BARBADOS

IN THE EMPLOYMENT RIGHTS TRIBUNAL

Case: ERT/2016/209

Vicky Chandler **CLAIMANT**

AND

Barbados Tourism Marketing Inc. **RESPONDENT**

DATES: October 30, 2019 and May 22nd 2020

BEFORE: Christopher Blackman Esq, GCM; Q.C. Chairman
John Williams, Esq. Member
Frederick Forde, Esq. Member

APPEARANCES: Mr. Westmin R A James, Counsel for the Claimant
Mrs. Faith Seale Q.C for the Respondent at Case Management Conference on February 4, 2019; thereafter Mr. C Anthony Audain Q.C with Mr. Brian Barrow for the Respondent.

DECISION

1. Miss Chandler, (the Claimant) was employed by the Barbados Tourism Authority (the Authority) under a number of contracts from April 1, 1993 until August, 2014. From 1998 to 2001, the Claimant was engaged as District Sales Manager, New York and from 2001 to 2014, as a Marketing Executive in the Barbados office. The Authority ceased to exist in April 2014 when by virtue of the **Barbados Tourism Marketing Inc. (Transfer of Management and Vesting of Assets) Act 2014** certain of the Authority's functions and responsibilities were transferred to the **Barbados Tourism Marketing Inc. (**BTMI). In August 2014 BTMI (hereinafter called the Respondent) hired the Claimant as a Director with effect from August 25, 2014. The relationship of over 23 years in the tourism industry came to a sudden and crashing end on August 11, 2016 due to the termination of the Claimant by the respondent as Director of Marketing, with responsibility for the Caribbean and Latin America.

2. On July 5, 2016 the Claimant was orally informed by Mr. William Griffith, the Chief Executive Officer of the Respondent that the Board of Directors had decided to transfer her to the post of Director of Cruise. This advice was later confirmed by letter dated July 7, 2016. On July 18 the Claimant declined the offer and three days later she was advised that it would be considered an act of insubordination if she did not comply with the reassignment.

3. A disciplinary hearing was convened for August 4, 2016 to discuss the act of insubordination and the breach of the terms of the contract of employment resulting from the decision by the Claimant not to comply with the reassignment. The hearing on August 4, 2016 was chaired by the Deputy Chairman of the Board who also functioned as Chairman of the Human Resources Committee.

4. The decision given on August 10, 2016 by the Deputy Chairman who upheld the position that continued non-compliance with the proposed reassignment was insubordinate. The Claimant was offered a final opportunity to comply with the directive of reassignment by 4.00 pm on August 11, 2016. As there was no reply at that time, the Chief Executive Officer of the respondent on August 11, 2016 issued a letter to the Claimant terminating her employment with immediate effect for insubordination and breach of contract.

5. The Claimant on the 12th day of August 2016 referred the issue of her dismissal to the Chief Labour Officer, pursuant to section 42 of the Employment Rights Act (the Act) and following the failure of conciliation, the matter was referred to the Tribunal for its consideration on October 3, 2016.

6. Subsequent to the case management conference (CMC) on February 4, 2019 and other CMCs at which the Claimant and the Respondent were represented by Counsel, there was acceptance by the respondent that the Privy Council decision in ***Stubbs et al v. The Queen*** [2018] UKPC 30; [2018] 1 WLR 4887, was apposite the issues that arose in the instant matter. The respondent by its Counsel, C. Anthony Audain Q. C. on October 30, 2019 conceded that the dismissal of the Claimant was unfair and that the disciplinary hearing was procedurally irregular.

7. Section 33 of the Act provides for the remedies to be granted by the Tribunal where it has found that the claim of the Claimant is well founded. Equally, in the case of an admission of liability by the Respondent, the Tribunal is similarly empowered to make the appropriate orders.

8. The Claimant has sought reinstatement to her former position as Director of Marketing, asserting through her Counsel that she is of the belief that there is a position suitable within her competencies, with the Respondent. Sub-section 4 of Section 33 provides, inter alia, that in determining whether to make an order for the reinstatement of the employee or for his re-engagement, the Tribunal shall take into account, whether it is

practicable for the employer or its successor, to comply with an order for reinstatement or re-engagement, as the case may be. The Respondent through its Counsel has stated that there are no positions to which the claimant may be reinstated.

9. Mr. James in his written submissions has stressed that the Tribunal in evaluating the purpose of the Act should give recognition to the tenet that reinstatement or reengagement is the primary remedy for unfair dismissal. While the Tribunal accepts the underlying principle in the foregoing statement, it is equally aware that reinstatement should not be ordered if it is 'not practicable' for the employer to comply with it. As **Mrs. Justice Simler** in the Employment Appeal Tribunal decision in ***British Airways plc v. C Valencia*** [2014] IRLR 683; [2014] ICR D29 noted at paragraph 7, that while it is clear that tribunals have a wide discretion in determining whether or not to order reinstatement or reengagement, it is a question of fact for them. This Tribunal has accordingly considered whether it has been provided with the factual background to consider whether to order reinstatement or reengagement.

