



ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 2 of 2023

BETWEEN:

SUNDRY WORKERS

Employee

and

DESTINATION ANTIGUA (2000) LTD t/a
TROPICAL ADVENTURES

Employer

Before:

The Hon. Samantha May- Francis

Vice President

The Hon. Judith A. Dublin

Member

The Hon. John. H.R. Benjamin

Member

Appearances:

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

Mrs. Stacy-Ann Saunders-Osbourne, Attorney-at-law for the Employer

2024: April 2
December 17

Employer contends Employees were not made redundant but were temporarily terminated- Employees contend Employer dismissed them for redundancy; Were the Employees temporarily terminated or were they made redundant- If made redundant, did a redundancy situation exist- or were the Employees unfairly dismissed; Are the Employees entitled to severance- The rate to be used to calculate the severance; Are the Employees entitled to statutory interest

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JUDGMENT

May-Francis, VP

Background

1. At all material times, the Employer was engaged in a tour operations business, offering tours and excursions on land and sea to cruise ship passengers.
2. By Reference filed on January 28, 2023, employees Colin Palmer and Theophilus Nathaniel commenced a claim for unfair dismissal against the Employer.

3. Mr. Palmer and Mr. Nathaniel were employed in February 2002 and October 2003, respectively. At the time of his dismissal, Mr. Palmer was employed as a mechanic/ driver, for which he earned a monthly salary of \$4,200.00 plus an allowance of \$600.00. Mr. Nathaniel, in his Memorandum, claimed that he held the position of Supervisor and earned \$3,000.00 monthly plus an allowance of \$900.00.
4. By letters dated January 29, 2021, the Employees were notified that they would be made redundant for six (6) months, commencing March 1, 2021, with a recall date of September 1, 2021.
5. The Employer did not remit any severance payments to the Employee on January 29, 2021, or at any time between that date and September 1, 2021.
6. Consequently, via letter dated May 11, 2021, the Employee's Representative wrote to the Employer advancing the contention that the Employees are entitled to terminal benefits and interest thereon at a rate of 10% in accordance with Section C42 of the Antigua and Barbuda Labour Code (the Labour Code). Additionally, the Employees requested that severance be paid at a rate of one (1) month for every month worked.
7. The Employer posited they were committed to the September 1, 2021 recall date. The Employees, however, did not return to work and continued to demand their severance.
8. In November 2021, the parties met, and the Employer continued to advance their position that the letter of January 29, 2021, did not make the Employees redundant but was, in their view, a temporary termination of the Employees.
9. Unfortunately, the negotiations between the parties and the conciliatory hearing at the Labour Department failed, and the dispute regarding the quantum of severance to be paid to the Employee remained unresolved. The matter was, therefore, referred to this Court for determination.

The Pleadings

10. By their Memorandum dated January 26, 2023, the Employees contend they were made redundant on January 29, 2021. They claimed that they were unfairly dismissed and alleged that the Employer failed to consult, adopted an unfair selection process, and, after making them redundant, the Employer engaged other employees with less seniority and tenure to perform their duties. They further contend that the Employer refused to pay them severance based on their pay interval.

11. The Employers accepted that they found themselves in a predicament. Firstly, the contended that they had made an error stating that the Employees had been made redundant. Secondly, they claimed that they also made an error in the date of recall – issuing a date that exceeded six (6) months from the initial date of temporary termination. They asserted that they did not intend to make the Employees redundant. They argued that the Employees had acted unreasonably in not returning to work after September 1, 2021.
12. The Employer also contended that the severance should be calculated per Section C41 of the Antigua and Barbuda Labour Code and calculated at one day per month for every year worked.

