlier “hurricane warning”, informing the public of the actual date and time when the hurricane would be expected to make landfall.
29. On our careful consideration of the evidence, we find that the Employees received no clear and unequivocal warning or notice of the redundancies from the Employer until April 30, 2018. The pertinent clause in the Employer’s letter under the hand of its Chief Executive Officer, Gregory Georges, reads: “We therefore formally notify you that with effect from June 1, 2018, your position with the company as Accounts Clerk shall become redundant and, as a result your employment with the company shall be terminated by reason of redundancy”.

30. Our discussion in the preceding 5 paragraph leads us to a firm conclusion that the Employer failed or refused to give the Employees any or any adequate warning or notice of their redundancies. Taking the hurricane analogy to its logical conclusion, the Employees were confronted with a significant and potentially devastating hurricane without any adequate time to batten down or otherwise prepare for the same. It would be fair to say that, contrary to their legitimate expectation to work until they attained the age of 65 years, the Employees found themselves in a tailspin.
31. For completeness, we note that the evidence reveals that the Employer engaged in discussions with the Union Representative only on or about January 19, 2018, a date in our view which was far too late under the circumstances. Further, those discussions were largely concerned with the Employer's attempt to convince the Employees to opt for early retirement although they had not applied for the same. The Employees were probably confused, unnecessarily, by what we consider to be the Employer's equivocatory approach to them in that regard.
32. Our unavoidable conclusion is that the discussions between the parties did not suffice to give the Employees and /or their Union the required clear and unequivocal warning and notice of the impending redundancies. In our opinion, the Employees received no or no adequate warning or notice of the redundancies which ultimately resulted in the termination of their employment. Moreover, the Employer appeared to have wittingly or unwittingly suppressed the role of the Union in respect of the application of the articles in the Collective Agreement providing for Retirement Age, Redundancy and Early Retirement. As a whole, the actions and omissions of the Employer were unreasonable and potentially fatal.

The Consultation Process

33. In his closing submissions, learned Counsel, Dr. Cort, after referring to the **Workers Union** case emphasized that the meaning of "fair consultation" includes consideration of the timing of the process and the adequacy of the information provided. For the process to be meaningful and effective, consultation should have occurred when the Employer's proposals and recommendations were still at a formative stage. In order to maximize the usefulness of the process, one of the critical objectives should be the avoidance of the redundancy, if possible.
34. The evidence reveals that the Union was not engaged to discuss the unfolding situation until January 19, 2018, by which time the Employer had apparently reached a firm decision to terminate the employment of the Employees, subject only to its efforts to convince them to opt for early retirement.

35. Needless to say, the preferable approach should have been to engage the Union in fair consultation starting in 2015 when the decision was taken to review the Department. In any event, the acknowledged involvement with the Union clearly did not commence at the first stage when the Employer contemplated the restructuring. Moreover, the evidence reveals that the Employer provided no or no adequate information regarding the rearrangement of functions and duties and the redeployment of some employees in the Department.
36. In particular, there is no evidence that the Employer shared information of the “roles assignment” within the Department prior to the implementation of the restructuring exercise vis-a-vis and its proposals for the new role assignments which would result from the restructuring. In our estimation, all the relevant information were available in the tables prepared by Mr. Bramble and should have been shared with the Union preferably during their draft stage or, in any event, upon their completion by the end of December 2017.
37. As events transpired, during the first quarter of 2018, the Union was not given adequate details of the restructuring and had no sufficient opportunity to respond to the Employer’s proposals within a reasonable time or at all. Ultimately, it appears that the Employer did not open its mind to any possible alternatives or further review based on what might have been proposed or counter proposed by the Union.
38. We find the chronology submitted by Dr. Cort to be very instructive. We note that after the review was completed in or about November/December 2017, meetings were convened with the Employees, individually. In our estimation, those meetings were not genuinely consultative in respect of the proposals for redundancy. They were largely limited to the offer of the option for early retirement. Accordingly, the consultative process which followed with the Union appear to have been largely dealing with the issue of whether the termination of the Employees’ services was going to be on the basis of redundancy or early retirement.
39. In any event, we note that a meeting was held on March 1, 2018, at which the issue of redundancy and the option of early retirement were discussed. Those discussions did not bring closure to the matter which remained open up to April 16, 2018, when the Employer notified the Union Representative that it would proceed on the basis of redundancy. In response, by email the following day, the Union took the position that there was no case of redundancy. That response marked a watershed. On the one side, the Employer put on its blinkers and forged ahead towards the dismissals on the basis of redundancy. On the other side, the Union was adamant in its position that there was no

genuine redundancy. In the meantime, the Employees appeared to have been overlooked or left behind.