10. This Tribunal, in a decision dated 23rd August 2019 **ERT/2018/316 Johnson v. Griffith** considered the issue of reinstatement and we reproduce hereunder paragraphs 10,11 and 14 of that decision in support of our position that the Tribunal needs an evidentiary background to consider the matter:

> **"[10]** *The case of* ***Central & North West London NHS Foundation Trust v. Abimbola*** *[2009] UKEAT 0542/08, was concerned with an order for reinstatement made by an* ***Employment Tribunal*** *in favour of Mr. Abimbola, a Psychiatric Nurse following a finding that Mr. Abimbola had been unfairly dismissed from his employment by the Respondent, the Central & North West London NHS Foundation Trust.*
>
> ***[11]*** *On appeal to the* ***Employment Appeal Tribunal****, Judge Peter Clark, sitting with Mr. Harris and Mr. Warman, set aside the order for reinstatement. Such an order would have required the employer to re-employ him in a female ward,*

where there had been complaints, albeit unproven, of sexual misconduct made against him. In such circumstances and noting the other allegations, ***Employment Appeal Tribunal*** *held that the Employment Tribunal failed to take into account the cogent factors which undermined the NHS Foundation Trust's trust and confidence so to re-employ him.*

[14] *In the circumstances of the instant case, having regard to the small number of employees (7), and the nature of the previous personal relationship which had existed between the Claimant and the Respondent, the Tribunal is of the view that an order for reemployment whether by way of reinstatement or re-engagement, would be impracticable. (See* ***Enessy Co SA (t/a The Tulcan Estate v. Minoprio*** *[1978] 1RLR 489 where Lord McDonald said obiter :*

"In our view it was not realistic to make an order of this nature in a case where the parties involved were in close personal relationships with each other such as they were in the present situation. It is one thing to make an order for reinstatement where the employee works in a factory or other substantial organisation. It is another to do so in the case of a small company with a few staff."

11. Counsel has also referred us to another decision of the Tribunal dated 15th July 2016 **ERT/2014/064 Cutie Lynch v. National Conservation Commission** which was also concerned with the issue of reinstatement. At page 35 of the decision the following statement is made: "***It was clearly demonstrated from the evidence taken in this matter that the practicability of reinstatement or reengagement of the complainant at this time is too remote…"***

12. Three Commonwealth cases on the issue of reinstatement, where orders for reinstatement were made, have also been relied upon by Counsel for the Claimant. Two of them are from New Zealand and the other from Jamaica. The New Zealand cases are

Horton v. Fonterra Cooperative Group Limited **[2010] NZEMPC** 72 which dealt with the reinstatement of a mechanical technician and ***Hong v. Auckland Transport*** [**2019] NZEMPC 54** which was concerned with the reinstatement of a parking attendant, a position akin to that of a traffic warden. The Jamaican case is that of ***National Commercial Bank of Jamaica v. Industrial Disputes Tribunal et al*** [2019] JMSC Civ. 171, and the reinstatement of a relatively junior employee of the Bank.

13. The feature common to the cases mentioned in the preceding paragraphs, is that the tribunals which adjudicated upon them had heard evidence from the parties involved so as to have an evidentiary background to consider the respective matters and make the appropriate orders. This is apparent in the local cases of **Johnson v. Griffith** and **Cutie Lynch,** the UK decisions in ***Abimbola and Enessy,*** the decisions from New Zealand and Jamaica and the other authorities hereinafter considered.

14. Section 33(4) of the Act provides that: "In determining whether to make an order for the reinstatement of the employee or for his re-engagement and, if the latter, on what terms, the Tribunal shall take into account:

(a) whether the employee wishes to be reinstated or, in the case of re-engagement, any wish expressed by the employee as to the nature of the order to be made;

(b) whether it is practicable for the employer, or his successor, to comply with an order for reinstatement or re-engagement, as the case may be; and

(c)….

15. In a recent decision from the UK Court of Appeal, ***Dr. Catherine Mackenzie v. The Chancellor***, ***Masters and Scholars of the University of Cambridge*** [2019] 4 All ER 289 where Dr. Mackenzie had sought an order for re-engagement, which was resisted by the University on the ground that re-engagement would not be practicable, the tribunal rejected the argument and made a re-engagement order. The observation made at paragraph 4 of the decision by **Underhill LJ** that "*although there had indeed been an irretrievable breakdown in Dr. Mackenzie's relationship with a senior colleague there was*

no breakdown in the relationship of mutual trust and confidence between herself and the University more generally…" clearly demonstrates that there was evidence before the tribunal to enable it to reject the University's argument and to make the re-engagement order.

16. In the ***British Airways*** decision referred to above, at paragraph 14 thereof, this was stated: "*The Tribunal's decision on **remedy** (emphasis added) is commendably brief. It identified the relevant statutory provisions ….and at paragraph 4 the issues that it had to resolve in relation to reinstatement were whether such an order was reasonably practicable, and if practicable, whether it would be just in the circumstances of the case.*
15. At paragraph 5 to 7 it recorded the evidence of the Respondent's Chief Training Pilot……..The Respondent relied on this evidence to submit that it was not reasonably practicable for the Claimant to be reinstated."

