

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/98 of 2017

BETWEEN:

JENNIFER SIMPSON-EDWARDS

Employee

And

DIGICEL ANTIGUA LIMITED
ANTIGUA WIRELESS VENTURES LTD
DIGICEL (ANTIGUA) WIRELESS VENTURES ANTIGUA LIMITED
t/a DIGICEL ANTIGUA

Employers

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Samantha May-Francis

Vice President

Appearances:

Mr. Anderson Carty, Antigua and Barbuda Tradesmen & United Workers' Federation
for the Employee

Mr. Justin L. Simon KC, of Simon Rogers Murdoch, Attorney-at-Law for the
Employer

2021: October 28

2022: November 23

2024: February 15

*Redundancy situation resulting from Employer's outsourcing of cleaning services-
Employee cleaner dismissed without consultation and receiving enhanced redundancy
package- Claim of unfair dismissal and for award of compensation- Whether Employer
acted reasonably or unreasonably under the circumstances*

JUDGMENT

Brown, P

Background

1. The heading of this Reference suggests that the Employee harboured doubt as to the identity of the Employer. We note that the Employer is named as Digicel Antigua Limited (the First Employer) in the contract subsisting between the parties up to the date of termination of her services. We also note the letterhead used to communicate with the Employee immediately before the termination



suggests that Antigua Wireless Ventures Ltd. (the Second Employer) was properly named. The accuracy of the identity and the relevance of the entity "Digicel (Antigua) Wireless Ventures Antigua Limited", (the Third Employer) as named by the Employee did not arise in these proceedings and therefore remains unclear. In the circumstances, out of an abundance caution, we have maintained the said three entities as initially named by the Employee. In any event, at all material times, the named Employers, jointly or severally traded as Digicel or Digicel Antigua. Accordingly, the term "Employer" refers to them as being registered and operating in Antigua and Barbuda as part of a group of regional and international companies with their regional headquarters in Jamaica.

2. On March 1, 2006 the Employee was first engaged by the Employer as a Cleaner to provide cleaning services for its premises first situated in two small buildings in the city of St. John's and subsequently in one large building on Friar's Hill Road. In three successive contracts, respectively referred to as a "Service Agreement", covering the period February 1, 2010, to June 14, 2011 the Employee was referred to as the "Supplier" and as an "Independent Contractor".
3. In a subsequent contract entitled "Cleaning Services Contract", dated July 07, 2015, it was agreed that in consideration of her monthly gross pay of \$5,958.33 the Employee would "clean floors , kitchen and kitchen appliances, toilets, removal of trash from interior trash containers and brought to the outdoor dumpster" Mondays to Saturdays, with effect from that date and continuing indefinitely.
4. By letter of dismissal dated May 31, 2017, the Employee's services were terminated due to "imminent restructuring", including the reorganization of the Employer's mobile business to improve internal efficiency, which rendered her position redundant as of May 31, 2017. The express terms of the separation included an "enhanced redundancy payment of \$53, 580.89". That total included Severance Pay of \$47, 622.59 and Notice Pay of \$5,958.33.
5. In addition, under cover of a follow-up letter dated July 24, 2017, the Employer paid an additional sum of \$23, 456.08 to the Employee in acknowledgment of its error in calculating her severance pay for February 10, 2010, instead of March 1, 2006. Her total "severance pay" was thereby increased to \$71,078.65 for her years of employment for the period March 1, 2006 to May 31, 2017, a total of 11 years and 3 months.
6. The payment of severance pay in the total sum of \$71,078.65 and pay in lieu of notice in the sum of \$5,958.33 were both accepted by the Employee, save that in terms of her claim of unfair dismissal the former amount was accepted as payment for loss of protection from unfair dismissal.

The Proceedings

7. In these proceedings, the Employee asserts that in its dismissal letter dated May 31, 2017, the Employer failed to state a precise reason for her dismissal. Moreover, the Employee asserted that no redundancy situation existed at that time. On those bases, she contends that her dismissal was unfair.
8. At the commencement of the trial, the Employee's Representative did not pursue her position that the dismissal letter did not contain the "precise reason" for the dismissal. The matter, therefore, proceeded in terms of the Employee's assertion that the absence of a genuine redundancy situation rendered her dismissal unfair.
9. Subsection C 58 (1) and (2) of the Antigua and Barbuda Labour Code (the Labour Code) requires the Employer to prove conjointly that (a) a genuine redundancy situation existed, and (b) that it acted reasonably in dismissing the Employee on that basis under the then prevailing circumstances.
10. In **Ref. No. 66 of 2016 Antigua and Barbuda Workers Union v Cable and Wireless (Antigua and Barbuda) Ltd.**, this Court was concerned with a state of affairs not wholly dissimilar to that in this Reference. In that case, upon instructions from its overseas parent company, the employer discontinued its retail business. It was held that a genuine redundancy situation existed. By establishing that fact, the employer met the threshold of a good factual basis as required under subsection C 58 (1). However, in the final analysis, it was held that the dismissals were unfair because the Employer did not pass the test of reasonableness as required under subsection C 58(2). That judgement was upheld by the Court of Appeal.
11. Adopting the approach used in the **Cable and Wireless case**, we find that the Employer acted on the ubiquitous desire to reduce costs across all Digicel regional and international locations. To that end, it embarked on a restructuring exercise to outsource its cleaning services thereby triggering the cessation of the work which the Employee was required to perform. It was in that context that her services were terminated. Those findings lead us to conclude that a genuine redundancy situation existed at the material time which would satisfy the requirements of section C 58 (1) (c).
12. In the premises, the resolution of the main issue of unfair dismissal turns on whether or not the Employer discharged its evidentiary burden of proving that it acted reasonably. In that regard, we note that learned Counsel Mr. Simon, KC glossed over this requirement and submitted that "the question whether or not the Employee's termination was justified on the ground of redundancy is moot".

