

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO.C/ 27 of 2017

BETWEEN:

AYESHA CHARLES

Employee

and

ERICSSON AB ANTIGUA LIMITED

Employer

Before:

The Hon. Samantha May-Francis

Vice President

The Hon. Judith Dublin

Member

Appearances:

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

Mr. Michael Koeiman (via Skype) and Ms. Jenell Gibson of Dentons Delany, Attorneys-at-Law for the Employer

2022: November 9

2023: July 7

JUDGMENT

Unfair dismissal- whether a genuine redundancy existed- whether the Employer acted fairly in dismissing the Employee- Fixed Term Contract- whether Employer has the right to terminate fixed term contract of employment without cause- Whether the Employee is entitled to compensation.

May-Francis, VP.

1. The Employer is an external company duly registered in Antigua & Barbuda and was at all material times a global company and leading provider of Information and Communication Technology (ICT) to service providers, including Cable and Wireless (Antigua and Barbuda) Limited (Cable and Wireless).



2. At the time of her dismissal, the Employee had been engaged by the Employer for fourteen (14) months by a fixed-term contract of employment which commenced on January 18, 2014, with an end date of January 17, 2016. Based on the terms of the contract, the Employee worked a forty-hour work week and earned \$4,600.00 monthly. She held the position of Field Services 1 within the Field Services department in the Employer's Antigua Office. Her duties included dispatching engineers and technicians, providing technical mechanical, electronic and ground support and receiving and resolving customer complaints.
3. The Employee in this Reference filed on March 29, 2017, claims that she was unfairly dismissed on March 18, 2015. The dismissal letter, delivered via email, informed the Employee that the Employer was undergoing a transformation and that organizational changes were being undertaken. The relevant parts of the dismissal letter read:

" ...

Dear Ayesha,

Re: Notice of Termination of the Contract of Employment between Ericsson AB Antigua ("the Company") and Ayesha Browne

This letter serves to inform you that the Field Services Organization in the Caribbean is currently going through a transformation and as a result the requirement for Dispatch & Fault Management Support in Antigua will be reduced. Based on the organizational changes your position as Field Services 1 with Ericsson AB Antigua will be made redundant. Regrettably this means your employment with the Company will terminate. This decision is not a reflection on your performance.

You are entitled to severance payment under the Act. You are also entitled to and will receive your salary up to and including the termination date (less necessary statutory deductions) payment of outstanding vacation. These payments and other payments owed to you will be paid on or about April 25, 2015...."

The Employee's case

4. In her Memorandum of Claim filed on April 21, 2017, the Employee pleaded that *"having regard to the statutory definition of Antigua and Barbuda Labour Code, a redundancy situation did not exist at the time of the Employee's termination. The Employee was unfairly dismissed. Further, in any event, even if a redundancy had existed, the Employer failed to follow the known and acceptable redundancy procedure that is set and established by good industrial relations practice."* The reasons for her claim are as follows:

- (a) She received no prior warning, no consultation took place, nor was she aware of financial or economic difficulties that would cause the Employer to take such sudden action and make her position redundant.
- (b) The dismissal was communicated to her via email.
- (c) There was no redundancy situation based on the laws of Antigua and Barbuda.
- (d) If a redundancy situation existed, the Employer failed to follow the known and acceptable redundancy procedures set out and established by good industrial relation practices in Antigua and Barbuda, which was unfair.
- (e) She is entitled to compensation for unfair dismissal and unpaid gratuity.

The Employer's case

5. By its Memorandum of Defence filed March 25, 2022, and supported by the witness statement of Luisa Ramos dated April 8, 2022, the Employer maintained that the Employee's position became redundant. It also disputed the Employee's Claim on the following grounds:
- (a) As provided in the employment contract, the Employer was empowered to terminate the Employee's employment by giving the Employee one month's written notice.
 - (b) The position of Field Services 1, which the Employee held, had been reorganized, resulting in her work becoming redundant.
 - (c) That the Employee was paid severance, notice pay, salary up to the date of termination and payment in lieu of outstanding vacation days.
 - (d) The only other Employee previously engaged in that position was made redundant on March 18, 2015.
 - (e) The Antigua Field Office was closed, and as such, a genuine redundancy existed as the operations of the Company were rendered substantially diminished.
 - (f) The Employee is not entitled to compensation and gratuity.