40. In the circumstances, we conclude that the discussions between the Employer and the Union were largely confined to a period of approximately two months ending on April 18, 2018. The conversations between the Union and the Employer were substantially concerned with whether termination of the services of the Employees would be on the ground of redundancy or early retirement. In so far as consultation is a key component of good industrial relations practices, we find that there was inadequate consultation, for which we hold the Employer wholly blameworthy.

Selection of the Employees for Redundancy

41. The question of the reasonableness of selection of the Employees must be considered from at least two perspectives. Firstly, in relation to the Finance and Accounts Department, the Employer was entitled to consider the effect of the restructuring in that Department. From that relatively narrow perspective we are satisfied that the Employer's initial selection was based on the likely effects of automation on the job functions of the Employees. Thus, at first blush, it appeared that the redundancy situation would likely lead to the dismissal of the Employees. Needless to say, that first impression is subject to the evidence elicited at trial.
42. On behalf of the Employer, Mr. Bramble testified regarding the Employees' lack of "comfort" with the new technology. In particular, he asserted that they did not have "that type of qualification" and "could not perform with the same competence" as younger employees who held associate degrees and had been hired in 2016. In our opinion, Mr. Bramble's comments are far too general and vague to convince us that the Employer applied any objective criteria in selecting the Employees for dismissal. The Employer provided no evidence that it earnestly attempted to avoid the dismissal of the Employees and was left with no choice but to select them for dismissal. Moreover, there is no evidence that the Employer explored other options, such as training the Employees to equip them to function efficiently within the restructured and automated Department.
43. It is noteworthy that Mr. Bramble testified that there was an increase of three Employees in the Department when the redundancies occurred, one of which had been transferred from the Purchasing Department, one who had been studying towards her finance degree and one "new hire" who joined the Employer's work force through the internship program with the Antigua State College. At the end of the day, based on Mr. Bramble's subjective assessment, the Employer appeared to have formed the view that the

Employees were not trainable. In the absence of any objective criteria, we consider the selection of the Employees for redundancy to be unsafe and unreasonable.

44. Further, from the wider perspective, we have no evidence in respect of any restructuring of any of the Employer's other departments. In our opinion the Employer should have explored the possibility of dealing with the redundancy situation in such a manner as to avoid the dismissals of the Employees, even if that meant "bumping" other employees in other department. From the available evidence, we do not know if any consideration was given to the possibility of redeploying the Employees, perhaps after adequate training and reorientation, if necessary, to function in other departments. In that regard, there is no evidence that the Employer considered the well-known principle of "last in, first out" in relation to its entire staff complement.
45. Among Mr. Potter's persuasive submissions is one that, contrary to its undertaking under Article 28 of the Collective Agreement, the Employer failed or refused "to carry out biannual assessments" of the Employees. In that regard, we accept the Second Employee's evidence that "no assessments were done for the period 2007 to 2017". Further, we note Mr. Bramble's effort to downplay the significance and usefulness of the required assessments for the purposes of redundancy. As we understand them, the biannual assessments which the Employer agreed to carry out would have provided invaluable information which could potentially be useful in determining which employees should be marked for dismissal on the ground of redundancy. In the absence of such assessments, there is no evidence to suggest that the Employer had any issues with the Employees' good record of "competence, commitment, attitude, team-working ability, health, absences and conduct" during their long tenures.
46. We consider the Employer's omissions in terms of the selection process to be crucial parts of its undischarged obligation. The omissions are significant in light of the Employer's declared preference to treat with the Employees in a respectful manner, having regard for the "strong familial relationships" among them, their colleagues and the management team which had developed over the years. In the circumstances, we find that the Employer were unnecessarily abrupt and unreasonable in the selection process.

Alternative Employment

47. The evidence discloses that during the course of their employment, the Employees had exposure and interaction with several other departments, including Purchasing and Stores, Marketing, Maintenance, Computer, Personnel and Human Resources. However,

during his testimony, Mr. Bramble merely declared that: “no alternative employment was available”. As a whole, the Employer’s evidence did not persuade us that it did enough to find alternative employment for the Employees. In our opinion, the Employer did not sufficiently explore whether there were any other suitable roles in other departments which were suitable for the Employees.

