

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO.C/ 85 of 2017

BETWEEN:

AVALON WILLIAMS

Employee

and

CURTAIN BLUFF RESORT

Employer

Before:

The Hon. Samantha May-Francis

Vice President

The Hon. Hesketh A. Williams

Member

The Hon. Collin R. Maynard

Member

Appearances:

Mr. Leon Chaku Symister, Attorney-at-Law for the Employee

Mr. Loy L.E. Weste and Mrs. Lisa John-Weste of Thomas, John & Weste, Attorneys-at-Law for the Employer

2022: November 15

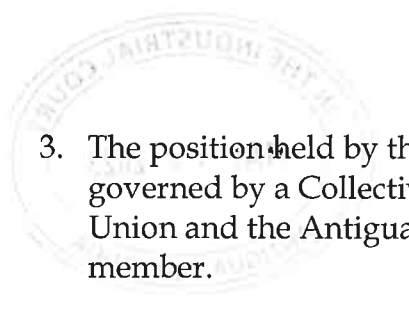
2023: May 12

May-Francis, VP.

Background

1. The Employer is a luxury beach resort duly registered in Antigua & Barbuda. It is engaged in the hotel business providing accommodation, amenities and hospitality services to its guests on its premises situated on the southern coast of Antigua in the village of Old Road in the Parish of Saint Mary.
2. The Employee commenced his employment in October 1988 as a Watersport Attendant. He was later promoted to Dive Master. In 2012 he was transferred to the Food and Beverage Department. He last held the position of Runner. At the date of his dismissal on October 22, 2015, the Employee had 27 years of unbroken service.



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3. The position held by the Employee fell within the Bargaining Unit, which was governed by a Collective Agreement between the Antigua & Barbuda Workers Union and the Antigua Hotels & Tourist Association, of which the Employer is a member.
 4. The Employee in this Reference filed on October 23, 2017, claimed that he was unfairly dismissed on October 22, 2015. Based on the contents of the dismissal letter, the Employer, having reviewed its operations, declared the Employee's position redundant.

The Employee's Case

5. In his Memorandum of Claim filed on October 23, 2017, the Employee contended and premised his claim for unfair dismissal on the following contentions:
 - (a) He never held the position of Driver. Instead, at the time of his dismissal, he held the position of Runner.
 - (b) The duties he used to perform as a Runner continue to be performed by persons with less tenure than him.
 - (c) There was no redundancy based on the laws of Antigua and Barbuda.
 - (d) Further and alternatively, if a redundancy situation existed, the Employer failed to consider him for alternative employment.

The Employer's Case

6. By its Memorandum of Defence filed on November 27, 2017, the Employer disputed the Employee's claim on the following grounds:
 - (a) The job titles of Driver and Runner are one and the same and were used interchangeably.
 - (b) The Employee no longer wished to work in the Food and Beverage Department for health reasons, he could not go back to perform his duties in the Water Sports Department, and there were no other available vacancies.
 - (c) It had economic challenges, which were brought to the attention of the Bargaining Agent who represented the Employee.
 - (d) By letter dated October 12, 2015, the Employer informed the Bargaining Agent of its intention to retrench and its contemplated action regarding the Employee.
 - (e) The Bargaining Agent did not advise the Employer of any issues or objections to its contemplated action regarding the Employee.
 - (f) After reviewing its operations and due to economic challenges, the Employee's position was made redundant.
 - (g) The Employee received all his entitlements, including redundancy pay.
 - (h) A genuine redundancy existed in accordance with the Antigua and Barbuda Labour Code and the Collective Bargaining Agreement.

The Main Issues

7. According to the dismissal letter, the Employee received redundancy pay of \$54,412.00. Nonetheless, the Employee contended that no redundancy existed. His claim is that he was unfairly dismissed. Having regard to his contention and his statutory right not to be unfairly dismissed, the two main issues arising from the dismissal are:
- (i) Whether a genuine redundancy situation existed on October 22, 2015, when the Employee was dismissed.
 - (ii) Whether the Employer acted reasonably when it dismissed the Employee.