The Main Issues

6. According to the dismissal letter, the Employee was paid severance, salary up to date of termination and notice pay. Nonetheless, the Employee contends that there existed no redundancy and, therefore, she was unfairly dismissed. Having regard to

her contention and her statutory right not to be unfairly dismissed, the two main issues arising from the dismissal are:

- (i) Whether a genuine redundancy situation existed on March 31, 2015, when the Employee was dismissed.
- (ii) Whether the Employer acted reasonably when it dismissed the Employee.

The Legal Framework

7. During their closing arguments, Learned Counsel for the Employer correctly stated that Sections C3 and C58 of the Antigua and Barbuda Labour set the legal framework for determining these issues. The Labour Code provides:

"C3. In this Division, unless the context otherwise requires

"redundancy" means 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; "

"C58 (1) 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."

"C 58 (2) The test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably but, even though he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee's dismissal."

8. Additionally, in Reference No. 66 of 2015 **Antigua and Barbuda Workers' Union v. Cable & Wireless (Antigua & Barbuda) Ltd**, this Court emphasized that the burden is that of the Employer to prove the existence of genuine redundancy.

Resolving the Issues

Whether a genuine redundancy existed

9. This Court's approach and the legal framework applied to resolving claims of unfair dismissal involving redundancy is well established by the Labour Code, judicial precedents and the Industrial Court Act. Accordingly, with the legal framework in mind and the burden resting on the Employer, we highlight and summarise the evidence of the Employer through its only witness Ms. Ramos:

- (i) The Employer provided twenty -four hours daily field support services to a major telecommunications company (Cable and Wireless).
- (ii) As a service provider, the Employer was required to assess the services it offered to its customer and to improve on these services.

- (iii) The assessment required the Employer to find ways to reduce its customer's costs and improve its operations.
 - (iv) This resulted in the reorganizing/transforming the Field Services Sector of its business in the Caribbean.
 - (v) The reorganization necessitated the merging of smaller territories with larger ones. As a result, there would be a reduction in the Dispatch and Fault Management Services in its Antigua Office.
 - (vi) The work performed by the Employee in the Antigua office was substantially reduced, thereby giving rise to redundancy.
10. From the evidence, it is clear the Employer did not dispute the fact that the functions and duties of the Employee continued to exist. The sum total of the Employer's evidence in this regard, as we understand it, is that it ceased the Field Services Technician 1 function of its business in its Antigua Office; therefore, the work performed by the Employee no longer existed.
 11. On behalf of the Employee, Mr. Carty contended that the job the Employee was engaged to do still exists up to the date of trial, albeit it was now being performed by other Employees who were trained and hired by the Employer in a different territory.
 12. Learned Counsel for the Employer relied on the **Antigua and Barbuda Workers' Union v Antigua Gases, Reference No. 20 of 1988**, and argued that a situation of redundancy can arise where the task or work still exists, but the employer requires fewer employees or where work is reorganised requiring fewer employees. The Employer's witness, Ms. Ramos, gave evidence that the Antigua office was merged with Jamaica. . She also presented evidence that the Employee in this reference was terminated along with another employee in Antigua who held the same position as the Employee. She went on to state that the Employer then trained other employees and hired three (3) employees in Jamaica to undertake the work performed by the Employee.
 13. Considering all the evidence, we find that a redundancy situation arose by the Employer's decision to merge its field services in Antigua with another territory, which would have resulted in a substantial reduction of the work performed by the Employee. Therefore, we accept the Employer's position that a genuine redundancy existed on March 31, 2015, when its Antigua Office was no longer carrying out the functions of Field Services 1.
 14. Despite our finding that a genuine redundancy existed, we have to examine whether the dismissal which ensued was fair. This approach has been well settled in the **Antigua Workers Union Case**. President H. S. R. Moe (as he then was) stated:

“Nonetheless the mere fact that a genuine redundancy does exist does not per se lead to the conclusion that the dismissal was fair; for the determining factor is whether the employer acted reasonably in handling the situation. When, therefore, redundancies are being considered it might be regarded as good industrial relations practice to follow the guidelines laid down in **Williams v Compair Maxim Ltd.** 1982 1.C.R.156. In particular, the employer should seek to establish selection criteria which can be objectively checked against such things, inter alia, as attendance records, job performance, length of service, needs of the business...”.

15. Additionally, in **Sundry Workers v Kings Casino** Court of Appeal in Civil Appeal No. 28 of 2001, Chief Justice Sir Dennis Byron (as he then was) stated:

“I think that the main point of relevance to this case is that it is pellucid that for a redundancy there must be cause and effect. The effect being that the work has ceased or substantially diminished....This brings me to point out, however, that the existence of a cause, such as a hurricane, does not mean that any dismissal subsequent to it is fair. The employer must have acted reasonably ...”

