



ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 34 of 2020

BETWEEN:

JUNIOR JAMES

Employee

and

ROBERTS CONSTRUCTION AND ENGINEERING COMPANY LIMITED

Employer

Before:

The Hon. Samantha May- Francis

Vice President

The Hon. Hesketh A. Williams

Member

The Hon. Collin R. Maynard

Member

Appearances:

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

Ms. Cherissa Roberts Thomas of C. Roberts-Thomas & Associates, Attorneys-at-Law
for the Employer

2024: March 19
December 13

JUDGMENT

Employee dismissed by the Employer- Did the Employer fail to issue a termination letter to the Employee, and if so, is the Employer estopped from giving reasons for the dismissal at trial- Was the dismissal unfair, or did a genuine redundancy exist- Did the Employer act reasonably or unreasonably in dismissing the Employee- Is the Employee entitled to compensation

May-Francis, VP

Background

1. The Employer is one of the leading and established construction companies in Antigua and Barbuda.

2. The Employee commenced his employment on February 3, 1998, and last held the position of Warehouse Custodian. He earned \$699.20 weekly and worked a five-day (5) week.
3. At all material times, the Employee's employment was covered by the Collective Bargaining Agreement (CBA) dated June 24, 2009, between the Employer and the Antigua Trades and Labour Union (AT&LU), the Bargaining Agent. The Employee was the elected representative of the AT&LU and, at one point, held the position of Shop Steward on behalf of the workers within the Bargaining Unit.
4. In March of 2019, in the context of the workplace, a significant event occurred; the Antigua and Barbuda Free Trade Union (ABFTU), on behalf of the employees, filed a petition for the decertification of the AT&LU and for them to replace AT & LU as the sole Bargaining Agent. The balloting was subsequently scheduled to take place on March 21, 2019.
5. On March 18, 2019, three (3) days before the scheduled ballot, the Employer, through its consultant, Mr. Alrick Daniel, informed the Employee that the warehouse would be closed. As a result, the Employee was instructed not to report for duty until further notice.
6. On May 13, 2019, Mr. Samuel James, President of the ABFTU, wrote to the Employer on behalf of the Employee, alleging that the Employer's decision to have the Employee remain at home was punishment for his efforts in bringing a ballot to fruition to decertify the AT&LU. He claimed this was an apparent infringement of the Employee's rights and a discriminatory action on the Employer's part.
7. On May 22, 2019, Mr. Alrick Daniel, Consultant to the Employer, responded on behalf of the Employer, denying all allegations of interference, union busting, or breach of the Employee's rights. Mr. Daniel stated that the Employer's decision to place the Employee on layoff had no connection with the scheduled ballot. He represented that the Company had been experiencing a decline in its construction activities since the year prior, which was attributed to the Employee being laid off.
8. On May 27, 2019, Mr. James responded by enquiring whether the Employer had informed the Employee of the impending layoff, whether the Employee had been given a letter of layoff, and whether the Employee had been given any notice of the layoff, amongst other queries.
9. On June 20, 2019, the Employer deposited the sum of \$39,714.56 in the Employee's bank account, purportedly the Employee's terminal benefits.

10. The Employee, by correspondence dated June 28, 2019, wrote to the Employer claiming unfair dismissal. The Employee also contended that his terminal benefits had been inaccurately calculated and that the Employer owed him \$8,973.53.
11. On August 15, 2019, Mr. Alrick Daniel responded on behalf of the Employer, maintaining the Employer's position that the layoff was due to a decline in work and accepted that there was a shortfall of \$5,865.91.
12. An additional sum of \$4,660.87 was remitted to the Employee on August 14, 2019.