The Legal Framework

8. The burden is that of the Employer to prove the existence of genuine redundancy. During their closing arguments, Learned Counsel correctly stated that Sections C3 and C58 of the Antigua and Barbuda Labour Code ('the Labour Code') sets the legal framework for determining these issues.

9. Redundancy is defined in Section C 3 of the Labour Code 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;"

10. Section C56 establishes an employee's statutory right not to be unfairly dismissed in the following terms:

"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."

11. As to what constitutes a just cause for dismissal, 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;

...

(e) is some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held:

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

12. Notwithstanding the existence of good cause, the determination of what constitutes an unfair dismissal requires the application of the test of reasonableness as provided under Section C 58 (2) 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 defense, 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."

13. The burden to prove that the existence of a redundancy rests upon the Employer as has been emphasised by this Court in its Judgment in Reference No. 66 of 2015 **Antigua and Barbuda Workers' Union v. Cable & Wireless (Antigua & Barbuda) Ltd** at paragraph 31:

"Having made the assertion and declared its right to dismiss the selected employees, the onus is on the Employer firstly to establish that a redundancy situation existed. In order to discharge this burden, the Employer must prove the factual basis as required under Section C 58 (1) of the Labour Code."

The Evidence

14. The Employee testified on his own behalf. His testimony mirrored the facts stated in his Memorandum. In particular, the Employee's testimony emphasised that the Employer failed to substantiate that a redundancy situation existed, as a result of which he was unfairly dismissed.
15. During cross-examination, the Employee conceded that his position included driving the Employer's vehicle on the property. However, he maintained that as of October 20, 2015, the work he was required to perform had not ceased or substantially decreased. Additionally, he contended that alternative employment could have been offered to him as he carried out duties in the dining room area, particularly waiter services and delivering food to guests.
16. In her testimony on behalf of the Employer, Ms. Anique Goodwin, the Human Resource Manager, gave testimony that the Employee wished to be transferred as he no longer wanted to drive; he could not return to perform his duties in the Water Sports Department for health reasons; he did not possess the skillsets to be work in the dining room area; and ultimately there were no other possible vacancies. Her evidence was that the Employer always acted reasonably towards this Employee

and had even created a position for him when he was transferred to the Food and Beverage Department in 2012. On the whole, she refuted the Employee's testimony regarding the additional duties he performed outside his duties as a Runner. She denied that he provided guest services since he was not attired in the appropriate uniform to do so.

17. Mr. Trevor Crump, the Food and Beverage Manager, also gave testimony on behalf of the Employer. His testimony supported the testimony of Ms. Goodwin in that he stated that apart from driving, the Employee had very little work to do and would do minor things around the kitchen to keep himself occupied. However, unlike Ms. Goodwin, who suggested the positions of Runner and Driver were the same. Mr. Crump's evidence was that he did not consider the Employee a Runner as this function is part of the waitering staff job description. The sum total of his evidence was that the Employee was a Driver, the Employee did not perform the duties of a Runner, and in any event, he did not have the training and skillsets to do so.
18. Having examined the Employer's case and based on the closing submission of Learned Counsel Mr. Weste, the Employer's contention, as we understand it is, having reviewed its operations to reduce labour costs, a reorganisation resulted which caused the work performed or to be performed by the Employee substantially reduced, thereby affecting the position held by the Employee. Accordingly, Learned Counsel Mr. Weste argued that this circumstance falls within Section C58, which states that a dismissal due to redundancy is not unfair and therefore, the Employee was fairly dismissed.

Resolving the Issues

Issue 1- Redundancy

19. Ms. Goodwin, during cross-examination, gave evidence that the job titles Runner/Driver are the same. However, under further cross-examination, she conceded that the title Runner/Driver was created after the Employee had been dismissed. Therefore, having heard the testimony of the witnesses and the documentary evidence particularly the Employee's job description, we are satisfied that before the Employee's dismissal, his job title was "Runner". He was required as part of his duties to drive to deliver supplies on the Employer's property.
20. Accordingly, we continue our analysis on the premise that the Employee was employed as Runner. Based on the Labour Code, for a genuine redundancy to exist, it must have both a cause and an effect component. The effect that must be proven is either that there existed (a) a cessation, or (b) a substantial diminution of the work which the Employee was last employed to perform, or (c) a genuine requirement for fewer workers in the organisation to perform the required work.