The Issues:

13. The main issues to be resolved by this Court are:
 1. Were the Employees made redundant
 2. The quantum of severance pay the Employees are entitled to receive
 3. Were the Employees unfairly dismissed
 4. Are the Employees entitled to compensation

The Evidence

14. The salient points of Employees' evidence are as follows:

Trevor Nathaniel

- Accepted that there was a significant decline in the demand for tours being the Employer's core business function
- He was not surprised that the Employer represented it was losing money back in 2020 and 2021
- Accepted that the letter of January 29, 2021, provides that he was to return to work on September 9 2021.
- He maintained that the letter represented that he had been made redundant
- The Union advised that the Employer had requested that he return to work, but he did not because he had been made redundant

Colin Palmer

- The Employer had temporarily laid him off for three (3) months in 2020, and he received from the Employer one week vacation pay for each month of the temporary layoff
- Based on its actions in 2020, the Employer ought to have been familiar with the temporary layoff procedures established by the Labour Code.

- The Employer made no error when it made him redundant in 2021 and intended to do so.
- Other employees on contract were doing his job while he was made redundant
- Accepted that the letter of January 29, 2021 suggests that the termination was temporary
- He did not report back to work as he had placed the matter in the hands of his Representative, and it had not been resolved

15. . The highlights of the Employer's witnesses' evidence are as follows:

Mr. Patrick Ryan

- In 2020, the shareholders of the Employer injected significant funds to keep the business afloat
- In 2021, the Employer continued to experience extreme losses and challenges
- All non-management staff were made redundant, and three (3) managers were kept at work on half-pay
- The Employer continued to do business, albeit on a significantly reduced basis after February 2021 on a call-out basis.
- It was not the intention of the Employer to make the Employees redundant
- The Employees refused to approach the situation reasonably despite the efforts of the Employer
- Severance ought to be calculated at the rate provided in Antigua and Barbuda Labour Code

Noel Jackson

Mr. Noel Jackson's evidence was similar to that of Mr. Ryan, except he gave evidence :

- The Employees were recalled to work before the letter of May 11, 2021, from the Employee's Representative
- Mr. Colin Palmer returned on a call-out basis, but Mr. Nathaniel did not
- The Employer did not retract the letter of January 29, 2021 having received the letter of May 11, 2021.

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Legal Framework

16. The Antigua and Barbuda Labour Code Cap 27 of the laws of Antigua and Barbuda 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; "

17. Section C42 reads:

"C42 (1) Subject to the other provisions of this section, simultaneously upon the termination of employment of any employee entitled to severance pay under section C40, the employer shall remit to that employee severance pay computed in accordance with section C41.

(2) If the termination be stated as temporary, no severance pay need be remitted to the terminated employee at the time of termination:

Provided however that-

(a) where the date of recall, if one is given at the time of termination, be six months or more in the future, severance pay shall be payable on the date of the original termination;

(b) if no date of recall is given at the time of termination, severance pay shall be payable when and if, after three months from the termination, the employee shall not have been recalled:

In this case, interest at the rate of ten percent per annum on the amount of severance pay due shall be payable between the original termination date and the date of actual payment.

(3) After such payment with interest has been made, if the employee is recalled to his past or substantially equivalent employment or is again hired by the same employer, he shall be considered newly hired. For subsequent severance pay purposes, his term of employment shall be considered to have commenced on the date of recall or rehire."

18. Section C 58 provides:

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

(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."

