



ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/32 of 2021

BETWEEN:

SUNDRY WORKERS
(Represented by the Antigua Trades and Labour Union)

Employee

and

CARIBBEAN DEVELOPMENT (ANTIGUA) LTD

Employer

Before:

The Hon. Samantha May- Francis

Vice President

The Hon. Judith A. Dublin

Member

The Hon. John H.R. Benjamin

Member

Appearances:

Mr. Ralph Potter of Antigua Trades and Labour Union, Representative for the Employees

Mr. Hugh Marshall of Marshall & Company, Attorneys-at-Law for the Employer

2024: March 25
December 13

Employer unilaterally implemented mandatory retirement policy- whether this amounts to unfair dismissal of the Employees- Whether the Employees are entitled to retirement benefit

JUDGMENT

May-Francis, VP

Introduction

1. On August 27, 2021, the Antigua Trades & Labour Union (the Union), representing Sundry Workers, commenced a claim against the Employer. The claim was on behalf of the Employees, specifically Lawrence Belle, Carol Joseph, and Cynthia King, who were allegedly unfairly dismissed and are seeking retirement benefits. This Reference was filed on September 8, 2021.

Background

2. At all material times, all three Employees held a managerial or supervisory role. Lawrence Belle was employed from February 1, 2006, to February 1, 2020, and last held the position of Human Resources/Ground Manager and earned \$9,416.77 plus a travel allowance of \$500.00 monthly. Ms. Carol Joseph was employed from December 12, 2006, to September 30, 2020, and last held the position of Accounts Receivable Officer, Customer Service Supervisor and Customer Relations Coordinator and earned \$5,000.00 plus a travel allowance of \$500.00 monthly. Cynthia King was Employed from February 6, 2007, to January 14, 2020, and last held the position of Golf Clubhouse Assistant and Administrative Assistant and earned \$2,800.00 monthly.
3. Based on their last positions, the Employees were not covered by the Collective Bargaining Agreement between the Employer and Bargaining Agent, which provides for a retirement age of sixty (60) for employees within the Bargaining Unit.
4. The Employer had no retirement age policy for employees outside the Bargaining Unit and never communicated any retirement policy to the Employees until on or about February 11, 2019. On the aforementioned date, the Employer communicated via written correspondence to the Employees that a retirement policy had been instituted, which would take effect on March 1, 2019. The retirement policy imposed a mandatory retirement age of 62. The letter from the Employer is reproduced as follows:

"February 11, 2019

*Re: Mandatory Corporate Retirement Policy
CDAL Staff:*

The Caribbean Development (Antigua) Ltd. (CDAL) Board of Directors are hereby announcing the formal implementation of a mandatory retirement policy effective starting March 1, 2019. This mandatory retirement policy will coincide with the retirement age as set forth by the Antigua and Barbuda Social Security Board (currently 62). Retirement age in this policy refers to the age at which retiring employees will be eligible for retirement as per the current age of retirement in Antigua and Barbuda. This policy applies to all full-time and part-time employees who are employed on fixed terms contracts by the company.

The detailed policy is attached hereto for review and signature. CDAL management is available at your convenience to further discuss and answer any questions you may have.

We appreciate your time and attention.

*Wim Berend
Technical Director
Caribbean Development (Antigua) Ltd"*

5. The retirement policy contained a declaration section to be executed by the Employees stating that they acknowledged, read and understood the Employer's retirement policy and agreed to abide by its terms and conditions. The Employees refused to affix their signatures to the document and sought intervention from the Union, although they were not within the Bargaining Unit.
6. On July 10, 2019, the Union intervened on behalf of the Employees and requested a meeting with the Employer to discuss its mandatory retirement policy. Although several correspondences were exchanged between the parties, the two sides failed to meet.
7. The Employer thereafter issued individual letters to the Employees advising them they were eligible for retirement. The Employees were all dismissed on the effective date of mandatory retirement, which the employer had communicated to them in their letters.

The Main Issues

3. The two main issues arising in this Reference are:
 1. Were the Employees unfairly dismissed?
 2. Are the Employees entitled to retirement benefits?

The Employees' case

9. The Employees contend that each entered into individual employment contracts with the Employer for an indefinite period. Therefore, they expected their employment to continue as long as they could physically work.
10. They were not advised of a mandatory retirement age until they received the Employer's correspondence of February 11, 2019. They contend that the Employer's unilateral implementation of a mandatory retirement age was a material change to their contract of employment and, therefore, required their consent.
11. The Employees further contended that the Employer had negotiated with the Union that persons falling within the Bargaining Unit would retire at age 60 and be entitled to retirement benefits as stipulated in the Collective Bargaining Agreement. Mr. Belle testified that at least two (2) line employees were allowed to work until age seventy (70) and that another Employee who had chosen to retire before age sixty had been paid 50% of his severance.
12. The Employees argued that their retirement had no benefits attached to it, and as such, the line employees enjoyed better benefits than management employees and

non-unionized employees. They contended that that is discriminatory and conflicts with Division C 4 of the Antigua and Barbuda Labour Code, which prohibits discrimination because of age. Additionally, the benefits and equity of senior employees should be above what is considered for the line employees.