21. Although, Reference No 20 of 1988: **Antigua & Barbuda Workers' Union v. Antigua Gases** predates the amendment of the definition of "redundancy" under the Labour Code, we consider relevant President H. S. R. Moe's (as he then was) statement that, **"What this definition seems to contemplate therefore is that redundancy may occur as a result of retrenchment which itself is ordinarily defined as removing what is superfluous, or reducing the amount, or economizing. Thus the situation can arise where the task or work still exists but the employer requires fewer employees ...Redundancies may also arise because the work has been re-organised thus requiring fewer employees to do the same work...Thus a re-organisation which results in a reduced workforce is a redundancy...."**
22. We accept that from time to time, employers will review their operations to reduce their operating costs and that a situation can arise where the duties of an employee, although still existing, may require fewer persons to carry out the duties. This was, in effect, what Learned Counsel Mr. Weste contended on behalf of the Employer. Additionally, Mrs. Goodwin in her evidence stated that the Runner position was practically created for the Employee to keep him employed after he faced his health challenges some years prior and could no longer continue to work in the Water Sports Department.
23. Although we accept the Employer's contention that a genuine redundancy could exist with an employee's duties continuing to exist, we are challenged by the lack of evidence supporting that contention. The Employer presented no evidence of its economic challenges and financial state as the cause for the retrenchment. Notably, even in the correspondence of October 22, 2015, from the Employer to the Bargaining Agent, the Employer did not provide any details of its challenges save to say that it desired to increase efficiency and reduce labour costs. There was no evidence of the Employer's financial circumstances, particularly that it was overstaffed relative to its other expenditures. Apart from the Employer stating that it desired to reduce its labour costs, it provided no evidence of the extent of its overstaffing issues, which necessitated the dismissal of the Employee based on the existing circumstances at the time.
24. Having considered the facts of this case coupled with lack of supporting evidence, we are not convinced that a genuine redundancy situation existed. In other words, the duties of Runner did not cease, nor were they substantially diminished. Instead, by its admission, the Employer redistributed the Employee's duties amongst the other staff members within the Food and Beverage Department. Consequently, the Employer has failed to discharge its evidentiary burden. Accordingly, we reject the Employer's submission that there was genuine redundancy.

25. For completeness, notwithstanding our conclusion that there was no genuine redundancy, we will apply the test of reasonableness under section C 58 (2) of the Labour Code.

Issue 2-Reasonableness

26. The Employer's evidence was that it wrote to the Bargaining Agent on October 12, 2015, advising of its contemplated action. Ms. Goodwin's evidence was that she spoke with the Bargaining Agent, who said, "It was fine". Accordingly, it was on that basis the Employer proceeded to make the Employee's position redundant.
27. The Employee's evidence was that he had no inclination that the Employer was experiencing financial challenges, nor was he consulted with or considered for alternative employment. He did not receive any notice of the Employer's declaration of redundancy before being dismissed.
28. We are reminded of the test of reasonableness under Section C 58(2) of the Labour Code and referred to the case of **Osbert Frederick v Liat (1974) Ltd Reference 52 of 2013** where this Court having regard to several principles in particular, the requirements for a warning; consultation; selection criteria; and alternative employment examined the reasonableness of the Employee's actions and omissions.
29. We therefore considered the letter of October 12, 2015, issued to the Bargaining Agent concerning the declared redundancy, amongst other things, to determine whether the Employer actions were reasonable. Based on the contents of the letter, we note the following:
- (i) The Employer did not provide the Bargaining Agent with sufficient details or particulars of the financial and economic challenges it faced;
 - (ii) The Employer did not provide the Bargaining Agent with any details of its overall proposal setting out the criteria for retrenchment and or the extent of the retrenchment;
 - (iii) The Employer provided no notice to the Bargaining Agent of when retrenchment would take effect; and
 - (iv) The Employer gave the Bargaining Agent four (4) days to revert with any comments regarding its intended action.
30. Additionally, we note that the Employer produced no evidence to support its contention that it had received the position of the Bargaining Agent concerning the Employer's intended course of action. Given the short time frame that the Employer asked the Bargaining Agent to revert to it and the step which was taken a mere few days after to dismiss the Employee, the evidence is tenuous as to whether the Bargaining Agent had the opportunity to duly consider the Employer's position and to adequately consult with the Employee. In the final analysis, we accept the

Employee's evidence that there was no consultation with him and that he received no prior warning from the Employer or Bargaining Agent that his employment had been made redundant.