17. Unlike in ***Mackenzie*** and the ***British Airways*** matter, no evidence has been led or placed before the Tribunal as to whether it is practicable for the Respondent to comply with an order for reinstatement or re-engagement.

18. Accordingly, the Tribunal having considered the foregoing authorities and for the reasons hereinbefore stated, declines to make an order either for reinstatement or reengagement.

THE AWARDS

19. Section 37 (1) (a) provides that where neither an order for the reinstatement or `` re-engagement of an employee is made, the Tribunal shall make an award of compensation for unfair dismissal to be paid by the employer to the employee, and 37(2) stipulates the amount of compensation to be awarded under subsection (1) (a), shall be calculated in accordance with the Fifth Schedule.

20. Paragraph 2 (2) (d) of the Fifth Schedule provides for a basic award of three and a half weeks' wages for each year where the period of continuous employment is 20 years or more but less than 33 years. Accordingly, the amount of the basic award is $120,000.00 ÷52x3.5**=$185,769.05.**

21. In addition to the forgoing basic award, the Claimant is entitled an award in respect of the notice period. Section 22 (3) (c) states that two and one-half months' notice is required where the terminated employee has been in continuous employment for 15 years or more. In this matter, the Claimant was employed for over 23 years, and her salary was $10,000.00 per month at her dismissal. The amount now due in respect of the notice provision is $10,000.00x2.5=**$25,000.00.**

22. The Caribbean Court of Justice (**the CCJ**) in its recent decision in ***Chefette Restaurants Limited v. Orlando Harris*** [2020] CCJ 6 (AJ) at paragraphs 125 and 126, considered the meaning of benefits in paragraph 1 (b) of the Fifth Schedule. At paragraph 126, the Court said that "*The meaning of the word benefit in this area of employment law is commonly accepted as including* ***pension rights*** *(our emphasis), salary increases, tips, allowances, and what are called fringe benefits."*

23. The Claimant has made a claim in respect of a travel allowance, and the amount claimed for that benefit is $18, 576.99. Counsel for the Respondent has offered $6,625.00 in settlement of that claim. The **CCJ** at paragraph 134 of ***Chefette*** held that it was open to the Tribunal to award such an amount as it thought fit in respect of benefits other than future wages, and that it would be for unfairly dismissed employees to identify the benefits they claim. It was a term of the Claimant's contract that she should be paid a commuted travel allowance of $12,000.00.

24. In the circumstances of this matter, the Tribunal considers the sum of $12,000.00 a reasonable amount for the loss of the travel allowance, and accordingly awards the Claimant that sum.

25. In the aggregate therefore, the Respondent **Barbados Tourism Marketing Inc.** is ordered to pay to the Claimant Vicky Chandler the sum of $222,769.05.

26. During the course of the Case Management Conferences in this matter, the issue of the pension rights of the Claimant were addressed. The Claimant's contract of employment said with respect to a pension, "***A defined pension plan will be negotiated and will be addressed within the permissible legal timeframe. Please note that the provision of a pension benefit is not a condition of employment with the BTMI."***

27. Section 8 (2) of the BTMI Act) provides that **BTMI** shall, within a period of 3 years from 2nd April, 2014 provide for the establishment and maintenance of a pension fund for the benefit of the employees of **BTMI.** However, it appears that although 3 years have elapsed since the obligation to establish and maintain a pension fund, this has not occurred and that the **BTMI** is in breach of its statutory obligation.

28. The Tribunal directs the Respondent body to rectify its breach as soon as possible, and further in the circumstance that the Respondent conceded that the dismissal of the Claimant was unfair, she should be eligible for such pension arrangements as may be appropriate to the holder of the post of Director of Marketing, Latin America and Caribbean Affairs.

COSTS APPLICATION

29. Mr. James has sought an order for costs in the sum of $7,500.00**.** The Tribunal in its decision given on 13th July, 2015 in ERT/2014/056 ***Joel Leacock v. PMM Services Ltd.*** at page 17, noted that there is no provision in the Act giving a tribunal jurisdiction to make costs orders, unlike in the United Kingdom where provision for costs were made in Rules under the relevant legislation.

30. In Civil Suit 376 0f 2006 **The Public Counsel v. The Fair Trading Commission, Blackman J (**as he then was**)** in a decision given September 28, 2006 noted at paragraph 50, that costs are the creation of statute, and their application and the circumstances of

their application evolved over time. In the circumstances that there is no provision in the Act empowering the Tribunal to make a costs order, the application for an order for costs is refused.

DISPOSITION

31. **[A]** The Respondent **Barbados Tourism Marketing Inc.** is ordered to pay to the Claimant Vicky Chandler the sum of $222,769.05 within 30 days of the date of this judgment;

[B] That the Respondent give effect to the directive at paragraph 28 hereof; and

[C] Each party bear their own costs.

Dated this 17th day of June 2020.

Christopher Blackman, Esq, GCM; Q.C.
Chairman

John Williams, Esq
Member

Frederick Forde, Esq.
Member