13. The Employees further contended that from August 1, 2012, to December 31, 2012, the Employer temporarily reduced the Employees' wages on the agreement that they would be reimbursed the full amounts later, but the sum remains unpaid.

The Employer's case

14. The Employer accepts that the Collective Bargaining Agreement for line employees contains a retirement provision that excludes non-unionized employees. The Employer equally accepted that it introduced a retirement policy that materially changed the Employees' employment contracts.
15. Nonetheless, the Employer contended that the Employees were responsible for negotiating their contracts. They argued that the Employees were always aware that their employment contract contained no provision for retirement and benefits on retirement and that they did not attempt to negotiate with the Employer. The Employer further contended that the Employees were paid higher wages than the line staff and received increased benefits over the years. Therefore, the Employer considers the retirement policy fair and reasonable.
16. Additionally, the Employer argued that it provided the Employees with sufficient notice; each Employee was given one (1) year's notice of the effective date of retirement, which is the established reasonable notice period.
17. In answer to the Employees claim for outstanding wages, in its Defence, the Employer stated that it faced a situation in August 2012 that would have made several positions redundant. Instead of redundancy, after consultation and discussion with the Employees, it was agreed that as part of cost-saving measures, they would accept a 20% reduction in their wages from August 1, 2012, until December 31, 2012. The Employer, therefore, contends that there was no agreement to repay.

Resolving the Issues

Were the Employees unfairly dismissed?

18. In his submissions, Learned Representative Mr. Potter cited the case **E. Alex Benjamin v St. Lawrence Defreitas ANUHCVP2002/0012**, which concerned the right of an employer to implement a retirement age policy and the consequences to

the employees. He argued that the **Defreitas Case** can be distinguished from the facts of this case as the Employer's retirement policy covered all employees, while in this case, it only applied to senior employees. He argued that this Reference is one of unfair dismissal and should be treated as such.

19. Learned Counsel Mr. Marshall argued on behalf of the Employer that the **Defreitas Case** is similar to the facts of this Reference. He stated that the employer unilaterally implemented a retirement policy in both cases. Mr. Marshall, however, argued that the Court of Appeal determined that the unilateral implementation of the retirement age policy was neither unreasonable nor unfair. He argued that reasonableness and fairness must be determined by the sufficiency of the notice given to Employees.
20. Learned Counsel argued that the Employees first received notice on February 11, 2019 which meant that Mr. Belle and Ms. King, both received eleven (11) months, four (4) days' notice and in the case of Ms. Joseph, she received twelve (12) months and two (2) weeks' notice. He contended that the notice period given to the Employees was sufficient for them to make alternative arrangements or seek alternative employment having regard to their ages and station in life.
21. We note that in the **De Freitas Case**, Saunders JA, determined firstly that compulsory retirement does not amount to an unfair dismissal despite compulsory retirement not being specified as a good cause for dismissal in Section C 58 of the Labour Code. The Learned Justice of Appeal stated: *"The Labour Code simply does not address the issue of retirement. The logical extension of the Industrial Court's decision were it to stand, must be that even where an employer had given several years' notice to all its employees that it desired to introduce a compulsory retirement policy, if any employee were not in agreement, then that employee could successfully argue, upon being terminated on his attaining the specified age, that he was unfairly dismissed because compulsory retirement is not specified as a good cause for dismissal. I don't think that the Court below intended that consequence. Nor do I consider that such a result would be in keeping with the policy objectives that inform a Labour Code that strives to achieve the highest standards of industrial conduct"*.
22. In **Albert George v Cortland Hotel Reference No. 9 of 2015**, paragraph 16, this Court was asked to determine whether an employee had been unfairly dismissed as a result of the implementation of a retirement policy by the employer. In arriving at a determination, Learned President Browne, in paragraph 14 of the judgment, stated, *"...we are mindful that at paragraphs 13 and 14 of its judgment (the Defreitas Case), the Court of Appeal found it to be "unfortunate" that the Industrial Court treated the case as an ordinary case of unfair dismissal" "We are guided by that dictum and will refrain from that treatment in this instant case." Instead, acknowledging that the implementation of a retirement policy "is neither*

unreasonable nor unfair", we will direct our attention to the adequacy or inadequacy of the notice to the Employee of the existence of the policy/practice and its implementation or introduction."