31. Furthermore, the Employee's evidence was that there was no fair selection process. He gave evidence that he had requested to be transferred to the Grounds Department on several occasions as there was an opening but received no response from the Employer. The Employer's witness, Ms. Goodwin, refuted this evidence. She stated there was no vacancy within the Grounds Department, and the Employee's requests for a transfer were specific to the Grounds Department. In any event, she said, based on the Employee's skillsets, he could hold no other position. Ms. Goodwin accepted that there were employees who were retained with less tenure than the Employee. However, her evidence was that it was necessary to retain those persons, based on their skillsets and the needs of the Employer.
32. Learned Counsel Mr. Weste urged us to consider that the Employer in 2012 could have dismissed the Employee in accordance with Section C16 of the Labour Code, which provides that an employee may be medically boarded and paid severance if no longer able to perform his duties. Learned Counsel submitted that in 2012, the Employee who was hired to work in Water Sports Department could no longer perform his duties for medical reasons. The Employer, although seized with the power to determine that the Employee was unfit to continue, did not do so. Instead, it created a position for the Employee.
33. We commend the Employer for its actions back in 2012. However, since 2012, the Employee had been engaged on different terms and continued to be employed until October 2015 without complaints of poor or unsatisfactory performance. In any event, the circumstances in 2012 are not particularly relevant to determine whether the position of Runner was genuinely redundant and whether the Employer's decision was reasonable. Based on the totality of the Employer's evidence, little or insufficient evidence emerged to support its contentions regarding the fairness of its selection process and the consideration given to the Employee for alternative employment.
34. We are 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"**.

35. The Employee was dismissed without any consultation or warning. We, therefore, find that the Employer acted unreasonably.

Compensation

36. We have already determined that the dismissal was unfair. Therefore, the issue remaining for consideration by this Court is the amount of compensation to be paid to the Employee.

37. The dismissal letter indicates that the Employee received the sum of \$54,412.00 for redundancy pay in accordance with the Memorandum of Agreement, which was in force at the time. However, we did not have the benefit of evidence related to the Employee's wages and hours of work.

38. Nonetheless, we will endeavour to determine the compensation to be paid to the Employee. Notably, for the purpose of the assessment, having carefully considered the sums already paid by the Employer to the Employee, any award we may now make will be subject to the payments already made by the Employer and received by the Employee.

39. Accordingly, we considered the following established heads:

(a) Loss of Protection

The uncontested evidence of the Employer is that the Memorandum of Agreement between the Employer and the Bargaining Agent sets out the rate of redundancy pay. The Employee worked from October 1988 to October 22, 2015, i.e. approximately twenty (27) years. According to the dismissal letter, the amount paid to the employee represented 12 days of basic pay for each year of service from 1 to 4 years, 15 days for each year of service from 5 to 8 years and 20 days of basic pay for each year of service from 9 years upwards.

Likewise, the uncontested evidence of the Employer was that the \$54,412.00 paid to the Employee was for severance/redundancy pay.

The calculation for Severance and Loss of Protection is similar. Therefore, having accepted that the payment of \$54,412.00 was for severance pay and assuming that the Employee worked a five-day work-week, we calculate the number of days he is entitled to be paid loss of protection as 488 days broken down as follows:

Years 1-4	12 days x 4 years = 48 days
Years 5-8	15 days x 4 years = 60 days
Year 9 upwards	20 days x 19 years = 380 days

We fix the Employee's daily rate at \$111.50 (\$54,412.00 / 488). **Accordingly, we award the sum of \$54,412.00 (\$111.50 daily rate x 488 days) as and for loss of protection.**

(b) Notice Pay

The Employee is entitled to notice pay equivalent to his periodic pay. The uncontested evidence of the Employer is that the Employee is entitled to 1 week's notice pay, and which sums were paid through direct deposit to his bank account. Accordingly, we make no award under this head.