16. With that approach in mind, we will apply the reasonableness test under section C58(2) of the Code and the principles as outlined in the case of **Williams v Compair Maxam Ltd [1982] UK EAT 372**, which this Court has referred to in past judicial decisions relating to unfair dismissal involving redundancy. Having heard the evidence, we note the following undisputed facts in our examination of the Employer’s actions:

- (i) The Employer was undergoing a “transformation”.
- (ii) The Employer was aware for a while before the declaration of redundancy that the Employee’s job would have been affected but gave no notice of the contemplated redundancy.
- (iii) No consultations were held with the Employee, nor was the Employee given an opportunity to consider alternative employment.
- (iv) The Employer’s position is that it was within its right to dismiss the Employee as long as one month’s notice was given to the Employee.
- (v) Ms. Ramos confirmed that the Employee was notified of her dismissal by email.
- (vi) The job description related to Field Services Technician 1 and 2 is the same.

Consultation

17. The Employer admits that there was no consultation. However, Learned Counsel Mr. Koeiman submitted that the redundancy not being of a large scale and no Union involvement “*removes this case from the typical termination contemplated in Compair Maxam*”. Additionally, he submitted that a failure to consult with an Employee does not automatically render a dismissal unfair if it can be demonstrated

that the consultation would be futile. We note the evidence of the Employer, which the Employee accepted under cross-examination- that her primary job function was to receive incoming tickets/reports of faults in the system and then assign them to the individual who held the position of Field Technician 2. The Employer's evidence is that the only other Employee who performed the same function as the Employee was also made redundant.

18. We must emphatically express that we remain guided by the dictum of Lord Browne- Wilkinson in **Freud v Bental Case [1982] IRLR 443 EAT**, that **"consultation is one of the foundation stones of modern industrial relation practices. In the particular sphere of redundancy, good industrial relations practice in the ordinary case requires consultation with the redundant employee so that the employer may find out whether the needs of the business can be met in some other way than by dismissal and, if not, what other steps the employer can take to ameliorate the blow to the employee."**
19. Mr. Koeiman relied on the case of **Byron v Bank of Antigua Ltd and the Eastern Caribbean Amalgamated Bank AG 2012 IC**. The facts and circumstances in the **Byron** case are distinct. The Bank of Antigua, which employed Mr. Byron was under threat of insolvency and closure as a result of the demand by depositors on the Bank due to the arrest of its owner Mr. Allen Stanford. The entire situation played out in public and required immediate intervention from the Eastern Caribbean Central Bank and the Government of Antigua and Barbuda to prevent a run on the bank. The end result was that there was an amalgamation- the Bank of Antigua was going to be closed, and Mr. Byron would lose his job. Consequently, after the amalgamation, there was no room in the Eastern Caribbean Amalgamated Bank for Mr. Byron's admittedly limited function. Having examined the facts and circumstances, President Pilgrim (as he then was) held that a failure to consult did not render the dismissal unfair.
20. However, we must emphasize that depending on the facts of each case, a failure to consult may render a dismissal unfair. For example, the Employer in this Reference argues that there was no need for the consultation, it would have been futile, and there was no other position the Employee could hold. However, in examining the evidence and hearing the oral testimony of Ms. Ramos, it was clear to us that the Employer did not consider the 'blow' that the redundancy could have on the Employee. A blow which perhaps would have been less impactful had there been consultations.
21. We considered the evidence of the Employee to include her work history- the fact that she had taken up employment with the Employer when her former Employer (Cable & Wireless) reorganized to outsource the duties she performed to this Employer; the fact that her job function though it continued to exist would now be

performed in another territory; how her dismissal was communicated and the Employee's evidence that the responsibilities and duties of the Field Services 1 and 2 Technicians were the same.

22. Consultation is fundamental irrespective of the extent of the redundancy and whether a Bargaining Unit exists. It remains an essential prerequisite to any declaration of redundancy and its subsequent implementation. Additionally, transformation and restructuring do not come abruptly; but require planning. Therefore, having considered the facts and circumstances of this case, we find that the Employer's failure to conduct consultation was based on the inaccurate premise that it could simply dismiss the Employee with notice.

Notice of Redundancy

23. The evidence discloses that the Employee received the notice of redundancy on March 18, 2015. Having communicated the effective date of dismissal as March 31, 2015, the Employer did not provide the Employee with adequate notice or warning of the redundancy.