For the reasons stated above, and with reference to sub section C 58(2), we respectfully disagree. Therefore, we will consider the Employer's evidence to determine whether we are convinced that it acted reasonably in the circumstances.

13. Only 2 witnesses testified at the trial: the Employee herself and Ms. Janice Sutherland on behalf of the Employer. According to the Employee, after signing the Cleaning Services Contract in July 2015 and continuing in her employment, she was not told anything about any restructuring or a resulting redundancy. It was not until May 25, 2017, merely 5 days before receiving the termination letter, when the Human Resources Manager, Terry Ann-Benjamin, called her to a meeting and informed her that her employment would be terminated because the Employer was restructuring its operations. Further, the Employee testified that, although she did not apply for a voluntary separation package being offered by the Employer, she was offered and paid "an enhanced severance package".
14. For her part, Ms. Sutherland testified that in March 2017, a decision to outsource cleaning services was taken by the Employer in accordance with the directive from its Digicel Regional Headquarters. Further, the Employer's evidence is that apart from affecting the cleaning staff, the restructuring resulted in the closure of one of the Employer's Stores and the cessation of work by the Department Sales Team. However, the Employer provided no evidence that the advent of restructuring and how the process would affect the Employee were brought home to her.
15. It is instructive that, as noted above, the Employer's letter terminating the Employee's services was issued on May 31, 2017, the same day as its effective date, being her final day of work. Obviously, the Employee was not consulted about the impending situation and received no warning or notice of her redundancy.
16. In the circumstances, given the statutory requirement of reasonableness, the evidentiary burden on the Employer and the paucity of Ms. Sutherland's evidence, it is fair to conclude that the Employer was blatantly unreasonable in handling the redundancy situation. As it transpired, it failed to consult with the Employee and give her adequate warning and notice of the actual redundancy.
17. In the final analysis, upon adopting the settled approach as used in the Cable and Wireless Case, which relied on the principles outlined in the cases of **R v British Coal Corporation [1974] IRLR 72** and **Williams v Compair Maxam Ltd. [1982] IRLR 83**, we conclude that the dismissal of the Employee was unfair. As a result, she is entitled to compensation which we assess below.

Compensation

18. We assess compensation under the following heading:

(a) Notice Pay

In light of the sum of **\$5,958.33** paid and accepted as such by the Employee no claim was made under this heading.

(b) Loss of Protection

In light of the total sum of **\$71,078.68** paid to and accepted as such by the Employee as severance pay no claim was made under this heading.

(c) Immediate Loss

The entitlement of an unfairly dismissed employee under this head is subject always to her duty to mitigate her loss. The absence of mitigation militates against a reward under this heading. Although Employee testified that she made no effort to find alternative employment. Mr. Carty submitted that she should be paid the equivalent of her salary for 9 months under this heading. On the other hand, learned Counsel submitted that the award under this heading should be limited to the equivalent of three months' pay. In principle, having regard to an award of notice pay, we agree. However, in our opinion the award should be limited to **\$11, 916.66** the equivalent of 2 months' salary.

(d) Vacation Pay

We have noted the rates of vacation entitlement stipulated in the Handbook, on the basis of which the employee claimed a whopping sum of \$100,000.00. We have noted the requirement for advance submission of leave forms as well as the proviso that vacation leave cannot be accumulated. In the circumstances, we will treat the payment of \$4,125.00 for 15 days' vacation, paid by the Employer, as her entitlement for the year immediately before her dismissal. Treating her claim for vacation as a claim for payment of a debt owed, we limit the award under this heading to **\$24,750.00**, the equivalent of payment in lieu of vacation for 6 years.

(e) Other Awards

Upon careful consideration of the evidence before us, we have found no evidentiary bases for making any of the other awards claimed by the Employee. Moreover, having regard to the lack of pertinent evidence or express provisions in the Collective Agreement or the Employer's Handbook, we are persuaded by learned Counsel's submissions that no other discretionary awards should be made under the circumstances.

Order

19. By reason of matters aforesaid, we order that the Employer do pay the sum of **\$36,666.66** to the Employee, as compensation for her unfair dismissal, no later than March 15, 2024.

Dated this 15th day of February 2024.



.....
Charlesworth O. D. Brown
President


.....
Samantha May-Francis
Vice-President