The Claim

13. By Reference filed on July 20, 2020, the Employee claims unfair dismissal and has asked the Court to determine whether a genuine redundancy existed and whether his terminal benefits have been accurately calculated.
14. By his Memorandum, also filed on July 20, 2020, the Employee contends that the Employer failed to give him notice of the impending closure of the warehouse and his subsequent layoff and redundancy. He complained that he was not given any letter of layoff and was asked to remain at home until further notice. He claims that the warehouse remained open, and at all times, other employees worked in the warehouse. He also claimed that the Employer failed to issue him a termination letter.
15. The Employer responded with its Memorandum filed on September 20, 2020. Its defence is that in July 2018, it had a contract for one major construction project in Barbuda, but a decline in that project resulted in the layoff of employees in January 2019. It communicated the circumstances of the decline to its employees through the issuance of an internal Memo dated January 18, 2019. According to the Employer, all warehouse employees, including the Employee, were subsequently advised by memo dated March 8, 2019 and April 17, 2019, of their layoff and subsequent redundancy. Thereafter, in accordance with the Antigua and Barbuda Labour Code (the Labour Code), they were paid their terminal benefits.

Issues

16. The main issues in this case are:
 1. Whether the Employer is estopped from giving reasons for the dismissal as per Section C 10(4) of the Antigua and Barbuda Labour Code
 2. Was the Employee unfairly dismissed, or was he dismissed because of redundancy?
 3. Whether the Employer acted reasonably or unreasonably by dismissing the Employee in the circumstances
 4. Is the Employee entitled to further compensation?

The Proceedings

Evidence

17. Only two witnesses were called in this matter: the Employee and Mr. Alrick Daniel on behalf of the Employer. The witnesses' vivo voce evidence mirrored, for the most part, the evidence contained in their witness statements. However, of interest is Mr. Daniel's evidence, in which he stated that the memo of April 17, 2019, was the termination letter that was issued and mailed to the Employees. However, under vigorous cross-examination, he conceded that based on Section C10 of the Labour Code, a termination letter had not been issued to the Employee. Nonetheless, Mr. Daniel's evidence is that he had consulted with the Employee during his layoff period and told the Employee of the impending redundancy.

Submissions

18. Learned Representative Mr. Samuel James submitted that the memo issued on April 17, 2019 to the general staff without any evidence that the Employee was aware of the memo could not be construed as a termination letter in keeping with the Section C10 of the Antigua and Barbuda Labour Code. He ultimately submitted that in the absence of a termination letter, the Employer is estopped from giving evidence in any proceedings in accordance with Section C10 (4).
19. He further submitted that no genuine redundancy existed, the warehouse continued to be operational, and the Employer contacted the Employee occasionally while he was on layoff, concerning matters related to the warehouse. Additionally, Learned Representative Mr. James submitted that there was no issue of unsatisfactory performance and even with the Employee's visual impairment; he continued to perform his duties at the warehouse without complaints or warnings from the Employer.
20. Learned Representative Mr. James submitted that the Employer presented no evidence of its criteria in selecting the Employee for termination. Further, the Employer's selection process was unfair as the Employee was the longest-standing employee at the warehouse. He contended that the Employer's selection process was insensitive to the Employee based on his tenure, competence, visual impairment and age. On the whole, Learned Representative Mr. James' submission was that the Employer acted unreasonably.
21. Conversely, Learned Counsel Mrs. Cherrisa Roberts-Thomas submitted that the Employee was not terminated due to his disability or impairment. The sole reason for the termination was redundancy. She submitted that the definition of redundancy as per the Labour Code does not require a complete cessation of work but a diminution of work. She argued that the Employer had been faced with

reduced work for several years before the termination of employees in 2019. She submitted that, as evidenced in the memos, the two major projects the Employer had been engaged in had declined.

22. Learned Counsel submitted that the established mode of communication within the Employer Company was via memos. She stated that the temporary termination in December 2018 was communicated to the employees by memo, and the Employer provided no individual notices. Additionally, she posited that the terminations commenced in 2018, and the Employee was the last to be affected by the redundancy. Her contention is that the March 8, 2019, memo stipulated an effective termination date for all the warehouse staff.
23. Learned Counsel asked the Court to consider all the memos issued by the Employer. Her submission is that though the layoff may have been by word of mouth, the Employer's actions cannot be looked at in a vacuum, and the memos must be considered collectively. Additionally, the Employer acted in accordance with Section C10 of the Labour Code. She further argued that the memos, though not concise, precisely set out the reasons for the Employee's termination and that they were always aware of the redundancy situation.