Ex Gratia Payment

48. The payment package offered to the First Employee as early as April 8, 2018 included an ex gratia payment, equivalent to 12 months’ basic salary, in the sum of \$56,808.00. That amount was included when she received her package on May 31, 2018. Neither that item nor any of a similar kind was offered or paid to the Second Employee. Moreover, although by its letters dated April 30, 2018, the Employer notified both Employees of its decision “to make a special exception” in terms of health insurance coverage, no mention of an ex gratia payment was made to either of them. In the circumstances, we are left clueless as to why that amount was paid. Needless to say, in the absence of any explanation, it was unreasonable for the Employer to pay that sum to the First Employee and not pay a similar sum to the Second Employee.

The Releases

49. The evidence is clear that the initial forms of Release as presented by the Employer for signatures by the Employees bore the heading: “**Final Payment and Individual Statement**”. Further, they included a “**Release Agreement**” requiring endorsement that the Employees accepted the amounts stated as **full and final payment**. The Release first presented to the First Employee read:

“I, JANIS JAMES hereby accept the sum of EC \$195,914.67 from the WEST INDIES OIL COMPANY LIMITED as full and final settlement of any and all outstanding claims from West Indies Oil Company Limited for my services as an employee during the period June 10, 1991 to May 31, 2018.

This Release is final, enforceable and supersedes all correspondences and agreements between the West Indies Oil Company, Ltd. and JANIS JAMES on this matter“

50. It is not in dispute that when the respective documents were delivered to the Employees they objected, through their Union, with both the heading and the terms of the Release Agreement. At their joint request, the documents were amended by the Employer by the removal of the word “**Final**” from the heading and the removal of the clause indicating

“full and final settlement”. In fact, both clauses quoted above were replaced by a single clause as follows:

“I, JANIS JAMES hereby accept the sum of EC \$200,000.00 from the WEST INDIES OIL COMPANY LIMITED for my services as an employee during the period June 10, 1991 to May 31, 2018”.

51. As we understand those amendments, which were made by the Employer at the request of the Union Representative on behalf of the Employees, it was the mutual understanding as agreed, that the payments were neither considered nor stated to be **“full and final”**. As a result, notwithstanding the inclusion of “Severance Payment” as a line item in the statement, there was no consensus that the employment relationship was being terminated on the ground of redundancy. To the contrary, there appeared to be a clear consensus that, notwithstanding their acceptance of the amounts paid, the Employees effectively reserved their rights to claim additional amounts.
52. In the circumstances, the actions of the Employer in acceding to the request of the Employees and agreeing the new terms of Statement and Release, vis-à-vis the original version, constitute an element of unreasonableness. In effect, the Employer was maintaining an equivocal position. As we understand the Employer’s actions at this late stage, it continued to equivocate as it had been doing since January 4, 2018 when it sought to convince the Employees to opt for early retirement.
53. In our final analysis of the Releases, contrary to the submission of learned Counsel, we are not persuaded that they should be construed to mean that the payments were accepted as **full and final settlement** under the circumstances. To the contrary, the signing of the amended Releases in the agreed terms was equivocal. Their true import and significance were uncertain and left open to question. In our opinion, the Releases did not give rise to an estoppel preventing the Employees from pursuing their claims in this matter.

The Employer’s Anniversary Magazine

54. Excerpts from publication of the Employer’s 50th Anniversary Magazine were produced at the trial. According to Mr. Bramble it was published in late 2018 and the pictures were taken “long after” the Employees left. According to Ms. Bailey, the Employer’s Human Resources Manager, the production of the magazine took place over a two-year period, which, coincidentally, is approximately the same period between the mandate and the actual review of the Department. Most instructively, the magazine carried photographs of the Employees and indicated that they were “retired”. Obviously, that published information is consistent with the Employer’s stance from the onset. It is

indicative of the Employer's preferred position that the Employees be considered as retirees.

55. Given production time and the date when the pictures were taken, it is evident that the Employer then evinced a clear and continuing intention to hold out to the public that the Employees had applied for and were granted early retirement. While we do not know the source person for the input in the magazine, it is safe to conclude that Mr. Bramble and/or Ms. Bailey knew or had oversight of the published assertion that the Employees had retired. In any event, it was the Employer's publication. Thus, we are of the view that this was another aspect of unreasonableness on the part of the Employer which was directly referable to its earlier efforts to persuade the Employees to opt for early retirement.

Conclusion and Declaration

56. Upon careful consideration of the evidence, we conclude that the actions of the Employer, taken as a whole, were not within the range of reasonable actions which a reasonable employer should have taken under the circumstances. The result is that the Employer has failed to discharge its evidentiary burden of proving that it acted reasonably when it dismissed the Employees. Given the conjoint operation of the provisions of sub-sections C58 (1) and C58 (2), our findings of fact in respect of reasonableness overarch our earlier findings that there was a genuine redundancy situation.