Resolving the Issues

19. We note that the Employer's witness, Mr. Noel Jackson, provided evidence that the Employer had incorrectly used the word "redundant" instead of "layoff" in its January 29, 2021 letter.
20. The Employees argued that the letter of January 29, 2021, is the dismissal letter. From the evidence, we concur that it is. In the dismissal letter, the Employer stated that the Employees were being made redundant. In our view, Section C42 of the Labour Code answers the question - "Were the Employees temporarily dismissed or made redundant?"
21. In the termination letter dated January 29, 2021, the Employer does not state the termination as temporary. The Employer informed the Employees that they were being made redundant. The letter then directed the Employees to return to work on a date exceeding the maximum period in which an employee can be placed on temporary layoff without severance becoming due on the date of the layoff.
22. Since the recall date exceeded the maximum six (6) months, the Employer's legal obligation to pay severance was activated. With the right to severance being activated, and based on the contents of the dismissal letter, it is a reasonable inference that the existing employment had ended, affording the Employees the right to insist on redundancy pay.
23. Having cited redundancy as the reason for the dismissal, the Court then examined whether, based on the facts, a genuine redundancy having considered the definition of redundancy as contained in Labour Code. Mr. Patrick Ryan, the Employer's Director, testified that due to the impact of the COVID-19 Pandemic and the significant diminution of customer orders, only three employees were retained. His evidence is that all non-managerial staff were made "redundant." The three employees retained held managerial positions: the General Manager, the Operations Manager, and the Accounts Manager.
24. We did not have the benefit of the Employer's documentary evidence to support averments concerning its financial position. However, during their oral examination, the Employees agreed that demand for the Employer's services had significantly diminished and accepted the financial challenges that the Employer stated existed at the time. Considering these facts and having applied Section C42 of the Labour Code, we conclude that the Employees had been dismissed for redundancy.
25. In considering the fairness of the dismissal, Section C58(1) provides that a dismissal shall not be unfair if the reason assigned by the employer falls within subsection (1)(a) - (e) and there was a factual basis for the reason assigned; one such reason being dismissal for redundancy. We are satisfied based on the evidence of the Employer and the Employees that a factual basis existed to support the Employer's

contention that it was experiencing extreme financial losses and reduced business activity at a level to warrant the layoff of the Employees.

26. The Employees contended that the Employer violated established guidelines and proper industrial relations practices in selecting them for redundancy. They argued that no proper criteria was used to select them. Nonetheless, Management did not hold any meetings with them before they received the letter of January 29, 2021.
27. Having raised these issues, we considered the provisions Section C 58 (2) to determine whether or not the Employer acted reasonably in the circumstances when considering the fairness of the dismissal.
28. We could not determine the issue of reasonableness in isolation to the COVID-19 pandemic. We considered the nature of the Employer's business, the size of the organization and the scope of the business function. We are cognizant that the COVID-19 pandemic, the lockdowns and the travel restrictions caused a host of problems for businesses and perhaps even more so for those in the hotelier, restaurateurs, tour operators and other businesses within the tourism and services sector industries. We appreciate that it was a time of intense focus on the effect of COVID-19 on the financial implications for businesses.
29. Additionally, we accept the Employer's evidence that in their business context, there was a mass layoff of all non-managerial staff and that the Employees who were subsequently engaged were engaged on a need-basis to perform specific tasks.
30. The Employers contended that the Employees failed to return to work after being given a recall date of September 9, 2021. They did not return to work after taking vacation, from September 1 until September 9, 2021. They were informed that upon their return and until further notice, the Employer would engage them on a three-day (3) week until business improved.
31. However, we are mindful that Section C42 (3) permits an Employer to rehire an employee on new terms after dismissing them for redundancy. A recall date after six (6) months can be construed as an offer of new employment, which the Employees were free to accept or reject.
32. In the final analysis, in determining whether the Employees were unfairly dismissed, we considered (i) the reason assigned by the Employer for the dismissal, (ii) whether the reason assigned by the Employer falls within subsection (1) (a) – (e); (iii) whether there is a factual basis to substantiate the reason for dismissal; and (iv) whether the employer acted reasonably in dismissing the employee having regard to the actual circumstances.

33. Based on the existing circumstances of this case, no evidence emerged to suggest that the Employer failed in its responsibility to act reasonably toward the Employees and therefore, we make no finding that the Employees were unfairly dismissed.
34. In conclusion we have determined that a genuine redundancy situation existed, the Employees were made redundant and it on that basis that they are entitled to severance in accordance with Section C40 of the Labour Code.