Analysis

24. Section C 10 of the Labour Code contains a statutory obligation which requires an Employer, within seven (7) days of dismissing an employee, to issue the employee with a written statement of the precise reason for termination. Learned Counsel Mrs. Roberts-Thomas has asked the Court to look at all the memos together, and in doing so, the precise reason for the termination is apparent. Mr. Daniel's evidence is that the memo of April 17, 2019, is the termination letter.
25. Considering the Employer's contention, we note the case of **Margaret Berridge et al. v Benjies Business Center Privy Council Appeal No. 51 of 1995**, which determined that previous notification, whether written or oral, as to the reasons for the dismissal is of no consequence. Section C10 requires the timely issuance of a written statement upon termination setting out the precise reasons. Undoubtedly, the April 17, 2019 memo fails to do so. The resulting effect is that the Employer is estopped from introducing any testimony at trial in support of its case regarding the reasons for the dismissal, as such facts or reasons ought to have been captured and clearly stated in the dismissal letter.
26. The Court finds that the Employer failed to meet its statutory obligation, so the Employee's dismissal was unfair.

27. Nonetheless, even if we were found to be wrong, the Court must first decide if the requirements of the work the Employee was obligated to execute had substantially diminished when the Employer dismissed the Employee. This requires the perusal and analysis of any evidence regarding the existing state of affairs at the time of the dismissal.
28. The following facts are noteworthy:
- The memos issued by the Employer to its employees between December 2018 and April 2019 suggest that the Employer was experiencing reduced work availability.
 - The Employer laid off more than sixty (60) employees from December 2018 to April 2019.
29. Given that evidence, we are inclined to find on a balance of probabilities that a redundancy situation existed at the time of the Employee's dismissal. It is plain to us that the problem arose due to reduced construction projects for which the Employer had been engaged.
30. However, the final determination of this matter does not rest on whether a redundancy situation existed; instead, the crucial consideration is whether the Employer acted reasonably in the circumstances. The Employer must pass the reasonableness test set out by Section C58 (2) of the Labour Code which requires us to examine the reasonableness of the Employer's actions based on the prevailing circumstances.
31. The facts of this case caused us to revisit the decision of the **Polkey v AE Dayton Services Ltd [1987] UKHL 8** in which Lord Bridge stated:
- "In the case of redundancy, the employer will normally not act unreasonably unless she warns and consults any employee affected or their representatives, adopt a fair basis on which to select for redundancy and take such steps as may be reasonable to avoid or minimise redundancy..."*
32. We also considered the established guidelines in **Williams v Compare Maxim Ltd [1982] ICR 156**, where an Employer is contemplating or has determined that employees will be made redundant must follow the established guidelines to make the process fair so that he would not fall foul of failing the reasonableness test.
33. Apart from the general memos, the Employer did not issue any other communication to the Employee and or the Bargaining Agent that it intended to place the Employee on layoff and the date of commencement of the layoff.

34. We accept that a temporary layoff may lead to a redundancy. We are also cognizant that Section C42 of the Labour Code requires the Employer on the date of termination to pay the Employee his severance if no date of recall is given within three (3) months of the layoff. There is no evidence that the Employee received any memos, particularly those of March 8 and April 19, 2019. The Employee received no individual notice of the contemplated redundancy. It is instructive that Learned Counsel, in her submissions, stated that the Employee was paid notice, having not been included in the first round of layoffs and not having received notice of his layoff on March 8, 2019.
35. The evidence surrounding the Employer's selection process and criteria is sketchy at best. Mr. Daniel gave evidence that the Employee had a medical condition which prevented him from lifting heavy objects, which the Employee vehemently denied. However, no connection was made between that contention and the Employee's selection for redundancy.
36. We accept the Employee's evidence that he was a good worker and developed a system of packing and storage that the Employer was pleased with and commended him for. The Employer failed to explain why Mr. Daniel, as a Labour Relations & Human Resource Management Consultant to the Employer, was working within the warehouse instead of the Employee who was the most senior of the warehouse employees both in tenure and experience.
37. It is beyond dispute that consultation never took place. There is no evidence of consultation with the Employee or the Bargaining Agent at any stage leading up to the layoff and subsequent dismissal of the Employee. Having heard the evidence of the Employee and that of Mr. Daniel, we preferred the evidence of the Employee that the Employer failed to consult with him. This omission is contrary to law and good industrial relations practices and is another component of unreasonableness.
38. Therefore, notwithstanding that a redundancy situation existed as defined by Section C3 of the Labour Code and having applied the test of reasonableness to the facts applicable to this Reference, we conclude that the Employer acted unreasonably. Therefore, this Court resolves the issue of unfair dismissal in favour of the Employee.