- 57. By reason of matters aforesaid, we declare that the Employees were unfairly dismissed and are entitled to compensation which we will assess below.**

Compensation

58. Our primary objective is to compensate the Employees for the financial loss they suffered as a consequence of their unfair dismissals. At the onset, it is important to note that in the exercise of our statutory powers, we are obliged to make fair and just awards, taking into account the interests of the parties as well as the national community as a whole. Moreover, we must act in accordance with equity and have regard to the principles and practices of good industrial relations, and the provisions of the Labour Code, in particular.
59. In summarizing the Employees' claims, Mr. Potter submitted that they should each be paid "salary for the period between her date of termination at her sixty-fifth birthday

which would have been her date of retirement.” That bald claim is not sustainable. On settled principles, we must take into consideration the following:

(a) The Duty to Mitigate:

Each of the Employees has a duty to mitigate her loss. Any unreasonable failure to attempt to find alternative employment may result in a reduction in the compensation they would otherwise be awarded.

(b) The Ex Gratia Payment:

The amount of ex gratia payment, being discretionary and not falling under any of the settled headings of compensation, will be deducted from a compensatory award under the appropriate heading.

(c) Imponderables and Vagaries

Our consideration of awards under Immediate Loss and Future Loss must take into account the several imponderables and the vagaries of life, the impact of which are inherently difficult to estimate or assess.

60. In the premises, we assess compensation as follows:

A. Payment in Lieu of Notice(Notice Pay)

- (i) The Labor Code provides that, unless the employment contract calls for a longer period, advance notice of termination by the employer need not exceed 30 days. Under Articles 28 of the Collective Agreement, “ An employee wishing to retire shall give a minimum of three months’ notice in writing”. Given the circumstances in this case, we are of the opinion that 5 and 6 months’ notice, respectively, of the impending redundancies would have been reasonable. Accordingly, we award the following sums to Employees as payments in lieu of notice:

Janis James:	\$ 23,670.00
Bernadine Henry-Hughes:	\$ 49,260.00

- (ii) These totals must be reduced by \$873.96 and \$ 1,515.88 paid to the Employees respectively for payment in lieu of notice for 4 days. As a result, **we award the net sums of \$22,796.04 and \$47,744.12 to the Employees under this heading.**

B. Loss of Protection (Basic Award)

Awards under this heading are the equivalent of severance pay to which employees are entitled in cases of redundancy. Clause 2 of Article 17 of the Collective Agreement provides for the calculation of severance pay for all employees at the rate of one month’s pay for each year of service. Thus, in accordance with the settled practice in this Court, the amounts to which the Employees are entitled are \$127,818.00 and \$ 336,610.00, being \$ 4,734 x 27 and \$ 8,210 x 41 respectively, for Janis James and Bernadine Henry-

Hughes. Since these amounts have already been paid to the Employees, **the net amounts payable under this heading are nil.**

C. Immediate Loss

(i) Subject to an employee's duty to mitigate, an award under this head is usually made to compensate for his financial loss for the period between the date of dismissal and the date of judgment. Since Mr. Potter advanced no claim under this particular heading and Dr. Cort omitted to address any of the heads of compensation, we are left to do the best we can, based on the available evidence and our knowledge of the job market. In the end, our assessment will not be as scrupulously accurate as they would be if the required additional evidence was elicited.

(ii) No evidence was elicited from the Employees in respect of their efforts to mitigate. Given the circumstances under which they were dismissed, and the claims made on their behalf, it is not surprising that no evidence was advanced about mitigation. In the circumstances, we will adopt a common-sense approach.

(iii) Ms. James testified that at the dates of her dismissal on May 31, 2018, she was 3 years and 8 months away from the retirement age of 65 years. Similarly, Mrs. Henry-Hughes testified that she was 4 years and 9 months from the same milestone. Accordingly, Ms. James attained age 65 in January 2022 and Mrs. Henry-Hughes will attain age 65 in February 2023.

(iv) Having come out of the tailspin of their dismissals, both Employees were most likely apprehensive, tentative and hesitant about seeking alternative employment. On the other hand, a typical employer in the ordinary course of things, would most likely be skeptical about hiring the Employees. In the circumstances, we would fix a period of one year as a reasonable time for them both to find a new job or be engaged in profitable self-employment. As a result, **we award them the equivalent of their full monthly salaries, in the respective sums of for one year (up to May 31, 2019) immediately after their dismissals.**

Janis James	(\$4,734 x12)	\$56,808.00
Bernadine Henry-Hughes	(\$8,210 x 12)	\$98,520.00

(v) Further, in our estimation, if the Employees made diligent efforts to find alternative employment or engage in start-ups of their own, by the second year after their dismissal, they should have been able to earn at least a fraction of what they earned in their previous employment. For present purposes, we fix the estimated net monthly earnings of each of the Employees at \$1,500.00 during the second year after their dismissal commencing June 2019.

