

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 11 of 2023

BETWEEN:

SUNDRY WORKERS

Employee

And

BELMONT CLINIC LTD.

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Hesketh A. Williams

Member

The Hon. Dalmer McCoy

Member

Appearances:

Mr. Samuel James and Mr. Simon Leonard of the Antigua and Barbuda Free Trade Union,  
Representative for the Employee

Mr. Cosbert Cumberbatch of Cumberbatch & Associates, Attorneys-at-Law for the  
Employer

2024: May 08, June 28

*Retirement - Compulsory retirement of 61-year old employees - Employer giving notice of retirement over one year in advance of retirement date - Employee disputing existence and knowledge of retirement policy - Whether letter giving notice adequate to meet employees' entitlement to reasonable notice - Requirement for prior existence and knowledge of policy - Whether dismissal unfair.*

.....  
**JUDGMENT**

**Brown, P**

Overview

1. The Employees herein, Bridget Browne and Janis Sonia Dublin, jointly referred to above as Sundry Workers, commenced their employment with the Employer as Cleaners at its clinic on February 10, 2010 and July 10, 2010, respectively. They worked 6 days per week and were paid wages of \$1,000.00 and \$1,200.00 per fortnight.
2. By letters dated August 26, 2020 and July 15, 2020, when they were both 61 years old, the Employer wrote to the Employees in the following identical terms:



***"Re: Retirement Letter***

***You are now 60+ years and Belmont Clinic wishes to notify you of your retirement. The company is obliged to relieve you of your working tenure, effective July 31, 2021, which will be your last day with the Company.***

***The Company fully acknowledges your services and maintains that you have been a dedicated staff of the organization. Your years of service have been an asset.***

***The organization wishes you all the happiness in your future endeavor.***

***..."***

3. On the one hand, the Employees disputed the termination of their services and contend that they were unfairly dismissed. The reasons for their contention include the following:
  - 1) They were dismissed on the basis of retirement which does not constitute a fair cause for dismissal.
  - 2) They received no advance notice of the Employer's Retirement Policy requiring them to retire at any particular age.
  - 3) They were not aware that they became liable to be compulsorily retired upon attaining the age of 60 years.
  - 4) They were dismissed without receiving any severance pay or other payment in recognition of the "equity" which they had earned during their tenure.
4. On the other hand, the Employer contends that Employees' claims should be dismissed on the following grounds:
  - 1) The Employer's Retirement Policy was introduced and shared with them "as early as 2008-2009".
  - 2) The Policy "spoke to the Employer's option to retire employees ... at the age of 60 years... consistent with the Social Security retirement age at the time".
  - 3) On May 16, 2020, at least 3 months before giving them notice, the Employer updated, circulated and posted the Retirement Policy.
  - 4) The Employee's received more than one year's notice of retirement which notice period is consistent with case law.
  - 5) The claims are frivolous and vexatious.

**The Evidence**

5. Upon careful consideration of the witness statements - one made by each of the Employees and one by Dr. Eumel Samuel, the Employer's Chief Executive

Officer - and the oral testimonies of Ms. Browne and Dr. Samuel, we have distilled pertinent findings of fact as stated below.

6. Prior to receipt of their retirement letters in July and August 2020, the Employees were not aware of the existence of a Retirement Policy as they had received no written or other communication in respect of such a policy at the commencement of their employment or subsequently. In particular, such a policy was not brought to their attention during staff meetings or posted anywhere at the work place.
7. The Employees did not receive and were not aware of the Employer's "memo" dated May 15, 2020, entitled "Company Policies" in which the Employer referred to its operation of a "flexible retirement policy and procedure after the age of 60 years"
8. Having already attained the age of 61 years and continuing in their employment without interruption or interference by the Employer, the Employees were not aware that they were liable to be retired at the age of 60 years. Moreover, it was reasonable for them to conclude that they would continue indefinitely in their employment, provided they remained fit, unless and until they subsequently retired by mutual agreement or were notified of the Employer's formulation and implementation of a retirement policy requiring them to retire by a certain date.
9. In the absence of the Second Employee on account of her certified medical condition, the Court permitted the First Employee to testify on her own behalf as well as on behalf of the Second Employee. Accordingly, the witness statement of the latter was admitted into evidence notwithstanding her absence. We found Ms. Browne to be a credible and trustworthy witness. As to their tenure as employees, as acknowledged by the Employer, they were both "dedicated" staff members who were assets to the Employer.
10. As only Dr. Samuel testified on its behalf, the Employer was left with a crucial and unsurmountable challenge in that it was in no position to prove the existence of the Retirement Policy, its terms and, most importantly, the date and the process by which it had been brought home to the Employees. Although Dr. Samuel appeared to be an earnest witness with underlying good intentions, his evidence alone was not sufficient to meet the required standard of proof.
11. In the premises, we are constrained to conclude that at the material time the Employer had no Retirement Policy or Retirement Age Policy. And, even if it did, the same was never communicated to the Employees. Accordingly, we are inclined to conclude that the Employees were unfairly dismissed. However,