23. Adopting the sentiments of Learned President Browne, we remain mindful of paragraphs 13 and 14 of the **De Freitas Case** and accept Learned Counsel Mr. Marshall's submissions that the Employees were dismissed having reached the specified retirement age according to the Employer's policy. We therefore find that there was no unfair dismissal.
24. Therefore, the issue for consideration is whether the Employer provided adequate notice to the Employees.
25. In the **De Freitas Case**, Saunders, JA stated: *"As regards the length of notice that should be given, I would be guided by the Industrial Court's view that a period of at least 12 months' notice should have been given. The period of 12 months is also in line with the judgment and Approach of Singh, JA in Julie Saunders et al. v St. Kitts Sugar and Manufacturing Corporation Civil Appeal No. 1 of 1993'.*
26. We, therefore, need to determine whether the Employees received adequate notice. It is undisputed that the Employer issued a notice to all employees on February 11, 2019, that effective March 1, 2019, its retirement policy would be implemented. The Employer subsequently issued individual letters, all dated June 19, 2019, to each Employee herein, giving them notice that they would be required to retire on the dates stipulated in their letter. Mr. Belle's letter, dated June 19, 2019, advised him that his retirement would take effect on January 15, 2020. Ms. King received a similar letter on June 19, 2019, with an effective retirement date of January 15, 2020; Ms. Joseph also received correspondence on June 19, 2019, advising of her mandatory retirement in September 2020.
27. Based on the facts, the Employees all accepted that they received the Employer's notice on February 11, 2019. In the circumstances, Mr. Belle and Ms. King received approximately 11 months' notice of their retirement. Ms. Joseph, on the other hand, received more than 12 months' notice.
28. We considered each of the Employees' age and length of service. The Employees were purportedly dismissed based on the retirement policy at age 62, two years later than the line employees. We are guided by the decisions of the Learned Justice of Appeal in the **De Freitas Case** and subsequent judgments of this Court and conclude that at least twelve (12) months would have been reasonable notice to the Employees of their retirement.

Are the Employees entitled to retirement benefits?

29. Learned Representative Mr. Potter argued that the Employer failed to meet with the Employees before and after the introduction of its mandatory retirement policy, and therefore, there was no opportunity for the Employer and Employees to negotiate their retirement benefits as was done many years prior for the employees within the Bargaining Unit. He submitted that the lack of a retirement plan was discriminatory and is another example of the Employer providing more favourable benefits to the line staff than its senior employees.
30. Learned Counsel Mr. Marshall submitted that the Employees continued working until their retirement. He further contended that the non-unionized employees negotiated their contracts directly with the Employer and freely negotiated, entered into, and agreed to the terms of their respective employment contracts.
31. No evidence was submitted to establish that there was ever any agreement between the Employer and Employees that they would be entitled to retirement benefits even if the Employees expected to work until they were physically incapable. Therefore, in the absence of a contractual arrangement, whether in the form of individual employment contracts, a collective bargaining agreement, or specific legislation requiring an Employer to compensate the Employee on retirement, an Employer is under no obligation. Accordingly, the Employees are not entitled to any retirement benefits.

Outstanding wages

32. In their Memorandum, the Employees claim outstanding wages from August 1, 2012, to December 31, 2012. According to the Employees, they agreed to a 20% reduction in their wages for that period due to financial hardship reported by the Employer. The Employees contend that it was agreed that the Employer would reimburse at a later date.
33. In its Memorandum of Defence, the Employer denies this and averred that the Employees, after consultation, accepted the 20% reduction in pay to prevent redundancies due to the financial difficulties the Employer was experiencing at that time.
34. We considered the evidence relied upon by the Employees, particularly the Minutes of the Employer's Management meeting dated July 4, 2012, and the Memo dated July 30, 2012, in support of their contention that they were to be reimbursed a 20% wage loss for August 1 to December 31, 2012. Having carefully examined both documents, we find nothing contained therein to support the Employees' contention

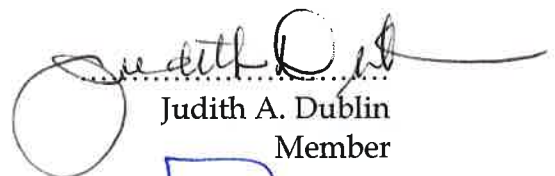
Order

We hereby order that:

1. The Employer shall pay Lawrence Bell one month's pay and allowances in the sum of \$9916.17 in lieu of notice on or before January 31, 2025.
2. The Employer will pay Cynthia King one month's pay in the sum \$2800.00 in lieu of notice on or before January 31, 2025
3. No award is made with respect to the Employee Carol Joseph.
4. No orders as to costs.

Dated this the 13th 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