(vi) In the circumstances, we award the equivalent of their previous monthly salary less \$1,500.00 for the 12 months ending May 2020 as follows:

Janis James: (\$4,734 - \$1,500) x 12	\$38,808.00
Bernadine Henry-Hughes (\$8,210 - \$1,500) x 12	\$80,520.00

(vii) In addition, assuming a reasonable amount of diligence, the Employees should have been in a position to increase their average monthly net earnings to \$2,000.00 during the third year and fourth years, commencing June 2020, after their dismissals.

(viii) in the case of Ms. James, we award the following additional amount under this heading for the period up to her 65th birthday. And in the case of Mrs. Hughes, we award an additional amount up to the date of judgment as follows:

Janis James (\$4,734 - \$2,000) x 20	\$ 54,680.00
Bernadine Henry-Hughes (\$8,210 - \$2,000) x 24	\$149,040.00

The total sum payable to Ms. James will be reduced by the amount of \$56,808.00 which she received as ex gratia payment

D. Future Loss

In our estimation, with further diligence, Mrs. Henry-Hughes' earnings will probably increase to \$2,500.00 in the ensuing 9 months up to her 65th birthday. On that basis, **we are inclined to award the sum of \$51,390.00 (\$8,210 – 2,500) x 9**. However, since it is an advance payment of an amount not yet accrued, it must be discounted. Taking into account the relative value of money over time, **we reduce that amount by 20% and award the additional sum of \$41,112.00 to Mrs. Henry-Hughes.**

E. Fringe Benefits

In addition to the foregoing, we make the following awards of fringe benefits:

Cooking Gas Concession:

(i) Under Article 12. 9 of the Collective Agreement, the Employees are entitled to 2 free 100lb cylinders of cooking gas per year. The current value of a cylinder is \$175.00. Accordingly, we award as follows:

Janis James (\$175 x 8)	\$1,400.00
Bernadine Henry-Hughes (\$175 x 10)	\$1,750.00

Long Service Award:

(ii) Under Article 12. 8 of the Collective Agreement, the Employees are entitled to Long Service Awards with cash components of US \$800.00 and US \$1,200.00. Accordingly. We award as follows:

Janis James (27 years)	\$2,160.00
Bernadine Henry-Hughes (41 years)	\$3,240.00

Thrift Fund:

(iii) Under Article 28. 1 of the Collective Agreement, the Employer had an obligation to contribute 7% of the wages of the Employees to the Thrift Fund. Accordingly, the Employees are entitled to the following amounts which should have been paid by the Employer if the Employees had continued in their employment up to their 65th birthday.

Janis James (\$4,734 x 44) 7%	\$14,580.72
Bernadine Henry-Hughes (\$8,210 x 57) 7%	\$32,757.90

Health Insurance Coverage:

(iv) The Employees are entitled to continued health insurance coverage up to their 68 birthdays pursuant to Article 68.(4) of the Collective Agreement.

F. Summary of Awards

(i) Janis James

Notice Pay	\$ 22,796.04
Immediate Loss	93,480.00
Fringe Benefits	<u>18,140.72</u>
	\$130,416.76

(ii) Bernadine Henry-Hughes

Notice Pay	\$ 47,744.12
Immediate Loss	328,080.00
Future Loss	41,112.00
Fringe Benefits	<u>37,749.90</u>
	\$454,686.02

Order

61. By reason of matters aforesaid, we order that:

- (1) The Employer shall pay to the First Employee, Janis James, the aggregate sum of \$130,416.76 no later than July 15, 2022, as compensation for her unfair dismissal.
- (2) The Employer shall reinstate and maintain health insurance coverage for Janis James until she attains the age of 68 years.
- (3) The Employer shall pay to the Second Employee, Bernadine Henry-Hughes, the aggregate sum of \$454,686.02 no later than July 15, 2022, as compensation for her unfair dismissal.
- (4) The Employer shall maintain health insurance coverage for Bernadine Henry-Hughes until she attains the age of 68 years.
- (5) There shall be no order as to costs

Dated this 10th day of June 2022



Charlesworth O. D. Brown
President



Samuel R. Aymer
Member