before stating our final conclusion, we will briefly consider the nature and effect of the letters received by the Employees.

12. At their extreme best, the "Retirement Letters" could potentially be treated as statements of the Employer's retirement policy. However, good industrial relations practices would dictate that any such statement would meet the ubiquitous requirement for reasonableness and include some essential criteria, including the following:
  - i. The terms of the policy should be clear, objective and unequivocal.
  - ii. The policy should allow for a certain or ascertainable retirement age without any degree of doubt or subjectivity.
13. The retirement letters, as quoted above, are bad for several reasons. Firstly, the Employer states to each of the Employees that she was then "60+ years". There is nothing to signify that the Employer had at some previous date determined that the retirement age was 60 years. Further, by that approach, there would be nothing to stop the Employer from writing in similar terms to an employee who was 65+, 70+ or some other random age over 60 years, to belatedly notify her of her retirement.
14. Secondly, there is no direct correlation between the Employees' 60<sup>th</sup> birthday and their respective "last day" of work. Clearly, there is no stated link between the individual date of birth or the 60<sup>th</sup> birthday and the last day of work. Fixing the last days of work as July 31, 2021 and August 31, 2021 leaves it open to speculation as to the respective dates of their 60<sup>th</sup> birthdays.
15. Thirdly, Dr. Samuel's testimony suggest that under the Employer's touted "flexible retirement age policy", the individual retirement age would turn to a greater or lesser extent on the Employees' genetic or inherent physical and mental attributes in addition to the many vagaries of their individual lives.
16. At the end of the day, despite the Employer's good intentions, the implementation of the "flexible retirement age policy" as explained by Dr. Samuel, would be susceptible to much uncertainty and doubt. In any event, it could not be implemented in a linear manner and would ultimately result in inconsistent treatment among some employees. Moreover, such a policy would be susceptible to abuse by the Employer.
17. For the foregoing reasons - apart from not been previously known to the Employees - we would conclude that a flexible retirement policy, like that proposed by the Employer, would prove to be void or voidable because of its uncertainty, ambiguity and subjectivity.

### The Authorities

18. The fountainhead for recent deliberations in this Court in respect of the enforcement of an employer's retirement age policy is the line of cases starting with **Ref. No. 3 of 1999, St. Lawrence DeFreitas v E. Alex Benjamin Limited**. It may be useful to highlight the following aspects of the judgement in that case. The employer introduced a mandatory retirement age of 60 years when the employee was between two or three months away from that milestone. In enforcing the policy, the employer made an ex gratia payment to the employee.
19. The employee commenced proceedings claiming that he was unfairly dismissed. Ultimately, the court held that the dismissal was unfair and ordered the payment of compensation less the gratuitous payment.
20. Being dissatisfied with the judgment of this Court the employer appealed by way of **Civil Appeal No. 2 of 2002 E. Alex Benjamin Limited v St. Lawrence DeFreitas**. The Court of Appeal bemoaned the approach of this Court in its treatment of the case as one of unfair dismissal. Instead, it determined that the central issue was really the adequacy of the period of notice. In the end, the Court of Appeal quashed the decision of this Court and substituted its findings that the employee had been retired but was entitled to receive reasonable notice, which it fixed at 12 months. It ordered the employer to pay the equivalent of 12 months' salary pay in lieu of notice, less the ex gratia payment it made earlier.
21. After that Court of Appeal decision, this Court dutifully followed its approach therein. That approach, as interpreted and adopted, led to a dichotomy of results in retirement cases as evident in **Ref. No. 5 of 2010 Theresa Gregory v St. John's Cooperative Credit Union** vis-à-vis **Ref. No. C/ 33 of 2020 Evelyn Aaron v AGA Distributors Limited**.
22. In the **Gregory case**, like the **DeFreitas case**, there was no dispute as to the employer's establishment of a mandatory retirement age of 60 years. The inevitable question arising was narrow. In reliance on that policy and the ascertained or ascertainable retirement date, the issues were reduced to one: to what period of reasonable notice of compulsory retirement was the employee entitled? Based on the clear facts of that case, this Court determined that Ms. Gregory, like Mr. DeFreitas, was entitled to reasonable notice of 12 months. Accordingly, it was ordered that she be paid the equivalent of 12 month's salary, in lieu of notice.
23. Contrastingly, in the **Aaron case** there was an obvious dispute as to the existence and dissemination of a retirement policy. Upon consideration of the facts, this Court determined that the employer failed to discharge its evidentiary burden of establishing (a) the existence of a retirement age policy by virtue of which all its