(c) Immediate Loss

The Employee's evidence is that he took a break for six (6) months after his dismissal. Thereafter he made several attempts to find employment. He however could not recall where he applied for work. He testified that he was 'mentally' disturbed due to the dismissal. Having gotten over the shock and disturbance of the dismissal, he started a catering business cooking from his home.

Additionally, considering his long tenure with the Employer and the family-like atmosphere the Employee said existed in the workplace, it is reasonable to conclude that the dismissal may have had some emotional or possible psychological effect on the Employee, which accounted for the delay in immediately seeking other employment to mitigate his loss.

In any event, and of greater significance for assessment under this head, the fact that the Employee was dismissed just 2 days before the start of the new hotel season. Further, having been employed for the past 27 years, the Employee worked within the hotel industry and with his 'limited skillsets' as advanced by the Employer, it was reasonable that the Employee's preference would be to continue in a sector in which he was experienced. Notably, in those circumstances seeking employment 2 days before the start of the new season would present its challenges and would be difficult, to say the least. Accordingly, on the whole, we accept the evidence of the Employee that he suffered immediate loss as a result of the dismissal. **Accordingly, we award the sum of \$9,663.33 (\$2,415.83 monthly rate x 4 months).**

(d) Manner of Dismissal

The Employee's evidence did not meet the standards and fundamental principles to justify us making an award under this head; particularly, there is no evidence to suggest that the Employer did anything to cause the Employee's reputation to be

damaged, thereby affecting his prospects of securing employment. We, therefore, make no award under this head.

(e) Exemplary Damages

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 relations practice”.

Re-organisation to the extent that a redundancy results, as advanced by the Employer in our view, do not usually happen overnight. It usually requires much discussion and planning. Moreover, in a unionised environment, there must be evidence of consultation with the Bargaining Agent and or the Employee and evidence of compliance with agreed provisions regarding the redundancy process and evidence that it was followed.

Considering the facts, we found that the Employer was hasty in its action, which accounted for the lack of consultations with the Employee and, in our opinion, insufficient time allotted for response and necessary consultation with the Bargaining Agent. Having regard to the evidence it was not sufficient just to inform the Bargaining Agent. There must have been concerted effort to engage in meaningful consultation.

Therefore, after careful consideration of all the facts and evidence, we find that in certain essential aspects and having regard to Mrs. Goodwin’s admission that the dismissal appears to be less than compassionate, the evidence supports us finding that the Employee’s dismissal was harsh and oppressive. **We, therefore, award exemplary damages of \$10,000.00.**

(f) Costs

Section 10(2) of the Industrial Court Act provides for costs to be awarded only where exceptional reasons exist. For the same reasons previously stated, we consider it proper to award costs; **therefore, we award the sum of \$1,500.00.**

Award

40. The Employee is entitled to compensation of **\$75,575.33** broken down as follows:

Loss of Protection	\$ 54,412.00
Immediate loss	\$ 9,663.33
Exemplary damages	\$ 10,000.00
Costs	\$ 1,500.00

Order

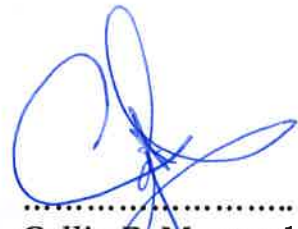
41. We order that:

- (1) The Employee is entitled to overall compensation of **\$75,575.33**, which shall be offset against the sum of \$54,412.00 previously paid by the Employer, leaving a net sum of \$21,163.33 due and owing to the Employee.
- (2) Accordingly, the Employer shall pay the sum of **\$21,163.33** on or before June 15, 2023.

Dated this 12th day of May, 2023


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Samantha May-Francis
Vice-President


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Hesketh A. William
Member


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Collin R. Maynard
Member