Compensation

39. Having found that the Employee was unfairly dismissed, the Employee is entitled to compensation. The Employee acknowledged receiving \$44,375.43. as and for severance entitlement. This sum will, therefore, be deducted from the award we make.

(a) Loss of Protection from Unfair Dismissal

The Employee worked for 21 years and four months from February 3, 1998, until June 20, 2019, the date of his dismissal. Based on the Collective Bargaining Agreement, severance is to be calculated as follows:

1-4 years (\$ 139.84 daily rate x 12 days x 4 years)	\$ 6,712.32
5-8 years (\$139.84 daily rate x 14 days x 4 years)	\$ 7,831.04
9 + years- (\$139.84 x daily rate x 16 days x 13.33 years)	<u>\$ 29,825.07</u>
Total	<u>\$ 44,368.43</u>

The Employee is entitled to a loss of protection equivalent to severance in the sum of \$44,368.43. He received a payment of \$44,375.43, representing an overpayment of \$7.00.

(a) Notice Pay

Having received no notice, the Employee is entitled to an amount equivalent to his periodic pay. The Employee was paid weekly and is entitled to **\$699.20**.

(b) Immediate Loss

The Employee gave evidence that in 2022, he was diagnosed with glaucoma and can no longer work. However, before his diagnosis, he tried to secure work after being dismissed. He searched for employment in construction and as a mixer and operator. He could recall at least five places where he asked to be hired and stated that there were others, but he could not remember. We also remain cognizant that the COVID-19 pandemic, which raised its ugly head in early 2020, may have affected the Employee's ability to secure employment. Nonetheless, we are satisfied that the Employee was diligent in his efforts to secure new employment. Accordingly, we award the Employee the equivalent of six (6) months' pay in the sum of **\$18,179.20** ($\$3,029.86 \times 6$).

(c) Vacation

The Employee testified that he is due vacation from January 2019 to June 2019. In its Memorandum, the Employer disputed that the Employee is owed vacation. However, as the keeper of the records, the Employer provided no evidence to refute the Employee's contention. To this end, the Employee is entitled to 10.41 days of accrued vacation between February 2019 and June 2019 as per the Collective Bargaining Agreement. We therefore award the Employee the sum of **\$1,456.66** ($\$139.84 \times 10.41$ days).

10. The Employee is entitled to compensation as follows:

Loss of Protection	\$44,368.43
Notice	\$ 699.20
Immediate Loss	\$18,179.20
Outstanding vacation	\$ 1,456.66
Total entitlement	\$64,703.49

Less payment received	<u>\$44,375.43</u>
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Total	<u>\$20,328.06</u>
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Order

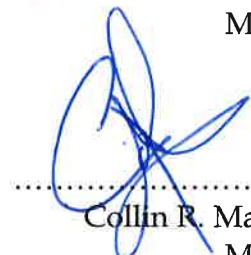
11. By reason of matters aforesaid, we order as follows:

- (i) The Employer shall pay compensation to the Employee in the sum of \$20,328.06 for his unfair dismissal.
- (ii) The Employer shall pay the sum of \$20,328.06 no later than January 31, 2025
- (iii) There is no order as to costs

Dated the 13th day of December, 2024


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Samantha May-Francis
Vice-President


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Hesketh A. Williams
Member


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Collin R. Maynard
Member