employees were required to retire at the certain or ascertainable age of 60 years; and (b) the said policy was clearly communicated to the employees. In the absence of such a policy, it was held that the employee was unfairly dismissed and the employer was ordered to pay compensation under the various customary of headings.

24. Thus, the dichotomy, to which we referred above, turns on the employer's proof by positive evidence that the policy existed and was disseminated to staff at the material time. In other words, the existence of the policy and its communication to the employees marks the watershed for the application of the approach implemented by the Court of Appeal in the **DeFreitas case**.
25. In the premises, the existence of the known retirement policy is akin to the statutory requirement for an express reason or good cause with a sound factual basis under section C 58 (1) of the Antigua and Barbuda Labour Code, the absence of which would render the dismissal unfair.
26. Accordingly, based on the facts of this case, we would respectfully decline to adopt the approach in the **DeFreitas case** as followed in the **Gregory case**. Instead, based on our foregoing findings of fact, we will adopt the approach used in the **Aron case**, conclude that the Employee was unfairly dismissed and assess compensation below.
27. After hearing oral submissions after trial from both parties, the door was left open for the filing of additional written submissions. Learned Representatives for the Employees rested on their oral submissions while learned Counsel followed up with written arguments. In the final analysis, despite Counsel's spirited attempts, he was not able to persuade us that the approach in **DeFreitas** and **Gregory** vis-a-vis that in **Aaron**, should prevail.
28. In the provocative final sentence of his submissions, Counsel posed the question: "What would be the position if the Employees were given the letters days before turning 60 but nevertheless had thirteen months' notice?" The answer is: If the Employees were given the letters before turning 60 and the letters contained a precise statement of the Employer's clear, unambiguous and independent policy, this Court would probably be persuaded to apply the alternative approach of **DeFreitas** and **Gregory**.

#### Compensation

29. For the reasons stated above, we assess compensation as follows:

**Janis Sonia Dublin:**

(a) Loss of Job Protection:

**We award the sum of \$19,950.00** ( $150 \times 133$ ) calculated at the rate of one and one half day's pay for each month of employment.

(b) Immediate loss:

In light of her age and her efforts to mitigate her loss, **we award the sum of \$15,600.00** ( $\$2,600 \times 6$ ) the equivalent of her monthly pay for 6 months.

(c) Exemplary Damages

The facts do not support any awards for exemplary damages and/or costs.

**Bridget Browne:**

(a) Loss of Job Protection:

**We award the sum of \$17,375.00** ( $125 \times 139$ ) being the rate of one and one half day's pay for each month of employment.

(b) Immediate loss:

In light of her age and her efforts to mitigate her loss, **we award the sum of \$13,000.02** ( $2,166.67 \times 6$ ) the equivalent of her monthly pay for 6 months.

(c) Exemplary Damages

The facts do not support any awards for exemplary damages and/or costs.

Order

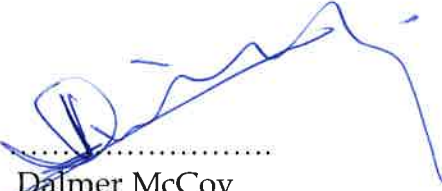
30. In the premises, we order that:

1. The Employer do pay the total sum of \$35,550.00, to the Employee, Janis Sonia Dublin, as compensation for her unfair dismissal, no later than July 31, 2024.
2. The Employer do pay the total sum of \$30,375.02 to the Employee Bridget Browne, as compensation for her unfair dismissal, no later than July 31, 2024.

Dated this ~~28~~<sup>28</sup> day of June 2024.

  
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Charlesworth O. D. Brown  
President

  
.....  
Hesketh A. Williams  
Member

  
.....  
Dalmer McCoy  
Member