Award

35. We reminded ourselves that “... *redundancy payment is not, and never has been, intended to be a kind of unemployment benefit, tiding the worker over until a new job is found. It is more of a recognition of past service, or the worker’s stake in and contribution to the enterprise.*” G. Pitt *Employment Law* (6th ed Thompson Sweet & Maxwell) 273.
36. In our jurisdiction severance pay is mandatory upon an employee being made redundant. Therefore, the issue for our consideration is the rate to be applied for severance calculation. The Employer contends that the rate should be based on the minimum standard set out by the Antigua and Barbuda Labour Code Section C41, which is one day per month for every year worked.
37. However, it is now settled in this Court in several cases authorities to include **Arden Williams v Antigua & Barbuda Olympic Association Reference 5 of 2014**, **Raymond Dickenson v Belmont Clinic t/a Belmont Pharmacy C/UD/2/2014** and **Ayesha Charles v Ericsson AB Antigua Limited Reference C27 of 2017** that severance pay for monthly paid workers should be calculated at the rate of a month’s pay per year worked. In this case, we accept the Employee’s submission that severance of \$79,800.00 (19 months x \$4,200.00) is due to Employee Palmer and that severance of \$54,000.00 (18months x \$3,000.00) is due to Mr. Nathaniel.
38. By Order of the Court dated March 9th 2023 and entered on March 13, 2023, the Employers were ordered to pay an interim payment to Employee Palmer the sum of \$41,197.80 and \$31,014.90 to Employee Nathaniel. We will therefore reduce the severance payments due to the Employees by the amounts received.

Statutory Interest

39. The Employees are entitled to receive interest at the rate of 10% per annum from the date of their dismissal to the date of actual payment as per Section C42 (3).

Order

40. By reason of the matters aforesaid, we order:

In respect of Employee Colin Palmer

1. The Employer do pay the Employee the sum of **\$ 17,290.00** as accrued statutory interest on the said sum of \$79,800.00 at the rate of 10% per annum from the date of his dismissal to March 24, 2023.
2. The Employer do pay the sum of **\$38,602.20** to the Employee as and for his severance entitlement having deducted the interim payment of \$41,197.80.
3. The Employer do pay the Employee the sum of **\$9,187.12** as accrued statutory interest on the said sum \$38,602.20 at the rate of 10% per annum from March 25, 2023 to the date of this judgment.
4. The Employer shall pay the Employee the aggregate sum of **\$65,079.32** to include severance and interest thereon no later than February 28, 2025.
5. The Employer shall pay the Employee additional prorated interest in accordance with paragraph (3) from the date of this judgment until the date of actual payment.
6. No order as to costs

In respect of the Employee Trevor Nathaniel

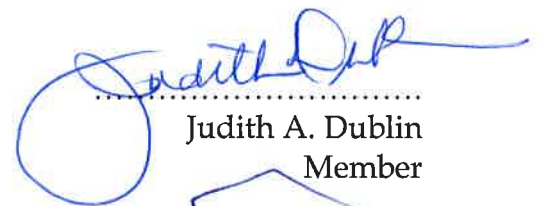
1. The Employer do pay to the Employee the sum of **\$11,700.00** as accrued statutory interest on the said sum of \$54,000.00 at the rate of 10% per annum from the date of his dismissal to March 24, 2023.
2. The Employer do pay the sum of **\$22,985.10** to Employee as and for his severance entitlement having deducted the interim payment of \$31,014.90.
3. The Employer do pay the Employee the sum of **\$3,848.35** as accrued statutory interest on the said sum \$22,985.10 at the rate of 10% per annum from March 25, 2023 to the date of this judgment.
4. The Employer shall pay the Employee the aggregate sum of **\$38,533.45** to include severance and interest thereon no later than February 28, 2025.
5. The Employer shall pay the Employee additional prorated interest in accordance with paragraph (3) from the date of this judgment until the date of actual payment.

6. No order as to costs

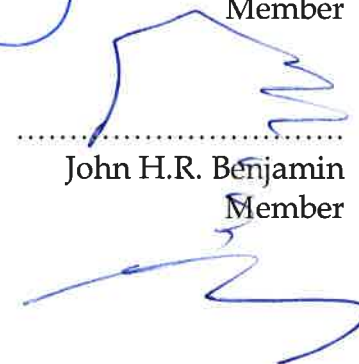
Dated this the 17th day of December, 2024



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Samantha May- Francis
Vice President



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Judith A. Dublin
Member



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John H.R. Benjamin
Member