Selection Criteria and Other Job Opportunity Employee

24. We have merged these two heads to avoid being repetitive. The Employer's evidence is that the reasonableness of the selection criteria does not arise, as the other Employee in Antigua who held the position of Field Services 1 was also dismissed due to redundancy. The Employee's evidence differs in that she states that there were three (3) Employees in her department, all of whom carried out the same duties. Her evidence is that she provided technical mechanical, electronic and ground support and received and resolved customer complaints.
25. She gave evidence that, at times, she engaged in ground services though she accepts that she mainly passed the tickets to the person referred to as the Field Officer 2. Her evidence is that she was competent and capable of performing the same functions as the Field Technician 2. This was not disputed by the Employer.
26. Through its cross-examination, the Employer attempted to create a distinction between the duties of the Field Officers 1 and 2. However, the Employer failed to convince us that the duties and responsibilities were different and having regard to the documentary evidence, we prefer the evidence of the Employee. Regarding the job description exhibited by the Employer, we note that it effectively shows that the function of the Field Services Technician (1 and 2) are the same. In that regard, the Employer has not provided sufficient evidence of its criteria for selection or any evidence to help us determine that no alternative opportunity was available to the Employee.

27. It would be remiss not to address the Employer's general approach to the redundancy. It is clear from the evidence and by the Employer's admission that the decision and process of the reorganization were influenced primarily to meet its customer's objective of reducing its costs and improving operations. On the whole, it appears little regard was given to the affected Employees, and neither did the Employer give any consideration to the established approach and processes in this jurisdiction relating to redundancy. The result is its actions are unreasonable. Therefore, we conclude that the Employee has been unfairly dismissed and is entitled to compensation.

Compensation

28. We considered the following heads of compensation:

Notice Pay

- (a) The Employee received notice of her dismissal on March 18, 2015, and her dismissal took effect on March 31, 2023. The Employer submitted that the Employee was paid in lieu of notice per the employment contract. However, the Employer provided no evidence to substantiate this. At the very least, the Employee should have received notice of her dismissal on February 28, 2015. As such, the Employee is entitled to **\$2,300.00** ($\$4,600.00 / 2$) for notice pay.

Loss of Protection

- (b) An employee who is paid monthly and deemed unfairly dismissed is entitled to loss of protection at the established rate of one month's pay for each year worked. This is equivalent to severance payment. At the very least, the Employee's employment was protected for two years per the employment contract. We wish to highlight that although the contract of employment provided for termination at will with one month's notice, this term falls below the Labour Code standard. The Employee is entitled to **\$9,200.00** ($\$4,600.00 \times 2$).

Loss of Earning

- (c) The Employee's evidence is that she immediately sought work and commenced her own poultry farm business after failing to find a job. After starting her business, it took another six (6) months before she realized any income. This means the Employee was out of income for approximately one year. We assess that the Employee was diligent in finding work and mitigating her circumstances. Therefore, we award the Employee the remaining ten (10) months' wages under the fixed-term contract from April 1, 2015, to January 17, 2016, in the sum of **\$46,000.00** ($\$4600.00 \times 10$ months).

Vacation Pay

- (d) The Employee gave evidence that she was paid in lieu of her vacation for 2014-2015. Her claim for vacation is for the period April 1- January 2016. Having

awarded the Employee her salary per the fixed-term contract, we make no award under this head.

Gratuity

- (e) The contract provided a gratuity of up to 5% of the total basic pay earned during the respective year, less applicable taxes. The contract provides that an Employee is eligible for payment of gratuity if the Company determines that the Employee has satisfactorily performed under the terms of the agreement. We are mindful that the Employee had not been paid gratuity for 2014-2015 and had not raised any concern at the time of her employment. However, in the dismissal letter, the Employer makes it clear that dismissal is not a result of the Employee's performance. Therefore, we award the Employee gratuity for 2015-2016 in the sum of **\$2,760.00** (12 months x 4600 x 5%).

Exemplary Damages

- (f) Section 10 (5) of the Industrial Court Act provides that the Court may award exemplary damages in circumstances where an **"employee has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relation practices"**.

This dismissal was harsh, oppressive, and contrary to good industrial relations practices. Furthermore, the Employer showed no regard to the Employee's statutory rights, the provisions of the Labour Code, established industrial relation processes and even the contract of employment on which it relied.

For these reasons, we award **\$15,000.00** under this head.

Order

29. The Employer shall pay \$75,260.00 to the Employee for her unfair dismissal.

- (i) The sum of \$75,260.00 will be paid by August 15, 2023.
(ii) No order as to costs.

Dated this ^{4th} 07 day of July 2023


Samantha May- Francis
Vice President


Judith Dublin
Member

